POST-DATED CHECKS: (1) The drawer of a post-dated check given in payment of a pre-existing debt, which is not paid on presentation, is chargeable under R.S. 1939, Sec. 4695; (2) The drawer of a post-dated check given for money or property who states that the check is not good but will be good on its date, and which is not paid on presentation, is chargeable under R.S. 1939, Sec. 4695; (3) The drawer of a post-dated check given to a sheriff in payment of an execution, which is not paid on presentation, is chargeable under R.S. 1939, Sec. 4695. Sheriff should not accept post-dated check in payment of execution.

October 24, 1949

FILED
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10/27/49

Mr. Christian F. Stipp
Prosecuting Attorney
Carrollton, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion upon three questions which will be considered by us in the order in which they have been submitted by you.

I.

Your first question is:

"Facts:

Defendant owed prosecuting witness $190.00. On March 27, 1949 defendant gave to witness his check which was as follows:

Chillicothe, Mo., March 27, 1949

Chillicothe State Bank

Pay to the order of (name of witness) $190.00

One hundred ninety and no/100 Dollars

Hold to July 15th Signature of defendant.

It was understood by both defendant and witness that defendant had no money in the bank at that time, but defendant told witness that on July 15th the check would be good. Defendant accepted the check as payment for the amount due him and relied upon defendant's statement that on July 15th the check would be good. On July 16th the check was presented for payment and not paid by the bank because there was no account. Defendant has had no

money in or credit with the bank from before January 1, 1949 to date. About February, 1948, defendant had given another check to another party which was not paid by the bank because there was no account.

Questions:

1. Has a crime been committed by defendant?

2. If so, under what section can he be charged?

3. Can defendant be charged under Sec. 4694, R.S. Mo. 1939?"

We have here a question involving what is commonly called a "post-dated check." For a definition of such a check we direct your attention to the following excerpt from the opinion (1934) of the Missouri Supreme Court in the case of State vs. Taylor, 73 S.W. (2d) 378. There, in this connection, the court stated:

"* * * A postdated check is thus defined in 7 C.J. page 674: 'A post-dated check is one containing a later date than that of delivery. The presumption is that the maker has an inadequate fund in the bank at the time of giving it, but that he will have enough at the date of presentation. Such a check is payable on or at any time after the day of its date, being in effect the same as if it had not been issued until that date.'

"Concerning the presumption that the maker of a postdated check has an inadequate fund in the bank at the time of giving it, but that he will have enough at the date of presentation, Corpus Juris cites Clarke National Bank v. Bank of Albion, 52 Barb. (N.Y.) 592, which thus states the rule: 'Post-dated checks are instruments often used, and their nature and character are well understood by bankers and the trading community. By all such persons it is regarded that the drawer is not in funds at the bank on which he draws

> his check, when he makes and delivers the same, and does not expect to be, until the arrival of the date inserted in the check.'"

From the above definition of a "post-dated check" it seems clear to us that the check described by you in Question No. I quoted above is a "post-dated check," and thus comes within the scope of the law relating to such checks.

We are now concerned with the matter of the criminal liability, if any, of one who gives a post-dated check which is not honored upon presentation, when such presentation is made upon or subsequent to the post date. Again we call your attention to the Taylor case, cited above, which in this connection states:

> "Nor is a postdated check outside the classes of instruments at which section 4305, (Section 4695, Mo. R.S.A. 1939) R.S. Mo. 1929 (Mo. St. Ann. Sec. 4305, p. 2998), is directed. Our statute covers 'any check, draft or order, for the payment of money, upon any bank or other depository.' The California statute (Pen. Code, Sec. 476a) relates to 'any check or draft on a bank, banker or depositary for the payment of money.' It should be noted that the two statutes use the words 'check or draft.' In the case of People v. Bercovitz, 163 Cal. 636, 126 P. 479, 480, 43 L.R.A. (N.S.) 667, the defendant sought a reversal of the judgment founded upon a verdict of guilty of uttering a postdated check in violation of the statute. He contended that a postdated check was not such an instrument as was intended to be described by the Penal Code. Of this contention the Supreme Court of California observed: 'We are of the opinion that these facts show the offense defined by section 476a, Penal Code, and that it is altogether immaterial that the check was dated February 6, 1911, when delivered during the evening of February 4, 1911. Even if we assume in accord with appellant's claim that, by reason of the fact that the instrument was postdated, it was not a "check" within the meaning of that word as used in section 476a, Penal Code, which we do not concede, it was clearly a "draft," the giving of which under such circumstances is likewise inhibited by the section, the language being "any check or draft."'

