THE

Argument

OF

D. RAYMOND, ESQ.

BEFORE THE

COURT OF APPEALS

OF

MARYLAND,

AT THE DECEMBER TERM, 1821,

IN THE CASE OF

The State of Maryland,

VS.

BUCHANAN, McCULLOH, AND WILLIAMS,

UPON AN INDICTMENT FOR A

CONSPIRACY TO CHEAT THE BANK OF THE UNITED STATES.

REPORTED BY THOMAS HARRIS, ESQ.

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COURT OF APPEALS.

December Term, 1821.

THE STATE OF MARYLAND, *vs.* *Buchanan, McCulloh, and Williams.* } Indictment for a conspiracy to cheat the Bank of United States—demurrer to the indictment—judgment for the traversers.

WRIT OF ERROR FROM THE HARFORD COUNTY COURT.

MR. RAYMOND, *for the Defendants in Error.*

THE Record in this cause presents a very singular spectacle, when contrasted with the argument on behalf of the State.

The indictment charges a conspiracy to cheat, and that cheat actually to have been effected, and yet the agreement to cheat, and not the cheat itself is relied on as the ground upon which the prosecution is to be sustained. One would suppose, that if the act when done, was not an indictable offence, *a fortiori*, the agreement to do the act could not be indictable.

Four questions have been made in this cause; two upon the writ of error; and, two upon the demurrer to the indictment.

The 1st question is, whether this writ of error has not improvidently issued, or in other words, whether the State in a criminal prosecution can have a writ of error in this court to reverse a judgment against itself in an inferior court. 2d, Whether the record has come up to this court properly certified from the inferior court.

Upon the first point it is contended, that the State cannot have a writ of error in a criminal cause. 1st, Because it is a novelty, and there can be no novelties in criminal law, either in the nature of offences, or in the mode of trial, unless those novelties are introduced by statute. The State must show itself entitled to this writ of error, either by adjudged cases or by statute, or the writ must be quashed. The only adjudged case in the English books that has been attempted to be produced, is in Sir William Jones, 407. Rex vs. St. John, Marquis of Winchester.

But on examination it will be found that, that was not a writ of error by the King, but by the traverser. St. John had been indicted for recusancy for two months, and found guilty for one month, and not guilty for the other, and fined £20. The King could not bring a writ of error to reverse a judgment in his favor, and the mistake of the reporter arose no doubt from the circumstance, that at that time, it was supposed a defendant could not bring a writ of error without the permission of the attorney general, and this reporter has confounded the permission of the attorney general to the traverser to bring a writ of error with a writ brought by the crown. There being no capiatur entered, was no doubt, a mere pretext for permitting the defendant to bring the writ. Besides, it is manifest from the report of the same case in Cro. C. 504, that it was a writ of error by the traverser.

2 Hale, P. C. is also cited in support of this writ of error, but Lord Hale merely repeats what is to be found in the year book of Henry V., and it does not appear that, that was in fact a writ of error; the same mistake may have been made in the year book that Jones has made, and besides, if there has been no case since the time of Henry V., in which the crown has brought a writ of error, it may be taken for granted, that there is no such practice in England, and that a writ of error by the crown or the state in a criminal case is a novelty. No good reason can be given why the State should have a writ of error, and many reasons may be given why it should not. There would be no practical utility in allowing it, for if the State is allowed to have a writ of error, a mode of practice may be resorted to, (which will produce precisely the same result as a demurrer to an indictment) in which it is admitted the State can have no redress. The party may plead the general issue and pray the direction of the court to the jury upon the sufficiency of the indictment, upon which the court would give precisely the same opinion that they would do on a demurrer, and if the court should give a wrong opinion, it is admitted there could be no remedy, for this court has decided (Queen vs. the State, June term, 1821,) that a bill of exceptions will not lie in a criminal case, and there is not one jury in ten thousand that would find a verdict for the State against the

opinion of the court. although they will often do it in favour of the accused, besides, if the jury were to find a verdict in favour of the State against the opinion of the court, it would grant a new trial. The same effect may also be produced by a motion to quash, and the State can have no remedy. Since the State therefore, can neither have a bill of exception, nor an appeal in a criminal case, it is useless to allow it a writ of error. But, besides the novelty and inutility of allowing the State to bring a writ of error, there is great injustice in it. The accused is not entitled to have a writ of error, except *ex gratia*. Unless the attorney general and the court think there is probable cause, they will not allow it. It is unequal, therefore, to allow the State the right to bring a writ of error, and deny it to the party.

There is another reason against sustaining writs of error in behalf of the State. It will in effect convert the court into a moot-hall to decide abstract questions. By the judgment below, the parties have been discharged without day, and while this court is debating the case, they may go to the ends of the earth. Why should this court sit to hear arguments and reverse judgments, when those judgments can never be carried into execution. It is a universal rule in criminal cases, never to proceed to trial where there is to be corporal punishment, till the party is actually in court, ready to receive and satisfy the judgment of the court in case of conviction. The rule has been adopted to prevent a useless consumption of time in trying causes to no purpose, and the reason of the rule applies as strongly in this as in any other case.

A case has been produced from the general court. (The State vs. Messersmith,) in which the State brought a writ of error, but there appears to have been no opposition by the party, and it passed *sub-silentio*. It cannot therefore be considered as authority. There is no pretence that the Statute of 1713, ch. 4, or of 1785, ch. 57, has changed the common law on this subject in cases like the present. The fair conclusion therefore is, that the State cannot have a writ of error in a criminal case. But if it can, this writ has not been properly served and returned. The mandate of the writ is to the court below, and the court should regularly allow the writ and direct the record to be cer-

tified to this court, but in this case every thing appears to have been done by the clerk, without the direction or authority of the court.

