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Criminal Law - Theft - A Cause of Action Not a Thing of Value

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are readily distinguishable since they were dealing with situations in which the injuries, while arising out of a single transaction had resulted from separate acts.[20] When the court is faced squarely with the problem it may be that the distinction between a single and plural intent of the offender may prove a practical one. It empowers the courts to deal harshly with the offender who intends multiple injuries or deaths, but would not authorize cumulative penalties for the offender who did not intend to cause more than one injury or death.

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CRIMINAL LAW — THEFT — A CAUSE OF ACTION NOT A THING OF VALUE

Defendant attorney was indicted for theft of a twenty percent interest in a cause of action. The theft was alleged to have been committed by the use of fraudulent conduct, practices, and representations in inducing the complainant to sign a contingency fee contract. The contract, which the defendant recorded and caused to be served on all parties concerned, contained a provision transferring an interest in the cause to the accused. It also provided that neither the client nor the defendant could "settle, compromise, release, or otherwise dispose of" the claim without the written consent of the other.[1] The district court sustained a motion to quash the indictment. On appeal to the Supreme Court, *held,* affirmed. A cause of action has only a potential value, thus it is not a thing of value within the requirement of the theft article.[2] *State v. Picou,* 107 So.2d 691 (La. 1958).

formation. The court decided that his objection was premature regardless of the question of whether a person can be charged with more than one crime when there has been but one act.

20. The court cited State v. Cannon, 185 La. 395, 169 So. 446 (1936), where the accused killed two women at the same time and place in "one continuous transaction" but the homicide did not result from a single act. They also relied on State v. Montcrieffe, 165 La. 296, 115 So. 493 (1928), where there was burglary followed by larcency involving two separate and distinct acts.

1. This provision was apparently written into the contract pursuant to the provisions of LA. R.S. 37:218 (1950).

2. The court also held that the indictment failed to allege an intent permanently to deprive the complainant of part of his cause of action on the date the contract was entered into. The rationale was that while the theft was alleged in the indictment to have occurred when the fraudulent conduct was used to procure the contract, the bill of particulars alleged that the intent permanently to deprive arose when the contract was recorded, which was 14 days after the alleged theft. The majority further reasoned that recordation of the contract could not change

The scope of the early common law crime of larceny was greatly restricted by the courts in order to avoid imposing the death penalty.[3] One method of restricting the scope of the crime was to limit its subject matter. For example, it was held that a chose in action could not be the subject of a larceny.[4] When the penalty for larceny was made less severe, the restrictions were still retained. Consequently, the common law concept of larceny, which prevailed in Louisiana until 1942,[5] was not broad enough to encompass many situations in which things of value were stolen. In order to fill this gap, Louisiana prior to 1942 enacted many special statutes enlarging the subject matter of larceny to include the stealing of rides on trains, fixtures of locomotives, electric current, natural gas, cattle, the milk from cattle, automobile parts, plumbing fixtures, bills and notes, flowers, and trees.[6]

A single theft article was enacted in the 1942 Criminal Code which not only combined the various stealing crimes but also sought to avoid technical limitations on the subject matter of theft by providing that it would include "anything of value."[7] The legislature specifically directed that the phrase "anything of value" be given the "broadest possible construction, including any *conceivable* thing of the *slightest* value, movable or immovable, corporeal or *incorporeal,* public or private"[8] (emphasis added) and that it "be construed in the broad popular sense of the phrase."[9] Until the instant case arose, the courts apparently

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the relationship of the parties since it was binding as between the parties before recordation. In addition, the court appeared to give great weight to the fact that the accused relinquished his rights under the contract before any attempt was made by the complainant to settle the claim.

Although a critical analysis of the above arguments may be justified, the primary purpose herein is to note the holding that a potential cause of action is not a thing of value and to investigate whether there was a "taking" of anything from the complainant.

3. Bennett, *The Louisiana Criminal Code, A Comparison with Prior Louisiana Criminal Law,* 5 LOUISIANA LAW REVIEW 6, 37 (1942).

4. See, *e.g.,* Culp v. State, 1 Port. 33, 26 Am. Dec. 357 (Ala. 1834). See also CLARK AND MARSHALL, LAW OF CRIMES 717 *et seq.* (6th ed. 1958).

5. In the Criminal Code of 1942, the three basic stealing crimes of larceny, embezzlement, and obtaining by false pretenses along with many other statutory stealing crimes were combined into a single theft article. LA. R.S. 14:67 (1950).

6. See the Reporter's comments on the 1942 Criminal Code, 9 WEST'S LA. STATS. ANNOT. 357 (1951). See also *id.* at 355, where the special statutes mentioned above are listed.

