EDITORIAL

Two of our Journal Board members declined to accept nomination for a succeeding term at this past Friday's corporation meeting. Both of them have been with us for a long time . Roy Angle, our Founding Father, who was advocating for this publication before your editor was even a member of the Bar, received a well deserved round of applause for this fine lesson in advocacy, and its successful result. Roy has been the subject of another commendatory editorial, and I am sure we are all aware of the value of his service to the Journal, without my going into greater length about it here.

Eddy Beck was another one. Our Treasurer from the inception of plans to actually get this publication into operation, Eddy has also served us for years. He assumed this office when our only asset was a $100.00 loan from the Bar Association. His budgeting and other financial expertise have resulted in the repayment of this loan and an operation running clearly in the black, with a cash reserve buffer for hard times. Eddy has to leave because he has a number of commitments to serve charitable organizations. Such organizations need the kind of service Eddy can render in this regard, so we reluctantly conclude we should not monopolize upon him.

We hope these two retiring officers will remain available to counsel and assist the rest of us and our own successors for many years to come. We extend our best wishes to them, and our thanks for the fine services they have rendered our Journal.

MANAGING EDITOR

decree of specific performance." 81 *Corpus Juris Secundum*, Specific Performance, Sect. 35, p. 496.

The clauses pointed to by the executors do not display as a matter of law an intent by the parties that the agreement embodies only preliminary negotiations. Speedway directs the Court's attention to the case of *West Heights Realty Corp. v. Adelman*, 107 N. J. Eq. 351, 152 A. 196 (1930). There the defendant entered into an agreement to lease to the plaintiff a parcel of land for a three year term. The agreement was held to embody the essential terms of a lease.

> The dispute arose because of a clause stating: "Any further provisions... to be made in addition to the above mentioned and later to be agreed upon, shall be incorporated in addition to the provisions herein contained in a lease . . . not later than March 25, 1920."

The court found that the agreement on its face was a complete and binding contract at law and in equity, remarking:

> "It is better to construe a single clause in an elaborate and extensive contract as an inoperative but harmless provision than to give a clause a construction which renders the whole contract voidable at the option of either party thus depriving the entire instrument of all finality and legal force."

ORDER OF COURT

NOW, March 5, 1976, the demurrer is overruled and the defendants are given twenty (20) days from this date to file an answer. Exception to the defendants.

COMMONWEALTH OF PA. V. EVANGELISTA, C.P. Cr.D. Franklin County Branch, No. 171 of 1978

Criminal Conspiracy - Demurrer - Insufficient Evidence

1. A mere statement by a person to an undercover agent that a third individual would be willing to sell a controlled substance is insufficient to convict that person of conspiracy to commit the crime of selling controlled substances.

John F. Nelson, Assistant District Attorney, Attorney for the Commonwealth

Blake E. Martin, Public Defender, Attorney for the Defendant

OPINION AND ORDER

EPPINGER, P. J., November 15, 1978:

Louis Evangelista (defendant) was charged with conspiracy to deliver a controlled substance in a transaction where Jerry Ott sold some cocaine to a narcotics agent (Albrecht). The agent had approached and asked Evangelista about buying some "T". Evangelista stated that Ott might have some and told Albrecht to follow him to a place on "dope alley" near a high school. There they would try to find Ott, but when they got there, he could not be found. So Evangelista told the agent to come back later. When the agent returned, the seller was there — Jerry Ott was then a student at the high school and would be expected to arrive on "dope alley" in time to go to school.

At the request of Albrecht, Evangelista approached the seller's car and asked if he had any "T". The response was negative but Ott did have "coke" and "pot". Defendant told the agent this and was instructed to find out if the agent could buy some "coke". The seller said all right, the defendant returned to the agent's car and the two of them approached the seller's car, where the agent gave the seller $10.00 and received the "coke". While the transaction was occurring, the defendant was behind the agent, did no talking, received no money, did not touch the substance and after the agent completed the transaction, the parties separated.

When the Commonwealth's evidence was in, the defendant demurred, the court reserved ruling and the defendant rested. In making the demurrer, defendant's attorney contended that the Commonwealth had not shown a conspiracy between Ott and the defendant to sell a controlled substance. We agree. We will sustain the demurrer.

The essence of every criminal conspiracy is a common understanding, no matter how it comes into being. *Commonwealth v. Yobbagy*, 410 Pa. 172, 177, 188 A. 2d 750, 752 (1963). Since an explicit or formal agreement to commit a crime can seldom, if ever, be proved, a conspiracy may be inferentially established by showing the relation, conduct or circumstances of the parties. *Commonwealth v. Horvath*, 187 Pa. Super 206, 211, 144 A. 2d 489, 492 (1958). However, this circumstantial evidence must meet the following standard:

> **Evidence to sustain a charge of conspiracy must be "such as reasonably and naturally justifies an inference of guilt of the accused and is of such volume and quality as to overcome the presumption of innocence and satisfy the jury of the accused's guilt beyond a reasonable doubt. [citations]. A conviction will not be allowed to stand if it is based solely upon suspicions and conjectures. [citation]."** *Commonwealth v. Yobbagy*, **supra, 410 Pa. at 176-77, 144 A. 2d at 752.**

In *Commonwealth v. Cameron*, 249 Pa. 146, 372 A. 2d 904 (1977), Cameron was approached by two narcotics agents seeking heroin. Cameron did the following: (1) Took the agents to house No. 1 where heroin was passed from the seller to Cameron to the agent, with the money passing directly from the agent to the seller; (2) Then took agents to house No. 2 where the occupant was reluctant to sell to the agents, complaining that Cameron was always bringing unknown buyers and the seller was worried about the police. Cameron vouched for the agents. Drugs and money were exchanged without either passing through the hands of Cameron. (3) Two days later Cameron returned with the agent to house No. 1 where the agent bought heroin directly from the occupant, again without drugs or money passing through Cameron 's hands. There were two other transactions.