3rd. Is there any offence known to the laws of Maryland, charged in the indictment? It is a maxim of English law, and more emphatically a maxim of criminal law in this State that, "no man shall, under any pretence whatsoever, be tried upon any thing but a known law." This is a fundamental, indispensable maxim of civil liberty, and every departure from it by a court of justice, is an act of tyranny and oppression. This maxim does not refer the existence of the law to the knowledge of the party, so as to enable him to excuse himself upon the plea of ignorance, but it refers to the actual existence of the law either in the statutes or books of reports at the time the offence is charged to have been committed, so as that the State when called on by the accused, can point him to the law he has violated. The enormity of an offence in a moral point of view, affords the court no ground for punishing it. It must be shown to be in violation of some known law. See Wait's case and Bazely's case, 2 East. C. L. 571—573. The principles upon which this indictment is attempted to be supported, are in direct violation of this fundamental principle of civil liberty. In the language of Mr. Justice Dennison in Wheatly's case, "This is nothing more than an action on the case turned into an indictment. It is a private breach of contract, and if this were to be allowed of, it would alter the course of the law by making the injured person a witness upon the indictment, which he could not be for himself in an action."

The State and the defendant are directly at issue upon the very first principle advanced in support of the doctrine of conspiracy. The State maintains, that the offence consists in the naked *agreement*, without reference to the object of the agreement. Hence, they say, a conspiracy to do an act, whether lawful or unlawful, may be indictable as a conspiracy, and in support of this absurd and unintelligible doctrine they cite (8 Mod. 11. Sid. 174. 2 Stra. 866. 6. T. R. 636. 3 Bur. 1320, 1434, and 1 Leach 274.) and many other cases of minor importance. In 8 Mod. the court is reported to have said that, "a conspiracy of any kind is illegal, though the matter about which they

conspired might have been lawful for them, or any of them to do, if they had not conspired to do it." In 2 Stra. 866, the court according to the reporter, says that "an indictment will lie for a conspiracy, though it be to do a lawful act." In 6 T. R. 636. Justice Gross says, "in many cases an agreement to do a certain thing has been considered as the subject of an indictment for a conspiracy, though the same act if done separately by each individual without any agreement among themselves, would not have been illegal." In 3 Bur. 1438. Lord Mansfield says, "the court of B. R. is the *custos morum* of the people, and has the superintendency of offences *contra bonos mores*." These and many other general unqualified *obiter dicta* of judges have been produced in this cause for the purpose of sustaining this prosecution; for the defendants it is contended, that a bare naked agreement can never amount to a conspiracy. The word conspiracy in law has a technical meaning; it means an agreement between two or more to do a criminal act: it is always taken in *mala parte*, and includes not only the agreement but the object of that agreement, for without knowing the object of that agreement, it is impossible to know whether it is to do a good or a bad act; a bare naked agreement can never be known to amount to a conspiracy, because it is the object of the agreement which gives it its character, and if the object be good or lawful, the agreement cannot be unlawful. It is the object of the agreement which gives character to the agreement, and not the agreement which gives character to the object, as some of the books seem to imply.

In support of this construction, see 5 Inst. 143, 9. Co. 56, 4 B. C. 137, 15 East, King vs. Turner and others, 1 Stra. 707. Much reliance has been placed by the State on the definition of conspiracy given by Hawkins and Chitty, and the other elementary writers who have copied them. Hawkins says, "also it seems certain, that a man may not only be condemned to the pillory, but also to be branded for a false and malicious accusation, but since it doth not appear to have been solemnly resolved, that such an offender is indictable upon the statute, it seems to be more safe and advisable to ground an indictment of this kind upon the common law than upon the statute, since there can be no doubt, but that ***all confederacies whatsoever wrongfully to prejudice a third person, are highly criminal at common law.***"

Chitty says, (3 Ch. Cr. L. 1140.) It might be inferred from the decisions, 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, and though it is agreed that the gist of the offence is the union of persons, it is impossible to conceive, a combination, as such to be illegal." A plain contradiction, for if a combination as such be not illegal, then the gist of the offence in conspiracy does not consist in the agreement or union of persons. Whatever is the gist of the offence, must constitute the offence itself.

It may be laid down as a sound principle, that the common law does not consider any thing an offence which it does not clearly and explicitly define. If there be ambiguity or uncertainty in the definition or description of the offence, it is then no common law offence. There is in Serj. Hawkins' definition of a conspiracy, a patent ambiguity which must receive an interpretation and construction, before it can be applied to the charge in the indictment. He says, "all confederacies whatsoever, *wrongfully* to prejudice a third person, are highly criminal at common law," &c. Admit that the words confederacy and conspiracy are synonymous, and still the definition is not free from ambiguity. Conspiracy according to this definition then, means the concurrence of two or more minds to an unlawful or wrongful object; in other words it is an agreement to do an unlawful or wrongful act, although some of the books say it may be an agreement to do a lawful act, which is absurd. But what does Hawkins mean by the words *wrongfully to prejudice*, in his definition. He certainly means wrongfully to prejudice in reference to some law, and it will have one or another meaning, according to the reference. Does he mean *wrongfully*, in reference to the moral, civil, or criminal code? He certainly cannot mean wrongfully in reference to the moral code; because, there are thousands of cases in which two or more may not only agree to do, but actually do immoral or wrongful acts in reference to this law, without being liable to an indictment as conspirators. Two may not only agree, but actually commit fornication or adultery, both of which are very wrongful acts, when tested by the moral law, and also prejudicial to third persons, without

being indictable as conspirators, because neither fornication nor adultery are offences at common law. 4 B. C. 65.

