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HOUSE OF LORDS

SHAW

v.

DIRECTOR OF PUBLIC PROSECUTIONS

4th May, 1961

Viscount Simonds

Viscount Simonds
Lord Reid
Lord Tucker
Lord Morris of Borth-y-Gest
Lord Hodson

my lords,

The Appellant, Frederick Charles Shaw, was, on the 21st September, 1960, convicted at the Central Criminal Court on an indictment containing three counts which alleged the following offences:

(1) Conspiracy to corrupt public morals; (2) Living on the earnings of prostitution contrary to section 30 of the Sexual Offences Act, 1956; and (3) Publishing an obscene publication contrary to section 2 of the Obscene Publications Act, 1959. He appealed against conviction to the Court of Criminal Appeal on all three counts. His appeal was dismissed, but that Court certified that points of law of general public importance were involved in the decisions on the first and second counts and gave

him leave to appeal on them to this House. They refused so to certify in respect of the third count. I propose, my Lords, to deal in this Opinion in the first place with the second count, for I have had the privilege of reading the speech which my noble and learned friend, Lord Tucker, is about to deliver on the first count and so fully agree with him that I find it convenient to add some general observations which can be regarded as supplementary to what he says.

My Lords, the particulars of the offence charged in the second count were that on divers days unknown between the 1st October, 1959, and the 23rd July. 1960, the Appellant lived wholly or in part on the earnings of prostitution. Before I refer to the statute on which the charge is based I must refer briefly to the relevant facts.

When the Street Offences Act, 1959, came into operation it was no longer possible for prostitutes to ply their trade by soliciting in the streets and it became necessary for them to find some other means of advertising the services that they were prepared to render. It occurred to the Appellant that he could with advantage to himself assist them to this end. The device that he adopted was to publish on divers days between the dates mentioned in the Particulars of Offences a magazine or booklet which was called " Ladies Directory ". It contained the names, addresses and telephone numbers of prostitutes with photographs of nude female figures and in some cases details which conveyed to initiates willingness to indulge not only in ordinary sexual intercourse but also in various perverse practices. Learned Counsel for the Appellant made some point of the fact that the magazine contained also advertisements of models and clubs. I therefore mention it, but 1 do not think that it is of any importance. The profit derived by the Appellant from this enterprise was twofold. From the prostitutes whom he canvassed and advertised he received fees ranging from two guineas for quarter-page advertisements without photographs to ten guineas for full-page advertisements with photographs. There was evidence that one issue produced from this source a sum of £250 19s. 0d. Secondly, the Appellant sold copies of the magazine to a Mr. Blass, the proprietor of a sweet and cigarette kiosk, and perhaps, though this is not very clear, to other persons at a price of two shillings per copy. The weekly sales of Mr. Blass were said by him to have started at 30 to 40 and eventually reached about 80. It is manifest that the Appellant received substantial sums from his undertaking. It is also clear from the evidence that the prostitutes paid for advertisement out of the earnings of their profession and that they or some of them obtained custom by means of it.

It is in these circumstances that the question must be asked whether the Appellant lived wholly or in part on the earnings of prostitution, and I turn

at once to the statute that makes it an offence to do so. That is now section 30 of the Sexual Offences Act, 1956, which is as follows:

" 30.—(1) It is an offence for a man knowingly to live wholly or in
" part on the earnings of prostitution.

" (2) For the purposes of this section a man who lives with or is
" habitually in the company of a prostitute, or who exercises control,
" direction or influence over a prostitute's movements in a way which

" shows he is aiding, abetting or compelling her prostitution with others,
" shall be presumed to be knowingly living on the earnings of prostitu-
" tion, unless he proves the contrary."

This section stems from section I of the Vagrancy Act, 1898, as amended by section 7 of the Criminal Law Amendment Act, 1912. The earlier of these two Acts was itself an amendment of the Vagrancy Act, 1824, but I do not think that any assistance is to be derived from a consideration of its ancestry. The Act of 1824 may be regarded as a convenient peg on which to hang divers offences to which the words " vagabondage and roguery " would not be entirely appropriate. Nor do I think that subsection (2) can throw much light on the meaning of the words " lives on the earnings of prostitution " in subsection (1). It was at one time argued that the two subsections were coextensive, but this argument was abandoned by Mr. Rees-Davies. who presented the Appellant's case with candour and ability. It is. I think, clear that the second subsection is probative and explanatory of the first but is not an exhaustive definition of it.

What, then, is meant by living in whole or in part on the earnings of prostitution"- It was not contended by the Crown that these words in their context bear the very wide meaning which might possibly be ascribed to them. The subsection does not cover every person whose livelihood depends in whole or in part upon payment to him by prostitutes for services rendered or goods supplied, clear though it may be that payment is made out of the earnings of prostitution. The grocer who supplies groceries, the doctor or lawyer who renders professional service, to a prostitute do not commit an offence under the Act. It is not to be supposed that it is its policy to deny to her the necessities or even the luxuries of life if she can pay for them.

