IN THE DISTRICT COURT OF THE UNITED STATES OP AMERICA FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

United States of America, Plaintiff,

v.

T. J. Pendergast, R. E. O'Malley, and A. L. McCormack, Defendants.

Nos. 14912 and 14937

MEMORANDUM FOR THE HONORABLE A.LEE WYMAN, UNITED STATES JUDGE, UPON PLEAS IN ABATEMENT INTERPOSED BY THE ABOVE-NAMED DEFENDANTS

All of the defendants in the above-entitled cause have interposed pleas in abatement against the indictments filed herein. These pleas in abatement are practically identical. They are all divided into two sections, the first of which asks the abatement of the indictment because of the character of the charge made by United States Judge Merrill E. Otis to a United States Grand Jury convening at Kansas City, Missouri, on the 24th of June, 1940, and the second section makes the same request for the reason that there was not competent evidence before the grand jury upon which the last two overt aots in each of the indictments are based.

I.

There is a certain principle of law so well and so firmly established as applying to pleas in abatement that it may truly be called fundamental. That principle is that pleas in abatement are not favored in law; that no presumptions will be indulged by the court to whom such pleas are directed, and that they are to be strictly construed against the pleader. Because of this it has been held uniformly that the burden of proof is upon him who makes a plea In abatement to an indictment.

We think that this fundamental principle uniformly applying in criminal law should be constantly borne in mind throughout the entire discussion of the merits of these pleas in abatement.

In Agnew v. United States, 165 U.S. 56 (l.c. 44), the Supreme Court of the United States said:

"Such a plea must be pleaded with strict exactness. United States v. Hammond, 2 Woods 197; O'Connell v. Reg., 11 Cl. & Pin. 155; Dolan v. People, 64 N.Y. 485; Jenkins v. State, 35 Florida 757; McClary v. State, 75 Indiana 260; Whart. Cr. Pl. & Pr. Sec. 427; Biship New Cr. Pro. Secs. 327, 745."

In Hillman v. United States, 192 Fed. 264 (C.C.A.9)
(l.c. 267), it was ruled:

"It is well settled that pleas in abatement are not favored in law, that they are to be strictly construed, and that the courts will not supply omissions therefrom. In United States v. Standard Oil Co. (D.C.), 154 Fed. 728, the court said;

'Any inference indulged in by the court must be against the pleader. It is his duty to set forth in his plea, in clear, definite, and positive language, the facts relied upon. All the authorities agree that great strictness and accuracy are required in pleas in abatement, and no latitude in practice is extended to them.'"

To the same effect are;

United States v. Greene, 113 Fed. 683,

United States v. Jones, 69 Fed. 973,

United States v. American Tobacco Co., 177 Fed. 774.

The three cases just cited above, but from which no quotation is made, are District Court cases, but the reasoning follows that of the Supreme Court in the Agnew case and of the Circuit Court of Appeals in the Hillman case.

In the case of Cox v. Vaught, 52 F. (2d) 562 (C.C.A.10), the court said (l.c. 564);

"The Ninth Circuit, following the Eighth Circuit, has held that an indictment cannot be abated unless it affirmatively appears that no competent evidence was presented to the grand jury, and 'that a plea in abatement to an indictment, being a dilatory plea and not favored in law, must be pleaded with strict exactness and with certainty, accuracy,' and completeness, and must set forth facts, ana not conclusions of law, nor evidence of facts, and that every inference must be against the pleader.' Olmstead v. United State's (C.C.A.), 19 F. (2d) 842, 845, 53 A. L. R. 1472."

In the case of Gridley v. United States, 44 F. (2d) (l.c. 739), it was held that the burden, not only to state specifically and with exactness the grounds upon which a plea in abatement is based, but also to establish them by proof, is upon the pleader.

This case said that it was not sufficient that the pleader allege that the court's charge to the grand jury was intemperate, inflammatory, prejudicial and impassioned, but he must allege and prove facts showing that some members of the grand jury would not have voted the same way they did irrespective of the charge of the court.

In the case at bar no such allegation appears in the plea in abatement.

