[HIGH COURT OF AUSTRALIA.]

THE KING . . . . . APPELLANT;

AND

WEAVER . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF NEW SOUTH WALES.

H. C. OF A. 1931.

SYDNEY, *April* 29, 30; *June* 22.

Gavan Duffy C.J., Starke, Evatt and McTiernan JJ.

Criminal Law—Conspiracy to cheat and defraud—False pretences—Form of indictment—Determinable by Crown—Overt acts—Particulars—Values—Evidence—Directions to Jury—Verdict of guilty—Appeal to Court of Criminal Appeal—Two accused, appeal by one only—Appellant's conviction quashed—Verdict of acquittal entered—Other accused released by Crown—As to him no further action proposed—Appeal by Crown to High Court—Competency—Determination—New trial warranted, but, in circumstances, not ordered—Crimes Act 1900 (*N.S.W.*) (*No.* 40 *of* 1900), *sec.* 393—*Criminal Appeal Act* 1912 (*N.S.W.*) (*No.* 16 *of* 1912), *sec.* 6 (2).

1. Every kind and description of fraudulent statement, conduct, trick or device by which a party may be induced to part with his property for less than its value or to give more than its worth for the property of another falls within the description of fraud necessary to make criminal a combination to cheat and defraud.

2. A false pretence may suffice to satisfy a charge of conspiracy though the pretence is such that making it would not constitute the statutory crime of false pretences.

3. It is for the Crown to determine what form a prosecution shall take and for the Court to determine whether the charge made has been supported.

4. The *Crimes Act* 1900 (N.S.W.), sec. 393, provides that it is not necessary to state any overt act in an indictment for conspiracy but the Court may order such particulars to be given as to the Court may seem meet:

Held, that it is the duty of the Court trying the indictment to direct precise particulars of the acts relied upon by the Crown to establish the conspiracy charged.

R. v. Partridge, (1930) 30 S.R. (N.S.W.) 410, approved.

H. C. OF A. 1931. THE KING v. WEAVER.

5. The Court of Criminal Appeal directed, pursuant to sec. 6 (2) of the *Criminal Appeal Act* 1912 (N.S.W.), that a conviction for conspiracy against an appellant to that Court be quashed:

Held, that such a judgment and verdict is the determination of a Court of law and not of a jury, and is subject to the appellate power of the High Court.

R. v. Snow, (1917) 23 C.L.R. 256, at p. 261; (1918) 25 C.L.R. 377, followed; *R.* v. *Snow*, (1915) 20 C.L.R. 315, at p. 363, distinguished.

Decision of the Court of Criminal Appeal (N.S.W.), *R.* v. *Weaver*, (1931) 31 S.R. (N.S.W.) 403, in view of the particular circumstances of the case, allowed to stand.

APPEAL from the Court of Criminal Appeal of New South Wales.

George Lynne Weaver and William Clarke Stevens were tried on 24th November 1930 and succeeding days, at the Court of Quarter Sessions, Gundagai, on an indictment in which they were charged that on and after 16th April 1926 at Jugiong and other places in New South Wales they "did amongst themselves with each other and with divers other persons conspire to cheat and defraud Francis Thomas Coggan and divers other persons of divers large sums of money." Particulars of the overt acts relied upon by the Crown were supplied to the accused before the trial, and were as follows:— "The overt acts relied on by the Crown . . . are those disclosed in the depositions, more particularly: (1) All exhibits and writings tendered during the hearing at the Police Court; (2) various visits made to Belmont, Jugiong, on and after 15th April 1926, where sales took place of certain blocks of land in the estates known as Marayong, Walgrove and Lynwood, and all representations made in connection therewith mentioned in the depositions; (3) visit to Great Southern Hotel, Sydney, on 5th August 1930, and all conversations subsequent thereto, inducing Coggan to drop criminal proceedings, (4) various visits made to" certain named persons "and all representations made in connection with the sales of various blocks of land in the aforementioned estates, and such other matters, documents and writings as are necessary to connect and elucidate the above-stated items as set out in the depositions, the Crown, of course, reserving the right to tender further evidence upon due notice." It was shown in evidence that for a period of three or four years commencing April 1926, Weaver and Stevens—

the latter being in receipt from the former of a salary and a commission on sales—were in close and constant association for the purpose of selling land owned by Weaver and situated near Blacktown, New South Wales. The practice of the accused was to visit country people at their homes in distant parts of the State, to whom they stated that having themselves been born in the country they sympathized with country people and wanted them to share in the profits to be made on the sales of the land owned by Weaver. Schemes were propounded to the country people whereby they should buy land from or through Weaver and Stevens and then sell it again within the course of a few months at, so it was stated, prices which would result in a net profit of 100 per cent or more and which would, indeed, make them the wealthiest people in their respective districts. Both the accused on the same and different occasions, and invariably in the presence of each other, stated that the land they had to sell was extremely valuable; that there was a keen demand for the land in question, and that they would resell it, and would guarantee its sale within the course of a few months at huge profits. Representations were made as to existing and prospective improvements on or in the vicinity of the various estates, especially in regard to one estate, of the proposed construction or erection of a speedway and a factory, and, as regards another estate, of a hotel and a dance hall; but the evidence showed that such representations were untrue. Country people were appointed by the accused to act as their representatives in the districts in which the appointees resided, a remuneration of £5 per block of land being promised for each sale recorded within such districts. Evidence was given by a grazier and his wife, who had been so appointed, and who had bought many blocks of land from and paid considerable sums of money to the accused, that whilst on a visit to Sydney the accused had taken them out by motor-car to some land near Blacktown, which Weaver informed them was the Marayong Estate, and during the brief stay of a few minutes only Weaver pointed out where, according to him, it was proposed to build a railway station, and the speedway and factory above referred to, but no signs of any preliminary work were noticed. Regard was expressed by the accused for the interests of the children of some of

H. C. OF A. 1931.

THE KING v. WEAVER.

the country people so visited, and "special" blocks were reserved for them on the condition that the parents should contribute in cash two-thirds of the value fixed by the accused, which condition was complied with, quick returns in respect of such blocks being promised. Bad investments these people had made in shares were to be met by investment in the land offered by the accused. Contracts procured by misrepresentation on the part of others were to be set aside and the moneys paid thereunder recovered and more land purchased from the accused. The evidence showed that a large number of blocks of land were sold, for which the purchasers paid some £20,000 to the accused although according to the evidence such land was of small value and there was little, if any, demand for it. Promises made by the accused to purchasers that they would resell the land at "handsome profits" were not kept, not one resale being effected.

In the course of his summing up to the jury the Chairman of Quarter Sessions, Judge *Coyle*, said :—"In this case the conspiracy charged is apparently that these two men put their heads together, . . . and started out deliberately into the country for the purpose of cheating and defrauding various people . . . of large sums of money by reason of a sort of false pretence, coupled in many cases by a false promise ; getting into their confidence by all the arts of a confidence person, and having obtained their confidence selling them land at a value which, the Crown states, they, at that time, knew was not of that value ; and furthermore inducing them to buy at an extravagant value, giving them a promise that within a short time—two or three months—they would either sell the property or hand them back their money, that is to say, cancel the contract. . . . On the question of their combining the Crown alleges that these two men made up their minds. There are circumstances from which they ask you to come to the conclusion that they did make up their minds to go forth, and by trick or confidence or whatever you may call it, compel, or urge—or whatever the term may be—induce these various people to believe that land that they said was worth £150 or £200—that that was the actual value of it—and by that means to do at the least a civil wrong. It has been pointed out to you, gentlemen, that there must necessarily be a criminal wrong. Conspiracy can lie if two people combine to do a civil wrong to a

particular person, and it has been said that two people may combine and be party to do an act which an individual may not be criminally liable for. There is the case, gentlemen, and with the directions that I have given you, will you please consider your verdict."

Both the accused were found guilty, and were sentenced to imprisonment with hard labour, Weaver for a term of five years and Stevens for a term of two years.

Weaver appealed to the Court of Criminal Appeal against his conviction and sentence on the grounds (*inter alia*) that the trial Judge (1) did not direct the jury (a) as to what constituted cheating and defrauding in respect of the sale of land, (b) as to the effect of the knowledge or otherwise of the accused of the falsity of the representations, and (2) did not properly instruct the jury as to the real issues that arose from the indictment. A report was made by the trial Judge in which he stated (*inter alia*) :—" The evidence, in my opinion, shows Weaver to have been a very suave confidence trickster, who, with his companion Stevens, had obtained thousands of pounds from trusting people by the sale at extravagant prices of practically worthless land. Misrepresentation was made as regards a speedway being built particularly, besides other false statements. It was one of the most glaring instances of what is known as 'go-getting' that I have known. . . . In some instances, land was stated to be worth £200 per block, and at the time of sale Weaver would promise to sell it in two or three months at 20 per cent profit, or cancel the contract. By this means a sale was effected, and as a matter of fact the land was never sold or the contract cancelled. These matters were placed before the jury, together with Weaver's denial that he ever mentioned the worth of blocks."

The Court of Criminal Appeal allowed the appeal, quashed Weaver's conviction and directed that a verdict of acquittal be entered in respect of him : *R.* v. *Weaver* (1).

The judgment of the Court, which was delivered by *Ferguson* J., contained (*inter alia*) the following :—" There was evidence upon which it was open to the jury to find that the prices paid for the land were far in excess of its real value, and that buyers were misled by fraudulent misrepresentations as in matters of fact

(1) (1931) 31 S.R. (N.S.W.) 403.

