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THE OLD MONTANA DILEMMA AND THE NEW APPROACH TO LARCENY BY TRICK AND OBTAINING GOODS BY FALSE PRETENSES

Joel E. Guthals

INTRODUCTION

Before opening a law book, almost everyone appreciates what "theft" means. But as most lawyers know only too well, the law which has been developed to deal with the crime is far from simple. This note examines the complexities and inconsistencies which have occurred with regard to two of the more ingenious forms of stealing: larceny by trick and obtaining property by false pretenses. Because many of these problems are rooted in antiquity, the analysis begins with a discussion of the common law approach. As the old law was codified and interpreted, new problems were created. These difficulties are discussed with emphasis on the unique and somewhat confusing changes in the law which appear in the Montana cases. Fortunately, most of these problems have been solved by the Montana Criminal Code.¹ The new provisions are discussed in light of their objectives and the experience of other states with similar statutes. Hopefully, through examining the many problems which have occurred concerning larceny by trick and false pretenses, the bar will be encouraged to ensure that "theft" reacquires a simple meaning which both lawyers and laymen can understand.

THE COMMON LAW

(A) SIMPLE LARCENY

Considering the historical prevalence of larceny, it is not surprising that the common law developed an early and harsh solution to the problem of theft. As defined by Blackstone, larceny consisted of "the felonious taking and carrying away of the personal goods of another."² While this definition became the subject of much interpretation, the primary elements of the crime were (1) a trespassory taking, that is, a taking by force and violence, and (2) a *mens rea*, usually defined as an existing intent to permanently deprive the owner of possession.³ The penalty for larceny was death—a straightforward approach which should have deterred virtually anyone who planned any form of theft.

¹Laws of Montana (1973), Ch. 513, Sec. 1 (MONTANA CRIMINAL CODE OF 1973, Title 94, REVISED CODES OF MONTANA (1947), Effective Jan. 1, 1974) [hereinafter cited as M.C.C. 1973].

²4 W. BLACKSTONE, COMMENTARIES* 230-231; an even earlier treatment of the offense may be found in STAUNFORD, LES PLES DEL CORON 24-30 (1583).

³For a complete analysis of the acquisitive offenses see PERKINS, CRIMINAL LAW, 234-278 (2d Ed. 1972).

(B) STEALING BY FRAUD

Unfortunately, the law soon encountered difficulties. Larceny, as defined, contemplated the thief who by audacity or stealth ran off with his neighbor's possessions without permission. What then became of the man who, while pretending to *borrow* a carriage for the day, actually galloped over the hill never to be seen again? How was the law to treat the cunning Fagin who enticed his victim to voluntarily give up his silver for the promise of receiving twice as much on a future day? In both examples the important element of a trespassory taking is absent. If the owner willingly parted with his property, the taking could not be said to have been forceful. The thief who used his brain rather than his brawn to steal was thus left unpunished.

The law soon dealt with the person who, while intending to permanently misappropriate another's goods, fraudulently pretended that he was borrowing them.⁴ The courts devised a legal fiction which held that because the offender had a felonious intent from the outset, he never acquired possession peaceably. The fraudulent taking was "constructive" violence and the committor of the crime, which became known as larceny by trick, was a trespasser *ab initio*—from the beginning.⁵ With the use of the *ab initio* fiction, the fraudulent borrower could be punished within the existing larceny law regardless of the intricacy of the scheme he used.

The case of the "con man" who fraudulently acquired goods by making false promises to his victim was not so easily solved. Common law larceny was concerned with the forceful taking of *possession*.⁶ While it might have been convenient to accept the fiction that obtaining possession by fraud constituted a type of violence, the concept was not extended to the thief who induced the owner to give up both possession and *title*.⁷ The common law distinguished very sharply between these different interests in property. Title was full and complete ownership. Possession was something less—the assertion of unqualified custody and physical control over the property.⁸ Common law larceny was derived from ancient trespass actions designed to proscribe the wrongful taking of possession. If title was passed voluntarily from one person to another, the taker could not be guilty of larceny because larceny was a crime against possession. In maintaining this artificial distinction, the courts reasoned that a thief could not be a trespasser against goods which he *owned* through a voluntary transfer of title, regardless of the fraudulent methods used in acquiring title.⁹ The courts were rigid in refusing to

⁴Tunnards Case, 2 East P.C. 687, 688 (1729).

