New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY, *Plaintiff-Respondent,* vs. FRANCIS GREGORY, *Defendant-Appellant.*	*On Writ of Error*

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BRIEF FOR DEFENDANT-APPELLANT

The writ of error in this case brings up for review the conviction, before the court and a jury in Essex County, of Francis Gregory, under an indictment for conspiracy, found by the Grand Jury of that County. The indictment was returned into the September Term, 1916, of the Essex Oyer and Terminer Court, which opened on the third Tuesday of September, 1916. The indictment charged the prosecutor, with two others (Simon Hahn and John Gregory) with conspiracy to cheat and defraud one Charles M. Kase of the sum of $25,000 and "after giving to one Charles Peaker a portion thereof to divide the remainder of said money among themselves." The defendant, Francis Gregory, alone was placed on trial; the defendant, Simon Hahn, being out of the State, and the third defendant, John Gregory, being too ill to be tried.

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The reasons urged for setting aside the conviction briefly are:—

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1. If any offense is set out in the indictment it was committed more than two years before the indictment was found and is barred by the Statute of Limitations.

2. The indictment does not set out any offense committed within two years before the finding of the indictment.

3. Errors have been committed in the trial of the case.

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The Statute of Limitations is controlling on reasons 1 and 2 and the contention of the defendant is that any offense that the indictment charges is barred by the Statute.

The indictment consists of two counts, each made up of a number of allegations; and, bearing in mind that the indictment was not found or returned into Court until the September Term, 1916, the following statement of the dates mentioned in the indictment is of vital importance. The indictment charges as follows:—

Dec. 22, 1913.—The defendants and Hahn "wickedly, devising, contriving and intending knowingly, corruptly and unlawfully to cheat and defraud one Charles M. Kase, of the city and county aforesaid, of the money of Charles M. Kase aforesaid, and after giving to one Charles Peaker a portion thereof, to divide the remainder of money among themselves; did on the day and year aforesaid, in the city and county aforesaid, wickedly, falsely, fraudulently, deceitfully and unlawfully combine, unite, confederate, conspire and bind themselves together to cheat and defraud said Charles M. Kase of divers large sums of money, and after giving to said Charles Peaker a portion thereof and divide the remainder of said money among themselves."

Dec. 30, 1913.—One of the alleged conspirators, Simon Hahn, "in execution of and to effect the object thereof and in pursuance of said wicked, unlawful and malicious combination and conspiracy, then and there, not only representing himself but also said John Gregory and Francis Gregory" did represent to the said Charles M. Kase that he, the said Simon Hahn, had been retained by one, Charles Peaker, to institute and commence an action for the alienation of the affections of his wife, Bertha Peaker, by the said Charles M. Kase, against the said Charles M. Kase on behalf of the said Charles Peaker," etc. Then follows a statement of the alleged false representations made to Kase by Hahn on that date to

procure the $25,000, and that the false representations were made with the knowledge of Hahn and the two Gregorys for the purpose of cheating and defrauding Charles M. Kase of $25,000, and "the said Charles M. Kase did then and there and at the time and place aforesaid pay to the said Simon Hahn the sum of $25,000 so as aforesaid, demanded by the said Simon Hahn then and there representing not only himself but the said John Gregory and Francis Gregory, to be paid by said Charles M. Kase, and the said Charles M. Kase was then and there cheated and defrauded by the said Simon Hahn, John Gregory and Francis Gregory of the said sum of $25,000, and they procured the same for the purpose of division as aforesaid.

Dec. 30, 1913.—"In execution of and to effect the object thereof and in pursuance of said wicked, malicious and unlawful combination and agreement so as aforesaid made between the said Simon Hahn, John Gregory and Francis Gregory, from the said sum of $25,000, so procured as aforesaid from the said Charles M. Kase," did pay Peaker the sum of $2,000; Hahn retained $14,000; and Hahn paid to John Gregory and Francis Gregory, each, the sum of $4,500; "and the said John Gregory and Francis Gregory then and there received said sums of money as aforesaid, knowing the same to have been procured as aforesaid from the said Charles M. Kase."

Jan. 4, 1915.—"In execution of and to effect the object thereof and in pursuance of such wicked, malicious and unlawful combination and agreement such as aforesaid, made by and between the said Simon Hahn, John Gregory and Francis Gregory, said Simon Hahn, from said moneys received as aforesaid from the said Charles M. Kase, did pay and turn over to the said Francis Gregory the sum of $1,250, for the use of the said Francis Gregory and John Gregory, and which sum of $1,250, was a further division of the moneys received and procured from the said Charles M. Kase as aforesaid, and the said

Francis Gregory then and there received said sum of money as aforesaid, knowing the same to have been procured as aforesaid from the said Charles M. Kase.

Jan. 5, 1915.—"In execution of and to effect the object thereof and in pursuance of such wicked, malicious and unlawful combination and agreement, so as aforesaid, made by and between the said Simon Hahn, John Gregory and Francis Gregory, said Francis Gregory did pay and turn over to John Gregory, the sum of $625, both knowing the same to be part and parcel of the said sum of $1,250 received and procured from the said Charles M. Kase as aforesaid."

SECOND COUNT.

Dec. 22, 1913.—The allegation here is of the conspiracy among the same parties, "to cheat and defraud said Charles M. Kase of divers large sums of money, and after giving to said Charles Peaker a portion thereof, to divide the remainder of said moneys amongst themselves, by putting the said Charles M. Kase in fear of public infamy and disgrace, by representing to him through the said Simon Hahn," etc.—following a statement of the representations similar to those in the First Count.

Dec. 30, 1913.—"In execution of and to effect the object thereof and in pursuance of said wicked, unlawful and malicious combination and conspiracy, then and there, not only representing himself but also said John Gregory and Francis Gregory," Hahn made certain false representations to Kase with intent to defraud and deceive him, and by reason of the false representations known to Hahn and the two Gregorys to be false and made for the purpose of cheating and defrauding Kase, the said Kase then paid to Hahn $25,000, so demanded by Hahn representing not only himself but the two Gregorys and said Kase "was then and there cheated and defrauded by the said Simon Hahn, John Gregory and Fran-

cis Gregory of the said sum of $25,000, and they procured the same for the purpose of division as aforesaid."

Dec. 30, 1913.—"In execution of and to effect the object thereof and in pursuance of said wicked, malicious and unlawful combination and agreement so as aforesaid made between the said Simon Hahn, John Gregory and Francis Gregory," the said three defendants paid out of Kase's money, to Peaker $2,000; Hahn retained $14,000, and gave to John and Francis Gregory each $4,500, they knowing the same to have been procured as aforesaid from Kase.

Jan. 4, 1915.—"In execution of and to effect the object thereof and in pursuance of such wicked, malicious and unlawful combination and agreement such as aforesaid made by and between the said Simon Hahn, John Gregory and Francis Gregory," Hahn from Kase's said money paid to Francis Gregory $1,250, which "was a further division of the money received and procured from the said Kase as aforesaid," and said Francis Gregory knew when he received the money that it was part of the money procured from Kase."

Jan. 5, 1915.—"In execution of and to effect the object thereof and in pursuance of such wicked, malicious and unlawful combination and agreement as aforesaid by and between the said Simon Hahn, John Gregory and Francis Gregory," said Francis Gregory did pay to John Gregory $625, both knowing the same to be part of the Kase money.

I.

The indictment charges a conspiracy, which, if committed at all, was formed on December 30, 1913. Briefly stated, the conspiracy alleged in the indictment was a conspiracy to cheat and defraud Kase of $25,000, and to divide the $25,000 among the alleged conspirators.

By reason of the fact that the only act alleged to have been performed two years before the indict-

ment, was done on January 4 or 5, 1915, and which act the indictment refers to as being "a further division" of the sum of $25,000 among the alleged conspirators, it becomes important in the consideration of this case to determine three points:

(a) What is the conspiracy charged in the indictment; and to what extent does the conspiracy charged in the indictment constitute an offense under our Statute?

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(b) When was the conspiracy formed?

(c) When was the common object of the conspiracy consummated?

(a) The conspiracy alleged in the first paragraph of each count in the indictment was "to cheat and defraud Charles M. Kase of divers large sums of money, and, after giving to said Charles Peaker a portion thereof, to divide the remainder of the moneys amongst themselves." The New Jersey Statute (Crimes Act, Sec. 27) provides, "Any two or more persons who shall combine, unite, confederate, conspire or bind themselves by oath, covenant, or agreement or other alliance to * * * cheat and defraud any person of any property by any means which are in themselves criminal; or to cheat and defraud any person of any property by any means which if executed would amount to a cheat * * * shall on conviction be deemed guilty of a conspiracy; * * * but no agreement to commit any crime other than (certain crimes of which conspiracy is not one) shall be deemed a conspiracy, unless such act in execution of such agreement be done to effect the object thereof by one or more of the parties to such agreement."