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

8. LA. R.S. 14:2 (1950).

9. *Ibid.* The Reporter's comments regarding the phrase "anything of value" are as follows: "In view of the methods of use of these expressions in the Code, it is extremely important that they be taken to include as much as possible. They have been used in place of long enumerations in many articles, and only by ex-

encountered little difficulty in following this legislative directive as regards the subject matter of theft.[10]

In the instant case, the court was confronted with the state's contention that the accused attorney committed theft of a twenty percent interest in a tort action by fraudulently inducing the complainant to enter into a contingency fee contract relating to the claim. In quashing the indictment, the court held that the interest transferred to the defendant had only a potential value when the contract was entered into, and, since there was nothing of present value involved, the essential element of a thing of value was not set forth. The court pointed out that the interest was neither transferable nor saleable at the time the contract was completed. The contract was characterized by the court as a mere employment contract under which the defendant would have received nothing until he was successful in effecting a recovery for the client. This argument appears to rest on the notion that an accused must have gained something through his fraud in order to be guilty of theft. However, the only significant consideration should be whether the victim lost something, not whether the alleged offender or anyone else gained through the fraudulent practices.[11] In view of the legislature's avowed intent that "anything of value" be given "the broadest possible construction,"[12] it is logical to assume that the legislature did not intend to exclude a cause of action as the subject matter of theft. A person who is deprived of the chance of securing a judgment, or of negotiating a favorable settlement, would appear to have lost something of value according to the test set forth by the legislature. The question of whether or not he would have been successful should not be considered on a motion to quash the indictment, but should be presented to the jury with instructions

tensive interpretation will this purpose be served." 9 WEST'S LA. STATS. ANNOT. 15 (1951).

10. In State v. Mills, 214 La. 979, 39 So.2d 439 (1949), the court held that steel rails stolen from a bridge were "anything of value" within the meaning of the theft article. Prior to 1942, it is unlikely that the steel rails would have been considered the subject of larceny since real property and those movables annexed to immovables by man so as to acquire the nature of real property could not form the subject matter of larceny under the common law. See State v. Davies, 22 La. Ann. 77 (1870).

11. The use of the word "taking" is explained by the Reporter as follows: "The word 'taking' also has been used advisedly, rather than 'obtain', since the only significant consideration is whether someone lost, not whether the offender or anyone else gained by 'obtaining'." 9 WEST'S LA. STATS. ANNOT. 359 (1951).

12. LA. R.S. 14:2 (1950).

to consider that factor in arriving at the actual value of the thing obtained.[13]

Although the court apparently regarded the "thing of value" issue as decisive, it would seem that the crucial issue was whether there was a "taking" of the cause of action.[14] In order to resolve that quesion it is necessary to examine the rules governing the contingency fee contract in Louisiana. If a client forfeits his right to dispose of his claim independently, by consenting to a clause waiving that right in the attorney's employment contract, then it would appear that there was a "taking" in the instant case. On the other hand, if a client is free to deal with his claim without the consent of the attorney even in the face of such a contractual provision, then it would follow that the client loses no right when he enters the contract. The contingency fee statute[15] provides that an attorney may acquire an interest in the subject matter of a claim by entering into a written contract to that effect with the client. The statute permits the inclusion of a clause providing that neither the attorney nor the client may dispose of the claim without the written consent of the other. Finally, it provides that either of the parties to the contract may cause it to be recorded and served on the opposing party, after which "any settlement, compromise, discontinuance, or other disposition made of the suit by either the attorney or the client without the written consent of the other is null and

13. Both the concurring and dissenting opinions disagreed with the majority statement that the potential cause of action was not a thing of value within the meaning of the theft article. The concurring opinion stated: "Such a claim is an incorporeal movable and, if the defendant had taken it by fraud, I think he would have been subject to prosecution." State v. Picou, 107 So.2d 691 (La. 1958). The dissenting opinion, after quoting the broad definition of "anything of value" embodied in LA. R.S. 14:2 (1950), stated: "Even though the bill of particulars stated the value of the thing taken to be unknown as of the date of the taking, the question of what the value was and whether there was any value, no matter how slight, was a question of fact and a matter of proof to be established by the state and to be submitted to the jury." *Id.* at 698.

14. The concurring opinion, while disagreeing with the majority position that no thing of value was involved, was nevertheless constrained to sustain the motion to quash on the basis that there was no taking or misappropriation of the cause of action by the defendant. This conclusion was based on the theory that the accused acquired only an irrevocable right to represent the complainant. The opinion acknowledged that there was a transfer of an interest to the accused but concluded that it was based on a valid consideration — professional services to be rendered. It was further stated that the alleged fraud gives rise only to a civil action for annulment of the contract. However, the fraud contemplated in the theft article is said by the Reporter to be "intended to produce identity of meaning between civil and criminal fraud." 9 WEST'S LA. STATS. ANNOT. 358 (1951). Thus, if the other premises of the concurring opinion are accepted, the logical conclusion would be that the indictment alleged the elements of a theft.

