Louisiana Law Review

Volume 3 | Number 1
November 1940

Criminal Law - False Pretense and Confidence Game Statute - Meaning of "Property"

R. B. L.

had been held that the board had no power to waive. But even in such cases, a constant disregard of the by-laws by the board of directors with the acquiescence of the stockholders may effect their repeal. Thus, a habitual failure of the directors to comply with by-laws providing for notice of assessments was held to abrogate them.[5] Continued disregard of the by-laws by the directors in assessing stock for a greater sum than provided,[6] or in making loans for a number of years,[7] has been held to result in waiver.

J. W. L.

CRIMINAL LAW — FALSE PRETENSE AND CONFIDENCE GAME STATUTE—MEANING OF "PROPERTY"—Defendant, superintendent of the Louisiana Highway Commission, used highway commission labor to paint his house and improvements. He was charged with obtaining "money or property" by means of false pretenses[1] and also by means of the confidence game.[2] *Held*, that labor, being neither money nor property, was not covered by these statutes. *State v. Smith*, 197 So. 429 (La. 1940).

Perhaps a result more desirable than the one reached in the instant case would have been achieved if the court had adopted a broader construction of the word "property."[3] Yet the decision has ample support in legal precedent.[4] It may appear rather

---

5. Graves Valley Irr. Co. v. Fruita Imp. Co., 37 Colo. 483, 86 Pac. 324 (1906).

6. Huxtable v. Berg, 98 Wash. 616, 168 Pac. 187 (1917).

7. Blair v. Metropolitan Savings Bank, 27 Wash. 192, 67 Pac. 609 (1902).

1. La. Rev. Stats. of 1870, § 813 [Dart's Crim. Stats. (1932) § 945]: "Whoever, by any false pretense, shall obtain or aid and assist another in obtaining, from any person, money or any property, with intent to defraud him of the same, shall on conviction be punished by imprisonment at hard labor or otherwise, not exceeding twelve months."

2. La. Act 43 of 1912, § 1 [Dart's Crim. Stats. (1932) § 946]: "Every person who shall obtain or attempt to obtain from any other person or persons, any money or property, by means or by use of any false or bogus checks, or by any other means, instrument or device, commonly called the confidence game, shall be imprisoned with or without hard labor for not less than three months nor more than five years."

3. Cf. State v. Thatcher, 35 N.J. Law 445, 454 (1872), where the New Jersey Supreme Court, in giving the term "valuable thing" the broadest possible interpretation, declared that, "Under our humane system of criminal law, judicial ingenuity should not exhaust its resources to reach an interpretation in favor of wrong." Few courts have followed this reasoning.

4. Gleason v. Thaw, 185 Fed. 345, 34 L.R.A. (N.S.) 894 (C.C.A. 3rd, 1911), affirmed 236 U.S. 558, 35 S.Ct. 287, 59 L.Ed. 717 (1915) (services are not included within the word "property" as construed in connection with false pre-

strange that the word "property" has been so narrowly defined in connection with our criminal statutes, while at the same time it is accorded a very broad interpretation when considered in connection with the "due process" clause of the Constitution.[5] A partial explanation lies in the fact that the early American criminal statutes were modeled after and interpreted in the light of the contemporary laws of England which at that time protected only money and chattels.[6] It was the express legislative intent to follow the English common law when the original Louisiana false pretense statute was enacted in 1805.[7] The present statute is almost identical.[8] Although the confidence game statute was passed at a later date when the nature and value of intangibles and property rights therein were fully recognized, the similarity of its phraseology to that of the false pretense statute is probably responsible for the same narrow interpretation.[9]

In view of the fact that the court has decided with apparent finality upon a limiting interpretation of our false pretense and confidence game statutes, it may be well to consider what changes in phraseology would be necessary in order to make these statutes all-inclusive. In many states the lawmakers added the words "or any valuable thing." The Mississippi Supreme Court held that a statute so worded embraces services obtained by false pretense.[10] However, the Kansas Supreme Court has held that even this apparently all-inclusive wording does not cover the obtaining of a loan extension by fraudulent means.[11] The court declared that

---

tense statutes); approved in Carville v. Lane, 117 Me. 95, 101 Atl. 968 (1917) (loan renewal is not property). Ex parte Wheeler, 7 Okla. Cr. App. 562, 124 Pac. 764 (1912) (medical services are not property).

