# The Law Commission

**Working Paper No 63**

## Codification of the Criminal Law

## Conspiracies to effect a public mischief and to commit a civil wrong

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# CONSPIRACIES TO EFFECT A PUBLIC MISCHIEF AND TO COMMIT A CIVIL WRONG

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# CONSPIRACIES TO EFFECT A PUBLIC MISCHIEF AND TO COMMIT A CIVIL WRONG

## I INTRODUCTION

1. Within the last twelve months, the Law Commission has published a series of working papers[1] which have been concerned principally with an examination of those types of conspiracy having an unlawful but non-criminal objective. These working papers considered in detail the implications of the provisional proposal of the Law Commission's Working Party[2] on the general principles of the criminal law that conspiracy should for the future be confined to agreements which have as their object the commission of a crime. Some of the papers have proposed the creation of certain new offences necessary to fill the lacunae which would otherwise be present if the Working Party's proposal were implemented; at the same time proposals have been made for the abolition of other common law offences cognate to the types of conspiracy with which the papers dealt.

2. The present paper is the last in this series, and it examines those types of conspiracy which have not previously been considered in detail. In Working Paper No.

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1. Working Paper No. 54, "Offences of entering and remaining on property"; No. 56, "Conspiracy to Defraud"; No. 57, "Conspiracies relating to morals and decency"; No. 62, "Offences relating to the Administration of Justice".

2. Made in Working Paper No. 50, "Inchoate Offences"; see in particular paras. 8-14.

50[3] the types of conspiracy requiring closer examination were, for convenience, divided into six categories. The first three such categories[4] have already been the subject of working papers in this series.[5] The three remaining consist of conspiracies to effect a civil wrong, conspiracies to injure and conspiracies with a "public element". This paper is therefore concerned, in its first section, with conspiracies having a public element (or conspiracies to effect a public mischief), and in its second section, with conspiracies to effect a civil wrong and conspiracies to injure.

3. A short final section of the paper deals with the doctrine of contempt of statute. This has no direct link with the law of conspiracy, but for reasons given in paragraph 70 it is a subject which we believe is appropriate for consideration in the present context.

## II CONSPIRACIES TO EFFECT A PUBLIC MISCHIEF

### A. Scope of examination

4. The scope of our examination of conspiracies to effect a public mischief is limited by two considerations. In the first place, "public mischief" is a label which has been used frequently to apply to certain other kinds of conspiracy with which we have already dealt. For example, Lord Simon of Glaisdale in Knuller v. D.P.P. considered that conspiracies to corrupt public morals were no more than one form of conspiracy to effect a public mischief[6], while

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3. Para. 7.

4. Conspiracies to defraud, to pervert the course of justice, and conspiracies relating to public morals and decency.

5. See note 1 above.

6. [1973] A.C. 435, 489: see Working Paper No. 57, para. 60.

Lord Hailsham of St. Marylebone L.C. in Kamara v. D.P.P.[7] referred to several species of conspiracy, for example, conspiracies involving fraud and conspiracies to corrupt public morals, as falling within the ambit of conspiracy to effect a public mischief. Indeed, it is fundamental to the decision of the House of Lords in Withers v. D.P.P.[8] that conspiracy to effect a public mischief is not a separate head of conspiracy at all, and that nearly all cases so labelled are in reality examples of conspiracies falling within other long-recognised categories. In this part of the paper, we are, therefore, concerned, not with those conspiracies to effect a public mischief which either overlap or are coincidental with other categories of conspiracy previously examined, but solely with those - if there be any - which do not fall within those categories.

5. The second factor limiting the scope of our examination of conspiracies to effect a public mischief is, of course, the decision of the House of Lords, already mentioned, in Withers. As we explain in more detail hereafter, this decision has had the effect of eliminating conspiracy to effect a public mischief as a separate head of liability. This has removed much of the uncertainty which previously surrounded the use of the term "public mischief" and will enable us to deal with the present legal position at greatly reduced length. The decision will not, however, absolve us of the responsibility of examining what conduct, if any, was previously punishable only by a charge of conspiracy to effect a public mischief; nor will it eliminate the need for us to examine certain still existing common law

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7. [1974] A.C. 104, 122-3: see Working Paper No. 54, para. 23 et seq.

8. [1974] 3 W.L.R. 751: the case is referred to hereafter in the text of this paper as Withers or, where necessary to avoid confusion with the unreported case in 1971 of the same name, Withers (1974).

offences punishable without conspiracy but cognate to the charge of conspiracy to effect a public mischief.

6. The following paragraphs therefore consider in more detail, first, the case of Withers, secondly, the conduct which prior to that case appears to have been punishable only by a charge of conspiracy to effect a public mischief, and thirdly, certain cognate common law offences. In the course of this review, we make provisional proposals for reform and rationalisation in these areas of the law, which are summarised at paragraph 35.

## B. Withers v. D.P.P.[9]

### The facts

7. The appellants ran an investigation agency which obtained information about customers' accounts from banks and building societies, and information from government departments which they were either not entitled to have, or to have only on payment of a fee. They sold the information to those employing them. They were convicted at the Central Criminal Court (the convictions being affirmed by the Court of Appeal)[10] on two counts of conspiracy to effect a public mischief: first, by unlawfully obtaining confidential information from banks by false representations that they were persons authorised to receive such information; secondly, by obtaining such information from central and local government departments by such representations.

### The decision of the House of Lords

8. The House of Lords held unanimously that there was no separate and distinct class of criminal conspiracy

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9. [1974] 3 W.L.R. 751.

10. [1974] Q.B. 414.

to effect a public mischief. They indicated, however, that where a charge of conspiracy to effect a public mischief had been preferred, it was necessary to consider whether the object or means of the conspiracy alleged in the charge were in substance of such a quality or kind as had already been recognised by the law as criminal. On the facts as charged here, it might have been possible for the accused to have been convicted of a conspiracy to defraud on the basis of the test referred to by Lord Radcliffe in Welham v. D.P.P.[11] that the persons deceived were those holding public office or a public authority.[12] But because the issues that the jury would then have had to decide had not been put to them in this case there was no room for upholding the conviction by the application of the proviso to section 2(1) of the Criminal Appeal Act 1968.[13] The appeals were therefore allowed and the convictions quashed.

The speeches in the House of Lords

9. Cases of conspiracy to effect a public mischief decided before 1974 were considered in detail by Viscount Dilhorne and Lord Simon of Glaisdale. Viscount Dilhorne concluded that a number of cases described as conspiracies to effect a public mischief "might have been regarded as coming within well-known heads of conspiracy e.g. conspiracy to defraud, to pervert the course of justice etc."[14] While

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11. [1961] A.C. 103, 124.

12. See [1974] 3 W.L.R. 751 at 759 per Viscount Dilhorne.

13. The section sets out the grounds upon which the Court of Appeal shall allow an appeal, "Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred".

14. [1974] 3 W.L.R. 751 at 759. Viscount Dilhorne referred specifically to Brailsford [1905] 2 K.B. 730, Porter [1910] 1 K.B. 369, Bassey (1931) 22 Cr. App. R. 160, Young (1944) 30 Cr. App. R. 57, Newland [1954] 1 Q.B. 158 and Bailey [1956] N.I.L.R. 15.

it was too late to hold that conspiracies of the kind occurring in those cases were not criminal, judges now had no power to create new offences.[15] Where a charge of conspiracy to effect a public mischief has been preferred, it must be considered whether the object or means of the conspiracy are in substance of such a quality or kind as has already been recognised by the criminal law; if they are, it must be considered on appeal whether the course taken by the trial in consequence of the reference to public mischief was such as to vitiate the conviction.

10. Lord Simon, after examining authorities, concluded, in the first place, that there was no crime in the individual of effecting a public mischief; and that, secondly, recognition of a generic offence of conspiracy to effect a public mischief would amount to acceptance of "a juridical situation the practical effect of which is to permit the forensic creation of new criminal offences or the forensic extension of the ambit of old ones, contrary to what was plainly endorsed in Knuller's case". This would "give an uncontrollable dynamism to this branch of the law."[16] Thus, although at first instance and on appeal the courts were bound by authority to convict, the House was free to declare that the generic offence was not known to the law and should do so. Lord Simon also recognised that there exists a class of conspiracy dishonestly to procure a person charged with a duty to the public to act in derogation of that duty, but unlike Viscount Dilhorne[17] and Lord Kilbrandon he did not favour classifying this as a type of conspiracy to defraud.[18]

11. Lord Reid agreed with Viscount Dilhorne, while Lord Diplock and Lord Kilbrandon in their speeches both referred to

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15. [1974] 3 W.L.R. 751 at 756, citing Knuller [1973] A.C. 435.

16. [1974] 3 W.L.R. 751 at 771.

17. See note 12 above.

18. [1974] 3 W.L.R. 751, 772.

the urgency and necessity of the task undertaken by the Law Commission in making proposals for reform of the law of conspiracy as a whole.[19] Lord Kilbrandon and Lord Diplock also regarded conspiracy to defraud as including conspiracy to deceive public officers into committing a breach of duty; but Lord Kilbrandon was not prepared to accept that the "officials of banks and building societies" referred to in the first count were public officers within the meaning of Welham v. D.P.P.[20]

## C. Conduct prior to Withers punishable only as a conspiracy to effect a public mischief

12. As we have mentioned, the examination of the law of conspiracy in previous working papers in this series makes it unnecessary for us to deal with those well recognised categories of conspiracies to which the House of Lords in Withers assigned many of the reported cases of conspiracy to effect a public mischief. There remains, however, a residue of cases, in the main unreported, to which it is necessary to draw attention; since it may be that as a result of Withers the conduct which they held to be punishable cannot now be the subject of a conspiracy or any other charge. We deal with these in turn under separate headings.