In United States v. Rintelen, 235 Fed. 787 (D.C. N.Y.), the court said:

“These allegations contain no statement of ultimate facts. An intelligent grand juror can hardly be found who has not decided opinions derived from his general knowledge as to any case of public notoriety. He may have even passionate feelings on the subject which in general affect and actuate him. The question is not what his feelings were, but whether he voted for an indictment honestly and upon competent evidence. That an indictment can be quashed because the grand jurors had personal prejudices, even ill-founded ones, would leave every indictment in an important case, irrespective of the evidence on which it was found, open to attack. In this case the plea does not allege that any grand juror would not have voted in the same way as he did, irrespective of his feelings or of the articles in the newspapers. I know of no case in which such a plea has been sustained or argument made, and am of the opinion that it cannot stand. United States v. American Tobacco Co., 177 Fed. 774; United States v. Mitchell (C.C.), 136 Fed. 896."

II.

I do not wish to extend this brief by a long discussion of the Court's charge to the grand jury, because that question was argued fully by counsel before the Court.

I do wish to call the Court's attention, however, to the following things:

1. Constitutional safeguards — and this is said with the very highest respect and veneration for our great American constitutional safeguards — are not, in the light of modern judicial thought, to be regarded as static, but, upon the other hand, as evolutionary. They are to be interpreted in the light of social surroundings, and so are treated by the courts as having a certain flexibility in order that they may be adjusted to the requirements of justice according to the social conditions which prevail in the age and degree of enlightenment in which they are interpreted.

This is true of the Fifth Amendment of the Constitution of the United States, which is properly regarded as one of our great constitutional safeguards for the protection of the citizen against arbitrary and unreasonable prosecution, and yet the Supreme Court of the United States has said over and over again that an indictment by a grand jury is not one of those fundamental principles of liberty and justice enforced upon the states by the Fourteenth Amendment.

This is particularly mentioned here and emphasized because the defendants. counsel in his argument stressed the fact (to use his language), “We invoke the great principle of due process."

The Eighth Circuit Court of Appeals in McKinney v. United States, 199 Fed. 25, said:

“It is suggested that an indictment upon imcompetent evidence violates the clause of the fifth amendment, which provides that no one 'shall be deprived of life, liberty or property without due process of law.' The suggestion involves a misconception of the scope and meaning of the due process clause.

In Hurtado v. California, 110 U.S. 516, 4 Sup. Ct. 111, 292, 28 L. Ed. 232, in speaking of the fifth amendment the court said:

'The natural and obvious inference is, that in the sense of the Constitution “due process of law“ was not meant or intended to include, ex vi termini, the institution and procedure of a grand jury in any case.'

And it applied the same construction to the like clause of the fourteenth amendment limiting the powers of the states. Due process of law within the meaning of the Constitution does not even embrace such an important safeguard as exemption from compulsory self-incrimination (Twining v. New Jersey, 2ll U.S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97), much less mere rules of procedure like those pertaining to evidence before grand juries."

It is to be noted from the above quotation from the opinion by the Eighth United States Circuit Court of Appeals that two decisions by the United States Supreme Court are cited. They are:

Hurtado v. California, 110 U. S. 516,

Twining v. New Jersey, 211 U. S. 78.

Because they are cited and quoted from in this opinion, and for the sake of brevity, we are not quoting from those cases.

The Ninth Circuit Court of Appeals in the case of Hillman v. United States, 192 Fed. 264, said:

“There is no merit in the contention that the case at bar should be distinguished from the cases above cited for the reason that some of the evidence before the grand jury in the present case was used in violation of constitutional rights.

The question of constitutional right under the fifth amendment was presented in the Holt case. Upon the authority of that decision, and upon principle, it must be held that no distinction is to be made in cases where the evidence is alleged to be incompetent because constitutional rights have been invaded."

To the same general effect is another Eighth Circuit Court of Appeals case, Anderson

v. United States, 274 Fed. 20.

2. To say that Honorable Merrill E. Otis, United States Judge who charged the grand jury which returned the indictments in the case at bar, coerced the grand jurors to return the indictments in question, is to belittle the grand jurors. The grand jury which returned these indictments was composed of men of intelligence, character and of wide and varied experiences in the affairs of life. The foreman of the grand jury was one of the outstanding business men of Kansas City.

As I mentioned in my argument, the jury convened and was charged on the 24th of June. On the following day, which would be the 25th of June, the Court gave the grand jury a supplemental charge. Both the first charge and the supplemental charge are set out in extenso in the pleas in abatement filed herein. About the first of July the grand jury recessed over the Fourth of July holiday and reconvened shortly thereafter, and the indictments were returned in the court on the 13th day of July, the same date upon which the grand jury voted upon them. The lapse of time between the charge of the Court and the action of the grand jury, as well as the fact that the grand jury records show that these indictments were returned by a unanimous vote, are circumstances which tend strongly to show that the action of the grand jury was not impassioned or hasty, but, upon the other hand, was studied and deliberate.

