Court of Appeals, 77 December Term 1821

The State vs Buchanan, et al.

Error to Harford County Court. ~~for the removal of a prosecution against the defendants in error on a judgment of acquittal~~. The first indictment contains two counts: The first charges the defendants with an executed conspiracy, falsely, fraudulently and unlawfully, by wrongful and indirect means, to cheat, defraud, and impoverish The President, Directors and Company, of the Bank of the United States; And the second charges them with a conspiracy only, falsely, fraudulently

and unlawfully, by wrongful and indirect means, to cheat, defraud and impoverish, The President, Directors and Company, of the Bank of the United States. The defendants first demurred to the indictment, & on the ground that a State court has no jurisdiction, but that the matters alleged in the indictment are cognizable, (if at all,) in the Courts of the United States; and secondly, that the facts charged do not amount to an indictable offence. The County Court, (Hanson and Ward, A. J.) ruled the

demurrer good, and discharged the defendants. The present writ of error was brought on the part of the State.

The case was argued at the present term, before Chase, Ch. J. Buchanan, Earle and Martin, J. by

Murray, (District attorney for the Sixth Judicial District, by substitution of the assistant attorney general, with the approbation of the court, assisted by Wirt, (attorney general of the United States), Harper and Mitchell, on the part of the State; and by Pinkney, Winder and Raymond, for the defendants in error

Buchanan, J. delivered the opinion of the Court.

~~The opinion of the Court of Appeals~~

~~was delivered by~~

~~Buchanan, J.~~ This case was brought up by a writ of error directed to the Judges of Harford County Court; and it has been strongly urged, ~~1st~~ that a writ of error will not lie at the instance of the State, in a criminal prosecution, and therefore that the writ in this case was improvidently sued out, and ought to be quashed. But it is said in 2 Hale's P. C. 247, the authority

2

authority of which it is difficult to question, and

indeed we require more higher, that if a. be

indicted of murder, or other felony, and plead

non cul, and a special verdict found, and

the court do erroneously adjudge it to be

no felony; yet so long as that judgment

stands unreversed by writ of error, if the

prisoner be indicted de novo, he may

plead autrefoits acquit, and shall be

discharged; but if the judgment be reversed,

the party may be indicted de novo." And

this is not a loose dictum, but it is laid down and repeated as legal law; for in page 248 it is stated, that, "in the case of the special verdict above, where an erroneous judgment of acquittal is given, yet it is conclusive to the King till it be reversed by Error". So in page 394, speaking of the ancient form of a judgment of acquittal, he says "and if the entry were such, I do not think the prisoner could ever be arraigned again, notwithstanding the insufficiency of the

indictment, till that judgment of acquittal were reversed". And again in page 395 of the same book, "and if in Vaux's case the judgment had been so entered; (that is, quod eat inde quietus), he could never again have been indicted for the same offence, notwithstanding the defect of the indictment, till that judgment reversed by writ of error." Hence it is manifest, that in the opinion of Lord Hale, the King might have a writ of Error in a criminal case; since it would be absurd

to say that, a man who had obtained a judgment
of acquittal for a defect in the indictment
or on a special verdict, could never
again be indicted for the same offence,
until that judgment was reversed by
writ of error, if a writ of error would
not lie. Fortified by such authority
alone, in the absence of any legislative
provision in this state on the subject,
we think
we might safely say, without further
inquiry, that the writ of error in this case
lay

was properly sued out. But instances are

not wanting, of writs of error being prosecuted

3

was properly sued out. But instances are

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late general court on writ of error by the State; - Luther Martin, attorney general; and in 1792 in each case the judgment was reversed. And there is no sufficient reason why the State should not be entitled to a writ of error in a criminal case; It is perhaps a right that should be seldom exercised, and never for the purpose of oppression, or without necessity; which can rarely and it is supposed would never happen, and would not be tolerated by public feeling. But as the State has no interest in the punishment of

an offender, except for the purpose of general justice connected with the public welfare; no such abuse is to be apprehended; and as the power of revision is calculated to produce a uniformity of decision, it is right and proper that the writ should lie for the State, in the same proportion ~~that~~ as it is essential to the due administration of justice, that the criminal law of the land should be certain and known; as well for the government of Courts, and information to the people, as for a guide

to juries; who tho' by the law and practice of the State they have a right to judge both of the law and of the fact, in criminal prosecutions, should, and usually do, respect the opinions and advice of judges, on questions of law, and would seldom be found to put themselves in opposition, to the decisions of the supreme judicial tribunal of the State. ~~It has also been~~

It has also been contended that the return of the writ of error in

this

this case, supposing the writ ~~of error~~ to have been properly sued out, is defective in this, that it is not under the hand and seal of the Chief Judge, but that there is only a transcript of the record sent up, under the hand of the clerk and the seal of the court, with the writ of error annexed. But there is nothing in the objection. By the fifth section of the act of 1713 Ch. 4 "for regulating writs of error, and granting appeals from and to the Courts of common law within this province", it is enacted, "that the method and rule of the

prosecution of appeals and writs of error, shall
for the future be in manner and form as is
herein after mentioned and expressed; that
is to say, the party appealing or suing out
such writ of error as aforesaid, shall procure
a transcript of the full proceedings of the said
court from which such appeals shall be
made, or against whose judgment the
writ of error shall be brought as aforesaid,
under the hand of the clerk of the said
court and seal thereof, and shall cause the
same to be transmitted to the court before

whom such appeal or writ of error is or ought to be heard, tried and determined," &c. The preamble sets out that, "forasmuch as the liberty of appeal and writ of error, from the judgment of the provincial and county Court of these provinces, is found to be of great use and benefit to the good people thereof;" and the second section provides under what circumstances alone, an appeal or writ of error shall operate as a supersedeas. The act is silent on the subject of the return of the writ of error, and only directs that

the transcript of the proceedings shall be under
the hand of the Clerk and seal of the court,
without dispensing with the signature of
the Judge to the return of the writ, yet
from that time to the present, the uniform
practice under that act has been, for
the clerk to send up the transcript of the
proceedings under his hand only, and
the seal of the court, together with the
writ of error, as done in this case,
unaccompanied by the signature of the Judge
to the return of the writ. and if it should be
admitted

admitted that it originated in error, it is now too late to shake a practice so long settled. It may perhaps be doubted whether that act of the general assembly ought not to be understood as being applicable to writs of error in civil causes only; and it has been urged, that no practice growing out of it in relation to such cases, can be brought in aid of a defective return in a criminal case. But whatever may have been the construction originally given to it in that particular, whether it was held to extend as well to criminal as to civil cases, or

whether the returning of writs of error in the
same manner in criminal & in civil
cases, had its birth in the circumstance,
that the mandate of the writ being the
same in each, no good reason could be
perceived why the manner of the return
should be different; or from whatever other
cause it may have arisen, the practice
is found on examination to have been
the same. That was the form of the return
in the cases of The State vs Mefresmith &
Ashew, - The State vs Forney, - The State vs Brown,

and The State vs Durham, the cases before
alluded to for a different purpose. The
same return was made in Burk's case,
an indictment for a Rape, which was
tried before me in Washington County
Court in the year 1809, and was brought up
by writ of error to this court, by the present
attorney general, (Luther Martin), who
defended him with great zeal and
ability in the court below, and it is
presumed looked well into the subject.

~~writs of~~ [illegible]

And so in every criminal case removed by
writ of error, that which is to be found among
the records of the late general court, of
which there are many. The return therefore
in this case has the sanction of the same
authority on which a similar return
in a civil case would rest. The authority
of a settled practice for more than an
hundred years, with which we are content
without

without seeking to support it on any other;
nor is it pretended that such a return would
be insufficient in a civil case; and there
is no sensible difference between a criminal
and a civil case in that respect, or any sound
reason why the return should not be the
same in one as in the other, But there is no
uniform rule for the returns of writs of
error; and if the object of the writ, which
is, that a true and perfect transcript of the
proceedings shall be brought up, is substantially
gratified, it is all, that courts do or need

book to. If a writ of error be brought in parliament on a judgment in the Court of King's Bench, the Chief Justice goes in person to the House of Lords, with the record itself, and a transcript, which is examined and left there, and then the record is brought back again into the King's Bench. 2 Tidd's Practice, 1092.

In the Court of Common Pleas the practice is different. There on a writ of error returnable in the King's Bench, it is usual for the Chief Justice to sign the

return. Ibid (note). But that is not absolutely necessary, for the court of King's Bench will not stay the proceedings for want of his signature; and tho' the writ of error requires the record to be sent sub sigillo, yet this is never practised. 2 Strange, 1063. And if the seal can be dispensed with, why may not the signature also? Since the omission of either, is equally a departure from the mandate of the writ, and both are dispensed with in the ~~King's Bench~~ case of a writ of error returnable from the

Blackwood vs The South Sea Company

King's Bench to the House of Lords. Besides,
in England, a writ of error must be directed
to him, who has the custody of the records
~~of the court~~
wherein any judgment is given; and for
that reason it is, that a writ of error
brought on a judgment in the Court of
Common Pleas, for instance, is always
directed to the Chief Justices of that court,
who has the custody of the record. ~~of that~~
~~court~~. But in this state, tho' the form
of the writ as used in England, and
introduced

introduced here at a very early period,
& still retained, yet the clerk of the
court in which the judgment is rendered,
has ~~the custody of the record and the~~ a much greater control over the record
than in England, and hence probably arose the
practice, that appears to have prevailed
here at least from the year 1713, for
the clerk to send up a full transcript
of the proceedings under his hand
only, and the seal of the court, with the

writ of error annexed, which sufficiently
gratifies the object of the writ; as much so,
as the practice in the Court of King's
Bench on a writ of error brought in
parliament; and affords as much certainty

writ of error annexed, which sufficiently
gratifies the object of the writ; as much so,
as the practice in the Court of King's

These preliminary questions being thus disposed of, the next presented for consideration, is whether the facts stated in the indictment, amount to an offence punishable by the laws of Maryland. This is denied on the part of the defendants in error, and much reliance is placed on the Statute 33 Edward 1, de conspiratoribus, on the supposition that the offence of conspiracy, was originally created by that Statute; or if it was a common law offence,

8

These preliminary questions being thus disposed of, the next presented for consideration, is whether the facts stated in the indictment,

law, and rendered despunishable) all conspiracies but such as it defines; and if either position be correct there is an end to this prosecution, since the matter charged in the indictment is clearly not embraced by the Statute; and if it was, the Statute being considered as not in force here, the case would not be helped; and there would be no law in this State, for the punishment of conspiracies of any description, there being no legislative provision on the subject.

But neither branch of the proposition, will on examination be found to be true. The Statute

is in these words: "Conspirators be they that do confeder or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indite or cause to indite, or falsely to move or maintain pleas; and also such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved; and such as retain men in the county with liveries or fees to maintain their malicious enterprises; and this extendeth as well to the takers, as to the givers. And Stewards and Bailiffs of great Lords, which by their seignory, office, or power, undertake to bear or maintain quarrels, pleas, or debates, that concern other [illegible] than such as touch the estate of their Lords or [illegible]

is in these words: "Conspirators be they that do confeder or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indite or cause to indite, or falsely to move or maintain pleas; and also

face of it, to show that conspiracies were known
to the law before. "Conspirators be they," &c. Now
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combinations or conspiracies of any description to be unlawful, nor does it impose a penalty, or inflict any punishment upon conspirators. And if combinations for any of the purposes mentioned in the Statute, were punishable at all, it could only have been on the ground, that both the offence of conspiracy (eo nomine), and the punishment, were known to the law anterior to the enactment of the Statute; and that the declaring those to be conspirators, who should be engaged in certain combinations, subjected them to the law of conspiracy, as it then existed

and it has never been pretended, that the combinations enumerated in the Statute were not indictable conspiracies. The Statute therefore, which had for its object the prevention of the combinations it enumerates, carries with it internal evidence, that conspiracy was an indictable offence before. But the question, whether conspiracies were indictable or not at common law, anterior to the Statute 33 Edward 1, does not depend alone upon the construction of that Statute. In ~~4 Bl. Com. 136 137~~ it is said that "conspiracies

~~may be inducted at the suit of the king, and~~

~~used by the ancient common law to receive~~

~~the villenous judgment, viz. to lose their liberam~~

~~legem, whereby they are rendered incapable~~

~~as jurors or witnesses, to forfeit their goods~~

~~& chattels, and lands for life, to have their lands~~

~~wasted, their houses pulled down, their trees rooted~~

~~up, and their own bodies committed to prison~~"

But it now is the better opinion, that the villenous judgment is by long disuse become obsolete, it not having been pronounced for some ages: but instead thereof the delinquents are usually sentenced to imprisonment, fine, and pillory."

