New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY, Defendant-in-Error, vs. JOHN B. FAUNCE, Plaintiff-in-Error.	On Indictment for Conspiracy. On Writ of Error to the Supreme Court.

BRIEF FOR PLAINTIFF-IN-ERROR.

This case was originally tried in the Essex Oyer and Terminer.

Raymond E. Smith, Clarance P. Whitman, John B. Faunce, Augustus R. Jennings, William J. Thompson and Jesse S. Peters, were jointly indicted for conspiring fraudulently and falsely to cheat and defraud the Roseville Trust Co. of $28,487.73. Of the defendants named the indictment was *nolle prossed* by the State as to Jennings and Thompson. Peters was not apprehended. Raymond E. Smith pleaded *non vult*. He had previously pleaded either guilty or *non vult* to about twenty-four indictments for crimes, which resulted in the wrecking of the Roseville Trust Co., and was at the time of the trial and still is serving a term in the State Prison.

The indictment was pressed to trial as against Whitman and Faunce, both of whom pleaded not

guilty. The Supreme Court affirmed the conviction; hence this appeal.

The Intercity Land & Securities Co., a corporation, was a depositor in the Roseville Trust Co. Faunce was the president of the Intercity Co. Whitman was secretary and treasurer of said company. Neither Faunce or Whitman had any connection whatever with the Roseville Trust Co. They were not directors. Whitman had been a depositor in his own name. Faunce was not even a depositor. Faunce lived in New York, and apparently had not been at the Roseville Trust Co. more than once, which seems to have been shortly after the Intercity account was opened (page 160). Raymond E. Smith was a director of the Intercity Co. and was also treasurer of the Roseville Trust Co. He was a stockholder of the Intercity Co. to the amount of about one-quarter of its stock. Originally he held 500 shares (page 105, line 3), and later agreed to take 700 shares more (page 130, lines 10-18). Whitman says that he held $12,000 worth, which was about one-fourth (page 202, line 12). Smith does not deny this.

The charge against the defendants, as stated in the indictment, was that they had conspired to cheat and defraud the Roseville Trust Co. of a large sum of money, to wit, $28,487.73 (page 7, line 5). The overt acts charged in the indictment looking toward the carrying out of this conspiracy to cheat and defraud were (1) by procuring the fraudulent application of the funds of the trust company to the payment of checks and promissory notes of the Intercity Co. in overdraft of funds standing to the credit of the Intercity Co., (2) by procuring a fraudulent application by the treasurer of the Roseville Trust Co. (Raymond E. Smith) of the trust company's money, and wilfully and corruptly concealing this fraudulent applica-

tion by falsely keeping the accounts of the trust company; and (3) by procuring the taking and the drawing of moneys by the Intercity Co., a depositor of the Roseville Trust Co. by means of withdrawals in excess of moneys which the Intercity Co. had to its credit, and wilfully and corruptly concealing such taking and withdrawing of moneys by falsely keeping the accounts of the Roseville Trust Co., and (4) by procuring the embezzlement by Raymond E. Smith, treasurer of the trust company, of the moneys, properties and securities of the trust company committed to his keeping.

The overt acts, therefore, stripped of legal verbiage, are an overdrawing of the account of the Intercity Co., and the falsifying of the books of the trust company so as to conceal these overdrafts.

To sustain this indictment the State was required to prove, beyond a reasonable doubt a corrupt motive, which it attempted to do by showing, (1) that the defendants Faunce and Whitman had, as officers of the Intercity Co., overdrawn its account; (2) that they had falsified the books of the trust company to conceal this, or had procured the falsifying of the books by Smith; and (3) that they had done these things with the intent to cheat and defraud the trust company.

The defendants Faunce and Whitman are represented by different counsel. Each has taken a separate writ of error. The facts relating to the two defendants, while similar in general, are different in many particulars, Whitman lived in East Orange, and was a frequent visitor at the bank. Faunce lived in New York, and was very seldom if ever at the bank, except possibly on one occasion. Whitman was well acquainted with and a friend

of Smith's. Whitman was at the bank two or three times a week (page 215, line 1). He had numerous conversations with Smith about the state of the Intercity Company's account (page 215, lines 28-42). Smith says he told him that checks were coming in that were not good on the ledger (Smith, page 106, line 30), although Whitman denies this (page 215, line 32).

Faunce knew Smith very slightly, and Smith saw very little of him (Smith, page 106, lines 10-20).

Whitman was secretary and treasurer of the Intercity Co. He looked after the repairs and upkeep of the company's properties (page 201, line 12). He also seems to have attended largely to its financing. The company's account was originally carried in his name personally (page 201, line 30), and he engaged in a real estate deal with Smith, resulting in the further financing of the company (page 203, and Exhibit D4, page 303).

Faunce was the real estate expert in the company (Whitman, page 200, line 29; Smith, page 138, line 18; Faunce, page 252, line 1). He had general charge of the properties, made the contracts for the purchase and sale, etc. He apparently had no part in the finances of the Intercity Company except as president he signed checks and notes (page 252, line 20). Whitman arranged with Smith for any accommodation at the bank on behalf of the Intercity Co. He would report that to Faunce, who would draw against it (Whitman, page 230, lines 1-12; Faunce, page 252, lines 32-40). The Intercity Co. was depositing between seven and eight thousand dollars a month from rents and other moneys (page 271, line 12), and when deposits were made a slip was put on Faunce's desk to indicate that (page 271, line 1).

The information as to the discounted notes he got from Whitman. He relied on his cashier to keep the books (page 281, line 12).

The case comes up on both assignments of error and causes of reversal under Section 136 of the Criminal Procedure Act.

I.

The Trial Judge erred in refusing to direct a verdict of acquittal for the defendant Faunce, because the State failed to prove any corrupt motive on the part of Faunce as one of the alleged conspirators.

At the conclusion of the entire case, each defendant moved for a direction in his favor, which was denied and exception taken (page 284, line 17, page 285, line 5). This refusal to direct a verdict of acquittal in behalf of the defendant Faunce is now assigned as error as assignment No. 45 (page 312, line 16), (No. 46, page 331), and is also assigned as a cause of reversal pursuant to Sections 136 and 137 of the Criminal Procedure Act (page 316, line 30) as cause No. 3 (page 335, line 22).

The indictment is in conspiracy. The conspiracy alleged was to cheat and defraud the trust company. The means to that end are alleged to be the overdrawn of the account and the falsifying of the records of the trust company. Under the evidence the most that the verdict of the jury can mean is that the defendant Faunce either participated in or knew of the overdrafts. There is absolutely no evidence to connect him with any falsification of the records of the trust company.

To establish the charge the State must show a wrongful intent on the part of the defendant.

In *Wood* vs. *State*, 47 N. J., L. 461, *Judge Reed* said (page 463):

> "It may not be easy to exactly define by a general formula what elements of fact are essential to constitute such a combination a criminal conspiracy, but it may be safely said that the motives of the confederates must be corrupt or no criminality can attach to such a confederation."

The acts of the parties may indicate the character of their intent, and conversely their intent may be gathered from their acts. In *State* vs. *Donaldson*, 32 N. J. L., 151, *Chief Justice Beasley*, laid down the following definition of an indictable conspiracy (page 154):

> "It may be safely said nevertheless that a combination will be an indictable conspiracy whenever the end purposed or the means employed are of a highly criminal character; or where they are such as indicate great malice in the confederacy; or where deceit is to be used, the object in view being unlawful; or where the confederacy having no lawful aim tends simply to the oppression of individuals."

