SOME ASPECTS OF CRIMINAL CONSPIRACY; THE DOCTRINE OF PUBLIC MISCHIEF, THE HOUSE OF LORDS AND D.P.P. v. WITHERS

by

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I.

Criminal conspiracy has attracted a certain obloquy for various reasons. It has been complained that it is illogical to punish an agreement for the doing of an act when the performance of that act by an individual acting alone is not an offence at law; that the principles governing liability are too wide, in that a person becomes afflicted with responsibility for a whole conspiracy even if his role in its transaction[1] has been minor or passing... so that he is sentenced on the basis of the judge's own private inferences as to his role rather than for a role precisely charged and found proved by a jury. It has been objected that the trial of the crime has almost inevitably become associated with a wide rule of evidence allowing the admission against the accused of the words and acts of persons alleged to be co-conspirators, whether or not charged, in violation of the hearsay rule, one subject to qualifications but inevitably applied informally. Perhaps the most enduring complaint has been that as to the vagueness of liability — just what is the basis of criminal responsibility in conspiracy? How is conspiracy to be legally defined? What is its true ambit?

The quest for a legal definition of conspiracy has revolved around two basic and essentially competing views: (1) conspiracy is to be characterised in terms of the memorable antithesis attributable to Lord Denman in *Jones'* case,[2] as an agreement for the accomplishment of an unlawful end, or a lawful end by unlawful means. Such a concept of liability is

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1 The courts will permit an illegal agreement to be spelled out and proved by reference to the overt acts done in the course of its transaction.

2 *R* v. *Jones* (1832) 110 E.R. 485 at p. 487. But as R. S. Wright observes, Lord Denman did not employ his antithesis in the way in which courts and commentators have usually done subsequently: *The Law of Criminal Conspiracies and Agreements* (1873) at p. 63 ff. It is evident both in the context of *Jones'* case and in the subsequent decisions by him, that Lord Denman intended the phrase to express a limitation on criminal conspiracy, and not a definition of it; the phrase was to be strictly qualified.

An instance of a misconstruction of Lord Denman's usage is Lord Alverstone C.J.'s general characterisation of it as the definition of criminal conspiracy accepted for 'many years... (by) the law of England... This

of course a very broad one — R. S. Wright describes the supposed rule as being 'of great apparent generality'.[3] (2) Conspiracy is to be regarded as composed of agreements for the commission of a crime and agreements for the attainment of an object 'unlawful' but not, however, criminal. Such latter objects fall into a number of well-defined categories. According to this analysis, criminal conspiracy is conceived as being confined to several well-defined classes which are now closed to judicial extension.

To begin with the Denman formulation: it is apparent that the first and second branches can be assimilated — a criminal conspiracy is an agreement with an unlawful object. Such is the proposition contended for by Professor Howard.[4] If an illegal means is a term of conspiratorial agreement — and of course it must be if an agreement for its effectuation is to be criminal — then we are in fact talking of what is merely a more *immediate* object of such a conspiracy. No case has ever turned upon distinguishing means from ends in these terms (if indeed the ultimate object of an individual's motivation could necessarily always be known). There are no judicial dicta on the issue. Very occasionally a court will classify an illegal act as a means. An instance is *R.* v. *Newland*.[5] Some contemplated doings will be immediate, others long-term. And there is no legal point in distinguishing immediate from ultimate purposes.

To re-express Lord Denman's antithesis in these terms is to accent its true breadth — an agreement is criminal if for an 'unlawful' purpose. If such a test is allied to the orthodoxy, that in the trial of an indictable crime it is for the judge to decide whether the alleged acts constitute a crime or not, the jury simply finding whether or not the factual allegation has been made out according to the appropriate standard of proof — the judge is virtually given the power to declare new crimes.[6] The Denman test is this broad — the only way in which a judge's (or a jury's) discretion is limited is by the requirement that two or more people ought to have agreed upon the unlawful purpose.

It is perhaps unremarkable that a judge ought have the responsibility of deciding whether a set of facts satisfies the legal definition of a crime

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definition was expressly approved by the House of Lords, in *Quinn* v. *Leathem* ([1901] A.C. 495) . . .': *R.* v. *Brailsford* [1905] 2 K.B. 730 at p. 746. The phrase is often wrongly attributed to Willes J. in *R.* v. *Mulcahy* (1868) L.R. 3 H.L. 306 at p. 317. See Lord Hailsham L.C. in *Kamara* v. *D.P.P.* [1973] 2 All E.R. 1242 at p. 1258 in this regard.

With this qualification, the formula will for the sake of convenience be identified with its inventor.

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3 *The Law of Criminal Conspiracies and Agreements* (1873), at p. 63.

4 C. Howard, *Australian Criminal Law* (2nd Ed. 1970), at p. 272.

5 [1954] 1 Q.B. 158 at p. 166.

6 In characterising an agreement as 'unlawful' according to the Denman antithesis, a judge would be creating a precedent, the question being one of law.

— it is, for instance, for the judge to put to the jury the legal ingredients of larceny where that crime is charged. But most crimes are more finely defined than conspiracy; the judge's discretion is narrowed by established rules. It is evident that the Denman formula is too broad to constitute a proper definition of a crime — that it ought be regarded as merely descriptive. And yet it is periodically repeated by the textbooks and has been frequently invoked in the law reports: there are certainly instances where it has been relied upon in establishing criminal liability where it could not be said with certainty before that a criminal liability would arise, given the same facts. In such cases, it may be said that the Denman antithesis has been treated as the operative principle of liability; even though reference may have been made to one supposed category of conspiracy or another, such as agreement to injure a third person, or agreement to do a civil wrong. Some of these decisions have long been suspected — others, no doubt, stand in the centre of an accepted stream of authority and are unimpeachable.

