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Criminal Law—Proof of False Representations Inadmissible Unless Alleged in Indictment

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labeling the indictment so misled the defendant that he was induced to plead guilty to the acts described when he would otherwise have entered a plea of not guilty had the misdemeanor been so labeled. In branding the trial court's action in this instance an abuse of discretion, the Court has gone to unusual lengths to affirm a right, the denial of which remains doubtful.

PROOF OF FALSE REPRESENTATIONS INADMISSIBLE UNLESS ALLEGED IN INDICTMENT.

Defendant's conviction for first degree grand larceny was reversed and a new trial ordered by the Appellate Division on the ground that testimony concerning false representations made by defendant was improperly admitted in absence of an allegation in the indictment that defendant made use of any false representations.[34] The Court of Appeals, in *People v. Palen* unanimously affirmed this result.[35]

In 1942, Section 1290 of the Penal Law was passed thereby abolishing ". . . the subtle and confusing distinctions that had previously differentiated the various types of theft."[36] Section 1290-a, however, required any false representations to be alleged if (and only if) the crime was "effected" thereby, that is, if the crime was one that previously would have been prosecuted as "obtaining money by false pretenses." Since this, in effect, continued the distinction between obtaining money by false pretenses and the other forms of common law larceny which the Legislature had sought to abolish, Section 1290-a was amended in 1950.[37] This Section now provides that if . . . defendant made use of any false or fraudulent representation or pretense in the course of accomplishing, or in aid of, or in facilitating the theft, evidence thereof may not be received at the trial unless the indictment or information alleges such a representation or pretense. Thus, the pleading requirement is extended to any theft situation, not merely those amounting to "obtaining money by false pretenses".

Testimony was introduced in the present case to show that the defendant had represented to his victim that he had a balance in his bank account of $6,000, when in truth it was only $2.50, and had pretended to make an arrangement with the bank whereby the complainant could leave his Veterans Administration check with the bank for "safekeeping". Although the crime did not amount to obtaining money by false pretenses at common law, the Court felt these were false representations which defendant "made use of" in accomplishing the theft. Since they were not alleged in the indictment, the Court held that Section 1290-a required a reversal of the conviction. The decision is a judicial confirmation of the plain language of the section, making clear that the applica-

34. People v. Palen, 7 A.D.2d 791, 181 N.Y.S.2d 9 (3d Dep't 1959).
35. 7 N.Y.2d 107, 195 N.Y.S.2d 829 (1959).
36. People v. Karp, 298 N.Y. 213, 216, 81 N.E.2d 817, 818 (1948).
37. See New York State Legislative Annual, 54-55 (1950); People v. Lobel, 298 N.Y. 243, 82 N.E.2d 145 (1948).

tion of 1290-a is not limited to prosecutions which would have formerly been "obtaining money by false pretenses".

REFUSALS TO ANSWER QUESTIONS CONCERNING SAME SUBJECT MATTER CONSTITUTE A SINGLE CONTEMPT

In one of the numerous cases arising out of the so-called "Apalachin meeting" of November 1957, the Court of Appeals reversed and remitted for resentence the conviction of the defendant in *People v. Riela*.[38] The defendant, Riela, was called as a witness before the Grand Jury investigating the meeting which he and some sixty others had attended at the country estate of the late Joseph Barbara in Apalachin, New York. He refused to answer seventeen questions concerning that meeting on the ground that to do so might tend to incriminate him. He again refused to answer all seventeen questions when he was granted immunity pursuant to Section 2447 of the New York Penal Law.[39]

Because of his refusal to answer although granted immunity, he was indicted, convicted,[40] and sentenced for seventeen separate crimes of contempt in violation of New York Penal Law Section 600.[41] On each of the 17 counts he received a sixty day sentence, to be served concurrently, and a fine of $250, making a total fine of $4250.

Defendant appealed unsuccessfully to the Appellate Division,[42] and finally brought his case to the Court of Appeals. Riela defended his refusal to answer on the ground that the immunity granted him was not broad enough to assure him the protection guaranteed by the Constitution.

The Court brushed this objection aside and pointed out that it was clear under current decision, that a witness may be compelled to answer in a state proceeding, as long as the immunity granted by the state protects against prosecution under *its* laws, even though it may not protect against prosecution by the federal government or by other states.

In remitting the case for resentence, the Court of Appeals in a unanimous opinion reversed sixteen of the seventeen counts, holding that defendant's refusal to answer the seventeen questions constituted a single contempt of court and not seventeen separate offenses. The Court found that the defendant had

38. 7 N.Y. 571, 200 N.Y.S.2d 43 (1960).

39. (1). In any investigation or proceeding where by express provision of a statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any kind on the ground that he may be incriminated thereby, and, notwithstanding such a refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

40. 14 Misc. 2d 213, 178 N.Y.S.2d 873 (County Ct. 1958).

41. A person who commits a contempt of court, of any one of the following kinds is guilty of a misdemeanor: . . . (6). Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory; . . . .

42. 9 A.D.2d 481, 195 N.Y.S.2d 558 (3d Dep't 1959).