[HIGH COURT OF AUSTRALIA.]

GREENE . . . . . APPLICANT-APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 10, *Dec.* 6.

Latham C.J., Rich, Dixon, McTiernan and Webb JJ.

Criminal Law—False pretences—Existing fact—Representation by accused that he could supply venetian blinds—Money paid to him therefor—Failure to supply blinds—Similar transactions—Remedy—Civil or criminal—Crimes Act 1900-1946 (*N.S.W.*) (*No.* 40 *of* 1900—*No.* 43 *of* 1946), *ss.* 179, 182.

G. was convicted upon a charge that he falsely pretended to T. that he then intended and was in a position to supply and deliver to T. within a period then agreed upon certain venetian blinds; by means of which false pretences he then obtained from T. with intent to defraud a valuable security, the property of T., namely, a sum of £11. The evidence showed that G. obtained a cheque for £11 from T. on account of venetian blinds which G. said he could supply in six weeks. The blinds were not supplied. It was proved that G. had operated in a similar manner in relation to some twelve other persons. Upon appeal,

Held, by *Latham* C.J., *Rich* and *Dixon* JJ. (*McTiernan* and *Webb* JJ. dissenting), that in the absence of a false statement of a material existing fact the conviction must be quashed.

Per Latham C.J., *Rich*, *Dixon* and *Webb* JJ.: In relation to the offence of false pretences a representation of the existence of a present intention to perform a promise is not a representation of an existing fact.

Decision of the Court of Criminal Appeal of New South Wales, by majority, reversed.

APPEAL from the Court of Criminal Appeal of New South Wales.

Lawrence Henry Benson Greene was charged at the Court of Quarter Sessions, Sydney, upon an indictment for the following

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offences: (1) that on 24th December 1946 he falsely pretended to Percival Thomson that he then intended and was in a position to supply and deliver to Thomson, within a period then agreed upon, certain venetian blinds; by means of which false pretences he did then obtain from Thomson with intent to defraud a valuable security, the property of Thomson, to wit, a cheque for payment of the sum of £11; and (2) that between 24th December 1946 and 25th December 1947, at Sydney, having received the sum of £11, upon terms requiring him to account for the whole of that money, fraudulently did omit so to account for the said money in violation of the terms upon which he so received the money.

Greene pleaded not guilty to each charge and conducted his own defence.

The jury returned a verdict of guilty on the first count.

An appeal by Greene to the Court of Criminal Appeal was dismissed.

Upon the hearing of an application made on behalf of Greene for special leave to appeal to the High Court the parties agreed that the application for special leave should be treated as the hearing of the appeal.

Further facts and relevant statutory provisions appear in the judgments hereunder.

M. H. Byers, for the applicant-appellant. The making of a promise to deliver goods cannot ground an indictment alleging a representation as a fact that the promisor was in a position to supply the goods. The subject indictment was based on *R.* v. *Hattam* (1) but in that case the false pretence was as to position to perform the contract. The intention of performance was in respect of a contractual obligation. By making a promise to do a thing, despite the fact that that promise may be wilfully false, no indictment can be preferred alleging as representations of fact either an intention to fulfil that promise or that a promisor was in a position to fulfil that promise. A false promise, that is to say, a promise which may not be fulfilled or one which the promisor does not intend to fulfil, cannot support an indictment alleging a false pretence because it is not a pretence of fact (*R.* v. *Burrows* (2); *R.* v. *Lee* (3); *R.* v. *Ferguson* (4); *R.* v. *Sawyer* (5); *R.* v. *Goodhall* (6); *R.* v. *Dah Ram* (7)). There is an important distinction between a fact and a promise. The matter of

(1) (1913) 13 S.R. (N.S.W.) 410; 30 W.N. 118.
(2) (1869) 11 Cox C.C. 258.
(3) (1863) 9 Cox C.C. 304.
(4) (1913) 9 Cr. App. R. 113, at p. 115.
(5) (1936) V.L.R. 1, at p. 5.
(6) (1821) Russ. & Ry. 461 [168 E.R. 898].
(7) (1901) 3 W.A.L.R. 111, at p. 113.

inducement was dealt with in *R.* v. *Bates and Pugh* (1); *Re Jennison* (2). A person who makes a promise does not, provided he does not as a matter of fact state his intention to fulfil his promise, make a false pretence. What is referred to as a representation is a contract or promise. A statement of existing intention is not to be regarded as a statement of existing fact (*R.* v. *Henshaw and Clark* (3)). The distinction made in *R.* v. *Sawyer* (4) is supported as relevant in *R.* v. *Bates and Pugh* (5). If it be held that whenever one makes a false promise it can be alleged against the promisor that by virtue of making the promise he represented as a matter of fact that he intended or was in a position to fulfil his promise, then the distinction which has hitherto existed between fact and promise, and which, as shown by s. 179 of the *Crimes Act* 1900-1946 (N.S.W.), is recognized by the legislature, would disappear. Capacity or ability to fulfil a promise was dealt with in *R.* v. *Sawyer* (4) and *R.* v. *Jones* (6). The statutory provision there under consideration is not in force in New South Wales.