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The conspiracy, therefore, under the foregoing section of the Crimes Act is a conspiracy to cheat and defraud. It is true that the draftsman of the indictment has attempted to enlarge upon the statute and to state the offense to be a conspiracy to

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cheat and defraud and divide the proceeds. The statute, however, must be strictly construed and only those things mentioned in the indictment which constitute an offense under the Crimes Act should be taken into consideration in determining the statutory offense with which it is attempted to charge the defendants in this indictment. One of the other kinds of conspiracy mentioned in the same section of the Crimes Act is a conspiracy "to obtain money under false pretenses. The conspiracy to cheat and defraud is very analogous to a conspiracy to obtain money under false pretenses. It would be just as easy to say that an indictment would lie for a conspiracy "to obtain money under false pretenses and divide the proceeds" as for a conspiracy "to cheat and defraud and divide the proceeds." It is palpable that the only object the draftsman of the indictment could have in going beyond the language of the statute and including the matter of division, in the statutory offense of cheating and dividing, was for the purpose of attempting to prolong the duration of the offense to a period less than two years before the finding of the indictment and contend that the Statute of Limitations did not run until the very last division of the money had been made. If the agreement between the conspirators had been to cheat and defraud Kase of $25,000, place the money out on bond and mortgage or real estate, divide the interest semi-annually and at the end of five years, divide the principal among the conspirators, such state of affairs could as readily be set up in an indictment as the facts the indictment actually sets out, and the division of the interest and the final division of the proceeds would be considered overt acts as much as the divisions set out in the indictment. Or if the agreement was to cheat and defraud and put the money away for five years and at the end of that time divide the money among the conspirators, the statute of limitations would not begin to run until the expiration of the five years

after the cheating and defrauding was accomplished, if the contention of the State in this case is correct.

The several divisions of the money in this case did not constitute overt acts. All of the overt acts were done before the cheating and defrauding were actually accomplished. An overt act is something done before or at the time of the accomplishment of the common object of the conspiracy. A subsequent division of the spoils is very good evidence to be used in the trial pointing to the previous formation and accomplishment of the conspiracy; in the same manner as a confession of guilt made subsequent to the commissions of the crime, or the finding of money or goods in the possession of the thief, as proof of his having committed the theft at such time previous.

(b) The indictment in the first paragraph of each count alleges the conspiracy to have been formed on December 22, 1913.

(c) The common object of the conspiracy was consummated on December 30, 1913, when the purpose for which the conspiracy was formed was attained; the cheating and defrauding of Kase of $25,000. The indictment itself in the concluding words of the second paragraph, in both the first and second counts, alleges that on December 30, 1913, "the said Charles M. Kase was then and there cheated and defrauded by the said Simon Hahn, John Gregory and Francis Gregory of the said sum of $25,000." And the same paragraphs allege that the acts of the conspiracy done on December 30, 1913, which resulted in the cheating and defrauding of Kase on that date were done "in execution of and to effect the object thereof and in pursuance of said wicked, unlawful and malicious combination and conspiracy."

It is clear that paragraphs one and two of both counts of the indictment state a situation embracing—

1. The conspiracy agreement and its object,

2. The doing of the overt act in execution of the agreement and to effect the object thereof.

3. The consummation of the common object of the conspiracy.

Remembering that the statute is directed, among other things, against the conspiracy "to cheat and defraud any person of any property," and that the agreement shall not be deemed a conspiracy unless some act "in execution of such agreement be done to effect the object thereof," it is plain that the common object of such a conspiracy is the securing of another's money or property by cheating and defrauding him; and that the common object of such a conspiracy as charged in the statute, is fully accomplished when that person has been cheated and defrauded; and the overt acts are those steps taken by the conspirators, after the agreement has been entered into, which go towards the accomplishment of the common object or purpose of the conspiracy, which, in this case, was to cheat and defraud Kase of his money.

While it is true that conspiracy is an offense that may cover a considerable length of time, it cannot be contended that it covers any greater length of time than from the formation of the conspiracy to the consummation of the common object thereof. This is very plainly set out in the case of State vs. Dougherty, 86 L. 525, at Page 542. The indictment in that case charged a number of Atlantic City Councilmen with conspiracy to pervert the administration of the law by corruptly passing an ordinance and for the passage of which they were each to receive a bribe. The defendant, Murtland, was not to receive his bribe until the contract to be awarded after the passage of the ordinance, was actually given out, and it held on the point of admitting evidence that "it cannot be well said that before Murtland had been paid that the full common object of the conspiracy had been consummated."

A large part of the Court's reasoning in the

Dougherty case relates to the question of admission of evidence on the trial, and there would seem to be no question after the decision in the Dougherty case that all acts, including those relating to the division of the spoils, were proper to be admitted in evidence, even though such acts or declarations referred to some past act done in execution of the conspiracy. The division of the spoils would unquestionably be proper to refer to in the evidence as relating to the past overt act of procuring the money from Kase; upon the same reasoning that the attempt of a burglar to dispose of stolen articles a year after the theft would be admissable in evidence to prove the original crime, but would not have the effect of interrupting the running of the statute of limitations.

All this evidence, such as division of spoils, declarations and the like, would be evidential of an offense committed in the past, but would not revive the Statute of Limitations and cause it to begin to run anew from each declaration or each division or subdivision.

Suppose Hahn had taken the whole $25,000 and put it in a Savings Bank and retained it for three years after it had been obtained from Kase, and at the end of three years had called the two others together and divided the money, under these circumstances, could it be possibly held that the division of the money was an act done in execution of the conspiracy and to effect the object thereof? The indictment says that the object of the conspiracy was to cheat and defraud Kase, and further states that on December 30, 1913, "for the purpose of carrying into effect" the conspiracy, and by virtue of certain false representations, the $25,000 was obtained from Kase on that day and Kase "was then and there cheated and defrauded." All of the allegations that are mentioned in the indictment as having taken place after December 30, 1913, the date upon which Kase was defrauded, were not overt acts done in execution of the conspiracy, or to effect the object thereof, but

were merely acts done, evidence of which admitted at the trial would tend to prove the previous conspiracy and consummation thereof.

Mr. Justice Kalisch, in the thorough and complete opinion in State vs. Dougherty, supra, at p. 539, makes this statement: "While it is true that the statute makes it necessary that an overt act be done in pursuance of the unlawful agreement in order to make it an indictable offense, and while the proof of such an overt act is sufficient to warrant a conviction, it by no means follows that the common object of the unlawful agreement has thereby been consummated. Oftentimes there are many steps necessary to be taken by the conspirators to achieve the common object of the conspiracy; and each step taken may in itself be an overt act sufficient to make the unlawful agreement indictable and to convict the conspirators, notwithstanding that the common object of the conspiracy was not wholly attained." The conspiracy, therefore, is continuous until the common object is attained. Acts done in pursuance of the conspiracy and before the common object is attained, are overt acts and part and parcel of the conspiracy. Acts and declarations of the conspirators, after the common object of the conspiracy has been attained, are not overt acts, and are not part and parcel of the crime; but they are admissible in evidence for the purpose of proving a crime committed in the past.

The test, therefore, in this case is, when was the common object of the conspirators consummated? Bearing in mind that the conspiracy under the statute is "to cheat and defraud" Kase; and that the indictment alleges that in pursuance of the conspiracy Kase "was then and there cheated and defrauded" on December 30, 1913, the day on which the conspirators secured from him the $25,000, there would appear to be no doubt that the conspiracy was completed and the common object of the conspirators attained on December 30, 1913, when the money was

procured. If the indictment had terminated at that point, and had made no statement whatever as to the division of the spoils, it would have stated a completed offense constituting a conspiracy, an overt act, and the consummation of the common object.

As above stated, the statute does not allege that division is any part of the conspiracy; the division was incidental to the conspiracy and was evidential of it, but there is no suggestion in the statute that the division of the money was any part of the conspiracy.

Under the head of "Division of Fruits of Crime," is quoted in State vs. Dougherty, supra, at pages 540 and 541, the following: "Thus where the common purpose of the conspirators embraced not merely the commission of a series of unlawful acts, but also the disposition of the fruits of those acts and the division of the proceeds amongst themselves, acts and declarations by any of them, though after the commission of the unlawful acts, but before the disposition or division, are admissible in evidence against the other conspirators, notwithstanding such acts and declarations also referred to a past act committed in execution of the conspiracy."

Of all the cases supporting that text, which holds only that the acts are admissible *in evidence* (which we do not dispute) there is only one case, "People v. Opie, 123 Cal. 294, which states, "In certain cases where the conspiracy discloses an intention to divide the property to be stolen, *evidence* of the acts and declarations of a conspirator taking place at any time prior to the division, are admitted. This is upon the theory that the conspiracy does not end until that time." This statement by the California Court is dictum only and has not a single case quoted to support it, and the Court in that case actually decided the other way.

The following cases outside of New Jersey bear on the points now before the Court:

Queen vs. Blake, (K. B.) 115 Eng. Rep.
Reprint, at p. 54.

This was an indictment charging conspiracy to defraud the Customs. The question was on admission of evidence.

The question hereinafter referred to was on the admission as evidence of the check-stub (counterfoil) of a check drawn as a division of the spoils among the conspirators. Each of the three judges gave his views on the subject, as follows: 10

PATTERSON, J.:

"As to the counterfoil, it seems to me to have nothing to do with the conspiracy. What is the charge? A conspiracy to defraud the Customs. That appears to have been done before the cheque was drawn; the cheque had nothing to do with carrying the conspiracy into effect. The principle in Rex v. Watson (2 Stark, N. P. C. 140) is quite in analogy with this decision; and the same distinction was taken in 20 Regina v. Murphy (8 C. & P. 305), where my brother Coleridge rejected evidence of what was said after the transaction. Here the evidence offered is of a statement made after the conspiracy was effected."

