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Criminal Law: Crimes--Worthless Checks Oklahoma Session Laws 1965, Ch. 216

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"automatically ceases" seems to exclude any connotation that the provision may be inserted into the decree at a later date. It is unlikely that the statute will operate in such a manner as to allow modification of the alimony award based on a change in circumstances subsequent to the rendering of the decree. The provision for termination of the alimony upon the death or remarriage of the wife must be an integral part of the original divorce decree.

Turning again to the nature of the alimony award, it must be emphasized that it is an allowance for support of the wife and is to be differentiated from child support for maintenance of the children of the marriage, or a property division disposing of jointly acquired property. The underlying philosophy of the statute is undoubtedly to absolve the husband from the obligation of continuing maintenance of the wife under conditions whereby the necessity of such obligation has expired or shifted. The purpose of the statute is easily reconciled with the existing divorce statutes in the case of the remarriage of the wife. In such an instance the later husband acquires a duty to maintain the wife, certainly dissolving any necessity of the first husband providing for her.

If the provision in the statute is included in a divorce decree providing for alimony, the wife will acquire a vested interest in a sum of money, payable in gross or in installments. The vested interest of the wife, however, will be subject to the contingencies that the one paying the alimony will no longer be obligated to maintain her under circumstances whereby another has become duty-bound to provide such maintenance, or in the case of death where the object of the allowance could not be realized.

Dwayne C. Pollard

CRIMINAL LAW: "CRIMES—WORTHLESS CHECKS" OKLAHOMA
SESSION LAWS 1965, CH. 216.

Oklahoma's Thirtieth Legislature Regular Session passed an act on the uttering and passage of false and bogus checks.¹ This subject had been covered in a statute relating to the entire field of obtaining money and property by means of false pretenses.² The new act differs in some respects from the "worthless check" section of the old act, which, coupled with the absence of a repealing clause in the new act, suggests possible complications in the interpretation of the new act in relation to the old.

In the words of the false pretense statute:

[E]very person who, with intent to cheat and defraud, shall obtain or attempt to obtain from any person, firm or corporation, any money, property or valuable thing, of the value of Twenty (\$20.00) Dollars, or less, . . . by means or use of any false or bogus checks, . . . shall be guilty of a

¹ OKLA. SESS. LAWS 1965, ch. 216.

² OKLA. STAT. § 1541 (1961).

misdemeanor and upon conviction thereof shall be punished by a fine not to exceed Five Hundred (\$500.00) Dollars, or by imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment. If the value . . . be more than Twenty (\$20.00) Dollars, any person convicted hereunder shall be deemed guilty of a felony and shall be punished by imprisonment in the State Penitentiary, for a term not exceeding seven (7) years, or by a fine not to exceed Five Hundred (\$500.00) Dollars, or by both such fine and imprisonment.

The statute also provided that a check passed but refused by the drawee for insufficient funds was prima facie evidence of the intent to defraud and the knowledge of insufficient funds, provided it is not paid by the drawer within five days from presentment for payment, and provided the check is presented to the drawee within thirty days after deliverance and acceptance.³

The Oklahoma Court of Criminal Appeals has held that the gist of the offense of obtaining money by means of a bogus check is the fraudulent intent⁴ to unlawfully, wrongfully, wilfully and feloniously obtain merchandise,⁵ money,⁶ property,⁷ or valuable thing⁸ by means of a false and bogus check. A transfer of property, or the attempt to cause a transfer, must be brought about by the inducement of such a check. The state, to prove the false and bogus nature of the check, must show the non-existence of funds or credit of the drawer.⁹ Therefore, a prima facie case is proved when a check is delivered and returned marked "insufficient funds."¹⁰ A formal protest by the bank is not a prerequisite to prosecution under the old statute.¹¹ It should be noted that a bogus check given for payment of an open account may not be considered in the charge of receiving property by means of a bogus check because there is no passing of title or possession by the inducement of the bogus check, a basic element of the crime.¹² That a defendant has made restitution for the check is no defense to the crime; it is complete at such time as the check is uttered and passed and property given for the check.¹³

The new bogus check law has several interesting differences from the bogus check portion of the false pretenses statute. The definition of the crime is basically the same as that of the old law, but with the conspicuous deletion of the word "money" in describing those things procured by the bogus check.¹⁴ Also noticable in reading the old and the new sta-

³ *Ibid.*

⁴ *Moore v. State*, 96 Okla. Cr. 118, 124, 53 P.2d 46, 53 (1952).

