1954

*May 19, 20
*Oct. 21

HER MAJESTY THE QUEEN .....APPELLANT;

AND

DANIEL O'BRIEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Conspiracy to commit indictable offence—Gist of offence —Whether necessary to have intention to commit the indictable offence—Criminal Code, s. 573.

It is misdirection for a trial judge to tell the jury, at the trial of a person charged of having conspired with another person to commit the indictable offence of kidnapping, that the offence of conspiracy was complete by the making of the agreement to kidnap even though the other alleged conspirator never at any time had had any intention of carrying the agreement into effect. The mere agreement, without the intention of both parties to carry into effect the common design, is not sufficient. There must exist an intention not only to agree but also an intention to put the common design into effect.

Per Locke J. (dissenting): The gist of the offence of conspiracy is the agreement of two or more persons to commit any indictable offence, and the mens rea is to be found in the intention to offend against the penal provisions of an act. Therefore, the agreement entered here between the two conspirators to commit the offence of kidnapping was a conspiracy within the meaning of s. 573 of the Criminal Code. There was an agreement in the eyes of the law and the fact that one of the parties in the agreement did not intend to carry out his part of the bargain could not affect the legal nature of the arrangement.

The portion of the judgment of Willes J. in *Mulcahy* v. *The Queen* ((1868) L.R. 3 H.L. 306), purporting to define criminal conspiracy, was never intended as such, but rather was it a statement of the offence covered by the statute under which that case was tried.

R. S. Wright's *The Law of Criminal Conspiracies and Agreements* (1873 ed.); *Poulterers Case* (1611) 9 Co. Rep. 55b; *Reg.* v. *Best* (1705) 1 Salk. 174; *O'Connell* v. *Reg.* (1844) 11 Cl. & F. 155; *Reg.* v. *Aspinall* (1876) L.R. 2 Q.B.D. 48; *Brodie* v. *The King* [1936] S.C.R. 188 and *Bank of New South Wales* v. *Piper* [1897] A.C. 383 referred to.

Per Fauteux J. (dissenting): In the circumstances of this case, the exchange of promises could not be treated as having never existed because of the alleged mental reservation on the part of one of the two parties. Mental reservations are not apt to defeat the natural consequences of words accompanied by deeds. In this case, the common intention was assented to and encouraged by word and by deeds, and that was sufficient to constitute the conspiracy even though one of the parties did not intend to go through with the execution of the agreement.

*PRESENT: Taschereau, Rand, Estey, Locke and Fauteux JJ.

1954

THE QUEEN v. O'BRIEN

APPEAL from the judgment of the Court of Appeal for British Columbia (1), allowing, Robertson J. dissenting, the appeal of the respondent from his conviction on a charge of having conspired to kidnap and ordering a new trial.

T. G. Norris Q.C. for the appellant.

J. Stanton and *G. M. Bleakney* for the respondent.

TASCHEREAU, J.:—The Attorney General of British Columbia appeals from a judgment of the Court of Appeal (1) which ordered a new trial. It held that there had been misdirection.

The charge for which the respondent was convicted was that, in the City of Vancouver, British Columbia, between the 30th day of November, 1952, and the 14th day of January, 1953, the respondent unlawfully conspired with one Walter John Tulley and others, to commit a certain indictable offence, namely, kidnapping.

Tulley, the alleged co-conspirator, was not charged, but at the trial, being called as a Crown witness, he gave an account of various meetings he had with the respondent, and explained that both had agreed, at the request of the latter, to kidnap one Joan Margaret Pritchard. He said in his evidence that he never had any intention of going through with this plan, but was just fooling the respondent, or hoaxing him. He also explained that he denounced the whole scheme to the police authorities, and the respondent was arrested.

The learned trial Judge in his charge said:—

> Counsel for the accused has suggested that the offence is not complete, because Tulley, in his own evidence, said that he had had at no time any intention of carrying out that agreement. I tell you as a matter of law, gentlemen, *that the offence was complete,* if, in point of fact, the accused and Tulley did make the agreement which is charged against him, *even though Tulley never at any time had any intention of carrying the agreement into effect.*

The Court of Appeal, Mr. Justice Robertson dissenting, held that this constituted misdirection, and therefore, ordered a new trial.

The contention of the respondent which was accepted by the majority of the Court of Appeal, is that Tulley, not having any intention to carry through the common design,

(1) 108 C.C.C. 113.

1954

THE QUEEN v. O'BRIEN

Taschereau J.

could not be a party to the conspiracy, and that therefore, O'Brien the respondent, could not alone be found guilty of the crime. It is common ground that no others were involved in the conspiracy. The mere agreement, without any intention to carry into effect the common design would, according to the submission of the appellant, be sufficient.

I think there has been some confusion as to the element of intention which is necessary to constitute the offence. It is, of course, essential that the conspirators have the *intention to agree,* and this agreement must be complete. There must also be a common design to do something unlawful, or something lawful by illegal means. Although it is not necessary that there should be an overt act in furtherance of the conspiracy, to complete the crime, I have no doubt that there must exist *an intention to put the common design into effect.* A common design necessarily involves an intention. Both are synonymous. The intention cannot be anything else but the will to attain the object of the agreement. I cannot imagine several conspirators agreeing to defraud, to restrain trade, or to commit any indictable offence, without having the intention to reach the common goal.

I fully agree with some of the statements that have been made by the Court of Appeal of Quebec in *Rex* v. *Kotyszyn* (1). The head note reads:—

> There was no common design between the accused and the police-woman, and there was no agreement between them *since the police-woman had no intention of undergoing the operation.* Consequently there *was neither* a *conspiracy* nor an *attempt to conspire.*

In the same case, at page 269, Mr. Justice MacKinnon said:—

> There can be no conspiracy when one wants to do a thing and the other does not want to do it.

Stephen (Commentaries on the laws of England, 21st Ed., Vol. 4) says at page 166:—

> The object of the agreement may be the accomplishment of an unlawful act, or of a lawful act by unlawful means. In other words it must be unlawful either in *its aims or in its methods.*

The two elements of agreement and of *common design* are specifically stated to be essential ingredients of the crime of conspiracy. Willes, J. in *Mulcahy* v. *The Queen* (2):

(1) 95 C.C.C. 261.

(2) (1868) L.R. 3 H.L. 306 at 317.

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

Vide also *Rex* v. *McCutcheon* (1).

This is not the case of the conspirator, who after having completed the crime, withdraws from the conspiracy. If a person, with one or several others, agrees to commit an unlawful act, and later, after having had the intention to carry it through, refuses to put the plan into effect, that person is nevertheless guilty, because all the ingredients of conspiracy can be found in the accused's conduct. But, when the conspiracy has never existed, there can be no withdrawal.

The definition of conspiracy itself supposes an aim. People do not conspire unless they have an object in view. The law punishes conspiracy so that the unlawful object is not attained. It considers that several persons who agree together to commit an unlawful act, are a menace to society, and even if they do nothing in furtherance of their common design, the state intervenes to exercise a repressive action, so that the intention is not materialized, and does not become harmful to any one. The intention must necessarily be present because it is the unlawful act necessarily flowing from the intention, that the state wishes to prevent.

