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DOUBLE JEOPARDY AND CONSPIRACY IN THE FEDERAL COURTS

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Even those who have turned the pages of legal history but casually realize that many of the principles which today we cherish as essential to a free democracy had their analogues and predecessors, if not direct ancestors, in a past so remote that not only the Declaration and Constitution but even America had never been heard of. Such a precept is the one prohibiting two trials of the same cause. As to civil or private suits, Gaius (c. 161 A.D.) tells us that subsequent action on a question which had already been the subject of an action was always barred by direct operation of law.¹ The *exception rei judicatae* when allowed in *litis contestatio* seems to have been not merely a bar to the same action between the same parties, playing the same parts, but also to have enforced the principle, as between parties bound by the judgment, that the content of the judgment must afterward be assumed to be true. There had to be identity of *res*, object, and *causa*, basis of claim, and juristic identity of *personae* parties (e.g., principal and representative, principal and surety, successors in title, legatees under an upset will). In one special case, at least, there is a hint of the modern rule that, to be removed from relitigation, the point must have been in issue. The *judex* might or might not take *compensatio*, set-off, into account: if he did, whether he allowed or rejected it, no future claim on it could be made; but if the *judex* did not consider *compensatio* at all, it had not been in issue and the exception would not lie.² Under Justinian, the extinctive effect of *litis contestatio* practically disappeared and the *exceptio rei judicatae* is not found in the *Corpus Juris Civilis*. Instead, the Code (529 A.D.) declared that no one ought to be twice harassed for the same cause.³ That an issue once decided must not be raised again is indeed a prin-

¹ G. IV, 108.

² Buckland, *Textbook of Roman Law* (2nd ed. 1932) 699.

³ *Nemo debet bis vexari pro eadem causa*. c. 9.2.-9.11 Eisele, *Abhandlungen*, 113.

ciple common to most systems of law, ancient or modern. As to criminal actions, the later Roman law provided: *Iisdem criminibus quibus quis liberatus est, non debet praeses pati eundem accusari.*⁴

In France, the principle of *non bis in idem* came down through the Medieval juriconsults and has been incorporated in modern French law in the form of the rules as to *chose jugés*⁵ applying to both civil and criminal actions. As to criminal prosecutions, Napoleon's Code expressly provides that no person legally acquitted may be again held or accused for the same act.⁶

The text-writers and most of the jurisprudence agree that for operation of the plea of *autrefois acquit* there must be shown to be identity of facts and of persons in the two prosecutions. In Germany, according to the pre-war criminal law, if a person committed several crimes during the same transaction (e.g., rape, incest and adultery), he might be indicted for and could be convicted of all of them, but his punishment was for that one only for which under the law the punishment might be the most severe. This principle of absorption as to penalty, *poena major absorbet minorem*, applied to cases thus involving the "ideal concurrence of crimes" (as opposed to real concurrence, several crimes by the same person in several transactions), and did not cover cases in which the commission of one crime necessarily included the commission of another crime (as murder includes battery), when he would be indicted only for the more comprehensive crime.⁷ The Japanese Penal Code of 1908 follows the German model.⁸ In Spain, how much direct Roman influence is generally to be found in the *Fuero Real* (1225 A.D.) is very debatable, but in the *Siete Partidas* (1263 A.D.) there is a law on this subject for criminal cases which seems very like the Roman doctrine: "If a man has been acquitted by a valid judgment, of some offense of which he was accused, no one can afterward charge him with the same offense."⁹ Like the French, the modern Spanish law treats this question as a matter of *cosa juzgada* for both civil and criminal suits, and requires identity of things,

⁴ L. 7, §§2 ff. *De off. proc.*

⁵ Merlin, *Repertoire* (5e ed. 1827) XI, 528. Dalloz, *Repertoire* (Nouv. ed. 1847) VIII, 389. Sirey, *Code D'Instr. Crim.* (4e ed. 1903) 492.

⁶ Art. 360. *Toute personne acquittée légalement ne pourra plus être reprise ni accusée a raison du même fait. Code d'Instruction Criminelle* (1808).

⁷ Edmund H. Schwenk, *Criminal Law in Germany* (1941) 15 *Tulane L. Rev.* 541 at 563.

⁸ (1908) 2 *Amer. Journ. Int. Law* 845.