⁵ *Snider v. State*, 338 P.2d 892, 894 (Okla. Cr. App. 1959).

⁶ *Simpson v. State*, 267 P.2d 1008, 1010 (Okla. Cr. App. 1954).

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Kilgore v. State*, 25 Okla. Cr. 69, 76, 219 P. 160, 163 (1923).

¹⁰ *Sharkey v. State*, 329 P.2d 682, 686 (Okla. Cr. App. 1958).

¹¹ *Ibid.*

¹² *Id.* at 688.

¹³ *Beach v. State*, 28 Okla. Cr. 348, 352, 230 P. 758, 760 (1924).

¹⁴ OKLA. SESS. LAWS 1965, ch. 216, § 1.

tures together is that the words "or attempts to obtain" have been removed.¹⁵ The prima facie evidence portion is basically the same. However, the condition attached to it, that of payment within a specified time, has been clarified. The defendant, under the new law, must pay the check within ten days after written notice to rebut such evidence. "[N]otice in writing shall be presumed to have been given when deposited as registered or certified mail in the United States mail. . . ."¹⁶

The most interesting new provision is the revised punishment. Now, one convicted of writing a bogus check for the first time is never guilty of a felony. If the check is for \$20.00 or less, the crime is punishable only by a fine of up to \$200.00. If the check is from \$20.00 to \$50.00, the defendant may be punished by up to thirty days in the county jail and/or by a fine not exceeding \$500.00. If the check is in excess of \$50.00, the offense is punishable by a term of up to one year in the county jail and/or by a fine not to exceed \$1000.00.¹⁷ None of these crimes is a felony. If, after conviction of uttering a bogus check for any amount, one is convicted of passing a bogus check under \$50.00, he may be punished by thirty days to one year in the county jail and/or a fine to \$1000.00. If, after any conviction for bogus check, a conviction is had for a check of \$50.00 or more, the crime is a felony and punishable by up to seven years in the penitentiary and/or a fine to \$5000.00. If, after two convictions for any bogus checks, one is convicted of passing a bogus check under \$50.00, one is guilty of a felony and may be punished by one to five years in the penitentiary and/or a fine to \$2000.00.¹⁸

The rationale of this new system of punishment is apparent after some consideration of the old bogus check punishment system. Under the old law, persons convicted of writing a small bogus check for the first time could be punished up to six months in jail and fined up to \$500.00. The new law is less harsh on first offenders. While the old law was perhaps overly harsh at times on first offenders, it was lax on chronic offenders who wrote small checks to keep the chances of conviction in the misdemeanor category. One could write numerous checks under \$20.00 and never be sent to jail for more than six months, much less be sent to the penitentiary. Under the new law, conviction for writing three checks, no matter how small, imposes a mandatory sentence of at least one year and up to five years in the penitentiary.

The principal problems arising in the interpretation of this new law by the courts will result from the Legislature's failure to put a repealing clause in the new law. Thus, repeal of the old law must be by implication. The points bearing careful scrutiny in the implied repeal of former statutes will be: 1) What effect does the deletion of the word "money" have upon things which may be received by means of bogus checks? 2) Because of the deletion of attempts, will attempts be prosecuted under the general attempt statute or will they be prosecuted under the old false

¹⁵ *Ibid.*

¹⁶ OKLA. SESS. LAWS 1965, ch. 216, §§ 2-3.

¹⁷ OKLA. SESS. LAWS 1965, ch. 216 § 4.

¹⁸ *Ibid.*

pretenses statute? 3) In relation to punishment, will the general habitual criminal statute ever apply? and 4) Does it obligate the use of the two-stage proceeding as in crimes charging former convictions of felonies?

