

1952

## State of Utah v. M. R. Bruce : Brief of Appellant

Utah Supreme Court

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# In the Supreme Court of the State of Utah

STATE OF UTAH,

*Appellant,*

—vs.—

M. R. BRUCE,

*Respondent.*

Case No. 7830

## APPELLANT'S BRIEF

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# In the Supreme Court of the State of Utah

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## APPELLANT'S BRIEF

### STATEMENT OF FACTS

On or about September 14th, 1951, M. R. Bruce, defendant and respondent herein, delivered to one LeGrand Smith, an automobile dealer in Spanish Fork, Utah, at Smith's place of business in Spanish Fork, a post-dated check drawn on the Eighth South Branch, First Security Bank of Utah, Salt Lake City, Utah, in the amount of \$1075.00. This check was uttered in payment for six used

automobiles (Tr. 27, 28). The check was dated September 17, 1951. It was deposited in the due course of business, but was rejected by the bank "for the fact that the account had been closed" (Tr. 30, 47), and this fact was noted on the check when it was returned to Mr. Smith.

The state's evidence showed that the account of M. R. Bruce had been closed by the bank on August 22, 1951, "for reasons of overdraft," and that several checks drawn by said M. R. Bruce had been returned because of insufficient funds between the period of August 3rd, and August 22nd, 1951; further, than no arrangements for credit had been made with the bank, by Bruce, after his account had been closed on August 22nd, 1951 (Tr. 46, 47, 48, 49). Defendant was bound over from the City Court of Provo for trial in the District Court of the Fourth District. A jury was impanelled and sworn. Defendant did not testify nor did he produce any witnesses. At the close of the state's evidence, the court entertained and granted defendant's motion for dismissal (Tr. 50, 51), whereupon, the state appealed from the decision of the lower court.

## STATEMENT OF POINTS

### POINT I.

THE TRIAL COURT ERRED IN TAKING THE CASE FROM THE JURY BY GRANTING DEFENDANT'S MOTION TO DISMISS.

# ARGUMENT

## POINT I.

THE TRIAL COURT ERRED IN TAKING THE CASE FROM THE JURY BY GRANTING DEFENDANT'S MOTION TO DISMISS.

It is appellant's view of this case that the only question to be determined is whether a post-dated check issued and delivered under circumstances in evidence here, falls within the provisions of 105-18-11 UCA, 1943, as amended; if it does, the ruling of the lower court is error.

There is a division of authority as to whether a post-dated check is such an instrument as is contemplated under the provisions of the various "cold check" statutes. The question can be found annotated in 95 ALR 496, IX. Post dated Checks.

103-18-11, as amended by Ch. 87, L. Utah, 1945, provides:

Any person who for himself or as the agent or representative of another or as an officer of a corporation, willfully, with intent to defraud, makes or draws or utters or delivers any check, or draft or order upon any bank or depositary, or person, or firm, or corporation, for the payment of money, knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer or the corporation has not sufficient funds in, or credit with said bank or depositary, or person, or firm, or corporation, for the payment of such checks, draft or order, in full upon its presentation, although no express representation is made with reference thereto, is punishable by im-

prisonment in the county jail for not more than one year, or in the state prison for not more than 14 years.

The making, drawing, uttering or delivering of such check, draft or order as aforesaid, shall be prima facie evidence of intent to defraud.

\* \* \*

The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or depository, or person, or firm or corporation, for the payment of such check, draft or order.

\* \* \*

In the case of *State v. Taylor*, 335 Mo. 460, 73 SW 2d, 378, 95 ALR 476, the court had under consideration a statute substantially the same as our own in that section 4305, R. S. Mo. 1929, includes "any check, draft or order, for the payment of money, upon any bank or other depository." Our 103-18-11, above quoted covers "any check, or draft, or order upon any bank or despositary \* \* \* for the payment of money \* \* \*." The Missouri court in holding that a post-dated check falls within the provisions of their statute reasoned that such was so, because the legislature in enacting their false check statute had done so at a time after the Negotiable Instruments Law had become a part of the law of the State of Missouri, and therefore, must have had the provisions of that law in mind. The court pointed out, in an exhaustive discussion of the Negotiable Instruments Law, that a check, as defined by said law, even though post-dated, is nevertheless, an instrument which would be included

within the words "check," "draft," or "order" as used in the false check statute. It is to be noted that our false check statute was enacted long after the Negotiable Instruments Law had become the law of the State of Utah.

The Supreme Court of California in the case of *People v. Bercovitz*, 163 Cal. 636, 126 P. 479, upheld a conviction under their false check statute where the check was postdated. At page 480, the court said:

\* \* \* 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,"  
\* \* \*

\* \* \* 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. \* \* \*

To the same effect see *State v. Avery*, 111 Kan. 588, 207 P. 838.

The court's attention is respectfully directed to the fact that the cases cited in the above referred to annotation, which hold that criminal liability can not be based on the issuance of a postdated check, do so, with one exception, either on the ground that the statute under consideration did not include the words "draft or order," or because the evidence showed that the payee was in-



formed there were not sufficient funds to meet the check and there would not be until the date indicated on the check. In this regard, it is to be observed that the Missouri case cited by appellant does not consider fatal the fact that the payee knew or had reason to know that the check was postdated. The California case deals with facts similar to those in the instant case, in that the payee did not know that the drawer did not have sufficient funds to cover the check on the day of delivery.

