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Res Judicata and Conspiracy

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has been a tendency to carry its application to extremes. The minority approach of Texas and Maryland seems the more desirable; in other words, a waiver of the right of confrontation should be permitted only when personally requested by the accused, and when he has a full understanding of the consequences.[13] Three problems are raised in each case involving waiver: was the waiver actually made; if so, was it done knowingly; and even if made with full knowledge, should it be permitted? The rule should not be permitted to operate automatically upon the request of the defendant or his attorney. Some examination into the causes and circumstances which have resulted in the request should be made by the court, and discretion should be used in the granting or denial of such a request.

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Res Judicata and Conspiracy

The United States Supreme Court in *Sealfon* v. *United States*[1] has recently sanctioned the use of res judicata in what may well become a significant limitation upon criminal prosecutions for both conspiracy and the crime of aiding and abetting in the commission of the substantive offense. The petitioner was first tried and acquitted on a charge of conspiracy. He was then tried and convicted as a principal for aiding and abetting in the commission of the substantive offense which was the object of the conspiracy. But in a unanimous opinion by Mr. Justice Douglas the Supreme Court reversed on the grounds that the acquittal on the conspiracy count was res judicata and precluded punishment for the substantive offense.[2]

Having rejected the common law doctrine that conspiracy merges into the successful crime and that only the latter can be prosecuted, the federal courts treat conspiracy as an entirely separate class of offense.[3] As

13 Courts appear to be increasingly insistent that the defendant in a criminal trial should not be permitted to waive fundamental rights, such as the right of counsel, unless the accused is advised of his rights, and what the probable consequences of the waiver are. See Federal Rules of Criminal Procedure 44, 18 U. S. C. A. following §687; Illinois Supreme Court Rules of Practice, and Procedure, 27A, Illinois Revised Statutes (1947), c. 110, §259.27A. For a complete discussion to the extent to which the right of counsel is guaranteed under the due process clause of the Fourteenth Amendment, see *Butte* v. *People of Illinois*, 333 U.S. 640 1948.

1 322 U. S. 575 (1948).

2 *United States* v. *Sealfon*, 161 F. (2d) 481 (C. C. A. 3rd, 1947). The Circuit Court of Appeals affirmed the action of the lower court in withdrawing the plea of res judicata from the jury, treating it as an issue of law, and ruling against petitioner on his plea. It held that the plea of res judicata, which it seemed to consider very similar to double jeopardy, did not apply. It distinguished *United States* v. *DeAngelo*, 138 F. (2d) 466 (C. C. A. 3rd, 1943), where the principle of res judicata was successfully invoked, without analyzing the records of the two *Sealfon* prosecutions with sufficient thoroughness to see that the doctrine was similarly applicable here.

3 *Braverman* v. *United States*, 317 U. S. 49 (1942); *United States* v. *Rabinowich*, 238 U. S. 78 (1915); 1 Bishop, Criminal Law (9th ed., 1923), § 787. A conspiracy at common law was a misdemeanor; so when the substantive crime was a felony, the former, the lesser crime, was deemed to have merged into the felony because the same act could not be both a misdemeanor and a felony. The reasons for the existence of the doctrine in England were: differences between the two as to punishment; person charged with a misdemeanor was entitled to full privilege of counsel, to a copy of the indictment and to a special jury which was denied in connection

pointed out in Mr. Justice Rutledge's dissenting opinion in *Pinkerton* v. *United States*,[4] Congress has defined three separate classes of crimes: (1) conspiracy to commit a crime;[5] (2) aiding and abetting or counselling another to commit a crime;[6] and (3) completed substantive offenses.[7]

The gist of the crime of conspiracy is an unlawful agreement between two or more persons to accomplish an unlawful purpose.[8] It is the agreement which the statute punishes, so the agreement must be proved.[9] But the prosecutor need not show a specific and formal agreement, but merely a unity of design or purpose or a meeting of the minds.[10] In addition, the federal statute requires proof of commission of an overt act in furtherance of the conspiracy.[11] The overt act is not a part of the conspiracy and is not what is punished.[12] Such proof of some act done to

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with a felony; forfeiture of property resulted from a conviction for a felony which the Crown desired; etc. These reasons did not exist in this country and conspiracy is expressly made a felony by federal statute. See Note (1942) 37 Ill. L. Rev. 183, 184.

