

1940

State of Utah v. E. B. Erwin, Harry Finch and R. O. Pearce : Brief of Appellants R. O. Pearce and Harry Finch

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,
vs.
E. B. ERWIN, HARRY FINCH and
R. O. PEARCE,
Defendants and Appellants.

CASE
NO. 6200

Brief of Appellants R. O. Pearce and Harry Finch

H. L. MULLINER,
Attorney for Appellants,
R. O. Pearce and Harry Finch

FILED
MAY 1 1931

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INTRODUCTORY STATEMENT

This statement will be based upon the assumption, not admitted, that the pleadings here are sufficient.

Three defendants were convicted, Mr. Erwin, former mayor, Harry Finch, former Chief of Police, and R. O. Pearce, attorney. The offense charged is that an agreement was entered into between the said three appellants and one Ben Harmon, deceased, and Frank A. Thacker, acquitted, to "allow, assist, and enable houses of ill fame, * * * lotteries, dice games, slot machines, book-making and other gambling devices and games of chance to be kept, maintained and operated at * * * Salt Lake City." * * *

This case is unique in that it does not charge an agreement between officers and operators of any of these things to operate or to protect their operation, as

has been charged in other cases coming before the courts. No one in this case was engaged in the operation of any of these things in any manner. This is an important element to be kept in mind in applying the law, as well as the testimony here. Appellants are not charged with operating nor agreeing to operate. They are not charged with an agreement to collect money nor with collecting money from any of these operations.

More important, they are not charged, either as officials or otherwise, with the offense of suffering or allowing any of these things to operate.

Assuming that it may be a crime to operate these things or a crime to permit them to be operated by persons having authority to stop them, this is not the charge. It was in this connection that there was a serious misapprehension on the part of the prosecutors and the court in this case.

A good deal of irrelevant testimony was introduced to show that these things operated, on the apparent theory that if this were shown it might be presumed that the appellants knew that they were being operated. This was irrelevant because under the law even knowledge that a conspiracy exists and is being carried out does not charge a person with guilt of participation, and secondly, as already stated, the operation or the allowance of an operation was not the offense charged here.

Incidentally, there was no evidence as to slot machines or dice games at all. It is common knowledge that prostitution, lotteries, book-making and gambling with

cards always operate in metropolitan sections to some extent. Card rooms, and some other gambling devices, were licensed here. It was established by plaintiff's evidence that these things except slot machines and dice games operated at the times alleged, and also that they had operated substantially the same before this time as well as subsequently. It appears to be conceded on all sides that gambling frequently accompanies card playing and that an officer, even though he may watch the game being played, cannot tell whether it is being played for money or for fun.

So that, while we have abolished common law conspiracies by statute and have limited the criminal ones to an agreement to commit "an act" injurious to public morals or for the perversion of justice, we have here charged an agreement not to commit "an act" but to allow, assist and enable things to operate. Which things not only customarily operate in spite of law or the ordinary, or even extraordinary efforts at law enforcement, but which clearly may and continuously do operate without any agreement whatsoever even as between officers and operators; and which obviously operate without such agreement between officers and laymen not connected with the operation of any of these things.

This brings us to two very basic propositions in this case to which we were never able to get the law applied on the trial:

(1) First, evidence that prostitution, lotteries book-making, and gambling occurred was no evidence at all of an agreement between the parties charged. Par-

ticularly is this true where the defendants were never connected with each other in any way or at any time or place in assisting or permitting anything of this kind, so that this evidence had no connection whatsoever with any relationship between the defendants. It is not a case of conspiracy to commit a crime such as to rob a bank or the commission of the crime of arson, where people meet at certain time and place, each contributing tools or equipment to commit the offense and all joining in its commission. Admittedly the bringing of tools to commit robbery or inflammable materials to commit arson and the entry into the commission of the act is evidence of a previous agreement or understanding to commit the offense. Here no substantive offense was charged. The agreement constituted the conspiracy and the offense charged.

It is true the statute required in addition that an "overt" act be alleged and proved to complete the offense. This should not be confused, however, with the agreement which was the gist of the offense. On this feature of the case it was not necessary to prove that anything was done afterward to carry out the agreement if the agreement were established. Anything that was done after to be material to this must be something that tended to prove the existence of the agreement. Under the rule of law with relation to circumstantial evidence it would not be admissible to prove the agreement unless it were consistent only with the existence of the agreement and inconsistent with every hypothesis of innocence of the agreement. Clearly, therefore, the fact that gambling did occur was no evi-

dence of an agreement between the parties charged.

(2) The second basic matter, which is related to the first, is that any insinuations of wrong doing or neglect of duty, or even evidence of such, was not only wholly immaterial but was prejudicial to the defendants, unless, again, it had the legal probative force required as proof of the agreement. Such alleged acts of irregular conduct were not admissible unless they tended to prove the existence of the agreement and were consistent only therewith, or in other words, could not have been expected to be done except as a result of the agreement alleged, between the defendants charged.

The danger of ignoring these basic propositions is that the jury from insinuations or gossip or proof of alleged irregular acts, though they were not charged and though they were not competent or material or relevant proof of the offense charged, would nevertheless feel called upon to convict. They were in effect so instructed. So that, as we see it here, what might have been expected to happen from a violation of these rules laid down as a guarantee of a fair trial, did happen and convictions resulted as a result of the introduction of evidence of irregular conduct which was not material to the charge.

Before attempting a closer clarification of the evidence and the assignments of error, some general statements of fact will be helpful.

There is no evidence here that the defendants ever met together. There is no evidence that any person

charged ever discussed the matter of permitting or aiding the operation of prostitution or gambling with any other defendant or with any other person. There is no evidence that the defendants discussed any matter relating to the things alleged to have been agreed to be aided or permitted. There is some evidence that Mr. Harmon may have talked with Mr. Finch and that Mr. Thacker did talk with Mr. Harmon on different occasions but not in relation to these matters. Mr. Harmon's place operated under a beer license and operated licensed marble games and had a licensed card room. These were operations which were checked up by Mr. Thacker not only in his place but in other places where they operated.

There is no evidence that the subject of or any agreement that prostitution or gambling be permitted or aided in operation were ever discussed between any two defendants or by any one of them with any operator. There is no evidence that Mr. Erwin knew Mr. Harmon. He did not know Mr. Finch until about the time they went into office. The evidence showed that Mr. Pearce had examined Mr. Erwin as a witness in a civil case that arose in 1934 but not as his attorney. The evidence is that he met Mr. Finch only twice, once some years previously when he lost an eye in a golf accident at Nibley Park and once while Mr. Finch was in office he applied for a licence for a client. So that the alleged conspirators, upon the record here, were only casual acquaintances or strangers. They never did any act to assist each other or to "assist or enable" any place of prostitution or gambling to operate. None of

the appellants was ever in any place where these operations were claimed to have occurred, except that Mr. Finch on one or two occasions visited certain places where it was testified gambling sometimes took place. This was in his official duties. There was no gambling at the time of such visits.

“OVERT ACTS”

Now as to “overt acts”. Our statute, as a recognized protection against abuses in prosecuting for alleged conspiracy, limits such prosecutions as stated above, and also requires separate allegation and proof of an overt act or acts. (See R. S. U. 103-11-3, also 105-32-11). The common law did not so limit or require. Such an act, if and when the conspiracy is established, may be by any conspirator shown to be connected therewith. It must, however, be in furtherance of the conspiracy, and with knowledge of the existence of the conspiracy alleged.

The matter of the sufficiency of the allegations of these is discussed elsewhere. Four things were alleged as “overt acts”: (1) That between March 15, 1936, and January 1st, 1938, defendants permitted, allowed, assisted and enabled houses of ill fame to be operated. That (2) between the same dates they did likewise with lotteries, dice games, slot machines, book-making and other games of chance. Thus it is first alleged that defendants agreed to do something very general in its nature and then it is alleged generally that they did what they agreed. We thus have in fact no “overt act” as contemplated by law or by the statute.

What we said previously as to the conspiracy applies here because these things had and would and did operate without any agreement as to their allowance or assistance, so that their operation is no proof of the conspiracy, nor is it proof of any overt act committed pursuant thereto.

Now we have (3), that on the first of each month from June, 1937, to January, 1938, defendants collected and caused to be collected "money from operators of houses of ill fame"; and (4) that at various times between April, 1936, and January, 1938, defendants collected money from operators of the same gambling games named in (2) above.

Passing over the generality of (3) and (4) as allegations of an "overt act", it may be admitted that an overt act may also be proved even though its proof tends to establish the conspiracy alleged. It may also be admitted that in certain cases, as above illustrated by the bank robbery and arson instances, an overt act may be cogent proof of an existing conspiracy. But such is not the situation here. No defendant ever collected any money from any operator of any of the things alleged. Golden Holt did, by his own evidence, collect from houses of prostitution from August, 1936, to January, 1937, and he said he gave the money to Abie Rosenblum. This was in 1936 and no defendant in this case was connected with that arrangement or that collection. Officer Holt also testified that again from June 1937 to January, 1938 he collected money from the operators of houses of prostitution and gave the money

to Ben Harmon. This appeared to be a separate arrangement and if it amounted to a conspiracy was a separate conspiracy, and a point is made of this in our assignments.

There is no testimony that any defendant collected any money and no testimony that any defendant "caused" Holt to collect any. In view of the money that he spent in automobile and motor boat operations, in living at the hotel and separately maintaining his family, and in mining stock speculation and operation, it is quite certain that he didn't give all the money collected to Rosenblum in 1936 or Harmon in 1937. In any event, he testified he collected it himself alone. There is no different testimony on this.

During the latter part of 1936 he was head of the anti-vice squad; during the latter part of 1937 he was under Mr. Thacker, who was head of the squad, and he was in charge of looking after the houses of prostitution from which he made the collections.

Upon the trial, and in an effort to make these collections overt acts of the defendants, the prosecuting attorney asserted (R. 318) that Holt was one of the conspirators. These collections by a police officer are not proof of the agreement alleged here. They are obviously typical police shakedowns of people subject to his coercion. Such collections required no agreement as alleged and constitute no proof of such. Neither did they constitute any proof of an overt act by defendants "to effect the object" of the conspiracy alleged. This is not an extortion case.

There is no evidence whatsoever that Mr. Holt was a party with the defendants or any of them to the agreement alleged. His conversations, by his own testimony, as to the collections in 1936 were with Rosenblum alone. He testified that again in about the middle of 1937 he talked with Harmon about collections and after he had made collections talked with Mr. Pearce. Harmon and Pearce were never mentioned until about June, 1937. There was nothing in any of these conversations with relation to assisting or permitting or allowing houses of prostitution to operate. They had operated for years before and still continue to operate. It certainly was no assistance to them for Holt to collect the income from their operations.

Mr. Thacker testified that although he was immediately over Holt in the 1937 period he never knew that Holt collected from the women, and Holt never claimed or testified, nor did any other witness testify, that he did. Holt, although practically admitting that he was testifying to keep his job on the police force, which he did and does keep, and indicating a willingness to deny or explain away all previous contrary statements and to testify to anything to help the State's case, never testified to any agreement as alleged here to "permit, allow, assist or enable" these things to operate, with any defendant, or at all. There was no such agreement or understanding ever intimated by or with him, and so these collections were not proof of the conspiracy alleged nor were they overt acts as required by the statute (103-11-3) "done to effect the object thereof by one or more of the parties to such agreement."

It should be mentioned in passing, since it is raised in the assignments, that Mr. Pearce and Mr. Erwin had been charged with Mr. Harmon in this matter of extorting or collecting money from houses of prostitution knowing it to be the earnings of prostitutes, and had been tried on exactly the same testimony offered here and these defendants had been acquitted of this charge.

It should be mentioned also that clearly the district attorney could not make the witness Holt a conspirator with the defendants by merely asserting that he was such. He could and did admit that he was an accomplice upon the State's theory of the case. It is our contention that his testimony was entirely without corroboration and that the trial court should have so instructed. However, he could not be made a fellow conspirator with the defendants except upon proof of the existence of the agreement alleged and his and their connection therewith.

He testified that he had been, off and on for more than five years, connected with the anti-vice squad, that such places of prostitution had operated all during that period, and to his own knowledge had operated for many years before, that the officers could not stop prostitution. If they were to put an officer in any of these houses, the girls would go somewhere else and that they could only drive them on to the streets or into the more residential sections. It was also shown that the law recognized this situation and the city ordinance gave to the City Board of Health the supervision of prostitutes, (Sec. 30, R. 444).

The only other collection of money was that by Abe Stubeck, testified to by one witness, Dar Kempner. (Ab. 40-64). It was testified by this witness that Stubeck collected some money from two pool halls "in March, possibly April", 1937. This is an alleged collection by Abe Stubeck, who was never in any way or by any testimony connected with any agreement as alleged, or at all, or with any of the defendants in any manner, or at all. The admission of this testimony is assigned as error, and of course it could not be any proof of the agreement here alleged or any proof of an overt act.

The record discloses that the defendants were not in fact tried for having agreed to allow or assist these things to operate. The trial court did not follow the rule that at least prima facie proof of the agreement should be required before the acts and statements of one alleged conspirator could be admitted as binding upon the others. The whole basis of the principle of agency in this regard was ignored.

So that in addition, as we shall contend, to the insufficiency of the evidence to prove the charge alleged and which alone the defendants were called upon to defend against, we have here a mass of irrelevant, immaterial and incompetent assertions by the prosecutor and insinuations and intimations of irregular conduct or neglect of duty and some proof of things done with and without the knowledge of defendants. All of which was not admissible as evidence or circumstances to prove the charge, but which created a confused ap-

pearance of some evil or evil conditions, arousing the jury to a feeling that for them not to convict here would be in effect an approval on their part of some or all of the things intimated, insinuated or discussed.

TESTIMONY CLASSIFIED

A general classification of the evidence offered by the state will be attempted. This may be classified under four heads, as follows:

(1) Testimony as to the operation of houses of prostitution, card games, book-making and lotteries. As to this class of testimony the court instructed (Ab. 266) in instruction 9(b):

“That the operating of gambling, prostitution, lotteries, etc., either before or after or during 1936 and 1937, in and of themselves cannot be considered by you as evidence of an agreement or conspiracy between the defendants in this case. Such conditions may or may not exist by agreement and their operation is consistent with the absence of such agreement.”

This instruction, in the absence of a cross appeal, has become the law of the case. So that it is our position that under the rule as to circumstantial evidence, as well as under the law of this case, this evidence gives no support to the state's case here.

(2) In this classification is a substantial volume of testimony admitted upon the theory that it constituted admissions by the different and individual defendants. This does not relate to the offense charged or to guilt of this offense. This testimony is made up of long

statements by Fisher Harris and other witnesses of what they had heard or discovered or found out and was admitted on the claim that they had so stated at different times to various defendants here. These were almost entirely after the conspiracy was alleged to have ended. It not only does not support the conviction here, but was erroneously admitted.

(3) This classification includes evidence of alleged wrongful acts or irregular conduct or statements involving irregular conduct of the individual defendants themselves. It also involves some evidence of knowledge on the part of the defendants that some of the operations alleged took place. It in no way relates to the agreement alleged and for the most part was erroneously admitted.

(4) In this class may be included some alleged declarations made by one defendant or a third person with reference to another defendant. This testimony is quite limited. Some of this was after the conspiracy was alleged to have ended; all of it was without any foundation showing an agreement under which the statements could have been admitted as binding upon the defendant mentioned in the statement in any case; and where made by third parties, of course, was erroneously admitted.

BRIEF AND ARGUMENT

Before discussion of the evidence and the sufficiency, it may be helpful to inform the court as to the theories here alleged and pursued.

Ses. 103-11-1 R. S. U., under which the charge is laid, says:

“ . . . if two or more persons conspire: (5) To commit an act injurious to (a) public morals, (b) for the perversion and obstruction of justice, (c) the due administration of law.”

This indictment incorporates (a), (b) and (c).

The cases cited by respondent in support of the indictment are not cases in point, as we view the matter, but they were cases holding that under the allegations involved a cause of action was stated under (b), the obstruction of justice. There appears to be no case holding that the theory attempted to be alleged here would be under the other divisions of this statute.

People v. Tenerowicz, 253 N. W. 296 (Mich. 1934), was the case mainly relied upon in support of the indictment. The indictment there charged the public officers and the operators of the houses together and alleged that they were engaged in keeping, maintaining and operating the same, and then alleges that they combined and conspired “to permit and allow the keeping, maintaining and operating of houses of ill fame”, knowing that such operation was in violation of the law. The court said that the language “to permit and allow” as used in the indictment should be construed that the officers “conspired to assist and enable the other parties named in the indictment in maintaining and operating such houses of ill fame.” It held that the indictment as so construed stated a cause of action, on the theory of a conspiracy to obstruct justice.

This case cited in support of its holding *People vs.*

McPhee, 146 *Pac.* 522, (*Cal.*). Which case also involved an alleged conspiracy between officers, gamblers and bunco men. It also held that such a conspiracy as between officers and the operators of gambling working together, charged a conspiracy to "obstruct justice." It will be at once noticed that these cases are distinguishable in that here we have no agreement with operators whatsoever or with any person connected with the conduct of the various operations involved.

Before leaving the *McPhee Case* on the question of pleading as showing the nature of the authorities relied upon as to evidence, it is important to point out the holding in that case with relation to the question of evidence as here involved. In that case some of the gamblers turned state's witnesses and testified freely as to the conspiracy and introduced a number of conversations and actions involving the appealing defendants, which actions and conversations took place in 1910 and 1911. It appeared to be established that the appealing defendants were allied with the conspiracy in 1912. The testimony appeared to be ample that the officers and the gamblers were working together, the one protecting the other, and dividing the "percentages of profit."

The court first cites the law to the effect that if an individual is shown to have become a member of a conspiracy after the conspiracy was formed, that he may adopt the whole conspiracy by knowingly identifying himself with it and thus assume responsibility for what has been done up to that time. The opinion recites that

the trial court so stated the rule, and under his statement of it, and over repeated objections, introduced the line of testimony above indicated. The opinion says:

“The statement of the foregoing principle of law, however, presupposes that before the acts or declarations of one or more of the co-conspirators, done or made at a time prior to the entering into the conspiracy by the particular person charged, can be used in evidence against him, the fact of the existence of the conspiracy at the time such acts were done or declarations made must have been shown by some degree of proof sufficient to justify the court in admitting the evidence of such prior acts or declarations; and that such proof *cannot consist merely in the acts and declarations of the alleged co-conspirators, but must be in the nature of an independent showing as to the existence of the conspiracy at the very time when the acts were done or declarations made by which the persons alleged to have subsequently joined the conspiracy are sought to be bound.*”

* * * * *

“It is indispensable, however, that, before this evidence could have been rightfully admitted, some degree of proof aliunde must have been presented tending to prove the existence of the conspiracy among those then associated in it, and whose acts and declarations are sought to be so used.”

* * * * *

“In the entire absence of such proof aliunde tending to establish the existence of such conspiracy, during these prior years, the action of the court in admitting in evidence the acts and declarations of the alleged co-conspirators dur-

ing those years against these defendants must be held to be prejudicial error;"

The case cited and mainly relied upon by respondent in the contention as to the admissibility or sufficiency of the evidence was *People vs. Luciano*, 277 N. Y. 348, 14 N. E. (2d) 433.

This is a rather famous racketeer case. Luciano was indicted with others for conspiring to violate Sec. 2460 of the New York Penal Code relating to compulsory prostitution of women. The opinion recites that the evidence showed the existence of the conspiracy to control prostitution. It does not recite the evidence to show this, but states that it was sufficiently shown. The discussion then turned mainly upon the connection of Luciano. The opinion recites the evidence showing a definite connection with the operation of prostitution. Among other things, it was shown that one Bendix applied as a collector for the ring and Luciano offered him a job as collector. Luciano was with one Fredrico, shown to be the manager under Luciano "the boss". Luciano told Bendix that he would tell another established member of the ring to put Bendix to work at \$40.00 per week. One Betillo, also active under both Luciano and Fredrico, introduced a woman to Luciano, naming Luciano as his boss. Later, this woman wanted to marry a member of the ring and both wished to withdraw from it. Betillo refused and the witness applied to Luciano, who advised the woman that this could not be done until her husband paid over to the ring the money from his collections. Another witness testified that twice during

the existence of the conspiracy she saw Luciano in conference with Fredrico and Pennochio, who was treasurer of the ring, and Wohman, a collector, and in both conferences heard Luciano receive reports from these people and give them orders. Also that Luciano told this witness that he would be better off to run the ring himself rather than to trust the management to Betillo, and that he was going to take over the houses of prostitution and raise the prices and place the madams on a salary basis.

Another witness testified that she saw Luciano and the other persons above named together with one Flo Brown, in conference on numerous occasions and heard them discuss the management of the ring and heard Luciano give directions to Fredrico. Also this witness testified that she heard Luciano on another occasion say that they had better cease operations pending a vice investigation and that Luciano, after discussing the matter with Betillo, consented that the ring continue operating under certain instructions, which he then gave, as to the methods to be pursued. This opinion simply held that the evidence sufficiently connected Luciano with the alleged conspiracy.

This case, so far as we can see, furnishes no support for respondent in the case at bar.

CONTROLLING PRINCIPLES OF LAW

In considering the numerous cases which will be cited, space will not permit a review of the difference in statutes under which the cases are decided. Many of the states and the Federal Government do not limit

conspiracy cases as does our statute cited. In jurisdictions following the common law overt acts are not required.

A great many Federal cases will be cited. It may be stated that these are generally more liberal in the matter of punishment of persons connected with alleged conspiracies than are the state cases. One reason for this is set out in *Marino vs. United States of America*, 91 Fed. (2d) 691, 113 A. L. R. 975, where it is stated:

“Although participation in the agreement must be had by the accused before he can be convicted under the statute, he may be punishable as a principal, without such participation, under 18 U. S. C. A. Sec. 550, which provides that: ‘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.’ ”

Under this statute persons have been fined where the knowledge of the conspiracy was not shown, as is generally required, but a participation in the substantive offense which it is alleged the conspirators agreed to commit has been shown.

With this distinction pointed out, we will cite Federal cases without further general comment. We have already pointed out that here there is no commission of a crime charged, in which it is alleged the conspirators agreed to participate. Here the offense is not the accomplishment of any unlawful design, but is the unlawful confederation or agreement charged. See *People vs. Billings*, 24 N. E. (2d) 339. The offense here is the

agreement. This must be kept constantly in mind in applying the rule as to circumstantial evidence and in considering the admissibility or effect of the evidence to be discussed.

As the evidence is entirely circumstantial, there being no claim of any direct evidence of agreement or confederation between the defendants charged, we will cite a few cases upon limitations as to this character of evidence:

State v. Crawford, 201 *Pac.* 1033 (*Utah* 1921):

“The contention, however, is in line with certain rules of evidence generally recognized in this country as elementary and fundamental. It is consistent with the rule that accords to a defendant charged with an offense the benefit of every reasonable doubt. It is consistent with the rule applied in cases dependent solely upon circumstantial evidence, as in the case at bar, *that the circumstances must be such as to exclude every reasonable hypothesis except that of the defendant's guilt of the offense charged that every circumstance constituting a necessary link in the chain of evidence must be consistent with the defendant's guilt and inconsistent with his innocence.*”

Terry vs. United States, 7 *Fed.* (2d) 28, (9th C. C.):

This is a leading case on this point. Here the matter was presented directly by an instruction to the jury, which we desire to point out particularly, and a holding that the instruction given was erroneous. The instruction was as follows:

“In this case, therefore, even though you may find that there was no open or express dec-

laration of purpose on the part of these defendants or the other parties concerned to unite in doing the acts charged, yet if you find that the acts of the parties were committed or accomplished in a manner or under circumstances which by reason of their situation at the time and the conditions surrounding them, *gave rise to a reasonable and just inference that they were done as the result of a previous agreement then you are justified in finding that a conspiracy existed between them to do those acts.*”

The italicized portion of the instruction does not contain a correct statement of the law.

“It is also true, in cases of conspiracy, as in other criminal cases, that the prisoner is presumed to be innocent until the contrary is shown by proof; and, where that proof is in whole or in part, circumstantial in its character, the circumstances relied upon by the prosecution must so distinctly indicate the guilt of the accused as to leave no reasonable explanation of them which is consistent with the prisoner’s innocence.” *United States v. Lancaster* (C. C.) 44 F. 896, 904, 10 L. R. A. 333.

Shannabarger vs. United States, 99 Fed. (2d) 957, (8th C. C.):

This case contains a good statement of the law on this point.

“It is a settled rule of law that ‘In conspiracy cases the unlawful combination, confederacy, and agreement between two or more persons, that is, the conspiracy itself, is the gist of the action, and is the corpus delicti charged.’ The agreement must therefore, be established before a conviction

can be sustained. *Tingle v. United States*, 8 Cir., 38 F. 2d 573, 575.”

This was a case in which the commission of a substantive offense was charged and the defendants were charged with confederating to commit it. However, the court said:

“Where the government relies upon circumstantial evidence to establish the conspiracy, the circumstances must be such as to warrant the jury in finding that the conspirators had some unity of purpose, some common design and undertaking, some meeting of minds in an unlawful arrangement, and the doing of some overt act to affect its object. See *Marx v. United States*, 8 Cir., 86 F. 2d 245, 250, and cases there cited. *Further, the circumstances relied upon must be not only consistent with the guilt of defendants, but must be inconsistent with their innocence.* *Spalitto v. United States*, 8 Cir., 39 F. 2d 782; *Salinger v. United States*, 8 Cir., 23 F. 2d 48; *Langer v. United States*, 8 Cir., 76 F. 2d 817.”

Because it will be at once noticed from the evidence that an attempt was made to show that Mr. Finch stated that he did not know of the payoff when the state contended that he did, that this was admissible as a circumstance to prove the agreement here, we cite by way of illustration the following cases:

State vs. Marasco, 17 Pac. (2d) 919, (Utah 1933):

Arson was charged. The building burned contained personal property of the defendant insured by him. The circumstances were suspicious. He falsely claimed to be in Salt Lake, when in fact he was in

Carbon County where the fire occurred and thereafter employed a person to drive him to Salt Lake, and twice, once at the time and once near the time of the trial, approached this person and told him to deny that he had seen him or had driven him. There was clearly evidence of some kind of guilt. This court held that the circumstances, however, did not show guilt of the offense charged. The case was reversed, the court following the rule as to circumstantial evidence.

The case decided also the points that when a person was charged directly and tried on that theory, it was improper for the court to instruct or for the jury to consider that they might convict him for aiding or counseling and thus try to convict him as a principal.

State vs. Judd, 279, *Pac.* 953:

This court, in pointing out that it was not necessary that one circumstance alone connect the defendant with the offense or be sufficient to convict, said:

“The general rule is that the evidence is not relevant or admissible unless it reasonably tends to establish the fact sought to be proved.”

State vs. Dean 254 *Pac.* 142, (*Utah* 1927):

Laid down the rule which we desire to invoke in discussing the admissibility of the evidence along with the other point now under discussion. The opinion in that case said:

“Evidence to be relevant or material of course, must have some probative value, and in some degree must tend to prove what is claimed for it. Whether proffered evidence tends to do

so or has such probative value, and thus is admissible, is, in the first instance, a question for the court."

TESTIMONY AS TO MR. FINCH:

We shall now refer to the evidence offered as against Mr. Finch. We contend that for the most part, it was not relevant or material or competent and was, therefore, not admissible; and, secondly, that in any event it does not point to the guilt of the defendant of the offense charged, excluding every reasonable hypothesis of his innocence of such offense.

JOHN S. EARLY (Ab. 22-29) testified for the state, and when objection was made to an alleged conversation with Mr. Erwin in January, 1936, immediately upon their taking office, as to there then being a payoff, that there was no foundation and that such could not be admitted as against the other defendants, the court over-ruled the objection and said:

"If there is some evidence introduced of an agreement to conspire, as stated in the indictment, then the Court, unless it becomes convinced to the contrary, *will probably take the view that statements of anybody, anywhere, are pertinent to the issues.*" (Ab. 23)

The witness then testified that he knew Mr. Finch, after he took office as Chief in the middle of March, 1936, and then told him that he had heard rumors that there had been graft going on, and Mr. Finch said he hadn't heard anything about it. (Ab. 25)

This witness then testified over objection that he

had conversations with Mr. Browning, a Chinaman named Wong, Cliff Jennings and Wm. Cayias, about their operations, and that Ben Harmon and Abe Rosenblum called on him. The evidence showed that Browning was at times a book-maker, that Cliff Jennings had the reputation of being a gambler, and that Abe Rosenblum was a bondsman. The witness testified that on one occasion Browning, and on one occasion Harmon went to the secretary's office, which was the anteroom to Mr. Finch's office, and that he didn't know whether the Chief was in or not. There was no testimony that they contacted the Chief on these occasions. The witness testified that he afterwards had a conversation with the Chief but didn't remember mentioning any of the persons referred to. He said he told the Chief he had heard rumors of a considerable payoff and that Mr. Finch stated, "Those people know their own business and would have to operate their own business; that it was his duty to operate the Police Department and he proposed to operate it." Objections and motions to strike were denied. (Ab. 27).