Privateering is admitted by all ethical writers to be highly immoral, and therefore *wrongful* in the eye of the moral law, and yet Serj. Hawkins would hardly pretend that if two agreed to carry on privateering, they could be indicted as conspirators. All mankind, *una voce*, will admit that the African slave trade, although allowed by law, is a horrible immorality, and yet no lawyer will pretend that if two agree to carry it on in the most aggravated manner, they can be indicted as conspirators, unless the laws have first prohibited the trade. The word "wrongfully," therefore in Hawkins' definition does not refer to the moral law. Does it refer to the civil law? In the eye of the civil law it is *wrongful* for two to agree, or concur in refusing to pay a just debt which they owe, because the law will compel them to pay it; but it will hardly be pretended that they can be indicted as conspirators for doing it. If two lessees agree to hold over after the expiration of their term, and force the lessor to his action to recover the premises, it is a wrongful act in the eye of the civil law, and yet the parties could not be indicted as conspirators. So if two agree to commit a trespass, or to do any unlawful and therefore wrongful act in reference to the civil law. 13 East, 238. As Hawkins therefore could not have used the word "*wrongfully*," in reference to either the moral or civil codes, he must have used it in reference to the criminal code, and then it becomes necessary to inquire, whether *cheating* be wrongful in the eye of the criminal code, for if not, then this indictment does not charge a conspiracy to do a *wrongful* act within Hawkins' definition of a conspiracy, for no act can be considered wrongful in the view of the criminal code of a country which that code does not prohibit and punish. There are multitudes of aggravated moral and civil law offences, which are nevertheless in the estimation of the criminal law as innocent and harmless as charity. If in the eye of the criminal law cheating be as innocent as alms-giving, then an agreement to cheat is no more wrongful than an agreement to give alms, and if the criminal law does not punish cheating, it is in the eye of that law as innocent as alms-giving.

It can hardly be necessary to cite authorities, to show that cheating is not an indictable offence at common law, with two or three specified exceptions of which this is not one. Vide on this subject. Lara's case, 6 T. R. 565; Bower's case, Cowp. 323; Wheatly's case, Bur. 1127; and East and Leach Sparsim.

There is a very good reason why the common law does not punish *cheats*, except in certain cases. The common law does not punish an offence without first defining it. But no precise definition has or can be given of a cheat. The words cheating and defrauding, are perfectly abstract general terms, as much so as any in the language, and therefore incapable of any definition which will render their meaning certain. *A departure from moral rectitude in our dealings with our fellow men*, is probably as accurate a definition of cheating and defrauding as can be given, but it would be monstrous to indict a man for an offence embraced in so general a definition as this. It might as well be said that a man who did not do unto his neighbour as he would that his neighbour should do unto him, should be indicted for it. The common law does, it is true, punish a cheat effected by false public tokens, and by false dice, but these are specific offences precisely and accurately defined. The statutes of Henry VIII. and Geo. II. also punish cheats effected by *false private tokens* and by *false pretences*, but those statutes have never been incorporated into our laws. Cheating therefore being no offence at common law, it follows that an agreement to cheat does not amount to an indictable conspiracy within the definition of Hawkins and Chitty.

An attempt has been made to perfect Hawkins' definition of conspiracy, so as to make it embrace this case, by adding to it the words *deceitful means*. All conspiracies and confederacies whatsoever wrongfully to prejudice a third person, by *deceitful means*, &c. But this does not help the definition an atom. The words deceitful means, are just as ambiguous as the word *wrongfully*, and liable to precisely the same construction and interpretation, and precisely for the same reasons they must also be referred to the criminal law. Will it be pretended that if two have agreed to commit or actually committed adultery by deceitful means, they can be indicted for it at common law? The crime is always committed by deceitful means.

An attempt has also been made to establish a distinction between cheats effected by conspiracy, and ordinary cheats at common law. And, a dictum of Lord Mansfield in Wheatly's case has been relied on for that purpose. But that dictum is unsupported by any adjudged case—none of the decisions turn upon such a distinction, nor do any of the elementary writers recognize or support it. What difference can it make, whether the cheat be effected by one or by two?

There is sophistry in the argument as it is urged upon us from the dictum of Lord Mansfield. It is said, that a cheat effected by a conspiracy is indictable at common law, and hence they conclude that a conspiracy to cheat, is a conspiracy to do a wrongful act according to our own exposition of Hawkins' definition. In the first place it may be observed, that there has not been a single case produced to support Lord Mansfield's dictum. The case of Hevey which has been relied on, does not support it. That was a case of a conspiracy to effect a cheat within the Stat. Geo. II., by false pretences, and there is no reason to suppose the indictment could have been sustained, but for that statute. But, suppose Lord Mansfield's dictum be admitted to be law to the utmost extent, and what does it prove? Barely this, that a cheat effected by conspiracy stands on the same footing as a cheat effected by false tokens under the Stat. of Henry. Under that statute the false tokens enter into the essence of the offence, and an indictment cannot be sustained upon the statute, unless it alleges the false tokens. The false tokens therefore, constitute a part of the offence, and do not of themselves make a distinct offence from the cheat. Now, if a cheat effected by conspiracy stands upon the same grounds, it will follow that the conspiracy enters into the essence of the offence and constitutes a part of it, and must be so alleged, the same as the false tokens under the statute, and cannot therefore constitute a distinct offence from the cheat, any more than the false tokens can constitute an offence distinct from the cheat. The false tokens are the means in one case, and the agreement the means in the other, and neither the one means, any more than the other, are indictable separate from the cheat. The distinction however, between cheats effected by concurrence of two, and ordinary cheats

effected by one, is too subtle for the criminal law, and as no case is produced founded on that distinction it must be rejected.

It has been attempted to force this absurd doctrine of indicting the agreement to do an act, when the act itself is not indictable, upon this court by the authority of English adjudications. It is said, that these decisions are evidence of the common law, and are binding on this court. But, no authority can bind this court to adopt an absurdity in criminal law.

It is necessary in order rightly to understand the cases in English books on this subject, to recur to the history of this law of conspiracy. The earliest record we have of it, is in the statute *de conspiratoribus* in the reign of Ed. I. This statute specifies several distinct acts, which it declares shall amount to conspiracy, and then makes a final definition of conspirators. It is in these words: "Conspirators be they, that do confeder and bind themselves by oath, covenant or other alliance, that every of them shall aid and bear the other falsely and maliciously to indict or cause to indict; 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 maintain men in the country with liveries or fees for to maintain their malicious enterprises; and this extendeth as well to the takers as the givers; and stewards and bailiffs of great lords which by their seigniory office or power, undertake to bear or maintain quarrels, pleas, or debates that concern other parties, than such as touch the estates of their lords or themselves. This ordinance and final definition of conspirators was made and accorded by the king and his council in his parliament, the 33d year of his reign." A. D. 1304.