3. It is a well-established principle in law that where a charge which a court makes to a jury is criticized, the charge of the court cannot be taken in part and criticized, but that it must be construed from its four corners taken as a whole. In his original charge Judge Otis made it clear to the jurors that any action they took upon the matter concerning which they were charged must be based upon competent evidence.

In his supplemental charge he gave this same instruction an emphasis which could not possibly be strengthened.

In cases too numerous to set down here appellate courts have held in reviewing a court's charge to a petit jury that the trial judge might even tell a petit jury that in his opinion the defendant was guilty as charged in the indictment, but if at the same time he admonished them that if their judgment on the facts in the case did not coincide with that of the trial court, it was the duty of the jury to follow their own interpretation of the facts and not that of the court.

I mentioned this particular thing in my oral argument and it was indicated by Your Honor that he did not approve of a trial judge expressing his opinion upon facts to the

jury. I am sure that Judge Otis does not either, because I have never known of the trial of any criminal case before him where he has made any attempt to express an opinion upon the facts which were submitted to the petit jury.

But, nevertheless, the law is well settled that a court can do this and that it does not constitute reversible error. If this may be done by a trial judge where the liberty of a person is at stake, or where his life may be at stake, without an invasion of his constitutional rights, certainly it would appear logical that a judge in charging a grand jury might express opinions upon facts where only the commencement of prosecutive action is involved and where neither life nor liberty are
at stake.

4. There is no allegation anywhere in these pleas in abatement in connection with the Court's charge to the grand jury that any member of the grand jury was coerced; that the will of the judge charging the grand jury was substituted for its will; that any grand juror would have voted differently from the way he voted upon the indictments if the court had not so charged the grand jury, nor is there the slightest evidence of any kind that any of these things were true.

5. Under such circumstances and because of the settled law relating to pleas in abatement, it must be presumed that the grand jury faithfully and properly discharged its duty.

The Court cannot say in this case that actual prejudice must be presumed as a matter of law.

In Cox v. Vaught, 52 F. (2d) 562 (C.C.A.10), it was said that where no facts were presented and no evidence was presented that ”the presumption that the grand jury faithfully discharged its duty must prevail.” In Fuller v. State, 85 Miss. 199, the court said:

"The circuit judge is vested with power to specifically call the attention of grand jurors to all statutes which the public interest may require shall be brought to the consideration of the grand jury. This grant of power carries with it the authority to decide what classes of offenses the public interest demands shall receive special attention by the grand jury. And in deciding this the circuit judge must necessarily be guided, to a great extent, by his knowledge of the social conditions as they exist in each county at the time when the grand jury is empaneled therein. Those statutes which may be most flagrantly and openly violated in one county of his judicial district may be strictly observed in another, and the same offense which is conspicuous for its presence in some communities may

be equally as conspicuous for its absence in others. It would be folly to hold that a circuit judge should not be permitted to charge the grand jury in reference to a particular class of crimes, for the reason that such charge might have the effect of directing the attention of the grand jury to the individuals who are guilty of the crimes. In truth, this is the object at which the charge to the grand jury is aimed, the purpose which it hopes to effect. The circuit judge, being a conservator of the peace, and, in the discharge of his duty, having the peace and quiet of the entire district much at heart, being well advised as to the conditions existing in every locality within his district, his charge to the grand jury is intended to direct their deliberations into the channel which will result in the greatest good to the people of the entire county where the grand jury is empaneled.."

In State v. Turlington, 102 Mo. 642, the Supreme Court of the State of Missouri refused to abate an indictment, although the language of the trial judge in his charge to the grand jury named the defendant in language as unmistakably as though he had called him by name, but without naming him, because the court said that the charge must be considered as a whole, and other parts of the court's charge placed the matters for investigation fairly before the members of the grand jury. It Is true that in this case the court criticized the judge charging the grand jury for practically naming the defendant by name. The effect of the court's charge was the same as if the defendant had been called by name, because there could be no mistaking the Identity of the person to whom the court referred, but the Supreme Court of the State of Missouri said that where other parts of the charge placed the matter fairly before the grand jury for investigation, the court would not then abate the Indictment because the defendant had been practically identified and singled out by name.

