exercise of the reserved power to amend the general statute.[25] In the instant case, the court indicated its acceptance of this approach but the finding that the plan was voluntary made it unnecessary to consider the problem.

Criminal Law—Criminal Conspiracy—"Wharton's Rule" as Exception from Charge of Criminal Conspiracy—[Illinois].—Indictments were returned against two defendants for conspiring to gamble for money with cards. Gambling with cards was prohibited by an Illinois statute.[1] Upon writ of error by the state[2] from a judgment quashing the indictment, *held*, conspiracy will not lie for agreement to commit an offense which by its nature involves a plurality of agents. Judgment affirmed. *People v. Purcell.*[3]

The holding in the instant case is the first application in Illinois of Wharton's rule[4] that necessary parties cannot be indicted for conspiracy to commit a crime which by its nature requires a concert of agents.[5] Whether the crime planned was or was not consummated, the effect of the rule is the same. The general acceptance of Wharton's rule[6] as a qualification to the conspiracy charge suggests that an explanation for it may be found in an examination into the purposes underlying the crime of conspiracy.

[25] See Buckley v. Cuban Sugar Co., Prentice-Hall Corp. Serv. ¶ 20,997 (N.J. Eq. 1940); Marshall County Bank v. Wheeling Dollar Savings & Trust Co., 119 W. Va. 383, 193 S.E. 915 (1937); Avondale Land Co. v. Shook, 170 Ala. 379, 54 So. 268 (1911); Pronick v. Spirits Distributing Co., 58 N.J. Eq. 97, 42 Atl. 586 (1899); In re Election of Directors of Newark Library Ass'n, 64 N.J.L. 217, 43 Atl. 435 (1899); cf. Crotty v. Peoria Law Library Ass'n, 219 Ill. 516, 76 N.E. 707 (1906). A larger number of courts do not draw this line so arbitrarily, but grant greater discretion to the legislature in exercising the reserved power, although some limitations are fixed in every jurisdiction. Looker v. Maynard, 179 U.S. 46 (1900); Davis v. Louisville Gas & Electric Co., 16 Del. Ch. 157, 142 Atl. 654 (1928); Lord v. Equitable Life Assurance Society, 194 N.Y. 212, 87 N.E. 443 (1909). Language in this group of opinions indicates that the basis of the decisions is the application of notions of due process—evaluation of the proposed change by comparing the interests of the public and the state with the interests of the complainant in the particular case. Hinckley v. Schwarzschild & Sulzberger Co., 107 App. Div. 470, 95 N.Y. Supp. 357 (1905); 4 Univ. Chi. L. Rev. 139 (1936). See, in general, Berle and Means, The Modern Corporation and Private Property 148–51 (1932); Dodd, Dissenting Stockholders and Amendments to Corporate Charters, 75 U. of Pa. L. Rev. 585 (1927); Curran, Minority Stockholders and the Amendment of Corporate Charters, 32 Mich. L. Rev. 743 (1934); Stern, The Limitations of the Power of a State under a Reserved Right to Amend or Repeal Charters of Incorporation, 53 Am. L. Reg. (44 n. s.) 1, 73, 85 (1905); 34 Mich. L. Rev. 859 (1936).

[1] Ill. Rev. Stat. (1939) c. 38, § 324.

[2] This is permitted by Ill. Rev. Stat. (1939) c. 38, § 747.

[3] 304 Ill. App. 215, 26 N.E. (2d) 153 (1940).

[4] 2 Wharton, Criminal Law § 1604 (12th ed. 1932). The rule is applicable to such crimes as adultery, incest, dueling, rebating, bribery, selling liquor and Mann Act violations.

[5] When, however, more persons participate than are necessary for the substantive offense, the conspiracy count should be available. State v. Clemenson, 123 Iowa 524, 99 N.W. 139 (1904); State v. Martin, 199 Iowa 643, 200 N.W. 213 (1924). But see People v. Wettengel, 98 Colo. 193, 58 P. (2d) 279 (1935).

