

DECISIONS NOTED

Criminal Law—Under the Federal Conspiracy Statute the Substitution of Proof of an Unalleged for the Alleged Overt Act Does Not Constitute a Fatal Variance—Defendant was one of two persons indicted for conspiring to violate the Narcotics Act. Upon reversing a conviction because of an erroneous charge by the trial judge, the circuit court of appeals remanded with instructions that an overt act is not a part of the crime of conspiracy in the sense that the particular overt act alleged must be proved, and proof of an unalleged overt act would be sufficient to support a conviction. [*United States v. Negro*, 164 F. 2d 168 (C. C. A. 2d 1947).]

At common law an overt act was not considered a part of the crime of conspiracy even though prosecutors oftentimes included overt acts in their allegations. The federal conspiracy statute, however, imposes criminal liability on the conspiring parties only if “. . . one or more of such parties do any act to effect the object of the conspiracy . . .” [REV. STAT. § 5440 (1875), 18 U. S. C. § 88 (1940).] Reasons for this requirement as shown by federal decisions have been that it affords a *locus penitentiae*, [*United States v. Britton*, 108 U. S. 199, 204-205 (1883)], and that the statute of limitations begins to run from the doing of the last overt act. [*United States v. Kissel*, 218 U. S. 601 (1910).] Rules for prosecution under the conspiracy statute as evolved by the courts have permitted many overt acts to be alleged, yet proof of only one alleged act is deemed sufficient to sustain a conviction. [*DeLacey v. United States*, 249 Fed. 625 (C. C. A. 9th 1918).] Similarly, where certain overt acts have been alleged, the courts, after proof of these, have admitted proof of additional acts unalleged. [*Friedman v. United States*, 260 Fed. 388 (C. C. A. 6th 1919).] The court in the instant case carries this flexibility one step further: proof of any overt act, alleged or not, is sufficient.

Simple, non-technical rules of criminal procedure, generally desirable, are exemplified by the “harmless error” rule which directs that any variance which does not affect substantial rights shall be disregarded. [FED. R. CRIM. P., 52 (a).] In the field of conspiracy, however, where public prosecutors use the conspiracy statute as a device to secure trial advantages and heavier sentences, the necessity for more stringent procedural rules is manifest. [REP. ATTORNEY GENERAL 5-6 (1925).] There is a real danger of double jeopardy in these cases, especially where there is a conviction for the substantive crime as well as the conspiracy. [See dissent of Rutledge, J. in *United States v. Pinkerton*, 328 U. S. 640, 648 (1946).]

While the defendant in the instant case has not been seriously prejudiced by the instruction of the court inasmuch as he will not be surprised upon retrial, the prosecution should have been aware that the overt act alleged would be incapable of proof as to one defendant and should have made out its indictment accordingly. If the rule adduced by the court is carried to its extreme, it will be possible for prosecutors to make a mere recital of an overt act and then, by proving a real one at the trial, still obtain a conviction. Such a proceeding would certainly be contrary to precedent and, moreover, contrary to the “plain meaning” of the statute. On analysis, this decision seems to be another harmful relaxation of rules for the prosecution of conspiracy which already allow the prosecutor considerable leeway.

Estates—Tenancy by the Entirety—Husband and Wife as Vendees in Contract to Sell Land—Specific Performance When One Spouse Died Before Executing Agreed Purchase Money Mortgage—Defendant contracted to sell land to husband and wife for down payment, periodic instalments, and subsequent execution of a purchase money mortgage on settlement date. After completion of down payment and instalments but before execution of a bond and mortgage husband died, bequeathing and devising all his estate to wife. Wife tendered her personal bond and mortgage, and brought a bill for specific performance when defendant refused to convey. Defendant moved to dismiss on the ground that because of husband's death it was apparent that husband and wife could not execute the personal liability bond which was to accompany the mortgage. In denying the motion, the court held that wife could properly bring a bill for specific performance since she was the survivor to an equitable estate by the entirety. [*Siesel v. Mandeville*, 55 A. 2d 167 (N. J. 1947)].

