SUPREME COURT OF APPEALS OF VIRGINIA.

HARRIS *et al. v.* COMMONWEALTH.

Feb. 2, 1912.

[73 S. E. 561.]

1. **Conspiracy (§ 23*)—"Criminal Conspiracy."**—A criminal conspiracy is a combination of two or more persons by some concerted action to accomplish a criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 30-39; Dec. Dig. § 23.*

For other definitions, see Words and Phrases, vol. 2, pp. 1454-1461; vol. 8, p. 7613; vol. 2, pp. 1745-1746.]

2. **Monopolies (§ 12*)—Combinations Prohibited—Common-Law Rule.**—The common law did not prohibit the creation of a monopoly by individuals, but only the granting of a monopoly by the sovereign, and combinations in restraint of trade, in view of the laws against engrossing which were not technically monopolies at common law, were only unlawful when made among dealers in provisions or the necessaries of life or of merchandise or manufacture in the market.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

3. **Monopolies (§ 18*)—Combinations by Insurance Companies—"Insurance"—"Necessaries."**—Insurance is not an article of merchandise or manufacture, or one of the necessaries of life, within the laws against engrossing, prohibiting combinations among dealers in merchandise or manufacture or necessaries of life, since a policy of insurance is a simple contract of indemnity against loss.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 14; Dec. Dig. § 18.*

For other definitions, see Words and Phrases, vol. 4, pp. 3674-3677; vol. 5, pp. 4693-4703.]

4. **Conspiracy (§ 23*)—Combinations by Insurance Company to Fix Rates.**—A combination of fire insurance companies to fix rates and control the business of insurance in a city, though an agreement in restraint of trade, is not an indictable conspiracy at common law.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 23.*]

5. **Conspiracy (§ 43*)—Criminal Conspiracy—Indictment.**—Where the object of a conspiracy is not criminal or illegal, and the illegality consists of the means by which the object is effected, the indictment

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

must set forth the means which must be such as to constitute an offense at common law or by statute.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79-99; Dec. Dig. § 43.*]

6. Criminal Law (§ 1*)—Offenses—Motive.—Acts which will subject one to a civil action without regard to the motive with which it is done may be indictable when done maliciously.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1; Dec. Dig. § 1.*]

7. Conspiracy (§ 43*)—Illegal Combinations—Warrant.—A warrant alleging that insurance companies and individuals doing business in a city which had levied a license tax on insurance companies doing business there maliciously conspired to arbitrarily raise insurance rates for the purpose of maintaining a monopoly of the insurance business in the city, and to stifle competition and coerce the city authorities to repeal the license tax, does not charge a criminal conspiracy at common law, but shows that the companies had just cause for raising their rates in the city by considering the license taxes imposed, and the motive charged does not make the acts complained of a criminal offense.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 43.*]

Error to Corporation Court of Newport News.

A. H. Harris and others were charged with criminal conspiracy, and from a judgment overruling demurrers to the criminal warrant they bring error. Reversed and rendered.

O. D. Batchelor, R. Randolph Harrison, J. Winston Read, and *Alex C. King,* for plaintiffs in error.

The Attorney General and *C. C. Berkeley,* for the Commonwealth.

BUCHANAN, J. This is a prosecution for criminal conspiracy. It was commenced before a justice, but upon appeal to the corporation court of the city of Newport News the warrant was by leave of the court amended.

The amended warrant is quite long. It charges, in substance, that on May 17, 1910, and previously for a number of years, a large number of insurance companies had been doing all the fire insurance business of the city, which insurance was a necessity to all persons owning property in the city; that prior to the said 17th of May the city authorities had passed an ordinance requiring a certain license tax to be paid by each fire insurance company doing business in the city for the license year beginning May 1, 1910; that the (6) plaintiffs in error and some 20 other

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

persons, naming them, and others unknown, together with all the said fire insurance companies and associations, did on the 17th of the said May, with a wanton and malicious intent to damage and injure, oppress, and coerce the persons owning property in the city, and the council of the city and the members thereof acting in their official capacity, "maliciously, immorally, corruptly, wantonly, and fraudulently, unlawfully, and wickedly, conspire, combine, confederate, and agree together, with intent aforesaid" by coercion and intimidation to arbitrarily fix, establish, regulate, control, charge, and collect the premiums of insurance on all policies and contracts of insurance issued, and to be issued by the said insurance companies and all others who might attempt to do a fire insurance business in the city, and all their agents, on all property in the city, for the purpose of maintaining a wicked and exclusive monopoly of all the fire insurance business done in the city and state, and with like intent to stifle and destroy all competition in fire insurance in the city, and with like intent to arbitrarily charge, coerce, extort, and collect the noncompetitive rates and premiums so arbitrarily fixed, and to prevent persons owning property in the city from procuring fire insurance at any other than the said established noncompetitive rates, and thereby coerce and intimidate said council and its members to repeal the said license tax on said fire insurance companies—all of which was charged to be the great damage of the city and state, the council and its members, and against the peace and dignity of the commonwealth.

The warrant further charged that, pursuant to said conspiracy, the parties had done the said acts complained of.

There are numerous assignments of error; but, in the view we take of the case, it will be unnecessary to consider any of them except the demurrer to the warrant.

That demurrer is in substance that the warrant does not charge a criminal offense.