⁹ *Quito seyendo algunt home por sentencia valedera de algunt yerro sobre que lo hobiesen acusado dende adelante non lo podrie otro ninguno acusar sobre aquel yerro. Partida VII, Titulo I, Ley 12.*

persons and actions.¹⁰ The law of Criminal Procedure provides: "The only issues which may be the subject of pre-trial discussion are the following questions or exceptions 2 *Res judicata*."¹¹ Even the Latin-American Republics, which quite frankly took the United States Constitution in some measure as a model for their national charters, incorporated only limited portions of the Bill of Rights Amendments, and in particular the provision against double jeopardy is probably not found in the Constitution of any other American nation today. Some of them recognize in their criminal procedure the application of the principles of *res judicata* which exist in France and Spain, but for the most part there is little text discussion and less jurisprudence on the double jeopardy problem. The explanation perhaps lies in the circumstance that since the prosecution and punishment of criminals was taken out of the hands of the Church and given over to secular governmental authorities, the civil law countries have never had to seek meticulous excuses and fine-drawn pretenses to protect an accused person from the severe harshness of the law, as in the early history of the criminal law in England; and with the judge as trier of fact instead of a jury capable of being unduly swayed by sympathy or emotion it has not been so necessary for the prosecution to multiply serious charges in order for justice to be done. Moreover, the criminal in a Central or South American Republic generally has at his disposal for legal retainers far less money than his United States brother, and is much more apt to take his punishment and get it over with, without constitutional or other doctrinal battles.

In England, with no written constitutional provision to be construed or debated, the common law recognized the principle of *non bis in idem* and prohibited a second trial for the same act of a person once tried and acquitted.¹² By an early precedent since somewhat shaken but apparently still followed,¹³ it was held that to bar further prosecution, the indictment in the earlier trial must have been sufficient in law. For reasons arising from the difference in the procedure for prosecution, a misdemeanor was formerly held to merge in a felony, so that a man indicted for both on the same set of facts could be tried only for the felony;

¹⁰ Arrazola, *Encic. Esp. de Der. y Admin.* (1848) I. 511. Robles Pozo, *Leyes y Jurispr. Vigentes del Enjuic. Crim.* (Madrid, 1890) 409. Aguilera de Paz, *Comentarios a la Ley de Enjuic. Crim.* (2a ed. 1924) V. 189.

¹¹ Art. 666. *Seran tan solo objeto de articulos de previo pronunciamiento las cuestiones o excepciones siguientes:—2a La de cosa juzgada. Ley de Enjuiciamiento Criminal* (1882).

¹² Turner's Case (1676), 84 Eng. Rep. 1068. See 33 A.B.A.J. 745.

¹³ Vaux's case, 76 Eng. Rep. 992 (1590); followed: *Wrote v. Wigges*, 76 Eng. Rep. 994 (1591); disapproved: Lord Hale, 2 P. C. 248, 393; rejected on another point: *B. v. Aylett*, 8 Term Rep. 69, 99 Eng. Rep. 973 (1785).

but this rule has long been abandoned.¹⁴ The common law did not recognize jeopardy, and considered that nothing short of a previous acquittal or conviction supported the plea in bar, but the judges by interpretation gradually construed the protection to exist as soon as the trial had effectively begun. Such was the general state of English law on the question at the time of the Revolution.

The framers of the Bill of Rights Amendments to the United States Constitution adopted not only the common law but the judge-made extension of it when they provided in what became the Fifth Amendment: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." With the exception perhaps of the still difficult question as to some statutory penalties as to whether they impose civil or criminal sanctions,¹⁵ a multitude of cases has by now made fairly plain the general terms of the application and operation of this clause, like the others of the Fifth Amendment. Despite the mention of "life or limb" the provision is not limited to felonies, but covers misdemeanors as well. United States courts have generally though not unanimously settled on the swearing of the jury as the moment at which jeopardy attaches, and so usually even if the first indictment is defective in law.¹⁶ After some earlier suggestions to the contrary, it is now settled that this provision is to be interpreted exclusively as a restriction upon federal power and does not create or sanction any limitation upon the rights of the states to determine their own criminal procedure.¹⁷ Further, the right granted by the Fifth Amendment is not included under either the privileges and immunities or the due process clauses of the Fourteenth Amendment, from which is derived the federal power to correct state process.¹⁸ The Constitutions

¹⁴ 9 Halsbury's Laws of England (2d ed. 1933) 43, 132, para. 43-47, 212. *Ordinatio de Conspiratoribus* (1305, 33 Edw. I), Stat. 2; 4 Complete Stats. of England 265 (1929). Criminal Procedure Act, 14 & 15 Vict. c. 100, §28 (1851); 4 Complete Stats. of England 530 (1929). See 14 Eng. & Emp. Digest (1924) 110, 336.

