

1940

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

Utah Supreme Court

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Joseph Chez; Zelf S. Calder; Attorneys for Plaintiff and Respondent;

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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. 620C

**REPLY BRIEF OF APPELLANTS**

BALL & MUSSER  
EDWARD F. RICHARDS,  
*Attorneys for Appellant*  
*E. B. Erwin, on the Brief*

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

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IN THE  
**SUPREME COURT**  
OF THE STATE OF UTAH

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STATE OF UTAH,  
*Plaintiff and Respondent,*

vs.

E. B. ERWIN, HARRY FINCH and  
R. O. PEARCE,  
*Defendants and Appellants.*

CASE  
NO. 6200

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**REPLY BRIEF OF APPELLANTS**

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This case has been analyzed in the previous briefs filed. This brief will be devoted to calling attention to some specific and basic points of difference which appear to us to be of conclusive importance on this appeal. The same order of discussion will be observed as was followed in the main briefs after a brief discussion of the indictment and evidence.

**THE INDICTMENT**

This indictment, it will be recalled, accused these appellants and others, naming Ben Harmon, deceased, and Mr. Thacker, acquitted, that they "did wilfully and unlawfully agree to combine, conspire and confederate"  
\* \* \* "On the 6th day of January, 1936, and on divers other days and times between that day and the first day of January, 1938, \* \* \* to permit, allow, assist and enable houses of ill fame \* \* \* lotteries, dice games,

slot machines, book making, and other gambling devices and other games of chance to be kept, maintained and operated.”

While we do not waive any of the contentions as to the indictment made in our former briefs, we emphasize again that this is an attempt to allege an agreement. What were the terms of the agreement?

There is no point to arguing the validity of the statute as to short forms of pleadings in criminal cases. The cases cited in the Brief of Mr. Erwin are conclusive that this cannot limit the constitutional provision of a defendant to be informed “of the nature and cause of the accusation against him.”

(References hereafter to the Erwin Brief will be marked “E”, and to the Finch and Pearce Brief will be marked “F and P”).

The point is that this indictment does not sufficiently allege the agreement to enable a defendant to be informed as to the nature of the accusation or so as to protect him against other prosecution for the same acts that might be involved under the generality of this allegation.

Particularly, it does not allege the “means agreed upon”, to “permit, allow, assist and enable”. Clearly it could be in the mind of the Grand Jury that the appellants agreed to solicit business for these places, that they agreed to advertise these places, or that they agreed to provide financial assistance, or housing assistance for these places, or that they agreed to partici-

pate in the profits from them, or that they agreed to afford police protection for these places, or the operators thereof. These or any number of other means of assistance might have been in the mind of the Grand Jury, or might be later charged against these defendants, as constituting the "means agreed upon."

The case cited (E. bf. p. 15) where it was held that an indictment "to injure, oppress, threaten, or intimidate" citizens, was insufficient, is certainly in point in principle on this matter.

While it is now conceded that the indictment could not "be cured by the Bill of Particulars (Respondent's brief, p. 45) this was not the position taken in the trial court but an effort was made to allege the means agreed upon or supply the same by the Bill of Particulars. The Bill of Particulars, however, in no way supplied this deficiency in the indictment. It did inject into the case another cause of action entirely, which has been relied upon as the charge here in the opening statement, in the evidence, in the instructions, and now finally in the brief of respondents.

This allegation in the Bill of Particulars said "That during all of the period between the 15th day of March, 1936, and the First day of January, 1938, the said appellants permitted, allowed, assisted and enabled houses of ill fame", etc. "\* \* \* to be kept, maintained and operated \* \* \* by then and there failing and refusing to make arrests."

Thus the Bill of Particulars alleged a substantive offense committed by the appellants and for which they

were tried. The indictment, however, alleges no substantive offense but alleges an agreement which was the corpus delicti of the offense.

(See E. bf. p. 23 et seq.) on the proposition that the District Attorney can not "assume to specify" the offense the Grand Jury intends to charge.

Coming back to the indictment the question is what are the acts or what are the things that these people agreed to do or perform. It is argued that the object of the conspiracy was to permit or allow as alleged. Clearly this might be accomplished by doing any number of things or by doing nothing.

Even in a civil case if a person should attempt to allege an agreement he couldn't allege it without stating what it was that the parties agreed to do or perform. Even where a substantive offense is alleged and it is alleged that defendants agreed to confederate to commit it, it is required that they allege the acts that they agreed to do or perform.

The Topham case, decided by our Supreme Court, cited at page 19 of the Erwin Brief, is a leading case on the general principle, sustained by the following cases, some of which are based upon the Topham case. As the indictments used somewhat similar language to that used here, they will illustrate this defect.

In *Abrams v. State* 161, P 331, (Okla.) the defendant was charged that he unlawfully "procured" a girl to become an inmate of a house of ill fame. Holding the Complaint bad the Court said, and cited the Topham



case in support of its opinion, that the use of the word "procured" was not sufficient, that there are many things that might have been done to come under the definition of this word and said:

"It is then necessary, in charging an offense claimed to be embraced within the general language of the statute, to set forth the particular things or acts charged to have been done with reasonable certainty and distinctness."

*People v. Burns*, 241 P. 935 (Cal.), is another case which cites the Topham case, and where the defendant was charged and convicted for inducing a female, etc., to enter prostitution, in that the defendant did unlawfully "cause, induce, persuade and encourage" her. This was the language of the statute. The Court held the indictment bad. It recites that each of these words had a meaning and that effect, should by the Court, be given to the meaning of each and that the defendant therefore could not know in advance what acts might be proved. That it was necessary to allege what "was the means" used by the defendant.

*Cole v. State*, 177 P. 129, was a case in which the defendant was charged that he did knowingly "harbor, aid, assist", etc., a fugitive from justice. The court said:

"How would the defendant be able to prepare his defense without being informed by the information how he *enabled* or how he *assisted* or how he harbored, or how he concealed, said fugitive from justice."

This court cites 124 U. S. 483, 31 L. Ed. 516 upon

the proposition that while an indictment may charge an offense in the language of the statute that the description nevertheless “must be accompanied by a statement of all the particulars essential \* \* \* to acquaint the accused with what he must meet on trial.”

*People v. Zambounis*, 167 N. E. 183, (N. Y.).

The defendant was charged that he did unlawfully, with intent to sell, show lewd, obscene, etc., printed matter. The court said while it was not necessary to allege this material in full, the defendant should be informed of the “nature of the charge against him and of the act constituting it”, not only to enable him to prepare for trial, but to protect him from again being tried for the same offense, and that no defendant should be required to resort to the testimony in any case to show that he had already been tried for the same acts.

In *Hood v. United States*, 43 F (2) 353 (10 C. C.) it was charged that the defendant did “receive, conceal, buy and facilitate the transportation, concealment and sale” of narcotic drugs. The court held that the charge did not identify the offense within the rule of *Skelley v. United States*, 37 F. (2) 503, and that the charge should have been sufficiently definite to identify the acts committed and distinguish them from other similar offenses.