4 328 U. S. 640, 649 (1946), which held that the substantive offenses committed by one of the defendants were in furtherance of the conspiracy so that the other defendant was also guilty of the substantive crimes, even though he was in jail when some of the substantive offenses were committed, and there was no evidence that he directly participated in any of them. A doctrine of a "partnership in crime" was relied on to hold the defendant liable for the crimes committed by his co-conspirator. The Court did not rely on the aiding and abetting statute which would have served as a more sound basis. Mr. Justice Rutledge gave a vigorous dissent, joined in part by Justice Frankfurter. Case criticized in Note (1947) 56 Yale L. J. 371; and Note (1947) 16 For. L. Rev. 275, for its introduction of vicarious liability from the fields of tort and agency to criminal law. The *Sealfon* case may possibly reflect a retreat from the *Pinkerton* opinion, which was also written by Mr. Justice Douglas, although res judicata was not involved in the latter case.

5 35 Stat. 1096 (1909), 18 U. S. C. A. § 88; "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000 or imprisoned not more than 2 years or both."

6 35 Stat. 1152 (1909), 18 U. S. C. A. §550: "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal."

7 These are covered by the various statutes defining the crimes against the United States.

8 *Braverman* v. *United States*, 317 U. S. 49, 53 (1942) (conspiracy to violate the Internal Revenue laws); *United States* v. *Gordon*, 138 F. (2d) 174 (C. C. A. 7th, 1943) (conspiracy to violate the Espionage Act; *Marino* v. *United States*, 91 F. (2d) 691, 693 (C. C. A. 9th, 1937).

9 *Braverman* v. *United States*, 317 U. S. 49, 53 (1942) ("A conspiracy is not the commission of the crime which it contemplates and neither violates nor arises under the statute whose violation is its object"); *Tabor* v. *United States*, 152 F. (2d) 254 (C. C. A. 4th, 1945); *see United States* v. *Britton*, 108 U. S. 193 (1883).

10 *Marino* v. *United States*, 91 F. (2d) 691, 694 (C. C. A. 9th, 1937); *Garhart* v. *United States*, 157 F. (2d) 777, 780 (C. C. A. 10th, 1946). But, as the court pointed out in *United States* v. *Falcone*, 109 F. (2d) 579 (C. C. A. 2d, 1940), mere association with the main offenders without cooperation or agreement to cooperate was not enough.

11 The statute is quoted *supra* note 5. This is in contrast to the Sherman Act prosecutions, in which no proof of an overt act in furtherance of the conspiracy to be committed is required, *Nash* v. *United States*, 229 U. S. 373, 378 (1913); *see* Mr. Justice Douglas's famous footnote 59 in *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 224 (1940). No attempt in this note will be made to cover cases arising under the Sherman Act or in the field of civil law, the use of conspiracy in the labor field, or state decisions.

12 *Bell* v. *United States*, 2 F. (2d) 543, 544 (C. C. A. 8th, 1924) (court said that overt acts were material allegations in the conspiracy count but were not a part

effectuate the agreement is required in order to give the would-be conspirator a chance to repent and withdraw if the conspiracy has proceeded no further than the agreement stage.[13] Any act, even if not criminal, in furtherance of the conspiracy will satisfy the requirement, and may be supplied by any one of the conspirators.[14]