The Oklahoma Legislature has said, "If the provisions of any . . . chapter . . . , conflict with or contravene the provisions of any former . . . chapter . . . , the provisions of the latter . . . chapter . . . must prevail as to all matter and questions arising thereunder out of the same subject matter."¹⁹ There is sufficient case law to allow the new statute to repeal by implication the old portions of the false pretenses statute relating to bogus checks. The Oklahoma court, in a decision in 1911, defined repeal by implication when it said, "Whilst repeals by implication are as a rule not favored in law, yet when it is clear that it was the intention of the Legislature that a certain complete act should be substituted for all pre-existing statutes on the subject, it is the duty of the courts to so hold."²⁰ Thus, the court must determine the legislative will at the time the new law was passed. In a recent case, the Oklahoma Court of Criminal Appeals, quoting the Supreme Court of Maine, said, "[T]he latest expression of the legislative will, will, although it contains no repealing clause, govern, control, or prevail, so as to supersede and impliedly repeal the earlier act to the extent of the repugnancy."²¹ In a clear explanation of why this is true, the court, again quoting the Maine court, said:

Implied amendment or repeal of an earlier by a later statute is founded 'on the reasonable inference that the legislature cannot be supposed to have intended that there should be two distinct enactments embracing the same subject matter in force at the same time, and that the new statute, being the most recent expression of the legislative will, must be deemed a substitute for previous enactments, and the only one which is to be regarded as having the force of law.'²²

In another case, the Oklahoma court said implied repeal hinges on "legislative intent" and that to have such repeal, the two acts must be "inconsistent, incompatible and conflicting to the extent that they may not stand together."²³ Repeal by implication is not favored and will not be upheld in doubtful cases.²⁴

In this instance, an entire statute is not being repealed by implication, and the court has upheld such implied repeal of portions only. Statutes will have the effect of modifying prior statutes in so far as any sections of two acts are in conflict.²⁵ Quoting the Supreme Court of Maine again, the Oklahoma court said, "Where a later statute does not cover the entire field of the earlier statute but is inconsistent or repugnant to some of its provisions, a repeal by implication takes place to the extent of the

¹⁹ 75 OKLA. STAT. § 22 (1961).

²⁰ *Erwin v. Wheeler*, 31 Okla. 331, 333, 120 P. 1098, 1099 (1911).

²¹ *Ritchie v. Raines*, 374 P.2d 772, 776 (Okla. Cr. App. 1962).

²² *Ibid.*

²³ *McLean v. State*, 95 Okla. Cr. 271, 274, 244 P.2d 335, 338 (1962).

²⁴ *Ritchie v. Raines*, *supra* note 21, at 775.

²⁵ *Ex parte Burns*, 88 Okla. Cr. 270, 275, 202 P.2d 433, 434 (1949).

conflict."²⁶ It has been held that these ideas apply to criminal statutes as well as civil statutes.²⁷

This problem may also be approached from the standpoint that the false pretenses statute is a general statute covering the entire field of false pretenses, including bogus checks, and that the new statute is a special statute relating only to the narrower field of bogus checks. The Oklahoma court states, "A rule of statutory construction is that later special legislation must be given precedence over former general statutory provisions in conflict with the special legislation. This rule applies even though the special legislative act contains no repealing clause."²⁸

Since the Legislature has omitted the word "money" in the new statute, the question arises whether bogus checks for which money is given will be prosecuted under the old law, the new law, or at all. The court probably will attempt to include money under the category of "thing of value" which is in the new act. Oklahoma appears to have never faced the problem of finding a basis for such an inclusion. There is, however, abundant authority outside Oklahoma on this point.²⁹

Since the new law makes no mention of attempts as did the old law, will attempts be prosecuted under the old law or under the general attempt statute of Oklahoma?³⁰ In looking at this problem, one must again seek to grasp the Legislature's intentions on this point. It would appear that the new law seeks to take the crime of passing bogus checks completely out of the sphere of the false pretenses statute. It is unlikely that the Legislature would punish solely by fine one who passed a bogus check for less than twenty dollars, and sentence yet another to jail for up to six months for the attempt only. The general attempt statute punishes attempts basically with half or less the punishment assessable for the completed crime.³¹ To assume that such punishment would be imposed for an attempt would be reasonable in this instance. To further fortify this theory, case law on construction of criminal statutes has held that when construing penal statutes, ambiguities are to be resolved in favor of the accused.³²

