APPELLATE DEPARTMENT OF THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA BARBARA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
DOUGLAS DORR and JACK O'LEARY,
Defendants
CODOX DISTRIBUTING COMPANY,
Appellant

M.C. 142336
S.C. 101621

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
PETER C. DORLAN and ROBERT HUMMELL,
Defendants
CODOX DISTRIBUTING COMPANY,
Appellant.

M.C. 143945
S.C. 101622

CONSOLIDATED

MEMORANDUM OF DECISION

Appeal from the Municipal Court of the Santa Barbara-Goleta Judicial District, County of Santa Barbara, State of

California, the Honorable Milton A. Elconin, Judge Assigned, Presiding. Reversed.

Richard E. Marell, San Francisco, for appellant.

David D. Minier, District Attorney, County of Santa Barbara and Thomas W. Sneddon, Jr., Deputy District Attorney for plaintiff and respondent.

THE CASE

Following the conclusion of criminal proceedings brought against four individuals in the Municipal Court, the trial Court, on its own motion, ordered Codox Distributing Company to show cause why it should not reimburse the County of Santa Barbara for the cost of providing the services of the Public Defender to its employees. Following a hearing, the Court directed Codox Distributing Company to pay $6,798.50 for attorney fees and expenses incurred by defendants O'Leary and Dorr and $5,800.00 for attorney fees and expenses incurred by defendants Dorlan and Hummel.

Codox Distributing Company then filed a timely Notice of Appeal from this Order (Code of Civil Procedure Section 904.2). At appellant's request, we continued this matter until People v. Amor could be decided. Thereafter, we ordered the two matters consolidated for hearing since they present identical issues of law.

THE FACTS

A. The Criminal Proceedings Brought Against defendants Dorr & O'Leary

In May, 1972, defendants Dorr & O'Leary were charged with 17 counts of distributing obscene matter (Penal Code Section 311.2)[1]

1. Not all defendants were charged with the same Counts.

dangerous drugs and Dorr was charged with possession of marijuana.

Initially, R. Hirsh of Los Angeles, appeared for both defendants, and defendants entered pleas of not guilty to each offense. After various pretrial motions were made and disposed of, Mr. Hirsh's motion to be relieved as counsel of record was granted on September 25, 1972.

On September 28, 1972, defendants advised the Court that they had secured the services of attorney Diamond and requested a 45-day continuance. Their request was denied and the Public Defender was appointed to represent both defendants. On November 6, 1972, the Public Defender successfully argued that a conflict of interest existed and attorney Jack A. Otero was appointed to represent defendant Dorr. On November 29, 1972, defendant Dorr entered a negotiated plea of guilty to three Counts of distributing obscene material. Judge Elconin referred the matter to Probation. Although all other obscenity Counts charged against Dorr were dismissed, the Court severed the marijuana Count and set it for trial on December 27, 1972.

The charges against defendant O'Leary proceeded to trial before Judge Elconin on November 29, 1972. Throughout the 5-day trial, defendant O'Leary was represented by the Public Defender. On December 6, 1972, the jury found defendant O'Leary not guilty of two Counts of distributing obscene matter but was unable to agree upon the remaining Counts.

The remaining Counts against defendant O'Leary were reset for trial on December 27, 1972. However, on December 22, 1972, a netogiated disposition was reached whereby the charges would be

Distributing Company (his employer). [2]

Defendant Dorr also appeared for sentencing on December 22, 1972. The Court sentenced him to 30 days in the County Jail, but suspended execution thereof on condition that he not work in or be associated with the selling or distribution of pornographic materials, and abstain from use of illegal drugs, including marijuana. The marijuana charge was then dismissed.

No attempt was made at that time to have either Dorr or O'Leary pay the costs of assigned counsel (Penal Code, Section 897.3).

B. The Criminal Proceedings Brought Against Defendants Dorlan and Hummell.

In September, 1972, defendants Dorlan and Hummell were charged with 22 Counts of exhibiting obscene materials (Penal Code, Section 311.2). [3]

Initially, both defendants were represented by Mr. Davis. However, on December 29, 1972, after a number of continuances, the Court granted Mr. Davis' motion to be relieved as counsel of record.

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[2] The d o c k e t fails to show an express dismissal of these charges. However, since there is no suggestion that they were ever brought to trial, we assume that they were dismissed.

