1. **COMMON LAW OFFENCES AND MARKETS: Tony Shaw QC**

**COMMON LAW OFFENCES AND MARKETS**

1. Market manipulation comes in many forms. At its heart lies the simple proposition that the perpetrator of any fraud has information which is not available to the other traders or the public. The criminal manipulation of financial markets is ultimately about the dishonest control or acquisition of such information. Data may be falsified to assist traders (e.g. LIBOR); knowledge can be acquired illegitimately allowing the direction of market movement to be anticipated (insider trading); and prices movements may be controlled or influenced by illegal share support operations[[1]](#footnote-1) or the spreading false rumours. [[2]](#footnote-2)
2. Such activities are usually made criminal by legislation. Insider trading is covered by s57 of the *Criminal Justice Act* 1993, and market manipulation by s397 of the *Financial Services and Markets Act* 2000 (FSMA). Legislation to similar effect is found in many other countries as well as the European Union.[[3]](#footnote-3)
3. Part 1 deals with the earliest form of common law control of markets and how far it continues today. To some extent this part is a work in progress. Part 2 deals with conspiracy to defraud. Part 3 deals with the theoretical width of conspiracy to defraud and its limitations.

**PART 1: Early Common Law Control of Markets**.

*The past is never past. It is not even dead*.[[4]](#footnote-4)

1. Control of market activity by the criminal law is both ancient and commonplace. The *lex Julia Annona* (possibly introduced by Julius Caesar) imposed a heavy fine on those who artificially increased the price of corn.[[5]](#footnote-5) Diocletian’s *Edict on Price-Control* in AD 301 set out maximum prices, the violation of which was punishable by death.[[6]](#footnote-6) In 483 Zeno issued an *Edict against Monopolies* which prohibited price-fixing agreements.[[7]](#footnote-7) There are religious prohibitions. The Talmud forbade hoarding of food essentials and making excessive profits; Islam denigrated speculative activity (*gharar*); and St Thomas Aquinas condemned for mere profiteering the “*buying of goods in the market with the intention to resell them at a higher price.*”[[8]](#footnote-8)
2. In England, most early mediaeval markets were small and local. Their sources of supply were local and could be could be easily dammed, diverted or controlled with serious consequences to consumers.[[9]](#footnote-9) Those who interfered with markets in such manner were widely regarded as a threat to economic stability, and were threatened with pillories, fines and imprisonment and even death.[[10]](#footnote-10)
3. Three principal offences existed to ensure the both the free flow of goods and the maintenance of fair prices by discouraging anti-competitive practices: forestalling, regrating and ingrossing:[[11]](#footnote-11)
4. **Forestalling** appears originally to have meant an ambush on the highway - *forstal* according to the laws of Cnut.[[12]](#footnote-12) By the fourteenth century it had expanded from the violent detention of goods intended for market, to include persuading or threatening or preventing persons coming or bringing their goods to market; trading before market opening;[[13]](#footnote-13) or to any attempt by any means to enhance the price of goods.
5. **Regrating[[14]](#footnote-14)** was buying provisions in a market and reselling them for a profit in the same market or any other market within four miles.
6. **Ingrossing[[15]](#footnote-15)** was thebuying of growingcornor any other victual in order to sell them again (as opposed to purchasing for one’s own use) – literally buying in gross (wholesale) and selling in gross. (The object was to prevent speculation and monopolies, and incidentally delayed the creation of trading in pork belly futures).
7. The offences were undoubtedly old. Illingworth[[16]](#footnote-16) traces forestalling to Saxon England and the reign of Athelstan and finds it mentioned in the Domesday Book. Both he and Blackstone find parallels in Roman law.[[17]](#footnote-17) The offences also appear to have been commonplace[[18]](#footnote-18), and were regularly denigrated by Parliament. Forestallers were the speculators and market-riggers of their day and as food riots in times of scarcity were not uncommon they provided useful scapegoats. The opprobrium they attracted was sometimes extreme. Pulton[[19]](#footnote-19) in *De Pace Regis* observed that:

*“forestallers, ingrossers and regraters, deserve to be reckoned amongst the number of oppressors of the common good and public weal of the realm, for they do endeavour to enrich themselves by the impoverishment of others, and respect not how many do lose, so they may gain. They have been exclaimed upon and condemned in parliament from one generation to another, as appeareth by the statute, but among others especially by the statute 34 Edw 1 it was ordained that no forestaller should be suffered to dwell in any town, for he is a manifest oppressor of the poor and a decayer of the rich, a public enemy of the country, a canker, a moth, and a gnawing worm, that daily wasteth the commonwealth and the act and name of a forestaller was so odious in that time, that it was moved in parliament to have it established by law, that a forestaller should be baited out of the town where he dwelt by dogs, and whipped forth with whips*.”

1. The Middle Ages was a period of intense market regulation. Numerous statutes were passed criminalising combinations or agreements to fix or raise prices (or wages) of victuals and merchandise.[[20]](#footnote-20) The statute books are replete with examples of attempts to control the activities and regulate prices of fishmongers, wool and wheat merchants, cordwainers, dyers and the like. Winfield observed:[[21]](#footnote-21)

"*. . . the prevailing idea was that trade combinations when they interfered with prices were an economic evil to be stamped out by the state, and a Parliament which was parental enough to fix the price of a young capon at three pence, and an old one at four pence was not likely to shirk this duty. That its attempts to regulate trade were not always satisfactory in result was only to be expected. . . But 2 and 3 Ed. VI c. 15 surpasses any previous enactment in scope and graduated severity, for it punishes in effect all purveyors of food who conspire to sell their goods only at fixed prices, and all artificers and labourers who conspire not to work, except at a fixed wage or for a fixed time*."

1. Holdsworth asserts that, from the middle of the fourteenth century, there is authority for the principle that all persons ought to be allowed to carry on their trades freely, subject only to any restrictions or regulations which might be imposed by common law or statute.[[22]](#footnote-22) But that principle (if it existed) was obscured by the sheer number of mediaeval statutes which sought to legislate "*honest manufacture, a just price, a fair wage, a reasonable profit.*" By the eighteenth century "*it was inevitable that the courts should hold that combinations of masters which were entered into to force down wages or force up prices, or combinations of men which were entered into in order to force up wages or diminish the length of the working day, were indictable conspiracies*."[[23]](#footnote-23) Prosecutions for the offences continued well into the eighteenth century.[[24]](#footnote-24)
2. This plethora of legislation intervention makes it difficult precisely to untangle the common law origins of the offence. The difficulty is further aggravated by the fact that most eighteenth and nineteenth century definitions of forestalling, regrating and ingrossing adopted the statutory definition used when the offences were put into statutory form in 1552.[[25]](#footnote-25) Nevertheless, by the eighteenth century there was a universal consensus[[26]](#footnote-26) that these were common law offences of some antiquity.
3. Not unnaturally, most reports concern the necessities of life. However, whereas engrossing appears to have been limited to such necessities as agricultural produce, livestock, meat, poultry,[[27]](#footnote-27) fish, salt (a preservative);[[28]](#footnote-28) tar[[29]](#footnote-29) (used to treat sheep) and coal,[[30]](#footnote-30) forestalling at least included other merchandise.[[31]](#footnote-31) In *Starling*[[32]](#footnote-32) it was said that "*the very conspiracy to raise the price of pepper is punishable, or of any other merchandise*."[[33]](#footnote-33) Pepper could hardly have been then described as a necessity, nor indeed linen[[34]](#footnote-34) nor silk. [[35]](#footnote-35)
4. However, by the later eighteenth century, more enlightened views began to emerge as *laissez-faire* economic theories[[36]](#footnote-36) disavowed these market restrictions. Adam Smith railed against them in his *Wealth of Nations*:*[[37]](#footnote-37)*

*The popular fear of engrossing and forestalling may be compared to the popular terrors and suspicions of witchcraft. The unfortunate wretches accused of this latter crime were not more innocent of the misfortunes imputed to them, than those who have been accused of the former.[[38]](#footnote-38)*

1. In this he seems to have been supported by Lord Mansfield, who was Chief Justice of the King’s Bench Division (1756-1788). Lord Mansfield has been called the founder of English commercial law. [[39]](#footnote-39) Not surprisingly he held strong free trade views and appears to have supported the *Repeal of Certain Laws Act* 1772 which repealed the statute of 1552. Indeed, in a case before Lord Kenyon in 1800, barrister Edward Law asserted that Mansfield had “*revolted so much at the judgment which, under the statute, he was obliged to pronounce, that he ….. let the matter stand over, postponing his judgment from term to term, until the statute itself … had been repealed.*”[[40]](#footnote-40)
2. However, Adam Smith’s views were not wholly unopposed in Parliament. There were attempts to re-introduce these criminal penalties in 1787, which was opposed by Edmund Burke who condemned similar proposals in 1795. A restoring Bill in 1797 was defeated.[[41]](#footnote-41)
3. Opposition from the judiciary was more successful. Lord Kenyon, who succeeded Lord Mansfield as Chief Justice of King’s Bench in 1788, diverged from the views of his predecessor. He thought that the common law subsisted, and made his views known for example by specifically announcing on the summer assize circuit in 1795 that forestalling was still indictable at common law.[[42]](#footnote-42) He described the repeal of the statute as "*though in an evil hour all the statutes which had been existing above a century were at one blow repealed, yet, thank God, the provisions of the common law were not destroyed.”[[43]](#footnote-43)* Kenyon enjoyed the support of his fellow judges, and had some legal support from the law-books. However, there had been little appetite for such prosecutions under Lord Mansfield.
4. The poor harvests and food shortages of 1795 and 1800 led to food riots. Again, speculators provided easy targets for the mob. They were encouraged by traditionalists such as Joseph Girdler, an old-fashioned JP who started a general campaign of prosecution against forestallers in 1796 and 1800. He produced handbills, offered rewards for information, wrote letters to the press[[44]](#footnote-44) and published an essay on the law. He also instigated a number of prosecutions. His prodigious efforts spurred one anonymous correspondent to write:

*“We no you are an enemy to Farmers, Millers, Mealmen and Bakers and our Trade if it had not bene for me and another you you son of a bitch you wold have bene murdurd long ago by offering your blasted rewards and persecuting Our Trade God dam you and blast you you shall never live to see another harvest. ..”[[45]](#footnote-45)*

