

STEALING BY FRAUD

BY COLIN HOWARD*

There has always been difficulty in applying the law of larceny to the case where the defendant, D., did not take the property of the owner, V., in the traditional sense of a taking without the consent of the owner, because V. handed the property to D. voluntarily owing to a misapprehension of fact. There are two possible situations: either V.'s mistake was deliberately induced by D. or it was not. The present article is an account of the Australian law relating to the first of these situations, where D. obtains property from V. by fraudulently misleading him.

(a) *Introduction*

Under the old common law it was not a crime for D. to obtain property from V. by fraud except by way of cheating by the use of false weights or measures on sale.¹ This gap in the law was ultimately filled in two ways: at common law by the invention of larceny by a trick in *Pear*² in 1779, and under statute by the creation in 1757 of the misdemeanour of obtaining by false pretences.³ There seems to be no reason of substance why under some circumstances the same facts should not have been regarded as amounting to both larceny and obtaining, but the law has long been settled that if D. has committed one of these offences he cannot at the same time have committed the other.⁴ This rule sometimes has important consequences in the civil law, for if D. commits larceny, *prima facie* he cannot pass title to the property in question to a third party, whereas if he commits obtaining by false pretences he can.

(b) *The Difference between Larceny and Obtaining*

The difference between larceny by a trick and obtaining by false pretences is clear in theory but has occasioned much difficulty in its practical application. The difference is as follows.⁵

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1. *Patmy* (1944) 45 S.R. (N.S.W.) 127, 130; *Jones* (1704) Ld. Raym 1013. For modern statutory offences of cheating see Queensland Code, s. 429; Western Australian Code, s. 411, Tasmanian Code, s. 252.
2. (1779) 1 Leach 212.
3. 30 Geo. II, c. 24.
4. Except in Queensland and Western Australia: *Petrie* (1928) 22 Q.J.P.R. 125. The inconvenience of this rule is mitigated by statutory rules relating to verdicts. See below, s. (b) (iii).
5. *Ward* (1938) 38 S.R. (N.S.W.) 308, 313.

The distinction between larceny and the statutory offence of obtaining property by false pretences is that, if a person being the owner of a chattel, or having authority from the owner to alienate it, is induced by the fraud of another person to part with it to him, and the latter at the time of taking it intends to misappropriate it as his own, then, if the former intended to part with property in the chattel to the taker as well as possession, the offence is not larceny but false pretences; but if he intended to part only with possession of the chattel to the taker, the offence is larceny.

For the present purpose the distinguishing features of larceny by a trick are two: the intent to steal must be present when D. takes the property, and V. must intend to part only with the physical possession of the property to D., not with his rights of ownership. The first of these distinguishes larceny by a trick from other forms of larceny, particularly larceny as a bailee, which may be committed if the intention to steal is formed some time after D. takes the property from V., and from certain statutory offences, such as fraudulent appropriation in New South Wales⁶ and fraudulent conversion in Victoria,⁷ which are designed to fill gaps in the law of larceny by subsequent intention to steal. It is the distinction between an intention to part with possession and an intention to part with ownership which distinguishes larceny by a trick from obtaining by false pretences.

(1) *The Money Cases*

Much of the practical difficulty of this part of the law has arisen out of the fact that the property acquired by the trick or false pretence is usually money. Money is an ambiguous commodity. Since abandonment of the practice of issuing coins made of a quantity of precious metal equal to their value there has been a marked distinction between a coin as a physical object and a coin as a denominator of value. This distinction has always been present with banknotes, cheques and other bills of exchange.⁸ Normally it is with money only as a denominator of value that people are concerned. This creates problems in larceny because at common law one cannot steal an intangible such as value.

Thus if D. induces V. by some deceit to give him money which he intends to misappropriate, and the question is whether D. has committed larceny or obtaining, it is hard to see in most cases how D. could have committed larceny; for both V. and D. will normally be

6. Crimes Act, 1900 (N.S.W.), s. 124. This offence is to be distinguished from fraudulent misappropriation under s. 178A, enacted as a result of the High Court decision on the scope of larceny as a bailee in *Slattery v. The King* (1905) 2 C.L.R. 546, and amended in consequence of *McDonald* (1930) 30 S.R. (N.S.W.) 73. See also *Heavener* (1933) 33 S.R. (N.S.W.) 101; *Kirk* (1901) 20 N.Z.L.R. 463, 470; *Hood* (1915) 15 S.R. (N.S.W.) 362.

7. Crimes Act, 1958 (Vic.), s. 148. For South Australia see Criminal Law Consolidation Act, 1935-1957 (S.A.), s. 184 (1).

8. Cf. Mann, *The Legal Aspect of Money* (2nd ed.), ch. I.

interested only in the value of the money, not in the money as a physical object, with the consequence that V. will have intended to part with full powers of disposition of the money as a physical object to D. and there is nothing else which D. can be said to have stolen. The difficulty of the present law is increased by a number of decisions in which the courts have held D. guilty of larceny when one would have more readily regarded him as having obtained money by false pretences.

For example, in *Richards*⁹ D. borrowed money from V. on the untrue pretence that he needed it to buy goods from a shop and would repay V. later. After entering the shop D. absconded. His conviction of larceny was upheld by the Full Court of Victoria notwithstanding that V. clearly did not expect to receive back the same banknotes that he gave to D. Possibly *Richards* would not now be followed because in the latter case of *Lambell v. Moore*,¹⁰ a civil action, Irvine C.J., who delivered the judgment of the court in *Richards*, tended to confine the earlier case to its own facts. But *Lambell v. Moore* was not a money case. D. had fraudulently induced V. to hand him a ring with authority either to sell it or return it on demand. Since V. gave D. power to pass the property in the ring to another, D. obtained the ring by false pretences and not by larceny.

On the borderline was the intervening case of *Wort*.¹¹ D. untruthfully told V. that he was a circus proprietor and needed a publicity agent, which non-existent job he offered to V. on condition that V. deposited ten pounds with D. for six months as security for the proper performance of his duties. The point of requiring security was said to be that V. would have to go to each place of performance in advance of the circus, so that D. could not always supervise V.'s activities. The Victorian Court of Criminal Appeal held that D. was rightly convicted of larceny by a trick. The fact that the money was only to be deposited with D., not to be spent by him, tended to show that V. never intended to part with the property in the actual notes he handed over and expected to get the same notes back.¹² It seems a little unrealistic to suppose that V. did not envisage that D. would even put the money into a bank account for a period of six months, but the court held that the length of time for which D. was to hold the deposit amounted to no more than evidence of V.'s intentions in this regard which the jury was entitled to reject. Indeed, the court went further and said that,¹³

9. [1927] V.L.R. 634.