In the case at bar, there is evidence that although he made an agreement with the respondent, Tulley never intended to carry the plan through and kidnap Mrs. Pritchard. On the other hand, there is also evidence that may indicate that he intended to attain the object of the agreement. Did Tulley have this intention or not? This is a question for the jury, and I would invade a domain which is not mine, if I attempted to answer it.

It has been said that if the submission of the respondent were the law, it would be impossible to obtain a conviction on a charge of conspiracy, because the mental state of an accused very often remains in the sphere of uncertainty. All crimes where intention is an essential element would then become impossible to prove. Various factors have to

(1) (1916) 25 C.C.C. 310.

1954

THE QUEEN v. O'BRIEN

Taschereau J.

come into play, and with their help it is then possible to determine what the intention was. There is a presumption for instance, that a person who does an act intends to do it. As well, numerous circumstances will indicate if an alleged thief intended to rob, or if a killer intended to murder. Conspiracy is not in a different class. It is within the exclusive province of the jury, to weigh all the evidence and to determine all these questions of fact, and to say whether the intentional element is revealed by the evidence.

But I do think that the jury were not properly instructed when they were told that, even without the intention to commit the kipnapping, which was necessarily the common design, the conspiracy was complete by the agreement. The jury were not free to weigh the evidence because, being improperly instructed, they had to disregard what is in my view one of the most important elements of the crime for which the accused was charged.

I agree with the Court of Appeal that there was misdirection, and that consequently there must be a new trial. It has been suggested that the Court of Appeal should have dismissed the appeal, on the ground that although there was misdirection, a properly instructed jury would have necessarily come to the same conclusion. (Cr. Code 1014). With this proposition, I entirely disagree. There is evidence that would justify a properly instructed jury to acquit or to convict, and I do not think in either alternative, that the verdict would be set aside as unreasonable.

I would dismiss the appeal.

RAND J.:—I agree that a conspiracy requires an actual intention in both parties at the moment of exchanging the words of agreement to participate in the act proposed; mere words purporting agreement without an assenting mind to the act proposed are not sufficient. The point of difference between the judgments below is the meaning to be given the word "agreement". In the opinion of Robertson J.A. (1) there was an agreement when Tulley in effect said "I will" even though at that moment his mind was "I won't". The mens rea here appears to lie in the intent to utter the words "I will"; but this severance of the intention to speak the words from that of carrying out the action they signify

(1) 108 C.C.C. 113.

is a refinement that seems to me to be out of place in a common law crime. Modern statutes have introduced offences in which the objective or physical acts themselves are struck at but they are irrelevant to the unwritten offences. Bishop's Criminal Law, 9th Ed. Vol. II, p. 131 puts it thus:—

> Obviously there must be, between the conspirators, a concert of will and endeavor, not a mere knowledge, acquiescence or approval or a mere several attempt to accomplish the particular wrong. . . . Where there are only two, and one simply joins in appearance to draw the other on, neither is a conspirator.

and at p. 132:—

> As soon as this union of will is perfected, the offence of conspiracy is complete,—no act beyond is required. . . . It is sufficient if the minds of the parties meet understandingly so as to bring about an intelligent and deliberate agreement to do the acts and commit the offence charged, although such agreement be not manifested by any formal words.

The question raised is, in my opinion, concluded by the judgment of the House of Lords in *Mulcahy* v. *The Queen* (1). In that case a prosecution had been brought under *The Crown and Government Security Act,* 11 Vict., c. 12. The indictment following the language of the statute alleged that the accused with five other persons "did feloniously and wickedly compass, imagine, invent, devise, and intend to deprive and depose Our Lady the Queen from the style, honour, and royal name of the Imperial Crown of the United Kingdom of Great Britain and Ireland" and proceeded to declare that the accused did "express, utter, and declare by divers overt acts and deeds hereinafter mentioned, that is to say". The overt acts were then alleged:—

> In order to fulfill, perfect and bring to effect this felonious compassing, imagination, invention, devise and intention aforesaid, they . . . feloniously and wickedly did combine, conspire, confederate, and agree with (19 other persons all named) and with divers other evilly disposed persons, to the jurors aforesaid unknown to raise, make, and levy insurrection and rebellion against Our said Lady the Queen within this realm.

The statute required the expression of compassing and intending by overt acts and it was necessary, therefore, to allege them. The question raised was whether a conspiracy was such an act.

(1) (1868) L.R. 3 H.L. 306.

1954

THE QUEEN v. O'BRIEN

Rand J.

The House held that it was. This means that the act of conspiracy was sufficient to establish both the compassing and the intention to do the forbidden act, or to put it in another form, that in conspiracy there is not only agreement to do the act proposed signified by words or other means of communication, but also the coexistent intent in each to do it. If that were not so, conspiracy would not have evidenced the *intention* of those charged "to deprive and depose, etc." The language of Willes J. at p. 317 of the report bears out that view. In the course of considering the argument that conspiracy rests in intention only and that an overt act must consist in some external manifestation or deed, he says:—

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

In that language he distinguishes between the intention of each person severally and the communicated assent between them to carry out the intention. In stressing the necessity for agreement he assumes the existence of intent.

The same view is expressed in *Rex* v. *Dowling* (1). It appears that one of the witnesses had in appearance been involved in the conspiracy and it had been urged that being an accomplice his evidence required corroboration. Erle J., in directing the jury on this, said:—

> He was not an accomplice, for he did not enter the conspiracy *with the mind of a co-conspirator,* but with the intention of betraying it to the police, with whom he was in communication.

In *The Queen* v. *Aspinall* (2), Brett J.A., dealing with one of the counts in the indictment for conspiracy to defraud, expressed himself thus:—

> If the second count in this indictment contains averments sufficiently stated which are enough to shew sufficiently that the defendants unlawfully, i.e. *with minds intending to do wrong,* agreed by false pretences to cheat and defraud . . . it sufficiently alleges a criminal conspiracy within the last rule above enunciated.

(1) (1848) 3 Cox C.C. 509 at 516. (2) (1876) L.R. 2 Q.B.D. 48 at 59.

That rule was,

> An agreement made with a fraudulent or wicked mind to do that which, if done, would give to the prosecutor a right of suit founded on fraud, or on violence exercised on or towards him, is a criminal conspiracy.

On the contrary view, even if both parties had been without the intent to carry out the scheme, each seeking to incriminate the other, they would have drawn guilt upon themselves.

Assuming, then, the truth of the evidence of Tulley that at no time did he ever intend to go along with the proposal made to him, there was no conspiracy.

I would, therefore, dismiss the appeal.

