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Criminal Law—Conspiracy—Conviction of One Defendant

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In the light of the variant moral and social standards which are current, there seems to be little uniformity in the interpretation of what is or is not a petty offense, thus leaving the courts much leeway to decide individual cases according to judicial prejudices and standards. See further, Frankfurter and Corcoran, above, n. 278, appendixes A, B, C, D. H. R. S., '32.

CRIMINAL LAW—CONSPIRACY—CONVICTION OF ONE DEFENDANT.—Four persons were charged with conspiracy to violate the National Prohibition Act by the illicit manufacture of intoxicating liquor. Conviction of defendant was upheld, notwithstanding two were acquitted and one had not been apprehended. *Rosenthal v. United States* (1930) 45 F. (2d) 1000.

The general rule is that only one of several defendants cannot be convicted of conspiracy. *People v. Hamilton* (1915) 165 App. Div. 546, 151 N. Y. S. 125; *Sherman v. State* (1925) 113 Neb. 173, 202 N. W. 413; *Bartkus v. U. S.* (1927) 21 F. (2d) 425. Where the conviction as to one of two defendants was reversed, it was held to carry with it a reversal as to the other, *Morrow v. U. S.* (1926) 11 F. (2d) 256; *Turinetti v. U. S.* (1924) 2 F. (2d) 15, and reversal of conviction as to three of four defendants proceeded against as conspirators required the same ruling as to the fourth. *Cofer v. U. S.* (1930) 37 F. (2d) 677.

But where a defendant is charged with conspiring with persons unknown, a different rule governs. As held in *U. S. v. Hamilton* (1876) F. Cas. No. 15, 288, if the jury find from the evidence that one of the defendants has conspired, not with his co-defendant, but with other unknown persons a verdict of guilty could be had as to him, accompanied by one of not guilty as to his co-defendant. Where two defendants were charged with having unlawfully conspired together and with other persons unknown to the grand jury, to violate the National Prohibition Act, held, the acquittal as to one did not require the acquittal of both. *Donegan v. U. S.* (1922) 287 F. 641. Where three persons were engaged in a conspiracy and one of them died before trial and another was acquitted, it was held that the survivor might be tried and convicted. *People v. Olcott*, 2 Johns. Cas. 301. Where one of four conspirators was not indicted, in order to obtain his evidence for the prosecution, and the indictment of two other conspirators was dismissed on the motion of the prosecuting officer, leaving the question of guilt or innocence undetermined, these conspirators were held not to have been acquitted or discharged under such circumstances that the remaining conspirator might not be indicted and sentenced. *Bradshaw v. Territory* (1887) 3 Wash. Terr. 265, 14 Pac. 594.

Thus one defendant may be convicted of the offense of conspiracy provided the acquittal of co-conspirators does not remove the basis of the charge. *Browne v. U. S.* (1905) 145 F. 1; *People v. Richards* (1885) 67 Cal. 412, 7 Pac. 828. It is only when all of the co-conspirators have either been acquitted, or discharged under circumstances tantamount to acquittal that a conspirator cannot be convicted. *Bradshaw v. Territory*, above.

H. H. G., '33.