St. John's Law Review

Volume 2, December 1927, Number 1 Article 22

Partnership--Firm Property--Stock Exchange Seat (In re Amy et al., 21 F.2d 301 (2nd Cir. 1927))

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is a fugitive.[2] The mode in which fugitives are to be arrested, brought before the governor and surrendered pursuant to requisition is prescribed by statute.[3] Before surrendering a person, it is the duty of the governor to determine whether or not he is a fugitive from the demanding state.[4] For the wrongful institution of such proceedings, the authorities hold that an action for malicious prosecution will lie.[5] Similarly, actions in the nature of malicious prosecution have been maintained for the abuse of a search warrant,[6] of an injunction order,[7] of a warrant of attachment.[8] It has also been held in other jurisdictions that the termination of the original criminal prosecution is not a condition precedent to the maintenance of the action for the malicious abuse of the process.[9] These holdings, as the Court well demonstrated, are sound in principle, and the holdings were based more upon a desire to do substantial justice than upon fine distinctions between actions for malicious prosecution and actions for the malicious abuse of process.

PARTNERSHIP—FIRM PROPERTY—STOCK EXCHANGE SEAT.—Father and son, as partners, conducted a banking and brokerage business from 1899 to 1901. With money given him by his father, the son had purchased a seat on the New York Stock Exchange. Upon the father's death in 1901, the son formed a new partnership with a younger brother. The firm name was continued and the same set of books was used. Under the new articles, the firm agreed to pay $3600 per annum "as compensation for and in consideration of the contribution to the firm of the entire and exclusive benefit of the membership in the New York Stock Exchange." Through this membership the firm was enabled to execute orders upon the Exchange. After a number of years of trading, the firm encountered difficulties in the post-war period and finally made an assignment for the benefit of creditors. A petition in bankruptcy shortly followed and, in due course, both the partnership and the individual members were adjudicated bankrupts. The individual in whose name the Exchange membership stood, had, prior to the failure, misappropriated substantial sums in securities entrusted to him by a testamentary trustee and a charitable corporation. It developed that the Stock Exchange seat constituted the greater part of the assets. The seat

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[2] U. S. Const. Art. IV, § 2, cl. 2, as supplemented by the Act of 1793, 1 Stat. L., 302, now embodied in U. S. Rev. Stat. §§ 5278, 5279.

[3] N. Y. Code Crim. Proc. §§ 827, 828.

[4] Hogan *v.* O'Neill, 255 U. S. 52, 56 (1921); McNichols *v.* Pease, *supra*, note 1,108; N. Y. Code Crim. Proc. § 827.

[5] Johnson *v.* Corrington, 7 Ohio Dec. 572 (1878); Malone *v.* Belcher, 216 Mass. 209, 103 N. E. 637 (1913); Cardival *v.* Smith, 109 Mass. 158 (1872).

[6] Boeger *v.* Langenberg, 97 Mo. 390, 11 S. W. 223 (1889).

[7] Powell *v.* Woodbury, 85 Vt. 504, 83 Atl. 541 (1912); Mark *v.* Hyatt, 135 N. Y. 306, 31 N. E. 1099 (1892); Rieger & Co. *v.* Knight, 128 Md. 189, 97 Atl. 358 (1916).

[8] Lawrence *v.* Hagerman, 56 Ill. 68 (1870); Brand *v.* Hinchman, 68 Mich. 590, 36 N. W. 664 (1888).

[9] Spangler *v.* Booze, 103 Va. 276, 49 S. E. 42 (1904); Zinn *v.* Rice, 154 Mass. 1, 27 N. E. 772 (1891).

was sold and the proceeds claimed by creditors of the firm and by the two parties defrauded by the individual. *Held,* that the seat was the personal property of the individual member and that the proceeds of the sale should be allocated as an asset of his personal estate. *In re Amy et al.,* 21 Fed. (2d) 301 (C. C. A. 2nd 1927).

Judge Swan, writing for the Circuit Court, gave full efficacy to the apparent intent of the parties to the second partnership agreement. Nowhere in the books nor in the articles of agreement was found evidence that the membership was a capital contribution. The payment of the annual compensation based upon a fixed valuation of the seat could not well be regarded as interest upon a capital contribution, for if the value of the seat were added to that of the other capital furnished by its owner, the apparent effort made in the articles to co-ordinate the extent of profit-sharing with capital contribution would necessarily be disregarded. Neither could the payment, in the first instance, of the carrying charges of the seat be properly held indicative of such contribution, for it was found that these sums were later charged to the member's personal account. Nor did the Court consider as expressive of the true intent of the parties the inclusion of the seat among the partnership assets in the sworn inventory filed in the state insolvency proceeding. Further, the fact that the trustee in bankruptcy (an attorney long familiar with the firm's affairs and the draftsman of the partnership agreement) had mingled the firm and individual assets should not be deemed of controlling influence.

Generally, courts in determining the ownership of alleged firm property endeavor to give effect to the true intent of the parties, unless in so doing the rights of third parties would unduly suffer.[1] The law presumes ownership in the individual where title is taken in his name rather than in that of the firm.[2] This presumption may not be rebutted by evidence that the property was used by the firm,[3] but by evidence that it was bought with partnership funds or treated in the accounts as firm property.[4] In short, in the absence of an agreement more or less definite, one must look to the conduct of the parties, the indicator of their intention. The decision of the Circuit Court, when analyzed, it is believed will be found in accord with well recognized legal principles and more representative of sound legal reasoning than the determinations of the referee and the court below.[5]

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[1] 30 Cyc. 432.

[2] Darrow *v.* Calkins, 154 N. Y. 503, 49 N. E. 61 (1897).

[3] Chamberlin *v.* Chamberlin, 44 Super. Ct. (N. Y.) 116 (1878).

[4] Hammond *v.* Hopkins, 143 U. S. 224 (1892).

[5] It might be interesting to note that shortly after the rendition of the Circuit Court's decision the New York Stock Exchange joined with certain of the appellees in moving for an order directing the trustee in bankruptcy to apply to the Supreme Court for a writ of *certiorari,* the Exchange desiring a high court ruling upon a question deemed by it of prime importance to those dealing with Stock Exchange firms. The District Court, after a thorough review of the record, denied the motion, saying that the carefully considered opinion of the Circuit Court left no doubt in its mind as to the correct disposition of the matter. (See memorandum Winslow, D. J., 9/19/27, endorsed on motion papers.)