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Obtaining by False Promises: A Proposed Statute

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OBTAINING BY FALSE PROMISES: A PROPOSED STATUTE

I

The purpose of this comment is to urge the desirability of broadening the crime of obtaining property by false pretenses to include the making of false promises. The traditional concept of criminal "false pretenses" requires an intention to deprive the owner of his property coupled with a misrepresentation of fact which induces the victim to transfer ownership.[1] If the wrongdoer does not misrepresent any fact but makes only a false promise, that is, misrepresents his intention, he is not subject to criminal prosecution.[2]

The distinction drawn between misrepresentations of fact and false promises has no foundation in degree of moral guilt. The intent to deprive another of his property is present in both cases, and the reliance on the misrepresentation by which one is deprived of his property is a hurt to that individual as a member of society. The need for legislation to redefine the law and the hopelessness of relying on the judiciary to do so is apparent upon consideration of court activity. In only a few cases have they held that the crime of obtaining property by false pretenses can be made out when the defendant's misrepresentation consisted only of a false promise.[3] Entrenched in almost two centuries of jurisprudence excluding false promises from the criminal law, the judicial attitude can only be one of reluctance to tamper with the law.

The opposition to the expansion of the criminal law of obtaining by false pretenses beyond its present scope of misrepresentation of fact comes mainly from two groups whose membership is not necessarily exclusive: local prosecuting attorneys, and those who fear that

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[1]Scarlett v. State, 25 Fla. 717, 6 So. 767 (1889); Regina v. Woodman, 14 Cox. C.C. 179 (1879); CLARK AND MARSHALL, CRIMES §359(c).

[2]In addition to the intent to deprive, the crucial element of the supposedly related crime of larceny by trick is an intention by the victim to give up possession of the property. With respect to the misrepresentation, it may be one of fact or intent.

[3]People v. Gordon, 71 Cal. App.2d 606, 163 P.2d 110 (1945); State v. Nicholls, Houst. Cr. 114 (Del. 1862); Commonwealth v. Morrison, 252 Mass. 116, 147 N.E. 588 (1925); Commonwealth v. Drew, 153 Mass. 588, 27 N.E. 593 (1891); Commonwealth v. Walker, 108 Mass. 309 (1871); State v. McMahon, 49 R.I. 107, 140 Atl. 359 (1928). In Rex v. Bancroft, 26 T.L.R. 10-CCA (1909), the court allowed the jury to pass on whether the statement was of a fact or intention.

an expansion of the law in this area will jeopardize legitimate business.

The local prosecuting official is reluctant to have his office become an agency for the collection of debts.[4] *A*, a loan office, has a debt from *D* which is long overdue. Thinking that it may be possible to force *D* to pay his debt and at the same time save the legal expenses of collection, *A* makes out an affidavit which states that when *D* borrowed the money he did not intend to pay it back, although he represented that he would. In this situation, the prosecuting attorney does not wish to and fortunately cannot accept the affidavit alleging the crime of obtaining property by false pretenses because the alleged misrepresentations were about *D*'s intention and not about an objective fact, for example, the amount of *D*'s bank deposits. The prosecuting attorney is of the opinion that if the crime is broadened to include misrepresentations of intent his office will be flooded with this type of litigation. However, an accidental change in the facts may cause him to feel differently about the particular case. *B* is a wealthy widow. On the strength of *D*'s promise alone, she is induced to give him $300 to use in a stock venture. *D* promises to return $350 to her. *D* never pays his debt and the evidence clearly shows that he had no intention of returning any amount to her.[5] The prosecuting attorney, however much he desires to bring action against *D*, is barred because the scope of the crime of obtaining property by false pretenses is not sufficiently broad.[6]

The second group of opponents are those who contend that legitimate business will be jeopardized by a weapon in the hands of the prosecuting official to be used against contracting parties who in

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[4]A former assistant district attorney in the City of New Orleans, when asked his opinion of the expansion which had already taken place in Louisiana, LA. REV. STAT. tit. 14, §67 (1950), quickly replied that "The D.A. could never use that law; the office would be flooded with calls from loan offices with bad debts."

[5]Chaplin v. United States, 157 F.2d 697 (D.C. Cir. 1946), 21 TULANE L. REV. 639 (1947).