In an action of this character the conspiracy is the crime. *State* vs. *Young*, 37 N. J. L., 184 (page 189), but the proof of the conspiracy necessarily lies in the actions of the conspirators. To establish the conspiracy there must be an overt act, coupled with a criminal intent. *State* vs. *Young*, *supra*. *State* vs. *Hickling*, 41 N. J. L., 208 (page 211).

Thus, in *State* vs. *Cole,* 39 N. J. L., 324, Chief Justice Beasley said (page 325):

> "The gravamen of the charge, it will be perceived, is the fraud of a person in fabricating the notes of his firm, and, with the collusion and aid of a third person, putting them to a use entirely alien to the business of the firm."

He said further (page 325):

> "The query is not whether it is an indictable offense for a member of a firm to direct a partnership note to alien uses, but whether it is not such crime for him to do such act by concert with a third person, the intention of the two being fraudulent, and the act being carried into effect by deceitful devices."

See also:

> State vs. Reiners, 80 N. J. L., 196, at page 197.
> State vs. Beinstock, 78 N. J. L., 256.

Applying these principles to the case at bar, there was a complete failure on the part of the State to prove any criminal intent on the part of the defendant Faunce. If it be taken as a fact that Faunce did sign checks of the Inter City Co., which resulted in that company's over drawing its account, nevertheless the facts show that instead of doing this with the intention of overdrawing the account and securing the misappropriation of the funds of the Roseville Trust Company to the Inter City Company's account, he supposed and believed, and had a right to suppose and believe that the Intercity Co. had sufficient funds on deposit against which the drafts could be drawn.

Not only did Faunce suppose, and was entitled to suppose that the Intercity Co. had sufficient funds on deposit, but he had no knowledge whatever of the false manipulation of the trust company's books by Raymond E. Smith.

(1) If the Intercity Company's account was in fact overdrawn, it was not with the intention of obtaining funds of the trust company unlawfully. The contrary was the fact.

The State's case was built up entirely upon the evidence of Raymond E. Smith, the self-confessed wrecker of the trust company. To corroborate him, William J. Thompson, who had been employed under Smith in the trust company, was called, and also two bank examiners, Mayhem and Ferguson. The testimony of these three witnesses, however, was of no value except as they testified from the books of the trust company. These books were concededly false and fraudulent, due to the manipulations of Smith. Smith's practice had been to conceal overdrafts against the account of the Intercity Co., as well as against the accounts of other depositors, by failing to enter up the checks in the proper books, and either carrying the checks as cash items, or concealing them in his private box #55. The juggled records of the bank, together with the checks found in box #55, tended to show an overdraft of the Intercity Company's account, as claimed by the State. Smith's testimony was (page 170, line 32):

> "So far as the individual ledger is concerned, the overdraft did not show, but so far as the checks were concerned, that had not been charged against the account, the overdraft did show."

The Intercity Co. deposited between seven and eight thousand dollars per month (page 271, line

12). In addition to these large deposits, Faunce, as president of the Intercity Co. supposed, and had a right to suppose, that that company was entitled to the benefit of notes which had either been discounted or placed to its credit in the Roseville Trust Co. Whitman says they were very large (page 199, line 23). One of these notes was for $11,165 signed by one W. L. Smith. It was given to pay for $12,000 of stock of the Intercity Co. purchased by said W. L. Smith (Whitman, page 220, line 36, page 221, line 14). Another note was Raymond E. Smith's own note for $7,000 which he had agreed to give in payment of the $7,000 worth of stock of the Intercity Co. which he had agreed to take over and above the original $5000 worth which he had orignally subscribed to the company (Faunce, page 258, lines 10-30). Faunce relied on these two notes to bring up the balance of the Intercity Company on the books of the trust company. He testified on cross-examination (page 271, lines 30 etc.):

"Q. How did you know how much money to draw out of the Roseville Trust Company? A. Why, from the deposits from day to day, as the money was sent over, I entered it in.

"Q. The evidence in this case is that during the month of June you deposited $4,570.69, and drew out $12,943.50. Will you account for that, please. A. I can't at this time, because I don't know. I understand there was deposits which has not been credited to us.

"Q. For what? A. What month was it?

"Q. This month I ask you about, was June. A. Well, I know of at least $18,000 that was supposed to be there that was not there, as I understand it.

"Q. What? A. Two notes.

"Q. What notes? A. One for $11,165 and one for $7,000."

The two notes which he was there referring to were notes respectively of W. L. Smith and Raymond E. Smith. That the officers of the Intercity Co. were justified in relying on the note which Raymond E. Smith gave in payment of his stock appears from Smith's own testimony. He said (page 138, line 35):

"Q. When you bargained for the purchase of 1,200 shares of stock did you have any reason to suppose that they thought you could not pay for the stock? A. I think they thought I would pay for it finally."

Smith also says that he told the defendants that he would try and get the $11,165 note of W. L. Smith discounted (page 131, line 17). Faunce, however, believed that the Intercity Company got the benefit of that note. He testified (page 257, line 30):

"Q. Do you remember the execution and delivery of the note of Winfred L. Smith, Exhibit D-3? A. Yes, sir.

"Q. What was your understanding with regard to that being delivered to the Roseville Trust Company? A. That was the balance of purchase price on $12,000 stock.

"Q. What was your understanding of delivering it to the Roseville Trust Company? A. I don't understand.

"Q. (Question read.) A. I don't understand what you mean by that.

"Q. Why was that sent to the Roseville Trust Company? A. Because it was to be used as working capital of the Inter-City Company.

"The Court: What note is that?

"Mr. Bachman: Eleven thousand one hundred and sixty-five dollars."

W. L. Smith was financially responsible (page 220, lines 20-35).

Assuming that there were in fact overdrafts of the accounts of the Intercity Co. those overdrafts did not in themselves constitute a crime. Faunce was not a director nor an officer, or in any way connected with the Roseville Trust Co. He was not even a personal depositor. It was conceded by the state at the trial that the mere overdrawing the account was not a crime, and the judge so charged the jury (page 290, line 4). The overdrafts, assuming they existed, instead of having been made with a fraudulent purpose, and to cheat and defraud the trust company, were made in perfect good faith, certainly so far as the defendant Faunce is concerned.

Nor is that all. Instead of the understanding being, as the state claimed, that the overdrafts were for the purpose of defrauding the trust company, the evidence was, from the mouth of the state's own witness, Raymond E. Smith, that the understanding was that the checks should be paid. Smith testified on cross-examination (page 145, line 15):

"Q. Mr. Smith, when you did pay the checks of the Inter-City Land and Securities Company, which you say overdrew their account, you expected that those checks would subsequently be made good, did you not? A. I

thought they would be made good at some time, yes.

"Q. You never had any agreement with Faunce or Whitman that they should not be made good, did you? A. No, sir.

"Q. On the contrary, the argument was that they should be made good, wasn't it? A. The understanding was that they should be made good.

"Q. Your understanding, certainly was that? A. That was the understanding, that they should be made good.

"Q. And did you have any understanding that the promissory notes of Faunce and Whitman, or of the Inter-City, should not be paid? On the contrary, was not your understanding that those notes would be paid? A. Which notes do you mean, Mr. Whiting?

"Q. Well, the notes of the company, the notes signed by Whitman or Faunce, which you had? A. You mean whatever notes were purchased by the company or to the credit of the company?

"Q. Yes. A. There was not any agreement that the notes would be paid at all.