In this connection we strongly feel that the language of the Eighth Circuit Court of Appeals in the case of McKinney v. United States, 199 Fed. 25 (l.c. 29) is entitled to earnest consideration. The language there employed by the court is:

"There is an unfortuante tendency in criminal jurisprudence to raise minor matters to the dignity of substantial rights. The plain safeguards against governmental and private oppression have become by judicial action so embedded in nonessential additions and technical refinements that their true limitations are not always clear, and it not infrequently happens that criminal trials become mere adroit contests in which substance yields to form and the search for truth is diverted to and ends in collateral inquiries. Many an intelligent person accused of crime has been discharged for reasons so abstruse as

to be beyond his comprehension, and the triumph has been not of innocence but of ingenious subtlety. Of course fundamental safeguards should not be frittered away, but the growth of judicial construction should also be with due regard to the just rights of society and the practical conduct of trials."

6. It is also to be noted that Judge Otis, who charged the united States Grand Jury which returned the indictments in the case at bar, was a member of the three-judge tribunal before which the litigation in connection with fire insurance rates in the State of Missouri was pending, and in which the fraudulent compromise was effected. He had first-hand knowledge of the fraud which was perpetrated upon the court and knew of his own knowledge of the matters whereof he spoke.

To say that under these conditions the judge should not have directed the attention of the grand jury to this matter specifically is neither good law nor good sense.

Finally we must observe again, as we did in our argument, that the names of all the defendants in this case had, as the trial court so aptly said, been blazoned in headlines upon the front page of every newspaper of any considerable circulation in the State of Missouri. The papers which had been published in Kansas City the day before the grand jury convened carried prominent stories of the possibility of a grand jury investigation into the matter of a conspiracy to defraud the United States and to obstruct justice by these defendants, whose names were freely used in these stories.

The matters involved were matters of great public interest. The general public had a very definite idea of the nature of the offenses committed by these defendants in connection with the insurance compromise. That was true of the members of the grand jury assembled on the 24th of June, 1940.

In his charge to this grand jury in connection with a statement of the facts, Judge Otis did not tell them a single thing which in all human probability they did not already know, and did not recite a story to them of which they were not already definitely cognizant.

Under such circumstances, and particularly in the absence of any allegation and a total absence of any proof that any grand juror was prejudiced by this statement, or would have voted otherwise than he did vote, the presumption is made the stronger that the grand jury faithfully and properly discharged its duty.

It is our earnest contention that none of the cases (and we have read them all carefully) cited by the defendants apply with full force to the cases at bar. We have quoted from two of the cases on which we know the defendants will rely. One is Puller v.

State, supra; the other is State v. Turlington, supra.

State v. McCoy, 89 Ind. App. 330, and Clair v. State of Nebraska, 40 Neb. 534, do not present facts comparable with the facts in the case at bar.

We do not wish to extend this brief by a long discussion distinguishing all of the oases cited by the defendant, but we do wish to submit that a reading of these cases will convince the Court that they are not helpful in determining the issues here involved.

III

We come now to the second part of the defendants. pleas In abatement. As suggested above, this section of the pleas in abatement is based upon the allegation that there was no competent evidence at all before the grand jury upon which to base the last two overt acts in each indictment.

In support of this contention the defendants quote from the indictment as follows:

". . . that they, the said defendants, and each of them, the said T. J. Pendergast, R. E. O'Malley and A. L. McCormack, would, and did, keep secret all of the fraudulent and corrupt plans, negotiations and agreements hereinbefore described and would and did prevent the said United States District Court from discovering the fraudulent and corrupt means employed by which the said decree of the said U.S. District Court was obtained as hereinbefore set out, and that they would, and did, continue to endeavor to conceal all of the corrupt and fraudulent agreements made by them, hereinbefore described, until all of said causes were finally determined and completely disposed of by the said U.S.District Court, as aforesaid."

Having quoted this excerpt from the indictment the defendants then allege that there was no evidence of any kind before the grand jury bearing upon or tending to prove the allegation of the indictment which they quoted but that said allegation was placed in the indictment without any evidence to support it for the sole purpose of bringing the alleged offense within the statutory period of limitations.