It is apparent, however, that in more recent times at least, Lord Denman's formula has not been appealed to as the definitive principle of liability. R. S. Wright questioned it in these terms in 1873.[7] The alternative view, that conspiracy is confined to several settled heads, seems to be implicit in most modern judgments, if not textbook commentaries. For his own part, Wright indicated conspiracy to be confined to combinations concerned with (1) the commission of any crime (2) acts against the government (3) acts tending to pervert or defeat justice (4) the corruption of public morals and decency (5) fraudulent activity (6) the injury of individuals (in circumstances not involving fraud) (7) the restraint of trade and disturbance of markets (8) the coercion of individuals (in the context of trade union combinations). He was inclined to doubt whether (6) or (7) had really been settled — whether the modern courts would recognise a liability under these heads (in fact the *Mogul Steamship Company* case[8] which followed his work some twenty years later, strongly affirmed such a category).

On the other hand, successive editions of Kenny repeat the first edition's classification of conspiracy thus: (1) agreements to commit a substantive crime (2) agreements to commit any tort that is malicious or fraudulent (3) agreements to commit a breach of contract in circumstances that are peculiarly injurious to the public (4) 'agreements to do certain other acts which (unlike all those hitherto mentioned) are not breaches of law at all, but which nonetheless are outrageously immoral or else are, in some way, extremely injurious to the public'.[9] In these terms Kenny proposed that certain facts might with relative certainty be characterised as criminal conspiracy (viz, the first three objects), but the

7 *The Law of Criminal Conspiracies and Agreements* (1873), at p. 62 ff.
8 *Mogul Steamship Co. Ltd.* v. *McGregor Gow and Co.* (1892) A.C. 25.
9 *Outlines of Criminal Law* (19th Ed. 1966) at p. 428.

fourth category is extremely vague. In this form it is of an obvious organisational convenience, classifying those conspiracy cases not defineable in terms of the first three classes. But Kenny's unqualified statement of it in these terms discloses a view of conspiracy as being of an extreme breadth sustainable by reference to such a broad principle of liability as that represented to have been formulated by Lord Denman.

In the second view of conspiracy indicated that categories are certainly of more than merely discursive significance — they are seen as legally significant. The 'unlawful' purpose comes to take on a relatively settled range of meanings. Unlawful purposes are to be seen as defineable in terms of a finite number of recognised categories. Conspiracy consists of a number of heads of liability, each having its own specialised incidents. Such an analysis of the crime excludes a more general basis of liability; and views conspiracy as more certain and narrower than it has been commonly supposed to be. The categories upon this view cannot be judicially extended in number, because for the courts to do this would be tantamount to their creating new offences, something now regarded as a matter for legislative initiative alone.[10]

The second view of conspiracy confines the Denman formula to a merely general descriptive significance, or recognises it as being at most of historical importance, perhaps explaining in part how the modern categories came to be fashioned.

This view of conspiracy is the analysis implicitly contended for in the House of Lords decision in *DPP* v. *Withers*,[11] one involving the destruction of the supposed crime of conspiracy to effect a public mischief. Conspiracy to affect a public mischief could have been supported on one or more of three bases (1) public mischief *per se* is a crime — so an agreement for an act constituting a public mischief is criminal (2) conspiracy to effect a public mischief is a well-accepted category of conspiracy like conspiracy to defraud (3) the Denman-type approach; agreements for an unlawful purpose are criminal. In these terms the phrase 'public mischief' is of descriptive rather than substantive implication. Indeed, in some of the cases thought to be good authority for the crime the indictment did not employ the phrase, but simply charged an unlawful conspiracy; the usage 'public mischief' was only invoked in the judge's summing-up — or on appeal — perhaps as a redundancy.

The first rationale was lost with the destruction of the crime of public mischief in *Newland*[12] which, however, preserved the crime of conspiracy to effect a public mischief. As to (2) — it was unlikely by the time of *Withers* that conspiracy to effect a public mischief could be supported as a category of conspiracy, viz, as a crime *sui generis*, given its relatively

10 *Knuller Ltd.* v. *DPP* [1972] 2 All E.R. 898.
11 *DPP* v. *Withers and Others* [1974] 3 All E.R. 984.
12 *R* v. *Newland* [1954] 1 Q.B. 158 at p. 168.

brief history and the almost total want of judicial definition of its ingredients. As to (3) — it is certainly true that in its supposed 'public mischief' strain conspiracy was encountered in its vaguest and most general form. Given the failure of a settled definition to crystallise over time, and putting aside the possibility of public mischief being a crime in itself, conspiracy to effect a public mischief — could by the time of *Withers* only be sustained by reference to the most general principle of liability. The decision in *Withers* — that there is no such offence as conspiracy to effect a public mischief, is inconsistent with the survival of such a broad test of criminal responsibility, as either a substantive rule or even merely as a tool of analysis.