### 1. Obtaining information by deception

13. Five recent cases have dealt with obtaining confidential information by deception or other means. The facts of these cases, in their chronological order, are set out briefly below.

R. v. Tracing Services (Kensington)[21]. The defendants traced missing debtors by means of telephone calls to the Inland Revenue, the employees of the defendants impersonating other

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19. [1974] 3 W.L.R. 751, at 761 and 774.

20. [1974] 3 W.L.R. 751, at 761 (Lord Diplock) and 776 (Lord Kilbrandon).

21. Unrep., Central Criminal Court, 14th February 1969.

officers of the Revenue or of the Ministry of Pensions, or police officers, doctors and other public officials. This consumed the time of the public officials and in some instances the deception caused them to give confidential information which it was their duty not to reveal. Fines of up to £5000 were imposed for conspiracy to effect a public mischief. Some of the defendants' activities would appear to have constituted an offence under section 12 of the Inland Revenue Regulation Act 1890[22], but this is a summary offence with a maximum penalty of three months' imprisonment. It may be that on the facts, a charge of conspiracy to defraud could have been brought, as the facts were very similar to Withers, where the possibility of such a charge was mentioned by the House of Lords.[23]

R. v. Withers (1971)[24]. The defendants were involved in the planting of bugging devices in private bedrooms to obtain evidence in possible divorce proceedings, and with telephone tapping for commercial espionage. They also trespassed in a private residence: after a door was opened to them "four men burst into the house and ran upstairs...." The defendants were found guilty on two counts of conspiracy -

(i) to contravene section 1 of the Wireless Telegraphy Act 1949 by using an unlicensed wireless telegraphy apparatus; and

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22. "If any person not being an officer [of the Inland Revenue] takes or assumes the name, designation, or character of an officer for the purpose of thereby ... doing or procuring to be done any act which he would not be entitled to do or procure to be done of his own authority, or for any other unlawful purpose, he shall be guilty of a misdemeanour ...."

23. See paras. 10-11 above and para. 14 below.

24. Unrep. See The Times, 17 June, 1971. The case involved some of the same defendants as Withers (1974).

(ii) to commit trespass.[25]

Roskill J. commented, when sentencing, "You trespassed far over the line between what is lawful and what is unlawful... I am... dealing with you ...for serious breaches of a citizen's right to privacy in his own house".

R. v. Blackburn (1974)[26]. The defendant pleaded guilty to effecting a public mischief by tampering with Post Office equipment and intercepting, tape-recording and listening to telephone calls made by or to an occupant of a private house. The judge at Leeds Crown Court said that "whatever the legal technicalities, this offence constituted a very serious invasion of privacy".

R. v. Quartermain (1974)[27]. The defendant, a private investigator, pleaded guilty to effecting a public mischief by conspiring to obtain confidential information from government departments, local authorities and the police. The information was obtained from government departments by telephoning and impersonating police officers or public officials. He also pleaded guilty to charges of conspiring to contravene the Wireless Telegraphy Act, perverting justice by constructing false and misleading evidence in divorce cases, and obtaining passports by giving false names. He was sentenced to three years' imprisonment. So far as concerns the obtaining of confidential information, it again seems that a charge of conspiracy to defraud might have been brought.

Withers v. D.P.P. (1974)[28]. This case has been discussed above.[29]

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25. The Commission's Working Paper No. 54, "Offences of Entering and Remaining on Property", makes provisional proposals to deal with this type of case.

26. Unrep. See The Times, 6 June 1974.

27. Unrep. See The Times, 23 and 24 October 1974.

28. [1974] 3 W.L.R. 751.

29. Para. 7 et seq.

14. In Withers (1974), as we have seen,[30] it was assumed by members of the House of Lords that the defendant's conduct would or might have consitiuted a conspiracy to defraud. The same might have been the case in Quartermain and also in Tracing Services (Kensington), where in addition a summary prosecution might have been possible under the Inland Revenue Regulation Act 1890. In the first Withers case, the defendants were found guilty of conspiracy to commit a statutory offence; and, as the law now stands[31], they were probably also guilty of an offence under the Forcible Entry Acts. Other charges involving statutory offences or conspiracy to commit a crime were brought in Quartermain. In these four cases involving obtaining confidential information there was, therefore, the possibility of charging the defendants with offences other than the charges of conspiracy to do a non-criminal act which were in fact brought against them. There appears, however, to have been no possible alternative charge in the telephone tapping case of Blackburn. Telephone tapping in itself is not an offence. There is the possibility of charging an offence under section 13 of the Theft Act 1968 (abstraction of electricity), but this possibility is remote since the amount of electricity abstracted is minute. There is also the possibility of charges under section 5(b) of the Wireless Telegraphy Act 1949 where wireless telegraphy apparatus is used for telephone tapping without authority. Post Office employees are also liable for unauthorised interception or disclosure of telephone messages.[32]

15. In our Working Paper No. 56, "Conspiracy to Defraud", we have put forward provisional proposals for new offences to be used in those instances where the only charge available

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30. See paras. 8, 10-11 above.

31. See Brittain [1972] 1 Q.B. 357; and see Working Paper No. 54, paras. 18-19.

32. See Telegraph Act 1863, s.45, Telegraph Act 1868, s.20, and Post Office (Protection) Act 1884, s.11. See generally, Report of the Committee on Privacy (1972) Cmnd. 5012, Appendix 1, para. 34 et seq.

at present is that of conspiracy to defraud. One of the proposed offences is that of obtaining information by deception. The proposal is cast in alternative forms, one more widely drafted than the other. In its more extended form it involves simply "inducing another by deception to give information, which but for the deception he would not have given". Apropos the offence in this form, we commented[33] -

> "It would not be necessary to show either that there was any element of injury to the community, or even that there was any duty upon the person deceived not to disclose the information. It may be thought that this would penalise too wide a range of conduct. If the offence were cast in the terms of inducing another by deception to give information which it was his duty not to disclose except to those properly entitled to it [this is the narrower form proposed] there would be some limitation upon the extent of the offence; but it could be contended that there is little justification for distinguishing between deceiving a bank manager into disclosing the bank balance of his client and deceiving a person into disclosing his own bank balance."

It is our provisional view that such an offence, whether in the wider or narrower form proposed in Working Paper No. 56, would be adequate to deal with such of the conduct of the defendants in Withers as merited punishment.

16. Telephone tapping was also the subject of comment by the Report of the Committee on Privacy, which made a detailed survey of technical surveillance devices[34]. The Committee recommended the creation of a new offence which would cover the unauthorised use of surveillance devices without the consent of the "victim". In summary form, this

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33. Working Paper No. 56, para. 76.

34. (1972) Cmnd. 5012, para. 501 et seq.

recommendation states that -

> It should be unlawful to use an electronic or optical device for the purpose of rendering ineffective, as protection against being overheard or observed, circumstances in which, were it not for the use of the device, another person would be justified in believing that he had protected himself or his possessions from surveillance whether by overhearing or observation.[35]

In the appendix we set out the relevant paragraphs of the report which deal in more detail with the elements of the proposed offence.

17. It will be seen from the preceding paragraphs that all of the situations where public mischief has until now been used to penalise the obtaining of confidential information are the subject either of existing statutory offences or of proposals made in previous Law Commission working papers or in the Younger Committee Report. The proposals made in our papers are the subject of current consultation. However, we welcome any comments which recipients of this paper may wish to make about those proposals in the present context. Implementation of the recommendations made by the Younger Committee Report lies with the Home Office, and we do no more than draw attention to the existence of this recommendation designed to combat unauthorised use of surveillance devices, which would effectively cover the practice of unauthorised telephone tapping.

2. Causing alarm and false reports

18. The defendant in Manley[36] was convicted of effecting

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35. Ibid., para. 53(i).

36. [1933] 1 K.B. 529.

a public mischief after she had given false information to the police and had thereby wasted their time. The case was the subject of later criticism[37], and in their Report on Felonies and Misdemeanours[38] the Criminal Law Revision Committee recommended the creation of a specific offence to cover the situation typified by Manley. Effect was given to this recommendation in section 5(2) of the Criminal Law Act 1967[39], which creates a summary offence with a maximum penalty of six months' imprisonment and a fine of £200. This subsection has been used in cases of false reports of the planting of explosive devices. Where, however, such reports have amounted to a threat to destroy or damage property, defendants have been indicted under section 2(a) of the Criminal Damage Act 1971, which carries a maximum penalty of ten years' imprisonment[40].

19. Section 5(2) of the 1967 Act can only be invoked where there has been a false report, not necessarily directly to the police, although it must at least be passed to them with the result that their time is wasted[41]. But in some cases in recent years the mischief has been caused, not by a report, but by the actual placing of hoax bombs in the form of parcels, etc., in situations giving rise to public apprehension. Charges of conspiracy to effect a public mischief have occasionally been used in these cases. We describe two cases in which the facts are known to us.

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37. See Newland [1954] 1 Q.B. 158; and see Withers [1974] 3 W.L.R. 751, 757 (per Lord Dilhorne).

38. (1965) Cmnd. 2659, para. 45.

39. "Where a person causes any wasteful employment of the police by knowingly making to any person a false report tending to show that an offence has been committed, or to give rise to apprehension for the safety of any persons or property, or tending to show that he has information material to any police inquiry, he shall be liable...."

40. See e.g. news item in The Times, 30 November 1974, where the defendant Dunn was sentenced to five years' imprisonment at Wakefield Crown Court for making a 999 call alleging that there was a bomb in Wakefield Magistrates' Court.

41. See (1965) Cmnd. 2659, para. 45.

In the case of Chandler,[42] the defendants placed a false but realistic "time bomb" on the pavement of a London street. A passer-by telephoned the police who sealed off the street for three-quarters of an hour while the parcel was examined by a bomb expert. All seven defendants pleaded guilty to conspiracy to effect a public mischief and were given a two year conditional discharge. In Longhurst,[43] a charge of conspiracy to effect a public mischief was brought where three Post Office engineers manufactured an imitation bomb incapable of exploding and placed it in a post office. The police were called and the building cleared. The defendants pleaded guilty and were fined. In neither of these cases, although police time was wasted, was there a false report originating with the defendants.