H. C. OF A. 1931.

THE KING v. WEAVER.

affecting its value. . . . The offence, if any, was a conspiracy to obtain money by false pretences, and it is necessary to bear in mind that the essence of such a conspiracy is not the making of the false representation itself, but the agreement to make it. As there was no direct evidence of such agreement, it might be proved, as in the ordinary case of prosecution for conspiracy, by inference from the acts of the accused. . . . If both the accused were not guilty of false pretences, there is no evidence upon which they could properly be convicted of the conspiracy charged against them. It became necessary, then, for the prosecution, in the first place, to establish beyond reasonable doubt that each of the accused had made, or was a party to, some specific representation of fact made with intent to defraud, which, to his knowledge, was false. This would have been sufficient to justify his conviction on a charge of false pretences, but that was not the offence with which he was charged. . . . Where a charge against several persons of conspiring to commit a crime can be made out only by proof that they have, in fact, committed that crime, in common fairness they should be charged with the specific crime, and not with conspiring to commit it. . . . The Crown, however, having laid the charge in this way, as it was legally entitled to do, the question now for the Court is whether any ground has been shown why the conviction upon it should not be allowed to stand. It was essential that it should be made clear to the jury what facts should be proved before they could find the accused guilty. Had the applicant alone been charged with false pretences, it would have been left to the jury to say whether it had been proved to their satisfaction that this or that specific representation had been made by him, that it was false, and false to his knowledge. Had Stevens been tried alone, there would have been a similar direction in his case. The fact that they were tried together, not for false pretences but for conspiracy which could be proved only by proving false pretences, did not deprive them of the right to have that part of the case presented with, at least, as much particularity and precision. In my opinion this was not done. The careful summing-up of the learned Chairman of Quarter Sessions proceeded largely upon the assumption that the

essence of the charge was that the accused had made misrepresentations as to the value of the land. In that, I think, with respect, that he was wrong, for the reasons I have given. Our attention has been drawn, however, to passages in the evidence which might have justified the jury in coming to the conclusion that the appellant, and possibly Stevens, had each been guilty of wilfully false representations as to specific matters of fact affecting the value of the land. But there was nothing to indicate to the accused that that was the case they had to meet. There was nothing to show the jury that those were the matters upon the consideration of which their verdict should be based. It is quite possible, and, I think, probable, that they acted upon the view that the charge was made out if it was proved to their satisfaction that advantage had been taken of the gullibility of buyers to induce them to give extravagant prices for the land."

Stevens, who had not appealed, was subsequently released by the Crown.

From the decision of the Court of Criminal Appeal the Attorney-General for New South Wales now, by special leave, appealed to the High Court on the grounds (*inter alia*) that the Court of Criminal Appeal was in error in holding that if both the accused were not guilty of false pretences there was no evidence upon which they could properly be convicted of the conspiracy charged; that the Court should have held that no substantial miscarriage of justice occurred; and that it was in error in holding that the conspiracy charged could be proved only by proving false pretences against the accused.

Other material facts appear in the judgments hereunder.

Loxton K.C. (with him *McMinn*), for the respondent. There is a preliminary objection to this appeal being proceeded with. The Crown's right of appeal in this matter has been extinguished. Upon the Court of Criminal Appeal allowing the present respondent's appeal and quashing his conviction, the Crown released also the person who had been convicted of conspiring with him, and such person cannot again be placed upon his trial. The right to appeal

H. C. OF A. 1931. THE KING v. WEAVER.

did not exist at the time of the application for special leave to appeal (*Loughnan* v. *Haji Joosub Bhulladina* (1)).

[GAVAN DUFFY C.J. In view of the fact that the Court of Criminal Appeal ordered and directed a judgment and verdict of acquittal to be entered, can any further proceedings be taken? (See *R.* v. *Snow* (2).)

[STARKE J. referred to *Musgrove* v. *McDonald* (3); *Baume* v. *The Commonwealth* (4); *The Commonwealth* v. *Brisbane Milling Co.* (5).

[EVATT J. referred to *Secretary of State for Home Affairs* v. *O'Brien* (6).]

According to the official papers the Crown stated that the matter was a nullity and that a release ought to take place.

Weigall K.C. (with him *Kinkead*), for the appellant. No question arises as to the Crown's right or power to re-arrest after release: such re-arrests have been effected many times (*R.* v. *Grills* (7); *R.* v. *Finlayson* (8); *R.* v. *Eyles* (9); *R.* v. *Judd* (10)). The other person convicted with the respondent was released under the *Fines and Penalties Act* 1901 (N.S.W.). Where the Court of Criminal Appeal has made an order that a verdict be entered, this Court has power to make any order that the Court of Criminal Appeal ought to have made. The question as to re-arrest need not arise (*Director of Public Prosecutions* v. *Christie* (11)).

[EVATT J. Under sec. 24 of the *Criminal Appeal Act* 1912 (N.S.W.) the Crown must apply for a stay of proceedings before the release of a successful appellant.]

The release of a prisoner does not prevent this Court from granting special leave to appeal (*Attorney-General (N.S.W.)* v. *Jackson* (12)).

[*Loxton* K.C. That case was decided prior to the passing of sec. 24 of the *Criminal Appeal Act* 1912.]

The observance of the provisions of sec. 24 is not a condition precedent to the institution of an appeal. Such provisions are intended to meet the case where the Crown thinks a person will

(1) (1851) 7 Moo. P.C. 373, at p. 381; 13 E.R. 923, at pp. 926, 927.
(2) (1915) 20 C.L.R. 315.
(3) (1905) 3 C.L.R. 132.
(4) (1906) 4 C.L.R. 97.
(5) (1916) 21 C.L.R. 559.
(6) (1923) A.C. 603.
(7) (1910) 11 C.L.R. 400.
(8) (1912) 14 C.L.R. 675.
(9) (1917) 23 C.L.R. 1.
(10) (1919) 26 C.L.R. 168.
(11) (1914) 10 Cr. App. R. 141.
(12) (1906) 3 C.L.R. 730.

not answer his bail. As to the Court entering a verdict of acquittal, see sec. 6 of the Act.

[STARKE J. referred to *R.* v. *Snow* (1).]

Assuming that there is no appeal from the verdict of a jury; in this case the jury did in fact convict, which conviction was set aside by the Court of Criminal Appeal. Similar facts were present in *Attorney-General* (*N.S.W.*) v. *Jackson* (2), but the High Court dealt with the appeal nevertheless.

[GAVAN DUFFY C.J. Is not the order of the Court of Criminal Appeal similar in nature to the direction of a trial Judge to a jury to find a verdict?]

The position is covered by *Attorney-General* (*N.S.W.*) v. *Jackson* (2); see also *R.* v. *Boston* (3).

GAVAN DUFFY C.J. The Court will reserve its decision on this point, and will hear argument on the merits of the case.

Weigall K.C. (with him *Kinkead*), for the appellant. The two accused could not have been convicted of obtaining money by false pretences. The judgment of the Court of Criminal Appeal unduly restricts the right of the Crown to take proceedings in case of cheating and defrauding (*R.* v. *Hudson* (4), which was followed in *Scott* v. *Brown, Doering, McNab & Co.* (5)). Whilst the judgment of the Court of Criminal Appeal stands, a trial Judge will be unable, in cases where the charge is conspiracy to cheat and defraud, to direct the jury to convict if the evidence be such as would support a charge of false pretences. (See also *R.* v. *Gunn and Howden* (6) and *R.* v. *Partridge* (7).) As to the summing-up the substantial question is: Was the case properly left with the jury? (See *R.* v. *Grills* (8).) "Puffing" does not apply where there is a false statement of fact (*R.* v. *Nathan and Harris* (9)).

The evidence amply shows that as to values and prices the accused had made false statements of fact. A defence of "puffing" must

(1) (1915) 20 C.L.R. 315; (1917) 23 C.L.R. 256; (1918) 25 C.L.R. 377; (1919) 26 C.L.R. 506.
(2) (1906) 3 C.L.R. 730.
(3) (1923) 33 C.L.R. 386.
(4) (1860) 8 Cox Cr. Ca. 305; Bell 263; 169 E.R. 1254.
(5) (1892) 2 Q.B. 724, at p. 733.
(6) (1930) 30 S.R. (N.S.W.) 336.
(7) (1930) 30 S.R. (N.S.W.) 410.
(8) (1910) 11 C.L.R. 400.
(9) (1909) 2 Cr. App. R. 35.

H. C. OF A. 1931.

THE KING v. WEAVER.

have some limits imposed upon it. On the question whether the jury should have been directed on this point, it is material to ascertain whether the verdict of the jury was perverse or not (*R.* v. *McManus* (1)). If a matter is properly before a jury, even if only pointed out by counsel, a Court of appeal will not interfere (*R.* v. *Quinn* (2) ; *R.* v. *Murray* (3)). In *Murray* v. *The King* (4) this Court refused an application for special leave to appeal from the decision of the Full Court of the Supreme Court of Victoria. A " summing-up " is not a lecture on law, but is merely a pointing out of material features. Non-direction is not misdirection. It is for the Crown to determine with what offence an accused person shall be charged and the Courts should deal with the charge as so laid. The practice obtaining in New South Wales is not to join any other counts with conspiracy charges (see *R.* v. *Luberg* (5)). The only offence here is a conspiracy ; that is, a conspiracy together to do something which is a moral wrong, and unless conspiracy be charged the offence cannot be adequately dealt with. The judgment of the Court of Criminal Appeal should not be allowed to stand (*R.* v. *Hudson* (6)). The jury could not reasonably have come to the conclusion that the accused came by the money honestly.