10. [1929] V.L.R. 149, 161

11. [1927] V.L.R. 560. Cf. *Buckmaster* (1887) 20 Q.B.D. 182; *O'Brien* (1928) 2 *Australian Law Journal* 277.

12. Cf. *Brockman* (1870) 1 A.J.R. 152, below, s. (c).

13. [1927] V.L.R. 560, 567.

in none of the cases where money has been the subject-matter of the larceny by trick does the question whether it was intended that the money should be returned in specie or not appear to have been regarded as material . . .

This is an overstatement, although it would account for the decision in *Richards*. In *Mark*¹⁴ D. went to a bank, passed three five pound notes across the counter and asked for change. The teller handed D. fifteen one pound notes. By sleight of hand D. abstracted four of the notes but appeared immediately to hand the whole bundle of notes back to V., requesting that he be given gold instead of notes. Instead of taking for granted that there were still fifteen notes in the bundle V. counted them again. D. was convicted of attempted larceny of the fifteen gold sovereigns which he asked for. The Victorian Full Court quashed the conviction on the ground that D. had attempted to obtain the money by false pretences. The decision proceeded expressly on the ground that if V. had been deceived into handing the sovereigns over he would have parted, not only with the physical possession of them, but also with the power of disposition of them and that in the circumstances this would have been what he intended to do.

A similar view of the law was taken by the New South Wales Court of Criminal Appeal in *Ward*.¹⁵ D. a solicitor, by fraudulent misrepresentations induced V. to hand him a deposit of fifty pounds to hold as stakeholder pending settlement of a purported contract under which V. was to buy land. D. misappropriated the fifty pounds and was convicted of larceny. The conviction was quashed on the ground that the jury had not been directed on the question whether V. intended D. to receive the deposit subject to a liability to account, in which case he would have obtained the money by false pretences, or as bailee of the actual money delivered to him, which would have been larceny by a trick.¹⁶

The court rejected the suggestion that a stakeholder is necessarily intended to receive money as a bailee¹⁷ and held that whether V. intends to part with the power of disposition over specific items of money or only with their physical possession is always a question of fact. The capacities in which V. and D. purport to be acting are no more than evidence of the actual transaction. Jordan C.J. observed:¹⁸

If a person hands a boy a shilling with instructions to buy him a newspaper and bring back the change, the inference that no more

14. (1902) 28 V.L.R. 610.

15. (1938) 38 S.R. (N.S.W.) 308.

16. Cf. *Critchell* (1864) 3 S.C.R. (N.S.W.) (L) 209, 211: "a person cannot by fraud become a bailee". *Webb* (1882) 4 A.L.T. 51; *Millard* (1906) 23 W.N. (N.S.W.) 8.

17. See the discussion of *Brodie* (1894) 15 L.R. (N.S.W.) (L) 436, at 38 S.R. (N.S.W.) 317-318.

18. (1938) 38 S.R. (N.S.W.) 308, 315-316.

than a bailment of the shilling was intended is overwhelming. If a person sends a draft for a thousand pounds to a person in England with instructions that the same is to meet the cost of goods to be shipped c.i.f. from time to time by the latter to the former at the former's order, the likelihood that only bailment of the thousand pounds is intended is negligible. An infinite variety of cases can be imagined between such extremes.

With particular reference to the case of the stakeholder his Honour said:¹⁹

The question whether a stakeholder of money is a mere bailee of the specific money delivered, or acquires property in it subject to a liability to account, depends on the facts of the case. If a cheque is handed to a person to be by him delivered over to one or other of two persons, according to the result of an event to be determined within the next few minutes, there is the strongest evidence of bailment. If, as in *Harington v. Hogart*,²⁰ a sum of £2,000 is paid to a person on the terms that he is to pay this sum to one or other of two persons in an event which might not, and in fact did not happen for nearly nine years, the probability that bailment was intended is negligible.

In *Cain v. Banks*²¹ D. called upon V. at her home, pretending to be a photographer. He induced V. to place an order for photographs of herself and her children and took a cheque for £2 15s. as a deposit. D. was convicted of stealing but the Queensland Full Court quashed the conviction on the ground that V. had intended to pass to D. the property in the cheque.

The judgment of Jordan C.J. in *Ward* is the most thorough and careful consideration yet handed down by an Australian court of the differences between larceny by a trick, obtaining by false pretences and related offences. It is in accord with both *Mark* and *Cain v. Banks*, and also with the important decision of the English Court for Crown Cases Reserved in *Prince*,²² on the relevance of the distinction between money as a physical object and money as a denominator of value to this part of the law. It is submitted that *Ward*, *Mark* and *Cain v. Banks* represent the law of Australia on the point; that *Wort* turned on a finding by the jury that V. intended only a bailment of his money for six months; and that *Richards* was wrongly decided.²³

19. (1938) 38 S.R. (N.S.W.) 308, 317.

20. (1830) 1 B. & Ad. 577.

21. [1959] Qd. R. 234.

22. (1868) L.R. 1 C.C.R. 150. See also *Papworth* (1944) 44 S.R. (N.S.W.) 394, below s. (c).

23. The same applies to *Cheatham* (1886) 7 L.R. (N.S.W.) (L) 359, which was clearly obtaining and not larceny as held. No reasons for judgment were given. *Middleton* (1873) L.R. 2 C.C.R. 38, purported to be followed but was irrelevant because in *Cheatham* D. misled V., whereas in *Middleton* he did not.

(2) *Civil Cases*

If D. has fraudulently deprived V. of money V. is unlikely to get his money or its value back, because D. will usually not be worth suing and it will normally be impracticable to trace into whose hands the money has passed from D. Also there are special rules protecting the innocent holder for value of a negotiable instrument. But if D. has misappropriated some other valuable object, such as jewellery, it will frequently be possible for V. to trace and sue a third party who has innocently bought it from D. for its return.²⁴ The general rule is that if D. had no power to dispose of the title to the property, which will be the case if he has committed larceny, V. can recover it from anyone into whose hands it has come; but that if V. gave D. the power to pass title to a third party, which will be the case where D. obtained the property by false pretences, V. cannot recover it from an innocent purchaser for value.