20. There seems to be no alternative charge which is apt to cover conduct consisting merely of the placing of hoax bombs giving rise to public alarm. It is true that charges have on occasion been brought under the Public Order Act 1936. Thus in a recent case[44] two defendants were sentenced at Manchester City Magistrates' Court to three months' imprisonment for planting a hoax bomb in a crowded wine bar. They were charged under section 5 of the 1936 Act with having "displayed a visible representation, namely a brown paper plastic-taped parcel, which was threatening, whereby a breach of the peace was likely to be occasioned". But it seems to us that this involves a somewhat strained interpretation of the section, which was certainly not designed to combat this particular kind of incident.

21. We believe that the cases described in paragraph 19 disclose what is clearly a genuine gap in the law as it now stands. It is one which, in our provisional view, needs

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42. Unrep., Central Criminal Court, 25 November 1970.

43. Unrep., Central Criminal Court, 3 September 1971.

44. Reported in the Daily Telegraph, 27 November 1974. We are indebted for details of the charge to the Clerk to the Justices, Manchester City Magistrates' Court.

filling. Furthermore, we think that this would best be accomplished by an entirely new offence, rather than by amendment of any existing provision. An essential element under section 5(2) of the Criminal Law Act 1967 is that police time be wasted. It also requires that a report of some kind be given.[45] Under section 5 of the Public Order Act 1936 it is essential that what is displayed should be likely to cause a breach of the peace. But the social evil which, in our view, the law needs to combat in the instant case is the public alarm and panic, indeed fear of bodily injury, caused by the placing of the hoax or imitation explosive devices.

22. We have considered and rejected certain formulations of an offence which would specify as one of its requirements the placing of an imitation explosive device, or an imitation device. Provisionally we have concluded that an offence in such terms would not be sufficiently wide to embrace all situations which a new offence should be designed to penalise. A "brown paper plastic-taped parcel" such as figured in the case described in paragraph 20 does not, on the face of it, necessarily imitate an explosive device. The object in question may appear to be nothing other than a parcel or a shopping bag, and the suspicions it arouses may originate only in the circumstances or situation in which it has been placed. Nor do we think that the term "device" is apposite. It would scarcely be apt to describe any parcel or bag; and still less is it a word appropriate to use in relation, for example, to a notice placed in a prominent position giving a false warning of an impending explosion. It is true that display of a notice would fall clearly within section 5 of the Public Order Act 1936, but as we have said, an essential element of that offence is the intent to cause a breach of

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45. This is also an element of the offence of "False Public Alarms" in the American Law Institute's Model Penal Code, s.250.3: "A person is guilty of a misdemeanor if he initiates or circulates a report or warning of an impending bombing or other crime or catastrophe, knowing that the report or warning is false or baseless and that it is likely to cause evacuation of a building, place of assembly, or facility of public transport, or to cause public inconvenience or alarm."

the peace rather than the causing of public alarm and panic. We have also considered and rejected as unnecessarily wide an offence in terms simply of doing any act with intent to cause public alarm.

23. We have come to the conclusion that the proposed offence should penalise any person who places any thing which in the circumstances is likely to induce the public to fear that personal injury will thereby be caused. There should, in addition, be a mental element in the defendant of an intention to induce the public to fear that personal injury will be caused. We are aware of the wide terms in which this proposal is drafted. Nevertheless, for the reasons given in the preceding paragraph we do not consider that conduct described in narrower terms would be adequate to meet all anticipated situations. We draw attention, however, to two essential elements of the offence which limit its ambit. First, the object must be so placed as to be likely to induce the public to fear personal injury. The placing of a hoax bomb in these circumstances may lead to widespread panic and in the worst cases it is not impossible that physical injury will ensue as a result. The placing of a hoax bomb where the public are not likely to be present may induce panic in an individual who comes across it but, ex hypothesi, the object itself is not dangerous, and any panic that is caused by it will not have as a result that kind of injury which may be caused by wide scale public apprehension. Secondly, we draw attention to the mental element which it will be necessary for the prosecution to prove. If, notwithstanding these limitations, readers of this paper consider that the proposed offence is too wide in its scope, we invite their assistance in suggesting other elements which might further limit it.

24. One possible limitation we have considered and rejected. This is that the proposed offence should be qualified by requiring that the defendant's activity should have occurred in a public place. Provisionally, we do not think it should be so qualified. The essence of the offence

is first, that it is likely that the public fear that personal injury will be caused and, secondly, that the defendant must have intended to cause this. Thus any provision designed to restrict the location in which the defendant's activity must take place seems to be unnecessary. While in most cases the defendant's conduct will have occurred in a public place, we do not think it desirable to introduce a further element in an offence which might well be apt to cover acts taking place on premises to which the public do not have access (although they may be present), and which is irrelevant to the mischief with which we are concerned.

25. This offence should, in our provisional view, have a maximum penalty of five years' imprisonment. In making this proposal we have in mind, first, that a threat to destroy property under section 2 of the Criminal Damage Act 1971 is punishable with a maximum of ten years' imprisonment, and that there have been cases recently in which a bomb hoax report was prosecuted under this section[46]. The placing of a hoax bomb where it is likely to cause public fear of injury is in many ways akin to a threat of destruction. In the second place, we have had regard to the substantial injury which this kind of offence may cause. It is true that the maximum sentence under section 5(2) of the Criminal Law Act 1967 is only six months' imprisonment and a fine of £200 on summary conviction. But in the case of a hoax bomb it is, as we have already indicated, quite possible to envisage situations (for example where the object is placed in a crowded cinema) in which panic ensues and serious injury results. That particular kind of situation is less likely where there is merely a report upon which the management may arrange for the orderly evacuation of the premises concerned.

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46. See note 40 above.

Notwithstanding, therefore, that a hoax device is, by definition, in itself incapable of causing physical injury or loss, we conclude that a high maximum penalty is desirable. However, we propose in addition that the offence should be triable summarily with the consent of the accused.

3. Obtaining leave from prison custody by false means

26. In an isolated unreported case[47], D, serving a prison sentence, conspired with H for the latter to send him a false telegram telling him of his daughter's death, in order that D should be granted on false grounds compassionate leave for her funeral. The telegram was received but enquiries showed its contents to be false. D and H pleaded guilty to conspiracy to effect a public mischief and were each sentenced to six months' imprisonment.

27. The facts of this case appear not to fall within the provisions of any other offence. It did not constitute an instance of the common law offences of prison breach, escape or rescue since it did not involve either an escape or attempted escape from lawful custody, but merely temporary absence. For the same reason, H was not guilty of aiding escape or attempted escape under section 39 of the Prison Act 1952, nor again, for the same reason was D guilty of escape or attempted escape under rule 47 of the Prison Rules 1964[48]. Possibly they might now be regarded as having committed a conspiracy to defraud on the basis of their attempt to deceive the prison authorities to act contrary to what would have been their duty, in granting unauthorised leave[49], but this use of conspiracy to defraud seems far-fetched.

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47. Henman and Donovan, Unrep., Central Criminal Court, 1 May 1969.

48. For the detailed requirements of the offences here mentioned, see Smith and Hogan Criminal Law (3rd ed., 1973) p.590; for the Prison Rules, see S.I. 1964 No. 388, Rule 47(5).

49. See Welham v. D.P.P. [1961] A.C. 103; and see paras. 8, 10-11 above.

28. The case does, therefore, indicate the existence of a lacuna in the law. We think, however, that the government department concerned with the administration of prisons will be best placed to know whether the gap is sufficiently serious to require amendment to the law. If such amendment were needed, it could, perhaps, be effected by appropriate amendments to the Prison Rules and the Prison Act. We ourselves, however, do not propose amendments to this legislation.

## 4. Other conspiracies

29. We deal in the immediately following paragraphs with offences akin to conspiracy to effect a public mischief. In the field of conspiracy itself, we doubt if there are any further cases which either raise important points of principle or disclose what would be a major gap in the law following the decision in Withers. There are certain cases, such as Young[50], which do not readily conform to any of the well established categories of conspiracy[51]. But that case in particular has been disapproved by the House of Lords in Withers[52]. We are not aware of any other cases whose disappearance as authority would require consideration of the creation of new offences, but, if there be any, particularly cases which have not been reported, we should welcome information about them.

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50. (1944) 30 Cr. App. R.57: D1 was clerk of works to a local authority, D2 the principal of a builders' firm employed by the authority to build air-raid shelters to specification. The shelters were deficient but D1 and D2 certified that the work was properly done. A shelter collapsed in a raid, killing a small girl. A count of manslaughter was withdrawn and several counts of obtaining by false pretences failed, but D1 and D2 were convicted of conspiracy to effect a public mischief in building shelters short of specification, thus causing the local authority expense in rebuilding.

51. Although Young (see note 50) might today be prosecuted as a conspiracy to defraud.

52. See [1974] 3 W.L.R. 751 at 771 per Lord Simon and at 775 per Lord Kilbrandon.

D. Offences akin to conspiracy to effect a public mischief

1. Public mischief

30. The question canvassed in cases before Withers as to whether there exists an offence of public mischief independent of a conspiracy to effect a public mischief must be taken to have been answered by that case in the negative. Had the House of Lords in Withers recognised that effecting a public mischief was an offence in itself, their inquiry into whether a conspiracy to effect a public mischief was a separate category of conspiracy would have been quite unnecessary. Clearly, no member recognised effecting a public mischief as an offence in itself. It is, therefore, unnecessary for us to consider this heading in further detail.

