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Conspiracy, a Misdemeanor, is Not Merged in the Felonious Acts Done in Furtherance Thereof

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would be upon the assured or his representatives to show that the misrepresentation was not material."

By these decisions, it is obvious that the courts have seen the injustice of imposing an impossible burden upon the insurance carrier. The old rule enunciated in such cases as *Cushman* v. *U. S. Life,*[21] wherein it was held that failure to disclose temporary disorders or functional disturbances, as having no bearing on general health or continuance of life, was not to be considered material misrepresentation, has finally been abrogated. The requirement of the insurance company to sustain such burden has now been definitely changed.[22]

It appears that this change is being consistently followed. In the recent case of *Jenkins* v. *John Hancock Mutual Life Insurance Company,*[23] the beneficiary of a life insurance policy brought an action to recover the proceeds thereof. Payment was resisted on the grounds that the insured had made false statements in her application for the policy.[24] The jury returned a verdict in favor of the plaintiff. This the court set aside and dismissed the complaint. Although the Appellate Division reversed the lower court and reinstated the verdict for the plaintiff distinguishing the facts in the instant case from those in the *Pomerantz* and like cases, nevertheless the Court of Appeals affirmed the decision of the trial court thereby extending the rule to cases wherein the misrepresentations were made not only to specific questions in an application but to general questions as well. It is indeed unfortunate that the correction of such an evil, made possible by unfounded legislative enactment,[25] is left to the courts. It is submitted that the attention of the legislature be drawn to the situation and such harmful statute be modified, and so deprive the unscrupulous practitioner of an unfair and dangerous weapon.

ROBERT D. FLEMING.

CONSPIRACY, A MISDEMEANOR, IS NOT MERGED IN THE FELONIOUS ACTS DONE IN FURTHERANCE THEREOF.

A recent decision [1] by the Court of Appeals has rendered obsolete another ancient common-law rule, which, until now, was deemed

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[21] *Supra* note 9.

[22] *Supra* notes 19, 17, 15; Schrader v. John Hancock, 251 N. Y. Supp. 169 (1st Dept. 1931).

[23] 257 N. Y. 289, — N. E. — (1931).

[24] *Ibid.* at 291. Questions as to specifically enumerated diseases, etc., were truthfully answered; the further question, "Have you within the past five years had medical advice for any disease or disorder not included in the above?" was not.

[25] 5 WIGMORE, EVIDENCE (1923) §2380, p. 206.

[1] People v. Tavormina, 257 N. Y. 84, 177 N. E. 317 (1931).

to be the law of this state. It is refreshing to note the readiness of our courts to abandon an out-worn theory of criminal procedure, and to know that another outpost in the labyrinth of defences available to the criminal has been demolished.

Under the early common law of England an indictment for a misdemeanor, which recited facts showing the commission of a felony, would be demurrable on the ground that the lesser crime had merged in the greater.[2] The rule developed from certain modes of procedure in the trial of misdemeanors and felonies, which have long since disappeared.

The question of merger came before the Supreme Court of Massachusetts in 1809,[3] and the English rule was adhered to. Later, in 1827, the Court of Errors in this state cited the Massachusetts decision with approval and followed it.[4] This was the first authoritative decision on the subject here, and has been cited with approval in numerous cases.[5] The doctrine, however, has not been free from criticism.[6]

In the instant case[7] an indictment was returned by the Extraordinary Grand Jury of Kings County, charging the defendants with the crime of conspiracy, growing out of the failure of the City Trust Company. Certain of these defendants had already been indicted for grand larceny and had been acquitted. Five of the thirteen defendants demurred to this indictment on the ground that the conspiracy had merged in certain felonious acts (forgery, perjury and larceny) set forth in the indictment as overt acts in aid of the conspiracy. The lower courts assented to the claim of merger and sustained the demurrers, relying on the authority of *Lambert* v. *People*.[8] The question had not been presented to the Court of Appeals for more than half a century.

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[2] Rex v. Westbeer, 1 Leach's Crown Law 14 (1739); Rex v. Doran, 2 Leach's Crown Law 608 (1790); Rex v. Parry, 7 Carr. & P. 836 (1837).

[3] Commonwealth v. Kingsbury, 5 Mass. 106 (1809).

[4] Lambert v. People, 9 Cow. 578 (N. Y. 1827).

[5] People v. Fish, 4 Park. Crim. Rep. 206, 212 (N. Y. 1854); People v. McKane, 7 Misc. 478, 482, 28 N. Y. Supp. 397, 399 (1894). "Care must be taken in preparing an indictment for this breach of conspiracy to charge the offense as merely an unconsummated attempt. If, either in an overt act, or in the body of the count, the commission of the actual offense be charged, the conspiracy merges in the felony and the indictment is incapable of supporting a conviction." People v. Wicks, 11 App. Div. 539, 42 N. Y. Supp. 630 (1896); People v. Thorn, 21 Misc. 130, 131, 47 N. Y. Supp. 46. 47 (1897); People v. Wiechers, 94 App. Div. 19, 87 N. Y. Supp. 897, *aff'd*, 179 N. Y. 459, 72 N. E. 501 (1904); People v. Coney Island Jockey Club, 68 Misc. 302, 304, 123 N. Y. Supp. 669, 671 (1910); People v. Rose, 101 Misc. 650, 168 N. Y. Supp. 933 (1917).