1. The argument as to the efficacy or legitimacy of the common law offences continued.

Hay[[46]](#footnote-46) states, “. *. .if the common law was to continue to be put into effect, Kenyon and his brother judges needed to do two things: establish a modern authoritative precedent by a judgement after full argument by counsel; and encourage prosecutions through the most public discussion of the grounds of that judgement.* . . . *as corn prices mounted to vertiginous heights, Kenyon and several of the other eleven common-law judges had been busy for some months working to those ends”*

1. Two ideal targets appeared, of whom Samuel Ferrand Waddington achieved the greatest notoriety. Waddington was considered somewhat radical. He had stood unsuccessfully for Parliament (twice) and (again unsuccessfully) as one of the Sherrifs of London. In 1798 he became a hop trader. He inspected the Kent crop in 1799 and decided that the yield would be poor, and made a number of forward purchases. In 1800 he thought that the yield from the Worcester hop gardens would also be low and made similar forward purchases. He also tried to persuade the Worcester hop growers not to lower their prices, to hold their hops back temporarily, and not to sell so as to allow prices to rise. His motive appears to have been a genuine desire to assist poorly paid hop growers, as well as his own financial gain.[[47]](#footnote-47) He was a perfect foil for Lord Kenyon.
2. Waddington was tried for 9 counts of engrossing and one count of effectively trying to rig the market (effectively forestalling) by spreading false rumours.[[48]](#footnote-48) Lord Kenyon CJ rejected the argument that these offences had been repealed in 1772, ruling that the repeal affected only the statutory offences and that the offence subsisted in its older common law form.[[49]](#footnote-49) He also used the case to attack Adam Smith:[[50]](#footnote-50)

“*It has been said, that people have no more reason to fear forestalling, engrossing, and regrating, than they have to fear witchcraft. It is easy for a man to write a treatise in his closet, but if he would go to the distance of 200 miles from London, and went to observe people at every avenue of a county town, buying up butter, cheese and all the necessaries of life they can lay hold of, in order to prevent them coming to market (which has happened to my knowledge) he would find that this is something more real, and substantial than the crime of witchcraft. The country suffers most grievously by it.”*

1. Waddington was convicted, roundly condemned, [[51]](#footnote-51) fined £500 and sentenced to imprisonment for 1 month. For his second (Kent) offence he was sentenced that same year by Grose J to a further fine of £500 and 3 months imprisonment at King’s Bench prison.[[52]](#footnote-52)
2. Lord Kenyon’s pre-judged and somewhat one-sided views of the evidence (for example, he ignored the fact that forward purchases were both common and necessary in the hop trade), led to later criticism. Lord Campbell called his judgments an “*absurd doctrine*” about an “*imaginary crime*.”[[53]](#footnote-53) His encouragement of such prosecutions was also thought to be “*a genteel sanction for the food riots*” in London.[[54]](#footnote-54) There was some justification for that concern. Lord Kenyon’s other major case was that of Thomas Rusby who was prosecuted for regrating oats at the Corn Exchange in London in 1799, and convicted in July shortly before Waddington’s trial. Lord Kenyon at the trial judge blamed speculators for a 50% increase in the price and asked the jurors to establish a precedent to end the afflictions of the poor.[[55]](#footnote-55) It was perhaps not wholly surprising that in the September food riots, the London mob tried to lynch Rusby and gutted his home. [[56]](#footnote-56)
3. Rusby sought a retrial which was granted. At the retrial it was argued that regrating had never existed outside of statute law. The court was divided. It never reached a decision. Lord Kenyon retired in 1802. In 1804 Rusby’s prosecution was discharged. Other pending prosecutions were also dropped.
4. One of Waddington’s barristers (he had seven) was Edward Law, who had acted for Warren Hastings. Law sought to argue the wisdom of the market before Lord Kenyon, and they repeatedly clashed during Waddington’s trial. [[57]](#footnote-57) Within a few days of the verdict Law was made Attorney-General. When Lord Kenyon retired in 1802, Law succeeded him as Chief Justice as Lord Ellenborough. Hay argues with some force that once Lord Ellenborough was on the Bench it was realised that no convictions for forestalling could be had or would stand re-examination.[[58]](#footnote-58)
5. However, *Waddington[[59]](#footnote-59)* remained the law insofar as it asserted the continued existence of the common law offences. Chitty thought that any subsequent successful prosecution would have to show not only *mens rea* but that actual harm had resulted.[[60]](#footnote-60) *Waddington* also appeared fully reported in Burn’s *Justice of the Peace* in 1805[[61]](#footnote-61), although in later editions the references were truncated. All three offences were regularly cited in the early editions of Archbold *Criminal Pleadings* which referred to *Waddington.*[[62]](#footnote-62)
6. In 1824 some 14 statutes which had also outlawed combinations by workmen, including the *Combination of Workmen Act* 1800 which had made it a criminal offence for workmen to combine to secure higher wages, shorter working hours, or to control their employers in the conduct or management of their business were repealed. The Act also repealed the *Bill of Conspiracies of Victuallers and Craftsmen* *1548* which had been directed against those who "*conspired and covenanted together to sell their victuals at unreasonable prices*."
7. The common law offences were finally abolished by the *Forestalling, Regrating etc Act* 1844.[[63]](#footnote-63) However, forestalling was preserved in part. Section 4 of the Act stated that nothing in its provisions should apply "*to the offence of knowingly and fraudulently spreading or conspiring to spread any false rumour with intent to enhance or decry the price of any goods or merchandise, or to the offence of preventing or endeavouring to prevent by force or threats any goods, wares or merchandise being brought to any fair or market, but that every offence may be inquired of, tried and punished as if this act had not been passed*."
8. The first part of the proviso “*conspiring to spread any false rumour with intent to enhance or decry the price of any goods or merchandise”* reflected the old text books and early case law. As long ago as 1369 a Lombard had been convicted in London of forestalling, by practising words to enhance the price of wool (i.e. spreading false rumours) that there were wars in foreign parts so that no wool could “pass the sea” next year.[[64]](#footnote-64) Jenkins reports a case in 1620 where false rumours were spread to depress the price of wool in the Cotswolds.[[65]](#footnote-65) *Hilbers[[66]](#footnote-66)* was indicted for a conspiracy to raise the price of oil by fictitious sales, and of course, *Waddington* was indicted for spreading false rumours to affect the price of hops.
9. After 1845, even this aspect of the offence faded into some obscurity. Nevertheless, the s4 proviso remained good law. The *Forestalling, Regrating etc Act* 1844 was itself abolished by the *Statute Law Revision Act* 1892, but if the effect of its abolition did not revive the original offences, nor did it affect the continued existence of the truncated offence of forestalling as preserved by s4.[[67]](#footnote-67) The existence of the proviso made its regular appearance in Archbold up to the 36th edition in 1966.[[68]](#footnote-68) Moreover it was cited in Halsbury’s *Laws* in its first 3 editions (until 1973), as punishable by fine and/or imprisonment.[[69]](#footnote-69) It was quietly dropped from both works after that.
10. Nevertheless, it appears that the forestalling remnant represented by the proviso still exists. I suggest that its non-appearance in the text-books merely reflects its desuetude and the appearance of alternative statutory remedies.

**De Berenger**

1. Lord Ellenborough was still Chief Justice when the *­De Berenger* Stock Exchangescandalbroke in 1814.*[[70]](#footnote-70)* He conducted the subsequent criminal trial which was lengthy (2 days) and notorious for his insistence that the defence begin at 10pm after a thirteen hour prosecution case (the case was adjourned at 3:00 am); and the fact that one of the defendants was Lord Cochrane, a famous frigate captain.[[71]](#footnote-71)
2. *De Berenger* involved a successful conspiracy “*by false rumours to raise the price of public funds and securities*” by spreading reports through by uniformed couriers wearing white Bourbon cockades about the death and dismemberment of Napoleon from Cossack sabres. Lord Ellenborough observed that the conspiracy “*strikes at the price of a vendible commodity in the market*” and Le Blanc J stated:

*“The offence being to raise the funds on a future day, its object was to injure all those who should become purchasers on that day, and not some individuals in particular. In the same manner it is if a false rumour be spread on a day prior to a market day, in order to raise the price of* ***a*** *commodity in the market, whether it be an article of necessity or not.”*

1. The case is usually cited as a classic case of conspiracy to defraud.[[72]](#footnote-72) Counts 1 and 2 of the indictment certainly pleaded an intention to “*cheat and defraud*”. But the remaining counts (3 to 8) merely refer to the temporary increase in the rise of the prices of government funds and other government securities by means of the false rumours *“with the wicked intention to thereby greatly injure and aggrieve all liege subjects*”.
2. Direct reference was made to the common law provisions. During the course of argument in Arrest of Judgement[[73]](#footnote-73), Le Blanc J observed the crime was complete before any loss, “*in like manner as conspiring to raise the price of commodities in a market*…” To Sergeant Best’s rejoinder that “*commodities in a market are articles of necessity, which makes a distinction*,” Lord Ellenborough replied: “*Whether it be articles of necessity, or of universal sale, comes to the same thing*”. In giving judgement, Lord Ellenborough stated that the purpose of the conspiracy “*is in its nature mischievous; it is one which strikes at the value of a vendible article in the market, and if it gives a fictitious value, by means of false rumours, it is a fraud…”* Dampier J. described the object of the conspiracy as wrong  “*for it is to give a false value to a commodity in a public market*.”
3. It is perhaps not surprising that in the circumstances no specific reference was made to *Waddington*. However, the point was made by Brett J in *Aspinall:[[74]](#footnote-74)*

*“If any person were cheated by false pretences into purchasing a commodity which but for such falsehood he would not have purchased, it is understood that he could maintain some suit for relief or remedy on the falsehood and fraud thus perpetrated on him. This is the case of* De Berenger*. It was there held that it was a criminal conspiracy to agree to endeavour to raise the price of public funds on a particular day by false rumours. This was not because it is an injury to the public to raise the value of public funds; but because it is fraudulent against those who purchase a vendible commodity in the market to raise the price of it at the time they purchase it by fraudulent falsehoods on which they intended to act. The conspiracy was held to be criminal, not because the article to be dealt in was the public funds, but because the public funds were a vendible commodity.*