Aiding and abetting under federal law is not a separate statutory class of crime; for the aiding and abetting statute carries no penalty of itself, but is only intended to abolish the distinction between principals and accessories before the fact and make them all liable as principals for the penalties provided for the substantive crime.[15] But conceptually, aiding and abetting in the commission of a crime would seem to be distinguishable from the actual commission of the offense and would seem to present separate problems, as Mr. Justice Rutledge recognized in his dissent to the *Pinkerton* case. For ease of analysis, therefore, this note will treat it as a separate class of crime. By the use of the aiding and abetting statute, it is possible to convict one for the commission of a crime which he could not commit directly.[16] The acts of the actual perpetrator of the crime become the acts of the accessory or aider, and he can be charged with having done the act himself. A person may even be indicted directly for the commission of the substantive crime and convicted by proof showing him to be an aider and abettor.[17] The substantive offense is sometimes spoken of as being a step beyond aiding and abetting and covers the actual perpetration of the crime.[18]

Courts have been unable to draw sharp distinctions between the three types of offenses.[19] With the change from one label to another repre-

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of it); *United States* v. *Halbrook,* 36 F. Supp. 345 (E. D. N. Y. 1941); Note (1942), 37 Ill. L. Rev. 183.

13 *United States* v. *Britton,* 108 U. S. 193, 204 (1883) (it "merely affords a *locus penitentiae,* so that before the act is done either one or all of the parties may abandon their design and thus avoid the penalty prescribed by the Statute"); *United States* v. *Halbrook,* 36 F. Supp. 345, 347 (E. D. Mo. 1941).

14 *Braverman* v. *United States,* 317 U. S. 49 (1942); *United States* v. *Rabinowich,* 238 U. S. 78, 86 (1915); Miller, Criminal Law (1934), 114; Grigsby, Criminal Law (1922), § 421.

15 *Vane* v. *United States,* 254 Fed. 32, 33 (C. C. A. 9th, 1918) (court said: "distinctions which once existed between classes of offendors, accessories before the fact, and principals, are abrogated"); *Colbeck* v. *United States,* 10 F. (2d) 401, 403 (C. C. A. 7th, 1926); *Harris* v. *United States,* 273 Fed. 785, 790 (C. C. A. 2d, 1921). However, punishment of an accessory after the fact is separately provided for by statute. *Bollenbach* v. *United States,* 326 U. S. 607 (1946).

16 *Barron* v. *United States,* 5 F. (2d) 799 (C. C. A. 1st, 1925) (defendant held liable as principal for violating the Bankruptcy Act although he could not have violated the act directly because not a bankrupt himself); *Haggerty* v. *United States,* 5 F. (2d) 224 (C. C. A. 7th, 1925) (held defendant, a federal officer, liable as a principal for aiding others to violate the Criminal Code by pretending to be federal agents and obtaining money falsely). *Contra, Field* v. *United States,* 137 Fed. 6 (C. C. A. 8th, 1905).

17 *Vane* v. *United States,* 254 Fed. 32 (C. C. A. 9th, 1918) (overruled petitioner's claim that he was being deprived of his constitutional rights to be advised of the nature and cause of the accusation against him when he was indicted for robbery and convicted of aiding and abetting in the robbery); *Colbeck* v. *United States,* 10 F. (2d) 401 (C. C. A. 7th, 1926); *Harris* v. *United States,* 273 Fed. 785 (C. C. A. 2d, 1921).

18 Mr. Justice Rutledge's dissent, *Pinkerton* v. *United States,* 328 U. S. 640, 649 (1946).

19 The confusion in drawing the distinction between the crimes is heightened by the looseness with which the terms of conspirator and accomplice are used interchangeably by the courts. *Blanton* v. *United States,* 213 Fed. 320 (C. C. A. 8th, 1914) (there was no indictment for conspiracy and defendants were convicted as

senting only a matter of degree of participation in the planning and execution of the crime, the dividing line becomes especially obscure when one prosecution is for conspiracy and the other is on the theory of aiding and abetting.[20] The use of both theories in prosecuting a defendant for one act of misconduct, with the resulting hardship on defendant, is illustrated by the *Sealfon* case.