31. It only remains to be added in this context that the facts in the cases which have been decided on the basis either that the offence exists, or that it was unnecessary for the instant purpose to decide whether it did, are fully covered in other ways. Manley and Blackburn we have already referred to[53]. In Leese and Whitehead[54] the printers and publishers of a newspaper were charged with publishing a seditious libel and effecting a public mischief in that the paper contained statements reflecting on the Jewish community as a whole. They were found guilty only on the second charge. Today they would probably be charged under section 6 of the Race Relations Act 1965. In Joshua v. R.[55] the defendant was also charged, in the Windward and Leeward Islands, with both sedition and public mischief. In a public speech he asserted that the police had stored, and were prepared to use, an arsenal of weapons against the people "when they decide to fight for their rights." He was found not guilty of sedition but guilty on the

53. See paras. 14 and 18 above.

54. The Times, 19 and 22 September 1936. The Law Commission has under review the law of treason, sedition and allied offences.

55. [1955] A.C. 121 (P.C.).

public mischief charge. The Privy Council left open the question whether there was a separate crime of effecting a public mischief, and allowed the appeal on other grounds. Had the facts occurred in this country the defendant might perhaps have been guilty of an offence under section 5 of the Public Order Act 1936. In Duffy[56] the defendant, a hospital orderly, "spirited away" a geriatric patient and forged a cheque for £10,000 on his bank account. She pleaded guilty to charges of effecting a public mischief by removing the patient[57] and of forging and uttering a cheque. An examination of the implications of this case belongs more properly to the sphere of kidnapping and offences against the person. The latter is under review by the Criminal Law Revision Committee. In any event, it appears that the public mischief charge was in this case unnecessary to secure the defendant's conviction.

## 2. Disinterment or failure to bury dead bodies

32. In Kamara v. D.P.P.[58], Lord Hailsham of St. Marylebone L.C.[59] referred to certain offences against dead bodies as being examples of conspiracy to commit a public mischief. He mentioned in particular the cases of Young,[60] Lynn[61] and the recent case of Hunter[62].

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56. Unrep. (1972), The Times, 7 and 8 June 1972.

57. It seems that D would have been guilty of kidnapping but for the fact that the victim's incapacity would have made it doubtful whether his being carried away was against his will: see Archbold (38th ed., 1973) para. 2796.

58. [1974] A.C. 104.

59. Ibid., at 122.

60. (1784) 4 Wentworth Pleading 219.

61. (1788) 2 Term Rep. 733.

62. [1974] Q.B. 95.

33. There is, in fact, a wide range of offences at common law connected with the disinterment of bodies or the failure properly to bury them[63]. And it is clear from Hunter[64] that most, if not all of these offences are not dependent upon conspiracy, but are offences capable of commission by an individual. In that case, following the death of a girl as a result of "horseplay" with the three defendants, they hid her body under a pile of stones. They were convicted, among other things, of conspiracy to prevent the burial of a corpse, and the Court of Appeal upheld the conviction, relying upon Russell on Crime and the old conspiracy cases there cited.[65] The court stated unequivocally, however, that the conduct of each of the defendants would have been indictable without the charge of conspiracy -

> "... if a decent burial is prevented without lawful excuse, we consider that this is an offence. If it is an offence to prevent burial, then it is an offence to conspire to prevent that burial...if the defendants agreed to conceal the body and the concealment in fact prevented burial, then the offence was made out although prevention of burial was not the object of the agreement...."[66]

Since this offence, like many others in this area of the law, is not dependent upon the existence of a combination, the question which presents itself is whether proposals for reform of the law may appropriately be put forward in the present context.

34. The offences under discussion are specific offences at common law and we have come to the conclusion that their examination must form part either of an exercise aiming at the elimination of common law offences which are unaffected by our examination of the law of conspiracy, or of a specific examination

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63. See Russell on Crime (12th ed., 1964) Vol. II p. 1413 et seq.

64. [1974] Q.B. 95.

65. See 12th ed., (1964) Vol. II p. 1420 and notes 60 and 61 above

66. [1974] Q.B. 95, 98.

of the laws relating to burial. Although, as we have seen, some of these offences have been labelled examples of conspiracy to effect a public mischief, as the law now stands we doubt if any of them are dependant upon the existence of a combination. And although the offences have the character of a public nuisance, their examination here would extend the scope of this paper far beyond its intended limitation to the residual categories of conspiracy not dealt with in previous working papers in this series. Consequently, we make no proposals in the present context in relation to common law offences pertaining to the disinterment of, or failure to bury dead bodies.

## E. Summary of proposals relating to conspiracy to effect a public mischief

35. We indicate here, with reference to the main headings of discussion in the previous paragraphs, both our provisional proposals for reform of the law and those areas of the law where, for reasons given, we make no proposals.

(a) We make no proposals in relation to the conduct which was considered by the House of Lords in Withers[67], that is, obtaining information by deception. Proposals have been made in our Working Paper No. 56 on Conspiracy to Defraud, and the Home Office is considering proposals made in the Younger Committee Report. Taken together, these, in our provisional view, adequately meet requirements (paragraphs 15-17).

(b) We propose a new offence with a maximum penalty of five years' imprisonment (but triable summarily with the consent of the accused) to deal with instances of placing imitation explosives where

67. [1974] 3 W.L.R. 751.

no warning or report is made. This would penalise a person who places any thing which in the circumstances is likely to induce the public to fear that personal injury will thereby be caused; and there would be a mental element in the defendant of intention to induce in the public this fear. We request comment upon whether an offence in these terms is too widely drawn and, if so, in what manner it should be further limited (paragraphs 23-25).

(c) We propose no new offence to deal with obtaining leave from prison custody by false means, although a recent conspiracy case has revealed a lacuna in the law here (paragraph 28).

(d) We make no proposals at present for new offences relating to the disinterment or failure to bury dead bodies. This must await a review of common law offences either after completion of the current examination of the law of conspiracy or as part of an examination of the laws relating to burial (paragraph 34).

## III CONSPIRACIES TO COMMIT A CIVIL WRONG

36. The remaining categories of criminal conspiracy which it falls to outline are, despite recent judicial attempts to clarify their ambit,[68] perhaps the most nebulous in character. Conspiracies to commit a civil wrong and conspiracies to injure were treated briefly under separate headings in Working Paper No. 50[69]. That paper adverted to the difficulties of categorising this area of the law at all satisfactorily, and because of the close interconnection between the types of conspiracy under discussion, they are considered together in the present section of this paper.

37. A further difficulty in treating of this area of the law is that the cases disclose no systematic pattern of development. In this they are, of course, far from unique in the law of criminal conspiracy. But, by according differing emphases to certain cases and dicta, it is possible to present very divergent views of how the law has developed and, consequently, of what is its present state.[70] Some account of the law's development is unavoidable; but our provisional conclusion, as will be seen[71], is that, having regard to proposals made in previous papers in this series and to alternative charges available both at common law and under statute, it is doubtful whether any new substantive offences are required in this area before implementation of the proposal to confine conspiracies to those having a criminal objective. For that reason, we have kept the exposition of legal history as brief as possible.

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68. See in particular Lord Hailsham of St. Marylebone L.C., in Kamara v. D.P.P. [1974] A.C. 104, 129. We refer again to his speech at para. 45.

69. See Working Paper No. 50, "Inchoate Offences" pp. 15-17.

70. Compare e.g. Lord Diplock in Knuller v. D.P.P. [1973] A.C. 435 at 475-479, especially his conclusion at 479B, with Lord Hailsham of St. Marylebone L.C. in Kamara v. D.P.P. [1974] A.C. 104, 120 et seq.

71. Para. 58.

38. In the following paragraphs we refer briefly to the common background to the development of conspiracy to commit a tort and conspiracy to injure. We then treat their further history separately and analyse what we believe to be the present state of the law. We then deal similarly with conspiracy to commit a breach of contract. Our provisional conclusions are set out in the final paragraphs of each section.

## A. Conspiracy to commit a tort and conspiracy to injure : the background

39. A convenient starting point is the passage in the first edition of Hawkins' Pleas of the Crown[72] -

> "there can be no doubt that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law".

There was little authority for this wide proposition. Nevertheless, its substance was frequently cited in argument in conspiracy cases in the course of the eighteenth century and in consequence, while never receiving explicit judicial approval, it exerted considerable influence.

40. Some of the cases in this early period may be seen as ancestors of what would today be regarded as conspiracy to defraud[73] or conspiracy to pervert the course of justice,[74] and as such need not detain us. Others, however, have nothing in common with the well established categories of conspiracy examined in previous papers in this series. One group, of lesser importance, appears to have established, somewhat shakily, that it was an indictable conspiracy for several by a

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72. (1706) 1 P.C., c.27, para. 2.

73. See e.g. Lord Mansfield in Wheatley (1761) 2 Burr. 1125, 1127-8; Hevey (1782) 1 Leach 229 and 232.

74. See e.g. the cases cited in Russell on Crime (12th ed., 1964) p. 1484.

preconcerted plan to hiss an actor off the stage[75]. In fact, only one of these was a criminal case[76]. Of far more importance were the many cases connected with trade; whether in connection with combinations of workmen to raise their wages;[77] or agreements to fix or raise prices[78]; or conspiracies to impoverish by means of unfair competition[79]. Assessment of their significance is complicated by the presence of legislation relating to contracts of service and combinations, and common law offences relating to sale and resale of goods; and it is sometimes not clear whether the defendants were charged with conspiring to contravene a statutory provision or with conspiring to do an act which would be lawful for an individual to do, but unlawful when planned by a combination. A typical case is Eccles[80], where the conspiracy charged was to impoverish a tailor and prevent him by indirect means from carrying on his trade. The case is reported on whether details of what the defendants actually did needed to be set out; it was held that they need not, Lord Mansfield stating[81] -

> "the illegal combination is the gist of the offence; persons in possession of any articles of trade may sell them at such prices as they individually may please, but if they confederate and agree not to sell them under certain prices, it is conspiracy; so every man may work at what price he pleases, but a combination not to work under certain prices is an indictable offence".