Fewer than half of our states recognize tenancy by the entirety in any form; and within the jurisdictions where this tenancy is accorded recognition, there is no agreement as to how far it may be extended. The major controversy as to whether the tenancy may properly be applied to both real and personal property has somewhat overshadowed discussion concerning whether it is found in equitable as well as legal estates. Although before the Statute of Uses tenancy by the entirety did not exist in the case of a limitation by way of use, later courts have had no difficulty in determining that an equitable estate was held by the entirety. [*McCune v. Graves*, 273 Mo. 584, 201 S. W. 894 (1918)]. Such determinations have laid a foundation for finding an estate by the entirety in an unexecuted land contract. Some jurisdictions, which like that of the instant case do not recognize tenancy by the entirety in personalty, have applied a theory of equitable conversion so that a surviving spouse was permitted to bring an action for specific performance of a land contract made by both spouses as vendees. [*Sasso v. Meachem Realty Corp.*, 242 App. Div. 853, 275 N. Y. Supp. 230 (2d Dept. 1934).] It is notable, however, that there was no indication of a purchase money mortgage or bond in the case last cited, and consequently no question of the surviving spouse's ability to perform. Other jurisdictions where these estates are ordinarily confined to realty have permitted them to exist in chattels directly derived from land held by the entirety, [*See Koehring v. Bowman*, 194 Ind. 433, 142 N. E. 117 (1924)]; but New Jersey courts have made no such extension and have ruled that a purchase money mortgage resulting from the sale of land held by the entirety was acquired by husband and wife as tenants in common with no right of survivorship. [*Central Trust Co. v. Street*, 95 N. J. Eq. 278, 127 Atl. 82 (1923)]. The validity of these technical distinctions is questionable. Fortunately, in the instant case by adopting the fiction of equitable conversion, [*See Stone, Equitable Conversion by Contract*, 13 Col. L. Rev. 369 (1913)], the court circumvented previous state decisions denying the application of tenancy by the entirety to personalty and has enabled the parties subsequently to argue the paramount question of intent. On trial, the equitable conversion may well fall if it is established that defendant was relying on the personal credit of both husband and wife, and cannot now be satisfied with a bond executed by the wife alone. By this decision, however, the wife has properly been given the opportunity to prove that as sole devisee of her husband's estate her credit is substantially the same as her husband's, and that defendant's present refusal to convey possibly is dictated by factors other than a substitution in personal liability on the bond.

Federal Rules of Civil Procedure—Jurisdiction Over Ancillary Proceeding Upon Settlement of Original Controversy—Plaintiff brought a tort action against defendants in a federal court, the grounds of jurisdiction being diversity of citizenship. Upon motion, defendants were given leave under Rule 14 to implead a third party, a citizen of the same state as defendants, alleged to be liable as a joint tort-feasor. Subsequently, plaintiff and original defendants settled their case out of court, whereupon the third-party defendant moved to dismiss the third-party complaint. The court granted the motion holding that the original controversy upon which federal jurisdiction was grounded having been settled, the federal court no longer had jurisdiction over the ancillary action. [*State of Maryland to use of Wood v. Robinson v. Oursler*, 10 Fed. Rules Serv. 14a. 62, Case 7 (October 29, 1947).]

In reaching its decision, the court relied upon a number of early cases, decided long before the adoption of the new Federal Rules of Civil Procedure, involving third-party situations somewhat similar to the present one. These cases held that in a separable controversy, where, after a cause is removed to a federal court by one of two defendants who alone is entitled to invoke federal jurisdiction on the grounds of diversity of citizenship, the suit is dismissed as to such defendant, the federal court has no further jurisdiction and the cause will be remanded to the state court. [*St. Paul Indemnity Co. v. Cab Co.*, 303 U. S. 283, 295 (1938).] The rationale of these decisions is that a party not entitled to sue in a federal court in his own right should not be allowed to do so by merely associating with a party who has the right and grafting his controversy upon a separate controversy of which the court has jurisdiction. [*Kromer v. Everett Imp. Co.*, 110 Fed. 22 (C. C. N. D. Wash. 1901).] In the light of this reasoning, it would appear that the court's holding in the principal case was in accord with the weight of authority. Certainly, the instant decision is consistent with the familiar policy of federal tribunals to avoid any undue extension of their jurisdiction. In view of the considerations governing the adoption of Rule 14, however, the wisdom of the court's decision seems somewhat questionable. Quite manifestly, the objectives of third-party impleader are to avoid circuity of action, eliminate useless expenditure of time, and reduce the cost of litigation. [*Tullgren v. Jasper*, 27 F. Supp. 413, 416 (D. C. Md. 1939).] But what are the consequences of the court's decision? To get contribution, the original defendant must now commence a second action in a state court, with the attendant loss of time and money—a result hardly compatible with the spirit of the rule. [*See* FED. R. CIV. P., 1.] Moreover, the court's holding, in effect, makes federal determination of ancillary proceedings contingent upon whether the original parties continue their litigation or settle out of court, an anomaly indeed. If Rule 14 is not to be deprived of much of its effect, it would appear that once the third-party action had been initiated, the federal court should retain jurisdiction until final settlement of both the original and the ancillary proceedings had been effectuated. Inasmuch as the very assumption of jurisdiction over the ancillary proceeding, where no independent grounds for federal jurisdiction exist, may be said to constitute an extension of federal jurisdiction, it would appear that there is no valid policy against retaining the controversy.