This witness also testified that in the fall of 1937 there were again rumors of a vice payoff and that he talked with Mr. Erwin about it and the mayor said he hadn't heard anything about it and there had been no reports from the department. Asked the leading question, "During any of these conversations was it mentioned by you whether the chief and the mayor were involved?" the witness answered no, and being cross examined by the District Attorney said "that there were such rumors around. It had slipped my

mind for the time being.” He then testified that both the mayor and Mr. Finch disclaimed all knowledge of it. (Ab. 28)

AUSTIN SMITH (Ab. 29-34), another state’s witness, who was appointed secretary to the mayor in January, 1936, and served for a time, testified that he went to Mr. Finch’s home and was admitted by Mrs. Finch “very shortly after Mr. Finch was appointed.”

“I asked how he liked his job, he made the remark it was alright. We discussed things generally pertaining to the department.

Q. I direct your attention to the subject: Was anything said about graft payoff?” Objection was made and overruled.

“I asked: Approximately what is the payoff existing at the time and the answer was approximately \$2000.00 a month. I asked who was getting it, or who collected or what became of it and was told probably Abe Rosenblum *would* collect it as he had had experience along that line.” (Ab. 29)

Mr. Finch emphatically denied that there ever was such or any conversation at his house, and testified that Mrs. Finch, who afterward died from her then sickness, was confined to her bed at the time testified by the witness and did not admit anyone, nor was she in condition of health to be where the witness could have seen her. This was not denied.

This witness also testified that in *June*, 1936, he had a conversation with a newspaperman and obtained a memorandum purporting to contain a list of supposed

payoffs in gambling houses and houses of prostitution. That he left it on the mayor's desk but didn't see it in the mayor's possession. That he then talked with Mr. Holt and Mr. Taggart about this matter and later talked with the mayor, but he refused to give the name of the fellow he had talked with. That he then attended a conference at which he had Mr. Holt present and at which the chief was present; that the mayor felt that he had talked with people that he should not have talked to. That Mr. Holt then said he had informed me of the conditions discussed with the newspaperman because he thought the mayor should be given the information and "*that rumors were rampant*" that there was a payoff on houses of prostitution. That the whole statement was rather brief.

That the witness then asked if there was any misunderstanding or if they were satisfied with what had been said, and that Mr. Finch made the remark that "We should not be washing our dirty linen in the enemy's camp." (Ab. 33) Mr. Finch afterwards testified that he had had some personal disagreements with Mr. Taggart, and also mentioned that Mr. Taggart's daughter was employed in the department at the time that he went there.

The Holt referred to was the only person shown to have collected from the houses of prostitution at any time, and when questioned by Mr. Finch denied that he had ever collected. If anyone was collecting he would have known it because he was head of the anti-vice squad after April 1, in 1936, by his own testimony. (Ab. 97)

D. L. HAYS (Ab. 37) was the witness who testified to his various gambling operations over a long period of years and including 1936 and 1937, and prior and subsequent years. He testified that he asked the City Commission on February 20, 1939, why they continued to license the card rooms "when it was well known that gambling went on as long as they were licensed." His only reference to any of the defendants was to Mr. Finch. He testified that in about November, 1937, he said to Mr. Finch, "You must know that gambling is going on in these places either under protection or without regard to law." Mr. Finch said, "Yes, I know that gambling is going on here." The witness then said he asked him what he was going to do about it and he said he was not going to do anything about it and he gave me his reasons." (Ab. 37)

A. H. ELLETT (Ab. 75-79), sworn by the state (Ab. 75), testified that he was a judge in the police court in 1936 and had a conversation with Mr. Finch in the middle of April, 1936, one month after he became chief. It appeared that some gamblers had been brought into police court and charged there and that the witness refused to proceed with the cases and suggested that they be sent down to the county attorney's office. (Ab. 79) That Mr. Finch called on the telephone and asked to come and talk with him about these gamblers or gambling cases and that he saw Mr. Finch that afternoon between 5:30 and 6 o'clock in the Public Safety Building. That in the course of that conversation Mr. Finch said, "Judge, why can't we get together on the

sentencing of these gamblers? Let them pay the fine; let the city get the revenue." I said the reason we can't do this is because *my friends tell me* you are taking \$2500.00 a month in your hand behind your back and I am not going to be a party to it and we can't get together on it." That after a minute or two the chief made some remark and the meeting broke up.

He stated on cross examination that if Mr. Finch took office in March that this was about a month afterward. That the question of felony charges against gamblers was in his mind. That it was the practice for the prosecuting attorney to file complaints and that the clerk assisted the attorney in these cases and that all arrests were reported to the city attorney, and that he rejected the complaints drawn by the city attorney and wouldn't sign them. That it was after he sent the cases down to the county attorney that Mr. Finch talked with him.

An important point to notice in this connection is that the testimony of the witness himself was that he said to Mr. Finch "My friends tell me you are taking \$2500.00 a month in your hand behind your back." There was no admission, nor could Mr. Finch deny that his friends had or had not told him this. Objections and motions to strike were denied.

BEN HUNSAKER (Ab. 79-92), testifying as to conversations with Mr. Erwin, none with Mr. Finch, stated that in 1936 he had a conversation with Mr. Erwin at the time Mr. Erwin paid him \$200.00 in currency on a debt, in which conversation the witness claimed it

was intimated that Mr. Erwin received the money involved from operations such as are alleged, and in which this witness said Mr. Erwin said, "Finch is the man they will get, but I don't think they will be able to get Finch because he doesn't do the collecting himself. He has his men collecting for him."

This witness also testified to another alleged conversation in the latter part of the summer of 1936, in which he said the mayor said that he thought the chief of police was taking in a lot of money and he didn't know if he was getting his right split; that he couldn't go down to his office and watch him and tend his office at the same time so he had just got to take what was handed him.

This was all there was with relation to Mr. Finch, except that in another conversation the witness said Mr. Erwin said he had a chief of police in there that was bringing him in very good money but not enough. (Ab. 79-92)

It should be mentioned in this connection that Mr. Finch testified that he had contributed, and that some collections from the men up there were made for Mr. Erwin's campaign fund. That otherwise he had collected no money and paid no money.

GOLDEN HOLT (Ab. 97-124) testified that the first of April, 1936, he was appointed head of the anti-vice squad. That in discussing his appointment with Mr. Finch they talked over the vice situation and the chief said, "I don't particularly object to vice but I

don't want them to get the best of it, not let them run too openly."

He also testified to the conversation with Austin Smith above referred to and with the mayor and chief in the Public Safety Building in June, 1936, in which conversation he said he stated "we had heard a payoff was going on."

He testified that he had another conversation with Mr. Finch the following day in which Mr. Finch told him to close everything up. That was in the latter part of June, 1936. That he went around and notified them to close, that is the places of prostitution and lotteries, and said it appeared to him that they then closed up. He testified he had another conversation the latter part of July, at which time Mr. Finch "mentioned Mr. Rosenblum and told me to go see him. Nothing was said about the places of vice." (Ab. 99)

He testified he talked again with Mr. Finch about the first of August and Mr. Finch said "he thought the heat was off and to let them reopen and not to let them run too openly. No specific places were mentioned. After then I just let them run until the first of January with the exception of the lotteries." (Ab. 100)

He said he had another conversation with Mr. Finch about the middle of January, 1937, and Mr. Finch told him to close everything up. That he was going to give me another man on the squad and to see that there was absolutely no more payoff. He said in February, 1937, Mr. Finch "told me that he thought I was the

one who was making the town too hot and that if he moved me things would calm down. I was removed the first of March and Record was put in my place. I was in the detective bureau for two months and then I went back on the vice squad." (Ab. 100) (It will be remembered that it was in the latter part of 1936 and the early part of 1937 that some of the women were making reports to the newspapers of various vices. It will also be remembered that when Holt went back it was at the request of these same women, and he was put in under Thacker to look after the houses of prostitution).

This witness then testified to conversations with Harmon, and in June with Mr. Pearce. He appears to have testified to no conversation whatsoever with Mr. Finch prior to his commencing collections from the houses of prostitution again in June of 1937. This witness testified that he had made these collections alone. On cross examination he testified that it was the practice for them not to go alone in the discharge of their duties on the anti-vice squad but it was necessary to go in pairs for their own protection, and that he traveled with Mr. Boyd and with Mr. Rogers. That they instructed the girls and saw that they appeared for examination and kept track of the houses to which they went. That it had been the practice in the past to book them at the police station once a month for the Board of Health. That after Mr. Finch came in he required that they be booked and examined twice. That the practice was the same as it had been for years.

That Abe Rosenblum was a bondsman. That in 1936, (when he claimed he was collecting and turning the money over to Abe Rosenblum), "we had complaints about what happened in Rosenblum's place." This was over the Bailey Feed Store. That "Mr. Finch told me that they couldn't tolerate that place and I was to put a man there and keep him there to see that he didn't indulge in infractions of the law. * * * It was closed up around the first of July and later some time the latter part of August or September. It wasn't opened any more by Abe Rosenblum that I know of." The witness further testified that "while Abe Rosenblum was running it the chief gave me special orders to make every effort to see that no infractions of the law occurred. * * * It had the reputation of being a gambling place."

This witness was then asked if he hadn't been asked by the chief in the presence of Mr. Bower, the chief's secretary, and Inspector Record and others, "They say there has been a payoff in Salt Lake City. I want you to tell me before these witnesses if I ever asked you to favor any of the games, bookies, prostitutes, or anyone else? * * * Have I ever asked you to coerce or intimidate any of these people?" He was asked if he didn't answer no to these questions and he said he wouldn't say either way. He was then asked if the chief hadn't said to him at the same time, "Have any of these people ever paid me any money?" and the witness answered, "I don't recall everything * * * I wouldn't say I didn't make that answer. I don't recall, I may have done." He was then asked if the chief had not said to him, "Have I ever asked you to do any-

thing other than to enforce the ordinances and laws?" and the witness answered that he couldn't answer that either. (Ab. 108) It was proved by Mr. Finch and O. B. Record (Ab. 169) that these questions were asked of him and that he gave negative answers to Mr. Finch as above suggested.

The witness also testified that in May or June of 1938 Mr. Hoagland, another police officer, and Mr. Finch were in an automobile in front of Mr. Hoagland's home. That the witness drove up from the rear and got out of his car and got into the car with these two gentlemen and that the conversation there was to this effect: "Mr. Finch said, 'I don't see what has been done that would cause this talk about taking money from the underworld and about the department being tied up to the underworld.' And I said, 'I don't know how anyone could have anything on you. You don't need to worry. I don't know anything that involves you in this.'" (Ab. 109)

The following testimony indicating definitely the character of this witness was then given. This testimony relates to and follows the foregoing testimony:

"Q. Was it true what you said?

A. Well, no.

Q. You didn't even tell him then that you had been making collections, did you?

A. I didn't; figured he knew.

Q. But you didn't even tell him, never speak to him about it?

A. Only the time he told me to quit making them; see they quit being made.

Q. Now, just a moment.

A. You asked for that.

Q. Did he tell you to see to it no more collections were made?

A. Yes, he did.

Q. When was that?

A. In his office on around the middle of January, 1937.

Q. 1937?

A. Yes."

I don't remember a conversation with Mr. Finch in his office the latter part of 1936 or early in 1937, when he said he heard a rumor that I had been taking or accepting money from various people and I said I have never taken a dollar from anyone. I can go right out and arrest anyone. No one has any strings on me.

"Q. Did you tell him you were making collections in 1937?

A. He told me to quit making them.

Q. Did you tell him you were making collections?

A. I didn't tell him, never.

Q. You didn't tell him anything?

A. He told me in the office to see there was no more made." (Ab. 109-110)

* * * * *

The time I said Mr. Finch told me to see no more collections were made was around the middle of January, 1937. That is the time that I testified that he told me to close these places up.

"Q. And at that time you said Mr. Finch said to close these places up?

A. If I recall, I said he told me to see *there* was no more payoff."

I testified to this same conversation in case 10785.

“Q. And you said at that time, did you not, that Mr. Finch said to close the places up?
A. I did.” (Ab. 111)

FISHER HARRIS (Ab. 124-59), after testifying to conversations with Mr. Erwin in which he had stated that he had made an investigation in the fall and winter of 1937 and found operation of houses of prostitution, gambling in card rooms, lotteries and book-making, and had also testified that he had talked with Captain Thacker and told him that his relationship with Ben Harmon and the payoff in Salt Lake City was known to Attorney Harris and then asked him for information, and had also stated to Thacker that Thacker knew there was a payoff in regard to vice and that Thacker said anybody would know that. (Ab. 133) This was denied by Thacker. The witness said he asked Thacker why he didn't do something about it and Thacker said, “I can't because I act entirely on orders from the chief.” He also testified that he asked, “Why did you get in touch with Ben Harmon in the first place?” and Thacker said, “Chief's orders. Chief said that Ben Harmon knew all about underworld conditions and in the performance of my duty I was to take advice from him. I didn't take any advice and directions from him.” He also said that he stated to Thacker, “There must have been other occasions when you took directions from Harmon” and Thacker said, “No there wasn't. The chief and Harmon would talk things over.”

The witness also testified that he asked Thacker not to say anything to Chief Finch, but keep confidential their conversation, and Thacker said that was im-

possible because the chief knew he came to see the attorney.

Mr. Harris said the chief telephoned him about an hour afterwards and said he understood that the witness had accused Thacker of all sorts of crookedness. That he and Mr. Finch then had a meeting. (This took place January 10, 1938). (Ab. 135).

“Mr. Finch said, ‘I understand you have accused Mr. Thacker of all sorts of crookedness.’ I said, ‘I have stated to Mr. Thacker that there are all kinds of illegal activities in operation running in Salt Lake City in connivance with the Police Department’, and I said ‘I wouldn’t have any argument with you on matters of judgment as to how the town should be run. Nobody will claim that public officials should personally profit from illegal activities.’ He said, ‘Well, the last thirty years I have been hearing stories about payoffs in Salt Lake City. How is one to prevent such stories?’ I said, ‘Maybe the least that anyone can do or maybe the most is to see that the stories are not true; but in this case the stories are true, and public officials are profiting from illegal activities in Salt Lake City.’ I went on to enumerate them, and I enumerated dice games—

Q. Now, just a minute. At that time did you know who had collected this tribute?

(Objection to it as incompetent, irrelevant, immaterial leading and prejudicial, calling for a conclusion).

The witness answered: ‘Oh yes.’

The answer was stricken.

Q. Did Mr. Finch ask you at that time who anyone was who was involved?

(Objection to this as contrary to the rule as to relating conversations. Overruled.)

A. No, he did not.

Q. Did he at any time?

(Objected to on all general grounds, without sufficient foundation, interrupting the witness in attempting to give a conversation, and trying to put in any and every conversation in one question. Overruled.)

A. No, Mr. Finch has never asked me the name of any person involved or asked me to give him the name of any person involved.

I went on to enumerate to Mr. Finch the activities, the illegal activities which were being carried on in Salt Lake City and which had been carried on for a long time prior to our conversation.

(A motion was made to strike that statement as a conclusion. Refused.)

The witness then volunteered:

A. Oh no, it isn't my conclusion. I know it to be so.

MR. MULLINER: Now, I ask that that go out.

THE COURT: I think I ought to strike it.
(No other order was made.)

I went on to tell Mr. Finch that the activities I referred to were dice games, pool games, houses of prostitution book-making establishments, Chinese lotteries. He said, I don't see how anything of that sort could be true. We have collected \$2000.00 in fines from gamblers in Salt Lake City during the past year. I said, 'Mr. Finch, one man pays graft protection money of

\$3,600 a year, one man alone, and you talk about getting \$2,000 from Salt Lake City. Here is one group of people who pay \$6000 a year for protection money, and you talk about \$2000 for Salt Lake City. Here is another group that pays \$7200 a year to Salt Lake City.' I said, 'Here is card rooms—I haven't figured it up exactly—but they pay thousands of dollars a year; and here are the prostitutes paying thousands of dollars a year, and you talk about getting \$2000 for Salt Lake City, when all this money is going into the hands of public officials and people interested in them, in the underworld.' He said, 'Well, I thought the town was run pretty well', and that was about all there was of that conversation. I think that was on the 10th of January.'

(Motion was then made to strike out this testimony on all the general grounds that it is not admissible as an admission. That there was no sufficient foundation for it; that it was after the alleged conspiracy had ended. Denied.) (Ab. 135-136-137).

The witness stated that he had another conversation at the Alta Club at which Mr. Finch and Mr. Erwin and some newspapermen were present on January 20, 1938. That the parties present, other than the witness, had taken lunch there and at the end of the lunch he came in. That Mr. Fish, one of the newspapermen, said he had heard rumors of an investigation in regard to underworld activities and official corruption relating to them and asked if I had made such an investigation. I answered that I had and that I had made a report to Mr. Erwin in writing. He asked me if I knew what illegal activities were in operation and I said I did and I

enumerated them—as I have enumerated them before.

I stated the amount that each kind of activity paid and Mr. Fish said, “Do you know who gets this money and to whom it is finally distributed?” I said I did, and he said, “Who?” and I said, “E. B. Erwin gets \$750.00 a month; Harry Finch \$500.00 per month, the amount collected. Mr. Erwin and Mr. Finch were both at the table. Neither one of them said anything *at that time*. Mr. Finch remarked that this was the first time he heard of any payoff situation in Salt Lake City. Mr. Erwin suggested that Mr. Finch resign and Mr. Finch said he would resign the next day. Mr. Finch asked me how long this had been going on and I said it had been going on since the last of 1937, and it had been going on before that but that was the scope of my then investigation. I suggested that Mr. Finch be allowed to resign under circumstances such that ia would not appear that it was on account of these charge I made. I think it was me who made the suggestion. Nobody opposed the idea. (Ab. 146).

On cross examination this witness testified that Mr. Finch stated at the Alta Club in substance and effect that he had repeatedly told the mayor in the last number of months that if his occupying the position of chief of police was in any way embarrassing to the mayor that he would resign. (Ab. 149)

He also stated that Mr. Finch, in the first conversation with the witness in the Felt Building, stated that he had no knowledge of the payoff. That conversation was not over a half hour.

He also testified on cross examination as follows:
 “In the matter of who gets the money, I rather think I just wrote that down on a piece of paper and showed it to Mr. Fish at my left, and that paper had on it \$750.00 in one place and \$500.00 in another.” (Ab. 151)

E. A. HEDMAN, a captain of police in charge of the Detective Bureau, said that after Christmas 1937, he was called to the chief's office and Mr. Thacker was there and Mr. Thacker said he wanted to know why I ordered a raid on a gambling place at an address west on 4th South. (This was apparently under the 4th South Street Ry. viaduct). I said I hadn't made it but it was made by the Detective Bureau, and Mr. Thacker said that he had to know about these raids and I said “what do you want me to do?” and he said to write it down and leave it at my desk if it relates to gambling. I said if it is a burglary or robbery going on I would want you to take care of it, and Mr. Thacker said that is a different matter. *Mr. Finch didn't say anything at all during the conversation.*

This witness on cross examination said that each department had a scope of things it was expected to handle and if one department is making an investigation and another broke in on it there would be some possible resentment and jealousy. He said *Mr. Finch made no criticism of his having made the arrests.* (Ab. 65)

O. B. RECORD, (Ab. 15-22), inspector of police, testified that around the 25th of August, 1937, he and officer Burt made an arrest in the basement of the Atlas Building but he didn't know at the time who oper-

ated the place but now knew it was Bill Browning. The arrest was for book-making and he saw book-making equipment there, and that he and Sargeant Pierce made an arrest in the New Grand Hotel a day or two later of some book-makers. That he was next to the chief in rank and was in his office a dozen times a day. That after these arrests the chief asked him if he had complaints about these particular places and he said he hadn't. The chief then suggested that he let Thacker handle the arrests and not interfere; if they had any complaints on gambling to let Thacker know and he would see it was taken care of.

He said *the chief did not tell him to cease making arrests.* (Ab. 16) Objections and motions to strike this conversation were over-ruled and denied.

O. B. RECORD, sworn again, testified that he was acquainted with Abe Rosenblum. That he was a bondsman, and that he saw him around the police station several times, maybe a dozen. That he saw him talking to Mr. Finch three or four times he guessed, and that he had no idea what he was talking to Mr. Finch about. (Ab. 20)

This covers the mention by state's evidence of Mr. Finch in the record.

With reference to the instructions of Mr. Finch to see Harmon or Rosenblum or any of the parties operating card rooms or similar places, MR. THACKER testified that Mr. Finch said: "We are having an epidemic of burglaries around the city. I would like you

to contact Ben Harmon and Bert Hays and Joe Vincent —” and I guess he named over a dozen different places where there were card games and beer joints—“and see if you can get them to give you any information concerning suspicious characters hanging around and who might be pulling these burglaries” that I might give it to the Detective Bureau and help them out. The situation was bad and I went to these places as requested. (Ab. 222) The witness also testified that this was in fact what he told Mr. Harris. (See ab. 224-225)

MR. FINCH (Ab. 170-208) testified by way of explanation of some of these matters, and under the decisions of this court in *State vs. Converse*, 119 P. 1030, at 1033; *State vs. Allen*, 189 P. 84, such reasonable explanations cannot be ignored in determining the weight or effect of the evidence. That when I became police chief I had no police experience, I had no acquaintance with the officers that were turned over to me under civil service regulations, (Ab. 173). I knew Ben Harmon when Mr. Rodgers and I operated our restaurant on 2nd South Street, where we operated for about thirty years. For some time he had a place near us. I never had any business or social contacts with him. I did not become acquainted with Mr. Erwin until about the time I was appointed chief. I had no personal acquaintance with Mr. Pearce; I had met him twice, once some years before when he had an accident at the Nibley Park golf course and I was Commissioner of Parks and once while in office when he attempted to get a license for a client.

A good many years previously Abe Rosenblum used to eat in our restaurant occasionally. I had not seen him for a good many years. I had no acquaintance or association with him except as an occasional customer. I had no conversation with Cliff Jennings, Bill Browning, and a Chinaman named Wong. (Ab. 173). I saw Bill Cayias and Abe Rosenblum a few times. They were bondsmen. Ben Harmon talked with me the first thirty days I was up there, twice. Nothing was ever said about graft or payoff. He wanted to know if he could not keep the card room open after midnight and I told him no that he could not get any privileges. (Ab. 174).

I never did tell Holt to see Abe Rosenblum or take or deliver any instructions from him. I did tell them to see these and other men and get information to help the detective bureau. I did tell Holt that I had information that gambling was being carried on in Rosenblum's place and asked him to check up on it closely. I took this matter up two or three times and told him to see that unlawful acts were not carried on, and within a week or ten days after the last order Rosenblum's place was closed. I did take Mr. Holt off and put Mr. Record on as head of the anti-vice squad in the spring of 1937, "the newspapers were riding us over the women's clubs." I put Mr. H. K. Record as head of the anti-vice squad. I began to have reports from various sources. Mr. Early informed me that Mr. H. K. Record and another officer were interested in a crap game on 4th South. The mayor's secretary made the same report. One member of the anti-vice squad gave a sim-

ilar report, Mr. Hoagland. I removed Mr. Record for the reasons above stated and Mr. Thacker was then appointed. I appointed Mr. Thacker after discussing the matter with Inspector Record, who was in charge of personnel. The instructions I gave were to the effect that we wanted the places run as closely as they could regulate them and no infractions of the law that they could help. (Ab. 178. Mr. Thacker verified this).

I took up the matter testified to by Mr. O. B. Record because Mr. Thacker said that these arrests had been made in his department and he thought they ought to talk to him, or something to that effect, it aroused a little jealousy. (Ab. 178)

After I removed Mr. Holt the women's organization, which had taken quite an active part in vice conditions, came to me and they wanted to know why I had removed him. They felt that he was doing a good job. They said they had never made complaints of him, or words to that effect, and felt I had made a mistake in taking him off the vice squad. That influenced me when I came to put him back on the squad under Thacker.

Early in 1937 I said to Mr. Holt in substance "I have heard rumors that you have been collecting, or accepting money from various people", and he said I have never taken a dollar from anybody. I can go right out and arrest anyone. No one has any strings on me. (Ab.181)

After hearing Judge Ellett, I recall that I had a

conversation with him. I met him in the hall and we went into my room. My officers had been telling me—the conversation was about fines being levied against gamblers and the question had been raised by the judge, not in my presence, that they should be prosecuted on a felony charge. I did tell him that he could fine them up to \$299.00 and give them six months in jail and if they were brought in on these charges twice a year that probably would answer and we could get the fines in the City Treasury. I also told him that we would just as soon furnish our evidence at one place as another and if the city attorney felt so disposed it was immaterial to us where the cases were tried.

He brought up the rumors of graft. I told him I had been on the street down there for thirty-five years and heard these rumors all my life. I never could get to the bottom of them. It was not expressed in the conversation that I had my hand behind my back that I recall—"not in that way at all". I had only been there a few days. I did not take it that his statement applied to me. I do not recall that any amount was mentioned. (Ab. 182)

The witness denied that he had the conversation stated by the witness Hays with relation to card games. (Ab. 182) The witness denied the testimony of Austin Smith that they had any conversation at his house, or that Austin Smith could have seen Mrs. Finch there or be admitted by her because she was not up and about the house at that time; and testified that he never stated to Austin Smith that there was a payoff of

\$2000.00 a month in Salt Lake, and I never at any time to anyone said in substance that I guessed Abe Rosenblum "*would*" collect graft in Salt Lake City. (Ab.183)

This witness testified that he did say something about taking the affairs of the department into the enemy camp, in connection with Holt's alleged conversations with the newspapermen and with Mr. Taggart in his office, and what he had reference to was that he and Mr. Taggart had had words about a matter of employment in the police department and that Mr. Taggart had said "I will remember you when the time comes." (Ab. 184)

Concerning the conversations with Fisher Harris, Mr. Fish took the examining position and the discussion was between him and Harris. Mr. Fish wanted to see the slip that Mr. Harris had taken out of his pocket and Mr. Harris showed it to him. When he brought up the proposition that I was getting \$500.00 a month I said that I had no knowledge of any payoff and I certainly had not been a party to it. I did say that any time I stood in the way of the mayor in any way I would be glad to resign. I had tendered my resignation to the mayor once before. As we were going out I said I had no objection to resigning but that I would not resign under fire.

I never received any money that was collected by Mr. Holt or anybody else. (Ab. 186) I never gave any money to Mr. Erwin, except that he told me that during the campaign of 1936, he had a certain amount that the Democratic Committee had asked him to raise and I

gave him two percent of one month's salary. I never received any money from any source, except some life insurance when Mrs. Finch died and my salary, and possibly a couple of small loans paid to me \$100.00 apiece. (Ab. 186)

On cross examination this defendant said, I did not know Bill Browning or Cliff Jennings.

TESTIMONY AS TO MR. PEARCE:

Before commenting on the admissibility of portions of this testimony and the effect of it, we will set out the testimony as against the defendant Pearce and consider them both together.

The witnesses who testified as to Mr. Pearce were H. K. Record, Golden Holt, Jacob Weiler and Fisher Harris.

