ICLR: King's/Queen's Bench Division/1878/Volume 3/CHARLES BRADLAUGH AND ANNIE BESANT v. THE QUEEN. - (1878) 3 Q.B.D. 607

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[IN THE COURT OF APPEAL.]

CHARLES BRADLAUGH AND ANNIE BESANT v. THE QUEEN.

1878 Feb. 12.

BRAMWELL, BRETT and COTTON, L.JJ.

Criminal Pleading - Indictment for publishing Obscene Libel - Omission to set out Words charged as Obscene - Arrest of Judgment - Error - Defect not cured by Verdict.

In an indictment for publishing an obscene book, it is not sufficient to describe the book by its title only, for the words thereof alleged to be obscene must be set out; and if they are omitted, the defect will not be cured by a verdict of guilty, and the indictment will be bad either upon arrest of judgment or upon error.

Judgment of the Queen's Bench Division (2 Q.B.D. 569) reversed.

ERROR upon a judgment of the Queen's Bench Division(1).

The record alleged that at the Central Criminal Court an indictment was presented against the plaintiffs in error, the first count of which was in the following terms:-

> "Central Criminal Court, to wit: The jurors for Our Lady the Queen, upon their oath present, that Charles Bradlaugh and Annie Besant unlawfully and wickedly devising, contriving, and intending as much as in them lay to vitiate and corrupt the morals as well of youth as of divers other liege subjects of our said Lady the Queen, and to incite and encourage the said liege subjects to indecent, obscene, unnatural, and immoral practices, and bring them to a state of wickedness, lewdness, and debauchery, heretofore, to wit, on the 24th day of March, in the year of Our Lord, 1877, in the City of London, and within the jurisdiction of the said Central Criminal Court, unlawfully, wickedly, knowingly, wilfully, and designedly, did print, publish, sell, and utter a certain indecent, lewd, filthy, and obscene libel, to wit, a certain indecent, lewd, filthy, bawdy, and obscene book called 'Fruits of Philosophy,' thereby contaminating, vitiating, and corrupting the morals as well of youth as of other liege subjects of our said Lady the Queen, and bringing the said liege subjects to a state of wickedness, lewdness, de-

bauchery, and immorality, in contempt of our said Lady the Queen and her laws, to the evil and pernicious example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown, and dignity."

(1) 2 Q.B.D. 569.

The second and only other count was precisely similar, except that the date of the alleged offence was the 29th of March, 1877. The record then set forth the removal of the indictment into the Queen's Bench Division, by a writ specifying Middlesex as the county and jurisdiction in which the indictment was to be tried, the plea of not guilty by the plaintiffs in error, the joinder of issue thereon by F. Cockburn, as the Queen's coroner and attorney, and and the award of jury process. The record afterwards alleged, amongst other matters unnecessary to be mentioned, that on the 18th of June, 1877, before Cockburn, C.J., a jury was impanelled and sworn, and a verdict of guilty was found against both the plaintiffs in error. The record afterwards proceeded as follows: "And because the Court of Our Lady the Queen now here, to wit, the Queen's Bench Division of the High Court of Justice, is not as yet advised about giving their judgment of and upon the premises whereof the said Charles Bradlaugh and Annie Besant are so convicted as aforesaid, day is therefore given as well to the said F. Cockburn, Esq., who for our said Lady the Queen in this behalf prosecuteth, as to the said Charles Bradlaugh and Annie Besant, until the 28th day of June, in the 41st year of the reign of Our Lady the Queen, before our said Lady the Queen, at Westminster, that is to say, before the Queen's Bench Division of the High Court of Justice, to hear their judgment thereupon."

The record then alleged that on the 28th of June it was adjudged and ordered by the Queen's Bench Division, upon each of the counts of the indictment, that the plaintiffs in error should be severally imprisoned for six calendar months, and should severally pay a fine of 200*l.*, and should severally give security for good behaviour for two years.

Error having been brought, the following were alleged as the grounds thereof:-

(I.) That the indictment shews no offence known to the law, and does not warrant the conviction and sentence.

(II.) That the libel in question was professedly a work on medical science and political economy, and that in the indictment in which the said work is alleged to be "an indecent, lewd, filthy, and obscene libel," such portions of the work as were libellous as aforesaid ought to have been set out.

(III.) That the indictment does not shew any specific offence, and that the particular words supposed to be criminal ought to have been expressly specified and set forth in the indictment.

The Queen's coroner and attorney joined in error.

Jan. 29, 30, 31. The plaintiff in error**, Bradlaugh**, in person. The omission to set out the book in the indictment renders it bad; whenever words formed the ground of complaint in an action of law, they must have been set out in the declaration: *Zenobio v. Axtell* (1), *Cook v. Cox* (2), *Wright v. Clements* (3); and this rule also applies to criminal cases: Archbold's Crim. Pl. and Evid. bk. i. pt. 1. ch. 1, s. 3 (ed. 18), p. 58. In *Rex v. Sparling* (4), where the defendant was convicted of profane cursing and swearing under 6 & 7 Wm. 3, c. 11, the conviction was held bad because the curses and oaths were not set out, and *Rex v. Popplewell* (5) is to the like effect. In *Hunter's Case* (6) an indictment for forgery was held bad under the then existing law, because the words alleged to be forged were insufficiently described. In *Rex v. Mason* (7) it was held to be a fatal objection that the indictment did not disclose the nature of the false pretences, and this case has not been overruled by *Reg. v. Goldsmith* (8), in which the indictment was for unlawfully receiving goods knowing them to have been obtained by a false pretence. In a libel, the words complained of constitute the crime, and it is a rule of criminal pleading, that "whatever circumstances are necessary to constitute the crime imputed must be set out:" *Rex v. Horne* (9); and the jury are entitled to judge for themselves whether the interpretation put upon the words in the indictment is the meaning intended to be conveyed in the libel: *Rex v. Fitzharris* (10); and any variance between the meaning alleged and the meaning proved will be fatal: Russell on Crimes, vol. iii. bk. 5, ch. 3, s. 13, 5th ed. p. 219, citing *Tabart v. Tipper* (11), and *Rex v. Bear*. (12) Before the

(1) 6 T. R. 162.

(2) 3 M. & S. 110.

(3) 3 B. & Ald. 503.

(4) 1 Str. 498.

(5) 2 Str. 686.

(6) 2 Lea. C. C. 624.

(7) 2 T. R. 581.

(8) Law Rep. 2 C. C. 74.

(9) 20 How. St. Tr. 792; per De Grey, C.J., delivering the unanimous opinion of the judges in the House of Lords.

(10) 8 How. St. Tr. 356.

(11) 1 Camp. 352.

(12) 2 Salk. 417.

Queen's Bench Division(1), for the Crown reliance was placed upon *Dr. Sacheverell's Case* (2); but that case is really a very strong authority against this prosecution, for the judges present were unanimously of opinion that by the laws of England and constant practice in all prosecutions by indictment or information for crimes and misdemeanours by writing or speaking, the particular words supposed to be criminal must be expressly specified in the indictment or information(3). This proposition is really identical with the contention of the plaintiffs in error. It is true that the House of Lords decided(4) that in a prosecution by impeachment it was unnecessary to set out the words complained of in the articles of impeachment; but then it may well be that proceedings in Parliament are governed by different rules from proceedings in courts of criminal law. In *Rex v. Layer* (5) the judges overruled an objection that in an indictment for high treason the words complained of must be set out; but the real explanation of that decision is that in high treason words are not the gist of the offence, but merely evidence or proof of it: Archbold's Crim. Pl. and Evid. bk. i. pt. 1, ch. 1, s. 3 (ed. 18), p. 58. In *Rex v. Curll* (6), which appears to be the first case where an obscene libel was punished in the temporal courts, the passages complained of were set out. The necessity of setting out the libellous matter correctly is pointed out in Folkard on Slander and Libel, ch. 42, p. 699. Before the Queen's Bench Division the counsel for the Crown relied upon *The Commonwealth v. Sharpless* (7), and *The Commonwealth v. Holmes* (8); but the rule in the American courts id that if the obscene libel is omitted it must be averred that it is too gross to be inserted in the indictment: *The Commonwealth v. Tarbox* (9); and no averment of that kind here occurs. Moreover, those authorities may be dismissed with the remark that they are the decisions of the tribunals of a foreign country, and that the validity of the present indictment depends upon the common law of England. A total omission of a necessary

(1) 2 Q.B.D. 571.

(2) 15 How. St. Tr. 1.

(3) 15 How. St. Tr. 466, 467.

(4) 15 How. St. Tr. 467, 473.

(5) 6 Har. St. Tr. 328, 329, 330, 331; 16 How. St. Tr. 315, 316, 317, 318.

