

# Federal and State Prohibition Against the Issuance of False Financial Statements

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## FEDERAL AND STATE PROHIBITION AGAINST THE ISSUANCE OF FALSE FINANCIAL STATEMENTS

**T**HE growth and development of modern business and the manifold ramifications incident thereto have in time given rise to problems which have had their echo in the administration of the criminal law generally, and more particularly that phase of the criminal law which seeks to punish crime peculiar and germane to business. Within that zone where sharp business practices merge into actual violation of law we shall not, in this article, concern ourselves. Rather will this discussion be limited to an exposition of some of the laws which seek as their purpose the punishment of business crimes.

Such laws appear both among Federal and State Statutes and Criminal Codes. There exists no sharp line on one side of which it can be said it is for the Federal Government to act and on the other side for the State Government. It is quite obvious that some cases are better handled by a federal prosecution and some by state prosecution. However, with business knowing oftentimes no state and, for that matter, no federal lines, the larger authority and jurisdiction and the longer arm of the Federal Government is under normal circumstances and, as a general rule, better fitted to cope with the problem.

Exactly what honest industry has to contend with when fighting the depredations of the business thief is best described by the various estimates that are given by authorities of the millions of dollars in cost to the community. This cost, borne in the first instance by business itself in the form of bad debt losses, is eventually passed on to the consumer and, for that reason, clearly affects every person in the community.

The types of business crimes which the prosecution has to fight are many. No attempt can be made in an article such as this to cover the entire field of such crime, but by confining ourselves to a discussion of the outstanding and most frequent methods resorted to by the so-called white collar

bandits a fairly comprehensive idea of the weapons which the law has provided for the fight can be given.

One of the most frequent methods used by swindlers is the obtaining of credit on the strength of false financial or property statements. Under ordinary circumstances such a statement sets forth ostensibly the assets and liabilities of the party desiring credit and is usually demanded as a condition precedent to the extension of credit by the seller. These statements in detail will give the seller such information with respect to the financial condition of the buyer as the seller deems important. Obviously such a statement when falsified can be made the basis for misleading and deceiving the seller. It may indeed be that apart from the falsity of the statement the buyer is conducting a substantial and well-rated business,—in other words, the only impropriety being the issuance of the false statement.

A closer approximation to an out-and-out larceny, however, is evidenced by the so-called "racket," which is the name applied to a business ostensibly honestly conducted but really conceived with the intention of buying up as much merchandise as is possible without any intention to pay for it, and subsequently either disappearing or going into bankruptcy. These methods can perhaps best be described when the laws which concern them are taken up in detail.

Quite frequently both types of swindles are met with in the same case, but, whether considered separately or together, they are best contended with in the Federal Court under the so-called Federal Mail Fraud Statute.

### 1. *The Federal Mail Fraud Statute.*

#### Section 215 of the Federal Criminal Code<sup>1</sup> in effect

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<sup>1</sup> Section 215 of the Federal Penal Code reads 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, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money, or any obligation or security of the United States, or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "sawdust swindle," or

makes it a crime to use the mails in furtherance of a scheme or artifice to defraud or for the purpose of obtaining money or property by means of false pretenses, representations or promises. Two elements are necessary to constitute the offense:

- a. The scheme and artifice itself, and
- b. The use of the mails pursuant thereto.<sup>2</sup>

As for the first element,—what constitutes a scheme to defraud,—there is much discussion in the cases. As thieves have grown bolder and more resourceful, the elasticity of the Mail Fraud Statute becomes more and more necessary and apparent; and it may be that cases never intended by the original framers of the law to come within the purview of the statute are now included therein and are punishable under it. For instance, the following have been held to constitute schemes to defraud under the law:

Blackmail<sup>3</sup>—although there seems to be some

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“counterfeit-money fraud,” or by dealing or pretending to deal in what is commonly called “green articles,” “green coin,” “green goods,” “bills,” “paper goods,” “spurious Treasury notes,” “United States goods,” “green cigars,” or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal 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 for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.”