It is conceded that there is no statute of this state prohibiting such a combination as that charged in the amended warrant, but the contention of counsel for the commonwealth is that the combination charged is a crime at common law.

No case is cited by the counsel for the commonwealth which holds that a combination of fire insurance companies and associations to fix, regulate, and control fire insurance rates is a criminal conspiracy at common law; but the claim is that the common law "is an expansive, elastic, progressive system, and its old principles are as effective to-day to prevent unlawful conspiracies to oppress the people in the exercise of their rights to enjoy the benefits of modern insurance as it is to protect the

people to-day in their rights to enjoy wholesome food at reasonable prices."

It is true that the principles of the common law are elastic, and that one of its peculiar merits is that it adapts itself to the rights of parties under changed circumstances (Foster *v.* Commonwealth, 96 Va. at pages 309, 310, 31 S. E. 503, 42 L. R. A. 589, 70 Am. St. Rep. 846), but the difficulty is in ascertaining what are the principles or rules of the common law as to criminal conspiracies. The cases and text-writers are not agreed on the subject.

[1]The definition or description which seems to be more generally adopted is that a conspiracy must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. See Jones' Case, 4 B. & A. 45; Pettibone *v.* U. S., 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419; Commonwealth *v.* Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346; Mogul Steamship Co. *v.* McGregor, etc., 23 Q. B. Div. p. 624; Wright on Cr. Conspiracy (Carson's Ed.) 48, 110-111, and authorities cited; 2 Wharton's Cr. Law, § 1337.

It is insisted that the object of the combination charged in the warrant was to create and maintain a monopoly in the fire insurance business in the city of Newport News, and that the creation of a monopoly in an article of necessity was a criminal offense at common law.

[2] It seems to be settled that there was no prohibition at common law against the creation of a monopoly by individuals. Chief Justice White in Standard Oil Company *v.* United States, 221 U. S. 1, 52, 55, 31 Sup. Ct. 502, 512, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, says it is remarkable that nowhere at common law can there be found a prohibition against the creation of monopoly by an individual. "The frequent granting of monopolies [by the sovereign] and the struggle which led to a denial of the power to create them—that is to say, to the establishment that they were incompatible with the English constitution—is known to all and need not be reviewed. The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: (1) The power which the monopoly gave to the one who enjoyed it to fix the price and thereby injure the public; (2) the power which it engendered of enabling a limitation on production; and (3) the danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale. As monopoly as thus conceived embraced only a consequence arising from an

exertion of sovereign power, no express restrictions or prohibitions obtained against the creation by an individual of a monopoly as such. But, as it was considered, at least so far as the necessaries of life were concerned, that individuals by the abuse of their right to contract might be able to usurp the power arbitrarily to enhance prices, one of the wrongs arising from monopoly, it came to be that laws were passed relating to offenses such as forestalling, regrating, and engrossing by which prohibitions were placed upon the power of individuals to deal under such circumstances and conditions as, according to the conception of the times, created a presumption that the dealings were not simply the honest exertion of one's right to contract for his own benefit unaccompanied by a wrongful motive to injure others, but were the consequence of a contract or course of dealing of such a character as to give rise to the presumption of an intent to injure others through the means, for instance, of a monopolistic increase of prices. This is illustrated by the definition of engrossing found in the statute (5 and 6 Edw. VI, c, 14), as follows:

"'Whatsoever person or persons * * * shall engross or get into his or their hands by buying, contracting, or promise-taking, other than by demise, grant, or lease of land, or title, any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victual, whatsoever, within the realm of England, to the intent to sell the same again, shall be accepted, reputed and taken an unlawful engrosser or engrossers.'"

After showing the difference between monopoly and engrossing, and how they afterwards became to be regarded as one and the same thing because of the similarity of some of the evils which resulted from them, he says: "Generalizing these considerations, the situation is this: (1) That by the common law monopolies were unlawful because of their restrictions upon individual freedom of contract and their injury to the public. (2) That as to necessaries of life the freedom of the individual to deal was restricted where the nature and character of the dealing was such as to engender the presumption of intent to bring about at least one of the injuries which it was deemed would result from monopoly; that is, an undue enhancement of price. (3) That to protect the freedom of contract of the individual not only in his own interest, but principally in the interest of the common weal, a contract of an individual by which he put an unreasonable restraint upon himself as to carrying on his trade or business was void. And that at common law the evils consequent upon engrossing, etc., caused those things to be treated as coming within monopoly and sometimes to be called monopoly, and the same considerations caused monopoly because of its op-

eration and effect to be brought within and spoken of generally as impeding the due course of or being in restraint of trade."

From these quotations and the authorities cited in that case and others that might be cited, it appears, we think, that combinations in restraint of trade and called monopolies, though not technical monopolies as known to the common law, were combinations, so far as pertinent to this case among dealers in provisions or the "necessaries of life," or "articles of prime necessity," or of "merchandise" or "manufacture in the market."

[3] Insurance is not an article of merchandise or manufacture, or one of the "necessaries of life," or of prime necessity, within the letter or spirit of the laws against engrossing.

It was said in Paul *v.* Virginia, 8 Wall. 168, 19 L. Ed. 357, that: "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire entered into between the corporation and the assured for a consideration paid by the latter. The contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as having an existence and value independent of the parties to them." Hooper *v.* California, 155 U. S. 648, 653, 15 Sup. Ct. 207, 39 L. Ed. 297.