Loxton K.C. (with him *McMinn*), for the respondent. The other accused was merely a salaried employee of the respondent and in no way benefited by sales of the land, and there is no evidence to show that he had any knowledge that the statements complained of, if made, were false. The evidence of the Crown's principal witness shows that long after he had been shown over the land referred to he continued to buy and sell allotments thereon and earned large sums of money as commission, and it was not until after the lapse of three or four years that he made any suggestion as to deceit. Assuming that the representations were made as alleged, such a case is the very one in which a charge of false pretences should be laid. On a fair reading of its judgment the Court of Criminal Appeal dealt with the facts of this particular case and what was reasonable to

(1) (1930) 30 S.R. (N.S.W.) 262, at p. 264.
(2) (1911) 6 Cr. App. R. 269.
(3) (1924) V.L.R. 374, at p. 383 ; 46 A.L.T. 35, at p. 39.
(4) (1924) 35 C.L.R. 596.
(5) (1926) 19 Cr. App. R. 133.
(6) (1860) Bell 263 ; 8 Cox Cr. Ca. 305 ; 169 E.R. 1254.

be done having regard to the way the case was conducted. No exception can be taken to representations as to value when such representations are made by the vendor: such value is a mere matter of opinion. "Puffing" is not limited by a question of degree. It is an exaggeration of the value of the commodity then being dealt with, and is not ordinarily, a misstatement of an existing fact. It is not fraudulent for a vendor to speak in most exaggerated terms of an article he desires to sell (*Halsbury's Laws of England*, vol. xx., p. 670, par. 1634; *Webster* on *Conditions of Sale*, 3rd ed., pp. 14-18). A statement by a vendor as to value is a mere expression of opinion, and the principle is that purchasers ought not to be deceived by such statements (*Bellairs* v. *Tucker* (1); *Kerr* on *Fraud and Mistake*, 6th ed., pp. 53 *et seqq.*). Assuming all the representations as capable of being taken as statements of fact, they were simply expressions of opinion as to future probabilities (*Bisset* v. *Wilkinson* (2)). The attention of the trial Judge was drawn specifically to the distinction between "puffing" statements and statements of fact (*R.* v. *Levine and Wood* (3)). As to the ingredients necessary to constitute conspiracy, see *R.* v. *Warburton* (4). The decision in *R.* v. *Partridge* (5) was in accordance with decided cases and practice. Accused persons should know clearly what particular offence or offences they are charged with, and in matters of this nature full and complete particulars of the overt acts relied upon by the Crown should be communicated to the accused at the earliest possible moment before the trial. The summing-up does not give any indication as to what guided the jury in arriving at its verdict. It is the duty of the trial Judge to direct the jury in such a way that it has a clear idea of all material issues and matters in the case. The jury should have been directed (*inter alia*) that inferences of guilt should not be drawn from exaggerated statements unless such statements were statements of fact. Values are purely questions of opinion, and regard must be given to differences in the economic and other relevant conditions prevailing at the time the representations were alleged to have been made, and at the time of the trial; in this case a period of some years intervened. To take advantage

(1) (1884) 13 Q.B.D. 562, at pp. 571 *et seqq.*
(2) (1927) A.C. 177.
(3) (1867) 10 Cox Cr. Ca. 374.
(4) (1870) 1 C.C.R. 274, at p. 276.
(5) (1930) 30 S.R. (N.S.W.) 410.

H. C. OF A. 1931. THE KING v. WEAVER.

of the gullibility of the public is neither a civil wrong nor a criminal wrong. In his summing-up the trial Judge referred to a civil wrong but did not define such a wrong. The accused Stevens was, as already stated, merely an employee of the respondent, and he derived no benefit from the sale of the land. The evidence fails to show that Stevens knew anything as to the value of the land or that statements said to have been made by the respondent were untrue. The onus of proof of knowledge is upon the Crown, and such onus has not been discharged.

Weigall K.C., in reply.

GAVAN DUFFY C.J. In this case we are of opinion that the order of the Court of Criminal Appeal should stand, but we do not agree with the reasons stated in the judgment of that Court. We think that the trial miscarried, and will at a later date give our reasons for so holding.

Cur. adv. vult.

June 22. The following written judgments were delivered :—

GAVAN DUFFY C.J., STARKE AND MCTIERNAN JJ. George Lynne Weaver (the appellant) and William Clarke Stevens were charged on indictment, in New South Wales, with conspiracy to cheat and defraud one Coggan, and divers other persons, of divers large sums of money. They were convicted, but the conviction of Weaver was quashed on his appeal to the Court of Criminal Appeal, which ordered and directed that a judgment and verdict of acquittal be entered (*Criminal Appeal Act* 1912, sec. 6 (2)). Stevens did not appeal, and his conviction still stands upon the records of the Court of Quarter Sessions holden at Gundagai. The Attorney-General of New South Wales, pursuant to special leave, brought an appeal to this Court against the judgment of the Court of Criminal Appeal. The appeal was dismissed, and we intimated that we would give reasons for this decision on a later day.

Before dealing with the substance of the appeal, some matters referred to during the argument must be mentioned. One affects the competency of the appeal. As already observed, the Court of

Criminal Appeal directed the entry of a verdict of acquittal, and it was said that such a verdict is final and conclusive. No doubt a verdict of acquittal given by a jury on a sufficient indictment in a purely criminal trial conducted by a competent Court is final (*R.* v. *Snow* (1)). But the decision of the Court of Criminal Appeal quashing a conviction and entering judgment and verdict of acquittal is a determination of a Court of law, and not of a jury, and has been regarded in this Court as subject to the appellate power (*R.* v. *Snow* (2); cf. *R.* v. *Ball* (3)). Another affects the form of indictment. Under the *Crimes Act* 1900, sec. 393, it is not necessary to state any overt act in an indictment for conspiracy, but the Court may order such particulars to be given as to the Court may seem meet. Particulars were given in this case, No. 1 was as follows :— " All exhibits and writings tendered during the hearing at the Police Court." Such a particular is indefensible and should not have been allowed. More than once the learned Judges of the Supreme Court of New South Wales have said that accused persons are entitled to and should be furnished with the precise particulars of the overt acts relied upon by the Crown to establish the conspiracy charged, so that there may be clearly defined issues before the Court and the jury (*R.* v. *Partridge* (4)). In this we entirely agree. The particular cited above, and indeed, all the particulars given under the indictment in this case, should have been struck out at the trial, and the Crown compelled by the Judge trying the indictment to give, clearly and unequivocally, the acts relied upon to establish the charge against the accused. The matter is within the control of the Judge before whom an indictment comes for trial. If the Crown fails to give proper particulars, then the Judge can adjourn the trial until it does so, and if he thinks fit bail the accused.

Again, the learned Judges of the Supreme Court of New South Wales, following the opinions of some learned Judges in England, have said that where facts intended to be submitted to a jury to establish a conspiracy to commit a crime establish the actual commission of the crime, then the proper course is to charge the parties with the commission of the crime, and not with conspiring to commit it (*R.*

(1) (1915) 20 C.L.R., at p. 363.
(2) (1917) 23 C.L.R., at p. 261; (1918) 25 C.L.R. 377.
(3) (1911) A.C. 47, at pp. 69, 70, 72.
(4) (1930) 30 S.R. (N.S.W.) 410.

H. C. OF A. 1931.

THE KING v. WEAVER.

Gavan Duffy C.J. Starke J. McTiernan J.

v. *Partridge* (1); *R.* v. *Gunn and Howden* (2); *R.* v. *Selsby* (3)). It is a matter of opinion whether charging a conspiracy in such a case is satisfactory or not, but undoubtedly it is legal. It is entirely a matter for the law officers of the Crown to determine the form of prosecution, and for the Court to determine whether the charge made had been supported. In the case now before us the law officers exercised a wise discretion in the form of charge adopted. It was a charge of conspiracy to cheat and defraud. But it has been held in modern times that a false pretence may suffice to satisfy a charge of conspiracy though the pretence is such that making it would not constitute the statutory crime of false pretences (*R.* v. *Hudson* (4); *Scott* v. *Brown, Doering, M'Nab & Co.* (5); *R.* v. *Warburton* (6); *Wright, Law of Criminal Conspiracies* (1873), pp. 34-35). It is not necessary, nor, perhaps, possible, to state exhaustively the description of fraud necessary to make criminal a combination to cheat and defraud: it is enough to say that every kind and description of fraudulent statement, conduct, trick, or device by which a party may be induced to part with his property for less than its value, or to give more than its worth for the property of another certainly falls within the description of fraud necessary to make criminal the combination to cheat or defraud. Thus it is a criminal conspiracy to cheat and defraud if two or more persons combine to defraud others by means of false accounts, fabricated shares, false representations or conduct, or fraudulent betting (*R.* v. *Warburton*; *R.* v. *Mott* (7); *R.* v. *Esdaile* (8); *R.* v. *Timothy* (9); *R.* v. *Orman and Barker* (10)). Of course, as *Willes* J. said in *R.* v. *Bryan* (11), if the misrepresentation was a simple commendation of goods, if it was a mere "puffing" of articles offered for sale, the case would easily be disposed of by a jury, acting as persons of common sense and knowledge of the world (cf. *R.* v. *Levine and Wood* (12)). But if statements known to be untrue are made with intent to defraud

(1) (1930) 30 S.R. (N.S.W.), at p. 414.
(2) (1930) 30 S.R. (N.S.W.), at p. 345.
(3) (1847) 5 Cox Cr. Ca. 495, at p. 497.
(4) (1860) 8 Cox Cr. Ca. 305.
(5) (1892) 2 Q.B., at p. 733.
(6) (1870) 1 C.C.R. 274.
(7) (1827) 2 Car. & P. 521; 172 E.R. 236.
(8) (1858) 1 F. & F. 213; 175 E.R. 696.
(9) (1858) 1 F. & F. 39; 175 E.R. 616.
(10) (1880) 14 Cox Cr. Ca. 381.
(11) (1857) 7 Cox Cr. Ca. 312, at p. 323.
(12) (1867) 10 Cox Cr. Ca. 374.

another of his property or money, then a fraud is committed, and a combination to effect such a fraud is indictable as a conspiracy.