3 Coke's Institutes 143, and in
1 Hawk. P.C. 193, Ch 72, sect. 9, it is said,
that the villenous judgment is given by the
common law, against and not by any statute,
against those convicted of a conspiracy. Now

3 Coke's Institutes 143, and in
1 Hawk. P.C. 193, Ch 72, sect. 9, it is said,
that the villenous judgment is given by the
common law, against and not by any statute,

Edward I, Ch. 10, entitled "The remedy against conspirators, false Informers and Embracers of Juries", makes this further provision:

"In right of conspirators, false informers, and evil procurers of dozens, assises and juries, the king hath provided remedy for the plaintiffs by writ out of the Chancery; notwithstanding, he

of Juries", makes this further provision:

"In right of conspirators, false informers, and evil procurers of dozens, assises and juries, the king hath provided remedy for the plaintiffs by

them, award inquest thereupon without writ, and shall do right unto the plaintiffs without delay)."
It must be the provision in the 20th. of Edward 1st
for the writ of conspiracy, to which the first clause
of this statute has reference, as there does not appear
to be any other, and which according to 2d Institutes
562, was but in affirmance of the common law;
and these provisions for private remedie, against
conspirators, clearly demonstrate the existence
of the offence of conspiracy. It is equally clear,
that the statute does not embrace all the

ground covered by the common law. Who doubts, or was it ever questioned, that a conspiracy to commit any felony is an indictable offence; as to rob or murder, to commit a rape, burglary or arson, &c or a misdemesnor, as to cheat by false publick tokens, &c? Indeed this has been conceded throughout the whole of the argument in this case, and the ground mainly relied upon, on the part of the defendants in error is, that the object of the conspiracy charged in the indictment, is not of itself an indictable offence. Yet such cases of conspiracy are not

made punishable by any Statute, and are only

known rule of construction, the common law of conspiracy) such as it was before, may well stand together with the Statute; for surely the merely declaring one act to be an offence, which act as well as others, was so before in contemplation of law, cannot render those others unpunishable: Nor will one act, which in law amounts to a particular offence, cease to be so, because another act, is merely declared by Statute (without any negative words) to amount to the same offence. The Statute therefore, ~~which does nothing~~ must be considered either

as declaratory of the common law only, so far as it goes, for the purpose of removing doubts and difficulties which may have existed in relation to the conspiracies it enumerates, by giving to them a particular and definite description; or as superadding them to other classes of conspiracy ~~clearly~~ already known to the law, leaving the common law, in possession of all the ground it occupied, beyond the provisions of the Statute. And so it has been uniformly understood in England, from the earliest down to the latest decision that is to be found on

the subject; otherwise the judge, could not have

sustained a great proportion of the prosecution's ca-

the subject; otherwise the judge, could not have

sustained a great proportion of the prosecution's ca-

support the enterprizes of the other, whether true or false"; and in the same book we find this notice of a criminal prosecution: "and note that two were indicted for a confederacy, each of them to maintain the other, whether the matter was true or false; and notwithstanding, that nothing was alleged to have been actually done, the parties were put to answer, because it was a thing forbidden by law". If this falls within either of the provisions of the statute 33 Edward 1st, it can only be that, which relates to the moving and maintaining pleas, and that does not embrace

embrace it; for if the indictment had been under the statute, for a ~~confederacy~~ confederacy "falsly to move and maintain pleas," which can only have reference to proceedings in Courts of justice, it is very clear that the parties must have been acquitted, as the conspiracy was not to do that specific act; otherwise they might have been punished for what they did not contemplate, since nothing being alleged to have been done, non constat, that they had any intention, to move and maintain

pleas within the purview of the Statute; and the intention enters into the essence of every offence. The indictment however, was not under the Statute, for either of the specific acts mentioned in it, but at common law for the conspiracy, which was considered per se a substantive offence, no act in furtherance of it being alleged, and this after, and notwithstanding the statute. The position, that "a confederacy each to maintain the other, whether the matter be true or false", is a common law offence, is

distinctly adopted in 1 Hawk. P.C. 199, ch 72, and 9. Coke's Rep. (The Poulterers case) 56, and the principle of the case noted in the Book of assises, to wit, that conspiracies are punishable at common law, though nothing be put in execution, is fully recognized in the Poulterer's case, in which that book is referred to; and the further principle also laid down, that the law punishes the conspiracy "to the end to prevent the unlawful act"; and in the same case, speaking of another article

19, also in the Book of Assize, 138, relative to
combinations among merchants to regulate
the price of wool, it is said, "and in these cases,
the conspiracy or confederacy (not the false ~~C~~
conspiracy or confederacy)
is punishable, altho' the conspiracy or confederacy
be not executed?" Hence it is manifest, that
the "note" at the ~~conclusion~~ end of the case, which
seems to be relied on, to shew, that both malice
and falsehood are indispensable ingredients of
a punishable conspiracy, and must be united
in the same case, was not intended by Lord Coke
as applicable to all confederacies, but to such
false

false conspiracies only, as are of the character of those, of which he had treated immediately preceding the nota; for he does not speak of the case of a conspiracy between merchants to fix the price of wool, as a false conspiracy, nor does either falsehood or malice, ~~if~~ necessarily enter into such a combination. And these combinations among merchants, (which are not within the statute 33d Edward I.) were, and remained punishable at common law, and were not first made so by the statute Staple, 27th Edward III. St. 2. Ch 9, as has

been supposed in argument. That statute does indeed prohibit the exportation of wool under a very severe penalty, but neither creates, nor provides a punishment for, the offence by merchants, of combining to fix a price beyond which they would not go. All that is said in relation to the purchasing of that article is, that "all merchants, as well subjects as foreigners, may purchase wool folk, & throughout the whole of our Kingdom and territories, without covin or collusion to lower the price of the said merchandize, so nevertheless as they bring

them to the staple"; from which it would seem
that all covin and collusion to lower the price

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and if that, which it was the principal object of the statute to prevent and to punish, was before, an offence at common law, it may readily be supposed, that no new offence was intended to be created; but that a conspiracy to fix the price of wool, was an offence at common law. Moreover, the words of the statute are "without covin or collusion to lower the price", &c and a combination to "fix a price, beyond which they would not go," might not necessarily be to "lower" the price. On an

information

information against Brereton, Townsend and others, 1 Roy's Rep 103, for the suppression of a will, to the prejudice of Egerton, the relation, whose wife was thereby disinherited, all the defendants but one were convicted and fined. This was a case of fraud effected by a confederacy, and the injury was to ~~the estate~~ an individual. The suppression of a will by one, was not an indictable offence, though a fraud highly injurious to the party affected by it. It was the confederacy alone which rendered it

criminal, and therefore, the information
was against the offenders conjointly. In
Timberly and Childe, Siderfin 68, the indictment
was for a conspiracy to charge one with being
the father of a bastard child, with intent to
extort money from him; and on motion
to quash the indictment, it was held by
the court to be good. In Child or North
and Timberly, 1 Keble 203, the indictment
was for a conspiracy to deprive the prosecutor
of his fame, and to extort money from him,

by falsely charging him with being the father of a bastard child. There was a motion to quash the indictment, because the conspiracy as laid, was to charge the prosecutor with matter that the court had no cognizance of; which was overruled, on the ground that it might be a loss to the prosecutor; and it was held that the conspiracy was punishable, though the court had no cognizance of the matter of it. And in the same case in 1 Keble 254, it was moved after verdict in arrest of judgment, that the indictment only charged the parties with

a conspiracy to deprive the prosecutor of his
fame; and to extort money from him, and
not with a conspiracy to charge him before any
tribunal having cognizance of the matter of
bastardy. But the motion was overruled and
judgment rendered for the King, on the two
grounds distinctly taken, that it was a conspiracy
for lucre and gain, to charge and disgrace
a man with having a bastard, and that the
crime was the conspiracy, which (whether it was
to defame or disgrace a man, or to charge him
with heresy, was punishable at common law.

In

In the Queen v. Armstrong, Harrison and others, 1 Ventris 304, the defendants were indicted for conspiring to charge (or burden) one with the keeping of a bastard child, and thereby to bring him to disgrace. After verdict there was a motion in arrest of judgment, on the ground that it did not appear that the party was actually burdened with the keeping of a child; but on the contrary, that it was alleged to be only a pretended child; and also that the party was not stated to have been

brought before a justice of the peace on that account; but only that the defendants went and affirmed it to himself, intending to obtain money from him, that it might be no further disclosed; and that a bare unexecuted conspiracy was not a subject of indictment. The objection was overruled and the parties were punished by fine. The principle of this case cannot well be misunderstood. It was a conspiracy to extort money from an individual, by going to him, and affirming that he was the

father of a bastard child, with a views of
inducing him to pay them to say no more
about it. and it was decided on the ground,
(expressly taken by the court)
~~(expressly taken by the court)~~ that it was a
contrivance by conspiracy, to defame the
person, and cheat him of his money, which
was an indictable crime of a very heinous
nature). In The Queen v Best and others,
2 Ld. Raym. 1167, the indictment was for a
conspiracy, falsely to charge the prosecutor
with being the father of a bastard child, with

which one Elizabeth Carter was pretended to be ensient, in order to defraud him of his money, and destroy his reputation. On demurrer it was among other things objected to the indictment, that it was not alleged, that the child was likely

which one Elizabeth Carter was pretended to be ensient, in order to defraud him of his money,

conspiracy to do an ill act, was not indictable.

But the demurrer was overruled, on the principle

~~expressly~~ broadly laid down by the Court, that the

defendant being charged at least with a

conspiracy, to charge the prosecutor with

fornication, though that was only a spiritual

defamation, yet the conspiracy was the gist of

the indictment, and was a temporal offence

and punishable as such. The King v. Kinnersly

and Moore, 1 Strange, 193, was a case of conspiracy

to extort money from Lord Sunderland, by

charging him with an attempt to commit

Sodomy with one of the defendants. It was not charged as a conspiracy to accuse him in a course of Justice, but only in fact. The object was to extort money, by means of a verbal slander for which the party injured had his civil remedy, and the mere verbal slander by one only, would not have been indictable.