*. . . . judges are entitled and bound to take judicial note of that which is common knowledge of the great majority of mankind and the great majority of men of business . . . that shares in limited companies are a vendible commodity.”*

1. More recently, in *Kamara* (1974) Lord Halisham stated that the unlawfulness of combinations of merchants rigging the markets was extant.[[75]](#footnote-75) *De Berenger* (and to that extent the forestalling proviso) remains good law[[76]](#footnote-76) although the manipulation of stock and other markets are now covered by statute.[[77]](#footnote-77)

**PART 2: CONSPIRACY TO DEFRAUD**

1. Today, the common law interacts with markets in the criminal justice system principally through conspiracy to defraud.**[[78]](#footnote-78)** The use of the offence in the nineteenth and early part of the twentieth century was desultory. For the past forty or fifty years it has become commonplace. Conspiracy has been described as the ‘*prosecutor’s darling*’,**[[79]](#footnote-79)** and a ‘*not yet rusty, and still trusty’* companion,**[[80]](#footnote-80)** whose retention has been strongly advocated by most prosecution authorities.**[[81]](#footnote-81)** It is easy to see why. It is a broad offence. It can cover in one count, multiple examples of fraudulent conduct which would be tedious or onerous to indict separately. It allows a jury to be presented with an overarching narrative of criminal misconduct. **[[82]](#footnote-82)** In appropriate circumstances it can allow for the imposition of a greater penalties than those imposed by lesser statutory offences.
2. However, the offence can cause real problems for any prosecution which misunderstands its development, ambit and limits. The *Jubilee Line[[83]](#footnote-83)*, *Norris*, *Goldshield,* *Evans* and *Quillan*[[84]](#footnote-84) are recent examples.
3. The classic definition of conspiracy to defraud derives from Viscount Dilhorne’s speech in *Scott v Metropolitan Police Commissioner:***[[85]](#footnote-85)**

*…it is clearly the law that an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud.*[[86]](#footnote-86)

1. *Scott* reflects the earlier decision of the House in *Welham v DPP*[[87]](#footnote-87) where Lord Radcliffe said (as p 123):

*Now, I think that there are one or two things that can be said with confidence about the meaning of this word ‘defraud’. It requires a person as its object: that is, defrauding involves doing something to someone. Although in the nature of things it is almost invariably associated with the obtaining of an advantage for the person who commits the fraud, it is the effect upon the person who is the object of the fraud that ultimately determines its meaning… Secondly popular speech does not give, and I do not think ever has given, any sure guide as to the limits of what is meant by ‘to defraud’. It may mean to cheat someone. It may mean to practise a fraud upon someone. It may mean to deprive someone by deceit of something which is regarded as belonging to him or, though not belonging to him, as due to him or his right. It passes easily into metaphor, as does so much of the English natural speech. Murray’s New English Dictionary instances such usages as defrauding a man of his due praise or his hopes. Rudyard Kipling in the First World War wrote of our ‘angry and defrauded young’. There is nothing in any of this that suggests that to defraud is in ordinary speech confined to the idea of depriving a man by deceit of some economic advantage or inflicting upon him some economic loss. Has the law ever so confined it? In my opinion there is no warrant for saying that it has. What it has looked for in considering the effect of cheating upon another person and so in defining the criminal intent is the prejudice of that person: what Blackstone[[88]](#footnote-88) called ‘to the prejudice of another man’s right’. East[[89]](#footnote-89) makes the same point in the chapter on Forgery: ‘in all cases of forgery, properly so called, it is immaterial whether any person be actually injured or not, provided any may be prejudiced by it’.[[90]](#footnote-90)*

1. A further definition of some assistance was that articulated by Lord Goff of Chieveley in *Wai Yu-tsang[[91]](#footnote-91)*:

*The question whether particular facts reveal a conspiracy to defraud depends upon what the conspirators have dishonestly agreed to do, and in particular whether they have agreed to practise a fraud on somebody. For this purpose it is enough for example that, as in Allsop and in the present case the conspirators have dishonestly agreed to bring about a state of affairs which they realise will or may deceive the victim into so acting, or failing to act that he will suffer economic loss or his economic interests will be put at risk.*

1. The offence thus appears to be extraordinarily wide. The Home Office has said that once a course of conduct has been agreed which prejudices or risks prejudice to the rights or interests of another, the element of dishonesty is ‘*left to do all the work*’ in a criminal trial. [[92]](#footnote-92) Similar statements can be found in the Law Commission’s early working Paper on the offence.[[93]](#footnote-93) More recently, the Law Commission also observed[[94]](#footnote-94):

*“3.6 In a capitalist society, commercial life revolves around the pursuit of gain for oneself and, as a corollary, others may lose out, whether directly or indirectly. Such behaviour is perfectly legitimate. It is only the element of “dishonesty” which renders it a criminal fraud. In other words, that element “does all the work” in assessing whether particular facts fall within the definition of the crime. . .*

*3.8 Activities which would otherwise be legitimate can therefore become fraudulent if a jury is prepared to characterise them as dishonest.7 Not only does this delegate to the jury the responsibility for defining what conduct is to be regarded as fraudulent, but it leaves prosecutors with an uncommonly broad discretion when they are deciding whether to pursue a conspiracy to defraud case. If, for example, the directors of a company enter into “industrial espionage” in order to gain the edge over a competitor, they could potentially be prosecuted for conspiracy to defraud, despite the absence of any statutory offence governing such activities….*

*3.9 In effect, conspiracy to defraud is a “general dishonesty offence”, subject only to the irrational requirement of conspiracy. ..“*

1. Although its ambit is undoubtedly wide, the suggested primacy of dishonesty overstates the position. What is often overlooked is that conspiracy to defraud was and remains a common law conspiracy.

PART 3: The Ambit and Limitations of Conspiracy to Defraud.

Common Law Conspiracy

1. Conspiracy evolved from three separate sources[[95]](#footnote-95) which are conveniently summarised by Lord Diplock in in *Knuller (Publishing, Printing and Promotions) Ltd v D.P.P:*[[96]](#footnote-96)
   1. A statutory writ of conspiracy, deriving from the thirteenth century, which provided a remedy against two or more persons acting in concert to indict or accuse another person of felony where that other person had been acquitted by a jury.[[97]](#footnote-97) [This led not only to the modern tort of malicious prosecution[[98]](#footnote-98) but also to conspiracies to pervert the course of justice.]
   2. Combinations in restraint of trade, which arose following the collapse of the mediaeval guild system.
   3. The development in Star Chamber of punishing attempts as misdemeanours, from which an agreement to commit a crime was viewed as analogous to an attempt. It also introduced what became common law cheat in order to remedy a lacuna in mediaeval common law which gave no remedy for fraud: "*a man was regarded as having only himself to blame if he did not take sufficient precautions to avoid being deceived by another*".[[99]](#footnote-99) From this flowed conspiracy to defraud.
2. The parameters of common law were set out by the House of Lords in *Mulcahy:*[[100]](#footnote-100)

*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. The propositions on which the Mulcahy dicta was based had been clarified during the eighteenth and early nineteenth century. One example can be found in a series of cases relate to the Poor Laws which provided for the relief of the “impotent poor” who were cared for in almhouses, and the able-bodied poor, who were sent to the workhouse. The financial burden was shouldered by the parish ratepayers. The nearest modern equivalent might the obligation of local authorities to provide for the homeless. In the eighteenth century some bright parishioner conceived of a scheme to alleviate the burden on their own rates by marrying off pregnant single mothers from their parish to poor men in other parishes. The other parishioners were understandably indignant at their increased financial burden. There was debate as to whether such agreements were indictable.**[[101]](#footnote-101)** By 1834 the position was clear:

“*Merely persuading an unmarried man and woman in poor circumstances to contract matrimony is not an offence. If indeed it was done by unfair and undue means, it might be unlawful, but that is not stated. There is no averment that the parties were unwilling, or that the marriage was brought about by and fraud, stratagem, or concealment, or by duress or threat. No unlawful means are stated; and the thing in itself is not an offence.*”[[102]](#footnote-102)

1. In other words such agreements were lawful, and absent unlawfulness could not be indicted. A similar point was recently considered in *Evans[[103]](#footnote-103)* where Mr Justice Hickinbottam ruled at first instance that a conspiracy to defraud must incorporate some unlawfulness, either in its object or its means and that it would be wrong in principle for the common law to extend conspiracy to defraud to include agreements to achieve a lawful object by lawful means. *Evans* was a restatement of *Mulcahy* from another approach.
2. From a historical perspective, the dicta that conspiracy lies in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means was too narrow. It derived from a statement by Lord Denman**[[104]](#footnote-104)** who later, when the phrase was cited back at him, commented that he “*did not think the antithesis very correct*”**[[105]](#footnote-105)** and he later explained that the phrase should have been accompanied by the words “*at least*.”**[[106]](#footnote-106)** However, the phrase become embedded to such a degree that it has achieved not only acceptance but the sanction of the House of Lords.**[[107]](#footnote-107)**

The Meaning of Unlawful

1. All this begs the question as to what is meant by unlawfulness. It clearly includes any form of criminality. Any dishonest criminal act, however minor, which it is agreed should be carried out in order to achieve the plotters intention, renders the agreement an indictable conspiracy.
2. However, despite the wording of *Mulcahy*, “*unlawful*” does not only mean criminal.[[108]](#footnote-108) As Lord Cockburn CJ explained in *Warburton*:[[109]](#footnote-109)

“*It is sufficient to constitute a conspiracy if two or more persons combine by fraud and false pretences to injure another. It is not necessary in order to constitute a conspiracy that the acts agreed to be done should be acts which if done alone would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, that is, amount to a civil wrong….. The facts of this case thus fall within the rule that when two fraudulently combine, the agreement may be criminal, although if the agreement were carried out no crime would be committed, but a civil wrong only would be indicted on a third party.*”

1. There is much authority for the proposition. [[110]](#footnote-110)
2. What it means is less clear. The Law Commission said in 1976:[[111]](#footnote-111)