I would say, however, that, though a person who is paid for goods or services out of the earnings of prostitution does not necessarily commit an offence under the Act, yet a person does not necessarily escape from its provisions by receiving payment for the goods or services that he supplies to a prostitute. The argument that such a person lives on his own earnings, not on hers, is inconclusive. To give effect to it would be to exclude from the operation of the Act the very persons, the tout, the bully or protector, whom it was designed to catch. For they would surely claim that they served the prostitute, however despicable their service might seem to others. Somewhere the line must be drawn, and I do not find it easy to draw it. It is not enough to say that here are plain English words and that it must be left to a jury to say in regard to any particular conduct whether the statutory offence has been committed. I have said enough, for instance, to show that the wider meaning of which the words are clearly capable is inadmissible. The jury should be directed that some limitation must be put upon the words. What is the limitation?

My Lords, I think that (apart from the operation of subsection (2)) a person may fairly be said to be living in whole or in part on the earnings of prostitution if he is paid by prostitutes for goods or services supplied by him to them for the purpose of their prostitution which he would not supply but for the fact that they were prostitutes. I emphasise the negative part of this proposition, for I wish to distinguish beyond all misconception such a case from that in which the service supplied could be supplied to a woman whether a prostitute or not. It may be that circumstances will be equivocal, though no example readily occurs to me. But a case which is beyond all doubt is one where the service is of its nature referable to

prostitution and to nothing else. No better example of this could be found

than payment by a prostitute for advertisement of her readiness to prostitute herself. I do not doubt that a person who makes a business of accepting such advertisements for reward knowingly lives in part on the earnings of prostitution.

In one of the cases to which I shall refer a person receiving payment from a prostitute for services rendered by him is described as her coadjutor and in another as trading in prostitution. These expressions indicate the distinction that t have in mind though neither of them accurately defines a legal relation. Thus a man who advertises prostitutes and receives payment from them for doing so embarks with them on a joint venture the object of which is that they may earn money by prostitution and in turn pay him for his services. No doubt, all that he is paid is not profit, for he has the expenses of publishing. But his net reward is the direct and intended result of their prostitution. If he had no other means of livelihood it would be truly said that he lived on their earnings: if he had other means, he would be doing so in part.

I must add a few words on the authorities that were called to our attention. In *Reg.* v. *Thomas,* 41 C.A.R.117, the accused, who was charged under the Vagrancy Act, 1898, as amended by the Act of 1912, had agreed with a woman whom he knew to be a convicted prostitute that she should have the use of a room between the hours of 9 p.m. and 2 a.m. at a charge of £3 per night. He was convicted upon a direction by Mr. Justice Pilcher, which was subsequently approved by the Court of Criminal Appeal. The learned judge said that " if there is evidence that the accused has let a room or a flat at a grossly inflated rent to a prostitute for the express purpose of allowing her to ply her immoral trade, then it is for the jury to determine, on the facts of each particular case, whether the accused is in fact knowingly living wholly or in part on the earnings of prostitution." The only criticism I would make of this direction is that it does not distinguish between rooms and flat and in that case that it attaches undue importance to the rent being " grossly inflated " or, as is sometimes said, " exorbitant". It appears to me that, whatever the rent, the jury might have concluded that the accommodation was provided for no other purpose than prostitution and would not have been provided for her unless she was a prostitute. The exorbitance of the rent would, in my opinion, become important only if there had been evidence that this sort of accommodation was a necessity or luxury commonly required by other women for other purposes than prostitution, a thing which is not easily imaginable. In reaching this conclusion Mr. Justice Pilcher had found it necessary to differ from a ruling given by Judge Maude at the Central Criminal Court in *Reg.* v. *Silver.* 40 C.A.R.32, and in this too his decision was approved by the Court of Criminal Appeal. Judge Maude in that case held that it was not an offence for landlords and their agents to let flats to prostitutes at what were described as exorbitant rents and by the learned Judge as " prostitute rents " knowing that they would be used for the purpose of prostitution. I find this a more difficult case. If premises are let only for the purpose of prostitution and not also for occupation by the prostitute, as was the room in *Reg.* v. *Thomas,* it is easy to conclude that an offence has been committed. But, if the flat is let for occupation, I am not prepared

to say that the landlord commits an offence merely because he knows that his tenant is a prostitute and must be assumed to know that she will there ply her trade. The prostitute must live somewhere just as she must eat and drink to live. It is, I think, too fine a distinction to say that a grocer supplying her with groceries does not, but a landlord letting her a flat does, commit an offence. It is true that the flat is the scene of her prostitution, but, if she did not eat and drink, she would not have a body to prostitute. Therefore, in such a case as *Silver* (where the flats appear to have been let for occupation) the landlord can only be convicted of an offence upon the ground that the rent is exorbitant. This may be a tenable view upon the footing that, to the extent to which the rent is in excess of normal, he extorts it from the prostitute upon no other ground than that she is a prostitute. He may be said, therefore, knowingly to live or, as was said in the course of the argument, to prey upon her earnings. But, as I have said. I find this a difficult case and would express no final opinion on it.

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A third case to which I would refer is *Calvert v. Mayes* [1954] 1 Q.B.342. It was, I think, a very clear case, the substantial point in which was that the accused received payment not from the prostitutes but from the American airmen who availed themselves of their services. The argument that for this reason he did not live in part on their earnings was rightly rejected by the Court of Criminal Appeal. It is interesting in that Mr. Justice Sellers (as he then was) in the course of his judgment referred to the accused as " trading in prostitution ", an expression which, as I have already pointed out, is an apt, if colloquial, way of describing a person who lives on the earnings of prostitution.