[4] The most that can be said as to the combination to fix, regulate, and control the business of fire insurance in the city of Newport News is that it was an agreement in restaint of trade. But agreements merely in restraint of trade are not illegal in the sense that they are either indictable or actionable.

In Mogul Steamship Co. *v.* McGregor, 23 Q. B. Div. 619, Bowen, L. J., in commenting upon Hilton *v.* Eckersley, 6 El. & Bl. 47, said that "no action at common law will lie against any individual or individuals for entering into a contract merely because it is in restraint of trade," and in the same connection further said: "We are asked to hold the defendants' conference or association illegal as being in restraint of trade. The term 'illegal' here is a misleading one. Contracts, as they are called, in restraint of trade, are not in my opinion illegal in any sense, except that the law will not enforce them. It does not prohibit the making of such contracts. It merely declines, after they have been made, to recognize their validity. The law considers the disadvantage so imposed upon the contract a sufficient shelter to the public."

In the same case, Fry, L. J., said: "It is said that such an agreement is in restraint of trade, and therefore illegal. Be it so. But in what sense is the word 'illegal' used in such a proposition? In my opinion it means that the agreement is one upon which no action can be sustained, and no relief obtained at law or in equity; but it does not mean that the entering into the

agreement is either indictable or actionable. The authorities on this point are, I think, with a single exception, uniform. * * * The language of all the judges in the cases of Hornby *v.* Close and Farrer *v.* Close is consonant with that of Lord Campbell and Erle, J., in Hilton *v.* Eckersley, and Crompton, J., is, I believe, the only judge who has ever hitherto held such contracts illegal as well as void."

In United States *v.* Addyston Pipe & Steel Co., 85 Fed. 279, 29 C. C. A. 148, 46 L. R. A. 122, Taft, J., said: "Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, or giving rise to a civil action for damages in favor of one prejudically affected thereby, but were simply void, and were not enforced by the courts. Mogul Steamship Co. *v.* McGregor, Gow & Co. (1892) App. Cas. 25; Hornby *v.* Close, L. R. 2 Q. B. 153; Lord Campbell, C. J., in Hilton *v.* Eckersley, 6 El. & Bl. 47, 66; Hannen, J., in Farrer *v.* Close, L. R. 4 Q. B. 602, 612."

In the case of Queen Ins. Co. *v.* Texas, 86 Tex. 250, 24 S. W. 397, 22 L. R. A. 483, in which that state attempted to dissolve a combination of insurance companies similar to that charged in the warrant in this case, one of the grounds urged by the Attorney General of the state was that "any article of general use and benefit to the public, which affords to the public convenience, comfort, enjoyment, and profit, ought to be protected as a 'prime necessity.' Insurance affords all these in this latter day of business progress, and has become an important factor in every business of the country and in the use and enjoyment of property and possessions and belongings." But the court refused to adopt that view, and held that such a combination was not illegal at common law; and in doing so said: "Insurance is a mere contract of indemnity against contingent loss. Though it is an important aid to commerce, it is not a business of commerce, or one in which the public have any direct right. No franchise is necessary for its prosecution, and no one has a right to demand of an underwriter that his property shall be insured at any rate. Any individual may execute a policy, and so any company incorporated for the purpose of insuring property may refuse to execute one, unless it be so bound by its charter. Forced insurance, for obvious reasons, is detrimental to the public interest, and it is therefore not probable that such restrictions will be found in any charter. Labor is necessary to production and transportation, and therefore it is not merely an aid, but a necessity, of commerce. It is advantageous to the public, and in that sense they have an interest in it. The services of professional men are likewise indispensable to most civilized communities, and are presumably likewise advantageous to the public. The public have an interest in them in the same sense in which

they have an interest in the business of insurance. It follows, therefore, that if insurance companies are to be brought within the rule that makes agreements to increase the price of merchandise illegal, upon the ground that the public have an interest in their business, agreements among laborers and among professional men not to render their services below a stipulated rate should be held contrary to public policy and void upon the same ground. Combinations among workingmen to increase or maintain their wages by unlawful means are unlawful. But are such combinations unlawful when the only means resorted to accomplish their objects is a refusal on the part of the parties to the agreement to accept employment at a lower rate of wages than that designated in the contract? This is the next question for determination, and it is not without difficulty.

That court, after reviewing the course of decision in this country and England, reached the conclusion that a combination of laborers agreeing not to work except upon named conditions, no unlawful means being employed, is not a criminal conspiracy, and that neither were such contracts illegal or void on the ground of public policy; thus reaching the same conclusion upon that subject as did this court in the case of Everett Waddey Co. *v.* Richmond Typo. Union, 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N. S.) 792.

In the latter case it was held that it was not unlawful for laborers to organize for their own protection and to further their own interests, and to persuade others to join them, provided they used no unlawful means in accomplishing those objects; citing a number of cases, among others the case of Carew *v.* Rutherford, 106 Mass. 1, 8 Am. Rep. 287, from which is quoted with approval the following language: "Every man has a right to determine what branch of business he will pursue, and to make his own contracts with whom he pleases and on the best terms he can. He may change from one occupation to another and pursue as many different occupations as he pleases, and competition in business is lawful. He may refuse to deal with any man or class of men; and it is no crime for any number of persons, without an unlawful object in view, to associate themselves together and agree that they will not work or deal with certain men or classes of men, or work under a certain price or without certain conditions. * * * Freedom is the policy of this country."