Sodomy with one of the defendants. It was not charged as a conspiracy to accuse him in a

to do a lawful act". In this class of conspiracies, the meditated end, was not accomplished in either of the cases. The object in each, was to defame and extort money from an individual; and the indirect or wrongful means, by which that object was intended to be effected was verbal slander — a combination to do that, which if actually done by one alone, would not be the subject of an indictment; for if one verbally defames another, or extorts money from him, not under colour of office, it is not an indictable offence. The conspiracy

therefore for a corrupt purpose, was the offence
for which they were punished; and there is
no pretence for supposing, as has been urged
in the bastardy cases
in argument, that prosecutions were sustained
on the ground, that the conspirators contemplated
an abuse of judicial authority, by falsely
accusing or causing the parties to be accused,
of having bastard children, before justices of the
peace having cognizance of such matters.
A conspiracy of that character, would there
is no doubt have been an indictable offence,
having for its object, the subjecting the party
accused

17 accused, to the provisions of the Statute ~~of the~~ ~~subject of~~ in relation to Bastardy. But that is not the nature of the conspiracy charged in either of the cases referred to. In every case the defendants were indicted for a conspiracy

[redacted]

17 accused, to the provisions of the Statute ~~of the~~ ~~subject of~~ in relation to Bastardy. But that is not the nature of the conspiracy charged

to charge the prosecutor before any that had jurisdiction of the matter; and in The Queen v Armitrong, Harrison and others the same objection was raised, and also that the defendants only went and affirmed it to the prosecutor himself; and so in The Queen v Best and others, which with the exception also taken in The King v Timberly and ~~Smith~~ North that it was not within the Statute 33 Edward 1, was disregarded by the judges. "Every indictment must contain a certain description of the crime of which the defendant is accused,

and a statement of the facts by which it is constituted, so as to identify the accusation, lest the grand jury should find a bill for one offence, and the party be put upon his trial for another, without any authority" 1 Chitty's Criminal Law 169 and "the charge must be sufficiently explicit to explain itself, for no latitude of intention can be allowed, to include any thing more than is expressed." Ibid. The King vs Wheatley, 172. 2 Burr. 1127. And the accused is put upon his trial only for that, with which he is charged, and against which alone, he is called on

to defend himself. The prosecution therefore
in the case referred to, could not have been
supported on the ground, that the defendants
contemplated an abuse of judicial power,
by falsely accusing the prosecutor before justices
of the peace; for no matter what they contemplated,
that was not what they were charged with,
and if they were only punishable on that
ground, as the judges could not by
intendment, have supplied what was not
expressed, the indictments must have been
quashed, or the judgments arrested for want
of

of sufficient matter in law, (which was brought fully under the consideration of the Court,) otherwise it would have been, to punish the defendants for what they were not convicted of, for they could only have been convicted of what was alleged against them in the indictment. And thus the singular picture would have been exhibited in criminal jurisprudence, of men convicted of what was no offence in law, and punished for what they were neither convicted nor accused of, and for any thing appearing might never have

contemplated, but such a strain is not to be found on
these reports especially to the case of the King vs
Kinnersly and Mead, and
any page of juridical history. it is not possible to
suppose that in either of the cases, the judges went on
the ground, that the defendants had accused, or
meditated the accusation of the prosecutor before those
who had jurisdiction of the matter; or the contrary
the idea is expressly negatived by the proceedings
themselves. The absence of the allegation was urged
in each case, as an objection to the indictment,
and the court decided, not that it might be inferred
from what was alleged, but that it was not necessary,
and that the conspiracy alone to defame and

extort

extort money from an individual, without any abuse, or mediated abuse of judicial power, was per se an indictable offence at common law. If they had not stated the ground on which they acted, then indeed any legal principle ~~that could~~ could be extracted from the case, might in support of the decision properly be assumed as the ground on which they were given. But the ground that is here attempted to be assumed, as that on which the conspirators were punishable, is not only different from that, on which the Judges expressly place their decisions, but is an illegal ground, and

one on which the indictment could not have been ..

supported. Illegal, not because a conspiracy to accuse
~~a [illegible] of sodomy~~ or of an attempt to commit sodomy,
a man of being the father of a bastard child, before
those who had cognizance of such matters, was not
an indictable offence, but because it was, what
was not charged in the indictment, and could
not legally be ~~enforced~~ inferred from what was
expressed. To say therefore, that those conspiracies
were indictable, or that the prosecutions were
sustained only on the ground, that the conspirators
meditated the abuse of judicial power, by falsely
accusing the prosecutor before a tribunal having
cognizance

cognizance of such offences, would be to overturn altogether the authority of the cases, which has not been attempted; on the contrary their authority seems to be admitted, and their application only, to the case under consideration is resisted, on the hypothesis, that they were decided on grounds not appearing in the indictments, and entirely different from those on which the Judges professed to act. But the fallacy of the argument becomes obvious, when it is seen, that without a violation of the principle, that "every indictment must contain a certain description of the crime of

which the defendant is accused, and a statement of the facts, by which it is constituted", the indictments in those cases, could not have been sustained upon the grounds, on which the decisions are attempted to be placed. Those cases, therefore, must stand or fall on the grounds upon which they are placed by the Judges who decided them, not the reasoning of the judges, but the principles on which their decisions are made to rest. The King vs Parsons and others, 1 Blk Rep. 392, was a conspiracy to take away the character of an individual, and accuse him of murder, by

means of a mere phantom, which could have no reality + pretended communications with a Ghost; and the actual fact of conspiring, was left to the jury to be collected from all the circumstances. The only object of the conspiracy in that case, was to injure the man's reputation, 3 Burr 1320, and in The King vs Rispal, 1 Blk Rep 368, which was a prosecution for a conspiracy to extort money from an individual, by charging him generally with having taken a quantity of human hair out of a bag; on the objection being raised to the indictment, that the

defendants were not charged with having conspired

defendants were not charged with having conspired

injure his standing in society; and is a full answer to the argument that the principle of the cases last referred to, is not applicable to this, because they are of conspiracies, to fix punishable offences upon the parties. In The King vs Shirrett and others, 1 Sidersfin 312, the defendants were prosecuted for reading a release to an illiterate man, in other words, than those in which it was written, by which he was induced to sign it. It does not appear by the short report of the case, what the form of the indictment was, but as it was against them conjointly, they must

have been charged either with conspiracy or combination. The fraud was practised upon an individual, and if it had been perpetrated by one only, would not have been an indictable cheat. It was the combination therefore alone which made it criminal, and that too in a case not within the Statute 33 Edward I. In The Queen v. Mackarty and Fordenbourgh, 2 Ld. Raym. 1179. 2 East's P.C. 823, the defendants were conjointly indicted, for falsely and deceitfully bargaining and exchanging

with another, a quantity of pretended wine),

alleging it to be good new Lisbon wine, for a

with another, a quantity of pretended wine),

alleging it to be good new Lisbon wine, for a

Ch. 24, which provides, under heavy penalties,
against cheating by "false pretences," (and which
was passed long afterwards) But was for a cheat
at common law, and though it did not charge
the defendants with a conspiracy eo nomine,
yet it charged that they together, did the act
imputed to them; and as there were no false
public tokens, which were necessary at
common law, to constitute a cheat effected
by one an indictable offence, it was the
combination alone on which the prosecution
could

21

could have been sustained. & cheat perpetuated

by the use of false public tokens, such as false

weights and measures, is an indictable crime)

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could have been sustained. & cheat perpetuated

by the use of false public tokens, such as false

weights and measures, is an indictable crime)

expressly placed on the same footing with
cheats effected by false weights and measures.
In The Queen v Orbell, 6. Mod. 42, the indictment
was for a combination to cheat one J.S. of his
money, by getting him to bet a certain sum on
a foot race, and prevailing on the party to run
booty; and the court sustained the indictment
on the ground as they said, that "being a cheat,
though it was private in the particular, yet it
was publick in its consequence". That was a
case emphatically of individual injury, and
as little connected with any publick concern-
ment,

motion to quash the indictment, on the ground that it was not unlawful to marry a woman and give her a portion. But the object of the conspiracy, being to impose a pauper on a parish to which she did not belong, it was held by the Court to be an indictable offence at common law; for that a bare conspiracy to do a lawful act to an unlawful end, was a crime, tho' no act should be done in consequence thereof. The conspirators certainly meditated a fraud on the inhabitants of a particular parish, by burdening them with the support of a pauper belonging to

a

a different parish, and so far perhaps it may be viewed as a case of contemplated private ~~injury~~ fraud, as the inhabitants of a parish, are not the community at large). But whether the principle laid down by the court, was on the point of meditated individual injury or violation of public police, does not appear from the report of the case. In 3 Chitty on Criminal Law, it is treated as a conspiracy to violate public police; but the principle equally applies to both. In The King vs Cope and others, 1 Strange, 144, the prosecutors

was for a conspiracy to ruin the trade of the prosecutor who was a cardmaker to the King, by bribing his apprentices to put grease into the paste, by which the cards were spoiled. The putting grease into the paste, and thereby spoiling the cards, if done by one, would have been no crime in law, but a private injury, for which the party would have been left to his civil remedy; and it was the conspiracy alone which constituted the offence. And in The King v. Eccles, 1 Leach's Crown Cases, 274, the indictment was for a conspiracy, by wrongful and indirect

means to impoverish one Booth, a tailor, and to deprive and hinder him from following and exercising his trade. In the first count in the indictment, the object of the conspirators was alleged to have been accomplished, and in the second count the conspiracy only was charged. It was not denied that the conspiracy was an indictable offence, and the only objection on the part of the defendant was, that the acts done to impoverish Booth, ought to have been set out in the indictment. But it was decided by the whole court, that it was sufficient to allege

the conspiracy and the object of it, the illegal combination being the gist of the offence; and that it was not necessary to state the means by which the intended mischief was effected; for that the offence did not consist in doing the acts by which the end was accomplished, (for they might be perfectly indifferent,) but in the conspiring with a view to effect the intended mischief by any means; and by Buller, justice, that "the means were only matters of evidence to prove the charge, and not the crime itself." It has been contended that these

these last cases were conspiracies to injure public trade; the distinguished judges before whom they were tried have not said so, nor could they have so considered them. They were not so laid in the indictments, but were distinctly cases, in which the meditated injuries were levelled against particular individuals, unconnected with any matter of public concernment, and do not fall within the principles of any of the enumerated offences against public trade, which are offences committed by traders or dealers themselves, such as cheating, forestalling,

regrating, [illegible]) &c so in The King) v.
Leigh and others, (Macklin's case) 2 Macklin's
life 217, in which it was held, that an indictment
would lie for a conspiracy to impoverish an
actor, by driving) or hissing him off the
stage: and in Clifford v Brandon, 2 Camp.
358, it was said by Sir James Mansfield,
that "tho' the audience had a right to express
by applause or hisses their sensations at the
moment; yet if a body of men were to go to the
Theatre, with a settled intention of hissing an actor,
or even of damning a piece, there could be no

doubt, that such a deliberate preconcerted scheme would amount to a conspiracy, and that the persons concerned in it, might be brought to punishment". There the preconcerted scheme alone, the unexecuted conspiracy, was held to be indictable; but if put into execution, according to circumstances, it would be a riot. In The King v. Robinson and Taylor, 1 Leach's Crown Cases, 37, the defendants were indicted for a conspiracy to raise a specious title in Mary Robinson to the estate of Richard Holland, by marrying Taylor, under the assumed name

of Richard Holland. The only evidence in the
case was of the marriage, and that she lived
with Holland as a kind of servant. It was
distinctly admitted, that a conspiracy to do an
injury to the person or estate of another was
an indictable offence; and so held by the Court,
Willes, Foster and Reynolds presiding;
and it was also ruled, there being no positive
proof of an intention to injure Holland, that
it was not necessary to prove any direct or
immediate injury, or even to show any
specific overt act of conspiracy, but that it
was

was the province of the Jury to collect from all the circumstances of the case, whether there was not an intention or design in the parties to do a future injury to Holland. And that case would seem to cover all the ground necessary to support their prosecution. The conspiracy was levelled at the property or estate of another, and the object was to defraud an individual, but the act by which the fraud was intended to be accomplished, (a marriage under an assumed name) was not in itself unlawful. It has been ingeniously argued here, but not ventured on by those who conducted the

defence of Robinson and Taylor, that they

medicated a perversion of the course of justice,

to Holland's estate

as her right could only have been established

by judicial proceedings. It was not so charged

in the indictment, and without it, the prosecution

must have failed, if it had been deemed at all

necessary to constitute the offence; for "no latitude

of intention can be allowed to include any

thing more than is expressed in an indictment,"

as has been before observed on the authority of

Lord Mansfield in the case of The King v.