The facts proved in the present case afforded ample evidence of a conspiracy on the part of the accused to cheat and defraud divers persons of large sums of money. It is a disgraceful story, and too long for full repetition here. In outline it is as follows :—The two accused, in close and constant association, introduced themselves to country people, as sympathizers with them, desirous that they should share in profits to be made on the sales of subdivided suburban properties near Sydney in New South Wales. They appealed to their cupidity by unfolding a scheme whereby the country people should buy land from or through them and then sell it again and thus double their money, and, indeed, become the wealthiest people in the South of New South Wales. They said that they had valuable land for sale, that there was great demand for this land, and that they could resell it, and would guarantee its resale in a very short time, at huge profits. Confidential relations were established by the appointment of country people as representatives in the district in which they lived, and promising them remuneration on land there sold. Anxious regard for the interests of the country people's children was expressed, and "choice blocks" were reserved for them and quick returns promised. Bad investments these people had made in shares were to be met by investment in the land offered by the accused. Contracts procured by misrepresentation on the part of others were to be set aside and the moneys paid thereunder recovered and more land purchased from the accused. Thus it is deposed that the accused Weaver said :—"I will get those contracts set aside that you signed and the return of your £1,300, even if it costs me £1,000. I am that sure of getting you out of that, I will give you a receipt for the £1,300 you have lost, and you need not repay me until the contract is set aside and your £1,300 returned."

Amazing as it may seem, the accused, by means such as these, sold a large number of blocks of land to confiding country people, and procured from them some £20,000. Evidence was led which, if believed, established that the lands were of small value, and that there was little, if any, demand for them.

H. C. OF A. 1931.

THE KING v. WEAVER.

Gavan Duffy C.J. Starke J. McTiernan J.

There was ample evidence, fit to be submitted to a jury, that the accused conspired together to cheat and defraud, and, unfortunately, succeeded in cheating and defrauding, many country people. A jury had no doubt that they did so conspire, and found them guilty of the offence. But the charge to the jury of the learned Judge who tried the case is imperfect, and the conviction cannot, in our opinion, be sustained. The opening words of the charge might suffice, but for the concluding passage of the charge: "In this case the conspiracy charged is apparently that these two men put their heads together, . . . and started out deliberately into the country for the purpose of cheating and defrauding various people . . . of large sums of money by reason of a sort of false pretence, coupled in many cases by a false promise; getting into their confidence by all the arts of a confidence person, and having obtained their confidence selling them land at a value which . . . they, at that time, knew was not of that value; and furthermore inducing them to buy at an extravagant value, giving them a promise that within a short time —two or three months—they would either sell the property or hand them back their money, that is to say, cancel the contract." Those introductory words of the learned Judge to the jury do not emphasize as clearly as is desirable that the essence of the matter is the agreement of the accused by means of false and fraudulent statements, conduct and devices to induce persons to buy land at more than its worth and thus cheat and defraud them. The concluding passage of the charge is as follows:—"On the question of their combining the Crown alleges that these two men made up their minds. There are circumstances from which they ask you to come to the conclusion that they did make up their minds to go forth, and by trick or confidence or whatever you may call it, compel, or urge—or whatever the term may be—induce these various people to believe that land that they said was worth £150 or £200—that that was the actual value of it—and by that means to do at the least a civil wrong. It has been pointed out to you, gentlemen, that there must necessarily be a criminal wrong. Conspiracy can lie if two people combine to do a civil wrong to a particular person, and it has been said that two people may combine and be party to do an act which an individual may not be criminally liable for. There is the case, gentlemen, and

with the directions that I have given you, will you please consider your verdict." This passage is obscure. The expression "civil wrong" is undefined, and the direction wholly fails to state the essence of the charge, namely an agreement, by means of fraudulent statements, conduct, tricks and devices, to obtain the money of divers persons and to defraud them of it. It is consistent with the passage that the crime is complete though the agreement to do a civil wrong involved no such fraudulent means. Consequently we agree with the result reached by the Supreme Court that the conviction cannot stand.

But there is power under the *Criminal Appeal Act* to order a new trial, and the question arises whether that power should now be exercised. The conviction of Weaver was quashed by the Supreme Court on his appeal, and the Crown authorities, on that judgment being given, also released Stevens, and do not now propose that the judgment and sentence upon him should be executed. Further, the fair and proper conduct of the trial was rendered most difficult by the improper and inadequate particulars of overt acts delivered by the Crown. In all the circumstances it is undesirable that one only of the two accused should be subjected to a new trial, and consequently the order of the Court of Criminal Appeal will stand.

EVATT J. The respondent, Weaver, was the owner and vendor of certain blocks of land near Blacktown, New South Wales. The land was subdivided. Weaver and his employee Stevens then set forth to sell the blocks to persons living in country districts situated at a great distance from Blacktown. Their methods of business led to investigation, and ultimately they were tried at Gundagai Quarter Sessions before his Honor Judge *Coyle* and a jury. The charge was conspiracy to cheat and defraud Francis Thomas Coggan and divers other persons of large sums of money. They were both convicted, but Weaver alone appealed. The learned Chairman of Quarter Sessions reported to the Court of Criminal Appeal (constituted by the Supreme Court of New South Wales) in the following terms :—

> "The trial lasted eight days. The evidence in my opinion shows Weaver to have been a suave confidence trickster, who, with his companion Stevens, had obtained thousands of pounds from trusting people by the sale at extravagant prices of practically worthless land. Misrepresentation was made

H. C. OF A. 1931. THE KING v. WEAVER. Evatt J.

as regards a speedway being built particularly, besides other false statements. It was one of the most glaring instances of what is known as 'go-getting' that I have ever known."

The Supreme Court quashed the conviction of Weaver and directed the entry of a judgment and verdict of acquittal. From that judgment the Crown appeals to this Court in pursuance of special leave. An analysis of the judgment of the Supreme Court will show that it proceeds upon certain propositions which I think it convenient to set out in the following order :—

1. The offence charged against Weaver and Stevens (conspiracy to cheat and defraud purchasers) was not distinguishable from that of a conspiracy to obtain money by false pretences, that is, to commit the crime of false pretences.
2. On the facts of the present case unless both of the accused were guilty of false pretences there was no evidence upon which they could properly be convicted of the conspiracy charged.
3. Where a charge against several persons of conspiracy to commit a crime can be made out only by proof that they have in fact committed that crime, they should, as a matter of common fairness, be charged with the specific crime and not with conspiracy to commit it.
4. The fact that Weaver and Stevens were tried together, not for false pretences but for conspiracy which could be proved only by proving false pretences, did not deprive them of the right to have the case against them presented by the trial Judge to the jury with at least as much particularity as if the two had been charged with false pretences.
5. The summing-up of the Chairman of Quarter Sessions proceeded largely upon the assumption that the charge being made was that the two accused had made representations as to the value of the land in order to take advantage of the gullibility of buyers and thus had obtained extravagant prices.
6. The assumption made was erroneous although there was evidence that the buyers were misled by fraudulent misrepresentations as to specific matters of fact affecting the value of the land sold.

The relevance of propositions Nos. 2, 3 and 4 depends largely on the validity of proposition No. 1, so that it is necessary to consider the nature of the crime of conspiracy to cheat and defraud in relation to the crime of obtaining money or goods by false pretences.

The law of criminal conspiracy is of comparatively modern growth. During the 17th century the Court of Star Chamber acted as "the curious eye of the State and the King's Council prying into the inconveniences and mischiefs which abound in the Commonwealth." (*Hudson*, quoted by *Holdsworth*, 37 *Law Quarterly Review*, p. 466). For the Court of King's Bench having first "asserted itself as a rival of the Star Chamber" (*Wright, Law of Criminal Conspiracies*, p. 9) by assuming and exercising a criminal jurisdiction over a very wide area of subject matter, had, by the end of the 17th century, successfully converted to its own use many of the doctrines of "Criminal Equity" which had been administered in the Star Chamber before its abolition. "Although," said the Court of King's Bench in 1664, "there was not now a Star Chamber, still they would have him know that this Court is *custos morum* of all the subjects of the King" (*Wright*, p. 9).

The same point of view is evident in many of the declarations of the Courts of common law in the 18th century. In 1727 Sir *Phillip Yorke* (as he then was) successfully argued that the King's peace might be broken by an act offending merely against morality where the public in general were affected. In 1773 Lord Chief Justice *Mansfield* who was greatly influenced by the opinions of Lord *Hardwicke* said :—

> "Whatever is *contra bonos mores et decorum*, the principles of our law prohibit, and the King's Court, as the general censor and guardian of the public manners, is bound to restrain and punish" (*Wright*, p. 9).