⁵*Id.* at 688; the first actual use of the term "trespasser *ab initio*" was made some years later in *Ozley v. Watts*, 1 T.R. 12, 99 Eng. Rep. 944 (1785).

⁶PERKINS, *supra* note 2 at 238.

⁷PERKINS, *supra* note 2 at 296.

⁸BROWN, THE LAW OF PERSONAL PROPERTY, 19-22 (2d Ed. 1955).

⁹*People v. Nebeloff*, 244 N.Y. 355, 157 N.E. 1070, 671 (1927).

apply the larceny law to misappropriations of title.¹⁰ Consequently, legislatures were forced to enact statutes to deal with the offense which became known as obtaining goods by false pretenses.¹¹

As ordinarily defined, false pretenses consisted of "knowingly and designedly obtaining the property of another by means of an untrue representation of fact with intent to defraud."¹² The crime required: (1) a pre-existing intent to steal, coupled with (2) a misrepresentation of a *past* or *present* fact, relied upon by the victim, and (3) a fraudulently induced parting of title to the goods from the rightful owner.¹³

The second element of the offense became an essential and distinctive characteristic of false pretenses. The law sought to avoid prosecuting unlucky entrepreneurs who, innocent of any wrongful intent, simply could not produce what they promised. Therefore, if the accused merely misrepresented a future occurrence without lying about an existing fact, he could not be convicted of the crime.¹⁴ While some argued that an intentionally false promise was a misrepresentation of an existing state of mind and thus an untrue representation of a present fact,¹⁵ the distinction between false facts and false promises became fixed in the law.

(C) GROWING COMPLICATIONS

As criminals became increasingly clever, the distinctions which the courts tried to make between larceny by trick and false pretenses became increasingly advantageous to the thief. Judges attempted to maintain larceny by trick as an extension of the old trespass laws by requiring all of the ancient elements. The crime remained one against possession where a person pretended through a misrepresentation to take property for a temporary period while his real plan was to permanently deprive the rightful owner of the goods. The victim had to intend to part only with possession, while the thief had to intend to steal from the very beginning. Thus, if the prosecution charged larceny by trick and the victim testified that he intended to give title rather than possession, the accused could not be convicted. False pretenses was a crime prohibiting fraudulent schemes to obtain title. If the victim decided on the stand that he had intended to transfer only possession, the defendant charged with false pretenses would be acquitted.

Because the distinction between present facts and future promises existed only in false pretenses, an interesting "loophole" in the law was created. It was possible for the thief who was clever enough to

¹⁰PERKINS, *supra* note 2 at 297.

¹¹The original false pretenses statute was 30 GEO. II, c. 24, Sec. 1 (1757).

¹²PERKINS, *supra* note 2 at 297.

¹³PERKINS, *supra* note 2 at 296-319.

¹⁴Commonwealth v. Drew, 36 Mass. 179, 185 (1837).

¹⁵See Commonwealth v. Truckerman, 10 Gray 173, 199 (Mass. 1857).

acquire title through a false promise to escape punishment entirely. His comrade, however, who was so unlucky as to acquire were possession through a fraudulent promise, could be convicted of larceny by trick, for in this crime the law did not distinguish between misrepresentations of fact and promise.¹⁶

In its attempts to punish those who stole money rather than tangibles through fraud, the law became ludicrous. Attorneys debated whether the victim who was defrauded of his life savings intended to pass title or just possession.¹⁷ The courts commonly held that if the owner expected to get back the same coin that he had given, then he had intended to transfer only possession.¹⁸ If the owner did not care what money he was eventually to receive for his "investment," he must have intended to part with both possession and title. The determination of what property interest had been transferred would decide what crime, if any, could be charged and which elements were necessary for conviction. Because this determination was so tenuous, attorneys often did not learn the crime with which they were dealing until the trial court decision reached the appellate level. Due to procedural requirements, these appellate rulings often came too late to allow the filing of an amended pleading. The accused was either set free or his act was twisted to fit into a related category of larceny, such as embezzlement, in which a conviction was allowable.¹⁹

The artificial distinctions between larceny by trick and false pretenses and the resulting difficulties in applying the law became embedded in the foundations of virtually every enactment dealing with theft by fraud. Unfortunately these laws, when interpreted by the Montana courts, became even more complicated and confusing. This interpretation is examined next.