ESTEY, J.:—The respondent was found guilty before a jury upon an indictment that charged that he conspired with Tulley and others to kidnap Mrs. P. The learned judges in the Court of Appeal (1), Mr. Justice Robertson dissenting, were of the opinion that there had been misdirection and directed a new trial. The passage held to constitute misdirection reads as follows:

> Counsel for the accused has suggested that the offence is not complete, because Tully, in his own evidence, said that he had had at no time any intention of carrying out that agreement. I tell you as a matter of law, gentlemen, that the offence was complete, if, in point of fact, the accused and Tully did make the agreement which is charged against him, even though Tully never at any time had any intention of carrying the agreement into effect.

The contention is that the learned trial judge was in error in stating that even though Tulley never, at any time, had any intention of carrying the agreement into effect, the offence was completed. Tulley was not charged, but was called as a witness on behalf of the Crown. O'Brien gave evidence on his own behalf. These parties, upon all essential points, are in complete disagreement. It is clear, however, that no others were involved and, therefore, if there was a conspiracy, it existed only between O'Brien and Tulley.

In view of the objection to the charge, it will be necessary to summarize only Tulley's evidence. Early in December O'Brien approached him and suggested, and it was agreed, that he would assist O'Brien to kidnap Mrs. P. for the sum

(1) 108 C.C.C. 113.

1954

THE QUEEN v. O'BRIEN

Estey J.

of $500. During one of the first conversations he received $10. O'Brien also showed him where Mrs. P. lived and, as Mrs. P. was standing in the window, he pointed her out as the lady he desired to kidnap. He accompanied O'Brien to White Rock to find a house where they might take Mrs. P., but none was found. Before Christmas he received $190. In January he received $40 to pay for the rent of a house that he led O'Brien to believe was available for rent. He did not, however, spend this $40, but retained it, making a total of $240 that he had received from O'Brien and which he kept. In January, though a day was not fixed for the kidnapping, O'Brien was pressing that it ought to be done as quickly as possible. On January 12 Tulley told Mrs. P. of O'Brien's intentions, which led to the arrest and prosecution of O'Brien. Tulley deposed to the foregoing and stated that though he had entered into an agreement with O'Brien to kidnap Mrs. P. that never, at any time, had he intended to carry out the agreement. O'Brien denies that at any time he entered into an agreement to kidnap Mrs. P. He admits the payment of the three sums of money—$10, $190 and $40—but explains these in a manner that has no relation to the kidnapping, and likewise the trips looking for the houses.

Though dealt with in several sections of the *Criminal Code,* the result is that conspiracy to commit any indictable offence is itself an indictable offence. Nowhere, however, does the *Code* define a conspiracy. The definition, therefore, must be found in the common law. Since 1868 the accepted definition has been that of Mr. Justice Willes in delivering the opinion of the judges in *Mulcahy* v. *The Queen* (1):

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

Mulcahy was indicted under *An Act for the better Security of the Crown and Government of the United Kingdom* (11 & 12 Vict., c. 12). This statute, in part, provides that

(1) (1868) L.R. 3 H.L. 306 at 317.

If any Person . . . shall, . . . compass, . . . or intend to deprive or depose our most Gracious Lady the Queen, . . . and such Compassings, . . . Intentions, or any of them, shall express, utter, or declare, . . . by any overt Act or Deed, every Person so offending shall be guilty of Felony, . . .

It was the contention of the prosecution in the Mulcahy case that his conspiracy with nineteen others to stir up and incite insurrection and rebellion constituted an overt act within the meaning of the statute.

Mulcahy was convicted and his conviction affirmed in the Court of Queen's Bench in Ireland. Upon a further proceeding by way of writ of error his conviction came before the House of Lords. Their Lordships solicited the opinion of the judges and this was delivered by the Honourable Mr. Justice Willes, in the course of which he gave expression to the definition of a conspiracy above quoted and which, as I have said, has been accepted since 1868.

The point material to this discussion was stated by Mr. Justice Willes at p. 316:

The main point of this question is, whether a conspiracy to do an unlawful act in promotion of a felonious design can be a sufficient "overt act" to express that design within the 11 Vict. c. 12. The first count and the first overt act sufficiently raise that question.

This point, particularly as it was contended on behalf of Mulcahy that, as conspiracy rested in intention only, it could not be an overt act within the meaning of the statute, required a consideration of what constituted a conspiracy and, where it existed, would it be accepted as an overt act and, if so, was it an overt act within the meaning of the statute. The statute under which Mulcahy was indicted did not contain a definition of conspiracy and it would appear that Mr. Justice Willes and the learned judges on whose behalf he was writing were setting forth their conception of conspiracy under the common law. Under this definition a conspiracy does not exist in the mere intention to commit an unlawful act, but when two or more entertain that intention and embody their common design in an agreement the conspiracy is complete. It is the concluding of the agreement which constitutes the overt act. Then, specificially referring to whether the conspiracy constituted an overt act within the meaning of the statute, Mr. Justice Willes stated at p. 317:

1954

THE QUEEN
v.
O'BRIEN

Estey J.

The history of the statute also points clearly to the conclusion that a conspiracy is a sufficient overt act, and, indeed, seems to shew that the language of the Act, following that of 36 Geo. 3, c. 7, was framed to confirm, and even extend, the decisions upon the construction of Statute of Treasons, and to preclude all such questions for the future.

The opinion of the learned judges expressed by Mr. Justice Willes was approved by all of their Lordships sitting in the House of Lords. Lord Chelmsford, while approving of Mr. Justice Willes's opinion, stated the grounds upon which he arrived at the same conclusion. At p. 328 he stated:

> It is a mistake to say that conspiracy rests in intention only. It cannot exist without the consent of two or more persons, and their agreement is an act in advancement of the intention which each of them has conceived in his mind. The argument confounds the secret arrangement of the conspirators amongst themselves with the secret intention which each must have previously had in his own mind, and which did not issue in act until it displayed itself by mutual consultation and agreement.

Though the precise point with which we are here concerned was not before the court in the Mulcahy case, the language of both Mr. Justice Willes and Lord Chelmsford, it seems to me, indicates the answer. In that case, as in all cases of felony, or, under the *Code,* indictable offences, unless otherwise provided, the requisite mens rea must be found. This can only be found, when conspiracy is charged, if the mental attitude of the parties is such that each possesses a common design or intention to do an unlawful act or a lawful act by unlawful means. Lord Chelmsford gives expression to the same view in the passage already quoted. In this passage he emphasizes that it is the agreement to carry out the intention which each has conceived in his mind. If, therefore, where only two parties are involved, one has not "conceived in his mind" that intention, there can be no agreement evidencing a common design and, therefore, the offence of conspiracy is not completed. In this case, as it is so often throughout the criminal law, the nature and character of the act is determined by the intention of the party committing it.

Again in Russell on Crime, 10th Ed., at p. 1798, it is stated:

> The external or overt act of the crime is concert by which mutual consent to a common purpose is exchanged.