It is for this reason that many of the cases in which the application of this part of the criminal law to the fraudulent taking of valuable property other than money has been discussed have been civil actions. Although Scrutton L.J., in *Folkes v. King*²⁵ said, "I do not think Parliament had any intention of applying the artificial distinctions of the criminal law to a commercial transaction, defeating it if it were larceny by a trick, but not if there were only larceny by a bailee, or possession obtained by false pretences", the parallelism between the rules of the criminal and the civil law in this area has made it usual for relevant civil actions to be cited as elucidating the criminal law.

An Australian example which has already been cited is *Lambell v. Moore*,²⁶ which makes it clear that false pretences is not limited to the case where V. actually passed the ownership of the property to D. but also covers the case where V. empowered D., although not himself the owner of the goods, to pass title to a third party on behalf of V. V. entrusted D., in consequence of fraudulent misrepresentations by D., with some rings on sale or return. D. pledged the rings with pawn-brokers who, when sued by V., relied on the rule just stated. V. argued that since he did not make D. the owner of the rings, and did not authorise him to pawn them, D.'s offence was larceny by a trick, and that therefore V. was entitled to recover the rings. It should be observed that V.'s argument was not invalidated by the fact that D. had previously been acquitted of larceny, for decisions of the criminal courts do not bind the civil courts, and *vice versa*.²⁷ Nevertheless it

24. Subject to the law of market overt. See, e.g., Sale of Goods Act, 1895-1952 (S.A.), s. 22.

25. [1923] 1 K.B. 282, 305.

26. [1929] V.L.R. 149. *London Jewellers v. Attenborough* (1934) 2 K.B. 206; *Whitehorn Bros. v. Davison* [1911] 1 K.B. 463; *Oppenheimer v. Frazer* [1907] 2 K.B. 50.

27. *Hollington v. Hewthorn* [1943] K.B. 587.

was held that D. had obtained the rings by false pretences and that therefore V. was not entitled to recover them from the pawnbrokers unless he redeemed the pledges.

Although civil cases may be cited in this part of the law, they should be used with caution. The parallelism between the rules of the civil and the criminal law is not exact, and a strong line of English decisions has departed from the old view exemplified by *Lambell v. Moore* and laid down that the questions of consent which arise in determining civil title to goods are not necessarily concluded by the distinction between larceny by a trick and obtaining by false pretences.²⁸ Although Atkin L.J., in a dissenting judgment in *Lake v. Simmons*,²⁹ described it as a logical absurdity that D. could both take goods without the consent of the owner, and thus commit larceny, and yet be entrusted with the goods by the owner so that he could pass civil title to them, his view has not prevailed. Dicta on this part of the criminal law in civil cases, therefore, may still be regarded as relevant but should be treated with reserve.

(3) *Verdicts*

Owing to the close similarity between stealing and obtaining by false pretences, it is often difficult for P. to know which offence he should charge against D., but since they are materially different he cannot charge both in the same indictment. It is undesirable that D. should be able to avoid conviction of either on the ground, in effect, that he has committed the other. To reduce the likelihood of a technical acquittal where it is clear that D. has committed one of these offences but P. has charged the other, five states have statutory rules that where D. is charged with stealing but false pretences is proved, he may be acquitted of stealing and convicted of false pretences, and *vice versa*.³⁰

In South Australia only the more limited rule applies that if on trial for obtaining by false pretences it is proved that D. stole the property in question, "he shall not by reason thereof be entitled to be acquitted of obtaining such property by false pretences".³¹ The apparent effect of the law is that if D. is charged with false pretences he may be convicted of the offence charged on proof of larceny, but that if he is charged with larceny he may not be convicted of the offence charged

28. *Du Jardin v. Beadman* [1952] 2 Q.B. 712; *Pearson v. Rose & Young Ltd.* [1951] 1 K.B. 275; *Folkes v. King* [1923] 1 K.B. 282.

29. [1926] 2 K.B. 51, 70-71. The decision of the majority was reversed by the House of Lords on another point: [1927] A.C. 487.

30. Crimes Act, 1900 (N.S.W.), ss. 120, 183; Crimes Act, 1958 (Vic.), s. 430; Queensland Code, s. 581; Western Australian Code, s. 599; Tasmanian Code, s. 338 (1). The three codes do not expressly require that D. be acquitted of the offence charged, as well as convicted of the offence proved, but this must be implied.

31. Criminal Law Consolidation Act, 1935-1957 (S.A.), s. 195 (3).

on proof of obtaining by false pretences. There is no power on a trial for either offence to return a verdict of guilty of the other.

(c) *Larceny by a Trick*

There are a number of cases which illustrate the scope of larceny by a trick quite apart from its relationship with obtaining by false pretences. Of the cases already discussed, *Wort*³² would have afforded an example if there had not been a finding that V. expected to receive back the same money that he gave to D. A similar case was *Brockman*,³³ in which V. agreed to work for D. and to give D. £300 to hold as security for three months. V. gave D. a cheque for this sum which D., who had intended throughout to misappropriate the so-called security, immediately cashed. D. was convicted of larceny of the cheque because V.'s intention was that the cheque itself should be held by D. for the three months.

In *McCabe*³⁴ a confederate of D. induced V. to drink with him in a public house. D. entered with a box and offered to bet that they could not open it. He then went out again for a short while and during his absence his confederate and V. both opened the box. On D.'s return, V. accepted the bet and wagered twenty-three pounds that he could open the box while D. counted up to twenty-two. He failed to do so owing to some trick mechanism in the box of which he was not aware. D. was convicted of larceny of the money won in the fraudulent wager.

A common trick is known as ringing the changes. This consists of asking for change for a certain coin and then, when the change is produced, asking instead for some different denomination, hoping thereby to confuse V. and induce him to hand over more money than D. is entitled to take. Although it is arguable that such cases ought to be regarded as obtaining money by false pretences, the courts have always treated this trick as larceny. An instance is *Bull*.³⁵ D. ordered two small beers costing sixpence and paid for them with a half-sovereign. The barmaid gave him nine shillings and sixpence change. D. then purported to borrow sixpence from his companion and offered the ten shillings thus made up to the barmaid in exchange for a half-sovereign, on the ground that the change would be useful to her. She accepted the offer and gave D. a half-sovereign. D. retained the ten shillings change in his hand, added the half-sovereign to it and on the same excuse offered all the money to the barmaid in return for a one pound note. She accepted the exchange and D. was convicted of stealing the one pound note.