The next question involves the application of this new law to second and subsequent offenses, in the place of the general statute relating to second and subsequent offenses.³³ This situation presents the question of the implied repeal of a general statute covering all second and subse-

²⁶ *Ritchie v. Raines*, *supra* note 21, at 776.

²⁷ *Ibid.*

²⁸ *Maryland Casualty Co. v. Board of County Comm'rs*, 128 Okla. 58, 62, 260 P. 1112, 1116 (1926).

²⁹ Other authorities appear on this point. Fourth Division of the District Court of the United States, *United States v. Gellman*, 44 F. Supp. 360 (1942); *Pennsylvania, Commonwealth v. Brink's, Inc.*, 346 Pa. 348, 30 A.2d 128, 131 (1943); *Missouri, State v. Gabriel*, 342 Mo. 519, 116 S.W.2d 75 (1938); and *Texas, Tyler v. State*, 228 S.W.2d 517 (Texas, 1956).

³⁰ 21 OKLA. STAT. § 42 (1961).

³¹ *Ibid.*

³² *State v. Hamilton*, 298 P.2d 1073, 1081 (Okla. Cr. App. 1956).

³³ 21 OKLA. STAT. § 51 (1961).

quent bogus check convictions by the special statute relating to bogus check punishment. The new law specifically sets out punishment for second and subsequent offenses, the punishment applying to all successive instances of bogus check convictions. In one instance the new act states if "the defendant has two or more times before been convicted of the same offense. . . ."³⁴ and a second time refers to subsequent offenses when it states "conviction of any second and subsequent offense for a violation of this act. . . ."³⁵ If one has been convicted under this act and has also been convicted of other crimes before being convicted any given time under this act, since he is prosecuted under this act for a bogus check, undoubtedly this statute would apply and one's sentence would rest upon his prior bogus check convictions, and not upon his other prior convictions. Thus, the general habitual criminal statute would be done away with completely when prosecuting under this act and charging prior bogus check convictions. The question does not arise when charging one with first offense bogus check after former conviction of another crime, since the first bogus check offense is not punishable under any circumstances by imprisonment in the penitentiary. This view is bolstered by the words of the Oklahoma Court of Criminal Appeals when it said, "[W]here there are two statutes covering the same subject, one a general statute and the other a special statute, and both cover the same subject matter, the special statute prevails."³⁶ A special statute supersedes a general statute "which does not refer to the particular subject matter, but does contain language which might be broad enough to cover the same subject matter if the special statute was not in existence."³⁷

The question of the use of two-stage proceedings in prosecution under the new bogus check law is, after the previous discussion of implied repeal, not difficult to answer. The statute providing for two-stage proceedings is a general one and would apply to all criminal proceedings, subject to the rules of evidence as to intent and motive, in which prior convictions of any crimes are alleged.³⁸ There is no inconsistency between the two, and the two may stand together and be followed without one encroaching upon the other.

No reference was made in this statute to any other statute. This, in itself, is bound to create problems in judicial interpretation, since the Legislature did not make itself clear on what was to be included, excluded, and repealed. This has not been determined by any court of last resort. The views expressed here are only those made after research into prior decisions on similar subject matter. The final determination of interpretation can be made only by the Oklahoma Court of Criminal Appeals, and until such time as all these issues are raised in that court, answers to the questions must remain purely speculative.

Craig Blackstock

³⁴ OKLA. SESS. LAWS 1965, ch. 216, § 4.

³⁵ *Ibid.*

³⁶ *Lovins v. State*, 49 Okla. Cr. 200, 203, 293 P. 273, 274 (1930).

³⁷ *Ibid.*

³⁸ 22 OKLA. STAT. § 860 (1961).