



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**PRICE DANIEL
ATTORNEY GENERAL**

Apr. 2, 1947

Hon. Sam B. Hall
Prosecuting Attorney
Harrison County
Marshall, Texas

Opinion No. V-121

Re: Has the offense of forgery been committed when the marginal figures on a valid check have been altered but the written words in the body of the check remain unchanged, and payment of the check is made in accordance with the marginal figures?

Dear Sir:

Your letter of March 28, 1947, requesting an opinion of this department as to whether or not the offense of forgery has been committed under the facts submitted, has been considered by this department. Under the facts submitted, a defendant took a valid check for \$4.80, placed a figure 5 before the figures \$4.80, and obtained the amount of \$54.80 when he cashed this check. You also state that the amount written in the body of the check was \$4.80 made by a check protector and that this amount was not altered. The photostatic copy of the check shows the amount written in the body of the instrument to be clear and certain and in the amount of "4 dols 80 cts."

Article 984, Vernon's Penal Code, provides:

"He is also guilty of forgery who, without lawful authority, and with intent to injure or defraud, shall alter an instrument in writing then already in existence, by whomsoever made, in such manner that the alteration would (if it had been legally made) have created, increased, diminished, discharged or defeated any pecuniary obligation, or would have transferred, or in any manner have affected any property whatever."

Article 987, Vernon's Penal Code, defines the word "alter" as used in the above statute.

"The word 'alter' in the definition of forgery, means to erase, or obliterate any word, letter or

figure, to extract the writing altogether, or to substitute other words, letters or figures for those erased, obliterated or extracted, to add any other word, letter or figure to the original instrument, or to make any other change whatever which shall have the effect to create, increase, diminish, discharge or defeat a pecuniary obligation, or to transfer or in any other way affect any property whatever." (Emphasis added.)

The Negotiable Instruments Law was adopted by Texas in 1919 and is found in Articles 5932-5948, Vernon's Civil Statutes. We think that part of it which has to do with the construction of the instrument before us is pertinent. Article 5932, Sec. 17, provides:

"1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount; . . ."

It appears from a reading of the above provision that the only time reference may be had to the figures on a negotiable instrument is when the words denoting the amount are ambiguous or uncertain. In the case before us the words are written by check protector and are clear and unambiguous.

We have been unable to find a Texas case in point, but we have found several cases containing identical fact situations decided by other jurisdictions.

In 37 C.J.S. 41, we find the following statement:

"An alteration of marginal figures on an instrument in which the amount payable is plainly expressed in words is not a forgery, but there is some authority apparently to the contrary."

The earliest case cited is the case of Commonwealth v. Hide, 23 S. W. 195. This is a case by the Kentucky Court of Appeals decided in 1893. This case involved a check originally in the amount of seventy cents. However, the figure 3 was inserted between the dollar mark and the figures 70 in the upper margin of the check, thus making it appear to be a check for \$3.70, although the amount was written "Seventy Cts." in the body of the check and this writing was unaltered. The Court used the following language in this case:

"Clearly, the writing was a forgery, and the indictment in apt terms, charged the defendant with the

crime. It is certainly not necessary that the whole instrument should be made false or fictitious. Making an alteration or erasure in any material part of a true instrument, whereby another may be defrauded, is a forgery. This check, in a material - and we may say a prominent - part, was altered; and it does not matter that the word 'Seventy Cts.' remained as written, or that by close observation the merchant could have detected the forgery, and prevented the confirmation of the fraud."

Another case involving a similar fact situation was the case of *Wilson v. State*, decided by the Supreme Court of Mississippi in 1905, and reported in 38 So. 46. In this case, the figures in the upper right hand corner of the draft were altered from \$2.50 to \$12.50, but the words "Two and 50/100 Dollars" were written in the body of the instrument and were unchanged. Also, the words "Ten Dollars or Less" were stamped across the face of the draft. The court in this opinion reached the conclusion that the alteration was not forgery, and in so doing, used the following language:

"This was not forgery, because it was an immaterial part of the paper, and because it could not possibly have injured anybody. In order to constitute the crime there must not only be the intent to commit it, but also an act of alteration done to a material part, so that injury might result."

The court further states:

". . . it must have been capable of working injury if it had been genuine, and that the marginal numbers and figures are not part of the instrument, and their alteration is not forgery."

