

"Art. 567b. OBTAINING MONEY, GOODS, ETC., WITH INTENT TO DEFRAUD, BY GIVING OR DRAWING CHECK, DRAFT OR ORDER WITHOUT SUFFICIENT FUNDS

Section 1. It shall be unlawful for any person, with intent to defraud, to obtain any money, goods, service, labor, or other thing of value by giving or drawing any check, draft, or order upon any bank, person, firm or corporation, if such person does not, at the time said check, draft, or order is so drawn, have sufficient funds with such bank, person, firm or corporation to pay such check, draft, or order, and all other checks, drafts, or orders upon said funds outstanding at the time such check, draft, or order was given or drawn; provided that if such check, draft, or order is not paid upon presentation, the nonpayment of same shall be prima facie evidence that such person giving or drawing such check, draft, or order had insufficient funds with the drawee to pay same at the time the said check, draft, or order was given or drawn and that said person gave or drew such check, draft or order with intent to defraud; and provided further that proof of the deposit of said check, draft, or order with a bank for collection in the ordinary channels of trade and the return of said check, draft, or order unpaid to the person making such deposit shall be prima facie evidence of presentation to, and nonpayment of said check, draft, or order by, the bank, person, firm, or corporation upon whom it was drawn; and provided further that where such check, draft, or order has been protested, the notice of protest thereon shall be admissible as proof of presentation and nonpayment and shall be prima facie evidence that said check, draft, or order was presented to the bank, person, firm or corporation upon which it was drawn and was not paid.

"GIVING OR DRAWING CHECK, DRAFT OR ORDER WITHOUT SUFFICIENT FUNDS

Sec. 2. It shall be unlawful for any person, with intent to defraud, to pay for any goods, service, labor, or other thing of value, theretofore received, by giving or drawing any check, draft, or order upon any bank, person, firm, or corporation, if such person does not, at the time said check, draft, or order is so given or drawn, have sufficient funds with such bank, person, firm, or corporation to pay such check, draft, or order,

and all other checks, drafts, or orders upon said funds outstanding at the time such check, draft, or order is not paid upon presentation, the nonpayment of same shall be prima facie evidence that such person giving or drawing such check, draft, or order had insufficient funds with the drawee to pay same at the time the check, draft, or order was given or drawn and that said person gave such check, draft or order with intent to defraud; and provided further that proof of the deposit of said check, draft or order with a bank for collection in the ordinary channels of trade and the return of said check, draft, or order unpaid to the person making such deposit shall be prima facie evidence of presentation to, and nonpayment of said check, draft, or order by, the bank, person, firm, or corporation upon whom it was drawn; and provided further that where such check, draft, or order has been protested, the notice of protest thereof shall be admissible as proof of presentation and nonpayment and shall be prima facie evidence that said check, draft, or order was presented to the bank, person, firm or corporation upon which it was drawn and was not paid.

**"POSSESSION OF PERSONAL PROPERTY SUBJECT TO LIEN, OBTAINED
BY CHECK, DRAFT OR ORDER AGAINST INSUFFICIENT FUNDS**

Sec. 3. It shall be unlawful for any person, with intent to defraud, to secure or retain possession of any personal property, to which a lien has attached, by the drawing or giving of any check, draft, or order upon any bank, person, firm or corporation, if such person does not, at the time said check, draft, or order is so given or drawn, have sufficient funds with such bank, person, firm, or corporation to pay such check, draft, or order, and all other checks, drafts, or orders upon said funds outstanding at the time such check, draft, or order so given or drawn; provided that if such check, draft, or order is not paid upon presentation, the nonpayment of same shall be prima facie evidence that such person giving or drawing such check, draft, or order had insufficient funds with the drawee to pay same at the time the said check, draft, or order was given or drawn and that said person gave such check, draft, or order with intent to defraud; and provided further that proof of deposit of said check, draft, or order with a bank for collection in the ordinary channels of trade and the return of said check, draft, or order unpaid to the person making such deposit shall be prima facie proof of presentation to, and nonpayment of said check, draft, or order by, the bank, person, firm, or corporation upon which it was drawn;

and provided further that where such check, draft or order has been protested, the notice of protest thereof shall be admissible as proof of presentation and nonpayment and shall be prima facie evidence that said check, draft, or order was presented to the bank, person, firm, or corporation upon which it was drawn and was not paid; and provided further that the removal of such personal property from the premises upon which it was located at the time such check, draft, or order was drawn or given, shall be prima facie evidence that possession of such property was retained or secured by the giving or drawing of said check, draft, or order."

With reference to subdivision 4, Art. 1546, of the Penal Code, we quote from Tex. Jur., Vol. 39, p.p. 1075, 1076, as follows:

"§ 26. CHECKS DRAWN BY PERSONS OTHER THAN ACCUSED -- INDORSERS.- While a conviction will not ordinarily be sustained where the check was drawn by some person other than the accused, it is not necessary that the check be drawn or signed by the accused if he had guilty knowledge of its worthless character. It has been said that the statute, although making no specific reference to an indorser, is broad enough to cover an indorser if he was a party to the fraud by connivance, agreement or conspiracy. However this may be, it has been held that an indorser who stated in good faith that the check was good could not be convicted under the statute where, on learning that the paper was worthless, he deposited sufficient funds in the bank to meet it before it would be presented in the ordinary course of business."

JAMES v. STATE, 257 S.W. 886;
MOORE v. STATE, 219 S.W. 1097;
DAWSON v. STATE, 185 S.W. 875.

In answer to your first question, you are respectfully advised that it is the opinion of this department that the endorser is criminally liable only in those cases where he was a party to the fraud by connivance, agreement or conspiracy and where the endorser can be shown to have had a part in the plan to pass the check, draft, or order so drawn, upon any bank, person, firm or corporation.

In the case of LLOYD v. STATE, 266 S.W. 785, it was held that a party issuing a check under an agreement not to present the same for payment, where no more representations were made than implied by delivery

of the check and the request that its presentations be delayed and that there would be no funds in the bank until that date, did not constitute swindling, under Vernon's Annotated Penal Code, 1916, Art. 1422, Subdivision 4, as to obtaining property upon giving a check without reason to believe that it would be paid when presented.

It will be noted that Art. 567b, supra, specifically provides that --

" . . . it shall be unlawful for any person with intent to defraud . . . by giving or drawing any check, draft or order upon any bank, person, firm, or corporation, if such person does not at the time said check, draft, or order is so drawn have sufficient funds with such bank, person, firm, or corporation to pay such check, draft or order, and all other checks, drafts or orders upon said funds outstanding at the time such check, draft or order was so given or drawn . . . "

When any person gives a "post-dated" check it is evident that such person does not have sufficient funds on deposit with the bank, firm, person, association or corporation at the time of giving to pay the same.

You are respectfully advised that it is the opinion of this department that when any person gives a post-dated check, draft, or order and where this fact is understood by all parties, the person giving the check, draft, or order is not criminally liable under Art. 567b of the Penal Code, although the check, draft or order is later returned because insufficient funds, or other similar reasons.

We want to thank you for the able brief submitted with your inquiry, which has materially assisted us in answering your inquiry.

Trusting that the foregoing satisfactorily answers your questions, we are

Yours very truly

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Approved Opinion Committee
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