<sup>2</sup>Section 215 was drawn from R. S. Sec. 5480 as amended by the Act of March 2, 1889. The elements of the offense as defined by R. S. 5480 were the same as they are under Section 215 of the Criminal Code excepting that in addition to (a) the scheme and (b) the use of the mails, there had also to exist (c) the intention to effect the scheme by actually opening a correspondence with some person through the mail or by inducing some person to open communications through the mails. *Rimmerman v. U. S.*, 186 Fed. 307 (C. C. A. 8th, 1911), *certiorari* denied, 223 U. S. 721; *Brown v. U. S.*, 143 Fed. 60 (C. C. A. 8th, 1906), *certiorari* denied, 202 U. S. 620.

<sup>3</sup>*Horrman v. U. S.*, 116 Fed. 350 (C. C. A. 6th, 1902); *Lupipparu v. U. S.*, 5 Fed. (2d) 504 (C. C. A. 9th, 1925); *cf. Naponiello v. U. S.*, 291 Fed. 1008 (C. C. A. 7th, 1923).

question with respect to blackhand or threatening letters.

Mental Healing may constitute a scheme to defraud.<sup>4</sup>

Get-Rich-Schemes generally, such as the well-known Ponzi scheme.<sup>5</sup>

Bucket Shops.<sup>6</sup>

Matrimonial Agencies may be conducted so as to constitute a scheme to defraud.<sup>7</sup>

Stock Frauds generally,<sup>8</sup> including misappropriation by a padding of promotion expenses,<sup>9</sup> or the improper payment of dividends.<sup>10</sup>

Fake horse race betting and confidence games generally.<sup>11</sup>

False representations either actual or promissory.<sup>12</sup>

One of the most important of these schemes from the point of view of the business man, and one involving some technicalities has to do with the obtaining of credit on false financial statements. That such credit obtained by virtue of a false property statement is a scheme to defraud is now definitely settled.<sup>13</sup> It may indeed be that the business the buyer is conducting is a legitimate one and, in addition, the

<sup>4</sup> Post v. U. S., 135 Fed. 1 (C. C. A. 5th, 1905).

<sup>5</sup> Walker v. U. S., 152 Fed. 111 (C. C. A. 9th, 1907).

<sup>6</sup> Foster v. U. S., 178 Fed. 165 (C. C. A. 6th, 1910).

<sup>7</sup> Grey v. U. S., 172 Fed. 101 (C. C. A. 7th, 1909).

<sup>8</sup> Pandolfo v. U. S., 206 Fed. 8 (C. C. A. 7th, 1923), *certiorari* denied, 261 U. S. 621, 43 Sup. Ct. Rep. 433 (1923).

<sup>9</sup> Wilson v. U. S., 190 Fed. 427 (C. C. A. 2d, 1911).

<sup>10</sup> Kriebel v. U. S., 8 Fed. (2d) 692 (C. C. A. 7th, 1925).

<sup>11</sup> Shea v. U. S., 251 Fed. 440 (C. C. A. 6th, 1918).

<sup>12</sup> U. S. v. Comyns, 248 U. S. 349, 39 Sup. Ct. Rep. 98 (1919); Durland v. U. S., 161 U. S. 306, 16 Sup. Ct. Rep. 508 (1896), a leading case on the subject, gives the following comprehensive statement concerning promissory representations: "It was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the Post Office from being used for carrying them into effect, that this statute was passed; and it would strip it of value to confine it to such cases as disclose an actual misrepresentation as to some existing fact and excluding those in which is only the allurement of a specious and glittering promise."