[6]A prosecuting attorney, in this case, may attempt to bring it within the scope of larceny by trick and show that the victim intended to give up only possession of the money, People v. Noblett, 244 N.Y. 355, 155 N.E. 670 (1927); People v. Miller, 169 N.Y. 339, 62 N.E. 418 (1902); or may allege that the defendant implicitly misrepresented his ability to perform the promise—a fact, State v. Colly, 39 La. Ann. 841, 2 So. 496 (1887). *But cf.* People *ex rel.* Courtney v. Sullivan, 363 Ill. 34, 1 N.E.2d 206 (1936); Regina v. Gordon, 23 Q.B.D. 354 (1889) (defendant stated he "was prepared" to pay).

good faith have been unable to keep their agreements. Legitimate business transactions, it is insisted, ought not to be hampered by possible criminal prosecution. Furthermore, the businessman who is not prosecuted but against whom charges are brought may suffer irreparably from the publicity. Subsequent acquittal or nolle prosequi may not undo the harm received by the institution of charges.

II

The proposed crime of obtaining property by false promise can be divided into three material elements: (1) the defendant's intention to deprive the victim of his property (the mental element), (2) the false promise, and (3) the reliance of the victim on the false promise. These three elements will be discussed in order to distinguish their materiality from the evidentiary matter necessary to establish the existence of each beyond a reasonable doubt.

The mental element is the intent of the accused to commit the crime with which he is charged. He must have specifically intended to deprive the complainant of his property at the time he acquired it. Without this element there can be no successful prosecution. The necessary mental element is established primarily by the falsity of the promise which induced the victim to transfer ownership. There are many means of depriving another of his property. The making of a false promise is one. When a person makes a promise which he never intends to fulfill and believes that it will cause the victim to give up his property, he intends to deprive the victim of the property and the mental element is established. Any matter relevant to the allegation that the defendant made a false promise also tends to prove the allegation that the defendant intended to deprive the victim of his property.

The false promise element of the crime may be analyzed according to the following variations: (1) a false promise to give value in return, (2) an additional false promise, and (3) the nature of the promise in either case.

In the first category, let us assume that *D* promises *A* that if *A* gives him $25 *D* will procure the release of *A*'s friend who is presently in custody of the local marshal. Relying on this promise, *A* turns over $25 to *D*. *D* does nothing at all about the release of *A's* friend.[7]

[7]These are essentially the facts of State v. Colly, 39 La. Ann. 841, 2 So. 496 (1887).

The failure to fulfill his promise to *A* is not material. Theoretically the crime of obtaining property by false promises, like the related crime of larceny by trick, is effected at the time *D* is given title to or possession of *A*'s money. The fact that *D* did not fulfill his promise is relevant to the material proposition that *D*'s promise was false when made. The falsity of the promise, in turn, goes towards the establishment of the necessary mental element – an intention to defraud.

The second category involves the type of behavior in which the defendant makes two or more promises which induce the victim to surrender title to his property. *D* promises *A* that if *A* gives him enough money he will use the money to great advantage in a business transaction and that he will return the money to *A* after completion of the activity. *A* gives *D* the money. *D* does not use the money in the proposed business transaction and never returns the money to *A*. A jury may reasonably conclude from this evidence that *D* never intended to carry out his promise, that is, that it was a false promise. If *D* did use the money in one transaction,[8] the jury may still conclude that *D* had no intention to fulfill his promises to *A*, but the prosecution does not have the added evidence of *D*'s failure to keep the auxiliary promise to help it establish *D's* original intent to defraud – the mental element.

A third category may be found superimposed upon either of the above situations. In many cases, from the nature of the promise which the defendant made, the jury will want the defendant to explain away his alleged bad faith. Legally the burden of proving the defendant's intention to defraud will not shift from the prosecution. But psychologically if the jury believes that the defendant was incapable of carrying out an improbable promise, they are going to expect him to point out how and when he was going to perform the promise. *D* makes a promise to sell *A* a magic rod that divines hidden treasures and thereby induces *A* to give him money. The promise is not kept.[9] In addition to the fact that the promise was not fulfilled, the prosecution finds additional evidence to establish the material element that the promise was false from the nature of the promise itself. The fact that the fulfillment of the promise was hardly possible and the defendant believed that it could be accomplished would be

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[8]See note 5 *supra*.