Again the defendants quoted from the indictment as follows:

"That in March of 1939, defendant A. L. McCormack was sub-poenaed to appear before the United States Grand Jury sitting at Kansas City, Missouri, for the purpose of testifying as to all of the transactions between him and the defendant Pendergast and the defendant O'Malley in connection with the compromise and settlement of the litigation pending before the United States District Court for the Western Judicial District for the State of Missouri as hereinbefore set forth; that the said A. L. McCormack was

called before the United States Grand Jury sitting at Kansas City, Missouri, for the Western Judicial District of the State of Missouri on numerous occasions and from day to day and at first denied all of the fraudulent, corrupt transactions, agreements and negotiations hereinbefore set forth between himself, Charles R. Street, R. E. O'Malley and T. J. Pendergast. That between the sessions of the United States Grand Jury sitting at Kansas City as aforesaid, the defendant A. L. McCormack frequently visited and was frequently visited by the defendant R. E. O'Malley who requested of the said A. L. McCormack that he conceal and refuse to disclose to the U. S. Grand Jury sitting as aforesaid, to the U. S. Attorney and his assistants conducting the investigation before the said U. S. Grand Jury, and to the agents of the Government of the United States, any of the corrupt transactions, agreements and negotiations between the defendants and all of them and that he requested and importuned the said A. L. McCormack not to reveal the fact that any money had been paid to anyone for the purpose of corruptly influencing the decree of the court as hereinbefore described."

After having quoted the excerpt set out just above from the indictment the defendants then make the assertion that there was no evidence of any kind supporting or sustaining the allegation from the indictment which they quoted but that said allegation was placed in the indictment without any evidence upon which to base it for the sole purpose of bringing the alleged offense within the statutory period of limitation.

Again the defendants quote from the indictment as follows:

"In March, 1939, the exact day and date being unknown to the members of this Grand Jury, the said A. L. McCormack committed willful, deliberate and corrupt perjury before the United States Grand Jury sitting as aforesaid and refused to reveal any payment of money for the purpose of corrupting and influencing the State Superintendent of Insurance in agreeing to a settlement and compromise of the litigation pending before the U.S.District Court for the Western Judicial District of Missouri as aforesaid, and for obtaining a decree of the court not promulgated in a regular orderly and honest manner and refused to reveal to the U.S. Grand Jury, to the U.S.Attorney and to his assistants and to the agents of the United States any of the corrupt, fraudulent and unlawful transactions, agreements and negotiations between himself, Charles R. Street, R.E.O'Malley and T.J.Pendergast."

Again the defendants state that there was no evidence upon which to base the allegation quoted just above and that this allegation likewise was placed in the indictment

without any evidence to support it for the sole purpose of bringing the alleged offense within the statutory period of limitations.

We wish to point out emphatically that neither of the indictments in the cases at bar attempt to charge a conspiracy to commit perjury or to suborn perjury but that one of the indictments charges a conspiracy to obstruct justice by improperly procuring and keeping in force a decree of the United States Court induced by fraud and that the other charges a conspiracy to defraud the United States by interfering with the orderly and proper functioning of the judiciary.

Again we wish to point out as preliminary to a discussion of this phase of the pleas in abatement that these pleas are to be construed strictly against the pleaders, that no omission may be supplied by the court, that no inference or intendment can be indulged by the court but that the presumption in law that the grand jury properly and faithfully performed its duty must prevail especially in the absence of any showing or any proof that there was no competent evidence upon which to base these overt acts which have been quoted in the defendants' pleas in abatement.

We wish to point out again as we pointed out in our oral argument that an overt act does not constitute an essential element of an offense such as is referred to in the Brady case or in any of the other cases cited by the defendants. The conspiracy must be described in the indictment and in the cases at bar the conspiracies are described in the indictment.

In that part of the indictment in which the conspiracies are described, one conspiracy is described as "a conspiracy to feloniously and corruptly conspire, combine, confederate and agree together and with each other to commit an offense against the United States in violation of Section 241, Title 18 United States Code Annotated by endeavoring to Influence, obstruct or impede the due administration of justice in a certain United States Court."

This part of the indictment charges in the language of the statute every essential element of the offense. The essential elements of this offense are (1) corruptly combining, conspiring and agreeing to commit an offense against the United States (2) by endeavoring to influence, obstruct or impede the due administration of justice in a United States Court.

Immediately following the charge of these essential elements, the conspiracy is described in detail and the object and purposes of the conspiracy are clearly set forth.

The indictment referred to is the indictment in case No. 14912 and the quotations are on pages 1 and 2 of that indictment.

The same is true of the indictment in case No. 14937.

The overt acts referred to in the defendants' pleas in abatement are not properly to be regarded as an essential element of the offense but they, along with the other overt acts are recitations of the things done by the conspirators in furtherance of the conspiracy after the unlawful agreement had been effected.

In saying this we do not intend to deny that the last overt act in point of time must be within the three year period of limitations, nor that the commission of one overt act by one of the defendants within that period is essential to the completion of the crime.