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75. Leigh (1775) 1 Car. & K. 28n.; Clifford v. Brandon (1809)2 Camp. 358; Gregory v. Duke of Brunswick (1843) 1 Car. & K.24; 6 M & G.205 and 953.

76. Leigh; see note 75: the case was decided in 1775 but not reported, though it is mentioned in a footnote to one of the reports of Gregory v. Duke of Brunswick.

77. See e.g. Journeyman Tailors of Cambridge (1721) 8 Mod. 10; Eccles (1783) 1 Leach 274, 277 per Lord Mansfield.

78. See e.g. Anon (1698) 12 Mod. 248 (Holt C.J.); Eccles (1783) 1 Leach 274, 276 per Lord Mansfield; Waddington (1800) 1 East. 143.

79. Cope (1719) 1 Stra. 144; Eccles (1783) 1 Leach 274; compare Daniell (1704) 6 Mod. 99.

80. (1783) 1 Leach 274.

81. Ibid., 276-277.

By 1800 it seems, therefore, that conspiracies to prejudice third parties were indictable, certainly in matters relating to trade as outlined above, and possibly in other areas. But it could not be said with certainty how far Hawkins' doctrine extended.

B. The development of conspiracy to commit a tort

41. The decision in Turner[82] was a clear indication that the courts did not accept in full Hawkins' proposition. In this case Lord Ellenborough C.J. held that an agreement to commit a civil trespass was not indictable. The eight defendants had entered a game preserve at night with the object of poaching hare, and armed with offensive weapons in order, it seems, to resist any attempt to deter them. Hawkins' proposition was cited in argument; so, too, was Eccles' case, but Lord Ellenborough distinguished the latter as a conspiracy in restraint of trade, and so a conspiracy to do an unlawful act affecting the public. Subsequently Lord Denman C.J. in Kenrick[83] commented that Lord Ellenborough would no doubt have held such conduct indictable if the defendants' intention had been to enter the land to seize its owner or expel him - in other words, to commit an offence to the person or to effect an offence of forcible entry. And in Rowlands[84] Lord Campbell C.J. expressed the view that the case was wrongly decided since trespass of the kind occurring in Turner, where there was an intent to oppose interference with offensive weapons, was itself indictable.[85] Nevertheless, the case has frequently been cited by writers as evidence that not all conspiracies to commit a tortious act are indictable.

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82. (1811) 13 East. 228.

83. (1851) 5 Q.B. 49, 62.

84. (1851) 17 Q.B. 671, 686.

85. Perhaps as an unlawful assembly: see Smith and Hogan, Criminal Law (3rd ed., 1973) p. 185.

42. The law was further greatly influenced by a dictum of Lord Denman C.J., first pronounced in Jones[86], that an indictment must -

> "charge a conspiracy to do an unlawful act, or a lawful act by unlawful means."

The meaning of the crucial word "unlawful" was no more defined in this proposition (frequently termed "the Denman antithesis") than was the similarly ambiguous "wrongful" in Hawkins' doctrine. But it is evident from subsequent cases[87] that Lord Denman thought the antithesis in need of some qualification to its potentially extremely broad effect. The original formula was repeated by Willes J. in Mulcahy v. Reg.[88] in a context, however, which indicated with reasonable clarity that in his mind "unlawful" meant "criminal". That case involved an appeal by way of a writ of error against the plaintiff's conviction in Ireland for treason felony; and in the course of the judges' opinion, Willes J. said -

> "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means."

43. The dictum of Willes J. quoted above was by no means the last on this subject to exert a subsequent influence. But most, if not all, dicta in later cases appear to fall into

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86. (1832) 4 B. & Ad. 345, 349. Prosecuting counsel had put forward a formula in similar terms over twenty years before in Turner: see (1811) 13 East. 228, 229.

87. See Peck (1839) 9 Ad. & El. 686, 690 where Lord Denman C.J. said he did not think the antithesis "very correct"; and King (1844) 7 Q.B. 782, 788 where he said he would wish to insert the words "at least".

88. (1868) L.R. 3 H.L. 306, 317.

two groups. First, there are a few which have been isolated from the context of the cases in which they are reported; that context qualifies them, and the cases in which they appear are, in any event, not authority for the extremely wide principle they set forth. Thus in Warburton[89] Lord Cockburn C.J. said[90] -

> "It is not necessary in order to constitute a conspiracy that the acts agreed to be done should be acts which if done would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, i.e., amount to a civil wrong."

The case itself is authority[91] for the principle, established many years before,[92] that in conspiracy to defraud the fraud need not amount to a criminal offence, Lord Cockburn C.J. stating later in his judgment[93] that the facts disclosed a conspiracy "as the object was to commit a civil wrong by fraud and false pretences".

44. The second series of dicta relating to criminal conspiracy to commit tortious acts appears in that line of civil cases, culminating in Crofter Handwoven Harris Tweed Co. Ltd. v. Veitch[94], which established the tort of conspiracy to injure. We deal separately with this development,[95] and the extent to which the cases establish a parallel criminal liability.

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89. (1870), L.R. 1 C.C.R. 274; see also Parnell (1881) 14 Cox C.C. 508, 513 per Fitzgerald J. (an Irish case) and Whitaker [1914] 3 K.B. 1283, 1299 per Lawrence J.

90. Ibid., at 276.

91. See e.g. Smith and Hogan, Criminal Law (3rd ed., 1973) p. 184.

92. In Hevey (1782) 1 Leach 229 and 232 where defendants were found not guilty of forgery but were tried and convicted for conspiracy to defraud arising out of the same conduct.

93. (1870), L.R.1 C.C.R. 274, 277.

94. [1942] A.C. 435.

95. See para. 59 et seq.

It is here sufficient to observe that, appearing as they do in civil cases, the dicta cannot be treated as decisive authority upon the circumstances in which conspiracy to commit a civil wrong constitutes an offence. Perhaps the best known of these dicta is that of Bowen L.J. in Mogul Steamship Co. v. McGregor, Gow & Co.[96] which was approved in the House of Lords[97] and in subsequent civil cases.[98] He said -

> "Of the general proposition that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the combination may show that the object is simply to do harm and not to exercise one's own just rights. In the application of this undoubted principle it is necessary to be very careful not to press the doctrine of illegal conspiracy beyond that which is necessary for the protection of individuals or of the public".

45. There is little further direct authority[99] until Kamara v. D.P.P.[100] upon whether and in what circumstances a conspiracy to commit a tort is indictable. Having regard to the paucity of such authority, three views were tenable prior to that case: that conspiracy to commit a tort can never be indicted in any circumstances, as maintained by the appellant in Kamara; that all conspiracies to commit torts are indictable, as the Court of Appeal held in Kamara[101]; or that a conspiracy to commit a tort was indictable but only in certain circumstances.

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96. (1889) 23 Q.B.D. 598, 616.

97. [1892] A.C. 25.

98. E.g. Quinn v. Leathem [1901] A.C. 495, 535.

99. Bramley (1946) 11 Jo. Cr. L. 36, in which squatters were convicted of, inter alia, conspiracy to trespass, seems to be the only case.

100. [1974] A.C. 104; the case is more fully discussed in Working Paper No. 54 "Offences of entering and remaining on property".

101. [1973] Q.B. 660.

This last was the view taken by the House of Lords in Kamara, and the speeches of Lord Hailsham L.C.[102] and Lord Cross[103] indicate what those circumstances are. In Lord Hailsham's view,[104] to establish criminal liability, the conspiracy must aim at the commission not merely of a tort[105] but must also involve either "the invasion of the public domain or the intention to inflict on its victim injury and damage which goes beyond the field of the nominal". The tortious conduct which the execution of the conspiracy involves may consist of "trespass to land, goods or person", "ruin of the victim's reputation through defamation of character", "the commission of a private nuisance", "some contrivance of fraud", "the imposition of force" or, indeed, "any other means which is tortious". In the view of Lord Cross,[106] an agreement by several to commit acts which, if done by one, would only amount to a tort, may constitute a criminal conspiracy" when the carrying into execution of the agreement would have consequences sufficiently harmful to call for penal sanction."

C. Conspiracy to commit a tort: the present law examined

46. Kamara establishes that a conspiracy to commit a tort is indictable in a variety of circumstances, depending upon the character of the act contemplated by the agreement. It is our task to examine these circumstances, as specified by the House of Lords, and consider whether they disclose situations with which the criminal law should deal if they can no longer be penalised solely by the law of conspiracy. For this

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102. [1974] A.C. 104, 113, Lord Morris and Lord Simon of Glaisdale agreeing.

103. Ibid., at 131.

104. Ibid., at 129.

105. Lord Hailsham refers also to any "other actionable wrong".

106. Ibid., at 132

purpose it will be convenient to take the various forms of tortious conduct specified by Lord Hailsham[107] which may arise in the course of execution of a criminal conspiracy.

1. Conspiracies to commit trespass to land, goods or person

47. The circumstances in which a conspiracy to trespass upon land is indictable was, of course, the question at issue in Kamara. We have examined the decision fully in our Working Paper No. 54[108] and made provisional proposals covering this area of the law.

48. It is difficult to envisage situations of any moment in which a conspiracy to commit trespass to goods would not already constitute a conspiracy to commit a crime, such as theft or criminal damage. In some circumstances conduct falls outside the definition of theft,[109] for example where there is a mere temporary deprivation of property. We have made proposals in regard to certain instances of temporary taking in our Working Paper on Conspiracy to Defraud[110]. Others would remain outside our proposals, for example, where workmen temporarily deprive a colleague of his tools with malicious intent. This is not theft[111]. Conceivably, in an extremely serious case it might be prosecuted as conspiracy to commit trespass to goods on the criteria put forward by Lord Hailsham. But we doubt the necessity of providing a new criminal offence to deal with this type of case.