Wheatly, 2 Burr. 1127, and 1 Chitty's Criminal

Law, 172. In The King v Lara, 6 T.R. 565,
it was admitted by counsel in argument, that
a fraud upon an individual by conspiracy
was indictable, and the doctrine laid down by
the Judges in The King v Wheatly was fully
recognized and adopted by Lord Kenyon;
that is that a cheat effected by conspiracy
was an indictable offence. The case of The
King v Berenger, 3 Maule & Selwyn, 68, as
it is understood by the courts, is a very strong one. The
indictment was for a conspiracy by false

rumours to raise the price of the public
government funds, with intent to injure such
of the King's subjects as should purchase on a
particular day. It was broadly admitted in
argument, that if the indictment had stated,
"that the defendants conspired to raise the price
of the funds in order to cheat or prejudice
particular individuals by name, or to benefit
themselves at their expense, or that the public
were concerned in the purchases of that day,
and the defendants conspired &c. to the
prejudice of the public, it would have exhibited
a

a complete offence". But it was contended, that
~~complete~~

the allegation, that it was with intent to injure

"such of the King's subjects as should purchase

on that day" was too general, and for that

only

reason, the indictment was objected to. But

~~[illegible]~~

the objection was overruled by the Court, not

as supposed in argument,

on the ground, that to constitute an indictable

conspiracy, it should be levelled either at

the public in its aggregate capacity, or at a

205

a complete offence". But it was contended, that

the allegation, that it was with intent to injure

"such of the King's subjects as should purchase

with intent to prejudice or defraud either the public, or an individual or individuals by name, it would have been good; and the only difficulty on that part of the case was, whether, being laid with intent to injure those who might become purchasers, and not either an individual by name, or the public in its aggregate capacity, the generality of the charge, did not vitiate the indictment. But they sustained the indictment ex necessitate rei, from the necessity of the thing, on the ground, that as it was impossible the defendants could have known, who would be the purchasers on that

day, the charge could not have been one specific. And though it was conceded, that to raise or lower the price of the public funds, was not per se a crime, yet it was held to be an offence, for a number of persons to conspire to raise them by false rumours; and that the crime was not in raising the funds, but in the act of conspiracy and combination to do so, and would be complete, though it should

day, the charge could not have been one specific. And though it was conceded, that to

The King) v. Gill & Henry, 2 Barnwell & Alderson, 204, the defendants were indicted and convicted of a conspiracy by divers false pretences, and subtle means and devices to cheat several individuals by name). The prosecution in that case, could not have been sustained, on the ground, as has been supposed, that it was for a conspiracy to commit an offence, indictable of itself under the Statute 30 George II against cheating by false pretences; for it is well settled, that in an

indictment

indictment framed upon that Statute, it is not
enough to allege generally, that the cheat was

26

indictment framed upon that Statute, it is not
enough to allege generally, that the cheat was

cheating by false privy tokens &c 3 Chitty's Criminal Law 999. 2 Strange 1127. If then the conspiracy in that case was only indictable, because it was to commit the Statutory offence of cheating by false pretences, as they would form the principal ingredient of the offence, it would have been necessary to set out the particular false pretences, by which the cheat was intended to be effected, in order to show that it was the Statutory offence, which the conspirators intended to commit; on the acknowledged principle, that every

indictment must contain a certain description
of the crime of which the defendant is accused,
and a statement of the facts by which it is
constituted. But it was there ruled by the court
that when several persons have once agreed
to cheat a particular individual of his money,
although they may not at the time, have fixed
on any particular means for that purpose,
the offence of conspiracy is complete, and that
it was sufficient to state the conspiracy and the
object of it in the indictment, without setting
out the means by which it was intended

to be accomplished, and per Lord Mansfield, in the case of The King vs Eccles, "they may be perfectly indifferent". It is evident therefore that the indictment was not supported on the ground, that it was a conspiracy to commit an indictable offence, for if it had not been for a conspiracy to cheat, but against an individual, for the actual commission of the offence, it would have been bad for the generality of the allegation; and the principle of that case embraces every thing that is necessary to the support of the indictment

against

27

against these defendants. The case of The King vs Mawbey and others, 6 T.R. 619 was a conspiracy to pervert the course of justice, which is of itself an indictable offence. That case has no other bearing on the present, than as it shows that all indictable conspiracies, are not embraced by the Statute 33 Edward 1, but that

[redacted]

27

against these defendants. The case of The King vs Mawbey and others, 6 T.R. 619 was a conspiracy to pervert the course of justice,

held, that the conspiracy was indictable at common law, though it would have been lawful for either of them to raise his wages if he could. So in The King v. Delaval, 3 Burr. 1434, which was a conspiracy to place a girl by her own consent, in the hands of Delaval for the purpose of prostitution. The act of seduction was not of itself an indictable offence, but it was the end, the immoral object of the conspiracy, which gave it its criminal

held, that the conspiracy was indictable at common law, though it would have been lawful for either of them to raise his wages if he could.

P. 6. 190 Ch 72, it is said, "there can be no doubt, that all combinations whatsoever, wrongfully to prejudice a third person, are highly criminal at common law". This is literally adopted and transcribed into 1 Burn's Justice 378, and 3 Wilson's Works 118. Chitty in his 3 Vol. on Criminal law 1139, says, "in a word all confederacies wrongfully to prejudice another, are misdemeanors at common law, whether the intention is to injure his property, his person or his character"; and in 4 Bl Ch. Com 137 (Christian's note 4) "Every) confederacy to injure

individual, or to do acts which are unlawful,
or prejudicial to the community, is a conspiracy."
The concurring testimony of these writers, that,
all conspiracies wrongfully to injure a third
person are indictable offences, is not lightly
to be received, though the positions laid down,
are not ~~+~~ assumed as full, and ~~though~~ definite
descriptions of the crime of conspiracy; yet
they go quite far enough for all the purposes
of this prosecution. Indeed the four first were
only treatises of conspiracies, levelled against
individuals,

individuals. And such is the character of conspiracy, so ramified is it in its nature, the object, and tendency of it being that, from which it derives its criminality, that it would be exceedingly difficult to give a single specific definition of the offence. But by a course of decisions running through a space of more than four hundred years, from the reign of Edward ~~the 3d~~ III to the 59th of George ~~the 3d~~ III without a single conflicting adjudication, these points are clearly settled.

1st. That the offence of conspiracy is of common

law origin, and not restricted or abridged by the Statute 33 Edward 1.

2d That a conspiracy to do any act that is criminal per se, is an indictable offence at common law, for which it can scarcely be necessary to offer any authority.

3d That an indictment will lie at common law - 1st for a conspiracy to do an act not illegal, nor punishable if done by an individual, but immoral only, as in The King v Lord Grey and others, and the case of Sir Francis Blake Delaval.

— 2. For a conspiracy to do an act neither illegal nor immoral (in an individual), but to effect a purpose, which has a tendency to prejudice the public, as in The King v. The Journeymen Tailors of Cambridge for a conspiracy to raise their wages, either of whom might legally have done (v. 9, 1 and The King v. Edwards and others.

3. For a conspiracy to extort money from another, or to injure his reputation by means not indictable if practised by an individual, as by verbal defamation, and that, whether it be to charge him with an indictable offence or not, as in Timberly

and Childe; Child v North & Timberly;
The Queen v Armstrong, Harrison & others;
The Queen v Best and others; The King v
Skinnersby & Moore; The Queen v Markham
Brian; The King v Parsons & others, &
1 Ch. Rep. 392, and The King v Rispal,
1 Bl. Rep. 368. 3 Burr. 1320. 4th For a
conspiracy to cheat and defraud a third
person, accomplished by means of an act
which would not in law amount to an
indictable cheat, if effected by an individual,
as in Brereton & Townsend; The King v Shirrett
and

29

and others; The Queen vs Macarty & Fotheringham;

The Queen vs Orbell; The King vs Wheatley;

and The King vs Lara. 5th For a malicious

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and others; The Queen vs Macarty & Fotheringham;

The Queen vs Orbell; The King vs Wheatley;

and The King vs Lara. 5th For a malicious

The King vs Berenger & others, and The King vs Edwards & others. 7th For a bare conspiracy to cheat or defraud a third person, though the means of effecting it should not be determined on at the time - as in The King vs Gill & Henry. 8th That a conspiracy is a substantive offence and punishable at common law, tho' nothing be done in execution of it - as in the Book of assises, Ch. 44; The Poulterer's case; The King vs Edwards & others; The King vs Eccles; The King vs

Berenger & others, and The King or Gill & Henry), and all the authorities, that the conspiracy) is the gist of the offence; and 9th. That in a prosecution for a conspiracy), it is sufficient to state in the indictment, the conspiracy and the object of it; and that the means by which it was intended to be accomplished need not be set out, being only matter of evidence to prove the charge, and not the crime itself, and may be perfectly indifferent - as in The King v. Eccles, and The King or Gill & Henry.

From all which it results, that every

conspiracy to do an unlawful act, or to do a

From all which it results, that every

conspiracy to do an unlawful act, or to do a

therefore need not be stated in the indictment.

In 1 Tremaine's P.C. 82-83, there is an information against Turner and others, for a conspiracy to destroy the reputation of one George Green, and falsely to charge him with adultery with the wife of one of the conspirators, for the purpose of extorting money from him. In 86, against Record and others, for a cheat practised on Lady Dorothea Seymour, in prevailing on her by means of a false hood to advance large sums of money to them. In 91, against Wilcox and others, for cheating by conspiracy one John Dutton of a quantity of

cloth under pretence of buying them. In 94,
against Taylder and others, for a cheat by
conspiracy, in drawing an absolute conveyance
to themselves of the estates of two women, and
perswading them to execute it, pretending it
was only in trust for the women &c. And in 97,
against Allibone and others, for cheating by
conspiracy one Hilliard, in obtaining divers
bonds from him for the payment of money to themselves
and others, as a consideration for procuring a
marriage between him and an indigent woman

whom they represented as (being) rich. In neither

of those cases, could an indictment have been

whom they represented as (being) rich. In neither

of those cases, could an indictment have been

2d. And the law of conspiracy as settled by the uniform tenor of the decisions of the courts in England, has been recognized and adopted as the common law, by the Courts of several of the sister States; as in The Commonwealth vs Ward & others, 1 Mass. Rep. 473; The Commonwealth vs Judd & others, 2 Mass. Rep. 329, and The Commonwealth vs Tibbitts & Tibbitts, ibid 536; and the cases of The Journeymen Cordwainers in New York and Pennsylvania; and also in a similar case in this State, by the Court of Oyer and

terminer

termined &c. for Baltimore County, which has it is believed been entirely acquiesced in. In 2 East P.C. title Cheat — Cheats by conspiracy are treated of, as being on the same footing with cheats effected by the use of ~~false~~ public false tokens, as false weights and measures. Chitty in his 3 Vol. C. title Conspiracy, after speaking of indictable conspiracies levelled at individuals, says, "but the object of conspiracy is not confined to an immediate wrong to particular individuals, it may be to injure public trade, to affect public health,

to violate public police, to insult public justice
or to do any act in itself illegal". Thus taking
a clear distinction between indictable combinations
to injure individuals, and such as have for their
object an injury to the public at large, or the
commission of acts which are in themselves
illegal: and in page 1140 he says, "that to
constitute a conspiracy, it is not necessary that
the act intended, should be in itself illegal,
or even immoral; that it should affect the
public at large; or that it should be accomplished
by false pretences". Conspiracies are odious in