If it be lawful for laborers to combine to control the terms of their hiring and to induce others to unite with them for that purpose, it would seem to follow, in the absence of any statutory regulation upon the subject, that it is not unlawful for individuals or corporations engaged in the insurance business to agree upon the terms and conditions and rates upon which they are

willing to insure, and to induce others engaged in the same business to unite with them in maintaining the terms and conditions and rates so fixed and agreed upon, provided they use no unlawful means in accomplishing their objects. See, also, generally, Cont. Ins. Co. *v.* Fire Underwriters (C. C.) 67 Fed. 310, and cases cited; McCauley *v.* Tierney, 19 R. I. 255, 33 Atl. 1, 37 L. R. A. 455, 61 Am. St. Rep. 770; Bohn Mfg. Co. *v.* Hollis, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319; State *v.* Van Pelt, 136 N. C. 633, 49 S. E. 177, 68 L. R. A. 760; Ætna Ins. Co. *v.* Com., 106 Ky. 864, 51 S. W. 624, 21 Ky. Law Rep. 503, 45 L. R. A. 360.

Having reached the conclusion that the agreement to fix, regulate, and control the rate of insurance in the city of Newport News was neither criminal nor unlawful, the next question is, Were the means by which that end was to be accomplished criminal or illegal?

[5] Where the object of an alleged conspiracy is not criminal or illegal and the illegality is in the means by which that object is to be effected, the means must be set forth, and must be such as to constitute an offense either at common law or by statute. 2 Whar. Cr. Law (9th Ed.), §§ 1358, 1367; Pettibone *v.* United States, 148 U. S. 197, 205, 13 Sup. Ct. 542, 37 L. Ed. 419; Wright on Cr. Cons. 197-199.

The warrant contains a great deal of strong assertion and the frequent use of the words, "fraudulently," "unlawfully," "maliciously," "coercion," "intimidation," and the like, but the facts averred do not show any element of fraud, coercion, or intimidation in the legal sense of those terms. 2 Whar. Cr. Law, §§ 1367, 1368.

[6, 7] It is no doubt true that some acts which would subject a party to a civil action without regard to the motive with which they are done are indictable when done maliciously, and it may also be true that a combination of persons instigated and moved by mere malice towards others as a means of doing them injury and for no benefit to the parties to the combination would be a criminal offense. But that is not this case. The warrant does not so charge, and it affirmatively appears from its allegations that the city of Newport News had levied a license tax upon insurance companies doing business in the city, and that such companies had subsequently raised their insurance rates. The facts charged in the warrant show that the insurance companies had just cause for raising their rates of insurance in the city, for they had the same right in fixing their rates of insurance to take into consideration the license taxes they were required to pay as any other item of expense attending their business. The question involved here is whether or not, where the combination is neither in end or means criminal or unlawful, except in the sense that

courts will not enforce the agreement, the motives with which the parties to the agreement are moved, as charged in the warrant, will make it a criminal offense.

The general rule, as stated in Cooley on Torts (3d Ed.) p. 1505, citing numerous cases, is that "malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful. An act which does not amount to a legal injury cannot be actionable because done with a bad intent. Where one exercises a legal right only, the motive which actuates him is immaterial." Numerous cases are cited which sustain the text.

In Hunt *v.* Simonds, 19 Mo. 583, it was held that an action does not lie for a conspiracy to do a lawful act. Thus an action will not lie against the officers of insurance companies for combining to refuse to take insurance on a boat, however malicious their motive. In discussing the question involved in that case, the court said: "The damage to the plaintiff is alleged to have been produced by the refusal of the defendants to make contracts in the ordinary line of their business. It is obviously the right of every citizen to deal or to refuse to deal with any other citizen, and no person has ever thought himself entitled to complain in a court of justice of a refusal to deal with him except in some cases where, by reason of the public character which a party sustains, there rests upon him a legal obligation to deal and contract with others. * * * But such is not the obligation of underwriters. The business of insuring is but a game of hazard, and there are a great many elements entering into the calculations upon which it can be safely pursued."

Again it is said: "He had no right in law to demand insurance upon his boat from one or all of the defendants, nor that they should insure cargo on his boat, and consequently their refusal to insure from any motive, however improper, could give him no right to sue them."

In Orr *v.* Home Mut. Ins. Co., 12 La. Ann. 255, 68 Am. Dec. 770, it was held that a conspiracy by insurance companies that they would not insure any boat on which a certain person was employed, whereby such person was deprived of employment, did not furnish a ground of civil action, however malicious the motives of the insurance companies may have been. See Bohn Mfg. Co. *v.* Hollis, 54 Minn. 223, 234, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319; Bowen *v.* Matheson, 14 Allen (Mass.) 499.

Litigation would be endless if the motives of those who are simply doing what they have a legal right to do were made the subject of inquiry.

In Phelps *v.* Nowlen, 72 N. Y. 39, 45, 28 Am. Rep. 93, in which it was held that, where a man has a legal right, courts will

not inquire into the motive by which he is actuated in enforcing the same, the court said: "A different rule would lead to the encouragement of litigation, and prevent in many instances complete and full enjoyment of the right of property which inheres to the owner of the soil. An idle threat to do what is perfectly lawful or declarations which assert the intentions of the owner might often be construed as evincing an improper motive and a malignant spirit, when in point of fact they merely stated the actual rights of the party. Malice might easily be inferred sometimes from idle and loose declarations, and a wide door be opened by such evidence to deprive an owner of what the law regards as well-defined rights."