*Agreement to commit an offence is, of course, one instance of the crime of conspiracy. However, in addition, an agreement to effect some “unlawful” object, not itself an offence if committed by one person, can amount to the crime of conspiracy. This is because of the wide meaning which has been given to “unlawful” in this context. The exact extent of these “unlawful” objects (other than crimes) is far from clear.* ***. . . .*** *The extended meaning of “unlawful” thus leads to the result that, so long as two or more combine, they can, in certain circumstances, be punished for doing something which would not be criminal if one of them alone had done it.*

1. Common law conspiracy was of course abolished and replaced with statutory conspiracy in in 1977. However, not only was conspiracy to defraud preserved,[[112]](#footnote-112) but it is clear that it was preserved in its common law form. In *Ayres,[[113]](#footnote-113)* the point was argued before Lord Bridge on behalf of the Crown by Igor Judge QC (as he then was).[[114]](#footnote-114) Lord Bridge stated:[[115]](#footnote-115)

*the phase "conspiracy to defraud" in section 5(2) of the Act must be construed as limited to an agreement which, if carried into effect, would not necessarily involve the commission of any substantive criminal offence by any of the conspirators.*

In *Cooke[[116]](#footnote-116)* he cited the above passage,[[117]](#footnote-117) and added[[118]](#footnote-118):

*It is, I apprehend, precisely in order to maintain the criminality of certain forms of fraudulent conduct when agreed to be pursued by persons acting in concert which would not of itself be criminal conduct on the part of an individual acting alone that conspiracy to defraud at common law has been preserved.*

Later he said:[[119]](#footnote-119)

*At the other end of the spectrum, if persons agree to pursue a course of fraudulent conduct which does not involve the commission of any specific offence, the appropriate charge will be conspiracy to defraud at common law. The difficulty arises in the many cases, to which I regret I did not apply my mind in R. v. Ayres, where a course of conduct is agreed to be pursued which involves the commission of one or more specific criminal offences, but over and above such specific criminal conduct the agreement, if carried out, will involve a substantial element of fraudulent conduct of a kind which on the part of an individual, would not be criminal at all.*

1. What non-criminal unlawfulness can constitute conspiracy to defraud? In his Guidelines, the Attorney-General gives four examples of dishonest activity which could be prosecuted as conspiracy to defraud and which is not otherwise covered by statute: [[120]](#footnote-120)
2. the dishonest obtaining of land and other property which cannot be stolen such as intellectual property not protected by the *Copyright, Designs and Patents Act* 1988 and the *Trademarks Act* 1994, and other confidential information. However, the *Fraud Act* will bite where there is intent to make a gain or cause a loss through false representation, failure to disclose information where there is a legal obligation to do so, or the abuse of position;
3. dishonestly infringing another’s right; for example the dishonest exploitation of another’s patent in the absence of a legal duty to disclose information about its existence;
4. where it is intended that the final offence be committed by someone outside the conspiracy as in *Hollinshead*[[121]](#footnote-121) (sale of black boxes which could be fitted to electricity meters and reverse the flow of current thus reducing the meter reading);
5. cases where the accused cannot be proved to have had the necessary degree of knowledge of the substantive offence to be perpetrated.
6. However, the judicial dicta is wide. In *Whittaker*,[[122]](#footnote-122) the court ruled:

*it is enough if it be an agreement to do an act which is unlawful or wrongful in the sense of tortious. At any rate this is so where the agreement is to do an act of fraud or corruption. There is authority for saying that an agreement to commit a mere trespass is not necessarily a misdemeanour. If that be law, as to which doubts have been expressed by eminent judges, it is clear that where the tort is one of fraud or corruption an agreement to commit it is a misdemeanour.*

1. The authorities (conveniently collated in *Kamara*) suggest the following:

* An agreement to injure or commit damage to another by tortious means;
* An agreement to commit trespass (which effectively means agreements to exclude the victim from possession at least so to use his land or his chattel so as to deprive him of any effectual enjoyment of it or some part of it during the execution of the combination.)
* An agreement to commit a tort of fraud or corruption;
* Procuring people to break their contracts;
* Conspiring to injure a man in his trade without justification.

1. However, all these manifestation require that the other criteria for conspiracy to defraud be fulfilled. The courts would not permit the offence to be used as a back door to resurrect other common law conspiracies. Most dubious activity would be covered by specific criminal statutes. However, one can conceive of an agreement where conspirators to seek to persuade X to breach his employment contract with Y in order to undermine or damage Y’s trade.

**Determining Unlawfulness**

1. The truth of the matter is that determining whether non-criminal unlawfulness amounts to the offence is fraught with difficulty. It is dangerous to assume that simply because no criminal activity is involved, no offence is made out. In *Norris v US[[123]](#footnote-123)* Lord Bingham stated:

*The common law recognised that an agreement in restraint of trade might be unreasonable in the public interest, and in such cases the agreement would be held to be void and unenforceable. But unless there were aggravating features such as fraud, misrepresentation, violence, intimidation or inducement of a breach of contract, such agreements were not actionable or indictable.*

1. It would appear therefore that threats of violence, intimidation, or even arguably the inducement of a breach of contract can be sufficient to elevate a lawful but morally repugnant and dishonest agreement, into conspiracy to defraud.
2. Conversely it is equally dangerous to assume that because dishonesty and economic prejudice is obvious, conspiracy to defraud can be successfully indicted.

**Restrictions on Proceeding with Conspiracy to Defraud.**

1. ***Parliamentary Consideration***
2. In *Zemmel*,[[124]](#footnote-124) the defendants dishonestly induced an American exporter to ship leather on credit and extend the time allowed for payment. $8.5m was owed, and there was fraudulent trading. However, they did not intend never to pay, but merely to pay late – they were dishonestly playing for time. Logically such an agreement amounted to a conspiracy to defraud, and had been recognized as such by the Law Commission.[[125]](#footnote-125) Such conduct had been made a criminal offence under *Theft Act* 1968, s16(2) (obtaining a pecuniary advantage by deception). However, the ambit of that section had been severely criticized as it potentially criminalized commonplace, albeit dishonest, behaviour (e.g. ‘the cheque is in the post’). Accordingly, the law was amended so that the offence would only apply where there was an intention to make permanent default: *Theft Act* 1978, s2(1)(b).[[126]](#footnote-126)
3. TheCourt of Appeal observed that Crown’s position was effectively that:[[127]](#footnote-127)

*by a side wind the common law has suddenly re-emerged to reinstate or create as a crime that which Parliament thought it right to take off the statute book as a crime. We cannot accept that*.[[128]](#footnote-128)

1. The Law Commission’s observed in its report on fraud that the court’s reasoning may apply more broadly, although it would probably need to be clear that parliament had consciously decided that the conduct in question should not be criminal, rather than merely failing to make provision for it.[[129]](#footnote-129) However, where parliament has specifically considered and rejected the criminalization of a particular activity, there must be a strong argument that the Courts should not seek to interfere.
2. A similar judicial approach can be found in *Tsang Ping-nam v The Queen*.[[130]](#footnote-130) The defendant had made statements implicating officers in police corruption in exchange for immunity from prosecution. At the trial, he reneged from his statement and said that he had made it in order to obtain the immunity. He was charged with attempting to pervert the course of public justice on the basis that he had either made false statements or committed perjury. The Crown conceded that it could not prove which of the two statements was false, but that it was clear that the defendant had attempted to pervert the course of justice on one or other occasion.
3. The Privy Council noted the submissions made on behalf of the appellant by his counsel (later Ognall LJ):

*that an accused person could not be convicted on the basis that one of two mutually inconsistent allegations must be true. Moreover, once the concession was made that perjury could not be proved, as it was, the Crown could not be allowed to circumvent the crucial safeguard to an accused charged with perjury that he must not be convicted solely upon the evidence of one witness as to the falsity of any statement alleged to be false, by charging, not perjury, but an attempt to pervert the course of justice.*

The court concluded:

*however distasteful it may be to allow a self-confessed corrupt police officer to escape convictions for his gravely corrupt activities, it was wholly illegitimate for the Crown to seek to overcome their difficulties of proof by charging attempts to pervert the course of justice upon this alternative basis.* [[131]](#footnote-131)

1. Similarly in *Dady[[132]](#footnote-132)* the trial judge had rejected a charge of conspiracy to defraud because of statutory provisions which, on one view at any rate, covered the alleged criminal activity of unlicensed streaming of football matches which deprived the broadcaster of license fees. On an application for a voluntary bill, Coulson J rejected the Crown’s argument that the streaming was contrary to s297 of the *Copyright, Designs and Patents Act* 1988, observing that that was a summary offence which (i) required the consent of the DPP and (ii) had to be commenced within six months of the commission of the offence.[[133]](#footnote-133) It would be wrong to allow the common law to be used to ignore safeguards introduced by Parliament,[[134]](#footnote-134) as expressed by Lord Bingham in*Rimmington*: [[135]](#footnote-135)

[W]here Parliament has defined the ingredients of an offence, perhaps stipulating what shall and shall not be a defence, and has prescribed a mode of trial and a maximum penalty, it must ordinarily be proper that conduct falling within that definition should be prosecuted for the statutory offence and not for a common law offence which may or may not provide the same defences and for which the potential penalty is unlimited … It cannot in the ordinary way be a reason for resorting to the common law offence that the prosecutor is freed from mandatory time limits or restrictions on penalty. It must rather be assumed that Parliament imposed the restrictions which it did having considered and weighed up what the protection of the public reasonably demanded. I would not go to the length of holding that conduct may never be lawfully prosecuted as a generally-expressed common law crime where it falls within the terms of a specific statutory provision, but good practice and respect for the primacy of statute do in my judgment require that conduct falling within the terms of a specific statutory provision should be prosecuted under that provision unless there is good reason for doing otherwise.