"The court quoted the statutory definition of the offense, and made this further comment: 'There is nothing in the language used having the effect of excepting a case from the operation of the statute merely because the "check or draft" is postdated. It is essential, of course, that there should be on the part of one giving the check or draft both present knowledge of the insufficiency of funds and absence of credit with such bank, etc., to meet the check or draft in full upon its presentation, and an intent to defraud; but no reason is apparent why both of these elements may not exist as well in the case of a postdated check or draft as in the case of one bearing the date of its delivery.'"

* *

"V. The question has been raised whether a postdated check is within the purview of section 4305, R. S. 1929 (Mo. St. Ann. Sec. 4305, p. 2998), inasmuch as the payee of such a check, in accepting it, relies upon the maker's promise to do something in the future rather than upon an assurance, express or implied, that the check is good when given. To this it may be answered, as in the California case (People v. Bercovitz, supra), that there is nothing in the language used having the effect of excepting a case from the operation of the statute merely because the check is postdated. But a more complete answer is to be found in our own statutes. When section 4305, R.S. 1929, was enacted in 1917 (Laws Missouri, 1917, page 244), the Negotiable Instruments Law, enacted in 1905 (Laws of Missouri, 1905, p. 243 (Mo. St. Ann. Sec. 2629 et seq., p. 643 et seq.)), was on the statute books as it is to-day. Therefore, the General Assembly in 1917, in using the word 'check' in the insufficient funds statute, had in mind the definition of a check given by the Negotiable Instruments Law. That definition is as follows: 'A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this chapter applicable to a bill of exchange payable on demand apply to a check.' Section 2813, R.S. 1929, Mo. St. Ann. Sec. 2813, p. 721.

"A bill of exchange, which a check is declared to be, is thus defined in the Negotiable Instruments Law (section 2754, R.S. 1929, Mo. St. Ann. Sec. 2754, p. 708): 'A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.'

"It is to be observed that neither the definition of a check nor of a draft says aught about a date. The essence of a check and of a demand draft is that the instrument is an unconditional order in writing to pay a sum certain in money on demand.

"Pursuing the Negotiable Instruments Law further in our research for what was in the minds of the General Assembly when it enacted section 4305, we find that a check is a negotiable instrument. Section 2630, R. S. 1929, Mo. St. Ann. Sec. 2630, p. 644; Nelson v. Diffenderfer, 178 Mo. App. 48, 163 S.W. 271; John P. Mills Organization v. Bell, 225 Mo. App. 685, 37 S.W. (2d) 680.

"Therefore, there are applicable to checks sections 2640-2642, R. S. 1929, Mo. St. Ann. Sections 2640-2642, p. 649, showing the complacent state of mind of the lawmakers toward the true dating, antedating, postdating, and nondating of negotiable instruments.

"Sec. 2640: 'Where the instrument or an acceptance or any endorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance or indorsements, as the case may be.'

"Sec. 2641: 'The instrument is not invalid for the reason only that it is antedated or postdated: Provided, this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.'

"Sec. 2642: 'Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course, but as to him the date so inserted is to be regarded as the true date.'

"From the foregoing it should clearly appear that the General Assembly in enacting the insufficient funds act (section 4305) not only did not exclude a postdated check from the purview of that section, but that it very difinitely meant to include it.

"These views are not changed by the theory that a postdated check is merely a statement of a future fact, promissory in its nature; namely, that the drawer of the check will have on deposit in the drawee bank on the date of the check sufficient funds to pay the check. We are of opinion that this objection falls within the rule of State ex rel. St. Louis-San Francisco Railway Company v. Daues et al., Judges, etc., 316 Mo. 474, 290 S.W. 425. The question in this court upon review by certiorari of an opinion of the St. Louis Court of Appeals was whether certain statements made by a claim agent of a railroad company as an inducement to a settlement with an injured passenger were misrepresentations of fact or were merely forecasts of what might happen in the future, and promissory. In deciding that question against the relator railroad company, this court said (290 S.W. 425, loc. cit. 428): 'The rule that a forecast of what will happen in the future is merely promissory, and not a statement of existing fact, does not apply, where the matter involved is peculiarly within the speaker's knowledge. 26 C. J. 1090; Wendell v. Ozark Orchard Co. (Mo. App.) 200 S.W. 747, loc. cit. 749; Stonemets v. Head, 248 Mo. loc. cit. 252, 253, 154 S.W. 108. A statement may be promissory, or prospective, or an opinion in form,

and yet state a fact. The present representation was that the Frisco Railroad was going into the hands of a receiver, and the plaintiff probably would not get over 10 cents on the dollar. That implied a financial condition of the Frisco Railroad such as would carry it into the hands of a receiver. The agent was in better position to know the facts about that than the plaintiff. That was equivalent to saying that he believed it from knowledge in his possession, when in fact he had no such belief or knowledge, for he swore that he did not say it.'