And the evil consequences of such a practice would be much worse in cases of conspiracy where all are responsible within certain limitations for the acts and declarations of one of their number as to the motives which actuate him, when none of his associates may be moved by it or any other improper motive.

Dr. Wharton in his Criminal Law (9th Ed.), after stating in section 1337 that it is conceded on all sides that combinations of two or more persons may become indictable when directed to the accomplishment either of an illegal object or an indifferent object by illegal means, says the conflict in the cases begins when we reach those combinations which are assumed to be indictable, not as aimed at an indictable offense, but from the idea that the policy of the law forbids the reaching of the attempted object by a confederacy; and in section 1338 adds: "But to extend indictable conspiracies so as to include cases where acts not in themselves indictable are attempted by concert, involving neither false statement nor concerted force, should be resolutely opposed. A distressing uncertainty will oppress the law if the mere fact of concert in doing an indifferent act be held to make such act criminal. We all know what offenses are indictable, and, if we do not, the knowledge is readily obtained. Such offenses, when not defined by statute, are limited by definitions which long processes of judicial interpretation have hardened into shapes which are distinct, solid, notorious, and permanent. It is otherwise, however, when we come to speak of acts which, though not penal when they are committed by persons acting singly, are supposed to become so when brought about by concert which involves neither fraud nor force. * * * No man can know in advance whether any enterprise in which he may engage may not in this way become subject to prosecution. but conspiracies to commit by nonindictable means nonindictable that it should be prohibited either by statute or by common law; It is essential to the constitution of an indictable offense * * * offenses, if we resolve them into their elements, are neither prohibited by common law nor by statute. * * * An act of busi-

ness enterprise in purchasing goods in a cheap market for the purpose of selling them in a dear market, which, in one phase of judicial sentiment, would be regarded as meritorious impetus to commercial activity, would be in another phase of judicial sentiment, as it once has been, treated as an indictable offense."

In reaching the conclusion that the amendment warrant does not charge an indictable offense and that the demurrer to it should have been sustained, we do not wish to be understood as holding that the combination charged in this case may not be prejudicial to the public, and that a sound public policy may not require limiting or suppressing such combinations. But, as was said by the Court of Appeals of Texas in Queen Ins. Co. *v.* Texas, supra, in holding that a like combination was not a criminal offense at common law: "There are certain contracts and perhaps combinations which the law regards as being against public policy. The courts cannot extend the rule merely by reason of their opinion as to what the law ought to be. What other combinations or contracts should be held illegal on the ground of public policy is a political question—that is to say, one which it is the province of the legislative department of the government to determine. The Legislature has the power to weight the public interest, even 'in golden scales,' and, if such combinations be found detrimental, they can denounce the evil and provide the remedy."

The judgment complained of will be reversed, and this court will enter such judgment as the trial court ought to have entered.

Reversed.

Note.

This is a close case, and much might be said in support of its decision either way. And there are cases holding that such a combination as that under consideration here did constitute an indictable conspiracy at common law, as well as other cases holding the cor trary. Again, many cases seem to intimate strongly, though they do not so decide, that such a combination was indictable at common law and under the old statutes against monopolies and engrossing, which are a part of our common law.

Thus, a case holding that the formation of a trade combination, or monopoly, is not actionable standing alone, is West Va. Transp. Co. *v.* Standard Oil Co., 50 W. Va. 611, 617, 40 S. E. 591. The court there said: "But the very minute these aggregations conspire to do acts harmful to the state—that is the general public, to raise or depress prices of necessary things, or to restrain trade, they fall under the power of the state."

The definition adopted by the court, that a conspiracy must be a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or a lawful purpose by criminal or unlawful means, brings us to the question of what is an unlawful purpose. If the purpose here was not unlawful, it may be conceded that the means—mere combination to effect that purpose—was not so; but if the purpose sought was unlawful, then we have a case of criminal conspiracy within this definition. See Pettibone *v.* United States, 148 U. S. 197, 203, 37 L. Ed. 419.

An early New York Case, The People *v.* Fisher, 14 Wend. 9, expressly holds that a conspiracy of journeymen workmen of any trade or handicraft, to raise their wages, by entering into combinations to coerce journeymen and master workmen employed in the same trade or business, to conform to rules established by such combination for the purpose of regulating the price of labor, and carrying such rules into effect by overt acts, is indictable as a misdemeanor; and it was accordingly held, where journeymen shoemakers conspired together and fixed the price of making coarse boots, and entered into a combination that if a journeyman shoemaker should make such boots for a compensation below the rate established, he should pay a penalty of $10; and if any master shoemaker employed a journeyman who had violated their rules, that they would refuse to work for him, and would quit his employment, and carried such combination into effect by leaving the employment of a master workman, in whose service was a journeyman who had violated their rules, and thus compelled the master shoemaker to discharge such journeyman from his employ—that the parties thus conspiring were guilty of a misdemeanor, and punishable accordingly. The People *v.* Fisher, 14 Wend. 9, 12 N. Y. Com. L. Rep. 519.