1. ***Certainty***
2. In *Norris v Government of the USA*,[[136]](#footnote-136) the House of Lords was concerned with whether a US Sherman Act cartel offence of strict liability which did not require proof of fraud, deception, or dishonesty, would have constituted a conspiracy to defraud in this country. *GG*[[137]](#footnote-137) gave rise to similar issues, namely whether a price fixing cartel which came into being before the *Competition Act* 1998 and which existed in circumstances of secretive and deceptive behaviour could constitute conspiracy to defraud.
3. In both cases, the prosecution approach was rejected. The Committee ruled that the common law recognized that an agreement in restraint of trade might be unreasonable in the public interest, but, absent fraud, misrepresentation, violence, intimidation, or inducement of a breach of contract, such agreements were neither actionable nor indictable.[[138]](#footnote-138) Second, it observed that no one had hitherto regarded secret cartel behaviour as constituting criminal conduct, let alone a conspiracy to defraud, and that to do so would contravene the principles of certainty articulated in *Rimmington*.[[139]](#footnote-139)
4. The development of the common law played its part. During the nineteenth century the courts began to restrict the freedoms granted by Parliamentary repeals to trade and the markets. The most notable shift was in relation to cartels as exemplified in *Mogul Steamship Co. Ltd v McGregor Gow & Co.*[[140]](#footnote-140)In *Mogul*, ship owners had combined to reduce freight charges to uneconomic levels to drive others, including the plaintiffs, away from the ports where they operated. Their combination was held to be lawful as they had acted to protect their own trade interests, and not merely to injure the plaintiffs. Only if the purpose of the cartel was malicious injury to the Plaintiff would the cartel itself be unlawful. That common law position subsists.[[141]](#footnote-141) It was considered, followed and amplified in a number of subsequent cases, namely *Allen v Flood*; *Quinn v Leathem*; *Ware and De Freville Ltd v Motor Trade Association*; *Sorrel v Smith*, and *Crofter Hand Woven Harris Tweed Co. Ltd v Veitch and Others.*[[142]](#footnote-142)
5. The *Profiteering Acts* 1919 were introduced briefly after the First World War in response to public outcry against profiteering. In effect they represented a temporary reinstatement of ingrossing, forestalling and regrating. However, no other controls were introduced until the *Restrictive Trade Practices Act* (RTPA) 1956 as later extended, amended and consolidated by the *RTPA* 1968, *RTPA* 1976 and the *Fair Trading Act* 1973. The statutory scheme set up a new civil jurisdiction exercised by the Restrictive Practices Court which unusually policed the whole of the UK.
6. However, no breach of its statutory provisions appears ever to have been used to justify a criminal prosecution using conspiracy to defraud. During the debates on the original legislation in the Commons, both parties rejected the creation of criminal offences to police the Act. Moreover, both the President of the Board of Trade and the Lord Chancellor rejected the "*odour of criminality*" which they detected in the Report.[[143]](#footnote-143)
7. Accordingly, in *Goldshield* the House of Lords observed that lawful cartel behaviour, which might be carried out in circumstances of secretive and deceptive behaviour, required specific aggravating features such lies or positive deception in order to elevate price fixing into conspiracy to defraud.
8. **Evans**
9. *Evans[[144]](#footnote-144)* (the Coal Board case) is another useful example of prosecution error. The prosecution sought to allege that conspiracy to defraud subsisted because of the defendant’s dishonest intentions and acts. In a nutshell, in 1994 Celtic Energy Ltd (Celtic) obtained the freehold of a number of Welsh coalmines for £100m, and a licence from the Coal Authority to undertake mining operations.
10. It was a requirement of the licences that once mining ceased, Celtic would restore the sites. That would cost tens of millions of pounds. If Celtic defaulted, the work could be carried out by the Board, which would then be indemnified by the freeholder, Celtic. By 2010, Celtic had restored all save four of its sites but had insufficient funds properly to restore the remainder. Celtic’s solicitors and counsel advised that of Celtic sold its freehold title, it would also be passing on its restoration obligations. Accordingly, Celtic’s solicitors set up a BVI company which had relatively few assets and appeared to be independent (but was not) to purchase the remaining Welsh freeholds. That released Celtic remaining pot of restoration monies for other purposes. The scheme, was, as the trial judge observed, “*entirely dishonest”* but lawful.
11. *Evans* should be viewed with care. The prosecution’s difficulty was that it simply sought to rely on the apparent dishonesty. As the trial judge pointed out: there is no crime of dishonesty. Attempts made by the prosecution to bring an involuntary bill of conspiracy to defraud failed because of quasi abuse arguments. In effect they sought too late to change the basis on which the case was presented in order to allege unlawful activity to justify the common law conspiracy.[[145]](#footnote-145) As the Court of Appeal pointed out in *Hayes[[146]](#footnote-146):*

*“That case was decided on its own, and very unusual, facts. Moreover, it was decided by reference to the very particular way in which the Crown had chosen to frame the indictment, as Fulford LJ emphasised in his ruling. We should add, however, that our own view is that it is by no means to be assumed that, properly framed, the factual scenario arising in Evans was not capable of constituting a common law conspiracy to defraud. Indeed, we were rather surprised to note that it was apparently accepted before Hickinbottom J that no unlawful object arose in that case and that no unlawful means could be identified. One only has to consider the facts of that case, as alleged, in some detail to see how debatable those apparent concessions were*.”

**Conclusion**

1. The common law position for those trading in markets was collated and summarised by Lord Halsbury in *Mogul*:

* *a trader in a free country in all matters not contrary to law may regulate his own mode of carrying on his trade according to his own discretion and choice."*[[147]](#footnote-147)
* *The liberty of a man's mind and will to say how he should bestow himself and his means, his talents and his industry, was as much a subject of the law's protection as was that of his body. [[148]](#footnote-148)*
* *All are free to trade upon what terms they will*.[[149]](#footnote-149)

1. In broad terms, that position remains, and the policing now undertaken by the common law is performed by conspiracy to defraud.
2. As regards conspiracy to defraud, the precise boundary between criminality which includes statutory offences and non-criminal unlawfulness is somewhat opaque. But it is obvious that (subject to the involvement of two or more persons) conspiracy to defraud must nearly always be considered in a market or corporate setting. The essential issues to be considered in every case are:
3. Does the object of the alleged agreement constitute a criminal offence of itself: i.e. is this really a statutory conspiracy?
4. Do the alleged means used to achieve a lawful objective constitute a criminal offence?
5. Are there other means or objectives which the prosecution have not considered of identified?
6. Do those other means or objectives themselves constitute criminal offences?
7. If the objective and acts are not fraudulent, are they otherwise unlawful?
   1. It is probably insufficient if the agreement is merely void or voidable;
   2. Unlawful means do not have to be fraudulent. Violence, intimidation, or perhaps even the inducement of a breach of contract may be sufficient. [[150]](#footnote-150)
8. Proprietary interest should also be considered. If no proprietary interests were threatened or put at risk, the offence in this form will not lie.[[151]](#footnote-151)
9. If the unlawfulness alleged is non-criminal, does it fall within the historical ambit of the offence? If not, there are cogent arguments against expanding the ambit of the offence.[[152]](#footnote-152)