Under the first indictment, Sealfon and others were charged with conspiracy to defraud the United States by presenting false invoices and making false representations to a ration board to obtain sugar certificates.[21] The prosecutor based his case upon the false invoices and a letter from Sealfon to one Greenberg saying that some syrup produced by Sealfon was being sold at the Brooklyn Navy Yard. The government's theory was that the defendants, in order to obtain additional sugar, were trying to create the false impression that Sealfon's products were being sold to the Navy. No evidence was introduced at the trial to connect Sealfon with anyone other than Greenberg, so in order to convict Sealfon of conspiracy the government had to prove an agreement between him and Greenberg. The jury was instructed that Sealfon must be acquitted if they entertained reasonable doubt that he conspired with Greenberg. In its acquittal the jury must have concluded that the letter was not sufficient evidence of an agreement between the two.

Sealfon and Greenberg were then tried for the substantive crime of uttering as true the false invoices. Greenberg pleaded guilty, and Sealfon was prosecuted on the theory that he aided and abetted Greenberg. Again the prosecutor relied on the false invoices, the letter from Sealfon to Greenberg, and practically the same testimony. Under the evidence introduced, the only manner in which Sealfon could have aided and abetted Greenberg was by writing the letter pursuant to an agreement between them. This time the jury found Sealfon guilty. The Supreme Court

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accomplices but described as conspirators); *Baker* v. *United States,* 115 F. (2d) 533 (C. C. A. 8th, 1940) (there was no indictment for conspiracy but an accomplice was described as a conspirator and convicted as a principal; *Johnson* v. *United States,* 62 F. (2d) 32 (C. C. A. 9th, 1932) (no conspiracy indictment but a conviction as principals on evidence of aiding and abetting although defendants were described as conspirators).

20 *Louie* v. *United States,* 218 Fed. 36 (C. C. A. 9th, 1914) (defendants forcefully argued, to no avail, that the charge of conspiring to commit the act was the same as the charge of aiding and abetting because the two crimes involved the same character of cooperation, association, and union. But, the court said that it was the province of Congress to define crimes and not the courts). See also dissent in *Pinkerton* v. *United States,* 328 U. S. 640, 649 (1946), cited *supra* note 4. Another point at which the distinction seems nebulous is where the overt acts alleged in the conspiracy indictment are prosecuted separately as substantive crimes. *Pinkerton* v. *United States, supra; Bell* v. *United States,* 2 F. (2d) 543, 544 (C. C. A. 8th, 1924) (said the overt acts although material allegations in the conspiracy count were not part of it so were not necessarily decided). *Contra: United States* v. *Rachmil,* 270 Fed. 869 (S. D. N. Y., 1921); *United States* v. *Clavin,* 272 Fed. 985 (S. D. N. Y., 1921). However, the latter cases seem to be out of line with the majority of the decisions.

21 322 U. S. 575 (1948). Greenberg manufactured syrup and sold some of his product to Sealfon, a wholesaler. A salesman told Sealfon that if any sales were made to exempt agencies, he could make larger purchases. Sealfon wrote a letter to Greenberg mentioning sales to the Brooklyn Navy Yard although no sales were actually made to the Navy Yard as such. Greenberg used the letter as the basis for false invoices to present to the ration board although the letter was never shown to the board. On the basis of these invoices Greenberg received replacement coupons for 21 million pounds of sugar, 10 million of which he sold to Sealfon in the form of syrup.

concluded, however, that the prosecution in the second trial had merely attempted to prove the same agreement which the jury in the first trial had found did not exist. Under the doctrine of res judicata, that issue could not be relitigated, and a conviction of the substantive crime based on that issue could not be sustained.