H. K. RECORD (Ab. 95-97) testified that he had been in the police department fifteen years. That he was placed on the anti-vice squad about the first of March, 1937, and was there for two months. That he saw Mr. Pearce around the middle of April. Mr. Pearce called him on the telephone and he went to the office; that Ben Harmon was there. Mr. Pearce said he had been responsible for having me placed head of the vice squad; *that the mayor had instructed him to make collections from gambling houses and other forms of vice.* I asked him how much they expected to get. He said \$1700 a month I asked him where; he said \$600.00 from lotteries, \$600.00 from book-makers and \$400.00 from card games. I said I wouldn't be a party to it. He said, if you will string along

with us keep things in line you will get \$165.00 a month. I told him I wouldn't want to be a party to it. He said, alright, we will get someone else to do it. I related this same conversation in the previous trial of Mr. Pearce, case 10785, I never did report this matter to the chief of police. This was the first conversation I ever had with Mr. Pearce and the last one (Ab. 96) I didn't report this to the city attorney or the district attorney or the county attorney. Fisher Harris talked with me about it about December, 1937.

GOLDEN HOLT testified that previously to collecting in 1937 he talked with Ben Harmon and Harmon said he was going to put him back on the vice squad to work under Captain Thacker. (Ab. 101) That he talked with Harmon later about collecting from the houses of prostitution and the amounts they were to pay. That he then started making collections in June of 1937, about the 3rd or 4th. That after he had collected he talked with Mr. Harmon and Harmon told him to take it over to Mr. Pearce's office in the Continental Bank Building.

"When I got to Mr. Pearce's office Mr. Harmon was there, the door was open. I entered the lobby of his office and he told me to come in. I laid the money on his desk. He asked me if that was all of it and I told him it was. He picked the money up and put it in the drawer of his desk on the left side. Mr. Harmon was sitting to the left of the desk, about six feet from Mr. Pearce. It was around \$500.00." (Ab. 103)

About the latter part of September or the first of

October, 1937, Ben Harmon called me. I couldn't give the date any nearer. I went and saw him at the Mint. "Mr. Harmon told me that Mr. Pearce had told me to go to Mr. Pearce's office and see him."

I went. He had a slip of paper with a list of places on it and he asked me the amounts of the different places of prostitution I had been collecting from and he had some other addresses. There was no collection made at these. He asked me why. I told him they were residences and those girls weren't making a living out of it and I wouldn't collect from them. He said it was alright, thought I was doing a fine job, and I left. (Ab. 103)

On cross examination this witness testified that when he met Mr. Harmon in Mr. Pearce's office he knew that Mr. Pearce was an attorney. He had seen him in court off and on. He couldn't say whether he had seen him representing Mr. Harmon. I never had any dealings with Mr. Pearce whatsoever before. "There was very little conversation in his office. I took some money and put it on the desk; they asked me how I was; I was there a minute. Mr. Pearce put the money in his desk and I left. That is about what happened." (Ab.113)

The only other conversation I ever had with him was in September or October of 1937. I always went alone when I was collecting money and I went alone when I turned the money over to Rosenblum (1936) and I was alone when I turned the money over to Harmon (1937), except the occasion in June when I said Mr. Pearce was there. (Ab.114)

I never had a conversation with Mr. Erwin. I had a conversation with Ben Harmon around the middle of January, 1938. (Ab. 104) (This testimony was objected to on the general grounds and that it was after the conspiracy is alleged to have concluded. The objection at that time was sustained.)

Mr. Holt was recalled (Ab. 121) and this conversation offered again and objection over-ruled. He testified: Ben Harmon called me on the telephone around the middle of January of 1938. He asked me to pick him up at 1st South and Regent Streets. We went out along 4th or 5th North, down by the U. P. tracks, and he said, "For God's sake don't take any more collections whatever because *Mr. Harris and Mr. Lee have got hold of Pearce and accused him of being in the pay-off*. For God's sake see that there is no more of it. Don't take anything from anybody, because it may blow over." (Objections were made by each of the defendants separately and motions to strike as to this conversation all over-ruled.) (Ab. 123)

The witness said, all that I have testified to relating to Mr. Pearce in this case was testified to by me in case 10785. (Ab. 124)

JACOB WEILER testified that he was a deputy county clerk, and in Judge Thurman's court on March 19, 1936, in a case that consumed two or three hours, Mr. Pearce was one of the counsel. That he saw Mr. Erwin there and he took the witness stand and counsel for both sides examined him. He sat in the spectator's section before he went on the witness stand, and the

witness could not remember whether he went back to the spectator's section or sat at the counsel table afterwards. It was stipulated that Mr. Pearce put Mr. Erwin on the stand and examined him, and that any insinuation that Mr. Erwin employed Mr. Pearce as attorney in the case was eliminated. It was also stipulated that the civil case was first filed on July 25, 1934, (this was in the city court).

(Objection and motion to strike on the ground that there was no foundation or conspiracy shown were over-ruled.)

FISHER HARRIS (Ab. 142) was allowed to testify generally that he had made an investigation and had found out that the operations hereinabove referred to, of card playing and licensed card rooms, houses of prostitution, lotteries and book-making, were carried on in Salt Lake City. He had written these up in a letter and the letter was offered and received and then the letter was rejected by the court, and then the witness took it upon himself to tell, and was allowed to tell the contents of the letter and kept the contents in the record.

This letter and testimony, in addition to the statement that he had found out that these vices were carried on, also contained statements that he knew there was a payoff and that he knew who was in it. This testimony was also entirely inadmissible and prejudicial. It involved conversations with Mr. Thacker, above referred to, wherein he stated to Thacker that his connection with it and with Ben Harmon was well known,

also a conversation above referred to with Mr. Finch, as well as conversations with Mr. Erwin.

He later gave the following testimony with relation to Mr. Pearce. Before this conversation was given, objection was made and attention was called to the court to the fact that it had been given in case 10785 and that the transcript was available and the court was invited to examine the transcript and see that there was no admission contained in it. Overruled.

The witness testified that he had the conversation with Mr. Pearce in Harold B. Lee's office in January, 1938. It was the day before or the day after he talked with Mr. Thacker and Mr. Finch. He called on the telephone and arranged the conversation.

He said, "Mr. Pearce, I have been making an investigation of the illegal activities in Salt Lake City and the official connection with them and the payoff that I have found existed." I was just introducing the subject to Mr. Pearce, telling what I wanted to talk to him about, telling him "I had made an investigation and that I had found certain illegal activities and payoff situation", and then I told him I knew of his relationship with it and I repeated, as I have before, that the principal thing I am interested in is the official connection with it. The persons in the official body of the city who are connected with it and I told Mr. Pearce that I knew of his relation with it and that he is involved with Mr. Harmon and others, and I think it would be to his interest to make a full and complete disclosure of all he knew about it. (Ab. 142).

When I first said that, Mr. Pearce just sat there and said nothing for two or three minutes or more. He then said, "Who says that I am involved in this thing?" And I said, "Dick, I am not at liberty to tell you precisely, but I will tell you the names of some of the persons who say you are involved." I enumerated perhaps fifteen persons. Among them was the name of H. K. Record. Mr. Pearce said, Well, Mr. Record might say this about me because he has it in for me. I said, I didn't say Mr. H. K. Record was one of them, I said he was among those. Why did you pick him out? He said, because he has got it in for me. He said, "Well maybe I can help you stop this payoff situation. I can talk to Ben Harmon. I am his attorney." I said, "I don't need anybody to stop the thing, it is probably stopped now." "Rather than have you speak to Ben Harmon about it I want you to promise you won't speak to him or anybody else that I have talked to you on the subject." (Ab. 143)

The next day I called him over the telephone and I said, "Dick, I am sorry you have taken the attitude that you have in regard to this thing. You may think it is clever to say nothing but I think it is not to your interest. I think you ought to make a full and complete disclosure." He said, Why should I talk to you?, and I said, because if you don't you are going to be indicted as sure as hell. He said he would call me in the next day or two. That was the end of the conversation.

A few days later I called him again and he said, "I told you I would talk to you about it. I will talk to you some other time." (Ab. 144)

On cross examination the witness testified that the conversation with Mr. Pearce was about the 10th or 15th of January. He started out and made a long statement to Mr. Pearce. I said I wanted information from him, as he could give it to me, and I was particularly interested in the public officials that might be involved.

At the close of the conversation Mr. Pearce told me that he didn't know anything about it. He told me that he was attorney for Ben Harmon and asked if I wanted him he would talk to Mr. Harmon and see if he could get any information.

I told him twice in the early part of the conversation that what I wanted was information. I told him that I knew the facts and that what I wanted was cooperation. I wanted his information to corroborate what I knew. I did ask Mr. Pearce for information. That was what my question was directed to and that was what the conversation was for. (Ab. 153)

This is all the testimony that refers to Mr. Pearce. It may be claimed that the fact that Mr. Pearce said in substance that Mr. H. K. Record would be removed from the anti-vice squad, and that he was in fact removed thereafter, would create an inference of a connection between him and Mr. Finch. However, the evidence is positive that that alleged conversation was never communicated to Mr. Finch, or any reference to it made to him until long after Mr. Record had been removed; and that the testimony is positive that Mr. Finch gave as his reason for removing him, the connection of Mr. Record with the gambling place and that

he had reports, as hereinabove cited, from different officers of that condition. In any event, it would have no tendency to prove the agreement here alleged.

Before applying the law to the foregoing testimony, we want to cite a recent case to correct an impression clearly carried by the trial court in this case and which was erroneous.

People vs. Rodriguez, 99, Pac. (2d) 263, (Cal. 1940):

This was a conspiracy case tried to the court. It was a different kind of conspiracy in that a substantive crime was charged and the appellant was charged with being a conspirator to commit the crime of robbery. He furnished the car and the guns used. One of the alleged conspirators, Carroll, testified that defendant said he "could bring the car and guns to Los Angeles and give them to two guys there who would take them and bring him in money." He stated that his reason for testifying was because he thought the appellant was trying to get the girl they were both interested in and that he would like to get rid of him. The court said, "Thus it appears that a treacherous influence threatened Carroll's veracity."

In the course of his decision the trial Court said:

"I always approach a conspiracy case with a searching attitude of mind, because of the very nature of the charge and the presumptive rules of evidence—much testimony is considered which would not be considered in a charge of an isolated offense."

* * * * *

"I merely state that as a human situation

with which I realize you are confronted, and I can only say in that connection that like all conspiracy cases the testimony may not be as fullsome and complete as is the case in any other offense but conspiracy.”

Commenting on this the appellate court said:

“It appears timely that some consideration be given to the popular but erroneous belief that less convincing evidence is required to support a judgment of guilty where the offense of conspiracy is charged. Such a belief is wholly unwarranted. Moreover, to charge conspiracy produces no advantage for the plaintiff, nor does such a charge create burdens for the defendant, any different with regard to each than might be expected in connection with the trial for other offenses. The crime of conspiracy is no more heinous, nor is it fraught with graver consequences, than other offenses. Fancied handicaps incident to the prosecution of other offenses cannot be overcome in the trial of a criminal action by merely charging conspiracy.”

The case was reversed on the ground that the evidence was not sufficient to establish the conspiracy as to the appellant.

TESTIMONY UNDER CLASSIFICATION (2):

We shall now cite law upon the proposition that the testimony here cited does not tend to support the allegations of an agreement to permit and allow the operations as alleged, but that it was itself erroneously admitted. These authorities refer to evidence of the nature indicated in classification (2) above. It includes the alleged statements of Early to Mr. Finch that there

were rumors of a payoff or that there were rumors that he was involved, which was disclaimed; of Austin Smith concerning the alleged statement by Mr. Holt and him that the rumors of a payoff were rampant in 1936; of Hays that Mr. Finch must know that gambling was going on in card rooms; of Ellett, within the first month of Mr. Finch's employment, *My friends tell me you are taking \$2500.00 behind your back*; of Fisher Harris, that he had investigated and found out that there were vice operations and a payoff in regard to vice and his alleged enumeration of payoffs, and Mr. Finch's response that he had heard such stories for the last thirty years and could not get to the bottom of it, that he did not know of the condition stated and that he thought the city was pretty well run; and the further statement of Mr. Harris at the Alta Club of the same nature and that he, addressing himself, not to this defendant, but to Mr. Fish, had noted on a piece of paper that Mr. Finch got \$500.00 per month and Mr. Finch's repeated responses, according to Mr. Harris, that he did not know of this condition and his question as to how long this had been going on and his later denial of any participation in the affair.

It also covers as to Mr. Pearce the testimony of Fisher Harris that he made a long statement to Mr. Pearce that he had been making an investigation of illegal activities and official connection and a payoff, and requested Mr. Pearce to give him information, and in the course of the statement said, I know of your connection with Ben Harmon and others, and Mr. Pearce's hesitation, and Mr. Pearce's response, "who says I

am involved'', his offer to get information, and his later denial of any personal knowledge of the payoff.

It will be recalled that most testimony of this nature came from Fisher Harris. He is an attorney and it is not too much, we think, to say that he was conscious of the effects of his long statements and letter in creating evidence which was very prejudicial in this case. All of these were after the conspiracy is alleged to have ceased and after he said it was stopped. *None of them charge the offense alleged.* Of course, as to Mr. Finch in his official position things were constantly being said as to rumors of law violation, etc., or of things that the persons had been told or had heard from other persons about public and police officers. He was not called upon to deny, when someone said they had been told something.

In 80 *A. L. R. commencing at page 1235* there is a note collecting numerous cases on the admissibility of inculpatory conduct of the accused. At page 1235, after discussing the broad proposition that failure to deny an accusation may be used, the author says:

“A statement so made, of itself, would be objectionable as hearsay testimony, being a statement made at some time other than at a present trial, offered to prove the truth of the matter therein asserted, and based entirely on the credibility of a declarer not then before the court.”

He then goes on to state that such statements may be used only for the purpose of introducing the reaction to the charge made in the statement, when such is pertinent evidence.

At page 1250 commences a discussion and citation of cases on limitation, on admissibility. It would serve no purpose to review all these cases. Herein are cited, some of these in the note and some which are later. These will sufficiently indicate the nature of the holdings in all this class of cases.

Tate vs. State, 95 Miss. 138, 48 So. 13, holds that an incriminating statement involving accused, addressed to bystanders when the accused was present did not call for an answer and there was no admission by silence.

People vs. Bissert, 75 N. Y. S. 630, affirmed 172 N. Y. 643, 65 N. E. 1120, held that a statement accusing a public officer of taking a bribe to protect operation of houses of prostitution was not admissible.

“because a public officer, while acting in the discharge of his duties imposed by law, is not bound to deny accusations then made against him in order to rebut inferences of his acquiescence by silence.”

McCormick vs. State, 181 Wis. 261, 194 N. W. 347:

In this case the facts were somewhat analogous. Letters written by a former attorney for the accused's murdered wife and for the accused were introduced in evidence. These letters stated the attorney's conviction that the accused had poisoned his wife and made other inculpatory statements. The accused, Shaw, attempted to employ this attorney in a matter involving the contest of his wife's will. When he did that, the attorney, who had previously written these letters to the district

attorney, read the letters to him and the accused made no denial of the charge. He simply said that it was not necessary for the attorney to consider such things since no criminal prosecution had been instituted. The opinion said:

“We then come to the vital and controlling consideration as to whether an ordinary, prudent person similarly situated would naturally make a reply as to his guilt with respect to the numerous incidents involving crime contained in these letters, and particularly whether the defendant, in remaining silent, can be deemed to acquiesce in such insinuations so as to constitute these letters competent evidence against him.”

The court held that they could not and that their admission was erroneous, and in reversing the case said:

“The very nature of the information contained in the letters was prejudicial. Numerous incriminating incidents were referred to in the letters, none of which was based *upon personal knowledge of the witness*, but on the contrary, represented his conclusions from alleged investigation made, and reports and conclusions of others. The silence of the defendant under these circumstances the court held would amount at most to an acquiescence in the mental operations of the witness, Shaw, and of others referred to in the letters which he was in no position to controvert.”

The error of the court in admitting the letters was held sufficient warrant for a reversal of the verdict.

State vs. Evans, 189 N. C. 233, 126 S. E. 607, involved a homicide, in the trial of which it became

important to prove that the deceased taxi-driver had been hired by the accused to make a trip to get some whiskey. A witness testified that the deceased taxi-driver in the presence of the defendant stated that he had hired him to make the trip involved and that the accused did not deny it. The holding was that this was improperly admitted because it did not charge nor involve an assent to the commission of the actual crime charged.

Geiger vs. State, 70 Ohio St. 400, 71 N. E. 721, was a case involving a conversation between one of the officers present and the infant son of the accused, who was questioned by one of the officers as to what occurred on the day in question. In the course of the conversation the son made a statement which accused the defendant of having killed his wife by stabbing her. It was testified that the defendant made no reply and was immediately taken away. The court held that by reason of the nature of the conversation and the persons to whom the answer of the son was addressed, other than the defendant, this did not naturally induce or provoke a denial and was improperly admitted.

The following two cases hold that an accused is not required to deny statements not involving a direct charge of the offense alleged, and particularly where the denial might involve a controversy.

People vs. Hartwell, 175 Pac. 21.

People vs. Countryman, 195 N. Y. S. 728, 49 N. Y. Criminal Reports 34.

This appears to apply to the statements of the

witnesses Ellett and Fisher Haris concerning what they had heard or found out or, in the latter instance, that investigation had disclosed.

Hanna vs. State, (Tex.) 79 S. W. 544 held a statement not made to the accused directly, but to a bystander, was improperly admitted. The opinion said:

“To entitle the state to introduce in evidence the declarations of bystanders, it must be clearly shown that defendant understood himself to be accused of the criminal act committed, and the circumstances must have been such as to require of him a response.”

At page 1272 of 80 A. L. R. there is a note addressed directly to the matter of admissibility of statements not made directly to the accused but in conversations with third persons. The author says:

“When an incriminating statement is made in a conversation between third persons, in which the accused is not included, and when the remarks are not specifically addressed to him, it is frequently held that his failure to deny does not render evidence of the statement and his silence admissible against him, for the reason that these circumstances neither afford him an opportunity to deny, nor are they such as to call for a reply. In such cases it is held that it might be a manifest intrusion and impropriety for the accused to force himself into the conversation for the purpose of denying a remark, while in others it is held that the remark may be a mere impertinence of the declarer which might best be answered by silence.”

This rule would seem to apply to the conversation

between Mr. Fish and Mr. Harris at the Alta Club, where the latter was attempting to relate to Mr. Fish matters of his investigation, and for Mr. Finch to immediately have intruded would have constituted an interruption of that narration.

The author cites a number of cases directly holding that statements made to third persons are not admissible. 80 *A. L. R.* 1272-1273.

At page 1278 of 80 *A. L. R.* there is a note citing a number of authorities discussing the matter of the nature of the statement and the necessity of it being directed to a charge of the offense alleged. We will cite a few of these cases directly in point here.

People vs. Page, 162 *N. Y.* 272, 56 *N. E.* 750:

A few days after the crime of rape, for which the accused was being prosecuted, a witness stated that a few days after the crime was alleged to have occurred, she said to the defendant that the "prosecutrix had told her that the defendant had committed the crime of rape on her and that the defendant did not deny it." It was held that this testimony should be excluded for the reason that *it was not a direct accusation of the crime, but was a mere repetition of rumor or gossip.*

Stach vs. State, (*Tex.*) 260 *S. W.* 569:

Defendant was arrested for violation of the prohibition law. The officer who arrested him testified that some time before he said to the accused, "You have been boot-legging. Frank, take a fool's advice and quit or you are going to get into trouble." The officer also tes-

tified that a moment before the arrest he said, "Frank, I have warned you about this." That the defendant remained silent in each instance.

The court held the statements inadmissible, saying that

"the statement which an accused is called on to deny is such as contains a direct accusation relating to *the particular offense with which the accused is charged in the indictment*"

and said that neither statement directly charged the defendant with the present offense. There was no such accusation in all the mass of testimony here.

People vs. Figara, 219 N. Y. S. 73:

In this case the defendant was charged with having stolen bags of feed and an adding machine. Previously, when the owner and police officers went to the defendant's farm, one of the officers opened the door of the barn and said, "There, that looks like a stolen car." That the defendant was silent. It was held that such statement charged another crime and not the one for which the defendant was being tried and was therefore incompetent.

State vs. Hamilton, 55 Mo. 520:

The defendant was accused of murder. The testimony was that the officers went to his house when he was suspected and on coming out, in the presence of defendant one of them said that he had found a pistol upstairs between some bed clothes. The defendant did not deny that he had found the pistol. This was held inadmissible.

The foregoing sufficiently illustrate the holding that the accusation must be a direct charge of the offense charged in the action on which the defendants are being tried. None of the statements involved in this case could be admitted under these limitations. Their admission was error.

People vs. Kazatsky, 63 Pac. (2d) 299, (Cal.):

This is a later case involving a faked automobile accident. The evidence received on the trial was that of an officer. He testified that he said to the accused, "We know that it was no accident." This is a very similar statement to those made by the witness Fisher Harris. The opinion says:

"The statement was not directly accusatory in form; to the contrary, before defendant could have understood that he was being accused of the commission of a criminal offense, it would be necessary that he indulge in a course of reasoning of facts as he understood them to exist, coupled with the law as applying thereto. As is stated in *People v. Davis*, * * * 293 P. 32: 'Before the failure of a person to deny a statement of fact can be received as evidence of an admission of guilt or of consciousness of guilt, it must appear that he understands that he himself is accused of *the criminal act.*' "

(The Davis Case cites after this quotation, Wharton on Criminal Evidence, 10th Ed., Vol. 2, Sec. 680, p. 1407).

The introduction of statements allegedly calling for admissions almost invariably result in reversal of the

case because of the effect of introducing a statement made by a witness to the accused. The statements here involved were particularly damaging for the reasons stated in the cases, that the jury does not discriminate as to the offense charged nor differentiate sufficiently to get out of its mind the alleged facts stated. This would be especially true in this case, where a major portion of the evidence was made up of damaging recitals of this character.

Garner vs. State, 83 So. 83 (Miss.):

This was a case in which the accusation, the court held, was in effect denied, but it was claimed that the error was harmless. The opinion said:

“The admission of this evidence was manifest error. *Brown vs. State*, 78 Miss. 637, 29 So., 519, 84 Am. St. Rep. 641. The learned attorney general concedes the error, but insists that it was harmless error. It may be said, in response to this suggestion of the representative of the state, that it is sometimes exceedingly difficult to say, with confidence, just what may influence the verdict of a jury; but we think the error was not harmless, and *besides, the error thus committed does not stand alone with an otherwise spotless record to cure the error.*”

It will be noted that Mr. Harris admitted that in the course of the conversation with both Mr. Finch and Mr. Pearce, they denied any of the intimations of the statement of the witness relating to them.

Pinn vs. Commonwealth, 186 S. E. 169:

In this case the opinion says:

‘‘It ought not to be necessary to note that the party’s denial of the third person’s statement destroys entirely the ground for using it.’’ Wigmore on evidence (2d Ed.), Vol. 2, Sec. 1072, p. 564. See, also, 22 C. J., p. 326, sec. 362, note 3(a); Com. v. Mazarella, 279 Pa. 465, 124 A. 163; People v. Harrison, 261 Ill. 517, 104 N. E. 259; Com. v. Kosior, 280 Mass. 418, 182 N. E. 852; State v. D’Adame, 84 N. J. Law 386 A. 414, Ann. Cas. 1914B, 1109.

People vs. Nitti, 143 N. E. 448:

This case is somewhat analogous in that the statements made in the presence of defendant were of considerable length and the charges not very well marked or pointedly directed. It did contain statements concerning one of the defendants present and also other statements affecting the several defendants present. The opinion says:

‘‘In order for the acquiescence to have the effect of an admission it must exhibit some act of the man and show that the accused purposely remained silent. * * * Furthermore, it must appear that the accused not only had an opportunity to speak for himself, but was in a situation where it would have been fitting, suitable and proper for him to speak, or where he would have been likely, according to common experience, to deny the imputation of guilt. The liability of misapprehension or misrecollection or misrepresentation is such that the authorities uniformly allow that this kind of evidence *should be received with great caution*. (Citing several cases)

* * * Since the demeanor of a person upon hearing statements of others charging them with crime is liable to great misconstruction, evidence

of this description ought to be regarded with care. In discussing this question courts often say that silence, under the circumstances, may be construed as an admission or a confession. Because of this loose phraseology confusion has arisen, and the circumstances arising from the conduct of the accused in remaining silent is often treated as though it were a confession. This is clearly an erroneous view."

The cases also uniformly hold that where a person has once denied his guilt of an offense charged, he is not called upon to deny it every time it is mentioned, and that his failure to do so when the matter is repeated is not admissible. It will be recalled that Fisher Harris and Mr. Finch both testified that Mr. Finch denied knowledge of any payoff just prior to this meeting at the Alta Club.

People vs. Collins, 137 N. E. 753 (N. Y.):

This involved again quite a lengthy statement in which the defendant was charged a number of times with guilty conduct and remained silent. The opinion says:

"Collins had already told his story. He had already contradicted the statements made. Under such a state of facts, the failure to renew his denial was no indication of acquiescence in any event. * * * Collins may or may not have been guilty of the crime charged against him. Whether guilty or not, he was entitled to a fair trial. This he did not receive and the judgment of conviction appealed from must be reversed."

People vs. Sarney, 184, N. E. 612:

This was similar to the case at bar in that the defense asked the court to hear the testimony of an alleged admission first and determine its admissibility; just as was done here in the case of Mr. Pearce and also Mr. Erwin, where transcripts of the testimony were present. The court refused, and the testimony was given before the jury. Here the defense wanted to show that the defendant had previously denied the accusation that he bought a gallon of gasoline from the witness. The witness was allowed to testify that at the time in question he identified the man as the one who bought a gallon of gasoline from him and that the man being so identified didn't deny it. The court did afterwards strike out the accusing portion of the testimony and the defendant's previous denial of the purchase, but allowed the identification to stand. The opinion says:

"Such statement will never be admissible where the accused unequivocally denies the truth of the statement or where he shows clearly that he does not acquiesce in it." (Citing 143 N. E. 448, 113 N. E. 113) * * * Unless the words or conduct of the accused under the circumstances are such that there is a natural and reasonable inference that he admitted the truth of the charge, such statement is inadmissible. * * * 104 N. E. 259. The testimony of Feldman was not only incompetent but highly prejudicial to defendant."

People vs. De Bolt, 256 N. W. 615:

Is another case holding that the defendant, having previously denied that he had anything to do with the robbery, the fact that he failed to deny a statement by

a co-defendant accusing him directly of participation in the robbery was not admissible and the case was reversed because of its admission.

See *Johnson vs. State*, 296 S. W. 887, as a later case on the point that the accusation was not of the offense charged.

Commonwealth vs. Smith, 161 Atl. 418;

Is a later case involving the question of hesitation in answering. This was the only basis for any claim of alleged admissions by Mr. Finch and Mr. Pearce. In this case one, Fisher, made a confession of setting fire to the building and stated that the defendant procured him to burn it for \$1000.00. The confession contained other allegations accusing the defendant. This was read to the defendant. The witnesses testified that the defendant remained silent between five and fifteen minutes after these accusations were read. The defendant then said Fisher was a "rat" and a liar. The court held that it was error to admit the confession because the defendant did deny the truthfulness thereof, that her conduct could not be described as an assent by silence to the accuracy of the statements in the confession. The case was reversed.

Commonwealth vs. Mazarella, 124 Atl. 63, is another case holding that complicity having been previously denied, subsequent refusal to deny could not be introduced.

This attempt to make admissions by the use of long and damaging recitals, particularly as to what

persons had been told on an investigation, or had found, or a friend had told them, and where the conversations result in a denial instead of an implied admission, are usually condemned as the foregoing authorities show.

In 3 Jones' Commentaries on Ev. (2d Ed.) 1063, Mr. Justice Field is quoted:

"Every admission upon which a party relies is to be taken as an entirety of the fact which makes for his side, with the qualifications which limit, modify, or destroy its effect on the other side."

In 22 C. J. 414, relating to admissions it is said:

"The triers of the fact * * * are not at liberty to disbelieve the self-serving part capriciously and without any reasonable grounds; and it has been said that they cannot believe part and disbelieve another part unless such parts are distinct and relate to different matters or facts."

The vice of introducing a statement made to a defendant that somebody else had said something and then trying to claim as an accusation what the other person said, is illustrated in *Risdon v. Yates*, 145 Cal. 210, 78 Pac. 641, where the situation is discussed, that a publisher of the Bible might be charged for printing "The fool hath said within his heart, 'there is no God,'" and by selecting only the words "there is no God" an indictment for blasphemy be sustained thereon.

Here we have a long recital to Mr. Fish in the nature of a report of investigation by Fisher Harris, a claim that a single item was passed over without Mr.

