

State of Mind Fact or Fancy

W. David Curtiss

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

W. David Curtiss, *State of Mind Fact or Fancy*, 33 Cornell L. Rev. 351 (1948)
Available at: <http://scholarship.law.cornell.edu/clr/vol33/iss3/6>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

A STATE OF MIND: FACT OR FANCY?

W. DAVID CURTISS

It has been said that "the state of a man's mind is as much a fact as the state of his digestion."¹ The statement is true if made with reference to a civil action for deceit; but if made concerning a criminal prosecution for obtaining property by false pretenses, it is false in the majority of jurisdictions. Civilly, the state of a man's mind is a fact; criminally, it is not. Is the distinction a sound one?

A purchases *B*'s goods, promising to pay for them, but at the same time not intending to do so. A civil action for deceit will lie.² Deceit requires a false representation of past or present fact. It is well settled, however, that civilly a statement of present intention is a statement of existing fact.³ A state of mind is a fact and an expression of intention is therefore a representation of such fact. Of course the present state of mind must be misstated in order for there to be a misrepresentation. Deceit cannot be based upon the breach of a promise made in good faith with the expectation of performance. There must have been a fraudulent intention not to perform at the time the promise to perform was made. While fraudulent intent is not established by the mere breach of a promise, it may be inferred from circumstances, such as the lack of any reasonable expectation of ability to pay.⁴

A purchases *B*'s goods with a preconceived intention not to pay for them. By the prevailing rule, *A* is not subject to successful criminal prosecution for having obtained property by false pretenses.⁵ False pretenses requires the misrepresentation of a past or present fact, and the weight of authority is to the effect that criminally a statement of present intention is not a statement of existing fact.⁶

¹Bowen, L.J., in *Edgington v. Fitzmaurice*, L. R. 29 Ch. D. 459, 483 (1882).

²For a discussion of the civil action of deceit, its historical development and its elements, see PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 85 (1941).

³See 51 A. L. R. 46, 63 (1927); 68 A. L. R. 635, 637 (1930); 91 A. L. R. 1295, 1297 (1934); 125 A. L. R. 879, 881 (1940); PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 89 (1941); Keeton, *Fraud—Statements of Intention*, 15 TEX. L. REV. 185 (1937); Note, 38 COL. L. REV. 1461 (1938).

⁴PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 89 (1941).

⁵For a discussion of the crime of false pretenses, see CLARK AND MARSHALL, *A TREATISE ON THE LAW OF CRIMES* §§ 359-369 (4th ed. 1940); Orfield, *Criminal Misrepresentation: Obtaining by False Pretenses*, 14 NEB. L. BULL. 129 (1935).

⁶For extensive citation of authorities, see 168 A. L. R. 833-849. 2 WHARTON, *CRIMINAL LAW* § 1439 (12th ed. 1932): "A false pretense . . . must relate to a past event or existing fact. . . . So a pretense that a party would do an act he did not mean to do (as a pretense that he would pay for goods on delivery) was ruled by all the judges not to be a false pretense under the Statute of Geo. II, and the same rule is distinctly recognized in this country, it being held that a statement of an intention is not a statement of an existing fact." See also 25 C. J. 595, 35 C. J. S. 649.

*Commonwealth v. Althause*⁷ is a typical case. Defendant loaned *P* five hundred dollars, taking from *P* as collateral security for the repayment of the loan a two thousand dollar negotiable receipt, and fraudulently representing to *P* that he (defendant) intended either to keep the receipt in his possession or to place it as security with a bank. Defendant sold the receipt, and was charged and convicted of its theft. Upon appeal, his conviction was reversed, the court saying, in part:

"In effect he [trial judge] told the jury that if A buys property intending not to pay for it he obtains that property by a false pretense. In that case A makes no representation at all. All that he does is to make a promise, and a promise is not a representation of a fact. . . . The fraud of obtaining property of another by buying it with an intent not to pay for it might well be made a crime by the Legislature. But it is not the crime of obtaining property by a false pretense."⁸