In *People v. Ward*, 42 P. 894 (Cal.) it was held that although alleged in the language of the statute, that the defendant did “give a bribe”, the indictment was not good because it did not charge the defendant with “any acts” of giving anything of value.

There are numerous cases holding that where statutes are general in attempting to state offenses and do not specify the "acts" which are made criminal, not only the indictments thereunder, but the statutes themselves, are bad.

*State v. Burns*, 23 P. (2) 731 (*Ida.*)

*State v. Diamond*, 202 P. 988 (*N. M.*);

*State v. Satterlee*, 202 P. 636. (*Kan.*) In this case the court said: "The statute prescribes punishment for any one who carelessly or negligently handles or exposes nitroglycerin", but does not say what acts constitute carelessness or negligence, thus necessarily leaving the jury to determine what is carelessness or negligence in any particular case." The court then says that neither the statute nor the indictment drawn in the language of the statute, "inform the defendant of the nature and cause of the accusation against him."

See also *Ex parte Moore*, 224 P. 662 (*Ida.*).

That this principle with relation to language such as is used here and applied by the foregoing authorities in cases alleging a substantive offense, also apply to allegations of the agreement is shown by numerous cases, some of which are cited in the brief of Appellant Erwin.

It is not contended that the means must be alleged independently of the statute in every instance, but the rule is that they must be alleged unless the language of the statute clearly indicates the "acts" constituting "the means agreed upon".

*United States v. Grunberg*, 131 F. 137 (C. C. A.) is a case squarely illustrating what we point out here. There, the indictment which was held bad, alleged that the defendants named conspired and confederated, etc., by “agreeing to defraud the United States of America of large sums of money to become due and payable to the United States of America as customs duties accruing upon divers importations of merchandise to be thereafter imported and brought by Grunberg, Baitler and Burnham \* \* \* from Switzerland into the United States \* \* \* into the port and collection district of Boston and Charlestown in said district of Massachusetts.”

The opinion of Justice Putnam says:

“Every element is here which is necessary to make out to the common understanding on offense. But, according to the settled practice on indictments for conspiracy, *whether the means to be employed are in themselves lawful or unlawful, it is not sufficient to merely allege in such general terms that the defendants have conspired to defraud*. The indictment must allege, to some extent at least, *the means* intended to be used in defrauding.”

“Of course, there are various ways of defrauding the customs. Parties may conspire to defraud by smuggling in goods at night; they may conspire to defraud by bribing the custom house officers; they may conspire to defraud by forging invoices; they may conspire to defraud by false invoices; and the pleader must ordinarily show, in a general way, which of those methods the parties intended. The indictment must go at least so far as to point out something as to the way in which the parties intended to defraud because there

cannot be a conspiracy known to the grand jury, without some knowledge of the general line in which it was to march.”

Thus, is pointedly shown, a glaring defect in this indictment.

Respondent, in answer to the foregoing and to the other arguments of appellants with relation to the indictment, merely cites *People vs. Tenerswicz*, 266 Mich. 276; 253 N. W. 296. This case was cited and distinguished in our original brief. (F. & P. p. 15). Respondent passes over it very lightly, doubtless for the reason that it is clearly distinguishable.

That case charged that certain police officers, naming them, and certain named operators of houses of prostitution conspired unlawfully “to permit and allow the keeping, maintaining and operating of houses of ill fame.” The import of the indictment, the bill of particulars and the proof is that they entered into an agreement for the operation of the houses of prostitution, of the defendant operators, and that such operation was a felony under the laws of the State of Michigan.

The opinion is somewhat confusing and illigical. It cites the case of *People vs. McKee*, 146 Pac. 522, (See F. & P., p. 16), which held that such an agreement with operators by officers constituted a conspiracy to “obstruct justice.” This opinion then loses track of this, and argues that this operation was a crime, and then cites a number of cases to support it, and ends up by holding that what was charged was a substantive offense, and that these parties conspired to commit it. It was not un-

der a conspiracy statute, but was a common law conspiracy. The opinion points out that it was shown that every defendant charged participated with the other defendants in operating the houses of prostitution and in dividing the profits among the group, consisting of the officers and operators charged. This is an entirely different situation and a situation where the conduct of the parties acting together might tend itself to prove the agreement, as in many other cases where a substantive offense is charged and the conspiracy consists merely in combining to commit it. This we have pointed out repeatedly in our brief is not our case.

The contentions made by us here were not made in that case. The contention was made, not that the agreement, but that the substantive offense was not sufficiently defined. The opinion devotes a good deal of discussion to the point that where a conspiracy to commit an offense is charged, and is so charged that the conspiracy is made the gist of the offense, it is not necessary to define the substantive crime with the same particularity as if the commission of the substantive offense was a direct charge. While this is a doubtful proposition itself, it is not involved here. We might add, however, that in the later case of *People vs. Westenberg*, 265 N. W. 489, the same court held that an indictment charging that the defendant did break in and enter the building of a person named in an attempt to commit a felony, was bad for the reason that it did not define the acts which it was claimed would constitute the felony. The opinion says:



“Both in this state and elsewhere it is the rule that, where a statute uses general or generic terms in describing an offense \* \* \* or the statute charges a mere legal conclusion, an information which alleges the crime in the words of the statute is not sufficient.”

## INSUFFICIENT EVIDENCE

The extended and as we believe, sound arguments and the numerous authorities cited in our main briefs show that the evidence here is wholly insufficient. These are met by the statement that it will help to arrange the same evidence in chronological order and by the citation of the Utah case later considered. As was stated in *Wyatt v. U. S.*, 23 F (2) 791 (F. & P., 132, 172) always,

“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 chronological arrangement by respondent here does not aid its case even though, it will be observed that it contains over-statements of what was actually testified.

Usually where the agreement is the gist of the offense and the parties charged are not accused of committing a substantive crime, so that their joint engagement in the crime may be some evidence of the agreement, there is some evidence of association, conversations, correspondence, communications or confederation of some kind. Here there is none. The trial court indicated that the fact that operations were carried on which

were always carried on, is no proof of any agreement. Neither is the individual conduct or statements shown by the chronological statement, legal proof of the agreement here, or of the participation of any appellant therein.

It is only necessary to examine the respondent's statement of the evidence, keeping in mind that the thing to be proved is "the" agreement, to at once determine this. There must be a meeting of the minds of alleged conspirators on the alleged means before there can be an agreement.

The state, by its independent charge in the Bill of Particulars, and by its proof, attempted to center upon some question of knowledge of isolated law violations. This is utterly immaterial. The cases go much further and hold that even knowledge of the existence of conspiracy as alleged in the indictment, and even though one is in position to stop it and has the duty to do so, does not justify a conviction. (See F. & P., p. 80, 81)

Any condition or circumstance that does not point directly to proof of the agreement must be eliminated in considering the question of evidence to support the conspiracy here. (F. & P., p. 21-24) In *State v. Judd*, 279 P. 935, this Court goes further and says:

"Evidence is not relevant or admissible unless it tends to establish the facts sought to be proved."

And the same rule is announced in *State v. Dean*, 254 P. 142, by this Court, the opinion there 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.”