In *State v. Trogstad*, 98 Utah 565, 100 P2d 564, this court held that the drawing of a check against insufficient funds was not culpable conduct on the part of the drawer, because the payee understood there were no funds available and that she was to hold the check a few days until there were. This court said these circumstances created a borrower and lender relationship because the payee treated the check as a promise to pay, therefore rebutting any idea that the check was delivered with intent to defraud.

In the *Trogstad* case, *supra*, the court addressed itself to Section 11 of Chapter 18, Title 103, R.S.U., 1933. That statute, insofar as the elements of the crime are concerned, is identical to the present statute, above quoted. The court on page 566 said:

The statute provides that there must be proved (a) an intent to defraud, and (b) a knowledge that the maker or drawer did not have (1) sufficient funds or (2) credit with the bank for payment. The essence of the charge is that the injured party must have relied upon some false

and deceitful pretense. The check must have been drawn, uttered or delivered willfully and with the intent to defraud and knowing there was neither sufficient funds nor credit with the firm or person upon whom it was drawn.

The specific intent to defraud must be found from the evidence. Such intent must be shown to exist in the mind of the maker or drawer. Intent may be found from the circumstances. \* \* \*

The court in further justifying its reversal of the conviction said on page 567 :

When it is proven that there is no account, an inference may arise that there is not credit but a criminal conviction may not rest upon such inference alone. May the state rest when it has established there is no account? It must be shown, further, that there is no credit. There may be "no account," or "insufficient funds" and yet there may be credit. This essential element was not proved.

It is respectfully submitted that the evidence adduced by the state in the instant case establishes that the drawer, respondent herein, knew he did not have sufficient funds to cover the check; further, that he *knew he did not have "credit with the bank for payment."* The testimony of Ronald H. Haslam, an employee of the drawee bank, makes these two facts clear. On direct examination Mr. Haslam, testifying from the permanent records of the bank, states as follows: (Tr. 48, 49)

Q. When was the account closed?

A. An August the 22nd, 1951.

Q. And you say for what reason was it closed?

A. There was an overdraft shown on the books of \$1.36, \* \* \*

Q. Was there any funds in that M. R. Bruce account on September 15, 1951?

A. No \* \* \*.

Q. Was there any money deposited in that account after August 22, 1951?

A. No, sir.

Q. Is there any indication on the account as to checks being returned for insufficient funds?

A. Yes, sir, there are several.

Q. Where are they?

A. They're from August the 3rd to August the 22nd.

\* \* \*

Q. Have you made a search of your records to ascertain whether or not there was any arrangements made at the bank for credit to M. R. Bruce after this account was closed?

A. Yes, sir.

Q. State what you found.

A. There was no such record of any arrangement.

Q. Was any arrangement for additional credit ever made by this defendant?

A. No, sir.

The testimony of Mr. Smith, the complaining witness makes it clear that he accepted the check as present pay-

ment for the six automobiles, and that he was not informed that the check was postdated (Tr. 29, 30).

Q. Did you have any conversation with the defendant about the check?

A. No, there was nothing said particularly. Only ordinary conversation. He did say he'd like the titles to give to his bank at the time.

Q. And that's why you gave him the titles?

A. That's right.

Q. Well, was there anything said at all about your holding the check?

A. Nothing was said at all.

Q. Did you notice that the check was dated the 17th?

A. No.

The fact that Mr. Smith deposited the check on the 15th of September, 1951, further bolsters the argument that he treated the check as a present payment as of the day of delivery, and that he had no indication of the post-dating (Tr. 30, 31).

On cross-examination Mr. Smith testified as follows:  
(Tr. 36)

Q. \* \* \* In other words, didn't he (Bruce) say he would have to finance the automobiles with a finance company before the check would be good?

A. I don't think he did. All he asked was—

Q. Just a moment. You said you don't think he did. Are you sure that he didn't? Are you sure?

A. I'm sure he didn't. All he said was he needed the titles to give to his bank. Of course, you can assume the fact, that he needed them, the titles, so he could floor. You can assume it either way.

\* \* \*

THE COURT: Did you assume that?

A. No, I didn't assume that.

We respectfully submit that the testimony of Mr. Haslam and Mr. Smith is not inconsonant with the establishment of a *prima facie* case. Indeed, circumstances such as those described by these two witnesses furnish sufficient basis for an inference of intent to defraud; therefore, the case should have been submitted to the jury. It is further to be noted that our statute provides that the drawing of a check, draft or order as contemplated by the statute is *prima facie* evidence of intent to defraud. See State v. Prettyman, 113 Utah 36, 191 P2d 142.

## CONCLUSION

Respondent respectfully submits that a review of the transcript and proceedings in this case discloses ample and sufficient evidence to establish a *prima facie* case; that a postdated check is such an instrument as was contemplated by the legislature when it enacted the false check statute and inserted the words "check, draft, or order;" and that particularly is this so when the payee

is not apprised of the postdating. The ruling of the lower court should be reversed.

Respectfully submitted,

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