Necessarily a consideration of *Withers* from two main viewpoints — the fate of the doctrine of public mischief, and the implications of this for a legal definition of conspiracy, must commence with a review of antecedent authority — most obviously with a look at the rather elementary idea of a crime of public mischief *per se*.

II.

There are relatively few reported public mischief cases. The supposed doctrine traces from the well-rehearsed dictum of Lawrence J. in *R.* v. *Higgins*, to the effect that 'all offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable'.[13] The remark is obviously ambiguous. He talks initially of *offences*: the suggestion is that all crimes affecting the public are indictable — something obviously wrong, given that almost all crime has a public implication. Alternatively, he meant that all acts or attempts tending to the prejudice of the community are crimes, it being of secondary significance only that such crimes are indictable. Such a sentiment is extravagantly broad. It has been observed that the remark was much broader than the circumstances of the case required,[14] and the case was not decided on this basis, it being ruled that solicitation of another was itself a crime (the accused was charged with soliciting a servant to steal his master's goods).

The *dictum* would seem to have been of the scantiest authority, and yet it was repeated without criticism in a succession of cases. It was not in fact taken up by the courts until *Brailsford's* case, in 1905. The report discloses that the prosecution relied on the dictum as authority

13 *R* v. *Higgins* (1801) 102 E.R. 269 at 275. The case has always been treated as the foundational case in public mischief decisions: see for instance Lord Simon in *DPP* v. *Withers* [1974] 3 All E.R. 984 at p. 996. A number of antecedent cases suggestive of such a doctrine have, however, been cited from time to time, as for instance *R* v. *Sterling* (1663) 83 E.R. 331; *R* v. *Wheatley* (1761) 97 E.R. 746; *R* v. *De Berenger* (1814) 105 E.R. 536. See Lord Alverstone C.J. in *R* v. *Brailsford* [1905] 2 K.B. 730 at p. 745; the Crown's submission in *R* v. *Porter* [1910] 1 K.B. 369 at p. 371; Lord Hewitt L.C.J. in *R* v. *Young* (1944) 30 Cr. App. Rep. 57, at p. 61.

14 Lord Goddard C.J. in *R* v. *Newland* [1954] 1 Q.B. 158.

for a common law offence known as effecting a public mischief.[15] The indictment did not employ these words. The Court of Criminal Appeal accepted the *dictum*, though not unambiguously, equating acts tending to 'produce a public mischief' with offences of 'fraud' and 'cheat' at common law, in the context of the general observation that the law has long recognised the distinction between acts which are merely improper or immoral and those which tend to produce a public mischief.[16] The act complained of was the obtaining of a passport from the Home Office by false pretences. The supposed doctrine is left quite undefined. The reasoning in the case was consistent with a finding of fraud in the context of conspiracy.

Bassey's case[17] dealt with an alleged conspiracy to do an act tending towards a public mischief, though these latter words did not apparently appear in the indictment. The conspiracy had been for the presentation of false papers in connection with an application to the Inner Temple as a student. The Court spoke of the Benchers' duty to the public regarding such admissions — there was no elaboration of the offence of creating a public mischief — the basis upon which the conspiracy was sustained.

In *R.* v. *Manley*[18] the Court of Criminal Appeal upheld the conviction of a person on a charge of causing a public mischief, the accused having represented to the police that she had been robbed. Hewitt L.C.J. placed principal reliance on Lawrence J.'s dictum. Once more the crime was left quite undefined, in the rather oblique observation that 'two at least of the ingredients of public mischief or prejudice to the community were involved' in the act, in that the time of the police was wasted and members of the public whose description answered that given were put in peril.[19] Lord Hewitt was not really propounding the legal ingredients of the crime; he seemed to be acknowledging that it was to be defined no less broadly than its description, that of an act to the 'prejudice (of) . . the community'.

The danger inherent in attaching criminal liability to a doing on the basis of so general a principle was manifested in the conspiracy case of *Young*,[20] where it was held that the contemplated act need not be accompanied by a guilty intention for it to constitute a public mischief or for its agreement to constitute a conspiracy to effect one. It was evidently thought sufficient if an accused had acted with 'reckless indifference'.[21]

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15 [1905] 1 K.B. 730 at p. 739.
16 *Ibid* at p. 745.
17 *R* v. *Bassey* (1931) 22 Cr. App. Rep. 160.
18 (1933) 29 Cox C.C. 574.
19 *Ibid* at p. 577.
20 *R* v. *Young* (1944) 30 Cr. App. Rep. 57.
21 *Ibid* at p. 59.

It was not until *Newland's* case that the doctrine was disapproved. The Court of Criminal Appeal ruled that Lawrence J.'s dictum ought not be followed; to do so would leave judges free 'to declare new crimes and enable them to hold anything which they considered prejudicial to the community to be a misdemeanour'.[22] It was noted that the offence of committing a public mischief had never been defined.

This court's reasoning was endorsed by the House of Lords in *Withers.* Lord Simon's explanation is the fullest. He saw the modern law on the subject as deriving from *Higgins,* with *Manley's* case being 'the first modern case where it fell for consideration whether conduct causing or tending to cause a public mischief constituted a crime irrespective of conspiracy'.[23] To reaffirm the existence of such a crime would be equivalent to ruling that judges (or juries) are empowered to create new offences — an implication inconsistent with 'your Lordships' firm indorsement in *Knuller'* of the converse.[24]

He obviously regarded the authorities as insubstantial, quite apart from the more general principle. The reference to *Manley* is, of course, a reflection of the fact that other modern cases concerning the doctrine were mainly conspiracy cases in which the court was not immediately concerned with whether or not there was an offence of public mischief *per se,* and in which the phrase did not necessarily appear in the indictment. It is apparent that judicial thinking in this area was bedevilled by a gratuitous and transcendently wide remark that was not, until *Newland's* case, scrutinised critically, mainly because — in the conspiracy cases at least — it was most commonly not the only possible basis of decision. In these cases, the unlawful object could usually be categorised under some other more substantial head, and this it will be seen is what the courts did, tacitly rather than overtly.