49. A conspiracy to commit trespass to the person must always, it seems to us, involve also a conspiracy to commit

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107. Ibid., 129; see para. 45 above.

108. "Offences of Entering and Remaining on Property".

109. I.e. the dishonest appropriation of property belonging to another with the intention of permanently depriving him of it: Theft Act 1968, s.1.

110. Working Paper No. 56, para. 58 et seq.

111. See Warner (1970) 55 Cr. App. R. 93.

an offence to the person; and so, however trivial the intended result may be - such as a "technical" assult - there is always the possibility of a charge of conspiracy to commit a crime. But even if this were not so, it is our provisional view that the law relating to offences against the person provides adequate protection in all circumstances likely to arise. Consequently, we see no useful purpose in retaining conspiracy to commit a tortious act in this area of the law, whether the tortious element be described as "trespass to the person" or "the imposition of force".

2. Conspiracies involving commission of a private nuisance.

50. There is early but weak authority that conspiracy to inflict injury upon a person by means of a private nuisance is indictable: in the case of Levy[112] the defendants conspired to injure a woman in labour by banging loudly on the wall of her room. The jury found them guilty, but no report of the direction is given. Such conduct would now most probably be dealt with as an agreement to commit an assult. We are not aware of any other cases of agreements to commit a private nuisance which have for that reason been dealt with as an offence, and therefore conclude that such liability, so far as it may exist, does not now have any utility.

3. Conspiracies to commit torts involving fraud

51. As we have seen,[113] statements are to be found in fraud cases to the effect that the conduct in question was actionable as a civil wrong in order to justify the conclusion that it was indictable as a conspiracy to defraud. However, the element of fraud in criminal conspiracy is not restricted to cases where the conduct involves a civil wrong; thus there is no necessary connection between tortious and criminal liability[114].

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112. (1819) 2 Stark, 458.

113. See para. 43.

114. Although see Glanville Williams, Criminal Law (2nd ed., 1961) p. 693 et seq.

We have dealt generally with conspiracy to defraud in Working Paper No. 56, and further examination of it in the present context is therefore unnecessary.

4. Conspiracies involving defamation of character

52. It is an offence to conspire to bring a charge against a person with having committed a crime when he has not done so. The subject is treated in detail in Russell on Crime which sets out precisely the circumstances in which the conspiracy charge is available.[115] It is said that this form of conspiracy is not criminal if the charge was to be preferred honestly and with reasonable belief in its truth.[116] The conspirators may, however, be indicted whether or not they have reached a stage of indicting the injured party, since it is the agreement which, as in all cases of conspiracy, is the gist of the offence.

53. It is also an offence to conspire to indict another for the purpose of extortion whether the charge is true or false,[117] or to enforce by legal process the payment of money known by the conspirators not to be due.[118]

54. So far as these types of conspiracy charges protect the property of the victims of such conspiracies and the proper functioning of the courts, they are, in our provisional view, clearly obsolete. Where the object is extortion, all conduct which needs to be penalised appears to be covered in any case likely to arise by section 21 of the Theft Act 1968

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115. See Russell on Crime (12th ed., 1964) p. 1482.

116. Ibid., although it is not clear that the authority cited, Jacobs (1845) 1 Cox C.C. 173, establishes this proposition.

117. Hollingberry (1825) 4 B. & C. 329.

118. Taylor (1883) 15 Cox C.C. 265; here a false civil claim was held to be both a conspiracy to defraud and a conspiracy against the administration of justice.

(blackmail).[119] Where there is abuse of the criminal process, the conduct would almost certainly involve, at one stage or another, a false report causing wasteful employment of the police,[120] fabrication of evidence amounting to a perversion of the course of justice or perjury.[121]

55. So far as the conspiracy charges under consideration protect the reputation of victims, they are to a large degree covered by other offences. By section 4 of the Libel Act 1843 it is an offence punishable with two years' imprisonment to "maliciously publish any defamatory libel, knowing the same to be false". There is some authority for the view that this creates no new offence but does no more than regulate the punishment for the offence at common law.[122] The common law offence of criminal libel is in some respects wider than the tort of defamation[123] though limited, of course, to the written word, and is in part regulated by the 1843 Act. Proceedings for criminal libel are discouraged if the libel is unlikely either to disturb the peace or seriously to affect the reputation of the person defamed.[124] This limitation upon proceedings is not a formal one but is based upon the attitude of the courts and the prosecutor's discretion; and were proceedings to be contemplated in respect of a conspiracy affecting a victim's reputation, a corresponding discretion might be expected to operate which would result in such a

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119. It is relevant to note that the Act abolishes, inter alia, common law offences of "obtaining property by threats": s.32 (1)(a).

120. Criminal Law Act 1967, s.5(2).

121. These are dealt with in Working Paper No. 62.

122. Sect. 5 of the 1843 Act punishes with one year's imprisonment anyone who shall "maliciously publish any defamatory libel". In Munslow [1895] 1 Q.B. 758 this was held only to prescribe the punishment for the common law offence. Archbold (38th ed., 1973), para. 3622, cites the case as authority for this proposition in relation to s.4.

123. As to the differences between the crime and the tort, see Smith and Hogan, Criminal Law (3rd ed., 1973) p. 637. See also Report of the Committee on Defamation (1975) Cmnd. 5909 paras. 428-448, which recommends retention of the offence of criminal libel with only minor amendments.

124. Wicks [1936] 1 All E.R. 384.

charge being brought only if the defendants' conduct was likely to disturb the peace or seriously to affect the victim's reputation.

56. We have considered whether there are instances where conspiracy charges of the type under consideration would lie but a charge of criminal libel would not. A difficulty arises in regard to the absolute privilege attaching to documents incidental to the proper initiation of judicial proceedings.[125] If the charge of criminal libel is in respect of an accusation contained in this kind of document, such as the formal information that is laid, the absolute privilege attaching to it would seem to exclude the possibility of a successful prosecution. It might, therefore, be thought that this is an instance where the only charge available to deal with such conduct would be one of conspiracy. It has to be borne in mind, however, that, on the better view,[126] privilege attaches to the occasion upon which the statement in a document is used rather than to the statement itself. This means that the statement in the information cannot be made the subject either of an action for libel or a prosecution for criminal libel. But it does not mean that it cannot be used as evidence of the commission of another criminal offence. To take a parallel case, it is well settled that an action for libel cannot lie for anything said by a witness in the course of judicial proceedings; but this does not prevent charges of perjury being brought against the witness in respect of his untrue statements[127]. Thus, where a false charge is made in an information, despite the absolute privilege attaching to it, there would appear to be nothing to prevent charges of perverting the course of justice being brought

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125. See Gatley on Libel and Slander (7th ed., 1974) para. 409 et seq.

126. See e.g. Salmond on the Law of Torts (16th ed., 1973) p.162 and the cases there cited.

127. See judgment of Lord Goddard C.J. in Hargreaves v. Bretherton [1959] 1 Q.B. 45, 51 and the cases cited therein; and Roy v. Prior [1971] A.C. 470, 477 per Lord Morris.

in respect of an abuse of the court process;[128] and where a charge, whether true or false, is laid in an information with intent to extort, there would again appear to be no bar to a prosecution for blackmail. We conclude, therefore, that in this respect the type of conspiracy charge under discussion does not extend the armoury of the criminal law.

57. The only other possible lacuna in this area of the law again arises from the limitations of the law of criminal libel. Charges for that offence cannot be brought in respect of oral statements. A conspiracy charge can, however, be brought where there is a false oral allegation of crime without intent to extort[129]. We have traced no case occurring in this country in which any such charge was made; and while the possibility of bringing such a charge remains open, we doubt whether the criminal law has a role to play here.

## 5. Conclusion

58. This survey has, we believe, indicated that, save in particular areas of the law with which we have already dealt in previous papers in this series, it is doubtful whether conspiracy to commit a tort adds anything of significance to the armoury of the criminal law. Our view is reinforced by the absence of recent cases, apart from Kamara, which suggests that this kind of conspiracy now serves little, if any, social purpose. Accordingly, we make no proposals for the creation of new offences to penalise any conduct which might cease to be criminal if conspiracy were limited as proposed. We do, however, welcome comment upon the possible utility of charges of conspiracy to defame in the light of the exposition of the law, as we understand it to be, in paragraphs 52-57 above.

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128. In addition, a charge of perjury might be available in some cases: under the Magistrates" Courts Act 1952, s.1, if the justice intends to grant a warrant, the matter of the information must be both in writing and substantiated on oath.

129. See Conteh [1956] A.C. 158 (P.C.)

## D. Conspiracy to injure; history and present law

59. We have seen[130] that by the end of the eighteenth century it appears to have been established that a conspiracy to injure a person in his trade was in certain circumstances indictable. The precise significance of the cases is, as we have indicated, difficult to judge because of the presence of legislation which in any event penalised combinations of workmen. The presence of such legislation again makes difficult the assessment of the law's development in the first half of the nineteenth century because it is not clear how far judges relied upon the common law and how far on statutory offences. It is clear, however, that as the effects of that legislation were progressively eliminated by statute, increasing reliance was placed upon the law of tort to protect the interests of employers. But the growth of this civil liability for conspiracy was based in part, at least, upon concepts developed in criminal conspiracy at common law during the first half of the century. It is not entirely certain how far these concepts have remained part of the criminal law, or what is the ambit of criminal liability in this field today. To deal adequately with this question, it is necessary first to set out the position in the law of criminal conspiracy during the first half of the nineteenth century, and then to trace the growth of tortious conspiracy. The following paragraphs summarise these developments.

60. Early nineteenth century legislation[131] created broad offences of "violence", "threats", "intimidation" and "molestation" by persons having as their aim the forcing of others to leave their work, to join associations (of workers) or to force employers to limit the numbers of workers employed. It was against

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130. Para. 40.

