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Criminal Law--Embezzlement--Prosecution of Retailer for Failure to Turn Over Sales Tax

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hundred dollars. Suffice it to say that conditions were serious enough that presumably over two-thirds of the bondholders were willing to accept 49.8 cents on the dollar in satisfaction of their claims. It does not seem sociologically desirable to hold in such a case that the refusal of a very small minority of creditors to assent to a plan of readjustment may place both the debtor district and the majority of its creditors in a Daedalian Labyrinth with no hope of release.

H. A. W., Jr.

CRIMINAL LAW — EMBEZZLEMENT — PROSECUTION OF RETAILER FOR FAILURE TO TURN OVER SALES TAX. — A statute of Illinois imposes a tax upon motor fuel, the tax to be paid with the purchase price by the autoist to the dealer. The dealer in gasoline is especially made by the statute the agent of the state to collect the tax and is allowed the actual cost of making collection and payment. The defendant, a dealer, failed to remit the tax under circumstances tending to show *animus furandi*. He was indicted for embezzlement. Defendant contended that a debtor-creditor relationship existed and that the sole penalty was that provided by the statute, a fine. Indictment quashed. People brought writ of error. *Held*, that the relationship between the dealer and the state being that of principal and agent and the penalty imposed by the act being recoverable in the absence of intent to misappropriate, a dealer who intentionally misappropriates the tax may properly be indicted for embezzlement. *People v. Kopman*.¹

On a similar set of facts in Wisconsin, the Illinois decision was followed. The Wisconsin statute does not expressly declare the agency nor allow the compensation. The court held this difference in the statutes immaterial, saying that the fact of agency follows from the declaration in both statutes that the tax is imposed for the privilege of operating motor vehicles on the public highway and therefore the express provision is unnecessary. *Anderson v. State*.²

The similarity between the statutes involved in the Wisconsin and Illinois cases, and the West Virginia Consumers Sales Tax³ is apparent. Should the retailer in West Virginia convert the tax, in whole or in part, to his own use, might he be convicted of em-

¹ 358 Ill. 479, 193 N. E. 516 (1934).

² 265 N. W. 210 (Wis. 1936).

bezzlement? The enforcing section of the statute provides that the defaulting taxpayer⁴ “. . . shall, in addition to all other penalties, pay a penalty of six per cent of the amount of the tax collected during the period reported.”⁵ Therefore, the fact that the statute in and of itself provides a penalty does not preclude the further criminal action. The real question, then, is: is the retailer under the statute an agent of the state or is he, as any taxpayer, a mere debtor of the state?

The act calls itself a consumers tax and insures that the consumer shall pay it by providing a penalty against the retailer's absorbing it;⁶ the tax is to be collected of the purchaser by the dealer.⁷ The act provides, moreover, that the tax so collected shall be kept separate and apart from the proceeds of sale.⁸ Such elements in the act as mentioned show an intent on the part of the legislature to constitute the consumer the taxpayer, the retailer a mere agent for collection of the funds of the state. But the act defines “taxpayer” as retailer,⁹ and states that the “taxes levied hereunder shall be a personal obligation of the taxpayer.”¹⁰ One might infer from the legislature's designation of the retailer as taxpayer an intent to treat him as such. One must not overlook, however, the fact that no matter what the retailer is called in the act, by the substance thereof, the consumer pays the tax and the retailer is only a collector of it.¹¹ Therefore, should the case of a retailer's misappropriation of the sales tax arise in West Virginia, the court, using the technique of the Illinois and Wisconsin courts might well convict the retailer of embezzlement.

F. W. L.

INSURANCE — RECEIPT ON BACK OF CHECK NOT BINDING UNLESS SUPPORTED BY CONSIDERATION. — A insured B, providing for \$10 weekly payments in case of disability. A's liability was limited

³ W. Va. Acts 1935, c. 84, art. 2.

⁴ “Taxpayer” defined as retailer, *id.* § 2.

⁵ *Id.* § 14. Italics ours.

⁶ *Id.* § 9.

⁷ *Id.* §§ 3, 5.

⁸ *Id.* § 3.

⁹ *Id.* § 2.

¹⁰ *Id.* § 14.

¹¹ “In the construction of a statute, its spirit, rather than its letter, is the guiding star, but contradiction and repugnance must be avoided, when it is possible to do so.” *Syl. S. Wellsburg & State Line R. Co. v. Traction Company*, 56 W. Va. 18, 48 S. E. 746 (1904).