This further emphasizes that there must be "mutual consent to a common purpose". Tulley's conduct was undoubtedly reprehensible, whether he intended to conspire, or to obtain money wrongfully from respondent, or to accomplish some other wrongful purpose. We are here only concerned with whether he possessed an intention to conspire with the respondent to kidnap Mrs. P. If he had such an intention at the time of the agreement and subsequently withdrew, he is none the less guilty. If, however, he never possessed a common design or intention with respondent to kidnap Mrs. P., then there was no conspiracy.

I am, therefore, in respectful agreement with the learned judges who have held that there was misdirection. While there was evidence to support the verdict, it cannot be said that a jury, properly directed, would have necessarily reached the same conclusion. I would, therefore, affirm the judgment of the Court of Appeal directing a new trial.

The appeal should be dismissed.

LOCKE J. (dissenting):—This is an appeal by the Crown from a judgment of the Court of Appeal for British Columbia (1) by which the appeal of Daniel O'Brien from his conviction of conspiracy to kidnap Joan Margaret Pritchard was allowed and a new trial directed. Mr. Justice Bird, with whom the Chief Justice of British Columbia agreed, delivered the judgment of the majority of the Court. Mr. Justice Robertson dissented and would have dismissed the appeal.

O'Brien was charged in that he, at the City of Vancouver, between November 30, 1952 and January 14, 1953:—

> Did unlawfully conspire, combine, confederate and agree together with Walter John Tulley, and together with divers other persons unknown, to commit a certain indictable offence, namely kidnapping, by then and there conspiring, combining, confederating and agreeing together to unlawfully kidnap Joan Margaret Pritchard with intent to cause her to be secretly confined within Canada against her will, against the form of the Statute in such case made and provided.

On this charge he was tried before Davey J. and a jury at Vancouver, found guilty and thereafter sentenced to five years' penal servitude.

(1) 108 C.C.C. 113.

1954

THE QUEEN v. O'BRIEN

Locke J.

O'Brien appealed to the Court of Appeal on the ground of misdirection in the charge to the jury and it was upon this ground that the majority of the Court considered there should be a new trial.

It is necessary for the determination of the matter to examine closely the evidence given on behalf of the Crown at the trial. Tulley, referred to in the indictment, had apparently known O'Brien for several years. On December 11, 1952, Tulley was unemployed and apparently penniless. His evidence was that that day he met the accused in Vancouver, when the latter asked him to go with him to a club where they had some drinks together. At this time O'Brien told him, without mentioning her name, that he had been going with a young woman for two years, that she had left him and that he was trying to get her back. During the time that they were together, Tulley said that O'Brien told him that the only way he could figure out to do this was to kidnap her. At the same time, he said that O'Brien, learning that he was "broke", gave him $10. Two or three days later, the two men met by arrangement and discussed plans for kidnapping the woman and Tulley said that O'Brien then said that if he would "stick with him and see him through this thing he would do right by me in regard to money" and mentioned the sum of $500. According to Tulley, what O'Brien proposed was that they would kidnap the woman and conceal her in a house and Tulley said that he thought it would be possible to get a satisfactory place for this purpose at White Rock, a village near the American border on the coast south of Vancouver. On December 18, 1952, Tulley hired a U-Drive car and drove with O'Brien to White Rock. The search there for a suitable house in which to conceal the woman was unsuccessful and the two returned to Vancouver. Tulley told O'Brien that he knew a fisherman in Vancouver from whom he thought they could get a house. This statement, he admitted, was untrue and the fisherman an imaginary person. On the day following, the two men met and Tulley asked O'Brien if he would loan him a couple of hundred dollars. O'Brien agreed and the amount was paid but not as a loan but rather as a payment on account of the promised sum of $500 to assist in the

kidnapping. In spite of this fact, Tulley said that he offered O'Brien an I.O.U. for the money but this the latter refused, saying that he:—

> Would trust me and if I would stick with him he would stick by me, he would keep his promise.

Tulley, according to his story, continuing the deception of O'Brien told him that he did not think he would be able to get the fisherman's house before some time in January. Thereafter they met several times and discussed the manner in which they were to carry out the proposed kidnapping. O'Brien's plans according to Tulley, were that they would go together to Mrs. Pritchard's house when Tulley was to knock on the door and when she came seize her, put tape over her mouth, put her in the back seat of a car and take her to the house selected.

Around New Year's Tulley says that he borrowed a car and drove out to East 52nd Street in Vancouver with O'Brien and pointed out a house which, he said, he had in mind as the place to conceal the woman and that O'Brien approved of it. Tulley said that his statements as to this house were also false, that he had merely picked it at random and had made no arrangements to rent it. At the same time, the two of them discussed how they were going to get food into the house while the woman was concealed there and, according to Tulley, O'Brien then stated that he was going to either make her come with him or she would go back a very sorry woman. Later that day, Tulley said that he told O'Brien that the rent of the house would be $40 and the latter gave him the money. No arrangements had been made to rent the place and Tulley apparently appropriated the money to his own use. About January 12, O'Brien who had, according to Tulley, been trying to speak to the woman on the telephone, said that they must carry out their plan at once, whereupon Tulley decided to inform Mrs. Pritchard and her husband of what O'Brien proposed and he was then taken in charge by the Police.

During the cross-examination of Tulley at the trial, the statements were made which gave rise to the claim of misdirection. The relevant portion of the evidence reads:—

> Q. Now isn't it a fact that you at no time did any more than pretend to O'Brien that you would assist him in this kidnapping?
> A. I didn't get the question.

1954

THE QUEEN
v.
O'BRIEN

Locke J.

Q. Perhaps I can assist you. I am going to read to you something that you said at the Preliminary Hearing. I would direct your attention to page 39, my lord, about the fifth line from the top of the page:

Q. You had no intention of going through with this scheme you are telling us about, did you?
A. This kidnapping?
Q. Yes.
A. No.

Q. Were you asked that question on the Preliminary Hearing and did you make the answer which I have read to you on oath?
A. I did.
Q. Is it true?
A. It is.
Q. I will proceed:

Q. No, no of course not. And you didn't agree in any way with O'Brien that you would do such a thing, did you?
A. Yes.
Q. You mean "yes" you did make such an agreement?
A. With him, yes.
Q. But you had no intention of carrying it out?
A. No.
Q. You were just fooling him, eh?
A. Yes.
Q. Were you asked those questions at the preliminary hearing and did you make those answers on oath?
A. I did.
Q. Are they true?
A. They are.
Q. In other words, witness, you were just hoaxing him, weren't you?
A. I was.

In charging the jury, the learned trial Judge instructed them that, as a matter of law, the offence of conspiracy was complete if in point of fact the accused and Tulley did make the agreement, even though Tulley never at any time had any intention of carrying his part of it into effect.

Bird J.A. considered that the charge was in this respect inaccurate, since the burden was upon the Crown to prove that each of the participants had the intent that the agreement should be carried into effect by one or both of them and that since, if the quoted portion of Tulley's evidence should be believed by the Jury, the intent was that of O'Brien alone, he could not be found guilty of conspiracy. As the question as to whether Tulley did in fact intend to carry out his agreement at the time he made it had not been left to the jury, he considered there should be a new trial.

