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Criminal Law- False Pretenses - Partner Fraudulently Obtaining Partnership Funds

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CRIMINAL LAW—FALSE PRETENSES—PARTNER FRAUDULENTLY OBTAINING PARTNERSHIP FUNDS—Defendant and another were equal partners in a used car business. Defendant took in an automobile, paying for it with his own funds. Representing that he had paid more than he actually had, he induced his partner to write him a check drawn on the partnership account. Defendant was indicted for obtaining half of the excess by false pretenses. The district court directed a verdict of acquittal. On appeal by the state, *held*, affirmed, three justices dissenting. A partner cannot be guilty of obtaining by false pretenses from the partnership; the statute[1] in question specifies that it must be "from

[1] Iowa Code Ann. (1950) §713.1.

another," whereas a partner has an interest in all the partnership assets. *State v. Quinn*, (Iowa 1954) 64 N.W. (2d) 323.

Direct support in this country on the issue raised is confined to two dicta,[2] both in agreement with the position of the majority. One text writer discusses the point[3] and, though also supporting the holding, his authority is only one English decision which, significantly, is based more on the grounds of practical financial management of the partnership than on the conceptualistic grounds of the partner's undivided interest in the funds of the firm.[4] The many cases holding that a partner cannot be guilty of larceny[5] or embezzlement[6] from the partnership give added support to the holding, as in both situations the courts base their views on the "from another" clauses of the statutes or the defendant's undivided interest in all the partnership assets or both.[7] But it may be doubted that the ends of criminal deterrence are served by such a line of decisions. In the embezzlement and larceny cases, for instance, it is hard to see that converting the assets of a going partnership is less reprehensible than when the partnership contract is executory,[8] or after dissolution.[9] On the same policy basis, there can be little differentiation between the instant case and one in which the false pretenses induced the victim to join the firm and place his money in the partnership funds, from which the defendant obtained them.[10] Under existing

[2] State v. Grumbles, 100 S.C. 238, 84 S.E. 783 (1915); State v. Simmons, 209 S.C. 531, 41 S.E. (2d) 217 (1947). The former is even vague as to the charge: "Larceny after breach of trust with fraudulent intent."

[3] 2 WHARTON, CRIMINAL LAW, 12th ed., §1470 (1932).

[4] Regina v. Evans, Le. & Ca. 252 at 257, 169 Eng. Rep. 1385 (1862). "Now, inasmuch as, before there could be any division of profit, those expenses would have to be paid out of the capital fund, those charges [defendant's overcharging on commissions] would be matter of account between the parties. . . . The act of the defendant was no more than a misrepresentation, which would be overhauled when the accounts were gone into." It may be noted that the English statute on false pretenses then in effect (Larceny Act of 1861, 24 & 25 Vict. c. 96, §88) was aimed at "Whosoever shall by any false Pretense obtain *from any other Person. . . .*" Italics added.

Sir J. F. Stephen commented: "I am unable to follow the reasoning of this judgement." DIGEST OF THE CRIMINAL LAW, 4th ed., art. 329, illustration, n. 3 (1887).

[5] People v. Dudley, 97 N.Y.S. (2d) 358 (1950); annotation, 169 A.L.R. 372 (1947). As to larceny between tenants in common, see 2 WHARTON, CRIMINAL LAW, 12th ed., §1162 (1932).

[6] Ex parte Sanders, 23 Ariz. 20, 201 P. 93, 17 A.L.R. 980 at 982 (1921); Pierce v. Commonwealth, 210 Ky. 465, 276 S.W. 135 (1925); State v. Ossendorf, 357 Mo. 366, 208 S.W. (2d) 209 (1948); 2 WHARTON, CRIMINAL LAW, 12th ed., §§1264, 1282, 1304 (1932); CLARK AND MARSHALL, LAW OF CRIMES, 5th ed., §347 (1952). *Contra*, State v. Sasso, 20 N.J. Super. 158, 89 A. (2d) 489 (1952). *Contra* as to cotenancy: Commonwealth v. Bovaird, 373 Pa. 47, 95 A. (2d) 173 (1953), noted in 102 UNIV. PA. L. REV. 136 (1953); 29 N.Y. UNIV. L. REV. 759 (1954).

[7] See State v. Kusnick, 45 Ohio St. 535, 15 N.E. 481 (1888); 102 UNIV. PA. L. REV. 136 at 137 (1953).