There is no escape from the authorities cited, (F. & P., p. 20, 23) to the effect that evidence to be considered as sustaining the charge must, in this kind of case, based entirely upon circumstantial evidence, “so distinctly indicate the guilt of the accused as to leave no reasonable explanation of them which is consistent with the prisoner’s innocence.” (F. & P. p. 22)

So we see again that even the wild opening statement of the prosecuting attorney at the trial, if admitted to be true, and now the statement of evidence by respondent in its brief and in its argument, do not sustain or tend to sustain the charge of the agreement alleged, no matter how it is arranged. Nor is there any escape from the rule quoted from 16 *C. J.* p. 652, that while *prima facie* proof of the existence of a conspiracy might be sufficient to let in proof of the separate statements of the different alleged conspirators at different times the rule of law now applicable as to such is this:

“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 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.” (F. & P., p. 103)

And, further, this Court has said in a number of

cases that this question as to whether the evidence is sufficient to justify a verdict is a question of law to be determined by the court. In *State v. Karas*, 136 P. 788, this question was involved and the holding of the Court is reflected in the syllabus as follows:

“While the jury are the judges of the facts \* \* \* it is \* \* \* for the Court, and not the jury to decide in every case whether the evidence will justify a verdict for the party adducing the evidence.”

Discussing this same principle in *Spring Canyon v. Industrial Commission*, 201 P. 173, at 176, this Court again says:

“Whether an inference may legitimately be deduced from a particular fact or from a state of facts, or from circumstances, is purely a question of law; while the probative force or effect that shall be given to the inference, if, as a matter of law it may legitimately be deduced from the given fact or state of facts, or circumstances, is a question of fact. Whether the inference in question may be deduced as claimed is therefore a question of law which we must determine as such.”

Respondent makes the statement throughout its brief and arguments in reference to separate and different statements or conduct at different times by different alleged conspirators that this is “some evidence of guilt.” *Guilt of what?*

The state is invoking the pernicious doctrine that a conviction may be sustained on suggestions and intimidations of misconduct of which appellants have not

been charged and of which they have had no opportunity, and against which, there was no duty to defend; and, in a properly conducted case, they would not be permitted to defend. This practice has been condemned not only by numerous cases cited in our original briefs, but by Courts generally. (F. & P., p. 79-90)

Further as was aptly stated by Judge Rudkins, 7 F (2) 28:

“A conspiracy is not an ominous charge, under which you can prove anything and everything, and convict of the sins of a lifetime.” (F. & P., p. 135)

And in connection with the testimony of Austin Smith and Hayes, and even the long hearsay statements of Fisher Harris, and particularly the testimony of Holt, we ask the Court to consider the statement by the Supreme Court of the State of California:

“To admit such declarations and such hearsay testimony in proof of the conspiracy \* \* \*” would “in charges of criminal conspiracy, render the innocent and helpless victims of villainous schemes supported and moved by the pre-arranged and manufactured evidence of the promoters thereof.” (F. & P., p. 94)

On this phase of the case respondent cites the opinion of Judge Straup as quoted in the Inlow case. This language was not there used by Judge Straup as he did not write the opinion in that case, but it was quoted there. The language was used by Judge Straup in *State v. Tidwell*, 44 *Utah* 248, 139 *P.* 863. It was to the effect that evidence must be considered in its relation to other

evidence. This, of course, is not denied. This was a larceny case involving the stealing of a cow and in which the opinion recites: "The record shows ample evidence to support the verdict." This quoted statement was made in connection with the testimony of a butcher, as to the kind of beef that he had purchased from the defendant, indicating that it was such beef as was claimed to have been stolen by him. It was an incident merely in the case not essential to the conviction, and immediately following the quotation given by respondent, Judge Straup said:

"We think this evidence had a direct relation between and connection with other facts shown, and that it, together with such other evidence, tended to show that the beef sold and delivered to the butcher was the beef of the stolen cow."

Certainly no one should object to this kind of evidence in this kind of case. But we ask the Court, what are the connecting facts even as now recited by the respondent which, together with other evidence, proves, or even tends to prove the agreement alleged here between the defendants, and particularly after the exclusion as to each circumstance of "any hypothesis" consistent with the non-existence of an agreement, or of the non-participation in the making of the agreement alleged, if any agreement had been proved.

The foregoing considerations, when the authorities heretofore cited are considered, require reversal of this case as we believe, independent of the later showing in our briefs. These relate as to a vast number of circumstances which were inadmissible because of lack of foun-

dation, or otherwise, and because of lack of corroboration of admitted accomplices, or for the other reasons stated; and also other errors.

We shall now briefly point out that appellants' contentions and authorities on these and other matters stand unanswered.

## SEPARATE MATTERS OF DEFENSE

### I.

Under classification of evidence (1), (F. & P., p. 13, 56) we pointed out that the fact of operating of houses of prostitution, or the fact of gambling in licensed card rooms, or the fact that lotteries occasionally operated, when, as shown in the evidence and as instructed by the court, they had operated not only at the times alleged in the indictment but also at prior and later times, and operated in spite of anything that could be done in any metropolitan city, was no proof of the agreement alleged. This was perfectly obvious.

Respondent passes over this merely with the statement, "The fact that these places operated was not evidence of an agreement, but when we consider that that evidence with the fact that collections were being made, instructions were being given to open and close these places, we immediately see that their operation does aid us in determining that the agreement existed."

We would like the Court to think about that, as it is the basic and fundamental contention of respondent here and throughout its brief. No collections were made by appellants.

Collections were made from houses of prostitution,

only by the state's protected, corrupt and uncorroborated crook Holt, if he is to be believed, in confederation, he said, with Rosenblum, who was never claimed to be a conspirator. This was in 1936, and with Ben Harmon in the latter half of 1937. The only other collection testified to was by a stranger, Stubeck, from one or two card rooms totally disassociated from any appellant and between January and April of 1937 when H. K. Record, another of respondent's witnesses, was head of the anti-vice squad and not even Holt was in it.

How could these possibly be circumstances which under the rule of evidence that the circumstance must point directly to proof of the agreement between the alleged conspirators, after excluding every hypothesis of the absence of such agreement or the absence of connection of the appellants with the agreement, if one were proved. Can this be said to be such proof of the agreement alleged? Not "an" agreement, but "the" agreement.

The next suggestion is that because instructions were given to open and close these places, this is proof of the agreement. Now Holt did testify that in January of 1937 Mr. Finch, and he alone told him to close these places, and he said he told them to close and he guessed they temporarily did. His own evidence is, however, that they couldn't stop prostitution even if they placed a man in every known place. He testified that Mr. Finch afterwards said to allow them to run but not run too openly. As shown hereinafter, this was not corroborated and was denied by Mr. Finch.