[9]State v. Antoine, 155 La. 120, 98 So. 861 (1924).

further evidence to support the first as well as the second element.

To go back to the case of *D*'s promise to cause the release of *A*'s friend from jail, if the local prosecuting attorney were able to offer evidence that there was a bond set for the release of the prisoner, that the practice of the local marshal in allowing the release of persons held in his custody was in accordance with legal requirements, and that the time within which *D* promised to procure the release was impossibly short, he would prove that *D* could not perform the promise and thus strengthen his allegation of the falsity of the promise and *D*'s intent to defraud *A*. Thus the circumstances relevant to the possibility of the fulfillment of the promise would shift the psychological burden of proof from the prosecution to the defendant, and the jury would expect an explanation of nonperformance from the defendant.

Cases of a more commercial nature will offer a more difficult problem. The possibilities of the fulfillment of the defendant's promise broadens in this area and the ability to explain away his action as poor commercial judgment is thereby increased. This is one reason why those who fear the jeopardizing of business interests are unjustified. The local prosecuting attorney has great discretion in choosing the cases which he wishes to prosecute. If he believes that evidence is insufficient to justify the time spent in the preparation and prosecution of a cause, he need not accept an affidavit made out even by a good faith party. To establish the commission of a crime there must be evidence that will prevent any reasonable doubt arising in the minds of the jurors.[10] This type of discretion is used by a prosecuting attorney in all cases, and little reason is offered to show that he cannot and will not exercise it within the proposed crime. Should political pressure be exerted to compel a prosecuting official to accept an affidavit alleging the proposed crime in a case where there is insufficient evidence, the official, it must be remembered, is still a lawyer and is aware of statutory requirements. Above all, he is answerable to the electorate, part of which may have been hurt by his abuse of

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[10]In the crimes of larceny by trick and embezzlement, the defendant is given possession of the property and it is to be used within a scope of authority. In the proposed crime, the victim intends to give up title to the property. Evidence neccessary to establish the commission of the proposed crime will be more difficult to acquire, since the defendant is not bound by any scope of authority and therefore cannot breach the scope.

power. Much the same social pressures are exerted in the crime of rape as may be exercised in this area.

Cases may be found that point out the ability of the prosecutor to offer evidence other than the defendant's nonperformance in a bad faith commercial transaction. For example, in *Commonwealth v. Morrison*,[11] the defendants were indicted for conspiring to commit the crime of obtaining by false pretenses. *A* was a retail merchant. *D* had a large store of obsolete spark plugs. *D*'s associates placed orders with *A* for the spark plugs and *A* bought a large stock from *D* to fill the orders. *A* shipped the spark plugs C.O.D. to the other defendants, who did not appear to accept them. With facts presented tending to prove that *D* and his associates knew each other and had been together to a great extent before the beginning of the scheme, that one defendant placed an order from a hotel room in which he registered for only one night, and that *D* assured *A*, after being informed that the plugs had not been accepted, that there was a ready market for them, the court allowed the case to go to the jury and stated that the jury could reasonably find that the defendants placed the orders with no intention of accepting the spark plugs. The nonperformance alone would not have been sufficient to allow the case to go to the jury, but further evidence coupled with the failure to perform allowed the prosecution to succeed in establishing the falsity of the promise and the defendant's fraudulent intentions.

In commercial cases, the fact that both promises are not performed or that the promise concerning the return of money or some article has not been carried out may aid the prosecutor's case along with the nature of the promise and other facts surrounding the transaction.

The third material element in the proposed crime will be the reliance of the harmed party on the false promise. As in the crimes of larceny by trick, where either fact or false promise is employed, or obtaining by false pretenses, the promise upon which the harmed party relies must be material to his relinquishing title to or possession of his property, that is, it must be the cause of the giving up of the property.[12] As an illustration, let us assume that *D* makes a promise to *A* that he will pick up *A's* packages at a downtown de-

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[11]252 Mass. 116, 147 N.E. 588 (1925).

