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CONSPIRACY IN SOUTH CAROLINA

Perhaps the most difficult wrong or crime in Anglo-American jurisprudence to define with any degree of clarity is the elusive, all-encompassing action for conspiracy. Certain basic elements are, of course, generally recognized and accepted, but these describe, rather than define, the wrong. Whether examined from the viewpoint of a criminal prosecution, or from that of a civil action for damages, it is commonly described as consisting of "a combination between two or more persons for the purpose of accomplishing a criminal or unlawful object, or an object neither criminal nor unlawful by criminal or unlawful means".[1] Such language as this has prompted Mr. Justice Jackson, of the United States Supreme Court, to comment that "the modern crime of conspiracy is so vague that it almost defies definition. Despite certain elementary and essential elements, it also, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid."[2] At Common Law the crime of conspiracy was a misdemeanor,[3] and existed only where there was an offense against the public, or an offense against an individual where unlawful means were used. The reasoning behind such a limitation is that where there was a conspiracy to injure the public, the public had a direct interest, whereas it had only an indirect interest in private injuries, stemming from its duty to maintain law and order and to administer justice.[4] Conspiracy has always included a multitude of sins, such as those enumerated in *State v. DeWitt & Watts*,[5] involving a conspiracy to destroy a will in order to defraud the devisees. Mr. Justice Johnson, in declaring that a conspiracy to do a public mischief was indictable, declared such "mischief" to consist of such conspiracies as those:

> To endanger the public health by vending unwholesome provisions; to raise the price of public funds by false rumors or other unlawful means; to manufacture for

1. State v. Ameker, 73 S. C. 330, 338, 58 S. E. 484 (1905).
2. See JACKSON, J., concurring opinion in Kruelwitch v. United States, 336 U. S. 440, 446, 93 L. Ed. 790, 796 (1948).
3. State v. Ferguson, ... S. C. ......, Westbrook Adv. Sheet, April 15, 1952.
4. State v. Cardoza, 11 S. C. 195 (1878); MURRAY'S CRIMINAL LAW, § 66(D), p. 100.
5. 2 Hill 282 (S. C. 1834).

> sale at vendue, a base article, so nearly resembling that which is genuine and valuable, as to be calculated to deceive the public; as a combination amongst a class of laborers to raise their wages by unlawful means . . .[6]

In this case the court found that attempts to suborn a witness to commit prejury or prevent his giving evidence, and the fabrication or suppression of evidence not involving perjury were so calculated to pervert the public justice as to substantiate an indictable conspiracy.

It is, of course, necessary—both in civil and criminal contemplation—that there be a combination of at least two or more persons to constitute a conspiracy, for one person alone obviously could not conspire with himself. Thus, the Supreme Court of South Carolina has held that where two defendants have been indicted for a conspiracy, and while the jury was out, the State entered a *nolle prosequi* as to one, a verdict of guilty as to the other can not be permitted to stand. The court, speaking through Chief Justice Moses, declared that the "concurring will of at least two persons is as necessary to the offense (of conspiracy) as that of three to the constitution of a riot."[7] The effect of a *nol. pros.* as to one of the two defendants, it would seem, prior to the rendition of verdict, is to leave the count in the indictment inoperative and without effect as to the remaining defendant, because it dissolves the allegation of conspiracy altogether. This does not mean, however, that all conspirators must be named or even known. It is possible for an indictment or complaint to be good which alleges simply that the defendant conspired with a person or persons unknown, and this is frequently used. A recent example may be found in the case of *State v. Hightower*,[8] involving the illegal procurement and sale of "key" answers to the questions on the National Teachers Examination. As a result of this wide-spread conspiracy, between eight and nine hundred teachers lost their certificates to teach in South Carolina. The indictment charged the defendant with conspiring with "other persons unknown" to defraud the State of one hundred dollars or more, by obtaining and selling these answers to teachers, aiding them to better their scores and thereby enable them to get money from the State to which they