[3] Again, not all defendants were charged with the same Counts.

that he was "no longer with the company" and unable to obtain counsel. The Court appointed the Public Defender and ordered that his fees not exceed $800.00. The trial was continued by stipulation.

On March 30, 1973, a negotiated disposition was reached with respect to the charges against defendant Hummell. He entered a plea of guilty to one Count of distributing obscene matter, and all remaining charges were dismissed. Defendant waived time for sentencing and was fined $250.00. No attempt was made at that time to have defendant pay any part of the expenses of Court-appointed counsel.

In January, attorney Hanson became attorney of record for defendant Dorlan. A number of pretrial motions were made and the trial was continued from time to time. However, on April 6, 1973, after defendant Hummell entered into a plea bargain, defendant Dorlan appeared without counsel. The Court found his attorney in contempt and issued an order to show cause.[4] Over defendant's objections (and the objection of the Public Defender), the Public Defender was appointed to represent defendant Dorlan. The jury trial was again continued.

On July 18, 1973, the matter was set for a jury trial before Judge Elconin. Throughout the 6-day jury trial, defendant was represented by the Public Defender's office. On July 24, 1973, the jury found defendant not guilty of each Count. No recoupment hearing was held at that time.

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[4] The order to show cause was never served upon Roger S. Hanson, the errant attorney.

C. The Proceedings Brought Against Codox Distributing Company.

No criminal proceedings were brought against Codox Distributing Company. Instead, on July 27, 1973, Judge Elconin, on his own motion, issued an order directing Codox Distributing Company to show cause why it should not be ordered to pay the attorneys' fees and costs in the two Municipal Court proceedings.[5]

The matter was heard on August 16, 1973. At the beginning of the proceedings, the Deputy Public Defender Beauvelt objected to the presence of Deputy District Attorney Thomas W. Sneddon on the ground that it was a civil matter. The Court overruled the objection and allowed him to appear as amicus curiae.[6]

The Court then advised that the proceeding was brought pursuant to both Penal Code, Section 987.8, and Labor Code, Section 2802. The Court observed that the evidence established that all of the defendants were employees acting in the course of their employment and that their employer should be required to indemnify them for their losses.

The Deputy Public Defender Beauvelt contended that the Court did not have jurisdiction to hold such a hearing since the criminal proceedings had long been concluded. The Court overruled

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[5] Codox Distributing Company and Robert Blake were both named in the order to show cause. However, only Codox Distributing Company was served.

[6] Later, when the formal order was signed, the trial Judge candidly revealed that he had asked Mr. Sneddon to represent the Court on these two matters, and to prepare and serve the orders to show cause. However, the Court was of the opinion that the Deputy District Attorney acted only as amicus curiae, since the Court was the moving party.

the objection on the ground that the statute did not require a recoupment proceeding immediately after the termination of criminal proceedings. Moreover, since the employer would be entitled to notice, it would be impossible to have the hearing immediately after the trial.

Mr. Beauvelt also objected on the ground that the four defendants were not present and had not been served with any notice. Mr. Beauvelt pointed out that no determination could be made as to their present ability to pay unless they were present.

The Court summarily rejected this contention, saying, "In a situation such as this [their absence] would be merely an incidental detail because the Court would have no intention of assessing the cost to the individual defendant, since under the Labor Code the employer would be responsible for it in any event. So, the Court is going directly to the principal rather than bothering going through the agent." The Court concluded that since the defendants testified they were engaged as employees of Codox Distributing Company at the time the alleged crimes were committed, no further proof of agency need be made.[7]

Deputy Public Defender Beauvelt then urged that since Penal Code, Section 987.8 clearly stated that the defendant was the responsible party, he didn't see how anyone else could be held liable. The Court rejected this contention noting that there was always some "invisible person" in this type of case. Moreover, the employer should not be allowed to abandon their employees to the tender mercy of the Public Defender.

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[7] Interestingly, Dorr, one of the defendants, had asked his Probation Officer if he could accept employment at the adult bookstore operated by Codox Distributing Company. The Probation Officer gave his approval.

At the Court's request, Deputy Public Defender Murphy represented that in addition to the 11 days consumed in the O'Leary and Dorlan trials, he had devoted additional time to trial preparation and pretrial matters which would be equivalent to approximately 13 trial days. Although reference was made to the Public Defender's schedule of reimbursement, the Court noted that if there were no established rates, the Court would use its own knowledge as to equivalent fees charged by private counsel.