(6) 2 Str. 788; 17 How. St. Tr. 154.

(7) 2 Ser. & Raw. (Pennsylvania), 91.

(8) 17 Massachusetts, 336.

(9) 1 Cush. (Massachusetts), 66.

averment is not cured at common law by the verdict: *Hearne v. Stowell* (1); and as the indictment was not intended to relate to an offence either created or regulated by statute, the prosecution cannot rely upon the latter clause of 7 Geo. 4, c. 64, s. 21. The defect is not of a merely formal nature, and therefore the objection holds good, although this is not an appeal from a decision upon demurrer or upon a motion to quash the indictment before the jury were sworn: 14 & 15 Vict. c. 100, s. 25; *Sill v. Reg*. (2)

Annie Besant, plaintiff in error, in person. According to the English precedents the indictment is bad for uncertainty; and the decisions in the American courts were pronounced by foreign tribunals and cannot countervail the current of authorities in England. The indictment alleges simply that the book is obscene: this is a hardship upon the plaintiffs in error, for they could not tell whether the whole of the book or only portions of it would be relied upon as obscene: if the words complained of were set out in the indictment, they would have known what charge they were called upon to meet.

Sir H. S. Giffard, S.G., for the Crown. The indictment discloses an offence at common law, and the objection is only that the facts constituting the crime are imperfectly averred: this defect is cured by the verdict. *Rex v. Mason* (3) can hardly be deemed to be good law after *Reg. v. Goldsmith* (4); but if it can be supported it is distinguishable, for the indictment charged the defendant with obtaining money by "false pretences:" now false pretences relating to future events are not indictable, and the indictment was therefore uncertain; but the publication of an obscene book is always indictable, whatever the motive of the person publishing it may be.(5) In *Heymann v. Reg*. (6) it was held that a defective averment in an indictment for conspiracy was cured by the verdict of guilty. In *Rex v. Bishop of Llandaff* (7) it was held that an omission to allege a presentation was cured by the verdict, and as is pointed out in Serjeant Williams'

(1) 12 Ad. & E. 719.

(2) 1 E. & B. 553; 22 L. J. (M.C.) 41.

(3) 2 T. R. 581.

(4) Law Rep. 2 C. C. 74.

(5) See *Reg. v. Hicklin*, Law Rep. 3 Q. B. 360; and *Steele v. Brannan*, Law Rep. 7 C. P. 261.

(6) Law Rep. 8 Q. B. 102.

(7) 2 Str. 1006.

note to *Stennel v. Hogg* (1), the decision proceeded upon the ground of the common law. Upon a similar principle a declaration, which simply charged the defendant with maliciously prosecuting the plaintiff for perjury, was held good after verdict: *Pippet v. Hearn*. (2) The recent decision in this Court of *Reg. v. Aspinall* (3) strongly supports the principle laid down in *Heymann v. Reg*. (4) An indictment for keeping a disorderly house may be framed in general terms, and no valid reason exists why greater strictness should be required as to an indictment for an obscene libel. The defect being only formal, it is now too late to raise any objection to it: 14 & 15 Vict. c. 100, s. 25; and it may be admitted for the Crown that the indictment would be held bad upon demurrer.

[BRAMWELL, L.J. If the defect were only formal, it might have been amended by the Court; but how could the Court direct the officer to amend the indictment, and thereby make it charge that the grand jury had presented as obscene those portions of the book, which the presiding judge considered to be obscene?]

Even in high treason the words complained of need not be stated: *Rex v. Stayley* (5); *Rex v. Layer*. (6) In *Dugdale v. Reg*. (7), the objection was not taken that the obscene words and prints must be set out in the indictment, and this case forms strong negative evidence that the present indictment contains all that is necessary. In many offences it is not necessary that the indictment should state the offence with particularity; thus, in *Rex v. Gill* (8), an indictment charging the defendants with conspiring by false pretences to obtain money was held good. The defect being an imperfect averment only, the cases as to the effect of a total omission, such as *Reg v. Gray* (9), do not apply: the difference between an imperfect averment and a total omission is pointed out in *Reg. v. Aspinall*. (10)

F. Mead, for the Crown. It is unnecessary in an indictment

(1) 1 Notes to Saunders by Williams, 260, at p. 267.

(2) 5 B. & Ald. 634.

(3) 2 Q.B.D. 48.

(4) Law Rep. 8 Q. B. 102.

(5) 6 How. St. Tr. 1501.

(6) 16 How. St. Tr. 315, 316, 317, 318.

(7) 1 E. & B. 435.

(8) 2 B. & Ald. 204.

(9) L. & C. 365; 33 L. J (M.C.) 78.

(10) 2 Q.B.D. 48, at p. 58.

for an obscene libel to set out the words complained of, and no objection can be taken to their omission even upon demurrer, or by motion to quash. The authorities relied upon by the plaintiffs in error relate to defamatory libels; and the publication of a blasphemous, seditious, or defamatory libel is an offence standing upon a different footing from the publication of an obscene libel: thus, by 5 & 6 Vict. c. 38, courts of quarter sessions are forbidden to try blasphemous, seditious, or defamatory libels, but they are not prohibited from trying obscene libels. In *Dugdale v. Reg*. (1), decided after the passing of that statute, the indictment contained counts for obscene libels, and the prisoner was found guilty thereon at the Middlesex sessions. *Rex v. Curll* (2) merely established that the publication of an obscene book is indictable as an offence contra bonos mores, and punishable in the temporal courts; it was not decided that it is an offence of the same nature and subject to the same rules as a defamatory, blasphemous, or seditious libel. The offence charged upon this indictment is like that contained in the indictment in *Rex v. Sedley* (3), and it is not a libel in the true sense of the word: it is more like the offence of common nuisance. It is, therefore, unnecessary that the words should be set out; and although there may be no decisions in the English courts to that effect, yet the precedents in 2 Chitty's Criminal Law, ch. 3, pp. 43, 45, shew that the words may be omitted: it is true that this indictment, unlike those precedents, does not contain an averment that the matters contained in the book are too gross to be set out; but that defect is cured by the verdict; and at all events, the omission of that averment is supplied by the description of the book as "an indecent, lewd, filthy, and obscene libel." The cases in the American courts clearly support the argument for the Crown: thus, in *The Commonwealth v. Sharpless* (4), it was held to be unnecessary to set out an indecent picture in an indictment, and *The Commonwealth v. Holmes* (5), and *The People v. Girardin* (6), and *The Commonwealth v. Tarbox* (7), shew that the words of an obscene

(1) See the report in Dearsley, 64, where the indictment is set out in full.

(2) 2 Str. 788.

(3) 1 Sid. 168; 1 Keb. 620; 17 How. St. Tr. 155.

(4) 2 Serg. & Rawl. (Pennsylvania), 91.

(5) 17 Massachusetts, 336.

(6) 1 Mann. (Michigan), 90.

(7) 1 Cush. (Massachusetts) 66.

libel may be omitted if they are so foul as to defile the records of the Court.

Plaintiff in error, **Bradlaugh**, in reply. The defect consists in an entire omission of a necessary averment. *Heymann v. Reg*. (1) is not in point; for the offence there charged was a conspiracy to defeat the operation of a statute; here the offence is regulated solely by the common law. In *Rex v. Wilkes* (2) the passages complained of in the Essay on Woman appear to have been set out in the information. *Rex v. Sedley* (3) stands upon a totally different footing from the present case. It is submitted that all prosecutions for libel are subject to the same rules, whether the words are defamatory, blasphemous, seditious, or obscene. The general words of the indictment would apply to any book which is in any degree obscene.(4)

Plaintiff in error, Annie Besant, in reply. In order to establish that the words ought to have been set out in the present indictment, it is necessary only to cite the following cases: as to a seditious libel, *Rex v. Paine* (5); as to a blasphemous libel, *Rex v. Williams* (6); and to an obscene libel, *Rex v. Curll*. (7)

Cur. adv. vult.

Feb. 12. BRAMWELL, L.J. This case comes before us upon a question of substantial importance, but nevertheless of a purely technical nature, and the decision which we have to pronounce is quite apart from the merits, and quite apart from the consideration

(1) Law Rep. 8 Q. B. 102.

(2) 4 Burr. 2527; 19 How. St. Tr. 1075.

(3) 1 Sid. 168; 1 Keb. 620; 17 How, St. Tr. 155.

(4) The plaintiff in error, *Bradlaugh*, also argued that the judgment in the Queen's Bench Division was erroneous on the ground that the trial having taken place on the 18th of June was held upon a day which, under the practice existing before the Judicature Acts, would have fallen in the sittings after Trinity Term, and that the continuance should have been to a day in what would have been the following Michaelmas Term, and not to the 28th of June. The Court intimated that the argument was unsustainable, the Judicature Act, 1873, s. 26, having abolished terms except for the purpose of computing time. They, however, gave no judgment upon this objection, as the decision of the main question rendered it unnecessary to consider it. See 11 Geo. 4 & 1 Wm. 4, c. 70, s. 9.

