McLAIN *v.* STATE.

Opinion delivered May 5, 1930.

1. FALSE PRETENSES—SUFFICIENCY OF EVIDENCE.—A conviction for obtaining medical services by false pretenses is not sustained by proof that defendant put up an alleged forged note as collateral security for a note given for medical services.
2. FALSE PRETENSES—OBTAINING SETTLEMENT OF ACCOUNT.—It is no violation of the statute against false pretenses to obtain settlement of an existing account or indebtedness by means of a forged note.

Appeal from Logan Circuit Court, Northern District; *J. O. Kincannon,* Judge; reversed.

STATEMENT OF FACTS.

This appeal is prosecuted from a judgment of conviction for obtaining "a thing of value"—physician's services—under false pretenses.

Appellant was indicted for uttering a forged instrument or note, and for obtaining the services of the physician by the false representation or pretense of putting the alleged forged note up as collateral security for notes already given the physicians in closing his account for medical services rendered. The cases were consolidated for trial, and appellant was acquitted on the charge of uttering a forged instrument. In the indictment for false pretenses it is alleged that he obtained from the physicians, H. M. Keck and R. A. Harkins, certain medical services and a certain credit on his account for medical services of the value of $500, the property of said H. M. Keck and R. A. Harkins, etc., by pretending or representing to said physicians and their bookkeeper "that a certain promissory note, which the said Edgar McLain then and there gave to the said H. M. Keck and

R. A. Harkins as collateral security, was a valid note, etc., * * * and obtaining said medical services and credit on his account for said medical services." A demurrer to this indictment was overruled.

It appears from the record that Ray Nunnelee was bookkeeper for Drs. Keck and Harkins at Radcliff in March, 1928. That there were two accounts on the books against McLain for medical attention, and that he gave notes to close the accounts. One of the notes was for $366.74, dated March 6, 1928, and payable to Harkins and Keck on November 1, thereafter with interest at 10 per cent. The other note was for $116 to Harkins, and he took the $450 note as collateral security for the two notes. The collateral note was dated before the others, and McLain told him that the boys owed him some money and his grandmother some money. He never came back to the office afterwards before this bookkeeper quit work there. He made no representations whatever, or any promises, about the note being given, other than as collateral to secure his notes given for the accounts.

Dr. Keck stated that he was practicing medicine with Dr. Harkins, and that they had rendered professional services to McLain; that he was not present at the time of the delivery of the $450 note as collateral by appellant to his bookkeeper, nor were any promises or statements made to him by appellant about any arrangement for future services because of it. He stated further that later on McLain came to him and asked for the collateral note, saying the parties were ready to pay it, that it was delivered to him, and that he never returned it nor any money collected. He also said that they had rendered professional services to McLain after the $450 note was pledged as collateral to the value of $35. McLain never said anything to him about the collateral note at all until in the fall after it was pledged when he came to procure the note, saying the makers were ready to pay it. He stated that he did not learn until afterwards, that the note was a forgery, and one or two of the wit-

nesses, purported makers of the note, testified that they had never signed any such note nor authorized any one else to do so and denounced it as a forgery.

The court instructed the jury on the charge of uttering a forged instrument or note and first gave eight instructions on the charge of obtaining money under false pretenses. He then told the jury to disregard the instructions given on false pretenses, and gave other instructions on that charge. The jury returned a verdict of "not guilty" on the charge of uttering a forged instrument, but found appellant guilty on the other charge, and from the judgment thereon this appeal is prosecuted.

Cochran & Arnett, for appellant.

Hal L. Norwood, Attorney General, and *Pat Mehaffy,* Assistant, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the court should have directed a verdict in his favor on the charge of obtaining "a thing of value"—medical services—under false pretenses, and we have concluded that the contention must be sustained. There is no testimony showing any representations whatever made, false or otherwise, to either of the physicians by appellant upon his pledging with their bookkeeper the alleged forged note as collateral to secure the payment of his notes to the firm and the individual member thereon given for closing his account due them for more than the sum of the collateral note; nor any testimony whatever indicating an intention upon the part of appellant to procure the professional services of either of the physicians because of the pledging of the collateral note. It is no violation of the statute against obtaining personal property by false pretenses (§ 2449, C. & M. Digest) to obtain credit or settlement of an existing account or indebtedness by such pretenses. *Jamison* v. *State,* 37 Ark. 445; *Shelton* v. *State,* 96 Ark. 237, 131 S. W. 871.

Even if it be conceded that obtaining the services of a physician by false pretenses would come within the provisions of the said statute within the meaning of the

term "or other valuable thing," and we are cited to only one authority, a case from the Supreme Court of Mississippi construing a like statute to that effect, there is no evidence showing that it was the intention of appellant to procure any such services in the future upon the pledging of the collateral note, which was for a less amount in fact than the amount of the notes it was given as collateral to secure. There was testimony showing that appellant had come to one of the physicians and procured the collateral note for collection, stating to him at the time that the makers were ready to pay it, and that he neither collected the note nor returned it, and one of the instructions of the eight first given and withdrawn was on that point allowing the jury to convict appellant if it found such to be the case, as though he had procured the note "a thing of value" by the false representation that the makers were ready to pay it. There should, of course, have been no such instruction given, and, conceding that it was sufficiently withdrawn by the statement to the jury that such instructions were not to be considered, it may nevertheless have influenced the jury's verdict. In any event there is no sufficient testimony in this case to support the verdict of the jury, and the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.