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### **Criminal Law—Murder in the First Degree—Evidence—Corroboration of Accomplice's Testimony (People v. Goldstein, 285 N.Y. 376 (1941))**

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a beneficiary into present vested rights. To accomplish such resultant effect, the depositor must complete "the gift in his lifetime, either by acts sufficient to constitute a valid gift *inter vivos*, or to effect the erection of a present trust",<sup>13</sup> thus necessitating such unambiguous conduct as plainly to imply that the depositor intended to divest himself of his interest in the property and hold it thereafter for the named beneficiary. The decision rests on the well-established rule that a gift of property to take effect after the donor's death, the donor in the meanwhile retaining control and dominion over the property, cannot be sustained since it is a testamentary disposition.<sup>14</sup> The court has placed great reliance on the recent cases of *In re Vaughan's Estate*<sup>15</sup> and *McCarthy v. Pieret*,<sup>16</sup> the latter case following the rule of *Townsend v. Rackham*.<sup>17</sup>

M. F.

CRIMINAL LAW—MURDER IN THE FIRST DEGREE—EVIDENCE—CORROBORATION OF ACCOMPLICE'S TESTIMONY.—The defendants, Strauss and Goldstein, were convicted of first degree murder under the New York penal law.<sup>1</sup> The indictment charged that they "willfully and feloniously and of malice aforethought, killed Irving Feinstein by strangling him with a rope and setting fire to his body." Abraham Reles, who admitted taking part in the crime, described a sequence of events which led up to the death of the victim. The evidence showed a deliberate and premeditated plan to commit murder. Reles admitted having committed perjury at a previous trial. Both defendants appeal on the ground that the judge's charge to the jury as to what was required by statute<sup>2</sup> as corroborative evidence of the testimony of an accomplice, in order to convict the defendants constituted reversible error. The defendant, Strauss, further contends that he was deprived of his constitutional rights<sup>3</sup> by being forced to trial without being afforded a judicial inquiry and determination as to his ability to comprehend the charge against him; to confer with his counsel; and to make his defense. *Held*, conviction affirmed. Although there were minor inaccuracies in the charge when it is con-

<sup>13</sup> WINGATE, S., in *In re Vaughan's Estate*, 145 Misc. 332, 260 N. Y. Supp. 197 (1932).

<sup>14</sup> See note 6, *supra*.

<sup>15</sup> 145 Misc. 332, 260 N. Y. Supp. 197 (1932).

<sup>16</sup> See note 4, *supra*. For a thorough discussion of this case see 53 HARV. L. REV. 1060; 26 CORN. L. Q. 130-3; 38 MICH. L. REV. 900; 24 MINN. L. REV. 1009; 18 CHI-KENT REV. 417.

<sup>17</sup> 143 N. Y. 516, 38 N. E. 731 (1894).

<sup>1</sup> N. Y. PENAL LAW §§ 1044, 1045.

<sup>2</sup> N. Y. CODE OF CRIM. PROC. (1882) § 399.

<sup>3</sup> U. S. CONST. AMEND. XIV, § 1; N. Y. CONST. art. I, § 6.

sidered as a whole it was a correct statement of the law and it cannot be said that it tended to mislead the jury. As to the second contention of the defendant, Strauss, the record shows no evidence of any violation of his constitutional rights. *People v. Goldstein*, 285 N. Y. 376, 34 N. E. (2d) 362 (1941).

The test of whether one is an accomplice is whether that person can be indicted for the same offense as the principal.<sup>4</sup> An accomplice is not disqualified as a witness<sup>5</sup> and is competent to testify for the prosecution.<sup>6</sup> A jury may reject the testimony of an accomplice who has previously perjured himself but they are not bound to do so and may give it such credit as they may deem it entitled to receive under the circumstances.<sup>7</sup> In a criminal action the defendant may not be convicted on the uncorroborated testimony of an accomplice.<sup>8</sup> This corroboration must be such that it tends to connect the defendant with the commission of the crime.<sup>9</sup> This does not mean that the evidence must prove the whole crime.<sup>10</sup> However, evidence which merely shows that the crime was committed in the fashion described by the accomplice is not such corroboration as is required to convict<sup>11</sup> nor will evidence which only establishes the credibility of the accomplice be held sufficient.<sup>12</sup> In the instant case the defendant cited *People v. Maione*<sup>13</sup> in support of their contention in regard to corroborative evidence, in which a reversal of a conviction was obtained on a similar appeal. The judge in that case, in his instruction to the jury, enumerated fifteen items of evidence with respect to external fact which were in agreement with the testimony of the accomplice. Such evidence, the court said, if believed by the jury would be corroborative evidence sufficient to convict the defendant. On appeal this evidence was found to establish only the *corpus delicti* and did not tend to connect the defendant with the commission of the crime. In the instant case, however, the court was more explicit when it instructed the jury that even if they believed the testimony of the accomplice, they could not convict on his testimony unless it was corroborated by "other independent and believable evidence tending to connect the defendant with the commission of the crime." This instruction gave

<sup>4</sup> *People v. Kopperschmidt*, 237 N. Y. 463, 143 N. E. 256 (1924).