Care must be taken to distinguish which piece of money it is that

32. [1927] V.L.R. 560.

33. (1870) 1 A.J.R. 152. Cf. *Cain v. Banks* [1959] Qd. R. 234.

34. (1880) 1 L.R. (N.S.W.) (L) 21.

35. (1881) 7 V.L.R. (L) 134.

D. is charged with stealing. In *Jenkins*,³⁶ on similar facts to *Bull*, the conviction of larceny was quashed on the ground that if D. had stolen anything it was the one pound note, whereas he had been convicted of stealing ten shillings. In *Bennett v. Howard*³⁷ D. was convicted merely of stealing "certain money", but an indictment in this form would not relieve P. of the necessity to prove larceny of the correct piece of money at the trial.

It is well settled that if D. obtains possession of goods pursuant to a purported contract which he has fraudulently pretended to conclude with V., D. commits larceny by a trick. In *Welsh*³⁸ D. induced three different people to give him cattle and a horse on the pretence either that he would pay for the animal in question or give another animal in exchange at a later stage. Since V. clearly did not intend that the property in the animal entrusted to D. should pass until D. performed his part of the supposed contract, D. was guilty of larceny.

In *Papworth*³⁹ D. was charged with larceny on the basis that he induced V. to give him £200 by representing that the money was needed to bribe a police officer not to prosecute both D. and V. for taxation and other offences in relation to certain transactions between the two of them. The conviction was set aside for want of evidence that D. had not in fact applied the money in the way stated, but if this had been proved, together with a fraudulent intent in D. when he took the money from V., the case would have been larceny by a trick because it was V.'s intention that D. should convey his £200 directly to the police officer and not deal with it in any other way.

(d) *Obtaining by False Pretences*

D. commits the offence of obtaining by false pretences if, with intent to defraud, he obtains property from V. by misrepresentation.⁴⁰

(1) *Intent to Defraud*

If D. obtains property from V. by misrepresentation, he does not commit the offence of obtaining by false pretences unless he does so with an intent to defraud.⁴¹ Usually D.'s intent to defraud will consist of an intention to steal, but this need not be the case. The essence of false pretences is the actual obtaining of property, not what D. does

36. (1905) 11 A.L.R. (C.N.) 49. Cf. *Roach* (1882) 16 S.A.L.R. 40.

37. [1913] V.L.R. 238.

38. [1940] V.L.R. 319. Cf. *Russett* [1892] 2 Q.B. 312; *Collins* (1922) 128 L.T. 31; *Arnold* (1883) 4 S.C.R. (N.S.W.) (L) 347.

39. (1944) 44 S.R. (N.S.W.) 394. Cf. *Mason* (1890) 16 V.L.R. 327, where D. also had to hand specific money to a third party for V., but committed larceny as a bailee when he misapplied it, and not larceny by a trick, because he received the money honestly.

40. Crimes Act, 1900 (N.S.W.) ss. 179 ff, cf. s. 178; Crimes Act, 1958 (Vic.), ss. 187 ff; Criminal Law Consolidation Act, 1935-1957 (S.A.), s. 195; Queensland Code, ss. 426 ff; Western Australian Code, ss. 408 ff; Tasmanian Code, ss. 249 ff.

41. *Denning* [1962] N.S.W.R. 173; *Abberton* [1931] V.L.R. 237; *Gibson* (1929) 30 S.R. (N.S.W.) 282; *O'Sullivan* [1925] C.L.R. 514.

with the property after he has got it. It follows that if the factor which induces V. to part with his property to D. is a false representation by D., the offence is committed even though D. may intend to deal with the property in a manner which of itself is lawful. There is an intent to defraud if D. intends to deal with V.'s property in some manner inconsistent with his representations to V.

For example, in *Denning*⁴² D. obtained deposits from a number of people by representing that in return he would arrange finance for the building of dwellinghouses, provide the land on which the houses were to be erected, and build the houses.⁴³ He was convicted of obtaining the deposits by false pretences, the financial position of his companies being such that he could not at any time have had a reasonable expectation of being able to fulfil his commitments. D. appealed on the ground, *inter alia*, that he did not intend to defraud because he intended eventually to furnish the depositors with the houses they expected to get. The difference between what he said to the depositors and what he actually intended to do was that instead of arranging finance separately for each depositor, he intended to use a number of deposits collectively to build one or two houses, sell these houses at a profit, use the profit together with more deposits to build more houses, and so on. It was doubtful if such a scheme could have been made to work, but even if it could it was a materially different *modus operandi* from the one explained to the depositors.

Dismissing the appeal Herron J. in the New South Wales Court of Criminal Appeal said:⁴⁴

The appellant was labouring, I think, under the impression that in order to intend to defraud certain persons he must have made his mind up mischievously, maliciously and wilfully to rob persons, to misappropriate the funds of the companies in some fashion.

In correcting this misapprehension the court approved the following direction given in *Kritz*:⁴⁵

If a false statement, false to the knowledge of the person making it, is made, and by this means money . . . is obtained, and the person who gives that money . . . does so in reliance on the false statements that have been made, that is sufficient and you need not go any further.

The court also said that the test of intention in false pretences was objective, D.'s actual intention being taken to be what a reasonable man in his position would have intended had he acted in the same

42. [1962] N.S.W.R. 173.

43. In N.S.W. the statutory definition of obtaining now includes false promises as well as false pretences: Crimes Act, 1900, s. 179, below s. (5).

44. [1962] N.S.W.R. 173, 178.

45. [1950] 1 K.B. 82. Also approved in *Pellow* (1956) 73 W.N. (N.S.W.) 478.

way. It is submitted that this dictum⁴⁶ was unnecessary for the decision of the case and ought not to be followed. The authority on which it was based, *D.P.P. v. Smith*,⁴⁷ has nothing to do with false pretences and is inconsistent with the law laid down by the High Court on the question of intention.⁴⁸ It is also inconsistent with the earlier Victorian case of *Abberton*,⁴⁹ where the trial judge had directed the jury, on a charge against a clerk of having made a false entry in his employer's books with intent to defraud,⁵⁰ that D. must be taken to have intended the natural consequences of his act, and that if a natural consequence was that V. would be defrauded, there was an intent to defraud. The Full Court unanimously held this to be a misdirection on the ground that the normal expectation that a man intends the natural consequence of his actions was not a rule of law and might therefore be rebutted by evidence to the contrary.