This case cites the Texas case of *Anderson v. State*, decided by the Court of Appeals of Texas in 1886 and reported in 20 Tex. App. 595. This Texas case involved a conviction for forgery of an order for goods, and was not an analogous fact situation. However, this language by the Court does appear to be important:

"To constitute forgery, the instrument forged must be such an one that, if it were true, would create, increase, diminish, discharge, or defeat a pecuniary obligation, or would transfer or in some manner affect property." (Emphasis added.)

The next case is the case of *State v. Letona*, decided by the Supreme Court of Appeals of West Virginia in 1907 and reported in

58 S. E. 621. This case involved a check which was in the amount of \$2.70 originally and was raised to \$20.70 in the marginal figures. However, the body of the check contained the writing "Two and 70/100 Dollars" and this was not altered. The Court in this case reached the conclusion that this alteration was not forgery and used the following reasoning:

"The test is the legal effect of the change or alteration, not whether someone may be misled or deceived by the paper. Here the only change was in what are called in some cases the 'marginal figures,' which, while they might mislead one who should fail to observe the body of the instrument, could not change or affect the legal status of the party, or tend in legal effect to prejudice another's right. The alteration of the check in this case did not deceive the Bank, and its legal effect was not changed. The materiality of the alteration is a question of law for the courts upon the admissibility of the altered instrument in evidence; and the alteration being shown, nothing remained for the jury to pass upon. . . .

"Was the alteration of the figures in the check a material one? We think not. It is true the figures follow the words in the body of the check denoting the sum called for, as is frequently the case, and are not strictly marginal; but we do not think they form a material part of the paper. They are for ready reference, as if written at the top or in the margin, and for convenience. They are not controlling, and do not change the legal effect of the paper. The words are the controlling portion, and the figures constitute no material part of the instrument. . . . We are cited to only one case which shows the contrary, Commonwealth v. Hide, 94 Ky. 517, 23 S.W. 195. That case stands alone, unsupported, and we do not think it states the law correctly."

The next case we consider is the case of McIntosh v. State, decided by the Court of Appeals of Georgia, Division No. 2 in 1919 and reported in 98 S. E. 555. In this case, the defendant forged a draft by altering and raising the figures and numerals on this draft originally in the sum of \$2.60, to the figures and numerals, \$57.60. The Court in this case cited the Lotono, Hide and Wilson cases and concluded:

"From the foregoing opinion, it appears that before the alteration of a check or a draft can be the

basis of a prosecution for forgery, the change must be such that it would affect the 'legal liability of the parties in an action on the instrument.' It is well established that when the amount of a check is expressed both in words and figures, and there is a conflict between the two, the amount stated in the words control. . . applying the above rule to the fact as alleged in the indictment in the instant case, it follows that the change in this check upon which the prosecution in the instant case was based, was not material, . . ."

The next case to be considered is the case of *People v. Lewinger*, decided by the Supreme Court of Illinois in 1911 and reported in 96 N. E. 837. This case involved a slightly different fact situation than the preceding cases. In this case, the check as originally written contained the numbers \$25.00 as marginal figures and in the body the amount was set forth as \$2500.00. The defendant altered the instrument by changing the marginal figures to read \$2500.00 and cashed the check. The court in reversing the judgment of conviction used the following language:

"But the figures in the margin of an instrument are not strictly a part of the contract. They cannot be reverted to, to impeach the amount named in the body of the paper, and are never resorted to for any purpose, unless there is uncertainty in regard to the amount written in the body of the instrument."

Later in the opinion, the court cites the case above set out and uses this language:

"Other courts have held that an alteration of marginal figures on a check in which the amount payable is plainly expressed in words is not forgery."

It is our opinion that under Articles 984 and 987 of Vernon's Penal Code and under the cases above cited, the defendant would not be guilty of the offense of forgery. Although the *Hide* case, *supra*, would seem to support an indictment for forgery, we believe that it is an isolated case and that the majority rule as shown in the later cases above cited would be followed by the Texas courts.

SUMMARY

The altering of the original marginal figures on an otherwise valid check so long as the sum

written in the body of the instrument remains
unchanged and certain does not constitute the
crime of forgery in Texas.

Yours very truly,

ATTORNEY GENERAL OF TEXAS

By 
Clarence Y. Mills
Assistant

CYM:rt:sl

APPROVED APR 8, 1947


ATTORNEY GENERAL OF TEXAS