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False Pretenses--Worthless Check Act--Effect of Postdating

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of the order of the Commission in *Lake Cargo Coal Rates*,¹¹ is now in process of determination by the Commission.

The struggle for the lake market has been long and bitterly fought. The end is not yet in sight. As always, a great deal of the future prosperity of the districts affected rests in the hands of the Commission. West Virginians are cognizant of the greater political strength of the Pennsylvania and Ohio producers, which has on various occasions been well demonstrated. We await the outcome of this present battle with mingled curiosity and apprehension.

—R. PAUL HOLLAND.

FALSE PRETENSES—WORTHLESS CHECK ACT—EFFECT OF POSTDATING.—Defendant was indicted for issuing and delivering a check without sufficient funds on deposit to pay the same, in violation of §34, ch. 145, CODE. The check was issued and delivered to the agent of the payee on April 10, 1926, bearing the date April 12, 1926. The statute is as follows: "If any person make, issue and deliver to another for value any check or draft on any bank, and thereby obtain from such other any credit, money, goods or other property of value, and have no funds, or insufficient funds, on deposit to his credit in said bank with which such check or draft may be paid, he shall be guilty of a misdemeanor, if the amount of such check or draft be under twenty dollars, and upon conviction thereof be fined not exceeding one hundred dollars and confined to the county jail not less than one day nor more than thirty days, and if the amount of such check or draft be twenty dollars or over he shall be guilty of a felony and confined in the penitentiary not less than one year nor more than two years, and the drawer of such check or draft shall be prosecuted in the county in which he delivers the same. Provided, however, that if the person who makes, issues and delivers any such check shall, within twenty days after he receives actual notice, verbal or written, of the protest of such check, pay the same, he

¹¹ 126 I. C. C. 309 (1927).

shall not be prosecuted under this section, and any prosecution that may have been instituted within the time above mentioned, shall, if payment of such check be made as aforesaid, be dismissed at the cost of defendant." The court held there could be no conviction under this statute without actual notice of protest. The question was raised whether the postdating of the check was in violation of the statute, which the court did not decide. *State v. Ambrigo*, 138 S. E. 322 (W. Va. 1927).

Apparently this question has never been decided by the Supreme Court of Appeals of West Virginia. In those jurisdictions having false pretense statutes only, and not so called "worthless check" statutes, it is commonly held that giving a postdated check, without more, is not obtaining property or other thing of value by color of any false token or writing. Any representation or assurance in relation to a future event may be a promise, a covenant or a warranty, but cannot amount to a statutory false pretense. 25 C. J. 590. Therefore, when the only pretense relied upon is the giving of a postdated check, it can be no false pretense, but only a representation as to a future event. 41 L. R. A. (N. S.) 173. In *State v. Ferris*, 171 Ind. 562, 86 N. E. 993, defendant was indicted under the Indiana false pretense statute, for delivering a postdated check, stating at the time, he intended to increase his deposit in order to meet the check, which he failed to do, and the court said: "We are unable to distinguish this transaction from a sale of goods, on a promise to pay for the same at a future date, and a false pretense cannot be predicated, within the meaning of our criminal law, upon the non-performance of a future promise." It has been held that giving a postdated check, without more, is a false pretense on the theory that it amounts to a representation that the drawer kept an account in the bank, but the weight of authority seems against this proposition. L. R. A. 1918F 982. However, where there are attendant circumstances or misrepresentations at the time the postdated check is delivered of an existing or past fact, it has been held that the fact the check is postdated constitutes no defense to a prosecution of obtaining money or property by false pretenses. *State v. Cooper*, 169 Iowa 571, 151 N. W. 835.

Worthless check acts must be distinguished from statutes relating to obtaining money or property by false pretense or token, as the essential purposes of the two types of statutes are different; the purpose of the former being to avert the mischief to trade, commerce, and banking, which the circulation of worthless checks inflicts. In other words, its purpose is to protect the public in general and bankers and business men specifically. The purpose of the latter is to avert fraud, looking more to the individual interests of the defrauded party. *State v. Avery*, 111 Kan. 588, 207 Pac. 838; *Commonwealth v. McCall*, 186 Ky. 301, 217 S. W. 109.

In those jurisdictions having express worthless check statutes, it is usually held that the fact that a worthless check is postdated does not protect the defendant, but there is authority to the contrary. 25 C. J. 612. The California statute provides, "Every person who wilfully, with intent to defraud, * * * * delivers to another * * * * any check or draft on a bank, * * * * for the payment of money, knowing at the time * * * * that he has not sufficient funds in or credit with such bank * * * * to meet such check or draft in full upon its presentation, shall be guilty of a misdemeanor. * * * *" §476a, PENAL CODE. In *People v. Bercowitz*, 163 Cal. 636, 126 Pac. 479, the court said: "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." The court said however that it was essential that the drawer have present knowledge of the insufficiency of funds or credit to meet the check upon presentation, and an intent to defraud. The Kansas statute corresponds essentially to the California statute, and the Supreme Court of Kansas has held it to be applicable to postdated checks, even to the extent where the defendant told the payee at the time of making the check he had no funds on deposit with which to meet it. *State v. Avery, supra*. The same result is reached in Illinois. In *People v. Westerdahl*, 316 Ill. 86, 146 N. W. 737, a postdated check was given in payment of an automobile, and the court held that the fact the check was postdated did not take it out of the statute, on the theory that the purpose of giving a postdated check was to be presumed to induce the belief that the check would be paid upon presentation, and

