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senting himself as agent for the signer. Even if the seller's capacity as agent is known, care should still be exercised since there is always the possibility that he completed the instrument in excess of the authority given.

GORDON E. NEUENSCHWANDER

## *Intent in Larceny by Trick in Ohio*

**A** BUILDING CONTRACTOR who obtained money from certain individuals with their consent by fraudulently promising that he would build houses for them was convicted of larceny by trick under Ohio General Code Section 12447-1. In his charge to the jury, the trial judge omitted reference to the intent of the accused to deprive the owner permanently of his property as an essential element of the crime of larceny by trick under the statute. The Court of Appeals found the omission reversible error, but the Ohio Supreme Court, reversing the appellate court, held that intent to deprive the owner permanently of his property is not an essential element of the crime under Section 12447-1.<sup>1</sup>

The Court of Appeals had held that while Section 12447-1 does not mention intent, it should be construed in the light of Ohio General Code Section 12447, the general larceny section, which for a conviction, does require the intent to deprive the owner permanently of his property. However, the Supreme Court reasoned that the larceny by trick statute would have no real purpose were it construed merely as a supplement to the general larceny statute and that where a statute is silent on intent, it indicates a legislative intent that "proof of a specific intent" is unnecessary, "general intent to do the proscribed act" being sufficient.<sup>2</sup>

Prior to the enactment of Section 12447-1,<sup>3</sup> larceny by trick was punishable under Section 12447, the general larceny section.<sup>4</sup> To constitute the

<sup>1</sup> State v. Healy, 156 Ohio St. 229 (1951)

<sup>2</sup> The court did not refer to Kilbourne v. State, 84 Ohio St. 247 (1911), which held a statute unconstitutional which defined a serious crime without requiring a criminal intent.

<sup>3</sup> OHIO GENERAL CODE § 12447-1 was enacted September 16, 1943 and provides: "Whoever obtains possession of, or title to, anything of value with the consent of the person from whom he obtained it, provided he induced such consent by a false or fraudulent representation, pretense, token, or writing is guilty of larceny by trick, and, if the value of the thing obtained by such false or fraudulent representation, pretense, token, or writing is thirty-five dollars or more, shall be imprisoned in the penitentiary not less than one year nor more than seven years, or, if the value is less than that sum, be fined not more than two hundred dollars or imprisoned not more than thirty days, or both.

<sup>4</sup> OHIO GENERAL CODE § 12447 provides: "Whoever steals anything of value is guilty of larceny . . ." Because the statute mentions only larceny to be a crime, the

crime of larceny by trick, the taker had to intend at the time of the taking to deprive the owner permanently of the thing delivered, and had to induce the owner by a fraudulent representation to part voluntarily with the possession of his property, the owner intending that the thing delivered be returned to him or disposed of under his direction.<sup>5</sup> If the owner, induced by and relying upon a false representation made by the taker with the intent to defraud the owner, intended to transfer not only possession of, but also title to, the property, the crime was false pretenses, punishable under Ohio General Code Section 13104,<sup>6</sup> and not larceny by trick.<sup>7</sup> The taker, therefore, could successfully defend a prosecution for larceny by trick by proving that he obtained title to, rather than mere possession of, the property of the owner.<sup>8</sup>

In order to constitute the crime of false pretenses under Section 13104, the representation made by the taker, unlike the representation in the crime of larceny by trick,<sup>9</sup> had to relate to a past or present fact; a mere representation or promise in relation to a future transaction, however fraudulent, was not within the false pretense statute.<sup>10</sup> Thus a taker who, with intent to

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courts have resorted to the common law definition of larceny, which includes larceny by trick. *Miller v. State*, 20 Ohio L. Abs. 408 (Ohio App. 1935).

<sup>5</sup> *Kellogg v. State*, 26 Ohio St. 15 (1875); *Miller v. State*, 20 Ohio L. Abs. 408 (Ohio App. 1935); *Eiseman & Landsman v. State*, 12 Ohio L. Abs. 145 (Ohio App. 1932).

