Checks—Prosecution—Proof—Fraudulent Checks.

The provision contained in Section 11369, R.C.M. 1921, relating to five days' notice to the maker of a fraudulent check is a rule of evidence concerning the proof of intent to defraud and knowledge of insufficient funds. The liability to prosecution for the offense is not suspended during said five-day period nor would the fact of payment after notice bar the prosecution, such payment having only to do with the amount of proof required to be made by the state.

Hon. George B. Winston, August 21, 1930.
Member Montana State Crime Commission,
Anaconda, Montana.

My dear Judge Winston:

You have written me relative to amending Section 11369, R.C.M. 1921, relating to the uttering of fraudulent checks or drafts.

I note that the claim is made that owing to the five-day provision made in the statute for the giving of notice of dishonor the party issuing

the check or draft cannot be arrested during that period. You ask my interpretation concerning this provision of the law.

The section referred to makes it a criminal offense for any person to make, utter, or draw any check, draft or order upon any bank or other depository, **with intent to defraud,** knowing at the time of such making, drawing, uttering or delivering that the maker or drawer has not sufficient funds in or credit with the bank or depositary for the payment thereof. It is also provided in said section that in any prosecution of this offense proof of the making, drawing, uttering or delivering of the check, draft or order shall be prima facie evidence of **intent to defraud and knowledge of insufficient funds in or credit with such a bank or depositary,** provided the maker or drawer shall not have paid the drawee the amount due thereon within five days after receiving notice that the draft, check or order has not been paid by the drawee.

The proviso relating to the payment after notice is, in my opinion, a rule of evidence pertaining to the prosecution of the offense rather than part of the definition of the substantive offense. In a prosecution under this section **as against the maker or drawer** the state could rely upon the prima facie evidence of intent and knowledge that is created by the statute when it is shown that the maker or drawer had received notice and failed within five days to pay the check, draft or order.

Without the aid of this proviso the state would have to prove the intent to defraud and knowledge of insufficient funds by evidence other than the bare issuance of the instrument and the refusal of payment by the bank or depositary upon which it was drawn and the failure to pay by the maker after receiving notice.

The purpose of this provision was evidently to relieve the state of the burden of proving, in the first instance, as a part of its case in chief. by direct evidence, that the check was issued with the intent to defraud and with knowledge of insufficient funds on deposit for its payment; but in lieu thereof evidence of the fact that the maker or drawer did not pay it within five days after receiving notice of nonpayment might be introduced from which evidence the statute infers the existence of the fraudulent intent and knowledge of the lack of funds. The defendant is left free, however, to overcome this inference by other evidence, and it might be, if his showing was sufficient in this respect, that the state would have to resort to other evidence by way of rebuttal to establish to the satisfaction of the jury the actual intent to defraud and knowledge of insufficient funds.

Also, I do not think under the statute that the state is precluded from a prosecution even though within the five-day period the maker or drawer paid the check, draft or order. In such a case the effect of the payment within the five-day period would be merely to destroy the prima facie evidence of intent and knowledge that arises under the statute when payment within said period has not been made and proof of the drawing, uttering and nonpayment by the bank or depositary has been established.

If the state has at its command other evidence bearing upon the existence of intent and knowledge sufficient to convince the jury that such intent and knowledge did in fact exist so that the state would not be required to rely upon the prima facie evidence mentioned in the statute, in my opinion, the prosecution could be maintained even though payment was made within the five-day period. Were it otherwise the substantive offense would be the making and issuing of the instrument with intent to defraud and failure to make it good after receiving notice of nonpayment by the institution upon which it was drawn. A person would be at liberty to issue a check **with intent to defraud,** but no offense would be committed unless he failed to make it good within the five-day period. The penalty would be inflicted for a failure or inability to pay after receiving notice of nonpayment rather than for the fraudulent act of issuing the check. Aside from possible constitutional objection to such a statute, I do not think a proper interpretation of the act warrants a construction which would have this effect.

Very truly yours,

L. A. FOOT,
Attorney General.