6. *Id.* at p. 284.
7. State v. Jackson, 7 S. C. 283, 287, 24 Am. Rep. 476 (1876).
8. ...... S. C. ......, Westbrook Adv. Sheets, Feb. 9, 1952.

would not have been entitled by reason of their own personal qualifications. The court considered the question of the necessity of naming all of the conspirators, and stated: "The question here presented has been definitely answered against the appellant in many cases which hold that the identity of the other members of the conspiracy is not needed, inasmuch as one person can be convicted of conspiring with persons whose names are unknown."[9]

In order to constitute a conspiracy it is necessary that there be a unity of design and purpose, for common design is the essence of the offense.[10] It is also clear that there must be an agreement, or so-called "meeting of the minds". However, it is not necessary that the agreement be formal. "It is sufficient that the minds of the parties meet understandingly, so as to bring about an intelligent and deliberate agreement, to do the act and commit the offense charged, although such agreement be not manifested by any formal words."[11] Illustrative of this principle is the case of *Rhodes v. Granby Cotton Mills*,[12] where the plaintiff had been blacklisted by the defendant, so as to prevent him from getting employment at other mills, as a result of the defendant's belief that the plaintiff was one of a group of strikers. The court found that the circumstances tending to establish a conspiracy were (1) the keeping of a blacklist by the defendant for the benefit of those mills with which it sustained a certain relation called a "curtesy," and (2) that as a result of such understanding a discharged employee was prevented from getting employment at other mills. This, it was held, tended to establish an implied agreement, which was in effect a conspiracy. However, conspiracy is the result of agreement, and not the agreement itself.[13]

While agreement is essential, it is not necessary that any special means have been decided upon to carry out such an agreement in order to establish criminal liability.[14] On the civil side, the means employed or decided upon become ma-

9. *Id.*
10. State v. Simons, 4 Strob. 266 (S. C. 1850); State v. James, 34 S. C. 49, 12 S. E. 657 (1890); State v. Ameker, *supra*, note 1; State v. Green, 40 S. C. 328; 18 S. E. 933, 42 Am. St. Rep. 874 (1893).
11. State v. Cole, 107 S. C. 285, 98 S. E. 624 (1917); State v. Davis, 88 S. C. 229, 70 S. E. 811, 34 L. R. A. (N. S.) 295 (1910).
12. 87 S. C. 18, 68 S. E. 824 (1910).
13. See 15 C. J. S., 1064.
14. State v. Cole, 107 S. C. 285, 98 S. E. 624 (1917).

terial only when the purpose of the conspiracy is lawful, for there can be no civil action unless unlawful means are used, or an unlawful end is sought.[15] It must be pointed out, however, that while an act may not be actionable when performed by an individual, it does not necessarily follow that the same act remains lawful when performed by two or more persons acting in concert. The Supreme Court felt called upon to correct such a misconception by saying: "Petitioner's counsel appear to have understood from the opinion that this court takes the view, as to conspiracy, that . . . two or more may lawfully do, under an agreement, and regardless of purpose or motive, whatever one may lawfully do singly. Although this rule prevails in some jurisdictions, such is not the majority view or that of this court."[16] Likewise, a combination which is lawful within itself may become a conspiracy when its object is to destroy or injure a business or calling.[17] However, some authorities feel that the more reasonable view is that while an act done by an individual, damaging another, may not be actionable because justified by his rights, the same act becomes actionable when committed in pursuance of a combination actuated by motives which are born of malice and lack the individual's justification.[18] This was shown in *State v. Shooter*,[19] when the court examined a charge of a conspiracy to pervert legal processes in order to force another to sign a deed, by using the respective positions of the defendants as constable and magistrate on behalf of the legal owner. It was held that a conspiracy may be criminal even though the purpose was only to gain possession of land by means of an extorted deed in favor of the legal owner.