It is said that the common law of conspiracy was broader than this statute, and that many of the cases in the English books do not come within the statute, but when the latitude of construction which some of the courts, into whose hands this statute afterwards fell for execution, adopted, is considered, it is fairly to be presumed that every case which is law in the English books, may fairly be traced to this statute—that they are all emanations from it, or what is the same thing, from the common law which was no broader than the statute. The court of star-chamber during the whole of its existence, had the

construction and execution of this statute, and as it was professedly a court of arbitrary and discretionary power, it follows that it would always extend the statute to every thing that fell within its spirit, whether it came within the letter or not. The decisions of this court after its abolition were handed down to the king's bench and relied on as authority, where they were not grossly unjust and absurd—although, therefore, we cannot trace all the cases in the English books to the letter of this statute, yet all that are law may be traced to its spirit. Hence, it may be inferred, that the whole of the English law of conspiracy emanated from this statute. This doctrine was contended for by the States' counsel in the court below, although they now attempt to repudiate it. If then the statute of Ed. is the foundation of all the English law of conspiracy, it will follow, that those decisions only are law in England which can be fairly traced to either the letter or spirit of the statute.

It may be admitted to be law in England, that agreements to do acts which are themselves indictable, amount to conspiracies, and may be indicted as such, but that agreements to do acts which are not indictable, are not conspiracies indictable either at common law or by statute. So an agreement falsely to charge one with an indictable offence, amounts to a conspiracy within the spirit of the statute; because, it is an abuse of courts of justice by causing a groundless prosecution, and it is also within the letter of the statute, it being to maintain "*false pleas.*" All the bastardy cases may therefore be admitted to be law, without affecting this case. Bastardy being a crime punishable by the ecclesiastical courts. There has, however, been a class of cases produced in this cause which do not fall within this principle, and will, therefore, be denied to be law. The leading cases in the English books denied to be law, are the King vs. The Journeymen Taylors of Cambridge, 8 Mod. 11. The tub-women's case, Lid. 174. 1 Lev. 125. Eccle's case, 1 Leach. 274. Cope's case, 1 Stra. 144. It has been contended that these, and all the other cases are to be considered as authority upon the principles which they appear in the reports to have been placed, although the cases themselves do not necessarily involve the doctrines advanced by the court. But this is an erroneous doctrine. It is calculated to make every dictum of a judge authority,

however carelessly it may have been advanced, or however inaccurately reported. The cases are authority no farther than the principle goes which the case necessarily involves. Whatever the court says out of a case, is merely obiter, and is never considered as having the force of law; it ought not to have any weight as authority, because, when a judge lays down law out of the case, he does it without argument and without due consideration. Besides, we can never know that we have the precise language of a judge who delivers his opinion extemporaneously, which the reporter cannot accurately take down; he may not even comprehend the purport of the language used, and does not probably catch a single sentence perfectly. We do not therefore know, with any certainty what the court did say, and we are relying on the authority of the reporter, and not on the authority of the court, when we take any doctrine for law which the case does not necessarily involve.

In examining the cases in the English books, it must be recollected, that it has been the policy of the English government, to deal very much in sumptuary laws, more especially in the early periods of English history. The price of bread, beer, meat, cloathing, and wages, has been regulated by numerous statutes, especially in the reigns of the Edwards and the Henrys. This policy has never prevailed in this state; every man has been left at perfect liberty to regulate his food, apparel, and wages as he pleased. Hence many acts may with propriety have been considered illegal in England, under their sumptuary laws, which could not have been illegal in this state. But with all these qualifications, many of the decisions in England cannot be reconciled with sound reason or the established principles of law, but must be rejected as unwarrantable stretches of judicial power. The tub women's case, in 1 Sid 174. 1 Lev. 125. The journeymen tailors' case, 8 Mod. 11. Cope's case in Stra. 144: and Eccle's case, in 1 Leach 274, are of this description, and the principle upon which they were decided, cannot be supported upon any *known* principle of English law, and are directly contradicted by adjudged cases, especially by the case in 15 East. In the tub-women's case, it was decided, that an agreement among certain brewers not to brew what was called "gallon beer," was an indictable conspiracy. In the journey-

men tailors' case, it was decided, that an agreement to raise their wages, was also a conspiracy and indictable. Cope's case was a mere agreement to commit a trespass, by putting grease into the paste of a card maker; and in Eccle's case, an agreement by indirect means, to impoverish a tailor, was indictable as a conspiracy. The case does not state the means to be used to effect their purpose of impoverishing the tailor, but it is to be presumed it was by not employing him. Such agreements cannot amount to conspiracies, according to any known principle of the common law in England, and certainly not in this state. If these cases are law here, then every mechanic in the country may be indicted for a conspiracy, for every craft has its society which regulates their wages. Common labourers have their associations for this express purpose. The merchants throughout the country, have lately entered into agreements not to buy goods at auction, for the express purpose of breaking up the auctioneers; and there are associations all over the country, for the purpose of not purchasing foreign goods, in order to diminish importations. Indeed, it is the spirit of the times, to enter into such associations, and it will be in vain to attempt to punish all these people for conspiracy; but if the above cases are law, all these people are indictable as conspirators. At this rate, the whole community may be indicted; and if the law be so, they ought to be indicted, for every man who violates a known law, ought to be punished. It is a partial administration of the law, to punish A, and let all the rest of the alphabet go clear, although guilty of the same offence.

Rispal's case, in 3 Bur. 1320, must be rejected for uncertainty. Rispal and others were indicted for conspiring to charge one Chilton with taking hair out of a bag, but *non constat* whether the charge was of a felonious taking or not, and if a felonious taking, then the case falls within the admitted doctrine.