Your Lordships were also referred to some civil cases such as *Pearce* v. *Brooks,* L.R.1 Ex. 213, and *Upfill* v. *Wright* [1911] 1 K.B. 506. They, I think, give little assistance upon the interpretation of the relevant words in the Sexual Offences Act. But it is at least satisfactory to know that the conclusion to which your Lordships come upon that Act marches with the view taken in civil cases of a contract made for an immoral purpose.

My Lords, as I have already said, the first count in the indictment is " Conspiracy to corrupt public morals ", and the particulars of offence will have sufficiently appeared. I am concerned only to assert what was vigorously denied by Counsel for the Appellant, that such an offence is known to the common law and that it was open to the jury to find on the facts of this case that the Appellant was guilty of such an offence. I must say categorically that, if it were not so, Her Majesty's courts would strangely have failed in their duty as servants and guardians of the common law. Need I say, my Lords, that I am no advocate of the right of the Judges to create new criminal offences? I will repeat well-known words: " Amongst many " other points of happiness and freedom which your Majesty's subjects have " enjoyed there is none which they have accounted more dear and precious " than this, to be guided and governed by certain rules of law which giveth " both to the head and members that which of right belongeth to them and " not by any arbitrary or uncertain form of government." These words are as true today as they were in the seventeenth century and command the allegiance of us all. But I am at a loss to understand how it can be said either that the law does not recognise a conspiracy to corrupt public morals or that, though there may not be an exact precedent for such a conspiracy as this case reveals, it does not fall fairly within the general words by which

it is described. I do not propose to examine all the relevant authorities. That will be done by my noble and learned friend. The fallacy in the argument that was addressed to us lay in the attempt to exclude from the scope of general words acts well calculated to corrupt public morals just because they had not been committed or had not been brought to the notice of the Court before. It is not thus that the common law has developed. We are perhaps more accustomed to hear this matter discussed upon the question whether such and such a transaction is contrary to public policy. At once the controversy arises. On the one hand it is said that it is not possible in the twentieth century for the Court to create a new head of public policy, on the other it is said that this is but a new example of a well-established head. In the sphere of criminal law I entertain no doubt that there remains in the Courts of Law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State, and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for. That is the broad head (call it public policy if you wish) within which the present indictment falls. It matters little what label is given to the offending act. To one of your Lordships it may appear an affront to public decency, to another considering that it may succeed in its obvious intention of provoking libidinous desires, it will seem a corruption of public morals. Yet others may deem it aptly described as the creation of a public mischief or the undermining of moral conduct. The same act will not in all ages be regarded in the same way. The law must be related to the changing standards of life, not yielding to every shifting impulse of the popular will but having regard to fundamental assessments of human values and the purposes of society. Today a denial

of the fundamental Christian doctrine, which in past centuries would have been regarded by the Ecclesiastical Courts as heresy and by the common law as blasphemy, will no longer be an offence if the decencies of controversy are observed. When Lord Mansfield, speaking long after the Star Chamber had been abolished, said that the Court of King's Bench was the *custos morum* of the people and had the superintendency of offences *contra bonos mores,* he was asserting, as I now assert, that there is in that Court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare. Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain since no one can foresee every way in which the wickedness of man may disrupt the order of society. Let me take a single instance to which my noble and learned friend, Lord Tucker, refers. Let it be supposed that at some future, perhaps, early, date homosexual practices between adult consenting males are no longer a crime. Would it not be an offence if even without obscenity, such practices were publicly advocated and encouraged by pamphlet and advertisement? Or must we wait until Parliament finds time to deal with such conduct? I say, my Lords, that if the common law is powerless in such an event, then we should no longer do her reverence. But I say that her hand is still powerful and that it is for Her Majesty's Judges to play the part which Lord Mansfield pointed out to them.

I have so far paid little regard to the fact that the charge here is of

conspiracy. But, if I have correctly described the conduct of the Appellant, it is an irresistible inference that a conspiracy between him and others to do such acts is indictable. It is irrelevant to this charge that section 2 (4) of the Obscene Publications Act, 1959, might bar proceedings against him if no conspiracy were alleged. It may be thought superfluous, where that Act can be invoked, to bring a charge also of conspiracy to corrupt public morals, but I can well understand the desirability of doing so where a doubt exists whether obscenity within the meaning of the Act can be proved.

I will say a final word upon an aspect of the case which was urged by Counsel. No one doubts—and I have put it in the forefront of this Opinion —that certainty is a most desirable attribute of the criminal and civil law alike. Nevertheless there are matters which must ultimately depend on the opinion of a jury. In the civil law I will take an example which comes perhaps nearest to the criminal law—the tort of negligence. It is for a jury to decide not only whether the defendant has committed the act complained of but whether in doing it he has fallen short of the standard of care which the circumstances require. Till their verdict is given it is uncertain what the law requires. The same branch of the civil law supplies another interesting analogy. For, though in the Factory Acts and the Regulations made under them the measure of care required of an employer is defined in the greatest detail, no one supposes that he may not be guilty of negligence in a manner unforeseen and unprovided for. That will be a matter for the jury to decide. There are still, as has recently been said, " unravished remnants of the common law ".

So in the case of a charge of conspiracy to corrupt public morals the uncertainty that necessarily arises from the vagueness of general words can only be resolved by the opinion of twelve chosen men and women. I am content to leave it to them.