¹⁵ 11 L.R.A. (N.S.) 667; 21 R.C.L. 227.

¹⁶ *United States v. Ball*, 163 U.S. 662 (1896); *Kepner v. United States*, 195 U.S. 100 (1904). Citations in this and following notes are not intended to be exhaustive but to offer only some leading, typical, or recent cases. A full compilation and analysis of United States cases on double jeopardy to 1935 may be found in American Law Institute, Administration of the Criminal Law, Double Jeopardy, Official Draft with Commentaries, §§1-39 (1936). Later cases are collected in 15 Amer. Juris. 38-98 (1938); 22 C.J.S. 432, §288 (1940).

¹⁷ *Fox v. Ohio*, 46 U.S. 432 (1847); *State v. Felch*, 92 Vt. 477, 105 Atl. 231 (1918); *Comm. ex rel. Garland v. Ashe*, 344 Pa. 407, 26 A. (2d) 190 (1942).

¹⁸ *Hurtado v. California*, 110 U.S. 516 (1884); *Maxwell v. Dow*, 176 U.S. 581 (1900); *West v. Louisiana*, 194 U.S. 258 (1903); *Gaines v. Washington*, 277 U.S. 81 (1928); *Palko v. Connecticut*, 302 U.S. 319 (1937); *Commonwealth v. Azer*, 308 Mass. 153, 31 N.E. (2d) 549 (1941).

of all but five of the states¹⁹ have provisions against double jeopardy, but because of varying wording, state decisions often turn on statutory or procedural points, and, whether or not there is a state constitutional provision, they may apply the local common law rule without regard to any federal constitutional question. The prohibition against double jeopardy has been traditionally accepted as forbidding only two prosecutions by the same sovereignty (under the Fifth Amendment, the United States). Accordingly, in our federated union, where there are two co-existent sovereignties over all territory within the boundaries of each state, a tremendous group of what a layman would probably consider double prosecution cases, namely, prosecution by the United States and separately by the State, for the same acts and on the same state of facts, are not within the constitutional prohibition.²⁰ On a lower level, two prosecutions for the same acts made unlawful by a state law and a municipal ordinance are generally held not to be prohibited,²¹ but this doctrine has been criticized on theory.²² There is, it will be remembered, no federal criminal common law,²³ and all prosecutions by the United States have to be founded on specific statutory provisions; but the acts made criminal by an act of Congress may also be criminal by the common law or a statute of a state. Further to determine what is the same offense, the numerous cases show a diversity of rules which are by no means uniform or consistent. Perhaps a majority nominally adhere to the same evidence test,²⁴ some inquire if the same transaction is involved, and a few ask if the essential element is the same in the two prosecutions. To constitute the same offense, the same or successive connected acts must have operated against the same person, and if two or more persons are objects, there is usually a separate offense against each and there may be several prosecutions. The test of the same evidence, however, is not a satisfactory criterion by which to determine whether or not there is double jeopardy; for if the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the

¹⁹ Connecticut, Maryland, Massachusetts, North Carolina, and Vermont.

²⁰ *Ponzi v. Fessenden*, 258 U.S. 254 (1922); *United States v. Lanza*, 260 U.S. 312 (1922).

²¹ *United States v. Farwell*, 76 F. Supp. 35 (1948).

²² Charles M. Kneier. *Prosecution Under State Law and Municipal Ordinance as Double Jeopardy* (1931) 16 Cornell L. Q. 201.

²³ *United States v. Hudson*, 11 U.S. 32 (1812); *Jones v. United States*, 137 U.S. 302 (1890); *Beauchamp v. United States*, 154 F. (2d) 413 (C.A. 6th 1946).

²⁴ *Successive Prosecutions based on the Same Evidence as Double Jeopardy* (1931) 40 Yale L. J. 462; *United States v. Sacein Rouhana Farhat*, 269 Fed. 33 (1920) (National Prohibition Act). *Williams v. United States* (C.A. 5th 1948), 170 Fed. 2d 319.

conspiracy which is not present in the completed crime, the same evidence will sustain both convictions, yet there is no double jeopardy;²⁵ and on the other hand, if two indictments for the same conspiracy allege different overt acts, the evidence to sustain the convictions would be different, yet there would clearly be double jeopardy.²⁶ A defense plea of double jeopardy, or motion to quash the indictment on that ground, raises the issues of identity or nonidentity of the person and of the offense, and is one of law for the court if either fact is shown on the face of the record; if not, the issues are of fact, and must be left for the jury.²⁷