But while we agree that the last overt act recited in point of time must be within three years from the date of the return of the indictment we still do not concede that a particular overt act is an essential element of the offense charged by the indictment within the meaning of the Brady case or the Vaught case cited by the defendants, although it is not necessary to argue that at this time.

In describing the purposes and objects of the conspiracies the indictment alleges among other things:

" . . . that they, the said defendants, and each of them, the said T. J. Pendergast, R. E. O'Malley and A. L. McCormack, would and did attempt to procure, by the corrupt, fraudulent and unlawful means hereinbefore described, the distribution of all the money impounded to the various Insurance companies who were parties plaintiff as aforesaid, upon the one hand, and to the policy holders upon the other, and that they would and did continue to work together in concerted action until all of said money had been finally and completely distributed, and until all of the causes had been finally determined and disposed of by the said United States District Court sitting as aforesaid; and that they, the said defendants, and each and all of them, the said T. J. Pendergast, R. E. O'Malley and A.L.McCormack, would and did keep secret all of the fraudulent and corrupt plans, negotiations and agreements hereinbefore described, and would and did prevent the said United States District Court from discovering the fraudulent and corrupt means employed, by which the said decree of the said United States District Court was obtained, as hereinbefore set out, and that they would and did continue to endeavor to conceal all of the corrupt and fraudulent agreements made by them hereinbefore described until after all of said causes were finally determined and completely disposed

of by the said United States District Court, as aforesaid;"

(Indictment in case No. 14912 pages 5 and 6. The same allegations are to be found in the indictment in case No. 14937.)

The purposes and object of the conspiracies being thus defined and described there cannot be any question then that the overt acts quoted in the defendants' pleas in abatement and complained of by the defendants were in furtherance of the object and purposes of the conspiracies as thus defined and described in the indictment.

The defendants argue that there was no evidence before the grand jury to warrant the inclusion of these overt acts. They might just as well say there was no evidence upon which to base the description of the object and purposes of the conspiracies.

Before we go into a discussion of the evidence which was before the grand jury let us call the court's attention to the fact that the offense of obstructing justice is by its very nature an offense which continues so long as the obstruction or the attempt to obstruct remains.

As was so aptly said by Hon. Merrill E. Otis, United States District Judge who charged the grand jury which returned the indictments in the cases at bar, an obstruction of justice may be compared with the offense of obstructing a public highway under the laws of Missouri. He said that certainly the offense of obstructing a public highway was not completed and terminated when the obstruction of the highway was made but that it continued until the obstruction was removed. We know of no better illustration which could be supplied than that which the c court gave to the grand jury in his charge.

All of the cases uniformly hold (and an indefinite number of them from various jurisdictions in the United States could be cited) that the law applying to continuing offenses is that the date from which the limitations begin to run is computed from the date when the offense is terminated and that the limitations do not begin to run so long as the offense continues. In this connection we desire to call Your Honor’s attention to the remarkably clear and foreeful language employed by Mr. Justice Holmes speaking for the Supreme Court in the case of United States v. Kissel, 218 U.S. 601.

"The defendants argue that a conspiracy is a completed crime as soon as formed, that it is simply a case of unlawful agreement, and that therefore the continuando may be disregarded and a plea is proper to show that the statute of limitations has run. Subsequent acts in pursuance of the agreement may renew the conspiracy or be evidence of a renewal, but do not change the nature of the original offense. So also, it is

said, the fact that an unlawful contract contemplates future acts or that the results of a successful conspiracy endure to a much later date does not affect the character of the crime.

"The argument, so far as the premises are true, does not suffice to prove that a conspiracy, although it exists as soon as the agreement is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it. It also is ture, of course, that the mere continuance of the result of a crime does not continue the crime. United States v. Irvine, 98 U.S. 450. But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one. Take the present case. A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan the conspiracy continues up to the time of abandonment or success. A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract but is a result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes, That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act."

The Supreme Court of the United States reasserted the thought of Mr. Justice Holmes in the case cited above, in a still later case (Hyde v. United States, 225 U.S. 347, l.c. 358, 369) in which Mr. Justice McKenna, delivering the court's opinion wrote as follows:

"The court charged the jury in substance that if Schneider had engaged in the conspiracy 'back of the three year period' and the conspiracy contemplated that acts should be done from time to time through a series of years until the purposes of the conspiracy should be accomplished, although he, Schneider, did not do anything within

the three year period but 'remained acquiscent, expecting and understanding' that further acts should be performed, they, if performed, would be his acts 'and would have the same effect against him as if he had done them himself. He would still be acting through his colleagues. He might be playing his part by keeping still as much as he did formerly by acting.'