[12]Clifton v. State, 76 Fla. 244, 79 So. 707 (1918); CLARK AND MARSHALL, CRIMES §365.

partment store when he passes there next. *D* then asks *A* for $10 and *A* gives the money to *D*. Here *A* does not give the money to *D* because *D* promises to pick up some packages for him. *A* intends to pass title to the $10 for another reason, and if *D* does not promise anything which induces *A* to give up the money the jury cannot find that *A* relied on *D*'s promise.

The jury question will be whether the defendant actually deceived the other party by the promise. If the promise is absurd, so that no reasonable man would believe it possible or probable of fulfillment, the situation may still be that the complainant did in fact believe that the defendant could fulfill it. The question of the reasonableness of the complainant's belief in the ability or intention to carry out his promise will resolve itself into that of whether the complainant was in fact induced to relinquish title to his property by the particular promise made under relevant circumstances. If the question were the reasonableness of the promise's fulfillment, the area of hard cases in which parties are injured because they relied on a foolish promise would remain uncovered. As Justice Edgerton has stated:[13]

> "In 1821, the fact that 'common prudence and caution would have prevented any injury' seemed to an English court a good reason for refusing to penalize an injury which had been intentionally inflicted by a false promise. . . . Fools were fair game though cripples were not. But in modern times, no one not talking law would be likely to deny that society should protect mental as well as physical helplessness against intentional injuries."

Clearly the fact that the promise was impossible or highly improbable of fulfillment may be relevant to the proposition that the complainant was *not* deceived by it. On the other hand, the fact that the injured party surrendered his property will be relevant to the allegation that he was deceived by the false promise. With this evidence alone, the jury may find that the accuser was not deceived. To establish its material allegation beyond a reasonable doubt the prosecution will have to offer further evidence such as the complainant's mental ability, his action toward third parties in respect to the

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[13]Chaplin v. United States, 157 F.2d 697, 700 (D.C. Cir. 1946) (dissenting opinion), 21 TULANE L. REV. 639 (1947).

false promise, and other circumstances tending to show he was in fact deceived by the promise.

In proving the element of reliance in the loan office type of case, the prosecuting attorney would obviously have a most difficult job. And this is another reason why the local prosecutor and those who fear the jeopardizing of business interests have really little to fear. The prosecutor will have to show that the lending agency was motivated by the defendant's promise to pay when it gave him the money. It is suggested, and juries may reasonably consider, that finance companies do not rely on the defendant's promise to pay but upon purely business motives of profit and loss and attending advertisement. Their business is the lending of money, and this renders them different from the ordinary person who is defrauded of his money by a confidence man.

III

The great increase in complexity of business brought about particularly by the modern corporation has given the confidence man greater opportunity to accomplish his evil purpose. He is hidden in the complexity and can carry on his schemes with more facility. Yet the maker of a false promise is protected by the absence of a criminal statute because such a statute is thought to be a potentially vicious weapon against legitimate business. Legitimate business can be better protected by a proper enforcement of the law to prevent fraudulent business dealings in which only promises are employed.

The federal mail fraud statute offers such a remedy in limited instances. This statute makes criminal "any scheme or artifice to defraud, or obtaining by false pretenses, representations or promises,"[14] in which the mail services of the United States Government are used. It has been a great deterrent to crime by use of the mails, and no great injustice has been wrought which would cause a public outcry for the abolition of the statute. Legitimate business of the complex twentieth-century commercial world has not been unduly hindered because this statute broadened the law of obtaining by false pretenses. It has, on the contrary, acted as a considerable deterrent to morally

[14]18 U.S.C. §1341 (1946). In Durland v. United States, 161 U.S. 306, 314 (1896), Mr. Justice Brewer said, ". . . it would strip it of value to confine it to such cases as disclose an actual misrepresentation as to some existing fact, and exclude those in which is only the allurement of a specious and glittering promise."

corrupt men who once made their way through the maze of commercial activity. With the further step proposed here, the criminal law will be sufficiently broadened to refuse sanction to commercial and noncommercial fraud in which only promises are used.

The proposed statute reads:

> If anyone, (1) with the intent to deprive another of any property,
> (2) makes a false promise
> (3) which induces such person to surrender title to such property,
> he shall be guilty of obtaining by false promises.

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