Accustomed as we are to the various legal consequences of the double jurisdiction under which we live in the United States, we can perhaps readily understand the doctrine that double jeopardy is not incurred by federal and state prosecution for the same set of facts. Remembering, however, that this conclusion is supposed to be based on the co-existence of two separate sovereignties, against each of which the acts of the accused might be separate offenses, we shall be forced to find a new ground for the further doctrine that neither do two prosecutions under different kinds of jurisdiction within the same sovereignty, as by civil and military courts, constitute double jeopardy. Forty years ago, the United States Supreme Court held²⁸ that the same acts constituting a crime against the United States could not after the acquittal or conviction of the accused in a court of competent jurisdiction be made the basis of a second trial of the accused for that crime in the same or another court, civil or military, of the same government.²⁹ In 1942, however, in the case of the seven Germans who came ashore in New York and

²⁵ *Seamble*, *United States v. Katz*, 271 U.S. 354 (1926) (National Prohibition Act).

²⁶ *Fleisher v. United States*, 302 U.S. 218 (1937) (reversing on ground indictment was faulty); *Short v. United States*, 91 F. (2d) 614 (C.A. 4th 1937) (rum running). See Note (1938) 51 *Harv. L. Rev.* 925. *Murphy v. United States*, 285 Fed. 801 (C.A. 7th 1923); *cert. denied*, 261 U.S. 617 (1923) (conspiracy to rob the mails and to conceal the stolen bag). A confederate had to serve his sentence for four conspiracies because he did not appeal. *Watkins v. Zerbst*, 85 F. (2d) 999 (C.A. 10th 1936); *Sprague v. Aderholt*, 45 F. (2d) 790 (1930) (use of mails to defraud, two registered letters). But see *Francis v. United States*, 152 Fed. 155 (C.A. 3d, 1907) *cert. denied*, 206 U.S. 565 (1907) (conspiracy to use mails to defraud in fictitious cotton speculations, mailing of each letter supports separate conspiracy charge).

²⁷ *Short v. United States*, 91 F. (2d) 614 (C.A. 4th 1937).

²⁸ *Grafton v. United States*, 206 U.S. 333 (1907) (Philippines). Explained: *United States v. Bayer*, 331 U.S. 532 (1947). Followed: *Wade v. Hunter*, 72 F. Supp. 755 (1947) (former court-martial jeopardy). Had been *contra*: *United States v. Cashiel*, 25 F.C. 318 (1863); *In re Fair*, 100 Fed. 149 (1900).

²⁹ Territorial jurisdiction. *Gavieres v. United States*, 220 U.S. 338 (1911) (Philippines).

Florida from German submarines, the Supreme Court held³⁰ that the Fifth and Sixth Amendments did not extend the right to demand a jury to trial by military tribunals. The Fifth Amendment had been accepted as requiring the court to permit counsel to represent and to assist the accused, even in court-martial proceedings,³¹ but the Second Circuit Court of Appeals apparently held, on the authority of the *Quirin* case, that the Fifth Amendment in its entirety was inapplicable to a court-martial,³² and the Supreme Court declined to review the decision after the cause became moot. The Ninth Circuit Court of Appeals this last year affirmed a district court decision that a naval court's denial of a plea of double jeopardy, even if erroneous, is not subject to correction or review by a civil court, but on the ground that they would assume to look into the question, and then found successive naval courts-martial for assault with intent to murder and manslaughter not double jeopardy.³³ If this case goes higher, the Supreme Court's decision will be of great interest; but if the majority of the lower courts has in recent years been correct in interpreting the Supreme Court's doctrine, there is no protection in the double jeopardy clause of the Fifth Amendment against trials of the same person by both courts-martial and civil courts for the same acts.

The Federal crime of conspiracy was first created immediately after the Civil War by the 39th Congress, by an enactment which, as Section 371 of Title 18 of the United States Code (1948 Revision) now provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.³⁴

³⁰ *Ex parte Quirin*, 317 U.S. 1 (1942). Followed: *Ex parte Benton*, 63 F. Supp. 808 (1945).

³¹ *Sanford v. Robbins*, 115 F. (2d) 435 (C.A. 5th 1940); *cert. denied*, 312 U.S. 697 (1941).

³² *United States ex rel. Innes v. Crystal*, 131 F. (2d) 576 (C.A. 2d 1943); *cert. denied*, 319 U.S. 755 (1943); rehearing denied, 319 U.S. 783 (1943).

³³ *Wrublewski v. McInerney*, 166 F. (2d) 243 (C.A. 9th 1948); affirming 71 F. Supp. 143 (1947).

