

ATTORNEY GENERAL OF ARIZONA
STATE CAPITOL
PHOENIX

Make 6 Copies

July 21, 1923.

H. S. McCluskey
Secretary to the Governor,
Phoenix, Arizona.

Dear Mr. McCluskey;

Complying with your request for an opinion as to the constitutionality of Chapter 26 Session Laws of Arizona, 1921, with respect to matters submitted by Mr. John Leam, of Kingman, Arizona, we have made some search into the authorities and beg to advise you as follows;

The chapter in question is an amendment of paragraphs 704-705 Penal Code of 1913; Its purport is to define the felony of obtaining labor by false pretenses, and to fix the penalty therefor. It defines two distinct elements either of which constitutes the crime. They are, first, employing labor without having assets within the County where the employment is made sufficient to pay the labor for a term of two weeks, and in addition thereto, having made false representations as to the possession of such assets, and second, having failed to pay employees upon the termination of the employment, within five days after demand.

The penalties provided are imprisonment in the State Prison and a fine. It is also provided that in any judgment of conviction secured, a civil judgment is entered in favor of the employee for the wages due, with wages up to the date of payment of the judgment, costs and attorney fees.

Does the chapter violate the constitutional provision against imprisonment for debt? It will be noted that Article 2, Sec. 18 of our constitution inhibits imprisonment for debt except in cases of fraud. It is universally agreed that a debt within the meaning of the section implies a debt arising out of contract. That is, not a debt arising in tort, or as a penalty for the commission of a crime, or for other liabilities not contractual.

With respect to the matter of imprisonment for mere failure to pay the wages within five days after demand, as prescribed in the second defining clause of the Chapter, we are of the opinion that a conviction under such clause might be held to result in an imprisonment for debt. A number of the State Courts have so construed similar provisions, and while our Supreme Court in *Power Co. vs. State* 19, Ariz. 114, has refused to follow the reasoning in these cases, the issues involved in this case did not comprehend an imprisonment, for the reason that the defendant was a corporation incapable of imprisonment. In any event we would deem a conviction under this clause at least doubtful if taken to the Supreme Court.

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As to a conviction secured under the first clause of the Chapter, that of not having assets and making false representations as to that fact, we can see no reason why such conviction should not be sustained. It is clearly analogous to any other case of obtaining money of another or any thing of value, by means of false representations, and is clearly without the purview of the constitutional provision as to imprisonment for debt.

It will be noted that the Chapter provides for a civil judgment in addition to the judgment of conviction. As to whether this constitutes a taking of property without due process of law we do not attempt to say. We confine this statement to the penal features of the Chapter.

In any event it would appear to this office that it would be good policy to have the matter finally settled by the Courts, and that for such purpose the validity of the law should be assumed, and an attempt at enforcement be made.

Very truly yours,

A. P. Lynch

Assistant Attorney General.

July 24, 1923

My dear Mr. Lynch:

I have been so busy that I have not had time to peruse your opinion of July 21st until today.

As the matter is of very vital importance to the working men of the State of Arizona I am very anxious that a correct interpretation be placed upon the laws in question. The second paragraph of the opinion reads,

"The Chapter in question (viz Chapter 26 of the Session Laws of Arizona, 1921) is an amendment of paragraphs 704-705 of the Penal Code of 1913."

I think you are in error. Chapter 26 of the Session Laws of Arizona, 1921, is an amendment to Chapter 168 of the Session Laws of 1919 and Chapter 163 of the Session Laws of 1919 amends section 524, Chapter 8, Title 14, Revised Statutes of 1913. Consequently, while the laws are somewhat related, yet they are distinct and offer two means of approach to the subject of the payment of wages.

In the second line of the fifth paragraph you refer to "the mere failure to pay wages within five days after demand". I do not think you mean to say what is implied in the use of that language. The subject is of vital importance for many reasons. For several years it has been the practice of wild-cat mine promoters to stake out a group of claims, employ a number of men, put on an advertising campaign, sell a lot of stock, defraud the stockholders, clean up and leave the State. The result has been that, as well as stockholders, men who are dependent for their livelihood upon their day's wages, have had hardship worked upon them and their families. We receive letters several times a week complaining of the continuance of this situation even at this time.