Finch's denying it "at that time", and that he did deny it when the recital was finished and he started to talk. In the case of Mr. Pearce, a long recital directed to and involving requested information and making one or two incidental references to Mr. Pearce. Naturally he would hesitate, to think about the matter of information requested, and again we have only the claim that he did not deny parts of this recital immediately, but did indicate his denial by asking, "Who says I am involved?" And then denied being involved. To introduce these recitals not accusing either of the offense charged, as well as the other similar recitals herein assigned and objected to, is clearly shown by the foregoing authorities to be prejudicial error.

TESTIMONY UNDER CLASSIFICATION (3):

The following discussion is in reference to the above testimony with relation to different acts or irregular conduct or conversations involving irregular conduct of the individual defendants themselves. It is our position that none of this, under the rule as to circumstantial evidence, tends to establish in any degree the existence of the agreement and conspiracy alleged and that it was also erroneously admitted, and was highly prejudicial.

This includes the testimony of D. L. Hays that he told Mr. Finch that gambling occurred in the licensed card rooms and that Mr. Finch said he knew it did and that he was not going to do anything about it and gave his reasons. The testimony of Mr. Ellett concerning the discussion as to the payment of fines

of book-makers so that the city could get the benefit of the fines. The testimony as to Mr. Finch that he didn't particularly object to vice but didn't want them to get the best of it, and also that on two or three occasions he ordered some operations to close, and these later reopened. That he told the witness Holt he was making the town too hot, and the removal of Holt, and the appointment and later removal of Record, and the later appointment of Thacker; and also Holt's testimony that Mr. Finch told him to see Rosenblum and some of the others who operated places where there were card rooms, at different times. And also the testimony of Holt in which he intimated that Mr. Finch had told him to quit making collections, but which simmered down to the testimony that Mr. Finch had told him to close some places up. The testimony of Fisher Harris that Mr. Finch had stated, also in 1938, on two occasions that he did not believe there was a payoff or had not heard of a payoff, and at the Alta Club that he said it was the first that he had heard of the payoff situation described and asked how long it had been going on, and also Mr. Finch's willingness to resign. This involves also the testimony of Mr. Hedman that he and Mr. Finch discussed in Mr. Finch's office the matter of an arrest by Hedman's department in Thacker's department, in which Mr. Finch listened but didn't say anything. Also the testimony of O. B. Record of a similar character, and discussion with Mr. Thacker in the presence of Mr. Finch concerning arrests made by him of book-makers. Also the testimony of O. B. Record that he saw Rosenblum, who was a

bondsman, talking with Mr. Finch three or four times but that he had no idea what they were talking about.

This, in brief, shows this class of testimony as to Finch.

There is also in this classification with relation to Mr. Pearce the testimony of Golden Holt that in June, 1937, he placed on Mr. Pearce's desk approximately \$500.00 in money which he had collected from houses of prostitution and that Mr. Pearce put it in a drawer of his desk on the side that Mr. Harmon was seated and asked the witness Holt if that was all of it. Also the later testimony of this witness that in September or October of 1937 that he again went to Mr. Pearce's office at the instruction of Mr. Harmon and there was asked by Mr. Pearce why he didn't collect from certain girls at certain residences; that the places mentioned by Mr. Pearce were on a slip of paper which he had.

This includes also the testimony of Mr. Harris that in his conversation asking for information and in the following telephone conversation, Mr. Pearce did not give him the information he demanded.

In this classification, as to Mr. Pearce, also is the testimony of H. K. Record that in a conversation in Mr. Pearce's office around the middle of April, 1937, when Mr. Harmon was present, Mr. Pearce stated that he had been responsible for having Record placed on the vice squad and proposed to him that he make collections, not from the houses of prostitution but from different gambling places.

From the testimony here as against these defendants one must wonder how,—after the exclusion of every hypothesis of innocence of the actual offense charged and under the law as laid down in *Terry vs. United States*, (9 C. C.) 7 Fed. (2d) 28, that it is not sufficient that a reasonable inference may be drawn supporting the charge, but that “circumstantial evidence * * * must be of such character as to exclude every hypothesis but that of guilt of the offense imputed to the defendant”—this evidence tends in any degree to support the conviction of the charge of the conspiracy and agreement between the defendants charged, to permit and allow the operations alleged.

It may indicate that Mr. Finch did not stop prostitution, or card gambling in licensed card rooms. There may be a difference of opinion as to whether prostitution could or should be stopped, but there is certainly no evidence tending in the slightest degree to show an agreement by him with the other alleged conspirators to permit and allow these operations.

As to Mr. Pearce, if the testimony of H. K. Record is believed it may be inferred that he attempted to enter into a smaller and different conspiracy, not to permit and allow operations but to extort money from some of them. However, this conspiracy never materialized, and it is not the one alleged. It may further be claimed that if the testimony of Holt be believed, it may be inferred that there was some arrangement between him and Harmon and Pearce in the latter part of 1937 to extort money from houses of prostitution. We say,

if Holt's testimony may be believed, because we shall contend that Holt was for this purpose an admitted accomplice and there was no corroboration of his testimony. In any event, this would be a smaller and a different conspiracy from that alleged and one not to aid prostitution but to hamper it by extortion, involving an entirely different agreement and offense.

We will not attempt to cite all the cases bearing upon the question of the inadmissibility and the insufficiency of this evidence as to different intimations of various wrong doing, but will cite some recent authority which we hope will help to emphasize our position.

Wilder vs. United States, 100 Fed. (2d) 177, (10 C. C.)

Is a case alleging a conspiracy to violate the National Prohibition Act. Judge Bratton reviews a lot of testimony such as we have in this case indicating definite wrong doing by the defendants, including the sheriff, and clearly showing extortion of money from people engaged in the sale of liquor. The opinion says:

“It was not possible under any conceivable view of the evidence for the jury to draw the inference or deduction that the conversation and contacts with them tended remotely to show concert of action to violate the revenue laws of the United States.”

* * * * *

“Viewed in the light most favorable to the Government, no substantial evidence was adduced to show that these appellants formed a conspiracy or aided others in carrying out one to violate the

laws of the United States relating to the manufacture, possession, or sale of intoxicating liquor.”

* * * * *

“Laying aside the question whether they acted together in extorting money from others for protection against prosecution under the laws of the state or otherwise participated in a concert of action to prevent the enforcement of such laws, there was no substantial evidence from which it reasonably could be inferred or deduced that they formed or furthered an agreement or understanding, express or implied, having for its object and purpose the violation of the laws of the United States.”

Weniger vs. United States, 47 Fed. (2d) 692 (9 C. C.):

Is a very pointed case on the point that evidence must point to the agreement and the participation with knowledge of the agreement alleged before a conviction can be had thereon. This case involved bootleggers and members of the Board of Trustees and police officer of the town of Mullan, Idaho, and also the County Sheriff Weniger and his deputy, Bloom. The sheriff and deputy appealed from the conviction. The offense charged was conspiracy to violate the National Prohibition Act. It was clearly violated and the town collected from it. It was shown that the sheriff mingled with, protected and patronized the violators and aided them against raids and on one occasion arrested a Federal agent and warned him to keep out of the county. The others did not appeal. The opinion reversed the judgment of conviction as against the sheriff and his deputy. It says:

“The crime of conspiracy (title 18 U. S. Code, Sec. 88 (18 USCA Sec. 88) consists in the combining or confederating of two or more persons with the purpose of committing a public offense. It is distinct from the offense intended to be accomplished as a result of the conspiracy and is complete upon the forming of the criminal agreement and the performing of at least one overt act in furtherance of the unlawful design.” (Citing authority).

“THE FAILURE OF A PERSON TO PREVENT THE CARRYING OUT OF A CONSPIRACY, EVEN THOUGH HE HAS THE POWER SO TO DO, WILL NOT MAKE HIM GUILTY OF THE OFFENSE WITHOUT FURTHER PROOF THAT HE HAS IN SOME AFFIRMATIVE WAY CONSENTED TO BE A PARTY THERETO.”

The opinion then comments that the United States Attorney “relies largely upon a showing of inaction on the part of the sheriff of the county and his deputy in enforcing the liquor laws as establishing connection of these appellants with the conspiracy charged”, and then points out that the evidence did show that the sheriff and his deputy knowingly permitted the violation of both the state and Federal law, and holds that this was not sufficient to connect them with the agreement alleged, their misconduct did not show that they were parties to the agreement alleged. On the question of admissibility of such evidence of wrongdoing, the opinion says :

“The cross examination of appellant Bloom respecting his knowledge of the prevalency of gambling in Mullan had no reasonable relation

to the charge being investigated * * *. The intimation that Bloom, as an officer, allowed other forms of law violation to be carried out without interference would tend naturally to create in the minds of the jury a prejudice against him and his superior officer. These facts were not relevant to the question as to whether the appellant had engaged in the conspiracy * * * .”

Donovan vs. United States, 54 Fed. (2d) 193:

Is a good case on the sufficiency of the evidence and of the necessity that it point to the guilt of the offense charged and not other wrongdoing.

Previously Wells and Beals were convicted under a liquor charge. Defendant Donovan and Wells and Beals and Rossiter, an attorney, and one Patrone were here charged with a conspiracy to conceal a person for whose arrest a warrant had been issued, by concealing his true identity and by obstructing and impeding the United States. What actually happened was that when it came to the sentence on a plea of guilty of a lesser charge, the defendants substituted Patrone for Wells and Patrone was sentenced, standing up with Beals who knew what the arrangement was. They were all convicted and the appeal is by Beals and Rossiter, the attorney who represented Wells and Beals and who was present and pleaded Beals and Patrone, who were sentenced. The court held that Beals knew of the arrangement; that it was not shown that he was instrumental in bringing about the agreement; that he had full knowledge and stood mute, and that this was not sufficient.

The main discussion then turned to Attorney Rossiter. Rossiter had taken Wells and Beals out of jail on bail, then for a period of time was away and did not represent them. Attorneys in another town arranged with the prosecutors for these two defendants to make the plea of guilty on a lesser charge. Rossiter returned and met Wells and Beals and Patrone at the court house with some clients of his in other cases. Wells did not go before the court, but Rossiter took in Patrone and Beals in this case and two or three other clients in other cases. When this case was called these defendants stood up and he represented them and they pleaded and were sentenced. The bail money put up by Wells was then withdrawn and Rossiter went to lunch in a hotel room with Wells and Donovan and the other attorneys and there it was testified that Rossiter said, "We have put it over." The bail money was there divided. The opinion reversed the case as to Rossiter, holding that he undoubtedly knew of this substitution but under the rule of evidence it could not be inferred that he was a party to the agreement to make this substitution. The opinion says:

"BEING AN ATTORNEY—AN OFFICER OF THE COURT—IT WAS UNQUESTIONABLY ROSSITER'S DUTY TO APPRISE THE COURT OF THE FRAUD. YET, IN REVIEWING HIS TRIAL, WE ARE NOT DEALING WITH OFFICIAL DUTY, PROFESSIONAL ETHICS, OR MORALS. WE ARE COLDLY CONCERNED WITH THE LAW TO BE APPLIED TO THE FACTS AND WITH THE PERMISSIBLE INFERENCES OF GUILT TO THE EXCLUSION OF EVERYTHING ELSE.

IF THE FACTS WERE EQUALLY SUSCEPTIBLE OF INFERENCES OF INNOCENCE—INNOCENCE IN RESPECT TO THE SPECIFIC OFFENSE FOR WHICH HE WAS ON TRIAL—THAT DISPOSES OF THE MATTER, *Graceffo v. United States*, (C. C. A.) 46 Fed. (2d) 852, 853. FINDING IN THIS RECORD NO SUBSTANTIAL EVIDENCE OF FACTS WHICH EXCLUDE EVERY OTHER HYPOTHESIS THAN THAT OF GUILT, WE ARE CONSTRAINED TO HOLD THE EVIDENCE DOES NOT SUSTAIN ROSSITER'S CONVICTION."

Commonwealth vs. Benz, 178 Atl. 390, (1935-Pa.):

A conspiracy was alleged to defraud the county by using gasoline procured on county orders for private use. The court reviews the showing in the evidence of irregularities, some use of public gas by individual defendants and their families, failure to enter orders, etc., and points out that some of the things done were improper and irregular. The opinion reversing the conviction says:

"The charge of conspiracy is easily made. Mere suspicion and possibility of guilty connections is not to be received as proof in such cases. * * * A foundation must first be laid by proof sufficient to establish the unlawful agreement between the parties. The connection being thus shown, the subsequent acts in pursuance of that agreement are then original evidence against them. But the subsequent acts are immaterial and are not competent until the agreement is established (citing authorities.) The gravamen of the conspiracy alleged lies in the agreement with

criminal intent to defraud the county; failure to prove the agreement with such intent defeats the charge (citing authorities). * * * *The Commonwealth thus failed to show any combination, certainly failed to prove an unlawful combination, and such failure defeats the conspiracy alleged.* * * * The facts and circumstances must not only be consistent with and point to the guilt of the accused; but they must be inconsistent with his innocence. (Citing authorities).''

Davidson vs. United States, 61 Fed (2d) 250, (8 C. C.):

'This case indicates wherein the evidence here is insufficient. The conspiracy charged was one between Davidson, Brummell and Weber, defendants, and two other individuals, Gillette and Latimer, to violate the National Motor Vehicle Theft Act and on second count to transport the stolen motor vehicle and on the third count to knowingly receive and store, etc., a certain car knowing it to be stolen.

The discussion on the appeal relates to Davidson and Brummell, constable and deputy constable in a town in Missouri. The car was stolen in Oklahoma, stored in Kansas City, Mo., and afterwards delivered by Gillette to Davidson and Brummell, who sold the car, as the opinion says, knowing that it was a stolen car. They told the buyer that it had been picked up and held for a long period of time and was being sold under an order of the Justice of the Peace to pay the charges, and they issued a constable's bill of sale so that the buyer could get official title. They also told the same story to the government inspector, and afterward admitted that it

was false and that they were selling the car for themselves upon the solicitation of Gillette who had stated that it was a hot car stolen from an Indian. The opinion, reversing the conviction, says:

“Of course, it is apparent that Davidson and Brummell knew that they were handling a so-called “hot” car, and that they adopted this plan of issuing a constable’s bill of sale in order to sustain apparent title in the hands of the purchaser. The conclusion is irresistible that both Davidson and Brummell prostituted their official position as officers in furtherance of a scheme to dispose of a car that they knew to be stolen.”

* * * * *

“One may suspect or conjecture that Davidson and Brummell were acting as “fences” for stolen cars transported in interstate commerce in pursuance to some conspiracy, but the evidence will not justify such a conclusion. *The evidence would warrant the view that these defendants, Davidson and Brummell, conspired with Gillette to sell a stolen car, but that conspiracy is not the one charged in the indictment.*”

* * * * *

“The subterfuge employed by these defendants in disposing of this car by issuing a constable’s bill of sale, and the false statements made to the officers with reference to the matter, strongly infer that they knew that they were handling a stolen car; but such circumstances cannot supplant the absence of testimony or circumstance connecting these defendants with the conspiracy charged in this indictment.”

Young vs. United States, 48 Fed. (2d) 26:

Is a case in point in the matter of separate mis-

conduct of defendants in a conspiracy case, even though their conduct may relate to the charge, as not proving the agreement.

Here six defendants were charged and conveyed of a conspiracy to possess and sell utensils for bootlegging and also substances, including corn chops, sugar, and other materials. The Government proved that two of them sold wholesale these things and delivered them to two other defendants who had adjoining stores with an entrance between, and that these two defendants sold them to customers for use, the customers including the other two defendants convicted. The court points out that no connection was shown between the customers and the wholesale sellers and no agreement as alleged shown between any of them. The opinion says.

“The conviction of the sellers cannot be sustained on the ground that they had knowledge of the intention of the purchasers to use the sugar and other articles in connection with the unlawful manufacture of liquor. One cannot be held as a member of a conspiracy upon proof merely that he had knowledge of, or negatively acquiesced in, a crime that was about to be committed; but, in order to fasten guilt upon one accused of being a coconspirator, it is necessary to prove that he actively participated in the conspiracy charged. Bishop’s Criminal Law (9 Ed.) Sec. 633; 5 R. C. L. 1065; *McDaniel v. United States*, (C. C. A.) 24 F. (2d) 303. There was no evidence that Lee, Franklin, and Campbell were acting in concert; for all that appears, each was acting only for himself. The conspiracy charged was not proved against any of the appellants.”

12 *Corpus Juris* 543, *Para. 5, Sec. 2*:

“To constitute a conspiracy there must be unity of design and purpose, *for the common design is of the essence of the conspiracy.* The confederating together is so necessary as a constituent element of the crime, that it has been held that several persons may, simultaneously, actually do, without incurring liability to punishment, that which if it were the object of a pre-concerted design, although not done or attempted, would render the participants liable to indictment for conspiracy; *nor will evidence that each of several defendants acted illegally or maliciously with the same end in view support a charge of conspiracy, unless it appears that such acts were done pursuant to a mutual agreement.*”

12 *Corpus Juris* 551:

“The overt act, when essential to a conviction of conspiracy must be a subsequent independent act following the conspiracy and must be one committed to effect the object thereof.”

United States vs. Corso, 10 *Fed. (2d)* 604, (9 C. C.):

It was held that evidence that one accused cashed a check obtained from the victims by others who were engaged in and convicted of what was called an “eye fraud”, and also deposited checks for collection in a bank which forwarded the items through United States mails, was insufficient to sustain a conviction against him for conspiring with others to use the mails to defraud, in the “absence of evidence that accused had knowledge of fraudulent scheme at time he cashed check

or that it was a part of a scheme of others that mails should be used.”

United States vs. Grossman, 55 Fed. (2d) 408:

The charge was that Grossman as chief of police of the City of Long Beach, and other persons, agreed to give protection to violation of the prohibition law. The court, after discussing the elements of conspiracy, said:

“However, before the overt act can be taken into consideration, it must be found that the defendants were parties to the conspiracy. The overt act must be entirely independent of the conspiracy. It must not be one of a series of acts constituting the agreement, but it must be a subsequent, independent act following a complete agreement or conspiracy and tend to carry into effect the object of the original agreement.”

Turcott vs. United States, 21 Fed. (2d) 829, (7 C. C.):

Here several persons were charged with conspiracy to violate the Federal Prohibition Law. The opinion says:

“The law is well settled that active participation must be established. Mere knowledge of illegal acts of others is not sufficient.”

Langer vs. United States, 76 Fed. (2d) 817, (8 C. C.):

Is a case reversing a conviction for conspiracy to corrupt the administration of certain laws of Congress relative to relief funds. It was claimed that the defendant political party workers agreed to a plan to compel and coerce clerks and employees engaged in disburs-

ing the relief funds to contribute to the political workers and their political funds. The opinion makes a distinction that we have attempted to make between substantive offenses and a mere charge of conspiracy. The opinion says:

“The gist of the offense is *the alleged conspiracy to obstruct the administration of a government function*. It is not claimed that the overt acts charged in themselves constitute substantive offenses. Unless there was such a conspiracy the conviction of appellant cannot be sustained. Whatever we may think of the ethics or propriety of the practice employed by appellant to secure funds for political purposes, it is not a matter of concern to the government unless some lawful function was thereby obstructed. * * *

* * * So far as the direct evidence of *any plan of conspiracy* for the collection of funds is concerned, it was confined to assessment of state employees.”

The government contended that a conspiracy may be inferred from the overt acts of the parties, it being shown that one of them solicited clerks in the Emergency Relief office. *But the court said, that granting that this was done, it was no proof of an agreement to do this.*

People vs. Brawn, 88 Pac. (2d) 728:

Is cited here more particularly upon the point that the introduction of these alleged matters of misconduct by individual defendants separately as evidence against all, not only did not tend to sustain the conviction but was prejudicial error. The case has a good discussion on corroboration of an accomplice.

On the point now under consideration and under the indictment for robbery, participation of different defendants in different robberies was introduced. Not all of the defendants participated in these, so that it could not be for the purpose of showing association between the alleged conspirators. The appellant was shown to have participated in one.

“Timely objections and appropriate motions to strike were made on behalf of appellant, and this testimony should have been limited by the court in its application to the defendants who participated in the respective robberies, and therefore should have been excluded as to the appellant, except in the Dairy case, in connection with which there was competent evidence of appellant’s participation.

“That this line of testimony was prejudicial to appellant cannot be questioned and is evidenced by the fact that Mrs. Ann Groves, one of the defendants whose participation in the Beehive Cafe robbery was akin to that of appellant, was acquitted, while the latter was convicted. Moreover, and in connection with this type of evidence, the court if a retrial is had should be careful to instruct the jury that the defendants are on trial solely for the offenses charged in the information, to-wit, murder and attempted murder, alleged to have been committed on March 21, 1938, as set forth in the information, and are not on trial for conspiracy, nor for any offenses other than the ones charged in the information;”

TESTIMONY UNDER CLASSIFICATION (4):

We come now to the offer of declarations by some person with reference to a defendant. It is our posi-

tion that any such declaration was inadmissible until the conspiracy was otherwise established, and that such evidence could in no way be admitted to establish it.

This evidence was introduced by witness who testified that one of the defendants, or a third person, had made a statement to the witness with relation to another alleged defendant. Mr. Hunsaker testified that Mr. Erwin had said, "I now have my chief of police" and that he might not be getting his full split from the chief and that they couldn't get the chief because he didn't make the collections. Holt testified that Harmon in 1938 made a statement to him that Fisher Harris and Mr. Lee had accused Mr. Pearce of being involved in collections. The witness Kempner said that Abe Stubeck had told him that Harmon was dividing the money collected with Erwin and his crowd. There was also an intimation in the testimony of H. K. Record that Mr. Pearce claimed he was authorized by Mr. Erwin to arrange for making collections from gamblers.

Assuming that these had related to the offense charged, which they did not, still admission of this character of evidence must rest upon the theory of agency. As stated by the cases, a conspiracy is a partnership in crime, and a statement of one cannot be used against another until the relation is established. It goes without saying that the statements alleged to have been made by Mr. Thacker to Fisher Harris about Mr. Finch are definitely out because Thacker was acquitted of being a conspirator.

We will now discuss this question of foundation,

and the cases go both to the statements of alleged conspirators and also to the statements of third persons about alleged conspirators, and also to the conduct of alleged conspirators as being binding upon others. Some of the authorities therefore overlap classification (3), above.

16 *Corpus Juris* 647, para. 1287:

“PROOF OF CONSPIRACY — a. NECESSITY. In order that the acts or declarations of an alleged conspirator may be admissible against an alleged co-conspirator the existence of the conspiracy must be shown; it also must be shown that the defendant against whom the evidence is offered was a party to such conspiracy. the same rule applies to acts and declarations of one charged as an aider or abetter of defendant.”

The cases on this are too numerous to cite in full. The principle is so well established that we will confine ourselves to some of the pertinent authorities.

Not only can such statements not establish the agency or the conspiracy, but if the same were established, such statements and conduct of alleged conspirators can only be introduced as are made or done in furtherance of the conspiracy. In other words, they are not binding unless within the scope of the agency or authority.

Witherow vs. Mystic Toilers, 130 Pac. 58 (Ut. 1913):

“Of course agency cannot be shown by declarations of the agent. And, before declarations

of the agent may be received as admissions against his principal, the agency and the authority of the agent *must first be shown*. Here neither was shown. Nor is it true, as the court seems to indicate in the charge, that declarations of an agent to show agency, go merely to the question of sufficiency of the evidence to show such relation, and hence may be considered for such purpose, in connection with other evidence. The authorities, we think, are to the effect that *such evidence is incompetent for such purpose, and that the fact of agency must be established by evidence dehors the declarations of the agent.*"

Looney vs. Bingham Dairy, 282 Pac. 1030 (Ut. 1929):

Is a case in which it was held that admissions by an alleged partner were improperly admitted because not made in pursuit of any partnership business or while he was acting for or on behalf of the partnership. the opinion says, at page 1033:

"We think the contention is well founded. The rule is that the admissions of one copartner in respect to the joint business are competent against the firm and its members, but to render such admissions competent he must be acting as a partner about a partnership matter, or the admission must be made in relation to matters within the scope of the partnership. 1 Ency. Evidence p. 579; 22 C. J. 403; 1 Elliott on Evidence 369; 2 Jones, Comms. on Evidence (2d Ed.) 1712. The rule is well illustrated and stated in the case of *State v. Salmon*, 216 Mo. 466, 115 S. W. 1106."

Smith vs. State, 171 S. E. 578:

In this conspiracy case conversations with various

defendants and others were admitted, and the case was reversed because the conspiracy had not been otherwise established. It also descusses the point that some of the alleged admissions were after the conspiracy had ended. The opinion says:

“declarations and acts of individuals cannot be introduced against the defendant for the purpose of proving a conspiracy, but that such must be shown aliunde to render such declarations admissible as declarations of co-conspirators, and quoting from Wall v. State, 152 Ga. 318, 112 S. E. 142, 146: ‘No man’s connection with a conspiracy can be legally established by what the others did in his absence and without his knowledge and concurrence.’ (Citing U. S. v. Babcock, 24 Fed. Cas. 1913, No. 14487.)

The court further stated:

*“The Supreme Court of California said: ‘To admit such declarations and such hearsay testimony in proof of the conspiracy itself, would in civil matters “put every man to the mercy of rogues.” * * * and in charges of criminal conspiracy, render the innocent and helpless victims of villainous schemes, supported and proved by the prearranged and manufactured evidence of the promoters thereof.’ People v. Irwin, 77 Cal. 494, 20 P. 56. Again, it has been said: ‘A species or form of evidence which is in its nature inadmissible, unless some prior or other fact is proved, cannot be received to establish the fact proof of which is an indispensable condition of its own admissibility.’ Cuyler v. McCartney, 40 N. Y. 221; Id. 33 Barb. 165. The criminal conspiracy cannot be shown by declarations of alleged conspirators, not in the presence of, and without the knowl-*

edge of, others sought to be bound thereby, but must be established by aliunde proof sufficient to establish *prima facie* the fact of conspiracy between the parties.”

State vs. Hopkins, 219 Pac. 1106 (Mont.):

Here the sheriff Hopkins, Wilson, the chief of police, and Bennett, a pool hall operator, were involved. Bennett contracted with a boot-legger, Barroch, to buy \$1600.00 worth of liquor. The boot-legger, who testified for the state, drove the liquor around back of the hotel near the pool hall where he met Bennett. Hopkins and Wilson were there with guns and they took him, along with his party, and locked them in jail; they also took the liquor. They kept the liquor and turned the prisoners loose and told them to get out of town and never issued any complaints against them. Bennett went with them to the jail. The sheriff made no return on the liquor seized. Conversations between Barroch and Bennett were introduced involving the sheriff and chief of police. The opinion said:

“It is an elementary general rule that a defendant in a criminal case cannot be bound by conversations between third parties not in his presence, hence the rulings permitting Barroch to testify to the conversations he had with Bennett were *prima facie* erroneous. An exception to the general rule, as well established as the rule itself, permits evidence of the acts and declarations of a coconspirator done or made in furtherance of a common design to be admitted against all the other parties to the conspiracy, whether the acts or declarations were done or made in their presence or with their knowledge,

provided only that they were done or made during the life of the conspiracy (State v. Allen, 34 Mont. 403, 87 Pac. 177), but the evidence of such acts of declarations is admissible only after proof of the existence of the conspiracy, (Subdiv. 6, para. 10531, and para. 11977, Rev. Codes 1921; State v. Dotson, 26 Mont. 305, 67 Pac. 938).

“There is not any pretense here that the existence of a conspiracy between Hopkins, Wilson and Bennett had been shown at the time the objectionable evidence was admitted; and the only evidence introduced at any time tending to prove the existence of such a conspiracy is that Bennett contracted to purchase the liquor from Barroch; that he was present when Hopkins and Wilson took the liquor from Barroch; that he accompanied Wilson, Barroch, and Harrold to the city jail, and was present there when Barroch and Harrold were released from custody.

“A conspiracy is constituted by an agreement, and is a partnership in criminal purposes. United States v. Kissel, 218 U. S. 601, 31 Sup. Ct. 124, 54 L. Ed. 1168. While it is not essential that the agreement between the parties should be formal, it is necessary that their minds meet understandingly, so as to bring about an intelligent and deliberate agreement to do the acts. 12 C. J. 544.”