THE MONTANA DILEMMA

(A) STATUTORY FOUNDATION

Eventually, the statutes of many states departed from the common law definitions of larceny by trick and false pretenses. But the Montana Codes,²⁰ although broadening the offenses by encompassing more types of property interests within their coverage than was contemplated by the common law, retained the traditional approach and language:

R.C.M. 1947, § 94-2701. Larceny defined. Every person who, with intent to deprive or defraud the true owner of property, or of the use and benefit thereof, or to appropriate the same to the use of

¹⁶This "loophole," as explained above, was created to protect entrepreneurs from being prosecuted for "puffing." See *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir. 1932).

¹⁷See *Regina v. Davenport*, 1 All E.R. 602, 603 (1954).

¹⁸*Id.*

¹⁹*Commonwealth v. Tuckerman*, *supra* note 15 at 202.

²⁰*Montana Codes Annotated* (1947) (hereinafter cited as R.C.M. 1947).

the taker, or of any other person. . . (1) Takes from the possession of the true owner, or of any other person; or obtains from such possession by color or aid of fraudulent or false representation or pretense, or any false token or writing, or secretes, withholds, or appropriates to his own use, or that of any other person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind . . . is guilty of larceny.²¹

R.C.M. 1947, § 94-1805. Obtaining money, property or services by false pretenses. Every person who knowingly and designedly, by false or fraudulent representation or pretenses, defrauds any other person of money or property, including evidence of indebtedness, or who knowingly and designedly obtains the service of another by false or fraudulent representation or pretenses, or who causes or procures others to report falsely of his wealth or mercantile character, and by this imposing upon any person obtains credit, and thereby fraudulently receives services or gets into possession of money or property, is punishable in the same manner and to the same extent as for larceny of the money or the value of the property or services so obtained.²²

R.C.M. 1947, § 94-2701 proscribed simple larceny with the clause “takes from the possession of the true owner,” as well as larceny by trick by using the language “obtains . . . possession by . . . fraudulent or false representation. . . .” The wording of R.C.M. 1947, § 94-1805 defines the offense of false pretenses: “knowingly and designedly by false or fraudulent representation or pretense. . . .” Obviously written to correspond to the traditional elements, the sections were nevertheless sufficiently ambiguous to create difficulties. The phrase in the larceny statute, R.C.M. 1947, § 94-2701 which spoke of “false representation or pretense” sounded very much like false pretenses. The clause near the end of R.C.M. 1947, § 94-1805 which stated “. . . receives possession of money or property . . .” was closer to larceny than to false pretenses which historically required the obtainment of title rather than possession. Due to this somewhat confusing wording, wrongdoers were sometimes charged and convicted under the improper section. When required to review such convictions, the Montana supreme court chose a solution which amplified rather than rectified the confusion.

(B) THE CASES

In the somewhat bizarre case of *State v. Dickinson*,²³ the complaining witness, Amanda Gray, approached the defendant believing him to be one Dr. Venno, a famous physician from Pennsylvania. For the sum of \$87 the defendant guaranteed in writing to cure Mrs. Gray's daughter of “stiffness of the muscles about the ankle.” Unfortunately, the defendant was not who he claimed and the cure was ineffective. When Mrs. Gray's money was not returned as promised, the defendant was charged with larceny by trick—or as the county attorney more

²¹R.C.M. 1947 § 94-2701 (repealed by Laws of Montana (1973), Ch. 513, Sec. 32). originally enacted as MONTANA PENAL CODE OF 1895, § 880.

²²R.C.M. 1947 § 94-1805 (repealed by Laws of Montana (1973), Ch. 513, Sec. 32); originally enacted as MONTANA PENAL CODE OF 1895, § 993.

²³*State v. Dickinson*, 21 Mont. 595, 55 P. 539 (1898).

eloquently termed the offense: grand larceny by obtaining money under false pretenses. The charge was made under Montana Penal Code of 1895, § 880, forerunner of R.C.M. 1947, § 94-2701.