(5) 22 How. St. Tr. 357.

(6) 26 How. St. Tr. 653.

(7) 2 Str. 788; 17 How. St. Tr. 153.

whether any wrong has or has not been done to the plaintiffs in error.

The question has arisen under the following circumstances:- An indictment was preferred against the plaintiffs in error charging them with publishing an obscene libel, "to wit, a certain indecent, lewd, filthy, and obscene book called 'Fruits of Philosophy;'" upon this indictment they were found guilty. They afterwards moved the Queen's Bench Division in arrest of judgment, and the rule which they asked for was refused; and the question before us is whether the judges of that Court were right in refusing that rule, or whether they ought to have granted it. The objection taken was that the indictment stated, but did not shew, that an offence had been committed; or, as it may be put in somewhat different language, the objection was that the indictment simply averred that an offence had been committed, and did not shew how it had been committed. For the Crown it was almost admitted by the Solicitor General that if the objection had been taken by demurrer, it would have been good; but it was urged that it was cured by the verdict, on the ground that the jury could not have found the plaintiffs in error guilty, unless an obscene libel had been proved at the trial to have been published by them.

It is undoubtedly a rule that an indictment for any offence must shew that the offence has been committed, and must shew how it has been committed; and if these particulars are omitted judgment will be arrested. No doubt that is the general rule; and I do not intend to allude to alterations made by statute as to criminal pleading, because no statute is applicable to this case; therefore in the observations which I shall make as to the form of indictments, I shall speak as if the common law were unaltered. It is not enough to indict a person for that he committed murder, or murdered A. B.; at common law it must be shewn what he did; so that if the acts charged are proved to have been perpetrated, it would be shewn that he committed murder; in other words, it is not enough to allege that he committed the crime, it must be shewn how he committed it. Similarly in an indictment for burglary, it is not enough to allege that the accused committed a burglary, or to allege that he committed a burglary at the house

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of A.; it must be charged that he burglariously entered between certain hours, with other circumstances shewing how the crime was committed, and those facts must be stated which constitute the crime said to have been committed. For this rule three reasons were assigned, two of which I do not think very important, at all events, at the present time; but the third is of a more substantial character. One of these reasons was, that the person indicted for the commission of a crime might know what charge he had to meet; if he were charged with murder or burglary generally, he would not know what particular act was alleged against him, and what he had to meet. Another reason was that, if convicted or acquitted on an indictment of that kind, the accused could not plead or prove, with the same facility as otherwise he might, a plea of autrefois convict or autrefois acquit. At the present day, I think those two reasons may be disregarded, because an accused person is very rarely ignorant of the charge which he is called upon to meet, and no real difficulty exists as to pleading or proving a former conviction or acquittal. But even as to these reasons I must admit that a very plausible observation was made by the female plaintiff in error, namely that the book, as a whole, was charged as an offence against her, and she could not possibly tell what passages would be selected as those on which the charge was to be supported. The third reason, in my opinion, is to this day substantial, and cannot be disregarded. It was that a defendant is entitled to take the opinion of the Court before which he is indicted by demurrer, or by motion in arrest of judgment, or the opinion of a Court of Error by writ of error, on the sufficiency of the statements in the indictment. It is true that a defendant has the decision of the judge presiding at the trial as to the validity of the indictment, yet it is not unreasonable that he should be at liberty in some way to question the decision of that judge. But whether these three reasons were good or bad, they clearly existed with reference to the form of indictment, which accordingly, as I have already intimated, must shew not only that the accused committed the offence, but must also state the facts which constituted it.

In some instances, words are the subject-matter of an indictment; and it follows from this principle, which I have mentioned,

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that wherever the offence consists of words written or spoken, those words must be stated in the indictment; if they are not, it will be defective upon demurrer, in arrest of judgment or upon writ of error. For instance, upon an indictment for perjury, it was necessary that the facts constituting the perjury should be set forth, and that necessity existed until 23 Geo. 2, c. 11. The authorities will be found in 2 Chitty's Crim. Law, ch. 9, p. 307, 2nd ed. That statute recited the extreme difficulty of getting convictions for perjury by reason of difficulties attending the prosecutions for them, and effected an alteration whereby the offence was allowed to be stated in a more general way. In like manner, upon an indictment for forgery it was necessary to set out the words of the forged instrument, as appears from 3 Chitty's Crim. Law, ch. 15, p. 1040, 2nd ed. In like manner, there can be no doubt that in an indictment for defamatory libel it was necessary to set out the words complained of, so that the Court might judge whether they were or could amount to a libel. Now, in support of this doctrine, I will refer to *Cook v. Cox*. (1) The action was for slander, and after a general verdict for the plaintiff a motion was made in arrest of judgment, on an objection to the last count, which did not set out the words complained of. Lord Ellenborough, C.J., in delivering the judgment of the Court, said(2): "The objection is, that in a count for slander by words the words themselves should be set out, in order that the defendant may know the certainty of the charge, and may be able to shape his defence, either on the general issue, or by plea of justification accordingly, and that this defect is not cured by verdict." Now, that is what his Lordship states to be the objection. Then he says(3): "The allegation then amounts to this; that the defendant by words, or by words coupled with acts, slandered the plaintiff in his trade, and therefore it is bad, and not cured by verdict, as a charge in the alternative. But supposing it to be taken as a charge of oral slander only, the weight of authorities is against the setting out words by their effect only. This count is equivalent to an allegation that the defendant used certain words to the effect of imputing insolvency to the plaintiff." Lord Ellenborough then goes on to

(1) 3 M. & S. 110.

(2) Page 113.

(3) Page 114.

cite the authorities, beginning with *Newton v. Stubbs* (1), which he says, "is an express authority that a count for using words to the effect following, &c., is bad after verdict," and he cites a variety of other cases, amongst them, *Dr. Sacheverell's Case* (2), and he says(3): "There seems to be no reason for any difference in this respect between civil and criminal cases; the action arises ex delicto." And, most certainly, if there was a difference, it would be that less strictness is required in civil than in criminal cases. Then he proceeds, after mentioning another case: "Unless the very words are set out, by which the charge is conveyed, it is almost, if not entirely, impossible to plead a recovery in one action in bar of a subsequent action for the same cause. Identity may be predicated with certainty of words, but not of the effect of them as produced upon the mind of a hearer. It has been said that this is not like the case of a defective title, but is more analogous to that of a title defectively set out. If, however, the authorities cited are law, and they are supported by more ancient ones, it is of the substance of a charge for slander by words that the words themselves should be set out with sufficient innuendoes, and a sufficient explanation, if required, to make them intelligible; it is of the substance of a charge of slander of any sort that it should not be laid in the alternative. Upon the whole, we think that this count is so defective in substance, that no intendment can be made to supply its defects from what can be presumed to have passed at the trial; and consequently that the judgment must be arrested." Now, that was the opinion of the Court of King's Bench, in an action for slander. I may mention that that case is referred to and recognised in *Solomon v. Lawson* (4), in which it was held that where a declaration for a libel set out a publication which referred to a previous publication, but, unless by reference to the language of the

previous publication, contained no libel, such previous publication must be considered as incorporated in the publication complained of, and must appear in the declaration to be set out verbatim, and not merely in substance. It is true that these two cases relate to actions at law, and the first is an action

(1) 2 Show. 435.

(2) 5 Har. St. Tr. 828; S. C. 15 How. St. Tr. 466, 467.

(3) Page 116.

(4) 8 Q. B. 823, at p. 839.

for slander. But, as was said by Mr. Justice Blackburn, in *Heymann v. Reg*. (1), at common law there is no difference between civil and criminal pleading except that, as I have before intimated, according to the spirit in which our law is administered, if there were a difference, more strictness would be required in criminal than in civil pleading. On these authorities it is manifest that where words constitute the offence, they must be stated in the indictment; and the authorities distinctly shew that where a defamatory libel is complained of, as was almost admitted by the Solicitor General, it must be stated in the indictment. It seems to me that whatever reason there is for setting out the words of a defamatory libel, is equally applicable to other writings that are called libels; though possibly, as Mr. Mead argued, they are called libels in a different sense from that in which defamatory writing is called a libel. Lord Justice Brett has collected authorities upon the matter. I do not know that there is any case in which judgment has been arrested on an indictment or information for a seditious, a blasphemous, or an obscene libel for want of setting out the words. But no precedent can be found in which they have not been set out, except in certain American cases, to which I shall presently refer; and except in two precedents in 2 Chitty's Crim. Law, pp. 43, 45, with which also I will deal, when I come to the American cases; and then there has been no judgment in an English Court of justice that they need not be set out, and no decision that the indictment will not be bad in arrest of judgment; and I repeat that whatever reason can be given for setting out the very words in defamatory libels, is equally true in blasphemous, obscene, or seditious libels. First, I will cite *Rex v. Curll* (2), where it was held that an obscene book is punishable as a libel in the temporal courts, and I will mention *Rex v. Sparling* (3), in which it was held that a conviction for cursing and swearing was bad, because it did not set out the words which had been used.