[6] People v. Willis, 24 Misc. 537, 54 N. Y. Supp. 129 (1898); People v. Petersen, 60 App. Div. 118, 69 N. Y. Supp. 941 (1st Dept. 1901); People v. Rathbun, 44 Misc. 88. 89 N. Y. Supp. 746 (1904); People v. Dunbar Contracting Co., 82 Misc. 174, 143 N. Y. Supp. 337 (1913); People v. Palmisano, 132 Misc. 244, 229 N. Y. Supp. 462 (1928).

[7] *Supra* note 1.

[8] *Supra* note 4.

Crimes in New York are defined by the Penal Law.[9] Section 580 makes conspiracy a misdemeanor. Section 583 requires the proving of an overt act done in the furtherance of the conspiracy. The conspiracy, and not the overt act, is the gravamen of the offense. The question then arose whether the rule of merger was still the law, or whether the conspiracy remained a distinct crime, separably indictable, where the overt act showed that the felonious object of the conspiracy had been accomplished. The answer is, without equivocation:

> "A conspiracy to commit a felony constitutes an independent crime, distinct from the felony contemplated, and complete in itself. It consists of a series of acts which constitute the misdemeanor, and under such circumstances the fact that the indictment alleges overt acts constituting a felony, or that the evidence upon a trial discloses that the conspiracy was executed by the commission of a felony, should not prevent a conviction for the crime of conspiracy." [10]

This clearly overrules the holding in *Lambert* v. *People*,[11] wherein the court stated:

> "It is urged that this indictment charges an executed conspiracy, that the first agreement to commit the offense and every other preliminary and intermediate step is absorbed in the actual commission of it. I am deeply impressed with the weight of this objection. I can not conceive how a crime can be split up into its several parts and each of those parts made subjects of accusation. If a man committed a theft by robbing, I can not conceive how the two can be separated and the defendant tried for the theft alone. An indictment for murder always charges that the defendant made an assault on A and him murdered of malice aforethought. If a general verdict of guilty were rendered on such an indictment, would it enter into the head of any man to inflict a punishment merely for the assault?"

The doctrine of merger has been abandoned in England.[12] This is likewise true in Massachusetts.[13] In New Jersey an indictment

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[9] N. Y. PENAL LAW, Laws of 1909, c. 88.

[10] *Supra* note 1 at 92, 177 N. E. at 319.

[11] *Supra* note 4.

[12] Reg. v. Button, THE JURIST, vol. 12, p. 1017 (1848); 9 HALSBURY, LAWS OF ENGLAND (1909) p. 262; Rex v. Luberg, 135 LAW TIMES 414 (1926).

[13] Commonwealth v. Walker, 108 Mass. 309, 314 (1871), "The fact that the defendant has been guilty of a higher offense than that alleged is no defense." Commonwealth v. Andrews, 132 Mass. 263, 265 (1882); "It is not open to them [defendants] to object that they are not indicted for the greater offense." Commonwealth v. Stewart, 207 Mass. 563, 93 N. E. 825 (1911); "The offense of conspiracy was not merged in the specific crimes afterwards committed in pursuance thereof, although the conspiracy was only a misdemeanor and the subsequent crimes were felonies." Commonwealth v. Marsino, 252 Mass. 224, 147 N. E. 859 (1925).

for a conspiracy to charge a person falsely with an offense, and procure his arrest therefor, is good, although the indictment alleges that the conspiracy was executed.[14] Section 37 of the Federal Criminal Code makes conspiracy a felony, and as crimes of equal degree do not merge, the question of merger does not arise in that jurisdiction.

The court points out, in the instant case, that to uphold the doctrine of merger would be to give the defendant, and not the prosecuting attorney, the right to determine the crime with which he must be charged. It is often possible to convict for the lesser crime when it would be impossible to convict for the greater. The court remarked:[15]

> "The same act may involve different offenses, felonies and misdemeanors. Robbery includes larceny, and if one breaks and enters a dwelling with intent to steal and does so, there is committed both burglary and larceny. It would be unfortunate if the state could not prosecute for any one of the crimes committed, without regard to the question of whether a lesser crime had merged in the greater."

This appears to deal the death-blow to the doctrine of merger in this state, and every student of the law will agree that it is a step in the right direction.

DANIEL O'SULLIVAN.

CERTIORARI TO REVIEW DECISIONS OF THE BOARD OF STANDARDS AND APPEALS.

By section 1283 of the Civil Practice Act, the writ of *certiorari* is abolished except for the purpose of reviewing tax assessments. The statute[1] provides that in all cases, except the latter, a petitioner must proceed by order and not by writ. The courts have declared that section 1283, *et seq.*, of the Act apply with equal force to *certiorari* proceedings to review decisions of the Board of Standards and Appeals.[2]

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[14] Johnson v. State, 26 N. J. L. 313 (1857).
[15] *Supra* note 1 at 91, 177 N. E. at 319.

[1] N. Y. C. P. A. §1283, Am'd by L. 1922, c. 355: "Nothing in this section shall be construed as abolishing the writ of certiorari under the tax law, or under any other general or special statute, to review assessments for purposes of taxation which are placed on the local tax rolls."

[2] Matter of Multiplex Garages, Inc. v. Walsh, 213 App. Div. 155, 210 N. Y. Supp. 178 (1st Dept. 1925), *rev'd*, on another ground, 241 N. Y. 527, 150 N. E. 540 (1925); Matter of McGarry v. Walsh, 213 App. Div. 289, 210 N. Y. Supp. 286 (2d Dept. 1925).