The appeal on both counts should in my opinion be dismissed.

Lord Reid

my lords,

I agree with my noble and learned friend that the appeal on the second count ought to be dismissed, but I regret that I am unable to concur in his reasons and I feel bound to express my own view, because in my opinion

those reasons could result in cases not within the scope of the Act being brought in and cases within its scope being left out. I would begin by asking two questions: What was the mischief which Parliament must have had in mind? and: What is the natural meaning of the words " to live on " the earnings of prostitution "?

The mischief is plain enough. It is well known that there were and are men who live parasitically on prostitutes and their earnings. They may be welcome and merely cohabit, or they may bully women into earning money in this way. They prey or batten on the women. Such men are clearly living on the earnings of prostitution: if they have or earn some other income then they are living in part on such earnings. The question, to

my mind, is how much further the Act must be held to go, bearing in mind that it is a penal statute and therefore should not be extended to apply to cases which its terms do not clearly cover.

Such men may render services as protectors or as touts, but that cannot make any difference even if their relationship were dressed up as a contract of service. And a man could not escape because he acted in some such capacity for a number of women. His occupation would still be parasitic: it would not exist if the women were not prostitutes. It appears to me that the accused in this case comes well within this class. His occupation of gathering and publishing these advertisements would not exist if his customers were not prostitutes. He was really no more than a tout using this means of bringing men to the prostitutes from whom he received money.

If this were an ordinary case I would be content to leave it there because, if I go further, I am in effect prejudging cases which are not before us and of which the facts may be beyond the sphere of common knowledge. But I appreciate the desirability of giving some general guidance as to the meaning of this Act. So I pass to my second question, the natural meaning of the words in the Act. " Living on " normally, I think, connotes living parasitically. It could have a wider meaning, but if it is to be applied at all to those who are in no sense parasites, then I think its meaning must be the same whether we are considering the earnings of prostitution or of any other occupation or trade.

If a merchant sells goods to tradesmen is he living on the earnings of their trades? Or if a landlord lets premises for business purposes is he living on the earnings of those businesses? Or if he lets to a man of leisure is he living on that man's dividends? Those are the sources of the rent which he receives, but I do not think that one would normally say that he is living on those sources. It is not an impossible use of the words—only unusual. And a penal statute ought not to be widened by reading its words in an unusual sense unless there is a very good reason for doing so.

And would it make any difference if the merchant supplied goods which could only be used for the purposes of the purchaser's trade or which he knew that the purchaser could not require if he were not engaged in that trade? I do not think so. I find it impossible to say that a merchant who sold goods to a farmer would be living on the earnings of agriculture if the goods could only be used for agriculture, but would not be living on the earnings of agriculture if the goods, though paid for out of the profits of agriculture, were for purely personal use or might be used either for agriculture or for some other purpose. Why, then, should the words mean something different when we are dealing with the earnings of prostitution?

One reason would be that the context requires it, but I find nothing in this context to require it. Another might be that otherwise cases plainly within the mischief would escape. But even if that were a good reason I do not think that it applies here.

What kind of case would escape if one takes what I think is the natural meaning of the words? I take first the landlord. Suppose a landlord lets a flat to an apparently respectable woman and later discovers that she is carrying on prostitution there as her means of livelihood. Is he thereafter knowingly living on the earnings of prostitution? And would it make a

difference if when he let it he either suspected or expected that she would use it for prostitution? We were informed that prostitutes sometimes live in one flat and use another for prostitution, and sometimes they live and carry on their tirade in the same place. Is a landlord guilty in the former case but innocent in the latter? And if in the latter case the woman decides to go somewhere else to live does the landlord thereupon become guilty if he continues to take rent from her? I can find nothing in the words or the policy of the Act to require us to pick and choose in such cases.

But I am far from saying that a landlord can never be guilty of living on the immoral earnings of his tenant. To my mind the most obvious case is where he takes advantage of her difficulty in getting accommodation to extract from her in the guise of rent sums beyond any normal commercial rent. In reality he is not then merely acting as landlord; he is making her engage in a joint adventure with him which will bring to him a part of her immoral earnings over and above rent. And there may well be other ways in which he can make himself a participator in her earnings and not merely a recipient of rent. The line may sometimes be difficult to draw, but juries often have to decide broad questions of that kind.

Then I takes the tradesman. Is the criterion to be whether he supplied goods or services which he knew that this woman would not require if she were not a prostitute, or is it to be whether the goods or services are of a kind which no honest woman would require? I doubt very much whether either distinction would be easy to draw in practice. Presumably Brooks in *Pearce* v. *Brooks,* L.R. 1 Ex. 213, would not have required the brougham if she had not been a prostitute. Whether the brougham was of a kind which some honest woman might have required I do not know. If a case of that kind occurred today would it depend on such niceties whether Pearce was living on Brooks's immoral earnings? We were informed that sometimes decorators or furnishers are asked to do or supply something which it is at least unlikely that an honest woman would require. But it is perhaps difficult to set limits to honest eccentricity.

I suppose there might be a tradesman who was as purely parasitical as the accused and there might be a tradesman who used his trade as a means to become a joint adventurer with prostitutes. But leaving such possible cases aside, I could not hold that a tradesman who supplies goods or services to a prostitute in the ordinary course of his business is living on her immoral earnings. I cannot find or think of any case which cannot be adequately dealt with on what I think to be the ordinary and natural meaning of the words of the Act.