The Ohio Supreme Court in the principal case stated that "this court has held that even where the taking is not coupled with an intention to permanently deprive the owner of possession it is nevertheless larceny." The court cited for authority *Berry v. State*, 31 Ohio St. 219 (1877) where a defendant took and carried away property without the owner's consent, with intent to conceal it until the owner offered a reward. It is apparent that the defendant did intend to deprive the owner permanently of his property unless the owner complied with a condition the defendant had no right to impose. See MAY, CRIMINAL LAW § 240 (4th ed. 1938); CLARK & MARSHALL, CRIMINAL LAW § 327 (4th ed. 1940)

<sup>6</sup> OHIO GENERAL CODE § 13104 provides: "Whoever, by false pretense and with intent to defraud, obtains anything of value" Cases construing this section are *State v. Joseph*, 115 Ohio St. 127, 152 N.E. 186 (1926); *Griffith v. State*, 93 Ohio St. 294, 112 N.E. 1017 (1915); *Williams v. State*, 77 Ohio St. 468, 83 N.E. 802 (1908); *Earp v. State*, 21 Ohio App. 417, 153 N.E. 245 (1926); *Zuckerman v. State*, 24 Ohio C.C. (N.S.) 404 (1905); *State v. Perrin*, 9 Ohio N.P. (N.S.) 97 (1909).

<sup>7</sup> The reason the taker was not guilty of larceny by trick is that "at the time of the transaction, he does not take and carry away the goods of another person, but the goods of himself." *Kellogg v. State*, 26 Ohio St. 15, 19 (1875).

<sup>8</sup> *Kellogg v. State*, 26 Ohio St. 15 (1875); *Kudla v. State*, 1 Ohio L. Abs. 43 (Ohio App. 1922).

<sup>9</sup> In larceny by trick the false representation could relate to past, present, or future facts. Cases cited Note 5 *supra*.

<sup>10</sup> *Harris v. State*, 125 Ohio St. 257, 181 N.E. 104 (1932); *Horton v. State*, 85 Ohio St. 13, 96 N.E. 797 (1911); *State v. Gibbs*, 9 Ohio N.P. (N.S.) 129 (1909) *aff'd in part*, 82 Ohio St. 456, 92 N.E. 1123 (1910); *Winnett v. State*, 18 Ohio

defraud, induced an owner to part with title to his property by a false representation of a future fact could escape punishment under both the larceny and the false pretense statutes.

Section 12447-1 makes the taker guilty of the crime of larceny by trick if he " obtains *possession of, or title to*, anything of value with the consent of the person from whom he obtains it, provided he induces such consent by a false or fraudulent representation, pretense, token, or writing " (Italics added). Under this statute the taker cannot successfully defend a prosecution for larceny by trick by proving that he fraudulently obtained title to, rather than mere possession of, the property of the owner. The abrogation of this defense, in effect, combines into one crime the crimes of larceny by trick and false pretenses.<sup>11</sup>

The appellate court in the principal case stated that the elimination of this defense was the apparent legislative purpose in adopting Section 12447-1.<sup>12</sup>

An Ohio appellate court, in the only interpretation of Section 12447-1 prior to the principal case, stated that the taker is guilty of larceny by trick regardless of whether the false or fraudulent representation, pretense, token or writing relates to past, present or future facts, events and transactions.<sup>13</sup> The court added that the legislature apparently intended the statute to remedy the inadequacies of the older larceny and false pretense statutes by making it a penal offense for a taker to obtain title to property from the owner by a false representation relating to a future fact.<sup>14</sup>

These conclusions of the appellate courts seem sound.

It is extremely doubtful that the purpose of the General Assembly was, as stated by the Supreme Court in the principal case, to eliminate intent to

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C.C. 515 (1899), *aff'd*, 62 Ohio St. 650, 58 N.E. 1102 (1899); *Norris v. State*, 25 Ohio St. 217 (1874); *Dillingham v. State*, 5 Ohio St. 280 (1855); *In re False Pretenses*, 9 Ohio Dec. 825 (1899)

If the representation concerning a future fact was accompanied by a representation of a past or existing fact, and reliance was placed in part upon the latter, there was sufficient representation of a present or past fact to bring the case within the false pretense statute. *Earp v. State*, 21 Ohio App. 417, 153 N.E. 245 (1926); *Zuckerman v. State*, 24 Ohio C.C. (N.S.) 404 (1905)

<sup>11</sup>The General Assembly, however, re-enacted § 13104, the false pretense statute, when it enacted § 12447-1.