"Q. Was there any agreement that they should not be paid? A. No, sir.

"Q. You expected them to be paid? A. That is the usual expectation of taking notes, yes, sir.

"Q. And it prevailed in this case, did it not? A. I expected them to be paid at some future time, yes."

Faunce never heard of any checks or notes being protested and supposed that they were being paid in the regular course (page 254, line 35).

Nor did Faunce in fact know that there were any overdrafts. Raymond E. Smith claims to have had a conversation in June or July, 1913, he was uncertain which, in New York, with Faunce, Whitman and W. L. Smith (page 117, lines 25-40), in which he claims to have told them that "the Intercity Company had been drawing very heavily against us, and we hadn't had the credits that we ought to have had" (page 118, line 2). He admits, however, that while he had talked the matter over a number of times with Whitman (page 119, line 40), he only occasionally saw Mr. Faunce "It wasn't very often I saw Mr. Faunce" (page 120, line 1), and he concedes that he never told Mr. Whitman and Mr. Faunce "just exactly the amount of overdraft" (page 121, line 20), and a reading of his testimony will show that whatever he may have told Whitman he told Faunce very little, if anything, about the state of the account.

Faunce denied absolutely that Raymond E. Smith had ever told him, or mentioned to his fellow-directors in his hearing, that the account of the Intercity Company was overdrawn (page 253, line 33). Faunce is supported in his statement by W. L. Smith, who was one of the persons mentioned by Raymond E. Smith as having been present at this supposed conversation. W. L. Smith denied absolutely what Raymond E. Smith claimed to have said (page 263, line 20). Louis E. Swarts, a member of the board of directors of the Intercity Company, also denied that Raymond E. Smith had ever stated to the board that the account of the Intercity Company was overdrawn (page 260, line 17). So did Whitman (page 215, line 33).

But even if it be assumed that Faunce knew that the account was overdrawn, that fact, standing by itself, does not impute to him a crime or

criminal intent, and when the other evidence is taken into consideration, especially that of the State's witness, Raymond E. Smith, all imputation of crime or criminal intent is taken away, for Smith stated expressly that the understanding, instead of being a fraudulent one that the money should not be repaid, was on the other hand, that the money should be paid, and that he as treasurer of the trust company expected that the money would be paid (page 146, line 10).

So far as any question of overdraft is concerned, therefore, the state has utterly failed to show that the motives of the aleged confederates was corrupt, or that any criminality attached to their alleged confederation.

Wood vs. State, 47 N. J. Law 461, page 463.

(2) The defendant Faunce had no knowledge of or participation in the falsifying of the books of the trust company to conceal the overdraft.

It was necessary for the state to prove, if not the act, at least the guilty knowledge of Faunce in the falsifying the trust company's books. The two overt acts alleged by the State were, first, the overdraft, and second, the falsifying of the records to conceal the overdraft. The overdraft itself was not enough. Concededly it was not a crime. The State, to establish its case, was therefore required to prove an overt act which would establish a crime.

Now the conspiracy is the crime. But "the motives of the confederates must be corrupt, or no criminality can attach to such a confederation." *Wood* vs. *State,* 47 N. J. L., 461, page 463. The criminal intent is the essence of the crime. The mere overdraft—especially in view of the evidence

of the State's own witnesses, that it was the intention to pay the checks—showed no criminal intent whatever. Quite the contrary.

The State, therefore, was required to prove the doing of a criminal act by Faunce as one of the conspirators, or the procuring of such act to be done by him, or with his knowledge, namely, the falsifying of the records of the trust company. In this the State utterly failed.

There was absolutely no evidence in the case to connect the falsifying of the records of the trust company with the defendant Faunce. On the contrary the evidence is quite conclusive that he knew absolutely nothing about it, and had absolutely nothing to do with it. Of the various witnesses called, the only ones who had, or could have had, any knowledge of such a matter, were Raymond E. Smith, the treasurer of the trust company, and Faunce and Whitman. No one else pretended to testify upon this subject. The evidence of Raymond E. Smith himself, as well as that of Faunce and Whitman, established conclusively that Faunce had no knowledge whatever, or part in the falsifying of the books of the trust company.

Smith's testimony on cross examination was (page 152, line 28) :

> "Q. Did Mr. Whitman or Mr. Faunce ask you to keep those books dishonestly? A. They did not.
>
> "Q. Did they know you were keeping them dishonestly? A. Not to my knowledge.
>
> "Q. You never told them so? A. No, sir.
>
> "Q. Isn't it a fact that there was no agreement between them and you that they should do so? A. Not that the books should be kept dishonestly, no, sir.

"Q. There was no agreement between them and you that any of their transactions should be kept from the executive committee, was there? A. No agreement, no, sir.

"Q. No understanding? A. No understanding, no.

"Q. Well, you did keep those transactions from your executive committee, as I understand you to have said once or twice before, some of them? A. Some of these transactions I did keep from the executive committee, yes, sir.

"Q. Now can you tell the jury how many instances there are of falsifications in the books of account of the trust company? A. I can't tell that, no.

"Q. There were a good many, were there not? A. There were several, yes, sir."

and at page 172, lines 12-20:

"Q. I understand, you did not tell Mr. Faunce or Mr. Whitman that checks which you claim were overdrafts were being held in the cash and subsequently charged to the wrong account? A. I never told him that, no, sir.

"Q. Of course, they never asked you to do that, did they? A. They didn't ask me to do that, no."

And at page 144, line 33 etc.:

"Q. Did you tell either Mr. Faunce or Mr. Whitman that you had not posted any of the checks of the Inter-City Land and Securities Company against the account of that company? A. No, sir.

"Q. Did you tell either Mr. Faunce or Mr. Whitman that you had charged the checks of the Inter-City Land and Securities Company to any other account but that company's own? A. I don't remember ever telling them that, no."

There is nothing in Whitman's testimony to indicate that he had any knowledge of the falsifying of the trust company's books by Smith, but whether he knew it or suspected it, there is no suggestion whatever in his testimony that he imparted either his knowledge or his suspicions to Faunce.

Faunce, on his own behalf, denies any knowledge whatever of the falsifying of the trust company's records, and in this respect his testimony and that of Smith, the State's witness, are in complete accord.

Faunce's testimony was (page 254, lines 9-40):

"Q. Did you have any knowledge—I am speaking outside of any allegations in the indictment which may perhaps be within your knowledge—I mean prior to August 14, 1913, did you personally have knowledge of any abstraction of the funds of the Roseville Trust Company to pay the checks and notes of the Inter-City Company? A. Why, no, sir; any more than the checks were always paid, as I presumed.

"Q. Did you know that there was any unlawful abstraction of funds? A. No, sir; I know nothing about banking business anyway.

"Q. Did you know that certain checks were paid by the Roseville Trust Company by neglecting to post same against the account of the Inter-City Company and

were laid aside by Raymond E. Smith? A. No, sir.

"Q. Has he ever informed you in his own behalf or in behalf of the Roseville Trust Company previous to August, 1913, that checks were being presented at the Roseville Trust Company in excess of the credit balances on the books of that company in the account of the Inter-City Company? A. He never informed me, no, sir.

"Q. Were any checks of the Inter-City Company refused payment and protested prior to August 14, 1913? A. Not to my knowledge.

"Q. Did you have any knowledge, directly or indirectly, prior to August 14, 1913, of the embezzlement of any funds by Raymond E. Smith from the Trust Company? A. No, sir."