In this development, the old crime of conspiracy diverges from its original application, which was to cases of abuse of process, until we find in the law some approximation to the dictum of Hobbes that "all uniting of strength by private men is if for evil intent unjust; if for intent unknown, dangerous to the Publique, and unjustly concealed." At any rate it is an established fact that during the 18th century the procedure by indictment for conspiracy was "applied to combinations for a great variety of purposes made criminal" by the adoption and recognition of principles of general morality and honourable conduct (*Wright*, p. 9).

H. C. OF A. 1931.

THE KING v. WEAVER.

Evatt J.

It is not possible, of course, entirely to account for what is a peculiar growth in the evolution of this doctrine in the common law Courts. There was certainly enough in the 17th and 18th centuries to create in those in authority a wholesome distrust of persons acting in combination. Moreover, the inadequacy of the police system seems to have been appreciated by the Judges as requiring sure punishment for detected combinations thought to be hurtful to the public. This emphasis on "public interest" and "public policy" has had a wide influence upon the law of conspiracy. "And just as in the law of contract there is a legitimate use of this doctrine, so there is a legitimate use for it in the criminal law. In both cases it is used legitimately to strike at practices and courses of conduct which are contrary to the established principles of the common law and obviously dangerous to the State. In both cases, because it is an elastic doctrine, it gives the law a power of so developing its principles as to keep in touch with the needs and ideas of the age." This opinion of Professor *Holdsworth* (37 *Law Quarterly Review*, p. 467) is well illustrated by the history of the law of conspiracy to cheat. And that history assists greatly in determining the validity of the main proposition of law contained in the judgment under review.

At common law, an individual who cheated by using false weights or measures, which were known as "public tokens," was guilty of an indictable offence. The "cheat" was punished because it was of a public nature, and the possession and use of the false tokens indicated a general desire to defraud. By such a public token "the public in general may be imposed upon without any imputation of folly or negligence" (*East, Pleas of the Crown* 1803, p. 820).

The common law sanction proved insufficient and, as a supplement, there was passed the statute 33 Hen. VIII. c. 1. This Act made punishable in an individual the use of "a false privy token." The statute recited the cunning of light and evil disposed persons in refraining from getting goods by stealth and so rendering themselves liable to suffer death, and who, in order to obtain goods, had "imagined privy tokens, and counterfeit letters in other men's names." The statute proceeded to prohibit the use "by colour and means of any such false token or counterfeit letter made in any other

man's name " to a special friend or acquaintance for the obtaining of money from such person.

The crime thus newly created consisted in the use of a " false privy token," which meant some real visible mark or thing as a key or ring, or writings in the name of a third person, " whereby some additional credit may be gained to the party using them." From the nature of the false public token punishable at common law when used by an individual for the purpose of fraud, and of the false privy token the use of which was made punishable by the statute of Henry VIII., it would seem to follow that the obtaining of money or chattels by an individual merely by means of untrue or fraudulent statements of fact or intention was not within the reach of the criminal law. This conclusion seems to have been gradually adopted and recognized in the eighteenth century by the Courts of common law. The *Statute of False Pretences* (30 Geo. II. c. 24) was not passed until 1757 in order " to protect the weaker part of mankind." It was subsequently extended by 52 Geo. III. c. 64 in 1812 so as to include the obtaining of choses in action as well as of goods or money, and, in substance, the felony of false pretences referred to in sec. 179 of the New South Wales *Crimes Act* 1900 is the crime created by the statutes of 1757 and 1812.

So far, reference has been made to the punishment of cheats committed by an individual, but it is also clear that, before the Act of 1757, conspiracies to cheat were punished by the King's Courts. These conspiracies were punished although

(i.) there was no user proved of false public tokens (punished in an individual at common law) or false privy tokens (punished in an individual by the statute of Henry VIII.) and

(ii.) the statutory offence of false pretences had not been created and the combination was, therefore, to commit an act which was not a crime in an individual at all and

(iii.) what was agreed to be carried out would not have been punishable in an individual even if the *Statute of False Pretences* had been in force.

If the decided cases and authorities bear out the three points I have just stated, the validity of the first and main proposition of the judgment of the Supreme Court is directly affected.

H. C. OF A. 1931. THE KING v. WEAVER. Evatt J.

In *R.* v. *Jones* (1) an individual was indicted for obtaining £20 from J. D. by falsely pretending that he had been sent by J. S. to get £20 for his use. *Holt* C.J. said:—"It is no crime unless he came with false tokens. Shall we indict one man for making a fool of another? Let him bring his action." This is a typical case of conduct made criminal 54 years afterwards in the *Statute of False Pretences*. No proof was given of the use of false tokens either public or private.

R. v. *Orbell* (2) was an important decision given in the following year. The indictment was that the accused "fraudulently, and *per conspirationem*, to cheat J. S. of his money, got him to lay a certain sum of money upon a foot-race, and prevailed with the party to run booty." In this case the Court would not quash the indictment "for they said, that being a cheat, though it was private in the particular, yet it was publick in its consequences."

The point of *Orbell's Case* (2) lies in the conspiracy between the accused and the foot-runner to cheat the prosecutor of his money. It is certainly no case of (a) a cheat punishable in an individual at common law, or by the Statute of Henry VIII., or (*b*) what was later the crime of false pretences.

R. v. *Mackarty* (3) is also relevant. It was a case of two persons carrying out a fraud by bartering certain wine for a quantity of hats of the prosecutor on the representation that the wine was "good and new Lisbon wine." One person pretended to be a merchant of London dealing in wine, the other said that he was a London broker. The indictment charged that the defendants "together . . . did the acts," in form a joint offence, but also in substance a conspiracy. The 1803 edition of *East* (p. 824) treats the true point of the judgment given in favour of the Crown as resting on conspiracy. The individuals were apparently free of the net set for individuals by the common law or the Statute of Henry, the representations made resting entirely upon the assertions of the two accused.

East's view, though not universally accepted (36 *Law Quarterly Review* p. 375), seems to be borne out by *R.* v. *Bryan* (4). There the attempt of a woman to obtain goods on a false pretence was held to

(1) (1703) 2 Ld. Raym. 1013; 92 E.R. 174.
(2) (1704) 6 Mod. 42; 87 E.R. 804.
(3) (1705) 2 Ld. Raym. 1179; 92 E.R. 280.
(4) (1730) 2 Stra. 866; 93 E.R. 902.

be not punishable. The Court referred to *Mackarty's Case* (1) in the following way: "There the conspiracy was the crime; and an indictment will lie for that, though it be to do a lawful act." Bryan, however, had committed "no more than telling a lie, and no instance being shown to maintain it." The indictment in *Mackarty's Case* is fully set out in *Lord Raymond's Reports* (2); and there are imputed to the defendants "fictitious assumptions, personatings, and deceits."

The first case of importance, after the *Statute of False Pretences* was passed in 1757, is *R.* v. *Wheatly* (3), where the defendant was indicted for knowingly selling amber-beer short of the just and true measure. Lord *Mansfield*, presiding over the Court, emphasized the negligence and carelessness of the prosecutor in not measuring the beer upon receipt, but distinguished a case "if there be a conspiracy to cheat: for ordinary care and caution is no guard against this" (4). *Denison* J. said (5) that *R.* v. *Mackarty* (1) included a conspiracy and *Wilmot* J. boldly enunciated a principle (he declared) "which will solve them all":—"That in such impositions or deceits where common prudence may guard persons against the suffering from them, the offence is not indictable . . . but where false weights and measures are used, or false tokens produced, or such methods taken to cheat and deceive, as people can not, by any ordinary care or prudence be guarded against, there it is an offence indictable" (6). In *Wheatly's Case* there was no indictment for false pretences under the statute recently passed, but the Court seems to have recognized that a conspiracy to cheat was punishable because it was impossible to guard against its success by ordinary care and prudence.

In 1716 *Hawkins* had defined cheating as consisting in "any deceitful practice in defrauding, or endeavouring to defraud a man of his known right by some artful device notoriously contrary to the plain rules of common honesty." There is no doubt that the definition was too wide in its application to cheats made punishable

(1) (1705) 2 Ld. Raym. 1179; 92 E.R. 280.
(2) (1705) 3 Ld. Raym. 325; 92 E.R. 713.
(3) (1761) 2 Burr. 1125; 97 E.R. 746.
(4) (1761) 2 Burr., at p. 1127; 97 E.R., at p. 748.
(5) (1761) 2 Burr., at p. 1128; 97 E.R., at p. 749.
(6) (1761) 2 Burr., at p. 1129; 97 E.R., at p. 749.

H. C. OF A. 1931.

THE KING v. WEAVER.

Evatt J.

in individuals, and *East* accordingly criticizes it from that point of view. *Harrison*, however, in his work on *Conspiracy* (1924), at p. 21, says that a " combination to cheat within the meaning of this " (i.e. *Hawkins'*) " definition was, of course, a criminal conspiracy, and several cases of such conspiracies are on record." The foot-running case (*Orbell*) (1) is (he says) a good illustration of such a conspiracy. The edition of *East* published in 1803 states that in order to constitute a cheat at common law " it must be such as affects the public; such as is public in its nature, calculated to defraud numbers, to deceive the people in general. And this is instanced . . . by precedents of cheats effected by conspiracy, to which may be added forgery, which are in themselves substantive offences, though the cheats thereby intended be not fully carried into effect " (p. 816). *East* illustrates this position from the punishment inflicted at common law on the use of false weights and measures " which are known public tokens." " These betoken a general design to defraud; . . . the public in general may be imposed upon without any imputation of folly or negligence " (p. 820). Cheats in their nature private have, it is added, been adjudged indictable at common law " but upon examination they will either appear to be founded in conspiracy or forgery ; or as in some of the instances . . . to implicate considerations of public justice, public trade, or public policy " (p. 823).

