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Code definition, the defendants were distributors and the plaintiffs were retailers. These are two distinct types of operations, and their classification as such is proper.[32] As pointed out by the court, the fact that at the time of the actual sale to the consumer there is a great similarity in what is done will not justify a holding that both are using the same method of distribution. The defendants came under the statutory definition of distributor, and so were in the scope of the Director's order..

It is interesting to note that in *Challenge Cream and Butter Ass'n v. Parker*[33] the court held an order of the Director void which provided that minimum prices to stores for milk sold in fiber containers should be one-half cent higher than the price for milk sold in bottle containers. The plaintiffs in *Misasi* contended that the *Challenge* case supported their position. But in the *Challenge* case the court held that the Milk Control Act did not authorize the Director to fix a minimum price for milk delivered in fiber containers which is higher than the minimum price for the same quantity delivered in bottles. That is, the Act did not give the Director the authority to base minimum prices on a difference in the type of container used. The court held that the type of container used is not a "method of distribution." The *Challenge* case, then, is distinguishable.

The decision in *Misasi* is illustrative of the trend of the California courts to give the Milk Control Act a broad interpretation and to uphold the orders of the Director, where possible, and to insure an adequate supply of pure milk at a reasonable price to the consumer. It seems that the courts are likely to continue this policy, since it reflects the present trend in government regulation, especially of industries as vital to the public health as the milk industry. If there is to be a change, it will probably have to come from the legislature by a more specifically worded act which limits the regulation.

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[32] Note 28 *supra.*

[33] 23 Cal. 2d 137, 142 P.2d 727 (1943).

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FALSE PRETENSES: Obtaining Contractual Obligation by Fraudulent Representations as Criminal Offense

The false pretense and theft statutes of many states are powerful deterrents to commercial criminals because they expressly make it a criminal offense to obtain a contractual obligation by fraudulent representations. These statutes are often so worded to include the act of designedly, by false pretense, and with intent to defraud, obtaining the signature of any person to any written instrument, the false making of which would be punished as forgery.[1] Another type of statute makes it a separate offense in express terms to obtain a signature under the same circumstances.[2] The New York statute on larceny, amalgamating larceny, embezzlement and

[1] See, *e.g.*, IA. CODE ANN. § 713.1 (1954); see also Annot., 141 A.L.R. 210-34 (1942).

[2] N.Y. PEN. LAW § 932.

false pretenses, expressly includes a contract as property within the statute.[3] The California Penal Code is somewhat ambiguous in this regard, but the inclusive result seems to have recently been achieved in California courts by interpreting the obligation represented by the signature as personal property within the California "theft" statute.

In California, the elements of the crime of grand theft on the theory of obtaining property by false pretenses are: (1) an intent to defraud; (2) an actual fraud committed; (3) the use of false pretenses to perpetrate the fraud; and (4) reliance upon the fraudulent representations in parting with money or other property.[4] It is the fourth element of the crime with which this analysis is concerned.

The Caruso *Case*

Suppose X, sales agent for an automobile dealer, misrepresents the amount of a trade-in allowance he will give Y, the buyer, on Y's old car. Y accepts the offer and signs a conditional sales contract before the amounts are written in. X then inserts a lesser trade-in allowance and higher monthly payments than those for which the parties had contracted. At this point, has Y parted with a sufficient property interest when he has paid no money on the contract? Is the crime of false pretenses complete? The recent case of *People v. Caruso*[5] answered these questions in the affirmative. *Caruso* stands for two propositions: (1) the contractual obligation or thing in action is personal property within the meaning of the false pretense statute, and; (2) the offense is complete when this intangible obligation is obtained, regardless of whether property or money has been transferred pursuant to the terms of the instrument.

As to the first proposition, the California Supreme Court appears to have reached a contrary result by dictum in the case of *People v. Martin.*[6] The court considered that obtaining a contract was but one step in obtaining the property described, and inferred that it did not consider the contract to be personal property within the meaning of the false pretense statute. This dictum was qualified, however:[7]

> If this contract . . . be such that it may be treated as property, and thus form the basis of a prosecution for obtaining it, . . . as is claimed by appellant, then we can only say that such claim shows the accused to be guilty of an additional offense, rather than that it creates a bar to the present prosecution.

The period between *Martin* (1894) and *Caruso* (1959) is almost devoid of authority on these questions. Thus *Caruso* is important because it represents the modern viewpoint. Such additional questions as the limitations of prosecutions, the necessity for proving a benefit to the defendant or a loss to the person executing the instrument, and the jurisdiction and venue of the prosecution, revolve around the two propositions for which *Caruso* stands.

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[3] N.Y. PEN. LAW §§ 1290, 1290a.

