No. 12925

Supreme Court of Illinois

Backus et al

vs.

People

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SUPREME COURT.

CORNELIUS F. BACKUS *et al.*

vs.

THE PEOPLE.

POINTS FOR PLAINTIFFS IN ERROR.

I.

There being no joinder to the demurrer, the same was confessed, and defendants should have been discharged.

1 *Chitty's Criminal Law*, 440.

The record in fact does not show that the demurrer was disposed of.

This is fatal, and judgment will be reversed.

See 11 *Illinois*, 549-50.
2 *Scam.* 222.
4 *Scam.* 53.
5 *Gil.* 249.
And see page 3 of Record.

II.

Prisoner should have been arraigned, there was no issue *for the* jury to try.

2 *Hale*, 216; 1 *Chitty Cr. Law*, 413, 414.
3 *Modern*, 265; 4 *Bla. Com.*, 323.
Scates, &c., Statutes, page 407, *sec.* 181, 182.

There was no order of court even directing the plea of not guilty to be entered of record. *See.* 181.

See 2 *Gil.*, 551.

The record must show affiamatively the arraignment.

III.

INDICTMENT NOT GOOD.

There was a motion in arrest. See page of Record 42.

1st. It does not show a conspiracy to commit an indictable offense at common law.

2d. It does not show that the means to be used were an indictable offense at common law.

It is bad therefor.

1 *Cushing*, 189; *Eastman* v. *Comm.*
9 *Cowen*, 578; *Lambert* v. *People.*
5 Barr (Penn.,) 60 *Hartman* v *Comm.*
6 *Serg't & Rawle*, ~~67~~ 224, *Scott* v. *Comm.*
31 *Maine R.*, 376; 30 *Maine*, 132.
7 *Barbour*, 391.
3 *Archibald Cr. Law*, 616, 2.
Wharton, 675, 679, 690.
5 *W & Ser.*, 464; 7 *Ad. & Ellis*, 792.
1 *Starkie Rep.*, 402; 9 *Ad. & Ellis*, 686.
1 *Ad. & Ellis*, 706.

4 Halsted 317
34 Maine (Red) 320

5 Harris & Johnson R 317
this case is overruled by the above authorities. go to the note - yet the indictment held good in this case set out the means & in what way the fraud was to be consummated

The words "cheat" and "defraud," or either of them, have not an exclusive criminal signification. As to the word "cheat," see

3 *Scam.*, 32; 2 *H. Black.*, 531.
14 *Johns.*, 374; 2 *Moss.*, 506.
1 *Cushing*, 189; 3 *Hill*, 139.

And the word "defraud,"

7 *Pickering*, 542.
1 *Metcalf*, 1.
17 *Mass.*, 184.
3 *T. R.*, 51.
1 *Cushing*, 189.
9 *Ad & Ellis*, 686.

As to the means charged "false pretences," those words do not state a common law indictable offense. And have not even an exclusive criminal signification.

See above authorities.

Scates, &c., Statutes of Illinois, page 401.
Sec. 152-153 *& Laws*, 1857, on same page amending said sections.
4 *Scam. R.*, 99; *Arch. Cr. Law*, 471-2.
2 *Kent Com.*, 621 and note.
3 *Scam.*, 32, 34, *Dunbar* v. *Bonsteal.*
1 *Scam.*, 499.

By Art. 13, Sec. 7, of our constitution, page 73, every defendant has the right "to demand the nature and cause of the accusation against him." This indictment certainly does not.

2 *Gil.* 540, 549.

At common law no indictment for cheating and defrauding could be maintained, save those that affected the public, against which common prudence and care could not guard, as by using *false weights and measures*, or by some false token—and the false token must be set out.

9 *Cowen*, 578.
2 *Strange*, 1127.
7 *Johns. R.*, 201.
1 *Cushing*, 227.
5 *Barr.* (Penn.) 60.

The common law of England, (of a general nature) as amended by their statutes, was only adopted down to the fourth year of James Ist.

Scates, &c., Statutes, 401; *Sec.* 152, 153, amended, 1857, sets forth, the law of this State, as what "cheats and false pretences" are indictable.

If property is obtained, however, fraudulently, upon credit, no indictment can be maintained.

If by representations of wealth, honesty and business standing, &c., then not unless reduced to writing. And then it must appear that the

fraud was such that a man exercising care and caution might have become the dupe of the deception.

Henshaw v. *Bryant*, 4 *Scam.* 97.
14 *Ill.*, 348.

AS TO VENUE.

There is no allegation in the indictment of venue of the "false pretences"—the want of the same is fatal

The People v *Barrett & Ward*, 1 *John. R.*, 65.
See opinion of *J. Spencer*, 70,
" " *J. Thompson*, 71,
" " *C. J. Kent*, 75,
} 1 *John. R.* 65

And if it does not appear from the record that the same was proved, judgment must be reversed.

1 *Arch. Cr. Law*, 72,—note.
10 *Fergu.*, 549.