Thomas vs. United States, 57 Fed. (2d) 1039:

Is a case which so clearly states the principles here contended for, and cites the authorities in support thereof in the following three paragraphs, that we quote the opinion and call the attention of the court specifically to each separate paragraph quoted:

(1) "To render evidence of the acts or declarations of an alleged conspirator admissible against an alleged co-conspirator, *the existence of the conspiracy must be shown and the connection of the latter therewith established.* Pope v. United States, (C. C. A. 3) 289 F. 312, 315; Kelton v. United States, (C. C. A. 3) 294 F. 491, 495; Isenhouer v. United States, (C. C. A. 8) 256 F. 842; United States v. Goldberg, 7 Biss. 175, Fed. Cas. No. 15,223; United States v. McKee, 2 Dill. 551, Fed. Cas. No. 15,686; Burns v. United States, (C. C. A. 8) 279 F. 982, 986; Dolan v. United States, (C. C. A. 9) 123 F. 52; Stager v. United States (C. C. A. 2) 233 F. 510.

(2) "Declarations made by one conspirator to another *are not competent evidence* to establish the connection of a third person with the conspiracy. Kuhn v. United States, (C. C. A. 9) 26 F. (2d) 463; United States v. McKee, *Supra*.

(3) "The *existence of the conspiracy* charged cannot be established against an alleged conspirator by evidence of the acts or declarations of his alleged co-conspirator done or made in his absence. Hauger v. United States, (C. C. A. 4) 173 F. 54, 57; United States v. Richards, (D. C. Neb.) 149 F. 443; United States v. Goldberg, *supra*, United States v. McKee, *supra*."

Stager v. United States, 233 Fed. 510 (2 C. C.):

Is a leading case upon the questions under discussion. Stager was employed as an examiner of merchandise at the appraiser's stores in the Customs House in New York. He and his clerk were the only ones who had access to the invoice valuations and the appraisals. He was accused of conspiring with certain dealers in

imported quills and of defrauding the Government by colluding with and favoring the firm of Sciamia & Co. Evidence was introduced that he condemned the quills of others and suggested that orders for such may be filled by this particular firm. Silva, who was another dealer, was also alleged to be in the conspiracy and it was found that Silva had confidential information from the defendant Stager, which Silva disclosed to Sciamia. Another importer of quills claimed that Stager objected to him, that he was bringing in quills too cheap. Another dealer, as stated, had had his quills condemned.

When a subpoena was served upon Silva to appear before the grand jury Stager was followed and he went to Silva's place. The officers procured letters from Silva to Sciamia, which were very damaging, and Stager did not record his visit to Silva immediately in a book, as was the custom when he visited importers.

"The court said that the conduct of Stager in connection with Silva certainly aroused suspicion. The letter of Silva to Sciamia was admitted and this was very damaging, reciting among other things that "the two hundred dollars to Stager are well placed and we will have to give him more at the end of the year, if he continues to keep us informed properly."

The opinion says:

"When a conspiracy is once established acts and admissions of any one of the conspirators in pursuance of the conspiracy and while it is continuing, are admissible against the others upon the theory that the conspirators are agents for one another in the common enterprise. Comm.

Mutual Life Ins. Co. v. Hillman, 188 U. S. 218, 47 L. Ed. 446. * * *

“But the preliminary question whether sufficient evidence of a conspiracy has been adduced *must always be answered by the court in the affirmative, or the general rule of evidence excluding hearsay will render an admission of one of the conspirators inadmissible against the others.* Inasmuch as we do not think the existence of a conspiracy was established these letters were wholly incompetent and inadmissible as against Stager.”

The opinion then recites that the evidence outside of the letter was not sufficient to establish the conspiracy, and then with relation to the letter, said:

“If such a letter is competent, a conspiracy could be proved by the mere letter of one man that another was implicated. The very object of the rule against hearsay was to prevent a jury from being influenced by statements of persons who could not be subjected to cross-examination.”

* * * * *

“The fact is, the incompetent letters were the basis of the judgment of conviction, which for the foregoing reasons must be reversed.”

State vs. Paden, 202 N. W. 105 (Ia.):

This is a good case where conduct attributed to some of the conspirators in the nature of overt acts was admitted over objection without establishing the agreement between the three defendants charged, and without connecting the appellant Paden with the overt acts.

The case arose out of industrial trouble between the operators and the manager of a theatre. A stink bomb

was exploded in the theatre and simultaneously in another theatre electric light and power wires were cut, etc. This evidence after being received was stricken by the court. The opinion said:

“A conspiracy necessarily involves two persons, and neither the nature nor the essence of the crime can be established by the acts or declarations of one conspirator in the absence and without the knowledge and concurrence of the other. * * * The competency of such testimony is dependent on a proper foundation having been laid. In other words, a *prima facie* case of conspiracy must be established.”

The court then says that the order of evidence to some extent is in the discretion of the trial court, but, however, the better practice is to require a *prima facie* showing of conspiracy before receiving such evidence. citing 35 L. R. A. (NS) 1084). The opinion then says that if such judicial discretion in the order of evidence is abused, “we will not hesitate to reverse”.

The opinion then says that the evidence received and stricken was “toxic in character” and it is beyond human possibility that the mind of the jury was not influenced thereby and that the striking of the evidence did not cure the prejudice resulting from its improper admission.

State vs. Carlson, 22 Pac. (2d) 143 (*Ida.*):

The defendants were charged with conspiracy to commit forgery. In an attempt to prove the conspiracy, statements of Carlson, one of the alleged conspirators, made when the other defendant, Bentley, was not pres-

ent were offered and received in evidence. The court held that it was not admissible.

“unless the evidence establishes the fact that the appellants were acting in concert in the commission of the crime charged. *We do not consider the evidence sufficient to establish such fact.* All of the evidence tending to connect Bentley with the crime is sufficient to create a strong suspicion of guilt, but that is not sufficient to support conviction. The evidence was circumstantial, and, in order to sustain a conviction based solely on circumstantial evidence, ‘the circumstances must be consistent with the guilt of the defendant and inconsistent with his innocence, and incapable of explanation on any other reasonable hypothesis than that of his guilt.’ *Broshears v. State*, 17 Okl. Cr. 192, 187 P. 254, 256.

‘If the evidence can be reconciled either with the theory of innocence or of guilt, the law requires that the theory of innocence be adopted.’ *State v. Marcoe*, 33 Idaho 284, 193 P. 80; *State v. Burke*, 11 Idaho 420, 83 P. 228; *State v. Sorenson*, 37 Idaho 517, 216 P. 727.”

People vs. Linde, 20 Pac. (2d) 704, (Cal.):

Here the defendants were charged and convicted of burglary. Tires and tubes and money were stolen and found in the possession of one defendant. This defendant pleaded guilty and implicated the other defendant, Linde, as a participant in the burglary. The question arose on his evidence that he was an accomplice and must be corroborated.

They then introduced a letter written by the witness involving the other defendant, which letter was not mailed. The opinion reversing the case, said:

“The difficulty which arises in attempting to apply the rule to the proffered evidence is that in order to make such evidence admissible *there must be proof of the existence of the conspiracy. Manifestly, the declaration of co-conspirator may not be used to establish the fact of the existence of the conspiracy, for the declaration or statement is pure hearsay unsanctified by the solemnity of an oath and incapable of being subjected to the test of cross-examination.* People v. Double, 203 Cal. 510, 265 P. 184; People v. Zimmerman, 3 Cap. App. 84, 84 Pa. 446. The obvious danger of permitting evidence of this character to be received is that *the jury might accept it as proof of the existence of the conspiracy and then use the same evidence to establish a defendant's guilt.* People v. Irwin, 77 Cal. 494, 20 P. 56.”

The opinion then reviews the evidence independent of that of the accomplice and the letter showing that the two were in the company of each other on the afternoon and evening of the burglary and that thereafter the defendant who did not testify was looking for the other defendant, and said that these circumstances furnished no proof of conspiracy and the case was reversed.

State vs. McGonigle, 258 Pac. 16, (Wash.):

The defendant named was charged with others with conspiracy to violate the Alien Land Law by combining with Japanese land owner to permit the control, possession, etc., of land contrary to law. It was contended that the evidence was sufficient to sustain a conviction, and several admissions and declarations made by the individual parties were relied upon. The opinion said:

“It is true, there need be no evidence of a formally expressed agreement between the alleged conspirators. Conspiracies are seldom susceptible to such proof. But if there is evidence, circumstantial even, of a meeting of the minds and unity of design and of cooperative conduct which could only mean that there was such an agreement, that would be sufficient foundation for the admission of evidence of subsequent independent acts and declarations of each of the parties as against any one of them.” (Citing authorities) ,

The court then quotes with approval:

“The evidence tending to show a conspiracy must be outside of and in addition to the declarations of the co-conspirators whose declarations are sought to be introduced.”

16 *Corpus Juris* p. 652, Sec. 1291:

“DEGREE OF PROOF REQUIRED. Prima facie proof of the existence of the conspiracy is sufficient to let in evidence of the acts or declarations of a co-conspirator, and indeed there is authority for the view that slight evidence of conspiracy is sufficient. But in order to warrant the consideration of such evidence by the jury a higher degree of proof is required, and it is necessary that the existence of the conspiracy be established fully, or shown clearly, and indeed it has been held that such evidence can be considered only where the conspiracy is established beyond a reasonable doubt.”

Territory vs. Turner, 37 *Pac.* 368:

Defendants were charged with conspiracy to engage in butchering cattle for sale and not retaining in pos-

session the hides or brands or earmaks contrary to the Penal Code. Evidence was introduced of a conversation by one Taylor and Lyall regarding one of the defendants offering to sell the witness an interest in the cattle bought by working together and branding everything they could, and thus making up a herd. The court said that the statement was in the absence of such defendant and that no evidence had been introduced showing that a conspiracy had taken place of which he was a member, and the evidence could only serve to prejudice the jury.

The court further stated that it is a rule of ancient standing that a conspiracy should first be established before the acts and declarations of a co-conspirator can be admitted in evidence against the other. The court cited *Loggins v. State*, 8 Tex. App. 434, and quoted as follows therefrom:

“ ‘ordinarily the mere proof that two or more parties were actually engaged in the commission of a crime *does not lead to the necessary inference that, days or weeks or months before its commission, they had mutually undertaken and agreed to its commission.* * * * It would be a doctrine fraught with mischievous results if the mere proof of an actual commission of a criminal act by two or more parties was sufficient, in itself, to justify the conclusion that a conspiracy has been formed, a week or a month before, by the same parties, to commit the particular offense in question.’ ”

State vs. Roach and O'Donnell, 57 Pac. 1016,
(Or.):

Defendants were charged jointly with stealing a cow and a calf and tried on the theory of conspiracy. Roach had possession of the stolen cow and calf and thereafter sold the calf to the butcher. The cow, which was left in the possession of O'Donnell, followed the calf and was returned by Roach to his place. O'Donnell went to the butcher and told him that Roach wanted the calf butchered right away. O'Donnell was at Roache's place when he drove the calf to the slaughter house. The question arose over the statement of O'Donnell that Roach wanted the calf killed right away. The opinion says:

"But it is equally elementary that a foundation must first be laid by proof aliunde sufficient to establish prima facie the fact of conspiracy or common design, and in this case there was no such proof."

* * * * *

"It is also claimed that the admission of the evidence, if error, was harmless, but the entire theory of the prosecution, seems to have been that the defendant and O'Donnell were acting together in the commission of the crime, and the ruling of the court in the admission of the evidence over the objection of the defendant, and its subsequent refusal to strike it out, or instruct the jury to disregard it, was tantamount to advising them that this theory was, at least prima facie, supported by the testimony. In this view the acts and declarations of O'Donnell were very damaging evidence as against the defendant. It follows that the judgment of the court below must be reversed, and a new trial ordered."

The following cases indicate the error of the court

in admitting evidence under classification (4), of statements concerning the alleged conspirators here made by other alleged conspirators, after the conspiracy is alleged to have ceased. This refers to such statements as the one claimed to have been made by Mr. Harmon to Mr. Holt concerning Mr. Pearce having been charged by Fisher Harris and Mr. Lee, and also to alleged statements by Mr. Thacker with relation to Mr. Finch.

The foregoing cases establish the rule that to be within the scope of agency any act or statement must be in furtherance of the alleged conspiracy. The theory with relation to statements made afterwards is that they could not be in furtherance of the conspiracy and therefore could not be binding upon any other alleged conspirator. It is the simple rule excluding acts or statements of agents after their agency has ceased.

State vs. De Angeles, 269 Pac. 515 (Ut.):

This case seems to settle this question. It was an arson case. The day after the fire the sheriff had a conversation with two of the defendants in which one of them stated in the presence of the other that "the reason he and Mike were at the store at the time of the fire was at the request of John De Angeles", the other defendant. This court reversed this case for this error, and citing *People vs. Farrell*, 11 Utah 414, 40 Pac. 703, quoted the following:

" 'On the separate trial of one of two who had been indicted together for larceny, it is a fatal error to admit against the one on trial the acts and statements of the other made after the crime had been completely committed.' "

The rule or principle of law there stated has been recognized and applied by this court in at least three subsequent decisions; *State vs. Gillies*, 40 Utah 541, 123 P. 93, 43 L. R. A. (N. S.) 776; *State v. Inlow*, 44 Utah 485, 141 P. 530, *Am. Cas.* 1917 A., 741; *State vs. Barretta*, 47 Utah 479, 155 P. 343."

* * * * *

"The admission of the sheriff as to the conversation had on the morning following the fire with Mike De Angeles and Nick Galanis, under the authorities, must be held to be error. As the evidence so erroneously admitted was an important part of the state's case in its efforts to establish a conspiracy and in this way to connect the appellant with the offense charged, the error must be held to be prejudicial."

Feder vs. United States, 257 *Fed.* 694, 5 *A. L. R.* 370:

Here a conspiracy to defraud the United States by procuring the unlawful acceptance in the war department of barracks bags which were not properly made was charged. The defendant Feder took the stand and the prosecutor demanded whether or not she had made certain admissions to a representative of the United States, which admissions or declarations involved the other defendants and tended to prove the existence of the conspiracy. She denied making some of the statements, whereupon the prosecution produced a stenographic transcript of the statements and the statements were admitted in evidence against both of the defendants. The court said that at the time these statements were made by the witness Feder the conspiracy had ended.

The attorney for the defendant Polsky requested the court to instruct the jury that none of these statements made by the defendant Feder were evidence against the defendant Polsky and must not be so considered. The opinion said:

“It is true that the established rule of *Logan v. United States*, 144 U. S. 309, 36 L. Ed 445, 12 Sup. Ct. Rep. 617 (recently reiterated by this court in *Erber v. United States*, 148 C. C. A. 123, 345 Fed. 228), was not specifically brought to the attention of the trial judge when these requests were proffered. But that rule, to the effect that only those acts and declarations of a co-conspirator are admissible against his fellows *‘which are done and made while the conspiracy is pending and in furtherance of its object’*, was plainly violated in a way as plainly prejudicial to Polsky. This conspiracy had come to an end, and when that occurred, ‘whether by success or by failure, the admissions of one conspirator by way of narrative of past facts are not admissible in evidence against the others.’”

State vs. Goyens, 204 Pac. 704 (Kan.):

An automobile was stolen by a hired man and taken to the farm of the defendant Goyens, who there assisted in getting a mechanic to put it into shape and in concealing it. The hired man was arrested in Colorado and there made statements to the sheriff that “his boss told him to drive the car out there”, and that he drove the car out there for his boss. The court reversed the case on account of the admission of this testimony. The opinion said:

“The Bogue Case followed the case of *State v. Johnson*, 40 Kan. 266, 19 Pac. 749, where Mr.

Justice Johnston, speaking for the court, said in the opinion:

‘To make the declarations of one conspirator evidence against the others, they must be made in furtherance of the common criminal design * * *. When the conspiracy has * * * been consummated, the admission of one in the absence of the other conspirators that he and others participated in the crime, is a mere narrative of a past occurrence, and can affect only the one who makes it.’

See, also, *State v. Rogers*, 54 Kan. 683, 39 Pac. 219.

In the *Rogers Case* it was urged that the error was unimportant because there was an abundance of competent evidence to sustain the guilt of the defendant. In the opinion it was said:

‘Can we assume that the jury gave credit to the testimony of one, or of a number of witnesses, rather than to another? By what process of reasoning can we reach the conclusion that the conviction of the defendant is really based on the competent testimony rather than the incompetent?’ Page 695 of 54 Kan., page 224 of 39 Pac.”

Saunders vs. State, 244 Pac. 55:

Was a case where evidence of misconduct other than that charged was admitted in evidence. It was conduct on the part of one of the alleged conspirators. This was held error, and the opinion says:

“The evidence of acting together is confined to the offense charged in the information. The law is well settled that, where the guilt of one of several defendants jointly charged with a felony is sought to be established by evidence of conspiracy between him and the others, evidence as

to acts and statements of others must be confined to such acts and statements *done and made at times when the proof permits a finding that a conspiracy existed*. Declarations or acts made or done prior to the formation of a conspiracy or after its termination, *and not in furtherance of any plan between the parties*, is not admissible in evidence in the separate trial of one of the parties. *The admission of acts of the codefendants at a time prior to any connection of the defendant, under the proof, with his codefendants, was erroneous.*''

Assuming that the alleged statement of Mr. Harmon relating to Mr. Pearce, and testified by Mr. Holt, might have been used as against Harmon in some way, and it is impossible to see how this might be done in view of the fact that the statement had no tendency to prove the conspiracy alleged, and was afterward. Harmon was dead and was not being tried and so this statement had absolutely no place in the record. It was a damaging statement in view that it charged Mr. Pearce with having been accused by the city attorney and by a prominent citizen, Mr. Lee, who was then a member of the City Commission. Its admission was without any excuse and it was clearly prejudicial under the authorities cited.

People vs. Walther, 81 Pac. (2d) 452:

Is a recent case somewhat in point here, and particularly so with relation to the alleged statements of Mr. Thacker concerning other defendants being entirely out of the case.

This case was an alleged conspiracy to violate the

Corporate Securities Act. The case depended upon the testimony of one of the alleged conspirators. The court, in discussing the contention of the state that one of the conspirators, Webb, might be held under one of the counts of the indictment, said that to be held under that he must be guilty of the sale of the security involved in that indictment, and that he could not be so held because by being acquitted on another count of the indictment "he was formally acquitted of that very charge by the same jury at the same trial."

Mr. Thacker was acquitted of being a conspirator by the same jury at the same trial. This point is also involved in the later discussion as to the acquittal of Mr. Pearce and Mr. Erwin.

The case now under consideration discusses the point that

"It is unsatisfactory that the conviction of one of two conspirators to commit a crime should depend so completely as does the present case upon the testimony of the co-conspirator, * * * such evidence is open to suspicion lest the temptation to thus escape a threatened penalty of law may result in unreliable testimony."

This feature of the case involves the later discussion of the testimony of Mr. Holt, upon whose testimony the case of the state here largely rests.

The opinion then discusses the testimony of Webb, the conspirator who turned state's witness, and particularly statements made by him with relation to the other defendants, and said:

“It is fundamental that the fact of the existence of a conspiracy to commit a crime must first be established before the declarations of a co-conspirator with relation thereto become competent or admissible. When such declarations are prejudicial, as they certainly are in the present case, their admission in evidence necessitates a reversal of the judgment. Code Civ. Proc. Sec. 1870, subd. 6; *People v. Doble*, 203 Cal. 510, 517, 265 P. 184; *People v. Linde*, 131 Cal. App. 12, 19, 20 P. (2d) 704; 5 Cal. Jur. 517, Sec. 21.”

Before proceeding to attempt to show the court that principal portions of the evidence herein should be eliminated on additional grounds, we summarize briefly as to classes (1), (2), (3) and (4).

(1) The evidence as to operations under class (1) are eliminated by the instruction of the court, the law of the case, as well as under the authorities cited on the rule that it must point directly to the guilt of the offense charged and be inconsistent with any other hypothesis.

(2) That the evidence under class (2) as to alleged admissions involves no admission of the offense charged and was inadmissible.

(3) That the evidence of misconduct by separate defendants under class (3) did not tend to prove the agreement and was inadmissible and should be eliminated.

The rule is well settled, and we will not go into a recital of the cases that even where other offenses may be shown in order to prove a course of conduct to es-

establish criminal intent, that the other offenses must be established at least *prima facie*. There was no question of criminal intent here. If an agreement were proved it would carry its own intent. So that this evidence served only the purpose of confusing and prejudicing the jury and preventing the defendants from having a fair trial.

The leading Utah case upon the proposition that if other offenses are material they themselves must first be established at least *prima facie*, is

State vs. Judd, 279 *Pac.* 953:

(4) That the authorities establish that statements by one defendant, or by third persons as to another defendant, cannot be admitted for the purposes of proof of the existence of the agreement or of the connection of any person so mentioned with the conspiracy. And again these statements did not go to the offense charged.

The foregoing show the errors in admission of evidence under assignments 14 (Ab. 336), and 15(c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o), (p), (q), (Ab. 336-344), (w), (x), (y), (z), (aa), (bb), (cc), (dd), (Ab. 347-350), (jj), (kk), (ll), (mm), (nn), (oo), (pp), (qq), (rr), (ss), (tt), (uu), (vv), (ww), (xx), (yy), (zz), (aaa), (bbb), (ccc), (ddd), (eee), (fff), (ggg), (hhh), (iii), (jjj), (kkk), (lll), (mmm), (nnn), (Ab. 353-371), (qqq), (Ab. 374), (uuu), (vvv), (www), (xxx) (Ab. 378-379).

Any reasonable limit on the length of this brief would not permit a discussion as to each of the separate assignments of error as to testimony. We have

attempted by classification to present this matter within reasonable limits.

None of these assignments is waived.

Kempner Testimony as to Stubeck's Conduct and Statements Erroneously Admitted.

The testimony of this young man Kempner, whose name was not on the indictment as a witness, but who apparently became attracted by the prospect of publicity and contacted the district attorney shortly before he testified, testified with relation to nobody ever attempted to be connected with the alleged conspiracy whatsoever, by any proof "aliunde" or at all.

The assignments on this testimony are Nos. 14 and 15 (r) to (v) inclusive. (Ab. 345-347). The testimony is set out fully (Ab. 40-64). It comes under classification (4) above, as conduct and statement of a third person, which was introduced without limitation over the separate objections of each defendant and was introduced as binding upon all.

We particularly ask the court to examine this testimony and the record that was made in connection therewith, and shall not take the space here to state it at length. It was this testimony concerning which the court said that "the competency of it hasn't yet been made manifest", but the district attorney said that he would connect it up. (Ab. 42)

The court also said that this testimony was so important that if "it should develop that it isn't pertinent I presume it would be a mistrial. I am not saying it would, but I presume it would."

The witness testified to a time which he finally fixed as "around in March, possibly April" of 1937. It will be noticed that this was at a time when even Holt was not collecting—he *didn't* start until June. H. K. Record was head of the vice squad and Holt was not in it at all. (Ab. 95). The indictment in alleging what were termed overt acts alleges that collections were made from houses of prostitution from June, 1937, to January, 1938, and from operators of lotteries, dice games and other games of chance from April 1st, 1936, to January 1st, 1938, (Ab. 3), and the Bill of Particulars recites approximately the same dates (Ab. 11), and recites that the collections were made by the defendants with the aid and assistance of Golden Holt and Ben Harmon. Even Ben Harmon was not connected with any collections until June of 1937.

This testimony very briefly was that Abe Stubeck, who operated a billiard hall, met this witness and took him to the Ace and Peter Pan Billiard Halls. In the Peter Pan, Stubeck talked with a man who was racking pool balls and asked him if he had the money ready. The man said something and Stubeck told him he had better get it in a hurry or he knew what the results would be. The man said he would be back and he went and got some money. At the Ace Billiard Hall he saw no money collected, but when they got back out to the street Stubeck took two bunches of bills from different pockets and put them together. The witness then was allowed to testify that Stubeck told him that card games were paying off and that he took the money over to Ben

Harmon and Harmon split it with Erwin and his crowd. The witness then testified that Stubeck took the bills and laid them on the counter in Harmon's place before the customers and employees, and one of the cashiers put them under the counter, that Harmon was present. (Ab. 40-64)

There was never any foundation by showing any agreement as alleged to permit and allow the operations alleged. There was no foundation by showing that any defendant had any connection or acquaintance whatsoever with Abe Stubeck. This was conduct of a person not in any way connected with the defendants, or any of them, in any shape, manner or form, and statements made by him with reference to the defendants or implicating some or all of them, and its introduction is not only condemned by all of the foregoing authorities, but we believe by any authority that can be found; so that its admission gives no support to sustain the conviction here, although, as indicated, it was doubtless very effective in bringing about the conviction by the jury. That its admission was erroneous and prejudicial requires no further argument and the citation of no authorities additional to those cited under the preceding discussion of class (4) testimony.

If, as it may be contended, the operation of gambling in licensed card rooms and on licensed card tables is proof of an agreement between the defendants here; or if, as will be contended, the collection of money is the offense being tried or is evidence of an agreement by and with the parties here to "permit, allow, assist and

enable" houses of prostitution, etc., to operate, on the theory that some of the defendants might have instituted an investigation and brought about prosecution of the operators involved, then this testimony would point first to the guilt of H. K. Record, who was head of the anti-vice squad, and would point also to the guilt of the city attorney and the district attorney, who were so personally concerned in this prosecution. Because certainly they could institute investigations and bring about prosecutions, just as this record shows the district attorney did, in connection with this case, prosecute a number of prostitutes and operators of places of prostitution.

The fact is that this evidence had no probative value whatsoever to prove the agreement alleged. The simple collection of money in no way assisted the operation from which it was collected, and this testimony was utterly incompetent, irrelevant and immaterial and highly prejudicial.

Testimony of Golden Holt Erroneously Admitted.

The assignments as to this witness are covered by the foregoing authorities, and from 15 (kk) to 15 (vv) inclusive have been referred to above. These assignments as to the testimony of this witness require, however, separate treatment, in view of the admission and claim by the prosecution here that he was an accomplice. This testimony will also be now separately considered under the later contention, and later under the heading as to prior adjudication of the matters testified to.

Eliminating, as we clearly must, the testimony of

Kempner as to Stubeck, just considered, the only testimony as to collections of money was the testimony of Holt and, of course, the women who paid it to him. These, as we shall presently show, were also accomplices in this matter, and in any event had nothing to do with the charge alleged. The argument to the trial court, based erroneously upon the theory that the charge here was one of collecting money from these operations, was grounded upon the proof that money was collected by Holt. This, as stated, depends upon the testimony of Holt alone. No knowledge of his collection was ever shown to have been communicated to anyone except Mr. Harmon. Unless, of course, it may be assumed that the testimony of Holt that some money from prostitution was paid to Mr. Pearce, who was attorney for Mr. Harmon, in Mr. Harmon's presence, was proof that he knew where the money was collected. It was not so testified.

Mr. Pearce had been previously tried and acquitted of the charge of receiving this money from prostitution knowing that it was so received. This matter will be treated separately hereinafter.

The point we desire to emphasize now is that the claim of proof of an agreement has been rested and doubtless will be upon the testimony of collection of money by Holt and the presumption of knowledge thereof, and then the further inference attempted to be based on this inference, that there must have been an agreement between these particular defendants otherwise these collections would not have taken place.

This involves also the question of separate conspiracies, which will be hereinafter considered, but for the present we will discuss the testimony of this accomplice in the light of the contention, that he is an accomplice and uncorroborated.

There was no corroboration of the testimony of Holt with relation to any defendant here in the matter of these collections. This question of corroboration of an accomplice is difficult to discuss because it is impossible for us to see any proof as required by the rules of evidence hereinafbve supported as to the existence of the conspiracy alleged or as to the connection of any defendant with it. If there is any such testimony, the testimony of Holt must be the principal, if not the only testimony in this connection. That he was an accomplice may be assumed. That his testimony was not corroborated in any material aspect must be admitted.

We will now point out cases indicating, first, that in the absence of corroboration the evidence cannot be considered but should have been withdrawn by the trial court as a matter of law, and also cases illustrating the point that there was no corroboration.

People vs. Southwell, 152 Pac. 939 (Cal.):

Is a case holding directly that where money was paid to an officer by places of prostitution upon the understanding or condition that he would not arrest or molest such operation, that the women paying the said money for immunity were accomplices. The opinion says:

“The court at the request of defendant (officer), advised the jury that Coulter was an accomplice, but refused instructions advising the jury that the Martin and McMonagle women were such accomplices. This was undoubtedly error and of a prejudicial kind. That this error seriously interfered with the right of defendant to a full and fair hearing is made apparent when it is considered that the corroborative testimony offered in the case was not of a particularly strong character.”