C. V. Rooney K.C., for the respondent. By his representations the applicant lulled persons into a sense of security in the belief that they were dealing with an established firm, which had facilities, plant and contracts to get material, and could supply the blinds within a comparatively short space of time. Those representations induced persons to pay money to the applicant. A promise to do a thing *in futuro* may be the subject of an indictment: *Archbold's Pleading and Evidence in Criminal Cases*, 21st ed. (1893), p. 663. A promise to do a certain thing and a false statement to the promisee that the promisor had power to do so will support an indictment of obtaining moneys by false pretences (*R.* v. *Giles* (7)). This case is far stronger than the case of *R.* v. *Bancroft* (8) where it was held that a promise to do a thing *in futuro* may involve a false pretence that the promisor had the power to do that thing, for which false pretence the promisor may be indictable. The applicant has, for two and one-half years, been engaged in similar practices. The practice of the applicant was systematic. His promise to supply the goods was linked up with the other allegation in the indictment that he had the ability to do so. That allegation was based upon representations made by the applicant and the inferences arising

(1) (1848) 3 Cox C.C. 201.
(2) (1862) Le. & Ca. 157 [169 E.R. 1343]; 9 Cox C.C. 158.
(3) (1864) Le. & Ca. 444 [169 E.R. 1466].
(4) (1936) V.L.R. 1.
(5) (1848) 3 Cox C.C., at p. 203.
(6) (1898) 1 Q.B.D. 119.
(7) (1865) Le. & Ca. 502 [169 E.R. 1490]; 10 Cox C.C. 44.
(8) (1909) 26 T.L.R. 10; 3 Cr. App. R. 16.

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and intended to arise from those representations. The facts show that the applicant did not have the necessary facilities or organization. A promise to do a certain thing amounts to a representation that he was in a position to do it and would do it (*R.* v. *Hadley* (1)). The applicant promised that he would make delivery within six weeks. The essence of the three cases cited above on behalf of the respondent and the nexus between them and this case is that there are statements, express and implied, of present ability to enter into the contract in the normal course of business with the normal hope of performance, and there was at the time a wilful withholding from the promisees, who received neither goods nor a return of moneys paid by them to the applicant. This was the systematic practice pursued by the applicant for a long time.

M. H. Byers, in reply. Similar acts by an accused cannot be considered by a jury upon an issue of false pretences. The question is whether all the evidence, if accepted, shows a representation as to an existing fact. The same considerations as to ability and capacity as were applied in *R.* v. *Bancroft* (2) apply to this case.

Cur. adv. vult.

Dec. 6.

The following written judgments were delivered :—

LATHAM C.J. The question which arises upon this application for special leave to appeal from a decision of the Court of Criminal Appeal, New South Wales is whether a false statement, or a false representation implied from words or conduct, as to the existence of a present intention in the mind of the person who makes the statement or representation can be a false pretence so as to justify a conviction under the *Crimes Act* 1900-1946 (N.S.W.), s. 179. Section 179 is in the following terms :—" Whosoever, by any false pretence, or partly by a false pretence and partly by a wilfully false promise, obtains from any person any property, with intent to defraud, shall be liable to penal servitude for five years." The offence of obtaining property by false pretences involves four elements :—there must be a false pretence ; the defendant must know that the pretence was false ; property must be obtained by means of the pretence ; and there must be an intent to defraud. In the present case the charge against the defendant Lawrence Henry Benson Greene was that he did falsely pretend to one Thomson that he then intended and was in a position to supply and deliver to the said Thomson within a period then agreed upon

(1) (1910) 4 Cr. App. R. 36. (2) (1909) 26 T.L.R. 10 ; 3 Cr. App. R. 16.

certain goods, to wit, venetian blinds; by means of which false pretences he did then obtain from the said Thomson with intent to defraud a valuable security, the property of the said Thomson, to wit, a sum of £11. The prisoner was found guilty and appealed to the Court of Criminal Appeal. His appeal was dismissed.