Parson's case, in 1 B. R. 392, is liable to the same objection. It was a conspiracy to *accuse* one of felony, for the purpose of extorting money, but *non constat* the manner of the accusation. It might have been to accuse him before a grand jury, and have him indicted.

Wheatley's case, 2 Bur. 1127, has also been much relied on, ut as that was not a case of conspiracy, what Lord J. Mans-

field says in it, is merely obiter, as regards this case, and cannot therefore be considered as authority. The same observation applies to Delavall's case, 3 Bur. 1434; for although that was a conspiracy, yet all that was said was upon a rule to show cause why an information should not issue. The rule was made absolute, it is true, but it does not appear what became of the case afterwards. No judgment was ever given in it. And for ought that appears, Lord Mansfield may have been satisfied on further reflection, that although the parties had been guilty of a great immorality, they had violated none of the criminal laws of England; and as to the court of B. R. being the *custos morum* of the nation, it was a mere figurative expression of his Lordship, and could not have been intended in its literal sense; else, why does not that court punish adultery, fornication, drunkenness, and other gross immoralities, daily practised before its eyes?

Upon what principle the case of Rex vs. Taylor and Robinson, 1 Leach 44, was decided to be a conspiracy, it is impossible to conceive, unless it was upon the principle, that the parties had attempted to abuse what are deemed judicial proceedings, under some act of parliament, regulating marriages and marriage licences. It seems impossible to suppose, that a man should be liable to be indicted as a conspirator, merely for getting married in an assumed name. An abuse of courts of justice, if that was the offence charged, is within the Stat. of Ed. I.

Rex vs. Maubray and others, 6 T. R. 628, which was the case of an agreement to make a false certificate, respecting the condition of a road, must have proceeded upon some act of parliament, or some local usage in regard to such certificates, which are unknown to our laws.

The case in 1 Maul and Selwyn 68, which was a conspiracy to raise the funds on a particular day, most likely turned upon some English statute, prohibiting the circulation of false reports and spreading false news. The spreading of false news was made an offence by 2. Rd. 2. Ch. 5. & 12. Rd. 2. Ch. 11. see also 4 B. C. 141. If the spreading such reports is an offence in England, then the conspiracy to spread it is also an offence within the true exposition of the doctrine of conspiracy, but in this state it is no offence to spread false news or false rumours. They are constantly spread with impunity. Unless the case

turned upon some such point it is impossible to reconcile the decision with any known principle of law, for it would be too extravagant to maintain that the bare telling a lie by one or by a hundred is an offence, and if the lie is not criminal *per se*, it is contrary to the principles of the common law, to look to its consequences to ascertain its character in order to punish it. It is neither more nor less than a lie, and if a lie be dispunishable in itself, it cannot be made punishable by referring to its consequences either to an individual or the public.

The case of the King, vs. Gill and Henry, in Barn. and Ald. 204. was a conspiracy to cheat by some means or other, but as those means are not set out, it is impossible to know whether they were by means forbidden by the penal code or not. For ought that appears it might have been by indictment, or some prosecution in abuse of public justice, and therefore within the admitted principle. It is true C. J. Abbott says, the means need not be set out in the indictment. The question before the court in that case was upon the form of the indictment, and although it sanctions a very loose form of pleading, it is not an authority to establish an extravagant and absurd principle of law. If it be, as the court said, unnecessary to set out the means by which the cheat was to be effected, then it is unnecessary to prove by what means, and hence it will follow that two may be convicted of a conspiracy to cheat when the only thing they have done is to agree to purchase their neighbour's property at an under value, by telling him some ridiculous lie. Such a principle would subject half the merchants in the country to indictments for conspiracies to cheat. But admitting *arguendo* that this prosecution could be supported in B. R. upon the principles established in that country, and it will not follow that it can be supported in this state.

All the decisions in England are emanations from the statute of Edward I. and are founded upon it. Without that statute those decisions never would have taken place, for although many of the books say that the statute was in affirmance of the common law, and even that the common law was broader than the statute, yet there is no case anterior to the statute, nor any trace of any law except what is founded on the statute for centuries after. The Star Chamber which had the construction and

enforcement of the statute, during the whole period of the existence of that court, professedly exercised a discretionary, arbitrary power in construing penal laws. It construed penal laws by equity, and extended them to all cases which it was thought proper to punish. That court was emphatically the *custos morum* of the country, and constantly exercised the power of judicial legislation, *jus dare* was equally as much a prerogative of that court as *jus discere*. After this court was abolished its decisions became precedents, and authority for the court of B. R. and although some of the decisions since the statute of Ed. cannot, according to modern rules of construing statutes, be brought within that statute, which has caused modern lawyers to say, that they were at common law, and therefore the common law was broader than the statute; yet when this latitude of construction which had been adopted, is considered, it is very natural to conclude, that the statute is the fountain of all the English law on the subject of conspiracy. If this be so, then none of the cases that have been produced, can be considered as authority in this court; for the statute itself has never been extended to this state, or adopted by our ancestors. In proof of this, see Res. No. 22. 1809. The late chancellor in his Digest of English statutes, under these resolutions, says, that the statute of Ed. I. has not been adopted in this state. The legislature, in 1810, adopted this report of the chancellor, and ordered it to be printed at the expense of the state, and promulgated to the people as a guide to their conduct. The question is therefore settled by the legislative will. The legislature did not pass a formal act, declaring that the statute of Ed. should not extend or be in force in this state. It has in effect said by the resolution of 1810, that the chancellor was justified in saying, the statute had not been extended to this state. The only evidence the chancellor could have had of this fact, was the *non user* of the statute. The statute was as applicable to the people of Maryland, as to the people of England. The legislature has therefore in effect said, that *non user* is adequate to abrogate an English statute passed before colonization. The statutes of Henry 8th, and George 2nd, respecting cheats, have never been extended to, or adopted in this state, and *non user* is the only evidence of their not having been adopted.