1. For example, in it was alleged that 1986 Guinness was involved the manipulation of the stock market by a share support scheme to inflate its share price to assist in its takeover bid for Distillers (the bid involved a partial share swop). Ernest Saunders, Gerald Ronson, (Sir) Jack Lyons and Anthony Parnes were convicted of conspiracy to contravene s13(1)(a)(i) of the *Prevention of Fraud (Investments) Act* 1958, false accounting and theft. [↑](#footnote-ref-1)
2. Rogue traders are usually involved in legitimate trading but are guilty of acting beyond the authorised trading limits imposed by their employers: e.g. Nick Leeson (Barings – Nikkei Index Futures -$1.3B loss); [Jérôme Kerviel](https://en.wikipedia.org/wiki/J%C3%A9r%C3%B4me_Kerviel) ([Société Générale](https://en.wikipedia.org/wiki/Soci%C3%A9t%C3%A9_G%C3%A9n%C3%A9rale" \o "Société Générale) – European Stock Index Futures -$6.9B loss) ; Kweku Adoboli, UBS - S&P 500, DAX and EuroStoxx Futures - $2.3B loss). Others may try to corner the market: e.g. Yasuo Hamanaka aka King Copper lost Sumitomo $1.8B when his attempt to manipulate the price of copper by allegedly attempting to corner or control supplies failed when copper prices fell by one third in two months. [↑](#footnote-ref-2)
3. For example, s 9(a)(2) *Securities Exchange Act* 1934 [USA]; s54(a) *Securities Act* 1968 [Israel]; s104A Corporations Act 2001 [Australia]. With effect from 3 July 2016 the EU updated its rulebook to “The EU announced on 1 July 2016 a revamped legal framework to “strengthen the fight against market abuse across commodity and related derivative markets, explicitly ban the manipulation of benchmarks, such as LIBOR, and reinforce the investigative and sanctioning powers of regulators.” There will be common EU definitions of market abuse offences such as insider dealing, unlawful disclosure of information and market manipulation, and member states will have two years to implement the relevant Directive in their national law: see <http://europa.eu/rapid/press-release_MEMO-14-77_en.htm>. For see the Market Abuse Directive 2014/57/EU see <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0057> [↑](#footnote-ref-3)
4. William Faulkner: *Requiem for a Nun.* [↑](#footnote-ref-4)
5. *Digest of Justinian*: Dig x48. 12; Colquhoun: *Roman Civil Law* Vol 111 §2409Stephen: *History of the Criminal Law of England* (Macmillan 1883) Vol 1, 22. [↑](#footnote-ref-5)
6. It proved ineffective and was abolished after his own death. [↑](#footnote-ref-6)
7. Wilberforce *The Law of Restrictive Practices and Monopolies* (Sweet and Maxwell 1966) (1966) p.20 [↑](#footnote-ref-7)
8. UNFAO, *Safeguarding Food Security in Volatile Global Markets* (ed Prakash) pp 255-256 - <http://www.fao.org/docrep/013/i2107e/i2107e.pdf> [↑](#footnote-ref-8)
9. Dowdell: *A Hundred Years of Quarter Sessions: The Government of Middlesex from 1660 to 1760* Cambridge 1932 (2013 ed) 165 [↑](#footnote-ref-9)
10. The death penalty was introduced in 1350 (27 Edw. III c.11) and repealed 10 years later (38 Edw. III c.6): see Illingworth: *An Inquiry into the Laws Ancient and Modern respecting Forestalling, Regrating and lngrossing* (London, 1800), pp. 37-38. There is no evidence that it was ever imposed. [↑](#footnote-ref-10)
11. Other forms of control such as the issue of licences for badgers (those who purchased victuals in one market and sold in another) and chapmen (itinerant pedlars) and local controls of hucksters and hawkers are outside the scope of this paper. [↑](#footnote-ref-11)
12. Seabourne: *Royal Regulation of Loans and Sales in Mediaeval England*: *(*Boydell 2003) pp 125 et seq. [↑](#footnote-ref-12)
13. *Ibid.* [↑](#footnote-ref-13)
14. "*'Ingrosser' comes of the French word 'grosier', one that selleth by whole sale. But in our law an ingrosser is one that buyeth corne, graine, butter, cheese, fish, or other dead victuals, with an intent to sell the same againe; and so he is defined in 5 Edw. 6, c. 14, made against such ingrossing*" *Terms de la Ley*, 1721 ed. But that statute and the obvious sense of the thing show that the offence of ingrossing connoted, not only buying to sell again but also that its intent must be to create what would now be called a "corner". [↑](#footnote-ref-14)
15. A *"'Regrator' is he that hath corn, victuals, or other things sufficient for his owne necessary need, occupation, or spending, and doth nevertheless ingrosse and buy up into his hands more corne, victuals, or other such things, to the intent to sell the same againe at a higher and deerer price, in faires, markets, or other such like places, whereof see the stat. 5 Edw. 6, c. 14, for he shall be punished as a forestaller". The Terms de la Ley* 1721. ed. [↑](#footnote-ref-15)
16. lllingwonh, *An Inquiry into the Laws Ancient and Modern respecting Forestalling, Regrating and lngrossing* (London, 1800), pp. 13- 14. [↑](#footnote-ref-16)
17. Blackstone: Commentaries Vol 4 Chap 12 § 8 as regards engrossing cites: “*Poena viginti aureorum statuitur adversus eum, qui contra annonam fecerit, societatemve coierit quo annona carior fiat*” i.e “A penalty of 20 gold pieces is imposed on those who do anything injurious to the market (for grain) or who join an association whereby the market price may be raised. [↑](#footnote-ref-17)
18. See generally Britnell, *Forstall, forestalling and the Statute of Forestallers*: (1987) 102 English Historical Review 89-102; Davis, *Mediaeval Market Morality (*2012*,* Cambridge UP) pp 254-6; 268-9; 327-31; 405-7. [↑](#footnote-ref-18)
19. Pulton (1609) was the first legal writer to write a comprehensive book on the criminal law. The passage is cited by Illingworth, *op. cit* pp 29-30 [↑](#footnote-ref-19)
20. For an interesting review of the development of the English law on the topic, see Peppin, *Price Fixing Agreements under the Sherman Anti-Trust Law,* (1940) 28 California L.R. 297 at 310-334; [↑](#footnote-ref-20)
21. Winfield: *The History of Conspiracy and Abuse of Legal Procedure*. (1921) [2001 reprint], p.111: see also Holdsworth: vol. xi, 475 et seq. [↑](#footnote-ref-21)
22. Holdsworth: *op cit* vol. xi, 477-478 and 481-482. [↑](#footnote-ref-22)
23. Holdsworth, *op cit* xi, 479. [↑](#footnote-ref-23)
24. EV Thompson: *The Moral Economy and the English Crowd in the Eighteenth Century* (1971) Past and Present, No. 50. pp. 76-136 and see the numerous examples cited in ff 64. [↑](#footnote-ref-24)
25. 5 & 6 Ed. 6 c. 14. [↑](#footnote-ref-25)
26. Hawkins, *Pleas of the Crown*; (6th ed) 1778 p 478“.. *all endeavours whatsoever to enhance the common price of any merchandise, and all kinds of practices which have an apparent tendency thereto, whether by spreading false rumours . . are highly criminal at common law, and that all such offences anciently came under the general notion of forestalling, which included all kinds of offence of this nature.*”; and Blackstone *Commentaries* Vol IV, OUP Chap 12 *Of Offences against Public Trade §6.* [↑](#footnote-ref-26)
27. Including turkeys: *Wright* [[1724] EngR 467; (1724) Comb 225; 90 ER 443 (C)](http://www.commonlii.org/cgi-bin/disp.pl/uk/cases/EngR/1724/467.pdf?stem=0&synonyms=0&query=forestalling). [↑](#footnote-ref-27)
28. *R. v. Maynard* Mich 7 Car 1 [↑](#footnote-ref-28)
29. Thomas the Smith of Coombs cited in Davis: *Mediaeval Market Morality* (2012 Cambridge UP) p 231 who purchased 6 barrels of tar for 4s 6d and sold them for 6s. [↑](#footnote-ref-29)
30. See 16 & 17 Car II c 2; 7 & 8 Will III c. 36; 17 Geo III c. 35. [↑](#footnote-ref-30)
31. (1369) 43 ASS. PL 38 and see llingworth, *op. cit* pp. 16 and Hawkins, *Pleas of the Crown* cited *supra.* That forestalling went beyond the necessities of life is also supported by Baron Parke who seems to have recognised the distinction between forestalling and regrating on the one hand, and ingrossing on the other in an appeal from the Bombay Supreme Court involving bidding up the price of opium at auction in *Pettmaberdas v Thackoorseydass*,  [(1850) 7 Moo PC 239; 13 ER 873](http://www.commonlii.org/cgi-bin/disp.pl/uk/cases/EngR/1850/708.pdf?stem=0&synonyms=0&query=forestalling)) observing *obiter* (at 262):

    *There is no law which prevents any person buying any quantity of a commodity at any price that he likes, whether to use himself. or to sell again in gross or by retail, or to give away, or to prevent another having it, provided always, that he does not commit the Common Law offence of forestalling and regrating, which this is not, or ingrossing which the authorities show can be committed only with respect to the necessaries of life; provided, also, that he makes no false representation in order to effect the purchase.* [↑](#footnote-ref-31)
32. S.C. 1 Keb 650. [↑](#footnote-ref-32)
33. Holdsworth also refers to a combination of London publicans in 1773 which Sir John Fielding considered to be illegal: *op cit* xi, 487. [↑](#footnote-ref-33)
34. Linen gave rise to a prosecution: see the case of Alice Hall cited in Dowdell: *A Hundred Years of Quarter Sessions: The Government of Middlesex from 1600 to 1760* (Cambridge 1932) p 167 ff2. [↑](#footnote-ref-34)
35. For silk in both its raw and spun form see 43 Edw III Roll 19 cited in Illingworth: op cit: pp. 235-237. [↑](#footnote-ref-35)
36. Holdsworth, *op cit* xi, 476, 486-488. [↑](#footnote-ref-36)
37. Adam Smith: *An Inquiry into the Nature and Causes of the Wealth of Nations*: (1776) *Chapter V: Of Bounties: Digression concerning the Corn Trade and Corn Laws.* [↑](#footnote-ref-37)
38. An analogy to which Lord Erskine took exception in granting leave to proceed against Waddington: see below. [↑](#footnote-ref-38)
39. Foss, Edward (1870). *A Biographical Dictionary of the Justices of England (1066–1870)*. Spottiswoode & Co. p. 471 [↑](#footnote-ref-39)
40. *The Mansfied Mauscripts* (1992: University of N. Carolina) Vol 2 pp 933. [↑](#footnote-ref-40)
41. Hay: *The State of the Market: Lord Kenyon and Mr Waddington,* Past and Present 162 (1999): 101-162 at 117 [↑](#footnote-ref-41)
42. Hay: *op cit* p. 116 [↑](#footnote-ref-42)
43. *Rusby* (1800) Peake Add. Cas. \*189 [↑](#footnote-ref-43)
44. EV Thompson: *op cit* p97: Girdler: *Observations on the Pernicious Consequences of Forestalling, Regrating and Ingrossing* (London, 1800), p. 88. [↑](#footnote-ref-44)
45. *Op. cit.* [↑](#footnote-ref-45)
46. Hay: *op cit* p. 117 [↑](#footnote-ref-46)
47. The proceedings are well documented by Waddington: *A summary of the Trial: The King v S. F. Waddington, for purchasing hops at Worcester, also the proceedings of the Court of King’s Bench, when the rule was granted, with notes by the Defendant,* London, 1800; and *An appeal to the British Hop-Planters,* London, 1800. [↑](#footnote-ref-47)
48. *“1. Spreading rumours with intent to enhance the price of hops …. 3. endeavouring to inhance the price of hops, by persuading … persons dealing in hops and accustomed to sell hops, and having large quantities of hops for sale, not to go to any market or fair with any hops for sale, and to abstain from selling such hops for a long time, in contempt etc.* [↑](#footnote-ref-48)
49. *Waddington,* (1801) 1 East 143 per Lord Kenyon CJ at 158-159*: " I am perfectly satisfied that the common law remains in force with respect to offences of this nature; and in considering whether that was intended to be done away by the Act of the 12 Geo. 3, I cannot regard the resolutions entered on the Journals of the Commons House of Parliament, but must look to the Statute-Book; and there I find nothing which trenches upon what I have said, but only a repeal of certain statutes, upon none of which is this prosecution founded, but upon the common law."*  [↑](#footnote-ref-49)
50. Waddington: *A Summary of the Trial :The King v SF Waddington for purchasing Hops at Worcester* (1800) [↑](#footnote-ref-50)
51. # "*… this is to me most evident, that in whatever manner the supply is made, if a number of rich persons are to buy up the whole or a considerable part of the produce from whence such supply is derived, in order to make their own private and exorbitant advantage of it to the public detriment , it will be found to be an evil of the greatest magnitude; and I am warranted in saying, that it is a most heinous offence against religion and morality, and against the established law of the country. That our law books do declare practices of the sort with which the defendant is charged to be offences at common law cannot be denied".*

    # He also stated: "*Here is a person going into the market who deals in a certain commodity. If he went there for the purpose of making his purchases in the fair course of dealing with a view of afterwards dispersing the commodity which he collected in proportion to the wants and convenience of the public, whatever profit accrues to him from the transaction, no blame is imputable to him. On the contrary, if the whole of his conduct shews plainly that he did not make his purchases in the market with this view, but that his traffic there was carried out to enhance the price of the commodity; to deprive the people of their ordinary subsistence, or else compel the to purchase it at an exorbitant price, who can deny that this is an offence of the greatest magnitude? It was the peculiar policy of this system of laws to provide for the wants of the poor labouring class of the country. If humanity alone cannot operate to this end, interest and policy must compel out attention to it. Now this defendant went into the market for the very purpose of tempting the dealers in hops to raise the price of the article, offering them higher terms than they themselves proposed and were contented to take, and urging them to withhold their hops from the market in order to compel the public to pay a higher price. What defence can be made for such conduct? And how is it possible to impute an honest intention to him? We must judge a man's motives by his overt acts; and by that rule it cannot be said that the defendant's conduct was fair and honest to the public. It is our duty to take care that persons in pursuing their own particular interests do not transgress those laws which were made for the benefit of the whole community*."