The evidence showed that Greene obtained a cheque for £11 from one Thomson on account of venetian blinds which Greene said he could supply in six weeks. The blinds were not supplied. It was proved that he had operated in a similar manner in relation to some twelve other persons. When Greene was interviewed by the police he said: "It is only a breach of contract and he (the person who gave him a cheque) can do what he likes about it." There was plainly evidence from which the jury could conclude that when Greene promised to supply the blinds he had no intention whatever of performing the promise. It was not, however, clearly shown that Greene was not in a position to supply the blinds. He might have supplied them by purchasing them and then delivering them to Thomson. But the jury was certainly entitled to conclude that when he promised Thomson that he would supply the blinds he had no intention of carrying out his promise.

The Court of Criminal Appeal held that there was ample evidence that Greene falsely pretended that he had an intention which he did not have and the appeal was dismissed.

The Supreme Court of Western Australia in *R.* v. *Dah Ram* (1) held that a false representation as to the existence of an intention was a false representation of fact, and stated the law in the same manner as the Court of Criminal Appeal in New South Wales. In *R.* v. *Bancroft* (2) the Court of Criminal Appeal held that a promise to do something in the future may imply a representation as to an existing fact which, if false, may be a false pretence to sustain an indictment. The existing fact in the case in question was a bona-fide intention of the accused to publish a book. But the current of authority is to the contrary effect.

For centuries lawyers have quoted the saying of *Brian* C.J.—"The thought of man is not triable, for the devil himself knows not the thought of man": (3). Yet through those same centuries lawyers have been continuously concerned with questions of the existence or the non-existence of states of mind. But the doctrine of *mens rea* in criminal law and the necessity to prove intent in various torts have not destroyed the popularity of the dictum of *Brian* C.J. In *Edgington* v. *Fitzmaurice* (4) *Bowen* L.J. said:

(1) (1901) 3 W.A.L.R. 111.
(2) (1909) 26 T.L.R. 10; 3 Cr. App. R. 16.
(3) Y.B. 17 Ed. IV. 1.
(4) (1885) 29 Ch. D. 459, at p. 483.

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"The state of a man's mind is as much a fact as the state of his digestion," and this saying is as popular, but not as ancient as that of *Brian* C.J. The courts, however, in their consideration of the criminal law relating to false pretences, have been reluctant to admit that a psychological fact can be a fact or that a statement that a psychological fact exists can be a statement that a fact exists. It has been held again and again in relation to the offence of false pretences that a representation of the existence of a present intention to perform a promise is not a representation of an existing fact.

In *R.* v. *Sawyer* (1) it was held by the Full Court of the Supreme Court of Victoria that a statement that a man had a present intention to do something in the future was not a statement as to an existing fact of such a kind as to support a presentment for obtaining property by false pretences. In the judgments of the learned judges reference is made to the leading authorities—e.g. *R.* v. *Goodhall* (2); *R.* v. *Johnston* (3) and other cases. I agree with the statement of *Macfarlan* J. in *R.* v. *Sawyer* (4): "In my opinion, it has been settled law for more than a century that the allegation or proof of a false representation by the accused of his present intention to do a future act is not sufficient to found or prove the false pretence or representation of an existing fact which is a necessary ingredient in the crime of obtaining money or goods by false pretences." I agree equally with his Honour when he proceeded to say—"As a matter of strict principle, or of the strictly logical application of principle, this may be difficult to justify." In my opinion as a matter of logic and of common sense it is impossible to justify the proposition which *Macfarlan* J. accurately stated. It did not need recent developments in psychology to establish that states of mind are not only facts, but the most important facts in human life. A doctrine which declines to regard a state of mind as a fact is to me completely incomprehensible. Juries are regarded as competent in civil cases to distinguish between the breaking or non-performance of a promise honestly made and the dishonest making of a promise, involving a fraudulent misrepresentation of present intention. But it has not infrequently been said in the courts that they are not competent to appreciate the same distinction in a criminal case. It is difficult to understand why this particular form of fraud should be exempt from criminal liability—on either theoretical or practical grounds. But the cases show that it is non-criminal. The defendant knew what he was about in his

(1) (1936) V.L.R. 1.
(2) (1821) Russ. & Ry. 461 [168 E.R. 898].
(3) (1842) 2 Mood C.C. 254 [169 E.R. 101].
(4) (1936) V.L.R., at p. 5.

extensive, deliberate and well-considered scheme for cheating persons who trusted him. They have a worthless civil remedy and the appellant goes free to pursue further operations of the same character. He has the authority of the law on his side and the court must bow to authority. Accordingly I am of opinion that special leave to appeal should be granted, and, the parties having agreed to treat the application for special leave as the hearing of the appeal, that the appeal should be allowed and the conviction set aside.