That being the general principle, we must deal with the argument that obscene libels need not be, and indeed ought not to be, set forth on the record; the reason given being that the records of the court should not be defiled by any indecency of that kind.

(1) Law Rep. 8 Q. B. 102, at p. 105.

(2) 2 Str. 788.

(3) 1 Str. 497.

Speaking with the greatest respect to those who have thought otherwise, I think the objection fanciful and imaginary. The records of a court of justice are not read with a view to entertainment or amusement; and if the objection has any weight, why does it not apply to other libels, and to other offences? I suppose the majority of mankind would think much worse of a blasphemous libel than even of an obscene libel, and would consider it much more objectionable that the terms of the former should be perpetuated than those of the latter. I suppose excellent reasons could be given why seditious language, possibly alluding disrespectfully to the Sovereign, should not be perpetuated on the court rolls. But there is another kind of libels, which, to my mind, if it were possible, ought to be effaced from the rolls, and yet it is admitted that they must be set out on the record - I mean libels defaming the character of a private person. Let us see which is the worst in its consequences. Suppose a man indicted for a libel charging an infamous crime against another. It must be set out upon the record, for it is a defamatory libel. Then the defendant may never plead, or may not be arrested, or he may die, and thus the charge may never be tried, and yet that statement is to remain on the record for all time, and no answer will be given to it. In some respects it would be well that such an imputation as that should be effaced from the records of the court - an imputation so grievous to the individual and all connected with him. However, the argument as to this point on the part of the Crown was supported by authority. The only semblance of authority in English law was the precedents which I have mentioned. We are in the habit of looking at precedents as containing the law; but that is when there is a series of them, so that we may be sure that they would not be in existence or perpetuated unless they had received the sanction of the courts; these are in truth but one precedent, and therefore I do not think I need pay much attention to them. In support of this contention for the Crown, some American cases were cited. Decisions in the Courts of the United States are not binding authorities; and although they may be expressly in point, yet if they are contrary to our law, they must be disregarded. Whatever respect we may be disposed to pay to the judge who pronounced the decision, the only manner in which an

American case can be used as a guide is to consider it as the expression of the opinion of an able person acquainted with the general spirit of our law; and therefore we may look at it in much the same way, as we may consider the decisions of the judges of French, Italian, or other courts who have pronounced opinions upon mercantile law, which to a certain extent is common to ourselves. But I do not think that the American cases cited before us assist the case for the prosecution. It seems to have been assumed in the Queen's Bench Division that *The Commonwealth v. Holmes* (1) shewed that generally an obscene libel need not be set forth in terms; but the plaintiff in error, Bradlaugh, has produced before us *The Commonwealth v. Tarbox* (2), which was not cited in the Court below. In that case the indictment was held to be good without setting forth the obscene words, because there was an allegation that the libel was so obscene that it could not be, with decency and propriety, put upon the record. The rule in the American courts appears to be that when there is no allegation excusing the statement of the words on the record, on the ground of what may be culled their infamy, they must be set out. In *The People v. Girardin* (3) a vigorous and forcible judgment was pronounced in favour of the view now put forward on behalf of the Crown; but even in that case some description of the nature of the obscenity complained of was inserted in the indictment. Here the indictment does not allege that the words are too obscene to be inserted; and therefore in any point of view the American cases assist the argument for the plaintiffs in error. It was suggested that the insertion of the words complained of is sufficiently excused, because it is averred that the plaintiffs in error published "a certain indecent, lewd, filthy, and obscene libel." That was very well met with this argument: Would not those words be the proper prefatory description of every obscene libel? and that in order to bring this indictment within the authority of the American cases it would have been necessary to aver that the libel was so utterly indecent, filthy, lewd, and obscene that it ought not to appear on the records of the court. For the prosecution reliance was placed also on *Dugdale v. The*

(1) 17 Massachusetts, 336.

(2) 1 Cush. (Massachusetts), 66.

(3) 1 Mann. (Michigan), 90.

Queen (1), but the decision in that case does not affect the rule of law laid down in previous authorities.

We are not asked to say that the law is altered, because no power can alter it but the legislature; and it is not pretended that the legislature has altered it. What in effect we are called upon to do is, to say that the law has been mistaken and misunderstood, and that it is not necessary to set forth words when they constitute a crime. Reliance has been placed upon certain cases as to the law relating to false pretences, in which it has been held that after verdict judgment could be arrested, although the false pretence had not been stated. Now I do not think it necessary to go critically into those cases. I do not suggest for a moment that they were not rightly decided, but I wish to make this observation about them, namely, that they are cases in which the courts have held, rightly or wrongly, that the defect was not a failure to state the ingredients of the offence, but they were cases in which those ingredients had been imperfectly stated. This distinction is explained in the judgment of Blackburn, J., in *Heymann v. The Queen* (2), where he says: "The objection to the count therefore is that it does not state that the agreement or confederacy was in contemplation or expectation of an adjudication; and if the question had arisen upon demurrer, I am not quite prepared to say that that might not have been a good objection. But it is a general rule of pleading at common law - and I think it necessary to say where there is a question of pleading at common law there is no distinction between the pleadings in civil cases and criminal cases - where an averment, which is necessary for the support of the pleading, is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the Court after verdict that the verdict could not have been found on this issue without proof of this averment, there, after verdict, the defective averment, which might have been bad on demurrer, is cured by the verdict." That rule was held to apply in *Reg. v. Goldsmith*. (3) The prisoner was indicted for receiving goods, knowing them to have been obtained by means of false and fraudulent pretences, which were not set out; she was convicted, and the Court

(1) 1 E. & B. 435; 22 L. J. (M.C.) 50; Dears. 64.

(2) Law Rep. 8 Q. B. 102, at p. 105.

(3) Law Rep. 2 C. C. 74.

for Crown Cases Reserved held the conviction must be affirmed. I concurred in thinking that the judgment ought not to be arrested, and my reason for so thinking was, that it was impossible that if the false pretence used by the principal offender had been proved at the trial to be a future promise, or a matter of opinion, the judge would have let that case go to the jury. A false pretence primâ facie imports not a promise, but a mis-representation as to something existing. These are the only observations which I shall make about this case; but whether it was rightly or wrongly decided, it is impossible that the judges who decided that case could

have intended to lay down a different law from that, which had been established by previous authorities. It is the duty of judges to administer the law as they find it, and to leave the legislature to amend whatever defects there may be. Therefore, even if this case may appear to be difficult to reconcile in principle with previous cases, it does not overrule the current of authorities, which shew that the offence, and the facts constituting the offence, must be stated; that where those facts consist in words, the words must be set forth; and that if they be not, the indictment is bad, either on demurrer, or in arrest of judgment, or upon a writ of error.

Before concluding I ought to consider the reasons given by the judges of the Queen's Bench Division for the opinion they expressed, and I need scarcely say that I entertain the greatest respect for their decision. I think the Lord Chief Justice gives three reasons. First, he thinks it would be inconvenient to set out in an indictment the whole of a book alleged to be obscene, if in its entirety it is made the subject of a prosecution, and he alludes to the inconvenience of setting out in extenso the whole of a publication which may consist of two or three volumes.(1) With great submission to the Lord Chief Justice, I think it very unlikely that a work contained in many volumes will ever be published, the obscenity of which cannot be made apparent without the whole being set out in the indictment. But if the question of convenience were to determine whether the libel is to be set out, it would be necessary to adopt some rule, and that rule would probably be that the words of a libel need not be set out when it is very long. But then it would be very difficult to

(1) 2 Q.B.D. 572, 573.

determine what length would render it unnecessary to set out the libel; would two volumes be too many, would one volume, 100 pages, or what other amount? It may be a great inconvenience that a long libel should be put upon the record; but whatever the inconvenience may be, it seems to me that upon an indictment for private defamation, blasphemy, obscenity, or sedition, where the objection is to the whole, and not to a part, the whole must be set out.