History may help somewhat to explain this limitation on the concept of criminal fraud.⁹ The crime of obtaining property by false pretenses developed at a time of unprecedented commercial activity in England. It was the era of laissez-faire individualism,¹⁰ the day of *caveat emptor*.¹¹ Indeed successful prosecutions for commercial frauds were not brought until after the middle of the nineteenth century.¹² It was the temper of the times not to "cramp the style of trade."¹³ Sometimes "a page of history is worth a volume of logic."¹⁴ And yet if history thus played a part in shaping the criminal law of false pretenses, it would seem that the same historical forces would likewise have shaped the civil action of deceit. The point deserves consideration.

Professor Prosser discusses the history of deceit in these words:

"The action of deceit is of very ancient origin. There was an old writ of deceit known as early as 1201, which lay only against a person who had misused legal procedure for the purpose of swindling some one.

⁷207 Mass. 32, 93 N. E. 202 (1910).

⁸207 Mass. 32, 48, 50, 93 N. E. 202, 207, 208 (1910).

⁹See HALL, THEFT, LAW AND SOCIETY, ch. 1 (1935).

¹⁰The various limitations to the concept of criminal fraud, like the limitations to the concept of civil fraud, were largely the result of the effect of laissez-faire individualism on the common law of the eighteenth century. We must remember, too, that the scope of the doctrine of laissez-faire is far wider than the field of economics; indeed it is laissez-faire, as a theory of morals, which underlies Lord Mansfield's famous dictum that a person who is fooled by his own credulity should be 'left to a civil remedy.' Racivitch, *False Statement of Intention as an Element of Fraud in Criminal Law*, 21 TULANE L. REV. 639 (1947).

¹¹See Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L. J. 1133 (1931).

¹²HALL, THEFT, LAW AND SOCIETY 33 n. 94 (1935).

¹³Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L. J. 1133, 1184 (1931).

¹⁴Holmes, J., in *New York Trust Co. v. Eisner*, 256 U. S. 345, 349, 41 Sup. Ct. 506, 507 (1921).

At a later period, this writ was superseded by an action on the case in the nature of deceit, which became the general common law remedy for fraudulent or even non-fraudulent misrepresentation which resulted in actual damage. In particular, it was extended to afford a remedy for many wrongs which we should now regard as breaches of contract, such as false warranties in the sale of goods. Its use was limited almost entirely to cases of direct transactions between the parties, and it came to be regarded as inseparable from some contractual relation. It was not until 1789, in *Pasley v. Freeman*, which is the parent of the modern law of deceit, that the action was held to lie where the plaintiff had had no dealings with the defendant, but had been induced by his misrepresentation to deal with a third person. After that date deceit was recognized as purely a tort action, and not necessarily founded upon a contract. At about the same time, the remedy for a breach of warranty was taken over into the action of assumpsit, and it was thus established that it had a contract character. Thereafter the two lines of recovery slowly diverged, although some vestiges of confusion between the two still remain in many courts, particularly as to the measure of damages."¹⁵

Professor Hall cites the civil case of *Pasley v. Freeman*¹⁶ as one that gave great judicial impetus to the strong movement to extend the law of theft which was unmistakable from 1780 on.¹⁷ In *Pasley v. Freeman*, Pasley sued Freeman for damages, alleging that Freeman encouraged him to sell goods to Falch, falsely asserting that Falch was a good credit risk. Pasley, relying upon Freeman's representation, sold the goods to Falch and sustained loss. Judgment was rendered for the plaintiff Pasley.

In order fully to appreciate the significance of a passage from Professor Hall's *Theft, Law and Society* shortly to be quoted, the case of *R. v. Young*¹⁸ should be noted. It was decided within a week after the decision in *Pasley v. Freeman* and by the same court. The defendants had falsely represented to the complainant that a certain race was to be held upon which they said they had placed bets, and they induced the complainant to do likewise. The defendants were convicted of false pretenses.

