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### The False Pretenses Statute In Nebraska

Nebraska's criminal code is relatively unique in that false promises as distinguished from misrepresentations of past or existing facts are included within the ambit of the statutory crime of obtaining property by false pretenses. This crime, a late-comer to the larceny family, was designed to bridge the gap between larceny by trick or devise and the limited common law offense of cheating. In most states this statutory innovation requires proof of a false misrepresentation as to facts past or existing. A false pretense as to something which will happen in the future or a mere promise to do something is insufficient because it is regarded as the equivalent of "puffing" or "seller's talk." In

Nebraska, however, "... a promissory representation as to some future action to be taken by the person making the representation where made with the present intent that such future action would not be performed or carried out. . . ." is a false pretense within the statute.<sup>1</sup>

Nebraska's first statute<sup>2</sup> covering false pretenses was enacted during the time Nebraska was an organized territory and was patterned after the English statute<sup>3</sup> covering larceny by false pretenses. When the Nebraska state government was organized it adopted a statute<sup>4</sup> which was substantively identical to the territorial law and couched in practically the same language. In 1904, the Nebraska Supreme Court ruled<sup>5</sup> that false promises were not within the definition of the phrase "false pretenses" as it was used in the act. Although in so holding the court followed the great weight of authority, only a single landmark case<sup>6</sup> and two contemporary texts<sup>7</sup> were cited in the opinion. From time to time amendments further defined "property" and provided more protection for creditors, but the interpretation of false pretenses, in keeping with the orthodox pattern, remained the same. In 1947, an amendment<sup>8</sup> was enacted which expressly included false promises and made them actionable. The legislative history<sup>9</sup> indicates that this amendment was introduced because of *Hameyer v. State*,<sup>10</sup> which arose in Seward County, home of the bill's sponsor.

The evidence in this case showed that Hameyer appeared at the home of Woebbecke and stated that if Woebbecke would pay him \$1,600 he would procure an oil and gas lease which Woebbecke could sell for \$32,000. Woebbecke readily agreed to this and paid the money. Some thirty days later Hameyer returned and, upon the representation that the deal was progressing nicely but some more cash was needed, he received another \$1,000. In thirty days Hameyer again visited Woebbecke and this time he produced a fake oil lease; Woebbecke paid him \$2,800 as requested. Hameyer returned a fourth time and obtained \$1,200 after stating that the man who was willing to

<sup>1</sup> Neb. Rev. Stat. § 28-1207 (Reissue 1948).

<sup>2</sup> Neb. Terr. Rev. Stat., Crim. Code. § 157 (1866).

<sup>3</sup> 30 Geo. 2, c. 24 (1757).

<sup>4</sup> Neb. Gen. Stat. c. 58, § 125 (1873).

<sup>5</sup> *Cook v. State*, 71 Neb. 243, 98 N.W. 810 (1904).

<sup>6</sup> *Dillingham v. State*, 5 Ohio St. 280 (1855).

<sup>7</sup> McClain, Criminal Law § 668 (1897); Maxwell, Criminal Procedure § 129 (1896).

<sup>8</sup> Neb. Laws c. 99, p. 282 (1947).

<sup>9</sup> Statement by Judiciary Committee on L. B. 242 (60th Sess. 1947): "This bill provides for broadening the definition of the offense of obtaining money or property under false pretenses by permitting it to cover a promissory representation to do something in the future when it is made with the present intent that the future act will not be performed. It is designed to strengthen the law to prosecute swindlers."

<sup>10</sup> 148 Neb. 798, 29 N.W.2d 458 (1947).

pay the \$32,000 was waiting in Lincoln. An action was brought against Hameyer alleging four counts of obtaining money by false pretenses. The lower court dismissed the first two counts on the ground that the representations were merely promissory; the last two counts brought a conviction. The case went to the Nebraska Supreme Court on appeal and about six months after the legislature had passed the amendment as an emergency measure the opinion was handed down. In essence, the court stated that prior to the amendment the statute covered only misrepresentations of existing facts, however the false statements by Hameyer were interpreted as existing facts, i.e., Hameyer represented a present ability to procure a lease. Thus after the final disposition of the case Hameyer could have been prosecuted on any of the four counts. It is possible, however, that the court was influenced by the legislative amendment. It is interesting to note that no authority for this particular interpretation is cited and it appears for the first and only time in any Nebraska opinion.

A brief survey of other false pretenses statutes<sup>11</sup> proves interesting in conjunction with the study of the Nebraska statute. Although the overwhelming majority of states do not denominate obtaining property by false promises a criminal act, there are a few which do. The first time that false promises were made actionable as criminal fraud was under the federal mail fraud statute.<sup>12</sup> This was effected initially by judicial interpretation,<sup>13</sup> and later by legislative amendment.<sup>14</sup> At the time that the Nebraska legislature amended its statute, only Louisiana<sup>15</sup> had a statutory provision which expressly included false promises. However, Rhode Island,<sup>16</sup> California<sup>17</sup> and Massachusetts<sup>18</sup> have brought false promises within the purview of their criminal codes through judicial interpretation upon the theory that the "state of mind" of an individual is an existing fact. Thus, a promise to perform some act in the future with no present intent to perform it, is regarded as a

<sup>11</sup> For a detailed and well-documented treatment of this field of law, see Pearce, Theft by False Promises, 101 U. of Pa. L. Rev. 967 (1953).

<sup>12</sup> 17 Stat. 283, 323 (1872).

<sup>13</sup> Durland v. United States, 161 U.S. 306 (1896).