Curwood's 8th edition of *Hawkins*, published in 1824, in the main adopts *East's* criticisms, and says that for an individual to procure goods by a " mere naked lie " is not cheating ; and adds, too hopefully, that although the cases where cheats in individuals for the use of private tokens are founded either in conspiracy or forgery at common law, " the examination is now of no great importance, since the extension of the law by the subsequent statute of 30 Geo. II. c. 24 enlarged by 52 Geo. III. c. 64 " (p. 318 (n.), *Hawkins*, 8th ed., 1824).

R. v. *Hevey* (2) was a case of uttering a bill of exchange on the false assertion that one of the defendants was the person to whom the bill was payable and by whom it was indorsed. The judgment is based not on forgery but on conspiracy to defraud. It is noticeable

(1) (1704) 6 Mod. 42 ; 87 E.R. 804. (2) (1782) 1 Leach 229 ; 168 E.R. 217.

that no reliance is placed on the *Statute of False Pretences* although the evidence would have supported such a case. The truth seems to be that the words of the statute "who knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons, money, goods, wares or merchandizes, with intent to cheat or defraud any person or persons of the same," were regarded as being capable of far too wide an interpretation. The Courts seem to have been loath to punish a man who, for example, bought goods not intending to pay for them "by a false pretence of his ability and intention to pay." "This is closely analogous," says *Stephen*, "to the element of public harm involved in the definition of cheating. A mere lie told with an intent to defraud, and having reference to the future, is not treated as a crime. A lie alleging the existence of some fact which does not exist is regarded as a crime if property is obtained by it" (*Stephen, History of the Criminal Law of England*, vol. III., p. 161). Hence *Adolphus* in "The Circuiteers" attributes to *Lewin* (the reporter of the Crown Cases of that name) the question :—

> "Tell me the difference first, 'tis thought immense,
> "Betwixt a naked lie and false pretence."

The famous case of *R.* v. *De Berenger* (1), where false rumours of the death of Napoleon had been spread in pursuance of a design of certain persons to raise the price of the public funds, may be regarded from one aspect as a conspiracy to defraud the purchasers. *Dampier* J. certainly pointed out (2) that the means used—the spreading of false rumours—were "wrong," and the object in view—the giving of a false value to a public or vendible commodity to the injury of the purchasers—was also "wrong." Yet neither the means nor the end in themselves were strictly unlawful. It is as a conspiracy to defraud or cheat that Lord *Esher* treated *De Berenger's Case* in *R.* v. *Aspinall* (3).

R. v. *Pywell* (4) was a case before Lord *Ellenborough* of a conspiracy to cheat by selling an unsound horse by false warranties. An acquittal was directed, and the case has sometimes been relied upon for the view that a combination to cheat by the mere use of false

(1) (1814) 3 M. & S. 67; 105 E.R. 536.
(2) (1814) 3 M. & S., at p. 77; 105 E.R., at p. 540.
(3) (1876) 2 Q.B.D. 48.
(4) (1816) 1 Stark. 402; 171 E.R. 510.

H. C. OF A. 1931.

THE KING v. WEAVER.

Evatt J.

warranties is not indictable. The true ground of the decision appears to be that one of the two defendants in *Pywell's Case* (1) was not proved to be a party to the design, Lord *Ellenborough* stating that " No indictment in a case like this could be maintained, without evidence of concert between the parties to effectuate a fraud " (2). *Pywell's Case*, if it means more than this, cannot be regarded as good law. (*R.* v. *Carlisle* (3).)

In *R.* v. *Kenrick* (4) there was proof that A and B conspired to make a false representation (knowing it was false) that certain horses sold to the purchaser had belonged to a private person and not to a horse dealer. In the course of argument Lord *Denman* C.J. pointed out that a conspiracy to " cheat and defraud " were words " known to the law " (5) and distinct from conspiracy to obtain goods by false pretences. The Court held that the same evidence was sufficient to sustain convictions for (1) conspiracy to cheat and (2) obtaining money by false pretences.

In *R.* v. *Yates* (6) the indictment alleged a conspiracy " by false pretences and subtle means and devices " to extort money from T. E. and cheat and defraud him thereof. No evidence amounting to a false pretence was given but it was held that the allegation " by false pretences " could be treated as surplusage, *Crompton* J. stating that the gist of the offence was the conspiracy to injure.

In *R.* v. *Carlisle* (7) there was an agreement by false representations to induce the seller of a horse to abate part of his purchase price. No actual obtaining of any money resulted from the fraud but the agreement was held indictable. " I am not aware," said *Crompton* J. in the course of argument (8), " that there is any case which goes so far as expressly to decide that a conspiracy to misrepresent the value of goods, as between buyer and seller, would not be an indictable offence."

The impossibility of a purchaser's obtaining a civil remedy for misrepresentations made in pursuance of an agreement is not in itself an answer to a case of a conspiracy to cheat. *R.* v. *Timothy* (9)

(1) (1816) 1 Stark. 402; 171 E.R. 510.
(2) (1816) 1 Stark., at p. 403; 171 E.R. at p. 511.
(3) (1854) Dears. 337, at p. 342 (a); 169 E.R. 750, at p. 753.
(4) (1843) 5 Q.B. 49; 114 E.R. 1166.
(5) (1843) 5 Q.B., at p. 59; 114 E.R. at p. 1170.
(6) (1853) 6 Cox Cr. Ca. 441.
(7) (1854) Dears. 337; 169 E.R. 750.
(8) (1854) Dears., at p. 341; 169 E.R., at p. 752.
(9) (1858) 1 F. & F. 39; 175 E.R. 616.

shows this, because, the false representation as to solvency being oral, Lord *Tenterden's* Act made the ordinary civil remedy impossible. *R.* v. *Esdaile* (1) (the case of the directors of the Royal British Bank) is an example of an indictment for conspiracy to defraud by false representations to the effect that the Bank was in a sound and solvent condition.

R. v. *Hudson* (2) is a very important and typical case of a conspiracy to cheat. The conspirators induced a yokel to bet upon what was in fact a certainty, by tempting him to try and cheat one of the conspirators. By means of a device the event was indeed a certainty but in the contrary direction. The case is not one of false pretences at all. *Blackburn* J. (as he then was) pointed out that the prisoners cheated the prosecutor into believing that he was going to be the biter when in fact he was going to be bitten (3). The Court clearly regarded the "false pretence" assigned in the indictment as part of the means employed to cheat as being quite distinct from the statutory crime of that name. In *Scott* v. *Brown, Doering, McNab & Co.* (4) *A. L. Smith* L.J. relied on *R.* v. *Hudson* for the proposition that "false pretences," if mentioned as an ingredient in a conspiracy to cheat, "do not mean such false pretences as would support an indictment for obtaining money or goods by false pretences".

R. v. *Lewis* (5) was the mock auction case, with sham bidders and goods "vamped up" but far different in quality to that represented. The indictment was for (i.) conspiracy to defraud and (ii.) false pretences. *Willes* J. allowed evidence to be given that the price paid for articles in the auction room by purchasers was £8 and £10, whereas the real value (according to expert evidence of tradesmen in the town) was £4 13s. 6d. and £4 8s. 6d. respectively. The argument for the accused was not dissimilar to much that was urged on the question of value during the course of the present appeal. What took place (it was said) was only a misrepresentation of value and not of specie. It was a mere puffing of value. The goods delivered after sale were of the same general character as that

(1) (1858) 1 F. & F. 213; 175 E.R. 696.
(2) (1860) Bell. 263; 8 Cox Cr. Ca. 305; 169 E.R. 1254.
(3) (1860) Bell, at p. 267; 8 Cox Cr. Ca., at p. 307; 169 E.R., at p. 1256.
(4) (1892) 2 Q.B., at p. 733.
(5) (1869) 11 Cox Cr. Ca. 404.

H. C. OF A. 1931.

THE KING v. WEAVER.

Evatt J.

described. *Willes* J. withdrew the count of false pretences but allowed the conspiracy count to remain. He directed that the jury might convict if they found an agreement to put off goods at prices grossly higher than the defendants knew they were worth, inducing the belief that everything was genuine.

In *R.* v. *Warburton* (1) *Cockburn* C.J. for the Court of Crown Cases Reserved said that in a conspiracy to cheat it was not necessary that the acts agreed to be done should themselves be criminal, and it was sufficient if they would amount to a civil wrong. The combination of two or more to injure another by such fraudulent practices as would give the latter an equitable remedy would attract the sanction of the criminal law of conspiracy. *R.* v. *Warburton* is an established and binding authority.

In *R.* v. *Aspinall* (2), a case of a fraudulent company promotion, *Brett* J.A. (as he then was) said that "An agreement made with a fraudulent or wicked mind to do that which, if done, would give to the prosecutor a right of suit founded on fraud, or on violence exerted on or towards him, is a criminal conspiracy." It was fraudulent against the purchaser of a vendible commodity to raise the price of it by fraudulent falsehoods. *R.* v. *De Berenger* (3) should be regarded from such aspect, and shares of public companies were in the same position as Government stock. An agreement to give fictitious or unreal value to shares by transactions not representing any real or genuine desire to buy was within the principle, and might amount to a conspiracy to cheat.

