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Obtaining a Loan Under False Pretenses . . . The Colorado Law

By JEROME SMITH*

A question has come up in a local criminal case which has doubtless been passed upon by the various district courts, but oddly enough has never been before our state Supreme Court. We believe that a discussion of the question will be of interest to the members of the bar.

The question is: Can one who obtains a loan of money by false representations as to his financial responsibility be prosecuted under Section 305 of our Criminal Code? Section 305 reads in part as follows:

"Obtaining goods under false pretenses—Penalty.—If any person or persons shall knowingly and designedly, by any false pretense or pretenses, obtain from any other person or persons any chose in action, money, goods, wares, chattels, effects or other valuable thing whatsoever, with intent to cheat or defraud any such person or persons of the same, every person so offending shall be deemed a cheat, and upon conviction, shall, where the property obtained is over the value of twenty dollars, be imprisoned in the penitentiary not to exceed ten years; * * *"

If this section could be read alone, the answer to our question would be simple indeed, for the language of the section is broad enough to include the fraud of obtaining money on credit, but in Colorado we have in our Criminal Code another section in point, Section 316, to-wit:

"False pretenses of character or responsibility in writing—Penalty.—If any person, by false representation in writing of his own responsibility, wealth or mercantile correspondence and connection, shall obtain a credit thereby, defraud any person or persons of money, goods, chattels or any valuable thing, or if any person shall cause or procure others to report falsely of his honesty, wealth or mercantile character, and by thus imposing on any person or persons, obtain credit, and thereby fraudulently get into possession of goods, wares, merchandise or any valuable thing, every such offender shall be deemed a swindler, and on conviction shall be sentenced to return the property so fraudulently obtained, if it can be done, and shall be fined not exceeding one thousand dollars, and imprisoned in the county jail not exceeding six months."

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Both of the quoted sections have been Colorado law since the earliest days.

Is obtaining a loan of money "obtaining credit" under Section 316? The courts have uniformly held that it is. (24 A. L. R. 400, citing many cases.) If then, such an offense *can* be prosecuted under Section 316, our next question is: *Must* it be? Since there is a special statute relating to obtaining credit under false pretenses, does the general false pretenses statute become inapplicable? In at least two jurisdictions where there are statutes like ours this precise point has been ruled upon. (Lucas v. Illinois, 75 Ill. App. 662; Commonwealth v. Boyd, 181 Ky. 382, 205 S. W. 390.)

In the Illinois case one Lucas borrowed \$100 from one Metcalf as the result of Lucas' false oral representation that he was a man of certain wealth. The lower court overruled a motion to quash the indictment, but the appeal court reversed the ruling, saying in part:

"As we view it, the proper construction to place upon the two sections is that section 96 [like our Sec. 305] was intended to include cases where the defrauded party parted with his money in some other sense than as a loan, and that where the loan was procured by the false representation of the borrower as to his solvency, the case falls within section 97 [like our Sec. 316] provided the representation was in writing, of course."

Since the representation was oral, the case fell under neither Section 96 nor Section 97 and the court ruled that the motion to quash the indictment should have been sustained,

In the Kentucky case, under identical facts and similar statutes, the appeal court sustained the lower court's quashing of the indictment, saying in part:

"The latter section [like our Sec. 316] 'doubtless was dictated by the knowledge that criminal charges of false pretenses are often instituted in reality to compel the payment of debt and are easily fabricated.'"

The holdings in these cases are apparently in accord with recognized principles of statutory construction:

59 Corpus Juris 1056: "(d) *General and Specific Statutes.* Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy * * *. It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act, and thus conflict with it, the special

act will be considered as an exception to the general statute, whether it was passed before or after such general enactment * * *."

An early Illinois case well illustrates these principles of statutory construction. In this case (114 Ill. 320, 2 N. E. 55) the court was asked to determine whether the word "whoever" in a general larceny statute was broad enough to include "constables." Reading this statute by itself, the answer would clearly be "yes." But since there was a special statute governing larceny by constables, the court said "no":

"It is true that the word 'whoever' * * * has a broad or comprehensive meaning; but at the same time it is unreasonable to believe that the legislature intended that a constable should be prosecuted under both sections of the statute."

In passing a special act the minds of the legislators were necessarily directed to the details of the special case and it is not probable that they should intend by a general act to derogate from that special intention. If one obtaining credit by false pretenses can be prosecuted under Section 305, then Section 316 loses its meaning, both as a statute designed to prevent fabricated cases by requiring the false representations to be in writing, and as one designed to mark the offense of obtaining credit by false pretenses as less serious, because of the well-recognized human failing to puff and overstate one's financial position when he is in desperate circumstances and in need of a loan, often without real criminal intent.

There is but one fly in the ointment.

Prior to 1891, the latter part of Section 305 included a concluding sentence which was omitted in the amended statute of that year. This sentence read: "This section shall not apply to sales of property on credit." The change of the statute in 1891 was primarily for the purpose of increasing the penalty for the offense of false pretenses. Why was the quoted sentence omitted? It would seem that the omission, instead of repealing Section 316 (general statutes do not repeal special statutes by implication—86 Colo. 249), was either inadvertent, or intended to delete unnecessary language. The Kentucky statute referred to has no such statement expressly limiting its scope, nor under the principles discussed heretofore would such an express limitation be necessary.

In any event it is hard to believe that the legislature intended to greatly increase the penalty under Section 305 (one year minimum to ten years maximum) and at the same time put within the scope of that section for the first time cases of obtaining credit through false pretenses, when custom and justice dictate both a *lighter penalty* and *stricter proof* (characteristics of Sec. 316) than for the ordinary case of false pretenses.

However, the law is uncertain and should be clarified by legislative enactment or a Supreme Court decision.