31 law, and are always taken _mala parte_, and
[redacted]

31 law, and are always taken _mala parte_, and
[redacted]

honored a greater malignity of spirit displayed,
and a deeper and more lasting mischief contemplated
by a deliberately written libel, than by a mere
verbal slander, which is often repented of almost
as soon as it is uttered. Libels therefore furnish
evidence of a disposition, more dangerous to the
social order, than verbal slanders, against the
effect of which, the law has interposed itself, as a
necessary safeguard. So at common law, a cheat
effected by ~~public~~ false public tokens, as "false weights
and measures" is punished criminaliter, not
because the party cheated, is more injured
in

in that way, than by a mere private cheat accomplished by an individual in any other manner, which is not indictable; but because it is that, against which ordinary care and prudence are not sufficient to guard, and the use of which, carries a disposition to practise upon the whole community. And for the same reason fraudulent, false or malicious conspiracies to cheat or otherwise injure a third person, are indictable offences; for that ordinary care and prudence, which would be a sufficient guard against the evil designs of an individual, furnish no protection against the machinations

of a band of conspirators. The King v Turner 5 Rep. often, 13 East 228, has been much relied upon in error by the counsel for the defendants, but the case itself is not at all in hostility with this principle, or with any of the adjudications to which we have had occasion to advert. It was an agreement only, (in the words of Lord Ellenborough by whom it was decided) "to go and sport upon another's ground"; not tinctured either with malice, falsehood or fraud. And an agreement to commit a civil trespass, (for every unauthorised entry upon the possessions of another, tho' it

only be for the purpose of innocent amusement
is in law a trespass) may not, according to
circumstances, amount to an indictable
offence. But fraud, falsehood and malice
strike at the very root of the social order,
as the well being of a community, greatly
depends on the honesty, truth and properly
regulated passions of those who compose it;
and therefore it is necessary, that the law should
punish them whenever they assume a shape,
against the effect of which ordinary care and
prudence are not sufficient to guard. [There is

nothing in the objection, that to punish a conspiracy where the end is not accomplished, would be to punish a mere unexecuted intention. It is not the bare intention, that the law punishes, but the act of conspiring, which is made a substantive offence, by the nature of the object intended to be effected. And in that respect, conspiracy are analogous to unlawful assemblies. An unlawful assembly, is the assembling of three or more together to do an unlawful act, as to pull down enclosures, and departing without doing it, or making any motion towards it. In that case

it

it is not the bare unexecuted intention which the law punishes, but it is the act of meeting, connected with the object of that meeting, which constitutes the offence, and for that act of meeting alone, tho' it should be to do what if actually done by one, (as the pulling down of another's enclosure,) ~~which~~ would be but a civil trespass the parties are liable to be punished by fine and imprisonment. And why should the law favour the act of conspiring together, falsely to injure the reputation of another, maliciously to ruin him in his occupation, or fraudulently to cheat him of his property, (no matter by what means), and

yet punish the act of meeting together to pull down another's fence, without making any motion towards it.' [But it is contended that if our ancestors brought with them the common law of the mother country, or any part of it, it was the common law so far only as it had been established by judicial precedents, at the time of their emigration, and not as it has since been expanded in England by judicial

yet punish the act of meeting together to pull down another's fence, without making any motion towards it.' [But it is contended that

seriously questioned. The rule that "in conquered or ceded countries that have laws of their own, those laws continue in force, until actually altered" &c is for the benefit and convenience of the conquered, who submit to the government of the conqueror, or in the case of cession, of the people; who by treaty submit to the government of those to whom their country is ceded), and was not applicable to the condition of our ancestors, as the Indians did not submit to their government, but withdrew themselves from the territory they acquired. They were therefore in the predicament

of a people discovering and planting an uninhabited country; and as they brought with them all the rights and privileges of native Englishmen, they consequently brought with them also, as their birth right, all the laws of England, which were necessary to the preservation and protection of those rights and privileges. And it would be difficult to show, that the law of conspiracy was not at the time of their emigration, quite as necessary to them here in their new and colonial condition as it was in England, unless it can also be shown, that there was less necessity here, than there, for the preservation of life, liberty, reputation and property, or protection against

against falsehood, malice and fraud. If then they did bring with them the common law of conspiracy, which is assumed as undeniable, (though it may have existed potentially only,) they brought it as it is now settled and known in England; for what it is now, it was then; if any reliance can be had on ancient authorities, and it is to judicial decisions, that we are to look, not for the common law itself, which is no where to be found, but for the evidences of it. It appears as has been seen by a note of a case in the Book of Assises, 27 Ed. III. 44, that an indictment was sustained at common law for a conspiracy, though nothing

was done in execution of it. The same principle is recognized and adopted in 9 Coke's Repr. 56, (the Poulterers case) in its fullest extent, and that is the great principle running through the cases so much objected to in argument, that conspiracies are substantive punishable offences, though they are not executed; and the rest, that it is sufficient to state in the indictment the conspiracy and the object of it, that the means by which it was intended to be effected, are but matter of evidence to prove the charge, and no part of the crime itself, and may be perfectly indifferent,

and need not therefore be set out, are but consequences.

And in the case of Brereton & Townsend, cited Noy's Rep. 103 (12 James I) an indictment was held to lie, as has been seen, for a conspiracy to defraud another by means of an act, which if it had been effected by an individual, would not have been indictable. The case in Noy, in which the parties were punished by fine, also shows, that the villenous judgment was not given in all cases of conspiracy, but that there were at common law, different degrees of punishment and consequently of crime; and in 1 Hawk.

P. 6. 193 Ch 7259, it is said, that it has never been settled to be the proper judgment upon any conviction of conspiracy, except such as threatened the life of the party, which obviates any argument drawn from the Villenous judgment, against there being any other conspiracies at common law than those enumerated in the statute 33 Edward I. These cases were before the colonization, the charter being in the 8th year of the reign of Charles the 1st and they furnish the leading principles of the doctrine of conspiracy, of which the subsequent decisions are but practical applications, and must be received as expositions of

of the law as it before existed, and not as creating a new law, or altering the old one, which could only be done by legislative enactment; and cannot be assimilated to occasional alterations, or changes in the practice of courts, in relation to the forms of proceeding, which are only creatures of courts, and often go on mere fiction. And it is a mistake to suppose, that they are expansions of the common law, which is a system of principles not capable of expansion; but always existing, and attaching to whatever particular matter or circumstances

may arise, and come within the one or the other of them; not that this or that combination is by the common law in terms declared to be an indictable conspiracy, but that it falls within those principles of the common law, which have for their object the preservation of the social order, in the punishing such combinations as are calculated to threaten its well being. Precedents therefore do not constitute the common law, but serve only to illustrate principles. And if there were no other adjudications on the subject to be found, the judicial decisions

since the colonization, furnish conclusive evidence), not only of what is now understood to be the law of conspiracy in England, so far as those decisions go, but of what were always the principles, on which that law rests. And if the political connexion between this, and the mother country had never been dissolved, the supposition of a doubt would not now be hazarded on the question, whether the same law was in force here. And unlike a positive or statute law, the occasion or necessity for which, may long since have passed away, if there has

been no necessity before, for instituting a prosecution
for conspiracy, no argument can be drawn from
the non user; for resting on principles, which cannot
become obsolete, it has always potentially
existed, to be applied as occasion should arise.

been no necessity before, for instituting a prosecution
for conspiracy, no argument can be drawn from

that there was now no law in the State for the punishment of such offences. The third section of the bill of right, ~~which forms a part of the constitution of this state~~ which declares "that the inhabitants of Maryland are entitled to the common

36

that there was now no law in the State for the punishment of such offences. The third section of the bill of right, ~~which forms a part of the~~

courts of law or equity", has no references to adjudications in England anterior to the colonization, or to judicial adoptions here, of any part of the common law, during the continuance of the colonial government, but to the common law in mass, as it existed here, either potentially, or practically, and as it prevailed in England at that time, except such portions of it, as are inconsistent with the spirit of that instrument, and the nature of our new political institutions. And surely it cannot be inconsistent with, or repugnant to the spirit and principles of Republican

institutions, whose strength lies in the virtue and integrity of the citizen, to correct the morals, and protect the reputation, rights and property of individual, by punishing corrupt combinations, falsely to rob another of his reputation, maliciously to ruin him in his business, or fraudulently to cheat him of his property. If it is, the law of libel, and for punishing cheats effected by false tokens, should also be rejected; for the one, is not public more inconsistent with the personal liberty of the citizen than the other, or at all more necessary to the preservation of the social order, and

they all rest upon the same principle. And

that clause in the third section of the Bill of

Rights, which declares the inhabitants of

Maryland to be entitled to the benefit of such British statutes

made since the Emigration, as had been

introduced, used and practised by the courts

of law or equity, and thus virtually inhibits

the use of all such as had not been so introduced,

furnishes a clear exposition of the whole section,

and shows, that it was not the intention of the

framers of that instrument, to exclude any

part

part of the common law, merely because it had not been introduced and used in the courts here, and strongly implies, that there were portions of that valuable system, which had not been actually practised upon. And the judicial proceedings of our courts furnish no evidence of any prosecution ~~before~~ the Revolution for a cheat effected by ~~public~~ false tokens; and yet it is not pretended, that from the non user, it is ~~or has been contended~~ on the part of the ~~defendants in error~~ not now an indictable offence. [It is not necessary, as has been contended on the part of the defendants in error,

that every one should in fact know what the law is before he can be punished for what the law forbids. Such a doctrine would be fraught with the most mischievous consequences to society: it is enough that the offence was known to the law before, and if it be malum in se, there is an inward monitor, always present, to warn, advise and instruct. Nor is it any argument against the law of conspiracy, as contended for on the part of the prosecution, that under the English decisions, the act of conspiring, is not required to be proved by positive testimony, but may be

inferred by the jury from all the circumstances of the case. It has nothing to do with the question of what is, or is not an indictable conspiracy; and if it be an objection at all, it is one that arises upon the law of evidence, and is equally applicable to every description of conspiracy. But we cannot perceive what there is in it to quarrel with. It is not confined to the offence of conspiracy - murder which reaches the life of the offender, and various other crimes may be proved by circumstantial evidence, and there does not seem to be any thing in the crime of

conspiracy), that should exempt it from being proved by the same species of evidence. On the contrary as conspiracies from their very nature, are usually entered into in secret, and are consequently difficult to be reached by positive testimony, it would appear to be peculiarly necessary and proper to permit them to be inferred from circumstances, otherwise the most dangerous and injurious conspiracies would often go unpunished.

I have endeavoured to avoid bringing any thing into this case, which does not strictly belong to it, or assuming any principle, that is not well settled.

The indictment ~~in this case~~ has two counts, the first charges

charges the defendants with an executed conspiracy, falsely, fraudulently and unlawfully, by wrongful and indirect means, to cheat, defraud and impoverish The President, Directors and Company of the Bank of the United States; and the second, charges them with a conspiracy only, falsely, fraudulently and unlawfully, by wrongful and indirect means, to cheat, defraud and impoverish The President, Directors and Company of the Bank of the United States. James A. Buchanan, one of the defendants was the President of the office of discount and deposit of the mother bank, duly established in Baltimore; James H. McCulloh,

another of the defendants, was the Cashier of that office, and George Williams, the other defendant, was a director of the mother bank in the city of Philadelphia; and it has been contended, that as an improper use, or embezzlement of the funds of the bank, by either the President or Cashier of the office, would in law be only a breach of trust, a combination to effect the same purpose cannot amount to an indictable offence. But however ingeniously urged, there does not appear to be any thing in the argument, when stripped of the dazzling

attire in which it was clothed. Seeing, as has been shown, that to constitute an indictable conspiracy, it is not necessary, that the act conspired to be done, should if effected by an individual, be such, as would per se amount to an indictable offence. It seems ~~to be~~ therefore to be perfectly clear, both on principle and authority, that the matter charged in each count in the indictment, constitute ~~a~~ punishable conspiracy at common law, and that, that portion of the common law is in force in this State.