The other matter of closing was that he ordered Holt to see Rosenblum and demand that the law be observed in his card room, and later ordered him to close up Rosenblum. This was at the very time that Holt testified that he was collecting and turning prostitutes money over to Rosenblum in the last half of 1936. This is the evidence as to opening and closing. How does this prove the "agreement here alleged." In addition, this is the conduct of one alleged conspirator which could not properly be introduced into the case until a foundation was laid by making independent proof of the conspiracy, and cannot now be considered at all until the conspiracy is independently proved. To be proof of an overt act it must first be shown that the conspiracy existed, that Mr. Finch was a party to the agreement, and it was done to effect the object thereof. 103-11-3, R. S. U. But, and in any event it does not under the rule of circumstantial evidence in any degree tend to prove the conspiracy here alleged. A moment's analysis of the actual charge will definitely convince of this.

## II.

Under classification (2), (F. & P. p. 13, 58, Resp. p. 56) we made a rather exhaustive discussion and citation of authorities relating to the contention of respondent that long recitals of things by Fisher Harris and other witnesses and involving rumors of what they had heard, claimed to have been recited to different defendants, were here erroneously admitted as hearsay; and while they were admitted upon the theory that they



involved an admission, were wrongfully admitted for the different reasons discussed at the places above indicated. And particularly, and we again emphasize this, because in no instance did they relate to the offense charged here or to guilt of making the agreement. Not once was the alleged agreement or confederation of these defendants ever even intimated in connection with these alleged admissions. Now the respondent answers, but cites no authority in contradiction of our authorities that the charge must be of the offense made and the answer or the conduct of the defendant must constitute an admission of the charge alleged. This is studiously evaded and avoided.

Respondent says in relation to these that the state claimed that they "showed a consciousness of guilt on behalf of the defendants." *Guilt of what?* We ask the Court to read this part of the State's argument with this question in mind.

Reference is made to the testimony of Austin Smith and Ellett within thirty days after Mr. Finch had taken office in March, 1936, when he certainly could have been connected with no monthly collections on the first of the month. Further, there is not a word of evidence that anyone collected from anyone in the first half of 1936 or until August of that year. Austin Smith had been removed from the office of secretary to the Mayor. He obviously falsified when he said he went to Mr. Finch's home and was met by Mrs. Finch at the door when Mrs. Finch was sick in bed and died from the sickness that then confined her, and makes the confusing statements that Mr. Finch said "The pay-off is



\$2,000.00 and probably Abe Rosenblum *would* collect it." This witness apparently tries to show that Mr. Finch had knowledge of a previous pay-off and then tries to project it into the future by saying Rosenblum "would" collect. It will be remembered that Holt by his own testimony did not contact Rosenblum until August of 1936, and it was shortly after that Mr. Finch ordered his card room closed, for law violations.

Now Mr. Ellett testified "his friends" had told him that Finch "was receiving" \$2500.00 a month behind his back. We will not here discuss the admissibility of this kind of evidence as that has been argued and, as stated, this was during the first thirty days that Mr. Finch was in office and he stated that he did not think any mention of that kind could be intended to apply to him.

It will be noted in stating this evidence, and we plead with the Court to examine the actual record of testimony, that this and other testimony is not properly set forth in respondent's discussion here, particularly the conversations of Mr. Harris.

But, and this is the point, supposing Mr. Finch did have knowledge of a pay-off, or supposing Mr. Pearce did have knowledge of a pay-off in March, 1936, or any other time, and it is testified that at three or four different times at several month's intervals during the two years of 1936 and 1937 someone did say to Mr. Finch in substance that there were rumors of a pay-off, what does it prove as to the contract alleged here? It is only evidence of the agreement that we are interested in.

There is here no question of whether something was done accidentally or without intent, or that if an agreement were made that it was so made. If the agreement had been proved whether Mr. Finch was indifferent to rumors, and we think the evidence shows he was not, added nothing. Certainly it could not be admitted as proof of something done to further the agreement until the agreement, and his connection with it, was proved. It does not tend to prove any confederation or agreement with any alleged conspirator. And the law is that indifference to a known conspiracy does not constitute an offense.

In this part of the argument it is contended particularly that when Mr. Harris either said to Mr. Fish or wrote on a piece of paper and handed it to Mr. Fish at the Alta Club, after the conspiracy is alleged to have been closed, and in which it was stated or written that Mr. Erwin was receiving \$750.00 and Mr. Finch \$500.00, that Mr. Finch said he had not heard of this. Respondent says Mr. Finch did not deny it but Mr. Harris testified that he did. Anyway, respondent sums this up by saying, "it showed the consciousness of guilt."

Now first, we say there is no evidence that this particular thing had ever been stated even as a rumor to Mr. Finch previously, so that if he made this statement it was apparently true, and secondly, we say again, Guilt of what?

If he had said in so many words, "I am receiving \$500.00," it would have no tendency to prove the agreement alleged here nor would it be conduct which could be used against any other defendant in the case. Re-

spondent cites authorities every one of which are beside the point, because in every instance where an undenied charge is introduced as an admission it is a charge of the offense for which the defendant is being tried, and in no instance is there any such thing here. This mass of incompetent recitals offered as testimony as discussed in our original brief were inadmissible for the reasons given, and in no event do they tend to prove the agreement. Respondent says when they were told that there were rumors of these "illegal vice activities" they should have disclosed that they had heard of them at different times from other sources (Resp. p. 66), that their conduct indicated an intention to evade as much as possible the truth surrounding the pay-off in Salt Lake City, and that this was proof of the agreement. We say that under the law cited in our main brief that if respondent had proved a conspiracy beyond a reasonable doubt and if defendant had said, "I know of this conspiracy. I know it exists. I know that houses of prostitution are operating as a result of this agreement. I am not doing anything about it and I don't intend to," that this would not make him a party to the conspiracy and there is no law cited to the contrary. (See F. & P. p. 79-83.)

How can respondent then depend upon a lot of recitals at different times by different people of rumors of prostitution and gambling in card games and one or two instances of lotteries, never brought to the knowledge of any appellant at the time, as either proof of the agreement alleged, or the connection of any appellant with it, no matter how often it was stated, or whether he de-

nied or admitted that he knew about it. This contention, it appears to us, is too absurd for further comment.

### III.

Under classification (3), (F. & P. p. 14, 74) we discussed, as stated by respondent, seventeen different points of evidence which we contended were erroneously introduced and further did not tend to prove the agreement, which is the *corpus delicti* of the crime here alleged.

It includes intimations of wrongful acts or neglect or statements claimed to indicate irregular conduct of separate individual defendants at separate places and at different times during the two years involved. It in no way relates to the agreement alleged.

Respondent says we shouldn't take these instances separately but together and in connection with other evidence. We do not care how they are taken or in what order. The authorities cited in our main brief commencing at page 78 clearly sustain our position with reference to them and this contention and this authority stands unrefuted.

Respondent cites with some little variations its testimony again and again. There are some misstatements of the record which are more or less important. On page 88 they contend that Holt's testimony was that Mr. Finch told him to quit making collections. We say it comes down to the same statement that they previously made with relation to the same evidence, that he told him to close up some places. We cite this testimony as showing the caliber of this uncorroborated, corrupt witness (See

F. & P. p. 35-37), and we again assert that it comes down to just what we stated.

Respondent sums up this part of its brief at page 90 by saying that these incidents tended to establish "the connection of the defendants with the conspiracy" alleged in the indictment. This contention must presuppose that the conspiracy had been proved. It is apparently conceded that this kind of testimony doesn't prove the conspiracy.

