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# Criminal Law - Misappropriation of Funds of a Commercial Partnership by One of the Partners

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*Dearborn* case resolve conflicts between state legislation and the State Constitution. The court furthermore observed that in 1951 the United States Supreme Court had found the Louisiana statute to be a "price-fixing" statute, a finding contrary to that in the *Dearborn* case.<sup>20</sup>

The decision in the present case reflects a trend toward reappraisal of fair trade legislation,<sup>21</sup> apparently incited by the United States Supreme Court decision in 1952,<sup>22</sup> and the subsequent McGuire Act. That fair trade perhaps protects good will of producers and stops "loss leading" tactics is an issue not to be entirely disregarded. But the chief argument for fair trade is that it affords protection for the "little man" who cannot withstand competition of large-scale operations.<sup>23</sup> On the other hand, opponents of fair trade point out that the public is hurt by being denied the benefits of this competition.<sup>24</sup> Thus, in the context of public policy, the result of the instant case is to preserve the benefits of competition by permitting the large-scale operators to offer fair-trade goods for sale at lower prices. Also, the legal determination by the court in this instance protects the retailers' property rights against an unfettered exercise of the will by private persons.

*James Farrier*

#### CRIMINAL LAW—MISAPPROPRIATION OF FUNDS OF A COMMERCIAL PARTNERSHIP BY ONE OF THE PARTNERS

Defendant partner allegedly withdrew funds from the partnership bank account and converted them to his own use. The district court sustained a motion to quash the information filed against the defendant for theft of partnership funds. On appeal by the state, *held*, affirmed. Since the partner can eventually be held liable for the entire debt of a commercial partnership of

20. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). The argument that the Supreme Court in this case had overruled the *Dearborn* decision was quashed in *Schwegmann Bros. v. Eli Lilly & Co.*, 205 F.2d 788 (5th Cir. 1953). This case considered and upheld the McGuire Act.

21. See note 14 *supra*.

22. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

23. Two chief arguments for fair trade are that the manufacturer's trade mark has been "exploited and cheapened" and the small retailers driven out of business by sales of brands below cost. The chief fear is of "price wars" which will trample the little men down. See Fulda, *Resale Price Maintenance*, 21 U. CHI. L. REV. 175 (1954), for a full analysis of arguments for and against fair trade.

24. "In addition many newspapers and magazines throughout the country hailed the *Schwegmann* decision as a victory for the consumer and the free enterprise system . . . *Fortune* magazine repeatedly attacked the fair-trade laws as economically unsound and harmful to the best interests of consumers." *Id.* at 186-87.

which he is a member,<sup>1</sup> partnership property cannot be considered the property "of another" as to one of the partners, as required by the theft article of the Louisiana Criminal Code.<sup>2</sup> *State v. Peterson*, 232 La. 931, 95 So.2d 608 (1957).

Generally, under the common law, no criminal liability is imposed upon a partner for the misappropriation of partnership property.<sup>3</sup> Since each of the partners has a joint tenancy in the property of the partnership, no stealing crime is committed because the partner has not converted the property "of another."<sup>4</sup> The remedy available to the other partners is to sue for an accounting and dissolution of the partnership and then to obtain a personal judgment against the defrauding partner in the amount of what he has taken.<sup>5</sup> Whenever the contract to form a partnership is executory or the partnership has been dissolved, a partner may be convicted of theft because the joint tenancy in the property has not yet begun or has already ended at the time of the theft.<sup>6</sup> Under certain fact situations, some courts hold that the partner is acting as an officer or agent of the partnership in handling the property and is therefore criminally liable for his misappropriations under embezzlement statutes.<sup>7</sup>

1. LA. CIVIL CODE art. 2872 (1870): "Ordinary partners are not bound *in solido* for the debts of the partnership, and no one of them can bind his partners, unless they have given him power so to do, either specially or by the articles of partnership.

"Commercial partners are bound *in solido* for the debts of the partnership." (Emphasis added.)

2. LA. CRIM. CODE art. 67 (1942): "Theft is the misappropriation or taking of anything of value which belongs to another . . ." (Emphasis added.)

3. By larceny: *State v. Brown*, 38 Mont. 309, 99 Pac. 954 (1909); *State v. Elsbury*, 63 Nev. 463, 175 P.2d 430 (1946); *Hall v. State*, 103 Tex. Crim. App. 42, 279 S.W. 464 (1926). See also collection of cases in Annot., 169 A.L.R. 372 (1947).