Defendant Dickinson was convicted as charged, but appealed on the theory that the jury had been improperly instructed as to the property interests protected by the crime of larceny by trick. The defendant claimed, quite incorrectly, that the offense with which he was charged required proof that the complaining witness parted with both possession and title, rather than with mere possession as the trial court had correctly instructed. The Montana supreme court, apparently equating larceny through false pretense (actually larceny by trick) with the traditional offense of false pretenses, accepted the defendant's analysis. The court ruled that larceny by trick required proof of a parting of both possession and title. Even though such proof had been offered at the trial, due to the trial court's "misdirection in the law" the conviction was reversed.²⁴

The result of the *Dickinson* decision was to erase the distinction between larceny by trick and false pretenses. In effect, larceny by trick was eliminated from the statutes since it required the same essential element as false pretenses—an obtainment of title and possession. Seventy years later, however, a legal resurrection of the old crime seemed to occur in the holding of the court in the case of *State v. Love*.²⁵

The defendant, William Love, describing himself as a used car dealer, obtained possession of an automobile from the complaining witness by writing a check for which there were insufficient funds. Evidence at the trial proved the defendant knew the check to be worthless and indicated serious doubts as to Mr. Love's status as a reputable car dealer. The defendant was convicted of obtaining money through false pretenses under R.C.M. 1947, § 94-1805. The defendant appealed arguing with the trial court's refusal to instruct that false pretenses required a showing that both title and possession must pass. The Montana supreme court rejected this appeal and stated that R.C.M. 1947, § 94-1805 "does not require that title pass, only possession."²⁶

Since larceny by trick is the traditional offense against possession and false pretenses ordinarily is applied to acquisitions of title, the *Love* decision appeared to reinstate the crime of larceny by trick by finding the essential elements of the crime within the false pretense statute. The remainder of the decision, however, specified that false pretenses, while being an offense against possession, still required the ancient elements:

²⁴*Id.* at 541.

²⁵*State v. Love*, 151 Mont. 190, 440 P.2d 275 (1968).

²⁶176 Mont. 279.

First, the making by the accused to the person injured of one or more representations of past events or existing facts; second, that such injured party believed such representations to be true and relying thereon, parted with money or property, which was received by the accused; third, that such representations were false; and fourth, were made knowingly and designedly, with the intent to defraud such other person.²⁷

Interestingly, the court, in setting forth these elements, cited the earlier case of *State v. Bratton*,²⁸ thus indicating that not only were the ancient elements of false pretenses still present but the old loophole as well. For, in *Bratton* the court had reversed the defendant's conviction because the testimony of the complaining witness had indicated a reliance upon a false promise rather than upon an untrue fact.²⁹

(C) THE MONTANA DILEMMA

The *Dickinson* and *Love* decisions resulted in a unique juxtaposition of the traditional elements of larceny by trick and obtaining property by false pretenses. The rulings required that, in seeking to convict under R.C.M. 1947, § 94-2701 for larceny by trick, the state prove that the accused utilized fraudulent means to obtain both possession and title from his victim. The crime of false pretenses necessitated proof that the victim fraudulently obtained possession (not title) through an untrue representation of an existing fact upon which the victim relied.

Not only are these elements departures from the common law from which they were derived, but in so defining the offenses, the decisions also created a new dilemma for the law: the clever thief who falsely promised to return the buggy which he claimed to be borrowing, and for which the offense of larceny by trick was originally devised, could continue his fraudulent gallop unhampered. His conduct, which consisted of obtaining mere possession by the making of a fraudulent promise, was prohibited by neither section 94-2701, larceny by trick, nor section 94-1805, false pretenses. As provided in the *Dickinson* and *Love* decisions, this theft was beyond the reach of the courts because the wrongdoer had not misrepresented an existing fact. This loophole, which was originally created to protect the unlucky businessman who could not return what he promised, instead could be utilized to insulate an obvious criminal from punishment.

A NEW APPROACH

(A) THE MONTANA CRIMINAL CODE

Because of the extraordinary confusion which resulted in applying the common law elements of larceny by trick and false pretenses, the

²⁷*Id.* at 278.