Now again we ask that the Court take each statement made by respondent from pages 84 to 93 under this classification and try to find one that shows the connection of any defendant with any agreement as alleged in this indictment. We think there is no such. In this connection we directly challenge the statement made by respondent on page 85 that even Holt or anybody else has testified that Mr. Finch told Holt to see Rosenblum about making collections. On this matter, and this is intimated at other places in the brief, there is testimony of Mr. Finch and Mr. Thacker and other officers that Mr. Finch did at times, when burglaries were frequent in Salt Lake, tell different officers to see not only Abe Rosenblum but others who operated card rooms, as well as operators of different cafes and beer parlors, and try to get assistance as to any "hangers-on" around these places who might be committing these burglaries. He did tell Mr. Holt to see Rosenblum about the operation of his card room and to see that it was operated within the law, and later, to see that it was closed.

But, if Mr. Finch had told Abe Rosenblum to see

Holt and tell Holt to collect from houses of prostitution and bring the money to Rosenblum and tell Rosenblum to bring it to him, still that would not prove the agreement here alleged nor tend to prove it. There is not a scintilla of legal evidence that Mr. Finch ever touched a cent of corrupt money. This whole contention amounts to the proposition that Mr. Finch's attitude or some other person's attitude toward a strictly closed town is proof of the agreement here.

Respondent must know that this is not true, and the district attorney also knew that he could get a conviction anyway by making a lot of intimations of miscellaneous and colored wrong attitudes, and by getting them before a jury of laymen by means of his own opening statements and arguments and by various nondescript witnesses, and by prepared statements of the city attorney worked out for the purpose of ousting Mr. Erwin as mayor. The district attorney was never interested in seeing that these appellants had a fair trial. They have had to appeal to this Court for protection of their rights in this respect.

#### IV.

Under classification IV (F. & P. 90) (Res. 93), we discussed statements of certain persons made outside of the presence of any person claimed to be a conspirator. This relates to statements attributed to Mr. Erwin—"I now have my chief of police"; the statement attributed to Mr. Pearce that he was authorized by Mr. Erwin to make some arrangement with H. K. Record when he was head of the anti-vice squad; the statement made after the conspiracy was alleged to have closed and after the conduct

complained of is stated by Fisher Harris to have stopped, that Harmon told Holt that Fisher Harris and Mr. Lee had accused Mr. Pearce of being involved in collections; and that statement of Kempner that Stubeck had said to him that Harmon was dividing the money collected with Erwin and his crowd.

In our main briefs, we supported our contention that these statements were without sufficient foundation and were prejudicially introduced and constituted ground for reversal, and do not tend to support the allegation of any agreement.

We cited authorities at length (F. & P. 92) from our Supreme Court and other jurisdictions, showing that this was a matter of agency and must be within the scope of the agency, and after proof of agency. These authorities are not disputed. Respondent (p. 93) appears to admit that this testimony did not tend to prove a conspiracy but says "these acts were done in furtherance of the conspiracy." We refer the Court particularly to the statement attributed to Mr. Pearce and to Kempner and say again—*What conspiracy?* Certainly Mr. Pearce's alleged conversation with H. K. Record has nothing to do with the conspiracy alleged, and certainly Stubeck was never connected with any conspiracy, or with any one charged with being involved in this one.

Where a substantive offense is alleged as was done in the cases cited by respondent here, the acts done in consummation of the substantive offense charged, as we have often stated, may even be evidence of the agreement, and it is stated in such cases that such acts by one in consummation of the offense charged, may,

after the conspiracy is proved and the connection of the acting conspirator therewith established, be introduced as acts in furtherance of the conspiracy. Here the offense was the agreement. This must be first proved in order for anything of this character to have relevance and if this was proved here, such statements would appear to have no materiality, because the principal offense would be complete, if and when, the agreement was established. Without such proof, the admission of any of these statements was clearly prejudicial. In other words, unless or until this agreement was proved, these matters of individual statement of conduct were inadmissible and if the agreement had been proved they add nothing to that proof, and in addition were erroneously and prejudicially admitted. *State v. Smith (Wash.)*, 174 P. 9, contains in the opinion a statement of this last point:

“There is no more insidious and dangerous testimony than that which attempts to convict a defendant by producing evidence of crimes other than the one for which he is on trial. \* \* \* To establish guilty intent, unlawful motive, or criminal knowledge, it is permissible to show that the act charged against the defendant was one in a series of similar ones; but beyond this the state cannot go, and for the purpose of securing a conviction show the perpetration of other similar acts, *even though committed in furtherance of a general scheme*, where there is no proof required to establish intent, motive, or knowledge, other than proof of the act charged itself.

Furthermore, and this is vitally important, although it is claimed some of these statements were in furtherance of the conspiracy, an examination will show that



such incidental statement of such persons with reference to other persons' statements would not, and did not, in any way, further the objects of the conspiracy. It is idle to contend otherwise.

Furthermore, the alleged statement of Harmon as to Pearce after the conspiracy was alleged to have been concluded was admitted directly in the teeth of the decision of this Court in *State v. DeAngeles*, 269 P. 515 (F. & P. 106).

Now respondent intimates that the statement by Mr. Erwin as to Mr. Finch as Chief of Police was admissible as an admission against interests (Res. 94) against Mr. Erwin. Of course, this is not true. The law is that such an admission must be against the financial interest of the declarant at the time he makes it. What the respondent apparently means is that it is a confession of Mr. Erwin. But the agreement here cannot be proved by confessions as pointed out (E. 32-33) in *State v. Johnson*, 95 Utah 572, 83 Pac. (2) 1010, and other authorities cited, so that this cannot be taken as proof of the agreement even as against Mr. Erwin. What was it a confession of? Certainly not the offense charged.

There simply is no defense of the introduction of this testimony and particularly the damaging testimony of Kempner as to the statement of Stubeck.

Respondent nevertheless attempts to defend this and cites two cases. (Res. 94.) The first is *Delaney v. United States*, 263 U. S. 586, 68 L. Ed. 462. The reference to this subject in the opinion in that case is very brief. The statement as quoted by respondent as made by one of the con-

spirators "He told me that I could sell whiskey, that it is all right, that Mr. G. had talked with Mr. D. (the prohibition director and a defendant herein) and that we could go ahead and sell whiskey." The case involved the charge of the substantive offense of selling liquor in violation of the Prohibition Act. The statement was made at the very time that the person making the statement was selling the liquor. This is indicated from the facts as stated by the Circuit Court of Appeals. It is definitely pointed out that the conspiracy between the speaker and the other conspirator mentioned had been independently established. The statement was made in consummating the very act which was the basis of the substantive charge. We, of course, do not contend that such a statement upon such foundation could not be admitted.

But here is Stubeck, stated to have made a statement about division of money to Mr. Erwin, when the collection of money is not the charge, no alleged conspirator was present, no relation whatsoever was shown between Stubeck and any alleged conspirator. He was himself an operator of a licensed card room. It is not uncommon for people in the same industry to collect money as a defense fund, or a political fund, or for the purpose of procuring licenses or concessions, or for any other number of purposes. This money according to Kempner, was taken openly to Harmon and passed over the counter in the presence of a number of employees and customers.

