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THE QUEEN v. WARBURTON.

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tions between the prisoner and Lister, after payment of partnership liabilities; and that the prisoner, in order to cheat Lister, had agreed with his brother, Joseph Warburton, who managed the partnership business at Urbigau, and with W. H. Pepys, a friend of the prisoner residing at Cologne, to make it appear by documents, purporting to have passed between Pepys and Joseph Warburton, and by entries in the partnership books or accounts, made under the superintendence of Joseph Warburton, that Pepys was a creditor to the firm for moneys advanced, and that by reason of such documents and entries certain partnership property was to be withdrawn and to be handed to Pepys, or otherwise abstracted or kept back, so as to be divided between the prisoner and Joseph Warburton and Pepys, to the exclusion of Lister from any interest or advantage in or from or in respect of it. The jury upon this evidence found the prisoner guilty of the conspiracy charged, and I think rightly so found, if, in point of law, such an agreement, made by a partner with such an intent to defraud his partner of partnership property, and to exclude him entirely from any interest in or advantage from it on such an occasion, that is to say, on the taking of an account for the purpose of dividing the partnership property on a dissolution of the partnership, by means of false entries in the partnership books, and false documents purporting to have passed with a supposed creditor of the firm, is a conspiracy contrary to law, for which a prisoner can be criminally convicted.

The offence, if it be one, was fully committed and completed before the passing of the statute, by which a partner can be criminally convicted for feloniously stealing partnership property.

I request the opinion of the Court of Criminal Appeal whether the verdict found in this case upon the evidence so stated, assuming such verdict to be correct in point of fact, can be sustained so as to support a conviction for conspiracy in point of law. If it can be, the conviction to be affirmed; if it cannot, the conviction to be set aside. I reserved the sentence to be passed on the prisoner.

*Waddy (Whittaker with him)* for the prisoner. There is no conspiracy, unless there is a combination by two or more to do an illegal act, or to do a legal act by illegal means, and both those elements are wanting in the present case. The transaction for which the prisoner was indicted was complete before 31 & 32 Vic. cap. 116 came into force. By that act, a partner who steals or embezzles any of the partnership effects is made liable to conviction as if he was not a partner; but apart from that act, there would be no illegality in dealing with partnership property as was done by the prisoner, and he has at most been guilty of an immoral act. In 2 Lindley on Partnership, 856, it is said that there is no method by which an ordinary firm can sue or be sued by any of its members, either at law or in equity, and that follows from this—"1. That no action at law can be brought by one partner against another for the recovery of money or property payable to the firm, as distinguished from the partner suing. 2. That no criminal prosecution is sustainable by one partner against another for what he may do with the property of the firm." The case of *R. v. Evans*, 11 W. R. 125, 9 Jur.

N. S. 184, is then cited, where a partner who misrepresented the partnership accounts, and thereby obtained more than his share of the property, was held not liable to conviction for obtaining money by false pretences. This case was decided upon the ground that the prisoner only obtained his own, that is to say, the partnership property, and the present case is on all fours with it. [BRETT, J.—Here there was to be no result of the fraud till after the dissolution of partnership, and the effect of the prisoner's act would have been to obtain not his own, but his partner's property.] [COCKBURN, C. J.—There was a conspiracy to do something which, when it took effect, would be an illegal act in every sense of the word. The criminality of a combination must be judged of by its result if carried out.] The prisoner was guilty of no actionable wrong; and an act which, if done by one alone, is not actionable, cannot be ground for an indictment for conspiracy when done by two or more. Buller, J., giving judgment in *Pasley v. Freeman*, 3 T. R. 51, says, p. 58, "If one man alone be guilty of an offence which, if practised by two, would be the subject of an indictment for conspiracy, he is civilly liable in an action for reparation of damages at the suit of the person injured." Here the prisoner had not ceased to be a partner, and there was no time at which he would have been liable to an action for reparation of damages.

*Maule, Q. C. (Nathan with him)* for the prosecution, was not called upon.

COCKBURN, C. J.—I am of opinion that this conviction was right. It may be that the law of England goes further than that of other countries in holding that an act which, if done by one alone, would not make him liable to the criminal law, may become an indictable offence if carried out by two or more acting in combination; but, if that be so, the present case is most certainly not one in which I should desire to restrict the operation of the law.

The prisoner is indicted for having unlawfully conspired with others to cheat and defraud his partner. The offence charged was committed before the passing of the statute 31 & 32 Vic. cap. 116, and it has been contended, on the part of the prisoner, that because the act, if committed by him alone, would not have been a criminal offence, he cannot be convicted; and further, that if it is enough, for the purpose of this prosecution, that the prisoner should have committed an illegal act, it must be illegal in the sense of being actionable, and that that element is also wanting. I cannot agree with the argument that the act must of necessity have been a criminal act, if done by one alone, and I think it may, under some circumstances, be enough if the act is unlawful, in the sense that it is a civil wrong. It appears to me that it is not material whether the conspiracy had reference to a dissolution of partnership, or to the share which each partner would take on a division of present profit. The intent would in either case be an equal wrong to the other partner, tending to deprive him of his share of the profits, or of the partnership property. It is clear that that would be a civil injury, and would be within the ordinary definition of conspiracy or combination of two or more to wrong another by fraud and false pretences. It