By embezzlement: *Ex parte Sanders*, 23 Ariz. 20, 201 Pac. 93 (1921); *Gary v. Northwestern Mutual Aid Assn.*, 87 Iowa 25, 53 N.W. 1086 (1893); *Pierce v. Commonwealth*, 210 Ky. 465, 276 S.W. 135 (1925); *State v. Ossendorf*, 357 Mo. 366, 208 S.W.2d 209 (1948). It should be noted that in prosecutions for embezzlement, the courts also hold that the partner does not belong to any of the classes of persons covered by the statutes.

By false pretenses: *State v. Quinn*, 245 Iowa 846, 64 N.W.2d 323 (1954).

4. See note 3 *supra*. See also collection of cases in Annot., 17 A.L.R. 982 (1922).

5. *West v. Ray*, 210 La. 25, 26 So.2d 221 (1946); *Riley v. Riley*, 150 Neb. 176, 33 N.W.2d 525 (1948); see Annot., 21 A.L.R. 21, 124 (1922).

6. Contract of partnership executory: *State v. Brown*, 38 Mont. 309, 99 Pac. 954 (1909); *Napoleon v. State*, 3 Tex. Crim. App. 522 (1878).

Partnership dissolved: *State v. Matthews*, 129 Ind. 281, 28 N.E. 703 (1891); *Sharpe v. Johnston*, 59 Mo. 557 (1875).

7. *State v. MacGregor*, 202 Minn. 579, 279 N.W. 372 (1938) (where the partner was the bookkeeper for the partnership); *State v. Kusnick*, 45 Ohio St. 535, 15 N.E. 481 (1888) (where the cashier partner was treated as an agent in receiving money); *Commonwealth v. Bovaird*, 373 Pa. 47, 95 A.2d 173 (1953) (where the partner was general manager and agent of the partnership).

It has also been held that under the Uniform Partnership Act, each partner is considered an agent of the partnership and subject to the embezzlement statutes.<sup>8</sup>

The only previous case in Louisiana which discusses the problem of theft of partnership property by one of the partners is *State v. Hogg*, decided in 1910.<sup>9</sup> In that case the court stated that a partner could not be criminally liable for the misappropriation of partnership funds because the existing embezzlement statute did not impose criminal liability upon a partner and because the property taken was not that "of another." However, it does not appear that the court relied too heavily on the *Hogg* case in reaching its decision in the instant case, probably because the Louisiana Criminal Code had not been adopted at the time of that decision.<sup>10</sup>

In the instant case the Supreme Court was faced with the problem of determining whether the property of a commercial partnership could be considered the property "of another" as to one of the partners, as required by Article 67 of the Louisiana Criminal Code. The court reasoned that since each partner in a commercial partnership can be held liable for the entire debt of the partnership under Article 2872 of the Civil Code,<sup>11</sup> the property of a commercial partnership is not the property "of another" as to one of the partners. The court bolstered its position by emphasizing that all penal statutes should be strictly construed and that the other partners have a civil remedy available to recover their loss. Consequently, no criminal liability is imposed upon a partner who misappropriates the funds of a commercial partnership of which he is a member.

While it is true that the law provides a civil remedy to victimized partners, this does not prohibit the state from imposing criminal sanctions. A civil remedy is always available against a thief for the recovery of the property taken or its value.<sup>12</sup> It is submitted that the better solution was suggested in well-reasoned dissents by Justices McCaleb and Simon, who would hold

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8. *State v. Sasso*, 20 N.J. Super. 158, 89 A.2d 489 (1953). See Section 9 of the Uniform Partnership Act, "Partner Agent of the Partnership as to Partnership Business."

9. *State v. Hogg*, 126 La. 1053, 53 So. 225 (1910).

10. *Ibid.* Another reason why it is believed that the court did not rely too heavily on the *Hogg* case is that in that case there proved to be no partnership existing. Therefore, the statements concerning the criminal liability of a partner were merely dicta.

11. See note 1 *supra*.

12. *Emerson v. Sookul*, 9 So.2d 325 (La. App. 1942).

a partner criminally liable under the Louisiana Criminal Code. Unlike common law jurisdictions,<sup>13</sup> Louisiana treats a partnership as a legal entity, separate and distinct from its members.<sup>14</sup> In discussing the legal entity theory of partnerships, the Supreme Court has stated that "partnership property belongs to the partnership, and *not to the partners*," (emphasis added)<sup>15</sup> and "it [a partnership] is a civil person."<sup>16</sup> Since Article 2 of the Louisiana Criminal Code defines "another" as "any other person or *legal entity*," (emphasis added) it would seem that the misappropriation of partnership funds by one of the partners would satisfy all of the requirements of Article 67 of the Louisiana Criminal Code. It is well settled that a corporation is a legal entity and that the property of the corporation is not owned by its stockholders.<sup>18</sup> Thus, a stockholder can be convicted of theft of corporation property because he is converting the property of the legal entity and therefore the property "of another."<sup>19</sup> The same reasoning could be employed in the partnership situation in Louisiana since the partnership is treated as a legal entity;<sup>20</sup> thus, conversion of partnership property by a partner would be the conversion of property "of another," i.e., the legal entity.