In any event, no conspiracy was independently proved or attempted to be proved in which Stubeck was connected with these appellants. It could just as well have

been claimed that he made the statement against any member of the jury trying him, or any member of the court, and the foundation would have been the same. Certainly, this, the law does not permit.

The other case relied upon by respondent, *International Indemnity Company v. Lehman*, 28 F (2) 1, was a civil case involving a conspiracy in connection with the sale of land. The statement alleged to have been made as to appraisement was made during the very transaction and after the conspiracy had been independently established and the speaker and the person mentioned shown to have been connected in the conspiracy together. This was so clearly shown, as stated by the opinion, that the opinion says if the admission of the statement were error, it was not prejudicial because the testimony outside of it was sufficient to independently require conviction.

There are other cases where a substantive offense is charged and where statements were admitted when made after the conspiracy had been established and when they were in furtherance of the conspiracy, in the sense that they were made in consummation of the crime charged as the substantive offense. We have no argument with these cases. But here a contention is made that one person can convict another by making a statement about him without any foundation of agency at all.

Respondent says that such declarations made "during the progress and in the prosecution of, the joint undertaking" have been admitted. And that is true, always assuming, however, that the conspiracy constituting the joint undertaking is independently proved so as to establish the agency and that the statement is within the scope of the agency.

Respondent also quoted a general statement to the effect that they may be introduced when they form part of the *res gestae*. This involves a general exception to the hearsay rule, but the *res gestae* here is the making of the agreement constituting the offense alleged, so it is foolish to talk about *res gestae* in connection with these statements, and particularly Stubeck's alleged statements. It is needless to cite decisions from this Court holding that this rule as to *res gestae* applies only where the statements are made under the influence of an accident or other similar matter and under the compulsion of the act, so that it is the act of speaking. That is what the words mean. In other words, that the speaker making the hearsay statement has no opportunity to consider or make up a statement made.

*22 C. J. 461, Sec. 549*

“Spontaneity—a. In General. In order for a declaration to be admissible as a part of the *res gestae*, it must be the spontaneous utterance of the mind while under the influence of the transaction, the test being, it has been said, whether the declaration was the facts talking through the party, or the party talking about the facts. The guaranty for truth is found in such a correlation between the statement and the fact of which it forms part as strongly tends to negative the suggestion of fabrication or invention, and a suspicion of afterthought will prevent the reception of the statement.

It is difficult for us to imagine a circumstance under which there could be such spontaneity in connection with the making of an agreement alleged as the offense here. It is nonsense to talk about any of these statements hav-

ing been made under such influence. This testimony, particularly as to Stubeck, was just as damaging as the Court indicated when he said it would probably result in a new trial if not connected up, and it never was. And certainly statements made after the conspiracy ended couldn't be in furtherance of it, nor within the scope of agency.

Considering our review and the respondent's review of these four classes of testimony which includes it all, and the practicable admission of respondent that the major portions of it do not tend to prove the conspiracy had independently been established, we emphasize again that the evidence does not support the verdict here, and this really is so conclusive as to obviate the necessity for consideration of any other matter. This is not intended, however, to in any way waive any contentions that we have made because we have selected to argue to this Court only those errors which appear to us to be clear and manifest.

## THE TESTIMONY OF ACCOMPLICE HOLT

The matter of corroboration of this admitted accomplice is discussed (F. & P. p. 117; Res. 108). Again we find ourselves to be on what we believe is solid legal ground. We quoted from *State v. Laris*, 2 Pac. (2) 243:

“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.”

Also :

“The accomplice may state any number of facts, and these facts may all be corroborated by the evidence of the other witnesses; still, \* \* \* 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.”

It will be noticed how often the state, in attempting to cite testimony to show any support of the allegation of an agreement here, has cited the testimony of Holt and the collections made by him. This is done to try to tie the case here in with the Tenerowicz case (F. & P. 15), a case so much relied upon by the respondent. But in that case, as has been pointed out, the officers and the operators of houses of prostitution were collecting and dividing the money from the operations which they had agreed to carry on. Here Holt nowhere testified to any agreement or confederation or understanding with the appellants or any of them as to his collections of money. He says he did collect and turn money over to Rosenblum in the latter half of 1936, and did collect and turn the money over to Harmon in the latter part of 1937.

Far from implicating Mr. Finch he corroborates Mr. Finch, and testifies that in May or June of 1938 he stopped his car when he saw Mr. Hoagland and Mr. Finch sitting in an automobile at Mr. Hoagland's home and got in their car and that the following was said:

“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 de-

partment being tied up with 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.' "

We have never been able to see that there is any proof of an agreement here even including Mr. Holt's testimony. No one could contend that outside of it there is anything to "show the corpus delicti or to connect any of the appellants with it." Certainly no corroboration of a single thing Holt testified too.

Undoubtedly this fellow used this money, or at least substantial amounts of it in his own operations as shown by his own testimony. In any event he was a confessed criminal seeking to save his own hide and his testimony should be regarded with suspicion and should not be given full credence.

The argument of the state amounts to no more than this: That this court should give full credence to the testimony of this witness even though they admit that he is an accomplice. We say that the proposition is similar to that in *People v. Rodriguez*, 99 P. (2) 363 (this page was erroneously given before as 263) where the appellate court refused to give full credence to the testimony of an alleged accomplice and where the court says:

"Thus it appears that a treacherous influence threatened Carroll's veracity."

And in the case of *People v. Walther*, 81 P. (2) 452, at 455, where the appellat court said:



“We may assume that the district attorney has a right to arbitrarily select one of two coconspirators to whom he may tender immunity from prosecution in reward for his state’s evidence against his colleague, but such evidence is open to suspicion lest the temptation to thus escape a threatened penalty of law may result in unreliable testimony. \* \* \*

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 coconspirator with relation thereto become competent or admissible. \* \* \*

If the appellant is guilty of the last-mentioned offense his coconspirator is equally culpable, and under such circumstances the court should carefully scrutinize his evidence to see that the wholesome rule with respect to proving the facts constituting a conspiracy independently of the coconspirator’s admissions has been complied with.”

We beg of the court to examine the testimony independently of Holt, and assert that there will be found no evidence to support the charge of an agreement here. We assert with confidence also that such examination will disclose no corroboration whatsoever of Mr. Holt’s testimony in any material matter.

## DIFFERENT OR SMALLER CONSPIRACIES

We discussed (F. & P. 128) this question on what we considered and still consider to be solid legal ground, so solid in fact that there is no doubt in our minds as to the soundness of our position. We contended that mere



proof of other or smaller conspiracies could not be considered as sustaining the main conspiracy here alleged, and also discussed the principal error of the court in refusing to instruct at all upon this subject even though requested to do so. We did not contend that the proof of an agreement between Rosenblum and Holt might not be introduced if it was also proof of the main agreement here, but we did contend that clearly, in view of the way this case was tried, that this evidence of this smaller agreement and others that were suggested would confuse the jury into convicting here without having actual proof of the main conspiracy particularly if they were not instructed on this issue. We ask the Court to consider this subject at the pages indicated and the authorities cited in support thereof. (F. & P. 128 to 139).