"The contention of the defendants is that the statute begins to run from the last overt act within three years from the formation of the conspiracy within which there was conscious participation. (Italics ours.) The Government makes the counter contention that however true this may be as to accomplished conspiracies it is not true of one having continuity of purpose and which contemplated the performance of acts through a series of years. And that such a distinction can exist, we have seen, is decided and illustrated in United States v. Kissel. And necessarily so. Men may have lawful and unlawful purposes, temporary or enduring. The distinction is vital and has different conn sequences and incidents. The conspiracy accomplished or having a distinct period of accomplishment is different from one that is to be continuous. If it may continue it would seem necessarily to follow the relation of the conspirators to it must continue, being to it during its life as it was to it the moment it was brought into life. If each conspirator was the agent of the others at the latter time he remains an agent during all of the former time. This view does now, as it is contended, take the defense of the statute of limitations from conspiracies. It allows it to all, but makes its application different. Nor does it take from a conspirator the power to withdraw from the execution of the offense or to avert a continuing criminality. It requires affirmative action, but certainly that is no hardship. Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law. As the offense has not been determinated or accomplished he is still offending. And we think consciously offending, offending as certainly as we have said, as at the first moment of his confederation, and consciously through every moment of its existence. The successive overt acts are but steps toward its accomplishment, not necessarily its accomplishment. This is the reasoning of the Kissel case stated in another way. As he has started evil forces he must withdraw his support from them or incur the guilt” of their continuance.' Until he does withdraw there is conscious offending and the principle of the cases cited by defendants is satisfied."

Keeping in mind then the object and purposes of the conspiracy as described and defined in the indictments, keeping in mind the overt acts which are alleged to have been in furtherance of the object and purposes of the conspiracy and keeping in mind the language of Mr. Justice Holmes and Mr. Justice McKenna speaking for the Supreme Court of the United States in the cases cited above, let us briefly summarize the evidence that was before the grand jury.

It was that certain cases were pending in the United States District Court in which numerous fire insurance companies were parties plaintiff and in which they asked for restraining orders to prevent the Superintendent of Insurance for the State of Missouri from putting into force certain prescribed fire insurance rates; that the court made an order granting the injunctions as prayed by the insurance companies; that there was a difference of approximately 16 2/3 per cent of each premium charge on every contract for fire insurance written in the State of Missouri between the amount which the insurance companies charged and the amount which the State Superintendent of Insurance promulgated; that the court made an order impounding this difference of 16 2/3 per cent upon every contract of fire insurance written in the State of Missouri by the parties plaintiff and appointed a custodian to have charge of such funds and that by the year 1935 this money so impounded had amounted to approximately $8,000,000; that the defendant O'Malley in this case requested the defendant McCormack to see a man named Street who was the agent and representative of various fire insurance companies which were parties plaintiff in the suits pending before the United States District Court, find out if he would consider a settlement of the insurance suits and if he would be willing to discuss the compromise and settlement with the defendant T. J. Pendergast; that the defendant McCormack did this, that Street agreed to see defendant Pendergast, that they met in Chicago some time later and agreed that if the defendant Pendergast could effect a settlement that he would be paid the sum of $500,000 for his services; that the defendant Pendergast immediately started to work to bring about a settlement and that Street sent him first $50,000 by McCormack which was carried by McCormack from Chicago to Kansas City, Missouri and paid to defendant Pendergast, all of which was received and retained by the defendant Pendergast; that thereafter McCormack delivered another $50,000 in currency in the same manner and that Pendergast retained $5000 of that and gave $45,000 to McCormack with instructions to divide it equally between himself and O'Malley which the defendant McCormack did by carrying the