Mr. Davis, counsel for Codox, then stipulated that the four defendants were Codox employees at the time they were arrested[8] and that there was no question of the corporation's financial ability to respond if the order were made against the corporation. He was then granted an opportunity to file points and authorities in opposition to the proposed order.

D. The Formal Order.

On September 28, 1973, Judge Elconin issued an order directing appellant to pay the County the sum of $12,598.50 for the attorneys' fees and costs expended in the defense of the four named individuals.

The trial Judge concluded that Codox, as an employer, was liable for such expenses pursuant to Labor Code, Section 2802. He reasoned that Penal Code, Section 987.8 should be read together

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[8] The Deputy District Attorney attempted to elicit a further stipulation to the effect that the defendants were acting within the scope of their employment. Mr. Davis responded that they were employed for the purpose of selling books and materials. He appeared to be unwilling to stipulate further.

with Labor Code, Section 2802, and, since the Court did not have any jurisdiction over the corporation at the conclusion of the criminal proceedings, the Court had a reasonable time to make a determination of liability. [9]

Judge Elconin noted that the defendants testified "that they had been advised that what they would be doing was perfectly lawful but that they might be 'hassled' or 'rousted' by the cops and that if they should happen to be arrested they should not worry and they would have good lawyers." He found that the employees were acting in good faith and did not believe they were breaking the law, and that they therefore had a right to indemnity pursuant to Labor Code, Section 2802.

Judge Elconin was also of the opinion that Penal Code, Section 987.8 and Labor Code, Section 2802, read in conjunction with each other, authorized the trial Judge to assess liability upon a corporation after the conclusion of criminal proceedings brought against its employees.

Finally, although the Public Defender's office estimated that the average cost of a one-day misdemeanor jury trial was estimated to vary between $196.18 and $253.38, [10] Judge Elconin concluded that the two cases were not average under any stretch of the imagination. Although attorneys specializing in the defense of obscenity cases routinely commanded $1,000.00 or more per day, the Court

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[9] Judge Elconin reasoned that since the legislature did not expressly define the time within which the Court might act, the one year statute of limitations prescribed "upon actions upon a statute" might be applicable (C.C.P. Section 340(2).)

[10] The estimate for the 1972-73 fiscal year was $196.18 and the estimate for the 1973-74 fiscal year was $253.38.

concluded that $500.00 per day would be reasonable

economies effected by the establishment of the Public Defender's office. Moreover, while $100.00 per hour would be a reasonable sum for trial preparation, the Court again reduced this to $50.00 per hour for the same reason.

Accordingly, the Court entered an order directing the Codox Distributing Company to pay the following sums to the County of Santa Barbara: [11]

1.	Public Defender's services to defendant O'Leary	$ 5,000.00
2.	Amount paid to attorney Otero for his services to defendant Dorr	125.00
3.	Public Defender's services to defendant Dorlan	5,000.00
4.	Expert witness fees, Reporter's transcripts, etc.	2,473.50
	Total	$12,598.50

DISCUSSION

I.

Costs in criminal proceedings are a creature of statute, and a Court has no power to award them unless some statute has conferred it. (United States ex rel Phillips v. Gaines, 25 L. Ed. 733, 734 (1880); 20 A. Jr. 2d, Costs, Section 100, p. 79.)

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[11] In making this award, Judge Elconin was of the opinion that the legislature, in enacting statutes providing for counsel for indigents ". . . . never intended that those of the ilk of respondent herein who reap large profits from their questionable activities should be allowed a free ride at the expense of the taxpayers . . . because of the jurisdictional limitations of this Court, the Court will be unable to remove completely the respondent's snout from the public trough and make orders for fees in accordance with the full value of services rendered . . . ."

Although there are statutes which empower the Court to direct parents to pay the costs incurred in providing assigned counsel to their children in Juvenile Courts or Adult Criminal Courts (Welfare and Institutions Code, Section 903.1; Penal Code, Section 937.4),[12] there is no California statute which expressly provides that a corporation must defray the legal expenses of its employees charged with crime.

II.

At the time the order in question was made, Penal Code, Section 987.8 provided:

"In any case in which a defendant is furnished counsel, either through the Public Defender or private counsel appointed by the Court, upon conclusion of the criminal proceedings in the trial Court, the Court shall make a determination of the present ability of the defendant to

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12 The Supreme Court upheld Section 903.1 on the ground that the expenses incurred in providing counsel in Juvenile proceedings was properly chargeable to the parents as an element of their pre-existing support obligation (In re Ricky H., 2 C. 3d 513; 86 C.R. 76 (1970)). On the other hand, the minor has been held to be entitled to a free transcript without regard to his parents' financial status (J. v. Superior Court, 4 C. 3d, 836; 94 C.R. 619 (1971)).