<sup>5</sup> *People v. Nicosia*, 164 Misc. 152, 298 N. Y. Supp. 591 (1937).

<sup>6</sup> *People v. O'Neil*, 48 Hun 36, 10 N. Y. Supp. 1 (1887), *aff'd*, *People v. O'Neil*, 109 N. Y. 251, 16 N. E. 68 (1888).

<sup>7</sup> *People v. Kerr*, 6 N. Y. Cr. Rep. 406, 6 N. Y. Supp. 674 (1889).

<sup>8</sup> N. Y. CODE OF CRIM. PROC. (1882) § 399. A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime.

<sup>9</sup> *People v. Remer*, 243 App. Div. 566, 276 N. Y. Supp. 266 (2d Dep't 1935); *see also* *People v. Burlison*, 119 Misc. 107, 195 N. Y. Supp. 284 (1921).

<sup>10</sup> *People v. Smith*, 108 Misc. 240, 177 N. Y. Supp. 519 (1919).

<sup>11</sup> *People v. Maione*, 284 N. Y. 423, 31 N. E. (2d) 759 (1940).

<sup>12</sup> *People v. Kress*, 284 N. Y. 452, 31 N. E. (2d) 898, *rev'g*, 259 App. Div. 738, 18 N. Y. S. (2d) 425 (2d Dep't 1940).

<sup>13</sup> *People v. Maione*, 284 N. Y. 423, 31 N. E. (2d) 759 (1940).

the defendants all the protection the statute was intended to provide while in *People v. Maione* the instruction tended to cancel its effect.

P. D. A.

DOMESTIC RELATIONS — DECEDENT'S ESTATE — SEPARATION AGREEMENT—GIFT INTER VIVOS.—The claimant, the former wife of the deceased, is seeking to recover from the executors money alleged to be due her on a separation agreement between her and the deceased, which at the request of the parties had been incorporated into the divorce decree obtained by the claimant in the New Jersey Court of Chancery.<sup>1</sup> The agreement provided that in lieu of alimony the husband would pay the claimant one hundred dollars per month for the support and maintenance of their son "as long as the said son should continue to be a student at college." At the time of the agreement the son was about to enter a college of liberal arts. After graduating at the end of the four-year course, he continued, with his father's knowledge, to take post-graduate work in universities in Europe and in the United States, up to the time of his father's death. The deceased paid to the claimant one hundred dollars for each school month during the first four years. The claim is for the difference between the amount received and the amount that would be due to her at one hundred dollars per month with interest from the time of the commencement of the payments in June, 1930 to December, 1937, the time the deceased passed away. The surrogate denied the claim on the ground that there had been full payment by the deceased under the agreement incorporated in the divorce decree on the basis that a college year does not exceed ten months, and that four such undergraduate years were all that were contemplated. The Appellate Division modified the decree so as to allow the claimant one hundred dollars per month for each of twelve months for each of four years. *Held*, decree as modified by the Appellate Division affirmed. *In re Kelly's Estate*, 285 N. Y. 139, 32 N. E. (2d) 62 (1941).

A separation agreement which has been made part of a final divorce decree in a foreign jurisdiction is enforceable in New York despite the fact that it is subject to revision by the court where it was rendered.<sup>2</sup> The constitutional requirement<sup>3</sup> that full faith and credit shall be given to judgments and decrees of other states requires, where applicable, that such states shall give to the decree such force and

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<sup>1</sup> Divorce obtained on the grounds of desertion under New Jersey statute (2 REV. STAT. c. 50).

<sup>2</sup> *Yarborough v. Yarborough*, 290 U. S. 202, 54 Sup. Ct. 181 (1933); *Guggenheim v. Wahl*, 203 N. Y. 390, 396, 397, 96 N. E. 726 (1911); *Jones v. Jones*, 108 N. Y. 415, 15 N. E. 707 (1888).

<sup>3</sup> U. S. CONST. Art. IV, § 1.