~~The~~ question

~~The~~ The only remaining ~~question~~ to be

2.

~~that~~ is
examined, whether under the constitution and
laws of the United States, the county Court of
Hartford, had jurisdiction of the offence, in this
particular case; the Bank of the United States,
being chartered by an act of congress, requires but little
~~it will be required to be said~~, and
will be
~~it~~ disposed of, in a few words. A conspiracy
to cheat or defraud the bank, ~~of the United States~~
declared to be
is not ~~made~~ an offence against the United States
by any act of congress, and ~~none there in the statute~~
~~any provision for the protection of the interests~~
~~of the institution against frauds of any description.~~
In the case of The United States v. Hudson & Goodwin,

7 Cranch, 32, it was decided by the Supreme Court, that the courts of the United States, had no common law jurisdiction in criminal cases. The authority of which case is recognized in the case of the United States vs Coolidge & others, 1 Wheaton, 415, and until it shall be overruled by the same tribunal, the principle must be considered as settled. The matter therefore charged in the indictment is not an offence against the United States, nor cognizable in any of their Courts; but a common law offence against the State of Maryland - the act of congress creating the bank, and the establishment of the office of discount

and deposit in the City of Baltimore within the territorial jurisdiction of the State, furnishing only the occasion for the offence, by bringing into existence the thing, upon which the fraud is charged to have been committed. and as the previously vested jurisdiction of the State, cannot be supposed to be taken away, by the mere potential right of congress (supposing it to exist) to ~~declare~~ make a conspiracy to cheat the bank, ~~to be~~ an offence against the United States, and to give exclusive jurisdiction thereof to the United States Courts, without any exercise of that right,

the original common law jurisdiction of the
courts of the State, in relation to this subject,

[redacted]

the original common law jurisdiction of the
courts of the State, in relation to this subject,

to us. [It has been urged on the part of the defendants in error, as an objection to the jurisdiction of the courts of the State, in such a case as this, that the principle would be dangerous to the well being of the bank, ~~as it~~ might lead to the passing of laws by the State legislature, calculated to destroy the institution, under pretences of protecting its interests. It may be admitted, that the legislature of the State has no right to pass laws calculated to control or impede the operations of the bank. But it is difficult to imagine, how a general power in the

the judicial tribunals of the State, to punish an offence against the State, can be considered as an unconstitutional interference with the concerns of the bank of the United States, or as in any manner endangering its security, only because its officers happen to be the objects of the prosecution, and the offence is charged to be, to the prejudice of that institution; which for the purpose of the prosecution is considered as an individual).

Chase

Judgment Reversed and Procedendo awarded to the County Court of Harford

Decr. T. 1821
The State
v.
Buchanan
& others

Chase, Ch. J. (a). In this case four questions have been submitted to the Court for their consideration

1. Whether the State has the right to issue a writ of error in this case?

2. Whether the record has been legally and properly transmitted?

3. Whether the Court has jurisdiction over this case?

4. Whether the facts charged in the indictment constitute the offence of conspiracy at the common law?

I ans. to the first. ~~question~~ This is a question which arises on demurrer to the indictment, and is solely and exclusively a

(a) Owing to indisposition the Chief Judge did not attend when the opinion of the Court was delivered in this case.

question for the court to decide on the legal sufficiency of the indictment.

If the facts charged constitute the crime of conspiracy at the common law, it is a misdemeanor, and is punishable by fine and imprisonment. Supposing, for argument sake, the court below had determined the indictment was sufficient, and the offence a conspiracy at the common law, there cannot be a question but that the defendants would have had a right to a writ of error, to have the Judgment of the

Court below reviewed, and the law settled. Where the offence is a misdemeanor, it is the right of the party to have a writ of error ex debito justitiæ. The allowance of the attorney general in England is a matter of course, and never refused. In this State the allowance of the attorney-general is not necessary, and never applied for. What good reason can be assigned why the State should not have a writ of error? The right ought to be reciprocal, at least in the case of a misdemeanor. In the marquis of Winchester's case, reported in Sir William Jones and Croke Charles, the right of the King to a writ of error was not questioned. The right of the party accused to bring a writ of error was taken

away by the words of the Statute of James 1, Ch. 3,
but the right of the King remained — the King not
being named in the statute. The offence charged,
was Recusancy and a Misdemeanor, which subjected
the party to a fine. This case unequivocally
establishes the right of the King to bring a writ
of error in the case of a misdemeanor; the
Court of Kings Bench acted on the record
returned under it, and pronounced a judgment
of reversal. The defect in the Judgment in the
court below, was the want of the idea Capiatur.
The motives which induced the King, or the
Attorney-general, to issue the writ of error, could
not have been a subject of inquiry in the

Superior

superior court.

2. As to the question whether the record has been legally and properly transmitted?

I am of opinion that the record has been legally transmitted, and is properly before the court. The act of 1713, Ch 4, provides fully for the transmission of records in all cases civil and criminal, and the mode prescribed by that act has been fully and strictly pursued. The fourth Section of that act directs, that the party appealing, or suing out such writ of error, shall procure a transcript of the full proceedings of the said court, &c. under the hand of the Clerk of the said court, and the seal thereof, and shall cause the same to be transmitted to the court, &c. upon which transcript the said court shall proceed

to give judgment. The transmission of the record in this case has been made pursuant to the fourth section of the act of 1713, Ch 4, and in strict conformity to it, and the previous order of the court below is by no means necessary.

3. As to the third question, Whether the courts of Maryland have jurisdiction over

to give judgment. The transmission of the record in this case has been made pursuant to the fourth section of the act of 1713, Ch 4, and in

United States, and to fix, with precision, the line of division between them and the State courts.

By the third article, and first section of the constitution of the general government, the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. By the second section, the judicial power shall extend to all cases in law and equity, arising under the said constitution, the laws of the United States, &c. These sections of the third article comprehend all the powers vested in the judiciary of the United States, so far as respects the question under the consideration of the court.

(This is not a question or case arising
under the constitution of the United States, nor
under the laws of the United States. The law
of the United States, establishing the Bank of the
United States, does not create any offence
against the United States; and it has been
determined by the Supreme Court, that the
common law of England is not a part of the
laws of the United States; and that decision
has been since recognized and sanctioned,
although some of the judges expressed a
willingness to hear an argument on the question.

It is a position, not to be controverted,
I think, that all powers not granted by the
constitution to the general government, is still
resident

resident in the States, or the people, and is to be exercised in the manner and way the constitutions and laws of the several States respectively prescribe. If the offence charged had been committed prior to the establishment of the constitution of the general government, and during the existence of the first Bank of the United States, there can not be a doubt but what it would have been cognizable by the Courts of the State in which the offence was committed, and punishable according to the laws of such State. I therefore am of opinion, that the courts of this State have jurisdiction over the offence charged in the indictment.

4. Having disposed of the preliminary questions, and all impediments being removed which were supposed to prevent the consideration

of the fourth and last question, I shall now endeavour to express my opinion upon it, and shall do it in as concise and plain a manner as possible, consistent with perspicuity.

The question is important as it concerns the state, and the individual accused, and has undergone a very full and elaborate discussion, and nothing has been omitted which splendid talents could urge, or ingenuity invent, to elucidate the subject, and place the question in every view of which it is susceptible; but as it appears to me, it lies within a small compass

of the fourth and last question, I shall now endeavour to express my opinion upon it, and shall do it in as concise and plain a manner

Bank of the United States, and the said James A. Buchanan, & being
~~the accused with~~ & being) evil disposed, and dishonest
persons, and wickedly devising, contriving and
intending, falsely, unlawfully, fraudulently, craftily
and unjustly, and by indirect means, to cheat
and impoverish the said President, Directors
and Company, of the Bank of the United States,
and to defraud them of their moneys, funds and promissory notes for the payment of money, commonly called Bank notes, and of the benefit and fair gains thereof, pursuant to the said acts of Congress from the use of their said notes, funds, promissory notes for the payment of money,
commonly called Bank notes, on the ~~fourth~~ eighth day of
May, in the year of our Lord one thousand eight hundred and
nineteen, at the City of Baltimore aforesaid, with
force and arms, &c. did wickedly, falsely, fraudulently,
and unlawfully conspire, combine, confederate,
and agree together, by wrongful and indirect
means, to cheat, defraud and impoverish, the
said President, Directors and Company, of the
Bank of the United States, and by subtle,

(6) President of the said Bank of the United States and deposit of the said bank in the City of Baltimore, and the said James A. Buchanan, being an heir of the said Bank in the City of Baltimore,

fraudulent, and indirect means, and devices
artful, unlawful, and dishonest devices and
practices, to obtain and embezzle a large
amount of money and promissory notes for the
payment of money, commonly called Bank
fifteen hundred thousand
notes, to wit, of the amount and value of ~~£100,000~~
dollars
current money of the United States, the same being
then and there the property and part of the proper funds
of the said President, Directors and company of the
Bank of the United States, from and out of the said
office of discount and deposit of the said bank in
the city of Baltimore, without the knowledge,
privity or consent, of the said President, Directors
and company of the Bank of the United States, &c
and also without the privity, consent or knowledge, of the
directors of the said offices of discount and deposit
of the said bank in the city of Baltimore, for the
purpose

purpose of having) and enjoying the use thereof for
a long space of time, to wit, for the space of two
months, without paying any interest, discount or
equivalent, for the use thereof, and without securing
the repayment thereof to the said corporation.
And the more effectually and securely to perpetrate
and conceal the same, that the said James W.
McCulloh should, from time to time, falsely
and fraudulently state, allege and represent,
to the said directors of the said office of discount
and deposit in the city of Baltimore, that such
monies and promissory notes, so agreed to be
obtained and embezzled as aforesaid, were loaned

4

purpose of having) and enjoying the use thereof for
a long space of time, to wit, for the space of two
months, without paying any interest, discount or
equivalent, for the use thereof, and without securing

Corporation to be laid before and exhibited to the
said directors of the said office of discount and
deposit of the said bank in the city of Baltimore.
And that the said George Williams, James A.
Buchanan, and James W. M^c^Culloh, being
such officers of the said corporation as aforesaid,
did then and there, in pursuance of and according
to the said unlawful, false, and wicked conspiracy
and ~~conspiracy~~ confederacy, combination and agreement
aforesaid, by indirect, subtle, wrongful, fraudulent,
and unlawful means, and by divers artful and
dishonest devices and practices, and without the
knowledge, privity or consent of the said President
Directors and company, of the Bank of the United
States, and without the privity, knowledge or
consent, of the Directors of the said office of discount
and deposit of the said bank in the city of Baltimore,
obtain and embezzle a large amount of moneys
and of promissory notes for the payment of money,

commonly called Bank notes, the same being the property and part of the proper funds of the said corporation, from and out of their said office of discount and deposit in the city of Baltimore, to wit, of the amount and value of fifteen hundred thousand dollars current money of the United States, for the purpose of having and enjoying the use thereof, and did have and enjoy the use thereof, for a long space of time, to wit, for the space of two months, without paying any interest, discount, or equivalent therefor, and without securing the repayment of the said money, and the said promissory notes for the payment of money, commonly called Bank notes; and did then and there falsely, craftily, deceitfully, fraudulently, wrongfully and unlawfully keep and convert the same to their own use and benefit, without the knowledge, privity or consent, of the said corporation, and without the knowledge, privity

or consent, of the directors of the said office of discount and deposit in the city of Baltimore, and did then and there, more effectually to perpetrate and conceal the said conspiracy, confederacy, fraud and embezzlement, cause and procure false and fraudulent representations, allegations, statements and vouchers, to be made and fabricated, and the same to be exhibited to and laid before the directors of the said office of discount and deposit in the city of Baltimore, by the said James W. McCulloh as cashier of the said office of discount and deposit, respecting the said monies, and the said promissory notes for the payment of money, so obtained and embezzled as aforesaid, in which said representations, allegations, statements and vouchers, it was then and there falsely and fraudulently represented, alleged and exhibited, that the said monies and promissory notes for the payment of money, were loaned on good, sufficient, and ample security, in capital stock

stock of the said bank, pledged and deposited therefor,
when in truth and in fact no capital stock of the
said bank, and no other security was pledged or
deposited therefor, as the said George Williams,
James & Buchanan, and James W. McCulloh
then and there well knew; and that the said
false, wicked and unlawful and fraudulent
conspiracy, confederacy and agreement, above
mentioned, and the said false, wicked,
unlawful, and fraudulent acts done in
pursuance thereof, above set forth, were then and
there made, done and perpetrated by the said