Now respondent (Res. 115) contends that the admission of evidence of different and smaller conspiracies was not error. This is not supported, and even so would not meet our contention. Respondent cites *Berger v. United States* 295 U. S. 78, 79 L. Ed. 1314 and says that this case overrules the authorities cited by us. This might be important if true. A careful examination of the opinion and of our briefs indicates that no authorities cited by us was even mentioned, let alone overruled in this decision. In this case the indictment charged conspiracy to utter false notes of a federal reserve bank. The object of the utterance thus concerted was not stated in the indictment, but the proof showed an agreement between Katz, Jones and Berger to ut-

ter the false notes and then "to pass the notes to tradesmen". Incidentally the evidence disclosed also an understanding between Katz and Rice, with reference to passing some of these notes "to buy rings." With this Burger was not connected. The court held that the conspiracy with which he was connected and convicted was alleged and also proved, that is the utterance of the notes, and although evidence showed that he was not connected with the disposition of them in one direction, that this did not constitute a variance, even if as contended "in addition to proof of the conspiracy with which petitioner was connected, proof of a conspiracy with which he was not connected was also furnished and made the basis of a verdict against others." The Court then points out that he is not in a position to complain even if the others were in a position where they might have appealed. The Court then illustrates by pointing out that if these two incidents of the conspiracy had been charged in different counts and Berger had been convicted on the one but not on the other count, he would not be in a position to complain because others had been convicted on the other count. They therefore held that Berger was not affected or prejudiced by the other matter because not involved in it and not convicted if it. That is in no way conflict with any of the authorities cited by us or with the sound principals laid down in those authorities

We urge particularly that the failure of the Court to instruct on this subject at all was prejudicial, and the state can not question that.

RES JUDICATA AS TO MR. PEARCE  
AND MR. ERWIN

This matter is discussed (F. & P. 139; Res. 120) and we rely upon the authorities there cited. We do not believe that the respondent's brief controverts those authorities nor that any further legal discussion would help the Court. We do point out that here is an instance where Mr. Pearce, for example, has been tried once on the very same evidence from the very same witnesses, and only this. He is tried now again. What the jury convicted him of under the circumstances it is impossible to say.

What we do say is that unless we can get applied the settled principles of law as to pleadings, evidence, and trials in conspiracy charges, any defendant, can be tried a dozen times on the same evidence from the same witnesses. It emphasizes the importance of our contentions as to the indictment here not alleging the means agreed upon, and again in connection with the last topic, the importance of the Court instructing the jury that they must try defendants upon the charge alleged alone, not upon other and smaller agreements between other and different individuals at different times, or upon other intimated matters of misconduct. Certainly a defendant in this state must still have the constitutional rights to be tried under such an indictment, and such procedure, as will protect him against repeated trials for the same alleged conduct, and given a fair trial, and under instructions that will give him the constitutional protection to which he is entitled.

## CONDUCT OF THE DISTRICT ATTORNEY

This subject is discussed (F & P 154; Res. 134). We do not intend to discuss it again at any length. We insist, however, that the showing made is sufficient to require reversal of this cause even if no other ground existed. We would like to cite respondent's own case, *Berger v. United States*, 295 U. S. 78, 79 L. Ed. 1314, recently discussed under a previous topic as showing a parallel situation. In this case notwithstanding that the court held there was no error in the matter which respondent and we previously discussed, it reversed the case because of the conduct of the district attorney, which was not so seriously prejudicial as in the case at bar.

In the brief and in the argument here, attempt is made to show that the district attorney was opposed by such outstanding counsel and so harassed by us that his conduct should be excused. Unfortunately it was not us but the appellants who were made to suffer. A reading of the record, moreover, will show that he was not so harassed. In fact it will be very difficult for this Court to find any objections made by counsel for the defense that did not have real merit. There was no disposition on our side to over-ride the rules. We wanted the rules observed. With very few, if any exceptions, the remarks that were made by us were made to the Court without design to influence the jury, and were pertinent to the matters being discussed.

The respondent further contends and cites some authorities in support of the contention that the mere

fact that the prosecuting attorney states matters which he may not be able to prove, is not ground for reversal if the statement is made in good faith. With this we agree, but we say that any one would have to stultify himself, in reviewing the conduct of the district attorney here and reading his opening statement and the other matters referred to in our brief (F & P 154-165) to pretend to believe that the district attorney was acting conscientiously and with a good faith regard for the rights of appellants here, and with the purpose of giving them a fair trial.

We point out that the conduct of the district attorney in the examination of Mr. Finch and reading from a newspaper the rumors as therein recited to the jury as to alleged conditions of vice in Salt Lake City, is not only sufficient to establish, by itself alone, the absence of good faith on the part of the prosecuting attorney, but also to justify a reversal of this cause. It was exactly the kind of conduct for which the Berger case, *supra*, was reversed by the Supreme Court of the United States. (Abs. 200, F & P 169.)

### IMPROPER EVIDENCE ADMITTED

The matter of improper evidence is discussed throughout our former brief (F & P 166) and under all the four classifications of evidence contained therein. It would serve no purpose to attempt to review this discussion or the authorities. We also make reference to the assignments with relation to this. (F & P 166) Respondent, under this heading, makes a brief discussion of this matter in answer to our statements. (F & P 166)

This appears to add nothing calling for any additional comment.

## INSTRUCTIONS TO THE JURY

The confusion, commencing with the Bill of Particulars charging a different offense, and continuing with insinuations of irrelevant misconduct and evidence not pointing to the actual agreement as charged; also the confusion of this case with cases where substantive offenses were charged, has continued throughout the trial, and was then carried to the jury through the refusal of the Court to give requests for instructions and also in the instructions given. (F & P 171; Res. 149)

Respondent commences by discussing our requests for instructions as to alleged admissions by silence, and says that they contend that Mr. Pearce's conduct when interviewed by Fisher Harris was an admission. It will be recalled that Mr. Harris testified over and over that he started out asking Mr. Pearce for information, reciting that Harris had made an investigation and found that there was vice in existence and that there was official connection therewith, and asked Mr. Pearce to give him information. He claims that Mr. Pearce hesitated — this was perfectly natural when information was being asked for after a long recital — and that Mr. Pearce later denied any knowledge of it. He did mention that Mr. Pearce was connected with Harmon whom he involved

Again we asked admission of what? Nothing was said about any connection by Mr. Pearce with any of the appellants tried. Certainly there was no admission



of the charge here because there was no statement of it. He stated he was Harmon's attorney. That is not an admission of guilt of the offense for which he was tried.

We wanted an instruction that the long recitals to defendants of rumors, etc. as testified, were not to be taken as evidence of the truth of the matters recited. It is just foolish to contend that we were not entitled to an instruction on this matter, and we never got one. Contention is made that some statements in our request do not state the law. There is no authority to support this. The requests were taken from cases cited. In any event, we were entitled to an instruction of some kind on this subject.