RICH J. I agree that special leave should be granted and as, in accordance with the agreement of the parties, the appeal was heard it should be allowed and the conviction quashed.

In my opinion the crime was not completed. To constitute a false pretence within the meaning and intent of s. 179 of the *Crimes Act* 1900-1946, the false statement must be one of a material existing fact. A mere promise to do some act in the future is not sufficient. This statement of the law was made in New South Wales in the case of the *R.* v. *Lotze* (1) and adhered to by later decisions. The amendment made in 1883 by 46 Vict. No. 17 is explained in *R.* v. *Thorland* (2) and in *R.* v. *Patmoy* (3). It does not affect this case.

In my opinion the necessary element to complete the crime is missing. And I consider that the statement by the accused that he was prepared to make the blinds did not warrant the jury finding proof of a statement untrue to the knowledge of the accused of a material existing fact which induced Thomson to part with his money.

DIXON J. This is an application for special leave to appeal from an order of the Supreme Court sitting as a Court of Criminal Appeal by which a conviction for false pretences was affirmed. The applicant was convicted on a count alleging that he, the applicant, did falsely pretend to one Thomson that he then intended and was in a position to supply and deliver to Thomson within a period then agreed upon certain goods, to wit venetian blinds, by means of which false pretences he, the applicant, did obtain from Thomson with intent to defraud a valuable security, to wit a cheque for £11.

Thomson, who was called as a witness at the trial, said that he read an advertisement in a newspaper and in consequence telephoned to a number given in the advertisement. As a result the applicant

(1) (1865) 4 S.C.R. (N.S.W.) 86.
(2) (1884) 5 L.R. (N.S.W.) 412, at pp. 415, 417.
(3) (1944) 45 S.R. (N.S.W.) 127, at p. 131; 62 W.N. 1, at p. 2.

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came to see him at his house. The applicant said that he had come to see Thomson in answer to his telephone call. He asked how many blinds Thomson wanted. Thomson asked him whether he was prepared to make the blinds and he said yes. A price was given and the house was measured. The applicant undertook to supply the blinds within six weeks. The price was £21 10s. He asked Thomson for a deposit of fifty per cent as a sign of good faith. A few days later Thomson sent a cheque for £11. This was the security obtained and the foregoing formed the pretence alleged. The advertisement was not put in evidence or its contents proved.

Ample evidence was given of the fraudulent character of the applicant's conduct. A number of similar transactions with other people was proved. In every case he obtained money as a deposit or earnest of good faith on the part of a householder to whom he undertook to furnish venetian blinds. In Thomson's case and in every other case the applicant made no attempt to supply venetian blinds. The inference was well warranted that when he contracted to supply and fit blinds he had no intention of doing so. The applicant asserted that he was unable to provide the blinds because he failed to obtain supplies of material. But the jury were, to say the least of it, at liberty to disbelieve this excuse and adopt the view that he never attempted to obtain material and had no intention of doing so. No evidence was led as part of the Crown case to prove that he had no means of making the blinds or causing them to be made even if he obtained the materials. But in the course of the cross-examination by the accused of two police constables who were called by the Crown and in the course of the evidence of one of them when he was recalled by the accused as part of his case, some facts appeared which would make this doubtful. However I do not think that sufficient support can be found in the evidence for a finding by the jury that the applicant or accused knew at the time of the transaction with Thomson that even if he obtained materials he could not supply blinds to Thomson. No proof was offered that at the time he made the contract with Thomson it was impossible to obtain materials for blinds and that he knew it. Rather the case made for the Crown was that when he said that his failure to supply the blinds to Thomson was due to his finding it impossible to obtain materials he was giving a lying excuse; that he never intended to supply the blinds and that he made no attempt to find materials. On the evidence there can be very little doubt that when he made the contract he never had the slightest intention of fulfilling it and therefore made no attempt to obtain the materials and took no other step towards supplying

the blinds. Assuming therefore that the representation that he was prepared to supply the blinds could be treated as a statement that it was within his power to provide the blinds, it is difficult to say that affirmative proof was adduced shewing that it was not within the accused's power to supply Thomson with venetian blinds and that he knew that it was not within his power. But in any case the statement attributed to him that he was "prepared" to supply blinds in my opinion could not be treated as more than a statement that he would contract to supply the blinds and was ready and willing to perform the contract.

The question is whether in the circumstances the applicant's fraudulent conduct amounts to the crime of false pretences.