The next reason assigned by the Lord Chief Justice was that the objection ought to have been taken by demurrer.(1). It might be more convenient for the administration of justice to enact that if a man will not take an objection to an indictment by demurrer, he shall not be at liberty to take it by motion in arrest of judgment, or by error. I think that many reasons can be urged in favour of limiting the power to take advantage of technical defects, but that is a matter to be considered by the legislature, and the answer which I have to give to the second reason assigned by the Lord Chief Justice is that the law of the land, as it at present stands, allows technical objections to an indictment to be taken upon arrest of judgment or by writ of error.

Then the Lord Chief Justice proceeds to mention the third objection, namely(2), that "although the subject-matter of this indictment falls within the law of libel, it to a certain extent arises out of the general law as being commune nocumentum, a matter complaint as to which arises from its being subversive of public morals, and therefore a public nuisance." It may be admitted that an offence of the kind alleged in the indictment before us is commune nocumentum, and that it may still be so described; but the answer to the third reason assigned by the Lord Chief Justice is, that whether the offence is commune nocumentum or not, the plaintiffs in error are charged with having committed it, and therefore the law requires that it should be fully stated in the indictment. I find no exception to the general rule, that where the offence is alleged to be commune nocumentum, the ingredients of it, the facts which constitute it, need not be stated in the indictment. I cannot feel the force of the difficulties propounded by the Lord Chief Justice.

Then my Brother Mellor bases his decision upon the ground

(1) 2 Q.B.D. 573, 574.

(2) 2 Q.B.D. 574.

that an objection of this kind could be taken by demurrer to the indictment, and says that the point may still be taken upon error.(1) The Lord Chief Justice also says(1): "We shall, however, shelter ourselves under the decisions of the American courts, leaving the ultimate decision of this matter - an important one, no doubt - to the Court of Error." I am glad to find those two statements of opinion, because when one has the misfortune to differ from the views of learned judges, it is a very great comfort to know that those views were not entertained strongly. I cannot help thinking that the opinions expressed by the Lord Chief Justice and my Brother Mellor shew that they thought that this was a matter which was fairly open to argument, and which might be reviewed in the Court of Error. It results, therefore, to my mind, that the authorities to which I have referred are unimpeached and are binding upon us, and no sufficient reason has been given why we should not act upon them.

Now this indictment is not merely doubtful, but wholly defective; not only are the words not set forth, but no description of any kind is given. The offence alleged is that the plaintiffs in error "did print, publish, sell, and utter a certain indecent, lewd, filthy, and obscene libel, to wit, a certain indecent, lewd, bawdy, and obscene book called the 'Fruits of Philosophy.'" The words following "to wit" serve only as a mere identification of the alleged libel, and therefore the indictment may be read as though it had merely charged that the plaintiffs in error had uttered a certain indecent, lewd, filthy, bawdy, and obscene libel. Under these circumstances certainly I am of opinion that the judgment ought to have been arrested, and we ought now to pronounce judgment to that effect, and reverse the judgment of the Queen's Bench Division. I repeat that I wish it to be understood that we express no opinion whether this is a filthy and obscene, or an innocent book. We have not the materials before us for coming to a decision upon that point. We are deciding a dry point of law, which has nothing to do with the actual merits of the case.

BRETT, L.J. It seems to me that we are not called upon to differ from any strongly formed opinion of the Lord Chief Justice

(1) 2 Q.B.D. 574.

and Mr. Justice Mellor; I think that their judgments shew that they did not form a strong opinion as to the point which we shall have to determine in this case. Some of the authorities which we have had to consider were not brought before the Queen's Bench Division; and with regard to the argument for the Crown there, it

must be observed that, except *Reg. v. Dugdale* (1), the only decisions cited as to indictments were American cases, and I think it will appear that *Reg. v. Dugdale* (1) is not in point for the present proceedings. It is evident from the terms of his judgment that Mr. Justice Mellor came to the conclusion that the words complained of ought to be set out, and that their omission would have made this indictment bad on demurrer; and one ground of the judgment of the Lord Chief Justice was likewise that the objection ought to have been taken by demurrer. The only real point, therefore, upon which we differ from the learned judges, is, that the omission in this case was so great a defect that it is not cured by the verdict.

It seems to me that the questions raised in this case are, first, what is it necessary to set out in such an indictment as this; secondly, what kind of omissions can or cannot be cured by verdict; and thirdly, whether in this indictment the omission was so great a defect that it could not be cured by the verdict.

The first question really comes to this, whether in an indictment of this kind it is necessary to set out the words relied upon as constituting the offence. I cannot express what I believe to be the rule with regard to indictments more accurately in my view than was done in *Reg. v. Aspinall*. (2) In that case almost every sentence of the judgment delivered by me on behalf of Lord Justice Mellish and myself was, I may venture to say, the result of many cases; as to each sentence a laborious examination of cases was made, and it was intended to express what we considered to be the result of those cases, and I cannot find better words now in which to express the result. With regard to indictments, it is there said(3) that "every pleading, civil or criminal, must contain allegations of the existence of all the facts necessary to support the charge or defence set up by such pleading. An indictment

(1) 1 E. & B. 435; 22 L. J. (M.C.) 50; Dears. 64

(2) 2 Q.B.D. 48.

(3) 2 Q.B.D. at p. 56.

must, therefore, contain allegations of every fact necessary to constitute the criminal charge preferred by it. As in order to make acts criminal, they must always be done with a criminal mind, the existence of that criminality of mind must always be alleged. If, in order to support the charge, it is necessary to shew that certain acts have been committed, it is necessary to allege that those acts were in fact committed. If it is necessary to shew that those acts, when they were committed, were done with a particular intent, it is necessary to aver that intention. If it is necessary, in order to support the charge, that the existence of a certain fact should be negatived, that negative must be alleged." Where the crime alleged in an indictment consists of words written or spoken, it seems to me that the words are the facts which constitute the crime, and that for this reason the words must be set out.

Now, the word "libel," as popularly used, seems to mean only defamatory words; but words written, if obscene, blasphemous, or seditious, are technically called libels, and the publication of them is by the law of England an indictable offence. The publication of obscene words comes also under another class of offences, namely, the class of offences against morality. I am aware that in a valuable book lately published, Stephen's Digest of the Criminal Law, ch. xviii. art. 172, p. 104, obscene words written are not put under the class of libels, but they are put under the class of offences against morality But they have long been treated as falling within the legal meaning of the term "libel." Therefore libels may be divided into seditious, blasphemous, obscene, and defamatory. There are other offences which consist in words, either written or spo-

ken, such as perjury, false pretences, forgery, letters demanding money with threats, and the administration of unlawful oaths, and I think it will be found that indictments for committing any of these offences are all within the principle which I have stated, namely, that inasmuch as the crime consists in the words, the words must be stated; and I think I shall shew that in every one of those cases there is authority for saying that the words must be set out, unless the necessity for setting out the words is excused by statute; and it seems to me that each of the statutes which have been passed to excuse the necessity of setting out the words, is

(1878) 3 Q.B.D. 607 Page 628

an authority that without the statute, by the common law, the words must have been set out, and of course wherever it has been decided that the omission to set out the words is a fatal objection, even after verdict, the decision shews still more strongly than the statutes which I have mentioned, the necessity for setting out the words, and that the objection must be fatal on demurrer. As we have to deal with a decision of such high authority as that of the Queen's Bench Division I have thought it right to look carefully into the authorities, and those authorities I feel bound to cite, in order to justify the conclusion at which I have arrived.

One of the earliest cases relates to the offence of cursing and swearing and uttering of profane oaths, which of course consists in words: it is *Rex v. Sparling*. (1) This conviction was for profane cursing and swearing under 6 & 7 Wm. 3, c. 11, and it set forth that the defendant did "profanely swear 54 oaths, and did profanely curse 160 curses," but none of them were set out. There having been a conviction there must have been a trial, and a decision of the court of petty sessions, but it was held that the conviction was nought, because the oaths and curses were not set forth. The Court of King's Bench, including Lord Holt, gave as a reason - "For what is a profane oath or curse is a matter of law, and ought not to be left to the judgment of the witness; he may think false evidence is so; suppose it was for seditious or blasphemous words, must not the words themselves be set out, be they ever so bad, that the Court may judge whether they are seditious or blasphemous." *Rex v. Popplewell* (2), and *Rex v. Chaveney* (3) are cases of a similar kind, and relate to the same subject-matter. They are all after conviction, and they seem to me to be authorities for saying that whenever words are complained of they must be set out, and that the omission of the words is fatal after verdict or decision.

I will now refer to the law as to letters demanding money. In *Lloyd's Case* (4), an indictment, following the words of the Black Act, 9 Geo. 1, c. 22, charged the prisoner with feloniously sending a letter, without any name subscribed and signed thereto, demanding

(1) 1 Str. 497.

(2) 2 Str. 686.

(3) 2 Ld. Raym. 1368.

