University of Miami Law Review

Volume 15 | Number 3 Article 9

5-1-1961

Criminal Law -- Conspiracy Between Husband and Wife

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Recommended Citation
Marvin S. Maltzman, *Criminal Law -- Conspiracy Between Husband and Wife*, 15 U. Miami L. Rev. 312 (1961)
Available at: https://repository.law.miami.edu/umlr/vol15/iss3/9

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> are: (1) the testator must have expressed substantially the same bequest in a will executed *immediately next prior* to his last will, *i.e.* in the *next to the last* will made by him, and (2) the next to the last will must have been executed at least six months before the testator's death.[23]

Therefore, since the testatrix executed both her last will and the will "*immediately next prior to such last will*"[24] *within* six months of death, the petitioner, who is a member of the class sought to be protected, may take her intestate share at the expense of the charitable and scientific beneficiaries.

The Supreme Court of Florida was forced to reach this decision because the statutory amendment was too narrow. If the purpose of the statute is to protect certain heirs from hasty and improvident bequests to charity by a testator who is in apprehension of impending death, it would appear unreasonable that a testator who has displayed charitable inclinations in a series of wills should not have his testamentary intentions honored. Therefore, it is submitted that the Florida Legislature might amend this statute to permit the courts to look beyond the will "*immediately next prior to such last will*"[25] in order to give effect to charitable bequests.

HARRY M. ROSEN

CRIMINAL LAW—CONSPIRACY BETWEEN HUSBAND AND WIFE

A husband and wife were indicted for conspiring to defraud the United States.[1] The federal district court dismissed the indictment on the ground that husband and wife could not conspire within the meaning of Title 18 U.S.C. Section 371.[2] The United States appealed directly to the Supreme Court. *Held*, reversed:[3] the common law fiction of unity of husband and

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23. *In re* Blankenship's Estate, *supra* note 20, at 468. (Emphasis not added.)
24. FLA. STAT. § 731.19 (1959).
25. FLA. STAT. § 731.19 (1959).

1. 18 U.S.C. § 545 (1958): "Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper. . . ."

2. 18 U.S.C. § 371 (1958): "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

3. The dissenting Justices were Mr. Chief Justice Warren, Mr. Justice Black and Mr. Justice Whittaker.

wife is not applicable to prosecutions for conspiracy against the United States. *United States v. Dege*, 364 U.S. 51 (1960).

At the common law the crime of conspiracy could not be committed by less than two persons.[4] By application of the common law fiction of unity of husband and wife,[5] it was held that spouses were incapable of conspiring together.[6] Prior to 1920,[7] this rule was mechanically followed by all jurisdictions in the United States.[8] Despite judicial criticism,[9] some courts held themselves bound by the unity fiction in cases of conspiracy until such time as the fiction was abrogated by the legislature.[10] The fiction was not applied to a husband and wife who conspired with a third party, even if the identity of the third party was unknown at the time of the trial,[11] or if the conspiracy occurred prior to a valid marriage between the parties.[12]

Although this rule was criticized by the courts,[13] it was not expressly repudiated until 1920[14] when the Supreme Court of Colorado, basing its holding on the Married Women's Act, held that a husband and wife were capable of conspiracy.[15] The common law fiction has been expressly

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4. "A conspiracy is . . . a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means . . . ." Pettibone v. United States, 148 U.S. 197, 203 (1893); CLARK & MARSHALL, CRIMES § 9.01 at 496 (6th ed. 1958).

5. See cases collected in 41 C.J.S. *Husband and Wife* § 5 (1944).

6. Gros v. United States, 138 F.2d 261 (9th Cir. 1943); United States v. Shaddix, 43 F. Supp. 330 (S.D. Miss. 1942); State v. Clark, 14 Del. (9 Houst.) 536, 33 Atl. 310 (1891); Worthy v. Birk, 244 Ill. App. 574 (1922); Merrill v. Marshall, 113 Ill. App. 447 (1904). See generally, HAWKINS, PLEAS OF THE CROWN 351 (6th ed. 1788); 1 WHARTON, CRIMINAL LAW AND PROCEDURE § 88 (12th ed. 1957); WINFIELD, THE HISTORY OF CONSPIRACY § 26 (1921).