In view of the amendment to Civil Code, Section 206, it has been recently held that children may be responsible to reimburse the State for aid paid to their parents (Swoap v. Superior Court, 10 C. 3d 490; 111 C.R. 136 (1973)). On the other hand, it has been held that the State may not require the father to pay the cost of maintaining his insane son (who was charged with murder) in an insane asylum (Dept. of Mental Hygiene v. Hawley, 59 C. 2d 247; 28 C.R. 718 (1963)). In that case, the Court stated: "The fact that innocent persons are relatives of an accused person does not deprive them of their fundamental rights or constitute a lawful basis for a statute or judgment whereby their property may be taken to pay the costs of prosecuting, detaining or otherwise treating the accused." (Id. 59 C. 2d at 256.)

"pay all or a portion of the costs of counsel. If the Court determines that the defendant has the present ability to pay all or part of the cost, it shall order him to pay the sum to the County in any installments and manner which it believes reasonable and compatible with his financial ability. Execution may be issued on the order in the same manner as on a judgment in a civil action. The order shall not be enforced by contempt." (Emphasis added.) [13]

In People v. Amor, 12 C. 3d 20; 114 C.R. 765 (1974), the Supreme Court upheld the validity of this statute. The Court held that the legislature could properly require both acquitted and convicted persons to reimburse the County for the services of appointed counsel and that a jury trial was not required.[14] Since defendant had been given notice and a hearing and found to have a present ability to pay $50.00 towards her counsel's fee of $100.00, the trial Court's order was upheld.

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[13] In 1974, the legislature amended Section 987.8 by adding subdivision b which provides that prior to furnishing counsel, the Court must notify the defendant that upon the conclusion of the criminal proceedings in the trial Court, the Court shall, after a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost of counsel.

[14] The United States Supreme Court upheld the validity of the Oregon Recoupment Statute in Fuller v. Oregon, 94 S.Ct. 2116 (1974). The Supreme Court also held that Oregon could rationally impose the burden of reimbursement only upon those who were convicted.

It is obvious that Penal Code, Section 987.8 does not purport to impose liability upon third parties. On the contrary, it provides that upon the conclusion of criminal proceedings,[15] the Court must assess defendants' present ability to pay the costs of assigned counsel[16] independent of any probation order.[17]

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[15] In this case, the recoupment hearing was held some eight months after the criminal proceedings against defendants Dorr and O'Leary were concluded, four months after the proceedings against defendant Hummel were concluded, but only one month after defendant Dorlan was acquitted.

In People v. Amor, supra, defendant was convicted on November 9, 1972, and the hearing was held on December 21, 1972. The Court upheld the order without specifically addressing the issue of the timeliness of the recoupment proceeding.

In United States v. Durka, 490 F. 2d 478 (7th Cir. 1973), the Court held that the trial Court had jurisdiction to make a recoupment order three months after defendant was acquitted. However, unlike the California statute, which expressly requires such a hearing to be held at the conclusion of criminal proceedings, the Federal Recoupment Statute construed in Durka allows such an order to be made at any time after the appointment of counsel (18 U.S.C. 3006A(c)(f)).

In this case, the Court did not attempt to assess defendant's present ability to pay the costs of appointed counsel. Accordingly, it is unnecessary to determine whether an order for recoupment can be made against a defendant months after the criminal proceedings terminated.

[16] In People v. Kozden, 36 C.A. 3d 918; 111 C.R. 826 (1974), the costs of appointed counsel amounted to $3,865.00 and the trial Court directed defendant, who earned $60.00 per month, to pay $600.00 at the rate of $50.00 per month on the ground that defendant had the potential to earn more than that. The Appellate Court reversed the order on the ground that there was no showing that defendant had the present ability to pay the sum of $600.00, in installments or otherwise.

[17] The Court may not make such an order as a condition of probation (People v. Johnson, 27 C.A. 3d 781; 104 C.R. 75 (1972)). Similarly, the Court cannot require defendant to pay the costs incurred by the prosecution as a condition of probation (People v. Baker, 39 C.A. 3d 550, 559-560; 113 C.R. 248 (1974)).