The following statement by Professor Hall indicates the effect of the play of the economic and social forces of the time upon the law of fraud:

"The intimate interplay between commercial and noncommercial frauds has been pointed out. Whether sound distinctions, legally significant, can be made out between these two types is problematic; in both, the conduct of the defendant is practically identical. Yet certain differences may be recognized in the types of offenders which appear to have had

¹⁵PROSSER, HANDBOOK OF THE LAW OF TORTS 704-705 (1941).

¹⁶3 Durn. & E. 51, 100 Eng. Rep. 450 (1789).

¹⁷HALL, THEFT, LAW AND SOCIETY 19 (1935).

¹⁸3 Durn. & E. 98, 100 Eng. Rep. 475 (1789).

considerable effect. Thus in . . . *R. v. Young*, the offenders were professional sharpers; whereas in commercial frauds, like . . . *Pasley v. Freeman*, ostensibly respectable business men were involved. The dominant social attitudes favored the encouragement of trade, and *Pasley v. Freeman*, which provided a civil remedy, satisfied both the judges' conscience and the needs of free commerce. These commercial requirements did not apply to *R. v. Young*, . . . The net effect was that apparently respectable business men were immune from prosecution and subject only to civil suit . . . And the decisions show that the courts were reluctant to attach a criminal liability to commercial transactions."¹⁹

It might also be pointed out that in so far as false pretenses was concerned, the reluctance of the courts to attach a criminal liability to commercial transactions cannot be traced to the historical fact that non-clergable felonies were punishable by death, for obtaining property by false pretenses was a misdemeanor.²⁰

A misstatement of present intention alone, since by the majority rule it is not a misrepresentation of fact, will not serve as the basis of an indictment for false pretenses. But if such misstatement of intention is accompanied by a misrepresentation of fact which is relied on by the victim as an inducement for parting with his property, an indictment can be found.²¹ In *Regina v. Jennison*,²² defendant obtained property from *A* by falsely representing himself to her as being single, and by promising to marry her although he had no such intention. His conviction of false pretenses was sustained. It is not necessary that a false pretense be the sole or even the primary inducement toward parting with the property. If it is in fact relied upon by the victim as an inducement, that is sufficient, however many other inducements may have contributed to the result.

The traditional view that a state of mind is not an existing fact in a criminal action has not gone unchallenged. In some jurisdictions the attack has been an indirect one. Massachusetts affords an interesting example. *Commonwealth v. Althause*²³ was decided in 1910. In 1925 *Commonwealth v. Morrison*²⁴ arose. *M* owned a large quantity of obsolete spark plugs of no market value. In agreement with *M*, and in order to assist him in creating an artificial demand for these items, *D* and *G* fraudulently represented themselves as bona fide purchasers of such spark plugs and placed large orders

¹⁹HALL, THEFT, LAW AND SOCIETY 33, 33 n. 94 (1935).

²⁰*Id.* at 10, 18, 73.

²¹See CLARK AND MARSHALL, A TREATISE ON THE LAW OF CRIMES §§ 359 (d), 365 (c) (4th ed. 1940); 2 WHARTON, CRIMINAL LAW § 1442 (12th ed. 1932).

²²9 Cox. C. C. 158 (1862).

²³207 Mass. 32, 93 N. E. 202 (1910).