"The applicable statutes, sections 4305 and 4306, R. S. 1929 (Mo. St. Ann. Secs. 4305, 4306, pp. 2998, 2999), have an element of futurity in them. Section 4305 provides that any person shall be guilty of a misdemeanor who shall make or draw or utter or deliver, with intent to defraud, any check, draft, or order for the payment of money upon any bank, etc., knowing at the time of making, drawing, etc., that the maker or drawer has not sufficient funds in, or credit with, such bank upon its presentation. It is a matter of common experience that in the normal course of business most checks are not presented for payment at the instant time of or even upon the day of delievery to the payee. The test of sufficiency comes at the time of presentation. The maker of a check may have on deposit, at the time of issuance of a check, sufficient funds to meet it. But he may also have outstanding other checks at the time of issuance of a particular check, which other outstanding checks, by their earlier presentation and payment, will reduce the money on deposit below the amount necessary to pay the particular check upon its later presentation. Of all these conditions a drawer of checks must take account. 'A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check.' Negotiable Instruments Law, section 2817, R.S. 1929, Mo. St. Ann. Sec. 2817, p. 722."

We would here call your attention to Section 4694, Mo. R. S. A., 1939, which states:

> "Every person who, with the intent to cheat and defraud, shall obtain or attempt to obtain, from any other person, or persons, any money, property or valuable thing whatever by means or by use of any trick or deception, or false and fraudulent representation, or statement or pretense, or by any other means or instrument or device, commonly called 'the confidence game,' or by means, or by use, of any false or bogus check, or by means of a check drawn, with intent to cheat and defraud, on a bank in which the drawer of the check knows he has no funds, or by means, or by use, of any corporation stock or bonds, or by any other written or printed or engraved instrument, or spurious coin or metal, shall be deemed guilty of a felony, and upon conviction thereof be punished by imprisonment in the state penitentiary for a term not exceeding seven years."

This section quoted above has been interpreted by the court in the case of State v. Herman, 162 S.W.(2d) 873, in which case the court stated:

> "As previously stated, the appellant was convicted under section 4694, R.S. Mo. 1939, Mo. R.S.A. Sec. 4694, for obtaining money under a false pretense. '* * * *as was said in the case of State v. Pickett, 174 Mo. 663, 74 S.W. 844, the purpose of this statute was to provide for a class of false representations not included in some other section dealing with the subject of the ordinary false representations. It was intended to reach a class of offenders known as "confidence men," who obtained the money of their victims by means of, or by the use of, some trick or representation designed to deceive. The very essence of the crime denounced by section 2213 (now section 4694) is that the injured party must have relied upon some false or deceitful pretense or device and parted with his property.' State v. Wilson, 223 Mo. 156, loc. cit. 166, 122 S.W. 701, 704."

From the above it is the opinion of this department that the drawer of the check described in your question No. 1 has committed a crime; that he is chargeable under Section 4695, Mo. R.S.A. 1939;

that he is not chargeable under Section 4694, Mo. R.S.A. 1939.

II.

Your second question is:

> "When a person receives money or property or other valuable things and, at that time, gives a post dated check stating that there is no money in the bank at that time to pay the check but that on the date of the check it will be good, and, when presented, there is no account in the bank to pay the check, has a crime been committed?"

It is the opinion of this department that a crime has been committed under the fact situation quoted above. We believe that the proper section under which to file in this case is 4695, Mo. R.S.A. 1939, because when the drawer of the check states at the time of drawing the check that there is no money in the bank that this negatives the intent to cheat and defraud which Section 4694 Mo. R.S.A. 1939, requires. Under Section 4694, supra, the intent to cheat and defraud must be proved as an essential element of the offense. It is therefore the opinion of this department that, as we stated above, a crime has been committed in this instance and that Section 4695 is the proper section under which to file.

III.

Your question No. III is:

> "A. received a civil judgment against B. An execution was issued and the sheriff served a copy of same on B. B., on February 10th, told the sheriff that he had some hogs which he wanted to sell and that he would have the money in a few weeks. B. offered to give the sheriff his check to hold. B. gave the sheriff his check dated February 26th and told him that he had no money in the bank at that time and further told the sheriff that if he (B.) did not pay the sheriff the amount of the check before that time that he would have the money in the bank and the check would be good on February 26th."

