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Criminal Law—Post-Dated Check May Be Criminal Offense Under § 1292-a of N.Y. Penal Code

Harry J. Poole

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be the actual term of service—one year—from January 1, 1958 to December 31, 1958. Therefore it would be possible for the plaintiff to show a renewal for a similar one year period and thereby avoid the Statute of Frauds ban. In answer to the second problem, the court was aware of the agency relationship but it concluded that a plaintiff should be permitted to show an agreed renewal from the fact of continuance beyond a year. The relationship between the parties was deemed to be irrelevant where the contract was for the performance of services. The question as to a renewed agreement is one of fact and as such the plaintiff must sustain his burden of proof.¹²

The position taken by the Appellate Division is difficult to sustain when viewed in the light of existing case law both in New York state and elsewhere.¹³ The difficulty encountered appears to be based upon too narrow an interpretation of the 1891 case.¹⁴ The intermediate court imposed a limitation in the application of its holding which does not seem to be justified either by the language of that case or by subsequent decisions.¹⁵ The Court of Appeals is not making new law or even extending pre-existing law. It is merely clarifying and re-applying basic principles of contract law which have a firm footing in New York case law. This is being done in an area of the law which obviously and understandably involved some confusion.

DAVID BROWN

CRIMINAL LAW

POST-DATED CHECK MAY BE CRIMINAL OFFENSE UNDER § 1292-a OF N.Y. PENAL CODE

Defendant mailed a check on October 19, 1959, which was dated October 22, 1959.¹ The check was received by the complainant on October 22, 1959, and he deposited the check. A few days later the bank notified the complainant that the check was returned because of insufficient funds on part of the defendant,² and subsequently the defendant was convicted of issuing a fraudulent check.³ He appealed, claiming that the instrument was a post-dated check, and that a conviction under section 1292-a of the Penal Law⁴

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12. *Id.* at 253, 196 N.E.2d at 56, 246 N.Y.S.2d at 398.
 13. *Sines v. Wayne Co.*, 58 Mich. 503, 25 N.W. 486 (1885).
 14. *Adams v. Fitzpatrick*, 125 N.Y. 124, 26 N.E. 143 (1891).
 15. *Cf. Chase v. Second Ave. R.R.*, 97 N.Y. 384 (1884).

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1. Brief for Defendant-Appellant, p. 6.
 2. Brief for Respondent, p. 2.
 3. *People v. Aryeh*, 18 A.D.2d 967 (1st Dep't 1963), affirming by memorandum decision a judgment of the former Court of Special Sessions, New York City.
 4. The relevant language of section 1292-a of the N.Y. Penal Law reads as follows: "Any person who, with intent to defraud, shall make or draw or utter or deliver any check, draft, or order for payment of money . . . upon any bank or other depository, knowing at the time of such making, . . . that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check,

could not be based upon the giving of a post-dated check because such an instrument constituted a promise to pay in the future, rather than a representation that the drawer had sufficient funds on deposit to meet it. The fact that it was a post-dated check was not denied by the People, since delivery of the check was completed at the time it was placed in the mail.⁵ The prosecution argued, however, that the short period involved in the post-dating of the check was properly disregarded by the trial court. *Held*, conviction affirmed unanimously, without opinion. By implication, the fact that a check is post-dated by a few days is no defense in and of itself to section 1292-a of the Penal Law. *People v. Aryeh*, 14 N.Y.2d 494, 248 N.Y.S.2d 222 (1964).

There is an apparent divergence of opinion among the several states on the question of whether the so-called "bad check" statutes apply to post-dated checks. Such division of authority is generally occasioned by differences in the statutes involved rather than by differences of opinion relating to applicable legal principles.⁶ Prior to the instant case, the New York view followed those jurisdictions which hold that a post-dated check precludes the prosecutor from showing intent to defraud under a "bad check" statute.⁷ The courts that hold this way reason that a post-dated check does not conform to the definition of a check in the Negotiable Instrument Law,⁸ and one who gives a post-dated check does not impliedly represent that funds are then available to pay it, but merely that they will be available on the future date of the check.⁹ Promises or representations relating to the future have been historically held not to be indictable.¹⁰ Jurisdictions which hold that a post-dated check does not in itself establish its status as a promissory note,¹¹ and allow the prosecutor to show

although no express representation is made in reference thereof, shall be guilty of a misdemeanor."

5. *Bacal v. National City Bank of N.Y.*, 146 Misc. 732, 262 N.Y. Supp. 839 (Munic. Ct. N.Y.C. 1933).

6. *State v. Eikelberger*, 72 Idaho 245, 239 P.2d 1069 (1951); *State v. Spitko*, 2 Conn. Cir. 99, 195 A.2d 577 (1963); see generally 29 A.L.R.2d 1181-85 (1953).

7. *People v. Mazeloff*, 229 App. Div. 451, 242 N.Y. Supp. 623 (1st Dep't 1930); see *People v. Kubitz*, 37 Misc. 2d 453, 235 N.Y.S.2d 971 (Monroe County Ct. 1963); *Azzarello v. Richards*, 198 Misc. 723, 99 N.Y.S.2d 597 (Munic. Ct. Syracuse 1950).