In this case, the Court did not attempt to determine whether any of the defendants had any ability to pay the expenses[18] of appointed counsel. Indeed, the Court specifically stated that it had no intention of requiring the defendants to pay any part of the cost of assigned counsel. Accordingly, the Court had no jurisdiction to make any order under Penal Code, Section 987.8.

III.

The trial Court's order was also predicated upon the assumption that the employer was required to indemnify the employer under Labor Code, Section 2802.[19] (See also 3 Cal. Jur. 2d, Agency, Section 109, p. 151.)

Although a right to idemnity may arise from an oral agency relationship, the implied promise of indemnity and reimbursement applies only to the actual loss and not to the liability incurred. Thus, the cause of action does not arise until the agent has actually paid the obligation. (Sunset-Sternau Food Co. v. Bonzi, 60 C. 2d 834, 843; 36 C.R. 741 (1964), Gribaldo, Jacobs, Jones and Associates v. Agrippina Versicherunges, A.G., 3 C. 3d 434, 447; 91 C.R. 6 (1970).)

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[18] It is true that the trial Court would ordinarily be competent to determine the amount of attorney's fees. (See People v. Amor, supra, 12 C. 3d at 30-32.) On the other hand, Penal Code, Section 987.8 specifically refers to the cost of counsel, not some hypothetical sum selected by the Court. Where as here, the Public Defender provided the Court with its own estimate as to the value of the services, the Court was not empowered to select a greater sum simply because the trial Judge disapproved of appellant's activities.

[19] Labor Code, Section 2802 provides: "An employer shall indemnify his employee for all that the employee expends or loses in direct consequence of the discharge of his duties as such, or his obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying such directions, believed them to be unlawful."

In this case the trial Judge refused to impose any liability upon the agents. Accordingly, since no liability was created, and no payment was made, no right to indemnity existed.

IV.

It is a well established rule that an agent will not be entitled to recover from his principal for monies advanced or liabilities incurred in a transaction prohibited by law if the agent knew the illegality of the transaction (3 Am.Jur. 2d, Agency, Section 245, p. 613; Bibb v. Allen, 149 U.S. 481, 490-491; 13 S.Ct. 950 (1893)). For instance, an agent is not entitled to compensation for his services in collecting rents from a bawdy house! (Ballerino v. Ballerino, 147 C. 544; 82 P. 199 (1905).[20]

Where an agent is prosecuted for a criminal offense, he is generally not entitled to seek indemnity from his principal.[21]

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20 A lessee, who was to receive restaurant profits and a percentage of the gambling proceeds, was in pari delicto with the lessor and could not recover for a breach of the agreement (Fong v. Miller, 105 C.A. 2d 411; 233 P. 2d 606 (1951)). Similarly, where a principal employs an agent to purchase a pistol, and the agent knows that the principal is going to use the pistol to commit a robbery, the agent is entitled to neither compensation nor indemnity. (Restatement of Agency, 2d, Section 467, Comment 7.)

21 Some statutes do authorize a corporation to indemnify its officers for expenses incurred in defending criminal proceedings brought against them. (See Cal.Corp.Code, Section 830; 1 Ballentine and Sterling, California Corporation Laws, 4th Ed., Section 89, pp. 162-167; New York Business Corp. Law, Section 723a, et seq.). See Merrit Chapman & Scott Corp. v. Wolfson, 321 A. 2d 138 Del. Sup.Ct. 1974, where indemnity was allowed certain corporate officers charged in criminal proceedings.

In P.S. & S. v. Superior Court, 17 C.A. 3d 354; 94 C.R. 738 (1971), the Court held that the employee might be entitled to recover the indemnification for expenses of defending a criminal action. Of course, here, the defendants never attempted to bring such an indemnity action. Moreover, the action was not brought by the attorney or other person rendering services to him in connection with the defense (Cal. Corp. Code, Section 830(b)).