The State evidently recognized the necessity of charging, and hence proving, not only the fact of the overdraft (in itself not criminal), but further the falsely keeping of the accounts of the Trust Company to conceal the overdraft, and so to make that which was in itself not criminal, a crime; for the indictment is drawn on that theory.

The State has utterly failed, however, to prove this very material allegation. Even the trial judge himself, who refused to direct a verdict of acquittal, seems to have recognized the necessity of it, for he said in his charge to the jury (page 293, line 30):

"The only question is whether the defendants knew what the real situation as alleged by the State was, either through the direct knowledge imparted by Smith, or through such facts and circumstances as would charge them

with guilty knowledge, that is, by acquiescing in those things which they knew were being done."

The "real situation" as alleged by the State was the overdrawing of the account and the falsifying of the records. It apparently, recognized that guilty knowledge of these two things must be brought home to the defendants. The State utterly failed, however, to bring home to the defendants, particularly the defendant Faunce, any knowledge whatever of the falsification of the records.

Section 37 of the Crimes Act, which deals with the matter of conspiracy, provides (2 C. S., page 1757, §37):

> "Any two or more persons who shall combine, unite, confederate, conspire or bind themselves by oath, covenant, agreement or other alliance, to commit any crime * * * or to cheat and defraud any person of any property by any means which, if executed, would amount to a cheat, or obtain money by false pretences * * * shall on conviction be deemed guilty of a conspiracy * * * but no agreement to commit any crime other than (crimes not included in this indictment) shall be deemed a conspiracy unless some act in execution of such agreement be done to effect the object thereof by one or more of the parties to such agreement."

The trial judge charged that some act in execution of the alleged criminal agreement must be done to effect the object thereof by one or more of the parties to such agreement (page 288, line 3); and that "all who, *with the knowledge of the facts*,

concur therein and aid in execution thereof are fellow conspirators" (page 288, line 36).

It is essential to the crime of conspiracy that some overt act be done "in the course of carrying into effect the scheme of the conspirators."

See:

Wood vs. State, 47 N. J. L., 180.

And the motive of the conspirators must be corrupt.

See:

Wood vs. State, 47 N. J. L. 461, page 463.

How can it be said the motives of Faunce, in signing checks as president of the Inter-City Co. was corrupt, when he believed, and from his understanding and knowledge of his company's affairs, had a right to believe his company had sufficient funds on hand to honor the drafts!

How can it be said the motives of Faunce were corrupt, when the State's own witness, Raymond E. Smith, admitted it was even his expectation that the overdrafts which he knew of (but which Faunce did not know of) would be paid!

And how can it be said the motives of Faunce were corrupt, when he had absolutely no knowledge at all of any falsification or alterations of the Trust Company's books!

All these facts were present to the mind of the trial judge. His charge to the jury (page 288) shows he had some appreciation of the legal requirements of the situation, and yet he failed to see that essential requirements of the State's case had not been made out.

When the evidence is clear and unequivocal it is the duty of the trial judge to direct a verdict of

acquittal on motion of the defendant at the close of the entire case.

State vs. Raymond, 78 N. J. L., 61.
State vs. Martin, 80 N. J. L., 685.

Even though the evidence might not have warranted a direction in favor of the defendant Whitman, that was no reason why an acquittal should not have been directed in favor of the defendant Faunce.

State vs. Lieberman, 80 N. J. L. 506, page 508.

This case comes up not only on writ of error but causes of reversal under §§136 and 137 of the Criminal Procedure Act. If at the conclusion of the entire case when the motion was made, there was not sufficient to justify or require the submission of the case to the jury, the motion should have been granted.

State vs. Jaggers, 71 N. J. L. 281, page 283.

The case at bar is completely distinguished from the case of the *State* vs. *Armstrong* (95 A. F., 99), where the conviction of Armstrong, a depositor in this same Roseville Trust Co. was upheld on an indictment very similar to that at bar. The facts which in the Armstrong case tended to show a criminal motive, are entirely lacking here, so much so that the Armstrong case by way of contrast is a direct precedent in favor of the defendant Faunce.

It appears, from a reading of the opinion of the Court of Errors in the Armstrong case, that the conviction was upheld because Armstrong not only

knew that he had overdrawn his account, but in addition knew that the checks which he drew had never been charged to his account. In other words, Armstrong knew that he was overdrawing his account, and also that Smith was falsifying the records to conceal those overdrafts. That these facts were the grounds of the affirmance of the conviction is plain from the reading of the opinion of Justice Bergen, speaking for the Court of Errors. He said:

> "This record shows that the plaintiff in error knew that his account was largely overdrawn; that checks paid by order of Smith were not charged to his account, and that on one occasion he gave Smith a check for a large sum of money, to meet which both he and Smith knew he had no funds on deposit, for the purpose of taking up a number of smaller checks which Smith had directed be paid, and which both knew had never been charged to his account. All this was done with the assistance and connivance of Smith. From this and other joint acts of the plaintiff in error and Smith, a jury might properly infer there there was an agreement between the two to cheat and defraud the bank, and in order to avoid detection, checks which had been paid by the Trust Company were not charged to the account of the plaintiff in error.
>
> "A clearer case of a corrupt agreement to defraud by the joint act of two persons, neither of which could have carried it out without the assistance of the other, is not often disclosed, and the record kept of the acts leading to its consummation by one of the conspirators was competent evidence against all, especially

in a case like this where both parties knew that one of the means of carrying out the agreement, *viz.:* the checks, were not charged, as they should have been, to the account of the plaintiff in error, and that the omission to do so tended to prevent the discovery of the wrong doing. It is urged, that the books were not correctly kept and therefore not competent evidence, but, so far as the plaintiff in error is concerned, one of the elements of the crime is that, to his knowledge, his account was not debited with the unlawful overdrafts. It was an overt act in the execution of the corrupt bargain, and the books were competent to prove it."

This language is pertinent here, by way of contrast, because the facts are quite opposite, in that Faunce had no knowledge of the false entries at all.

II.

The Trial Judge erred in refusing to direct a verdict of acquittal for the defendant Faunce, because the facts relied upon by the State are more consistent with the innocence than the guilt of the said defendant.

It may be taken as an established rule that when circumstances are relied upon to establish a crime the circumstances so relied upon must be consistent with each other. They must be consistent with the theory of guilt and inconsistent with the theory of innocence and they must exclude every other reasonable hypothesis but that of guilt. Every pre-

sumption is in favor of the innocence of the defendant.

The State's chief reliance for the conviction of the defendant was the testimony of Raymond E. Smith. His testimony, however, both alone and taken with the other testimony in the case, creates a situation which is not only inconsistent with the guilt but entirely consistent with the innocence of the defendant Faunce.