²⁴252 Mass. 116, 147 N. E. 588 (1925).

with various dealers for them. These dealers bought the spark plugs from *M* for cash and shipped them C.O.D. to the supposed purchasers, who disappeared without accepting delivery. *M*, *D* and *G* were indicted and convicted of false pretenses. The Supreme Judicial Court of Massachusetts upheld the convictions. Said the Court:

"A misrepresentation as to a person's present intention may be a false pretense. . . . When a person enters into a contract to buy goods, he impliedly represents that he intends to make a genuine contract; if such is not his intention, he may be found to have made a false representation. *In such a case the intention not to pay for the goods is merely incidental; the false pretense is the assumption of a false character as a contracting party.* The facts in *Commonwealth v. Althause* . . . make it inapplicable to the case under consideration."²⁵ (Italics added)

In other jurisdictions the attack on the prevailing rule has been more direct.²⁶ There are cases holding that a false statement of intention is a false pretense, even on the criminal side of the court.²⁷ In *State v. McMahan*,²⁸ defendant was found guilty of being a common cheat. He had held himself out to the public as a purchaser of second hand automobiles. In six instances he obtained automobiles by making a small cash payment to the seller and in addition thereto giving his note for the balance of the agreed purchase price. At the time of giving these notes, defendant's intention was not to pay them when they fell due. The Supreme Court of Rhode Island sustained his conviction:

"This state is committed to the doctrine that in an action for deceit intention not to meet a future obligation is a question of fact to be submitted to the jury, and that misrepresentation of a present state of mind as to such intention is a false representation of an existing fact. *The rule is equally applicable in this criminal prosecution for cheating.*"²⁹ (Italics added)

²⁵252 Mass. 116, 122, 147 N. E. 588, 590 (1925).

²⁶Some states have passed special statutes making criminal the obtaining of services by fraudulent promise of compensation, or the obtaining of money by false promise to work. See Note, 53 HARV. L. REV. 893 (1940). On the related point of whether or not the criminal enforcement of a labor contract constitutes involuntary servitude, see *Bailey v. Alabama*, 219 U. S. 219, 31 Sup. Ct. 145 (1911); Note, 11 COL. L. REV. 363 (1911). See also, Note, *Labor Contract Laws and the Thirteenth Amendment*, 24 HARV. L. REV. 391 (1911).

²⁷See *People v. Ames*, 61 Cal. App. 2d 522, 143 P. 2d 92 (1943); *State v. Huckins*, 212 Iowa 283, 234 N. W. 554 (1931); *State v. Bromley*, 5 N. J. Misc. 195, 135 Atl. 813 (Sup. Ct. 1927), *aff'd*, 104 N. J. L. 186, 138 Atl. 923 (1927); *Commonwealth v. McKnight*, 289 Mass. 530, 195 N. E. 499 (1935), *cert. denied*, 296 U. S. 660, 56 Sup. Ct. 245 (1935). See also *Smith v. Fontana*, 48 F. Supp. 55 (S. D. N. Y. 1942); *Rex v. Alexandra*, 26 Crim. App. R. 116 (1937).

²⁸49 R. I. 107, 140 Atl. 359 (1928).

²⁹49 R. I. 107, 108, 140 Atl. 359, 360 (1928).

The issues here involved were brought into sharp focus in the 1946 case of *Chaplin v. United States*,³⁰ decided in the United States Court of Appeals for the District of Columbia. Defendant borrowed money from *M*, representing that he would purchase certain liquor stamps with the money and that he would later repay it. At the time of acquiring the money, defendant intended neither to use it for the stamps nor to repay it. His conviction of obtaining property by false pretenses was set aside by a divided court.

The majority decision notes the traditional view that a statement of present intention is not a statement of existing fact in a criminal action, defends the view as reflecting sound "business policy", and holds in accordance with it.