[redacted]

5

stock of the said bank, pledged and deposited therefor,
when in truth and in fact no capital stock of the
said bank, and no other security was pledged or

James A. Buchanan, and James W. M'Culloh,
did then and there knowingly falsely wickedly
fraudulently, wrongfully and unlawfully cheat
and defraud, the said President, Directors and company,
of the Bank of the United States, to the great
damage of the said President, Directors and
company, to the evil example of all others in
like manner offending, and against the peace,
government and dignity of the State of Maryland
&c." The indictment also charges the accused
with "being evil disposed and dishonest persons, and
wickedly devising and contriving and intending,
falsely, unlawfully, fraudulently, craftily and
unjustly, and by indirect means, to cheat and
impoverish the said President, Directors and company,
of the Bank of the United States, and to defraud them
of their moneys, funds and promissory notes for
the payment of money, commonly called Bank
notes.

notes, and of their honest and fair gains to be derived under and pursuant to the said act of congress, from the use of their said monies, funds, and promissory notes for the payment of money, commonly called Bank notes, aforesaid, to wit, on the eighth day of May, in the year of our Lord one thousand eight hundred and nineteen, at the city of Baltimore aforesaid, with force and arms, &c did wickedly, falsely, fraudulently and unlawfully conspire combine, confederate, and agree together, by wrongful and indirect means, to cheat, defraud and impoverish, the said President, Directors and company, of the Bank of the United States, and by subtle, fraudulent, and indirect means, and deceitful, unlawful, and dishonest devices and practices, to obtain and embezzle a large amount of money, and of promissory notes for the payment of money, commonly called Bank notes, to wit, of the amount and value of fifteen hundred thousand

stock of the said bank, pledged and deposited therefor,
when in truth and in fact no capital stock of the
said bank, and no other security was pledged or
deposited therefor, as the said George Williams,
James & Buchanan, and James W. McCulloh
then and there well knew; and that the said
false, wicked and unlawful and fraudulent
conspiracy, confederacy and agreement, above
mentioned, and the said false, wicked,
unlawful, and fraudulent acts done in
pursuance thereof, above set forth, were then and
there made, done and perpetrated by the said

[redacted]

5

stock of the said bank, pledged and deposited therefor,
when in truth and in fact no capital stock of the
said bank, and no other security was pledged or

perpetrated, by the said George Williams, James A. Buchanan, and James W. McCulloh, in abuse and violation of their duty, and the trust reposed in them, and the oaths taken and lawfully sworn by them respectively as such officers of the said corporation as aforesaid, to the great damage of the said President, directors and Company, to the evil example of all others in like manner offending, and against the peace, government and dignity, of the State of Maryland, &c."

To this indictment there is a general demurrer, by which the facts set forth in the indictment are confessed and admitted by the accused to be true, for the purpose of submitting the question to the decision of the court, whether the facts charged constitute any offence indictable and punishable according to the common law of

England.

In order to determine this question, it becomes necessary to consider what is the common law of England as respects this case, and whether the common law of England is the law of this State?

The common law of England is derived from immemorial usages and customs, originating from acts of parliament not recorded, [redacted] destroyed. It is a

England.

In order to determine this question, it becomes necessary to consider what is the common law of England as respects this case, and

recognized the common law of England as the law
of the State, but by the Declaration of Rights, made by them
in Convention in 1776, claimed and asserted a right
to the common law of England as it was then understood
in Maryland, and had been transmitted to us by the
reports of adjudged cases decided by the courts of
England, and understood by learned men of the
profession, who had written on that subject.
The common law of England was adopted by the
people of Maryland, as it was understood at the
time of the Declaration of Rights, without restraint
or modification. Whether particular parts of the
common law are applicable to our local
circumstances and situation, and our general
code of laws and jurisprudence, is a question
that comes within the province of the courts of justice,
and is to be decided by them. The common law

like our acts of assembly, are subject to the controul
and modification of the legislature, and may be
abrogated or changed as the general assembly

like our acts of assembly, are subject to the controul
and modification of the legislature, and may be
abrogated or changed as the general assembly

profession, by the judicial records and adjudged cases of the courts of England

The questions now occur, do the facts contained in the indictment constitute the crime or offence of conspiracy? and is conspiracy an offence at common law, indictable and punishable as such?

Serjeant Hawkins, in his pleas of the Crown, Ch. 72, in defining conspiracy at common law, makes use of strong and explicit language, and says there can be no doubt but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law; as where divers persons confederate together by indirect means to impoverish a third person. This definition is corroborated and supported by

adjudged cases in the Courts in England, and especially in the courts of King's Bench.

In 1 Lev. 125, 1 Burn's Justice, 355, the King v Sterling and others, Brewers of London, — Information for unlawfully conspiring to impoverish the Excisemen by making orders that no small beer, called Gallon beer, should be made for a certain time, &c The whole court concurred in opinion, and gave Judgment for the King

The Statute 33 Edw. 1 de conspiratoribus, was made in affirmance of the common law, and is a final definition of the instances or cases of conspiracy mentioned in it; but certainly it does not comprehend all the cases of conspiracy at the common law, which is most apparent from the adjudged cases of the courts of England on that subject

I consider the adjudications of the courts of England, prior to the era of the independence of America, as authority to show what the common law of England was in the opinion of the judges of the tribunals of that country, and since that time, to be respected as the opinions of enlightened judges of the jurisprudence of England.

The better opinion appears to be, that a conspiracy to do an unlawful act is an indictable offence, although the object of the conspiracy is not executed. In this case the conspiracy to cheat, defraud and impoverish, the Bank of the United States, by appropriating the monies, promissory notes, and funds of the bank, to the use of the accused, has been proved by the admission and confession of the defendants, and a consummation

of all the overt acts has been fully established.

of all the overt acts has been fully established.

is an offence indictable and punishable at Common law ~~2 Burn 1125~~. Rex v Wheatly, 2 Burr. 1125. A cheat or imposition by one person only is not indictable at common law, but a conspiracy to cheat by two or more is indictable at common law, because ordinary care and caution is no guard against it. Indictment against Macarty and others, for a combination to cheat in imposing on the prosecutor stale beer mixed with vinigar, for port wine. 6 Mod. 301. Indictment against Cope and others, for a conspiracy to ruin the trade of the prosecutor by bribing his apprentices to put grease into the paste which had spoiled his Candles. ~~The King v Cope and others~~ 1 Strange 1144. Indictment against Kinnersley and Moore, for a conspiracy to charge Lord Sunderland with endeavouring to commit Sodomy

with said Moore, in order to declare money from
Lord Sunderland. The whole Court gave judgment
in support of the indictment, and punished
Kinnersley by fine, imprisonment, &c. and
sentenced Moore to stand in the pillory,
suffer a year imprisonment, and to give
[illegible] his good behaviour - 1 Stra. 193, 196.

with said Moore, in order to declare money from
Lord Sunderland. The whole Court gave judgment
in support of the indictment, and punished

A Combination among laborers or mechanics to raise their wages is a conspiracy at common law, and indictable (8 Ellod. 10,) acts' lawful for each separately to raise his wages.

I consider the doctrine so firmly established by the decisions of the courts of England, prior to the era of our independence, that a combination or confederacy to do an unlawful act, is a conspiracy indictable and punishable at common law, that I have deemed it unnecessary to refer to all the cases relative to this question, and therefore have confined myself with citing some of those which appear to me most apposite.

The opinion of Lord Ellenborough in The King v. Turner and others, 13 East, 230, does not impugn, but strongly sanctions and confirms this doctrine. He says

the cases of conspiracy have gone far enough -
he should be sorry to push them still further.
The charge in the indictment was for committing
a civil trespass. He also says, all the cases in
conspiracy proceed on the ground that the
object of the conspiracy is to be effected by
some falsity

I am of opinion that the Judgment
be reversed, and the demurrer overruled.

Judgment Reversed

The State
vs
Jas. A. Buchanan & Sorrey

Murray

The Counsel on the part of the State moved the
court for a writ of procedendo to Harford County
court, directing that court to proceed to a new trial
of the prosecution. This was resisted by the Counsel
of the defendants in error; but ~~after hearing counsel and~~
~~taking time for consideration~~
The Court awarded a writ of procedendo

The State
vs
Jamuth Buchanan
& others

Indictment for a Conspiracy
general Demr. to
the Indictment
Judgment below for
the Defendants
Writ of Error by the State, to remove
the Record into the Court of Appeals
In nullo est erratum pleaded,
& Joinder Submitted, to the Court for their
consideration

1st Whether the State has the Right, to issue
a Writ of Error in this Case?

2d Whether the Record has been legally and
properly transmitted?

3d Whether the Court has Jurisdiction over
this Case?

4th Whether the Facts charged in the Indictment
constitute the Offence of Conspiracy at the
Common Law?

As to the first,

This is a Question which arises on Demr.
to the Indt. and is fully & exclusively a
Question for the Court to decide on the Legal
Sufficiency of the Indictment.

If the Facts charged do constitute
the Crime of Conspiracy at the Common Law, It is
a Misdemeanor and is punishable by Fine
Writ of Error by the
the Record into the Court of Appeals
In nullo est erratum pleaded,
& Joinder Submitted to the Court for their

sufficient and a Conspiracy at the Common Law - there
cannot be a Question but that the Defendants would
have had a Right to a Writ of Error to have
the Judgment of the Court below reviewed, and the
Law settled - where the Offence is a Misdemeanor
It is the Right of the Party to have a Writ of
Error ex Debito Justitiæ - the Allowance of the
Attorney General in England is a Matter of Course
and never refused - In this State the Allowance
of the Att^y General is not necessary and never
applied for - what good Reason can be
assigned why the State should not have a Writ
of Error - the Right ought to be reciprocal at least
in the Case of a Misdemeanor - In the Marquis
of Winchester's Case reported in Sr William Jones and
Carter Charles the Right of the King to a Writ of
Error was not questioned; the Right of the Party
accused, to bring a Writ of Error was taken away
by the Words of the Statute of James 1. C. 3. but the
Right of the King remained; the King not being named
in the Statute, - the Offence charged was Perjury
and a Misdemeanor, which subjected the Party
to a Fine - this Case unequivocally establishes
the Right of the King to bring a Writ of Error
in the Case of a Misdemeanor - the Court of
King's Bench acted on the Record returned under
it, and pronounced a Judgment of Reversal, the
Defect in the Judgment of the Court below was the
Want of the Sine Capiatur - The Motives which
induced the King or the Attorney General to
issue the Writ of Error, could not have been
a Subject of Enquiry in the Supreme Court

As to the Question whether the Record has been legally and properly transmitted, I am of Opinion that the Record has been legally transmitted and is properly before this Court. the Act of 1793. C. 4 provides fully for the Transmission of Records in all Cases Civil, and Criminal and the Mode prescribed by that Act has been fully and strictly pursued — the 4th Section of said Act directs that the Party appealing or suing out such Writ of Error shall procure a fair Transcripts of the full Proceedings of the said, Court, &c. under the Hand of the Clerk of the said Court, and the Seal thereof and shall cause the same to be transmitted, to the Court, &c., upon which Transcript, the said, Court, shall proceed, to give Judgment, — The Transmission of the Record in this Case, has been made pursuant to the fourth Section of the Act of 1793. C. 4 and is in strict Conformity to it, and the previous Order of this Court, below is by no Means necessary —

As to the third Question whether the Courts of Maryland have Jurisdiction in this Case, It is the Duty of this Court to refrain from and restrain the inferior Courts of the State of Maryland from the Exercise of any Jurisdiction and Powers which exclusively belongs to the Tribunals of the United States — In Considering this Question It will be necessary to ascertain the Power and Jurisdiction of the Courts of the United States and to fix with Precision the Limits of Division between

them and the State Courts

By the 3d Article and 1st Section of the Constitution of the General Government, The Judicial Power of the U States shall be vested, in one supreme Court, and in such inferior Courts as the Congress may from Time to Time ordain and establish — By the 2d Section The Judicial Power shall extend, to all Cases in Law and Equity arising under the said Constitution, the Laws of the United States &c. —

The said Sections of the 3d Article comprehend all the Powers vested in the Judiciary of the U. States so far as respects the Question under the Consideration of the Court.