Public mischief in Australia

There appear to be two reported cases of relevance. In the Victorian case of *Kataja,*[25] Mann C.J. in a brief judgment refused to enlarge the ambit of the principle laid down in *Manley.* The defendant was charged with 'effecting a public mischief' on the basis of his having made a false statement to the police as to the fate of a truck owned by his employer and so wasting their time with enquiries. The Chief Justice observed that, 'such phrases as "public mischief", "tending to the prejudice of the community", or "contrary to public policy"... have to be applied by the Judges... with the very greatest caution and with the greatest regard to precedent', having regard to their nature.[26] The instant facts were distinguishable from those in *Manley's* case and were without

22 [1954] 1 Q.B. 158 at p. 167.
23 *DPP* v. *Withers* [1974] 3 All E.R. 984 at p. 997.
24 *Ibid* at p. 999.
25 *R* v. *Kataja* [1943] V.L.R. 145.
26 *Ibid* at p. 146.

precedent. He was not willing to create one, though he did not specifically disapprove *Manley*.

This approach was followed in *R.* v. *Todd*[27] by the Full Court of the Supreme Court of South Australia, where the charge was one of committing a public mischief, the accused having abandoned his car in such a way as to suggest he had drowned, so wasting the time of the police in making enquiries. The court found that there was no offence known to the law of South Australia 'which should be described in an information as "effecting a public mischief" *simpliciter*... although there are many indictable offences which may be described as "public mischiefs".'[28] The alleged offence was open to objection 'on the grounds of uncertainty'.[29] *R.* v. *Manley* was to be doubted on the basis that it was based upon Lawrence J.'s dictum in *Higgins* 'which in our opinion is not part of the law of South Australia'.[30]

This reasoning stands in line with Lord Goddard's reasoning in *Newland*, though this case is not the express basis of the decision in *Todd*. The two cases together (*Kataja* and *Todd*) indicate scant authority for the offence in Australia, even if it is viewed as confined to the ambit of the decision in *Manley*.

III.

The concept of conspiracy to effect a public mischief was first raised in *R.* v. *Brailsford*;[31] and the reasoning of the Court of Criminal Appeal in that case shows its birth to have been a confused one. The indictment did not mention public mischief, but described a conspiracy comprehending two essentially different unlawful purposes — the obtaining of a passport by fraudulent pretences, and the employment of that passport in a way injurious to international relations between Britain and Russia. The latter use was not a 'necessary consequence'[32] of the former, as the judgment seems to suggest, and as such was quite independent of it.

The usage of public mischief arose first in the Crown's submission on appeal, with particular reference to 'the prejudicing of international relations'. The trial judge had, however, spoken of the fraudulent obtaining in terms suggestive of public mischief, in talking of acts 'injurious to the public'.[33] In upholding the conviction, Lord Alverstone C.J. seemingly confused the two unlawful purposes, treating them as one. The process of reasoning is scarcely illuminating. It has been noted

27 [1957] S.A.S.R. 305.
28 *Ibid* at p. 322.
29 *Ibid* at p. 321.
30 *Ibid* at p. 331.
31 (1905) 2 K.B. 730.
32 *Ibid* at p. 739.
33 *Ibid* at p. 741.

how he spoke of 'frauds and cheats' at common law, some of which are observed to produce a public mischief. It is evident that the fraudulent obtaining might have been upheld as a conspiracy to defraud — by 1905 fraud was a settled head of conspiracy. On the other hand, the supposed prejudice to international comity was not obviously classifiable as an illegal purpose. The reference to public mischief as a substantive basis of liability is perhaps to be understood as the product of an ambition to draw the actual use to which the passport was put into the ambit of criminal responsibility — something not strictly needed to establish a criminal agreement. The court generalised fraud and an undefined doctrine of public mischief in a way seemingly to be avoided, given the quite different character of the two purposes. Their assimilation for the purposes of legal characterisation clouded the *ratio* of the case. The only level at which a common ground of liability is discovered is in the reference to the Denman formula,[34] and in this context that generalisation really affirmed no more than that agreements for criminal means or ends are punishable as crimes. The reference to *Higgins* and antecedent cases relied upon as founding a crime of public mischief indicate that the court viewed conspiracy to effect a public mischief as an agreement for the commission of a crime — but it is by no means clear that this was the basis of the decision. And in its confusion of the offence of committing a public mischief and conspiracy to effect a public mischief, of two different conspiratorial purposes, and of the doctrines of public mischief and fraud, the case is an uncertain endorsement of conspiracy to effect a public mischief quite apart from the existence of a criminal offence of public mischief. All that can be safely said is that the court employed the phrase 'public mischief' in such a manner as to indicate its endorsement of a substantive principle of liability in conspiracy more narrow than the Denman test — the words were not intended as a mere embellishment of the judgment.