7. Dalton v. People, 68 Colo. 44, 189 Pac. 37 (1920).

8. Gros v. United States, 138 F.2d 261 (9th Cir. 1943); United States v. Shaddix, 43 F. Supp. 330 (S.D. Miss. 1942); People v. Richards, 67 Cal. 412, 7 Pac. 828 (1885) (dictum); People v. Little, 41 Cal. App. 2d 797, 107 P.2d 634 (Dist. Ct. 1940); (dictum); People v. Eppstein, 108 Cal. App. 72, 290 Pac. 1054 (Dist. Ct. 1930) (dictum); State v. Clark, 14 Del. (9 Houst.) 536, 33 Atl. 310 (1891); Worthy v. Birk, 224 Ill. App. 574 (1922); Merrill v. Marshall, 113 Ill. App. 447 (1904).

9. Smith v. State, 48 Tex. Crim. 233, 89 S.W. 817 (1905). The court stated by way of dictum that the common law rule should be rejected, although there was no need to apply the rule since a third party was involved in the conspiracy. *Cf.* Jones v. Monson, 137 Wis. 478, 119 N.W. 179 (1909), where the plaintiff was allowed to recover damages for the injuries sustained as a result of a conspiracy between husband and wife.

10. Dawson v. United States, 10 F.2d 106 (9th Cir.), *cert. denied*, 271 U.S. 687 (1926); People v. Miller, 82 Cal. 107, 22 Pac. 934 (1889); State v. Struck, 44 N.J. Super. 274, 129 A.2d 910 (Essex County Ct. 1957).

11. United States v. Anthony, 145 F. Supp. 323 (M.D. Pa. 1956); United States v. Shaddix, 43 F. Supp. 330 (S.D. Miss. 1942) (dictum); People v. MacMullen, 134 Cal. App. 81, 24 P.2d 794 (Dist. Ct. 1933); State v. Clark, 14 Del. (9 Houst.) 536, 33 Atl. 310 (1891) (dictum); People v. Estep, 346 Ill. App. 132, 104 N.E.2d 563 (1952), *cert. denied*, 345 U.S. 970 (1953); Rex v. Locker, 5 Esp. 107, 170 Eng. Rep. 754 (1803).

12. People v. Keller, 165 Cal. App. 2d 419, 332 P.2d 174 (Dist. Ct. App. 1958); People v. Little, 41 Cal. App. 2d 797, 107 P.2d 634 (Dist. Ct. App. 1940).

13. See cases cited note 9 *supra*.

14. Dalton v. People, 68 Colo. 44, 189 Pac. 37 (1920). There was no need to repudiate the rule in this case as the spouses had conspired with a third party.

15. *Id.* at 47, 189 Pac. at 38.

rejected by two other state courts.[16] The Fifth Circuit and the District of Columbia Circuit have overruled the common law fiction of unity without aid of statutory repeal,[17] while the Ninth Circuit has continued to apply it.[18] The Supreme Court, in the instant case, was unwilling to perpetuate this fiction merely because it had been followed since the eighteenth century.[19] The Court looked to the change in the social status of the "twentieth century wife"[20] and realized that there was no longer any logic behind the fiction that husband and wife were incapable of conspiracy.

The trend, allowing the conviction of spouses for conspiring together, has been in accord with the law in other areas involving husband and wife. The tendency of modern legislation has been to abrogate the common law theoretical unity of husband and wife. All jurisdictions have enacted married women's statutes or emancipation acts.[21]

It should be noted that a criminal conspiracy between husband and wife presents the same degree of danger to society as would any other unlawful combination. To shield the conspiring spouses from conviction under the common law rule might increase the possibility of such offenses being committed.

The dissent argued that the 1948 conspiracy statute was merely an adoption of the original 1867 statute,[22] and as husband and wife were incapable of conspiring at the common law, in the absence of a specific repudiation by Congress, this well-established rule was included within the legislative purpose of the 1867 statute. As the re-enacted statute must be interpreted in the light of the original statute,[23] the dissent contended that the rule was improperly repudiated by the Court, and that such action properly lies with the Congress.[24]

The dissent further argued, that for the "solidarity and confidential relationship of marriage"[25] to continue, there should be a preservation of

16. People v. Martin, 4 Ill. 2d 105, 122 N.E.2d 245 (1954); State v. Bayoukas, 226 Iowa 1385, 286 N.W. 458 (1939) (dictum); Marko v. State, 144 Tex. Crim. 509, 164 S.W.2d 690 (1942).