Generally, an overt act is not needed in order to establish conspiracy. However, in *State v. McAdams et al*,[20] where the named defendant with his co-conspirators came from Georgia, at which place the conspiracy was entered into, to South Carolina, ostensibly for the purpose of surveying the scene of a proposed robbery, and then returned to Georgia . . . but was not with his fellow conspirators on a subsequent trip when the robbery took place, the court held that in order to

15. See 15 C. J. S. 999.
16. Howle v. Mountain Ice Co., 167 S. C. 41, 57, 165 S. E. 724 (1932).
17. Charles v. Texas Co., 199 S. C. 156, 18 S. E. 2d 719 (1942), citing 11 AM. JUR. 578.
18. *Ibid*, citing 11 AM. JUR. 579.
19. 8 Rich. 72 (S. C. 1854).
20. 167 S. C. 405, 166 S. E. 405 (1932).

convict him in South Carolina of conspiracy, it was necessary to prove some overt act was committed here in pursuance of the conspiracy made in Atlanta to which he was a party. It is clear therefore, that if the conspiracy was entered into without the court's jurisdiction, but an overt act, however slight, was committed within its jurisdiction, then all members of the conspiracy may be tried where such overt act took place. "The law considers that wherever the conspirators act, there they continue their agreement, and this agreement is continued as to all whenever any one of them does an act in furtherance of their common design".[21] For the general rule is that if the overt act is committed within the court's jurisdiction, the place of the conspiracy is immaterial, and that the conspiracy is then deemed to be renewed as to all the conspirators at the place where the act took place.[22] While it is necessary to allege an overt act to establish jurisdiction, it does not appear that it is otherwise necessary, for our court has recently held that since the gist of the crime of conspiracy is the unlawful combination, the crime is complete when such combination is made.[23]

The question naturally arises from the preceding paragraphs as to what liability is placed on the conspirator for the act of his cohort. In this respect it is essential to present some evidence that the other party to the alleged conspiracy had guilty knowledge of the unlawful purpose and agreed to participate in the illicit confederation.[24] The general rule is then that, on either the civil or the criminal side of the law, what one does, all do, and the act of one is the act of all.[25] It is possible that one of the conspirators may retire from the conspiracy, and thereby avoid any liability, and this is always a question for the jury. In illustrating such a retirement, a trial judge inartfully used the story of the Stoning of Stephan, in connection with a case in which one McIntire, a conspirator, stood by and watched his compatriots beat the victim of their conspiracy to death. On appeal, Mr. Justice Carter,

21. *Ibid*, at 409; 5 R. C. L. 1076.
22. *Supra*, note 8.
23. *Supra*, note 3.
24. Goble v. American Railway Express Co., 124 S. C. 19, 115 S. E. 900 (1923).
25. Exchange Bank of Meggett v. Bennett, 193 S. C. 320, 8 S. E. 2d 515 (1940); State v. Woods, 189 S. C. 287, 1 S. E. 2d 190 (1938); MURRAY'S CRIMINAL LAW, § 66(F), p. 101.

speaking for the court in an opinion which reads like poetry,[26] pointed out that, while it was not error to use it, the story was hardly appropriate, in that Stephan was legally executed according to Jewish law, albeit the execution was based on false testimony, and that Saul, while standing by and consenting to the stoning, was not violating the law by such consent. The court found that if McIntire went to the home of the deceased and stood by knowing of the conspiracy and being a party to it, did nothing to prevent the carrying of the conspiracy into effect, such a fact alone might refute a retirement and furnish grounds on which a jury might convict him.

One of the most indefinite phases of the law of conspiracy is the sufficiency required of the evidence. The general rule is that the "fact of a conspiracy may be proved by any relevant, competent evidence having a legitimate tendency to support the accusation."[27] A conspiracy, which by birth and nature is a secretive, indefinite and shadowy affair, must by the same token, produce the most indefinite and shadowy type of evidence. Individually, the circumstances employed as evidence might have little weight, but when taken collectively they may "point unerringly toward a conspiracy."[28] For this reason, the courts have allowed evidence of either a direct or circumstantial character in proving corrupt combinations.