²⁸*State v. Bratton*, 56 Mont. 563, 186 P. 327 (1919).

²⁹*Id.* at 328.

Montana Criminal Code abandoned the traditional approach for an entirely new solution. The applicable portion of the new statute provides:

(1) A person commits the offense of theft when he purposely or knowingly obtains or exerts unauthorized control over property of the owner, and

(a) has the purpose of depriving the owner of the property; or
(b) purposely or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or
(c) uses, conceals, or abandons the property knowing such use, concealment, or abandonment probably will deprive the owner of the property.

(2) A person commits the offense of theft when he purposely or knowingly obtains by threat or deception control over property of the owner, and:

(a) has the purpose of depriving the owner of the property; or
(b) purposely or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property, or
(c) uses, conceals, or abandons the property knowing such use, concealment, or abandonment probably will deprive the owner of the property.³⁰

The section makes no reference to common law elements or terminology. Instead, the statute uses broad but precisely defined terms to cover the formerly troublesome concepts. The artificial distinction between title and possession which was used under the traditional approach to determine which offense, if any, had been committed has been eliminated by using the phrase "obtains or exerts control." As defined by the new Code, this term includes virtually every type of property interest.³¹ Regardless of whether the actor acquires title or possession from his victim, his conduct is punishable. The problem of determining whether the item stolen was within the class of property protected by the law has been solved by the term "property" which is defined as "anything of value."³² Cumulatively, these new terms ensure that criminal sanctions will be provided for the fraudulent obtainment of any possible interest in any kind of property.

Subsection (1) is the foundation of the Criminal Code approach to theft and should prohibit virtually all forms of stealing. The subsection requires that the prosecution need prove only two elements to sustain a conviction: (1) that the offender purposely, with some design, or knowingly, with knowledge of facts and circumstances, obtained unauthorized control over the property; and (2) that the defendant had the purpose to deprive.³³ Subsections (1)(a), (1)(b), and (1)(c) allow the second element of the offense to be shown in three ways: (1) by proof of a purpose to deprive; (2) by implication from the offender's

³⁰M.C.C. 1973, § 94-6-302.

³¹M.C.C. 1973, § 94-2-101(34). "Obtains or exerts control" includes but is not limited to the taking, carrying away, or the sale, conveyance, or transfer of title to, or interest in, or possession of property.

³²M.C.C. 1973, § 94-2-101(49).

³³People v. Jordan, 115 Ill. App.2d 307, 252 N.E.2d 701 (1969); People v. Jackson, 66 Ill. App.2d 276, 214 N.E.2d 316, 318 (1966).

use of the property, or (3) by proof that the owner had knowledge that his activities would deprive the owner of the property. There is no requirement that the offender intend to permanently deprive the owner of the goods nor is any distinction made concerning the manner in which control was obtained.

Subsection (2) prohibits the specific offense of stealing by threat or deception. While such conduct is effectively prohibited by subsection (1), the Criminal Law Commission felt that the concise approach taken by that provision might create problems in application because of the numerous prior offenses embodied therein.³⁴ To support a conviction under subsection (2), the prosecution must prove that: (1) the property was acquired either purposely or knowingly by use of threat or deception, and (2) the defendant had the purpose to deprive which may be shown by direct proof or implication. "Deception," as defined by the new Code, includes any knowingly false misrepresentation or promise.³⁵ The term thus eliminates the distinction between representations of past, present, and future facts which plagued the prior law on false pretenses and larceny by trick.

From an examination of the statute, it may be concluded that the old problems which encumbered the prior law have been eliminated. By specifically avoiding reference to prior law and instead using new and carefully defined terminology, the section represents a considerable simplification of and improvement to the traditional approach.

(B) COURT INTERPRETATIONS

The wording for the new section on theft has been taken without substantial change from the Illinois Criminal Code of 1961.³⁶ A considerable number of cases have dealt with the substantive provisions and key definitions of the statute. Fortunately, as noted below, these

³⁴CRIMINAL LAW COMMISSION COMMENT, REVISED PROPOSED MONTANA CRIMINAL CODE (1973), § 94-6-302.

