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Carl F. Walker

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In conclusion, it might be said that the line between essential elements and those elements which are mere details and can be obtained through a bill of particulars is difficult to define. Because of the fact that a presumption of innocence exists in favor of the defendant,³⁶ any substantial defect in the indictment should be construed against the state. An indictment must state "every fact and circumstance necessary to constitute the offense," but "it need do no more." If effect is to be given to the latter clause, then it would be undesirable to require a greatly detailed statement of criminal liability in an indictment. The *Kelley* case and the above discussed illustrations clearly indicate that the Louisiana court has been and is today cautious in applying the rather liberal language of article 227. From the jurisprudence can be concluded only that article 227 requires a full and complete statement of the essentials of criminal liability. Uncertainty, however, exists as to how particularized this statement must be. Other states seem to have liberalized the requirements of sufficiency in indictments and it appears that "the trend [is] away from stressing old common-law technical necessities."³⁷ The position taken by the Louisiana Supreme Court in the *Kelley* case appears inconsistent with this trend, and could, if continued, result in burdening the indictment with a full statement of the details of the crime, a function which can best be served by the bill of particulars.

Patrick T. Caffery

Theft Between Spouses in Louisiana

The Louisiana Criminal Code defines the crime of theft as "the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices or representations."¹ The Code also states that an essential element of the crime is "an intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking."² The purpose of this comment is to

36. LA. R.S. 15:387 (1950).

37. Kaplan, *Criminal Procedure*, in 1953 ANNUAL SURVEY OF AMERICAN LAW 741, 747.

1. LA. R.S. 14:67 (1950).

2. *Ibid.*

inquire whether or not these provisions extend to a taking of one spouse's property by the other.

At common law, until recently, the well-settled rule was that one spouse could take the other's property with complete immunity to criminal prosecution.³ Husband and wife were regarded by the law as being one person, incapable of stealing from himself.⁴ An additional reason for the husband's immunity was that the wife ordinarily owned no property which he could be guilty of stealing, since ownership of the wife's personalty vested in him upon marriage.⁵ The effects of the so-called married women's emancipation acts on the common law rule of criminal immunity have not been uniform.⁶ Some courts have held that the acts did not affect this immunity, applying the principle of strict construction to their criminal statutes and interpreting the acts as merely enlarging the civil capacity of the wife.⁷ Others have taken the view that if the acts were not interpreted as having changed the common law rule, then property rights fully recognized in civil matters would be denied the full protection of the law.⁸ Accordingly, they have construed the married women's emancipation acts as destroying the traditional unity of husband and wife upon which the rule of criminal immunity was founded.

In Louisiana, both husband and wife have always been capable of owning separate property, whether immovable or movable.⁹ Moreover, since Louisiana is a community property state, husband and wife usually own property jointly or in indivision.¹⁰ Since one spouse's guilt of theft for taking the other's property may depend upon whether the property in question is separate or community, the inquiry must be divided accordingly.

Separate Property

The only Louisiana case on theft between spouses is *State v. Hogg*,¹¹ decided in 1910. The Supreme Court in that case upheld

3. 2 WHARTON, CRIMINAL LAW § 1158 (12th ed. 1932). See Annot., 55 A.L.R. 558 (1928) for a collection of cases.

4. Annot., 55 A.L.R. 558 (1928).

5. *Ibid.*

6. *Id.* at 559.

7. *Ibid.*

8. *Ibid.*

9. Art. 2383 *et seq.*, LA. CIVIL CODE of 1870. The text of this article is identical to that of the corresponding article of the Louisiana Civil Code of 1808.

10. Art. 2399, LA. CIVIL CODE of 1870.

11. 126 La. 1053, 53 So. 225 (1910).

the conviction of a husband for embezzlement of his wife's separate property, but refused to state whether or not a wife could be guilty of embezzling her husband's separate property. The *Hogg* case is questionable authority, since the court offered no reason whatsoever for rejecting defendant's argument that his marriage to the alleged victim required his acquittal. Moreover, a careful reading of the opinion indicates that the court entertained serious doubt that defendant and his alleged victim were actually husband and wife. Consequently, if the question of one spouse's guilt for theft of the other's separate property were to arise again in Louisiana, *State v. Hogg* might not be deemed controlling, even if the husband were defendant. This seems especially true in view of the repeal of the embezzlement statute under which the case was decided. If *State v. Hogg* were not deemed controlling, there are certain questions with which the court would seem bound to deal. Foremost among these is, does the concept of the spouses' unity exist in Louisiana criminal law?

