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Article 7

[The People v. Hines]

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CRIMINAL LAW—CONSPIRACY—OVERT ACTS OUTSIDE JURISDICTION.—In the New York conspiracy case of *The People v. Hines*,[1] counsel for the defense stated that "Prosecutors love to have conspiracy indictments because under them you can admit almost the kitchen sink". People's counsel tartly replied: "The charge is conspiracy which, I believe, counsel said prosecutors love to use. Well, it is one of those very ancient and honourable institutions derived from the Anglo-Saxon law under which we are trying this case."[2] Both statements contain elements of truth.

A charge of conspiracy is particularly dangerous to an accused because the range of admissible material is greater than that which is

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[10] See footnote 4 *ante*.

[11] See footnote 9 *ante*, section 207 (10) (3).

[1] (1940) 17 N.Y. Supp. (2d) 141.

[2] Michael & Wechsler; Criminal Law and its Administration, (Chicago, 1940), at p. 673.

admissible on other charges. What otherwise might be hearsay evidence is admissible against co-conspirators.

Conspiracy is a method of attacking conduct which has not yet reached the solicitation or attempt stages, but which already contains some element that is considered dangerous or objectionable to society as a whole or to individuals in society. United States federal law requires proof of some overt act (short of an attempt) to constitute an indictable conspiracy.[3] The recent case, *Board of Trade v. Owen*,[4] represents a move by the House of Lords in the direction adopted by the United States federal courts, toward a limitation upon the broad scope of conspiracy.

In the *Owen* case, the facts were these: The German Government's policy was to refuse licenses for the export of strategic metal to Eastern Europe. To circumvent this, Owen and others bought metal in Germany and presented false documents to the Government licensing agency, showing that the metal would be exported to, and used in, Ireland. Their scheme was to ship the metals to Russia. A charge of conspiracy to defraud was laid. The accused were English; they had not left England during the transaction. The representation took place in Germany, and the license was issued in Germany. All overt acts took place abroad.

The House of Lords admitted that there was no doubt that the acts done resulted in someone acting to his detriment; here the Government Department issuing the license enabled something to be done which the Department was charged with a duty to prevent. Lord Tucker, speaking for the court, said, ". . . I have no doubt that they (the facts) disclose a conspiracy which would be indictable here if the acts designed to be done and the object to be achieved were in this country".[5] Later His Lordship stated that criminal law was concerned with the maintenance of law and order within the realm.[6] It is submitted that at common law the offense of conspiracy took place "within the realm".

In criminal law it seems universally accepted that the agreement is the crime and that no overt act is necessary for the offense. It is not necessary to show that the conspiracy has resulted in prejudice to any one, as required in civil conspiracy.[7] In *Mulcahy v. Regina*[8] Willes J., in delivering the opinion of the Court, stated: "A conspiracy consists not merely in the intention of the two or more but in the agreement of the two or more to do an unlawful act or to do a lawful act by unlawful means." Thus the means and the object of an agreement must be examined. If either are criminal, an agreement to perform them, even without overt acts, is criminal. At common law, even if the contemplated

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[3] *Hyde v. United States* (1912) 225 U.S. 347, at p. 359.
[4] [1957] 2 W.L.R. 351.
[5] *Ibid.* at p. 355.
[6] *Ibid.* at p. 358.
[7] *Crofter Harris Tweed v. Veitch* [1942] 1 All E.R. 142.
[8] (1868) L.R. 3 H.L. 306.

acts, presuming a lawful object, are illegal—as distinguished from criminal—it would seem that the conspiracy still would be one for which an indictment would lie. According to Cockburn C.J.: "It is not necessary in order to constitute a conspiracy that the acts agreed to be done should be acts which if done would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongfull."[9]

In the *Owen* case Lord Tucker admitted that on the facts there would have been an indictable conspiracy had the means and the object been within England. The crux of the matter is that the means and the object were to take place outside Great Britain. Hence the conspiracy was not punishable within the realm. It is submitted that the common law doctrine of conspiracy does not dictate this conclusion, nor does the comity of nations recommend it.

The common law principles of conspiracy are stated by Dr. Glanville Williams as follows: "There need be no overt act beyond the making of the agreement. The crime of conspiracy is completely committed, if it is committed at all, the moment two or more have agreed that they will do certain things."[10] Archibold's Criminal Pleadings,[11] suggests that a conspiracy entered into in England to do abroad that which would be a crime in England appears to be indictable in England. Similarly in *Smith v. United States*,[12] the Court held that a conspirator could be tried at either the place where the agreement was entered into, or where the overt act was committed. Admittedly the overt acts are put in evidence in many of the English and American conspiracy cases, but it is submitted that this is merely to show if and where the inchoate offense took place, so as to confer jurisdiction upon the proper forum. In the *Owen* case the conspiracy, in its traditional sense, was completed in England. The fact that overt acts occurred in Germany should not affect the question of indictability. The offense occurred "within the realm" as Lord Tucker required. Even if the offense is deemed not to be within the realm the comity of nations demands punishment. In pointing out that United Kingdom courts should take notice of the laws of a friendly country, Denning L.J. said, "The courts of one country should not help break the laws of another."[13] Also there is *obiter dicta* from Lord Tucker indicating that there would have been a different decision had some public mischief resulted from the performance of the contemplated acts. It might be said that there is a public mischief in the *Owen* Case.

The *Owen* case represents a departure from the traditional common law view of conspiracy and leans to the United States view that the overt act is significant in the offense of conspiracy. One anomalous aspect of the situation is that what was originally criminal conspiracy may now

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[9] *Regina v. Warburton* (1870) L.R. 1 C.C.R. 274, at p. 276.
[10] Glanville Williams; Criminal Law (London 1953), at p. 512.
[11] Archibolds Criminal Pleadings, 33rd edition, at p. 1481.
[12] (1937) 92 F. (2d) 460.
[13] *Regazzoni v. K. C. Sethia* [1956] 2 All E.R. 487, at p. 490.

be defended by showing that the accused committed the contemplated wrongful act in another jurisdiction.

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