In *R.* v. *Giles* (1) *Erle* C.J., delivering a judgment in which *Channell* B., *Blackburn* and *Mellor* JJ. concurred, said—"I take the law to be, that there must be a false pretence of a present or past fact and that a promissory pretence to do some act is not within the statute." A promise to do something in the future is not a pretence for the purposes of this crime. The promise may import an assertion of a presently existing intention to do the thing, but that does not make it a pretence. This was settled as the law early in the nineteenth century. In *R.* v. *Goodhall* (2) the prisoner was convicted upon an indictment alleging a false pretence that if a certain butcher would sell to the prisoner the carcasses of three sheep and two legs of veal and send the same to him he would pay for them and send the money back by the butcher's servant. It appeared that the prisoner had requested the butcher to let him have the meat and had been told by the butcher that he did not trust him. The prisoner had thereupon promised the butcher that if he would send the meat in good time on the following morning he would send the money back by the bearer. He obtained the meat from the butcher's man without doing so. In finding the prisoner guilty the jury said that they were of opinion that at the time the prisoner applied to the butcher he knew the latter would not part with the meat without the money and promised to send the money back in order to obtain the goods and that they found that when he so promised he did not intend to return the money but intended by that means to obtain the meat and cheat the butcher.

The judges nevertheless held that the conviction was wrong, being of opinion that it was not a pretence within the meaning of the statute (*scil.* 30 Geo. II., c. 24, s. 1).

(1) (1865) 11 L.T. 643, at p. 645.

(2) (1821) Russ. & Ry. 461 [168 E.R. 898].

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From that time forward the law has been that no representation, express or implied, as to the existence of an intention on the part of the prisoner to do something in the future amounts to a pretence for the purposes of the crime of false pretences (cf. *R.* v. *Douglas* (1); *R.* v. *Johnston* (2); *R.* v. *Lee* (3); *R.* v. *Henshaw and Clark* (4); *R.* v. *Burrows* (5)). But a contract or promise as to a future act or future conduct may itself be based upon or accompanied by a false statement as to a past fact or present state of things and if by means of the false statement the prisoner obtains the property it would form a foundation for a charge of false pretences notwithstanding the contract or promise. Some difficulty appears to have been felt about an inducement consisting partly of a false promise as to future conduct and partly of a false representation of past or present fact. But it was decided that a false representation of existing fact though united with a false promise would sustain an indictment for false pretences if money or property was thereby obtained (*R.* v. *Bates and Pugh* (6); *R.* v. *Fry* (7); *R.* v. *West* (8); *R.* v. *Jennison* (9)).

In New South Wales by what is now s. 179 of the *Crimes Act* 1900, provision was expressly made that the obtaining might be partly by a false pretence and partly by a wilfully false promise: see too s. 180. But it seems to have required a judicial decision to establish that it is immaterial whether money or property is obtained by the false pretence alone or partly by the false pretence and partly by the false promise (*R.* v. *Thorland* (10)). Moreover it was thought necessary or desirable to enact the provision now standing as s. 182 to make sure that the fact that the property was obtained partly by a wilfully false promise should not be considered a ground of acquittal when it was obtained partly by a false pretence.

The rule that a false representation on the part of the prisoner as to his intention does not amount to a false pretence has perhaps been salutary. For in spite of all that has been said about a state of mind being a state of fact, it is not often a state of fact about which anyone can be sure, even the man himself, and, if the law were otherwise, the risk would be great of men being convicted of false pretences because juries failed to distinguish between false

(1) (1836) 1 Mood. C.C. 462 [168 E.R. 1345].
(2) (1842) 2 Mood. C.C. 254 [169 E.R. 101].
(3) (1863) Le. & Ca. 309 [169 E.R. 1408].
(4) (1864) Le. & Ca. 444 [169 E.R. 1466].
(5) (1869) 20 L.T. 499; 11 Cox C.C. 258.
(6) (1848) 3 Cox C.C. 201.
(7) (1858) Dears. & Bell 449 [169 E.R. 1077].
(8) (1858) Dears. & Bell 575 [169 E.R. 1126].
(9) (1862) Le. & Ca. 157 [169 E.R. 1343].
(10) (1884) 5 L.R. (N.S.W.) 412.