Does this concept exist in Louisiana criminal law by reason of its acceptance by the common law? Until recently, a Louisiana statute provided that "all crimes, offenses and misdemeanors shall be taken, intended and construed, according to . . . the common law of England."¹² This provision was enacted prior to the adoption of the Criminal Code,¹³ at a time when many criminal offenses were prohibited in name, but not defined, by statute. Apparently in recognition of the thorough definition of the principal crimes by the Criminal Code, the Revised Statutes of 1950 omit the provision above quoted but retain the companion provision directing the court to apply the common law rules of criminal *procedure* when the Code of Criminal Procedure is silent.¹⁴ Probably the Supreme Court would conclude from the history of the 1950 modification that the legislature did not intend to prevent entirely the court's use of the common law as a guide in the application of our criminal statutes. Otherwise, in case of doubt, the very legal system in which many of our criminal law concepts originated could not be consulted to determine their meaning. On the other hand, it is not impossible that the court would view the 1950 legislation as implicitly prohibiting the use of the common law in the interpretation of non-procedural criminal statutes. But even

12. LA. REV. STAT. § 976 (1870).

13. The Criminal Code was adopted in 1942. La. Acts 1942, No. 43, p. 137.

14. LA. R.S. 15:02 (1950).

if the court rejected this view and looked to the common law, it would find there only the conflict in decisions discussed above concerning the effect of the married women's emancipation acts on the concept of the spouses' unity.

Assuming that the court should decide that unity of the spouses does not exist in Louisiana criminal law merely because it exists at common law, does the concept of the spouses' unity exist in our criminal law as a consequence of any principle of our civil law? It is almost certain that no notion of the unity of the spouses exists in our civil law. The Civil Code states that "the law considers marriage in no other view than as a civil contract."¹⁵ However, article 105 of the Code of Practice,¹⁶ which contains a prohibition of suits by the wife against the husband (with certain irrelevant exceptions), can be traced to a provision in *Las Siete Partidas* which, by way of prefatory explanation, definitely views husband and wife as one.¹⁷ Moreover, it is possible, though questionable, to view article 105, prohibiting suits against the husband by the wife, and the decisions of the Supreme Court, denying the husband a right of action against the wife,¹⁸ as suggesting some notion of the spouses' unity. Nevertheless, it seems certain that the court would find no spousal unity in our civil law that would prevent conceiving of one spouse's guilt for theft of the other's property in our civil law. Even if it should, it might find their unity destroyed by our married women's emancipation acts,¹⁹ as other courts have done. On the other hand, should the court find that this unity does not exist in our civil law, it might still apply the prohibition of civil suits by one spouse against the other to criminal actions, by anal-

15. Art. 86, LA. CIVIL CODE of 1870. It is interesting to note that French law expressly exempts husband and wife from criminal responsibility for theft of each other's property. FRENCH CODE PÉNAL 3.2.380. See 31 LOCRÉ, LA LEGISLATION CIVILE, COMMERCIALE ET CRIMINELLE DE LA FRANCE—3 CODE PÉNAL 140, 170 (1832) for clear indications of the pragmatic basis of the exception and the lack of any theoretical difficulty in conceiving of the spouse's guilt of theft. Similarly, the Roman law did not regard married persons as one entity but prohibited criminal proceedings for theft between spouses. BUCKLAND & MCNAIR, ROMAN LAW AND COMMON LAW 37 (2d ed. 1952).

16. LA. CODE OF PRACTICE of 1870.

17. "Husband and wife form a union, consecrated by the Deity. . . . And though, notwithstanding one of them should take something belonging to the other, neither he from whom it was taken, nor his heirs, could complain against the other as for a theft, though they might sue for the restitution or value of the thing." *LAS SIETE PARTIDAS* 3.2.5 (Moreau & Lislet's transl., 1820).

18. No statute prevents the husband from suing the wife, but our courts have regarded such suits as against "public policy" and disallowed them. He may sue for restitution of his separate property, however. See *Reich v. Reich*, 23 So.2d 566, 567 (La. App. 1945).

19. LA. R.S. 9:101 *et seq.* (1950).

ogy, viewing the state as a nominal party and the complaining spouse as the real party at interest in a prosecution of the other for theft of his spouse's separate property. This technique, however, would seem indefensible. Again, the court might reject any suggestion of the spouses' unity and hold that criminal prosecutions of one spouse for taking the other's property, separate or community, are against public order, and disallow them entirely for that reason. Obviously, no court would feel compelled to adopt any of these possible approaches by their inherent soundness. Indeed, the court might simply follow *State v. Hogg*,²⁰ hold the husband guilty of theft for taking the wife's separate property, and extend the holding of that case to a taking of the husband's separate property by the wife.

Community Property

The problem of the criminal liability of husband or wife for taking community property involves additional considerations. If the court should decide that one spouse is not guilty of theft for taking the other's separate property, either because of their juridical unity or on grounds of public policy, there is no reason why the same rule should not be applied to prosecutions for theft of community property between spouses. However, if prosecutions for thefts of separate property between spouses were permitted by the court, it would not necessarily follow that prosecutions for thefts of community property are maintainable. Certain questions would first have to be considered.