15. *Supra* note 1.

the suit or claim shall be proceeded with as if no such settlement or disposition had been made."[16] Since recordation and service are apparently the events which enable the attorney to prevent his client and the opponent from entering a valid compromise agreement without his written consent,[17] it follows that until the instrument is recorded, the client retains his right to dispose of the claim, and there has been no taking of part of the cause of action. However, where the attorney has strictly complied with the provisions of the contingency fee statute,[18] it appears that he can render ineffective any attempt by the client to compromise the claim without his consent.[19] According to this interpretation of the contingency fee statute, it would appear that a "taking" was set forth in the indictment since the alleged victim lost his right to compromise the claim when the accused recorded the contract and caused it to be served on the proper parties.

The decision in the instant case may have been motivated by policy considerations. It may be in the best interest of the public and the legal profession to use the disbarment proceeding[20] rather than criminal prosecution as a deterrent to fraudulent conduct on the part of attorneys in connection with contingency fee contracts. However, that policy consideration was not stated by the court as a basis for the holding. It is submitted that further application of the reasoning of the *Picou* case as to the subject matter of theft will tend toward an unjustified return to the troublesome common law distinctions regarding the sub-

16. *Supra* note 1.

17. See Robinson v. Hunt, 211 La. 1019, 31 So.2d 197 (1946); Succession of Jones, 193 La. 359, 190 So. 581 (1939); McClung v. Atlas Oil Co., 148 La. 674, 87 So. 515 (1921); Stiles v. Bruton, 134 La. 523, 64 So. 399 (1914); Smith v. Vicksburg, S. & P. Ry., 112 La. 985, 36 So. 826 (1904).

18. Strict compliance with LA. R.S. 37:218 (1950) apparently requires: (1) a written contract; (2) a stipulation that neither the attorney nor the client can dispose of the claim without the written consent of the other; (3) recordation with the clerk of the district court where the action is to be brought; (4) service of the opponent with a copy of the contract; and (5) a return of the service as in the case of ordinary petitions. It appears that the accused in the instant case had strictly complied with the statute.

19. Robinson v. Hunt, 211 La. 1019, 31 So.2d 197 (1946). See also Stiles v. Bruton, 134 La. 523, 64 So. 399 (1944). This interpretation of the contingency fee statute also draws support from the following language, used perhaps unwittingly, in the majority opinion: "Apparently the only purpose served by the recordation was to obtain the protection afforded by LRS 37:218 which is that, on a compliance with the provisions thereof, any settlement made by one of the parties to the contract without the written consent of the other would be null and the claim could thereafter be prosecuted as if no such settlement had been made." State v. Picou, 107 So.2d 691, 697 (La. 1958).

20. *Articles of Incorporation of the Louisiana State Bar Association, Art. XIII, Discipline and Disbarment of Members*, 21 WEST'S LA. STATS. ANNOT. 377 (1951).

ject matter of theft which the 1942 Criminal Code sought to eliminate.

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CRIMINAL PROCEDURE — STATE CONVICTION SUBSEQUENT TO FEDERAL ACQUITTAL FOR THE SAME ACT NOT DOUBLE JEOPARDY OR DUE PROCESS VIOLATION

Defendant was acquitted in federal court for robbery of a federally insured savings and loan association. Subsequently he was convicted in a state court under a state robbery statute, the same conduct being the basis for both prosecutions. On appeal to the Illinois Supreme Court, defendant pleaded that the former acquittal was a bar to the subsequent state prosecution, but the court affirmed the conviction. The United States Supreme Court granted certiorari to determine whether there was a due process or double jeopardy violation. On rehearing,[1] *held,* in a five to four decision, conviction affirmed. Conviction in a state court subsequent to an acquittal in a federal court for the same act is not a violation of the due process clause of the Fourteenth Amendment or of the double jeopardy clause of the Fifth Amendment. *Bartkus v. Illinois*, 79 S.Ct. 676 (U.S. 1959).

The problem of dual prosecutions has been presented to the Supreme Court many times in cases of a federal prosecution subsequent to a state prosecution for the same act, and the federal conviction has been upheld. The possibility that the double jeopardy clause of the Fifth Amendment might apply to such cases was precluded by the early development of a double sovereignty theory.[2] Under this theory the Supreme Court has consistently held that the offensive conduct may be prosecuted under both federal and state statutes without violation of double jeopardy when both sovereignties have separate interests to protect,[3] because such punishments are not two punishments for one

1. Bartkus v. Illinois, 355 U.S. 281 (1958), in which the Illinois Supreme Court decision was affirmed by an evenly divided court.

2. Moore v. Illinois, 55 U.S. (14 How.) 13, 20 (1852): "[Every citizen] may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either . . . . Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other."

3. If there is an absence of separate interests, the problem would probably fall in the area of preemption. See note 5 *infra.*