WILLIAMS, J.:

"I am of the same opinion on both point. * * *

"The writing on the counterfoil is, in effect, a declaration by Tye for what purpose he had drawn the check, and how the money was to be applied. To 30 what did this relate? To a conspiracy at that time completed. In Rex. v. Watson (2 Stark, N. P. C. 140) the only doubt was whether the interval of time was not so great as to have allowed another party to place the document where it was found."

COLERIDGE, J.:

"I agree with the rest of the Court on both points. * * *

"As to the counterfoil, it is quite clear that no 40

declaration of Tye can be received in evidence against Blake which was made in Blake's absence, and did not relate to the furtherance of the common object. What then was this statement? It was made by Tye after the common object was effected and it was suggested merely to have related to the division of the plunder. It is a memorandum, not merely of the cheque drawn, but of a large account containing several items, made out for Tye's own use. How can that be connected with the conspiracy? It is suggested that Blake's receipt of the money connects him with the entry. That may make it more credible that the connection existed; but it still does not bring the case within the rule which makes the declaration of one conspirator evidence against another."

Rule absolute for a new trial.

People v. Opie, 55 Pac., 989.

"Conceding the evidence established a conspiracy between these two parties to commit the crime of grand larceny, still the court committed error in allowing evidence to be introduced. * * * This evidence was all directed towards matters occurring after the commission of the offense—after the conspiracy was accomplished and ended. * * * The attorney general attempts to meet the force of these objections by saying that the conspiracy was not ended when the events occurred which this evidence disclosed. It is said the conspiracy was not ended because the property stolen had not yet been distributed by the thieves. This is no answer, for there is no evidence that it was ever intended that it should be distributed. In certain cases where the conspiracy disclosed an intention to divide the property to be stolen, evidence of the acts and declarations of a co-conspirator taking place any time prior to the division are admitted. This is upon the theory that the conspiracy does not end until that time. The present case discloses nothing of that kind."

No reference to cases supporting this last statement is given, and it is dictum.

Commonwealth v. Bartelson, 85 Pa. St. 482.

Indictment, defendants "being persons of evil minds and dispositions, wickedly devising and intending to cheat and defraud one O. H. P. M. on . . . . fraudulently, falsely, etc., did conspire, combine, etc., between and amongst themselves, falsely and fraudulently to cheat and defraud the said O. H. P. M. of his moneys, goods, chattels, property and estate" and then proceeded to state a series of overt acts done in pursuance of the conspiracy. Every one of these averments of overt acts is linked to that which precedes and to the original general charge of the conspiracy to cheat, by the allegation that it was "in pursuance and as a renewal of said conspiracy," etc. Two overt acts were laid within two years.

"It was strongly urged, however, that inasmuch as it was averred in said count that the defendants had 'in pursuance and renewal of said conspiracy' committed divers overt acts, specially described in said count, the date of one of which at least was within the statutory period, there was a continuance and renewal of the conspiracy from time to time and the statute was thereby. This is plausible but unsound. The offence charged was the conspiracy. According to all the authorities, the conspiring is the essence of the charge and if that be proved, the defendants may be convicted. . . . According to the count, the offence was complete on the 20th of December, 1874. The overt acts set forth do not constitute the offence. They are the evidence of it and are sometimes said to be in aggravation of it. The overt act may or may not be unlawful per se. It is because of its relation to an unlawful combination that it becomes obnoxious to the criminal law. The averment that the conspiracy was 'renewed' from time to time does not meet the difficulty. If it proves anything, it proves

too much. The 'renewal' of a conspiracy means to begin it again; to recommence it; to repeat it. From this it is apparent that each renewal is a new offence; a repetition if it is true of a former one, but still an offence for which an indictment would lie. If, therefore, the overt acts were done or committed in renewal of the conspiracy of December 20, 1874, as charged in the count, they aver distinct offence. It is a well settled rule of criminal pleading that distinct offences cannot be joined in the same count. . . The Commonwealth must allege and prove a conspiracy within two years. If this cannot be done, the Commonwealth has no case. . . . For, as before said, the overt acts are the evidence from which a conspiracy may be inferred. This rests upon the principle that the overt act is evidence of a conspiracy existing at the time and place where the overt act was committed. Of course, the overt act must be such as to tend to show that it was the result of the conspiracy. As is said in Arch, C. P. & P. 1056, 'Every overt act, to be evidence, must have at least a tendency to prove either the general nature of the conspiracy or that two or more of the defendants were operating towards effecting that which is charged in the indictment as being the object of the conspiracy'."

U. S. v. Owen. 32 Fed. 534.

Indictment for conspiracy with intent to defraud the United States.

The prosecution of the defendants for an act committed three years before the finding of the indictment is barred by lapse of time, and those alleged to have been committed within three years of such finding are not sufficient to constitute the crime defined by the statute. The very foundation of the crime—the conspiracy—is shut out, and without this circumstance, the offence in question is not charged in the indictment. However, this is an instantaneous crime, composed of the conspiracy and the first act

done to effect the object thereof in whatever distance of time therefrom. When the conspiracy is formed, the crime is begun, and when the act is commtted, it is consummated. An indictment will then lie, and in three years the bar is complete."

U. S. v. McCord. 72 Fed. 159.

Indictment conspiracy to defraud.

"There is no doubt in the mind of the court—the authorities are all to that effect—that the gist of an action for conspiracy under the statutes of the U. S. is the same as it always was at common law. . . All the provision extra is that in order to complete the offence so that indictment will lie, there must be some overt act. . . . Any overt act, however slight, intended to effectuate the object of the conspiracy and whatever its character may be, whether it is itself criminal or perfectly innocent in its nature is sufficient to fix the offence and to make it indictable. Now it seems to me the question in this case is when the statute of limitations commenced to run, whether these defendants might have been indicted under the evidence in this conspiracy in the spring of 1891; and that they might, seems to be quite clear from the testimony. . . . It is a proposition that the Court cannot give its assent to that this transaction can be divided up into different conspiracies. . . . Now to make good this contention, it is claimed that it is a continuing offence. . . . But that it is a continuing offence in the sense that as to the first and original parties to the conspiracy, this statute begins to run anew from the time of the commission of every overt act, is a contention that the court is unable to affirm."

Del Campo v. Camarillo, 98 Pac. 1049.

"The object of the conspiracy, if there was any, was to obtain from the mother her interest in the rancho, that object was fully accomplished when they secured the execution of a deed from her to them conveying to them her interest. That deed being

executed immediately vested in them whatever interest the mother had. Nothing further remained to be done in furtherance of the conspiracy or to effect the object for which it was formed. The fact that they remained tenants in common of the land thus obtained does not operate as a continuance of the scheme, nor make declarations of one of the tenants in common made years after the execution of the deed with respect to its execution, admissible as to the other."

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Previously stated.

"The rule is that such declarations of one conspirator made while the conspiracy is pending and during the progress of the plan adopted for its accomplishment are admissible against both."

State v. Shields, 45 Conn. 256.

Rape.

"Now it is well settled that evidence of the entire transaction covered by the conspiracy from its commencement to its termination by the departure of all the conspirators from the scene of the crime is admissible against A. as well as against each of the other parties on their separate trials for the commission of the crime."

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Rape case. One of the parties ran away.

People v. Trim. 39 Cal., 75.

The charge was burning with intent fraudulently to procure insurance money.

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"As before remarked, the offence with which defendant was charged as defined by the statute consists of burning the house insured from loss or destruction by fire *with intent* to injure or defraud the insurer. The criminal intent is then under the statute as strongly evidenced by an effort of the parties causing the destruction of the house by fire to obtain from the insurer the value of the destroyed property as is the act of willfully applying the torch to the house. . . . If then the defendant and Mary F.

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Trim conspired together to commit the offence charged in the indictment, the object and purpose of the conspiracy was to burn the house and then procure payment from the insurer thereof for the loss which they had voluntarily occasioned. This object and purpose would not be fully accomplished until such payment had been actually made; since under the rule above stated the acts or declaration of Mary F. Trim evidencing an effort on her part to procure payment from the insurer of the amount of the loss insured against, was clearly competent as acts and declarations of a co-conspirator in furtherance of the original object and purpose of the conspiracy."

Wharton on Criminal Evidence §699.

"And in other offences, acts and declarations after commission of the crime and until the purpose of the conspiracy is complete are admissible."

This statement is based on Shields v. State, and Scott v. State, and 14 Tex. App. 502.

Lamb v. State, 95 N. W. 1050.

Larceny.

"Besides, the evidence was quite sufficient to establish prima facie the existence of a common purpose and design to steal and sell the Rooney cattle. The sale had not yet been made. The conspiracy was still pending and consequently the acts and declarations of each of the conspirators in the prosecution of the unlawful enterprise were the acts and declarations of all."

O'Brien v. State, 96 N. W. 649.

Larceny.

"A conspiracy to steal and sell hogs for the benefit of all engaged in the illegal enterprise is pending until the sale has been made and proceeds divided."

Neb.

People v. Weiss, 114 N. Y. S. 236.

Grand larceny.

"That conspiracy had not terminated when Flynn was arrested. The defendant was to hold the money evidently to satisfy the complainant, after he lodged a complaint. The money had not been divided. F.'s purpose to send for the money was in accordance with the evident understanding of the conspirators. Said statements of F. were therefore acts of a co-conspirator in the furtherance of the conspiracy or at least declarations accompanying and tending to characterize acts for which his co-conspirators were responsible, and as such could be proved against the defendant."

Baker v. State, 50 N. W. 518.