<sup>13</sup> Bettman v. U. S., 224 Fed. 819 (C. C. A. 6th, 1915), *certiorari* denied, 239 U. S. 642, 36 Sup. Ct. Rep. 163 (1915).

buyer may be financially secure. Both these elements are immaterial once the offense has been committed. It is the truth or the falsity of the statement and the knowledge of the scheme that is controlling.<sup>14</sup> An intent to injure must be present and the false representation must be knowingly made.<sup>15</sup> And the cases have held, with respect to a knowledge of the falsity of the statement, that it is the duty of the maker of a financial statement to investigate and determine the honesty of the statement he is making. So that if he acted with gross carelessness or with indifference with respect to the truth of the statement the conclusion may be warranted that he is acting fraudulently.<sup>16</sup> It is no defense for a defendant who is a president and general manager of an active business to say that he did not know that a false statement was contained in the financial report. It is his duty to know.<sup>17</sup>

Furthermore, it is not necessary that the scheme be successful generally, nor is it necessary that the debtor actually succeed in obtaining credit on the false financial statement;<sup>18</sup> and it is not necessary that the defendant either expect or actually realize any pecuniary profit from the false statement.<sup>19</sup>

Obviously in proving the scheme to defraud there must be proof of the falsity of the statement. This is usually shown by examination of the debtor's books. The proof of authenticity so far as the books are concerned may oftentimes be a matter of some difficulty. However, it has been held that books taken by a receiver from the defendant's place of business are sufficiently identified to be competent against the defendant.<sup>20</sup> And if there is no contention that the books were not accurately kept they may admitted, if it is proved that they were kept in the due course of business

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<sup>14</sup> Kaplan v. U. S., 229 Fed. 389 (C. C. A. 2d, 1916).

<sup>15</sup> Horrman v. U. S., *supra* Note 3.

<sup>16</sup> Slakoff v. U. S., 8 Fed. (2d) 9 (C. C. A. 3d, 1925); Straus v. U. S., 13 Fed. (2d) 122 (C. C. A. 7th, 1926).

<sup>17</sup> Lewy v. U. S., 29 Fed. (2d) 462 (C. C. A. 7th, 1928).

<sup>18</sup> Bryon v. U. S., 273 Fed. 769 (C. C. A. 9th, 1921); Grant v. U. S. 268 Fed. 443 (C. C. A. 6th, 1920).

<sup>19</sup> Calnay v. U. S., 1 Fed. (2d) 926 (C. C. A. 9th, 1924).

<sup>20</sup> Lewy v. U. S., *supra* Note 17.

without the necessity of verification of the entries by the employees.<sup>21</sup> And so, too, partnership books kept by partners, or which are under their supervision and control, are admissible against them in prosecutions of this character.<sup>22</sup> In fact it would seem that a witness can identify a book although he had never seen it before, if he knew that the particular book was one that was being kept in the regular course of business.<sup>23</sup>

As for the second element above mentioned as necessary to constitute an offense under Section 215 of the Federal Criminal Code, there must concur with the concoction of the scheme a use of the mails pursuant thereto and in furtherance thereof. In fact, the authority of Congress to legislate with respect to fraudulent schemes is predicated on its constitutional right to establish post-offices and post-roads and to make such regulations as are incidental thereto. In other words, although the fraudulent scheme itself is outside the jurisdictional power of Congress, it may prohibit the mailing of letters in execution thereof.<sup>24</sup>

Under an earlier statute the scheme had to impress as part of itself an intention to use the mails.<sup>25</sup> Under Section 215 of the Criminal Code, however, an intention to use the mails as part of the original scheme is not necessary.<sup>26</sup>

Considerable difficulty has been encountered in the construction of that portion of the section containing the words, “\* \* \* caused to be placed, any letter \* \* \*” and again, “\* \* \* shall knowingly *cause* to be delivered by mail \* \* \*.”<sup>27</sup> It is the law generally under the Federal Code that anyone who aids and abets, procures, induces, or causes the commission of an offense is himself a principal<sup>28</sup> and is

<sup>21</sup> *Wilson v. U. S.*, *supra* Note 9; *Parker v. U. S.*, 203 Fed. 950 (C. C. A. 2d, 1913).

<sup>22</sup> *Cullen v. U. S.*, 2 Fed. (2d) 524 (C. C. A. 9th, 1924).

<sup>23</sup> *Redmond v. U. S.*, 8 Fed. (2d) 24 (C. C. A. 1st, 1925).