The facts proved on trial do not show any agreement, "as to the means to be used."

The proof of means used do not show such a statement of *false pretenses* that would deceive a person of care and caution.

See above authorities.

See also 7 *Barb.*, 391.

It was not proved such means were agreed upon or *used* as are indictable in this State for "fraud" or "pretences."

Scates Statute, 401.
Sec. 152 and 153.

And amended 1857, same page, Casey says he sold the horse to Johnson for two notes of $300 each, made by Morse, secured by mortgage. Record 11, 12, 13.

There was no proof of inquiry on the part of Casey, as to goodness of security. See Record 18. Notes and mortgage were received by Casey. R. 16.

The non payment of the notes by Johnson, is not indictable.

Fraudulent breaking of a contract is not indictable.

3 *Greenleaf, Ev., Sec.* 84.
1 *Mass. R.*, 137.
Vol. 1. *British C. C., R. & Ry*, 461.

Casey cannot say he was defrauded. He sold the horse for the notes and mortgage. See R. 13. The notes were *not due*—were made by Morse. He relied upon the responsibility of Morse, and his ability to pay next day. Record 11.

Not indictable under section 152 as amended 1857.

If an indictment could not be maintained under the State, conspiracy cannot.

~~6 Serg. Rawle, 67; Scott v Com.~~
~~5 Barr (Penn) 66.~~

V.

IRRELEVENT TESTIMONY.

The signature to the mortgage was proven under objection, without producing same. R. 16—or accounting for its absence.

Also—The court erred in allowing witness to state the declarations of Chapman. *Record* 20.

They were the words of a third person.

2d. If they claim he was a co-conspirator, this being after the whole transaction, it could not be evidence.

Wharton, 262.
1 *Phil on Ev.*, 94, 95. See 6 *Ed.* 201.
2 *Russ on crime*, 6 *Am. Ed.*, 697.

Also erred in allowing witness A. G. Low to testify in regard to conversation with Backus. Page 22 of Record.

It was irrelevant; it did not tend to prove the issue; it was given to prejudice the jury.

6 *Hill R.* 292. On bill of exceptions. Where it appears improper evidence has been given to the jury, the objection is fatal, "although we cannot see that it probably affected the verdict."

Again erred in permitting R. A. Eddy to testify that he had sold several pieces of land to Backus; among the rest the land (as he was informed by them,) that secured these notes, *and also to state where it was*, and *the amount*, and have him fix value. See Record 28.

It was on cross examination of defendant's witness.

It was speaking of contents of a written instrument.

It tended to prejudice the jury by inferior testimony.

VI.

The Court, in overruling defendant's instructions No. 4, 5 and 10, erred, and amending No. 9.

The propositions asked by defendants and overruled were:

No. 4. 1st. If the defendants had committed the crime of fraud, then they could not be convicted of the conspiracy.

9 *Cowen* 578, *People vs. Lambert.*
Barr, (*Penn.*) 60.
Serg't & Rawle, ~~67.~~ 72
2 *Harris* (*Penn.*) 226.
5 *Mass.* 105.

No. 5. 2d. If the defendants had conspired to obtain the possession and not the title to the horse; and had got the possession with intent to cheat, &c. then the offence was larceny, and defendants could not be convicted under this indictment.

1 *Hale* 825, 507.
3 *Arch. Cr. P. P.* 467, 6*th Ed.*
Barbour Cr. Law 175.

"Where a felony or misdemeanor is in fact committed, a conspiracy to commit such felony or misdemeanor cannot be indicted and punished as a distinct offence.

Com. vs. Fisher et al., 5 *Mass.* 105.

Casey's testimony, said: "He sold the horse to Johnson, provided Morse would cash the notes, and Johnson was to pay $12½; he had not got the money; had not delivered the horse to any of the defendants."

See Record 14, 15, 16, 17, 18 and 19.

3d. If the defendants had committed a larceny, they could not
No. 10. be convicted of the misdemeanor.

Same authority, 5 *Mass.*, 105.

4th. The question of credit of sale of the horse was taken away
No. 9. from the jury, and they were instructed to the contrary, "That if the credit was obtained by fraud," the requirements of the statutes did not apply.

We contend that this was the very case excepted by statute of 1857.

Statute (Scates), 401.

The fifth instruction is in direct conflict with the case of

Com. v. *Fisher*, 5 *Mass.*, 105.

VII.

PEOPLE'S INSTRUCTIONS.

The 3d & 4th instructions to the jury are clearly not law.

Record 39.

"That they or any two of them did so act as charged in the "indictment, then if they find they had so acted, then they "would find defendants guilty."

This clearly ignores the doctrine that the agreement is the gist of the offence.

3 *Greenleaf Ev.*, *sec.* 91.
2 *Harris* (Penn.) 226.

VIII.

The cause should have been continued. Defendant Backus had no chance to prepare for trial.

See aff. *Record*, *page* 5, 6, 7, 8, and 9.

States Statutes 422

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4 201

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Authorities

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