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# Domestic Relations - U.S. Supreme Court Holds that Husband and Wife Can Be Guilty of Conspiracy - *United States v. Dege*, 364 U.S. 51 (1960)

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guage of the decree awarding permanent alimony to the wife manifests "unequivocally an intent" to bind the heirs of the husband after death, the allowance of alimony will not terminate with the death of the husband.<sup>31</sup> Thus, "the court does have power to decree that alimony shall be paid after the death of the spouse, and where the decree expressly so provides, it will be enforced and recognized. . . ."<sup>32</sup> In Illinois, the situation also presents itself whereby the parties to a divorce action can consent to incorporate their agreement into the decree.<sup>33</sup>

Each of the two different views concerning alimony after the death of the husband has its own particular disadvantages. In states where the rule is that alimony terminates on the death of the husband, the wife who has divorced the husband for his fault may after his death—no matter how large his estate—find herself destitute. On the other hand, under the holdings allowing payments after the husband's death, the estate of the husband may be changed by or encumbered with the duty of support owing to the ex-wife. The settlement of estates could thus be indefinitely prolonged, and funds belonging to the assets might have to be diverted, and used to make provision for such support. Therefore, a court, in deciding what rule to adopt, would seem to be limited to choosing between two rules, both of which, as pointed out, are subject to certain inherent weaknesses.

<sup>31</sup> Lennahan v. O'Keefe, 107 Ill. 620 (1883).

<sup>32</sup> Cross v. Cross, 5 Ill. 2d 456, 462, 125 N.E. 2d 488, 491 (1955).

<sup>33</sup> Storey v. Storey, 125 Ill. 608, 18 N.E. 329 (1888).

### DOMESTIC RELATIONS—U.S. SUPREME COURT HOLDS THAT HUSBAND AND WIFE CAN BE GUILTY OF CONSPIRACY

The defendants, husband and wife, were charged with conspiring to illegally bring goods into the United States and thereafter to conceal and transport the goods. The indictment charged the defendants with violating section 371 of title 18 of the United States Code.<sup>1</sup> The United States District Court for the District of Southern California dismissed the indictment on the grounds that it did not state an offense. The case went to the United States Supreme Court on direct review. The Court, in

<sup>1</sup> 18 U.S.C.A. § 371 (Supp. 1959), which provides: "If *two or more persons* conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined. . . ." (Emphasis added.) This section was enacted in connection with 18 U.S.C.A. § 545 (Supp. 1959), which deals with smuggling goods into the United States.

reversing the lower court's decision, decided that a husband and wife can conspire to commit a crime in violation of the federal statute.<sup>2</sup> Three Justices dissented. *United States v. Dege*, 364 U.S. 51 (1960).

Criminal conspiracy is generally defined as "[A] combination between two or more persons to do an unlawful or criminal act, or to do a lawful act by criminal or unlawful means."<sup>3</sup> As is apparent from the conspiracy statute and the definition, at least two persons are necessary to commit the crime of conspiracy. The question raised by the *Dege* case is whether or not a husband and wife are to be considered as two separate persons, capable of conspiring with each other within the interpretation of the statute. At early common law, the husband wife were considered one, that one being the husband. This rule was given its authoritative expression by Hawkins in his *Pleas of the Crown* in which he stated:

It plainly appears from the words of the statute, that one person alone cannot be guilty of conspiring within the purport of it; from whence it follows . . . that no such prosecution is maintainable against a husband and wife only, because they are esteemed but one person in law, and are presumed to have but one will.<sup>4</sup>

There has been some criticism that the common-law rule was merely pronounced in textbooks and treatises but there was no case in which the rule was applied by an English court.<sup>5</sup>

Early American cases dealt with the problem in dicta. Generally, these cases<sup>6</sup> affirmed the common-law rule without inquiring into its soundness.<sup>7</sup> *People v. Miller*<sup>8</sup> was the first American case in point to state that a husband and wife cannot be convicted of criminal conspiracy. Subsequent early American decisions affirmed this rule.<sup>9</sup> The basic rationale of these cases was the common-law rationale above indicated, namely,

<sup>2</sup> 18 U.S.C.A. § 371 (Supp. 1959).

<sup>3</sup> *United States v. Perlstein*, 126 F.2d 789, 794 (3rd Cir. 1942).

<sup>4</sup> 1 HAWKINS, *PLEAS OF THE CROWN* 448-449 (8th ed. Curwood 1824).

<sup>5</sup> Williams, *Legal Unity of Husband and Wife*, 10 MODERN L. REV. 16-21 (1947); *Contra*, *Mawji v. Reginam*, 41 Crm. App. R. 69, 1 All E.R. 385 (Privy Council, 1957); *Kowbel v. The Queen*, 110 Can. Cr. Cas. 47, 4 D.L.R. 337 (1954).

<sup>6</sup> *Commonwealth v. Kendig*, 18 Pa. Dist. 659 (1909); *State v. Clark*, 9 Houst. 536, 33 Atl. 310 (Del. 1891); *People v. Richards*, 67 Cal. 412, 7 Pac. 828 (1885); *State v. Christianbury*, 44 N.C. 46 (1852).

<sup>7</sup> *But see*, by way of dictum, *Smith v. State*, 48 Tex. Crim. 233, 89 S.W. 817 (1905).

<sup>8</sup> 82 Cal. 107, 22 Pac. 934 (1889).