The terms of the decision in Brailsford were echoed in the following case of *Porter*,[35] where the accused had been convicted of conspiring to indemnify a bail against his liability. Once more, the indictment did not mention the phrase 'public mischief'. Rightly or wrongly, the Court of Criminal Appeal, in a judgment delivered once more by Lord Alverstone C.J., felt unable to consider the agreement as one to pervert the course of justice, because the jury did not find that the parties to the agreement intended that the accused should abscond. On appeal, the Crown alleged a conspiracy tending to a 'public mischief', and these were the terms which Lord Alverstone accepted as the relevant ones. In upholding the conviction, the Court clearly relied on there being an offence of committing a public mischief. *Porter* is less ambiguous in this sense than Brailsford. The assumption that the offence existed is a completely uncritical one. It was readily assumed that the facts satisfied

34 *Ibid* at p. 746.

35 *R* v. *Porter* [1910] 1 K.B. 369.

the criteria of the crime even as the crime was left undefined. Both these foundational cases reflect a peculiarly casual invocation of the nomenclature of public mischief in circumstances suggesting that the doctrine was employed as a judicial cure for the failure of the facts to satisfy more settled conspiratorial heads — in *Brailsford* there was uncertainty as to whether the use to which the passport was put was comprehended by the conspiracy to defraud authorities; in *Porter* there was doubt as to whether the requisite *mens rea* for conspiracy to pervert the course of justice had been made out. There is a marked unwillingness to analyse the elements of public mischief as an offence *sui generis* and of conspiracy to effect a public mischief. Given the courts' acceptance of the trial judge's right to decide himself whether the facts constituted a public mischief, it was not to be wondered at that the courts did not feel compelled to specify the ingredients of conspiracy to effect a public mischief, or of the offence of committing a public mischief.

In *Bassey's* case,[36] some twenty years later, the indictment evidently charged a conspiracy to do an act tending to a public mischief. The Court of Criminal Appeal seemed to regard liability as being founded upon conspiracy to defraud or alternatively conspiracy to effect a public mischief. Clearly public mischief is conceived as an independent crime, though once more the ingredients of the offence are defined no more closely than in the observation that the act must be injurious to the public. It appears that the doctrine enjoyed an immunity from judicial scrutiny during the first half of this century.

It was not until *Newland*[37] and the Court of Criminal Appeal's destruction of criminal liability for public mischief *per se*, that it became at all necessary for any court to establish a clear alternative basis for the criminality of an agreement for a public mischief. The indictment charged a 'conspiracy to effect a public mischief', among other counts. The act complained of was the obtaining of a class of pottery from manufacturers and wholesalers, for sale within the United Kingdom, in the absence of a licence, a situation governed by regulations designed to promote Britain's export drive. Certain traditional heads of conspiratorial liability were canvassed, if somewhat undiscriminatingly, such as violation of statute, fraud and prejudice to trading competitors. The major theme throughout the court's judgment, which was given by Lord Goddard, C.J., was the violation of a statute by widespread activity that was itself fraudulent. Strictly then, it was unnecessary to discuss conspiracy to effect a public mischief, excepting that the words were used in a count for the indictment respecting which a guilty verdict had been entered. The court did not affirm a settled conspiratorial head of public mischief. And yet it is apparent that the concept of conspiracy to effect a public mischief was still considered a live one; the court's

36 *R* v. *Bassey* (1931) 22 Cr. App. Rep. 160.
37 *R* v. *Newland* [1954] 1 Q.B. 158.

rationalising fervour was not extended beyond the destruction of the offence go committing a public mischief to conspiracy effecting a public mischief. It is evident that liability for conspiracy to this end, if it were to be sustained, was regarded as supportable only in such general terms as Lord Denman's formula. This was in fact cited, along with the general observation that agreements for acts could be criminal even though the act itself was not criminal.[38]

But what was the *ratio* of the case? Viscount Dilhorne suggested in *Withers* that Lord Goddard treated the words 'public mischief' as a mere 'surplusage'.[39] The acceptance of the broad proposition — that whatever the labelling of the conspiracy, the particulars sufficiently alleged a common law misdemeanour, namely conspiracy... the matter might well be looked at 'simply as a conspiracy to effect an unlawful purpose'[40] — indicates that the court may have had in mind that the conviction could be properly sustained in reliance on more settled streams of authority such as conspiracy to defraud, or to violate the provisions of a statute. The invocation of the broad Denman principle certainly covered these possibilities. If conspiracy to effect a public mischief was endorsed it was without enthusiasm, and because it was not the sole possible basis of liability it was not found necessary to define it in any way. More generally, the best view of the *Newland's* decision is that it did uphold a concept of conspiracy as broad as that expressed in the Denman antithesis. The relatively casual process of reasoning — the shifting between ideas of conspiracy to effect a public mischief and of conspiracy for other types of unlawful object without ever feeling the need to explicitly found liability upon any one of them, and the upholding of the conviction on a count alleging a conspiracy to effect a public mischief in relation to which the judge's summing up must have conspicuously employed the vague and suggestive language associated with the doctrine of public mischief, seems to have been founded upon so generous a view of the crime.