[4] People v. Baird, 135 Cal. App. 2d 109, 114, 286 P.2d 832, 835 (1955); People v. Nesseth, 127 Cal. App. 2d 712, 715, 274 P.2d 479, 480 (1954); People v. Frankfort, 114 Cal. App. 2d 680, 697, 251 P.2d 401, 412 (1952).

[5] 176 Cal. App. 2d 272, 1 Cal. Rptr. 428 (1959).

[6] 102 Cal. 558, 36 Pac. 952 (1894).

[7] *Id.* at 568, 36 Pac. at 954.

In *Caruso*, when appellant contended tangible property must be transferred before the offense is complete, he apparently advocated the position that a note or contractual obligation is not itself property within the false pretenses statute. The court stated in this regard: "[i]t is well settled that where a promissory note or obligation to pay is obtained by the use of false representations, the note itself or other chose in action is property within the meaning of Penal Code, section 484."[8] There is an abundance of case authority to support this view of the court and also the proposition that the offense is complete when the note or obligation to pay is obtained, insofar as promissory notes are concerned. The courts have held: (1) promissory notes have legal existence as personal property when delivered to payee or whenever out of the hands of the maker;[9] (2) a promissory note is an evidence of debt and may be the subject matter of the false pretense statute;[10] (3) the defendant himself need not have received payment so long as defendant obtained possession of a note to the prejudice of the victim;[11] (4) the subsequent act of defendant in applying a portion of the proceeds of the note to the purpose for which the note was given, will not exculpate him from criminal responsibility for obtaining the note by false pretenses since the crime was complete when the note was obtained,[12] and; (5) for purposes of venue, the offense was complete where the note was delivered.[13] These holdings seem to negate the contention that tangible property need be transferred under an instrument. And, by analogy, if the obligation to pay represented by a conditional sales contract is personal property within the false pretenses statute, the same implications would apply as in the promissory note cases.

The only direct authorities for *Caruso* are *People v. Frankfort*[14] and *People v. Nesseth*[15] (relying entirely on *Frankfort* for the same propositions.) The court in *Frankfort* literally construed the Penal and Civil Codes to include promissory notes and contractual obligations within the definition of personal property. The court stated:[16]

> Section 7 of the Penal Code provides that "the word 'property' includes both real and personal property" (subd. 10), and "the words 'personal property' include money . . . things in action, and evidences of debt." (Subd. 12) "A thing in action is a right to recover money . . . by a judicial proceeding." (Civ. Code, sec. 953.) The Civil Code defines property as a "thing of which there may be ownership" (sec. 654) and states there may be ownership "of all obligations." (Sec. 655.) An obligation is a legal duty by which a person may be bound to do a certain thing, and it may arise from a contract. (Civ. Code, secs. 1427, 1428.) "If the thing stolen consists of any evidence of debt, or other written instrument, the amount of money due thereupon . . . or which in any contingency might be collected thereon . . ., is the value of the thing stolen." (Pen.

[8] *Supra* note 4 at 280, 1 Cal. Rptr. at 433.
[9] People v. Cassou, 27 Cal. App. 23, 25, 148 Pac. 810, 810 (1915).
[10] People v. Reed, 70 Cal. 529, 533, 11 Pac. 676, 678 (1886).
[11] People v. Bowman, 24 Cal. App. 781, 785, 142 Pac. 495, 498 (1914).
[12] People v. Hand, 127 Cal. App. 484, 488, 16 P.2d 156, 158 (1932).
[13] People v. Cummings, 123 Cal. 269, 272, 55 Pac. 898, 899 (1899).
[14] 114 Cal. App. 2d 680, 251 P.2d 401 (1952).
[15] 127 Cal. App. 2d 712, 274 P.2d 479 (1954).
[16] *Supra* note 14 at 703, 251 P.2d at 415.

> Code, sec. 492.) It is thus apparent that when it was shown that the victims signed promissory notes and contracts obligating themselves to pay sums in excess of $200, they parted with property. (Pen. Code, sec. 7, subds. 10, 12; sec. 484.)

Frankfort also held that although some payments had been made by the victims on the promissory notes and contracts, nevertheless the offenses that formed the basis of the prosecution were complete when the promissory notes and contractual obligations to pay were obtained by the use of false pretenses.[17] This holding negates the need for payment under such a note or contract. The *Frankfort* case, in so holding, seems in part to go no further than the case of *People v. Hand*[18] where a promissory note was involved, but *Frankfort* does appear to be the first case expressly holding that a contractual obligation, acquired by false pretenses, is personal property within the false pretenses section of the Penal Code. The solution to the question of when the offense is complete seems to turn on whether certain intangibles can be construed as property within the statute.