17. Wright v. United States, 243 F.2d 569 (5th Cir.), *cert. denied*, 355 U.S. 831 (1957); Kivette v. United States, 230 F.2d 749 (5th Cir. 1956), *cert. denied*, 355 U.S. 935 (1958); Thompson v. United States, 227 F.2d 671 (5th Cir. 1955); Johnson v. United States, 157 F.2d 209 (D.C. Cir. 1946): "No reason remains why the law should not recognize the obvious fact that the relation of husband and wife does not prevent two persons from conspiring to commit an offense." *Accord, Ex parte* Estep, 129 F. Supp. 557 (N.D. Tex. 1955).

18. Gros v. United States, 138 F.2d 261 (9th Cir. 1943); Dawson v. United States, 10 F.2d 106 (9th Cir.), *cert. denied*, 271 U.S. 687 (1926). *Accord*, United States v. Shaddix, 43 F. Supp. 330 (S.D. Miss. 1942).

19. United States v. Dege, 80 Sup. Ct. 1589 (1960).

20. *Id.* at 1591.

21. These statutes are collected in 3 VERNIER, AMERICAN FAMILY LAWS §§ 167, 179 (1935).

22. United States v. Dege, 80 Sup. Ct. 1589, 1592 (1960) (dissenting opinion, Mr. Chief Justice Warren).

23. *Ibid.*

24. *Id.* at 1593.

25. *Id.* at 1594.

the unit. However, such confidential relationship between the spouses does not offer sufficient excuse to exempt them from conviction if they are guilty of the crime.[26]

The *Dege* case resolves the conflict which had existed between the circuits. It is submitted that the Court correctly took this opportunity to overrule a doctrine "that has parrot-like been repeated"[27] since the eighteenth century. Whether the state courts will follow this rule remains to be seen.

MARVIN S. MALTZMAN

FEDERAL PROCEDURE—JURISDICTION CONFERRED BY STIPULATION

The plaintiff, a citizen of Pennsylvania, brought a negligence action against the defendant corporation, a citizen of New York, in a federal district court in Pennsylvania. The defendant, by answer, challenged diversity jurisdiction because it was also incorporated under the laws of Pennsylvania. Subsequently, the parties stipulated to the jurisdiction of the court. After twenty-three months, during which time extensive discovery and pre-trial procedures were utilized and the statute of limitations had expired, the defendant moved to dismiss for lack of jurisdiction. The motion was granted and the plaintiff appealed. *Held*, reversed: the trial court abused its discretion by re-examining jurisdictional facts previously stipulated to by the parties. *Di Frischia v. New York Cent. R.R.*, 279 F.2d 141 (3d Cir. 1960).

The great weight of authority holds that jurisdiction of a federal court may not be conferred by agreement, consent or collusion of the parties.[1] Diversity jurisdiction is a fact which must exist at the time the jurisdiction of a federal court is invoked.[2] If at any time jurisdiction is challenged, the court is under a duty to proceed no further until the jurisdictional question

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26. See Williams, *The Legal Unity of Husband and Wife*, 10 MODERN L. REV. 16 (1947).

27. United States v. Dege, 80 Sup. Ct. 1589, 1591 (1960).

1. United States v. Griffin, 303 U.S. 226 (1938); Mitchell v. Maurer, 293 U.S. 237 (1934); Ayers v. Watson, 113 U.S. 594 (1885); People's Bank v. Calhoun, 102 U.S. 256 (1880); Orth v. Transit Inv. Corp., 132 F.2d 938 (3d Cir. 1942); Page v. Wright, 116 F.2d 449 (7th Cir. 1940), *cert. denied*, 312 U.S. 710 (1941); 1 MOORE, FEDERAL PRACTICE § 0.60, at 608 (2d ed. 1960). "Diverse State citizenship of the parties, or some other jurisdictional fact prescribed by the second section, is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause . . . ." Ayers v. Watson, *supra* at 598.

2. McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936); Birmingham Post Co. v. Brown, 217 F.2d 127 (5th Cir. 1954); Town of Lantana v. Hopper, 103 F.2d 118 (5th Cir. 1939).