Newland's case was plainly a precursor to the House of Lords' decision in *Withers*. In a sense, *Newland's* decision simply did not go far enough. The whole logic of the decision, as to the offence of public mischief *per se*, tended to deny the validity of the offence of conspiracy to effect a public mischief. The House of Lords has demolished conspiracy to effect a public mischief on essentially the same basis as the Court of Criminal Appeal before it, when the latter ended the offence of public mischief; the crimes were so undefined that judges — or juries,

38 *Ibid* at p. 165.

39 *DPP* v. *Withers* [1974] 3 All E.R. 984 at p. 991.

40 *R* v. *Newland* [1954] 1 Q.B. 158 at p. 166.

depending on the delimitation of responsibilities between judge and jury,[41] had a *carte blanche* to create new crimes.

In *Withers*, the co-appellants ran an investigation agency. The indictment concerned certain methods employed by them in obtaining confidential information from others. The first count alleged a conspiracy to effect a public mischief in that they made false representations that they were entitled to receive such information from certain private organisations; the second count contained a similar allegation in relation to certain public authorities. All the defendants were convicted on count two, certain of them on count one.

The point of law before the House concerned the judge's direction to the jury in which he spoke of 'the offence of conspiracy to effect a public mischief' and of 'wilfully deceitful acts' such as 'would cause extreme injury to the general well-being of the community as a whole'.[42] What was at issue was the existence of the offence of conspiracy to effect a public mischief.

Viscount Dilhorne observed at the outset of his opinion that a 'criminal conspiracy may take many forms and it has been customary to attach labels to different categories... but whatever the label, there is only one offence, conspiracy'.[43] No doubt this is true in the formal descriptive sense, and it is true as regards the drawing of the indictment,[44] but the whole direction of his reasoning is towards a conspiracy of fixed categories. He dealt with the list of suggested categories of conspiracy compiled by Wright[45] and the list stated in Archbold, observing that in neither list is there mention of conspiracy to effect a public mischief.[46] The question is not whether the label is an apt description of the conspiracy but whether a conspiracy so described comes 'under one of the other heads form(ing) a separate class, recognised by law'.[47] The recognised categories then are of legal significance, though

41 Certain remarks of Lord Alverstone C.J. in *R* v. *Brailsford* [1905] 2 K.B. 730 at p. 746, 7, were relied upon as authority for the proposition that it was a matter solely for the judge as to whether the facts alleged in the indictment constituted a public mischief, and that it was not a matter upon which evidence could be given. Such a view was challenged by the Privy Council in *Joshua* v. *R* [1955] 1 All E.R. 22 at p. 25, and by the Court of Criminal Appeal in *R* v. *Foy* [1972] Crim. L.R. 504, both of which decisions reserved a larger discretion to the jury in conspiracy effecting a public mischief trials, at least where questions of 'public standards or morality'... or other more subjective questions of fact and opinion were raised by the instant facts. (*Ibid* at p. 504).

42 *DPP* v. *Withers* [1974] 3 All E.R. 984.

43 *Ibid* at p. 988.

44 Though particulars, it is suggested, will inevitably tend to specify the conspiracy in such a way as to make it amenable to classification.

45 It will be recalled that Wright did not accept all of these suggested categories.

46 *DPP* v. *Withers* [1974] 3 All E.R. 984 at p. 988, citing 22 ed (1900) 1209. See Archbold, *Criminal Pleading and Evidence* (38th Ed. in 1973) at para. 4051 ff.

47 *Ibid* at p. 988.

it is not stated that they constitute in the aggregate an exhausting definition of conspiracy. Public mischief is not a recognised head.

His major objection to public mischief is its extreme breadth, whereby a jury may be able 'to create a new offence by deciding that conduct not previously held criminal is criminal'.[48] His review of the so-called authorities turned on this apprehension. He stated that most of these cases were within the 'well-known heads of conspiracy'.[49] Where such a charge is preferred, the question is this: is 'the object of the conspiracy... of such a quality... as has already been recognised by the law as criminal?'[50]

As I interpret him, Viscount Dilhorne is of the view that (1) the phrase 'conspiracy effecting a public mischief' was very often employed as a surplusage (e.g. 'conspiracy to commit a fraudulent act tending to a public mischief') when the facts are such as to satisfy a settled head of conspiracy. In these circumstances, a conviction would be upheld provided reference to public mischief in a judge's charge to a jury wasn't so prejudicial or productive of uncertainty as to constitute a miscarriage of justice.[51] There is no separate category of conspiracy known as conspiracy effecting a public mischief. A conviction on such a count cannot be sustained if the facts do not satisfy an offence defineable in terms of a well-recognised class of conspiracy. This is because such a doctrine would bring great uncertainty to the criminal law, in that it would allow the jury to create new offences, something against the policy of the modern law.

Such reasoning is certainly an argument for a categorised conspiracy, and one against any widening of the crime. The Denman test in implicitly disapproved. But Lord Dilhorne did not expressly state that the ambit of conspiracy is to be now regarded as confined to well-recognised classes. Lord Simon's opinion is rather more specific in these terms.

Lord Simon objected to the idea of conspiracy to effect a public mischief on the basis firstly, that there was no offence known as public mischief,[52] and secondly, because the major authority in favour of conspiracy to effect a public mischief on a basis independent of public mischief itself being a crime, viz *Newland's* case, relied on the 'in-

48 *Ibid* at p. 989.

49 *Ibid* at p. 992.

50 *Ibid* at p. 992.