Raymond E. Smith was a director and stockholder of the Inter-City Co. That company was a prosperous concern. The total capital stock was $50,000 (page 200, lines 1-13). Smith already owned $5,000 of the stock and desired to increase his holdings $7,000 more, or a total of $12,000, so as to make himself a fourth owner of the company. His original stock purchase of $5,000 was to be paid partly by land and partly by $1,500 cash, Exhibit D-4 (page 303, lines 20-40). His additional purchase of $7,000 of stock was to be paid for by his note which was to be discounted and placed to the credit of the Inter-City Co. (page 258, lines 1-30). He never, however, paid this consideration and thereby swindled his associates Faunce and Whitman. He also failed to place to the credit of the Inter-City Co. the proceeds of the W. L. Smith note for $11,165.00 which he had agreed to try and discount; and Faunce believed he had done so (page 272, lines 1-10). Not only that, but he had falsified the books of the Roseville Trust Co.—had embezzled its funds, and had falsified accounts of other depositors which were not overdrawn by charging off to them checks which should have been charged to accounts which had been overdrawn, all the time concealing all of these things from his associates Faunce and Whitman. Smith's testimony throughout was that Faunce knew nothing of his falsifying of the books of the Trust Company, and

in view of Smith's efforts to buy into the Inter-City Co., the last thing in the world which he would have wanted Faunce to find out was the fact that he had failed to deposit to the credit of the Inter-City Co., of which Faunce was President, the items of cash and the note which he had agreed to deposit, and the failure to deposit which are now also held out by the state as circumstances pointing toward the guilt of the defendant Faunce. Conceding all the facts proved at the trial in favor of the State, these facts are more consistent with the innocence than the guilt of the defendant Faunce; because (1) they establish that Faunce had no knowledge whatever of the falsifying of the records of the Trust Company by Smith, and (2) they show the reason why Smith would never have told Faunce that he had failed to deposit to the account of the Inter-City Company the moneys which he had agreed to deposit, but which Faunce believed he had deposited.

Another set of circumstances upon which the State relied, but which are more consistent with the innocence than the guilt of the defendant Faunce, was the evidence which they sought to adduce from Raymond E. Smith that he had told the defendant Faunce that the account of the Inter-City Company was overdrawn. The weight of the evidence is against the State's contention, but conceding that the fact is proved, this statement is more consistent with the innocence than the guilt of the defendant Faunce. If, as the State alleged, the defendant Faunce and Raymond E. Smith were joint conspirators to overdraw the account of the Inter-City Company, why should Smith have told Faunce that the account was overdrawn and why should he have urged upon Faunce that it should be straightened up? (pages 122-125). The reasonable conclusion from these facts is against the contention of the State, and instead of every other reason-

able hypothesis being included, except that of guilt, every reasonable hypothesis points to the conclusion that the defendant Faunce was innocent.

Even though Faunce's position under the State's evidence be reduced to that of passive cognizance of the alleged fraudulent and illegal action of the others, that is not enough to convict him.

In Wharton on Criminal Law, Vol. 2, page 1826, §1699, 11th edition, the author says:

> "But it needs something more than a proof of mere passive cognizance of fraudulent or illegal action of others to sustain a conspiracy. There must be shown some sort of active participation by the parties charged. Of this we have an illustration in an English trial before Martin B., where certain warfingers and their servants were indicted for a conspiracy to defraud by false statements as to goods deposited with them and insured by the owners against fire. It was held that evidence that false statements were knowingly sent in by the servants, which would be for the benefit of the masters, and that afterward the servants took fraudulent means to conceal the falsehood of the statements, with evidence that the employers had the means of knowing the falsehood and know of the devices used to conceal it, was not sufficient to sustain the charge of a fraudulent conspiracy between the employers and servants."

See also:

O'Donnell vs. People, 110 Ill., App., 250; affirmed 211 Ill., 158.
State vs. Deeny, 65 Kan., 292, page 297.
State vs. Preston, 1 N. J. L. J., 117.

The conviction is open to two lines of attack on the ground:

First, the Court's refusal to direct a verdict of acquittal.

Second, his failure to charge on the doctrine of circumstantial evidence.

On the first proposition, the law surely must be, that where all of the circumstances relied upon are as consistent with innocence as guilt, the jury should not be permitted to speculate as to the guilt of the defendant.

On the second proposition, if the circumstances relied upon are uncertain in their nature, though tending to show guilt, the Court should carefully instruct the jury that they might not be misled.

Now the only circumstances in this case which could even be considered by the Court are the following: First: The relation of the witness Raymond E. Smith to the defendants in connection with the Inter-City Land & Security Co., and the common interest they had in building up the Company. Second: The advancing of large sums of money on notes, and the cashing of checks, where funds were not in bank to meet them, and the failure to enter these checks against the account of the Inter-City Land & Security Co. Third: The general falsification of the account of the Inter-City Land & Security Co. on the books of the bank by Smith.

As to the first of these circumstances, the evidence clearly shows that there was only an apparent and not a real community of interests between Smith and the other members of the Inter-City Land & Security Co. Smith admittedly was deceiving his associates in this Company, and whatever holdings he had, had been procured by him through actual misrepresentation, and without the

paying of anything therefor. The evidence is overwhelming, that Smith to cover up his own default and to curry favor with them pretended, first, that he had arranged to discount their papers, his own included, and second, had permitted them to believe it had been accomplished by honoring all of their checks.

It is testified by the witness, Reuck, that after he became the bookkeeper for the Inter-City Land & Security Co., and sometime in June or July of the year in question, he made repeated efforts to have the account of the Inter-City Land & Security Co. with the bank balanced up, and the vouchers returned with a statement, and this is not denied by Smith who merely says that he did not remember whether it occurred or not. It is further shown that the W. L. Smith note was in the possession of the bank practically from the date of its execution until the bank closed; and it is further shown that the deposits for the month of August up to the time of the failure, about two-thirds of he month, were the largest deposits that had been made by the Inter-City Land & Security Co., since the beginning of May, aggregating over $6,500. It is perfectly evident that Smith was serving his own purposes in first, failing to discount his own and the W. L. Smith note, which he pretended he would have discounted, but which his bank directors he knew would not permit him to discount, and second, by honoring all checks drawn, thus leading the Inter-City people to believe the notes had been discounted, and third, by secreting the overdrawn checks to prevent his bank official from discovering the joint fraud he was perpertrating upon themselves and the Inter-City Co.

In this connection, it should not be overlooked, that Raymond E. Smith, not only expressly denied

any agreement or understanding, but that the various facts he testified to all indicate that there was no such agreement or understanding. If Smith is to be believed at all, he made repeated demands throughout this entire period for the settling up by the Inter-City people of their overdrafts on the bank, and this is entirely inconsistent with an agreement or understanding, that the bank should be defrauded by reason of this overdraft.

We are not bound to show that there was no overdraft, nor are we bound to show that if an overdraft existed it was inadvertent. Rather, the State was bound not only to show there was an overdraft—that it was purposely made—and that the defendants and Smith each knew of it and acquiesced in it, but they must further show that it was the result of an agreement or understanding express or implied, that the bank should thus be swindled and defrauded of money.

Now it is not to be denied that Smith was swindling and defrauding the bank in a variety of ways, but this very fact tended to negative the idea, that in this particular instance the defendants were conspiring with him to do so.

There is not a fact in the case, nor a circumstance which indicates that the purpose in making the overdraft was to swindle or defraud the bank, so far as Faunce and Whitman are concerned, nor do we believe that the evidence shows that Smith in this instance intended to defraud the bank by stealing its funds. He could not well do that without the knowledge of all of the members of the Inter-City Co. The most that could be said is this, that Smith and the defendants with knowledge of the facts, created this overdraft for the purpose of protecting their real estate holdings in the Inter-City Co.; and it is admitted by every one that the

entire proceeds and all other securities obtained by the Inter-City Co. were turned over to the bank repaying it thus as far as it might be done for the advances made.

The important point is that the falsification of this account, which so far as the evidence is concerned in this case, concededly was done without the knowledge or consent of the defendants, is shown by all the circumstances to have been done by Smith to serve a purpose of his own. That is, Smith either did it to prevent his directors from learning how far he was aiding the Inter-City Co. and for that reason, or he did it to prevent the Inter-City Co. from learning that he did not handle their paper and finance them, as he had told them he could, and no matter which of these reasons was the real one, the circumstance could not be charged against the defendants, as excluding the hypothesis of their innocence.