<sup>24</sup> *Badders v. U. S.*, 240 U. S. 391, 36 Sup. Ct. Rep. 367 (1916). Causing the receipt or delivery of mail comes within the statute as well as causing the mailing itself, U. S. Crim. Code, Sec. 215.

<sup>25</sup> U. S. Rev. Stat. 5480; *Brooks v. U. S.*, 146 Fed. 223 (C. C. A. 8th, 1906).

<sup>26</sup> *Silkworth v. U. S.*, 10 Fed. (2d) 711 (C. C. A. 2d, 1926).

<sup>27</sup> *Supra* Note 1.

<sup>28</sup> U. S. Crim. Code, Sec. 332.

usually indicted as such. Applying this rule to a violation of the postal laws it becomes apparent that the defendant need not have personally deposited the forbidden letter in the mail box. It would be a most useless statute if it were enforceable only against a business which was run in such a way that the head of the company took the letters to the mail box himself every day. Anyone who causes a mailing is as culpable as the one who performs the overt act. But the question as to what is "causing" presents some difficulty. "Causing" has been defined as a "bringing about" a use of the mails; as such conduct which calculates that the effect of it will be a mailing.<sup>29</sup> And so the preparation of a false financial statement when the defendant knew that it was going to creditors outside the state and the mailing of that statement by an agent, or bookkeeper, or stenographer will be clearly binding upon the maker of the statement.<sup>30</sup> Where it was clearly contemplated that the mails were to be used, direct testimony to that effect is not necessary so far as a particular debtor is concerned.<sup>31</sup> So, too, the sending of a statement by an innocent agent may be binding on the parties to the scheme.<sup>32</sup> It has been held, for instance, that depositing checks with a bank which in turn transmitted them through the mail is causing a use of the mails.<sup>33</sup> Finally the use of the mail by any party to a scheme will be binding upon all.<sup>34</sup>

Despite the clarity of earlier decisions as to what constitutes a causing of the use of the mails two very recent cases seemingly opposed to each other perhaps call for some detailed discussion. In *Freeman v. U. S.*,<sup>35</sup> it was held that the proof of the mailing on the part of a defendant was insufficient. In that case Freeman was president of Rosin, Pascow & Freeman, doing business in Newark, N. J. In May, 1921, he came to the credit manager of Heywood Bros. & Wakefield Company of New York for the purpose of

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<sup>29</sup> *U. S. v. Kenofsky*, 243 U. S. 440, 37 Sup. Ct. Rep. 438 (1917).

<sup>30</sup> *Ibid.*

<sup>31</sup> *Kellogg v. U. S.*, 126 Fed. 323 (C. C. A. 2d, 1903).

<sup>32</sup> *Spear v. U. S.*, 228 Fed. 485 (C. C. A. 8th, 1915), *certiorari* denied, 246 U. S. 667, 38 Sup. Ct. Rep. 335 (1918).

<sup>33</sup> *Ibid.*

<sup>34</sup> *Grant v. U. S.*, *supra* Note 18; *Ader v. U. S.*, 284 Fed. 13 (C. C. A. 7th, 1922); *Tincher v. U. S.*, 11 Fed. (2d) 18 (C. C. A. 4th, 1926).

<sup>35</sup> 20 Fed. (2d) 748 (C. C. A. 3d, 1927).



getting a line of credit, the account of Rosin, Pascow & Freeman at that time being unsatisfactory. The credit manager for Heywood Bros. asked Freeman for a financial statement before Heywood Bros. would ship a particular order and gave Freeman a blank statement to fill out, which Freeman agreed to do. Freeman's bookkeeper prepared the financial statement that the credit manager for Heywood Bros. had given Freeman, the latter signed the statement; and Heywood Bros. received it in the mail in a Rosin, Pascow & Freeman envelope bearing a Newark, N. J., post-mark. This was about a month after Freeman had received the blank statement from Heywood Bros. On the receipt of the financial statement Heywood Bros. shipped Rosin, Pascow & Freeman merchandise of the value of \$177.00. That merchandise was received by Rosin, Pascow & Freeman. The Court held that there was no proof that Freeman had anything to do with the mailing, thereby reversing a judgment of conviction under the Mail Fraud Statute.