Scott v. *Brown, Doering, McNab & Co.* (4) is also an important case. The Court of Appeal treated as a conspiracy to defraud an agreement to purchase shares in a new company so as to induce purchasers to believe, contrary to the true position, that there was a bona fide market and shares were at a real premium. *Lindley* L.J. said (5) that, although the purchase was an actual and not a sham purchase, the sole object of it was to cheat and mislead the public into the belief that the shares had a value. *A. L. Smith* L.J. referred (6) with approval to *Hudson's Case* (7) in the manner previously described.

(1) (1870) 1 C.C.R. at p. 276.
(2) (1876) 2 Q.B.D., at p. 59.
(3) (1814) 3 M. & S. 67; 105 E.R. 536.
(4) (1892) 2 Q.B. 724.
(5) (1892) 2 Q.B., at p. 729.
(6) (1892) 2 Q.B., at p. 733.
(7) (1860) Bell 263; 8 Cox Cr. Ca. 305; 169 E.R. 1254.

A long line of decisions has been traced because of the tendency to identify a conspiracy to cheat with a conspiracy to commit the crime of false pretences. No doubt the judgment of the Supreme Court was largely affected by the simplicity of the rule which would be applicable on the hypothesis of this identity. Moreover, in a number of cases, the view has been expressed by Judges of the Supreme Court that the use of the indictment of conspiracy to cheat was accompanied by unfair heaping together of evidence by the Crown, by the failure to give proper particulars, and often by proof of substantive criminal offences on the part of one or more of the individuals jointly indicted for conspiracy.

There is, however, a vital distinction between a conspiracy to cheat and a conspiracy to obtain money by false pretences. The latter conspiracy is a conspiracy to commit a crime. The former conspiracy is proved by showing an agreement to do certain acts of a fraudulent or dishonest character which, if done, would enable the person defrauded to succeed in obtaining a civil but not necessarily a criminal remedy. It is occasionally said to be an illogical and surprising feature of the law that an individual may do certain acts without criminal liability attaching to him, whereas a criminal conspiracy arises if two persons agree to do those very same acts; but if the result surprises, it is certainly not illogical. For conspiracy consists in the making of an agreement. The nature and quality of the agreement determine its legality or criminality, and there is no logical reason why certain agreements should not be struck at by the criminal law. What an individual may of himself lawfully do is nothing to the point. One thing he can never do—of himself—is to make any agreement.

Turning now to the propositions laid down by the Supreme Court, proposition 1 is, in my opinion, erroneous. As long ago as 1890 it was accepted law that "Beyond all question there are, as the law now stands, some cases where an indictment for a criminal conspiracy may be maintained, although if the purpose of the conspiracy were carried into effect, no indictment would lie against any individual for anything done in pursuance of the combination" (6 *Law Quarterly Review*, p. 131). One of the best instances of this general statement is the case of a conspiracy to defraud. Proposition No.

H. C. OF A. 1931.

THE KING v. WEAVER.

Evatt J.

2 is based upon the hypothesis that the Crown had to prove both the accused guilty of false pretences, and this hypothesis is unsound. The third proposition is not one of law but of policy. It is a matter for the exercise of discretion by the Crown Authorities. It may be observed, however, that the suggestion of unfairness has no necessary application to a conspiracy to cheat. In order to prove a conspiracy to cheat, evidence may be led which incidently tends to show the commission or the attempted commission by one or more of the accused of the crime of false pretences. As it is not necessary, however, that such crime should be proved as an ingredient in a conspiracy to cheat, the comment of the Supreme Court has not the force it might otherwise have where what is charged and has to be proved, is an agreement to commit a crime.

It must not be forgotten in matters of this kind that grave abuses are associated with the practice of what is called "go-getting," where vendors or agents send out persons to work in teams in order to compel and to coerce members of the public to buy land of little or no value, at extravagant prices, and often situated at distant or inaccessible places. It is possible that this practice may be conducted without dishonesty, fraud or criminality, but many cases which have reached the Courts during the past ten years have shown that the practice is constantly associated with fraud of a serious description. Often the success of the fraud depends upon the salesmen selling in association. It is well known that two or three are able to effect a cheat or a fraud where one by himself is powerless to do so. This fact has, in the past, been a feature of many cheats, including the sale of worthless animals and worthless goods.

It may, therefore, be essential for the proper administration of justice that, where the Crown Authorities consider frauds to have resulted from the agreement of two or more persons to sell worthless land, or worthless company shares, or worthless goods, the indictment for conspiracy to cheat should be used, even though it may reveal the commission or attempted commission of the crime of false pretences by one or more of the accused. If the agreement which can be inferred from the acts of the accused is to do acts which would enable purchasers to rescind their contracts because of

the deceitful practices employed, or to succeed in an action of deceit at law, then the conspiracy has been established. It does not lie in the mouth of one of the accused to complain that it may incidentally be proved that he has also committed or attempted to commit the statutory felony of false pretences.

At the same time, where the indictment of conspiracy is used, proper particulars of the overt acts relied on should be given. A mere reference to depositions taken upon the preliminary magisterial inquiry will seldom be sufficient. I have known cases where these depositions contained hundreds of pages, and something more specific than such reference is required in order to enable the Judge presiding at the subsequent trial to rule on questions of the admissibility of evidence, and to instruct the jury on the questions for their consideration. The tendency of legislation in New South Wales and elsewhere has been to do away with the necessity of giving anything in the nature of particulars in the indictment itself. The formal charge to which the accused pleads becomes more and more general and vague, as witness the indictment in the present case. It has statutory warrant and it cannot be criticized with any advantage. But the Courts have jurisdiction to order particulars, and, as Lord *Denman* C.J. pointed out some ninety years ago, " the expedient now employed in practice, of furnishing the defendants with a particular of the acts charged upon them, is probably effectual for preventing surprise and unfair advantages " (*R.* v. *Kenrick* (1)).

Proposition No. 4 in the judgment of the Supreme Court is also based upon the assumption that it was necessary for the Crown to prove that both Weaver and Stevens were guilty of the crime of false pretences. Propositions Nos. 5 and 6 really amount to the view that the learned Chairman of Quarter Sessions in his charge to the jury failed to direct that it was necessary to establish against the accused acts amounting to the crime of false pretences. Upon this assumption, there was, in the opinion of the Supreme Court, misdirection as well as failure to direct.

It is the first or root proposition of the judgment under appeal which is not correct in point of law. The Supreme Court appears

(1) (1843) 5 Q.B., at pp. 61-62; 114 E.R., at p. 1171.

H. C. OF A. 1931.

THE KING v. WEAVER.

Evatt J.

to have entertained the opinion that a case of false pretences might have been presented successfully against one or both of the accused, but, as this was never suggested at the trial or put to the jury, the verdict of guilty could not stand; moreover, it would not have been of any use to order a new trial on the charge of conspiracy, consequently a judgment of acquittal was entered.

Whilst I am of opinion that the basis upon which the judgment of the Supreme Court proceeded is erroneous, the question still remains whether the trial itself did not miscarry. Inasmuch as no definite particulars of the overt acts, relied upon by the Crown to prove the conspiracy, were before the learned Chairman of Quarter Sessions, his summing-up was necessarily a task of special difficulty. But counsel for the accused from an early stage of the trial made submissions to the effect that a misrepresentation of the value of the land sold could not serve as evidence to support a charge of conspiracy to defraud, or, if it could, such evidence was of a special character and it was essential to point out to the jury the distinction between mere puffing or exaggeration and fraudulent misrepresentation.

Undoubtedly the case was largely dependent upon the decision of the jury as to what was said to prospective purchasers by the accused upon the subject of the value of the blocks of land which were being offered for sale.

It is extremely important to disabuse over-enthusiastic persons of the notion that they are able to escape the clutch of the criminal law by confining their misrepresentations to statements as to the value of land offered for sale. No doubt the view often entertained is that in making such statements all that is being done is to express an opinion. It is apparently believed by those engaged in land deals of a dishonest or doubtful character that, so long as they confine their representations to statements of land value, they are safe.

Leaving out of consideration *mere* puffing or *mere* exaggeration, in which the representor does not condescend to any definite statements of value, the first essential is to ascertain the meaning of the words used and the representations made. That meaning may be affected to some extent by the means of knowledge and the relative positions of the persons concerned. To say that land "is

worth £20 per foot, but you may have it for £2 per foot," may mean (1) that the land offered possesses an actual value of £20 per foot or (2) that in the opinion of the seller the land being offered has such value. Even in the second case—a representation as to opinion—there may be implied a representation that there are facts in existence which justify the expression of the opinion (*Bisset* v. *Wilkinson* (1)).

Passing by such question of implied representation contained in the statement of opinion itself, and confining attention to the two main types of representation set out, it will be for the jury to determine in the circumstances of each case what was the meaning conveyed by the statements made.

In the first type, representation as to value is definitely objective in character. The Crown must prove (often no doubt by expert evidence) that the actual value of the land was not as represented, but it is not essential that actual knowledge of the untruth of the representation as to objective value should be proved. If the representation is false, it may be shown to have been intentionally made, without belief in its truth, and with a dishonest indifference to its truth or falsehood. The conduct of two or more persons may, in the circumstances, justify an inference that the representations were made in pursuance of an agreement to ascribe a value to the land which it did not possess, and made without the slightest regard to the truth or otherwise of the statements of objective value to be asserted. Such an agreement is a criminal conspiracy to defraud because, if carried into effect, the persons injured could obtain civil relief either at law or in equity.

