

Opinion No. [29-58]

August 6, 1929

TO: Office of the Attorney General of New Mexico

OBTAINING GOODS BY FALSE PRETENSES -- Use of mail to promote fraud.

OPINION

This will acknowledge receipt of your letter of the 29th ult., and the files accompanying it, all pertaining to the experiences of your Daniel P. Walker, register No. 5380 and the activities of one Arthur H. Lamb, Manager of an Indian Curio Store in Pawhuska, Oklahoma.

We have carefully examined this correspondence and as a result agree with you that it appears very much as though Mr. Lamb has no intention of settling his account with Walker; in addition to which a suspicion arises that from the beginning he may have intended to defraud.

We have considered the situation in connection with section 215 of the Penal Code of the United States pertaining to the use of mails to promote frauds. This section being rather long, I shall not quote it in its entirety but from it we get language as follows:

"Whoever having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises shall * * * for the purpose of executing such scheme or artifice or attempting so to do, place or cause to be placed any letter, post card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States in any post office or station thereof, or street, or other letter-box of the United States or authorized depository and mail matter to be sent or delivered by the post office establishment of the United States * * * shall be fined not more than \$ 1,000 or imprisoned not more than five years, or both."

To constitute an offense against the United States under this section, at least two things are essential, (a) a scheme devised or intended to be devised to defraud, or for obtaining money or property by means of false pretenses, and (b) for the purpose of executing such scheme or attempting to do so, the placing of any letter or other communication in any post office, or recognized depository of mail, to be sent or delivered by the post office establishment.

In general, false pretenses, as used in criminal statutes, must refer to the past or present. But it has been held repeatedly by the Supreme Court of the United States, that this section includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose and it has been held that ordering goods by mail with the intention of

not paying for them is a scheme or artifice to defraud within the meaning of this section, that ordering a diamond ring by mail with intent not to pay for it amounts to a scheme or artifice to defraud. The last two statements are borne out in the following cases:

U.S. v. Watson, 35 Fed. 358

U.S. v. Staples, 45 Fed. 195

Tucker v. U.S., 224 Fed. 833

In Evans v. U.S., 153 U.S. 584, the court said:

"If a person buy goods on credit in good faith knowing that he is unable to pay for them at the time, but believing that he will be able to pay for them at the maturity of the bill, he is guilty of no offense even if he be disappointed in making such payment. But if he purchases them knowing that he will not be able to pay for them and with an intent to cheat the vendor, this is a plain fraud and made punishable as such by statutes in many of the states."

In Rurland v. U.S., 161 U.S. 306, Mr. Justice Brewer, in rejecting the contention that a misrepresentation to be within the statute must relate to an existing or a past fact and cannot consist of a mere intention not to carry out the contract in the future, quoted this language of Justice Brown with approval.

In other cases it has been held that a scheme to defraud by sending letters requesting the persons addressed to sell and ship to defendant articles of merchandise for which he agreed to pay the shippers, but for which, in fact, he did not intend to pay, was within the offense created by the section above quoted and it was also held by the Circuit Court of Appeals for the Fourth Circuit, that the mailing with an order for goods of a check drawn upon a bank in which the sender had no funds and which he himself did not intend to pay but intended to defraud the party in whose favor the check was drawn, was within Section 215 of the Criminal Code. See 7 Fed. Stat. Ann. (2nd Ed.) 820.

At this point, it may be well to call attention to the fact that Lamb wrote and mailed but two letters, to one dated May 28, 1929 and addressed to whom it may concern, and the one dated June 14, 1929, reporting the return of unsold goods and enclosing a check such as defined by Oklahoma Statutes as "bogus check." To this we might add a third use of the mail by Lamb, the notation returned to Walker on the foot of the letter written by Lamb on June 18, 1929. Communications by wire do not fall within the statute but possibly could be used as evidence of intent in connection with letters. And here again, let me repeat that intent to defraud is an essential element of the offense and even though a scheme should appear on its face to be a legitimate business, it is within the statute if there was an intention to defraud. Intent, of course, is usually a fact for a jury to determine from other facts capable of being proven, intent being in the mind of the person acting.