Petitioner pleaded both double jeopardy and res judicata in the lower courts. He abandoned the plea of double jeopardy before the Supreme Court, however, probably because the federal courts treat conspiracy as a separate offense from aiding and abetting or the commission of the substantive offense. The courts have pointed out that there must be an identity of offenses before double jeopardy can be invoked.[22] As the court said in *United States* v. *Halbrook*,[23] "The prohibition of the Constitution is against a second jeopardy for the 'same offense'; that is, for the identical crime. The offenses charged in the two transactions must be the same in law and fact." In determining whether the offenses are actually the same although under different names, the federal courts have generally used the "same evidence test."[24] Simply stated the test is whether the same evidence is *required* to sustain indictments for both offenses. If the same evidence is not *required*, a defendant can be prosecuted for more than one crime even though they were committed in the course of the same transaction.[25] The courts talk in terms of whether the same evidence is *required* to support both indictments and not as to whether or not the same evidence is actually relied upon.[26] Since convictions of conspiracy and of aiding and abetting do not require the same evidence, the prohibition against double jeopardy, as defined by the federal courts, could not be used by Sealfon.[27]

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22 *Louie* v. *United States*, 218 Fed. 36 (C. C. A. 9th, 1914) (acquitted on conspiracy charge and convicted of aiding and abetting); *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531 (1913) and *Moorehead* v. *United States*, 270 Fed. 210 (C. C. A. 5th, 1921) (in both of the last two cases defendants were acquitted of substantive offenses and later convicted of conspiracy to commit these same crimes); *Westfall* v. *United States*, 20 F. (2d) 604 (C. C. A. 6th, 1927) (convicted of substantive crime and then convicted of conspiracy).

23 36 F. Supp. 345 (E. D. Mo. 1941).

24 *Morgan* v. *Devine*, 237 U. S. 632, 641 (1914); Comment (1947), 38 J. of Crim. L. & Criminology 379, 383; Miller, Criminal Law (1934) §187; Note (1940) 24 Minn. L. Rev. 522, 558-560. The Massachusetts court gave an oft-quoted definition of that test in *Morey* v. *Commonwealth*, 108 Mass. 433, 434 (1871): a "single act may be an offense against two statutes and if each statute requires proof of an additional fact which the other did not, an acquittal or conviction under either statute does not exempt a defendant from prosecution and punishment under the other."

25 *Carter* v. *McClaughery*, 183 U. S. 365, 395 (1901) (said that one of the offenses required certain evidence which the other did not so "the fact that both charges related to and grew out of one transaction made no difference"); *Westfall* v. *United States*, 20 F. (2d) 604 (C. C. A. 6th, 1927). A different result would probably be reached if the federal courts applied one of the other tests used in other jurisdictions: tests are, "the single intent test" and "the same transaction test." See Comment (1947) 38 J. of Crim. L. & Criminology 379 for a discussion of the three tests and their results. Grigsby, Criminal Law (1922) §207.

26 *Woodman* v. *United States*, 30 F. ((2d) 485 (C. C. A. 5th, 1929) and *Westfall* v. *United States*, 20 F. (2d) 604 (C. C. A. 6th, 1927); and *United States* v. *Sealfon*, 161 F. (2d) 481 (C. C. A. 3rd, 1947), where the court said that it would make no difference if the record of the first trial had been introduced and the prosecution had relied on it.

27 *Carter* v. *McClaughery*, 183 U. S. 365, 395 (1901); *Berkowitz* v. *United States*, 93 Fed. 452 (C. C. A. 3rd, 1899) (the evidence necessary to convict on one charge is not that necessary to convict on the other and may be wholly immaterial at the second trial); *Westfall* v. *United States*, 20 F. (2d) 604 (C. C. A. 6th, 1927).