(4) 2 East's Pleas of the Crown, ch. 23, par. 5, p. 1122.

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money. After conviction it was moved in arrest of judgment that the indictment was bad on two grounds, one of which was that neither the letter nor even the substance of it was set forth in the indictment. It was held bad in arrest of judgment, and the reason was that in every indictment a complete offence must be shewn, and the report states that the precedents which had been looked through generally set forth the letter.

With regard to false pretences, it is only necessary to refer to *Rex v. Mason*. (1) That case is always quoted. I know it was said by Mr. Justice Mellor, in *Heymann v. Reg*. (2), that it had been virtually overruled, and in *Reg. v. Goldsmith* (3), Lord Justice Bramwell expressed his concurrence with the remark of Mr. Justice Mellor. But I have failed to find any case before *Heymann v. Reg*. (4), which treats *Rex v. Mason* (1) as overruled; on the contrary it has been again and again approved of and cited as a binding authority. The indictment was that the defendant had obtained from "one Robert Scofield divers sums of money, that is to say, the sum of two guineas, of the value of two pounds and two shillings of lawful money of Great Britain, of the proper moneys of the said Robert Scofield, by false pretences, with an intent then and there to cheat and defraud the said Robert Scofield of the same." The defendant pleaded not guilty, and on his trial at the quarter sessions at Worcester he was convicted, and sentenced to transportation; but the judgment was reversed by the Court of King's Bench upon a writ of error. The first objection was that the offence imputed was not specified with sufficient particularity. "Several objections," said Mr. Justice Buller (at p. 586), "have been made on the part of the defendant, but the material one on which I found my judgment is, that the indictment does not state what the false pretences were. … I am of opinion the first objection is fatal, and that the judgment must be reversed:" and Mr. Justice Grose says he is of opinion, "that the objection that the pretences are not specified is decisive, and for the reasons mentioned by the defendants' counsel; that the defendant may know what he is to defend, and the Court may see what punishment they are to inflict." I think that those are reasons why the words should be

(1) 2 T. R. 581.

(2) Law Rep. 8 Q. B. 102, at p. 103.

(3) Law Rep. 2 C. C. 74, at p. 79.

(4) Law Rep. 8 Q. B. 102.

set out, but to my mind the fundamental reason is, that the words are the ground of complaint. *Rex v. Perrott* (1) is to the same effect. It was an indictment for obtaining money by false pretences, and the judgment was arrested for the reason that, although the false pretences were set out, there was not an averment stating that they were false; but Lord Ellenborough says (p. 385): "Every indictment ought to be so framed as to convey to the party charged a certain knowledge of the crime imputed to him. The legislature have so held, and have recorded their opinion to that effect in the cases of perjury." And then he mentions the statute as to perjury, 23 Geo. 2, c. 11, which allows the substance of the charge to be set forth. He also cites *Rex v. Mason* (2), and approves of it.

The cases with regard to perjury I do not propose to cite, because 23 Geo. 2, c. 11(3) is a strong authority pronounced by the legislature itself, that by the common law, upon an indictment for perjury, the words must be set out.

As to the law of forgery I will mention *Hunter's Case*. (4) The prisoner was charged with the forgery of a navy bill, and the objection taken was that, although the indictment alleged the forgery of a receipt for money, there was not a sufficient averment to shew how the fabricated words amounted to a receipt. I quote the case for the opinion of the judges, delivered by Grose, J.(5), "The material objection to this indictment was,

that it did not contain any averment amounting to a capital offence, for although it avers that the prisoner forged a certain receipt for money, yet there is nothing stated in any of the counts to shew that the instrument set out, which does not on the face of it import to be a receipt, is in fact a receipt." *Rex v. Mason* (2) is then cited, and the learned judge afterwards adds, "In indictments for forging a bill, bond, note, will, or other instrument, an exact copy of the instrument respectively charged to have been forged must be stated."(6)

Now the next head which I will mention is the administering

(1) 2 M. & S. 379.

(2) 2 T. R. 581.

(3) Repealed by 30 & 31 Vict. c. 59, having been practically superseded by 14 & 15 Vict. c. 100, s. 20.

(4) 2 Leach, C. C. 624.

(5) Page 631.

(6) See as to the now existing law, 14 & 15 Vict. c. 100, ss. 5, 6, 7, and 24 & 25 Vict. c. 98, ss. 42, 43.

unlawful oaths. This offence clearly consists in using the forbidden words. There are two statutes with regard to it, the 37 Geo. 3, c. 123, which in s. 4 excuses the setting out of the words, and provides that it shall be sufficient to set out only the substance and effect, and the 52 Geo. 3, c. 104, which in s. 5 contains a similar provision. The legislature excuses the setting out of the words, and, therefore, as it seems to me, admits that the words must have been set out if it had not been for the provisions in these statutes.

The next case which I shall cite is a decision with regard to a seditious libel, and it is *Rex v. Horne*. (1) There the words relied upon were set out, and the information was held good. It was in many respects a remarkable case.

I will now go to cases as to defamatory words, and the first which I will cite is *Newton v. Stubbs*. (2) It was an action for words spoken of the plaintiff, and it was alleged that on one occasion the defendant spoke the words "ad effectum sequentem." It was objected that this was uncertain, and the Court held that this mode of pleading was wrong.

I will next refer to *Zenobio v. Axtell* (3), which was cited in the course of the argument. It was an action for publishing a defamatory libel in the French language, in a newspaper called the *Courrier de Londres*. The declaration alleged that the libel was "according to the purport and effect following in the English language," and then it set out the translation. It stated that what had been said was in the French language, and then assumed to state its purport and effect in English, and it did not say, "which being translated into English has the following meaning." Upon that ground Lord Kenyon, C.J., said: "That this objection must prevail, is evi-

dent from the uniform current of precedents, in all of which the original is set forth. The plaintiff should have set out the original words, and then have translated them."

Now in *Wright v. Clements* (4) the declaration stated that the defendants did publish a certain libel, "containing amongst other things, certain false, scandalous, malicious, defamatory, and libellous matters, of and concerning the plaintiff, in substance as follows,

(1) 2 Cowp. 672.

(2) 2 Show. 435.

(3) 6 T. R. 162.

(4) 3 B. & Ald. 503.

that is to say," and then it set out the words with innuendoes. The words were introduced by the allegation "in substance as follows." There was a motion in arrest of judgment, and it was argued, that although the words were not set out according to their tenor, yet, inasmuch as they were alleged to be set out according to their substance, it was sufficient after verdict. Lord Tenterden said, p. 506, "Judgment must be arrested. In actions for libel, the law requires the very words of the libel to be set out in the declaration, in order that the Court may judge whether they constitute a ground of action; and unless a plaintiff professes so to set them out, he does not comply with the rules of pleading. The ordinary mode of doing this is to state that the defendant published of and concerning the plaintiff the libellous matters to the tenor and effect following."

Then Holroyd, J., says, p. 508, "Now where a charge either civil or criminal is brought against a defendant arising out of the publication of a written instrument, as is the case in forgery or libel, the invariable rule is, that the instrument itself must be set out in the declaration or indictment, and the reason of that is that the defendant may have an opportunity, if he pleases, of admitting all the facts charged and of having the judgment of the Court, whether the facts stated amounted to a cause of action, or a crime."

Lord Justice Bramwell has cited the case of *Cook v. Cox* (1), and that case lays down the same principle. Now, these decisions were pronounced in 1814 and 1820, after Fox's Act, 32 Geo. 3, c. 60, passed in 1792. Therefore any argument based upon Fox's Act cannot prevail. It is true that before that statute the judges held that upon the trial of an indictment or information for libel, all that the jury had to find was, whether the defendant had published the writing, and whether the innuendoes were true, and that it was for the Court to say whether the writing was a libel or not. Fox's Act declared that view of the law to be wrong. Whether the legislature were right in principle, or whether the judges were right, is not for us to discuss; and we must accept the declaration of the legislature as an authoritative statement of the law. But it seems to me that Fox's Act leaves untouched the validity of an objection to the omission of words from an indictment

(1) 3 M. & S. 110.

or information when they form the substance of the offence charged. In principle the only difference made by that statute is, that if the written instrument can be a libel, then it is for the jury to say whether it is a libel(1); but there remains a preliminary question which it is for the Court or judge to decide, namely, whether the writing can be a libel, whether in truth there is any evidence upon which a jury can say it is a libel, and that question is still open, and is a question for the Court(2); and therefore the reason which is given by Holroyd, J., in *Wright v. Clements* (3) still prevails, that the words ought to be set out, in order that the defendants may demur and may raise the objection that the words cannot by any reasonable construction amount to a libel. Moreover, by the 4th section of Fox's Act, 32 Geo. 3, c. 60, the power to move in arrest of judgment is expressly preserved for the benefit of a defendant who is found guilty, and I think that the legislature intended to allow a defendant, either before verdict by demurrer, or after verdict by motion in arrest of judgment, to object that the words complained of either do not amount to a libel or are wholly omitted from the information or indictment, as the circumstances of the case may allow.