The next matter discussed is a request for an instruction on the subject of separate conspiracies or separate offenses by different persons. We were certainly entitled to an instruction that appellants were not to be convicted here because of the belief of the jury that there had been some misconduct other than the conspiracy alleged. We have already mentioned this subject and cited numerous and most convincing authorities thereon. It was definitely an issue made by objection to evidence and throughout the trial, and now the state contends, contrary to all of the decisions of this Court, that we were not entitled to an instruction at all on this issue. They cite again *Berger v. U. S.* which has not the slightest bearing on this subject. This was an issue. Then the refusal to instruct thereon was error. That follows inevitably.

The next matters referred to by respondent is with relation to instruction 12-a (F & P 177; Res. 153). That instruction clearly permitted conviction if the jury thought that anybody had committed any act that might have been committed if an agreement, such as was alleged, existed. The court itself indicated that he should and probably would put into the instruction that a person committing any such act would have to do it knowingly. He didn't do so. We contended that the jury should be instructed that in any event, the act must be performed by one knowing of the existence of the conspiracy. That the conspiracy must first be proved and the knowing participation therein established in order to convict, is too clear for further discussion. No person's liberty would be safe if this were not the law. No authority is cited to the contrary.

Respondent a number of times suggests that other instructions tend to correct the error complained of. We do not find this to be so and this Court and other courts passing upon this question have consistently held that where an instruction of this kind is given purporting to state the law to the jury, that the appellate court will not assume that the jury did not follow this instruction, but might have followed some other instruction containing different intimations.

We pointed out in connection with instruction 13 (F & P 179; Res. 153) particularly, that while the Court recites different alleged misconduct on statements by different individuals at different times, there was never any instruction that these could not be used by the jury



as proof of the agreement, or to tell the jury that it had to be independently proved. This matter is passed over.

In this connection, and at page 154, respondent refers to our request at page 282, with relation to the alleged conversation between Pearce and H. K. Record, they say that this instruction does not clearly state the law, and they refer to the statement of Mr. Pearce in that conversation with relation to having authority from Mr. Erwin. This conversation was when H. K. Record was head of the anti-vice squad, when nobody alleged to be conspirators had anything to do with collections and when there is not a word of evidence that any collections were being made. Certainly the case relied upon by respondent and cited by us (F & P 17) shows that this testimony was not admissible at all. It is strange that respondent would contend that, even taking this as broadly as they say, that "Mr. Pearce was trying to find a collector", at that time that this was an admission of having entered into "the" agreement alleged in this indictment. Certainly it was inadmissible against Mr. Erwin. Any instruction on this was refused.

Respondent enters into a lengthy defense again of the Court's instructions to the effect that circumstantial evidence is sufficient if the jury believes that any inference of guilt may be drawn therefrom. This is plainly contrary to the rule of law as to circumstantial evidence in this case as cited in the numerous cases under Controlling Principles of Law (F & P 19-25). There cases are cited from this and other leading jurisdictions lead-

ing inevitable to the rule as laid down in *Terry v. United States*, 7 F (2) 28, wherein the Circuit Court reversed the trial Court for instructing the jury, exactly as it was here instructed, that circumstances shown in the evidence and which “give rise to a reasonable and just inference that they were done as the result of a previous agreement” justified a conviction. The Court said:

“This is not a correct statement of the law,” and added:

“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.”

Respondent must ignore this principle of law otherwise a reversal of this case follows definitely because of lack of evidence and because of the instructions and refusals of requests for instructions. But this rule of law cannot be ignored. It is too definitely established, and to ignore it would be to disregard an essential legal safe-guard which must result, and which has here resulted in the conviction of men entirely innocent of the charge alleged.

This instruction 16 just flatly instructs contrary to the law (F & P 180) and there should be no contentions that it was not erroneous. This instruction even goes on to say that the defendants can be convicted if the jury finds they conspired and agreed “among themselves \* \* \* or with Abe Stubeck”. There was never a more amazing injustice done to any appellants than to instruct this

jury that on this record they had any right or any foundation or any evidence to find any agreement with Abe Stubeck by any appellant here any more than that they had an agreement with Al Capone or with the Duke of Windsor. We pointed out also that the Court had instructed (F & P 182) that Stubeck testified that he collected money. This alone requires reversal as assuming something exactly contrary to the evidence, and this is particularly true in view of the fact that the Court instructed that the appellants could be convicted upon the alleged conduct of Stubeck. Respondent has cited no authority to the contrary. (See F & P 182. See also I P 64-68.)

## SUFFICIENCY OF THE EVIDENCE

This is a separate subdivision (Res. 158). It again ignores the rule of evidence as to circumstances in conspiracy cases. They object that we eliminate certain evidence. We do not do this. The rules of law and evidence eliminate the great mass of alleged separate statements and other matters of that kind as proof of the conspiracy. These matters depend upon agency and the conspiracy must first be independently established in order to establish the agency. Respondent cites a number of cases again where a substantive crime is charged and the conspiracy simply consists in joining to commit the crime where the *corpus delicti* is the crime. They again ignore in this case the fundamental distinctions made in the authorities cited by us between that kind of a case and a case where the crime and the *corpus delicti* consist of the agreement.

We now respectfully ask the Court to review the points in conclusion as set out in our main brief ( F & P 185). We feel that this summarizes the errors and we would not be justified in repeating this summary here. In addition to this there is the point as to the sufficiency of the indictment and the other points discussed in the Erwin brief. (E. p 73).

## CONCLUSION

It would seem that common frankness should compel the state to admit that this is a very unsatisfactory case. No legal mind, we think, can take the pleadings and their evidence and their brief here, and applying recognized legal principles thereto, get any satisfactory basis to support a conviction. It should be admitted that in this hodge-podge of confusion there is no assurance that any conviction here rests upon a clear understanding by the jury of the actual charge and of the proper application of the evidence thereto. These are the very foundation of a fair trial. It certainly appears to us that everything that is claimed here against any appellant could have been done, if it was done, without even the existence of any agreement as alleged. That, really is the test as to circumstantial evidence.

We are dealing now with a question of law, as pointed out in the second division of this brief. Whether under the application of the rule as to circumstantial evidence in this kind of a case, this evidence supports the verdict. This is a question of law. It is also a question of law as to whether legitimate inferences of guilt of the offense charged may be deduced from particular

facts (201 P. 173, *supra*). Certainly no Court, and no legal mind, can determine that guilt of the offense charged may "legitimately be deduced" from separate circumstances depended upon by the state to convict appellants here. We do not mean that some inference may not be drawn of a wrong attitude or of a carelessness or of neglect, we mean legitimate inferences of guilt of the charge here alleged. If we do not limit the inferences that may be legitimately drawn to the offense charged, then we may as well throw away all law books and all legal procedure.

We respectfully submit that this case should be reversed.

Respectfully submitted,

H. L. MULLINER.

*Attorney for Appellants  
Harry Finch and R. O. Pearce.*

BALL AND MUSSER,  
EDWARD F. RICHARDS,

*Attorneys for Appellant  
E. B. Erwin, on the Brief.*