The doctrine of res judicata, which Sealfon successfully invoked, and the constitutional prohibition against double jeopardy probably have a common origin. They both rest in part on the two maxims that "a man should not be twice vexed for the same cause" and "it is for the public good that there be an end to litigation."[28] But the two defenses are not interchangeable.[29] Res judicata can be claimed when questions of fact or law have been distinctly put in issue in a previous trial and have been directly determined by a court of competent jurisdiction, even though the two offenses charged are entirely distinct. Thus, while the defense of double jeopardy is available in a second trial only where the same evidence is *required* to convict a defendant, res judicata can be invoked where the same evidence was actually *relied* upon. Res judicata simply means that a matter once decided will not be relitigated,[30] and its use is apparently available to the prosecution as well as to the accused.[31]

The first federal case to accept the doctrine wholeheartedly was *United States* v. *Oppenheimer,* decided by the Supreme Court in 1916.[32] The government there argued that res judicata did not apply in criminal cases except in the limited form of the Fifth Amendment's prohibition against double jeopardy. But the Court flatly rejected this contention[33] and there and in subsequent cases has recognized the use of res judicata in criminal law.[34] The Circuit Court of Appeals for the Third Circuit

28 *See Ex Parte Lange,* 85 U. S. 163 (1874); Miller, Criminal Law (1934) §186.

29 *See United States* v. *DeAngelo,* 138 F. (2d) 466 (C. C. A. 3rd, 1943); and *United States* v. *Meyerson,* 24 F. (2d) 855 (S. D. N. Y. 1928). Res judicata had been less frequently used in criminal than in civil cases. *Frank* v. *Mangrum,* 237 U. S. 309 (1915); *see United States* v. *Halbrook,* 36 F. Supp. 345 (E. D. Mo. 1941); Note (1935) 10 Wash. L. Rev. 198.

30 It is, however, not always easy to determine what issues have been decided. Note (1938) 7 Brook. L. Rev. 271, 283. "Finally, in ascertaining what issues were actually determined, or, though not raised, were, by implication, decided, or though decided, should not have been, and, even though decided, were immaterial, we become involved in the intricacies of findings and refusals to find, in the nuances of technical pleadings, and under the new practice permitting the omission of all findings, in puzzling inquiries as to what was actually decided."

31 *United States* v. *Greater New York Live Poultry Chamber of Commerce,* 44 F. (2d) 393 (S. D. N. Y. 1930) (indictment for conspiracy in restraint of commerce, court held that the prior conviction was res judicata as to fact of the conspiracy and every matter essential to it); *Ex Parte Dusenberg* v. *Rudolph,* 325 Mo. 881, 30 S. W. (2d) 94 (1930) (conviction for robbery was held to be res judicata as to the place where the robbery took place); *Commonwealth* v. *Feldman,* 131 Mass. 588 (1881) (conviction for being drunk was held conclusive of drunkenness in a later prosecution for assault).

32 242 U. S. 85. Defendant was indicted for conspiracy to conceal assets from a trustee in bankruptcy. Court held that it was barred by a previous adjudication. This was in spite of the fact that the previous adjudication, which held that the one year period or limitation of the Bankruptcy Act applied instead of the longer period under the conspiracy statute, had since been held to be wrong in another case, *United States* v. *Rabinowich,* 238 U. S. 78 (1915). The principle of res judicata was accepted by the Supreme Court in 1886 in *Coffey* v. *United States,* 116 U. S. 436, where the defendant claimed its protection in a civil action for forfeiture prosecution by the United States because of a previous acquittal in a criminal suit based on the same facts.

33 242 U. S. 85, 87 (1916) ("it cannot be that the safeguards of the person, so often and so rightfully mentioned with solemn reverence, are less than those that protect from a liability for debt").