Larceny.

"A conspiracy to commit larceny does not end when the crime has been committed, if, as part of the conspiracy, the stolen property has to be divided or disposed of; and in such case, declarations made by one of the conspirators after the larceny and before such division or disposal of the property are admissible against the co-conspirator.

"Although the general rule is that a conspiracy is at an end when the contemplated crime has been committed, there may unquestionably be circumstances which show that the conspiracy is not then terminated because of the objects of the conspiracy are not then fully accomplished. To illustrate, a conspiracy to commit an assault or a murder would of course be ended when the assault or murder was committed; but a conspiracy to steal money *and divide the proceeds* is plainly not at an end until the division takes place, and this view is supported by authority. Whart. Crim. Ev. §699; Scott v. State."

State v. Grady, 34 Conn, 118 (Theft.)

"The objection is, not that the evidence was admitted without sufficient proof of the conspiracy, but

that the acts and declarations admitted were made after the offence was consummated by the removal of the property from the car. But was the object and purpose of the conspiracy consummated and completed immediately upon such removal of the property from the car? Clearly not. The object and purpose of the conspiracy was not to remove the property from the car simply or to enable C. T. & G. to steal it for their own profit, but to transport it to New York as the joint property of all to be there divided; and until such transportation was completed and division made, the object and purpose of the conspiracy was not completed and C. G. & T. were still the agents of the prisoners."

Franks v. State, 35 S. W. 977. (Burglary.)

"If the disposition of said goods was a part of the common purpose and design of said co-defendants, and they were still acting together in the disposition or concealment of said articles, and the common design with reference thereto had not terminated, then any statement made by W. was legitimate evidence against his co-defendant; but the common design and purpose terminated with burglary and W. made these statements afterwards, such statements could affect him alone."

Scott v. State, 30 Ala. 503.

Larceny.

"The evidence justifies the conclusion that the conspiracy between West and the plaintiff in error was not confined to the mere feloneous taking and carrying away of the watch, but extended to a division of the profits of the larceny at a meeting to be held between them at another place as soon as convenient. Having given to their conspiracy that extent, neither of them, when indicted, has the right to call upon the court to diminish its extent for the purpose of relieving him from any of its consequences." This man paid double toll at a bridge after the larceny

had taken place. Held to show that the men were together.

State v. Pratt, 26 S. W. (Mo.) 556.

Forgery.

"No rule of law is better settled than that a conspiracy being shown and that conspiracy ended, no word of any one of the co-conspirators can be received as incriminating evidence against any one or more of the others. This rule, however, only applies where the words are merely narrative of a past transaction; it does not apply where the transaction —the criminal design—is still pending and unaccomplished. Sometimes it is a nice and difficult question to determine when any criminal design has terminated. In this case, however, no difficulty arises because the aim and object of the conspirators evidently was to so use the land as to which they had acquired a fictitious title as to divide the proceeds of their ill-gotten gains among themselves and until this was done the design was still inchoate and pending, and as shown by the evidence the conspirators were willing to forge another deed if necessary to make their unlawful gains secure."

Here a deed was forged.

State v. Byers, 41 Pac. 708.

Grand larceny.

On prosecution for conspiracy to steal and butcher cattle and sell the beef, statements and acts by one of the conspirators after the theft, but before the sale, are as part of the *res gestae* admissible against the other conspirators.

Mixon v. State, 31 S. W. 408.

"If the conspiracy, if there was such in this case, extended not only to the commission of the crime, but to a disposition of the fruits thereof, then any act or declaration of either of the parties in the furtherance of the common design became com-

petent evidence against all of the conspirators, and if there was evidence at all of a conspiracy in this case, it did not extend beyond the actual commission of the offence."

* * * * *

From the above statement of cases, it is submitted that the clear weight of authority bears out the statement heretofore made, that the common object of the conspiracy stated in the indictment in this case, was consummated on December 30, 1913, and the offense mentioned in the indictment is, therefore, barred by the statute of limitations.

II.

The indictment does not set out any offense committed within two years before the finding of the indictment.

Should the Court hold that the division of the money did not extend the conspiracy as to time, but that its common object was consummated on December 30, 1913,—when Kase was cheated and defrauded of the money—it would not be necessary for the Court to consider the second point of the defendants. Should it be held, however, that the conspiracy continued until the final disposition of the money among the alleged conspirators, then it would be necessary to urge the second point of the case, to wit: that no offense committed within two years before the finding of the indictment is therein set out.

The indictment charges a conspiracy formed in December, 1913. It does not allege any conspiracy formed within two years before the indictment was found—September Term, 1916. Each paragraph of the indictment alleges that each act mentioned in each paragraph was done "in execution of and to effect the object thereof, and in pursuance of such wicked, malicious and unlawful combination and agreement so as aforesaid made by said defendants." This language is almost precisely the same as the language used in Commonwealth v. Bartelson, supra.

In the case of Ware v. U. S. 154 Fed. 577; 12 L. R. A., N. S. 1053, there is ample authority for the statement that in an indictment of this sort where the State relies upon an overt act done within the statutory period to support the charge for conspiracy formed beyond the statutory period, that the indictment is defective. Also, that where a conspiracy has been formed and an overt act has been done in execution of it beyond the statutory period, a prosecution for that conspiracy and overt act is barred by the Statute of Limitations.

The "case note" to the above decision in 12 L. R. A., N. S. 1053, analyzes the law as to the effect of an overt act within the limitation period where the conspiracy was originally formed and the first act committed beyond the period of limitation. The conclusion arrived at after an analysis of those cases is, that where overt acts committed within the statutory period are relied upon to prove a conspiracy formed beyond the period, that the indictment must state the conspiracy as formed and existing within the statutory period and the proof must show the conscious participation of the defendants in the conspiracy within the limitation period.

III.

Under this sub-division, will be presented errors, detrimental to the defendant, alleged to have been committed in the trial of the case and the charge of the Court.

The specifications of causes, which go to the question of the statute of limitations, and on which the argument under I and II has been made above, are specifications Nos. 1, 2, 4, 5, 6, 7, 16, 17, 18 and 19.

The other specifications will be taken up in order as follows:

3. Because there was no evidence that the defedant conspired with any one or more of the other

defendants named in said indictment to cheat and defraud one Charles M. Kase of divers large sums of money.

This point is covered by No. 11 post, and will be treated under that head, the claim being that unless the testimony of the defendant himself is considered in behalf of the statute, there would be no evidence of a conspiracy.

8. Because the Court allowed evidence of conversations with persons not in the presence of the defendant. 10

This point is likewise treated under No. 11, post. Unless the evidence of the defendant, introduced by the State, is properly before the Court, there is no other evidence on the part of the State, from which the inference of concerted action by the defendants could be drawn. Without such concerted action proven, that part of the testimony of Kase and Peaker referring to conversations with Hahn, not in the presence of the defendant Gregory, would have been improperly admitted. 20

9. Because the Court erroneously refused to permit to be answered the following question asked by the defendant's attorney of the witness Kase, to wit: "And this money and this property came from him, didn't it?"

10. Because the Court erroneously refused to permit to be answered the following question asked by the defendant's attorney of the witness Kase, to wit: "And up to the time of his death it wasn't yours—it was his?" 30

The two questions which were ruled out by the Court in the above two specifications relate (Case p. 48 and p. 49) to an inquiry on cross-examination of the witness Kase on the question of ownership of the money or property out of which he was alleged in the indictment to have been cheated and defrauded. The questions immediately previous to the above 40

two questions (Case p. 48) attempted to trace the property from Kase's father to himself after the father's decease and the questions ruled out were part of the inquiry, on cross-examination, into this matter.

It is respectfully submitted that the Court erred in ruling out these questions as the indictment charges the defendant with having conspired to cheat and defraud Kase out of his (Kase's) money or property and with having succeeded in such conspiracy. An inquiry into that question as to whether the money was Kase's; what it was; where it came from and how he came by it, is all germane to the subject-matter of the indictment.

11. Because on the trial of the said cause the Court permitted to be read and offered in evidence in said cause the testimony given by the defendant, Francis Gregory, in a previous trial of said indictment, on which previous trial the jury disagreed:

The State offered in evidence and the Court allowed to be read as part of the record and as evidence for the State, the entire testimony of the defendant Francis Gregory, given in his own behalf, on a previous trial of this same indictment, and which trial resulted in a disagreement of the jury.

This procedure, if permissible, circumvents the constitutional provisions that no person in a criminal case can be compelled to be a witness against himself. To use his testimony, in toto, against him, both direct examination, cross-examination and examination by the Court, had in the former trial (Case pp. 74-107) in behalf of the State is exactly the same as forcing the defendant to go on the stand as a witness for the State and against himself. (Fifth Amendment to U. S. Constitution.)

12. Because the Court erroneously refused to charge the jury as requested by defendant's attor-

ney, as follows: "If you find from the evidence that the money was extorted from Kase by threats of Hahn, but that such threats were made by Hahn acting alone, and not because of any corrupt agreement between the defendant and Hahn, as set out in the indictment, there should be a verdict for the defendant."

13. Because the Court erroneously refused to charge the jury as requested by defendant's attorney, as follows: 10

"If you find from the evidence that up to the time that the money was gotten from Kase by Hahn, there was no corrupt agreement between Hahn and the defendant whereby they had conspired to cheat and defraud Kase of the money, there should be a verdict of 'Not Guilty' rendered in favor of the defendant, even though they were given by Hahn, the sums of money stated in the indictment after he had received the money from Kase."