We contend also, that the State has wholly failed in another particular. They rely upon the fact that the charter of the Roseville bank does not permit the making of an overdraft, and they offer no evidence to show that the credits in the way of notes discounted extended to the Inter-City Co. by Smith, were unreasonable or excessive credits, in view of its business assets, etc. They urge that no evidence was offered by the defendants to show the financial condition of the Company, which is true, but the defendants are not bound to establish their innocence, and the State was bound to establish their guilt.

In other words, assuming that the defendants did deliberately and knowingly create an overdraft, or discounted notes or both, the facts alone would not even indicate that they had intended to swindle or defraud the bank, as their property, holdings,

income, etc., might well have entitled them to several times the amount of credit they obtained by this manner, and there is nothing in the record to indicate that this was not true.

To complete the argument, the mere fact that the laws of New Jersey forbade this trust company from making loans, except upon authorized securities, would not make a man a criminal who obtained such a loan, without the specific securities, whatever the effect might be upon the official of the bank who thus violated the statute. The State, relying upon circumstances must make out a complete chain by showing the inability of the Inter-City Co. to take care of the credits which had been extended to it, before even an inference of guilt would be drawn.

III.

The Trial Judge erred in his charge to the jury.

(*a*) The trial judge stated the claim of the State to be (page 290, line 10): "That this overdraft is evidence of the conspiracy which arose when Smith notified Whitman and Faunce of the condition of their account, and which continued after that" (Assignment of error 47, page 313, line 15), (No. 48, page 332, line 15).

He further said in commenting on this (page 290, line 35): "Even if this situation be true, even though the defendants did not make an arrangement with Smith to honor these checks specifically, if they knew the fact and concurred in the facts and aided in their execution, under the law they are fellow conspirators" (Assignment 48, page 313, line 30, No. 49 page 332, line 30; Cause

of reversal 4, paragraphs a, b and c), (page 335, line 36).

In thus charging the jury the trial judge erred in that he charged them that if there was an overdraft and the defendants knew it, they would be guilty of the conspiracy charged.

The conspiracy charged was a conspiracy to defraud the trust company. The mere making of an overdraft by Faunce, as an officer of the Inter-City Company, would in no sense constitute this crime, even though he knew he was overdrawing. Intent to defraud cannot be inferred from the mere proof of an intentional and repeated overdraft (See also on this the argument of counsel for defendant Whitman in point 4 of their brief).

Something more than the mere overdraft is necessary. The State recognized this in charging in the indictment that the defendants had knowledge of the falslfication of the records of the trust company, which were designed to conceal the overdraft. The trial judge erred, therefore, in charging that the mere knowledge of the overdraft made them guilty as conspirators of the crime charged.

Moreover the facts upon which the State relied were as consistent with the innocence of the defendant Faunce, as with his guilt. The State relied entirely on the testimony of Raymond E. Smith. He testified that at the time of the alleged overdrafts he expected that the account would be made good, and he claimed to have repeatedly demanded of Whitman that it should be made good, and also claims to have once spoken to Faunce about it.

The theory of the State's case was that the defendants and Raymond E. Smith had conspired and agreed together that the account should not

be made good but that the overdrafts were made with the deliberate intention of defrauding the bank. The facts as proved are utterly inconsistent with the State's theory of the case. The judge, however, categorically charged the jury that the fact of the overdraft, if proved, constituted proof of the conspiracy, for which they were indicted. At page 290 of the charge the trial judge stated the State's contention to be that the overdraft was the evidence of the conspiracy; he commented on the fact that Smith testified that he had told the defendants of the overdraft, and then charged that (page 290, line 37). "If they knew the fact and concurred in the facts and aided in their execution, under the law they are fellow conspirators." On page 293, line 25, of the charge, after commenting on the contention of both the defendants and the State, he said to the jury (assignment 51, page 314, line 30, cause of reversal 4, a, b and c): "I have said that an overdraft is not necessarily criminal, but it may become an element of the crime of conspiracy if it is shown that it was done pursuant to an unlawful agreement." He then said: "The only question is whether the defendants knew what the real situation, as alleged by the State, was, either through the direct knowledge imparted by Smith, or through such facts and circumstances as would charge them with guilty knowledge, that is, by acquiescing in those things which they knew were being done. It is largely a question of the credibility of Smith."

The only facts and circumsances which the case by any construction showed the defendants knew of, were the overdrafts. The evidence is overwhelming that they had no knowledge of the falslfication of the records. The testimony of

Smith showed conclusively that there was no "unlawful agreement." The judge's charge, therefore, amounted to this: That if the jury found that there were in fact overdrafts, those overdrafts branded them as guilty of the conspiracy charged in the indictment. This charge entirely overlooked the effect of the testimony of Raymond E. Smith, that he was continually applying to Whitman, and once to Faunce that the account be made good. The idea of an effort on the part of Smith to persuade the defendants to make the account good, was utterly inconsistent with the allegation of the State that the defendants and Smith had agreed that the account should not be made good, and that the trust company should be cheated out of its funds. While the defendant Faunce at the trial asked for no specific instruction upon this point, nevertheless it was error for the trial judge to have charged that the finding of an overdraft as a fact, constituted him guilty of the charge in the indictment, because no unlawful agreement or corrupt motive resulted from the mere fact of the overdraft. Something more was needed to constitute the defendant guilty and this additional element the trial judge omitted entirely in his charge.

(*b*) The trial judge in his charge commented on the position of the State's witness Raymond E. Smith as though he was a witness for the defendant, whose testimony required corroboration (Assignment of error 50, page 314, line 10; cause of reversal 4, paragraph g, page 317, line 25).

In his charge at page 292, the court commented on the fact (line 23) that the jury were the sole judges of the credibility of the witnesses, and the weight of their testimony; instructed them that they should reconcile conflicts of testimony where

possible (line 29), and then said (line 30): "Where it is not possible, you should consider the interest these defendants have, if any, in the result of the issue on trial. You may consider the vital interest of the defendants in the outcome of these proceedings, and in this connection it is my duty to call your attention to the fact that Raymond E. Smith, one of the alleged conspirators, is a confessed criminal," etc. To be sure Raymond E. Smith had been called as a witness for the State, but no one can tell how much appreciation the jury had of the rules of evidence, so well known to lawyers, that a party calling a witness is bound by his evidence. The impression which the jury must have had from hearing this part of the judge's charge, was that Raymond E. Smith "one of the alleged conspirators" was in common parlance, "on the side of" the defendants. He had been indicted with them as a defendant. If the jury gained the impression, as they were quite entitled to do from the language of the judge, that the evidence of Raymond E. Smith was given on their behalf, and needed corroboration, they gained an impression most damaging to the defendant, for Raymond E. Smith by his own admission was the man who had embezzled the funds and wrecked the trust company.

IV.

The Essex Oyer and Terminer had no jurisdiction over the offense charged against the defendant Faunce and a verdict of acquittal should have been directed on that ground (page 284, lines 15-35; page 312, line 15; page 316, line 33).

The State charged in its indictment that both the conspiracy and the overt acts alleged to have

been carried out pursuant to the conspiracy, namely, the withdrawing of moneys and the falslfication of records, were all made and performed in the County of Essex, and within the jurisdiction of the Court (page 6, line 37, page 8, line 24).

