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## Criminal Law – Conspiracy – Participation Of State Agent

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of her natural life or until she remarries"<sup>13</sup> embodied within a divorce decree were held to bind the husband's estate. In neither of the above Illinois cases was there any express language that the alimony was to be a charge against the deceased husband's estate.

In both Florida cases cited as being applicable in the instant case, *Allen v. Allen*<sup>14</sup> and *Underwood v. Underwood*,<sup>15</sup> there was a clear agreement on the part of the husband to bind his personal representatives after his death. In the instant case, however, it was held that the expression "until her death or remarriage" in and of itself bound the husband's estate. The majority of the court was not without support in their decision,<sup>16</sup> but the dissent indicated that the stated expression could not bind the estate of the husband unless the intent was expressly stated in the divorce decree or could be implied from the surrounding circumstances.

Both the majority and dissenting opinions seem to agree on the law involved. The difficulty arises in interpreting the intent of the parties as expressed by the clause "until her death or remarriage" embodied within the decree. The majority opinion implied an obligation upon the husband's estate from the clause itself, rather than looking to the true intent of the parties. It is submitted that the expression "until the death of the wife or her remarriage" *does not* warrant such an interpretation. In order to bind the husband's estate there should be an express written agreement between the parties. Although this may prove harsh at times, it will eliminate future litigation by compelling the parties to reduce their agreement to writing where there is an actual intent to bind the husband's estate.

MAX SPIEGELMAN

## CRIMINAL LAW — CONSPIRACY — PARTICIPATION OF STATE AGENT

The defendants were convicted of conspiring to violate gambling statutes with one who was an agent of the County Solicitor and acting in his official capacity to obtain evidence of such violations. *Held*, where an essential part of a criminal act is to be performed by a government agent acting in the line of duty, persons conspiring with such agent and

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13. In re Estate Kuchenbecker, 4 Ill. App.2d 314, 124 N.E.2d 52 (1955).

14. 111 Fla. 733, 150 So. 237 (1933) (where the agreement provided that in the event the death of the husband before the death of his ex-wife, his heirs, executors, and administrators should pay said alimony).

15. 64 So.2d 281 (Fla. 1953) (where it was provided in the decree that alimony payments should continue during the life of the wife without any diminution or cessation).

16. Cases cited note 11: *supra*.

unaware of his official capacity may not be legally convicted of a conspiracy. *King v. State*, 104 So.2d 730 (Fla. 1958).

While decisions on this point are relatively few,<sup>1</sup> the rule seems to be that it is legally impossible to commit the crime of conspiracy with one whose only purpose in entering into the agreement is to secure evidence of violations of the law, and who is himself a necessary party in the completion of the plan.<sup>2</sup> In *State v. Dougherty*<sup>3</sup> a detective employed by the state attempted to secure evidence of corrupt practices by bribing city officials to vote for certain ordinances. The New Jersey court held that the alleged conspiracy of which defendants were tried and convicted had no existence without the detective, who was a necessary party; and that the State could not split the single conspiracy into two, making one criminal and the other meritorious. In *Weathered v. State*<sup>4</sup> defendants were convicted of conspiracy to commit burglary. The Texas court reversed on the ground that the only conspiracy shown was with a sheriff's agent who had no criminal intent, hence there was no union or meeting of the minds on the part of the sheriff's agent and the defendants. A Colorado court, in *Connor v. People*,<sup>5</sup> reversed a conspiracy conviction where the plan to rob a railroad originated with a detective (not an agent of the State, but of the railroad) and had the consent of the owner of the property. There was no unlawful act contemplated since there was consent of the owner, and consequently there could be no conspiracy to do an unlawful act.

The court stated:

. . . [W]hen, in their zeal, or under a mistaken sense of duty, detectives suggest the commission of a crime, and instigate others to take part in its commission in order to arrest them while in the act, . . . their conduct is not only reprehensible, but criminal and ought to be rebuked, rather than encouraged, by the courts . . .

The Seventh, Eighth and Ninth U. S. Circuit Court of Appeals have reversed conspiracy convictions where: (1) prohibition agents went into the whiskey selling business in order to obtain evidence of violation of

1. Most cases involving similar factual situations are decided on the basis of the entrapment doctrine. See 15 AM. JUR. *Criminal Law* § § 335-337 (1938); 22 C.J.S. *Criminal Law* § 45 (1940); 9 FLA. JUR. *Criminal Law* § 183 (1956); 6 FLORIDA LAW AND PRACTICE *Criminal Law* § § 55-59 (1957).

2. *O'Brien v. United States*, 51 F.2d 674 (7th Cir. 1931); Note, 45 HARV. L. REV. 381 (1931-1932); *De Mayo v. United States*, 32 F.2d 472 (8th Cir. 1929); *Woo Wai v. United States*, 223 Fed. 412 (9th Cir. 1915); *Connor v. People*, 18 Colo. 373, 33 Pac. 159 (1893); *State v. Dougherty*, 88 N.J.L. 209, 96 Atl. 56 (1915); *Weathered v. State*, 128 Tex. Crim. 263, 81 S.W.2d 91 (1935); *Woodworth v. State*, 20 Tex. Crim. 375 (1886); 11 AM. JUR. *Conspiracy* § 24 (1937); 15 C.J.S. *Conspiracy* § 50 (1939); Annot., 18 A.L.R. 158 (1922); 1 BISHOP, *CRIMINAL LAW* § 926 *z.a.* (9th ed. 1923).

3. 88 N.J.L. 209, 96 Atl. 56 (1915).

4. 128 Tex. Crim. 263, 81 S.W.2d 91 (1935).