promises and broken promises. But in many situations a man's ability to act in a particular way in the future will depend on circumstances existing in the immediate present. When that is so, it is likely that his promise to act in that way in the future will be accompanied by a representation as to the present existence of the circumstances which will enable him to carry out his promise in the future or it may even be that his promise implies the existence of those circumstances. Thus, to take an early example, in *R.* v. *Copeland* (1) Lord *Denman* C.J., with the concurrence of *Maule* J., ruled that an indictment alleging that the prisoner had obtained money from a woman by a false pretence that he was unmarried was supported by evidence that he had paid his addresses to her, had obtained her promise of marriage and had threatened her with an action for breach of promise and had so obtained a sum of money (see *R.* v. *Jennison* (2) and cf. *R.* v. *Johnston* (3); *R.* v. *Sawyer* (4) where there was nothing but promissory pretences). In the same way in *R.* v. *Giles* (5) a conviction was supported for a false pretence that the prisoner had power to bring back the prosecutrix's husband who had left her. The evidence was that the prisoner professed peculiar powers and said she would bring back the woman's husband on a certain day and thus obtained money. Claims to occult or supernatural powers have been considered enough to amount to a false pretence (*R.* v. *Lawrence* (6)).

In cases where people have been cheated out of their money by false promises, the courts have gone very far in supporting indictments based upon allegations of false pretences with reference to the existing capacity of the cheat to fulfil his promises.

But principle makes indispensable to the charge a representation, express or implied, which really relates to an existing state of fact whatever form the representation takes. Some departures from principle may be found, as for instance *R.* v. *Jones* (7) and *R.* v. *Dah Ram* (8) where the dissenting judgment of *Hensman* J. seems to take the sounder view, but few decisions can be found upholding convictions on grounds of this kind which do not depend upon the courts finding in the facts a representation of a presently existing state of facts affecting the prisoner's capacity to carry out his promises, however the representation may have been expressed or described. In *R.* v. *Cooper* (9) the Court decided that certain

(1) (1842) Car. & M. 516 [174 E.R. 615].
(2) (1862) Le. & Ca. 157 [169 E.R. 1343].
(3) (1842) Mood. C.C. 254 [169 E.R. 101].
(4) (1936) V.L.R. 1.
(5) (1865) 11 L.T. 643; Le. & Ca. 502 [169 E.R. 1490].
(6) (1877) 36 L.T. 404.
(7) (1853) 6 Cox C.C. 467.
(8) (1901) 3 W.A.L.R. 111.
(9) (1877) 2 Q.B.D. 510.

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correspondence written by the prisoner conveyed the meaning that he was then a dealer in potatoes in a large way of business and in a position to do a good trade in potatoes. Clearly that was a pretence as to an existing state of fact. In *R.* v. *Speed* (1) the conviction was affirmed on the ground that a representation made by the prisoner, in canvassing for advertisements in a supposed directory, to the effect that named publishers were about to publish a directory, related to an existing state of fact, namely the preparation of the work by them. There has been some misunderstanding of *R.* v. *Gordon* (2). The pretence there in question was that the defendant (a money lender) was prepared to pay the prosecutors £100 and thereby obtained a promissory note for £100. The facts showed that the defendant did lead the prosecutors to believe that he would advance the whole £100. His clerks on the appointed day obtained the signature of the prosecutors to securities for £100 and thus having obtained the documents the subject of the charge, thereupon handed over £60 only. The conviction was upheld on the ground that the representation was that the £100 was then and there ready for the prosecutors on their signing the paper (3). Whatever may be thought of this interpretation of the transaction, what the Court discovered in it amounted to a representation of a present fact. *Wills* J. (4) suggested that a representation as to an existing state of mind might be a pretence, but that was not the ground of the decision and the suggestion was made apparently without any consideration of the decided cases. In *R.* v. *Bancroft* (5) a case very like *R.* v. *Speed* (6) the conviction was upheld on the ground that it was for the jury to say whether the prisoner meant to represent that the work was in order for publication in May 1909 and that if so it was a statement made of an existing state of facts. Finally in *R.* v. *Alexandra* (7) the decision of the Court was based upon the rule, which was fully recognized and re-affirmed. Lord *Hewart* C.J. said :—" The appellant is charged with obtaining, with intent to defraud, certain money by falsely pretending that he honestly required the same only to secure himself against any breach by Dormer of a certain contract that day made with him. In our opinion, that is a perfectly good statement of an alleged existing fact, and the cases about future conduct have no bearing upon it. It is a matter of law that in a case of false pretences that which is relied upon must be a representation of an alleged existing fact." (8).

(1) (1882) 46 L.T. 175 ; 15 Cox C.C. 24.
(2) (1889) 23 Q.B.D. 354.
(3) (1889) 23 Q.B.D., at p. 359.
(4) (1889) 23 Q.B.D., at p. 360.
(5) (1909) 26 T.L.R. 10 ; 3 Cr. App. R. 16.
(6) (1882) 46 L.T. 174 ; 15 Cox C.C. 24.
(7) (1937) 26 Cr. App. R. 116.
(8) (1937) 26 Cr. App. R., at p. 120.