At the conclusion of the entire case the defendant Faunce moved for the direction of a verdict of acquittal in his favor on the grounds, among others (page 284, lines 20-36) that "it affirmatively appears on the State's case, and under all the evidence that the defendant Faunce was in New York City at the times when the conspiracy is alleged to have been entered into," and further "that all checks drawn by defendant Faunce and all acts charged against him were made and performed in the State of New York and not in the State of New Jersey."

The facts upon which this motion was predicated are true. Faunce lived in New York City. Smith so testified (page 106, line 16), and Faunce so testified (page 250, line 37). The office of the Inter-city Co., of which Faunce was president was in New York City. The evidence throughout shows that, and Faunce so expressly testified (page 266, line 24). The office at first was at 5 Beekman Street, afterwards at 150 Broadway.

All the checks and notes which Faunce signed were signed by him in the State of New York. Faunce's testimony was (page 252, line 17):

> "Q. Did you have any part in the financial transactions with the Roseville Trust Company other than the drawing of checks? A. No, sir; and endorsing of notes; I endorsed some notes.
>
> "Q. Did you draw checks in any other place than New York City? A. Never."

Smith did not and could not contradict this. He was asked about it and said: "I can't tell that; I have no way of telling it" (page 159, line 35):

Faunce testified again (page 252, line 36):

> "Q. Did you personally make any deposits in the Roseville Trust Company? A. Never.
>
> "Q. Did you at any time present a personal check at the Roseville Trust Company counter? A. Never.
>
> "Q. Did you have any conversation with Raymond E. Smith at the Roseville Trust Company at the time of the opening of the account A. Just an introduction.
>
> "Q. When was that? A. Some time in November, 1912.
>
> "Q. Did you see him at the Roseville Trust Company— A. I couldn't recall the date now; it was shortly after the opening of the account. I believe Mr. Smith wanted to know who I was, wanted to meet me."

Apart from that first introduction when or shortly after the account was opened in November, 1912, Faunce never went near the Roseville Trust Co. There is no suggestion in the evidence that any overdrafts were made until some time in 1913.

As opposed to this Raymond E. Smith testified that he "believed" (page 160, line 10) that Faunce had once presented a check personally at the bank, but he was utterly unable to tell when it was. Apparently he had in mind the time when Faunce went out and was introduced to him shortly after the account was opened. Smith's testimony was (page 160, line 22):

> "Q. When it was opened he came out there and you said in your direct examination that

Mr. Whitman, for the purpose of opening the account, came out there. Is that about the time the cash was drawn? A. At the time the account was opened with the Roseville Trust Company?

"Q. Yes. A. No, sir, I think not.

"Q. Was it soon after that Mr. Faunce called? A. I don't remember; it was soon after.

"Q. When? A. It was some time in the year 1913, I think.

"Q. Was it prior to March 1st? A. I couldn't tell you.

"Q. Was he alone at the time? A. I think he was."

Without question, Smith was referring to the single instance which Faunce had testified to, when he was present at the Trust Company shortly after the account was opened.

The alleged conversations between Raymond E. Smith and Faunce, by which the State sought to fasten knowledge of the overdrafts upon Faunce, and so to make him a co-conspirator, were all had within the State of New York. This appears clearly from Smith's own testimony. There is not a word in Smith's testimony to indicate that he ever spoke to Faunce about the account in the State of New Jersey. Smith admitted frankly that he very seldom saw Faunce (page 120, line 1), although he had had frequent conversations with Whitman about the account (page 121, line 25). Whatever conversations he had with Faunce were in the State of New York. He was questioned about this by the State and testified (page 117, line 30):

"I remember a conversation I had with Mr. Faunce and Mr. Whitman and W. L. Smith in New York.

"Q. When? A. About the beginning of June when I told him I was in great need of money, that is, the bank was, and that I had come to New York to look up a new correspondent in order to raise some money for the institution and I told him at that time they would have to do all they could to help me."

He testified further (page 118, line 13):

"Q. What was the date of that conversation? A. About the first of June, I should say, one morning in New York."

A little farther on his attention was again directed to any conversations with Faunce, and he said (page 132, line 28):

"I didn't have many with Mr. Faunce; they were all at the time of some informal meeting or regular directors' meetings of the Inter-City Land & Securities Company." He then testified (page 123, line 1):

"Q. You have spoken about a meeting in New York; you said, I think, it was in June, 1913, when you said you went to New York for the purpose of finding another correspondent? A. Yes, sir.

"Q. Did you meet either Mr. Faunce or Mr. Whitman in New York that day? A. I met both of them there. That was not a meeting of the company's that day.

"Q. I merely ask you if you met them in New York? A. There was no meeting.

"Q. I mean where did you meet? A. Oh, I see. In the office of the Inter-City Land & Securities Company on Broadway. I have

forgotten the number now. It was in New York City.

"Q. What was the occasion of your visit to the land company's office? A. I went up there with the idea of talking over the matter that had brought me to New York with them and stating the fact that the Roseville Trust Company needed some money. I met Mr. Whitman there, if I remember, and then Mr. Faunce and then they called in Mr. Smith. It was right near where I was going and very handy and I stopped, up there. That is one reason I stopped there."

On cross examination he testified to a conversation with reference to the discounting of the $11,165 note of W. L. Smith as follows (page 131, line 14):

"Q. To whom did you make that statement? A. Both to Mr. Faunce and Whitman.

"Q. Where? A. At the meeting.

"Q. New York? A. New York, I believe."

Smith testified that he, Whitman, Faunce and W. L. Smith "had meetings" page (118, line 22), but it appeared on cross examination that most of these meetings were for the purpose of discussing the sale of the company's properties, since the buying and selling of real estate was the company's principal business (page 164, lines 1-10). These meetings it appears were held at different places, sometimes in this State, and were apparently very informal (page 172, lines 23-30). There is no suggestion in the evidence that at any of the meetings held in this State the matter of the account was discussed or mentioned. There is in evidence as Exhibit S20 (page 300), the minutes of the meet-

ing held at the Lackawanna Terminal, in Hoboken, at which Faunce, Raymond E. Smith and W. L. Smith and Whitman, were present, at which it was resolved that checks could be signed by either the president or treasurer. There is no suggestion in the evidence that the question of overdrafts was mentioned at that meeting by anybody. Smith does not mention it at all, and Faunce apparently left early (page 256, line 15).

This analysis, we believe, covers every reference in the testimony to the locus of either the alleged conspiracy or any overt acts pursuant thereto, so far as they affected the defendant Faunce. The allegation of the indictment that Faunce conspired, and acted in pursuance of the conspiracy, in the County of Essex and jurisdiction of the Court, is not made out. On the contrary the exact opposite appears.

Under Section 37 of the Crimes Act, a conspiracy to cheat and defraud, as charged here, is not a crime unless some act in execution of such agreement be done. Any act pursuant to such agreement, therefore, to subject the defendant to the jurisdiction of the Essex Oyer & Terminer, would have to be done within the State of New Jersey and County of Essex. No overt act within that jurisdiction was proved.

At common law the corrupt agreement or conspiracy was the crime. No overt act had to be performed. If the indictment is sought to be sustained under the common law, then the fraudulent combining or agreement between the alleged co-conspirators must be proved to have taken place in the jurisdiction of the Essex Oyer & Terminer. namely, the County of Essex and State of New Jersey. The facts however, show that if Faunce entered into any corrupt agreement (which we

deny), it was entered into in the State of New York.