³⁵M.C.C. 1973, § 94-2-101(11). "Deception" means knowingly to:

- (a) create or confirm in another an impression which is false and which the offender does not believe to be true; or
- (b) fail to correct a false impression which the offender previously has created or confirmed; or
- (c) prevent another from acquiring information pertinent to the disposition of the property involved; or
- (d) sell or otherwise transfer or encumber property, failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether such impediment is or is not of value or is not a matter of official record; or
- (e) promise performance which the offender does not intend to perform or knows will not be performed. Failure to perform standing alone is not evidence that the offender did not intend to perform."

³⁶The source of the Montana statute is ILLINOIS REVISED STATUTES, Ch. 38, § 16-1. The primary change made by the Montana Criminal Law Commission is the use of the words "purposely" and "knowingly" in place of the Illinois section's use of the traditional term "intent" to define the required *mens rea*. "Intent" was well to be rid of considering the voluminous interpretations which surrounded the word.

decisions have indicated that the language used in subsections (1) and (2) means precisely what it seems to say.

In applying the terminology of the section to specific factual circumstances, the Illinois courts have generally held that the statute is broad enough to encompass practically all conceivable forms of theft and all types of fraudulent acquisitions of property interests. The terms "unauthorized control" and "owner" have been held to be sufficiently definite to be constitutionally valid.³⁷ Numerous decisions have indicated that any possessory interest is sufficient to make a person an owner and thus make the offender who obtains such interest an exacter of "unauthorized control," in order to sustain a conviction.³⁸ The definition of deception has been ruled to include false promises of future payments.³⁹ And in regard to the sometime difficult task of proving the mental states required by the statute, the courts have shown latitude in permitting facts and circumstances surrounding the act to be admitted to provide inferences of the wrongdoer's culpability.⁴⁰ In all, the section has been quite successfully applied to criminal conduct and has met most challenges.

(C) APPLICATION IN MONTANA

The Illinois decisions, of course, are only persuasive authority in Montana. In light of the confusion spawned by attempting to apply the common law foundations to the prior Montana statutes on larceny by trick and false pretenses, it is reasonable to expect that the Montana bench and bar will seek to follow the straightforward approach established by Illinois. The experience of California, which earlier sought to consolidate the theft-related offenses, may be instructive. Because the California statute made a passing reference to the traditional names of the offenses, lawyers were able to convince the courts that the ancient elements of the crimes were to be applied to the new statute.⁴¹ Thus, the forward step taken by the California legislature was invalidated. The Illinois decisions, on the contrary, have been careful to uphold the intent of the Illinois drafters.

The Montana statute avoids any reference to the common law. Instead, M.C.C. 1973, § 94-6-302 provides a simplified approach to theft

³⁷People v. Hardin, 42 Ill.2d 301, 247 N.E.2d 404, 406 (1969); People v. Cleveland, 104 Ill. App.2d 415, 244 N.E.2d 212, 214 cert. denied 90 S.Ct. 479; People v. Kamsler, 78 Ill. App.2d 349, 223 N.E.2d 237 (1966).

³⁸For example, in *People v. Smith*, 90 Ill. App.2d 388, 234 N.E.2d 161, 166 (1967), the manager of a hotel was held to have sufficient control over the hotel's property to be an "owner" as required by the section. Similarly, the payee of a stolen check was held to have had adequate interest in the check and the proceeds therefrom to meet the requirements of an "owner." *People v. Jones*, 123 Ill. App.2d 389, 259 N.E.2d 393 (1970).

³⁹People v. Kamsler, *supra* note 37 at 237.

⁴⁰People v. McClinton, 4 Ill. App.3d 253, 280 N.E.2d 795, 798 (1972); People v. Bixler, 49 Ill.2d 328, 275 N.E.2d 392, 396 (1971) cert. denied 405 U.S. 1066.

⁴¹People v. Kassab, 219 C.A.2d 687, 33 Cal. Rptr. 494, 496 (1963).

which should make the law understandable both to the bar and to citizens who are expected to obey and support it. The new section must remain unencumbered by intricate interpretations in order to meet the statute's objective: to deter and punish the crime of theft, regardless of the ingenuity of the offender.