Now I come to what seems to me to be a remarkable case. It is not a decision of a Court upon the present question, but it seems to me to be a great authority; I mean *Rex v. Wilkes* (4). In that case an information was exhibited in the Court of King's Bench for the publication of an obscene and impious libel. That obscene and impious libel was in the book styled an 'Essay on Woman.' The facts now material are (p. 2528) that Mr. Wilkes having pleaded not guilty, and the records having been made up and sealed, "the counsel for the Crown thought it expedient to amend them by striking out the word 'purport' and in its place inserting the word 'tenor.' The proposed amendments were in all those parts of the information where the charge was that the libel printed and published by Mr. Wilkes contained matters 'to the purport and effect following, to wit:' which the counsel for the Crown thought it advisable to alter into words importing that such libel contained matters 'to the tenor and effect following, to

(1) See *Fray v. Fray*, 34 L. J. (C.P.) 45.

(2) See *Mulligan v. Cole*, Law Rep. 10 Q. B. 549.

(3) 3 B. & Ald. 503, at p. 509.

(4) 4 Burr. 2527.

wit.'" It is clear that the words were set out; yet, because they were introduced by the words "to the purport and effect following" instead of "to the tenor and effect following," the Attorney-General, Sir Fletcher Norton, considered it unsafe to go on even after plea pleaded and issue joined, and thought it advisable to amend the record. That seems to me a very important authority.

The second question which I have proposed is what kind of omissions can or cannot be cured by verdict, and all the cases which I have cited seem to me to form a strong current of authorities to shew that in every kind of crime which consists in words, if the words complained of are not set out in the indictment or information, the objection is fatal in arrest of judgment.

Now we come to the cases which are said to be to the contrary, and I will deal very shortly with them. The first is a case upon which the Crown has relied: *Dugdale v. Reg*. (1) The only counts of the indictment in that case material to be now mentioned are the first and second; the first count charged the defendant with obtaining and procuring obscene prints, with intent to publish them, and the second count charged him with preserving and keeping them with the like intent. The second was held not to disclose an offence for another reason, that is, that the mere having them in his possession was not indictable. The first count was held to be good, because it alleged a step towards committing a misdemeanour. In my opinion, if a man, knowing prints to be obscene, procures them for the purpose of publishing them, his offence is complete, although be has never looked at them, and therefore the actual nature of the prints was not a part of the charge, and it was unnecessary to describe them. But further, I would strike out of the category of the cases which we are considering all cases with regard to obscene prints and obscene pictures. The publication of obscene prints and obscene pictures may be in one sense libellous, but they are not words, and therefore they do not seem to me to fall within the rules as to criminal pleadings which we are considering here to-day; the publication of them is an offence like that committed by Sir Charles Sedley(2), who was convicted, not of libel, but of indecent exposure.

(1) 1 E. & B. 435; Dears. 64.

(2) 17 How. St. Tr. 155.

Now I come to *Reg. v. Goldsmith* (1): I see but little difficulty in dealing with that case, if it were not for the expressions used by some of the judges. The prisoner was indicted, not for obtaining money by false pretences, but for unlawfully receiving goods knowing them to have been obtained by false pretences. The objection was that the false pretences were not set out. It seems to me that the crime charged in that case is complete, although the prisoner does not know what the false pretences were, and in this view the words actually used in making the false pretences formed no material part of the charge. If a man receives goods, being told and believing that they have been obtained by false pretences, he is just as guilty of the crime, as if he knew what the false pretences were; upon a similar principle if a man receives goods, knowing them to be stolen, he may not know from whom they were stolen, where they were stolen, or when they were stolen; but all that is wanted, in order to constitute the offence, is that he should know the fact that they have been stolen. In *Reg. v. Goldsmith* (1) it was sufficient to allege and to prove that the prisoner knew that the goods had been obtained by false pretences. It seems, therefore, to me that it was not necessary for the decision of that case to rely upon Serjeant Williams' note to *Stennel v. Hogg* (2), where it is laid down that a defect, imperfection, or omission in pleading is cured by the verdict by the common law.

Now comes the case of *Heymann v. Reg*. (3) That was a case of conspiracy to defraud, and in order to constitute that crime it is only necessary to shew that persons have agreed together to defraud; and as was pointed out in *Heymann v. Reg*. (4), and also *Reg. v. Aspinall* (5), the crime of conspiracy is complete so soon as the agreement to commit the unlawful act is come to; and the conspiracy may be complete, although the guilty parties have not yet agreed upon what means they should use; in a case like *Reg. v. Aspinall* (6), where the agreement was to defraud such persons, as might buy shares, by false pretences with regard to those shares, the conspiracy is complete the moment the parties

(1) Law Rep. 2 C. C. 74.

(2) 1 Notes to Saund. by Williams, at p. 261.

(3) Law Rep. 8 Q. B. 102.

(4) Law Rep. 8 Q. B. 102, at p. 105.

(5) 2 Q.B.D. 48, at p. 58.

(6) 2 Q.B.D. 48.

thereto agree to deceive such purchasers, although they have not as yet agreed on the false pretences. The crime of conspiracy does not consist in words, but in the agreement; and it follows that the crime is complete, although the false pretences never were used, and although the false pretences might never have been agreed upon. In the case of *Reg. v. Aspinall* (1), amongst the objections put forward it was urged that the false pretences were not set out; this objection was overruled upon the authority of the decided cases(2), but there were other matters which were not perfectly stated, and the imperfection in the statement of the indictment was much relied on, and it was necessary for this Court to consider whether the defeat was capable of being cured by verdict. The rule as to what can be cured is pointed out in *Reg. v. Aspinall* (3): "It (the rule) is thus stated in *Heymann v. Reg*. (4): 'Where an averment which is necessary for the support of the pleadings is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the Court after verdict that the verdict could not have been found on this issue without proof of this averment, then, after verdict, the defective averment which might have been bad on demurrer is cured by the verdict.' Upon this it should be observed that the averment spoken of is 'an averment imperfectly stated,' i.e. an averment which is stated, but which is imperfectly stated. The rule is not applicable to the case of the total omission of an essential averment. If there be such a total omission, the verdict is no cure. And when it is said that the verdict could not have been found without proof of the averment, the meaning is, the verdict could not have been found without finding this imperfect averment to have been proved in a sense adverse to the accused." And it seems to me obvious that must be the rule, upon referring to Serjeant Williams' note to *Stennel v. Hogg* (5), where it is said that the defect is cured by the verdict, if the issue joined be such as necessarily required on the trial proof of the facts "defectively stated." What are the issues in a criminal case? The plea of not guilty is general, and denies every averment necessary to

(1) 2 Q.B.D. 48.

(2) At p. 60.

(3) 2 Q.B.D. 48, at p. 55.

(4) Law Rep. 8 Q. B. 102, at p. 105.

(5) 1 Notes to Saund. by Williams, at p. 261.

constitute the offence, in other words, every averment which is a necessary part of the indictment, and does not deny what is totally omitted therefrom. That which is totally omitted from the indictment is no part of the dispute when issue is taken upon the plea of not guilty, and the jury must find for the Crown, if everything stated on the face of the indictment is proved to be true. Therefore, it is true to say that every averment contained in an indictment, although inaccurately stated, is involved in the issue, and that the inaccurate statement of it is cured by the verdict, because after a conviction that inaccurate averment must be taken to have been proved adversely to the prisoner; and it is immaterial that the indictment would be bad before verdict by reason of that inaccurate statement. Therefore, I take the rule to be that an inaccurate averment is cured by verdict, but that an averment which is totally absent cannot be supplied even after verdict.

Now the third and remaining question is whether there is such a total absence in the present case of material words, that the defect has not been cured by the verdict. The introductory part of each count alleges that the book complained of falls under the category of an obscene libel; but that introductory part does not justify the total omission of the words, which are relied upon as constituting the crime. Now, what is charged as to those words? It is said the defendants did "print, publish, sell, and utter, a certain indecent, lewd, filthy, and obscene libel, to wit, a certain indecent, lewd, filthy, bawdy, and obscene book called the 'Fruits of Philosophy.' It is obvious that the title of the book, 'Fruits of Philosophy,' was not enough to be relied on. Words cannot be more innocent - they never were or could be relied upon as the obscene libel charged. That which was to be relied upon was something written in the book which was so called, and there is no description of anything contained in that book. What is contained in that book, is not even attempted to be described according to its tenor and effect. There is a total omission of the contents, and yet it was the contents, or some part of the contents, which was to be relied on by the Crown. The words complained of are necessary to the averment in the indictment, and the total omission of them cannot be cured by the verdict.

