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NECESSITY FOR OBSERVING COMMON LAW DISTINCTION BETWEEN LARCENY AND OBTAINING BY FALSE PRETENSES UNDER MODERN STATUTES (WISCONSIN)

In *Whitmore v. State*,[1] upon delivery of a worthless check as down payment the defendant was placed in possession of an automobile sold under a conditional sales contract; by the terms of the contract, title was reserved in the vendor until the full purchase price was paid. The defendant was charged and convicted of the statutory offense of obtaining money by false pretenses. On appeal it was contended that reservation of title in the vendor precluded a conviction for obtaining money by false pretenses, as both title to and possession of the property must have been obtained in order to constitute that offense, and that the offense committed, if any, was that of larceny by trick. The court, however, held that as the legal title was retained by the vendor for purposes of security only, the property interest obtained by the defendant was sufficient to support the conviction.

The defendant's contention that he could not properly be convicted of the offense of obtaining by false pretenses was not based upon a specific requirement in the statute that title pass,[2] but rather upon the common-law distinction between the offense of larceny by trick and that of obtaining money by false pretenses. The doctrine of larceny by trick was first suggested in 1779 in *Rex v. Pear*,[3] the court holding that where by false pretenses the representor induced the representee to part with possession only, the representor was guilty of larceny. In as much as a statute adopted in 1757[4] had laid down the broad modern law of false pretenses, it would seem that the court in *Pear's Case* would have convicted the defendant of that offense, and in fact the application of the statute was urged by four dissenting judges. However, there was a distinction between the ordinary pretense situation and the situation in *Pear's Case*. In the former the person who was deceived intended to part with title, while in the latter he intended to part only with possession. This distinction, based on intention, was suggested by Eyre, B., alone, but it was immediately accepted by the courts, and has since been applied in innumerable instances.

The American courts, however, have not unanimously adopted the view that the intent of the defrauded party to pass title at the time of the transfer of possession is the determining factor in distinguishing between the offenses, although there is considerable authority to that effect.[5] In

[1] 298 N. W. 194 (Wis. 1941).

[2] Wisconsin Stats. (1939) §343.25. "Any person who shall designedly, by any false pretenses or by any privy or false token and with intent to defraud, obtain from any other person any money, goods, wares, merchandise, or other property, . . . shall . . . be punished by imprisonment."

[3] 2 East P. C. 685; 1 Leach (4th ed.) 212.

[4] 30 Geo. II, Chap. 24. This statute made the obtaining of goods by false pretenses punishable as a misdemeanor.

[5] "If the possession has been obtained by fraud, trick, or other device, and the owner of it *intends* to part with his title when he gives up possession, the offense, if any, is obtaining money by false pretenses." People v. Tomlinson, 102 Cal. 23, 36 P. 506 (1894) (italics supplied). See also State v. Loser, 132 Ia. 419, 104 N. W. 337 (1906).

several states it has rather been held that the true test is whether title actually passed to the representor as a matter of law.[6] The distinction is a fine one, and the courts have frequently encountered difficulty in observing it. There have been instances in which the court, after correctly stating the rule to be followed, clearly erred in its application of the rule to the particular situation. For instance, where an agent fraudulently purports to borrow for a non-existent principal, the offense has been held to be obtaining by false pretenses and not larceny by trick, although obviously there is neither an actual passing of title nor any intent to pass title to the representor, the intent rather being to pass title to the non-existent principal.[7] Again, there are instances where there may be a delivery of goods with the intent to pass title but for some reason no sale is effected, and yet it is held that no crime of obtaining by false pretenses is committed.[8] The consequence of the observance of the distinction by the courts is apparent; there are conceivably many instances where a defendant guilty of theft in some form must either receive a new trial or go free solely because the nature of his theft has not properly been set forth in the indictment.