Non user is quite as effectual to abrogate any portion of the common law, as it is to abrogate or reject an English statute, passed before colonization. If, then, it be admitted, that the common law of conspiracy was broader than the statute of Ed. I. and that the decisions of England have been at common law, and not upon the statute, and still the conclusion follows with equal force, that those decisions are not authority in this court, and are no evidence of the law in this state; because there has been a perfect *non user* of the common law of conspiracy in this state from colonization. The legislature has said, that *non user* is competent to the rejection of English statutes from our code, and in *pari ratione* it is competent to the rejection of a principle of the common law. It will not be pretended, that there have not been numberless agreements to cheat in this state, in every year from colonization to the present day, and yet no prosecution has ever been instituted for such offence. The evidence, therefore, of *non user* is complete. That the people of Maryland had a perfect right to reject from their code any portion of common law they pleased, vide 2 Dall. 394. The bill of rights puts the statutes and common law of England on the same footing. It being admitted that we have a right to reject such statutes as we pleased, it follows that we may reject such portions of the common law as we please. Many parts of the common law have confessedly been rejected by *non user*. Such as heresy, apostacy, præmunire, and many others. This court decided on solemn argument, in the case of Browning vs. M'Gill, at June term, 1808, that there were no markets overt in this state, and yet the law of markets overt is a part of the common law, which has never been abolished by statute.

Such a perfect novelty was this law of conspiracy in Maryland, that no lawyer in the state was found capable of drawing these indictments, and it was therefore necessary to send to New York, to have them drawn by a foreign lawyer, one who had been educated in a foreign land, where this law had its origin, and was better understood. It is admitted, that the statutes of Henry VIII. against cheating by *private tokens*, and of George II. against cheating by *false pretences*, are not in force in this state, although they are both as applicable to the people of this state, as to the people of England. Nor is it pretended,

that these statutes have ever been expressly abolished. *Non user* is, therefore, the only evidence of their having been repudiated; and if this rejection by *non user* is effectual, as it respects statute law, passed both before and since colonization, it must be as effectual in regard to common law, and where the *non user* is perfect, as it is in regard to the law of conspiracy, it is no more within the power of this court now to incorporate it into our penal code, than it would be within the power of the court to enact a penal statute.

The people of Maryland have showed their good sense, in not adopting these branches of criminal law into their code. They showed their wisdom in rejecting the statute of Henry VIII. against cheating by false private tokens, and of the statute of George II. against cheating by false pretences, on account of their vagueness and uncertainty. An uncertain criminal law is no law at all, and yet who can tell the meaning of "false private tokens," and more especially of "false pretences." A naked lie of any kind is a false pretence within the very letter and spirit of the statute, but the English courts have never held that a cheat effected by a naked lie was indictable. It is utterly impossible to know what is, and what is not, a cheat within these statutes, according to the English decisions. The statutes themselves are perfectly indefinite and uncertain, and no doubt for that reason were not adopted in Maryland.

The common law of conspiracy, in addition to its uncertainty, as it appears in the modern cases in England, is also unreasonable and unjust, and wholly repugnant to the genius of our institutions. By the constitution of the United States, high treason is confined to the actual levying war against the United States. At common law, there can be no such offence as a conspiracy to commit treason, because the conspiracy was itself treason. It would seem to follow, therefore, that a conspiracy to commit treason, the highest offence known to the law, would be no offence, and entirely dispunishable, for the conspiring could not be treason by the constitution, and it would not be a misdemeanor by the common law. It would, therefore, be no offence at all. And if an agreement to commit the highest crime known to the law, be no offence, surely an agreement to commit the lowest, ought not to be.

It is very doubtful whether a bare agreement to do any act whatever, is an offence in this state. It would appear that some *overt act* besides the naked agreement must be done, manifesting the intention, before the law can lay hold to punish. A bare naked agreement seems not to be such an overt act, as human laws can with justice presume to punish. It is punishing the thoughts of the heart, which belongs only to God. This doctrine of diving into the heart, and punishing its evil thoughts, is very ancient in the common law it is true, but it has for centuries been exploded from every other branch of the law, except that of conspiracy. *Voluntas rapudabatur pro facto*, was once considered a sound maxim of the common law, but it was in an age of darkness and superstition, when priests and monks were the principal agents in the administration of English law. Vide 4 Inst. 5. 3. Reeves' Hist. En. Law, 413. This bloody maxim has never been incorporated into any branch of the law of Maryland, nor is there any danger that it ever will be, unless it come in the guise of conspiracy, which does in fact punish the will for the deed; and what is still worse, it punishes, according to the English books, the will, when the deed itself cannot be punished. It is a remorseless doctrine, as it leaves no *locus penitentie* between the conception of the crime and its execution. It is, however, impossible for a Maryland court of judicature to incorporate such a doctrine into our, at present, healthful system.

But admitting *arguendo* that conspiracy to cheat is an offence known to the laws of Maryland, it still remains a question, whether a conspiracy to cheat the Bank of the United States is an offence punishable by this court, or in other words, whether this court has jurisdiction of this case.

In discussing this question, the following propositions will be maintained.

1. The general and state governments are foreign governments as it respects each other.

2. The common law takes cognizance only of offences against beings known to the common law.

3. The Bank of the United States is a political being unknown to the common law.

From which it will follow that this court which administers justice, according to the principles and course of the common law cannot take cognizance of the offence charged in this indictment.