Contrast with this, the case of *Lewy v. U. S.*,<sup>36</sup> wherein it was also contended that the proof did not show that the defendant mailed or caused the financial statement to be mailed. The statements in this case bore the defendant's signature, were received through the mail by Dun's Agency and two others with letters of transmittal over the defendant's signature. The Court declared:

"It is a matter of common knowledge that property statements are sent to commercial credit rating concerns for the purpose of having them bring the contents thereof to the notice of the selling public, and that they are sent to the selling public solely for the purpose of establishing credit. In the face of these facts, it is idle to say that it cannot be presumed from them that defendant mailed the statements, or caused them to be mailed. We do not find anything in *Freeman v. United States* \* \* \* that seems to us to justify a different conclusion from that here reached."<sup>37</sup>

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<sup>36</sup> 29 Fed. (2d) 462 (C. C. A. 7th, 1928).

<sup>37</sup> *Ibid.* 464.

The facts in the Freeman and Lewy cases appear to be virtually alike. If there is any distinction between them it would be in the fact that the Freeman case is the stronger in the proof of mailing than the Lewy case. Freeman, when he went back to his office with the Heywood Bros.' statement, knew that that statement was to go to the Heywood Bros. & Wakefield Company. When he signed it and gave it back to his bookkeeper (assuming the strongest hypothesis for the defense) he contemplated in the usual and ordinary course of business that the statement would be mailed. The only alternative would have been to deliver it by messenger. But Newark is a considerable distance from New York and, in the absence of some extraordinary circumstance, the use of a messenger would be most unusual and contrary to general business practice, and clearly not contemplated by a business man in Freeman's position. The fact was, however, that the mails were used; and when Freeman, after signing the statement, gave it to someone in his office who in turn mailed it, he, Freeman, clearly brought about, in the language of *Kenofsky v. U. S.*,<sup>38</sup> the use of the mails by the mailing agent in his employ who actually dropped the letter in the mail box. It would seem that any contention to the contrary would be in contravention of usual, everyday business practice.

It becomes apparent from an analysis of these cases that it is difficult for a prosecutor in a mail fraud case to prove the use of the mails on the part of those charged with the offense. But assuming sufficient proof of a use of the mails, the mere mailing of a financial statement with knowledge of its falsity is quite sufficient for the commission of the offense.<sup>39</sup> In other words, it is not necessary that the mail be sent to a victim.<sup>40</sup> And when a statement is mailed to a credit agency it is common knowledge that the purpose thereof is to bring notice to the selling public for the purpose of getting credit.<sup>41</sup>

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<sup>38</sup> *Supra* Note 29.

<sup>39</sup> *Scheinberg v. U. S.*, 213 Fed. 757 (C. C. A. 2d, 1914).

<sup>40</sup> *Stewart v. U. S.*, 300 Fed. 769 (C. C. A. 8th, 1924); *Ader v. U. S.*, *supra* Note 34.

<sup>41</sup> *Lewy v. U. S.*, *supra* Note 36.

Some question might arise as to whether or not the financial statement itself must go through the mail or whether any mailing pursuant to a scheme to get credit on the strength of a false statement is sufficient. It is settled that the letters themselves may be innocuous on their face and need contain nothing criminal or objectionable.<sup>42</sup> The gist of the scheme is the obtaining of credit on the strength of a false property statement. A false statement, therefore, by a debtor may be made orally, and he can be charged with using the mails in a scheme to defraud if he sent any sort of a letter which would serve to consummate the unlawful purpose.