State vs. Coroles, 277 Pac. 203, (Ut.):

Is a case squarely holding that where the evidence is without dispute the court should instruct the jury that a witness is an accomplice and that it is the duty of the court to decide whether there was sufficient evidence in corroboration of the accomplice to meet the requirements of the statute, and if not, to direct the jury. The opinion of this Court says:

“If the facts themselves are in dispute as to whether the witness did or did not do the things which, if he did do them, would make him an accomplice, then it is for the jury to determine whether he is in fact an accomplice or not. Where the facts are not in dispute, where the acts and conduct of the witness are admitted, *then it is a matter of law for the court to say, and to instruct the jury, whether the witness, under the circumstances, is an accomplice.* People v. Coffey, *supra*. Upon the present record, it was the duty of the trial court, after determining from the undisputed evidence that the witness Garrett was an accomplice, *to decide whether there was sufficient evidence in corroboration of the accomplice to meet the requirements of the*

statute, and if it was not, to then direct a verdict for the defendant."

State vs. Gardner, 27 Pac. (2d) 51, (Ut.):

This case, while not particularly in point because the corroboration there was found in the admissions of the defendant himself, sets out the statute in part as follows:

"A conviction shall not be had on the testimony of an accomplice, unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof."

The opinion then cites apparently all of the Utah cases at page 52 of the report, previously decided. These cases are not particularly enlightening here because in most, if not all of them the corpus delicti was proved and it was a question merely of connecting the defendant with the crime by testimony independent of that of the accomplice.

Of course, the very purpose of this rule and of such statutes is to prevent a conviction upon the testimony of a person interested in absolving himself from prosecution by implicating someone else. The essence of it is that such a witness shall not be believed to the extent of permitting a conviction thereon unless his testimony is corroborated as required by the statute. It would seem to follow logically that the testimony of Holt cannot be considered here, either as proof of the

offense charged or as connecting any defendant with it, unless this testimony is corroborated by other independent proof of the offense and other independent proof of the connection of these defendants with it.

Here there is nothing that can be considered as an admission by any defendant that we can find in the record, other than that which is involved in the testimony of this same accomplice.

In the opinion of Justice Straup in the Gardner case the following statement is made and supported and is consistent with the principal opinion therein:

“Thus under the statute there must be evidence independent and without the aid of the testimony of the accomplice to show the corpus delicti, that an offense was committed and to connect the defendant with it. Roscoe’s Criminal Evidence, 122; State vs. Geddes, 22 Mont. 68, 55 P. 919; State vs. Lawson, 44 Mont. 488, 120 P. 808.”

State vs. Laris, 2 Pac. (2d) 243:

Was another larceny case involving the point as to whether recent possession was sufficient corroboration of an accomplice and holding that under the circumstances of that case it was not. There is language and authority in this case in line with our above contention that the corroborating testimony must tend to sustain the truthfulness of the accomplice’s testimony as to the very offense involved. The opinion quotes from Weldon vs. State, a Texas case, at page 246 as follows:

“ ‘Eliminate from the case the evidence of the accomplice, and then examine the evidence

of the other witness or witnesses with a view to ascertain if there be inculpatory evidence * * * if there be no inculpatory evidence, there is not corroboration, although the accomplice may be corroborated in regard to any number of facts sworn to by him.' '' (Citing also *People vs. Morton*, 73 Pac. 609).

The opinion in the *Laris Case* also quotes with approval from an Iowa case, on page 248:

“ ‘The accomplice may state any number of facts, and these facts may all be corroborated by the evidence of other witnesses; still, if the facts thus corroborated do not tend to connect the defendant with the crime, or if they do not point pertinently to the defendant as the guilty party or as a participant, this would not be such corroboration as is required by the Code.’ *Weldon v. State*, supra; *State v. Cowell*, 149 Iowa 460, 128 N. W. 836.”

State vs. Somers, 90 Pac. (2d) 273 (Ut.):

This is the most recent Utah case that we have found. It was an arson case again considering the statute quoted in the *Gardner Case*, which is now 105-32-18 R. S. U. 1933. The opinion held the corroboration insufficient, and said:

“Under the above section a conviction cannot be based on the testimony of an accomplice alone. There must be corroboration of his testimony and the corroboration must be as to some material matter or fact which is inconsistent with the defendant’s innocence.” (Citing a number of Utah and other cases).

The opinion also states again the rule quoted from the *Coroles Case*, supra, as follows:

“While it is a question for the jury to determine whether the corroborative evidence is sufficient, in connection with the testimony of an accomplice, to justify a conviction, yet unless there is corroborative evidence of a material fact tending to connect the defendant with the commission of the crime, a court should direct a verdict for the defendant. *People v. Viets*, 79 Cal. App. 576, 250 P. 588, *State v. Arhontis*, supra.”

State vs. Elmer, 161, *Pac.* 167:

Is another Utah case holding the corroboration insufficient and pointing out that the jury should have been instructed that if they found that the witness Curtis was an accomplice, that then the defendant could not be convicted. In other words, that the court should have decided whether the corroboration of the evidence was sufficient.

State vs. Thompson, 87 *Pac.* 709:

Is a case holding that proof merely that a crime was committed, in that an unmarried woman was pregnant and the charge was adultery, could not be considered as in any way connecting the defendant with the offense charged.

State vs. Powell, 143 *Pac.* 588:

Is another Utah case emphasizing that in determining the question of corroboration every item of testimony of the accomplice himself must be entirely excluded.

State vs. Sheffield, 146, *Pac.* 306:

Is another Utah case involving the charge of adult-

ery, and holds that admissions or intimations of other wrong doing of a lascivious nature cannot be considered as corroboration; that it must be evidence of the specific charge laid.

It would serve no purpose to cite additional cases giving rules so well understood by this Court. However, we call the court's attention again to two comparatively recent California cases:

People v. Walther, 81 P. (2) 452.

People v. Rodriguez, 99 P. (2) 263.

In these cases the appellate court refused to sustain convictions because the court said they depended so substantially upon the testimony of an interested accomplice, who, while clearly guilty himself, was securing immunity by giving the testimony involved. This is clearly the case with the witness Holt, who was solely responsible for the extortion of money from these women in prostitution and solely responsible for the collections made. He made them and he alone. They were made only when he collected and ceased when he ceased collecting, according to the record in this case. Yet he had and has entire immunity.

The Testimony of H. K. Record was Inadmissible and in any Event Could not be Considered as Supporting the Verdict.

This matter involves assignments 14, and 15 (jj). It was the conversation referred to in which the witness said he talked with Mr. Pearce in the presence of Mr. Harmon, and Mr. Pearce proposed that he make collections from gambling houses, not prostitution, and

offered \$165.00, and the witness testified that he would not be a party to it.

This evidence, if believed, indicated a willingness on the part of Mr. Pearce to enter into an agreement with this witness. The discussion was in the presence of Mr. Harmon and the term "we" was allegedly used, so that it may be said that it involved Mr. Harmon also. It certainly was inadmissible as to Mr. Erwin and the other defendants. This attempted conspiracy was not one to permit or allow operations, it was one rather to extort money from the gambling operations, which was probably an offense but a different offense entirely, and definitely involved different conspirators.

Thomas vs. United States, 57 Fed. (2d) 1039
10 C. C.):

Is a case in our own Circuit definitely holding that under an indictment for a larger conspiracy involving a number of people, evidence of a smaller conspiracy involving some of them to do something similar to the alleged purpose of the main conspiracy, and which smaller and possibly included arrangement was discussed but never carried out, is not evidence of the conspiracy alleged and cannot be used to sustain a conviction thereunder.

A number of defendants were indicted for conspiracy to violate the National Prohibition Act by manufacture, transportation and sale of liquor under protection from Federal officers. Gorges, through another person, arranged to pay one Madden, assistant prohibition administrator for Kansas, \$1,000.00 a month, and sent

him a list of locations of a number of stills to which Madden was to furnish protection. Three monthly payments of \$1,000.00 were made to him and the list furnished. Armstrong, another prohibition agent, was sent by Madden as a representative in the matter of protection. Most of the defendants carried on the agreed operations on a large scale.

The appellant Simons was a brother-in-law of Gorges, the principal mover in the conspiracy alleged. Simons was frequently in the company of Gorges, knew of the arrangement to get protection, was present at conversations respecting the buying and selling of liquor. The opinion says:

“The evidence established that Simons had knowledge of the conspiracy. It further proved that Gorges desired to extend the conspiracy to Oklahoma, and he and Simons planned that the latter should take charge of the business there, but there was no proof that the conspiracy was ever so extended or that Simons ever entered it. Furthermore the indictment charged a conspiracy to manufacture, possess, transport, and sell intoxicating liquor in Kansas.

Mere knowledge or approval of or acquiescence in the object and purpose of a conspiracy without agreement to cooperate to accomplish such object or purpose is not enough to constitute one a party to the conspiracy. *Lucadamo v. United States* (C.C.A. 2) 280 F. 653, 657; *Marrash v. United States* (C.C.A. 2) 168 F. 225; *Turcott v. United States* (C. C. A. 7) 21 F. (2d) 829; *United States v. Lancaster* (C. C. Ga.) 44 F. 896, 10 L. R. A. 333.

The most that can be said is that Simons knew of and acquiesced in the conspiracy and was willing to enter it provided the organization was extended to Oklahoma. This was insufficient to connect him with the conspiracy charged."

This case also contains a good statement and cites a number of authorities upon the point that.

"to render evidence of acts or declarations of an alleged conspirator admissible against an alleged co-conspirator, the existence of the conspiracy must be shown and the connection of the latter therewith established."

Also the further point:

"Declarations made by one conspirator to another are not competent evidence to establish the connection of a third person with the conspiracy."

The question now under discussion is so closely related to the next topic that we will take that up and ask the Court to consider the application of the cases thereunder cited to the present matter, of the testimony of H. K. Record.

Evidence of Different and Smaller Conspiracies Was Not Admissible, and the Failure of the Court Upon Request to Instruct on this Matter was Erroneous.

This involves the assignments as to evidence with relation to alleged conduct or agreement between Holt and Rosenblum in 1936, when Holt was himself head of the anti-vice squad. And separately to his alleged arrangements or agreement with Harmon, or any connection by Mr. Pearce in 1937, several months after the alleged arrangement with Rosenblum had ended. Of

course the incident of Kempner and Stubeck and Harmon, if it has any place in the case at all, was still another arrangement, at another time.

We have pointed out that the indictment here was not for the collection or extortion of money, and of course insist that these separate collections by Holt had no legal tendency to prove the general agreement alleged to permit various operations. We now urge the further ground that these collections, which are mainly and almost entirely relied upon, involved other distinct, and substantive offenses, and if they involved any conspiracy, involved different and smaller conspiracies.

The dealings between Holt and Rosenblum are just as separate and distinct from his dealings with Harmon in a later year as any two transactions could be. Mr. Holt was then himself head of the vice squad. There was never any connection shown between Rosenblum and Harmon, or for that matter, any connection with any defendants at any time by Rosenblum in the matter of any agreement, or even any collections in 1936 or at all. The only other defendant concerning whom any knowledge of collections could be claimed was Mr. Pearce, and he was never connected with Rosenblum or heard of, in the case, until June, 1937. No defendant was connected in any way with the operations of Holt and Rosenblum in 1936.

Tinsley vs. United States, 43 Fed. (2d) 890:

Tinsley and four others were indicted on eight counts, the first seven counts being for larceny of

horses in the Indian country and the eighth being conspiracy to commit the larcenies set forth in the first seven counts. Two defendants were nolle prossed by the U. S. attorney, thereafter taking the stand for the Government, and the three were convicted on all eight counts.

It appeared that Tinsley, a farmer, had engaged two Indians (the ones testifying) to steal horses from the reservation and bring them to him at night; that he would then kill the horses and feed them to his hogs, and that one of the two defendants remaining aided and abetted him in the feeding and concealing of the hides, brands, etc., and was present when horses were delivered by the Indians.

The conspiracy count was based on the proposition that there were many transactions, and that Tinsley had made arrangements with each of two Indians to steal the horses and pay them for the thefts. The court on this point says: (page 893)

“We are forced to the conclusion that the evidence does not show any mutual understanding of plan whereby appellants and Paul Widow and Phillip Lone Eagle (the two Indians dismissed) were to cooperate in the stealing of horses from the Indian reservation, nor that the minds of these parties met understandingly to carry out a deliberate agreement to commit the larcenies charged in the indictment. The evidence tends to show a conspiracy between Tinsley and Widow, and a conspiracy between Tinsley and Phillip Lone Eagle, but they are separate and distinct conspiracies and not the conspiracy charged in the indictment. This is not sufficient.

Terry v. U. S., 7 F. (2d) 28; Wyatt et al v. U. S., 23 F. (2d) 791; Stubbs v. U. S. 249 Fed. 571."

United States vs. Byers, 73 Fed. (2d) 419:

Defendants were indicted and convicted for conspiracy to defraud the United States by obtaining surplus war materials from the Government by false pretenses; the false pretenses being they would turn the materials over to needy persons at cost, when defendants intended to sell the materials at a profit. The trial court instructed:

"If you find the sale of these goods by defendants was made as claimed by the government, knowingly and wilfully by these defendants, then you will convict."

The appellate court said (p. 422):

"Here the defendants were indicted for conspiracy to defraud the United States by buying goods under false pretenses. By the charge of the trial judge the jury was permitted to find them guilty of conspiracy to sell goods in violation of their contract not to sell. In no way can the latter conspiracy be said to be the former. While, as the appellee argues, the indictment need not be precise in charging the time or place of the conspiracy, yet it is necessary that a defendant be found guilty, if at all, only of the crime charged in the indictment. A conviction for one conspiracy cannot be sustained under an indictment for a separate and distinct conspiracy."

Lefco vs. United States, 74 Fed. (2d) 66:

"There is nothing new in this defense of multiple conspiracy, and nothing uncertain in

the law arising from such a defense. Of course, to sustain a verdict on an indictment charging one particular conspiracy the evidence must establish the conspiracy charged. Evidence that establishes another conspiracy or several other conspiracies will not sustain the verdict."

Wyatt vs. United States, 23 Fed. (2d) 791:

Was a case where it was alleged a conspiracy existed over a period of about four years by a group of persons, to violate the National Prohibition Act. The court says the ramifications were many and the interrelations of those who participated in furnishing protection and collecting money from boot-leggers was varied. It was clear that the officers involved did afford protection and did make collections and did on occasion arrest people who did not contribute. It was even contended that this proved enforcement of the liquor law. It was indicated that some were guilty of extortion and others might have been guilty of substantive offenses against the National Prohibition Act. The court refused to review the testimony, but made two very pertinent statements of the law, as follows:

"Having a responsibility for the enforcement in this circuit, not only of the National Prohibition Law, but of federal laws generally, we are strongly of opinion that the conspiracy statute should not be stretched to cover and be misused to convict for offenses not within its terms, and that, when resorted to, the conspiracy alleged must be proved as charged. When, as here, one large conspiracy is specifically charged proof of different and disconnected smaller ones will not sustain conviction; nor will proof of crime

committed by one or more of the defendants, wholly apart from and without relation to others conspiring to do the thing forbidden, sustain conviction. Terry v. United States (C. C. A.) 7 F. (2d) 28, 30; United States v. McConnell (D. C.) 285 F. 164, 166.

* * * * *

“Keeping in mind that the one crime which the indictment charged against all defendants is conspiracy to violate a law of the United States—not the substantive crime of violating the law itself—we have discovered no evidence that implicates John Sarnosky, Nathan Hollander and Hymie Cohen. Therefore, wholly without regard to whether the evidence proves these three men separately guilty of violating the National Prohibition Act, we find no evidence that sustains the verdict finding them guilty of the conspiracy charged. United States v. Heitler (D. C.) 274 F. 401.”

Terry vs. United States, 7 Fed. (2d) 28:

This case is so important here that it has been already referred to and will be cited again on the question of instructions. On the point now under consideration it has been widely quoted with approval.

It appeared that Terry and one Frohn agreed to transport several barrels of intoxicating liquor from Bodega Bay to a ranch in the vicinity of Petaluma, and at the same time the defendant Zucker rented a barn in that vicinity and that nine barrels of intoxicating liquor were stored therein. About six weeks later Zucker and other defendants, not including Terry, landed a shipment of liquor at Allen's Wharf in Monterey County. All this was in California. This last shipment of liquor

was seized, together with the automobiles, by the Federal authorities.

The indictment charged that the defendants did conspire and confederate together to commit offenses against the United States in violation of the National Prohibition Act, and set forth it was claimed as an overt act the shipment to Allen's Wharf. Nine defendants, including Terry, were convicted. The trial court took the view that the conspiracy was one to land, transport, sell or possess liquor generally and that all the defendants were properly convicted thereunder. Zucker was connected with both of the shipments, six weeks apart, just as Holt was connected by his testimony with both of the collections here in separate years. The appellate court in discussing the indictment says:

“The charge is limited, however, by the terms of the indictment itself. The indictment here charges but one combination or conspiracy, however divers its objects, and no defendant could be convicted thereunder unless he was shown to be a member of or a party to that conspiracy. Furthermore, the scope of the conspiracy must be gathered from the testimony, and not from the averments of the indictment. The latter may limit the scope but cannot extend it.”

Judge Rudkins writing the opinion, then says that he found no testimony tending to show any general conspiracy covering and including both incidents and said that the trial court apparently proceeded upon the theory that some of the defendants could be convicted for one conspiracy and some for another. The opinion proceeds:

“If, however, the charge of conspiracy in the indictment is merely that all the defendants had a similar general purpose in view, and that each of four groups of persons were co-operating without any privity each with the other, and not towards the same common end, but towards separate ends similar in character, such a combination would not constitute a single conspiracy but several conspiracies which not only could not be joined in one count, but not even in one indictment. *United States v. McConnell* (D. C.) 285 F. 164.

“IN OTHER WORDS, A CONSPIRACY IS NOT AN OMNIBUS CHARGE, UNDER WHICH YOU CAN PROVE ANYTHING AND EVERYTHING, AND CONVICT OF THE SINS OF A LIFETIME. FOR THESE REASONS THE RULINGS COMPLAINED OF ARE ERRONEOUS AND CALL FOR A REVERSAL. PROOF THAT THE PLAINTIFF IN ERROR WAS GUILTY OF ANOTHER CRIME WAS IN ITSELF PREJUDICIAL, AND AN INSTRUCTION THAT HE MIGHT BE CONVICTED OF A CRIME NOT CHARGED IN THE INDICTMENT CANNOT BE SUSTAINED.”

People vs. Zoffel, 95 Pac. (2d) 160:

Is a recent California case alleging a conspiracy to commit abortions. The very pertinent holding of the court is sufficiently indicated by the following quotation from the opinion:

“May took the stand in his own defense. He denied that he had committed any abortions, but admitted that he had entered into a conspiracy with his nurse to practice medicine without a li-

cense. Obviously, proof of conspiracy to commit that crime is no evidence of conspiracy to commit the crime charged, namely, conspiracy to commit abortions.’’

Davidson vs. United States, 61 Fed. (2d) 250,
Supra:

Is also cited as a very pertinent case. It will be remembered that three of the defendants sold an automobile in Missouri and which the opinion says they knew was stolen, but it was not the larger conspiracy alleged which contemplated taking the car from Oklahoma to Missouri and which larger conspiracy involved additional defendants, as in the case at bar.

Dickerson vs. United States, 18 Fed. (2d)
 887:

Is a case illustrating the point that the conduct of Mr. Pearce in connection with Mr. Holt or Mr. Record is entirely consistent with an arrangement to attempt to collect money from houses of prostitution in the first instance and from gambling in the latter instance and does not point to any agreement of a general conspiracy to permit and allow all these continuing operations, as alleged in the indictment.

In this case the court says the existence of the conspiracy was clearly proved. A conspiracy to transport, receive and sell or dispose of alcohol was alleged. The objects of the conspiracy were carried out and the appealing defendants participated therein in that they went to the warehouse where the alcohol was stored after shipment and were there told that the alcohol had

been shipped from Peoria, which was pursuant to and in accordance with the conspiracy, saw that the drums were labeled "complete denatured alcohol" when in fact they were buying straight alcohol and knew it, and being druggists, of course they knew that the alcohol was being illegally handled.

The opinion says that the evidence

"creates some suspicion or gives rise to an inference that the plaintiffs in error might have had some knowledge of the conspiracy at the time they purchased the liquor from one or another of the conspirators."

The receipt of this alcohol under the circumstances here is somewhat analogous to the alleged receipt by Mr. Pearce of money collected from the women. There is a difference in this, that the charge here is not a conspiracy to collect money but a conspiracy to allow operations, which makes the testimony as to Mr. Pearce more remote than in the case under consideration.

The opinion reversing the conviction in the case under consideration said:

"Wherever a circumstance relied on as evidence of criminal guilt is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value, even though from the other inference guilt may be fairly deducible. To warrant a conviction for conspiracy to violate a criminal statute, the evidence must disclose something further than participating in the offense which is the object of the conspiracy; there must be proof of the unlawful agreement either expressed or implied,

and participation with knowledge of the agreement. *Linde v. U. S.* 13 F. (2d) 59 (C. C. A. 8th Cir.); *U. S. v. Heitler et al* (D. C.) 274 F. 401; *Stubbs v. U. S.* (C. C. A. 9th Cir.) 249 F. 571, 161 C. C. A. 497; *Bell v. U. S.* (C. C. A. 8th Cir.) 2 F. (2d) 543; *Allen v. U. S.* (C. C. A.) 4 F. (2d) 688; *U. S. v. Cole* (D. C.) 153 F. 801, 804; *Lucadamo v. U. S.* (C. C. A.) 280 F. 653, 657.

The mere fact that the plaintiffs in error purchased liquor from the conspirators is not sufficient to establish their guilt as conspirators. The purchaser may be perfectly innocent of any participation in the conspiracy. The gist of the offense is the conspiracy, which is not to be confused with the acts done to effect the object of the conspiracy. *Iponmatsu Ukichi v. U. S.* (C. C. A.) 281 F. 525."

It appears to us that if there was proof of conspiracy here at all, it was of different conspiracies than the one alleged and smaller conspiracies by possibly some of the defendants here and others at different times and the object of which was different from that alleged by the indictment.

FAILURE TO INSTRUCT ON THIS WAS ERROR.

In this connection, and on assignment No. 16 (Ab. 380) Request 3 (Ab. 283); Request 3A (Ab. 284); and particularly Requests 4 and 5 (Ab. 285-6) as to instructions, we point out that in any event and in view of the evidence here and these authorities the defendants were entitled to an instruction upon this question. Such an instruction was requested (Ab. 285-6) and was refused and no instruction was given upon this question. We

call attention particularly to Requests 4 and 5 (Ab. 285-6) and the authorities there cited in addition to the authorities cited above, and to the fact that no instruction was given on this material and vital issue.

Mr. Pearce's Plea and Contention of Prior Adjudication Should Have Been Considered and the Evidence Relating Thereto not Excluded.

This issue was presented by the introduction of the indictment and Bill of Particulars and verdict of acquittal in Case No. 10785. (Ex. 26 (a)-(b)-(c)-(d).) (See assignment 15, ab. 336). There Mr. Pearce, together with E. B. Erwin and Ben Harmon were indicted and tried and acquitted. The indictment charged that the three defendants

“on or about the first day of June, 1937, * * * did wilfully, knowingly, and feloniously accept, receive, levy and appropriate money without consideration from the proceeds of the earnings of women engaged in prostitution.”

It was not contended that this necessarily constituted a plea of former jeopardy. It was contended that as to the issue there tried, it was an adjudication of that issue. That it was thus finally determined that the defendants were not guilty of the offense there charged of receiving money from the earnings of prostitution.

The record shows that exactly the same evidence was introduced by the same witnesses as to Mr. Pearce here as was introduced in Case 10785. The principal witnesses, H. K. Record, Golden Holt and Fisher Harris so testified. It was so established as to the women's testimony, and in fact stipulated as to all witnesses.

It is argued by the state, that while this evidence was introduced in the other case to prove the charge of receipt of money from prostitution, that it was introduced here for the purpose of having an inference of an agreement drawn from this same evidence and fact. We insist, as already pointed out, that it has no legal probative value to prove the agreement alleged anyway.

The further difficulty with plaintiff's contention is that all this was introduced again to prove that Mr. Pearce received money from the earnings of prostitution, knowing it to be from such earnings. Any inference of guilt could be drawn therefrom, only if the claim was true. But it had been proved untrue. The ultimate fact relied upon had been tried and disproved on this same evidence. Thus, the main fact and the very fact from which they attempted to make an inference of connection with the conspiracy or the existence of a conspiracy as alleged, had been tried and adjudicated.

Before citing authority it is necessary to point out that these exhibits were received by the court and was the main matter of defense on which the defendant Pearce introduced any evidence whatsoever. That after Mr. Pearce and all the defendants had rested, the court denied him the right to have the exhibits or the contention brought before the jury or considered by the jury in any way or manner, and thus he was left at that stage of the case without any defense so far as his evidence was concerned. (See Ab. 168, 252-256, 279). The defense, as stated, is not strictly one of former

jeopardy, but it is one of prior adjudication, or what is sometimes called by the courts estoppel, to re-try the same issue by the same evidence against the same defendant.

State vs. Hopkins, 219 Pac. 1106 at 1108:

Is a leading case upon this question and cites a number of authorities thereon. This case has been previously referred to on another point. In discussing this case previously it was pointed out that the Sheriff Hopkins, Wilson, the chief of police, and George Bennett, a pool hall operator, caused boot-leggers to deliver certain liquor, which was seized and the boot-leggers after being locked up were run out of town and the liquor used without any report thereof.

In the case was introduced evidence of a similar transaction involving the sheriff in the seizure and use of other liquor. The court discusses the introduction of that evidence, first from the standpoint of its proof of a course of conduct bearing upon the criminal intent and indicates that for that purpose it was admissible. However, the sheriff having been previously tried for that offense and on the evidence introduced with relation thereto, this presents an analogous situation on the question of introduction of an issue already tried. The opinion says:

“But this evidence of the alleged offense committed on November 9 was admitted solely for the purpose of tending to prove that defendant acted with a felonious intent in taking the liquor from Barroch on November 26. Defendant had been compelled to meet and rebut the same

testimony given by Heath upon the trial of cause No. 347, and this he did successfully, with the result that the jury trying that cause pronounced him not guilty, and, when the record of that acquittal was introduced by defendant upon the trial of this cause, the court advised the jury that it could be considered only as reflecting on the credibility of Heath; in other words, the court indicated that the jury might find that the testimony given by Heath upon the trial of this cause was true, notwithstanding the record of acquittal. The question then arises: What force or effect should have been given to the record in cause No. 347 when introduced upon the trial of this cause?

* * * * *

‘Important as the subject would apparently appear to be it is one which has not been thoroughly explained by the text-writers, and not frequently passed upon by the courts, considering the vast multitude of criminal cases and the various questions raised in that class of cases.’ 103 Am. St. Rep. 20.

The doctrine of res adjudicata as applied in civil cases is fairly well settled. It has its foundation in two fundamental maxims of the law.

‘A man shall not be twice vexed for one and the same cause’ and ‘It is for the public good that there be an end to litigation.’ Broom’s Legal Maxims, 247-250.

Almost a century and a half ago the English House of Lords declared ‘that the judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or, *as evidence, conclusive between the same parties upon the same matter, directly in question in another court.*’ (Duchess of Kingston’s Case, 20 Howell’s State

Trials, 355) and the doctrine has been adhered to in this country ever since.

In *Marvin v. Dutcher*, 26 Minn. 391, 4 N. W. 685, the court stated the rule as follows:

‘It is irresistible that the judgment of a court of competent jurisdiction is conclusive as evidence upon parties and privies in respect to every question directly involved in the issue and determined by the judgment.’

In *Freeman on Judgments*, section 318, it is said:

‘The principles applicable to judgments in criminal cases are, in general, identical, so far as the question of estoppel is involved, with the principles recognized in civil cases.’