Robertson J.A. was of a contrary opinion, considering that the gist of the offence was the agreement itself and that as Tulley, on his own statement, had intended to make the agreement, whether or not he intended to carry it into effect, the conspiracy was proved if the evidence were to be believed. Agreeing with the opinion of the majority that mens rea must be shown, he said in part:—

> I think in this case mens rea was proved by the mere entering into the agreement. If one person does the act of agreeing with another person to commit an indictable offence, intending to do that act (that is to say the act of agreeing) his mind is rea whether he intends to commit that indictable offence or not. It is not of the essence whether he has, or has not, a mental reservation as to its completion. Mens rea is in such a case merely a condition of mind which is evidenced by the act of agreeing itself. The guilty intent which is important is the intent to enter into the agreement.

The charge was aid under section 573 of the *Criminal Code* which reads:—

> Every one is guilty of an indictable offence and liable to seven years' imprisonment who, in any case not hereinbefore provided for, conspires with any person to commit any indictable offence.

In the same terms, this was enacted as section 527 of the *Criminal Code* when first enacted in 1892 (c. 29). Kidnapping is made an indictable offence by section 297 of the *Code*.

The *Code* does not define either the word conspire or the offence of conspiracy. In some of the text books and in some of the reported cases, a passage from the judgment of Willes J. in the opinion expressed by him on behalf of the judges in *Mulcahy* v. *The Queen* (1), is accepted as a definition of a criminal conspiracy. In the 10th edition of Russell on Crimes, at p. 1797, the following appears:—

> The generally accepted definition of the offence is that given by Wilkes (sic.) J. on behalf of all the judges in *Mulcahy* v. *R.*, and accepted by the House of Lords in that and subsequent cases:—
>
> > A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means.

(1) (1868) L.R. 3 H.L. 306 at 317.

1954

THE QUEEN v. O'BRIEN

Locke J.

It has been said that in *Quinn* v. *Leatham* (1), this was accepted as a definition of the offence (*R.* v. *Brailsford* (2), Alverstone C.J. at 746). With respect, I think this to be inaccurate since Lord Brampton alone, of the Law Lords who considered *Quinn* v. *Leatham,* mentioned *Mulcahy's* case or the extract from the judgment of Willes J. quoted by Russell.

In my opinion, the portion of the judgment of Willes J. above quoted was never intended as a definition of a criminal conspiracy, rather was it a statement of the offence which was punishable under the statute under which Mulcahy was charged. That *Act* was chapter 12 of 11 Vict. being *An Act for the better security of the Crown and Government of the United Kingdom* and amended earlier statutes passed in the reign of Geo. III directed to the punishment of treason. The language of the indictment followed that of the statute and charged that the accused

> Did feloniously and wickedly compass, imagine, invent, devise *and intend* to deprive and depose Our Lady the Queen.

and thereafter alleged various overt acts. It was of the offences so charged that Willes J. employed the language quoted by Lord Brampton in *Quinn* v. *Leatham* (and repeated in Russell as aforesaid), but part of his remarks were omitted which preceded and appear to me to explain the part quoted. The omitted passage reads (p. 317):—

> The argument was that a conspiracy rests in intention only, that the law distinguishes between acts intended and acts done; and that an overt act, to satisfy the statute, must consist in either publishing or printing some writing, or in some bodily act or deed, such as procuring arms.
>
> *So far as this question depends upon the bare construction of the statute, it appears to admit of no doubt.*

It has been said that the opinion of the judges in *Mulcahy's* case was approved by the House but it seems quite clear that all that the Law Lords approved was that this part of the opinion of Willes J. was a correct statement of the offence created by the statute, cap. 12 of 11 Vict.

It is to be noted that in *Regina* v. *Dowling* (3), a prosecution under the statute under which Mulcahy and others had been charged, Erle J. in charging the jury said (p. 514):—

(1) [1901] A.C. 495. (2) [1905] 2 K.B. 730.
(3) (1848) 3 Cox C.C. 509.

The indictment is divisible into two distinct parts: first, the criminal intent: secondly, the overt acts, by means of which such intent was carried out. The law requires proof, to the satisfaction of the jury, that such intent existed, and that such overt acts were committed.

In the Law of Criminal Conspiracies by R. S. Wright published in 1873, five years after the judgment of Willes J. and that of the House of Lords in *Mulcahy's* case had been delivered, the learned author said (p. 14) that no intelligible definition of conspiracy had yet been established and an examination of the earlier authorities supports this statement, in my opinion. After referring to the expression used by Willes J. in *Mulcahy's* case above referred to, Wright said (p. 66):—

> An expression cannot be the definition of conspiracy, the defining part of which is itself so devoid of definiteness for the purposes for which a definition is required.

I have referred to the language employed in the judgment in *Mulcahy's* case since, in the judgment of the majority of the Court of Appeal, the part of the passage from the judgment of Willes J. quoted by Lord Brampton in *Quinn* v. *Leatham* is given as authority for the proposition that the intention to commit the offence of kidnapping is of the essence of the offence charged in this case under *Code* section 573. I am unable, with respect, to agree with that opinion.

It is unnecessary in disposing of the present matter to attempt to formulate a general definition of the offence of criminal conspiracy as it was prior to the enactment of the *Criminal Code* in 1892. In *Quinn* v. *Leatham,* before quoting the passage from the judgment of Willes J. in *Mulcahy's* case, Lord Brampton said (p. 528) that a conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful and harmful towards another person. It is sufficient for me to say that, in my opinion, the agreement between Tulley and O'Brien to commit the offence of kidnapping was a conspiracy, within the meaning of this section of the *Code.* In agreement with the opinion of Mr. Justice Robertson, it is my view that the gist of the offence referred to is the agreement of two or more persons to commit any indictable offence.

1954

THE QUEEN v. O'BRIEN

Locke J.

This construction of the section appears to me consistent not only with the earlier cases in England but with the decisions of this Court in which the matter has been considered. Thus, in the *Poulterers Case* (1), it is said that a false conspiracy between divers persons shall be punished although nothing be put in execution and that "a man shall have a writ of conspiracy though they do nothing but conspire together and he shall recover damages and they may also be indicted thereof." In *Reg.* v. *Best* (2), it was said that the conspiracy is the gist of the indictment:—

> And that though nothing be done in prosecution of it, it is a complete and consummate offence of itself.

In *O'Connell* v. *Reg.* (3), Tindal C.J. said in part (p. 233):—

> The crime of conspiracy is complete if two, or more than two, should agree to do an illegal thing; that is, to effect something in itself unlawful, or to effect, by unlawful means, something which in itself may be indifferent or even lawful. That it was an offence known to the common law, and not first created by the statute 33 Edw. 1, is manifest. That statute speaks of conspiracy as a term at that time well known to the law, and professes only to be "a definition of conspirators". It has accordingly been always held to be the law that the gist of the offence of conspiracy is the bare engagement and association to break the law, whether any act be done in pursuance thereof by the conspirators or not.