My Lords, I turn to the first count. With regard to it I have had the advantage of reading the speech about to be delivered by my noble and learned friend, Lord Tucker, but I regret to say that I find myself in fundamental disagreement with it. I must therefore state my reasons with some particularity.

In my opinion there is no such general offence known to the law as conspiracy to corrupt public morals. Undoubtedly there is an offence of criminal conspiracy and undoubtedly it is of fairly wide scope. In my view its scope cannot be determined without having regard first to the history of the matter and then to the broad general principles which have generally been thought to underlie our system of law and government and in particular our system of criminal law.

It appears to be generally accepted that the offence of criminal conspiracy was the creature of the Star Chamber. So far as I am able to judge the summary in Kenny's Outlines of Criminal Law. Section 59. is a fair one.

There it is said that the criminal side of conspiracy was " emphasised by the " Star Chamber, which recognised its possibilities as an engine of government " and moulded it into a substantive offence of wide scope, whose attractions " were such that its principles were gradually adopted in the common law " courts ". The Star Chamber perhaps had more merits than its detractors will admit, but its methods and principles were superseded, and what it did is of no authority today. The question is how far the common law courts in fact went in borrowing from it.

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I think that Lord Goddard, L.C.J. was repeating the generally accepted view when he said: " A conspiracy consists of agreeing or acting in concert " to achieve an unlawful act or to do a lawful act by unlawful means" *(Reg. v. Newland* [1954] 1 Q.B. 158 at p. 166). But what is an " unlawful " act"? To commit a crime—yes, but what about offences which can only be dealt with summarily and punished lightly: they are certainly unlawful acts but (I quote from the Law of Criminal Conspiracies by R. S. Wright, J. p. 83) they " are not in themselves of grave enough consequence " to be matters for indictment; and, if so, it must in general be immaterial " whether the results are produced by one person or by two or more persons. " To permit two persons to be indicted for a conspiracy to make a slide in " the street of a town, or to catch hedge-sparrows in April, would be to " destroy that distinction between crimes and minor offences which in every " country it is held important to preserve". To commit a tort—yes, in certain cases, but for somewhat similar reasons it seems to be at least doubtful whether it is an offence to conspire to commit a tort which is neither malicious nor fraudulent nor accompanied by violence.

Then there is undoubtedly a third class of act which an individual can do with impunity but a combination cannot. Perhaps the best known example is conspiring to injure a man in his trade if done without justification. I need only refer to the series of cases in this House from *Mogul Steamship Company* v. *McGregor, Gow & Co.* (1892) A.C.25 to *Crofter Hand Woven Harris Tweed Company, Limited, and Others* v. *Veitch and Another* [1942] A.C. 435. No one has ever attempted to define what makes an act " unlawful " so as to bring it within this class ; the law seems to be haphazard, depending largely on historical accident. Perhaps as good a summary as any is that which goes back to early editions of Professor Kenny's book (now section 451): " certain other acts which .... are not breaches of law at all, but which " nevertheless are outrageously immoral or else are, in some way, extremely " injurious to the public ". One thing does, however, appear to be reasonably clear. So far as I have been able to trace, all who took part in the *Mogul Steamship Company* series of oases and who mentioned the matter, except Lord Esher, were of opinion that to make or carry out a contract which is unenforceable by reason of immorality or otherwise is not an unlawful act in this sense.

There are two competing views. One is that conspiring to corrupt public morals is only one facet of a still more general offence, conspiracy to effect public mischief; and that, like the categories of negligence, the categories of public mischief are never closed. The other is that, whatever may have been done two or three centuries ago, we ought not now to extend the doctrine further than it has already been carried by the common law courts. Of course. I do not mean that it should only be applied in circumstances precisely similar to those in some decided case. Decisions are always authority for other cases which are reasonably analogous and are not properly distinguish-

able. But we ought not to extend the doctrine to new fields.

I agree with R. S. Wright, J. when he says (op. cit. p. 86): " .... there " appear to be great theoretical objections to any general rule that agreement " may make punishable that which ought not to be punished in the absence " of agreement." And I think, or at least I hope, that it is now established that the courts cannot create new offences by individuals. So far at least I have the authority of Lord Goddard, L.C.J. in delivering the opinion of the Court in *Newland* (p. 167): "The dictum in *Rex* v. *Higgins, 2* East 5, " was that all offences of a public nature, that is, all such acts or attempts " as tend to the prejudice of the public, are indictable, but no other member " of the Court stated the law in such wide terms. It is the breadth of that " dictum that was so strongly criticised by Sir Fitzjames Stephen in the " passage in his History of the Criminal Law " (vol. 3, p. 259) ". . and " also by Dr. Stallybrass in the Law Quarterly Review, vol. 49, p. J 83. In " effect it would leave it to the judges to declare new crimes and enable " them to bold anything which they considered prejudicial to the community " to be a misdemeanour. However beneficial that might have been in days " when Parliament met seldom or at least only at long intervals it surely " is now the province of the legislature and not of the judiciary to create

" new criminal offences." Every argument against creating new offences by an individual appears to me to be equally valid against creating new offences by a combination of individuals.