However, a limitation has been imposed as to the admissibility of declarations of co-conspirators. Where there is evidence of a conspiracy, the declarations of one of the conspirators, made *during* the life of the conspiracy, is admissible against his cohorts, but where the declaration is made after the termination of the conspiracy, it is not.[29] For "once the conspiracy is ended, no such ligament binds each co-conspirator so that the confession of any one or more of such co-conspirators binds all who conspired."[30] It binds only its maker.[31] The foregoing is true when an admission or declaration, made after the conspiracy is at an end, is in the nature of a narrative, a description, or a subsequent confession, but it has been held that when it is in itself an act, or it accom-

26. State v. Rook, 174 S. C. 225, 177 S. E. 143 (1934).
27. *Supra*, note 8.
28. *Ibid.*
29. State v. James, 34 S. C. 49, 12 S. E. 657 (1890).
30. State v. Green, 40 S. C. 328, 330, 18 S. E. 933 (1893).
31. State v. Dodson, 14 S. C. 628 (1880); State v. Rice, 49 S. C. 418, 27 S. E. 452 (1896); State v. Davis, 88 S. C. 229, 70 S. E. 811 (1910).

panies and explains an act for which others are responsible, it will be allowed as evidence.[32]

Attention should be called to a pitfall in the path of litigation of a civil conspiracy. Its danger may be illustrated by the case of *Jennings v. Southern Standard Ins. Co., et al*,[33] in which the defendant's motion to have the complaint made more definite and certain was overruled, the trial court having found that the complaint stated only one cause of action, that of conspiracy to defraud and participation in the alleged fraudulent purpose. There was no appeal from this finding by either party, and it became the law of the case. A non-suit was granted, and on appeal the court said that: "Bearing in mind that the order . . . from which no appeal was taken, restricted the trial to the single issue of conspiracy, we are constrained to hold with the circuit judge that there was no evidence in support of conspiracy as set out in the complaint, which would have justified that court in submitting that issue to the jury."[34] In the foregoing example, the complaint was incomplete, in that the tort was not alleged sufficiently to become an independent cause of action. The reason for this becomes apparent in the following quotations from *Corpus Juris*, which have been quoted with approval by our Supreme Court.

> . . . If a plaintiff fails in the proof of a conspiracy or concerted design, he may yet recover damages against one or more of the defendants shown to be guilty of the tort without such agreement. The charge of conspiracy when unsupported by evidence will be considered mere surplusage not necessary to be proved to support the action.[35]

However, it must be remembered that this is not true where the act which is alleged as the basis of liability is one which, if committed by an individual, would impose no liability.[36]

CONCLUSION

In attempting to cover the entire field of civil and criminal conspiracy in these few pages, no attempt has been made to

32. State v. James, 34 S. C. 49, 12 S. E. 657 (1890).
33. 172 S. C. 496, 174 S. E. 433 (1934).
34. *Id.* at p. 502.
35. Goble v. American Railway Express Co., 124 S. C. 19, 28, 115 S. E. 900 (1923), citing 12 C. J. 584.
36. *Ibid.*

delve into the more mysterious regions of the offense, and much has, of necessity, been omitted. Rather, the attempt has been to depict, in sketchy fashion, what is perhaps the most potent judicial weapon existing in the spheres of either state or Federal Law. The inherent dangers of this doctrine, if allowed to come to the fore, would make a veritable playground for legal injustice and judicial abuse . . . for here is an offense requiring virtually no concrete proof for conviction. In most cases, no overt act is necessary . . . merely the unseen and intangible elements of a combination between two people to do some illegal act, or some act illegally. It is a combination which exists, if at all, in secret agreement, hidden in the dark recesses of man's mind. If wisely used, conspiracy is the law's strongest weapon, for it reaches out and grasps the conspirator who, himself, has violated no law, except by aiding those who have. It can sweep, glacier-like, across the State or nation to touch conspirators, wherever they may be, bringing them to trial in a place they may never have seen, but where a co-conspirator, whom they may not know, has performed some overt act in pursuance of their common purpose. It can be a tremendous force for justice and right . . . or, just as easily, a wicked tool for the infliction of wrong . . . It is to be hoped that our judiciary of the future will handle it as wisely as have those in the past.

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