It may be that the court in *Denning*, which admitted⁵¹ that its consideration of the intention to defraud was not as exhaustive as it might have been had judgment been reserved, had in mind recklessness rather than objective intention. There is no authority directly on the point,⁵² but it is quite possible that D. may obtain by false pretences if when he takes V.'s property he does not actually intend to misapply it but accepts to himself that he may do so. This may have been the case with some of the deposits in *Denning*. If so, it is understandable that the court should wish to make clear that D. is not entitled to be acquitted only because his state of mind was more akin to recklessness than to intention, but it is unfortunate that judgment was not reserved so that more detailed consideration could be given to the question.

It is commonly enacted that P. need not allege or prove an intent by D. to defraud any particular person.⁵³ It is enough for P. to prove a general intent to defraud. This rule is designed to cover the case where D. makes misrepresentations to a group of people, or to the public at large, as a result of which V. parts with property, but the misrepresentations are not repeated to V. specifically after V.'s identity is known to D.

46. [1962] N.S.W.R. 173, 178-179.

47. [1961] A.C. 290.

48. *Smyth* (1957) 98 C.L.R. 163.

49. [1931] V.L.R. 237.

50. Crimes Act, 1928 (Vic.), s. 147. See now Crimes Act 1958 (Vic.), s. 153.

51. See the reference at [1962] N.S.W.R. 173, 180, to the judgment of the court being "extemporary" (*sic*).

52. Cf. *Harrison* [1957] V.R. 117.

53. Crimes Act, 1900 (N.S.W.), s. 375 (1); Crimes Act, 1958 (Vic.), 6th schedule, rule 10; Criminal Law Consolidation Act, 1935-1957 (S.A.), s. 195 (2); Queensland Code, s. 643; Tasmanian Code, s. 325. Cf. Western Australian Code, s. 584 (16).

(2) *Ownership, not Possession*

It has already been seen, in connection with the distinction between obtaining by false pretences and larceny by a trick,⁵⁴ that to commit obtaining D. must get from V. either ownership of the property in question or the power to pass ownership from V. to a third party.⁵⁵ The essence of false pretences from this point of view is not that D. obtains ownership but that V. loses it. This principle is illustrated in a different way by *O'Sullivan*.⁵⁶

D. was authorised by his employer to buy a quantity of shirts from V. on credit. D. induced V. to supply him with the shirts by various misrepresentations as to his employer's business standing, although it does not appear whether he was authorised to make them. D.'s appeal from conviction of obtaining the shirts by false pretences was allowed on other grounds, but in answer to the contention that D. had not obtained the shirts for himself the Victorian Full Court said:⁵⁷

In no reported case has it, we think, been laid down that to constitute "obtaining", the passing of the property to the accused is essential, but the passing of the property from the person defrauded has been held to be sufficient.

This rule is reinforced by statute in sections⁵⁸ laying down that D. obtains property if he procures it to be delivered to any other person for the use either of himself or of another with intent to defraud.

(3) *The Making of the Pretence*

An essential element in this crime is the making by D. of a pretence which is false. If D. obtains property with intent to defraud V., but the representations which D. makes happen to be true, he may be guilty of attempting to obtain by false pretences⁵⁹ but he cannot be guilty of the full offence. An example is *Brien*.⁶⁰ D. leased some grazing rights to X. Later, believing that he was acting fraudulently, he purported to lease the same rights to V. and represented that he had power to do so. It turned out that the lease to X. was void for a technical reason. Therefore D.'s representation to V. was unintentionally true and D. had not obtained payment for the grazing rights from V. by false pretences.

D.'s misrepresentation will usually be verbal but may be made by

54. Above, s. (vii) (b).

55. *Lambell v. Moore* [1929] V.L.R. 149.

56. [1925] V.L.R. 514. Cf. *Livingstone* (1875) 14 S.C.R. (N.S.W.) (L) 182.

57. [1925] V.L.R. 514, 517.

58. Crimes Act, 1900 (N.S.W.), s. 180; Crimes Act, 1958 (Vic.), s. 188; Criminal Law Consolidation Act, 1935-1957 (S.A.), s. 195 (1) (a); Queensland Code, s. 427; Western Australian Code, s. 409; Tasmanian Code, s. 250.

59. *Wyatt* (1888) 22 S.A.L.R. 105; *Ferera* [1907] V.L.R. 240; *Waugh* [1909] V.L.R. 379.

60. (1903) 3 S.R. (N.S.W.) 410. Cf. *Deller* (1952) 36 Cr. App. R. 184.

conduct giving rise to a natural but wrong inference by V. Examples are the following.⁶¹

In *Greenhalgh*⁶² D. acting as an auctioneer, extolled the virtues of some gold watches which he produced, but actually sold brass ones. By careful selection of words he guarded himself against saying that any particular brass watch was a gold one, but his course of conduct misled, and was intended to mislead, purchasers into thinking that all the watches were gold. His conduct amounted to a false pretence that the brass watches were gold watches.

In *Robinson*⁶³ D. took bets on a racecourse which were made with him because he was wearing a badge, to which he was not entitled, issued by the Victorian Racing Club to people licensed to bet on a racecourse. The mere wearing of the badge amounted in the circumstances to a misrepresentation that D. was licensed.

In *Livingstone*⁶⁴ D. was employed by a man who could read and write only his own name. D. used to write all his employer's letters from instructions and they would then be signed by the employer. On the end of one letter he added an unauthorised request that V. make an advance payment to D. D.'s presentation of this letter to V. without comment amounted to a false pretence that the payment was authorised.

A common form of misrepresentation by conduct is the presentation of a false cheque with the unspoken implication that it is genuine. The cheque cases are considered in detail below in connection with the distinction between present and future facts.⁶⁵

Here, as elsewhere in the law, it is not necessary that D. make the misrepresentations himself, for he may act through an innocent agent. One instance of this is *Livingstone*, above. Another is *Garner*.⁶⁶ D. sent a child to buy some rum, giving her a false promissory note⁶⁷ which D. said was a one pound note. In this belief the child obtained the rum and some change from V. who was also deceived. D. obtained the rum and the change by false pretences.