But there is this historical difference. The judges appear to have continued to extend the law of conspiracy after they had ceased to extend offences by individuals. Again I quote from R. S. Wright, J. (p. 88): " In an imperfect " system of criminal law the doctrine of criminal agreements for acts not " criminal may be of great practical value for the punishment of persons for " acts which are not. but which ought to be made punishable irrespective of " agreement."

Even if there is still a vestigial power of this kind it ought not, in my view, to be used unless there appears to be general agreement that the offence to which it is applied ought to be criminal if committed by an individual. Notoriously there are wide differences of opinion today as to how far the law ought to punish immoral acts which are not done in the face of the public. Some think that the law already goes too far, some that it does not go tar enough. Parliament is the proper place, and I am firmly of opinion the only proper place, to settle that. When there is sufficient support from public opinion, Parliament does not hesitate to intervene. Where Parliament tears to tread it is not for the courts to rush in.

Before turning to the question whether the authorities on a fair construction warrant indictment on this charge, I must notice the offence of conspiring to effect public mischief. The most recent authority is *Newland's* case. There I do not think that the Court went beyond the ambit of earlier decisions. One of the early uses of this doctrine of conspiracy appears to have been to deal with various forms of cheating which no one would say ought not to be punished but which the common law had not made offences if done by an individual. Newland had conspired to obtain advantage for himself by using false and deceptive documents and devices to obtain for sale on the home market goods which manufacturers were only allowed

to sell for export. Lord Goddard, L.C.J. said (p. 164): " It is enough to " shew that they " (the suppliers) " would not have acted as they did but " for the false representations and dishonesty of the persons who obtained " the goods from them."

In my judgment this House is in no way bound and ought not to sanction the extension of " public mischief " to any new field, and certainly not if such extension would be in any way controversial. Public mischief is the criminal counterpart of public policy and the criminal law ought to be even more hesitant than the civil law in founding on it in some new aspect. I think that the following comments are as valid today as they were in 1824: "Iam not much disposed to yield to arguments of public policy: " I think the courts of Westminster Hall .... have gone much further " than they were warranted in going in questions of policy: they have taken " on themselves, sometimes, to decide doubtful questions of policy: and they " are always in danger of so doing, because courts of law look only at the " particular case, and have not the means of bringing before them all those " considerations which ought to enter into the judgment of those who decide " on questions of policy." (per Best, C.J. in *Richardson* v. *Mellish 2* Bing 229 at p. 242). " I for one protest .... against arguing too strongly upon " public policy; it is a very unruly horse, and when once you get astride it " you never know where it will carry you. It may lead you from the sound " law. It is never argued at all but when other points fail." (per Burrough, J. *ibid* at p. 252).

It may perhaps be said that there is no question here of creating a new offence because there is only one offence of conspiracy—agreeing or acting in concert to do an unlawful act. In a technical sense that is true. But in order to extend this offence to a new field the Court would have to create a new unlawful act: it would have to hold that conduct of a kind which has not hitherto been unlawful in this sense must now be held to be unlawful. It appears to me that the objections to that are just as powerful as the objections to creating a new offence. The difference is a matter of words; the

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essence of the matter is that a type of conduct for the punishment of which there is no previous authority now for the first time becomes punishable solely by a decision of a Court

I therefore proceed to consider the authorities on the footing that the Courts cannot now create a new offence or a new kind of criminal conspiracy, or at least that if any such power still exists this is not a proper sphere in which to exercise it.

The majority of the cases cited to us were instances of one or other of four well-established offences; offences which can be committed by an individual as well as by a combination. They are publication of an obscene libel, indecent exposure, exhibition in public of indecent things or acts, and keeping a disorderly house. I shall deal with the relevance of these in a few moments when I come to the facts of the present case.

But there is a group of four cases which are more directly relevant here—*Lord Grey's* case, 2 St. Tr. 519, *Delaval's* case, 3 Burr. 1434, *Mears'* case, 4 Cox 423, and *Howell's* case, 4 F. & F. 160. These were all cases of

conspiracy to seduce a girl under 21 or to induce a young girl to become a prostitute. I would agree that they are good authority for it being criminal to conspire to seduce a young girl. But I would not agree that by analogy they must be held to be good authority for it being criminal to conspire to " seduce " a man of mature years. Indeed I think that the Judges who decided these cases would have been very surprised to learn that they had thereby decided that conspiring to seduce a man is a crime. And it must be observed that there was no public element in these cases: they were conspiracies to seduce a particular girl. So if we are to proceed by analogy it must be a crime today to conspire to seduce a particular man and the offence cannot be limited to a conspiracy to *corrupt* public morals.