In *Reg.* v. *Aspinall* (4), Brett J.A. said (p. 58):—

> Now, first, the crime of conspiracy is completely committed, if it is committed at all, the moment two or more have agreed that they will do, at once or at some future time, certain things. It is not necessary in order to complete the offence that any one thing should be done beyond the agreement. The conspirators may repent and stop, or may have no opportunity, or may be prevented, or may fail. Nevertheless the crime is complete; it was completed when they agreed.

In *Brodie* v. *The King* (5), Rinfret J. (as he then was), in delivering the judgment of the Court said in part (p 198):—

> On a charge of conspiracy, the agreement is itself the gist of the offence (*Paradis* v. *The King*, 1934 S.C.R. 165 at 168). The mere agreement to commit the crime is regarded by the law sufficient to render the parties to it guilty at once of a crime (Kenny, Outlines of Criminal Law, 13th ed., p. 81).
>
> And we need only recall the often cited passage of Lord Chelmsford in *Mulcahy* v. *The Queen*:—
>
> > It cannot exist without the consent of two or more persons; and their agreement is an act in advancement of the intention which each of them has conceived in his mind.

(1) (1611) 9 Co. Rep. 55b.
(2) (1705) 1 Salk. 174.
(3) (1844) 11 Cl. & F. 155.
(4) (1876) L.R. 2 Q.B.D. 48.
(5) [1936] S.C.R. 188.

In other words, to borrow the expression of Mr. Justice Willes (*Mulcahy* v. *The Queen* at p. 317):—"The very plot is an act in itself". It follows that a person may be convicted of conspiracy as soon as it has been formed and before any overt act has been committed. The offence is complete as soon as the parties have agreed as to their unlawful purpose (Kenny, Outlines of Criminal Law, 13th ed., p. 289; *Belyea* v. *The King*, 1932 S.C.R. 279).

The contention of the Crown is that the offence of conspiracy in this matter was complete when O'Brien and Tulley agreed to commit the offence. Conceding that *mens rea* must be shown, the Crown contends, rightly in my opinion, that an intention to offend against the penal provisions of an Act (in this case to agree to commit an indictable offence) constitutes *mens rea* (*Bank of New South Wales* v. *Piper* (1)).

It is however, said for the respondent that if it be the case that to agree to commit an indictable offence is punishable under section 573 of the Code, here there was no agreement since, on Tulley's own showing, he did not intend to carry out his undertaking. Thus, while the parties exchanged promises, to adopt the above quoted language of Willes J., "capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means", it is said there was no agreement within the legal meaning of that expression, since Tulley never intended to go through with the plan.

Some support for this contention is to be found in a case of *Woodworth* v. *State* (2). That case is relied upon to support a statement in Bishop on Criminal Law, 9th ed. vol. 2, p. 131, that where there are only two parties and one simply joins in appearance to draw the other on, neither is a conspirator. That statement is followed by some further expressions of opinion as to what is necessary to constitute an agreement to support a charge of conspiracy founded on other American cases. In *Woodworth's* case, the Texas Court of Appeal considered an appeal from a conviction under certain articles of the Penal Code of the State of Texas. According to Willson, J. that Code defines the offence of conspiracy to be a positive agreement entered into between two or more persons to commit one of certain named offences. That learned judge then proceeded to express his view as to what was the meaning to be assigned

(1) [1897] A.C. 383.

(2) (1886) 20 Tex. App. 375.

1954

THE QUEEN v. O'BRIEN

Locke J.

to the word "agreement" in the Penal Code and apparently accepted as a definition of the word one given in Webster's Dictionary and one of several definitions given in Bouvier's Law Dictionary. The latter publication said, inter alia, that agreement "consists of two persons being of the same mind, intention, or meaning, concerning the matter agreed upon". Since the evidence supported the view that the principal witness for the State, one Hunt, who was the only party to the conspiracy alleged, at no time intended to commit the offence but proposed rather to prevent its commission and was merely trying to entrap the accused, Willson, J. considered that there was no such agreement as was contemplated by the statute. It would appear that this decision has been followed in a case in Tennessee and other cases in the State of Texas.

Whatever is to be said as to what constitutes a "positive agreement" under the Penal Code of the State of Texas, it is (in the absence of a statutory definition) to the common law of this country that we must look to determine what amounts to an agreement to commit an indictable offence. Where two or more persons declare their consent as to any act or thing to be done or foreborne by some or one of them, it is an agreement in the eyes of the law and the fact that one of the parties agreeing does not intend to carry out his part of the bargain cannot affect the legal nature of the arrangement. On the question as to whether or not an agreement has been made, the intention of either party to carry it out is an irrelevant consideration. If the contention of the respondent on this aspect of the matter be analysed, it amounts simply to this that when two parties exchange promises to do any act it is an agreement if the act to be done be lawful, but it is not an agreement if it is unlawful and one of the parties does not intend to carry out his part of it. This argument appears to be wholly untenable.

The cases which decide that the evidence of police spies or agents provocateurs who, in pursuance of their duty to suppress crime, become parties to criminal conspiracies do not, in my opinion, assist the respondent in the present matter.

It is to be remembered that these cases deal with the law of evidence and do not assume to deal with the legal position of such persons endeavouring to discharge the duties

imposed upon them by their calling who enter into agreements with others for the commission of criminal offences. They are collected in the standard works on the law of evidence (Phipson, 9th ed. 510: Roscoe, 16th ed. 145: Wigmore, 3rd ed. art. 2060).

The principal cases in England dealing with the question are: *R.* v. *Despard* (1): *Reg.* v. *Dowling* (2): *Reg.* v. *Mullins* (3): *R.* v. *Bickley* (4). Such persons are variously described as police spies, informers or accomplices, though in *Despard's* case Lord Ellenborough said they could not be considered as accomplices. The rule as to the corroboration of the evidence of accomplices generally is stated in *Reg.* v. *Stubbs* (5).

That the rule does not apply to persons who have joined in, or even provoked, the crime as police spies was decided by this Court in *Vigeant* v. *The King* (6). The reason that it does not apply is explained in the judgment of Lord Reading, L.C.J. in *R.* v. *Baskerville* (7).

The question as to whether an agent provocateur entering into an agreement such as that made between Tulley and O'Brien would be guilty of the offence referred to in section 573 has not been decided by any court whose decisions are binding upon us and does not arise in this case. Robertson, J. A. expressed the view that a person so acting on the instruction of the authorities would be excused on grounds of public policy. In Stroud on Mens Rea, p. 14, the learned author suggests that, since whenever the law imposes a duty it necessarily confers a right to carry out that duty, this might afford justification.

In none of these cases is the question considered as to whether such an arrangement made between an agent of the police and a third person, with the design on the part of such agent merely to entrap the other person, would in the eyes of the law be an agreement of the nature necessary to support a charge of criminal conspiracy. The cases, therefore, afford no support for the contention made here that

(1) (1803) 28 St. Tr. 346.
(2) (1848) 3 Cox C.C. 509.
(3) (1848) 3 Cox C.C. 526.
(4) (1909) 2 C.A.R. 54.
(5) (1855) Dears. 555.
(6) [1930] S.C.R. 396 at 400.
(7) (1916) 12 C.A.R. 81 at 89.