    [↑](#footnote-ref-51)
52. *Waddington,* 1 East 167. Waddington occupied an apartment outside the prison entrance on a surety of £40,000, above the apartment of Henry Hunt, a radical. It could not have been uncomfortable. Hunt describes how the turnkey’s wife, Mrs Filewood who kept his rooms “*was very attentive, and so communicative, that he really felt quite as comfortable as if he had been at an inn”*: Hunt: *Memoirs of Henry Hunt Esq*, (1820 Dolby ). On his release he returned to Kent where he was he was feted and feasted. [↑](#footnote-ref-52)
53. Lord Campbell, *Lives of the Chief Justices*, (1857; repr. London, 1971), Vol. iii, 138. Sherwin in his *Memoirs of the Life of Thomas Paine (1819)* was even more damming, describing Lord Kenyon as *‘one of the most cruel, vindictive, and merciless characters that ever disgraced the bench’ . . .*who sentenced *‘this worthy and respectable man* [Waddington] *to be imprisoned as well as fined, which, considering that it dissolved all his contracts, produced a forfeiture of his deposits, and caused a run upon his house and his bank, was, in fact, sentencing him to ruin, and almost to actual beggary’* [↑](#footnote-ref-53)
54. Hay: op. cit p.147 [↑](#footnote-ref-54)
55. *Times*, 5 July 1800, cited in Hay, *op.cit* p 117 [↑](#footnote-ref-55)
56. Barnes, *History of the English Corn Laws* (1930) 81-82. [↑](#footnote-ref-56)
57. Hay: *op cit.* p 164. [↑](#footnote-ref-57)
58. Hay*: op cit* p 156. [↑](#footnote-ref-58)
59. *Waddington* (1801) 1 East 143; 102 ER 56. [↑](#footnote-ref-59)
60. Chitty: *Practical Treatise on Criminal Law* (1816) [↑](#footnote-ref-60)
61. Burn, *The Justice of the Peace and Parish Officer*, 20th ed, (London, 1805), Vol II, 358 [↑](#footnote-ref-61)
62. Archbold: *Pleading and Evidence in Criminal Cases* 3rd ed 1828 pp 406-408. [↑](#footnote-ref-62)
63. 7 & 8 Vict. c. 24. The offences continued in Ireland under local legislation. [↑](#footnote-ref-63)
64. (1369) 43 ASS. PL 38 and see llingworth, *op. cit* pp 16 [↑](#footnote-ref-64)
65. Jenks1st Cent. Case XC111. (1771 3rd ed.) states: “*An alien goes to Coteswold and there falsely publishes that so much wool was already transported to parts beyond the seas, that they would buy no more this year; and the publishing of this false report was to the intent that the price of wool should fall; this alien , for this falsity, was indicted , convicted, fined, ransomed and imprisoned*.” [↑](#footnote-ref-65)
66. *Hilbers* (1818) 2 Chit. 163*.* Hilbers was also indicted for monopolising, which was quashed as an offence not known to common law. He was discharged as there was no evidence that he had conspired with anybody. [↑](#footnote-ref-66)
67. *Interpretation Act* 1889, s. 38 and see Bennion: *Statutory Interpretation* (2002) p 257 et seq. [↑](#footnote-ref-67)
68. Archbold: 1966 36th ed §4066 [↑](#footnote-ref-68)
69. Halsbury’s Laws of England: (1sr ed. 1902) Vol IX, §1139; (2nd ed: 1933) Vol IX § 715; (3rd ed 1955) Vol 10, §1310. No amendment is made in any of the cumulative supplements up to 1973. [↑](#footnote-ref-69)
70. *R. v. De Berenger* (1814) 3 M&S 67 [↑](#footnote-ref-70)
71. Cochrane is said by some to have been one of the models for Patrick O’Brien’s Jack Aubrey and CF Forrester’s Hornblower. Having been stripped of his knighthood, fined £1,000 and served his 12 month sentence, he went to South America where was offered command of the Chilean navy and helped liberate Chile, Peru and Brazil from their colonial masters before joining the Greek war for independence. He was pardoned in 1832, reinstated in the Navy list as Rear Admiral of the Blue, and in 1847 restored to the Order of the Bath. [↑](#footnote-ref-71)
72. E.g. see *Knuller, op cit* 477F – 478F per Lord Diplock. [↑](#footnote-ref-72)
73. Gurney: *The Trial of Charles Random De Berenger (and Others)* (1814) at 53 5 *et seq.* [↑](#footnote-ref-73)
74. *Aspinall* (1876) 2 QB 48 at 61-62, with which judgement Mellish LJ agreed. [↑](#footnote-ref-74)
75. *Kamara v DPP* (1973) 57 Cr.App.R. 880per Lord Halisham at 898 and 899. [↑](#footnote-ref-75)
76. *Norris v U.S.* [2008] 1 A.C. 920, §17: Agreements in restraint of trade before the *Enterprise Act* 2002 such as cartel activity are not indictable absent *aggravating features such as fraud, misrepresentation, violence, intimidation or inducement of a breach of contract*. [↑](#footnote-ref-76)
77. *Financial Services and Markets Act* 2000 (FSMA) s397 [↑](#footnote-ref-77)
78. This paper is concerned with conspiracy to defraud as defined in *Scott v Metropolitan Police Commissioner* i.e. Dishonest agreements to prejudice the economic interests of others. It does not deal with that manifestation of the offence concerned dishonest agreements to prejudice another’s right to discharge their duty. [↑](#footnote-ref-78)
79. *Saik* [2006] 2 Cr App R 26, per Lord Hope [123]. [↑](#footnote-ref-79)
80. *Norris v USA* [2007] 1 WLR 1730 [60] per Auld LJ [66]. [↑](#footnote-ref-80)
81. *Conspiracy to Defraud*: Law Commission, 1994 (Law Co No 228) para 5.1. Related arguments concerning the advantages of flexibility were used by the CPS and the SFO recently in support of the creation of a substantive offence of dishonesty: *Fraud*: Law Commission (2002) Cm 5560, paras 5.23–24. [↑](#footnote-ref-81)
82. The dangers of casual use or misuse of conspiracy to defraud were reflected in the Report commissioned under s2(1)(b) of the *Crown Prosecution Services Act* 2000 by the Attorney General following the collapse of the *Jubilee Line* case: June 2006. *Review of the Investigation and Criminal Proceedings relating to the Jubilee Line Case*: para 11.88. [↑](#footnote-ref-82)
83. See *Review of the Investigation and Criminal Proceedings relating to the Jubilee Line Case*: para 11.88. For an example of the wider problems which can relate to the use of conspiracy, see Jarvis and Bisgrove: *The Use and Abuse of Conspiracy*: [2014] Crim.L.R. 259-275. [↑](#footnote-ref-83)
84. *Norris*, *Goldshield,* *Evans* and *Quillan* are dealt with in more detail below. [↑](#footnote-ref-84)
85. [1975] A.C. 819. *Scott* was one five cases considered by the House of Lords between 1971 and 1975 concerning the ambit of common law conspiracy: *DPP v Bhagwan* [1972] AC 67; *R v Knuller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435; *Kamara v DPP* [1974] AC 104; and *Withers v DPP* [1975] AC 842. [↑](#footnote-ref-85)
86. *Ibid*, at 840. [↑](#footnote-ref-86)
87. [1961] AC 103, 123–124. Although *Welham* had been concerned with the narrow meaning of ‘intent to defraud’ in sections 1 and 5 of the *Forgery Act* 1913, Viscount Dilhorne in *Scott* thought that Lord Radcliffe’s dicta were of general application. [↑](#footnote-ref-87)
88. 4 Commentaries, 245. [↑](#footnote-ref-88)
89. East Pleas of the Crown (1803), vol II, at 852–854. [↑](#footnote-ref-89)
90. *Welham v Director of Public Prosecutions* [1961] AC 103, per Lord Radcliffe at 123. In *Scott*, Viscount Dilhorne accepted that Lord Radcliffe had set out the broad characteristics of the offence and accepted that *Welham* established general principles. [↑](#footnote-ref-90)
91. [1992] 1 A.C. 269 at 280 [↑](#footnote-ref-91)
92. Home Office: *Fraud Law Reform* (2004) para 4: [↑](#footnote-ref-92)
93. Law Commission: Working Paper No 56: *Conspiracy to Defraud* (1974):

    “*It seems right to conclude that any combination with the object of interfering directly with property or other legal rights is a conspiracy to defraud, if the combination has an additional element of "dishonesty".* §46