In connection with Part III of the request, it is asked if, under the facts, the sheriff is guilty of any impropriety. We are not exactly sure what you mean by the word impropriety, but we do believe that the sheriff did not act in accordance with law in accepting the check under the execution issued to him by the court.

Section 1317, R.S.A., provides that an execution should be a fieri facias against the goods, chattels and real estate of the party against whom the judgment is rendered. The statute then sets out the form of the execution issued to the sheriff directing him to seize the goods and chattels and real estate sufficient to satisfy the debt, damages, etc. It does not appear in the facts of Part III whether the check received by the sheriff was made payable to him or to the judgment creditor, but in any event, we do not believe that a post-dated check which was no good amounted to the taking of goods or chattels of the defendant as prescribed by the statute, sufficient to pay the debt.

In reading other sections of Article 19, Chapter 6 pertaining to executions and exemptions, it appears that the property taken under execution should be of a type that is subject to subsequent sale to pay the indebtedness. We do not believe that a post-dated check would fall within this category of property.

Section 1384, R. S. A., provides as follows:

> "If any officer to whom any execution shall be delivered shall refuse or neglect to execute or levy the same according to law, or shall take in execution any property, or any property be delivered to him by any person against whom an execution is issued, and he shall neglect or refuse to make sale of the property so taken or delivered, according to law, or shall make a false return of such writ, then, in any of the cases aforesaid, such officer shall be liable and bound to pay the whole amount of money in such writ specified, or thereon indorsed and directed to be levied; and if such officer shall not, on the return of such writ, or at the time the same ought to be returned, have the money which he shall become liable to pay as aforesaid before the court, and pay the same according to the exigency of the writ, any person aggrieved thereby may have his action against such officer and his sureties upon his official bond, or may have his remedy by civil action against such officer in default."

Section 1385, R.S.A., provides:

> "If any officer to whom any execution shall be delivered shall not return the same according to law and the command of the writ, such officer and his sureties shall be liable to pay the damages sustained by such default to be recovered by the party aggrieved, by action upon the official bond of the officer, or by civil action against such officer."

We believe that the sheriff under the facts in Part III of the request would probably be liable under Sections 1384 or 1385 or both.

In the case of Trigg vs. Harris, 49 Mo. 176, the sheriff collected a warrant under an execution issued to him, the warrant being on its face an amount sufficient to pay the indebtedness. For some reason, the creditor apparently was not paid what was owed him and the court in holding that recourse could be had against the sheriff on his bond, said, l.c. 177:

> "The warrant was an instrument or evidence of debt, which was capable of being seized and levied upon by the sheriff, and it was his duty to collect the money on it and apply it to the execution when it cameinto his hands."

* * * * * * * * * * *

> "If the sheriff received the warrant in satisfaction of the execution, it also satisfied the judgment; and if loss resulted to the creditor in consequence of the act of the sheriff, his recourse would be against that officer and his sureties upon his official bond. * * *"

Consequently, under the facts of Part III, in our opinion, it is very probable that the sheriff could be held liable on his bond to the judgment creditor, and his taking a post-dated check was certainly an exercise of bad judgment and probably not according to law. We therefore believe that the sheriff was guilty of an impropriety within whatever meaning you attach to this term.

Finally you inquire whether, when the check under the fact situation set out by you in question III, is presented on February 26, and is not paid because of no account in the bank, has B committed any crime?

It is the opinion of this department, under the fact situation

presented in Question III, that B has committed a crime. We have held above that the sheriff was guilty of an impropriety in taking the post dated check from B. However, we do not believe that this fact excuses B in giving a post dated check which he said would be covered by an account upon and after the date of the post dated check but which in fact was not good upon the date of the post date because B did not have any account in the bank upon which the check was drawn. B gave this check to the sheriff in satisfaction of the amount called for in the execution and he failed to cover the check on its post date. The fact that the sheriff was in error in taking the check does not, in our opinion, excuse B, and we believe that B should be charged under the familiar Section 4695.

CONCLUSION

It is the opinion of this department that the drawer of the check described in question I has committed a crime and is chargeable under Section 4695, Mo. R.S.A. 1939.

It is the further opinion of this department that under question II the drawer of the check has committed a crime and is chargeable under Section 4695, Mo. R.S.A. 1939.

Under your question III it is the opinion of this department that the sheriff is guilty of an impropriety. Under the second part of your question III it is the opinion of this department that the drawer of the check has committed a crime and is chargeable under Section 4695, Mo. R.S.A. 1939.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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