³⁴ Rev., 18 U.S.C. 371 (1948); C. 645 in effect Sept. 1, 1948; 62 Stat. 683. Criminal Code, c. 4, §37. Act of Mar. 2, 1867, c. 169, §30; 14 Stat. 484; Rev. Stats. (1873-74), c. 5, §5440; Act of May 17, 1879, c. 8; 21 Stat. 4; Act of Mar. 4, 1909, c. 321, §88; 35 Stat. 1096; 18 U.S.C. §88.

As passed in 1867, the statute, purporting generally to amend the internal revenue acts, specified that the newly created crime was a misdemeanor, but that provision was omitted in 1873 when the enactment became Section 5440 of the Revised Statutes, and a further amendment of 1879 omitted the minimum of \$1000 which had been stated for the fine and added "or both" to the possible punishment. The Criminal Code declares all crimes punishable by death or imprisonment for over one year to be felonies, all others are misdemeanors,³⁵ so that whatever doubt may have been left by the mere omission of the original declaration exists no longer and the federal crime of conspiracy is a felony. The common law rule of merger did not apply if both offenses were misdemeanors. If both were felonies,³⁶ a substantive offense merged in the crime of a conspiracy to commit it,³⁷ but the Supreme Court has declared this rule to have little vitality in the United States,³⁸ and the rule that a misdemeanor merged in a felony was apparently not applied in this country to a conspiracy even when it was a misdemeanor.³⁹ Congress has a general power to create, describe and define federal crimes, and accordingly it may separate a substantive offense and the conspiracy to commit that offense and attach to each a different penalty.⁴⁰ As they are separate crimes, a conviction for the conspiracy may be had whether the substantive offense was completed⁴¹ or not.⁴²

The courts run into real difficulties when they try to fix precisely the part played by the overt act in the federal offense of conspiracy. The Supreme Court sixty-five years⁴³ ago explained that under Revised Statutes, Section 5440, the offense was the conspiracy alone:

The provisions of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiae*,

³⁵ Criminal Code, c. 14, §212; Act of Mar. 4, 1909, c. 321, §335; 35 Stat. 1153; 18 U.S.C. §335. In effect, Jan. 1, 1919.

³⁶ *Waldeck v. United States*, 2 F. (2d) 243 (C.A. 7th 1924).

³⁷ 12 Cornell L.Q. 136 (1931).

³⁸ *Pinkerton v. United States*, 328 U.S. 640 (1946) (violation of Internal Revenue Code). *United States v. Sorrentino*, 78 F. Supp. 425 (1948); *Brown v. United States*, 167 F. (2d) 772 (C.C.A. 8th 1948); *Butledge v. United States*, 168 F. 2d 776 (C.A. 8th 1948); *Nye & Nissen v. United States*, 168 F. 2d 846 (C.A. 9th 1948); affirmed (1949); 336 U.S. 613, 69 Supr. Ct. 766, *May v. U.S.*, 175 Fed. 2d 994 (C.A. D.C. 1949), cert. den. (1949), 338 U.S. 000, 70 Supr. Ct. 58, 80, 154. 62 *Harvard Law Rev.* 1226 (1949).

³⁹ *Commonwealth v. Walker*, 198 Mass. 309 (1871). *Commonwealth v. Marsino*, 252 Mass. 224, 147 N.E. 859 (1925); *People v. Tavormina*, 257 N.Y. 84, 177 N.E. 317 (1931); noted (1931) 9 N.Y.U.L.Q. Rev. 231; (1931) 6 St. John's L. Rev. 94.

⁴⁰ *Clune v. United States*, 159 U.S. 590 (1895) (obstructing the mails).

⁴¹ *Heike v. United States*, 227 U.S. 131 (1913) (Sherman Antitrust Act).

⁴² *United States v. Bayer*, note 28 *supra* (court-martial and civil court).

⁴³ *United States v. Britton*, 108 U.S. 199, 204 (1885) (National Bank dividend).

so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows that . . . the conspiracy must be sufficiently charged and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy.