[6] Shannon v. Commonwealth, 14 Pa. 226 (1850); Miles v. State, 58 Ala. 390 (1877); United States v. Dietrich, 126 Fed. 664 (C.C. Neb. 1904); State v. Law, 189 Iowa 910, 179 N.W. 145

Although the precise nature of criminal conspiracy is indefinite, it is usually said that it consists of a combination of two or more people to do either an unlawful act or a lawful act by unlawful means.[7] Because of the availability of the charge in many different types of situations, the liberal venue requirements,[8] and the possibility of a severe penalty, there are instances in which the prosecutor finds this count attractive.[9] For these reasons there exists a danger of oppression against which safeguards may be necessary.

If the purpose behind criminal conspiracy is to provide a more effective control of crimes the social effects of which are aggravated by concert, there is no reason to add its sanction where no greater harm results from the conspiracy than from commission of the basic crime. But the purpose may also be to secure punishment of attempts at the earliest time possible, i.e., when an active intention to commit an overt act is first seriously communicated. Under this latter rationale there would seem to be no reason to exempt certain attempts merely because the crime attempted requires combination with another person.

Historically, there is support for the view that conspiracy was intended to punish attempts.[10] Conspiracy antedated Lord Mansfield's development of the law of attempts,[11] and the conspiracy category may have been applied to acts which later were called criminal attempts. Perhaps the frequency with which conspiracy counts appear today is explained by the desire of the prosecution to use this simple method of dealing with attempts. The tendency, moreover, to treat attempts as conspiracies is increased by the involved state of the law of attempts.[12] Although the category of conspiracy is not as inclusive as that of attempts, in a large number of all crimes, not including those of passion, the prosecutor may choose the conspiracy charge because the incident of concerted action is present.[13]

Nevertheless an important distinction between attempts and conspiracies may be

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(1920); United States v. Hagan, 27 F. Supp. 814 (Ky. 1939); State v. Martin, 199 Iowa 643, 200 N.W. 213 (1924); see State v. Clemenson, 123 Iowa 524, 99 N.W. 139 (1904); State v. Reiners, 80 N.J.L. 196, 76 Atl. 330 (1910); State ex rel. Durner v. Huegin, 110 Wis. 189, 85 N.W. 1046 (1901); Chadwick v. United States, 141 Fed. 225 (C.C.A. 6th 1905); 11 A.L.R. 194 (1920).

[7] 2 Bishop, Criminal Law § 175 (9th ed. 1923); Ritchie, The Crime of Conspiracy, 16 Can. Bar Rev. 202 (1938); Sayre, Criminal Conspiracy, 35 Harv. L. Rev. 393 (1922), especially criticism of this definition at 405; Holdsworth, Conspiracy and Abuse of Legal Process, 37 L. Q. Rev. 462 (1921); Digby, The Law of Criminal Conspiracy in England and Ireland, 6 L. Q. Rev. 129 (1890).

[8] "Although technically the place where the conspiracy is entered into is the place of venue .... venue may be laid as to any or all of the conspirators, in the county in which an act was done by any of [the conspirators]." 2 Wharton, Criminal Law § 1666 (12th ed. 1932).

[9] U.S. Att'y Gen. Ann. Rep. 5 (1925).

[10] Holdsworth, op. cit. supra note 7, at 466-67; Arnold, Criminal Attempts—The Rise and Fall of an Abstraction, 40 Yale L. J. 53, 63 (1931); Sayre, Criminal Attempts, 41 Harv. L. Rev. 821, 837 (1928).

[11] The law of conspiracy was developed as part of the criminal equity administered by the Star Chamber. It was adopted by the common law courts after the Restoration.

[12] Arnold, op. cit. supra note 10; Sayre, op. cit. supra note 10.