A statement of opinion by D., however misleading, is not a false pretence of existing fact, although in practice it may sometimes be difficult to distinguish the one from the other. For example, in

61. For an instance of conduct not amounting to a false pretence see *Kosky* [1960] V.R. 526.

62. (1924) 24 S.R. (N.S.W.) 289. Cf. *Ebsworth* (1854) 1 S.C.R. (N.S.W.) (Appendix) 24.

63. (1884) 10 V.L.R. (L) 131. Cf. *Barnard* (1837) 7 C. & P. 784.

64. (1875) 14 S.C.R. (N.S.W.) (L) 182.

65. Below, s. (5). The mere giving of a cheque, without words, is a representation that it is good for its face value: *Reidman* (1886) 3 W.N. (N.S.W.) 49; *Apfel* (1872) 3 V.R. (L) 172, 175.

66. (1862) 1 S.C.R. (N.S.W.) (L) 137.

67. In what respect the promissory note was false does not appear.

*Patmoy*⁶⁸ D. misstated the carat weight of a diamond, and therefore its value. D. was held to have made a statement of fact in that particular case, but in bargaining over the price of a precious stone, or any other commodity, D. may well do no more than utter excessively optimistic opinions about the qualities of the object he is trying to sell, or make flattering comparisons with other objects of high value. A misleading opinion, even if known to D. to be misleading, is not a false pretence.

(4) *The Pretence must be Material*

There must be a causal connection between D.'s false pretence and V.'s handing over of the property.⁶⁹ If D. made misrepresentations to V. in order to obtain property, and he obtained the property but V. was in no way influenced by what he said, D. would be guilty of attempting to obtain the property by false pretences but he could not be guilty of the full offence because there was no connection between the false pretences and the obtaining.⁷⁰

On the other hand it is not necessary that D.'s misrepresentations should be the only factor influencing V.'s decision to part with his property. It is enough that the false pretence be a factor which substantially contributed to V.'s decision, even though other things may also have substantially contributed thereto.

An illustration is *Lambassi*.⁷¹ D. entered for a race with the object of winning a prize of fourteen pounds. The competitors received handicaps based on their previous performances. In a written declaration D. falsely understated his previous results and received a more favourable handicap than he would have been given had the true facts been disclosed. He won the prize and his conviction of obtaining by false pretences was sustained by the Full Court of Victoria. D. contended, *inter alia*, that his deception had resulted only in his obtaining an unduly favourable handicap, his winning the prize being the consequence of his own efforts in running the race. In answer to this the court said:⁷²

The fact that the money would not have been paid to the prisoner if he had not, by his own exertions, won the race is immaterial. It merely shows that it was not *solely* in consequence of the prisoner's fraud that the money was paid to him but partly in consequence of the fraud and partly in consequence of his having won the race. The fraud was a direct cause—though not the sole cause—of the money being paid to the prisoner.

68. (1944) 45 S.R. (N.S.W.) 127. Cf. *Bryan* (1857) Dears & B. 265.

69. Thus the statutory definitions of obtaining say that the property must be obtained "by" the false pretence or promise.

70. *Perera* [1907] V.L.R. 240; *Wyatt* (1888) 22 S.A.L.R. 105; (1852) *Korff Legge* 716. These last two cases were on entrapment, i.e., allowing D. to make his false pretences and take the property in order to catch him in the act.

71. [1927] V.L.R. 349. Cf. *Button* [1900] 2 Q.B. 597; *Clucas* [1949] 2 K.B. 226.

72. [1927] V.L.R. 349, 353-354. Italics in original.

Similarly, in *Patmoy*,⁷³ D. sold V. a diamond by falsely overstating its carat weight. There was evidence that at the same time D. told V. that if the stone turned out to be of less weight than D. said, he would repay V. a proportionate part of the purchase price.⁷⁴ D. argued, *inter alia*, that his misstatement of the weight of the diamond was not the only operative false pretence because V. would not have bought it without the accompanying promise to repay, and that that promise, being a reference to a future fact,⁷⁵ was not within the scope of obtaining by false pretences. The New South Wales Court of Criminal Appeal, upholding D.'s conviction, said that if the false pretence "substantially contributed to the inducement" to V., "the co-existence of a contributing false promise was immaterial".

(5) *Present and Future Facts*

The general law of obtaining by false pretences requires that D. misrepresent either some existing state of affairs or something which has happened in the past, but does not extend to statements by D., normally in the form of promises, of something which will happen in the future. The view that a statement of future fact by D. is an expression of his present belief or intention that the event in question will happen, and therefore evidence of a present fact, has not been accepted by the courts. The rule was stated by Dixon J., as he then was, in *Greene v. The King*⁷⁶ as follows.

A promise to do something in the future is not a pretence for the purposes of this crime. The promise may import an assertion of a presently existing intention to do the thing, but that does not make it a pretence.

In that case D. had fraudulently contracted to supply V. with some venetian blinds in six weeks' time. On the strength of this promise V. paid D. a deposit of eleven pounds. The High Court held that as there was no evidence of a causally operative misrepresentation by D. of existing fact, but only the fraudulent promise to supply goods in the future, D. had not obtained the eleven pounds by false pretences. Another example is *Steel*,⁷⁷ where D. obtained thirty pounds from V. by pretending that he would need it to pay a debt falling due a few days later. In *Thorland*,⁷⁸ by contrast, D. was convicted on

73. (1944) 45 S.R. (N.S.W.) 127. *Thorland* (1884) 5 L.R. (N.S.W.) (L) 412; *Newcombe* (1887) 21 S.A.L.R. 55.

74. Cf. *Curtis* [1948] Q.W.N. 16.

75. Below, s. (5). The law has now been amended on this point in N.S.W. to include false promises: Crimes Act 1900 (N.S.W.), ss. 179, ff.

76. (1949) 79 C.L.R. 353, 361, overruling *Dah Ram* (1901) 3 W.A.L.R. 111. For examples of the working of this rule other than those in the text see *King* (1867) 1 S.A.L.R. 86; *Sullivan* (1867) 4 W.W. & A'B. (L) 114; *Savage* (1873) 4 A.J.R. 165; *Cunningham* (1899) 1 W.A.L.R. 91; *Pearce* [1904] St.R.Qd. 243; *Reynolds* [1927] S.A.S.R. 228.

77. (1887) 8 L.R. (N.S.W.) (L) 53.

78. (1884) 5 L.R. (N.S.W.) (L) 412.

similar facts because he told V. at the time that he borrowed the money that the fictitious debt had already fallen due.