"However, where, as here, the act complained of—namely, failure to repay the money or use it as specified at the time of borrowing—is as consonant with ordinary commercial default as with criminal conduct, the danger of applying this technique to prove the crime is quite apparent. Business affairs would be materially incumbered by the ever present threat that a debtor might be subjected to criminal penalties if the prosecutor and the jury were of the view that at the time of borrowing he was mentally a cheat. The risk of prosecuting one who is guilty of nothing more than a failure or inability to pay his debts is a very real consideration."³¹

Judge Edgerton's dissent is scholarly and convincing. He reasons: (1) that "difficulties of proof are seldom greater in criminal cases than in civil, except that the prosecution must prove its case beyond a reasonable doubt,"³² (2) that "the rule which the court adopts will make prosecutions impossible even when admissions or other evidence make guilt obvious,"³³ (3) that "prosecutions are not undertaken without evidence and convictions do not withstand attack unless they are supported by sufficient evidence,"³⁴ (4) that "the danger of a counter suit for malicious prosecution is always present

³⁰157 F. 2d 697 (App. D. C. 1946). See 168 A. L. R. 833; Note, 21 TULANE L. REV. 639 (1947).

³¹157 F. 2d 697, 698 (App. D. C. 1946).

³²*Id.* at 700. See Note, 34 HARV. L. REV. 557 (1921): "The criminal courts have hesitated, however, to hold that a promise not intended to be kept is a misrepresentation of fact. . . . The reason is, probably, the fear of a tendency to regard every promise subsequently broken as having been made with an intention not to keep it. But this would seem to be sufficiently guarded against by the requirement, in criminal cases, of proof beyond a reasonable doubt. The civil cases show that a false statement of this sort is as dangerous to the general security of transactions as any other false representation. Only a very narrow interpretation of the criminal statutes has let it go unpunished."

³³157 F. 2d 697, 700 (App. D. C. 1946).

³⁴*Ibid.*

to discourage unfounded charges,"³⁵ (5) that "the court suggests that the law should not jeopardize legitimate business. But this is the unavoidable price of protection against illegitimate business,"³⁶ and (6) that "since civil redress is not punitive but compensatory, the decision means that the law of the District of Columbia offers no deterrent to this sort of fraud."³⁷

One of the points would seem to deserve further consideration.

It is undeniably true that the possibility of a counter suit for malicious prosecution will tend to discourage unfounded charges.³⁸ Certain limitations on the possibility of succeeding in such an action should, however, be recognized. One such limitation is well illustrated in *Kittler v. Kelsch*.³⁹ Defendant, a prosecuting attorney, received an anonymous letter charging the plaintiff, a reputable woman, with maintaining a disorderly house. Later he received another letter, purporting to be signed by her, admitting the truth of these charges. Upon this information, defendant instituted criminal proceedings against the plaintiff, making the complaint himself. The proceedings were dismissed when it was discovered that the plaintiff's name had been forged to the letter of admission. The plaintiff brought an action for malicious prosecution, and the defendant demurred. The demurrer was sustained. Where a prosecuting attorney passes upon the sufficiency of evidence within his own knowledge as a basis for a criminal prosecution, he is acting in a quasi-judicial capacity and is not liable for malicious prosecution.⁴⁰ The case thus suggests a situation in which an action for malicious prosecution may not be available to a plaintiff injured by false criminal charges.⁴¹ Two judges dissented in *Kittler v. Kelsch*, taking the position that when a prosecuting attorney himself initiates a complaint, he goes beyond his quasi-judicial function, and may be held personally liable for his acts. There is additional authority to this effect.⁴²

³⁵*Ibid.*

³⁶*Ibid.*

³⁷*Ibid.*

³⁸For a discussion of malicious prosecution, see PROSSER, HANDBOOK OF THE LAW OF TORTS § 96 (1941).

³⁹56 N. D. 227, 216 N. W. 898 (1927); Note, 12 MINN. L. REV. 665 (1928).

⁴⁰A fortiori, a prosecuting attorney enjoys an absolute privilege when he merely conducts a criminal proceeding based on a complaint sworn out by another; in such case he is not liable for malicious prosecution even when he acts in bad faith and without probable cause. See PROSSER, HANDBOOK OF THE LAW OF TORTS § 96 (1941).