Under this theory sixteen years later a defendant acquitted under an indictment for conspiracy to utter a false naturalization certificate was allowed (with a dissent) to be tried again on an indictment for uttering the same false certificate, on the ground that the act to effect the object of the conspiracy was no part of the offense under Section 5440 and the uttering was not originally charged as an independent offense.⁴⁴

This doctrinal theory stood for nearly thirty years, and then the Supreme Court considered the question further in *Hyde v. United States*.⁴⁵ In an indictment for conspiracy to defraud the United States by fraudulently acquiring public lands, the conspiracy was charged to have been formed in the District of Columbia and some overt acts were charged to have been performed there and others in California. The evidence disclosed that the conspiracy if any had been formed in California and only one of the defendants had been in the District of Columbia, but the Court upheld the trial in the District as proper venue on the ground that any overt act there made all the other conspirators constructively present there⁴⁶ and Mr. Justice McKenna for the Court went on to say:

It seems like a paradox to say that anything, to quote the Solicitor General, "can be a crime of which no court can take cognizance". The conspiracy, therefore, cannot alone constitute the offense. It needs the addition of the overt act. Such act is something more, therefore, than evidence of a conspiracy. It constitutes the execution or part execution of the conspiracy and all incur guilt by it, or rather complete their guilt by it, consummating a crime by it cognizable then by the judicial tribunals, such tribunals only then acquiring jurisdiction.⁴⁷ * * * We realize the strength of the apprehension that to extend the jurisdiction of conspiracy by overt acts may give to the government a power which may be abused, and we do not wish to put out of view such possibility.⁴⁸

Two years later the Ninth Circuit Court of Appeals held⁴⁹ that on an indictment under Section 5440 charging a conspiracy to

⁴⁴ *Berkowitz v. United States*, 93 Fed. 452 (C.A. 3d 1899). *Cf.* *Wyatt v. United States*, 23 F. (2d) 791 (C.A. 3d 1928).

⁴⁵ *Hyde v. United States*, 225 U.S. 347 (1912).

⁴⁶ *Brown v. Elliott*, 225 U.S. 392 (1912). *United States v. McCarthy* (C.A. 2d 1948), 170 Fed. 2d 267.

⁴⁷ 225 U.S. 347 at 359. *Ladner v. United States*, 168 F. (2d) 771 (C.A. 5th 1948).

⁴⁸ 225 U.S. 347 at 363. *Cf.* *United States v. Hughes Tool Co.*, 78 F. Supp. 409 (1948).

⁴⁹ *Houston v. United States*, 217 Fed. 852 (C.A. 9th 1914); *cert. denied*, 238 U.S. 613 (1915) (fraudulent coal contracts).

defraud the United States, overt acts other than those specifically named in the indictment might be proved, and that conspiracy might be a continuing offense, so that the statutory period of limitation of three years ran only from the last overt act proved.⁵⁰ In dissenting, Judge Ross remarked:—

The present indictment was undoubtedly drawn with the manifest purpose, as I think, of avoiding the statute of limitations.

Since then, however, the District Courts and the Circuit Courts of Appeals have allowed the prosecuting District Attorney to manipulate the overt act for separate and additional convictions practically as they like.

Defendants may be convicted upon charges of conspiracy to use the mails to defraud⁵¹ although the use of the mails was unpremeditated and merely incidental⁵² or not contemplated in the scheme at all,⁵³ nor need the letter mailed be to or from the intended victim,⁵⁴ nor disclose on its face any fraudulent representation or purpose,⁵⁵ and the mailing of the same letter may constitute the overt act needed on the conspiracy charge and also serve for conviction under a count for a specific mailing to defraud.⁵⁶ Acquittal of a charge of conspiracy to use the mails to defraud in the sale of corporate stock is no bar to a conviction for using the mails to defraud by the same scheme.⁵⁷ Under the former National Prohibition Act, acquittal on a count charging the manufacture of intoxicating liquor did not bar a conviction for conspiracy to manufacture, sell and possess the same liquor.⁵⁸ The Seventh Circuit⁵⁹ held that if two indictments for conspiracy to violate the Prohibition Act alleged different overt acts, proof of an act averred in the second would not support a conviction under the first, so there was no double jeopardy.

The Fifth Circuit Court of Appeals said that several crimes cannot be carved out of one unlawful act,⁶⁰ but it also appears that only one of several acts charged need be proved, any minor

⁵⁰ Cf. *Brown v. Elliott*, note 46 *supra*. *United States v. Krulewitch*, 167 F. (2d) 943 (C.A. 2d 1948).

⁵¹ Criminal Code, c. 1, §215; Act of June 8, 1872, c. 335; 17 Stat. 323; Rev. Stat. (1873-74), c. 5, §5480; Act of Mar. 2, 1909, c. 321, §215; 35 Stat. 1130; 18 U.S.C. §338.

⁵² *Hendrey v. United States*, 233 Fed. 5 (C.A. 6th 1916); *United States v. Grayson*, 166 F. (2d) 863 (C.A. 2d 1948).

⁵³ *Freeman v. United States*, 244 Fed. 1 (C.A. 7th 1917).