[13] In a highly organized society the "lone wolf" offender has as little chance of success as the single enterpriser engaged in legitimate activity.

indicated by the effect of merger rules. Because the result would be double punishment, it appears well settled that an attempt cannot be punished when the attempted crime is consummated.[14] Acts in themselves criminal, such as assaults, do not, however, merge when they are incidental to another crime.[15] In some of the older cases conspiracy was allowed to be merged in the completed crime,[16] but no recent case allowing such a result has been found.[17] This refusal to allow merger is consistent with the modern view that conspiracy prosecutions are intended to control organized crime rather than to punish attempts.

The rule of Wharton is supported by this rationale of criminal conspiracy. The purpose of punishing conspiracy would not be served by substituting the stringent sanctions against conspiracy for those of the basic crime planned, unless the participation of additional persons resulted in aggravated social consequences.[18]

Under Wharton's rule, the prosecution should not be unduly handicapped.[19] The statement of the rule in the present case that conspiracy will not lie where a concert of agents is necessary for a crime, is, however, broader than the facts presented required. Apparently the court overlooked the fact that defendants were both necessary to the basic offense; the rule stated would include the situation where the number of persons involved was greater than necessary for the basic crime.[20]

The dangers of ignoring this limitation are demonstrated in *People v. Wettengel*,[21] where two persons were charged with conspiring to bribe the state's attorney who was also charged. In a divided opinion the upper court held that the indictment for criminal conspiracy was properly quashed as being within Wharton's rule since bribery is a crime which requires concerted action of a giver and a taker.[22] The *Wettengel* case might be explained by the rationale that the sole recipient of a bribe could not be indicted for conspiracy merely because there was a combination of persons giving the

[14] Graham v. People, 181 Ill. 477, 55 N.E. 179 (1899); Broadhead v. People, 24 Ala. App. 576, 139 So. 115 (1932); Brazier v. State, 25 Ala. App. 422, 147 So. 688 (1933); People v. Cosad, 253 App. Div. 104, 1 N.Y.S. (2d) 132 (1937); see Sneed v. United States, 298 Fed. 911, 912 (C.C.A. 5th 1924); West v. Commonwealth, 156 Va. 975, 157 S.E. 538 (1931); but see People v. Crane, 302 Ill. 217, 134 N.E. 99 (1922).

[15] Commonwealth v. Roby, 12 Pick. (Mass.) 496 (1832).

[16] Commonwealth v. Kingsbury, 5 Mass. 106 (1809); People v. Thorn, 21 Misc. 130, 47 N.Y. Supp. 46 (Gen. Sess. 1897).

[17] Commonwealth v. Stuart, 207 Mass. 563, 93 N.E. 825 (1911); People v. Robertson, 284 Ill. 620, 623, 120 N.E. 539 (1918); Graff v. People, 208 Ill. 312, 70 N.E. 299 (1904); People v. Moshiek, 346 Ill. 154, 178 N.E. 337 (1931); Regina v. Button, 11 Q.B. 929 (1848); 2 Univ. Chi. L. Rev. 485 (1934); 17 Corn. L. Q. 136 (1931).

[18] "In other words, when the law says 'a combination between two persons to effect a particular end shall be called . . . . by a certain name' it is not lawful for the prosecution to call it by some other name." 2 Wharton, Criminal Law § 1604 (12th ed. 1932).

[19] Note 9 supra.

[20] See Wharton's distinction between concursus necessarius and concursus facultativus. 2 Wharton, Criminal Law § 1604 (12th ed. 1932); cf. State v. Reiners, 80 N.J.L. 196, 76 Atl. 330 (1910).

[21] 98 Colo. 193, 58 P. (2d) 279 (1935); cf. United States v. Sager, 49 F. (2d) 725 (C.C.A. 2d 1931).

[22] 49 F. (2d) 725 (C.C.A. 2d 1931).

bribe.[23] Assuming this explanation, it is suggested that when two persons agree to execute one side of a transaction with a third person, the two who combine may be indicted for conspiracy, provided that the single member involved in the other half of the transaction is not also indicted.[24] Unless the rule of the *Wettengel* case does allow such an indictment, the law of conspiracy, which has been recognized as a useful social control, will be unavailable in large classes of cases.