In spite of the laws on the statute books, it is difficult to get county attorneys to prosecute as they seem to have the impression that the law is unconstitutional. As I understand the matter, the law sets out to provide the following:

First, that employers undertaking to employ labor shall first have sufficient assets within the county in which such work or labor is to be performed, over and above the exemptions allowed by law, to cover the wages accruing to said employee. (Chapter 26, Session Laws of 1921)

Second, Every employer shall fix pay day which shall be twice a month. (Section 704, Penal Code of Arizona).

Third, when an employee quits the service of an employer, he should be paid his wages at once. (Section 705 of the Penal Code of Arizona)

Fourth, Failure to comply with the provisions of Chapter 26, of the Session Laws of 1921, is defined to be obtaining labor under false pretenses.

From my knowledge of the subject I know that in the majority of these cases, fraud is involved from the start. The majority of employers who fail to pay wages, do not intend to pay them when the men are employed. The law sets out to prevent fraud, and in my judgment the question of imprisonment for debt should not enter into the question as a defense of fraud.

I make these comments in the event that you care to review your opinion or change it in any way before I send a copy to Mr. Leam in Kingman, in reply to his letter.

Very sincerely yours

SECRETARY TO THE GOVERNOR

Mr. A. R. Lynch,
Assistant Attorney General,
Phoenix.

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STATE CAPITOL
PHOENIX

July 31, 1923

Mr. H. S. McCluskey
Secretary to the Governor;
Phoenix, Arizona;

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Dear Sir;

In respect to your letter of July 24, 1923, relative to the proper interpretation of Paragraphs 704 and 705 of the Penal Code taken in connection with Chapter 26 Session Laws of 1921, we find that you are correct in your view that the laws are co-related, and that the later law is not an amendment of the other sections mentioned.

However we are unable to see where this fact in any particular alters our opinion submitted to you under date July 21, 1923.

An analysis of Sections 704-705 will reveal the fact that these sections are not of very much availability in the case under discussion. Section 704 defines who are to designate semi-monthly pay days ; They are as follows; The State, and its departments; Contractors employed by contract under the State or any department thereof, or by any municipality in the state; whether such contractors be individual, firm or corporation; Every company or corporation doing business in the State.

Hence the provision is not made to include the individual employer, except he be employed under contract with the State or a municipality or department of the State.

Section 705 provides that when an employee quits the service or is discharged he must be paid in cash or by check, and at once. This application is general and applies to any and all classes of employers, whether enumerated in Section 704 or not. Section 706 defines the offense of violating the provisions of Sections 704-705. It appears to limit the commission of the offense to contractors as such are defined in Section 704, i.e. contractors under contract with the State, its departments and municipalities.

Corporations also are subject to the penalty of the act. Hence it would appear that an individual employer not under contract with the State does not need to designate semi monthly pay days, and is not subject to prosecution under the Sections referred to above.

Chapter 26 Laws of 1921 however does appear to afford your correspondent a remedy. As stated in our former letter it defines two distinct acts or omissions which each constitute the offense of obtaining labor under false

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pretenses. First the employment of labor without having assets to cover the wages for two weeks, where such employment is made by means of false representations as to having such assets; Second the failure to pay wages within five days after such wages are due, upon the discharge or resignation of the employee. It is this last provision that we referred to in our former letter, when we made use of the words, "the mere failure to pay wages when due" etc. By that we mean the failure to pay such wages without other conditions entering into the question, that is without any false representations having been made by the employer. We are rather inclined to believe that the Courts might declare that an imprisonment under this last provision would be imprisonment for debt. However we cannot anticipate what view our Courts might take, as the cases we have investigated are in decided conflict on the subject.

In any event a prosecution could be secured in practically all the cases you mention under the first provision of the Chapter. Nearly every one of the many wild cat mining operators makes some puffing statement relative to his financial responsibility, and it is most usually upon the strength of such statements that the average miner accepts the employment.

If your correspondent has been induced to work under false statements as to financial condition made by the employer, it would appear that a clear case is made out free from any constitutional question, and if possible it would be best to bring the action under this provision of the code. If not it might be brought under the second clause and the law tested as to its constitutionality, although we do not wish to be understood to maintain that the Courts will declare this provision valid. They may not do so, but in any event it should be determined one way or the other.

Very truly yours,

A. R. Lynch -

Assistant Attorney General.