In 2 *Van Fleet’s Former Adjudication*, section 628, the author says:

‘If there is a contest between the state and the defendant in a criminal case, over an issue, I know of no reason why it is not *res judicata* in another criminal case.’

In *Commonwealth v. Evans*, 101 Mass. 25, the doctrine was applied to the fullest extent. Evans was first charged with assaulting Henry McKenzie with a knife, and was tried and convicted. Later McKenzie died as the result of the wound, and Evans was then charged with manslaughter, and upon the trial of that charge he sought to prove that he used the knife in necessary self defense. In rebuttal the commonwealth introduced the record of his conviction in the assault case, and the trial court instructed the jury that the record was conclusive evidence that the use of the knife upon McKenzie was unjustifiable, and that the defense that the knife had been law-

fully used by the defendant in self defense had been determined by the judgment, and was not open to him. In reviewing that instruction, the Supreme Court said:

‘The only question is as to the effect of that judgment, as evidence, upon the issues of fact raised in the trial of this case for manslaughter. The court below ruled that it established conclusively that the assault was unjustifiable, and therefore disproved the position of the defendant in this case, that the knife was used in self-defense. Upon general principles, the parties being the same, the former judgment must be held to have established all facts which were involved in the issue then tried, and essential to the judgment rendered upon it. The conviction for assault and battery therefore necessarily excludes all justification which could have been set up under the general issue of not guilty. The facts of the assault remain the same; and whatever would sustain the ground of self-defense, now relied on, would have been a complete defense to the former prosecution. The verdict and judgment in that case were therefore rightly held to be a conclusive answer to the attempt at justification made in this case.’

In *People v. Frank*, 28 Cal. 507, the defendant was convicted of passing a draft with a forged endorsement upon it, knowing that the endorsement was a forgery. To prove the felonious intent, the state was permitted to show that at about the same time the defendant had passed two other drafts, designated 3 and 9, with the same forged endorsement upon each of them. In offering this evidence, the prosecuting officer admitted that the defendant had been charged with forging the endorsement on draft 3, and with

passing the draft, knowing that the endorsement was a forgery, and had been tried upon the charge and acquitted. The Supreme Court held that the admission of the evidence did not do violence to the doctrine of *res judicata* under the peculiar circumstances there involved, but in the course of the opinion said:

‘The soundness of the doctrine to the effect that the judgment of a court of competent jurisdiction directly upon the point is as a plea at bar, or as evidence conclusive upon the same matter coming directly or incidentally in question in another action between the same parties, cannot be doubted. * * * In order to render the verdict and judgment of not guilty upon the draft offered in evidence conclusive upon the facts which the prosecution sought to prove for the purpose of showing guilty knowledge, it must appear with certainty from the evidence offered in support of the alleged estoppel that those facts were directly and necessarily found by the verdict in that case in favor of the defendant; or in other words, that the jury could not have found the verdict which they did without having passed directly upon the facts offered to be proved, and found them against the prosecution.’

After enumerating the several propositions which were necessarily involved in the trial of the defendant for passing draft 3, the court continued:

‘Now if all these provisions were directly and necessarily decided in favor of the defendant *by the verdict and judgment in question, then the district attorney was estopped from making the proof; or if either of them was so decided, as to such he was estopped, upon the principle that*

matters which have been once judicially determined cannot be again drawn into controversy as between the parties and privies to the determination.”

And concluded:

‘The verdict cannot operate as an estoppel, except as to the allegation that the defendant forged the endorsement.’

In *Bell v. State*, 57 Md. 108, the defendant was convicted of passing an order for the payment of money on July 16, 1880, knowing it to be forged. Upon the trial the state offered evidence to prove that on July 17 defendant had passed a similar forged order. In defense the record was offered, which disclosed that the defendant had been charged with passing the order on July 17, and had been tried and acquitted. But counsel for defendant offered the record ‘for the purpose of affecting the weight and credibility of the evidence against the accused’, and it was admitted for that limited purpose only. Before the jury, however, counsel for defendant undertook to argue that the record was conclusive against the contention of the state, but were not permitted to continue to argue to that effect. In disposing of the contention made, the appellate court said:

‘At the time that record was offered, the counsel might, if they had thought proper, have offered it generally, or as conclusive evidence, that the appellant had not forged or uttered the check of July 17, and as an estoppel upon the state, and, if rejected by the court when thus offered, or admitted for the purpose only of affecting the weight and credibility of the evidence against him, the appellant might have then excepted to such ruling, and had it reviewed by

this court. But it was not so offered. On the contrary, it was offered expressly on the terms and for the purposes which the court had stated it would be admissible for; that is, for the purpose of affecting the weight and credibility of the evidence against the accused. And even when the court interposed and stated the purposes for which alone the record had been admitted, the appellant might have excepted to the ruling, limiting the effect of the record to this particular purpose, if it had not been offered "under the permission of the court as stated in the first exception." *Sauerwein v. Jones*, 7 G. & J. 341, *Inloes v. Amer. Exchange Bank*, 11 Md. 185. But he excepted, not to the limitation thus put upon the effect of the record as evidence, but to the court's refusal to permit his counsel to argue that the record had a larger and broader effect, than that to which it had been limited by the court. The court has an undoubted right to state to the jury the legal effect of evidence which has been introduced and submitted to their consideration. *McHenry v. Marr and Emmart*, 39 Md. 532, 533; *Wheeler v. State*, 42 Md. 570. Not having excepted to the statement made by the court of the legal effect of the record, it became the law of the case. *Hogan v. Hendry*, 18 Md. 128; *Davis v. Patton*, 19 Md. 128; *Dent v. Hancock*, 5 Gill. 127. Being the law of the case, counsel were not at liberty to argue against it.'

In *Mitchell v. State*, 140 Ala. 118, 37 South. 76, 103 Am. St. Rep. 17, the defendant was convicted of arson, in burning a building belonging to Sue Harris. To prove the criminal intent in the commission of that offense, the state offered evidence tending to prove that about the same time and near the same place, the defendant had set

fire to a building belonging to one Murphy. In defense the record was offered which disclosed that the defendant had been charged with burning the Murphy building, and had been tried and acquitted. The trial court refused to admit the record in evidence, and on appeal the Supreme Court said:

‘The evidence so offered was admissible under the doctrine of *res adjudicata*, whereof it has been well said: “A final judgment on the merits determining any issue of law or fact after a contest over it, forever sets at rest, and fixes it as a fact or as the law in any other litigation between the parties.” *Van Fleet’s Former Adjudication*, 2 et seq. * * * For the error in rejecting the offer above referred to, the judgment will be reversed, and the cause remanded.’

The following cases, though not directly in point, illustrate the same principle: *Commonwealth v. Ellis*, 160 Mass. 165, 35 N. E. 773; *Coffey v. United States*, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684.”

Here this record was refused consideration for any purpose.

This proposition, so well recognized in civil cases, has not been passed upon directly, so far as we have found, by this Court. It has been suggested however.

State vs. Cheeseman, 63 Utah 138, 223 Pac. 762:

The opinion and authorities cited in that case are summarized accurately, we believe, in the second syllabus, as follows:

“Acquittal of one offense is no bar to prose-

cution for another offense, unless it appears that some essential element of the second offense was necessarily adjudicated and determined in the prosecution for the first offense.”

Authorities are cited along the same line as the authorities cited in the case next above. The facts in the case did not involve a close question at all, as one case involved the matter of the report of the accident and the other the question of negligence in the accident. The plea was one of former jeopardy.

The language of *Russell vs. Place*, 94 U. S. 608, (24 L. Ed. 214), as quoted by this Court in that case, is applicable here.

“It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties.”

United States vs. Oppenheimer, 242 U. S. 65, 61 L. Ed. 161, 3 A. L. R. 516:

Is a later U. S. Case discussing and directly settling the proposition that the same rule as to adjudication of an issue that applies in civil cases, applies in criminal cases; and pointing out the difference between a plea of former jeopardy under the 5th Amendment, and a plea of res judicata.

The former acquittal on the issue alleged in the previous case was under the statute of limitation. The question is discussed as to whether that amounted to an adjudication of the issue there charged in the indict-

ment, and the Supreme Court, in an opinion by Justice Holmes, held that it did, and then discussing the questions here involved, says:

“Upon the merits the proposition of the government is that the doctrine of *res judicata* does not exist for criminal cases except in the modified form of the 5th *Amendment*, that a person shall not be subject for the same offense to be twice put in jeopardy of life or limb; and the conclusion is drawn that a decision upon a plea in bar cannot prevent a second trial when the defendant never has been in jeopardy in the sense of being before a jury upon the facts of the offense charged. It seems that the mere statement of the position should be its own answer. 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 in debt. It cannot be that a judgment of acquittal on the ground of the Statute of Limitations is less a protection against a second trial than a judgment upon the ground of innocence, or that such a judgment is any more effective when entered after a verdict than if entered by the government’s consent before a jury is impaneled; or that it is conclusive if entered upon the general issue. (*United States v. Kissel*, 218 U. S. 601, 610, 54 L. Ed. 1168, 1179, 31 Sup. Ct. Rep. 124), but if upon a special plea of the statute, permits the defendant to be prosecuted again. We do not suppose that it would be doubted that a judgment upon a demurrer to the merits would be a bar to a second indictment in the same words. *State v. Fields*, 106 Iowa 406, 76 N. W. 802; *Whart. Crim. Pl. & Pr.* 9th Ed para 406.

We may adopt in its application to this case

the statement of a judge of great experience in the criminal law: *'Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, the adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offense. . . . In this respect the criminal law is in unison with that which prevails in civil proceedings.'* Hawkins, J., in Reg. v. Miles, L. R. 24 Q. B. Div. 423, 431. The finality of a previous adjudication as to the matters determined by it, is the ground of decision in Com. v. Evans, 101 Mass. 25, the criminal and the civil law agreeing, as Mr. Justice Hawkins says. Com. v. Ellis, 160 Mass. 165, 35 N. E. 773; Brittain v. Kinnaird, 1 Brod. & B. 432, 129 Eng. Reprint 789, 4 J. B. Moore, 50, Gow, N. P. 164, 21 Revised Rep. 680. Seemingly the same view was taken in Frank v. Mangum, 237 U. S. 309, 59 L. Ed. 969, 983, 35 Sup. Ct. Rep. 582, as it was also in Coffey v. United States, 116 U. S. 436, 445, 29 L. Ed. 684, 687, 6 Sup. Ct. Rep. 437."

It will be noticed that this opinion cites some of the same authority cited supra in the Hopkins Case.

"The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice. (Jeter v. Hewitt, 22 How. 352, 364, 16 L. Ed. 345, 348), in order, when a man once has been acquitted on the merits, to enable the government to prosecute him a second time."

In order to get the full force of this opinion and the references to the "5th Amendment", this is the amendment providing that no person may be twice put in jeopardy. So that Justice Holmes disposes of the general contention of the state in this case, and the position taken by the court, that the only question that could be raised was one of twice in jeopardy on the same charge. The above cases refutes that position.

State vs. Creechley, 37 Utah 142, 75 Pac. 384:

Goes merely to the question that the issue of prior adjudication here raised as a defense should have been considered by the jury even though it were not shown that any evidence was produced thereupon. As above pointed out, this issue was entirely withdrawn from the jury.

It should also be pointed out before leaving this discussion, that in addition to the allegation of an agreement to permit and allow operations, it is charged as an overt act in the indictment that about the first of each and every month between the months of June, 1937, and January, 1938, defendants collected and caused to be collected money from the operators of houses of ill fame (Ab. 3), and in the Bill of Particulars, that between said dates the defendants, with the aid and assistance of Golden Holt and Ben Harmon, collected money from such operators. (Ab. 11). The issue determined in case 10785 adversely to the state, being introduced by the same witnesses, as to such money, is the only evidence connecting any defendant with such overt act.

Oliver vs. Sup. Ct. (Cal.) 267 Pac. 764:

Was a proceeding to restrain the trial court from proceeding with the trial of certain defendants who had been tried under an indictment charging an agreement and conspiracy to do certain things and then alleging the various overt acts, and also contained counts alleging the doing of the things charged as overt acts in the conspiracy. The petitioners, defendants in the original case, had been acquitted of the counts which charged them with the offenses which were also pleaded as overt acts under the conspiracy. The court held that the issue as to these counts having been tried, the issue was determined, and these matters could not again be tried as overt acts of the conspiracy, and since the statute required overt acts to be alleged and proved, they could not be tried on a conspiracy charge either because that issue was now disposed of. The opinion says:

“But here the conclusion cannot be escaped that since each crime, considered and described collectively as a single entity, is alleged to be an overt act, and as the jury fully acquitted these petitioners of each overt act thus alleged, the portion of the count charging conspiracy remaining unadjudicated is insufficient to constitute criminal conspiracy. Moreover, considering the record here presented, by finding that none of the overt acts charged as part of the conspiracy were committed, the jury, in effect, acquitted the petitioners of the offense of conspiracy.”

This matter is presented in support of assignment 15 see Ab. 336. The issue was seasonably raised and the

court was asked to consider it upon the record then available and without denial that the evidence would be the same. It is also presented upon the assignments 9, Ab. 317 and 19, Ab. 390, that the defendant Pearce was prevented from having a fair trial.

Improper Statements and Conduct of the District Attorney Committed and Allowed was Prejudicial.

This involves assignments 11, 12, and 13 (a) to (n) inclusive (Ab. 318-335). Also assignments 9 and 19, that defendants were not given a fair trial.

It is quite apparent that the district attorney was determined to procure a conviction at all costs in this case. While some of these matters may not have been prejudicial taken alone, some of them are under the authorities prejudicial standing alone, and certainly taken as a whole they are prejudicial.

Space will not permit the discussion of each of these separately. A sufficient number will be given to show the import and nature and then authority will be cited thereon:

Assuming, as stated in 64 *C. J. p.* 235, *sec.* 251, that in an opening statement the attorney may define the nature of the issues, that he may state what he expects to prove in a general way, that he cannot state such proof as would be incompetent, and that he cannot make the opening statement a medium for arguing the merits, "nor will the relation of testimony at length be tolerated." And also assuming that it is not misconduct to make an error in stating something that he intends to

prove and which he does not later prove, if such statement is made in good faith, but that it is error if a statement is not so made.

We consider first the nature of the opening statement here as contained in the "Vol. V" supplement to the record and in the assignments (Ab. 318-329). Note particularly that this statement departs from the allegations of an agreement, recites hearsay statements at length, it imputes misconduct not pertinent to the issues to prejudice the jury, and that the whole statement, if all that was stated in it were true, would not establish the offense alleged. The statements with relation to investigations by Fisher Harris and what he had found were incompetent. The statement that defendants each had knowledge of the operations involved was immaterial, as the cases cited hold, that knowledge or the failure to prevent the carrying out of the conspiracy, even though a person has the power so to do, is not proper evidence in this character of case. (47 Fed. (2d) 692) *supra*.

The statements that Early investigated and determined there was a payoff in January, 1936; the statement that Harmon, Browning, Rosenblum and Jennings called and asked what they could do to keep operating, which was not only not supported by any evidence but clear hearsay; the statement that Early sent these men to the chief of police, stated in this very connection, which was not proved; the statement that Austin Smith would testify that there was a number of bills that had not been paid by Mr. Erwin and after these were paid

the payoff would be reorganized. There was no testimony of this. The statements concerning memorandums of vice conditions and the letter of Fisher Harris, which was finally held to be incompetent although actually recited into the record, and the numerous statements of rumors and the "gist of these rumors" that vice was going on and that there was a payoff. These were not only incompetent, but the district attorney must have known that they were.

This violated the rule as stated by this Court in

State vs. Distefano, 262 Pac. 113 at 114

Where it is said, in the opening statement the attorney may state the material facts which the evidence will establish

"but not facts which the party is not able to prove and none that cannot be supported by legal evidence. Bishop's Criminal Procedure, (2d. Ed.) Vol. 2, P. 791, para. 969."

There was refusal to follow the suggestions of the court that it be confined to competent evidence, but a statement by the attorney, "But, Your Honor, there is a responsibility and burden on the state * * *." The statement of conversations between Holt and Taggart; the statement that all these operations were permitted to operate unmolested "under the instruction of Chief Finch"; which was not proved. The build-up by the use of the Federation of Women's Clubs and the incompetent statement that they had made an investigation and what they had found as to rumors of vice, and the statement never proved that they read from a memor-

andum to the mayor names of men who were alleged to be taking a payoff. The further statement that they had discussed this with Mr. Finch, of which there was no proof. The statement of a conversation between Gust Captain and Holt, and the discussion about Captain being an investigator for the Women's Clubs, which was never proved.

There was another build-up with relation to Fisher Harris and Harold B. Lee "working with the Church Security plan" and relating to the conversation with Mr. Pearce and the false statement that Mr. Harris said to Mr. Pearce, "You are collecting from operators of vice establishments", which was never said; and then the instance in connection with Mr. Lee of the utterly incompetent statement of Ben Harmon to Holt after the conspiracy had ended, about Mr. Lee accusing Mr. Pearce. And again in this connection, when the court called attention to statements that counsel was making of a hearsay nature, and counsel's statement in the presence of the jury, "If we are not permitted to introduce in evidence statements made by defendants after they were apprehended, four or five days after the offense, etc." Defendants were never shown to have been apprehended or to have made any statements under such circumstances.

We have the extended statements about houses of prostitution here and throughout, as if this attorney, who had been in office many times as long as Mr. Finch with these things always operating, was horrified, and in this connection a statement that the money taken from

these girls was "turned over to the defendants" which was not proved, and as to Mr. Finch never attempted to be proved.

We have the statement that Chief Finch directed Thacker to take orders from Ben Harmon and do what Harmon asked him to do, which was never attempted to be proved, and that Thacker said that Mr. Finch would not permit Bill Browning to open up because Bill Browning would not pay Ben Harmon, also not proved. That Mr. Finch reprimanded Hedman for making an arrest, and similarly with relation to O. B. Record, when both of these witnesses testified that Mr. Finch did nothing of the kind. Also the damaging statement that Mr. Finch said to Judge Ellett, "Why can't we let these things run on?", which was never proved; and the frequent argumentative appeals, when objections were made or statements by the court, to the jury, such as "I have all the confidence in the world that this jury can determine when that evidence comes in whether or not I am telling the truth", and the statement in this connection that he had written it down. This certainly left no excuse for his making statements on which there was no evidence. And the statement with reference to Fisher Harris's letter, "I can assure you it was not gossip. It was put down in a letter * * *." Also in connection with objections made to the court that these things were incompetent and also immaterial, the voluntary statement that the attorney would not be able to show "any written memorandum prepared by the conspirators. They don't do it that way." And the further statement, "Of course we contend that a major-

ity of this was not in the presence of the defendants. Obviously they would not be there when it was going on, purposely * * *." This, and particularly when taken in connection with the other remarks, and the asking of leading questions to thus introduce objectionable matter, and the whole course of conduct of the attorney, was, quite obviously prejudicial.

Coming now to the evidence, we will cite some more examples. In connection with the testimony of Mr. Ellett (Ab. 329), an objection that a statement of what his "friend" had told him did not involve an admission or denial of the crime charged, which was entirely proper and called for no argument to the jury, whereupon the attorney made the two speeches indicated at page 330 of the abstract, concluding "I reiterate that the jury is the person and institution that will be called upon to determine whether or not such a statement as will be introduced would be denied by a reasonable person"; then after discussing Gust Captain in the opening statement and the court having settled that evidence as to him was not admissible, this statement: "We would be pleased to introduce that conversation but we are afraid there would be an objection." Then, after the court's ruling out Gust Captain, and in order to tie him in anyway, the next question the attorney asks: "Q. Well, after you saw Gust Captain, I think you said you saw Ben Harmon?" (Ab. 331) This was asked of Holt. Then in discussing the letter written by Fisher Harris of his investigation (Ab. 331) on an objection which the court ultimately sustained as to the document, the argument "Here is the city attorney, the chief enforcing

officer of the city, making charges against the mayor." There was no such charge made in the letter. (Ex. R). This argument, as loud as he could speak it to the jury, was objected to and no ruling made by the court. It was in this connection that it was pointed out to the trial court that objection had to be made and the court was required to instruct.

Counsel's repeated instructions and directions to the jury as to the law and the duty of the jury thereunder as above and hereinafter indicated, was wrong. It is uniformly held that such instruction is exclusively for the court.

After reading an ordinance to Mr. Finch (Ab. 332) a number of times as to the duties of the police, this could only relate to the immaterial matter as to whether the chief had been lax in his duties, and after the chief had stated that he was not a lawyer and he hadn't read the ordinance, the prosecuting attorney made the statement that "ignorance of the law is no justification".

Then we have the record after the state had put in its case with relation to Mr. Pearce, and after H. K. Record had stated that he made no report of the alleged conversation, O. B. Record was sworn and asked a long leading question (Ab. 333) as to the conversation between him and his brother H. K. Record. Objection was made that it was hearsay and not rebuttal. Counsel then made an irrelevant statement about Mr. Finch, who was not involved in the question. It was stated that the testimony would be prejudicial on objection, and on this occasion, and also on other occa-

sions, the prosecuting attorney said, "Don't get excited. *We think all these things are prejudicial to the defendant, your Honor, just as prejudicial as indicated here and as Mr. Mulliner thinks it is.*" The objection was sustained and there was no occasion for this statement. This will indicate the nature of conduct.

We desire to point out now a few matters in connection with the closing statement. In the introduction of Dar Kempner's testimony (Ab. 40-64) the attorney made a determined and misleading effort to have this witness testify that the occasion when Abe Stubeck collected money was after the first of June, 1937, so as to bring it within the allegation, and at a time when H. K. Record was not head of the vice squad. The witness clearly did not so testify. The attorney stated in his closing argument (Ab. 334) that he did, and attention was called to the record:

"MR. RAWLINGS: I expected that quibble; but the jury will remember collections were made up until June. * * * Kempner had known Stubeck. They were pals together."

This statement was absolutely untrue. Kempner did not so testify. The state's witness Holt testified positively that from the end of 1936 there were no collections until he started on the 3rd or 4th of June of 1937. There was no evidence that Kempner and Stubeck were pals, it was to the contrary. (Ab. 62, 229)

There was another statement (Ab, 334) by the attorney that these people wanted to be arrested and wanted to be taken to jail, intimating a laxness in not arrest-

ing them. Attention was again called to the record, and Mr. Rawlings said "They were arrested. That is in evidence." It is not plain what was meant by this unless this is another intimation that the defendants were arrested. In this connection (Ab. 335) there was also the statement, objected to, that Ben Harmon was "the king pin of the underworld". This was not shown.

We come now to a more serious matter. In his closing argument, and over objection, the attorney stated that the defendants "hired Mr. Pearce", which is wholly contrary to anything in the record. When attention was called to it, the attorney said: "I am drawing an inference. I don't know how much they paid him but Pearce himself said, 'I am instructed by the mayor to make these collection's. I don't know what else you need. If that is not hiring, you don't think he would be doing it for nothing.'" Such a statement, particularly against these defendants, was clearly improper.

There was not only no evidence of hiring by the other defendants, but there was no evidence of collection by Pearce, and such hearsay statement as to Mr. Irwin, without foundation, was maliciously prejudicial.

And now even a more serious matter. In many instances, as pointed out, evidence was introduced of statements or conduct by one defendant here sometimes involving the mention of another defendant. In many of these instances the court did not confine it to the defendant making the statement, but also in several cases the court did so limit it. As already pointed out, there was no foundation for the introduction of any of it,

but in this particular instance the attorney had consented to the limitation. It was with relation to testimony of a conversation with Mr Thacker. Such situation and ruling of course clearly indicated to the attorney that such statements could not be used to prove the conspiracy, but could only be admitted after the conspiracy had been proved. Now after the court had reminded the attorney that he is talking and arguing that this testimony of Thacker proved the conspiracy when it was limited to Thacker,

“THE COURT: What is your memory?

MR. RAWLINGS: That is my memory but I say it because it shows a mutual understanding. I say it shows a mutual understanding between these parties.”

Further objection was made to this statement, but no ruling by the court. (See next topic on this incident).

People vs. Grossman, 82 Pac.(2d) 76 at 83:

Held that where an attorney was trying to connect the other attorney with knowledge of a complaint and asked the witness if she signed it under his advice and direction, and an objection was made and the prosecuting attorney said, “It stands to reason she did so; what is the use of quibbling?”, that this was improper. It did not result in a reversal because it stood alone and the trial court then directed the jury not only that the remark was improper but that it would be stricken out and the jury was directed not to consider it.

State vs. Solomon, 87 Pac. (2d) 807, (Ut.):

Of course, is a leading case upon this question, and

the statements there made outside of the record and which resulted in reversal, are nowhere near as numerous or damaging as the statements of that character in this case.

State vs. Barone, 70 *Pac.* (2d) 735 (*Ut.*):

“There is no justification for the prosecution injecting anything into the trial of a case that would be unfair. In this case the district attorney apparently knew that the evidence proffered by him was not only incompetent but prejudicial to defendant, being calculated, though not received by the court, to influence the jury against defendant.”

State vs. Lyte, 284 *Pac.* 1006:

Is a case where this Court discusses the question of previous adjudication, hereinabove discussed, and intimates the correctness of our contention here. This court could not decide the question because of the lack of right to have the case appealed, and the point ruled on. It also involves the question of conduct of an attorney. The opinion says:

“The rulings thus involve the question not of jeopardy, but of permitting the state to give evidence of offenses separate and distinct from, and not included within the charged offense and of which the defendant has been acquitted. * * * The evidence was admitted on the statement of the district attorney, more adroit than sound, to show the character of the premises on which the liquor charged in this action was claimed to be possessed by the defendant and to show the probability of his possession of it. * * * especially since the accused had theretofore been

acquitted of such other offenses, may be assumed to be an erroneous and groundless claim or purpose for which the evidence was admissible.”

* * * * *

“In all criminal cases an undoubted duty and responsibility rests on the court and the prosecuting attorney to see that all rights and privileges of the accused are safeguarded and protected, and that convictions are permitted only on competent and material evidence.”

State vs. Martin, 300 Pac. 1034 at 1040 (Ut.):

“It is of course improper for the district attorney to refer to extraneous matter in his argument to the jury notwithstanding it had been referred to in argument by counsel for the defense. The district attorney should have objected at the time it was so referred to and moved the court to exclude it from the consideration of the jury.”

People vs. Kregewski, 163 N. E. 438:

Holds that attempts to elicit hearsay evidence, and commenting in that connection that evidence was sufficient to convict, was improper.

People vs. Reed, 164 N. E. 847:

Holds that arguments have no place in an opening statement.

Bolden vs. State, 155 N. E. 824:

Holds that the charge of other matters of crime in an opening statement is reversible error:

Green vs. State, 158 S. E. 285:

Held that recital of inadmissible matters in an opening statement by the prosecuting attorney was error.

The Court Erred in Admitting Improper Matters of Evidence.

This general subject has been adverted to and under each Class of Testimony, authorities cited sufficient to cover each separate assignment under 14 and under 15 (a) to 15 (nnn) inclusive. (Ab. 336-372). We would not be justified in repeating these, or the assignments as recited in these pages. The Court by looking at them will see the application of the authorities cited as to each of them. None of these assignments is waived.

We ask the court, however, to consider these assignments also in support of the general conduct claimed of introducing immaterial, incompetent and improper evidence by asking leading questions so that the objection thereto reflects upon the defendants and makes it appear that the defendants were trying to exclude evidence. We were in fact often accused of this and have already cited some instances.

In connection with these assignments also and this same general subject, we ask the court to note particularly the evidence of Fisher Harris, the city attorney, working in connection with the district attorney here, to accomplish the same result. The abstract, pages 126 to 139, show the discussion with relation to Mr. Harris's letter and his persistence in calling for that letter and getting the contents of it into the record regardless of the ruling of the court excluding the letter. In this connection also will be noted at the pages of the abstract indicated, and particularly the pages of the record therein cited, the persistence of the prose-

cuting attorney in asking irrelevant leading questions as to what the witness had heard, and whether the defendants asked Harris who was getting the payoff mentioned in the letter and other questions of this character.

While relying upon the authorities hereinabove cited as to each of the single assignments above referred to, we want to call the court's attention to a note in 78 *A. L. R.* 766 on the subject of counsel implying that an adversary was trying to suppress facts. The note there says:

“Gratuitous statements of counsel, not warranted by the evidence, are universally frowned on and regarded as improper by the courts, for the reason that the statements themselves, or the inferences which naturally flow from them, might tend to mislead or improperly influence the jury. In cases where such misconduct of counsel has had that result, the courts have held it sufficient ground for a reversal of judgment.”