14. Because the Court erroneously refused to 20 charge the jury as requested by defendant's attorney, as follows:

"If you find from the evidence that Hahn secured this money from Kase by the threats set out in the indictment, but that in so doing, there was no proof of a corrupt agreement with the defendant, and that he knew nothing of the steps that Hahn as attorney for Peaker intended to take in securing money from Kase, nor the amount that he intended to ask, until after the amount had been agreed upon between him 30 and Kase, the defendant would be entitled to be acquitted, even though you believe that the sum of money received from Hahn was greatly in excess of what his services were worth as a detective in the case."

It is respectfully contended that the Court should have charged these requests in the language stated. The gist of a conspiracy is the corrupt agreement. 40

The Court was asked in these requests to charge that if there was no corrupt agreement found but that the money was gotten by Hahn alone, not acting in conjunction with the defendant Gregory, there could have been no conspiracy. The Court refused to charge this and we submit committed error, as there was evidence tending to show that Gregory had no part in the matters leading up to the getting of the money, and had no knowledge of the methods used by Hahn, or in the fixing of the amount which Hahn obtained. (Case p. 126.)

15. Because the Court erroneously refused to charge the jury as requested by defendant's attorney, as follows:

"Before you can convict the defendant all of the allegations of the indictment must be proved beyond a reasonable doubt, or at least sufficient of such allegations to constitute a corrupt agreement to cheat and defraud; if the proof fails in any essential particular as to the defendant there should be a verdict of 'Not Guilty'."

It is respectfully contended that the defendant was entitled to have charged the above request in the language stated.

The Court only charged (Case pp. 154, 155) that the defendant is entitled to the benefit of any reasonable doubt, and defined what "reasonable doubt" is. He did not, however, in any part of his charge cover this request, even substantially. The defendant was entitled to have the rule of law applicable to conspiracy, and its essential parts, stated to the jury, and this was not done. (State v. Mount, 73 L. at 585.)

16. Because the Court erroneously refused to charge the jury as requested by defendant's attorney, as follows:

"Even though you decide that the proof shows beyond a reasonable doubt that the defendant was guilty of a conspiracy charged in the indictment, there should nevertheless be a verdict of 'Not Guilty' rendered in his favor, if you find that the common object of the conspiracy was consummated more than two years before the indictment was found, which would be two years before April, 1916."

17. Because the Court erroneously refused to charged the jury as requested by defendant's attorney, as follows: 10

"If you find from the evidence that the full common object of the alleged conspiracy was cheating and defrauding Kase of $25,000 or any other sum, and that such full common object was consummated when the money was secured from him on December 30, 1913, there should be a verdict of 'Not Guilty' rendered in favor of the defendant as under those circumstances, the offense would be barred by the Statute of Limitations." 20

It is urged that the above were proper requests to charge, even in view of the decision on the certiorari (post). In spite of what the indictment stated the conspiracy to be, if the evidence showed the above state of affairs to have existed, the jury should have been so charged.

20. Because the Court erroneously refused to charge the jury as follows, as requested by defendant's attorney: 30

"If you find from the evidence that the money paid by Hahn in January, 1915, was paid by him as hush money to buy the silence of the defendant and Peaker, or of the defendant alone, and was not done in execution of a conspiracy to cheat and defraud Kase, or to effect the object thereof, you should find a verdict of 'Not Guilty' for the defendant."

It is respectfully urged that the Court should have charged in the language requested and that failure to so charge was error. 40

21. Because the Court erroneously charged the jury as follows:

"The State has elected to try only Francis Gregory, and you are therefore by your verdict only to pass upon his guilt or innocence, the other defendants named in the indictment not being now on trial. That does not mean that you should not consider whether the defendants were guilty of a conspiracy, because it follows that a charge of this kind, although only one of the defendants is on trial, you must determine whether or not some one besides the defendant was guilty of conspiracy, because as I have already indicated, one cannot conspire with himself alone; therefore, if there was a conspiracy some one other than this single defendant must have been concerned in it."

This charge was erroneous, because it make it possible for the jury to find Gregory guilty, if they found that he conspired with some one other than the other defendants named in the indictment. It might have been, under this charge, with a person not named or referred to in the indictment.

The above extract from the charge is Case p. 150. Immediately preceding this statement to the jury, the Court uses this language:

"Whether the indictment embraces every person who was a party to this alleged conspiracy or not, we do not know. It has been suggested that Mr. Peaker was a party to the conspiracy. It may possibly occur to you that Peaker himself was co-operating in an effort to get money from Kase and using his wife's relations with Kase to that end as a basis for that. But neither Mrs. Peaker or Mr. Peaker have been named in the indictment, and neither is now on trial."

The above statement of the Court in conjunction with his statement immediately afterward that "although only one of the defendants is on trial, you must determine whether or not some one other than the defendant was guilty of conspiracy," etc. The

plain inference to be drawn by the jury from this charge is that if the defendant conspired with Peaker or Mrs. Peaker, even though they *were not* named in the indictment, he should be convicted of conspiracy, although he might not be guilty of any conspiracy with the other defendants who WERE named in the indictment. This charge makes this inference plain, and is prejudicial to the defendant.

22. Because the Court erroneously charged the jury, as follows: 10

"If you find there was an unlawful conspiracy to extort money from Kase, it makes no difference whether the defendant was a party to its original inception or not, if he knowingly participated in any of the several steps taken in furtherance of the conspiracy or knowingly participated in a division of the spoils (the division of the proceeds of the scheme being on overt act done in execution of the illegal agreement and a part of it) he thereby adopts as his own the acts of the others, and is equally guilty." 20

This charge is erroneous, because it makes possible a conviction of the defendant, for accepting part of the money dealt out in January, 1915, without having been a party to any corrupt agreement alleged to have been made in December, 1913, as the result of which Kase was "cheated and defrauded."

By reason of all of the above it is respectfully submitted that the conviction should be set aside.

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HOWE & DAVIS,

Attorneys and Counsel for
Defendant, Francis Gregory.

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Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY *vs.* FRANCIS GREGORY.	*On Writ of Error.* *Indictment for Conspiracy.*

BRIEF OF THE STATE.

The writ of error sued out in this cause seeks to reverse the judgment of the Supreme Court, affirming the conviction of Francis Gregory at the Essex Quarter Sessions of the crime of conspiracy. The Supreme Court affirmed the conviction upon the opinion which it rendered when the indictment was before it on certiorari in the case of *State* v. *John Gregory and Francis Gregory.*

Francis Gregory, Simon Hahn and John Gregory were indicted for conspiring to cheat and defraud Charles M. Kase of his moneys, and, after giving to Charles Peaker a portion thereof, to divide the remainder of said moneys amongst themselves.

There was a severance and Francis Gregory alone was put upon trial.

Francis Gregory and his father, John Gregory, conducted a detective agency in Newark, and Charles Peaker, a colored man, consulted them in reference to obtaining a divorce against his wife by reason of her relations with Charles M. Kase. Peaker was introduced to Simon Hahn, at that time a practicing lawyer, and Peaker claims to have retained Hahn for the purpose of procuring a divorce. Shortly after this Hahn called upon Kase and demanded twenty-five thousand dollars in settlement. The money was paid by Kase, upon the representation by Hahn that if it was paid the matter would not become public property. (See p. 44, l. 25.) After the money was obtained, twenty thousand dollars of which was in cash, Hahn, the two Gregorys and Peaker met at Hahn's office, where Peaker was given two thousand dollars and then left. After Peaker's departure, each of the Gregorys received forty-five hundred dollars and Hahn retained the balance. Hahn had represented that instead of procuring twenty-five thousand dollars he had only procured twenty

thousand dollars. In other words, he was trying to keep the extra five thousand dollars for himself.

About a year later, in January, 1915, Francis Gregory made a demand upon Hahn for a further division of the five thousand dollars, which resulted in Peaker getting twelve hundred and fifty dollars and Francis Gregory a check for twelve hundred and fifty dollars, which was divided equally between him and his father.

ARGUMENT.

POINT I.

The main point in the case involves the statute of limitations.

The indictment upon which this conviction was founded was reviewed by the Supreme Court, under a writ of certiorari, in the case of *State* v. *John Gregory and Francis Gregory;* in its opinion filed October 31st, 1917, the indictment was sustained. The opinion is not reported, but the following is a true copy:

> "The defendants were allowed a certiorari, to remove an indictment for conspiracy found against them and one Hahn, in the Essex County Oyer and Terminer into this court, for the purpose of moving here that the same may be quashed. The principal ground relied on by counsel for the defendant, in support of the motion is that the indictment was not found within two years from the time of the commission of the alleged offense, and, therefore, the defendants are immune from prosecution for the offense charged therein, under the statute of limitation.
>
> The first count charges that on the twenty-second day of December, 1913, the defendants and one Hahn conspired 'to cheat and defraud Charles M. Kase of divers large sums of money, and after giving to said Charles Peaker a portion thereof, to divide the remainder of said moneys amongst themselves; that in furtherance of the conspiracy alleged, on the 30th day of December, 1913, Simon Hahn, then an attorney at law and solicitor in chancery, represented to Kase that he had been retained by Peaker to institute two actions, one for the alienation of the affections of Peaker's wife by Kase, and the other for divorce in the Court of Chancery of this State, on behalf of Peaker against his wife on the ground of adultery, com-

Addendum to State of Case.