⁵⁴ *Ibid.*

⁵⁵ *Chew v. United States*, 9 F. (2d) 348 (C.A. 8th 1925).

⁵⁶ *Ibid.* *Reining v. United States*, 167 F. (2d) 362 (C.A. 5th 1948).

⁵⁷ *Mitchell v. United States*, 23 F. (2d) 260 (C.A. 9th 1927). *United States v. Tannuzzo* (C.A. 2nd 1949), 174 Fed. 2d 177.

⁵⁸ *Meucci v. United States*, 28 F. (2d) 508 (C.A. 9th 1928).

⁵⁹ *Ferracane v. United States*, 29 F. (2d) 691 (C.A. 7th 1928).

⁶⁰ *Ballerini v. Aderholt*, 44 F. (2d) 352 (C.A. 5th 1930) (Narcotic Act).

thing will do,⁶¹ and it need not be any act charged in the indictment.⁶² Acquittal of a conspiracy to violate the Prohibition Act was no bar to prosecution under a charge of simple conspiracy, differing as to some defendants and the number of counts and omitting former allegations as to the design.⁶³ A conspiracy may be charged as consisting of an agreement to commit several offenses, in which case proof of an agreement to commit any one of them is sufficient.⁶⁴

The Supreme Court has said that there can be no valid federal indictment for a conspiracy to do an act which is not an offense against the United States,⁶⁵ but the Seventh Circuit Court of Appeals sustained a conviction of labor union members under an indictment for conspiracy to commit against the United States the crime of transporting explosives in interstate commerce, although the purpose of such transportation was the destruction of open shops which would be an offense against and punishable only by state laws.⁶⁶ After an acquittal of one of two persons charged with conspiracy, the other person must be acquitted, "conspiracy being an offense which can be committed only by two or more persons,"⁶⁷ but the co-conspirators need not be named in the indictment.⁶⁸ A jury may of course acquit on some counts and convict on others of the same indictment or on the same trial, and the federal courts have held that no matter how seemingly inconsistent, illogical or irrational the convictions will be upheld. There is likewise no difficulty in upholding convictions of substantive crimes despite an acquittal of conspiracy in which the same events were charged as the overt acts.⁶⁹ The converse situation, however, in which there has been an acquittal of all the substantive offenses and a conviction for conspiracy on the same facts, if in separate trials, would seem clearly to involve the issue of double jeopardy; but although some federal courts expressed earlier doubts, all appear now to

⁶¹ *Frederick v. United States*, 292 Fed. 856 (C.A. 9th 1923) (National Prohibition Act).

⁶² *Meyers v. United States*, 36 F. (2d) 859 (C.A. 3d 1929).

⁶³ *United States v. Wills*, 36 F. (2d) 855 (C.A. 3d 1929). *Cf. Braverman v. United States*, 317 U.S. 49 (1942); *Thomas v. United States*, 168 F. (2d) 707 (C.A. 5th 1948). *United States v. Curzio* (C.A. 3rd 1948), 170 Fed. 2d 354. *United States v. Zeoli* (C.A. 3rd 1948), 170 Fed. 2d 358.

⁶⁴ *United States v. Baker*, 61 F. (2d) 469 (C.A. 2d 1932), *cert. denied*, 288 U.S. 602 (1932); *McWhorter v. United States*, 62 F. (2d) 829 (C.A. 5th 1933); *United States v. Speed*, 78 F. Supp. 366 (D.C. D.C., 1948).

⁶⁵ *United States v. Britton*, note 43 *supra*.

⁶⁶ *Ryan v. United States*, 216 Fed. 13 (C.A. 7th 1914).

⁶⁷ *Williams v. United States*, 282 Fed. 481 (C.A. 4th 1922); *United States v. Holdsworth*, 77 F. Supp. 148 (S.D. Me. 1948).

⁶⁸ *Norton v. United States*, 295 U.S. 136 (C.A. 5th 1923). *Cf. Grove v. United States*, 3 F. (2d) 965 (C.A. 4th 1925), *aff'd*, 268 U.S. 691 (1925).