delivery of the automobile was obtained on the assumption that the check was good, delivery being in reliance on the check, not the personal credit of the defendant. Other states have arrived at different conclusions. The worthless check act of Georgia (1914) declares: "Any person who shall draw and utter any check * * * * for present consideration, upon a bank, * * * * with which such drawer has not at the time sufficient funds to meet such check * * * * and shall thereby obtain from another money or other thing of value * * * shall be guilty of a misdemeanor." PARK'S CODE, vol. 6, §718d. In *Neidlinger v. State*, 17 Ga. App. 811, 88 S. E. 687, the court held the act was not intended to cover postdated checks, reasoning as follows: A fraudulent intent must exist and be operative before the giving of a worthless check could constitute a crime; that the concept of a fraudulent intent must be read into the statute, otherwise the law would be in contravention to the general proposition that to constitute crime, intent must concur with the act; one who draws a postdated check cannot, as a matter of law, be said to entertain a fraudulent intent, since the check, by its very date, informs all takers that the assurance that the drawer has sufficient funds to meet it is postponed until the specific day named on the check; that a postdated check is simply a promise to pay in the future, and the taker relies on the faith of the drawer, his ability to have funds in the bank when the check is presented, rather than the check itself. The Georgia statute was amended in 1919, but the court has held a postdated check accepted with knowledge is not a violation of the statute as amended. *Strickland v. State*, 27 Ga. App. 772, 110 S. E. 39; *White v. State*, 27 Ga. App. 774, 110 S. E. 40. The same result is reached in Indiana, *Brown v. State*, 166 Ind. 85, 76 N. E. 881; in South Carolina, *State v. Winter*, 98 S. C. 294, 82 S. E. 419, and in New Jersey, *State v. Brown*, 98 N. J. L. 9, 118 Atl. 779. In the latter case the court said: "The giving of a check presently payable is an implied representation that there are sufficient funds on deposit to meet same, upon presentation, but a postdated check carries no such implication, but rather the contrary. It is a mere promise to discharge a present obligation on a future day, and the mere fact of non-payment, upon presentation,

is no evidence that it was given with a fraudulent intent." *State v. Brown, supra*. In *State v. Cunningham*, 90 W. Va. 806, 111 S. E. 835, the court had the West Virginia statute under consideration, and there said: "The Legislature did not intend to make every issuance of a check or draft, in exchange for money or property, without funds or credit sufficient to pay it, a criminal act. There is no offense, unless the money or property obtained was parted with in reliance upon the false representation made by the check or draft. The offender must obtain it by issuance or delivery of the check or draft. If the vendor or lender relies upon the financial ability of the other party, and not upon the representations of funds in bank, the transaction involves no criminal offense."

Assuming the above language would be followed and the West Virginia court would accept the view that when a postdated check is delivered the vendor or lender relies upon the financial ability of the drawer, it might well hold that the giving of a postdated check was not within the statute. In an earlier West Virginia case, however, the court seems to have taken a different view. It was said by the court: "The object of enacting the new section (§34, ch. 145 CODE) was to constitute the making, issuance and delivery of a check, and to thereby obtain credit, money, goods or other property of value of another, a crime, regardless of the intent, or knowledge of the maker of the condition of his account, and to burden him with the duty of knowing the fact, before issuing a check, but relieving him from the offense * * * * if within the time prescribed by the proviso of the act he shall actually pay or make good the check so made and issued. This view is strengthened by the form of indictment prescribed, which contains no averment of guilty knowledge and intent to defraud, usually required in indictments for obtaining goods, money or property, by false pretenses." *State v. Pishner*, 72 W. Va. 603, 78 S. E. 752. It will be observed these elements are required to sustain a conviction under the West Virginia statute of cheating by false pretenses. §23, ch. 145, CODE, *State v. Hurst*, 11 W. Va. 54. It is submitted that §34, ch. 145, CODE, enacted subsequently to the false pretense statute, §23, ch. 145, CODE, created a new and distinct

offense, the commission of which is accomplished by giving a check on a bank, in which the maker has insufficient funds or credit to pay the same, and intent to defraud is not an element of the offense, or knowledge of the condition of the maker's bank account. Drawing the check, without sufficient funds on deposit to meet it, was the act the legislature intended to punish, in accord with the views expressed in *State v. Pishner, supra*, and it makes no difference whether the vendor or lender relies upon the financial ability of the maker, or the representation of funds in bank. The reasoning in *State v. Cunningham, supra*, is apparently based upon a false premise, *i. e.*, the offense is committed against the payee of the check. It is conceivable that business men and bankers had something to do with the passage of the act, and the offense the Legislature intended to prohibit consists in the public nuisance resulting from the practice of putting worthless checks in circulation. Therefore the offense could very well be committed, even though the check were postdated.

—KENDALL H. KEENEY.

DOES AN EXPRESS WAIVER OF SUBJACENT SUPPORT PRECLUDE INJUNCTION AGAINST DAMAGE TO AN UPPER VEIN OF COAL?—A decision has recently been handed down by the Supreme Court of Appeals which has a far-reaching effect on the coal mining industry of the state, involving as it does the respective rights of the owners of upper and lower seams of coal. In this case¹ the plaintiff, owner of the Sewickley vein of coal which overlies the Pittsburgh vein, sought to enjoin the owner of the latter from mining his coal in such a manner as would necessarily result in injury to the plaintiff's mine, and in endangering the lives of his workmen. The plaintiff introduced evidence tending to show that the defendant could avoid such injury by use of another method, or by changing the mine openings. De-

¹ *Continental Coal Co. v. Connellsville By-Product Coal Co.*, 188 S. E. 737 (W. Va. 1927).