New Jersey Supreme Court

THE STATE OF NEW JERSEY, *Defendant in Error,* vs. FRANCIS GREGORY, *Plaintiff in Error.*	*On Error.* *Remittitur.*

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The above stated cause having been duly submitted at the June Term Nineteen Hundred and Eighteen, in the New Jersey Supreme Court, by J. H. Harrison and John A. Bernhard, attorneys for the Defendant in Error, and Thomas A. Davis, attorney for the Plaintiff in Error, and the Court having considered the matter and finding no error in the record and proceedings in the Essex County Court of Quarter Sessions:

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It is thereupon ordered and adjudged that the judgment of the Essex County Court of Quarter Sessions, removed by the writ of error in this cause, be affirmed in all things with costs; and that the record be remitted to the Essex County Court of Quarter Sessions to be proceeded with according to law and the practice of said Court.

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Entered Nov. 16, 1918,

On Motion of

J. H. HARRISON,

Prosecutor of the Pleas,

Attorney of Defendant in Error.

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New Jersey Supreme Court

June Term 1918. No. 6.

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THE STATE OF NEW JERSEY,
Plaintiff Respondent,

vs.

FRANCIS GREGORY,
Defendant-Appellant.

20

Submitted June Term 1918. Decided November 1918.

Error to Essex Oyer & Terminer.

HOWE & DAVIS, for Defendant.

J. H. HARRISON, Prosecutor of the Pleas, and

ANDREW VAN BLARCOM, for the State.

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Per Curiam:

The question involved in this case is the same that has already been decided by this court on a motion to quash the indictment. For the reasons stated in Justice Kalisch's opinion* we affirm the present judgment.

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40 *This opinion is as follows:—

Per Curiam:

The defendants were allowed a certiorari, to remove an indictment for conspiracy found against them and one Hahn, in the Essex County Oyer and Terminer into this court, for the purpose of moving here that the same may be quashed. The principal ground relief on, by counsel for the defendant, in support of the motion, is that the indictment was not found within two years from the time of the commission of the alleged offence, and, therefore, the defendants are immune from prosecution for the offence charged therein, under the statute of limitation.

The first count charges that on the twenty-second day of December, 1913, the defendants and one Hahn conspired "to cheat and defraud Charles M. Kase, of divers large sums of money, and after giving to said Charles Peaker a portion thereof, to divide the remainder of said moneys amongst themselves"; that in furtherance of the conspiracy alleged, on the 30th day of December, 1913, Simon Hahn, then an attorney at law and solicitor in Chancery, represented to Kase that he had been retained by Peaker to institute two actions, one for the alienation of the affections of Peaker's wife by Kase, and the other for divorce in the court of chancery, on behalf of Peaker against his wife on the grounds of adultery, committed between her and Kase, and that he, Hahn, had prepared the necessary papers for the commencement and institution of such actions, and that unless Kase should pay to him, Hahn, said sum of $25,000, he, Hahn, would cause said actions to be instituted, whereby Kase was put in fear of public infamy and disgrace, Hahn then received from Kase $25,000.

That in pursuance of said conspiracy on the 30th day of December, 1913, the defendants and Hahn turned over to Peaker $2,000. Hahn retained $14,000, John Gregory received $4,500 and Francis Gregory $4,500.

That in pursuance of said conspiracy, on the 4th day of January, 1915, Hahn, from the moneys received from Kase, paid and turned over to Francis Gregory $1,250.00.

That in pursuance of said conspiracy, on the 5th day of January, 1915, Francis Gregory turned over and paid to John Gregory the sum of $625.00.

The second count is substantially like the first.

It is not claimed by counsel for defendants that the indictment does not charge a criminal conspiracy, but the contention is that since the offence charged is a conspiracy to cheat and defraud Kase, the object of the conspiracy was consummated when Kase paid the money to Hahn, and, therefore, the further allegation in the indictment that one of the objects of the conspiracy was to divide the money

amongst themselves, is an attempt to enlarge upon the statute of conspiracy and unwarranted in law.

But even if this were so it is no good ground for quashing the indictment. The allegation may be treated as surplusage.

The statute makes an agreement between two or more persons to commit a crime a criminal conspiracy, where some act in execution of such agreement be done to effect the object thereof by one or more of the parties to such agreement, but no overt act is required where the agreement is to commit the offences specifically mentioned in the act, in order to constitute such an agreement an indictable criminal conspiracy. A conspiracy to cheat and defraud does not become an indictable offence, until some act is done by one of the parties to the conspiracy in execution thereof.

The pleader is not confined to setting out any particular number of overt acts done in pursuance of the conspiracy. If there are a number of them he may set them all out, and at the trial be entitled to prove them all.

The setting forth in the indictment that one of the objects of the agreement between the parties was to divide the moneys fraudulently obtained from Kase between them is an allegation of the nature and extent of the corrupt agreement. We think this is good and careful pleading. But even if this were not so the defendants are in no position to complain because the state has more fully apprized them of the nature of the offence charged against them, than was legally necessary.

The agreement and its objects, as set out in the indictment, make it apparent that the agreement was not to be at an end until the money obtained by Kase from Hahn had been divided among the defendants. For that purpose the agreement between the defendants was kept alive and was continuing from its inception until the last division of the money obtained from Kase was made, which was on January 5th, 1915. This last division of the proceeds was an overt act done by the defendants in execution of one of the objects of the agrement between them, and hence, was a completion of the criminal conspiracy on that date, and from which time the statute of limitation commenced to run.

As the indictment in the present case was found within the two years from the time of the last division of the proceeds between the defendants, it cannot be successfully challenged upon the ground that the offence charged therein is barred by the statute of limitation.

These views lead to a denial of the motion to quash the indictment.

The indictment will be remitted to the Court of Oyer and Terminer of Essex County, there to be proceeded with in accordance with law.

mitted between her and Kase, and that he, Hahn, had prepared the necessary papers for the commencement and institution of such actions, and that unless Kase should pay to him, Hahn, said sum of $25,000, he, Hahn, would cause said actions to be instituted, whereby Kase was put in fear of public infamy and disgrace. Hahn then received from Kase $25,000.

That in pursuance of said conspiracy on the 30th day of December, 1913, the defendants and Hahn turned over to Peaker $2,000. Hahn retained $14,000, John Gregory received $4,500 and Francis Gregory $4,500.

That in pursuance of said conspiracy, on the 4th day of January, 1915, Hahn, from the moneys received from Kase, paid and turned over to Francis Gregory $1,250.

That in pursuance of said conspiracy, on the 5th day of January, 1915, Francis Gregory turned over and paid to John Gregory the sum of $625.

The second count is substantially like the first.

It is not claimed by counsel for defendants that the indictment does not charge a criminal conspiracy, but the contention is that since the offense charged is a conspiracy to cheat and defraud Kase, the object of the conspiracy was consummated when Kase paid the money to Hahn, and, therefore, the further allegation in the indictment that one of the objects of the conspiracy was to divide the money amongst themselves, is an attempt to enlarge upon the statute of conspiracy and unwarranted in law.

But even if this were so, it is no good ground for quashing the indictment. The allegation may be treated as surplusage.

The statute makes an agreement between two or more persons to commit a crime a criminal conspiracy, where some act in execution of such agreement be done to effect the object thereof by one or more of the parties to such agreement, but no overt act is required where the agreement is to commit the offenses specifically mentioned in the act, in order to constitute such an agreement an indictable criminal conspiracy. A conspiracy to cheat and defraud does not become an indictable offense until some act is done by one of the parties to the conspiracy in execution thereof.

The pleader is not confined to setting out any particular number of overt acts done in pursuance to the conspiracy.

If there are a number of them he may set them all out, and at the trial be entitled to prove them all.

The setting forth in the indictment that one of the objects of the agreement between the parties was to divide the moneys fraudulently obtained from Kase between them is an allegation of the nature and extent of the corrupt agreement. We think this is good and careful pleading. But even if this were not so the defendants are in no position to complain because the state has more fully apprised them of the nature of the offense charged against them than was legally necessary.

The agreement and its objects, as set out in the indictment, make it apparent that the agreement was not to be at an end until the money obtained from Kase by Hahn had been divided among the defendants. For that purpose the agreement, between the defendants, was kept alive and was continuing from its inception until the last division of the money obtained from Kase was made, which was on January 5th, 1915. This last division of the proceeds was an overt act done by the defendants in execution of one of the objects of the agreement between them, and hence was a completion of the criminal conspiracy on that date, and from which time the statute of limitation commenced to run.

As the indictment in the present case was found within the two years from the time of the last division of the proceeds between the defendants, it cannot be successfully challenged upon the ground that the offense charged therein is barred by the statute of limitation.

These views lead to a denial of the motion to quash the indictment.

The indictment will be remitted to the Court of Oyer and Terminer of Essex County, there to be proceeded with in accordance with law."

It is the contention of the State that the final object of the conspiracy was not affected until January 4th or 5th, 1915, when the last divisions of the moneys were made, and therefore the statute of limitations did not begin to run until that time.