Considering, then, the consequence of the application by the courts of the common-law distinction between these offenses, it is to be regretted that under existing statutes the distinction must still be observed in two-thirds of the states. The statutes in this field may in general be classified in the following manner: The majority of states have adopted statutes comparable to that of Wisconsin,[9] and make larceny and obtaining by false pretenses separate offenses as at common-law. This of course necessitates the observance of the common-law distinction, that is, the distinction between the actual passing of title and the intent to pass title, in framing an indictment. Several states have attempted to remedy the situation by abolishing any distinction between the offenses as far as the form of the indictment is concerned, the offenses being consolidated into the one general offense of larceny. The New York statute is an example of this type.[10] But these states neglected to change the methods of pleading and proof employed at common law in establishing the offenses, and for that reason the attempt has failed. The distinction must still be observed in pleading; that is, proof of facts constituting common-law larceny by trick will not sustain an indictment for larceny setting forth facts constituting the offense of obtaining by false pretenses, and *vice versa*.[11]

The remaining states have attempted to avoid this difficulty by various means. The Ohio statute provides that an indictment may contain counts for larceny and for obtaining by false pretenses, and the jury may find the defendant guilty of either offense.[12] Arkansas keeps the offenses separate, but then provides that if under an indictment for obtaining by false pretenses it is proved that the defendant obtained the property in such a manner as to amount to larceny, he is not entitled to an acquittal but shall be convicted as though the offense had been proved as charged.[13] Massachusetts consolidates the

[6] "That principle that, so long as the defrauded party retains either title or control over the property, the crime of obtaining is not consummated, has general support both in reason and authority." Bates v. State, 124 Wis. 612, 103 N. W. 251 (1905). See also State v. Burke, 189 Wis. 641, 207 N. W. 251 (1926). There has been considerable discussion as to which rule is better founded in reason and authority and should for that reason be adopted by all the courts as the sole test. See Note (1924) 9 Iowa L. B. 204, 209: "It has been held, however, in other states, and it is submitted, correctly, that the true test for distinguishing between larceny by trick and obtaining property by false pretenses, is whether or not, at a matter of law, the defendant received a property interest in the goods involved."

[7] Lewer v. Commonwealth (Pa. 1827), 15 S. & R. 93. See also Beale, The Borderland of Larceny (1892), 6 Harv. L. Rev. 244. Professor Beale cites several instances of convictions for obtaining by false pretenses where title did not pass, and other instances of convictions for larceny by trick where title did pass.

[8] In People v. Camp, 56 Mich. 548, 23 N. W. 216 (1885), goods were fraudulently obtained from one who had no power to sell; the court held that the offense committed was not that of obtaining by false pretenses.

[9] See note 2, *supra*.

[10] N. Y. Penal Code (Gilbert 1940) §1290.

[11] See People v. Dumar, 106 N. Y. 502, 13 N. E. 325 (1887).

[12] Ohio Code Ann. (Page 1939), §13437-23.

[13] Arkansas Stats. (Pope 1937), §§3073, 3075.

offenses, the same as New York, but further provides that an indictment for the general offense of larceny is sustained by proof that the defendant committed either the offense of larceny or that of obtaining by false pretenses.[14]

The statutes of twenty-eight of the states are similar to those of Wisconsin and New York; these statutes perpetuate the existence of a distinction the application of which constitutes a definite impediment to the administration of justice. The need for statutory reform is apparent. The majority of the legislatures of the states have either been blind or indifferent as regards the situation or their attempts to remedy it have proved inadequate, and in order to attain a just result under such statutes the courts have been forced to make technical and narrow distinctions—to strain in their application of law and fact in order to support the offense charged in the indictment. Thus we find the court in the instant case holding that "where goods are sold under a conditional sales contract and the legal title is merely retained for purposes of security, the vendee gets a sufficient property interest to support a conviction of obtaining money by false pretenses," and again that "the doctrine that one must obtain title and possession in order to be guilty of the crime of false pretenses cannot mean an absolute title because any title obtained by fraud is voidable and the requirement would make it impossible for the crime to be consummated."[15]

The situation is one that may be remedied by appropriate legislation. The statutes adopted by Ohio and Arkansas have achieved this result,[16] but the simplest remedy and the one which offers the fullest protection for the rights of the defendant is that of Massachusetts.[17] The right of the defendant to have sufficient knowledge of the exact accusation made against him in the indictment is adequately protected by a provision giving him the right to demand the state to file a bill of particulars.[18] Thus individual rights are fully protected and the possibility of the defendant being given a new trial or set free because his theft has not properly been set forth in the indictment is eliminated.

THOMAS H. CHILDERS.