But in argument more stress was put on words which are reported to have been used by the Judges than on the actual decisions, and in particular on the statement by Lord Mansfield and others that the Court of King's Bench was *custos* or *censor morum*. It was said that they thereby decided or recognised that any conspiracy to corrupt morals or, as the learned trial Judge put it in the present case, " to lead morally astray ", was an indictable offence. I do not think so. As the reports of those days are not full reports of the judgments we do not have the precise context, but I think it much more probable that these Judges were intending to say that they then had power to create new offences, that this power extended to the moral field, and that the acts in these particular cases should be held to be punishable. It must be observed that these references to the Court being *censor* or *custos morum* occur equally in decision in cases of conspiracy and in cases against individuals. In the eighteenth century Courts created new offences in the field of morals both against individuals (see, for example, *Curl's* case, 2 Strange 788) and against combinations. So if, contrary to my view, the references established a general offence of conspiring to corrupt public morals, then surely they must also have established that it is a general offence for an individual to act so as to corrupt public morals or to attempt to do so. If it was established in the eighteenth century that there was a general offence of conspiring to corrupt public morals (or to lead members of the public morally astray) then, as the essence of criminal conspiracy is doing or agreeing to do an unlawful act, it must follow that for two centuries every act which has tended to lead members of the public astray morally has been an unlawful act, and the Respondent's argument would apply equally to make unlawful every act which tends to lead a single individual morally astray. In the unending controversy about the proper relationship between law and morals no one seems to have suspected that. Hitherto I think there has been a wide measure of agreement with Professor Kenny's view that only *certain* acts which are *outrageously* immoral are unlawful in this sense.

I claim little knowledge of the history of English criminal law any such

knowledge that I may have is of a different system. But it seems that most crimes must have been the creation of Judges of a remoter time, because

Parliament played a comparatively small part and there was no reception of any foreign system. And it seems that they proceeded piecemeal, taking care, no doubt, not to move in advance of contemporary opinion, and that

they did not first invent a general theory or a general offence and then apply it at once to a wide variety of particular cases. A somewhat similar situation arose in connection with equally general statements by equally eminent Judges that Christianity is part of the law of England. That was dealt with in this House in *Bowman and Others v. Secular Society, Limited* [1917] A.C.406, where it seems to me that more attention was paid to what the Courts had in fact done than to the language that Judges had used in doing it

But the best test appears to me to be to look at the views expressed by the authors and later editors of standard works on crime. Passages were cited to us from Hawkins' Pleas of the Crown, East's Pleas of the Crown, and Blackstone, as well as from later standard works. None of them appears to have realised that any such general and far-reaching offence had been established. Hawkins refers to open lewdness grossly scandalous (p. 358), Blackstone (Book IV, II] to open and notorious lewdness, East to scandalous and open breaches of morality exhibited in the face of the people (p. 3), and Russell (ch. 97) deals separately with each of the specific offences which I have already mentioned. We were referred to no passage supporting the view for which the Respondent now contends, and I cannot think that it is only now, after nearly two centuries, that it has been vouch-safed to us to discover the true meaning of these old cases.

I must now deal with the particulars of the first count and the facts proved to see whether they disclose that the accused committed some offence of more limited scope than conspiracy to corrupt public morals. It is alleged that the accused and others conspired by means of the publication of certain advertisements to induce readers thereof to resort to prostitutes named in these advertisements for the purposes of *(a)* fornication, *(b)* taking part in " other disgusting and immoral acts " or *(c)* witnessing " other disgusting and immoral exhibitions ". I shall not deal with *(c)* because no attempt was made to prove this. The intent alleged is twofold—*(a)* with intent thereby to debauch and corrupt the morals of certain of the lieges and *(b)* with intent thereby to raise and create in their minds inordinate and lustful desires. I find this very obscure. Which of the lieges are referred to? Is it only those persons who are induced to resort to the prostitutes or is it all persons who read the publication? If it means that debauching and corrupting only occur (or may occur) when a man resorts to a prostitute, that is one thing: but if it means that a man may be debauched and corrupted merely by reading the advertisements, that appears to me to raise a different and wider question and to involve a consideration of the Obscene Publications Act. 1959. I am inclined to think that these intents are stated in the wrong order and that what is meant is with intent to raise inordinate and lustful desires in the minds of those who read the advertisements and then to debauch and corrupt those who are thereby induced to resort to the prostitutes. I am not at all sure whether the proposition is that an offence is committed merely by conspiring to publish matter which tends to raise in the minds of readers inordinate and lustful desires, or whether the real offence is said to be conspiring to publish matter which tends to induce men to resort to prostitutes.

No authority was cited to us which goes so far as to hold that any writing could be held to be an obscene libel merely on the ground that, although its language is in itself decent and inoffensive, it may tend to raise in the minds of its readers some lustful desire—I leave aside for the moment the word " inordinate " in the particulars. In Victorian times very strict views were

held about books or pictures that were in any way " suggestive ", but no authority was cited to us which in any way indicates that it was held to be an indictable offence merely to publish such matter without there being something more to bring it into the category of being obscene.

Section 1 of the 1959 Act defines " obscene' by enacting that an article (which includes all matter to be read or looked at) shall be deemed to be

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obscene if its effect is to tend to deprave and corrupt. But I cannot find any intention to widen the old law of obscene libel or to make it possible for a prosecutor to charge as obscene libel publication in wholly inoffensive terms of any matter which tends to raise lustful desires in the mind of a reader, whether that matter be allusion to or commendation of fornication or merely the name and address of a prostitute.

But I need not pursue that matter because, as I understood the Solicitor-General, he did not argue that these advertisements were obscene libels, and that must mean that merely reading them does not tend to deprave or corrupt—if it did they would be obscene libels by virtue of the definition in the Act, conspiracy to publish them would obviously be a crime, and the point now in controversy would never have arisen.