He may not recover a fine (Monnet v. Merz, 27 N.E. 827 (N.Y. 1891) even if the fine was imposed due to the employer's negligence (Mills Novelty Co. v. Dupouy, 203 F. 254 (CA 7 1913)(employer mislabeled gambling devices). Even where the claim is made that the corporation deceived an agent as to the status of certain property, and the agent is charged with larceny for obeying his employer's direction, he has no right to recover his attorney's fees and other expenses where he enters a guilty plea to the charge brought against him. (Woerle v. American Compressed Steel Corp., 210 S.W. 2d 769 (Ky. 1948).) [22]

In this case, Judge Elconin mistakenly assumed that he was empowered to create a right of indemnity in favor of the County by the simple expedient of finding that the employees had acted in good faith pursuant to the command of their employer.[23] In the first place, if there was a right to indemnity it had to be asserted by the employees themselves. In the second place, they would not be entitled to indemnity if they actively participated in the wrong. (Standard Oil Company of California v. Oil & Chemical W. Int. Union, 23 C.A. 3d, 585, 590; 100 C.R. 354 (1972).)

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22 In People v. Lavan, 218 N.W. 2d 797 (Mich. App. 1974), a justice of the peace, who successfully defended criminal charges brought against him, sought to have the State indemnify him for his legal expenses. Recovery was denied on the theory of sovereign immunity.

Under the "American Rule," attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor. (F.D. Rich, Inc. v. United States Industrial Lumber Co., Inc., 94 S.Ct. 2157, 2163 (1974); C.C.P. Section 1021.)

Although the jury may have determined that the prosecution failed to prove one of the defendants guilty beyond a reasonable doubt, this finding does not in any way establish that his conduct was morally blameless. Indeed, a jury,[24] guided by the standard of proof employed in civil actions, might well decide that all of the defendants had engaged in the sale of obscene matter,[25] and were in pari delicto and not entitled to indemnity.

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[23] It should be remembered that the elements of due process require that a Judge cannot be both a prosecutor and Judge at the same time (In re Murchison, 349 U.S. 133; 75 S.Ct. 623 (1955)). In this case, the result appears to have been preordained once the Court issued the order to show cause.

We recognize that it is difficult to prosecute an obscenity case, especially one brought against an absentee owner. (B. Pines, The Obscenity Quagmire, 49 State Bar Journal 509, 513-514 (1974).) Proof of Scienter (Penal Code, Section 311(e)) is, of course, a mandatory requirement. (Smith v. California, 361 U.S. 147; 80 S.Ct. 215 (1959), People v. Andrews, 23 C.A. 3d Supp. 1, 8; 100 C.R. 276 (1972).) Nevertheless, prosecutions against those engaged in managing such an enterprise can be successfully brought. (See Miskin v. State of New York, 383 U.S. 302, 511-512; 86 S.Ct. 958 (1966), Huffman v. United States, 470 F. 2d 386, 403 (C.A.D.C. 1972), Hamling v. United States, ____ U.S. ____; 94 S.Ct. 2887, 2908-2911 (1974).) See also People v. Conway, 42 C.A. 3d 875, 884-886; 117 C.R. 251 (1974).

The fact that the District Attorney's office elected to proceed against the employees rather than the absentee owners of the adult bookstore is not grounds for the Court, on its own motion, to impose a liability not authorized by law.

[24] A jury determination is proper where the indemnity action involves contested issues of fact (Niles v. City of San Rafael, 42 C.A. 3d 230, 239-240; 116 C.R. 733 (1974)).

[25] Penal Code 311.2 has been authoritatively construed (People v. Enskat, 33 C.A. 3d 900; 109 C.R. 433 (1973), People v. Nissinoff, 43 C.A. 3d 1025; 118 C.R. 457 (1974)). Accordingly, an objective standard could be employed to determine whether the employees had actively participated in a civil wrong.

We are also satisfied that the Court had no jurisdiction to proceed against appellant. "It would be incongruous to try to append to a criminal proceeding what is essentially a civil action for money against a third party. The procedural anomaly is compounded where the claim is asserted after final judgments in the underlying case . . . under established rules the proceeding was no longer pending (Code of Civil Procedure, Section 1049); it was 'absolutely dead' and the Court had no jurisdiction of the subject matter." (P.S. & S. v. Superior Court, supra, 17 C.A. 3d 354, 360.)[26]

DISPOSITION

The orders for payment of fees and costs made in Actions Nos. 142336 and 143945 are both reversed.

Dated: February 14, 1975.

JOHN T. RICKARD, Judge
Appellate Department of the
Superior Court

WE CONCUR:

JOHN M. WESTWICK, Presiding Judge
Appellate Department of the
Superior Court

ARDEN T. JENSEN, Judge
Appellate Department of the
Superior Court

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[26] In light of the determination of the jurisdictional issue, we need not decide any remaining issues briefed by the parties.