In the second type, the representation is of a subjective character, purporting to express the opinions of the seller. If the inference may be drawn from the evidence that the opinions were not really held by the seller expressing them, the untruth of the representations made is established. And if the actual salesmen are the parties charged with conspiracy the same inference shows that the representations were made fraudulently. It will then be for the jury to determine whether the misrepresentations made were made in pursuance of prior agreement.

(1) (1927) A.C. 177.

H. C. OF A. 1931.

THE KING v. WEAVER.

Evatt J.

In cases such as the present, statements as to value may present a double aspect. The Crown may desire both phases to be presented to the jury, and the latter may thereupon be directed that a conspiracy to cheat or defraud will be established if they infer from the facts either (1) an agreement to secure purchasers by making statements as to the market value of land offered for sale, such statements being untrue in fact and intended to be made, either with knowledge of their untruth, or with indifference to their truth or falsehood, or (2) an agreement to make or cause to be made statements of opinion as to the value of the land, such opinions, to the knowledge of the parties to the agreement, not being entertained by the persons alleged to hold them, or (3) an agreement combining the features of (1) and (2). Whether these alternative instances of conspiracy should be presented will usually depend upon the case opened and particularized by the Crown.

The two kinds of conspiracy, or rather the two species of the same kind of conspiracy, must be dissevered for the purpose of analysis and direction to the jury. The facts in most cases of "value" representations, however, will often establish a conspiracy to cheat and defraud answering to both the descriptions I have indicated.

I might add that, if one accepted the view of Dr. *Harrison* that a conspiracy to cheat exists when there is an agreement to do acts coming within *Hawkins'* original definition of cheating, the two described species of conspiracy to defraud by "value" misrepresentations might not constitute the whole even of such limited genus. *Brett* J.A.'s observation in *R.* v. *Aspinall* (1), "There may be and probably are others," might be in direct point. It is clear, however, that the two instances discussed are those most likely to be met with in practice.

In the present case I think the learned Chairman of Quarter Sessions should, in the circumstances, have emphasized and distinguished the two aspects of conspiracy discussed, for they were certainly both presented by the evidence of statements made by the accused as to the value of the land sold. Moreover, there was evidence of a further type of conspiracy to cheat by making false statements not as to the value of the land but as to certain

(1) (1876) 2 Q.B.D., at p. 59.

matters of fact the existence of which might have affected the value of the land in the estimate of a prudent purchaser. This third aspect of the case also required special consideration and treatment.

At the commencement of the summing-up his Honor said :—

"In this case the conspiracy charged is apparently that these two men put their heads together, as has been said, and started out deliberately into the country for the purpose of cheating and defrauding various people who have been brought before you (Coggan in particular) of large sums of money by reason of a sort of false pretence, coupled in many cases by a false promise ; getting into their confidence by all the arts of a confidence person, and having obtained their confidence selling them land at a value which, the Crown states, they, at that time, knew was not of that value ; and furthermore *inducing them to buy at an extravagant value*, giving them a promise that within a short time—two or three months—they would either sell the property or hand them back their money, that is to say, cancel the contract."

In this passage I think that the words italicized by me in the last sentence were calculated to mislead.

Subsequently, emphasis was again laid on the question of the value of the land. Finally his Honor said :—

"On the question of their combining the Crown alleges that these two men made up their minds. There are circumstances from which they ask you to come to the conclusion that they did make up their minds to go forth, and by trick or confidence or whatever you may call it, compel, or urge—or whatever the term may be—induce these various people to believe that land that they said was worth £150 or £200—that that was the actual value of it—and by that means to do at the least a civil wrong."

The last passage should have been accompanied by a direction as to what would have constituted a "civil wrong." What was, no doubt, present to his Honor's mind was proof of the common law ingredients of the tort of deceit, or of such fraudulent misrepresentation as would be sufficient to obtain relief in equity. But the jury were not instructed as to these ingredients, and they cannot be presumed to have known them. After the summing-up was concluded, Mr. *Holman* asked for a specific direction as to what false representations would be required to obtain a civil remedy, but nothing further was added by his Honor.

In the circumstances, therefore, the Supreme Court was justified in quashing the conviction. Had the learned Judges not taken the view they did upon the more fundamental question already discussed, a new trial would probably have been ordered. But judgment of acquittal was entered and Weaver was immediately released. So

H. C. OF A. 1931.

THE KING v. WEAVER.

Evatt J.

also was Stevens, who did not appeal against his conviction. During the application for special leave to this Court, emphasis was laid by the learned Solicitor-General upon the embarrassment to the Crown resulting from the opinion of the Supreme Court as to the identity between a conspiracy to cheat and a conspiracy to commit the crime of false pretences. It was stated that the Crown anxiously desired a decision from this Court upon this important question of law. It was also said that in no case would criminal proceedings for the same transactions be taken against Stevens.

In view of all these circumstances the opinion has been arrived at by this Court that it would not be proper to order a new trial for conspiracy to defraud as against Weaver alone.

A question was raised during the appeal as to whether it was competent for the High Court to hear appeals from judgments of the Supreme Court of a State directing the entry of a verdict of acquittal in criminal cases, pursuant to State Acts which give a right of appeal from a jury's verdict of guilty. I am of opinion that the High Court has jurisdiction to hear appeals from such judgments of the Supreme Court of a State. The verdict of acquittal entered by the Supreme Court as a Court of Criminal Appeal, whatever it may be in point of form, differs greatly in substance from an original verdict of a jury to whom an accused person has been given in charge upon an indictment and who have acquitted. The jury's verdict of not guilty has a special constitutional finality and sanctity which are always regarded as an essential feature of British criminal jurisprudence.

The legal position, as I appreciate it, may be summarized as follows :—

(1) The High Court has jurisdiction to hear and determine appeals from judgments of the Supreme Courts of a State (sitting as Courts of Criminal Appeal), notwithstanding that such judgments direct the entry of a verdict of acquittal in place of the jury's verdict of guilty.

(2) The offence of conspiring to cheat and defraud purchasers of land is quite distinct from the offence of conspiracy to obtain money from such purchasers by false pretences, and many of the legal considerations applicable to the former offence have little or no application to the latter.

(3) A conspiracy to cheat and defraud may be established by proof of an agreement to do acts in relation to purchasers of land which, if done, would enable the latter to obtain civil relief on the basis of fraud either at law or in equity.

(4) It is true that the legal result of proposition 3 is that the law punishes the parties to an agreement to do certain things although, if those things were done by an individual without prior agreement, he would not be exposed to punishment; but this result follows because the law of criminal conspiracy attaches its sanction to certain agreements as such, and agreements require the assent of at least two persons.

(5) It is clear from the history of the crime of conspiracy to cheat and defraud that, early in the 18th century, the English common law Courts had finally decided, in accordance with a principle of public policy adopted from the practice of the Court of Star Chamber during the 17th century, that a number of combinations (including a combination to cheat) were punishable as conspiracies and the gist of the offence lay in the combination itself.

(6) From early in the 18th century an agreement to cheat was punished as a conspiracy although

(a) there was no agreement to use or actual user of "false public tokens" (the use of which was punishable in an individual as a common law "cheat"), and

(b) there was no agreement to use or actual user of "false privy tokens" (the use of which was punishable in an individual by the statute of 33 Hen. VIII. as a "cheat"), and

(c) the statute of 1757 creating the offence of "false pretences" had not been passed, and

(d) even had such statute been in force, what was agreed to be done by the conspirators would not have come within the statute.

(7) There is thus a definite historical basis for propositions 2, 3 and 4, *supra*, and their validity is also supported by an analysis of the cases decided during the 19th century.

(8) It is true that the evidence given in the course of a particular case of conspiracy to cheat and defraud may incidentally prove or tend to prove the commission by one or more of the accused of

H. C. OF A. 1931.

THE KING v. WEAVER.

Evatt J.

the felony of false pretences. But the evidence is not inadmissible on that account, and it is entirely a matter for the discretion of the Crown Authorities whether or not a charge of false pretences is to be laid against the individuals concerned, in addition to or in lieu of the indictment for conspiracy to cheat and defraud.

(9) In New South Wales, there is statutory warrant for the absence from the formal indictment in conspiracy cases of particulars of the overt acts relied upon. There is a greater reason therefore for the exercise by the criminal Courts of their undoubted jurisdiction to order such particulars at or before the trial. A mere reference to the depositions of witnesses taken at the preliminary ministerial inquiry by a magistrate, will seldom suffice for this purpose.

(10) A conspiracy to cheat and defraud may, in cases otherwise appropriate, be based upon evidence of misrepresentation as to the value of land or other property offered for sale. In such cases convictions may lawfully proceed upon a finding by the jury that

(a) there was an agreement to ascribe to the property offered for sale an actual value, the representations being untrue in fact and the parties to the agreement either knowing of such untruth or (being unaware of their truth or untruth) agreeing to ascribe value, not caring whether the representations were true or false, or

(b) there was an agreement that statements of opinion as to actual value were to be made, merely as expressions of opinion of salesmen (including parties to the agreement), who, to the knowledge of the parties to the agreement, did not in fact hold such opinions.

Because of the special circumstances already referred to, the order of the Supreme Court stands.

In the circumstances the order of the Court of Criminal Appeal allowed to stand.

Solicitor for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors for the respondent, *T. Marshall, Marks & Jones.*

J. B.