⁶⁹ *Woodbury Corp. v. Pick*, 41 F. (2d) 148 (C.A. 1st 1930).

have agreed that the conspiracy conviction may stand.⁷⁰ This amounts in effect to holding that the overt act needed and charged to enable the crime of conspiracy to be prosecuted need not itself be a federal crime. Finally, the Supreme Court on Jan. 5, 1948, said that if an acquittal of a conspiracy charge involved a determination favorable to the defendant of facts essential to conviction of a substantive offense, the doctrine of *res judicata*, which applies to criminal as well as to civil proceedings, will be a defense to a second prosecution.⁷¹

The practice of United States Attorneys in using conspiracy charges to secure more freedom as to evidence and avoidance of the statute of limitations to obtain more and easier and double convictions, to bolster their personal records for diligence and efficiency, has been the subject of various strictures from the bench. Nearly forty years ago District Judge Holt said:⁷²

There seems to be an increasing tendency in recent years for public prosecutors to indict for conspiracies when crimes have been committed. A conspiracy to commit a crime may be a sufficiently serious offense to be properly punished; but when a crime has actually been committed by two or more persons, there is usually no proper reason why they should be indicted for the agreement to commit the crime instead of for the crime itself. * * * Prosecutors seem to think that by this practice all statutes of limitations and many of the rules of evidence established for the protection of persons charged with crime can be disregarded. But there is no mysterious potency in the word "conspiracy". If a conspiracy to commit a crime has been carried out, and the crime committed, the crime, in my opinion, cannot be made something else by being called a conspiracy.

In 1925, the Conference of Circuit Judges wrote:⁷³

We note the prevalent use of conspiracy indictments for converting a joint misdemeanor into a felony; and we express our conviction that both for this purpose and for the purpose—or at least with the effect—of bringing in much improper evidence, the conspiracy statute is being much abused. Although in a particular case there may be no preconcert of plan, excepting that necessarily inherent in mere joint action, it is difficult to exclude that situation from the established definitions of conspiracy; yet the theory which permits us to call the aborted plan a greater offense than the completed crime supposes a serious and substantially continued group scheme for cooperative law breaking.

⁷⁰ *Dunn v. United States*, 284 U.S. 390 (1931) (Butler J., dissenting). *Samuel v. United States* (C.A. 9th 1948), 169 Fed. 2d 787.

⁷¹ *Williams v. United States*, 282 Fed. 481 (C.A. 4th 1922). *Norton v. United States*, 295 Fed. 136 (C.A. 5th 1923). *Cf. Grove v. United States*, 3 F. (2d) 965 (C.A. 4th 1925), *aff'd.*, 268 U.S. 691 (1925); *United States v. Negro*, 164 F. (2d) 168 (C.A. 2d 1947), *Noted*, (1948) 61 *Harv. L. Rev.* 705.

⁷² *United States v. Kissel*, 173 Fed. 823, 828 (C.C. N.Y. 1909). *Cf. United States v. Sherman* (C.A. 2nd 1948), 171 Fed. 2d 619.

⁷³ Conference of Senior Circuit Judges, 1925. *Rep. Att. Gen.* (1925) 5-6. 328 U.S. 644, n. 4. *Cf. Holmes, J.*, in *Heike v. United States*, 227 U.S. 131, 144 (1913).

All this, of course, merely scratches the surface of the great problem of the conflict of federal conspiracy charges with the constitutional prohibition against double jeopardy, but enough has been adduced, even in the absence of any statistics from the Attorney-General's office, to indicate the extent of the abuse of the conspiracy statute by federal prosecutors, frequently upheld and aided by the lower courts in the usually laudable endeavor to give society and the state at least an even break in the modern fight against crime.⁷⁴ In a post-war period which is witnessing unprecedented invasion of the supposed rights of individuals from many directions, it is especially important that the constitutional issues be recognized and vigilantly presented. The evasion and nullification of the Fifth Amendment is not the result of generations of community habit, as violations of the Fourteenth may by some be said to be, but is the self-serving production of a small class of office holders which could be immediately and effectively terminated by a firm order, meant to be obeyed, from their common chief, the Attorney-General of the United States, or from his single superior in the governmental world. If lawyers were determined and united the abuse could be stopped at once and forever.

⁷⁴ United States District Court Criminal Cases; Annual Reports of the Attorney-General of the United States.

<u>For the Fiscal year ending June 30th</u>	<u>Criminal cases terminated</u>	<u>Defendants in cases terminated</u>	<u>Defendants guilty in all or part</u>
1937	35,461	52,167	41,961
1938	34,324	51,877	41,744
1939	35,695	53,053	43,083
1940	33,861	52,014	42,536
1941	32,207	49,237	40,100
1942	31,818	48,292	39,449
1943	35,793	47,955	35,378
1944	40,436	50,342	38,277
1945	39,209	48,990	39,197
1946	35,280	44,947	35,569
1947	35,474	44,685	36,021

Classification of cases by crimes does not show conspiracies separately, which the Attorney-General's office says is "impractical".