Again at common law had there been a fraudulent agreement outside of the jurisdiction, but an overt act performed within the jurisdiction of the Court, then such overt act might be held to be a continuance and renewal of the fraudulent agreement, but again, the facts fail to establish any such situation.

Two cases which analyze and sum up the law relating to conspiracy in its application to the jurisdiction of the Court are *Hyde* vs. *U. S.*, 225 U. S., 347, and *Brown* vs. *Elliott,* 225 U. S., 392.

The Court in the *Hyde* case held—as stated in the *Brown* case (225 U. S., at page 400) "that the place of trial could be any state and district where an overt act was performed."

In *Nugent* vs. *State,* 77 N. J. L., 84, the indictment came before the Court on application for a certiorari. Justice Reed said (page 85):

> "It is again insisted that the indictment does not show that the defendants conspired to commit a crime in the County of Essex. Assuming that such a charge was essential under the statute, it nevertheless appears in the indictment."

And analyzing the indictment he said further (page 86):

> "Conspirators may be indicted in the jurisdiction where the conspiracy was entered into (*Dealy* vs. *United States,* 152 U. S., 539), and this indictment charges it to have been in the County of Essex. The rule is that the conspirators may be indicted either in the county

> in which they first entered into the unlawful combination, or in any other county in which, in pursuance of it, and overt act was performed. 1 Bish. Cr. L., §61."

The indictment in the case at bar standing by itself would, perhaps, stand the test, for example on a motion to dismiss it; but the proof adduced at the trial utterly failed to bring the case, as against Faunce, within the jurisdiction of the Court.

In *Noyes* vs. *State,* 41 N. J. L., 418, affirmed 43 N. J. L., 672, the rules of law were applied to the facts and the conviction upheld. In that case (page 421) "there was a completed conspiracy effected with respect to the transaction in question in the State of New York." While the facts there were such as to vindicate the jurisdiction of the Court "on legal principles that are deemed unquestionable" (page 422); the views of the learned Chief Justice on the broader question of the jurisdiction of the Court were stated as follows (page 421):

> "To describe it in a word, the plan projected was to turn over the property and assets of the New Jersey Mutual Life Insurance Company to another company in a manner that was a fraud upon the former corporation. This plan was concocted in New York, and was perfected there by the execution and delivery of an assignment by Mr. Stedwell, the president of the New Jersey Mutual, to the defendant, Mr. Noyes. The defendant was the only one of the conspirators who came in person into this state and performed in this state any act in pursuance of the above-mentioned confeder-

acy. Granting these to be the whole of the facts to be taken into the account, it might be difficult to sustain, on satisfactory grounds, the judicial jurisdiction of this state over the offence. On such a foundation of facts, the crime having been completely committed in another state, the only incident that could be relied on to draw such crime under the cognizance of our Courts, would be the act of this defendant Noyes, in coming within this state and doing something in furtherance of the conspiracy. And accordingly, this is the jurisdictional feature relied on by the state, the theory being that in whatever place one of the conspirators does an act in furtherance of the common design, the illegal agreement is thereby renewed as to all, and consequently the locality of the crime is by the same means changed as to all. But no authority has been cited in support of this proposition, at least no authority that is apposite. The cases referred to go no further than to hold that this legal intendment, that the act of one confederate is the act of all, will arise where such act is done within the same jurisdiction in which the conspiracy occurred. The principle is one relating to mere venue, and not to international jurisdiction. The leading American decision cited in favor of the rule is that of *People* vs. *Mather,* 4 Wend., 229, and its entire effect is to assert the rule in the narrow form just defined, the only question in reference to this particular being, whether the crime, having been committed in the state, could be tried in a county in which only one of the conspirators had done some act in pursuance of the common design. Such inquiries

> appertain obviously to mere form and procedure, and seem to me to have no bearing whatever on that important and delicate subject which regulates the amenability of the citizen of one country, or commonwealth, to the criminal laws of another. The inclination of my mind is opposed to all extensions of such power beyond the field which is already clearly defined."

The facts upon which the Chief Justice sustained the jurisdiction of the Court were that the defendant Noyes after having received in New York the assignment of the corporate property, went to Newark, and there took possession of the office and effects of the company, but such possession the Court said (page 423), was not acquired by the act of the defendant Noyes alone,

> "but on the contrary the president of the company, Mr. Stedwell, cooperated in producing such result; this office and the effects in it were in the custody of this latter officer of the company (Stedman), and through the agency of his clerks he passed the property over on the occasion in question to this defendant."

The result was that (page 424),

> "As an intendment of law, the act of changing the possession of this property from the company to the defendant Noyes, was the joint act of such defendant and of Mr. Stedwell, who is also a defendant and that by such joint act the conspiracy was renewed and partly executed in this State."

In the *Noyes* case, both Noyes and Stedwell were active participants in the conspiracy and its execution. Here the defendant Faunce had no knowledge of, or part in, the essential thing, which, on the State's own theory, was the overt act necessary to establish the crime; namely the falsification of the records of the Trust Company in connection with the (knowingly) overdrawing of the account.

V.

The Trial Judge improperly admitted in evidence the personal ledger H to N, Exhibit S-9.

This is covered by assignment No. 3. Without repeating, we beg to claim the benefit of the argument advanced by counsel for the defendant Whitman upon this subject in their brief.

VI.

The Trial Judge improperly permitted the State's witness Thompson to testify as to the payment of checks.

This is covered by assignments 5 and 6 (page 306, lines 1-16; Nos. 6 and 7, page 324). Thompson's testimony was based upon the records of the trust company which were admitted to have been falsified. Counsel reserved the benefit of their objection to all this line of testimony beginning on page 46.

His testimony was based on the ledger (page 46, line 26). If, as we contend, the ledger was not properly in evidence, his testimony was improper.

VII.

The Trial Judge permitted the witness Ferguson to reconstruct the account and testify thereto.

This is covered by assignment No. 11 (page 306, line 25; No. 12, page 325). Ferguson was a bank examiner. He had no personal knowledge of anything which transpired in the Roseville Trust Co., except as he gathered it from the books and records of that company after its failure. Nevertheless the Trial Judge permitted him to reconstruct the account by which he made up what he considered an ideal statement of what the account should be from such records as he found in the banking house. His reconstructed account was made up of records, some of which had been offered in evidence at the trial, and some of which were not even produced.

Without repeating, we beg to claim the benefit of the argument advanced by counsel for the defendant Whitman upon the subject in their brief.

VIII.

The Trial Judge improperly admitted in evidence Exhibit S-18.

This is covered by assignment 17 (page 307, line 28; No. 18, page 326).

Exhibit S-18 was the bills purchase book of the trust company (page 300, line 1). It contained a record of all the notes in evidence except the note of W. L. Smith for $11,165.

Without repeating, we beg to claim the benefit of the argument advanced by counsel for the defendant Whitman upon this subject in their brief.

IX.

The Trial Judge refused to permit counsel for the defendant to ask the State's witness Raymond E. Smith whether he ever informed Whitman or Faunce that he was taking money from the trust company.

This is covered by assignment 22 (page 308, line 16; No. 23, page 326).

The question appears at page 127, line 1.

Without repeating, we beg to claim the benefit of the argument advanced by counsel for the defendant Whitman upon this subject in their brief.

We respectfully urge that the record sent up contains errors, material and damaging to the defendant Faunce and that the conviction should be set aside.

Respectfully submitted,

McCARTER & ENGLISH,
Attorneys of John B. Faunce,
Plaintiff in Error.

GEORGE B. HOLBERT,
of Counsel.