131. Combination of Workmen Act 1824; Combination Laws Repeal Act 1825.

this background that the courts imposed criminal liability at common law upon combinations of workers. Three bases of liability were advanced -

(a) Contracts in restraint of trade were criminal conspiracies, and this included agreements to raise wages[132]. This basis of liability was disapproved later[133].

(b) Where an agreement had as its object injury to an employer, there was criminal liability[134]. This basis of liability introduced into the law the distinction between agreements having as their aim furtherance of workers' interests and those having as their immediate object the obstruction of the employer.

(c) Agreements which had the effect of coercing, rather than persuading, an employer were criminal[135]. In Bunn, the defendants organised a strike by employees of a gas company in response to dismissal of another worker. They were indicted in respect of two types of conspiracy. The second, involving a breach of contract, is referred to again below at paragraph 67. The first was described thus by Brett J. -[136]

> "... if there was an agreement among the defendants by improper molestation to control the will of the employers... and ... the molestation which was so agreed upon was such as would be likely, in the minds of men of ordinary nerve to deter them from carrying on their business ... then I say that this is an illegal conspiracy...."

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132. Hilton v. Eckersley (1856) 24 L.J.Q.B. 353.

133. In Hornby v. Close (1867) L.R. 2 Q.B. 153; Farrer v. Close (1869) L.R.4. Q.B. 602; Mogul Steamship Co. v. McGregor [1892] A.C. 25.

134. Duffield (1851) 5 Cox C.C. 404; Rowlands (1851) 5 Cox C.C. 466.

135. Druitt (1870) 10 Cox C.C. 592; Bunn (1872) 12 Cox C.C. 316.

136. Ibid., at 340.

It was an "improper molestation" if -

> "anything was done with an improper intent which you think was an unjustifiable annoyance and interference with the masters in the conduct of their business, and which in any business would be such annoyance and interference as would be likely to have a deterring effect upon masters of ordinary nerve."137

This case was decided after the repeal of anti-combination legislation; thus, as well as being the last instance of criminal prosecution for this kind of conspiracy, it is an authority on common law liability.

61. Legislation removed earlier statutory offences relating to combination[138], eliminated common law criminal liability for combinations to do acts "in contemplation or furtherance of a trade dispute",[139] and in their place substituted criminal liability for new statutory offences of intimidation.[140] Thereafter, in disputes with the trade unions resort was had to the law of tort, including the tort of conspiracy to injure established finally in Quinn v. Leathem.[141] The speeches of the House of Lords in that case disclose three strands of reasoning: the two bases of criminal liability described in paragraph 60(b)[142] and (c)[143], and a principle of purely tortious origin, that of interference with contractual rights.[144] All members of the House of Lords in the case assumed that the conduct of the defendants was a criminal conspiracy, although upon which of the bases of liability referred to is by no means clear.

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137. Ibid., at 348-9.

138. Molestation of Workmen Act 1859; Criminal Law Amendment Act 1871; Trade Union Act 1871.

139. Conspiracy, and Protection of Property Act 1875, s.3. "Trade dispute" is defined by the Trade Union and Labour Relations Act 1974, s.29.

140. Ibid., s.7.

141. [1901] A.C. 495.

142. Ibid., at 510-11 per Lord Macnaughten, and 512 per Lord Shand.

143. Ibid., at 525 per Lord Brampton and 538 per Lord Lindley.

144. Ibid., at 507 per Lord Halsbury, 510 per Lord Macnaughten, 525-6 per Lord Brampton, and 535 per Lord Lindley.

62. The limits of tortious conspiracy were more clearly settled in Crofter Handwoven Harris Tweed v. Veitch[145]. From this it emerges that a conspiracy to injure another, without the justification that the defendants are acting in furtherance of what they believe to be their own legitimate interests, is actionable if loss is caused by the defendants' activities. In the words of Viscount Simon L.C. [146] -

> "... unless the real and predominant purpose is to advance the defendants' lawful interests in a matter where the defendants honestly believe that those interests would directly suffer if the action taken against the plaintiffs was not taken, a combination wilfully to damage a man in his trade is unlawful."

Once the bona fides of the defendants is established, it is not for the courts to enquire as to the quantum of damage inflicted by their activities[147]. The doctrine of civil conspiracy to injure extends beyond trade competition and labour disputes[148]. Some dicta also suggest that a combination to injure by "unlawful means" - such as "illegal threats or the exercise of unlawful coercion"[149] - would give rise to a cause of action.

63. It cannot, however, be asserted with equal confidence that the limits of criminal liability for conspiracy to injure were entirely settled by the cases establishing the liability in tort. It is generally held that criminal and civil liability are identical, the one practical difference being that actual damage must have occurred to give an action in tort. As we have

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145. [1942] A.C. 435.

146. Ibid., at 446.

147. Ibid., at 447 per Viscount Simon L.C.

148. Ibid., at 447 per Viscount Simon L.C. and 478 per Lord Wright.

149. Ibid., at 467 per Lord Wright.

seen[150] this was assumed to be the position in Quinn v. Leathem, and it underlies the Crofter case.[151] Further, Lord Reid in Shaw v. D.P.P.[152] included injuring a man in his trade without justification as one head of criminal conspiracy. It is to be noted, however, that Lord Porter in the Crofter case said[153] -

> "... in recent times I do not think it has been held criminal merely to combine to injure a third party provided no unlawful means are used or contemplated and it is doubtful whether such a combination ever was criminal".

In his view, therefore, conspiracy to injure in itself, although actionable in tort, is not criminal, although it is criminal if done by "unlawful means". This isolated dictum has, however, to be set against the weight of opinion to the contrary.

64. More substantial difficulty is provided by the dicta referred to[154] relating to conspiracy to injure by unlawful means. Here the authority of the cases establishing the tort of conspiracy to injure are of doubtful relevance, since in tortious conspiracy upon the principles of the Crofter case "the conspiracy [to injure] is the gist of the wrong" and not "the particular wrongful acts done in pursuance of it";[155] while there is a total absence of criminal cases directly in point. It is, however, probable that, in the context of trade dispute cases, criminal liability exists in respect of agreements, which, while having a legitimate objective, are

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150. See para. 61.

151. See e.g. [1942] A.C. 435, 439-440 per Viscount Simon L.C.

152. [1962] A.C. 220, 273; and see Kamara [1974] A.C. 104, 124-125 per Lord Hailsham of St. Marylebone L.C.

153. [1942] A.C. 435, 488.

154. See para. 62 at n. 149 and para 63 at n. 153.

155. Crofter case [1942] A.C. 435, 461 per Lord Wright.

effected by means of coercion upon the employer. We have seen that the cases which established this liability[156] in some degree influenced the decision in Quinn v. Leathem,[157] and, in so far as concerns acts which are not "in contemplation or firtherance of a trade dispute",[158] the liability at common law still remains. Indeed, the case of Bunn[159] was cited in argument in Cory Lighterage Ltd. v. T.G.W.U.[160] and, although not mentioned in the judgments, we understand that the Court of Appeal in the course of argument indicated its view that the case is still good law.

65. The position may be summed up as follows: the balance of authority indicates, first, that conspiracy to injure another, without the justification that the defendants believe themselves to be acting in furtherance of their legitimate interests, entails criminal liability and, secondly, that a conspiracy to coerce a person in the way of his business through the use of improper threats also entails criminal liability. There is some doubt, however, whether any other kind of conspiracy to injure by unlawful means entails criminal liability.

66. The entire absence of reported cases of liability for criminal conspiracy to injure, and the similar lack of reported cases involving a conspiracy to coerce by unlawful means since the case of Bunn in 1872, suggests that in recent years these forms of criminal conspiracy have performed no useful social function. Our provisional conclusion is, therefore, that they can be eliminated without the necessity of creating

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156. Druitt and Bunn; see para. 60(c).

157. [1901] A.C. 495; see para. 61.

158. See Conspiracy, and Protection of Property Act 1875, s.3 and para. 61 above.

159. (1872) 12 Cox C.C. 316.

160. [1973] 1 W.L.R. 792. This was a civil case which turned on the meaning of an "industrial dispute" under the Industrial Relations Act 1971.

any new offences; but we do not propose that the abolition of criminal liability in this field should in any way affect the present position in regard to civil liability.

## E. Conspiracy to commit or induce a breach of contract

67. There is little authority in support of the view that a conspiracy to commit a breach of contract can in itself be indicted. It has been suggested that it is indictable if the breach occurs "under circumstances that are peculiarly injurious to the public";[161] and in the civil case of Mogul Steamship Co. Ltd. v. McGregor Gow & Co. Ltd. Lord Bramwell said that a combination to violate a private right would be indictable where "the public has a sufficient interest".[162] In Bunn[163] one of the charges was a conspiracy to commit a breach of contract but that was at a time when breach of a contract between master and servant was both a criminal and a civil wrong[164].

68. Were the question of criminal conspiracy to commit a breach of contract to be in issue today, it might well be that the courts would have regard to the principles laid down by the House of Lords in Kamara[165]. On these principles, a conspiracy to commit a breach of contract would not of itself

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161. Kenny, Outlines of the Criminal Law (19th ed., 1966) p. 429 citing Vertue v. Lord Clive (1769) 4 Burr. 2472: defendants in employment of E. India Co. resigned their posts simultaneously during an emergency. They were convicted of statutory offences and Yates J. said that their conduct was a conspiracy at common law.

162. [1892] A.C. 25,48.

163. See (1872) 12 Cox C.C. 316, 340 per Brett J.

164. Under the Master and Servant Acts 1867, repealed by the Conspiracy, and Protection of Property Act 1875.

165. [1974] A.C. 104: see para. 45.

be indictable but would be indictable if the conspiracy aimed not merely at breaking the contract but also at invading the public domain or at inflicting more than nominal injury and damage upon the other party;[166] or again, if the breach were to have consequences sufficiently harmful to call for penal sanctions[167]. The question, however, has never been in issue in any criminal case.