We copy the following excerpts from the opinion, thus, at p. 521 of 12 N. Y. C. L. Rep.: "That the raising of wages and a conspiracy, confederacy or mutual agreement among journeymen for that purpose, is a matter of public concern, and in which the public have a deep interest, there can be no doubt. That it was an indictable offense, at common law, is established by legal adjudications. In King *v.* Journeymen Tailors, etc., 8 Mod., 11, the defendants were indicted for a conspiracy among themselves to raise their wages; they were found guilty and moved in arrest, among other things, that no crime appeared upon the face of the indictment. To this the court answer, that it is true that the indictment sets forth that the defendants denied to work under such wages as they demanded, but it was not for the denial but the conspiracy, they were indicted; and the court add that a conspiracy of any kind is illegal, though the matter about which they conspired might have been lawful for them or any of them to do without a conspiracy, and they refer to the case of Tubwomen *v.* Brewers of London. This case has been cited as sound law by all subsequent writers on criminal law. People *v.* Trequier, 1 Wheel. C. C., 142, was an indictment against the defendants for a conspiracy to cause one Acker to be discharged from employment as a hatter, and refusing to work for their employers unless they would discharge Acker, because, as they alleged, he, Acker worked for 'knocked down wages.'"

Again: "We find precedents at common law against journeymen for conspiring to raise their wages and lessen the time of labor, and to compel masters to pay for a whole day's work; against journeymen lamp-lighters, for conspiring to raise wages, and against journeymen curriers for the like offense; 3 Chit. Cr. L., 1163, and n. 9; against salt-makers for conspiring to enhance the price of salt; against journeymen serge-weavers for refusing to work for a master who had employed a man contrary to certain rules entered into by conspiracy; against journeymen leather-dressers for conspiring to induce a man to turn a person out of his employment; against master rope makers for conspiring not to employ journeymen who had left their last master without his consent. Some of these offenses seem to have had for their object the oppression and injury of an individual; others were calculated to injure the public.

The immediate object in those cases, as in this, probably was to benefit the conspirators themselves; but if their individual benefit is to work a public injury, a conspiracy for such an object is against the spirit of the common law."

And again, at p. 522: "The offense of conspiracy seems to have been left in greater uncertainty by the common law than most other offenses. Mr. Chitty states that all confederacies wrongfully to injure another in any manner are misdemeanors. So the law was understood by this court, until the decision of the case of Lambert *v.* People, 9 Cow., 578. The judgment of this court was reversed in that case by the casting vote of the president of the Court for the Correction of Errors, but whether on the ground that a conspiracy to defraud an individual was not indictable, or on the ground that the indictment was defective in omitting to state the means by which the fraud was effected, it is impossible from the report of the case to ascertain; and the question was left in doubt whether an indictment lies for a conspiracy to produce a mere private injury, by means which are not in themselves criminal, and which would not affect the public nor obstruct public justice. That question was intended to be put at rest by the Revised Statutes; and we have the authority of the revisers for saying that this is the only particular in which a departure from the common law doctrine was intended, if, indeed, the common law was as it was understood by this court. See Revisers' Note to pt. 4, ch. 1, tit. 6."

This case goes deeply into the early English decisions and we quote largely from it, although it should be noted that an editorial note states that the case was overruled in 60 How. Pr. 174. It is cited however, in Arnott *v.* The Pittston, etc., Coal Co. (1877) 68 N. Y. 558, 23 Am. Rep. 190, 194, and in Raymond *v.* Leavitt, 46 Mich. 447, 41 Am. Rep. 170, 173, where it is said: It is limited in 2 Daly, 3, and explained in 9 Abbott's New Cases, 399.

There are numerous cases of civil actions where such combinations and agreements are termed illegal and contrary to law, but of course this does not mean that they are indictable. Thus in a suit by the State of Texas to forfeit the license of a foreign corporation to do business in Texas for a breach of the anti-trust acts of Texas, it was said, by the Supreme Court of the United States on appeal by the corporation to that tribunal from a decree of ouster: "It is certainly the conception of a large body of public opinion that the control of prices through combinations tends to restraint of trade and to monopoly, and is evil. The foundations of the belief we are not called upon to discuss, nor does our purpose require us to distinguish between the kinds of combinations or the degrees of monopoly. It is enough to say that the idea of monopoly is not now confined to a grant of privileges. It is understood to include a 'condition produced by the acts of mere individuals.' Its dominant thought now is, to quote another, 'the notion of exclusiveness or unity;' in other words, the suppression of competition by the unification of interest or management, or it may be through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be 'unified tactics with regard to prices.' It is the power to control prices which makes the inducement of combinations and their profit. It is such power that makes it the concern of the law to prohibit or limit them. And this concern and the policy based upon it has not only expression in the Texas statutes; it has expression in the statutes of other states and in a well known national enactment. According to them, competi-

tion, not combination, should be the law of trade. If there is evil in this it is accepted as less than that which may result from the unification of interest, and the power such unification gives. And that legislatures may so ordain this court has decided. United States *v.* Knight Co., 156 U. S. 1, 39 L. Ed. 325; United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290, 41 L. Ed. 1007; United States *v.* Joint Traffic Ass'n, 171 U. S. 505, 43 L. Ed. 259; Northern Securities Co. *v.* United States, 193 U. S. 197, 48 L. Ed. 679; Swift & Co. *v.* United States, 196 U. S. 375, 49 L. Ed. 518." National Cotton Oil Co. *v.* Texas, 197 U. S. 115, 129, 49 L. Ed. 689. See also, Alger *v* Thatcher, 19 Pick. 51; Stanton *v.* Allen, 5 Denio, 434; Central Ohio Salt Co. *v.* Guthrie, 35 O. St. 672; Hooker *v.* Vandewater, 4 Denio, 349; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. 173, 186; Craft *v.* McConoughy, 79 Ill. 346; Hannah *v.* Fife, 27 Mich. 172; Saratoga County Bank *v.* King, 44 N. Y. 87. In these cases only the legality of such combinations, their enforcement, or the civil liabilities arising thereout, were involved.