There are no cases in this State directly in point, but *State* v. *Dougherty,* 86 N. J. L., 525, bears on the question. This case was reversed in the Court of Errors and Appeals, 88 N. J. L.,

286, but on another point. The following is quoted from the Dougherty case in the Supreme Court (pp. 540 to 542):

"In Encycl. Ev., 432, under the caption of 'Division of Fruits of Crime,' the text reads: 'Thus where the common purpose of the conspirators embraced not merely the commission of a series of unlawful acts, but also the disposition of the fruits of those acts and the division of the proceeds amongst themselves, acts and declarations by any of them, though after the commission of the unlawful acts, but before the disposition or division, are admissible in evidence against the other conspirators, notwithstanding such acts and declarations also referred to a past act committed in execution of the conspiracy.' The text is supported by the following well-considered cases: Com. *v.* Scott, 123 Mass., 222; Pacific Live Stock Co. *v.* Gentry, 61 Pac. Rep., 422; affirmed on rehearing in 65 *Id.*, 597; State *v.* Pratt, 121 Mo., 655; People *v.* Opie, 123 Cal., 294; 55 Pac. Rep., 989; Baker *v.* State, 80 Wis., 416; State *v.* Grady, 34 Conn., 118; Kelly *v.* People, 55 N. Y., 565; 50 N. W. Rep., 518; Com. *v.* Brown, 14 Gray, 419.

"In People *v.* Trim, 39 Cal., 75, it was held that where the conspiracy charged is to burn property insured against fire with intent to injure or defraud the insured, the object and purpose of the conspiracy are not fully accomplished until payment from the insurer has been actually procured, and hence acts or declarations of one of the conspirators evidencing an effort on his part to procure such payment are competent as acts and declarations of co-conspirators in furtherance of the original objects and purposes of the conspiracy.

"In People *v.* Opie, *supra*, the Court (on p. 990) said: 'In certain cases where the conspiracy discloses an intention to divide the property to be stolen, evidence of the acts and declarations of a co-conspirator taking place at any time prior to the division are admitted. This is upon the theory that the conspiracy does not end until that time.'

"Testing the facts of the case *sub judice* by the rule of law to be extracted from the cases above quoted, what is the situation disclosed? Concretely stated, it is this: That Phoebus was the active agent of the conspirators; that the common object of the conspiracy was to obtain a bribe or other unlawful profit in some way or another, for

each member of the conspiracy, by his corrupt official act. The passage of the ordinance was a means to that end, but was in nowise a consummation of the unlawful design of the conspiracy. The conspiracy comprised much more than the passage of the ordinance. It included the payment of a bribe to each member of the conspiracy. It also contemplated a contract to be given out under the ordinance for the work to be done, from which contract Murtland, one of the plaintiffs in error, was to derive a personal benefit.

"It must be borne in mind that each conspirator was to receive a bribe. The bribe Murtland was to receive was somewhat different in character from what the others agreed to take or had taken. Murtland was to receive his bribe when the contract was given out. It cannot be well said that before Murtland had been paid, that the full common object of the conspiracy had been consummated. It is no valid answer that the contract may never be given out and thus the common object of the conspiracy can never be consummated, and hence there will be no limit in time when the declarations or acts of a co-conspirator will cease to be efficacious to bind one who has not received the fruits of the crime. If this were so, it is difficult to see how any declarations of co-conspirators would be evidential in any case where the conspiracy failed."

It is submitted that the Dougherty case is authority for the proposition that the object of the conspiracy had not been consummated until the final division of the money.

The authorities outside of the State of New Jersey are not in accord, but it is submitted that the weight of authority tends to support the position of the State that until the conspiracy ends the statute does not begin to run.

"Where a conspiracy is formed and a single overt act in aid of its object is committed beyond the statutory period of limitation before the finding of the indictment, and subsequent overt acts are committed within that period, then, through the repetition of such acts, the conspiracy is made a continuing offense and by each of such acts it is repeated and entered into anew, and the prosecution is not barred."

Lorenz v. *U. S.*, 24 App. D. C., 337.

"The statute of limitations is not bar to a prosecution for conspiracy, although the corrupt agreement took place at a date barred by the statute, where the crime continued in active operation as to the overt acts within such time."
People v. *Willis,* 52 N. Y. S., 808; 23 Misc. Rep., 568.

"Where a conspiracy has been formed and an overt act done in execution thereof more than three years before the finding of an indictment, but subsequent overt acts were committed under the old conspiracy within three years, the existence of the conspiracy and the participation of defendant therein within three years, if established, will sustain a prosecution for the conspiracy."
Ware v. *The U. S.,* 154 Fed. Rep., 577.

"Limitations do not commence to run against a prosecution for conspiracy to obtain money by false pretenses, until the commission of the last overt act in furtherance of the conspiracy."
Ochs v. *People,* 124 Ill., 399.

"Where defendants were charged with conspiracy to deceive the Insurance Commissioner of Philadelphia, the statute of limitations does not begin to run until the end of the conspiracy."
Commonwealth v. *Wishart,* 8 Leg. Gaz. Rep. (Pa.), 137.

"Limitation does not begin to run against a prosecution for conspiracy between officers of a national bank to embezzle, abstract or wilfully misappropriate its funds so long as the conspiracy continues or acts to effect its object are committed."
United States v. *Breese,* 173 Fed. Rep., 402.

"Where conspirators are acting together for a common purpose comprehended by the scheme, limitations begin to run from the last overt act, except as to a conspirator withdrawing from the scheme, as to whom the statute runs from time of his withdrawal."
United States v. *Raley,* 173 Fed. Rep., 159.

"A conspiracy to restrain or monopolize trade in violation of the Sherman Act (Act July 2, 1890, c. 647, 26

Stat., 209) (U. S. Comp. St. 1901, p. 3200), by obtaining control of a competitor through a pledge of the majority of its stock to secure a loan to a stockholder, and then voting to suspend business until further order of the board of directors, continues, so far as the state of limitations is concerned, so long as any further action is taken in furtherance of the conspiracy."

(1910) *United States* v. *Kissel,* 31 S. Ct., 124; 218 U. S., 601; 54 L. Ed., 1168, reversing judgment (C. C. 1909), 173 F. 823.

"Where an alleged conspiracy to defraud the United States contemplated various overt acts, and the consequent continuance of the conspiracy beyond the commission of the first one, each overt act gives a new, separate, and distinct effect to the conspiracy, and constitutes another crime, and a prosecution is not barred until three years after the last overt act averred in the indictment."

Jones v. *United States,* 179 F., 584; 103 C. C. A., 142.

"While under Rev. St., Sec. 5440 U. S. Comp. St. 1901, p. 3676), providing for the punishment of persons conspiring to commit any offense against the United States, the gravamen of the offense is the conspiracy, the period of conspiracy must be computed from the date of the overt act rather than the formation of the conspiracy, and, where there are successive overt acts, the period of limitations must be computed from the date of the last of them to which there is appropriate allegation and proof."

(C. C. A. 1910) *Lonabaugh* v. *United States,* 179 F., 476; 103 C. C. A., 56, reversing judgment *United States* v. *Lonabaugh* (D. C. 1907), 158 F., 314.

"An indictment for criminal conspiracy is not barred by the statute of limitations as to one of the accused, although the evidence shows that he did not participate in any act in furtherance of the conspiracy within the statutory period, where the conspiracy contemplated acts to be done after it was formed, in furtherance of it, from time to time, through a series of years, until its object should be accomplished, and such acts were committed by the other conspirators within the statutory period, and were not expressly repudiated by him."

Hyde v. *United States*, 35 App. D. C., 451, writ of certiorari granted, 31 S. Ct., 228; 218 U. S., 681; 54 L. Ed., 1207.

"As a criminal conspiracy under Rev. St. U. S., Sec. 5440 (U. S. Comp. St. 1901, p. 3676), may be a continuing offense, each overt act in furtherance of it amounts to a renewal of the original agreement, and the statute of limitations will run only from the date of the commission of the last overt act. *Id.*"

"Where defendants devised a scheme to defraud, consisting of plans for the sale of corporate stock by false representations to be carried out by means of correspondence through the post office, the conspiracy was a continuing offense, and a prosecution therefor was not barred until three years from the last overt act." *Wilson* v. *United States,* 190 F., 427; 111 C. C. A., 231.

(U. S. Sup.) "A conspiracy to acquire fraudulently school lands from the states of California and Oregon, and to corrupt the officers of the General Land Office to facilitate their selection, under act June 4, 1897, in exchange for other public lands, continues, so far as limitations are concerned, so long as any overt acts are done in furtherance of the conspiracy." *Hyde* v. *United States,* 32 S. Ct., 793; 225 U. S., 347; 56 L. Ed., 1114, affirming judgment, 35 Appl. D. C., 451.

(U. S. Sup.) "Conspiracy to use the mails to defraud, within Rev. St., Sec. 5480 (U. S. Comp. St. 1901, p. 3696), which the indictment alleges was designed to be and was in fact continuous, continues, so far as the limitations are concerned, so long as the overt acts are done by any of the conspirators." *Brown* v. *Elliott,* 32 S. Ct., 812; 225 U. S., 392; 56 L. Ed., 1136.

(U. S. C. C. A.) "An indictment for conspiracy to embezzle and misapply the funds of a national bank, made more than three years before indictment, but involving an overt act committed within the three-year period, was not barred by limitations." *Breese* v. *United States,* 203 F., 824, affirming order (D. C.); *United States* v. *Breese,* 172 F., 761.

(U. S. C. C. A.) "Limitations held not to run against prosecution for conspiracy to defraud the United States in connection with sale of zinc to it until payment of check therefor or giving of credit by the bank of deposit." *Meyer* v. *United States,* 220 F., 800; 135 C. C. A., 564.

