Larz Anderson Smith, a minor, residing in San Francisco, and Paul Smith, of age, residing at Springfield, Ohio. That he had formerly resided in California. That, before leaving said state, financial and domestic difficulties had arisen between himself and wife. That, under the laws of California (section 137 of the Civil Code), she had brought an action and obtained a judgment against him in the superior court of the city and county of San Francisco for maintenance and support, upon which judgment there was due at the time of his death the sum of $10,000. That prior to his death the policy of insurance, together with the sum of $5,000, had been sent by him to San Francisco, in order to enable him to comply with the terms of a certain agreement which had been entered into by himself and wife, to the effect that the policy in question should be delivered to her in trust for their son Larz, and that the $5,000 should be paid to her upon her obtaining a divorce from him. That the policy was sent to his counsel, E. L. Campbell, and the money to his agent, Jeremiah Lynch. That no action for a divorce had ever been commenced. That, after his death, Mr. Campbell delivered the policy to Mr. Lynch, and it was thereafter, by an order of the superior court of the city and county of San Francisco, delivered to Mrs. Smith, as the special administratrix of her husband's estate. That on April 4, 1891, three days prior to his death, Dr. Smith, being then indebted to one Dr. J. B. Murphy in the sum of $3,400, made, executed, and delivered to said Murphy the following instrument, in writing:

"Chicago, April 4, 1891.

"For value received, I hereby sell, assign, and transfer to John B. Murphy all of the property, effects, choses in action, and things of value hereinafter mentioned, and all my right, title, and interest therein: A judgment note made by Morris J. Allberger for $8,700.00 or thereabouts; a policy in the N. Y. Mutual Life Insurance Company for $5,000.00 or thereabouts; accounts due me as shown by my books, and said books; my horse and buggy; all my stock bonds in all corporations and associations; all my library, books, instruments, office furniture, household furniture, and effects of every kind soever. And I hereby authorize said Murphy to take immediate possession thereof, or possession thereof at any time thereafter.

"Wm. F. Smith. [Seal.]"

—That this document was executed and delivered to, and was accepted by, J. B. Murphy, in payment of the indebtedness of Smith to him. That Murphy thereafter took possession of all the property therein described that was in the city of Chicago. That, after this instrument was executed, Dr. Smith made his will, wherein he bequeathed to John B. Murphy, to be first paid out of his estate, the sum of $3,400, to his son Larz Anderson Smith the sum of $50, to Eudora Bascom (the defendant in error), designated "as formerly my wife," $50; and, subject to these bequests, he devised and bequeathed all of his estate to Elizabeth C. Merrill. That the party named as executor of the will declined to act, and thereafter, upon proceedings regularly had in the proper court in Cook county, Ill., letters of administration upon said estate were issued to the Jennings Trust Company, a corporation duly organized and existing under and by virtue of the laws of the state of Illinois; and that said company, under its letters of administration, made a demand upon the insurance company for payment of the amount due on the policy, which was refused; and the trust company thereupon commenced an action to recover the said amount, which action is still pending and undetermined in the circuit court of Cook county, Ill. It is claimed that said action was brought and is being prosecuted for, on behalf of, and at the request of, J. B. Murphy. The policy in question has never been paid. Judgment was rendered in favor of Mrs. Smith.

Edward J. McCutcheon and Charles A. Shurtleff, for plaintiff in error.

Henry N. Clement, for defendant in error.

Before GILBERT, Circuit Judge, and HAWLEY and MORROW, District Judges.

HAWLEY, District Judge (after stating the facts). The position and contention of the plaintiff in error is somewhat novel and peculiar. It admits its liability on the policy, but denies the right of the defendant in error to recover, unless Dr. Murphy is made a party to the action, on the ground that, unless he is made a party, it is liable to be twice compelled to pay the policy. Instead of paying the money due on the policy into court, and having notices served on all parties claiming the money or any part thereof, and asking that such parties be compelled to appear and present their claims, so that the court may decide their respective rights, it assumes the position of a partisan as between the respective claimants; and in its answer, as a defense to this action, alleges, after stating the facts as to the assignment of the policy, "that the said John B. Murphy is the owner of said policy and is entitled to the money due thereon; * * * that the plaintiff is not the real party in interest in this action"; and prays for judgment for its costs.

It is earnestly argued by the plaintiff in error that J. B. Murphy is an indispensable party as a defendant, and that this action cannot be maintained without his being made a party, and that, in the event that he could not be brought within the jurisdiction of the court, the action should be dismissed. Ergo, if this position is sound, the same objection could be made to any action brought by Murphy, and the insurance company would go Scot-free, and obtain a judgment in both cases for its costs. Nevertheless, if the law casts upon the defendant in error the burden of procuring the presence of Murphy, it would be her misfortune if she has not or could not do so. We are of opinion that the law imposes upon her no such burden. For the sake of the argument, it may be admitted that, if this was a suit in equity to determine the rights of the respective claimants, it could not be maintained without bringing them all before the court. It may likewise be admitted that, if Dr. Murphy had made any application, he would have been granted the right to intervene and assert his rights, if any he had, to any portion of the money due upon the policy, and that in either of these events the respective rights of Mrs. Smith and of Dr. Murphy might have been heard, litigated, and determined herein.