1954

THE QUEEN v. O'BRIEN

Locke J.

what transpired between Tulley and O'Brien was any the less such an agreement if Tulley did not intend to carry out his part of the bargain.

In my opinion, the learned trial judge did not misdirect the jury and I would allow this appeal and set aside the judgment of the Court of Appeal.

FAUTEUX J. (dissenting):—The material facts of this case appear in the reasons for judgment of my brother Locke. In substance, the appellant O'Brien, having formed the project of kidnapping one Mrs. X, confided it to one Tulley, with whom he was acquainted. The two had then several meetings during which they discussed and plotted with finality the means by which the criminal design of the appellant could be achieved. In brief, by words, Tulley declared his consent and, thereafter, by deeds, continued to manifest his agreement and encouragement to O'Brien as to both means and aim. Indeed he actually pocketed money which, he admitted, O'Brien gave him as part of the consideration agreed to between them for his guilty participation in the execution of this criminal purpose. At trial, Tulley admitted all these facts and more specially his corrupt participation in the plotting of the crime, his agreement to commit it and his acceptance of the money and he also testified that he hired a cab which he said he used with O'Brien for the purpose of locating a house convenient for the sequestration of the woman. He testified, however, that he never had the intention "of going through with this scheme" or "of carrying it out". On the basis that some credence could be given by a reasonable jury to the existence of this alleged mental reservation as to the execution of the agreement—negatived by his overt acts—it is contended that the trial Judge misdirected the jury in instructing them that, in law, the offence of conspiracy was complete if, in point of fact, the accused and Tulley did make the agreement even though the latter "never at any time had any intention of carrying the agreement into effect."

The question of law which then falls to be determined is whether there was an indictable conspiracy if Tulley, one of the two parties to the agreement who—motivated by a desire to extort money from O'Brien—admittedly had the

intention and the will to and did actually plot the commission of the crime and openly agreed to and encouraged its commission, but had no intention to satisfy his own part of the exchanged promises and engagements.

It is recognized in jurisprudence and in text books that no complete and exhaustive definition of conspiracy has yet been formulated. Generally, it is said that conspiracy is an agreement of two or more persons to effect an unlawful purpose whether as their ultimate aim or only as a means to it. But that the legal concept of criminal conspiracy and the legal concept of criminal agreement are not to be confused is, I think, sufficiently suggested by s. 266 of the *Criminal Code* enacting that:—

> Every one is guilty of an indictable offence and liable to 14 years imprisonment who conspires *or* agrees with any person to murder or to cause to be murdered, any other person . . .

The modern law of conspiracy stems from what is referred to as the 17th century rule. The principle is thus formulated by Coke:—

> Quando aliquid prohibetur, prohibetur et id quod pervenitur ad illud: et affectus punitur licet non sequatur effectus; and in these cases the common law is a law of mercy, for it prevents the malignant from doing mischief, and the innocent from suffering it. Coke's Reports, Vol. V, New Edition, page 101.

A similar principle underlies these provisions of s. 69 of the *Criminal Code* prescribing that he who counsels the commission of a crime is guilty of a substantive offence even if the offence he counselled is not committed, such substantive crime being completed once counselling has taken place. *Brousseau* v. *The King* (1). Furthermore, if the offence counselled is committed, the person who counselled it is also guilty of the latter unless he has, before its commission, given a timely, express and actual countermand or revocation of the counselling. *Croft* v. *The King* (2). An unmanifested change of heart on behalf of a person who has counselled is not sufficient. In the *Croft* case, it may be added, there was a mutual agreement to commit suicide, consequential to which one of the parties died. Croft, the other party to the agreement—who could undoubtedly have been successfully charged with criminal conspiracy, for

(1) (1917) 56 Can. S.C.R. 22. (2) 29 C.A.R. 168 at 173.

1954

THE QUEEN v. O'BRIEN

Fauteux J.

suicide is a common law crime, (Kenny, Outlines of criminal law, 13th edition, page 289)—was actually charged and found guilty of the major offence of murder and this on the basis that the agreement itself amounted to such counselling, procuring, inducing, advising or abetting of murder as constituted the survivor an accessory before the fact if he was not present when the other party to the agreement committed suicide. There was no suggestion that Croft's agreement was affected by any mental reservation with respect to the execution of the criminal purpose. But whether or not it was leaves untouched the proposition that his participation in the plotting of the crime and his signified agreement, his promise or engagement to execute it were tantamount to counselling, inducing, advising the other party to commit it. Hence, in the face of these promises and engagements amounting to counselling, inducing, etc., mental reservation could have been no defence to the charge of murder. And to say that, assuming the existence of such mental reservation there would have been no conspiracy, would be tantamount to a denial of the existence of the very ultimate foundation upon which the same party was found guilty of the partially executed agreement.

That two or hundreds of persons may confederate and plot in advance the commission of a crime or crimes against another person or group of persons, or even the State, though agreeing, at the same time, to defer to a later date the question whether such criminal plans should at all be executed, is not an extravagant hypothesis. That such a secret combination against the peace, though for the time being denuded of the actual intention to commit the plotted crime or crimes, would not come within the meaning of those which, under the principle enunciated by Coke, are indictable, I am not ready and do not have to say for the determination of this appeal.

To the narrower proposition, i.e., that, in the circumstances of this case, the external manifestation of intention, this exchange of promises, of engagements and encouragements between the parties must be treated as having never existed because of the alleged mental reservation on the part of Tulley as to the "going through with the scheme", I am unable to subscribe. An agreement is an act in the law whereby two or more persons declare their consent as to

any act or thing to be done. Such a declaration takes place by the concurrence of the parties in a spoken or written form of words as expressing their common intention. Mental acts or acts of the will, it has been said, are not the material out of which promises are made. Hence the law, in civil matters at least, does not allow one party to show that his intention was not in truth such as he made it or suffered it to appear to the other party. That a different view should be adopted because of the criminal nature of the object of the agreement in this case where Tulley, willingly and with full appreciation of the matter, signified his agreement, promised and took the engagement, and thus encouraged the criminal design, is not only inconsistent with the economy of our criminal law but, in my respectful view, unwarranted under the authorities.

Halsbury's Laws of England, Vol. 9, 2nd edition, page 44:—

> The gist of the offence lies in the bare *engagement and association* to do an unlawful thing (i.e., a thing contrary to or forbidden by law), whether such thing be criminal or not, and whether any act other than the *engagement or association* be done by the conspirators or not.

Russell on Crime, Tenth edition, Vol. 2, p. 1798:—

> The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, *but in the forming of the scheme or agreement between the parties.* The external or overt act of the crime is *concert by which mutual consent to a common purpose is exchanged.* In an indictment, it suffices if the combination exists and is unlawful, *because it is the combination itself* which is mischievous, and which is considered to give the public an interest to interfere by indictment.