1. Because the common law does not recognize the existence of the being against whom the offence is charged to have been committed, and

2. Because this political being is the creature of a foreign government.

The first proposition seems almost too clear to require proof. Although both the federal and state governments are limited sovereignties, as every government which has a written constitution must necessarily be, yet it is not thence to be inferred that they are not sovereign within the prescribed limits of their respective constitutions. If the word *sovereignty* has any meaning, when applied to nations, and states it means the power of making laws which no other government has a right to restrain, or control. It matters not whether the power of making laws extends to one or one hundred subjects, or objects, still so far as it does extend, it is as much sovereign as any legislative power whatever. Sovereignty in its absolute sense resides no where but with the Deity. He alone can be said to possess absolute sovereign power. When the word sovereignty, therefore, is applied to nations, it necessarily must be taken in a limited sense, and when applied to a nation or state that has a written constitution it is always restricted by that constitution. The federal and state governments being sovereign, therefore, within the limits of their respective constitutions, it follows that they must be foreign to each other, for if one government has a right to make laws independently of, and without the control of another government, those governments must be foreign to each other. The federal government has no more right to interfere with the state of Maryland in the passage of laws within the power of the state to pass by its own constitution, than the state of Maryland has to control congress in the passage of laws within the limits of the federal constitution. If the state oversteps its constitution and attempts to pass laws in violation of the federal constitution, those laws will be void. So if congress should overstep the constitution of the United States and attempt to pass laws in violation of

the constitution of Maryland or in violation of state rights, those laws would also be void. Our system of government is complicated, it is true, and yet its exposition depends on a few simple principles, which, if adhered to, will secure its harmonious and prosperous administration.

The federal and state governments are foreign as respects each other, but both domestic as regards the citizens. The citizen owes allegiance to both governments. The allegiance of the citizen to the two governments may be illustrated, by supposing a line to pass from each government and attach to the heart of the citizen. This line is of Heavenly texture, composed of many strands,—one furnished by each of the virtues. The governments exercise their influence over the citizen by means of this line, and so long as the two governments act in harmonious conjunction, the citizen will never be distracted by opposite and conflicting duties; but when the state governments shall (to use an astronomical term) get into the aphelion of their orbits, and exert their influence on the citizen in opposition to the federal government, as some of the states are now doing, it may place the citizen in a perilous predicament. There is, however, little doubt, but that the influence and attraction of the larger body will prevail over the smaller, and keep the citizen secure in his allegiance to the general government. But although both governments are domestic as it regards the citizen, yet the governments are not domestic as it regards each other. There is no connecting line between them, nor has the federal government any more right or power to exercise authority over the state governments, than the state governments have over the federal government. Congress can exercise no authority or control over the state governments, or any of its officers, *qua* officers. It can exercise no authority over them, except as citizens in their private characters. It is true, there is a kind of bye path or pent way between the highest judicial state tribunal to the supreme court of the United States, for the purpose of conducting constitutional questions from one to the other, but there is no such medium of communication for general purposes.

The courts of one government can take no cognizance of the penal laws of the other for the purpose of carrying them into

execution. The courts of each government, in civil cases, take notice of the laws of each which secure civil rights to the citizens, and so they do of the laws of any foreign government. The state courts recognize the laws of England, which secure rights to the parties litigant in the court, where the subject matter of the suit is of a transitory nature. In this respect the laws of the United States and of England stand upon the same footing in the state courts. And so do the penal laws of the same governments stand upon the same footing in the state courts. The state courts can no more enforce the penal laws of the one than of the other.

It may be said, that the constitution of the United States and the laws of Congress made in pursuance of it, are the supreme law of the land, and the state courts and legislatures are bound to take notice of them as such. This may be admitted, and still it will not follow, that they are not the laws of a foreign government. The states are bound to take notice of the constitution and laws of the United States, not for the purpose of carrying into execution or administering those laws, but for the purpose of not violating them. A law of a state repugnant to the constitution of the United States and of the laws of Congress made in conformity to it, is a void law, and ought not therefore to be carried into execution. The states are therefore bound to take notice of the constitution and laws of the United States, for the purpose of not violating them, and not for the purpose of carrying them into effect. So a wagoner travelling on a public road, is bound to take notice of his neighbour's wagon for the purpose of not running foul of it, but not for the purpose of guiding that wagon or conducting it to its destination. The states are bound to take notice of the constitution and laws of the United States, precisely in the same manner that an independent nation is bound to take notice of the laws of nations, for the purpose of not violating them. There is this difference in the two cases; in the one case, effectual means have been provided to check the violation of the supreme law, in the other case there is no such check; but it will not be pretended, that because one nation may violate the laws of nations, which are the supreme law of the world, without being liable to any check or restraint from any judicial tribunal, that therefore, the nation has a right so to

violate them: nor can it be pretended that, because the states have an effectual check from being able to do what they have no right to do, augments their obligation to refrain from doing what they have not a right to do, or to refrain from violating the supreme law of the land. One foreign nation is bound to take notice of the laws of another foreign nation, for the purpose of not violating them. England has no right, in violation of a law of France, to send a fleet of armed ships into the navigable waters of France, nor to march an army through her territory. England has no right to send a ship of war into the Chesapeake, in violation of a law of the United States, and England is bound to take notice of such law for the purpose of not violating it. One nation has no right to pass any law in violation of the rights of another nation. In precisely the same way, a state of this union has no right to pass any law in violation of the rights of the United States, or in other words in violation of the constitution and the laws of the United States made in pursuance of that constitution: neither has congress any right to pass a law in violation of the constitution and the laws of the state of Maryland, made in pursuance of that constitution. In other words, there can be no conflicting rights between the general and state governments. If there be two laws repugnant to each other, one or the other must be void, because in violation of its own constitution. So if the laws of nations could be carried into perfect execution, one nation could not pass a law repugnant to the laws rightfully made by another nation, for either one law or the other would be void. The final result of all this is, that we have contrived a form of government between independent sovereignties, more perfect than was ever before even imagined by the greatest philosophers, and not that these sovereignties are not sovereign, and consequently *foreign* to each other. The states are sovereign within the limits of their constitutions, (and the constitution of the United States is a part of their constitutions) even unto absolute despotism. They may pass any law, however impolitic, oppressive or tyrannical, unless restrained by some article in their constitution. And to say they are not sovereign, because they cannot do all acts of sovereignty, is just as absurd as to say, a man is not a man in Russia, because he has not as many rights there as in the United

States. Such reasoning would prove the United States not to be sovereign and independent, and it is an absurdity to say there are two sovereignties which are not distinct from each other, and therefore foreign to each other. The language of Chief Justice Marshall in the case of Maryland vs. M'Colloh, 4 Wheat. 405, applied to the sovereignty of the United States will, *mutatis mutandis*, apply with the same force to the state governments. The state governments are therefore supreme within the limits of their constitution. But it is an absurdity to say that two supreme powers or governments, so far forth as they are supreme, are not foreign to each.