51 Certain of their Lordships thought that the facts alleged in count (2) might have been sufficient to sustain a conviction for conspiracy to defraud, but the count itself mentioned the words 'public mischief', and in the words of Viscount Dilhorne, the trial judge's reference to 'public mischief' in his summing up was such as to 'vitiate the trial', in that this introduced 'a wide measure of uncertainty' into matters — at p. 993. He was supported in this view by Lord Diplock at p. 994, and Lord Killbrandon at pp. 1009, 1010.

52 *Ibid* at p. 996.

securely based cases of *Brailsford, Porter* and *Bassey*...'[53] Both the offence of committing a public mischief and conspiracy for this end were to be disapproved in principle because of their reliance on the thinking manifested in Lawrence J.'s dictum in *Higgins*, a doctrine allowing judges (or juries) to create new offences when they found the instant conduct complained of reprehensible.[54] He felt that Lord Goddard only sustained the offence of conspiracy to effect a public mischief because of the number of preceding cases dealing with conspiracy to effect a public mischief.[55] The Court in *Newland* disapproved of Lawrence J.'s dictum; conspiracy to effect a public mischief had to be sustained on another basis, and Lord Simon plainly did not accept that *Newland's* case established a valid alternative basis. Both in principle and as regards authority, conspiracy to effect a public mischief could not be upheld.

He spoke more generally of the 'well-recognised and universally accepted class(es) of criminal conspiracy, and noted that not all cases of conspiracy have been 'readily assignable' to any one of these categories. These decisions he calls "unconforming" cases'.[56] He asked a question seen as germane to the cases concerning conspiracy to effect a public mischief. Can these cases stand on their own? He referred to one of Kenny's statements as to the meaning of the word 'unlawful' in the conspiracy cases — that of an object concerning the doing of an act 'outrageously immoral or... in some way, extremely injurious to the public', and to judicial repetition or endorsement of this formula.[57] The conspiracy for a public mischief cases could be classified under this head. A number of these and of other cases such as those instanced by Kenny could not be classified under any other heading. Impliedly, Lord Simon did not necessarily disapprove such cases (though he indicated elsewhere a doubt as to those conspiracy for public mischief cases based on Lawrence J.'s dictum in *Higgins*.[58]) There are then, it seems, legitimate orphan cases quite independent of the standard classes. The sense of his opinion seems to be this, they may be able to be applied 'specifically, not generically, to analogous circumstances'.[59] As with his general approach to conspiracy to effect a public mischief, such *dicta* support a conspiracy composed of fixed classes, though these are accompanied by a closed rump of 'unconforming cases' which may be good authority given precisely similar facts but which can't be judicially extended. Lord Simon does not indicate his support for any more general principle of conspiratorial liability.

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53 *Ibid* at p. 1002.
54 *Ibid* at pp. 999, 1002.
55 *Ibid* at p. 1002.
56 *Ibid* at p. 996.
57 *Ibid* at p. 1001.
58 *Ibid* at p. 1002.
59 *Ibid* at p. 1004.

Lord Killbrandon also found it useful to refer to Wright's classification and observed it to be significant that a category of conspiracy to effect a public mischief was not included among these. He observed of the public mischief and conspiracy for a public mischief cases that the phrase was often a redundancy and not intended to refer to an offence known by either of these names. He reclassified certain of these cases in terms of recognised offences or categories of conspiracy. He referred to Kenny's four classes of conspiracy and viewed the fourth (that of objects concerning acts 'outrageously immoral or... extremely injurious to the public') with circumspection: 'it will be observed that the fourth head exists for the purpose of accommodating all those reported instances which don't fall under the first three'.[60] Conspiracy effecting a public mischief would of course be classifiable in these latter terms. The supposed crime is disapproved for the same reason as Kenny's fourth head — its breadth and vagueness.

His reasoning accords with that of the other members of the House: conspiracy is conceived mainly if not exclusively as being composed of a number of settled classes. The rejection of Kenny's general fourth class and of the crime of conspiracy to effect a public mischief which represents its spirit so completely is an acceptance of a more certain conspiracy which is to be defined by settled heads and not to be extended beyond them.[61]

Conspiracy to effect a public mischief in Australia

Two reported decisions in the Australian jurisdictions concerned indictments containing this usage. *R.* v. *Boston* [62] involved a conspiracy to bribe a member of Parliament as an inducement to him to act in violation of his official duty, something described in the indictment as 'being to the public mischief'.[63] The point of law before the High Court was whether the instant facts disclosed an offence. It is apparent that the words 'public mischief' were redundant, in that the bribing of a public officer can, as the object of an agreement, be regarded as criminal on the basis that this is an independent head of conspiracy. Alternatively the criminality of such an agreement is to be upheld on the basis that such conduct is itself a common law crime as performed by an individual.[64] The major controversy indeed, centred upon such issues as whether a member of Parliament could be regarded as a public officer and the nature of the duty he owed. But several of the justices were willing to endorse the usage of public mischief, or at least accepted

60 *Ibid* at p. 1008.

61 Lord Reid agreed with Viscount Dilhorne. In a short judgment Lord Diplock agreed that there ought not be an offence known as conspiracy to effect a public mischief, without elaborating his reasons.

62 (1923) 33 C.L.R. 386.

63 *Ibid* at p. 388.