[14] Mass. Laws Ann. (1932), Chap. 266, §30; Chap. 277, §41.

[15] Whitmore v. State, cited *supra* note 1, at p. 195.

[16] See notes 12 and 13, *supra*.

[17] See note 14, *supra*.

[18] Mass. Laws Ann. (1932) Chap. 277, §40.

CONSPIRACY UNDER THE LINDBERGH KIDNAPPING LAW (FEDERAL)

In *Hudspeth, Warden v. McDonald*[1] the Circuit Court of Appeals, Tenth Circuit, reversed the decision of the District Court for the District of Kansas which had released the defendant, McDonald, on a writ of habeas corpus. McDonald had previously been convicted of having conspired with others in the State of Minnesota to violate the Lindbergh Kidnapping Law.[2] The facts are as follows: Edward George Bremer was seized at St. Paul, Minnesota, by certain of the conspirators and transported to their hideout in the State of Illinois. It was agreed that they would hold him for a ransom of $200,000. To avoid discovery and arrest and to the end that they might safely enjoy the profits and fruits of their crime they agreed to convert the ransom money into other currency at various places deemed by them to be propitious for that purpose. There was no evidence of the defendant's having been bodily present within the State of Minnesota during or after the time the alleged offense was committed, but, on the contrary, he did not acquire knowledge of the conspiracy and its unlawful purpose until some four months after the ransom

[1] 120 F. (2d) 962 (C. C. A. 10th, 1941).

[2] 47 Stat. 326 (1932). In 1934 this act was amended. The taking of a minor by a parent was specifically excepted, the penalty was increased, and a proviso was inserted creating a presumption that a person has been transported in interstate or foreign commerce if he or she has not been released within seven days after having been unlawfully kidnapped. 48 Stat. 781 (1934), 18 USCA §408a (Supp. 1940).

money was paid and Bremer released. He came into the case for the sole purpose of exchanging the marked ransom money for unmarked money in consideration of a 25 per-cent commission.[3] The defendant was found guilty of having "conspired to kidnap in interstate commerce" and was sentenced to the penitentiary for fifteen years by the District Court for the District of Minnesota.

In upholding the conviction of McDonald the court was faced with two perplexing problems, viz.: (a) Was the defendant a member of the conspiracy to kidnap in interstate commerce; (b) was the defendant subject to the jurisdiction of the Minnesota District Court?

The Lindbergh Law contained two substantive provisions: (1) It penalized kidnapping in interstate commerce; (2) it penalized conspiracy to kidnap in interstate commerce. A careful analysis of the statute would seem to require the conclusion that only those acts actually concerned with movement or transportation in interstate commerce are prohibited.[5] The material part of the statute follows: "Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person . . . and held for ransom . . ."[6] shall be punished.

The defendant sought release on the theory that the District Court of Minnesota had no jurisdiction of the offense charged against him in the indictment because the conspiracy to kidnap in interstate commerce, if any, was fully consummated upon the payment of the ransom money and the release of Bremer on February 6, 1934, and his acts, if any, occurring subsequent to such date, are not within the denouncement of the statute on which he was indicted, tried and convicted.[7]

The court was forced to do a neat bit of judicial juggling to apply the Lindbergh Law to the factual situation. The movement in interstate commerce concept received very little emphasis by the court. Major emphasis was placed on determining the consummation of the criminal conspiracy. This appears to be the criterion of the court rather than the commerce clause.[8] The legalistic language of the court in disposing of the first question propounded, reiterated a settled rule of law that a criminal conspiracy, once formed, continues till the object for which it was formed has been accomplished.[9] The court in determining when the object of the conspiracy has been accomplished seems to have tested it as being a question of fact to be resolved by common sense, and experience. Parts of the opinion are perhaps worthy of quotation: "the conspiracy charged in the indictment had its inception in the agreement to kidnap Bremer but it did not end with the payment of the ransom and his release. The exchange of the ransom money for other currency was as much a part of the conspiracy as was the kidnapping of Bremer. The object of this type of conspiracy is to get possession of unmarked money which may be used with safety. It begins with the plan to abduct and ends when the ransom money is changed into unmarked currency.

[3] It is estimated that there are from eight to twenty individuals connected with the average kidnapping—from the "finger" man down to the disposer of the "hot" money, if a ransom is paid.