Possible Statutory Support

The codified law of California concerning the offense of false pretenses is primarily found in California Penal Code sections 7, 532, 484 and 1110.

California Penal Code section 7, defines words and phrases used throughout the Penal Code and the applicable part of this section provides that "the words 'personal property' include money, goods, chattels, things in action, and evidences of debt."[19] As enacted in 1872, California Penal Code, section 7, subdivision 13, read as follows:

> The term personal property includes every description of money, goods, chattels, effects, evidences of rights in action, and all written instruments by which any pecuniary obligation, right or title to property is created, acknowledged, transferred, increased, defeated, discharged, or diminished, and every right or interest therein.

It would have been a logical interpretation of the foregoing superseded section to construe both promissory notes and contracts as personal property. The amendment of 1873-74[20] changed the section to its present basic form. The current section seems but an abbreviation of the enactment of 1872 when the classifications, "evidences of debt" and "things in action" are defined.

California Penal Code section 532, defining the offense of false pretenses, provides that "every person who knowingly and designedly, by any false or fraudulent representation or pretense, defrauds any other person of money, labor, or *property*, whether real or *personal*, . . . is punishable, ... (Emphasis added.)

California Penal Code section 484, as enacted in 1872, applied only to larceny. In 1927 the section was amended and rewritten into its present basic form.[21] It has been stated that "section 484 amalgamates the crimes of larceny, embezzlement, false pretenses and kindred crimes under the

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[17] *Ibid.*

[18] 127 Cal. App. 484, 488, 16 P.2d 156, 158 (1932).

[19] CAL. PEN. CODE § 7(12).

[20] Cal. Code Amend. 1873-74, ch. 614, § 1, p. 419.

[21] Cal. Stat. 1927, ch. 619, § 1, p. 1046.

cognomen of theft,"[22] but that ". . . elements of the several offenses have not been changed."[23] Sections 484 and 532 are not inconsistent but the applicable provisions of section 484 have in effect repealed identical provisions of section 532.[24] Section 484 restates in substantially the same wording the offense delineated in section 532 with the exception of the punishment clause, which was modified, and the addition of the continuing offense theory. Throughout the remainder of this analysis, the false pretense statute will be referred to only as section 484.

California Penal Code section 1110, prescribes the quantum of evidence necessary for the conviction of false pretenses. The evidentiary requirements of this section are not applicable in a prosecution for larceny,[25] embezzlement or larceny by trick or device.[26] It is noteworthy that this section, having applicability only to the offense of false pretenses, has the following provision within it: *"Upon a trial for having,* with an intent to cheat or defraud another designedly, by any false pretense, *obtained the signature of any person to a written instrument. . . ."* (Emphasis added.) It would appear that section 1110 is more extensive in its coverage than is section 484. Considering these two sections together, it appears that it was the legislative intent to include as a part of the offense of false pretenses the "obtaining of a signature" in a manner similar to the statutes of other states. A canon of statutory interpretation is that specific statutes take precedence over general statutes when provisions of the two are not in accord.

Another clause within section 1110 that might be construed to support this interpretation includes this language: ". . . or having obtained from any person any labor, money or property, whether real or personal, or *valuable thing . . . ."* (Emphasis added.) Another state has construed the phrase "valuable thing" to include a signature to an obligation as personal property within the false pretense statute.[27]

Necessity of Payment

In the majority of cases involving promissory notes, the wrongdoer has wasted no time in discounting or negotiating the instrument, or the victim has made payments on the note. Thus there is a dearth of cases that discuss the need for payment on a note or contract to complete the offense. In each of the cases cited in this analysis, the courts seem to have taken for granted that a literal interpretation of the code would be followed, *i.e.,* to first determine whether the subject matter of the controversy is property, and if so, to hold that when *this property* is obtained by false pretenses, all other elements of the crime being present, the offense is complete.

Promissory note cases where the defendant or a third party did receive money on the note by discounting or negotiating the same, do not seem to the writer to lend any support to appellant's contention in *Caruso.* When a note is discounted, the defendant receives his money from a third party

[22] People v. Moorehead, 104 Cal. App. 2d 688, 694, 232 P.2d 268, 272 (1951).

[23] People v. Jones, 36 Cal. 2d 373, 377, 224 P.2d 353, 355 (1950).

[24] People v. Jackson, 24 Cal. App. 2d 182, 203, 74 P.2d 1085, 1097 (1937).

[25] People v. Rial, 23 Cal. App. 713, 719, 139 Pac. 661, 663 (1914).

[26] People v. Theodore, 121 Cal. App. 2d 17, 31, 262 P.2d 630, 639 (1953).

[27] State v. Thatcher, 35 N.J.L. 445, 449 (1872); see also Annot., 141 A.L.R. 210, 214 (1942).