Left unsolved is the problem of theft by a partner in an ordinary partnership. A partner in an ordinary partnership is not liable for the entire debt of the partnership, but only for his virile share of the debt.<sup>21</sup> Since the court in the instant case based its holding on the rule that the commercial partner can be liable for the entire debt of the partnership, a different result is

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13. *Carle v. Carle Tool and Engineering Co.*, 33 N.J. Super. 469, 110 A.2d 568 (1954); *Caplan v. Caplan*, 278 N.Y. Supp. 475, 243 App. Div. 456 (1935); *Allison v. Campbell*, 117 Tex. 277, 1 S.W.2d 866 (1928).

14. *Trappey v. Lumbermen's Mutual Casualty Co.*, 229 La. 632, 636, 86 So.2d 515, 516 (1956), where the court in holding that a partner could collect workmen's compensation from the partnership of which he was a member said: "Under the civil law system, unlike that of the common law, a partnership is an abstract ideal being with legal relations separate and distinct from those of its individual members."

15. *Toelke v. Toelke*, 153 La. 697, 704, 96 So. 536, 539 (1923).

16. *Succession of Pitcher*, 39 La. Ann. 362, 365, 1 So. 929, 932 (1887). See also *Smith v. McMicken*, 3 La. Ann. 319, 322 (1848).

17. See also the Reporter's Comment to Article 2 of the Louisiana Criminal Code of 1942, which states that "only by an extensive interpretation will [its] purpose be served."

18. *Ricks v. Louisiana Milk Commission*, 32 So.2d 643 (La. App. 1947); *Wild v. Standard General Realty Co.*, 145 So. 58 (La. App. 1932); *Warrior River Terminal Co. v. State*, 257 Ala. 208, 58 So.2d 100 (1952); *Matthews v. Minnesota Tribune Co.*, 215 Minn. 369, 10 N.W.2d 230 (1943).

19. *Reeves v. State*, 95 Ala. 31, 11 So. 158 (1892).

20. See notes 14, 15, 16, *supra*.

21. See note 1 *supra*.

implied in the case of misappropriation of funds belonging to an ordinary partnership. It is unlikely, however, that such a distinction was intended by the draftsmen of the Code or the Legislature which enacted it. It is submitted that full effect should be given to the theory that a partnership is a legal entity and to Article 2 of the Criminal Code, thus satisfying the requirement that the taking of property belonging "to another" and thereby imposing criminal liability upon a defrauding partner. In any event, it is hoped that subsequent cases will limit the present holding to cases involving commercial partnerships.

*William H. Cook, Jr.*

CRIMINAL PROCEDURE — PROCEEDINGS OF GRAND JURY —  
PRESENCE OF UNAUTHORIZED PERSON

Defendant filed a motion to quash based on the contention that the presence of a policeman attached to the district attorney's office as an investigator, who "monitored" a "Sound-scriber" machine used to record testimony of witnesses before the grand jury, was a violation of the defendant's right of secrecy during grand jury proceedings. The state contended that the investigator was present in the capacity of a stenographer, as contemplated by Article 215 of the Louisiana Code of Criminal Procedure.<sup>1</sup> The district court granted defendant's motion. On appeal, *held*, affirmed. Article 215 is mandatory in requiring that grand jury sessions be kept secret. The accused's rights were substantially violated by the presence of a recording machine operator who was not one of the persons specifically enumerated and authorized to be present at grand jury hearings. *State v. Revere*, 232 La. 184, 94 So.2d 25 (1957).

The function of the grand jury is to protect both society and the individual.<sup>2</sup> As an accusatory body, its members decide from the evidence adduced whether there is sufficient cause for requiring the accused to stand trial and answer the charge made

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1. LA. R.S. 15:215 (1950) states: "The sessions of the grand jury shall be secret, but the district attorney, as their legal adviser, shall have free access to said sessions; the district attorney may cause the testimony taken before the grand jury to be reported by a stenographer, who must be first sworn by the foreman of the grand jury; and whenever a witness is unable to speak the English language, the grand jury shall have the right, at its discretion, to employ an interpreter to translate the testimony of the witness, but such interpreter shall be first sworn to keep secret the proceedings of the grand jury."

2. *People v. Minet*, 296 N.Y. 315, 322, 73 N.E.2d 529, 532 (1947).