[4] See 89 F. (2d) 128 (C. C. A. 8th, 1937).

[5] It would seem that McDonald was not indictable for either of these two substantive provisions, because the victim of the kidnapping had been released on February 6, 1934, and his knowledge of the crime and his acts occurred subsequent to the payment and release of the victim. It would also seem that the kidnapping in interstate commerce terminated with the release of Bremer after payment of the ransom money. At that identical moment the conspiracy to kidnap in interstate commerce had been finally consummated.

[6] See supra, note 2.

[7] The District Court for the District of Kansas released the defendant on a habeas corpus proceeding.

[8] For an excellent discussion on this problem see: Fisher and McGuire, Kidnapping and the So-Called Lindbergh Law (1940) 28 Geo. L. J. 908.

[9] See supra, note 4. The court in attempting to formulate a general rule as to when a continuing criminal conspiracy is at an end said: "Whenever the unlawful object of the conspiracy has reached that stage of consummation, whereat the several conspirators having taken in spendable form their several agreed parts of the spoils, may go their several ways, without the necessity of further acts or consultation, about the conspiracy, with each other or among themselves, the conspiracy has ended."

"Nor does the jurisdiction of the District Court of Minnesota to try the defendant depend upon whether he was a member of the conspiracy from its inception. If, after the ransom money was paid and Bremer released, appellee with full knowledge of the conspiracy and its unlawful purpose, agreed to exchange the ransom money for other money, he thereby became a party to it with the same effect as if he had joined it at its inception."

A review of some of the cases, relied upon by the court is essential to an understanding of the rationale of what courts have done under the commerce clause.[10] In *Skelly v. United States*[11] the accused was not a party to the original conspiracy but only came into it after payment of the ransom and the release of the victim and took part in exchanging marked ransom money for unmarked money. Skelly was indicted, tried and convicted for conspiracy to kidnap in interstate commerce in violation of the Lindbergh Law. The court found that the defendant was an accessory after the fact and therefore guilty of the conspiracy.[12] The court indicated that the criminal agreement had two purposes which constituted one entire conspiracy, the commission of the substantive offense by principals and the commission of accessory criminal acts by "accessories after the fact." The court has shown a willingness to apply the broader interpretation of commerce to criminal cases in holding that both purposes are embraced within the conspiracy provision of the act and that such conspiracy was not completed until both its objects were effected. Analysis reveals the very strained construction employed by the court in order to apply the "accessory after the fact" concept.[13]

In *Lew Moy v. United States*,[14] the defendants were convicted on an indictment which charged a conspiracy to import Chinese into the United States contrary to an existing statute. In that case the court said that the conspiracy did not end the instant the Chinese whose illegal entry was procured and facilitated were brought across the international boundary. A successful consummation required the necessity to evade the immigration officials. The court concluded that the subsequent assistance by defendants to transport the Chinese into the interior and conceal their identity was an essential part of the unlawful project bringing the defendants within the intendment of the statute.[15] As recently articulated, the legislative policy behind the act contemplates and seeks to bring about punishment of all individuals who knowingly associate themselves with the conspirators; and it is intended to be interpreted to reach all who coalesce to achieve any object prohibited by the act.[16] It is submitted that the courts in seeking to determine when the conspiracy in interstate commerce terminates, evolves the theory that the conspiracy comprises inseparable elements that are inextricably interwoven to comprise a single scheme, the individual parts of which are incapable of division or separation. Decisions of the federal courts involving interpretations of the law reveal a consistent tendency to sustain prosecutions under the law.[17] Whether the commerce clause has been abandoned or enlarged depends on the interpretation given to it by the courts. Words, as we are told, "are flexible."

[10] For an illuminating discussion on this problem see: Finley, The Lindbergh Law (1935) 12 N. Y. U. L. Q. 646.

[11] 76 F. (2d) 483 (C. C. A. 10th, 1935).

[12] There is no definition in the statute of an "accessory after the fact to the crime of conspiracy."

[13] There is no federal legislation satisfactorily defining an "accessory after the fact." At common law an accessory after the fact is one who, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon in order to hinder the felon's apprehension, trial, or punishment. 4 Blackstone, Commentaries 37.

[14] 237 F. 50 (C. C. A. 8th, 1916).