69. We have no doubt that conspiracies to commit breaches of contract occur in commercial dealings, but there is, in our provisional view, no room in the law now for a crime consisting without more of conspiracy to commit a breach of contract. Furthermore, as we have indicated, the question of the circumstances in which a conspiracy to commit or induce a breach of contract would give rise to criminal liability has never been in issue; and, as in the other instances of conspiracy to commit a civil wrong, we take this as evidence that criminal liability in this field performs no useful social function. Our provisional conclusion again, therefore, is that this species of criminal liability, in so far as it may exist, may be eliminated without the necessity of proposing any new offences.

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166. The criteria put forward by Lord Hailsham of St. Marylebone L.C.: see [1974] A.C. 104, 129.

167. The criteria put forward by Lord Cross of Chelsea: see [1974] A.C. 104, 132.

## IV THE DOCTRINE OF CONTEMPT OF STATUTE

70. In our Seventh Annual Report[168] we stated that "other common law 'misdemeanours' which constitute separate substantive offences will be considered in due course in relation to the broad divisions of criminal conduct under which they most appropriately fall." For this reason in the present paper we have considered certain common law offences cognate to the types of conspiracy dealt with in it.[169] There is, however, one form of common law liability which we find has no link with any other broad division of criminal conduct, but shares with conspiracy not only an ancient lineage but the dual objection of extreme uncertainty as to its scope combined with the availability of an unlimited penalty. We refer to the doctrine of contempt of statute. We believe that it will be convenient to examine here this doctrine which, as will be seen, is obsolete but not dead, and make provisional proposals for dealing with it.

71. The doctrine is set out in Hawkins' Pleas of the Crown,[170] of which the relevant passage was approved by Charles J. in R. v. Hall.[171] It is as follows -

> "It seems to be a good general ground that wherever a statute prohibits a matter of public grievance to the liberty and security of a subject, or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable, not only at the suit of the party aggrieved, but also by way of indictment for his contempt of the statute, unless such methods of proceeding do manifestly appear to be excluded by it .... Also where a statute makes a new offence which was no way prohibited by the common law, and appoints a particular manner of proceeding against the offender, as by commitment, or action of debt, or information etc., without mentioning an indictment, it seems to be settled at this day that it will not

168. (1972) Law. Com. No. 50, para. 29.

169. See above para. 30 et seq.

170. (1788) Vol. II c. 25 s. 4; and see Archbold (38th ed., 1973) para. 6.

171. [1891] 1 Q.B. 747, 753.

> maintain an indictment, because the mentioning the other methods of proceeding only, seems impliedly to exclude that of indictment. Yet it hath been adjudged that, if such a statute give a recovery by action of debt, bill, plaint, or information, or otherwise, it authorises a proceeding by way of indictment. Also where a statute adds a farther penalty to an offence prohibited by the common law, there can be no doubt but that the offender may still be indicted, if the prosecutor think fit, at the common law. And if the indictment for such offence conclude contra formam statuti, and cannot be made good as an indictment upon the statute, it seems to be now settled that it may be maintained as an indictment at common law."

The most important part of this citation is, perhaps, the principle set out in its final sentence. The doctrine is put in more modern form in Article 152 of Stephen's Digest[172] -

> "Every one commits a misdemeanour who wilfully disobeys any statute of the realm by doing any act which it forbids, or by omitting to do any act which it requires to be done, and which concerns the public or any part of the public, unless it appears from the statute that it was the intention of the legislature to provide other penalty for such disobedience."

Craies on Statute Law and Maxwell on the Interpretation of Statutes both devote short passages to the doctrine[173] and refer to the old cases.[174]

72. The doctrine was most recently invoked in the case of Lennox-Wright[175] where the defendant who posed as a doctor in

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172. See 9th ed., 1950 p. 120.

173. 7th ed. (1971) at pp. 230-232 and 12th ed. (1969) at pp. 334-335 respectively.

174. These include Jones (1735) 2 Stra. 1146; Davis (1754) Say. 163; Wright (1758) 1 Burr. 543; Robinson (1759) 2 Burr. 800; Boyall (1759) 2 Burr. 832; Smith (1780) 2 Douglas 441; Harris (1791) 4 T.R. 202; Gregory (1833) 5 B. & Ald. 555; Price (1840) 11 Ad. & E. 727; Buchanan (1846) 8 Q.B. 883.

175. [1973] Crim. L.R. 529.

in a hospital was charged, inter alia, with "doing an act in disobedience of a statute by removing parts of a dead body contrary to section 1(4) of the Human Tissue Act 1961." Section 1(4) states that no removal of parts from a dead body "shall be effected" save by a registered medical practitioner. The Act nowhere states that it is an offence to violate its provisions, nor prescribes any penalties. However, it was held to be settled that if a statute prohibits a matter of public grievance to the liberties and securities of the subject or commands a matter of public convenience, all acts or omissions contrary to the prohibitions or command of the statute are misdemeanours at common law punishable by indictment unless such method manifestly appears to be excluded by statute. The punishment was governed by the common law and an unlimited term of imprisonment and an unlimited fine could be imposed. The defendant was convicted and a period of suspended prison sentence imposed. This is the first instance since 1846,[176] so far as we are aware, in which the doctrine has been successfully invoked.

73. In our view, this doctrine in practice now leads to results which are undesirable. But for the existence of the doctrine, it might be assumed that whenever Parliament intends to impose penalties for contravening a prohibition contained in a statute, it invariably provides expressly for this purpose. The recent affirmation of the existence of the doctrine, however, some one hundred and thirty years after the last case in which it was successfully invoked, makes that assumption impossible; and the doctrine is the more objectionable in that, operating as it does at common law, it permits the imposition of an unlimited period of imprisonment and fine. In this respect also, it encounters the objection frequently raised to the current operation of the law of conspiracy.[177]

74. In essence, this is a matter of statutory construction; and the modern approach would, we think, be to ask whether, in

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176. See Buchanan (1846) 8 Q.B. 883.

177. See Working Paper No. 50 "Inchoate Offences", para. 115 et seq.

the absence of an express provision making particular conduct an offence, there was any intent by Parliament to penalise that conduct. The answer today, we suggest, would always be in the negative. If this be correct, we think that the doctrine under discussion should be abolished. With that aim, we propose that no person shall be guilty of an offence by reason of a failure to comply with a statute unless the statute provides expressly that such failure to comply shall be an offence.

## APPENDIX *

Extract from the Report of the Committee on Privacy, Cmnd. 5012 (the Younger Committee Report), relating to the recommended new offence of surreptitious surveillance by means of a technical device.

### Unlawful surveillance by device

560 One set of circumstances is common to all the instances examined above where surveillance by means of technical devices is significantly offensive. It is that the victim has put himself in or otherwise established a situation in which, were it not for the use of the device, he would have been justified in believing that he could not be overhead or observed, as the case might be [155]. Accordingly, when a technical device is used for surveillance in these circumstances, we think that there is a need of more protection than the law now gives. Subject therefore to certain considerations, which we describe below, we propose that such use should be unlawful.

561 There are three considerations in particular of which any statement of the unlawful act should take account. The first is that there should be an intention to use the device with the object to which exception is taken. This would mean that where the victim had created, or put himself in, a situation of normally adequate protection against being overhead or observed, and a technical device were employed with some other object in view, there would be no offence. The second particular consideration is that the complainant would have to show that he had taken precautions against being overhead or observed, which, but for the use of the device, would have been adequate. The third consideration is the necessity to exclude use with the consent of the "victim". Surreptitious use by consent would be rare, but it is theoretically conceivable [156].

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[155] This formula embodies the same thoughts as are in the Danish Criminal Law Commission's proposals: "...against which one cannot reasonably protect oneself" and the Swiss Act's provision on photographs: "... a fact which otherwise could not have been perceived": "Straffelovradets Betaenkning om Privatlivets Fred", Copenhagen 1971, Chapter VIII, p. 52, and Swiss Penal Code, Article 179, paragraph 1.

[156] See paragraph 539.

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* See para. 16 above.

Surreptitious surveillance

562 A major problem with controlling surreptitious surveillance by devices is that, of its nature, it is difficult to detect. Enforcement of a controlling law on this type of activity would therefore be more than usually difficult. For this reason we consider that there should be a new criminal offence of unlawful surveillance by surreptitious means. This should ensure that, where any such act is reasonably suspected, the resources of the police would be available to investigate and prosecute it.

563 The criminal offence of surreptitious surveillance by means of a technical device would comprise the following elements:

a. a technical device;[157]

b. surreptitious use of the device;

c. a person who is, or his possessions which are, the object of surveillance;[158]

d. a set of circumstances in which, were it not for the use of the device, that person would be justified in believing that he had protected himself or his possessions[159] from surveillance whether by overhearing or observation;

e. an intention by the user to render those circumstances ineffective as protection against overhearing or observation; and

f. absence of consent by the victim.

For this criminal offence there should be provision for summary trial, but, as it could be a serious offence, the prosecution should have the option of bringing the charge on indictment and the accused should have the right of trial by jury. Other countries have provided for heavey fines and some have put a fairly short limit on terms of imprisonment. Any decision on penalties raises questions of penal policy on which we are not qualified to pronounce. We would envisage that a fine would be the penalty most often imposed and that substantial fines would be available in serious cases.

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[157] See paragraph 503.

[158] See paragraph 543.

[159] It seems necessary to include possessions to cover cases in which, for instance, a document is photographed or observed or a tape recording is overhead.

Advertising

564 As incitement to commit the offence would likewise be an offence, it follows that anyone advertising technical devices with reference to their aptness for surreptitious surveillance would face the same penalties.

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