California, Massachusetts, and New York have abolished larceny by trick, embezzlement and false pretenses as distinctive crimes and combined all into single statutory offenses. CAL. PEN. CODE §§ 484 and 490(a) (Deering 1949); MASS. ANN. LAWS c. 266, § 30 (1934); N.Y. PEN. LAW § 1290.

<sup>12</sup>*State v. Healy*, 58 Ohio L. Abs. 33 (Ohio App. 1950).

<sup>13</sup>*State v. Singleton*, 85 Ohio App. 245, 87 N.E. 2d 358 (1949) The Supreme Court refused to review the case, but affirmed this proposition in the *Healy* case.

<sup>14</sup>The New York Court of Appeals refused to adopt such a construction of § 1290 of the N.Y. PEN. LAW, declaring that the statute " was not designed to, and did not, broaden the scope of the crime of larceny or designate as criminal that which

deprive the victim permanently of his property as an essential element of the crime of larceny by trick.<sup>15</sup>

The legislature re-enacted the false pretense statute when it enacted Section 12447-1. A taker who obtains title to the property of another with his consent by falsely representing a past or existing fact can be indicted under either the larceny by trick or the false pretense statute. If the taker is indicted under the larceny by trick statute, the state need not show an intent to deprive one permanently of his property, according to the principal case, and, if convicted, the defendant may receive a maximum sentence of seven years in the penitentiary. If, however, the taker is indicted under the false pretense statute, the state must show an intent to deprive the victim permanently of his property—but, if convicted, the defendant can receive a maximum sentence of only three years.<sup>16</sup> Thus, a lesser wrongdoer, indicted under the larceny by trick statute could be sentenced to imprisonment more than twice as long as a greater wrongdoer indicted under the false pretense statute. Could the legislature have intended such an odd result?

Furthermore, it is difficult to believe that the General Assembly intended to impose the severe punishment provided for by the larceny by trick statute upon a person who, for example, borrows an automobile from a friend representing that he intends to go to a drug store when he actually intends to teach his wife how to drive, or who borrows a tea set from a neighbor by representing that he intends to use it for one day when he actually intends to use it for several days before returning it.

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was previously innocent." *People v. Karp*, 298 N.Y. 213, 216, 81 N.E.2d 817, 817 (1948). California and Massachusetts decisions have reached the same result as OHIO GENERAL CODE § 12447-1 by holding that a present intention not to perform in the future is a present fact. *People v. Mason*, 86 Cal. App.2d 445, 195 P.2d 60 (1948); *People v. Gordon*, 71 Cal. App.2d 606, 163 P.2d 110 (1945); *People v. Ames*, 61 Cal. App.2d 522, 143 P.2d 92 (1943); *Commonwealth v. Morrison*, 252 Mass. 116, 147 N.E. 588 (1925); *Commonwealth v. Walker*, 108 Mass. 309 (1871). *But cf.* *People v. Jackson*, 24 Cal. App.2d 182, 74 P.2d 1085 (1937); *Commonwealth v. Althause*, 207 Mass. 32, 93 N.E. 202 (1910).

<sup>15</sup> The California, Massachusetts, and New York statutes, *supra note 10*, expressly require a specific intent on the part of the taker. The New York statute, after defining larceny, provides: "Hereafter it shall be immaterial in, and no defense to a prosecution for larceny that 1. The accused obtained possession of, or title to such property with the consent of the person from whom he obtained it, provided he induced such consent by a false or fraudulent representation, pretense, token or writing; " There is a marked similarity between the language of OHIO GENERAL CODE § 12447-1 and this part of the New York statute.

<sup>16</sup> See CLARK & MARSHALL, CRIMINAL LAW § 364 (4th ed. 1940)