[8] Larceny: State v. Brown, 38 Mont. 309, 99 P. 954 (1909). See State v. Foot, 100 Mont. 33, 48 P. (2d) 1113 (1935). Embezzlement: Napoleon v. State, 3 Tex. App. 522 (1878). See Ray v. State, 48 Tex. Crim. Rep. 122, 86 S.W. 761 (1905).

[9] Larceny: See Phelps v. State, 109 Ga. 115, 34 S.E. 210 (1899). Embezzlement: State v. Matthews, 129 Ind. 281, 28 N.E. 703 (1891); Sharpe v. Johnston, 59 Mo. 557 (1875). *Contra*, State v. Snell, 9 R.I. 112 (1868).

[10] People v. Cravens, 79 Cal. App. (2d) 658, 180 P. (2d) 453 (1947).

Iowa law, the court could have found guilt by either of two paths. First, it could have followed the view of the vigorous dissent and held that the partnership was a separate entity, which had the entire interest in the assets. There is authority for the separate entity position,[11] especially in the absence of the Uniform Partnership Act with its non-entity or aggregate theory.[12] Secondly, the court could have expanded on the position suggested by the Pennsylvania court in *Commonwealth v. Bovaird*[13] and held that the partnership assets were divisible, hence the defendant could be convicted for appropriating what was not his share.[14] Either position would satisfy the "from another" test, the requirement that the property taken be entirely that of another. But it is suggested that both of these courses might only increase the confusion in the title and possession aspects of theft offenses.[15] Rather, the solution would seem to lie with the adoption of statutes covering the matter. One type makes such an appropriation by a partner a misdemeanor,[16] while another eliminates any defense to larceny[17] or embezzlement[18] based on partial ownership. Though this latter type has been interpeted in a hypertechnical manner so as to exclude partners,[19] it is susceptible of a more liberal construction.[20]

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[11] Jensen v. Wiersma, 185 Iowa 551, 170 N.W. 780 (1919); Soursos v. Mason City, 230 Iowa 157, 296 N.W. 807 (1941); State v. Pielsticker, 118 Neb. 419, 225 N.W. 51 (1929); Dunbar v. Farnum, 109 Vt. 313, 196 A. 237 (1937); 13 IOWA L. REV. 463 (1928); 15 IOWA L. REV. 186 (1930); 41 COL. L. REV. 698 (1941).

[12] MECHEM, ELEMENTS OF PARTNERSHIP, 2d ed., §6 (1920); Drake, "Partnership Entity and Tenancy in Partnership: The Struggle for a Definition," 15 MICH. L. REV. 609 (1917).

[13] Note 6 supra. As the latter note points out, the decision can be attacked because of its reliance on the defendant's status as agent for the cotenancy; a partner has an equivalent agency status, but is not liable for embezzlement as such. 2 BURDICK, LAW OF CRIME §575d (1946). *Contra,* State v. Sasso, note 6 supra.

[14] The indictment in the principal case may have been drawn on this theory as it alleged that the defendant obtained only half of the excess and obtained it *from his partner.*

[15] Beale, "The Borderland of Larceny," 6 HARV. L. REV. 244 (1892); 20 COL. L. REV. 318 (1920).

[16] Pa. Stat. Ann. (Purdon, 1945) tit. 18, §4835. See Commonwealth v. Moyer, 83 Pa. D. & C. 271 (1952); Md. Code Ann. (Flack, 1951) art. 27, §200. As to embezzlement from voluntary associations, see Mass. Laws Ann. (1933) c. 266, §§58, 59; Commonwealth v. Novick, 248 Mass. 317, 142 N.E. 771 (1924).

[17] Minn. Stat. Ann. (1947) §622.02; Wash. Rev. Code (1952), §9.54.060; Nev. Comp. Laws (1929) §10339.

[18] Mich. Comp. Laws (1948) §750.181; Wis. Stat. (1953) §343.20(2). See A.L.I., Model Penal Code (Tentative Draft No. 2, 1954) §206.11(1).

[19] State v. Eberhart, 106 Wash. 222, 179 P. 853 (1919); State v. Elsbury, 63 Nev. 463, 175 P. (2d) 430, 169 A.L.R. 364 at 372 (1946), noted in 32 MINN. L. REV. 68 (1947).

[20] State v. MacGregor, 202 Minn. 579, 279 N.W. 372 (1938).