The federal and state governments then being foreign to each other, the second proposition is, that the common law takes cognizance only of offences against *beings* known to the common law. If there be any self-evident proposition, it would seem to be this—Human laws have relation to *persons* and *things*, and those laws cannot be violated except through the medium of these persons or things. There can be no such thing as a breach of a law in the abstract. The law prohibiting murder, cannot be violated, without killing a being, for whose protection the law was made. The law forbidding larceny, cannot be violated, unless the subject matter of the larceny is recognized by the law forbidding the larceny, Hence animals *feræ naturæ* are not the subjects of larceny, because the law does not recognize the existence of property in such animals. So the law forbidding cheating cannot be violated, unless the *being* who is cheated, is recognized as having an existence by the law forbidding the cheat. It is no objection to the soundness of this reasoning, that the laws of the state protect the property of this bank and of other beings unknown to the common law, as the property of a foreign corporation. The law regards persons and things, and offences may be committed through the medium of persons or things. If the thing which is the subject matter of the offence is known to the law, the offence may be committed upon it, although the person or being to whom it belongs, may not be known to the law. In such cases, the legal title is not the subject of inquiry. So burglary may be committed upon a house, the legal title to which is vested in a foreign corporation. In such a case, the legal title is not the gist of the offence, nor the subject of inquiry. So of

arson—so of larceny: for although in larceny it is necessary to charge the property to belong to some person who has an interest in it, when such person is known, yet it may be charged to be the property of a person unknown, and it may always be charged as the property of the person whose possession was violated by the larceny; and the actual possession of property belonging to a corporation, must always be in an agent. In case of larceny, therefore, the indictment should always charge it to be the property of the agent. But a cheat is an offence against the person of the *being* who is cheated. The gist of the offence consists in the imposition practised on the understanding or will of the person cheated. The offence cannot, in the nature of things, be committed, unless the person or being cheated exists in contemplation of law; and where there could be no cheat, there can be no conspiracy to cheat. That an indictment for larceny should charge the property to belong to the person whose possession is violated. Vide 2 East. C. L. 652, 653.

If it be true, then, that offences can only be committed through the medium of beings or objects known to the law, the next inquiry is, whether the Bank of the United States is a being known to the common law, for this indictment is at common law. This proposition seems almost too plain for discussion. It is manifest, that the common law cannot recognize the existence of any but natural beings, or beings in *rerum natura*. The Bank is an artificial, political being, created by statute, and dependent on the statute for its existence. It has such capacities and such only, as the statute communicates to it. It has no personal identity; it has neither head nor hands, nor feet nor legs; it can neither read nor write, nor speak nor act, except through the organs of its agents. It cannot be murdered nor robbed, because it cannot be put in fear; nor cheated, for it has no understanding or will. It may own property, by express provision of statute, but it cannot in the nature of things, have the actual possession of that property. It is a mere legal entity. The common law does not recognize the existence of any such being. It is impossible that it should; and the common law cannot therefore take cognizance of an offence against such a being, for it cannot know, that the offence has been committed; and as the court who administers the law, cannot be wiser than the law it

administers, it cannot know either that the Bank has been cheated, or that any conspiracy has been, or could be formed to cheat it.

The true doctrine appears to be this. An offence against or upon the property of a corporation may be punished without the aid of a statute, but an offence against the person, being, or will of a corporation cannot be punished without the aid of a statute. None of the authorities are in conflict with this doctrine. It is believed there is no case in which an indictment for counterfeiting the notes of a bank has been maintained without the aid of a statute, or if there be such a case, the point was not made. The case in 2 Bin. 332, was for passing, and not for counterfeiting the note, and in that case the point was not made.

But even if an indictment for an offence against a corporation created by the government of the state could be maintained, still it will not follow that an indictment for an offence against a corporation created by a foreign government can be maintained. It would be the height of absurdity to say that a foreign government could send a being unknown to the laws of the state, into that state, and that the common law of that state should recognize its existence, and punish those who committed offences against it.

Suppose, France should enact, that monkeys in that kingdom should have the same rights and capacities to receive injuries as human beings, and one of these monkeys should pass into England, and should be killed under such circumstances as would if it had been a human being amount to murder, would the common law of England recognize this monkey as a being upon whom murder could be committed? And if not, how does that case differ from a political being created by a foreign government, and endowed with certain capacities unknown to the laws of another kingdom, being sent into that kingdom or state, and claiming recognition and protection upon the ground of its capacities communicated to it by the creating government? It seems in short a plain absurdity for a code of law to take cognizance of offences against beings unknown to that code, more especially when that being has been created by a foreign government.

But this court has no jurisdiction of the offence charged in this indictment for another reason. The state legislature possesses no visiting power over the Bank of the United States. It

cannot. for any purpose what
bank to exhibit a statement of
the legislature or to its courts of
not do that indirectly which the
If this prosecution is sustained,
to call on the officers of the bank
of the affairs of the bank, and in f
ing power over the bank, not posse
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accounts and entries in the books of
the truth of this charge, the books of th
the whole affairs of the bank must be
which may be very prejudicial to the ban
the State of Maryland to pry into the affa
expose to the public the situation of its affairs?
ture could do no such act itself, and how can the
power over this bank, which the legislature cannot
upon? This bank, neither belongs to the citizens of Ma
nor are the funds or property of the bank within the State,
State therefore, whose power is confined to subjects, and t
subjects matter within the State, has no right to pass a law
which must necessarily affect persons and property without
the territorial limits of the State. This case comes within the
spirit of the decision in the case of the State of Maryland vs.
M'Colloh, in 4 Wheat.