34 *See Collins* v. *Loisel,* 262 U. S. 426 (1927) (court said that it was not intended that double jeopardy should supplant the fundamental principle of res judicata in criminal cases); *United States* v. *Rachmil,* 270 Fed. 869 (S. D. N. Y. 1921) (court

recently applied the doctrine to conspiracy in *United States* v. *DeAngelo*,[35] where the defendant was acquitted of a robbery charge and was then prosecuted with others for conspiracy to commit the robbery. The court held that introduction by the prosecution of some of the evidence used in the first trial was prejudicial error. But since the government in the second case had relied on some other evidence which had not been used in the first trial and which might be sufficient to support a conviction for conspiracy, the court did not dismiss the case but granted a new trial.[36]

While the *Sealfon* case and earlier precedents do not define the exact scope of res judicata in criminal law,[37] they prevent the parties to a criminal case from relitigating issues of fact which were determined by a jury verdict in an earlier prosecution. The *Sealfon* rule is thus a desirable supplement to the constitutional prohibition against double jeopardy, which, as already indicated, has been narrowed by the same evidence test.[38] Moreover, where the alleged misconduct of a defendant

talked in terms of constitutional protection), *United States* v. *Clavin*, 272 Fed. 985 (S. D. N. Y. 1921).

35 138 F. (2d) 466 (C. C. A. 3rd, 1943). *Accord, United States* v. *Meyerson*, 24 F. (2d) 855 (S. D. N. Y. 1928) (defense of res judicata was good in conspiracy trial as the issue of participation in the scheme had been decided favorably to defendant in the previous trial for scheme to defraud creditors); *United States* v *McConnell*, 10 F. (2d) 977 (E. D. Penn., 1926) (at both trials it was necessary to prove that liquor permits were knowingly and unlawfully issued which had been determined favorably at first trial).

36 Other opinions have considered the doctrine of res judicata in criminal law and have recognized its applicability to situations in which there are indictments for both conspiracy and the substantive offenses, while holding that the defense would not lie because of the particular fact situations. *Bell* v. *United States*, 2 F. (2d) 543 (C. C. A. 8th, 1924); and *United States* v. *Halbrook*, 36 F. Supp. 345 (E. D. Mo. 1941) (in both cases defendants were acquitted of conspiracy and then indicted for substantive offenses which were overt acts alleged in first indictment—court approved of res judicata, but said that although the overt acts were material allegations in first indictment, the jury need not have passed upon them); *United States* v. *Morse*, 24 F. (2d) 1001 (S. D. N. Y. 1926) (approved of res judicata but said that upon a new trial of conspiracy charge it may be possible to sustain it without contradiction of any fact already adjudicated). *Contra: Fall* v. *United States*, 49 F. (2d) 506 (C. C. A. D. C., 1931) and *Woodman* v. *United States*, 30 F. (2d) 485 (C. C. A. 5th, 1929) where the courts held that res judicata would not lie unless the offenses were the same.

37 In *Mogall* v. *United States*, 333 U. S. 424 (1948), petitioner was acquitted on the conspiracy counts, but was convicted on the last count on the basis of the false assumption that under the Selective Service Regulations the employer was under a legal obligation to make reports to the local draft boards. The government now conceded that the conviction should be reversed, but urged that the indictment should not be dismissed since the prosecution might wish to try petitioner a second time on the same charges as an aider and abettor. Court said it was not necessary for them to pass judgment upon this procedure or the issue it might present as this would properly be raised before the district court. Made reference here to the *Sealfon* case.

38 In some criminal cases where the state courts have put their decisions on the basis of double jeopardy, the courts were apparently thinking in terms of res judicata. *State* v. *Wheelock*, 216 Iowa 1428, 250 N. W. 617 (1933) (three deaths resulted from auto accident; court held that an acquittal of manslaughter for one of the deaths necessarily meant that the defendants could not be guilty of manslaughter for causing the other deaths); *Spannell* v. *State*, 83 Tex. Cr. App. 418, 203 S. W. 357 (1918) (defendant unintentionally shot his wife while shooting at and killing another; court held that acquittal of murder of wife necessarily involves the finding that appellant's act in firing at B was not such as to constitute murder); *Carson* v. *People*, 4 Col. App. 463, 36 Pac. 551 (1894). *Contra: State* v. *Fredlund*, 200 Minn. 44, 273 N. W. 353 (1937) (defendant's conduct killed two persons; court