It is regrettable that the law has developed in a manner which requires a conviction on facts like *Thorland* but not on facts like *Steel*, for there was no difference of substance between the deceptions practised in the two cases. It can make no difference to V. or to anyone else whether he thought D. owed money at the time he was approached or would owe money later.

A similar unreality is found in the distinctions which the law has required to be drawn in other types of cases. For example, in *Sawyer*⁷⁹ the Victorian Full Court held that D, who was single, did not obtain money by false pretences when V. gave him the money on the strength of a promise that he would marry her; but in the English case of *Jennison*⁸⁰ it was held that where, on similar facts, D., who was married, told V. that he was single, the misrepresentation of D's existing status was a false pretence. In both cases the substance of the matter was that V. gave D. money because she believed that D. was willing and able to marry her. In neither case would V. have advanced the money unless D. had made his promise, whether married or not. Presumably in the *Jennison* situation D would not be convicted if he told V. that he intended to divorce his wife and thereafter marry V.

Considerations such as these have led the legislatures of New South Wales, Victoria and Queensland to extend the customary definition of obtaining by false pretences to include obtaining not only by any false pretence but also by any "wilfully false promise".⁸¹ South Australia, Western Australia and Tasmania have not yet taken this step.

It is common for money or property to be obtained in return for a cheque which D. knows is valueless.⁸² Such a cheque may present the court with difficulties arising out of the future fact rule. The cheque may be valueless for one or both of two reasons: it may be either not a good cheque because it is forged or has some defect on its face, or else formally valid but valueless because there are and will be no funds to meet it. The first of these situations occasions no difficulty because the giving of an invalid cheque is a representation of existing fact that it is valid.⁸³

79. [1936] V.L.R. 1. Cf. *Sullivan* (1867) 4 W.W. & A'B. (L) 114.

80. (1862) Le. & Ca. 157.

81. Crimes Act, 1900 (N.S.W.), ss. 179, 180, 182, 183; Crimes Act, 1958 (Vic.), ss. 187, 188, 190, cf. s. 191; Queensland Code, ss. 426, 427, 428. It is immaterial that D.'s promise may be to do something unlawful: *Reg. v. B.* (1953) 53 S.R. (N.S.W.) 497. Cf. *Papworth* (1944) 44 S.R. (N.S.W.) 395.

82. Cf. Crimes Act, 1900 (N.S.W.), s. 178B, creating an offence of obtaining property by giving a valueless cheque.

83. *Knowling* (1877) Knox 329; cheque unsigned and undated. *Doyle* (1875) 13 S.C.R. (N.S.W.) (L) 261; forged cheque. Cf. *Wilson* (1916) 16 S.R. (N.S.W.) 295: front of bank note separated from back, held front alone not a valid bank note.

The difficulty in the way of holding that the giving of a formally valid cheque is a false pretence if there are no funds to meet it is that the implication may be no more than that there will be funds available when the cheque is presented, which is a future fact. The courts have surmounted this difficulty by the rather strained method of saying that the giving of a cheque is a representation which "means that the existing state of facts is such that in ordinary course the cheque will be met."⁸⁴

Certainly it is quite possible to regard the giving of a cheque of even date as a representation that there are funds available to meet it even if it is presented immediately, unless there are special circumstances suggesting the contrary; but the dictum just quoted is wide enough to cover the case of a post-dated cheque also. It cannot be argued that the giving of a post-dated cheque is a representation that funds are presently available to meet it. Nevertheless the courts have drawn no distinction between even-dated and post-dated cheques as such. Thus in *Miller*⁸⁵ Stephen C.J. said:

I am of opinion, on the authority of the cases, that the giving of a post-dated cheque in payment for goods purchased with a fraudulent design, the prisoner having no funds when the cheque was drawn, nor having reason to expect any on the day of the date, is a false pretence within the statute. The prisoner represented that the cheque was "good and available" for the amount mentioned in it, and that it was of that value.

This does not mean that the giving of a cheque amounts to such a representation under all circumstances, for D. may take the precaution of persuading V. to accept a cheque on the express understanding that it will not be presented until a later date, thereby negating any implication of present ability to pay. This happened in *Muston*,⁸⁶ but as against that case it can be said that even under these circumstances D. does make a representation that "the existing state of facts is such that in ordinary course the cheque will be met", which would bring him within the doctrine of *Miller*.

In *Hattam*⁸⁷ D. took a cheque to a garage on a Saturday and asked V., a clerk there, if he would cash it. V. agreed and D. asked him if the cheque would be presented on the same day. V. said that it

84. *Hazelton* (1874) L.R. 2 C.C.R. 134, 140. For Australian cases see *Eckford* (1871) 10 S.C.R. (N.S.W.) (L) 70; *Butler* (1880) 2 S.C.R. (N.S.W.) (N.S.) (L) 289; *Arnold* (1883) 4 L.R. (N.S.W.) (L) 347; *Reidman* (1886) 3 W.N. (N.S.W.) 49.

85. (1868) 7 S.C.R. (N.S.W.) (L) 185, 189-190. Stephen C.J. went on to say that it made no difference if D. had some funds in the bank but nothing in comparison with the face value of the cheque. This, however, would go to evidence of fraudulent intent rather than law. *Ardill* (1883) Tarl. 179; *Apfel* (1872) 3 V.R. (L) 172; *Bathurst* (1870) 1 A.J.R. 40.

86. (1874) 12 S.C.R. (N.S.W.) (L) 357.

87. (1913) 13 S.R. (N.S.W.) 410.

would not and D. thereupon dated the cheque for the following Monday. After a further delay at D.'s request the cheque was eventually paid in on the following Thursday and dishonoured for insufficient funds. The New South Wales Court of Criminal Appeal approved *Miller* but did not over-rule *Muston*, distinguishing the case before them on the ground that since by the time D. gave the cheque to V. on the Saturday it was too late for V. to present it on that day, there was a representation that funds were available at any time, although as it happened the first relevant time would be Monday, and that therefore D. had made a false pretence as to the state of his bank account on the Saturday. On the general question of post-dated cheques the court said:⁸⁸

The question . . . does not turn on the considerations put to us in this case either by one side or the other. It is not correct to say that if the cheque is post-dated that is a sufficient answer for the appellants, nor to say that the prosecutor could rely on the mere giving of a post-dated cheque as the making of a misrepresentation as to the existing state of the banking account.

