

UNITED STATES *v.* BURGESS.**(District Court, E. D. Missouri. January 30, 1882.)*

1. CONSTITUTIONAL LAW—INFAMOUS CRIMES—CONSPIRACY TO MAKE COUNTERFEIT COIN—PRACTICE—INFORMATION.

A conspiracy to make counterfeit coin is not an infamous crime, within the meaning of article 5 of the amendments to the United States constitution, and may be prosecuted by information.

Motion in Arrest of Judgment.

Drummond & Smith, for the United States.

Paul Bakewell and *E. M. Stewart*, for defendant.

TREAT, D. J. An information was filed against the defendant for conspiracy to make counterfeit coin, whereupon a trial was had, and conviction followed. Many of the points considered in the case of *Wynn*, *ante*, 886, are involved in the question now presented. So far as the views of the court are stated in that case, they need not now be repeated.

Under the common law a conspiracy was not infamous unless it was for the subversion of justice, by the obstruction of its administration through perjury, subornation of perjury, spiriting away of witnesses, etc. Hence, if a like offence is by congressional enactment denounced a crime, without attendant consequences involving infamy, the same can be prosecuted by information.

If the common-law rule were to obtain, the crime charged would not be infamous, inasmuch as the alleged conspiracy, under section 5440, Rev. St., is not to subvert or obstruct the administration of justice through its administration in the courts.

It has been forcibly urged that a conspiracy to commit a felony which, if committed, would fall within the rule of *crimen falsi*, should, under the statute (5440) as to overt acts, be held to come within that rule. By what has been said in the case of *Wynn*, no such rule would prevail. If congress denounces a specified offence a felony it is so; not because like offences were such under the English law, but because congress chose so to make it. In this case, to commit which offence the conspiracy is charged, strange to say, the acts of congress have been frequently changed. In England there was, for technical reasons, a marked distinction between false coining and passing false coins. In the early statutes of the United States, counterfeiting coin was declared to be a felony, but in the re-enactment of these statutes

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subsequently the words "shall be adjudged guilty of a felony" were dropped. Hence, what was once a felony by force of the United States Statutes has ceased to be so through subsequent legislation. Independent thereof it must be considered that no conspiracy at common law was infamous except such as pertained to the subversion of justice. The conspiracy charged, for which the defendant has been found guilty on information, was not a conspiracy even to cause a felony to be committed, or to subvert the administration of justice. Still, under the rulings in *Wynn's Case*, if the conspiracy charged was not by act of congress declared infamous or a felony, the offence was rightfully prosecuted by information. Even if it had been a conspiracy to cause a felony to be committed, it would still be a simple misdemeanor.

The motion for arrest is overruled.

Cases cited and examined: Section 5440, Rev. St.; Act April 21, 1806, (2 St. at Large, 404, 405; 4 St. at Large, 121; 13 St. at Large, 120;) 3 Cox, Crim. Cas. 229; 4 Ward. 265; Cooley, Blackstone, 136; 13 Johns. 82; *In re Ville*, 2 Dod. 174; 12 Ward. 209; 2 Bish. 176; and those noted in *Wynn's Case*, ante, 886.

UNITED STATES v. MALONE.*

(Circuit Court, S. D. New York. December 20, 1881.)

1. INDICTMENT UNDER SECTION 3266, REV. ST.—ILLICIT DISTILLING—MOTION TO VACATE JUDGMENT.

Where conviction was had at March term and sentence imposed at the following May term, and application made at October term to vacate judgment and commitment, *held*, that the application was too late, as according to the rules of court it should have been made in arrest of judgment, or for a new trial before sentence was imposed, and that the term at which judgment was rendered having expired, no power remained in the court to vacate the judgment.

2. INDICTMENT—SEPARATE COUNTS IN—EFFECT OF.

Where a prisoner is convicted on the first count and acquitted on the second, the sentence of the court is a judgment that the verdict upon the second count did not make void the verdict upon the first count, and cannot be brought in review by a motion made after final judgment.

Each count of an indictment, in judgment of law, charges a separate and distinct offence, and is, in fact and theory, a separate indictment. Accordingly, where a prisoner is charged in two separate counts with having used two different stills at different times on the same day and at the same place, and is

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