⁴¹"If the view of the majority be correct, then any state's attorney may sit down any time, draft a complaint and . . . charge any crime he wishes, and though it is found to be just as false as was the charge in this case . . . , yet he would be immune from suit because after he had made the complaint he submitted it to himself as state's attorney and passed judicially upon whether or not it was in form a sufficient basis for prosecution." Burr, J., dissenting in *Kittler v. Kelsch*, 56 N. D. 227, 261, 216 N. W. 898, 912 (1927).

⁴²See *Leong Yau v. Carden*, 23 Hawaii 362 (1916); *Schneider v. Shepherd*, 192 Mich. 82, 158 N. W. 182 (1916).

There are other limitations on the possibility of succeeding in an action for malicious prosecution. The burden of proof is on the plaintiff to show that the defendant initiated or continued the criminal proceeding without "probable cause", and "maliciously".⁴³ An elaboration on these points is beyond the scope of this paper. It is enough here to suggest caution against overstating the possibility of a counter suit for malicious prosecution as an effective means of discouraging unfounded criminal charges. Professor Prosser has written:

"Malicious prosecution is an action which runs counter to obvious policies of the law in favor of encouraging proceedings against those who are apparently guilty, and letting finished litigation remain undisturbed and unchallenged. It never has been regarded with any favor by the courts, and it is hedged with restrictions which make it very difficult to maintain."⁴⁴

And another writer has pointed out that "it is notable how rarely an action is brought at all, much less a successful one, for this tort."⁴⁵

A state of mind—fact or fancy? Civilly, it is fact; criminally, by the prevailing rule, it is not. But there seem to be good reasons why it should be. By whom, however, should the matter be decided, by the legislatures, or by the courts? Hear Judge Lehman's words on judicial interpretation of a criminal statute, although not on the exact point of state of mind:

"It is the function of the legislature to determine whether modern conditions dictate a wider definition of acts which should subject the wrongdoer to criminal responsibility. We may not assume that function even where the established definition of a crime may be based upon distinctions which to us at the present time seem inconsequential. We may not hold that acts come within such definition which under recognized authority have been hitherto excluded."⁴⁶

⁴³See PROSSER, HANDBOOK OF THE LAW OF TORTS § 96 (1941).

⁴⁴*Id.* at 870.

⁴⁵WINFIELD, LAW OF TORT 664 (1943).

⁴⁶*People v. Noblett*, 244 N. Y. 355, 155 N. E. 670 (1927). Common law larceny by trick and device required that the victim be induced to part with possession of his property only, whereas obtaining property by false pretenses required that both possession and title pass to the defendant. In this case X paid defendant \$550. advance rental for an apartment under a sub-lease. Defendant agreed that X should have possession one week later. Defendant's own lease had at that time expired, and X never received possession of the apartment. Defendant was charged and convicted of common law larceny by trick and device, the jury finding that X had parted with possession of his money only, and had reserved title until his receipt of possession of the apartment. Upon appeal the conviction was reversed on the ground that the evidence of the advance payment indicated that X had transferred both possession and title to the money. The case is noted in 27 COL. L. REV. 737 (1927). There are only statutory offenses, no common law crimes, in New York. See N. Y. PENAL LAW § 22. See also the definition of larceny, N. Y. PENAL LAW § 1290.

But hear Judge Edgerton, writing on the precise point of state of mind:

“We should decide the question before us ‘in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past’ which was never adopted here.”⁴⁷

⁴⁷Chaplin v. United States, 157 F. 2d 697, 699 (App. D. C. 1946) (dissenting opinion). Defendant was indicted for false pretenses under D. C. CODE (1940) § 22-1301. *But see* D. C. CODE (1940) § 22-107 which deals with punishment for offenses not covered by provisions of the Code, and thus contemplates common law crimes. *See* Palmer v. Lenovitz, 35 App. D. C. 303 (1910), and United States v. Davis, 71 F. Supp. 749 (D. D. C. 1947).