    “*It seems that any dishonest act, even when it involves neither deception nor the more general falsification of* ***a*** *transaction, which has the effect of depriving a person of anything or, indeed, prejudicing him economically in any other way will suffice to found an indictment for conspiracy*”.§47 [↑](#footnote-ref-93)
94. Law Commission: *Fraud* (2002)Cm 5560 §3.6, 3.8, 3.9 [↑](#footnote-ref-94)
95. The historical development of conspiracy is set out in the following works: Wright: *The Law of Criminal Conspiracies an Agreements* (1873); Harrison, *The Law of Conspiracy* (Sweet & Maxwell: 1924); Winfield: *The History of Conspiracy and Abuse of Process* (1921) ; Holdsworth: *History of the English Law*: iii, 401-407; viii, 378-397; xi, 475-501; xiii, 339-351 [↑](#footnote-ref-95)
96. [1973] A.C. 435 HL. [↑](#footnote-ref-96)
97. *Knuller*, *op cit*, at 475 D-H; see also Winfield: *The History of Conspiracy and Abuse of Legal Procedure* (1921) [2001 reprint], Chap IV, p. 108 *et seq*; Holdsworth: *History of the English Law*: vol. iii, 401-403. [↑](#footnote-ref-97)
98. *Knuller, op cit* at 475D; and *Midland Bank Trust Co. Ltd.* v *Green (No. 3)* [1982] 1 Ch. 529, CA per Lord Denning MR at 539 E. [↑](#footnote-ref-98)
99. *Knuller, op cit* 476 D. See also *Jones* (1703) 1 Salt 379, 2 Ld. Rap. 1013 per Holt C.J: "*We are not to indict one man for making a fool* ***of*** *another*.” [↑](#footnote-ref-99)
100. *Mulcahy v The Queen*, (1868) L.R. 3 HL 306, at 317, §11. [↑](#footnote-ref-100)
101. *Edwards* (1725) 8 Mod 320; *Herbert* (1759) 1 East P.C 491; *Compton* (1783) Cald 246. [↑](#footnote-ref-101)
102. *Seward*, (1834) 1 A&E 706, per Taunton J. and see Foweler, (1788) 1 East PC 461 and Parkhouse (1792) 1 East PC 402. It appears that bribing a man to marry a woman was unlawful, but the judicious offer of what amounted to a bridal dowry was probably permissible. [↑](#footnote-ref-102)
103. *Evans* [2014] 1 W.L.R. 2817 (Cardiff Crown Court) at §173. In *Evans*, it was alleged that the defendants had defrauded local authorities and The Coal Authority by seeking to limit the effectiveness of their ability to enforce and recover the costs of restoration of open cast mining site. [↑](#footnote-ref-103)
104. *Jones* ( 831) 4 B. & Ad. 345 [↑](#footnote-ref-104)
105. *Peck* (1839) 9 A&E 686. [↑](#footnote-ref-105)
106. *King*, (1844) 7 QB 782 [↑](#footnote-ref-106)
107. *Kamara v DPP* (1973) 57 Cr.App.R. 880 [↑](#footnote-ref-107)
108. Wright, *op cit* analyses the earlier cases and states (p66) : “*The truth is that the word “unlawful,” when it is used as coextensive with criminal combination, now includes all criminal purposes and some purposes wrongful but not criminal apart from combination.”*  [↑](#footnote-ref-108)
109. *Warburton,* (1870) LR 1CC 274 [↑](#footnote-ref-109)
110. “. *. a number of actions and things not in themselves actionable or unlawful if done separately without conspiracy, may, with conspiracy, become dangerous and alarming*.” per Lord Brampton in *Quinn v Leathem* [1901] A.C 495 at 530; “*that certain kinds of conduct not criminal in anyone individual may become criminal if done by combination among several, there can be no doubt*” per Bowen LJ in *Moghul Steamships Co. v McGregor, Gow & Co.* (1889) 23 Q.B.D. 598 CA at p. 616; “*No conspiracy is, in my opinion, known to the law which has not for its object the accomplishment of an unlawful act (not necessarily a criminal act)*” per Bingham J in *Boots v Grundy* (1900) 82 L.T. 769 at 772: and see *Kamara v DPP* /[1974] AC 104*,* (1973) 57 Cr.App.R. 880. [↑](#footnote-ref-110)
111. Law Commission: *Report on Conspiracy and Criminal Law Reform*: Law Com no. 76: 17 Mar 1976. [↑](#footnote-ref-111)
112. *Criminal Law Act* 1977 sections 1 and 5 [↑](#footnote-ref-112)
113. *Ayres*, [1984] 1 ac 447, HL; (1984) 78 Cr.App.R. 232 [↑](#footnote-ref-113)
114. *Ayres* [1984] AC 447 HL at 451E-F: “*At common law the offence was committed by an agreement to do an unlawful act or an agreement to do a lawful act by an unlawful means, even if the unlawful act was not an offence. One interpretation of the presence of the second half of section 5(2) is that Parliament intended to make it clear that despite section 1(1) conspiracy to defraud did not require a conspiracy to commit an offence.*” [↑](#footnote-ref-114)
115. *Ayres, op cit*  at 459G [↑](#footnote-ref-115)
116. *Cooke* [1986] A.C. 909, HL and 83 Cr.App.R. 339 at 344. [↑](#footnote-ref-116)
117. *Cooke*  83 Cr.App.R. 339 at 343 [↑](#footnote-ref-117)
118. *Cooke, ibid*  [↑](#footnote-ref-118)
119. *Cooke op. cit* at 344 [↑](#footnote-ref-119)
120. *Attorney General’s Guidance on the use of the common law offence of conspiracy to defraud*: 9 January 2007, para 15. [↑](#footnote-ref-120)
121. *Hollinshead* [1985] AC 975 HL. The statutory offence requires that the planned criminal offence should be committed by one of the parties to the agreement: *Criminal Law Act* 1977 s1(1) [↑](#footnote-ref-121)
122. *Whitaker* (914) 10 Cr.App.R. 245 CA at p. 253 [↑](#footnote-ref-122)
123. [2008] 1 A.C. 920 at §17 [↑](#footnote-ref-123)
124. (1985) 81 Cr App R 279. [↑](#footnote-ref-124)
125. *Criminal Law: Conspiracy to Defraud*: Working Paper No 104, para 4.4 *et seq.* [↑](#footnote-ref-125)
126. Since repealed by the Fraud Act 2006. [↑](#footnote-ref-126)
127. *Zemmel*, (1985) 81 Cr App R 279, at 284. [↑](#footnote-ref-127)
128. Kenyon CJ had of course taken the opposite approach in *Waddington* (1801) 1 East 143; 102 ER 56 (discussed above*.* [↑](#footnote-ref-128)
129. *Fraud*: (2002) Law Com No 276, Cm 5560 §2.7 [↑](#footnote-ref-129)
130. (1982) 74 Cr App R 139. [↑](#footnote-ref-130)
131. *Tsang Ping-nam* was considered in *R v Bellman* (1986) 86 Cr App R 40.where the court noted that Lord Roskill had referred ‘without apparent dissent to the submission by counsel for the appellant.’ [↑](#footnote-ref-131)
132. [2013] EWHC 475 (QB) Coulson J [↑](#footnote-ref-132)
133. *Criminal Law Act* 1977, s 4(1) and (4). [↑](#footnote-ref-133)
134. Similar reasoning was used in *Tsang Ping-nam v The Queen*, (1982) 74 Cr App R 139 where the Privy Council deprecated the use of the common law offence of perverting the course of justice which circumvented statutory safeguards introduced by Parliament. The safeguard in question was contained in s43 of the *Crimes Ordinance of Hong Kong* which equated to s 13 of the *Perjury Act* 1913. [↑](#footnote-ref-134)
135. *R v Rimmington* [2006] 1 AC 459, para 30, per Lord Bingham. [↑](#footnote-ref-135)
136. [2008] 1 AC 920. [↑](#footnote-ref-136)
137. *Goldshield Group Plc* [2009] 1 Cr.App.R. 33 HL. [↑](#footnote-ref-137)
138. *Norris v Government of the USA* [2008] 1 AC 920, para 17. [↑](#footnote-ref-138)
139. *Rimmington* [2006] 1 AC 459, para 33, cited in *Norris* [2008] 1 AC 920, at para 52 *et seq.* [↑](#footnote-ref-139)
140. [1892] A.C. 25. [↑](#footnote-ref-140)
141. Clerk and Lindsell on *Torts* (18th ed.) pages 24-131 *et. seq*. [↑](#footnote-ref-141)
142. *Allen v Flood*, [1898] A.C. 1; *Quinn v Leathem*, [1901] A.C. 495; *Ware and De Freville Ltd v Motor Trade Association* [1921] 3 K.B. 40 and *Sorrel v Smith* [1925] A.C. 700; *Crofter Hand Woven Harris Tweed Co. Ltd v Veitch and Others* [1942] A.C. 435 HL. [↑](#footnote-ref-142)
143. Hansard: HC 13 July 1955, col 1941; HL 26 June 1956 col 16: "… the odour of criminality should not attach to proceedings under this legislation." This originated with the President of the Board of Trade in the Parliamentary debates concerning the Report's recommendations to criminalise collective resale price agreements. The phrase appears to have been adopted by Lord Wilberforce in Wilberforce, Campbell and Elles, *Restrictive Trade Practices and Monopolies*, (2nd ed., 1966), at pp. 148-149. [↑](#footnote-ref-143)
144. [2014] 1 W.L.R. 2817 [↑](#footnote-ref-144)
145. *SFO v.* *Evans* [201] EWHC 3803 (QB). [↑](#footnote-ref-145)
146. *Hayes* [2015] EWCA Crim 46 §46 [↑](#footnote-ref-146)
147. *Hilton v Eckersley* 6 E&B 74 at 75 per Baron Alderson, approved by Lord Halsbury in *Mogul Steamship Co. Ltd v McGregor and Others*, [1892] A.C. 25 at 36. [↑](#footnote-ref-147)
148. *R v Druitt* (1867) 10 Cox CC 592 at 600 per Bramwell B, cited by Lord Halsbury in *Mogul, op cit.* [↑](#footnote-ref-148)
149. *Mogul, op cit*. *per* Lord Halsbury at 38. [↑](#footnote-ref-149)
150. *Norris v US* [2008] 1 A.C. 920 at §17 per Lord Bingham: cited above. [↑](#footnote-ref-150)
151. *Evans* [2014] 1 W.L.R. 2817 [↑](#footnote-ref-151)
152. *Norris v US* [2008] 1 A.C. 920 at §52-57 on the issue of legal certainty and Parliamentary supremacy and *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241, para 38 where Strasbourg rejected the idea that national courts courts can characterise an action as criminal simply because it was “*wrong rather than right in the judgment of the majority of contemporary fellow citizens.*” [↑](#footnote-ref-152)