[15] Accord: Lasky v. United States, 82 F. (2d) 672 (C. C. A. 10th, 1936). Shannon v. United States, 76 F. (2d) 490 (C. C. A. 10th, 1935). These are but a few of the examples that might here be adduced.

[16] See hearings before Committee on the Judiciary on H. R. 5657, 72d Congress, 1st Sess. (The incensed people's representatives in the House deliberating upon the Lindbergh Law were vindictive.) See Note, 26 J. Crim. L. 762 (1936).

[17] Cf. Lee v. United States, 106 F. (2d) 906 (C. C. A. 9th, 1939); France v. United States, 164 U. S. 676 (1896).

After deciding that McDonald became a party to the conspiracy with the same effect as if he had joined it at its inception, the court in the concept of "constructive presence" found jurisdiction. This is not a new doctrine in the law. It is a settled rule of law that a member of a conspiracy can be constructively present by virtue of the acts of his co-conspirators.[18] The court relied upon the language of four United States Supreme Court decisions in holding that a party defendant may be constructively present in a state in which a crime is being or has been committed, as well as if he were actually present therein.[19]

One of the main arguments against the concept of "constructive presence" is that it is a transgression of the requirement of the Constitution that the trial of crimes shall be held in the State and district where the crime shall be committed.[20] Mr. Justice Holmes in his dissenting opinion in the Hyde case[21] pointed out serious objections to the use of the fiction of constructive presence. The use of a fiction hinders precise analysis. His logical reasoning is that although an overt act is necessary to complete the offense, it is in fact no part of the conspiracy.[22] Therefore it ought not to be said that an overt act constituting no part of the crime charged, should have any bearing in determining jurisdiction. Otherwise, if a conspiracy is present wherever an overt act is done it may be at the choice of the government to prosecute in any one of twenty States in none of which the conspirators had been.[23]

It is submitted that in view of the present day need for an efficient weapon to combat organized crime it is more suitable, in order to facilitate the administration of criminal justice, to take the conspirators from their homes and hideouts, guaranteeing them a fair trial, rather than subjecting the prosecuting witnesses to the inconvenience and financial loss that would result from traveling long distances in order to be available for the trial.

Another argument that has been offered but which seemingly has little merit is the possibility that a conspirator may be convicted of the same offense in each and every other state where other acts were committed as well as in the state where the conspiracy was originally formed. The answer to this argument emanates from the fact that in a prosecution for conspiracy, venue may be laid either in the district where the illegal agreement was formed or in any district where an overt act was committed.[24] The crime of conspiracy is a continuing one and the overt act in each state constitutes a distinct offense separably indictable and punishable.

It is interesting to note that Congress, in 1936, passed another amendment designed to reach persons who knowingly handled ransom money in connection with a violation of the kidnapping act.[25] It is to be questioned whether this amendment will be taken advantage of by the government in future situations presented by the McDonald case. The results reached by the courts under the conspiracy clause have included persons who knowingly handled ransom money in connection with a violation of the kidnapping act, thus threatening the perpetrators of this type of crime with swift, certain and heavy-handed punishment. Perhaps the amendment will be of value in cases more doubtful than this one. At any rate it is a further safeguard and assurance that kidnapping is to be reduced to a minimum in this country.

KENNETH L. HECHT.

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[18] Easterday v. McCarthy, 256 F. 651 (C. C. A. 2d, 1919).

[19] Hyde v. United States, 225 U. S. 347 (1911); Brown v. Elliott, 225 U. S. 392 (1911); Price v. Henkel, 216 U. S. 488 (1909); Burton v. United States, 202 U. S. 344 (1905).

[20] U. S. Const. Amend. IV.

[21] See Mr. Justice Holmes dissenting opinion, Hyde v. United States, supra, note 19. This was a 5-4 decision.

[22] Lasky v. United States, supra, note 15.

[23] See Note, 24 J. Crim. L. 779, 781 (1933), as to "double jeopardy."

[24] Chew v. United States, 9 F. (2d) 348 (C. C. A. 8th, 1925).

[25] 49 Stat. 1099 (1936), 18 USCA 408c-1 (Supp. 1940). Punishment is limited to a fine of $10,000 or imprisonment in the penitentiary for 10 years, or both.