5. 18 Colo. 373, 33 Pac. 159 (1893).

the prohibition statute;<sup>6</sup> (2) a government agent actually performed the overt act of introducing liquor into forbidden territory;<sup>7</sup> and (3) a government agent induced defendants into entering into a plan to violate immigration laws.<sup>8</sup> In *Ventimiglia v. United States*,<sup>9</sup> although not a case involving a government agent, the court found it legally impossible to convict of conspiracy where the act which defendants agreed to do was not unlawful, even though defendant may have thought so. The court stated:

. . . A legal impossibility might . . . be termed an inherent impossibility, in that the act, though consummated, would not be criminal, and consequently an attempt or agreement to commit it would also not be . . . .

Distinctions have arisen in cases where the conspiracy charged and proved was not only with the government agent but also with others, or the government agent did not originate the criminal plan, but merely afforded an opportunity to defendants.<sup>10</sup> In *Jung Quey v. United States*<sup>11</sup> the conspiracy proved originated with the defendants and the only participation of the government was in asking the quartermaster of a ship to remove opium from the ship in order that defendants might be caught delivering it. In *Commonwealth v. Wasson*<sup>12</sup> the Pennsylvania court found no legal impossibility in a conspiracy conviction where three councilmen conspired among themselves as well as with two detectives to accept bribes for passing certain ordinances. The court also discussed distinctions between measures used to entrap and "artifice" used to detect persons suspected of being engaged in crime.<sup>13</sup> In *Johnson v. State*<sup>14</sup> the defendant entered into an agreement with another to burglarize a store. Subsequently, the owners of the store hired a detective who joined the conspiracy in order to catch the defendant. The court held that the conspiracy was complete prior to the entry of the detective into the plan, and that conviction of conspiracy is only precluded where the original design is suggested by the detective. The conviction was reversed on other grounds, however.

6. *O'Brien v. United States*, 51 F.2d 674 (7th Cir. 1931) [finding government was estopped to convict of conspiracy under those circumstances, citing *Woodworth v. State*, 20 Tex. Crim. 375 (1886)]; note, 45 HARV. L. REV. 381 (1931-1932).

7. *De Mayo v. United States*, 32 F.2d 472 (8th Cir. 1929) [holding acts of government agent cannot be imputed to defendants since there is no community of purpose, and since defendant did not perform any overt act himself there was no conspiracy].

8. *Woo Wai v. United States*, 223 Fed. 412 (9th Cir. 1915) [holding defendants could not be held for conspiracy to violate the law since the government intended to prevent consummation of the offense]; *Sam Yick v. United States*, 240 Fed. 60 (9th Cir. 1917).

9. 242 F.2d 620 (4th Cir. 1957); Case Comment, *Impossibility in Conspiracy*, 15 WASH. & LEE L. REV. 122 (1958).

10. *Jung Quey v. United States*, 222 Fed. 766 (9th Cir. 1915); *Commonwealth v. Wasson*, 42 Pa. Super. 38 (1910); *Johnson v. State*, 3 Tex. Crim. 590 (1878).

11. 222 Fed. 766 (9th Cir. 1915).

12. 42 Pa. Super. 38 (1910).

13. *Id.* at 57.

14. 3 Tex. Crim. 590 (1878).

The instant case is one of first impression in Florida. The court examined the facts and found that, although the defendants had been charged with conspiring with each other and with the County Solicitor's agent, the *only* conspiracy shown by the evidence was a conspiracy with the agent of the County Solicitor. In an effort to discover whether or not police officers were acting corruptly, a hotel room was rented and set up as a bookmaking establishment. A phone call was then made to the police station complaining of gambling going on in the room, which resulted in the arrival of two of the defendants (one of which was acquitted by the jury). On their arrival, according to the testimony of the government agent, an arrangement was entered into whereby the defendants were to allow the agent to continue his bookmaking activities, and the agent in turn was to pay a weekly sum to the defendants through the medium of a third defendant, a taxicab driver. All expenses for the room, gambling equipment, salary of the agent, and "pay-off" money were supplied from public funds. Reasoning that the government agent was to perform an act "essential to the crime charged as the object of the conspiracy" and that there was no evidence tending to show that the defendants conspired with each other, the court reversed the conviction and remanded the case to the trial court for a new trial. The court stated:

. . . We hold . . . that where two or more persons conspire with another who is, unknown to them, a government agent acting in the line of duty, to commit an offense under an agreement and an intention that an essential ingredient of the offense is to be performed by, and only by, such government agent, such persons may not legally be convicted of a conspiracy . . .<sup>15</sup>

The court relied rather heavily on *Woo Wai v. United States*<sup>16</sup> and on the *Dougherty* case<sup>17</sup> in justifying its conclusion. *United States v. Wray*<sup>18</sup> was distinguished from the instant case on the basis that in the *Wray* case it was stated that there was evidence from which a jury could find that the two defendants had conspired with one another as well as with the government agent.

The court reached a socially preferred result in the instant case. It is true that this decision undoubtedly will impose a heavier burden on those whose duty it is to enforce the laws. The fact remains that in our system of jurisprudence it would be unconscionable to allow the State, through its agents, to entice citizens into conspiring with the State to commit acts which the State denounces as criminal. It is not unreasonable to require that law enforcement officers confine their activities to detecting persons engaged in criminal activities, rather than actively soliciting others to join them in crime.

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15. *King v. State*, 104 So.2d 731, 733 (Fla. 1958).

16. 223 Fed. 412 (9th Cir. 1915).

17. 88 N.J.L. 209, 96 Atl. 56 (1915).

18. 8 F.2d 429 (N.D. Ga. 1925).