Thomson's evidence in the present case discloses, in my opinion, nothing on which a finding could be based that the applicant was guilty of pretences amounting to more than representations as to future action or conduct. All that can be laid hold of in that evidence is the statement that he was prepared to make the blinds. But this vague expression could not reasonably be treated by the jury as a representation concerning an ascertainable present state of external fact. It is the ordinary language of a man expressing his readiness to undertake an obligation or a task.

In my opinion the offence of false pretences was not made out against the applicant.

I would grant the application for special leave to appeal; treat the application as the appeal; allow the appeal and quash the conviction.

McTIERNAN J. The evidence given at the trial of the prisoner shows that he obtained money from the person whom he was charged with defrauding and many other persons by systematic and deliberate deceit. His counsel ably argued on his behalf that although the prisoner's method of obtaining money from these persons was grossly dishonest it was not criminal. The argument proceeded upon the well-established principle that a mere promise as to future conduct or that something will be done in the future is not a pretence which, if false, is a false pretence for the purposes of the criminal law. Section 179 of the *Crimes Act* 1900 (N.S.W.) upon which the count was framed on which the jury convicted the prisoner, is not limited to false pretences, that is any pretence as to a present or past fact. The matter, which, in addition to a false pretence, this section expressly makes a crime, meets the argument for the prisoner that the sort of dishonesty which he practised is not a crime but only a matter for a civil remedy. If the inducement is either a false pretence, on the one hand, or partly a false pretence and partly a wilfully false promise, on the other hand, there may be an offence Section 179 says: "whosoever, by any false pretence, or partly by a false pretence and partly by a wilfully false promise, obtains from any person any property, with intent to defraud, shall be liable to penal servitude for five years." This section is different from s. 32 (1) of 6 & 7 Geo. V. c. 50: that section does not contain the words "or partly by a false pretence and partly by a wilfully false promise." A statement, however, consisting partly of a false representation of an existing fact and partly of a promise to do

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something in the future may be a false pretence: *R.* v. *Speed* (1); *R.* v. *Bancroft* (2); *R.* v. *West* (3).

Section 182 of the *Crimes Act* 1900 provides that "where, on the trial of a person for obtaining property by any false pretence, it appears that the property was obtained partly by a false pretence and partly by a wilfully false promise, such person shall not by reason thereof be entitled to acquittal."

The material count of the indictment alleges that the prisoner "did falsely pretend to Percival Thomson that he . . . then (the occasion alleged) intended and was in a position to supply and deliver to the said Percival Thomson within a period then agreed upon certain goods, to wit, venetian blinds."

In *R.* v. *Sawyer* (4) upon which the prisoner's counsel relied, it was held that a statement of intention to do something in the future is not such a pretence as will support an indictment for obtaining property by false pretences.

The indictment in the instant case, however, alleges more than a statement of intention or promise to supply and deliver the goods. It alleges that the prisoner falsely pretended that he was in a position to supply and deliver the goods. It is argued that this is nothing more than another allegation of a false promise. I do not agree with this argument. I think that, in this part of the count, what is alleged is a fraudulent misrepresentation of an existing fact, namely that the prisoner was in a position to supply and deliver the goods.

In *The Queen* v. *Gordon* (5) the false pretence alleged was that the prisoner "was prepared to pay" the sum of £100. *Coleridge* C.J. said: "It appears to me that the ordinary meaning of the allegation is: 'I am *now* prepared to give you £100 if you will sign this paper. Here is £100, and when you sign that paper, which you will do in a moment, the £100 is yours.' That, apart from all question of existing state of mind, seems to me to be a false pretence of an existing fact—the existing fact stated being that the money was ready for the prosecutors on their signing the paper. That was untrue, and untrue to the knowledge of the defendant, and it is clear that the promissory note was obtained by means of it." (6).

In the same case *Wills* J. said: "I find it difficult to see why an allegation as to the present existence of a state of mind *may* not be under some circumstances as much an allegation of an existing fact

(1) (1882) 15 Cox C.C. 24.
(2) (1909) 26 T.L.R. 10; 3 Cr. App. R., at p. 20.
(3) (1858) Dears. & Bell C.C. 575 [169 E.R. 1126].
(4) (1936) V.L.R. 1.
(5) (1889) 23 Q.B.D. 354.
(6) (1889) 23 Q.B.D., at p. 359.

as an allegation with respect to anything else" (1). *Wills* J. also said: "I should have thought that the allegation as to A.'s intention was one of an existing fact, capable of supporting an indictment for obtaining money by false pretences. But I am very sensible that in such an inquiry there must always be a danger of confounding intention with a representation or a promise as to something future; and I am very glad that it is possible, for the reasons given by my Lord, to affirm this conviction without approaching any such debateable ground" (2).