Divorce—Procedure—Injunction to Restrain Domiciliary from Prosecuting a Foreign Divorce Proceeding—[New York].—A wife brought an action in New York, the matrimonial domicil of the parties, to restrain her husband from further prosecuting divorce proceedings which he had instituted in Florida. The wife had not been personally served in Florida nor had the husband, a property owner in New York, acquired a bona fide domicil in Florida. Upon appeal from an order granting an injunction, *held*, that there were no grounds for equitable intervention as the Florida court was without jurisdiction to enter a valid divorce decree, and as no substantial rights of the wife were prejudiced. Order reversed and complaint dismissed. *Goldstein v. Goldstein.*[1]

In cases similar to the instant case the lower courts of New York,[2] and the courts of New Jersey,[3] Rhode Island,[4] and Maine[5] have in the past granted injunctions. Equitable relief has been predicated on various grounds: evasion of the divorce laws of the marital domicil;[6] burden and expense of defending an out-of-state divorce action;[7] and inconvenience of collaterally attacking a foreign decree not entitled to full faith and credit.[8] In addition, the injunction may serve to enhance the possibility of recon-

[23] United States v. Dietrich, 126 Fed. 664 (C.C. Neb. 1904).

[24] Cf. Rex v. Meyrich and Ribuffi, 21 Cr. App. R. 94 (1929).

[1] 283 N.Y. 146, 27 N.E. (2d) 969 (1940).

[2] Forrest v. Forrest, 2 Edm. Sel. Cas. (N.Y.) 180 (1850); Gwathmey v. Gwathmey, 116 Misc. 85, 190 N.Y. Supp. 199 (S. Ct. 1921), aff'd 201 App. Div. 843, 193 N.Y. Supp. 935 (1922); Greenberg v. Greenberg, 218 App. Div. 104, 218 N.Y. Supp. 767 (1926); Johnson v. Johnson, 146 Misc. 93, 261 N.Y. Supp. 523 (S. Ct. 1933); Richman v. Richman, 148 Misc. 387, 266 N.Y. Supp. 513 (S. Ct. 1933); Dublin v. Dublin, 150 Misc. 694, 270 N.Y. Supp. 23 (S. Ct. 1934); Jeffe v. Jeffe, 4 N.Y.S. (2d) 628 (S. Ct. 1938). But see DeRaay v. DeRaay, 265 App. Div. 544, 8 N.Y. S. (2d) 361 (1938), where the propriety of granting an injunction was doubted.

[3] Kempson v. Kempson, 58 N.J. Eq. 94, 43 Atl. 97 (1899); Knapp v. Knapp, 12 N.J. Misc. 599, 173 Atl. 343 (1934); Gross v. Gross, 13 N.J. Misc. 499, 180 Atl. 204 (1935).

[4] Borda v. Borda, 44 R.I. 337, 117 Atl. 362 (1922).

[5] Usen v. Usen, 13 A. (2d) 738 (Me. S. Ct. 1940).

[6] Greenberg v. Greenberg, 218 App. Div. 104, 218 N.Y. Supp. 767 (1926).

[7] Gwathmey v. Gwathmey, 116 Misc. 85, 190 N.Y. Supp. 199 (S. Ct. 1921), aff'd 201 App. Div. 843, 193 N.Y. Supp. 935 (1922); Kempson v. Kempson, 58 N.J. Eq. 94, 43 Atl. 97 (1899); Usen v. Usen, 13 A. (2d) 738 (Me. S. Ct. 1940).

[8] Gwathmey v. Gwathmey, 116 Misc. 85, 190 N.Y. Supp. 199 (S. Ct. 1921), aff'd 201 App. Div. 843, 193 N.Y. Supp. 935 (1922); Kempson v. Kempson, 58 N.J. Eq. 94, 43 Atl. 97 (1899); see Pound, The Progress of the Law, 1918–1919, 33 Harv. L. Rev. 420, 426 (1920).