money to St. Louis to the defendant O'Malley and that they each concealed his part of this money by placing it in safe deposit boxes so that it could not be traced; that later the defendant McCormack carried $330,000 in currency in a suit case, delivered it to T. J. Pendergast at his home in Kansas City, Missouri, that Pendergast retained $250,000 of this money, gave $80,000 to McCormack to be divided equally between him and O'Malley, that the division was made and the money again concealed in safe deposit boxes as had been done in the former case; that still later $10,000 was sent by Street by bank draft to McCormack to St. Louis after a request made by Pendergast of McCormack for more money and that McCormack converted this draft into currency and carried it to Kansas City and paid it to T. J. Pendergast in a room in the Menorah Hospital in Kansas City, Missouri; that between the date of the payment of the second $50,000 and the date of the payment of $330,000 a conference was called between the State Superintendent of Insurance, C. R. Street, Agent for the Insurance companies and other parties who were counselors and advisers to the State Superintendent of Insurance, which conference was held at the Hotel Muehlebach in Kansas City, Missouri, and at which a draft of compromise was drawn up which was later put into a final form and signed by Street as Agent for the insurance companies and by the defendant O'Malley as the Superintendent of Insurance; that in the early part of 1936 a decree was submitted to the United States Court in which the cases referred to above were pending which embodied all of the essential matters agreed upon in the conference in the Hotel Muehlebach heretofore referred to; that in March, 1939 when the United States Grand Jury was investigating the matter of attempted income tax evasion on the part of the defendant T. J. Pendergast, the defendant McCormack was a witness before said grand jury on numerous occasions, and for a long time denied and affirmatively concealed all knowledge of the decree of the Federal Court being tainted, in any way, with corruption or bribery; and that between the sessions of the grand jury he was visited by the defendant O'Malley who requested and importuned him not to disclose to anyone the payment of any money either to himself or to Pendergast for influencing or bringing about the compromise of the fire insurance rate litigation; and finally there was evidence that in March, 1939 at the time McCormack testified before the grand jury all of the impounded monies had not yet been paid out by the custodian of the court appointed to handle the same.

It is true that the court has before it only McCormack's testimony which was the only

testimony transcribed but the other evidence outlined above was presented to the grand jury.

The indictment follows the evidence which was presented in the grand jury. The court has only to read the transcript of McCormack's testimony to understand that there was evidence supporting the overt acts of which the defendants complain.

The court has also only to read the indictment to be fully aware that the object and purposes of the conspiracyare defined as being an attempt to obtain a decree from the Federal Court ratifying a compromise effected by bribery and corruption and to keep the same secret from all persons until all of the impounded monies should be paid out and until all of the cases pending Before the Federal Court should be finally disposed of.

The court has only to read the Kissel case and the Hyde case from both of which excerpts are quoted above in this memorandum to realize that this offense was a continuing offense and that as a matter of law the computation of the limitations is to be dated not from the time the offense was conceived and begun but from the date upon which it was terminated. And it could not have been terminated under the indictment until the monies were all paid out and finally distributed which had not been done at the time these indictments ware returned.

It was argued by counsel for the defendants that there was no evidence from which to draw the conclusion that a concealment of the nature of the transactions and negotiations between Pendergast, O'Malley, McCormack and Street was a part of the original agreement between them.

Let us point out here in this connection that the pleas in abatement do not allege that there was no evidence of concealment being a part of the original conspiracy. The pleas in abatement merely allege that there was no evidence to support the overt acts of which the defendants complain. And in this connection wa again direct the court's attention to the firmly established principle that pleas in abatement must be strictly construed against the pleaders, that the court may not supply any omission, that the court may not strengthen the plea by intendment, and that no inference or presumption is justified on the part of the court but that the pleaders are bound by their pleas strictly construed.

But even if the court should not take this view of the case it would be a perversion of all natural thought to believe for a moment that concealment was not a part of the conspiracy. It is true that there is no direct evidence of an express agreement between the conspirators that they would conceal the corrupt methods employed by them until all

the impounded monies had been distributed but if such concealment had not been made their plan would have been frustrated and would have failed and concealment may be presumed from their actions as testified to before the grand jury by the witness McCormack, for the principle of law is inescapable that all persons intend the natural and probable consequences of their actions.

Every act of every conspirator from the beginning of this conspiracy until its final exposure in the spring of 1939 was calculated to conceal and to deceive.

The indirect and circumstantial evidence of concealment being a part of the conspiracy from its very beginning is so strong and so obvious that a grand jury or even a petit jury in the trial of the case would be more than warranted in drawing the conclusion that one of the objects add purposes of the conspiracy was to prevent its being discovered by persons who would bring the conspirators to justice.

There has never been a conspiracy case probably in which an express agreement of all the conspirators to do everything that happened in furtherance of the conspiracy was ever proved by direct evidence. Prom the nature of the offense much of the proof must be made by indirect and circumstantial evidence. Federal Court cases sustaining this statement are so numerous and so uniform as not to require citation.

Respectfully submitted,

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