This Suit is not a Question or Case arising under the Constitution of the U States nor under the Laws of the U. States — The Law of the U States establishing the Bank of the U. States does not create any Offence against the U. States; and it has been determined by the Supreme Court, that the Common Law of England is not a part of the Laws of the United States; and that Decision has been since recognized and sanctioned although some of the Judges expressed a willingness to hear an Argument on the Question

It is a Position not to be controverted, I think, that all Powers not granted, by the Constitution to the General Government, to it's respective or the States or the People, and is to be exercised in the Manner and Way the Constitutions and Laws of the several States prescribe. If the Offence charged had been Committed, prior to the Establishment of the Constitution of the general Government and during the Existence of the

2. first Bank of the United States there cannot be a Double but what it would have been cognizable by the Courts of the State in which the Offence was Committed, and punishable according to the Laws of such State. I therefore am of Opinion that the Courts of the State of Maryland have Jurisdiction of the Offence charged, in the Indictment.

Having disposed of the Preliminary Questions and all Impediments being removed which were supposed to prevent the Consideration of the fourth and last Question I shall now endeavour to express my Opinion upon it, and shall do it in as concise a Manner as possible, consistent with Perspicuity.

The Question is important, as it concerns the State, and the Individuals who composed and has undergone a very full & elaborate Discussion and Nothing has been omitted which splendid Talents could, urge, or Ingenuity invent to elucidate the Subject, and place the Question in every View of which it is susceptible, but as it appears to me it lies within a small Compass—

The Indictment, after stating the Establishment of the Bank of the United States by an Act of Congress and the relative Situation of the Accused, to the said Bank and the Stock Holders thereof, charges the Accused with having wilfully disposed and dishonest Persons and wickedly designing contriving and intending falsely, unlawfully fraudulently

craftily and unjustly and by indirect Means to
cheat and impoverish the said President Directors
and Company of the Bank of the United States
and to defraud them of their Monies, Funds and
promissory Notes for the payment of Money commonly
called Bank Notes on the 8th day of May in the year
of our Lord eighteen hundred & twenty at the City of
Baltimore aforesaid with Force & Arms &c. did wickedly
falsely fraudulently and unlawfully conspire, combine, confederate
and agree together by wrongful and indirect Means to
cheat, defraud, and impoverish the said President
Directors & Company of the Bank of the United States
and by subtle, fraudulent, and indirect Means & devices
artful unlawful and dishonest Devices & practices to obtain
and embezzle, a large amount of Money and promissory
Notes for the Payment of Money commonly called Bank Notes
to a vast the amount and Value of $1500000 Dollars
Money of the United States, the same being then and
there the property and part of the proper Funds of the
said President, Directors and Company of the Bank
of the United States from out of the said Office of the
Discount and Deposit of the said Bank in the City
of Baltimore, without the Knowledge Privity & Consent
of the said President Directors and Company of the
Bank of the United States &c. And your Inquest the Remainder
of the Charge.

the

To this Indictment there is a General Demurrer
by which the Facts set forth in the Indictment, are
confessed and admitted, by the Accused to be true,
for the Purpose of submitting ~~to the Court~~, the
Question to the Decision of the Court, whether
the Facts charged constitute any Offence indictable,
and punishable according to the Common Law of
England. In Order to determine this Question
it becomes necessary to consider what is the C. Law
of England, as respects this Case, and whether
the C. Law of England is the Law of the
State of Maryland.

The C. Law of England is derived
from immemorial Usage and Custom originating from
the Edicts
Acts of Parliament not recorded or which have
been destroyed. It is a System of Jurisprudence founded on the
immutable Principles of Justice and ascertained
by the great Luminary of the Law of England,
the Perfection of Reason — The Evidences
of it are Treatises of the Sages of the Law
the Judicial Records and Adjudications of the
Courts of Justice of England;

The People of Maryland, have
not only recognized the Common Law of England,
as the Law of the State of Maryland, but
by the Declaration of Rights made by them in
Convention in 1776 claimed and asserted a Right to
the Common Law of England, as it was then
understood, in Maryland, and had been transmitted
to us by the Reports of adjudged Cases decided
by

by the Courts of England and by learned Men of the Profession who had written on that Subject.

the E. Law of England was adopted by the People of Maryland, as it was understood at the Time of the Declaration of Rights, without Restraint a Modification — whether portions of the E. Law are applicable to our Circumstances and Situation and our general Code of Laws and Jurisprudence is a Question to be decided by and that comes within the Province of the Courts of Justice and is to be decided by them — The E. Law exists our Acts of Assembly are subject to the Control and Modification of the Legislature, and may be abrogated or changed as the general Assembly may think most conducive to the general Welfare so that no great Inconvenience can result, from the Power being deposited with the Judiciary to decide what the E. Law is and its Applicability to the Circumstances of the State of Maryland and what Part has been abrogated from Non User or other Causes.

I think it may be assumed as a Position which cannot be controverted and is free from Doubt, that the E. Law of England as it was understood at the Time of our Declaration of Rights was the Law of Maryland, and I think the Position is equally clear that it must be ascertained by the writings of learned Men of the Profession, by the Judicial Records and adjudged Cases of the Courts

of England?

The Questions now recurr as to the Facts contained in the Indictment constitute the Crime or Offence of Conspiracy; and if Conspiracy an Offence at C. Law, indictable, and punishable as such?

Serjeant Hawkins in his Pleas of the Crown b. 72 c. 2 in Defining Conspiracy at Common Law makes use of strong and explicit Language and says there can be no Doubt but that all Confederacies whatsoever, wrongfully to prejudice a third Person, are highly Criminal at Common Law, as when divers Persons combine together by indirect Means to impoverish a third Person — This Definition is corroborated and supported by adjudged Cases in the Courts of England and especially in the Court of Kings Bench

1. Burr. Justice 355.

In 1. Lev. 125. the King v. Sterling & others Brewers of London. Information for unlawfully conspiring to impoverish the Excise[man] by making Orders that no smale Barr called Gallon Barr should be made for a certain Time &c. the whole Court concurred in Opinion and gave Judgment for the King —

The Statute 38. Edw. 1. de Conspiratoribus was made in Affirmance of the C. Law and is a just Definition of the Instances or Cases of Conspiracy mentioned in it; but certainly it does not comprehend all the Cases of Conspiracy at the Common Law which is most apparent from the adjudged Cases of the Courts of England or that Subject

I consider the Adjudications of the Courts of England prior to the Æra of the Independence of America as Authority to shew what the Common Law of England was in the Opinion of the Judges of the Tribunals of that Country and from that Time to be reputed as the Opinions of enlightened Judges of the Jurisprudence of England

The better Opinion appears to be that a Conspiracy to do an unlawful Act is an indictable Offence although the Object of the Conspiracy is not executed — In the Case the Conspiracy to cheat defraud and impoverish the Bank of the United States by appropriating the Monies, promissory Notes ~~to the Use~~ and Funds of the Bank to the Use of the Conspirators, and a Communication of all the overt Acts has been fully established.

The Postmen's Case 9. Geo. 56. 57—

The false Allegiance is a false binding oath to the other, By Bond or Promise to commit some unlawful Act: punishes the Conjunction, Confederacy or false Alliance to the End to prevent the unlawful Act. quia quando aliquid prohibetur, prohibetur et id per quod pervenitur ad illud: Et Effectus punitur licet non sequatur Effectus; and in their Case the Common Law is a Law of Mercy, for it prevents the malignant from doing Mischief and the Innocent from suffering it. The Defendants were punished by Fine & Imprisonment.

I think it is established by the Decisions of the Courts of England that a Conspiracy to cheat is an Offence indictable and punishable at Common Law. 2 Burr. 1125. Rex v. Wheatly—

a Cheat or Imposition by one Person only is not indictable at Common Law but a Conspiracy to cheat by two or more is indictable at Common Law because ordinary Care and Caution is no Guard against it.

Indictm.t v. Macarty & others— for a Combination to Cheat in imposing on Prosecutor stale Beer mixed with Vinegar for Port Wine— 6. Mod. 301.

Indictment v. Cope and others for a Conspiracy to ruin the Trade of the Prosecutor by bribing his Apprentices to put Grease into the Paste, which had spoiled his Cards. 1 Strange. 144—

Indictm.t v. Kinnersley and Moore for a Conspiracy to charge Lord Sunderland with ~~[illegible]~~ endeavouring to commit Sodomy with said Moore in Order to extort Money from Lord Sunderland

The whole Court gave Judgm.t in Support of Indictm.t and punished Kinnersley by fine, Imp.t 1 Year and sentenced Moore to stand in the Pillory suffer a Year's Impt. & to give Security for his good Behaviour. 1 Str. 193. 196.—

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4.

Indictment of Rispal - 3 Burr 1320.

The Indictment sets forth that Rispal and two others did wickedly and unlawfully conspire among themselves falsely to accuse John Chilton with having taken a Quantity of human Hair out of a Bag &c. for the Purpose of exacting and extorting Money from the said John Chilton -

The Court is of Opinion that the Indictment was well laid, and that the Gist of the Offence is the unlawful conspiring to injure Chilton by this false Charge -

a Combination among Labourers or Mechanics to raise their Wages is a Conspiracy at C. Law and indictable. 8 Mod. 10. allto Lawful for each separately to raise his Wages -

I consider the Doctrine so firmly established by the Decisions of the Courts of England prior to the Era of our Independence, that a Combination or Confederacy to do an unlawful Act is a Conspiracy indictable and punishable at C. Law that I have deemed it unnecessary to refer to all the Cases relative to this Question and therefore have confined myself with citing some of those which appear to Me most apposite -

It is the Opinion of the Judgment be arrested and the Demurrer overruled. The Opinion of L^d Ellenborough in 13. East 230. does not impugn but strongly sanctions and confirms this Doctrine. He says the

Case in Conspiracy have gone far enough he should be
sorry to push them still further -

The Charge in the Indictment was
for committing a civil Trespass -

He also says all the Cases in
Conspiracy proceed on the Ground that the
Objects of the Conspiracy could be effected
by some Falsity -

I am of Opinion that the
Judgment be reversed and the Demurrer
overruled

The State

vs

Jas. A. Buchanan
& others —

— Mr. Harris, file
this Opinion —

J. L. Hopase.

Decr. 1821