Harris and Wilshere's Criminal Law, 17th edition, page 45:—

> The offence consists *in the combining.*

In *Quinn* v. *Leatham* (1), Lord Brampton, at page 528, said:—

> The essential elements, whether of a criminal or of an actionable conspiracy, are, in my opinion, the same, though to sustain an action special damage must be proved.

and the learned Lord then proceeds to quote "as a very instructive definition of a conspiracy", the words of Willes J., in *Mulcahy* v. *R.* (2), who, in delivering the unanimous

(1) [1901] A.C. 495. (2) (1868) L.R. 3 H.L. 306 at 317.

1954

THE QUEEN v. O'BRIEN

Fauteux J.

opinion of himself, Blackburn J., Bramwell B., Keating J., and Pigott B., subsequently adopted by the House of Lords, said:—

> A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, *promise against promise, actus contra actum, capable of being enforced, if lawful,* punishable if for a criminal object or for the use of criminal means . . . The number and the compact give weight and cause danger.
>
> It is true these words were uttered touching a criminal case, but they are none the less applicable to conspiracies made the subject of civil actions like the present.

Dealing with and giving the reasoning out of which emerged the 17th century rule and its subsequent extension, Harrison in Law of Conspiracy, page 14, says:—

> For it was a general rule of criminal law that the gist of a crime was in the criminal intent, although it could not be punished until the intent was manifested by some act done in furtherance of it. Thus it was argued that in conspiracy the criminal intent was *the intent to combine* to indict falsely, and this intent was sufficiently manifested by *the act of combination,* that is, by the agreement, without any carrying out of the objects of the agreement.

The case of *Rex* v. *Kotyszyn* (1), quoted in support of respondent's contention, does not, in my respectful view, support the proposition that the alleged mental reservation of Tulley as to the commission of the crime of kidnapping renders the agreement, his promises and his engagements, non-existent and without jural consequences in criminal law. Indeed Bissonnette J., at page 202, quotes with approval the following passage of Marchand J. in *Deur* v. *The King*:—

> The principal element of the offence of conspiracy is the plotting or agreement of two or more persons to commit an act that is criminal in its design, or to accomplish a legitimate purpose by criminal means, and the complete offence is committed by the participants in the conspiracy as soon as there is an agreement between them to commit a crime. It is not necessary that the crime, the object of the plotting, be committed by one or the other of the conspirators. Each of them is guilty of conspiracy as soon as *he has signified his adherence to, or promised his collaboration in,* the common criminal design.

(1) 95 C.C.C. 261.

In the same case, Mackinnon J., having also, at page 268, quoted with approval the above statement of Marchand J., adds at page 269:—

> The dealings between Mary Elm and the respondent had advanced far past an attempt to commit a conspiracy, *the conspiracy itself having actually been accomplished.*

And then he quotes what was said by Willes J. in *Mulcahy* v. *R.*

Finally, Gagné J., at page 264, says:—

> I do not know that it is necessary to scrutinize the intimate intention of each one of the persons. The expression of the desire to conspire communicated to another person who consents thereto, ought to be sufficient to incriminate the latter, *even when it might later appear that the former did not really have the intention of doing an unlawful act.* The object that she pursued in her own conscience cannot be said to be an excuse for another. It seems to me that that is simply good sense.

The case of *Rex* v. *Kotyszyn* stands, besides, in quite a different category than the present. Furthermore, the fact that, on grounds of public policy, a peace officer, for instance, might be excused, or immuned of prosecution, for agreeing to buy drugs from a drug pedlar agreeing to sell them, in order that the latter be successfully brought to justice on the statutory charge of selling drugs, has not yet authoritatively permitted the statement that, because of the honest motives of the officer or his lack of criminal intent, there was, in criminal law, no agreement to sell and no sale.

For the dismissal of the present appeal, it is also said that if Tulley was charged with conspiracy and the jury would attach credence to his story, he should in law be acquitted and that, in such event, even if O'Brien had been previously convicted, O'Brien should be discharged according to the practice based on the rule that one cannot conspire alone. In this argument, I cannot find any assistance, for whether or not Tulley should in law be acquitted on the basis of his mental reservation is a question involved in the determination of this appeal. The question is one which according to Kenny, Outlines of criminal law, 15th edition, page 336, in a foot-note—has been raised, but whether as a pure academic question or in the consideration of an actual case, the learned author does not say. Indeed, no case in point, either in England or in Canada, has been quoted at bar nor was it possible to find any. Hence, furthermore, whether, assuming a defence resting on mental

1954

THE QUEEN v. O'BRIEN

Fauteux J.

reservation should, contrary to the views I hold, obtain in favour of Tulley, O'Brien—who, as implied by the verdict of the jury, had undoubtedly not only the intention to conspire but also the will to kidnap,—should legally benefit of the mental reservation of Tulley with whom he had agreed, is a question which has not then been considered in the cases where one convicted party was discharged because of the acquittal of the other party to the conspiracy, and is moreover a question which does not arise here in view of the conclusion I have reached as to Tulley's legal position in the premises.

In brief, Tulley, by lending a receptive ear to O'Brien's criminal proposition, by plotting along with him the unlawful means by which the crime was to be committed, by promising to O'Brien to actually join with him in its commission, by accepting money given to him by the latter as part of the price agreed for his participation in the matter, by hiring a cab and using it with O'Brien for the purpose of locating a house convenient for the sequestration of the woman, has, by deeds and by words, assented to and encouraged the design, and this whether he intended or not to go through with it. Mental reservations are not apt to defeat the natural consequences of words accompanied by deeds. Undoubtedly, O'Brien believed in and was encouraged by the manifested sincerity of Tulley. In Tulley's own words, O'Brien "believed something he had planned himself along with me." Indeed and when the moment came to actually kidnap the woman, Tulley thought it advisable, for motives of his own, to inform her husband of the plot against her. In the Law of Criminal Conspiracies and Agreements by R. S. Wright (London, 1873) at page 70, it is stated:—

> For the rest, there seems to be no reason to suppose that, unless perhaps in some forms of treason, the kind of conduct necessary for making a man a party to a conspiracy differs in any respect from that which would be necessary for making a man a party to any other sort of criminal design. If he procures, counsels, commands or abets a design of felony, he is involved in the guilt of the principal felon, though in a lower degree, if the felony is not actually committed. If he procures, counsels, commands or abets a misdemeanor, he is guilty of a misdemeanor at common law. So there can be no doubt but that a person may involve himself in the guilt of a conspiracy *by his mere assent to and encouragement of the design,* although nothing may have been assigned or intended to be executed by him personally.

In the circumstances of this case, I agree with Robertson J.A. of the Court of Appeal of British Columbia, and with my brother Locke, that the verdict of the jury should not be disturbed and that the present appeal should be maintained.

Appeal dismissed.

Solicitor for the Appellant: *T. G. Norris.*

Solicitor for the Respondent: *J. Stanton.*