At the beginning of this article the writer stated that there are many different types of business crimes, but no attempt could be made to discuss them all. Thus far we have been discussing that type of swindle involved in the obtaining of credit on false financial statements. Another scheme, referred to earlier in this article, oftentimes resorted to by pseudo-business men is the so-called "racket" scheme which has to do with the obtaining of property on credit without any honest intention to pay therefor. Ordering goods ostensibly as merchants without intending to pay has repeatedly been held to constitute a scheme to defraud.<sup>43</sup>

The ability to obtain credit in such a case and the scheme itself is predicated on some sort of reputation which the buyer possesses or has obtained. That reputation he can acquire in one of three ways:

1. Buying it.
2. Adopting it.
3. Simulating it.

1. In the first of these cases John Doe finds that there is for sale a well-established business with a well-established rating. He buys the business and fails to disclose a change

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<sup>42</sup> *Durland v. U. S.*, *supra* Note 12; *Brewer v. U. S.*, 290 Fed. 807 (C. C. A. 2d, 1923), *certiorari* denied, 263 U. S. 707, 44 Sup. Ct. Rep. 35 (1923).

<sup>43</sup> *U. S. v. Watson*, 35 Fed. 358 (E. D., N. C., 1888); *U. S. v. Akers*, 2 Fed. 963 (N. D., Ga., 1916); *Kaufman v. U. S.*, 282 Fed. 776 (C. C. A. 3d, 1922), *certiorari* denied, 260 U. S. 735, 43 Sup. Ct. Rep. 96 (1922); *King v. U. S.*, 25 Fed. (2d) 242 (C. C. A. 6th, 1928).

of the ownership. Creditors, as a result, are likely to extend credit on the strength of the reputation of the former owner without checking up for the purpose of finding out whether there has been a change of ownership. The essence of the scheme, therefore, is the purchasing of another man's standing and keeping the new ownership secret.

2. Another means adopted towards the same end has to do with the adoption of a trade name which is identical with a trade name of an already established business. Let us assume there is an X. Y. Z. Corporation doing business in Greenville, N. C., which is well established and well rated. John Doe goes to Greenville, S. C., and adopts the name X. Y. Z. Corporation. A negligent creditor will not notice that the reputable X. Y. Z. Corporation is in Greenville, N. C., and will easily be defrauded to extending credit to the X. Y. Z. Corporation in South Carolina.

3. The third means used has to do with a simulation of a well-established trade name, as for instance, when John Doe adopts as his trade name a name very similar to, though not exactly identical with, an already well-established business which has a substantial line of credit. In other words, John Doe establishes a trade name of A. B. C. Corporation where there possibly is already in existence an A. B. C. D. Corporation, and the difference between the two is not sufficient to put the prospective creditor on his guard against the scheme.

In all of these cases deception of the creditor can be spelled out, and, with other circumstances which become a matter of proof, there can be shown not only an illicit means for procuring credit but also a distinct intention of not paying for it.

The mails obviously must be used in connection with such a scheme, particularly in the ordering and in the disposing of merchandise.

From this short analysis of the schemes used, the application of the Mail Fraud Statute to discourage the activities of pseudo-business men becomes apparent. As their activities broaden out so does the statute; and although the recent

tendency has been perhaps to limit any further extension of the Mail Fraud Statute, there can be no doubt that the law is well established to include within the purview of Section 215 of the Criminal Code the various devices and artifices which are being used to deprive business men of property because of misrepresentation and fraudulent practice.

## 2. State Statutes.

In such instances, however, which do not come within the above classifications either by reason of the fact that no scheme is spelled out or by reason of the fact that the use of the mails has not been proved, ample jurisdiction exists in the various state courts which can be utilized to cope with the situation.

Many jurisdictions have enacted statutes declaring the issuance of false financial statements, for the purpose of obtaining credit, a crime.<sup>44</sup> This is apart from the laws which generally make larceny by false pretense a felony.<sup>45</sup> A provision in the Penal Law in New York is typical of statutory enactments for the purpose of discouraging the practice of business frauds.<sup>46</sup>