<sup>9</sup> *People v. MacMullen*, 134 Cal. App. 81, 24 P.2d 794 (1933); *Worthy v. Birk*, 224 Ill. App. 574 (1922) (which stated that the Married Women's Act did not in the least modify the common-law rule); *Merrill v. Marshall*, 113 Ill. App. 447 (1904) (where defendant's statement that the plaintiff and her husband conspired to defraud another was not held to be slander, since at common law a husband and wife could not be guilty of conspiracy).

that marriage united the husband and wife into one legal entity, so that they were not considered as two separate persons, and thus were not capable of committing the crime of conspiracy. The first American case rejecting the common-law rule and convicting a husband and wife of criminal conspiracy was *Dalton v. People*.<sup>10</sup> There the Supreme Court of Colorado stated that Colorado's Married Women's Act abrogated the common law rule. Later state decisions,<sup>11</sup> using the same reasoning as the *Dalton* case, have expressly rejected the common-law rule and have accepted the modern view of the relationship between man and wife. The Illinois Supreme Court, in *People v. Martin*,<sup>12</sup> expressly rejected the common-law rule on the grounds that the changed status of married women would no longer permit such a fiction.

The federal courts at first followed the common-law rule used in most state courts. In *Dawson v. United States*,<sup>13</sup> for example, the common-law doctrine was retained. The *Dawson* Court held:

[A] rule so well established and so generally recognized by modern authorities should not be judicially repealed.<sup>14</sup>

Federal decisions after *Dawson*,<sup>15</sup> citing the *Dawson* case as authority, affirmed the common-law rule. But when a husband and wife were convicted of violating a federal conspiracy statute in *Johnson v. United States*,<sup>16</sup> the court in that case stated that legislation had made the common-law view obsolete: "Acts of Congress have established the separation of husband and wife as to property, contracts, and torts. . . ."<sup>17</sup> Subsequent federal cases<sup>18</sup> followed the reasoning of the *Johnson* case.

The Supreme Court of the United States, in the *Dege* case, has agreed with the viewpoint of the later state and federal decisions. The Court held that the present day status of women in this country would not permit the fiction of the unity of the husband and wife to be followed in regard to criminal conspiracy. In reality, the wife has the same rights

<sup>10</sup> 68 Colo. 44, 189 Pac. 37 (1920).

<sup>11</sup> *People v. Martin*, 4 Ill.2d 105, 122 N.E.2d 245 (1954); *Marks v. State*, 144 Tex. Crim. 509, 164 S.W.2d 690 (1942). *Contra*, *People v. Keller*, 165 Cal. App.2d 419, 332 P.2d 174 (1958); *State v. Struck*, 44 N.J. Super. 274 (County Ct.), 129 A.2d 910 (1957).

<sup>12</sup> *People v. Martin*, *supra* note 11.

<sup>13</sup> 10 F.2d 106 (9th Cir.), *cert. denied*, 271 U.S. 687 (1926).

<sup>14</sup> *Id.* at 108.

<sup>15</sup> *Gros v. United States*, 138 F.2d 261 (9th Cir. 1943); *United States v. Shaddix*, 43 F. Supp. 330 (S. D. Miss. 1942).

<sup>16</sup> 157 F.2d 209 (D.C. Cir. 1946).

<sup>17</sup> *Ibid.*

<sup>18</sup> *Wright v. United States*, 243 F.2d 569 (5th Cir. 1957); *Kivette v. United States*, 230 F.2d 749 (5th Cir. 1956); *Thompson v. United States*, 227 F.2d 671 (5th Cir. 1955).

as her husband, and husband and wife must be treated as separate entities. The dissent strongly urged that law enforcement in conspiracy must consider the confidential relationship of marriage, and that the rejection of the common-law rule endangers such relationship.<sup>19</sup> The dissenting opinion further charged that only Congress should, if it so desires, dismiss such a well established rule.<sup>20</sup> The majority of the Court stated, on the other hand, that it would be false to imply that Congress intended to retain the common-law doctrine in light of the present status of married women.

Recent English and Canadian decisions have retained the common-law rule. In *Kowbel v. The Queen*,<sup>21</sup> the court held that such a well established rule should not be judicially repealed.<sup>22</sup> The Privy Council, in *Marwji v. The Queen*,<sup>23</sup> simply stated that the common-law rule was still retained. Apparently consideration was not given to the increased rights of women.

The Supreme Court's decision in the *Dege* case has these effects: (1) It settles the conflicting lower federal court decisions; (2) it will be a binding authority on future federal decisions applying federal conspiracy law; and (3) the decision is persuasive authority for the basis of future state decisions. But the ultimate effect of this decision is to increase married women's liabilities by refusing to recognize certain feudal notions concerning coverture and criminal responsibility.

<sup>19</sup> For discussion of the contrary view see Williams, *Legal Unity of Husband and Wife*, 10 MODERN L. REV. 16-21 (1947).

<sup>20</sup> *Accord*, Dawson v. United States, 10 F.2d 106 (9th Cir.), cert. denied, 271 U.S. 687 (1926).

<sup>21</sup> 110 Can. Cr. Cas. 47, 4 D.L.R. 337 (1954).

<sup>22</sup> *Contra*, dissent in the *Kowbel* case, 4 D.L.R. at 344.

<sup>23</sup> 41 Crim. App. R. 69, 1 All E.R. 385 (Privy Council, 1957).

## EVIDENCE—WIFE MAY BE COMPELLED TO TESTIFY AGAINST HUSBAND

The defendant was indicted under the White Slave Traffic Act (more commonly known as the Mann Act),<sup>1</sup> for knowingly transporting his wife in interstate commerce for the purpose of prostitution. Defendant was convicted in the United States District Court for the Middle District of Alabama; the United States Court of Appeals for the Fifth Circuit affirmed the conviction, and the United States Supreme Court, on certiorari, affirmed the appellate court's decision. The Supreme Court

<sup>1</sup> 18 U.S.C.A. § 2421 (Supp. 1959).