This is not, however, a suit in equity. It is simply an action at law to recover the amount due on a policy of insurance. There is an essential difference between the practice at law and in equity in determining who are proper and necessary parties to the litigation. Mahr v. Society, 127 N. Y. 460, 462, 28 N. E. 391; 1 Pom. Eq. Jur. 114; Fost. Fed. Prac. § 4. Under the pleadings, the insurance company took upon itself the burden of proving that Dr. Murphy had the legal right to recover from it the amount of money due upon the policy, but the evidence fails to establish such right. It is not shown that the policy of insurance was ever delivered to him; that he ever made any demand for its delivery; that he ever made any demand upon the insurance company for the payment of the money due upon said policy; that he ever brought any suit to recover the money, or took any legal steps whatever to assert any

right to the policy or any part of the money due thereon. It affirmatively appears that the time within which actions could be commenced against the insurance company, under the terms and conditions of the policy, has long since expired. The policy was an executory contract,—a chose in action,—available only as a legal contract to Dr. Smith and his personal representatives. The sale or assignment thereof, as made by Dr. Smith, did not vest any such interest therein in Murphy, either legal or equitable, as would authorize him to bring and maintain an action thereon against the insurance company. To constitute such an assignment, "two things must concur: First, the party holding the chose in action must, by some significant act, express his intention that the assignee shall have the debt or right in question, and, according to the nature and circumstances of the case, deliver to the assignee, or to some person for his use, the security, if there be one, bond, deed, note, or written agreement upon which the debt or chose in action arises; and, secondly, the transfer shall be of the whole and entire debt or obligation in which the chose in action consists, and, as far as practicable, place the assignee in the condition of the assignor, so as to enable the assignee to recover the full debt due, and to give a good and valid discharge to the party liable." Palmer v. Merrill, 6 Cush. 286. See, also, Holyoke v. Insurance Co., 22 Hun, 77; 2 May, Ins. § 389. Under the decisions of the supreme court in the state of Illinois, it is evident that Murphy could not bring an action there in his own name.

In Insurance Co. v. Ludwig, 103 Ill. 312, the court said:

"Policies of insurance are but choses in action, and governed by the same principles applicable to choses in action in general. They are assignable in equity only; and, in this state and in others where the strict rules of the common law prevail, courts of law will not recognize the assignment, so as to allow the assignee to sue on the policy in his own name. Insurance Co. v. Wetmore, 32 Ill. 221; Insurance Co. v. Hervey, 34 Ill. 62; Insurance Co. v. Robinson, 98 Ill. 324; Bliss, Ins. § 325; May, Ins. § 377; Jessel v. Insurance Co., 3 Hill, 88."

The policy is personal property, and was in the state of California. The issuance of letters of administration to Mrs. Smith in California was legal. She had the possession of the policy, and was entitled to recover the money due thereon. The law is well settled that the administratrix in California, as against the Jennings Trust Company or any other administrator in any other state, is entitled to recover the money from the insurance company. Insurance Co. v. Woodworth, 111 U. S. 138, 4 Sup. Ct. 364; Holyoke v. Insurance Co., supra; Morrisson v. Insurance Co., 57 Hun, 99, 10 N. Y. Supp. 445; Stevens v. Gaylord, 11 Mass. 262.

The views already expressed are deemed conclusive of this case, and render it unnecessary to review other assignments of error that appear in the record. Upon the facts, we are of opinion that the defendant in error is clearly entitled to the judgment which she obtained against the plaintiff in error. The judgment of the circuit court is affirmed, with costs.

UNITED STATES v. CASSIDY et al.

(District Court, N. D. California. April 1 and 2, 1895.)

No. 3059.

1. CONSPIRACY TO COMMIT OFFENSES AGAINST THE UNITED STATES—REV. ST. § 5440.

The statute relating to conspiracies to commit offenses against the United States (Rev. St. § 5440) contains three elements, which are necessary to constitute the offense. These are: (1) The act of two or more persons conspiring together; (2) to commit any offense against the United States; (3) the overt act, or the element of one or more of such parties doing any act to effect the object of the conspiracy.

2. SAME—CONSPIRACY DEFINED.

A conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal, by criminal or unlawful means. Pettibone v. U. S., 13 Sup. Ct. 542, 148 U. S. 203, cited.

3. SAME—MANNER OF CONSPIRING.

The common design is the essence of the charge; but it is not necessary that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be, and the details of the plan or the means by which the unlawful combination was to be made effective. It is sufficient if two or more persons, in any manner or through any contrivance, positively or tacitly, come to a mutual understanding to accomplish a common and unlawful design.

4. SAME—PARTIES TO CONSPIRACY.

Where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part any one was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators.

5. SAME.

Any one who, after a conspiracy is formed, and who knows of its existence, joins therein, becomes as much a party thereto from that time as if he had originally conspired. U. S. v. Babcock, Fed. Cas. No. 14,487, 3 Dill. 586, cited.

6. SAME—EVIDENCE—ACTS OF ONE PARTY.

Where several persons are proved to have combined together for the same illegal purpose, any act done by one of them, in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party, and therefore the proof of such act will be evidence against any of the others who were engaged in the conspiracy.

7. SAME—DECLARATIONS BY PARTIES.

Any declaration made by one of the parties, during the pendency of the illegal enterprise, is not only evidence against himself, but against all the other conspirators, who, when the combination is proved, are as much responsible for such declarations, and the acts to which they relate, as if made and committed by themselves. This rule applies to the declaration of a co-conspirator, although he may not himself be under prosecution.

8. SAME—CONSPIRACY AS DISTINCT OFFENSE.

The law regards the act of unlawful combination and confederacy as dangerous to the peace of society, and declares that such combination and confederacy to commit crime requires an additional restraint to those provided for the commission of the crime itself. It therefore makes criminal the conspiracy itself, with penalties and punishments dis-