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<sup>44</sup> Ala., Code 1923, Sec. 4139; Ark., Acts of 1917, p. 164, Act. 318; Cal., Penal Code, Sec. 532 A; Colo., Ann. Stat. 1912, Sec. 1979; Conn., Rev. Gen. Stat. 1918, Sec. 6521; Del., Rev. Code 1915, Par. 4759; Ind., Rev. Stat. 1914, Sec. 2950; Ky., Carroll's Ky. Stat. 1922, Sec. 1213 B; La., Acts 1912, Art. 72, p. 83; Me., Rev. Stat. 1916, Chap. 128, Sec. 3; Md., Code 1916, Art. 27, Sec. 146; Mass., Gen. Laws 1921, Chap. 266, Sec. 36; Mich., Comp. Laws 1915, Sec. 15342; Mo., Rev. Stat. 1919, Secs. 3367-8; Mont., Rev. Code 1921, Sec. 11408; Neb., Comp. Stat. 1922, Sec. 9898; Nev. Rev. Stat. 1912, Sec. 6696; N. H., Pub. Laws 1926, Chap. 387, Secs. 24-27; N. J., Pub. Laws 1906, p. 549, Comp. Stat. 186A; N. Mex., Code 1915, Sec. 1561; Ohio, Gen. Code, Sec. 13105-1; Ore., Stat. Supp. 1927, p. 988; Penna., Laws of 1913, Pub. Laws 161, Secs. 1-4; R. I., Pub. Laws 1912, Chap. 809; Tenn., Bald. Code 1920, 6888A-14 and 15; Texas, Penal Code 1925, Chap. 168; Utah, Comp. Laws 1917, Chap. 50, Sec. 8345; Vt., Gen. Laws 1917, Sec. 6884-6887; Wash., Laws of 1909, Sec. 368, Comp. Stat., Sec. 2620; Va., Code 1924, Sec. 4459a; W. Va., Acts 1915, Chap. 42; Wis., Stat. 1927, Chap. 343-41; Wyo., Comp. Stat., 1920, Chap. 7301, 7303.

<sup>45</sup> N. Y. Penal Law, Sec. 1290.

<sup>46</sup> *Ibid.* Sec. 1293B. *Obtaining property or credit by use of false statement.* Any person

1. Who shall knowingly make or cause to be made, either directly or indirectly, or through any agency whatsoever, any false statement in writing, with intent that it shall be relied upon, respecting the financial condition, or means or ability to pay, of himself, or any other person, firm or corporation, in whom he is interested, or for whom he is acting,

Under the statute in New York three elements must concur to constitute the offense:

A. There must be a false statement in writing respecting the financial condition.

B. Intention that it be relied on.

C. Issuance for the purpose of obtaining credit (or cash or other property) on the faith thereof.

At common law, prosecutions of this nature were possible as larcenies and the proof required was simply:

1. That defendant obtained possession of the merchandise.

2. By means of a trick or device.

3. That he feloniously appropriated the merchandise to his own use or for the use of another.<sup>47</sup>

Since the passage of Section 1293B<sup>48</sup> some question has

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for the purpose of procuring in any form whatsoever, either the delivery of personal property, the payment of cash, the making of a loan or credit, the extension of a credit, the discount of an account receivable, the execution, making or delivery by any person, firm or corporation of any bond or undertaking, or the making, acceptance, discount, sale or indorsement of a bill of exchange, or promissory note, for the benefit of either himself or of such person, firm or corporation; or

2. Who, knowing that a false statement in writing has been made, respecting the financial condition or means or ability to pay, of himself, or such person, firm or corporation in which he is interested, or for whom he is acting, procures, upon the faith thereof, for the benefit either of himself, or of such person, firm or corporation, either or any of the things of benefit mentioned in subdivision one of this section; or

3. Who, knowing that a statement in writing has been made, respecting the financial condition or means or ability to pay of himself or such person, firm or corporation, in which he is interested, or for whom he is acting, represents on a later day, either orally or in writing, that such statement theretofore made, if then again made on said day, would be then true, when, in fact, said statement if then made would be false, and procures upon the faith thereof, for the benefit either of himself or of such person, firm or corporation, either or any of the things of benefit mentioned in subdivision one of this section;

shall be guilty of a misdemeanor and punishable by imprisonment for not more than one year or by a fine of not more than one thousand dollars, or both fine and imprisonment. (Added by L. 1912, ch. 340; as amended by L. 1921, ch. 306, July 1.)