In his dealings with community property, under what circumstances is it legally possible for the husband to form the specific intent ("active desire")²¹ "to deprive the [victim] permanently of whatever may be the subject of the misappropriation or taking"?²² This intent is an essential element of the crime of theft. The question is presented by the extensive powers of the husband over the community. The community property is jointly owned by the husband and wife,²³ and each has a presently vested interest in it.²⁴ But the husband has its administration,²⁵ to the exclusion of the wife, and may freely

20. 126 La. 1053, 53 So. 225 (1910).

21. LA. R.S. 14:10 (1950).

22. LA. R.S. 14:67 (1950).

23. Art. 2406, LA. CIVIL CODE of 1870.

24. See, e.g., *Succession of Wiener*, 203 La. 649, 14 So.2d 475 (1943), *appeal dismissed*, 321 U.S. 253 (1944).

25. Art. 2404, LA. CIVIL CODE of 1870.

dispose of it within certain limits. He may not donate any immovable or any fractional part, as such, of the movables belonging to the community, nor is he privileged to sell or otherwise dispose of the community property "by fraud, to injure his wife."²⁶ It would therefore appear that the husband could entertain the requisite specific intent only when he disposes of the community property "by fraud, to injure his wife."²⁷ Any other disposition would either be privileged under the Civil Code or lacking in the "active desire" element of the Criminal Code and could not form the basis of a criminal prosecution for theft. Since the wife cannot, without the husband's consent, dispose of any part of the community property²⁸ (with certain exceptions not important here), her capacity to form the specific intent contemplated by the Criminal Code's definition of theft seems clear.

Assuming a taking or misappropriation of community property with the requisite specific intent by either husband or wife, a further problem arises. A joint owner of property at common law could not be convicted of theft for converting such property to his own use. His interest, being undivided, extended to every part of the property, and it was considered impossible to ascertain what part he had wrongfully taken.²⁹ Whether this result would be reached in Louisiana or whether the victim spouse's undivided interest would instead be considered "anything of value belonging to another"³⁰ under the Criminal Code is uncertain. In dictum, *State v. Hogg* stands for the proposition that a partner cannot be guilty of the theft of partnership property, since "as to him, the property of the firm is not the property of another in the sense of the law."³¹ This rule, derived from the common law, might be applied by analogy to the partners in the marital community. On the other hand, a few states have discarded this rule on the theory that it is too strict and

26. *Ibid.*

27. Such a motive and purpose on the husband's part have proved difficult to establish in civil cases. *Exposito v. Lapeyrouse*, 195 So. 814 (La. App. 1940); *Succession of Packwood*, 12 Rob. 334 (La. 1845).

28. Art. 2404, LA. CIVIL CODE of 1870; *Mathews Bros. v. Bernius*, 169 La. 1069, 1074, 126 So. 556, 558 (1930) (dictum).

29. Cases are collected in *Annot.*, 17 A.L.R. 982 (1922), 169 A.L.R. 372 (1947).

30. *Cf. State v. Kusnick*, 45 Ohio St. 535, 540, 15 N.E. 481, 483 (1888) ("[T]he statutes of nearly all the states . . . require that the subject of the offense [in this case, embezzlement] shall be shown to be the 'property of another'; and this has almost universally been construed to mean that it must be *wholly* the property of another." (Emphasis added.)

31. 126 La. 1053, 1058, 53 So. 225, 226 (1910).

technical an interpretation of the law.³² Whether or not the Louisiana court would also reject the dictum of the *Hogg* case, pursuant to the legislative mandate to give the provisions of the Criminal Code "a genuine construction, according to the fair import of their words,"³³ is nowhere indicated. If the problem centered upon the wife's guilt for theft of the community property, she might not be entirely protected by the immunity of joint owners, assuming that this immunity were held to exist. A famous Minnesota decision³⁴ held a person guilty of theft for taking his own coat from the hands of a tailor who, by virtue of the owner's unpaid alteration bill, had acquired a lien on it. Decisions of this type and the broad definition of the subject of theft in the Criminal Code—"anything of value which belongs to another"³⁵—suggest that any disposition which the wife might make of community property, without the husband's consent, could conceivably be a theft of the husband's right to administer that property. However, the only decision found concerning the wife's criminal responsibility for taking community property is a Texas case holding that, for such a taking, she is not guilty of theft.³⁶ Again, in this connection, the problem of the extent to which we may look to the common law for guidance in the interpretation of our criminal statutes is encountered.

In view of the unsettled state of the law in this area in all states and the virtual absence of authority in Louisiana, it is probable that the social desirability of one rule or the other concerning theft between spouses will influence the Supreme Court much more than any of the technical possibilities outlined above.

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32. *State v. Snow*, 98 N.H. 1, 93 A.2d 831 (1953) *semble*; *State v. Sasso*, 20 N.J. Super. 158, 89 A.2d 489 (1952).

33. LA. R.S. 14:3 (1950).

34. *State v. Cohen*, 196 Minn. 39, 263 N.W. 922 (1935); for other cases, see Annot., 58 A.L.R. 330 (1929).

35. LA. R.S. 14:67 (1950).

36. *Warren v. State*, 51 Tex. Crim. 616, 103 S.W. 853 (1907).