Also:

109 *A. L. R.* 1089 a note on the subject of offering improper evidence or asking improper questions as ground for reversal:

“Improper questions may be prejudicial in various ways, including the following: They may plainly convey information excluded by the rules of evidence; *may hint at the existence of significant though inadmissible facts, with or without a suggestion as to their exact nature*; may, by the assumptions therein contained, and notwithstanding the answers being prevented, impress upon the jury, by a mere show of proof, matters which

are not admissible in evidence and which perhaps could not be proved, as inferred, even if opportunity were afforded; and may, by reason of the objections made, emphasize the facts suggested more effectively than might be done by answers admitted without objection."

* * * * *

"In almost every instance of such misconduct, opposing counsel, if he makes objection, is necessarily placed in the false light of suppressing significant circumstances and attempting to deceive the jury into rendering an unjust verdict."

Also:

116 A. L. R. 1170 and the note there relating to comment by attorney on opposing counsel's objection or refusal to permit introduction of evidence:

"There are conflicting views as to whether it is proper for counsel to comment on the exercise by an opposing party of a privilege with respect to testimony or the calling of a witness. *By what seems to be the better rule, it is held improper for counsel to make such comments.*"

This last note refers to the matter involved in assignment 15 (nnn) (Ab. 371), as well as a number of other assignments.

We now call attention and shall discuss only generally assignments 15 (ooo) to 15 (xxx) inclusive. This refers to improper cross examination and improper rebuttal and comes under a little different classification.

We shall discuss 15 (ooo) and 15 (ppp). (Ab. 372-4), as illustrative. We ask the court to examine the ab-

tract at 194 to 200 inc. The district attorney stood with copies of the newspapers in his hand and was trying to bring out that the Federation of Women's Clubs had stated to the Telegram that there was vice here including gambling in card rooms. If it were admitted that they so stated, it was utterly incompetent and irrelevant to the charge of an agreement here. No conversation was attempted to be fixed with Mr. Finch and that objection was repeatedly made. Mr. Loofbourow pointed out to the court (Alb. 200), "It is just an effort to read these newspaper stories into the record, without any possibility of contradicting them in any legal way." It was emphasized to the jury and could not have failed to have been prejudicial. It was utterly indefensible. It was in this discussion that counsel commented that ignorance of the law was no excuse.

Repeated efforts were made to have the court instruct the jury to disregard the matters read from the newspaper. It had absolutely nothing to do with any direct examination of the witness or any matter referred to by him, or to refute any of his testimony. It was another illustration of building up a case by improper gossip and propaganda.

It is hard to pursue the assignments above referred to without thinking that the most condemnable conspiracy was between the city attorney and the prosecuting attorney to besmirch Mr. Finch, an honest and upright citizen, by a show of pretended indignation about operations here, during his short term of office, which had gone on under these same prosecuting attorneys for

many years before and since. Certainly they knew better than he could know how to deal with these problems and how to stop them if they could be stopped. When the city licensed card rooms, charging as much annually as \$150.00 on one table, everybody knows that the chief of police could not prevent gambling therein; and when the city practically licensed and provided for the control of prostitution by the Board of Health everybody interested knew and had always known that that operation was going on. It was almost plain hypocrisy to prate about these "vices", totally irrelevant as they were, and thus harass and bring about a conviction of Mr. Finch, who had performed his duties just as every police chief had and does perform them, and under the same conditions, and with the same operations during the entire memory of these prosecuting attorneys. He was not being tried for this.

In the group of assignments now under consideration, we call brief attention to 15 (www), (Ab. 378). It will be noticed there that the court called the writer down for making an objection with relation to an alleged conversation with Mr. Thacker, and the court said:

"THE COURT: Listen, Mr. Mulliner, this does not involve anybody but Thacker and Mr. Hanson has not objected.

MR. MULLINER: If the failure of Mr. Thacker to do anything is an agreement, then it is going to affect all of us."

Now after this, as above pointed out, with relation to the testimony of this same witness the prosecuting

attorney was allowed to argue to the jury that it did affect all of the defendants and showed a "mutual understanding" between these parties.

It is a matter often commented upon by the courts as showing prejudice in the cases of this kind, that the court supported and gave approval to the conduct of the attorney, thereby impressing the jury, and even arousing sympathy for the prosecuting attorney, where objections are made to such conduct.

State v. Trostad, 100 P. (2) 564 (Ut.):

This is a recent case discussing the question here so vitally involved as to the introduction of other matters of alleged wrongdoing, or of general vice, both in the statements of the attorney and throughout in the evidence, and without actual proof of any other actual crime, to show intent, or for any other purpose.

The opinion in this case says:

"On the prosecution for a particular crime, evidence which tends to show that the accused committed another crime, independent of that for which he is on trial, even of the same sort, is inadmissible. There are exceptions to the general rule, carnal knowledge cases being one. In re Sadlier, Utah, 85, P. 2d 810, on rehearing 94 P. 2d 161, and cases cited."

The Court Erred in Refusing Requests and in Giving Certain Instructions.

In the matter of instructions, the trial court continued to confuse the issue here with the class of conspiracy where a substantive offense is charged and the

alleged conspirators engaged in committing the offense or, in not as stated by the court in the *Wyatt Case*, 23 F. (2d) 791, *supra*:

“Keeping in mind that the one crime which the indictment charged against all defendants is conspiracy * * * not the *substantive crime* of violating the law itself—”

The instructions clearly leave the jury believing that they could convict the defendants, or any of them, for any misconduct or omissions of duty shown in the mass of insinuation argument and testimony as to isolated matters of this kind.

The instructions do indicate that the mere operations alleged in the indictment in 1936 and 1937 are not proof of the conspiracy, although this is somewhat nullified by other and more general language. The instructions fail to advise the jury at all with reference to the matter of alleged admissions by silence, and leave the jury to believe that the long recitals by the witnesses of conditions that they had investigated, or found out, or been told about, could be considered as evidence.

The instructions also not only leave the jury believing, but advise the jury that any kind of co-operation in any manner related to any of the operations by any persons, can be considered as proof of guilt of the charge here, making no distinction, notwithstanding the requests, as to the particular conspiracy and any other smaller conspiracies or any omissions to stop any of the operations alleged.

The instructions are entirely misleading upon the

point that conduct, admissions and declarations of a single alleged conspirator cannot be used to prove the conspiracy. That such matters involving any other conspirator could be admitted only if the conspiracy was otherwise proved. It is in this connection particularly that the jury are left to believe, as indicated by the court in the previous quotation herein, that anything said by anyone, anywhere, may be used to prove the conspiracy or to charge defendants here.

The instructions also contain a serious misstatement of fact by the court. It is these matters only that we will discuss. (1) First, with reference to the alleged admissions by silence, defendant requested (Ab. 287) separately with reference to the testimony of Attorney Harris and what he had investigated and had heard or found out, that his recital was not to be taken as proof of the matters which he recited, and again (Ab. 288) generally with relation to Attorney Harris and other witnesses that their recital of what they had heard or been told or found out was not to be considered by the jury as proof of the things that they recited. And then by request 10, (Ab. 292) asked another proper instruction on admissions by conduct. These requests were clearly correct and all were refused. No instruction was given upon this subject, which was clearly made an issue throughout by objections and motions.

The only instruction with relation to the subject of admissions at all, and this was wholly insufficient and did not advise the jury on this issue, or even bring to

their attention the matter at all, is a short statement, subdivision (b) of instruction 23 (Ab. 277):

“(b) The term ‘admission’ means the act of acknowledging something asserted; acquiescence or concurrence in the truth of an allegation or statement; conceding that a statement is true.”

This failure violates the rule repeatedly laid down by this Court that the defendants were entitled to an instruction presenting their theory of the evidence and instruction upon all material issues.

(2) The second matter of serious importance, is that with relation to separate conspiracies or separate offenses by different persons here charged, or other persons whose names were introduced in evidence. We have attempted to show under previous subdivisions of this brief that that matter was confused and that the evidence supported such separate conspiracies, if any conspiracy at all was proved. It appears to us beyond question that the proof of conspiracy here that must be relied upon rests upon Holt’s testimony. It rests particularly upon Holt’s testimony that he collected money in 1936 and again in the latter part of 1937. We do not see that this supports the general conspiracy.

We claim that under the rule of evidence applicable it clearly does not, but it has been and will be relied upon by the state as supporting the agreement alleged.

Now it must be clear, we think, that Holt’s arrangement, when he himself was head of the anti-vice squad, with Rosenblum, commencing by his testimony (Ab. 99)

about July of 1936, and ending at the close of that year, and which arrangement in no way involved anyone charged as a conspirator here, was a separate and distinct arrangement and the testimony proved no more than this. It must also appear that the matter of his alleged arrangement with Mr. Harmon about June of 1937, and his alleged contact with Mr. Pearce at that time, and then his collection and turning over of money to Mr. Harmon indicated another definite setup. These may have indicated understandings to collect money from prostitution. It in no way involved the larger agreement as alleged or the purposes of the general conspiracy to permit, allow or assist operations. This matter has been discussed and authorities cited at length on it, and it is submitted to the Court upon the cases hereinabove previously cited at length.

In any event we were entitled to have the jury instructed on this important issue.

Requests were made for instructions on this (Ab. 284) which related particularly to the separate arrangement attempted, according to H. K. Record, between him and Mr. Pearce and Mr. Harmon in 1937, when he was head of the anti-vice squad. Separately a request was made (Ab. 285) directly with relation to the testimony of Mr. Holt and to the testimony of Mr. Kempner as to these separate arrangements, the requests being that these could not be considered as proof of the conspiracy "unless you believe that such collections were made, if you believe they were made, as a result of the agreement alleged here or that such collections * * *

were made because of the agreement alleged against the defendants.” And further, that such circumstances should only be considered if they were, in the mind of the jury, consistent only with the existence of such agreement.

We then made request No. 5 (Ab. 286) directly on this question that if the jury believed that some one or more offenses had been committed by one or more alleged conspirators, or if they believed that there were some agreements or understandings other than the conspiracy charged, that proof of these smaller offenses or agreements or conspiracies at different times “if they believed they were such”, would not justify conviction of the offense charged, and added:

“Moreover, where, as here, a single conspiracy, general in its nature, is charged, defendants cannot be convicted upon proof merely of other offenses or of other or smaller conspiracies or of any conspiracy different from that alleged.”

We cited in this connection:

295 U. S. 78, 79 L. Ed. 1314, 43 Fed. (2d) 890.

We have now cited an abundance of other authority showing that this instruction was correct and fairly presented the issue. No instruction was given on this subject. Instead, the court confuses the matter throughout by a number of instructions indicating to the jury that they can find these defendants guilty without actual proof of their entering into the agreement alleged. This they did.

In instruction 7 (Ab. 264) the court says that the agreement may be shown by what is termed circumstantial evidence "or by inferences deducible and justifiable from other proven facts and some acts and conduct of the defendants, and each of them." The court then attempts to limit by saying that the circumstantial evidence must be sufficient to convince beyond a reasonable doubt of the guilt of the defendants, "or some of them, as charged in the indictment, and as having committed the unlawful acts or some of them in furtherance and in pursuance of the alleged agreement of conspiracy."

Then in 12, the court instructs that if Erwin, Finch and Thacker failed to perform their duties "then you may take such facts into consideration in determining whether or not they, or any one of them, so failing to perform his duties are guilty of conspiracy." This appears to indicate that this failure, which the cases definitely hold does not support the agreement here, may be considered as proof of conspiracy.

In 12(a) (Ab. 269) the court does say that mere cognizance of these operations "in the absence of other evidence" would not be sufficient to support the agreement. He should have said that the mere cognizance of these operations was no proof at all, but adds again:

"In other words, to find said defendants, or any of them, guilty as charged in the indictment, you are required to find beyond a reasonable doubt that they were parties to the alleged conspiracy or agreement, *or actually participated therein in carrying out the same,*"

In taking the exceptions (Ab. 302) it was particularly pointed out and discussed with the court that this instruction as to the carrying out of the conspiracy, permitted the conviction for any acts in any way connected with any of the operations mentioned in the indictments, and that in any view of the matter they would have to participate in acts to carry out the conspiracy knowing of the existence of the conspiracy. The court suggested that he might put in the word "knowingly". It was then suggested that that would be insufficient because a person might do what he did knowingly, as for example Stubeck's alleged collections, but that he must know of the conspiracy. The court, however, made no change in the instruction whatsoever. This instruction as to this character of conspiracy was clearly prejudicial.

This kind of instruction shows the misconception of the court as to this charge. If the commission of substantive crime had been charged, then doing something in the commission of that crime may have been some evidence of an agreement to commit it. But here no substantive crime was charged. It could not certainly be left to the jury to decide that any act committed in connection with the operation of any of these operations would justify a conviction, and that is what these instructions do.

(3) The third general matter referred to above is discussed at length under the subdivision of this brief with relation to the admission of declarations and conduct of alleged conspirators without a foundation of

agency. We have cited numerous cases on this, including the leading case of *Terry vs. United States*, 7 Fed. (2d) 28, where the opinion said:

“In other words, a conspiracy is not an omnibus charge under which you can prove anything and everything and convict of the sins of a lifetime. * * * Proof that the plaintiff in error was guilty of another crime was in itself prejudicial,”

Again this matter is confused and not covered although requested. There are statements, however, which are clearly misleading and contrary to the authorities cited.

In instruction 13, after stating that if they believe that a conspiracy as alleged existed, the instruction says:

“then the court charges you that any statement or declaration, if any, made by any or more of such conspirators in furtherance and pursuance of said conspiracy or agreement and while carrying out the same and the said common unlawful design or purpose and while it still was in progress, is admissible as against *all persons* engaged in such conspiracy or agreement, * * * and is admissible as against all persons engaged in such conspiracy.” This meant any conspiracy.

There is no instruction that these things cannot be used to establish the conspiracy. This demarcation is never made. In the requests (Ab. 282) this issue was asked to be submitted. It was requested that in considering the matter of circumstantial evidence, “you are not to consider as proof of the conspiracy * * * any statement or declaration, or alleged admission made by

any alleged conspirator. The existence of the conspiracy charged cannot be established against any alleged conspirator herein by evidence of the acts or declarations of any other alleged conspirator, done, or made in the absence of the conspirator sought to be charged", etc.

All defendants then joined in request No. 11 (Ab. 292 where the following was submitted, taken directly from one of the cases cited supra and supported by all the cases:

"You are instructed that the offense of conspiracy cannot be proved by statements or admissions of the defendants, or any of them, out of the presence of the others."

The court never covered this point. The court did, however, give instruction 16, which misled the jury to the contrary. This instruction also covered matters previously covered in the other instructions and therefore served to confuse the whole matter. This instruction says that before they could find the defendants guilty *"you must find from facts in evidence from which it may be reasonably inferred that the offense was committed"*, and then coming to subdivision (4) that "the defendants here, or either of them, conspired, agreed and confederated among themselves or with Ben Harmon, or with Golden Holt, or with Abe Stubeck to permit, allow and assist" houses of prostitution "or permit, allow and assist" lotteries, etc. Then coming down to (5), that "at least one of the following overt acts was committed." It does not say by whom on the overt acts, but puts in Abe Stubeck as well as mentioning others (Ab. 273).

The first part of this instruction, "*you must find from facts in evidence, from which it may be reasonably inferred*", and this applies to all the subdivisions of that instruction, is directly contrary to the holding in *Terry vs. United States*, 7 Fed. (2d) 28, wherein the trial court instructed that if they found that the acts of the parties and under the circumstances shown in the evidence and the conditions surrounding them "give rise to a reasonable and just inference that they were done as the result of a previous agreement, then you are justified in finding that a conspiracy existed between them to do those acts." The opinion says that the foregoing "*does not contain a correct statement of the law*" and adds:

"The circumstances relied upon by the prosecution must so distinctly indicate the guilt of the accused as to leave no reasonable explanation of them which is consistent with the prisoner's innocence." (Citing authorities).

And that was a case where a substantive offense was charged.

Now, subdivision (4) of this instruction 16 above quoted just simply tells the jury that they can convict here on any kind of a side agreement between any of the defendants or Holt or Stubeck either in connection with prostitution "or" the gambling operations. This amounts to an instruction contrary to the requests and contrary to the law as cited hereinabove at length with relation to separate offenses or separate conspiracies.

Subdivision (5) of this instruction 16 tells the jury in effect that if an overt act was committed that satis-

fies the statute as to overt acts, whether committed by any of the defendants or by any person shown by the evidence to be a party to the agreement alleged, and without any indication that it must be after such foundation, and by a party acting with knowledge of the agreement and in furtherance thereof.

(4) The fourth matter, which is technical but quite serious here and to which objection was taken, is in instruction 15 (Ab. 271). This instruction in the first part reads:

“You are instructed that if you believe that either Officer Holt or the witness Stubeck, or both of them, collected money as they testified,”

Mr. Stubeck did not so testify, but testified exactly to the contrary, that he had never gone with Kempner and collected money from these pool halls, as testified, either at the time testified or at any other time. Of course the balance of the instruction should not have been given in view of the fact that Stubeck was never in any way connected with the agreement here and any conduct of his could not prove the agreement alleged.

This instruction plainly assumes the fact that Stubeck collected the money as the court says he testified that he did.

State v. Hanna, 21 Pac. (2) 537 (Ut).

In this case this Court held again that such an assumption was error.

The Court at 540 says:

“That it is error for the court in instructing the jury to assume as proven any material contro-

verted fact is held by this court in *State v. Seymour*, 49 Utah, 285, 163 P. 789 792, where the court, speaking through Chief Justice Frick, says: 'Courts, in charging jurors, should be very careful not to assume any material fact or facts. Jurors, who are laymen, are always eager to follow the opinion or judgment of the court, and if the court assumes any material fact in the charge, the jurors are most likely to follow the assumptions of the court. Indeed, we must assume that such is the case unless the record clearly shows the contrary.' "

In addition to the authorities heretofore cited *Weniger vs. United States*, 47 Fed. (2d) 692, recites:

"The crime of conspiracy consists in the combining or confederating of two or more persons * * * Neither will the commission of an overt act, though unlawful in itself, be enough to show that the actor was a party to the conspiracy. The law requires proof of the common and unlawful design and the knowing participation therein of the persons charged as conspirators before a conviction is justified."

This recital alone, that Stubeck had so testified, requires a reversal here under the authorities.

Holland v. State, 206 S. W. 89 (Tex.)

We cite this case finally as supporting the discussion under No. 3 of this topic and also as having a more general bearing upon the question of error here in the refusal of our requests. In this case a request was refused and as here, no instruction was given on the point. For this error the conviction was reversed.

The instruction requested was as follows:

“ ‘Gentlemen of the Jury: You are instructed that you cannot consider the acts and declarations of Norvin Holland and Hill Holland made in the absence of defendant, for the purpose of proving a conspiracy; but you must find from the *evidence beyond a reasonable doubt that a conspiracy was formed before you would be permitted to consider said acts and declarations of said Norvin Holland and Hill Holland for any purpose whatever.*’ ”

The opinion says this request correctly stated the law.

GENERAL ASSIGNMENTS COVERED

Assignments 7, 8, 9 and 10 (Ab. 317) dealing with the over-ruling of defendants' motion for a non-suit, and separately for a directed verdict and in receiving and entering a verdict, are covered by the preceding discussion as to the sufficiency of the evidence and also as to the nature of and the elimination of evidence. These matters were brought to the Court's attention by these general motions and also motions to strike. (Ab. 159-168, 247-252). This was in addition to motions made throughout the trial.

Assignments 18, 20, 22 and 31 are covered also by the preceding discussion. These relate to the insufficiency of the evidence and particularly to its insufficiency under the rule as to circumstantial evidence, and also to the over-ruling and denial of appellants' motions in arrest of judgment and for a new trial.

ASSIGNMENTS COVERED BY ADOPTION OF ERWIN BRIEF

Assignments of error 1, 2, 3, 4, 5 and 6 (Ab. 316-17),

are now covered by the adoption of the brief filed herein in this case on behalf of defendant E. B. Erwin. This brief discusses the issues therein contained and the matters of over-ruling the motions to quash the indictment and objections to the Bill of Particulars, and other matters in connection with the pleadings as therein referred to. The defendants Harry Finch and R. O. Pearce do not waive these assignments but do adopt the argument in the brief of the defendant Erwin filed herein in respect to said assignments, without repeating the argument and brief on these matters herein.

POINTS IN CONCLUSION

The point is made throughout this brief that the evidence is insufficient to support the charge actually alleged. Defendants are not called upon to meet any other charge. It will be noticed in this connection that beginning with the Bill of Particulars the charge is departed from. It recites that houses of prostitution operated, that lotteries operated, that gambling in licensed card rooms operated, all in Salt Lake City. These, of course, always operated. The Bill of Particulars then recites that the defendants permitted and allowed these things to operate. This was not the charge. It was the misconception upon which the case was tried. The Bill of Particulars proceeds to blame the defendants for these vices. It then alleges collection of money for which it attempts to blame defendants. This, again, was not the charge.

We have next the opening statement of the attorney, containing no reference to the agreement or any

confederation of any kind or any connection between the defendants, but charging the defendants with miscellaneous and isolated wrongdoing and alleged omissions with relation to alleged vice. These recitals were very damaging, but again this was not the charge, and the whole statement, if true, and if established, did not sustain the charge. The principle portions of the statement and the most damaging parts were never proved.

Then we come to the testimony, and again we have miscellaneous insinuations of separate wrongdoing and omissions but no testimony of probative legal proof of the agreement. This we have classified under (1) testimony as to the operations, which always will and always have gone on in substantially the same manner as shown in the testimony; as to this their appears to be no dispute. Under (2) we have classified the testimony of alleged admissions and have shown the damaging nature of these long recitals of vice, of alleged payoff at times incidental thereto, and containing intimations of wrongdoing by individuals. The authorities cited under this division of the brief, we believe, establish that this testimony does not support the conviction of the offense charged in the indictment and was almost, if not entirely, erroneously admitted in that it involved no admission of the offense charged. This was inadmissible for the other reasons and under the authorities cited in the division of the brief with relation to testimony under classification (2). Error on this was also carried into the instructions.

Under classification (3) we have considered the

intimations of various matters of isolated misconduct, which it seemed to us was erroneously admitted. It was in line with the Bill of Particulars and with the opening statement and the general purpose here of blackening the defendants in any conceivable way. The authorities cited under the division of the brief with relation to testimony under classification (3) show, we believe, that this evidence does not serve to support the conviction of the offense charged, and for the most part was erroneously admitted. When taken in connection with the Bill of Particulars, which was read, the opening and closing arguments of counsel, and the conduct of counsel throughout and the voluntary statements made by him with reference to defendants, this was clearly prejudicial. This error also was in the instructions.

With reference to the testimony under classification (4), we believe the authorities conclusively prove that the conduct and statements of individual defendants referred to in statements introduced and made out of court by other defendants or by other persons, could not be used to prove the agreement, that the agreement was never proved independently thereof, and that these were erroneously admitted, and being incompetent and also immaterial to the issue charged here, were in addition prejudicial. This is especially true when, as shown in the later subdivisions, the error as to this and in fact as to the previous classifications, was carried throughout the instructions.

With relation to the discussion of the insufficiency of the testimony to sustain the charge, the authorities

cited eliminate from consideration, substantial portions of that discussed generally under these four classifications. In addition we have pointed to reasons and authority why (a) the testimony of Kempner as to Stubeck's conduct and statements should be eliminated and its admission was also prejudicial; (b) why the testimony of Golden Holt cannot be considered as supporting the verdict here under the authorities cited in the division of the brief as to his testimony; and (c) that the testimony of H. K. Record does not support the charge but relates to a separate attempted agreement that was by his own testimony never entered into; and (d) why evidence of different and smaller conspiracies was not admissible as proof of the general agreement and conspiracy alleged; and finally on this matter, that the same testimony as to Mr. Pearce and Mr. Erwin, from the same witnesses, to establish the same fact as between the same parties is not available here as establishing that fact. This is for the reason that the ultimate fact of receipt of earnings from prostitution, knowing it to be from such operation, is the very fact from which they seek to have an inference of guilt drawn here, and that fact was adjudicated and determined in the other proceeding. Such prior determination, under the authorities cited, is conclusive.

The division of the brief under improper statements and conduct of the district attorney, we believe also shows prejudicial conduct. This is somewhat involved in the next subdivision discussing the improper admission of matters of evidence, particularly as to the specific items referred to under this, and incorporating

the discussion and authorities cited under the classification of testimony as discussed under those separate headings. All this goes also to the assignments that defendants were not accorded a fair trial.

Coming to the instructions, while we have not discussed these at great length, we have shown, we believe, the error of the court in refusing: (a) the requests as to the alleged admissions by conduct; and (b) the requests as to the matter of other and isolated misconduct which is so seriously confused in the record, and in this connection the matter of the request with relation to separate conspiracies. On this, the court not only refused to instruct on these matters, but gave instructions clearly indicating to the jury that the defendants could be found guilty here for misconduct in connection with the operations mentioned and for separate conspiracies. This was particularly emphasized in the quotations from instruction 16. And also (c) in the matter of the request for an instruction that the conspiracy could not be proved, nor could the connection of any defendant therewith be proved by statements of another alleged conspirator or other person mentioning or attempting to involve such absent defendant. This was another vital issue, and again the instructions of the court are misleading to the effect that such matters could be used to connect.

There is also the additional point made that the court stated to the jury that Mr. Stubeck had testified that he collected money, when in fact he testified to the contrary. It is, of course, true that his collection of

money would have no tendency to prove the agreement, but, nevertheless, it was not his testimony that he was collecting and that the money was being distributed to Erwin and his crowd. None of this was his testimony; he denied it; and in view of the fact that defendants must have been convicted for such matters as this, the instruction becomes prejudicial.

It is quite obvious from the fact that Mr. Thacker, who was head of the anti-vice squad, was acquitted, that the jury lost entire track of any agreement, because if these vices or the allowance of these operations was proof of an agreement by these defendants, such an agreement would have to involve Mr. Thacker, as head of the vice squad, as he was the very person who could show leniency or could condone any of such operations. If he was not a party thereto, as the jury found, no such agreement could operate.

The fact is, that in this case, a very serious injustice has been done, particularly to Mr. Finch. He was not given a fair trial, that is obvious. He is not guilty on this record of the offense charged here, nor is he guilty in fact. He is a man well along in years, selected by the members of the City Commission, who personally knew his long honest service in the Parks Department of the City Commission, and had and have every confidence in his integrity. He has been unfairly imposed upon and disgraced. He was without police experience, and with a police department that he had to take as it was under the civil service regulations. He was convicted largely upon uncorroborated testimony of this man Holt,

who absolutely and clearly betrayed Mr. Finch, and then has attempted to disgrace him to save his own hide. It is a miscarriage of justice which can never wholly be rectified.

As to Mr. Pearce, there are intimations in this record of wrongful conduct. These intimations he was not called upon to refute or defend against, because he had once defended thereon and been acquitted, and because here this was not the charge. So we do not have his story with relation to these intimations. He is not guilty, and by no stretch of the imagination can it be indicated here that there is evidence of his guilt of the offense charged of agreeing with these various people to permit or allow or assist the operations alleged. There isn't the slightest intimation of such an agreement by him. There is no connection with these operations shown on his part, and he, as a layman, had no power to permit or allow such operations, and absolutely no control over them. The fact attempted to be established here of the receipt of money from prostitution, which is the intimation of wrongdoing contained in this record, was tried and proved to be an untrue charge.

The admission by the Court here of the record in that case 10785 bringing it to the attention of the jury and then the withdrawal of it by the Court after the close of the trial, when it was the only evidence introduced by this defendant, and the refusal to permit the matter to be mentioned in argument to the jury and then the instruction to the jury (Ab. 79) that they were not to consider this at all, was not only erroneous in

substance and thus prejudicial, but was prejudicial also because of its separate effect upon Mr. Pearce's position with the jury.

He was not tried, nor was any defendant tried upon the charge alleged in the indictment, nor was that charge proved against any defendant here, nor were the defendants here given a fair trial.

We believe it has been established that the judgment as against these defendants should be reversed.

Respectfully submitted,

H. L. MULLINER,
Attorney for Appellants,
Harry Finch and R. O. Pearce.