In transactions (2) and (3), Cameron was convicted of conspiracy to deliver heroin and on appeal the convictions were sustained, the Court stating that the jury properly inferred an agreement between Cameron and the supplier in both cases. In transaction (2) it was because it was apparent that Cameron was regularly bringing buyers to the seller indicating a continuing agreement between Cameron and the seller. An agreement could also be inferred in transaction (1) which involved the same seller, for which he was convicted of delivery of a controlled substance.

Cameron's personal assistance in each transaction was important, and as the court pointed out, he was more than a mere guide to the potential suppliers, for without his help the agents had virtually no chance of completing any transactions.

In our case, it was pretty well known that Ott was a seller who conducted his business on "dope alley". So undoubtedly there were many who could have given the agent the information he received from the defendant. Under the circumstances presented in this case, the extent of defendant's participation was to bring together a willing seller and a willing buyer, he had nothing to do with the terms of the sale or the sale itself. Evangelista had no agreement with Ott that Ott would sell to the agent and unlike the *Cameron* case, there was no evidence of prior relationships between Evangelista and Ott.

Our case also differs from *Commonwealth v. Minnich*, 236 Pa. Super 285, 344 A. 2d 525 (1975), where Minnich

approached the agents asking them if they wanted to buy some LSD and then arranged for the sale and, before the sale was actually made, informed the agents of the price. The inference of a conspiracy with the seller is obvious.

If we are to find a conspiracy between Evangelista and Ott, we ought to find some personal or financial interest in bringing trade to Ott, *Commonwealth v. Simione*, 447 Pa. 473, 291 A. 2d 764 (1972), or evidence of prolonged cooperation between the two parties, *Commonwealth v. Stephens*, 231 Pa. Super 481, 488-89, 331 A. 2d 719, 722 (1974); *Direct Sales Co. v. U.S.*, 319 U.S. 703 (1943).

Stephens owned a store and in exchange for room and board, a friend worked in the store without pay. A narcotics agent entered the store, went directly to the friend and made a purchase of marijuana from a supply which the friend kept in another room. Though Stephens was two feet away from the friend during the transaction, he did not react or respond to the conversation regarding the sale. Stephens' convictions for possession and conspiracy to sell marijuana were reversed because even though it could be inferred Stephens overheard the conversation and realized that marijuana was being sold, it was not reasonable to infer that he had made a prior agreement to sell.

The mere happening of a crime in which several people participate does not of itself establish a conspiracy among those people. There must be evidence of an agreement and even apparently concerted action does not prove an agreement or common understanding. *Commonwealth v. Holman*, 237 Pa. Super 291, 296-97, 352 A. 2d 159, 161-62 (1975). The fact that a person is present at the scene of a crime when it is committed, by itself, is insufficient to convict that person of conspiracy to commit the crime. *Commowealth v. Goodyear*, 235 Pa. Super 544, 549, 344 A. 2d 672 (1975).

If there was any agreement in this case, it was the agreement between Evangelista and Albrecht that Evangelista would try to direct the agent to a place or person where he could get what he asked for. There was no showing of any agreement between Evangelista and Ott to sell the controlled substance, only a statement by Ott to Evangelista that he would sell to Albrecht which Evangelista transmitted.

ORDER OF COURT

NOW, November 15, 1978, the defendant's demurrer is sustained, the case is dismissed and the costs are placed on the county of Franklin.

IN RE: TRUST UNDER WILL OF FRANTZ, C. P. Franklin County Branch, O.C. Doc. Vol. 87, p. 811

Orphan's Court - Advisory Opinions - Invasion of Trust Corpus - Maintenance of Beneficiary in Comfort - Station in Life - Attorney's Fees - Services Rendered an incompetent - Costs.

1. While advisory opinions are generally not given, they may be proper in a case where the language of a trust instrument is uncertain, the trustee may subject itself to surcharge by making certain disbursements, and all parties are present and all question are fully discussed.

2. The propriety of invading the corpus of a trust is controlled by the settlor's intent as reflected in the trust instrument, provided that that intent is within the rules of law.

3. Where testator has created marital and residuary trusts, with the stipulation that the residuary trust cannot be invaded until the marital trust is exhausted, the testator's primary intent is to provide for his widow during her lifetime.

4. Where settlor has given to the trustee the discretion to invade corpus to the extent "necessary to properly maintain and support my wife in similar comfort and in like manner as our standard of living provides", the invasion of corpus is not limited to the provision of necessaries.

5. Where settlor has given to the trustee the discretion to invade corpus to the extent "necessary to properly maintain and support my wife in similar comfort and in like manner as our standard of living provides", the trustee's payments of assessments against the benificiary's apartment residence, of reasonable room and board in light of the beneficiary's station in life, and of hospitalization expenses are proper disbursements.

6. Where settlor has given to the trustee the discretion to invade corpus to the extent "necessary to properly maintain and support my wife in similar comfort and in like manner as our standard of living provides", the trustee's payments of the expense of a rental car for the purpose of visiting family friends and chauffer charges and auto expenses incurred for depositions, court hearings, and doctor's examinations may be proper disbursements.

7. Where settlor has given to the trustee the discretion to invade corpus to the extent "necessary to properly maintain and support my wife in similar comfort and in like manner as our standard of living provides", the trustee's payment of the expenses of legal services to restore the legal competency of the beneficiary, to obtain a divorce for the beneficiary, and to establish the beneficiary's claim against the trust may be proper disbursements.