64 See *R.* v. *Vaughan* (1769) 98 E.R. 308; *R.* v. *Pollman* (1809) 170 E.R. 1139; *R.* v. *Beale* (1798) 1 East 183; *R.* v. *Whitaker* [1914] 3 K.B. 1283.

it uncritically. Knox J. was of the opinion that 'an agreement... to do an act which tends to produce a public mischief amounts to a criminal conspiracy'.[65] He offered no further legal, as distinct from factual elaboration as to this foundation of liability. Isaacs and Rich J.J., in a joint judgment, found it satisfactory to account for liability in terms of the Denman rule,[66] with the observation that it was 'not necessary to define the exact limits of the word "unlawful" in this connection',[67] because there was no doubt as to liability in the present case. Higgins J. also cited the Denman formula,[68] but he sounded the reservation present in the later judgments in *Newland* and *Withers*, namely that treating an agreement as criminal on the broad basis that it is 'injurious to the public' on the judge's view of the 'public interest' is unsatisfactory, for in this way the court is given a 'roving commission' to treat as criminal acts not hitherto thought to be criminal.[69] In the present case, however, he was in no doubt that bribery itself was a common law misdemeanour, and that accordingly the agreement should be regarded as criminal quite apart from any issue of public prejudice or public mischief.

Mr Justice Higgins' reasoning clearly anticipated the reasoning of the House of Lords in *Withers*. It is in the same vein as the later decision of *R.* v. *Howes*,[70] in which the Supreme Court of South Australia considered the validity of an indictment charging a conspiracy 'to effect a public mischief by fraudulent means'. The accused was alleged to have arranged for another person to present a subject at the 1970 matriculation examination conducted by the Public Examinations Board of South Australia in his own name. The phrase 'public mischief' was treated as a redundancy by the court, who further observed that the trial judge had 'expressed a preference that it not be used', having agreed with both counsel before him 'that there was no magic in the phrase'.[71] The count was clearly upheld by the Supreme Court as one alleging a conspiracy to defraud (anticipating the broad conception of this head enunciated by the House of Lords in *Withers* and *Scott* v. *R.*[72]

There is therefore no cogent authority in Australia inhibiting the acceptance by future courts of the decision in *Withers*, at least in its specific terms (the repudiation of an independent head of conspiracy for a public mischief), and *Howes* in particular, is directly in accord with it. Indeed, given the unarguable logic of *Withers* it is unlikely that the issue will come before an Australian court, but if it should there is no reason to doubt that the decision in *Withers* would be applied.

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65 *Ibid* at p. 392.
66 *Ibid* at p. 396. They attributed the formula to Willes J. in *Mulcahy* v. *R.* (1868) L.R. 3 H.L., 306 at p. 317.
67 *Ibid* at p. 396.
68 *Ibid* at p. 407.
69 *Ibid* at p. 408.
70 [1971] 2 S.A.S.R. 293.
71 *Ibid* at p. 307.
72 [1974] 3 All E.R. 1032.

The one obvious qualification on such a conclusion in regard to the Australian jurisdictions is suggested by the specific provision of a head of conspiracy for a public mischief in s. 297 (1) (h) of the Tasmanian *Criminal Code*. Given the explicit inability of the common law courts to lend flesh to this doctrinal phantom, it is clear that the ambit of this statutory purpose cannot be stated according to common law principles. Probably the best view of s. 297 (1) (h) is that it, perhaps taken along with the expansive generalities represented by s. 297 (1) (f) of the same Act (which prescribes the criminality of conspiracies to injure 'by unlawful means') and s. 297 (1) (i) (which is in similar terms), is to be construed as providing for the retention of the common law liability for conspiracy for acts criminal in themselves (which head is specifically preserved in s. 297 (1) (a)). Weight is led to such an interpretation of s. 297 (1) (h) in that the phrase 'conspiracy for a public mischief' has from time to time been used to describe those heads of criminal conspiracy additional to the primary head of conspiracy for a crime, i.e. those purposes not criminal *per se*. Recent instances of this ambiguous judicial shorthand occur in Lord Tucker's speech in *Shaw* v. *R.*[73] (in which he identified the head of conspiracy to corrupt public morals as an instance of conspiracy for a public mischief); in Lord Reid's speech in the same case (in which he saw '(p)ublic mischief' as 'the criminal counterpart of public policy'[74]); in Lord Diplock's opinion in *R.* v. *Bhagwen*,[75] where he spoke of 'the established categories of public mischief' in the conspiracy context, clearly meaning such settled heads as conspiracy to defraud; and in Lord Hailsham's speech in *Kamara* v. *R.*[76] where he contrasted conspiracies involving the 'infraction of criminal law' with agreements 'to effect a public mischief'. His instances of such latter cases are quite diverse.[77] Elsewhere he indicated the generality of the usage of his claim (now quite outmoded by *Withers*) that 'the categories of public mischief' are not 'closed or even . . capable of being closed'.[78]

In these terms the specification of the criminality of conspiracies for a public mischief in the Tasmanian Code is not to be construed, any more than are the common law decisions, as providing for a discreet head of conspiracy for a public mischief additional to the settled heads of conspiracy. The Code provision that is, is to be seen as harmonious with common law principles.

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73 [1961] 2 All E.R. 446 at p. 463.
74 *Ibid* at p. 457.
75 [1970] 3 All E.R. 97 at p. 105.
76 [1973] 2 All E.R. 1242 at p. 1250.
77 *Ibid* at pp. 1250, 1254.
78 *Ibid* at p. 1254.