5. In re Tiburcio Parrott, 1 Fed. 481 (C.C. Cal. 1880) (court held labor to be property).

6. 30 George II, c. 24, § 1 (1757) included money, goods, wares, and merchandise. 52 George III, c. 64, § 1 (1812) added choses in action.

7. Act of July 3, 1805, of Legislative Council of the Territory of Orleans was supplementary to the Crimes Act of May 4, 1805, § 33, providing: "That all crimes, offenses and misdemeanors herein before named, shall be taken, intended and construed according to and in conformity with the common law of England. . . ." The same provision, except for the words "herein before named," is to be found in La. Rev. Stats. of 1870, § 976. See State v. Lacombe, 12 La. Ann. 195, 196 (1857) (common law used to interpret the meaning of larceny statute); State v. Mullen, 14 La. Ann. 570 (1859) (common law used to define crime of murder); State v. Vicknair, 52 La. Ann. 1921, 28 So. 273 (1900) (common law used to define crime against nature).

8. Compare La. Rev. Stats. of 1870, § 813 [Dart's Crim. Stats. (1932) § 945] with Act of July 3, 1805, of the Second Session of the Legislative Council of the Territory of Orleans, c. iv, § 2.

9. Compare La. Rev. Stats. of 1870, § 813 [Dart's Crim. Stats. (1932) § 945] with La. Act 43 of 1912, § 1 [Dart's Crim. Stats. (1932) § 946].

10. State v. Ball, 114 Miss. 505, 75 So. 373 (1917).

11. State v. Tower, 122 Kan. 165, 251 Pac. 401, 52 A.L.R. 1160 (1926).

such an extension is a mere "pecuniary advantage" and is not included within the wording "or other valuable thing whatsoever." It follows that if all doubt is to be eliminated, the statutes should include "any tangible or intangible thing of value whether the same be money, property, rights in action, labor, services, or any other pecuniary advantage."

R. B. L.

CRIMINAL PROCEDURE—OPENING STATEMENT—ADMISSIBILITY OF EVIDENCE NOT MENTIONED IN OPENING STATEMENT—Certain portions of the district attorney's opening statement in a criminal trial were objected to by defendant as untrue and hence prejudicial to the defendant on the ground that the opening statement is regarded as evidence. *Held,* it is the mandatory duty of the district attorney in all cases triable by jury to make an opening statement explaining the nature of the charge against the accused and the evidence by which he expects to establish the same. The statement has no binding force and is designed only "to enable the jury to understand and appreciate the testimony as it falls from the lips of the witnesses."[1] *State v. Sharbino,* 194 La. 709, 194 So. 756 (1940).

The spare remarks in the Louisiana criminal jurisprudence throw very little light on the functions and operation of the opening statement. The present case is employed in this note only as a point of departure for a very brief discussion of a few current problems raised by the opening statement in Louisiana criminal trials. Prior to the adoption of the Code of Criminal Procedure in 1928, there seems to have been no requirement of an opening statement, nor can any cases dealing with such a problem be found. Article 333 of the Louisiana Code of Criminal Procedure states that in criminal cases tried before a jury, "the trial shall proceed in the following order. . . ." Among the steps listed is the opening statement by the district attorney "explaining the nature of the charge and the evidence by which he expects to establish the same."[2] Many states have held similar statutes merely directory when the question of omission of the statement has arisen,[3]

1. Quoted in State v. Sharbino, 194 La. 709, 716, 194 So. 756, 758 (1940) from People v. Van Zile, 73 Hun 534, 539, 26 N.Y. Supp. 390, 393 (1893).

2. Art. 333, La. Code of Crim. Proc. of 1928.

3. People v. Weber, 149 Cal. 325, 86 Pac. 671 (1906); Hendrickson v. Commonwealth, 23 Ky. 1191, 64 S.W. 954 (1901); People v. Koharski, 177 Mich.