With regard to the American cases, I must say that, to my

mind, they are either contrary to the law of England or in favour of the plaintiffs in error. A rule of practice seems to exist in the United States of America, that when an indictment contains an averment that the words are so obscene that if set out they would pollute the records of the Court, it is unnecessary to set them forth; but that where there is not this averment, the words must be set out, and if there is an omission both of the words and of the averment, the indictment is bad in arrest of judgment. Therefore the American cases, if they are to be regarded as authorities, are against the prosecution, and in favour of the plaintiffs in error in this case; because, besides the omission of the words, there is also the omission of that averment which is a necessary substitute for them. I confess, however, that I know of no authority saying that any similar rule exists in English law. I have read Lord Holt's view, as expressed in *Rex v. Sparling* (1), that the words of a blasphemous libel must be set out, however shocking they may be, and it seems to me, to say the least of it, a more robust rule to set out the obscene words upon the face of the indictment than to attempt to preserve the purity of the records, when the ears of every one in Court must be polluted by the words being read out before the judge and jury. I cannot follow the reasoning as to the advisability of the records of the Court being kept pure. It seems to me that it is a reason which does not bear examination, at all events, the principle that obscene words may be omitted if they are so obscene that they would pollute the records of the Court, is not the law of England, and if it were it does not apply to this case, as the indictment does not contain an averment that the words are too obscene to be inserted. Therefore, to my mind, this indictment is bad, and the plaintiffs in error are entitled to judgment. They are entitled to judgment, as all persons charged with crime in England are, for want of sufficient accuracy in the instrument by which they are charged.

This decision leaves the verdict really untouched. I confess I have felt humiliation in having to discuss such a question as this in the presence of one of the plaintiffs in error. We know not the particular ground on which the verdict passed; but it does seem to me sad that such a charge should have been brought against a

(1) 1 Str. 497.

woman. Although on a point of law the judgment in this case must be reversed, yet if the book complained of is published again, and the plaintiffs in error are convicted upon a properly framed indictment, the reiteration of the offence must be met by greater punishment.

COTTON, L.J. The question which we have to consider is, whether, on the indictment as framed, there is sufficient to support the judgment against the plaintiffs in error. Although it is a mere question of criminal pleading, it is nevertheless of considerable importance, because especially in criminal matters no departure should be allowed from those rules, which have been laid down for the purpose of guiding the Courts in the administration of justice. In the present case the offence charged is that of publishing an obscene libel. That offence consists of publishing obscene written words. Has any rule been laid down for framing an indictment for it? I cannot do better than take the rule quoted with approval by Lord Ellenborough in *Cook v. Cox*. (1) That rule, which was stated by ten judges, is as follows: "By the law of England, and constant practice, in all prosecutions by indictment or information for crimes or misdemeanours by writing or speaking, the particular words supposed to be criminal ought to be expressly specified in the indictment or information."(2)

This rule established so long ago as the reign of Queen Anne, has been ever since recognised, and to shew how uniform the practice has been, it is only necessary to refer to the numerous authorities and cases alluded to by Lord Justice Brett, amongst which I may especially mention *Wright v. Clements*. (3) Is there any authority to countervail this rule on behalf of the prosecution? Practically no decision has been quoted which enables it to be argued that this rule does not now prevail. The only English case which was referred to as not following the rule was *Dugdale v. Reg*. (4); but I wish to remark that in that case there was no decision that the actual words need not be set out; the point was not raised, and that case cannot in any way be looked upon as a decision meeting the long current of authority establishing and

(1) 3 M. & S. 110, at p. 116.

(2) 5 Har. St. Tr. 828.

(3) 3 B. & Ald. 503.

(4) 1 E. & B. 435; Dears. 64.

following the rule. When a rule is so well established as this, it is almost unnecessary to consider what the reason of it is; but here certainly one reason is apparent, namely, that when words constitute the alleged crime, if the words complained of are not set out, the defendant is precluded from raising, either by demurrer or by proceedings in the Court of Error, the question whether or not the circumstances charged are in fact, according to the law of England, criminal; and it is of the utmost importance in dealing with cases of this kind, that it should not be considered whether or not in the particular case any injustice has been done to the accused persons, or whether or not they have suffered any substantial disadvantage. In my opinion we ought to adhere strictly to the principles and the rules which have been laid down, without nicely speculating as to whether any advantage or disadvantage exists in the particular case.

On what ground is it contended that this indictment is sufficient? I will first take the point which was principally relied upon in the Queen's Bench Division. I do not understand that either of the learned judges who decided the case in the Court below thought that, according to the English decisions, there was an exception to the general rule in this kind of libel. It is true the Lord Chief Justice does refer to the inconvenience of setting out libels of this sort, or books of this sort, on the indictment; but he does refer to, and expressly says, that he relies upon the decisions of the American courts, and I must therefore consider whether or not those decisions do justify the judgment in the Queen's Bench Division upon this indictment. We are in no way bound by the American decisions, their effect is simply that they may enable us to see how principles recognised by the law of England ought to be applied, by shewing us how learned judges in other countries have acted on those principles; but if in fact the judgments of the American courts are founded upon principles which we do not recognise, then of course those decisions are perfectly useless, and can be neither guides nor authorities. In the American cases referred to the judges certainly recognised the rule to which I have referred, and which I have quoted from *Cook v. Cox* (1); they recognised it as a general rule; but as against that general

(1) 3 M. & S. 110.

rule they rely upon another, namely, that it is necessary to keep the records of the Court pure; but it was only upon an allegation that the book or libel in question was so gross that no records ought to be defiled by it, that they held the indictment to be sufficient without setting out the actual words relied upon. It might be sufficient to say that these cases have no bearing on the present, because there is no such allegation in the present case, and if the present indictment is held to be sufficient, every indictment for any offence in the nature of an obscene libel must also be sufficient, although it does not follow that general rule to which I have referred. But the matter does not rest here. Does the law of England recognise, so as to make it available for the prosecution, that rule upon which the judges in American courts rely? It is perfectly true that the English courts do require their records to be kept pure in this sense, that they will not allow their records to be the means of propagating defamation or obscenity under the pretence of its being part of a judicial proceeding. They will require anything impure or scandalous to be removed from their records when it is irrelevant to the matter to be tried, but if the matters on the records of the Court or in an affidavit are really relevant to the matter to be tried, they are not scandalous, and no principle recognised by the English courts requires any statement to be removed from their records, if relevant to the issue to be tried, simply because it is impure. Does the principle that the records must be kept pure justify the absence of what would otherwise be a necessary averment in the indictment, on the ground that it is gross and impure? In my opinion it does not, and

for this reason, the duty of the Court is to administer justice, either as between party and party, or as between the Crown and those who are accused; and for the purpose of doing so it ought not to consider its records as defiled by the introduction upon them of any matter, which is necessary in order to enable the Court to do justice according to the rules laid down for its guidance; a defendant has a right to say that he shall have fair notice, in order that he may not be prejudiced in defending himself against proceedings, whether civil or criminal, and therefore, in my opinion, the principle upon which those American cases are decided does not avail in this case. Those cases can be

no guide or assistance to us. If it is desirable that in cases of this sort there should be an exception to the rule as to the statement of words, it is not the duty of the Court to make an exception; it must be for parliament to interfere, as it has done in other cases mentioned by Lord Justice Brett.

I think that disposes of the ground principally relied on in the Queen's Bench Division, but there is another ground to which I must refer, that is, that the defect has been cured by the verdict. The rule is very simple, and it applies equally to civil and criminal cases; it is, that the verdict only cures defective statements. In the present case the objection is not that there is a defective statement, but an absolute and total want in stating that which constitutes the criminal act, namely, the words complained of, and the judgment of Lord Ellenborough in *Cook v. Cox* (1) shews that the omission of words, when they form the substance of the offence, cannot be cured by verdict, when he says, "It is of the substance of a charge for slander by words that the words themselves should be set out." Here we have not the substance set out, we have not a mere defective averment; we have an absolute omission to aver that which was relied upon as lewd and indecent. My opinion is that the defect is not a matter cured by the verdict, and it is perfectly open to the plaintiffs in error to rely on this as a fatal defect in the indictment even after verdict.

In my view, therefore, this indictment is not framed in accordance with settled rules, and neither on authority or principle can the omission of the words complained of be excused, and this judgment cannot stand.

Judgment reversed.

Solicitor for the prosecution: *T. J. Nelson*.

(1) 3. M. & S. 110.