We have a Virginia case on the subject of criminal conspiracy, not alluded to in the opinion, which contains some pertinent considerations. It is there held that the unlawful act done which constitutes a conspiracy, may be some act of the confederation which it would be unlawful for them to attain, either singly, or which if lawful singly, it would be dangerous to the public to be attained by the combination of individual means. Crump *v.* Commonwealth, 84 Va. 927, 6 S. E. 620.

The court at p. 937, of the report of this case, says: "The doctrine of criminal conspiracy rests upon the obvious proposition, that the power of many for mischief against the one is so great, that the state should protect the one. Therefore the general principle on which the crime of conspiracy is founded, is this: that the confederacy of several persons to effect any injurious object, creates such a new and additional power to cause injury, as requires criminal restraint; although none would be necessary were the same thing proposed or even attempted to be done by persons singly."

And, again: "A combination is a conspiracy in law, whenever the act to be done has a necessary tendency to prejudice the public or oppress individuals by unjustly subjecting them to the power of the confederates and giving effect to the purposes of the latter, whether of extortion or mischief." Quoting from Wharton's Crim. Law, Vol. 3, § 2322, 6th edition. Crump *v.* Commonwealth, 84 Va. 927, 935, 6 S. E. 620.

Combinations of Fire Insurance Underwriters to Raise or Maintain Rates.—But a case which is very illuminating on the subject of such combinations among insurance companies, and the power of the state officers to proceed against them for such practices, is McCarter *v.* Firemen's Ins. Co. (N. J.), 73 Atl. 80. It may well afford a hint for the conduct of such proceedings in Virginia. Our court here holds such a combination not criminal, hence this precedent from the great equity State of New Jersey points the way to injunction as the means to stop such practices. The New Jersey Court holds that if a corporation, engaged in a business that is affected with a public interest, contracts to enter upon a line of conduct in respect to such business that tends to affect such public interest injuriously, and is contrary to public policy, such contract is ultra vires, and such corporation may be restrained in equity at the suit of the Attorney General, without regard to whether or not actual

injury has resulted to the public. McCarter *v.* Firemen's Ins. Co. (N. J.), 73 Atl. 80.

The business of fire insurance, as it is carried on in this state by corporations created, licensed, and regulated by the state, is a business affected with a public interest within the meaning of this rule. McCarter *v.* Firemen's Ins. Co. (N. J.), 73 Atl. 80.

A contract in restraint of trade, entered into by fire insurance companies, the necessary effect and the actual result of which is to control such business within a certain area, and within such area to fix and regulate prices, and to limit or eliminate competition to the injury of the public, is contrary to public policy, and ultra vires such corporations, and may be restrained in equity at the suit of the Attorney General. McCarter *v.* Firemen's Ins. Co. (N. J.), 73 Atl. 80.

The court says in this case, at p. 84 of 73 Atl.: "Whatever concerns business credit ex necessitate touches a matter in which the public is directly interested. The impairment or embarrassment of business credit affects immediately, not only the demand for money and the volume of business transacted, but also the inauguration of new enterprises, the employment of people, and the payment of the wages they would otherwise receive and spend, and thus ramifies in its effects from the greatest banking houses, through the homes of the unemployed, or the badly paid, to the smallest retail shops." And the editor of the L. R. A., commenting on this case says: "Generally, such a combination is unlawful at common law where the purpose is to regulate and control the rate of premiums to be charged, the effect being to enhance the price. Note to Louisville Bd. of Fire Underwriters *v.* Johnson (Ky.), 119 S. W. 153, 24 L. R. A. (N. S.) 153, citing McCarter *v.* Firemen's Ins. Co. (N. J.), 73 Atl. 80; People *v.* Aachen & M. F. Ins. Co., 126 Ill. App. 636.

And: "The legality of combinations relating to trade, commerce, or commodities, using those terms in a sense broad enough to cover insurance, depends upon the purpose and effect of the agreement or combination whether tested by common-law principles or statutes specifically relating to combinations and monopolies. As a rule, combinations or agreements relating to insurance are valid, both at common law and under such statutes, where the principal purpose thereof is to promote the business welfare and convenience of the parties thereto. They must not, however, be unreasonably in restraint of trade, or for the purpose of regulating and controlling the rate of premium to be charged. Note to Louisville Bd. of Fire Underwriters *v.* Johnson (Ky.), 119 S. W. 153, 24 L. R. A. (N. S.) 153, citing Workman *v.* London & L. F. Ins. Co., 19 Times L. R. 360; Bloom *v.* Home Ins. Agency (Ark.), 121 S. W. 293; Childs ex rel. Smith *v.* Firemen's Ins. Co., 66 Minn. 393, 35 L. R. A. 99, 69 N. W 141.