8. N.Y. Negotiable Instr. Law § 321 "A check is a bill of exchange drawn on a bank payable on demand." Substantially in accord N.Y. UCC § 3-104(2)(b).

9. See, e.g., *Seaboard Oil Co. v. Cunningham*, 51 F.2d 321 (5th Cir. 1931), *cert. denied*, 284 U.S. 657 (1931); *Neidlinger v. State*, 17 Ga. App. 811, 88 S.E. 589 (1916); *State v. Doudna*, 226 Iowa 351, 284 N.W. 113 (1939); *State v. Crawford*, 198 N.C. 522, 152 S.E. 504 (1930); *State v. Turetsky*, 78 N.J. Super. 203, 188 A.2d 198 (1963); *Commonwealth v. Kelinson*, 199 Pa. Super. 135, 184 A.2d 374 (1962); *State v. Winter*, 98 S.C. 294, 82 S.E. 419 (1914); *State v. Nelson*, 58 S.D. 562, 273 N.W. 766 (1931); *Cook v. State*, 170 Tenn. 245, 94 S.W.2d 386 (1936).

10. See *Chaplin v. United States*, 157 F.2d 697 (D.C. Cir. 1946); *People v. Sloane*, 254 App. Div. 780, 4 N.Y.S.2d 784 (2d Dep't 1938); 2 *Wharton, Criminal Law and Procedure* § 585 (12th ed. 1957).

11. See, e.g., *Paterson v. State*, 194 Ark. 488, 107 S.W.2d 545 (1937); *People v. Bercovitz*, 163 Cal. 636, 126 Pac. 479 (1912); *People v. Westerdahl*, 316 Ill. 86, 146 N.E. 737 (1925); *State v. Johnson*, 116 Kan. 390, 226 Pac. 758 (1924); *State v. Taylor*, 335 Mo. 460, 73 S.W.2d 378 (1934); *White v. State*, 135 Neb. 154, 280 N.W. 433 (1938); *Gumm v. Heider*, 220 Ore. 5, 348 P.2d 455 (1960); *Martini v. State*, — Tex. Crim. —, 371 S.W.2d 387 (1963).

intent to defraud under the "bad check" statutes represent the view that, although a post-dated check cannot be classified as a check, which is essentially a demand instrument, it is a draft,¹² and therefore may be listed under the grouping of a "check, draft or order."¹³

Before the *Mazeloff*¹⁴ decision the drawer of a post-dated check could not avoid punishment for false pretenses in New York if an intent to defraud was shown.¹⁵ The *Mazeloff* case has been extensively followed as standing for the proposition that ". . . section 1292-a does not recite post-dated checks among the prohibited items . . ."¹⁶ Under this doctrine the fact that checks were post-dated by one¹⁷ or two¹⁸ days has been a defense to section 1292-a prior to the instant case.¹⁹ The decision of the instant case will not allow the mere post-dating of a check to rebut an intent to defraud, if such an intent is shown by the People.

The presence or absence of intent to defraud, therefor, instead of the date written on the check becomes the determining factor for a conviction under section 1292-a. This enforces the main purpose of the "bad check" statute—to avert mischief to trade, commerce and banking which the circulation of worthless checks may inflict.²⁰ It will prevent unscrupulous actions by those who have purposely taken advantage of the *Mazeloff* doctrine by using post-dated checks to avoid criminal liability under section 1292-a.²¹ In view of the accepted validity²² and the extensive use of the post-dated check in the commercial world, there is no apparent reason why such an instrument should not be subjected to the statute.

HARRY J. POOLE

12. *People v. Bercovitz*, *supra* note 11.

13. N.Y. Penal Code § 1292-a.

14. 229 App. Div. 451, 242 N.Y. Supp. 623 (1st Dep't 1930).

15. *Lesser v. People*, 73 N.Y. 78 (1878).

16. 229 App. Div. at 452, 242 N.Y. Supp. at 624 (1st Dep't 1930).

17. *People v. Kubitz*, 37 Misc. 2d 453, 235 N.Y.S.2d 97 (Monroe County Ct. 1963).

18. *Azzarello v. Richards*, 198 Misc. 723, 99 N.Y.S.2d 597 (Munic. Ct. Syracuse 1950).

19. Marks & Paperno, *Criminal Law in New York* § 418 (1961) states: "In as much as an instrument is not a 'check' if it is not payable on demand, a post-dated check is not one of the instruments described in Section 1292-a, and its issuance without funds is not a crime thereby contemplated."

20. See *People v. Siman*, 119 Misc. 635, 197 N.Y. Supp. 713 (Montgomery County Ct. 1922).

21. *In re Vyner*, 12 A.D.2d 10, 207 N.Y.S.2d 829 (1st Dep't 1960). (There was no conviction although defendant issued post-dated checks to the extent that eighty-seven of these were finally returned for insufficient funds.)

22. N.Y. UCC § 3-114 (1) provides: "The negotiability of an instrument is not affected by the fact that it is undated, antedated or post-dated."