In the matter before us, several facts appear which raise at least suspicion, notably the "rush telegram" of June 16 following the letter of June 14, timed to arrive just when Mr. Walker might be expected to have the letter and the enclosed check, thus inducing him to promptly send out other goods before he could have had time to ascertain whether or not the check was good. It may be you have noticed that the letter of June 14, 1929 is not signed. You may also have taken note of the fact that the first letter, that of May 28, which states that the writer has received an invitation to attend a Banker's Convention on the twelfth day of June, does not say where the convention is to be, neither does the telegram of June 16 contain further information in that respect than is found in the words "another convention on." The report of Western Union, answering the inquiry of Mr. Walker refers to celebration the Indian had at Pawhuska, probably meaning Indians.

The check sent was dated June 14, 1929, but was not presented for payment and protested until June 25, 1929. It would be interesting to know the condition of the bank account of A. H. Lamb on the 14th day of June and following: Ordinarily a check should be presented for payment promptly and I suppose this check was forwarded to the bank upon which drawn and through the usual channels immediately following its receipt. Kindly note the definition of a "bogus check" as defined by Oklahoma Statute which will be quoted farther on in this letter.

The fact that the first letter set out was not addressed to particular individual is probably immaterial under the statute as it now reads.

Under the statute and the rules of procedure, a prosecution under this section for mailing a letter in pursuance of a scheme to defraud, can be instituted only in the district in which the letter was placed in the post office. U.S. v. Sauer, 88 Fed. 249.

If a case against A. H. Lamb under this statute can be made, it will have to be in the Federal Court in the District in Oklahoma in which Pawhuska is, and I think the indictment might include two counts, one being based on the letter of May 28 and the other on the letter of June 14. But I fear that the evidence is insufficient unless and until further investigation should furnish more conclusive proof of intent to defraud. Of course, merely owing a debt and ignoring the same does not constitute an offense under the Penal Code.

So far, we have considered this in the light of the Federal Statutes. It would seem that an offense has been committed under the Oklahoma Statutes, Section 2146, pertaining to bogus checks, pertinent language of which is as follows:

"Every person who with intent to cheat and defraud shall obtain or attempt to obtain from any person, firm, or corporation any money, property, or valuable thing * * * by means or by use of * * * or any false or bogus check * * * if the value of the money property, or valuable thing * * * be more than \$ 20.00 * * * shall be deemed guilty of a felony and shall be punished by imprisonment in the State Penitentiary for a term not exceeding seven (7) years, or by a fine not to exceed five hundred dollars (\$ 500) or by both such fine and imprisonment. The term "false or bogus check" shall include checks

or orders given for money or property which are not honored on account of insufficient funds of the maker to pay same * * * the making, drawing, uttering, or delivering of a check, draft, or order, payment of which is refused by the drawee shall be prima facie evidence of intent to defraud and the knowledge of insufficient funds not on credit with such bank or other depository * * * and provided further that said check or order is presented for payment within thirty days after same is delivered and accepted."

This statute may be applicable on the theory that by means of the check and telegram together, Lamb obtained a second shipment.

Any prosecution under the Oklahoma Statutes would, of course, have to be in an Oklahoma court of that district in which the offense was committed.

It is possible, results might be obtained by bringing this matter to the attention of the prosecuting attorney at Pawhuska, Oklahoma.

It has occurred to me as possible, this same individual may have secured goods from other institutions or individuals in a similar manner. If such could be shown, it might be interesting to bring the matter to the attention of post office authorities.

I am heartily in sympathy with your efforts in this matter and assure you this office is desirous of protecting those men under your care, who are at present so situated as to be handicapped in their business transactions.