The whole of the circumstances had to be taken into account, and on the particular facts of the case D.'s conduct amounted to evidence of a false pretence for the jury. Nevertheless it seems clear from *Hattam* that in those jurisdictions where the difficulty is not avoided by the extension of false pretences to include false promises, the courts will not be astute to allow D. to escape conviction by relying on the distinction between even-dated and post-dated cheques.

The cases on post-dated cheques were reviewed by the Full Court of Victoria in *Kuff*⁸⁹ and the law as previously stated in *Miller*, *Muston* and *Hattam* reaffirmed. The court did not, however, advert to the point that since s. 187 of the Crimes Act, 1958 (Vic.), now includes false promises as well as false pretences, problems turning on the difference between present and future facts, whether in connection with cheques or not, no longer seem to arise in Victoria. It may be theoretically doubtful whether the fraudulent giving of a post-dated cheque is a misrepresentation of an existing fact, but there can be no doubt that it amounts to a false promise by conduct.

(6) *Fact and Law*

In several cases it has been held that if D.'s misrepresentation depends upon a question of law, it is not a false pretence; but it is submitted that these decisions are unsound in principle and will not be followed.

88. (1913) 13 S.R. (N.S.W.) 410, 413.

89. [1962] V.R. 578. Reference was also made to cases laying down similar rules in New Zealand: *Smith v. Elder* [1955] N.Z.L.R. 12; *Miller* [1955] N.Z.L.R. 1038.

The first is *Lotze*⁹⁰ in 1865. D. sold V. some cattle. In answer to V.'s inquiry D. told him that he had the right to sell the cattle. Whether D. had that right depended on the effect of a mortgage over the station from which the cattle came. It was held that a representation of this kind, even if known by D. to be untrue and made with intent to defraud, was not a false pretence because it was a representation of law, not of fact.

In *Murphy*⁹¹ D. obtained £100 from V. by handing him a certificate from an architect which entitled D. to be paid that sum for building work he had carried out, together with an authorisation for the money due on the certificate to be paid to V. instead of to D. He did not tell V. that he had already authorised the payment out to two other people of most of the £100 due under the certificate. It was held that D.'s right to receive £100 under the certificate was a question of law, the law of contract, and could therefore not be the subject of a false pretence.

Finally, in *Brien*⁹² D. obtained money from V. by representing that he had the power to let to V. the grazing rights over certain land and purporting to do so. Actually D. did not believe he had this power because he had previously let the same rights to someone else. It was held that D.'s powers over the land depended upon the effect of the earlier lease, which was a question of conveyancing law.

None of these cases is as strong an authority as at first appears. In *Lotze* only Stephen C.J. was clearly of the opinion that a question of law could not found a false pretence. Hargrave J. agreed only with much hesitation, and Wise J. dissented. In *Murphy* there was disagreement between the three members of the court as to the extent of the misrepresentation of law rule, Innes J. limiting its effect by distinguishing the case where X. owes D. money and D. owes Y. money from the case where there has been a novation by D. in favour of Y. of his contract with X., and holding that where there has been a novation D.'s statement to V. that X. owed him money would be a false pretence because it would be literally untrue. *Brien* is not strictly an authority on the point at all, for the previous lease of the grazing rights by D. was invalid, so that his statement to V. that he had the power to let the grazing rights to him was, albeit accidentally, correct; so that there was no false pretence on any view of the law. Moreover only Owen J. firmly agreed with the judgment of Stephen C.J. in *Lotze*. Simpson J. dissented and Pring J., although inclining to agree with Owen J., rested his judgment on the invalidity of the earlier lease alone.

90. (1865) 4 S.C.R. (N.S.W.) (L) 86.

91. (1888) 9 L.R. (N.S.W.) (L) 191.

92. (1903) 3 S.R. (N.S.W.) 410.

In New South Wales the effect of the decision in *Lotze* has been corrected by statute⁹³ so far as a false pretence of title is concerned, but it is submitted that the basis of the majority reasoning in both that and the later cases is unsound.⁹⁴ The suggestion that if a statement can be shown to depend upon a question of law it cannot be a false pretence is inconsistent with many other cases. Thus it is obvious that each of the following assertions of fact, held to be a false pretence, depends upon certain assumptions about the law applicable to the relevant facts: that D is unmarried;⁹⁵ that an unsigned cheque is a good cheque;⁹⁶ that D. owes money to X.;⁹⁷ that a letter signed by D.'s employer is a valid authorisation for D. to receive money from X.;⁹⁸ that a guarantee form is a form for raising money on an insurance policy;⁹⁹ that certain title deeds to land are the only existing deeds affecting the land;¹⁰⁰ that there are no charges on certain land;¹⁰¹ that a memorandum of transfer of land from V. to D. is a form of consent to a transfer of the land from X. to V.¹⁰² Indeed, it is probably possible to demonstrate that every false pretence depends at some point upon an assumption of law, but except in the three foregoing cases no importance has been attached by the courts to this consideration.

It is therefore submitted that if D. makes a fraudulent misrepresentation, and thereby obtains property, it is immaterial that the misrepresentation depends wholly or in part upon a question of law. Not only is the weight of authority against the opposite view; a distinction between law and fact in this context would exclude from the scope of obtaining by false pretences a number of frauds which the crime is clearly designed to cover.

93. Crimes Act, 1900 (N.S.W.), s. 181.

94. The Correctness of *Lotze* is also doubted in Hamilton and Addison, *Criminal Law and Procedure* (N.S.W.), (6th ed., Law Book Co., Sydney, 1956), 228.

95. *Jennison* (1862) Le. & Ca. 157.

96. *Knowling* (1877) Knox 329.

97. *Thorland* (1884) 5 L.R. (N.S.W.) (L) 412.

98. *Livingstone* (1875) 14 S.C.R. (N.S.W.) (L) 182.

99. *Aria* (1884) 4 L.R. (N.S.W.) (L) 341.

100. *Thompson* (1882) 8 V.L.R. (L) 12.

101. *Britcher* (1866) 5 S.C.R. (N.S.W.) (L) 121. At 127 Stephen C.J. distinguished his own decision in *Lotze* on the ground that the pretence in the earlier case had been exclusively a matter of law; but it is difficult to see how any pretence can be exclusively a matter of law.

102. *Lower* [1948] S.A.S.R. 227.