The meaning of the pretence in the present case that the prisoner was in a position to supply and deliver the goods is that he was able to do so because he had a business or factory or other means enabling him to do so. In *R.* v. *Jones* (3) another case upon which the prisoner's counsel relied, it was decided that there was no evidence that the accused obtained the food and wine by false pretences. Lord *Russell* C.J. said: "All that the defendant did was to go into an eating house, order food and refreshment, and eat, but not pay for it; no question was put to him, and no inquiry was made from him by the prosecutor as to his means, nor was any statement made by him whether he had the means to pay. The question is whether this can be regarded as a state of things in which a jury would be justified in finding that the defendant obtained consumable articles by false pretences" (4). If the accused had made such a statement it would have been a fraudulent misrepresentation of an existing fact. That case does not assist the argument for the prisoner in the present case.

Mr. Thomson gave the following evidence proving the representations made to him by the prisoner:—"During that month of December 1946, I read an advertisement in the newspaper, and as a result of that advertisement I rang a telephone number mentioned in the advertisement and spoke to some person. I would not be sure whether it was a man or a woman. As a result of that telephone conversation a man came to see me at my house. That would be just prior to Christmas 1946, round about the 24th December. That man was Lawrence Greene, the accused. He did not introduce himself, but he said what his business was. He said that he had come in answer to my 'phone call and he asked me how many blinds I wanted. I asked him whether he was prepared to make the blinds and he said, 'Yes,' and then I asked him what the price was and he told me 5s. a square foot. I asked him what time delivery, because his quote was 6d. a square foot dearer than anyone else, so

(1) (1889) 23 Q.B.D., at p. 360.
(2) (1889) 23 Q.B.D., at pp. 360, 361.
(3) (1898) 1 Q.B. 119.
(4) (1898) 1 Ch., at p. 123.

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I was curious to see what he had to offer, and he undertook that he would supply the blinds within six weeks, not counting the Christmas holiday period. Then he measured my home for two large blinds and two small blinds, and actually his quote came out at more than 5s. a square foot, because he had a minimum charge for any window that he did, which made the smaller ones dearer. The total quote he gave me for the blinds was £21 10s. He mentioned a period in which he would make delivery. He then asked for a 50 per cent deposit as a sign of good faith, to show good faith, to cover him against any expenses he may have incurred in case I reneaged. He talked of having done a great number of coffee shops and what have you in town with regard to blinds, &c. I did not ever get those blinds." The effect of these representations is correctly alleged in the count upon which the prisoner was convicted. The evidence proves that the representations alleged in the count were made. There was ample evidence entitling the jury to find that the prisoner induced Mr. Thomson to part with his money partly by a false statement that he intended to supply the blinds and by a false statement that he was able and prepared to make them. The evidence shows that the prisoner had no intention of making them and had nothing in the way of materials or tools to make them. His means and facilities for making a venetian blind were negligible. The jury was entitled to find that he made a false representation of an existing fact in saying that he was prepared to make the blinds and that the total effect of what he said to Mr. Thomson was that he had the plant and materials requisite to carrying out his order. This was a false representation of an existing fact.

The count of the indictment upon which the appellant was convicted correctly alleges an offence under s. 179 of the *Crimes Act* and there is evidence in the case to support every element in the charge. I should refuse the application.

WEBB J. I agree with the statement of the law in the judgments of the Chief Justice and *Dixon* J. But I am not prepared to hold that there was no evidence to support the conviction. The applicant in answer to Thomson said he was prepared to make the blinds. He may have meant nothing more than that he was willing, or even only inclined or disposed to make them, in which case he could not have been convicted. Or he may have meant that he had made ready to make them, and so was in a position to supply and deliver them. This latter meaning is that alleged in the indictment. It was for the jury to decide which meaning should be given to the applicant's spoken words. They could well have entertained a

reasonable doubt as to what he meant; but I cannot say that they should have entertained one. Further there was evidence that the applicant had not made ready to make the blinds. The reasoning in *R.* v. *Gordon* (1) to which *McTiernan* J. refers is helpful, although the facts are different.

I would refuse the application.

Special leave to appeal granted. Appeal allowed. Order of Court of Criminal Appeal set aside. Conviction quashed.

Solicitors for the applicant-appellant, *Stilwell Flynn & Co.*

Solicitor for the respondent, *F. P. McRae*, Crown Solicitor for New South Wales.

J. B.

(1) (1889) 23 Q.B.D. 354.