(U. S. C. C. A.) "If conspiracy existing before period of limitation continues into such period, held, that to support conviction nothing need be done in furtherance thereof within such period." *Patterson* v. *United States,* 222 F., 599; 138 C. C. A., 123, reversing judgment (D. C.); *United States* v. *Patterson,* 201 F., 697. Certiorari denied, 35 S. Ct., 939; 238 U. S., 635; 59 L. Ed., 1499.

(U. S. C. C. A.) "Where, since the date named in an indictment charging conspiracy to defraud the government, overt acts showing a continuance of the conspiracy were committed within the period of limitations, the running of the statute is tolled." *Stager* v. *United States,* 233 F., 510.

It may be argued that since the 37th section of the Crimes Act, C. S., 1757, makes provision for a conspiracy to cheat and defraud, that that part of the conspiracy constituting the division of the money, cannot be considered; but it may be noticed that the conspiracy referred to in the statute "is one to cheat and defraud any person of any property, by any means which, if executed, would amount to a cheat."

Where the conspiracy consists not only in the cheating and defrauding, but in the division of spoils, the indictment should not be limited to any particular part of the conspiracy. Such a limitation would not only be unfair to the State, but to the defendant.

If the complete conspiracy in this case is not provided for by the statute, it becomes a conspiracy at common law.

"The common law offense of conspiracy is not abolished by the statute defining conspiracy in certain cases, but such a conspiracy as was indictable before the statute at common law is so still." *State* v. *Norton,* 3 Zab., 33.

The common law indictment to cheat and defraud is recognized in the ~~statute~~ Case of *State* v. *Young,* 8 Vr., at p. 187.

There are numerous cases outside of this State where part of the conspiracy consisted in the division of the moneys or goods obtained.

Besides those referred to by Justice Kalisch in the Dougherty case, there are the following:

Lamb v. *State,* 95 N. W., 1050. In this case the evidence established the existence of a common purpose and design to steal and sell cattle.

O'Brien v. *State,* 96 N. W., 649. A conspiracy to steal and sell hogs for the benefit of all engaged in the illegal enterprise, is pending until the sale has been made and the proceeds divided.

Baker v. *State,* 50 N. W., 518. A conspiracy to commit larceny does not end when the crime has been committed, if as part of the conspiracy the stolen property has to be divided or disposed of.

Wharton Criminal Evidence, 699. A conspiracy to steal money and divide the proceeds is plainly not at an end until the division takes place.

Franks v. *State,* 35 S. W., 977. In this case the disposition of goods obtained by a burglary was part of the common purpose and design of the co-defendants.

Scott v. *State,* 30 Ala., 503. In this case the conspiracy was not confined to the mere taking and carrying away of the watch, but extended to a division of the profits of the larceny.

State v. *Pratt,* 26 S. W. (Mo.), 556. "Sometimes it is a nice and difficult question to determine when any criminal design has terminated. In this case, however, no difficulty arises because the aim and object of the conspirators evidently was to use the land as to which they had acquired a fictitious title, as to divide the proceeds of their ill-gotten gains among themselves, and until this was done, the design was still inchoate and pending."

State v. *Byers,* 41 Pac., 708. In this case there was a conspiracy to steal and butcher cattle and sell the beef.

POINT II.

It is contended that the Court erred in charging the jury that they must consider the guilt of the other defendants in order to convict Francis Gregory, because he could not conspire with himself.

This question is raised under the eighteenth Assignment of Error, which is as follows:

> "18. Because the Supreme Court sustained the Trial Court, which after the evidence was given, charged and instructed the jury, among other things, as follows:
>
> > 'The State has elected to try only Francis Gregory, and you are therefore by your verdict only to pass upon his guilty or innocence, the other defendants named in the indictment not being now on trial. This does not mean that you should not consider whether the defendants were guilty of a conspiracy, because it follows that on a charge of this kind, although only one of the defendants is on trial, you must determine whether or not some one besides the defendants was guilty of conspiracy, because, as I have already indicated, one cannot conspire with himself alone; therefore, if there was a conspiracy some one other than this single defendant must have been concerned in it.' "

It is argued that from the charge the jury might have been ready to believe that they could find the defendant guilty if he had conspired with some other person other than his co-defendants.

It is respectfully submitted that the jury could not have been misled in this respect, because they were told to consider whether the defendants were guilty of conspiracy, although only one of them was on trial, for the reason that one could not conspire.

The mere fact that the Court mentioned Mr. and Mrs. Peaker's names shortly before that part of the charge complained of could not have been sufficient to have misled the jury in this respect.

PONT III.

It is contended that there was error committed by the Trial Judge in allowing conversations to be given in evidence not having taken place in the presence of the plaintiffs in error, but with the other alleged conspirators.

The assignment of error covering this point is found at page 20, and concerned a conversation between Charles Peaker and John Gregory, the father of the plaintiff in error.

It is respectfully submitted that this ruling was not erroneous.

In *Patton* v. *Freeman*, 1 N. J. L., 134, the following is quoted from the syllabus:

> "Where a combination to perpetuate a particular fraud is proved, evidence of a conversation with the parties, though all might not have been present during the whole of the conversation, is good against all."

Professor Wigmore, in the work on Evidence, Volume 2, Section 1079, states:

> "the admission of a co-conspirator may be used to affect the proof against the others."

If his admission could be used there would seem to be no doubt but that his acts, of which the conversation would form a part, would be admissible.

The Court charged (p. 155, l. 35) that the declarations of Hahn, made in the absence of the defendant, could not be considered as evidence against the defendant, unless the jury found beyond a reasonable doubt that there was a conspiracy between Hahn and the defendant, and that Hahn's declarations, made in the absence of the defendant, could not be considered unless the conspiracy was established.

POINT IV.

It is contended that the Trial Judge erred in overruling the inquiry by counsel of the plaintiff in error concerning from whom Charles M. Kase got his property (pp. 48-49).

Kase's father died in 1895, and whether Mr. Kase inherited his fortune from his father or earned it through his own efforts could have no possible bearing on this case. The fact remains that he parted with $25,000, which was not disputed by plaintiff in error, because he and his father got a considerable portion of this amount.

POINT V.

It is contended that it was erroneous to permit the State to offer and read the testimony of the plaintiff in error at a previous trial of the same cause. This testimony was read at page 74.

Plaintiff in error, under his plea of "not guilty," denied the allegations of the indictment, and therefore anything said by the plaintiff in error on a previous occasion inconsistent with his plea of "not guilty" could be used against him.

Wigmore on Evidence, in Volume 2, Section 1048, treats generally of this subject. The last sentence of the first paragraph of that section is as follows:

> "Thus, in effect, and broadly, anything said by the party may be used against him as an admission, provided it exhibits the quality of inconsistency with the facts now asserted by him in pleadings or in testimony."

POINT VI.

It is contended that the Trial Judge erred in refusing to charge specifically, as requested, the 3rd, 4th and 5th request to charge (pp. 158-159).

It is respectfully submitted that the Trial Judge substantially charged these requests at p. 148, l. 10, when he charged that there must be two or more persons involved, otherwise there could be no conspiracy, and again at p. 150, ll. 20 and 30, in referring to the fact that if there was a conspiracy some one other than Gregory must have been concerned in it.

POINT VII.

It is urged that the Court erred in refusing to charge the seventh request (p. 159).

Reasonable doubt was fully charged by the Trial Judge (pp. 154, 155), and at the request of the plaintiff in error the jury was charged as follows:

> "Unless it is proved by the evidence beyond a reasonable doubt that the $25,000 was gotten from Kase by virtue of a conspiracy or illegal agreement between Hahn and the defendants, and such conspiracy was to cheat and defraud Kase, you should acquit the defendant."

POINT VIII.

Under this point the counsel for the plaintiff in error raises the statute of limitations.

Both requests, which are the 8th and 9th (p. 160), relate to the completion of the conspiracy.

It is argued that it was a question for the jury to determine, if the evidence showed that the state of affairs existed as stated in these requests to charge.

There was no evidence which would justify the charging of these requests upon the theory advanced by the plaintiff in error, for the reason that the undisputed testimony was that in January, 1915, the plaintiff in error received $1,250, of which he gave his father one-half. In fact, the plaintiff in error himself testified to these facts. Therefore, the common object of the conspiracy was not consummated two years prior to the finding of the indictment, which was in April, 1916.

POINT IX.

It is suggested that the Court erred in refusing to charge the 11th request, which is found on p. 160.

This request is similar to requests 3, 4 and 5. It is respectfully submitted that the Court in his charge substantially covered this request.

POINT X.

It is argued there was error in that part of the charge (p. 150, l. 35) wherein the Judge told the jury it made no difference whether Francis Gregory was a party in the beginning of the conspiracy, if he knowingly participated in any of the several steps taken in its furtherance or knowingly participated in the division of the moneys.

In the case of *Stewart* v. *Johnson,* 18 N. J. L., 87, it is held:

> "If an individual connect himself with others in a conspiracy to defraud, or for any other purpose, it is no answer to say that the whole plant was concocted before he became an associate. By connecting himself with them, and aiding in the execution of their plan, he adopts their prior acts and declarations, so far as they constitute a part of *res gestae.*"

It is respectfully submitted that the judgment should be affirmed.

J. H. HARRISON,
Prosecutor of the Pleas of Essex County.

ANDREW VAN BLARCOM,
Of Counsel.

March Term, 1919.