<sup>47</sup> *People v. Feinman*, 77 Misc. 408, 137 N. Y. Supp. 933 (1912).

<sup>48</sup> *Supra* Note 46.

arisen as to whether a prosecution for the issuance of a false financial statement comes within Section 1290<sup>49</sup> of the Penal Law as a larceny by false pretense. In the People *ex rel. Jaffe v. Jennings*,<sup>50</sup> the Court held that defendant could be charged with larceny by trick or artifice when he issues a false financial statement for the purpose of obtaining credit. The Court found as the basis for its decision the rule administered by the federal courts, namely, where there is an apparent inconsistency between a general and a special statute, the latter governs<sup>51</sup> and since Sections 1290 and 1293B provide for punishment for the same offense but in different degrees the later and subsequent section governs.

However, in *People v. Aronson*<sup>52</sup> there is dictum to the contrary. Here two defendants were prosecuted under Section 1293B for issuing a false financial statement. In a portion of the opinion the Court declared:

“\* \* \* Both these defendants are very fortunate in not having been prosecuted for larceny in obtaining money by means of false pretenses.”<sup>53</sup>

Whichever section of the statute the prosecution continues under, certain difficulties of proof are present. In the first instance, falsity of a financial statement is usually determined by books of the auditor of the prosecuted individual or firm. The rule with respect to admissibility of such evidence appears to have been this, if the books were reliably and properly kept their introduction was admissible, otherwise not.<sup>54</sup> Recently, however, an amendment to the Civil Practice Act was enacted which extends and adds flexibility to the former rule concerning admissibility of evidence in civil actions.<sup>55</sup> This may be construed to indicate that the

<sup>49</sup> *Supra* Note 45.

<sup>50</sup> 131 Misc. 657, 228 N. Y. Supp. 361 (1928).

<sup>51</sup> Citing *Haywood v. U. S.*, 268 Fed. 795 (C. C. A. 7th, 1920); *Rodgers v. U. S.*, 185 U. S. 83, 22 Sup. Ct. Rep. 582 (1902).

<sup>52</sup> 173 App. Div. 734, 156 N. Y. Supp. 396 (2nd Dept., 1915).

<sup>53</sup> *Ibid.* 736, 156 N. Y. Supp. at 397.

<sup>54</sup> *People v. Semenza*, 221 App. Div. 79, 222 N. Y. Supp. 616 (1st Dept., 1927).

<sup>55</sup> “374-a. ADMISSIBILITY OF CERTAIN WRITTEN RECORDS. Any writing or record whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be

same rule will apply in the prosecution of a criminal case as in the trial of a civil case.

In the second instance where the defrauding party has become a bankrupt he possesses certain immunities under the federal law<sup>56</sup> and also under Section 1293B, foremost among these things being the immunity against the use of testimony given by him.

A question sometimes arises as to who can be charged with a violation of Section 1293B. As to what the term *causing* includes, it has not had the same amount of consideration as it has received under the *Federal Mail Fraud Statute*. However, where a wife endorsed her note and had it discounted at a bank, the latter paying her the amount of the note on the faith of false statement by the wife as to her financial condition, both the husband and the wife were held as guilty parties.<sup>57</sup>

The state statutes in effect take up the burden where the federal enactment possesses no constitutional power to punish and both act in an effort to deter the consummation of schemes of roguish business men to defraud others by securing credit and property on the faith of fraudulent misrepresentation.

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admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation and calling of every kind."

<sup>56</sup> U. S. Comp. Stat., Sec. 9491, National Bankruptcy Act, Secs. 7, subd. 9 and 21A; *People v. Donnenfeld*, 198 App. Div. 918 (2nd Dept., 1921), *aff'd* without opinion, 233 N. Y. 526 (1922).

<sup>57</sup> *Supra* Note 52.