<sup>14</sup> 62 Stat. 763 (1948); 18 U.S.C. § 1341 (Supp. 1952).

<sup>15</sup> La. Code Crim. Law and Proc. art. 740-60 (1943) (The comments which follow this article at p. 513 serve to clarify its meaning. "Whenever the situation is such that the transaction between the parties could be avoided because of fraud the defrauder is guilty of theft . . . it is intended to produce identity of meaning between civil and criminal fraud. . . .") Civil fraud of course includes false promises; see Restatement, Torts §§ 525, 530 (1938); Prosser, Torts 705 (1941).

<sup>16</sup> State v. McMahan, 49 R.I. 107, 140 Atl. 359 (1928).

<sup>17</sup> Jeople v. Jones, 36 Cal.2d 373, 224 P.2d 353 (1950); People v. Ames, 61 Cal. App. 522, 143 P.2d 92 (1943).

<sup>18</sup> Commonwealth v. Green, 326 Mass. 344, 94 N.E.2d 260 (1950); Commonwealth v. Morrison, 252 Mass. 116, 147 N.E. 588 (1925).

misrepresentation of an existing fact. In 1943, Ohio initially<sup>19</sup> passed a statute<sup>20</sup> referring expressly to false pretenses and in 1949 the Ohio Supreme Court included false promises,<sup>21</sup> citing the judicial construction of the federal mail fraud statute.<sup>22</sup> In 1952, the legislature of New Jersey passed a statute<sup>23</sup> which expressly includes false promises. However, legislative history seems to indicate that the lawmakers were merely combining two sections of their prior criminal code<sup>24</sup> and did not intend that there should be a substantive change in the law.

There are cogent policy reasons which support Nebraska's statute. First, the distinction between misrepresentations of fact and promises is, by its very nature, a difficult one. Many statements fall into that twilight zone between fact and opinion or promise; it is exceedingly difficult to determine whether or not an individual is violating the law. Second, if misrepresentations of fact are punishable while false promises are not, a premium is placed upon form and the importance of substance is minimized. This is anomalous in that the antisocial nature of the act remains regardless of the form used to convey a false impression. Third, as a matter of ethics the use of false promises should be discouraged; certainly the granting of a sanction in the law is a logical manifestation of society's attitude toward such conduct. The old notion that you trust a man at your peril has become the exception rather than the rule. One of the essential tenets of modern civilization is that man is basically honest. Finally, since business in the modern world requires many credit transactions, it becomes important that fraud in all forms be discouraged because of its adverse effect upon credit.

There are two policy reasons which have frequently been used by the courts and text writers as a rationale for the orthodox strict interpretation of false pretenses. First, it is urged that if prosecution for false promises were authorized, defaulting debtors would be subject to abusive prosecutions designed to force them to pay. Theoretically, at least, these prosecutions could be brought whenever a debtor promised to pay at some future time and then later defaulted. One of the best ways to evaluate such an argument is to determine whether

<sup>19</sup> Previously there had been a statute dealing with the crime of theft in general terms; Ohio Gen. Code Ann. § 12447-1 (Supp. 1938).

<sup>20</sup> Ohio Code Ann. § 12447-1 (Supp. 1952).

<sup>21</sup> *State v. Singleton*, 85 Ohio App. 245, 87 N.E.2d 358 (1949). The court followed their previous holding in a more recent case, *State v. Healy*, 156 Ohio 229, 102 N.E.2d 233 (1951). Effective in 1953, still another statute has been adopted by the Ohio Legislature; Ohio Rev. Code § 2907.01 (1953). However, the wording of this latest revision is substantively the same as the 1943 statute and thus it is likely that the court's definition of false pretense will apply to the revision so that there is actually no change in the law.

<sup>22</sup> *Durland v. United States*, 161 U.S. 306 (1896).

<sup>23</sup> N.J. Stat. Ann. § 2A:111-1 (1952).

<sup>24</sup> N.J. Rev. Stat. §§ 2:134-1, 2:134-2 (1939).

or not there has been such an effect in the jurisdictions where prosecution for false promises is possible. The American Law Institute conducted a survey with this in mind and the results show an absence of this objectionable type of prosecution.<sup>25</sup> The second reason usually given for the position that false promises are not "false pretenses" is the assumed fear that conviction might be authorized upon no more evidence than the fact that the contract was not performed; thus a failure to perform a promise would be treated as conclusive evidence of an original intent not to perform. In May, 1953, the American Law Institute met and discussed the Model Penal Code. This code contains a provision which expressly includes false promises within the prohibited acts of the statute.<sup>26</sup> It also provides that the failure to perform a promise should not be conclusive evidence of a present intent not to perform, which disposes of the latter policy argument in support of strict interpretation.

It would seem that the policy considerations which support the inclusion of false promises within a false pretense statute outweigh the theoretical abuses which have been envisioned by the strict interpreters of such statutes. Experience under the Nebraska statute gives no support to the fear that such statutes will be abused. Clearly, the detrimental effect of obtaining money or goods by false pretenses is in no way mitigated because the result is accomplished by false promises rather than by misstatements of facts. The distinction has outlived its usefulness and other states might well follow the leadership of Nebraska in eliminating a distinction which emphasizes form at the expense of substance.

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<sup>25</sup> Model Penal Code 90 (Tent. Draft No. 1, 1953).

<sup>26</sup> Model Penal Code 54 (Tent. Draft No. 1, 1953). See comments on this section in the Draft at page 88.