But see Continental Ins. Co. *v.* Fire Underwriters, 67 Fed. 310, which holds that an association of fire underwriters for the purpose of regulating premium rates, the prevention of rebates, fixing the compensation of agents, and providing for nonintercourse with companies not members, is not an unlawful combination at common law. To same effect is People ex rel. Pinckney *v.* New York Fire Underwriters, 7 Hun 248.

In conclusion, we copy the following editorial, from Central Law Journal (April 12, 1912).

"In Harris *v.* Commonwealth, 73 S. E. 561, decided by Virginia Supreme Court of Appeals, there was considered an indictment for an alleged criminal conspiracy among fire insurance companies to

fix the rates and control the business of fire insurance in Newport News, Virginia.

It was conceded there is no statute prohibiting any such combination as was charged, but the contention was that there was charged a crime at common law, the claim being that the common law, "is an expansive, elastic, progressive system, and its old principles are as effective to-day to prevent unlawful conspiracies to oppress the people in the exercise of their rights to enjoy the benefits of modern insurance as it is to protect the people to-day in their rights to enjoy wholesome food at reasonable prices."

If the proposition can be stated no more strongly than this quotation shows, it well may be thought that the demurrer upon the ground that no criminal offense was charged rightly was sustained.

The proposition to be of sufficient basis for an indictment must regard fire insurance as one of the "necessaries of life" or of prime necessity, the enjoyment of which by the public illegally is prevented by engrossing.

The things which the law against engrossing embraced were combinations among dealers in provisions or the "necessaries of life," or "articles of prime necessity," or of "merchandise" or "manufacture in the market," these classes being found in the discussion by the Chief Justice in the opinion in Standard Oil Co. *v.* United States, 221 U. S. 1, 34 L. R. A. (N. S.) 834, and the authorities it cites.

The Virginia court says: "Insurance is not an article of merchandise or manufacture, or one of the 'necessaries of life' or of prime necessity within the letter and spirit of the laws against engrossing," and Paul *v.* Virginia, 8 Wall. 168, is referred to to show that insurance contracts are not articles of commerce in any proper meaning of the word.

It seems to us that this cited case ought to cut no figure in such a question as was before the court. It might be that a thing might not be an article of commerce under our constitutional clause merely because it is a contract, while the indemnity insurance contracts afford might be practically indispensable in the business world for the carrying on of trade.

If this be so, then "necessaries of life" or "articles of prime necessity" must be limited to man's individual needs in the pursuit of life and not in his pursuit of the means whereby he may live for it to escape.

But this idea is negatived by the law against engrossing applying to "merchandise" or "manufacture in the market," taking it that these terms may embrace other things than "necessaries of life" or "articles of prime necessity."

It may scarcely be doubted that things may in one civilization be deemed "necessaries of life" or "articles of prime necessity," which in another civilization might relegate to an inferior place, and conversely, that things unregarded might come into use as such necessaries or articles. For example, electricity as an agency for light and heat and water as furnished by a water company for domestic use may well be deemed such necessaries or articles, though they were unknown to the common law.

Going into business affairs, the telephone could be well deemed an article of prime necessity of this civilization and if "it is true that the principles of the common law are elastic and that one of its peculiar merits is that it adapts itself to the rights of parties under changed circumstances," as the Virginia court says, may it not

be claimed, that it would be a common law offense to control telephone rates by combination and conspiracy.

It may well be stated, however, that the telephone is not of such universal demand in the conduct of business as is insurance. Commercial credit even would be withheld from merchants who would omit to carry insurance upon their business, and thus there cannot be the exercise of volition in its being carried or not. There might not be specific inquiry of a merchant in this regard, but this would be upon the presumption that one in business is not so fool-hardy as to omit to carry reasonable insurance, or that he would not encounter a refusal of credit by such an omission. Indemnity of this kind is a commodity, though technically or in the sense of the commerce clause, it is merely a contract, but a contract "of prime necessity" and therefore "an article of prime necessity."

In this wise insurance companies might be supposed to argue in justification of their existence and with greatly more of elaboration and eloquence would their zeal and experience enforce the truth of their contention, but when their business is claimed to be *juris publici*, they take another tack.

Pressed in a corner of public accountability they argue that one does not have to take out fire insurance if he does not wish, and his freedom to leave it or take it is in the sacred domain of contract. No more, however, is the merchant free to continue in business and not buy insurance than an individual is free to go hungry and not buy bread. In the one case, his business will starve, and in the other, his body will starve.

It may be true, and is, that criminal offenses should not be raised by construction, and in this civilization old common law crimes should meet a challenge in our so different an age, but if they are to be recognized at all the spirit that informs them should also be recognized.

The particular kind of thing that the law against engrossing was aimed at was injury to the public in and concerning what was a widespread, general necessity. That insurance may not be so characterized it would seem absurd to assert. It were more plausible to argue that the common law applied merely to physical, tangible things and thus allow insurance companies to escape upon a technicality.

J. F. M.

POTTS *v.* COMMONWEALTH.

Nov. 23, 1911.

[73 S. E. 470.]

1. Homicide (§ 146*)—Murder—Instructions—Burden of Proof.—It was not error to instruct that, if the jury believed from the evidence that the killing was done with a deadly weapon, then the law

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.