So any depraving and corrupting must be the result of resorting to the prostitutes and the offence, if any, must be conspiring to tempt the lieges to resort to prostitutes. Prostitution is not an offence: it is not said that the woman or any man resorting to her is guilty of any offence. The argument is that if two or more persons (who may include the prostitute herself) combine to issue such an invitation to members of the public they are guilty of an offence. It could not matter whether the invitation was made by words or in some other way. So both Pearce and Brooks in *Pearce* v. *Brook cit. sup.* would today be guilty of an indictable offence by reason of having acted in concert to enable Brooks to attract men for the purpose of prostitution. That seems to me to be novel doctrine. It hardly seems to accord with views expressed in the *Mogul* series of cases to which I referred earlier, and I cannot believe that it is right.

But the advertisements also contain much more objectionable matter. The particulars refer to inducing readers to take part in " other disgusting " and immoral acts". and with this I think there must be coupled the reference in the intent charged to " inordinate " desires. The evidence shows that the invitations were to resort to certain of the prostitutes for the purpose of certain forms of perversion. That I would think to be an offence for a different reason.

I shall not examine the authorities because I think that they establish that it is an indictable offence to say or do or exhibit anything in public which outrages public decency, whether or not it also tends to corrupt and deprave those who see or hear it. In my view it is open to a jury to hold that a public invitation to indulge in sexual perversion does so outrage public decency as to be a punishable offence. If the jury in this case had been properly directed they might well have found the accused guilty for this reason. And the offence would be the same whether the invitation was made by an individual or by several people acting in concert. But it appears to me to be impossible to say the same with regard to ordinary prostitution. The common law has never treated the appearance of a prostitute in public as an indictable offence however obvious her purpose might be, and an

Act of Parliament has been found necessary to stop the nuisance of prostitutes parading in the public street.

Finally I must advert to the consequences of holding that this very general offence exists. It has always been thought to be of primary importance that our law, and particularly our criminal law, should be certain: that a man should be able to know what conduct is and what is not criminal, particularly when heavy penalties are involved. Some suggestion was made that it does not matter if this offence is very wide: no one would ever prosecute and if they did no jury would ever convict if the breach was venial. Indeed, the suggestion goes even further: that the meaning and application of the words " deprave" and " corrupt" (the traditional words in obscene libel now enacted in the 1959 Act) or the words "debauch" and "corrupt" in this indictment ought to be entirely for the jury, so that any conduct of this kind is criminal if in the end a jury think it so. In other words, you cannot tell what is criminal except by guessing what view a jury will take, and juries' views may vary and may change with the passing of time. Normally the meaning of words is

a question of law for the Court. For example, it is not left to a jury to determine the, meaning of negligence: they have to consider on evidence and on their own knowledge a much more specific question—Would a reasonable man have done what this man did? I know that in obscene libel the jury has great latitude, but I think that it is an understatement to say that this has not been found wholly satisfactory. If the trial Judge's charge in the present case was right, if a jury is entitled to water down the strong words " deprave ", " corrupt" or " debauch " so as merely to mean lead astray morally, then it seems to me that the Court has transferred to the jury the whole of its functions as *censor morum*. the law will be whatever any jury may happen to think it ought to be, and this branch of the law will have lost all the certainty which we rightly prize in other branches of our law.

Lord Tucker

my lords,

With regard to the conviction of the Appellant under Count 2 of the Indictment I am in complete agreement with the speech of my noble and learned friend on the Woolsack.

The first count charged the Appellant in the following terms:

" Statement of Offence

Conspiracy to corrupt public morals

" Particulars of Offence

" Frederick Charles Shaw on divers days between the 1st day of October,
" 1959, and the 23rd day of July, 1960, within the jurisdiction of the Central
" Criminal Court, conspired with certain persons who inserted advertise-

" ments in issues of a magazine entitled ' Ladies Directory', numbered 7,
" 7 Revised, 8, 9. 10 and a supplement thereto, and with certain other
" persons whose names are unknown, by means of the said magazine and
" the said advertisements to induce readers thereof to resort to the said
" advertisers for the purposes of fornication and of taking part in or
" witnessing other disgusting and immoral acts and exhibitions, with intent
" thereby to debauch and corrupt the morals as well of youth as of divers
" other liege subjects of Our Lady the Queen and to raise and create in
" their minds inordinate and lustful desires ".

It should, I think, be stated at the outset that the words "or witnessing" in the above particulars were not relied upon by the prosecution at the trial as constituting an essential ingredient in the alleged conspiracy nor was there any evidence that the advertisements constituted an invitation to the public to resort to the addresses of the advertisers as spectators for the purpose of witnessing disgusting and immoral acts and exhibitions. The case made by the prosecution was that the advertisements constituted invitations to the male public of all ages to visit the addresses of prostitutes for the purpose of fornication and in some instances taking part in perversive practices. I shall accordingly treat the indictment as if the words " or witnessing " had been omitted.

Counsel for the Appellant put in the forefront of his address the submission that there is no such offence known to the law as a conspiracy to corrupt public morals. Before turning to authority I would invite your Lordships to pause to consider for a moment how far-reaching are the consequences of such a proposition if it be correct. It has for long been accepted that there are some conspiracies which are criminal although the acts agreed to be done are not *per se* criminal or tortious if done by individuals. Such conspiracies form a third class in addition to the well known and more clearly defined conspiracies to do acts which are unlawful, in the

tense of criminal or tortious, or to do lawful acts by unlawful means. Assuming that the corruption of public morals by the acts of an individual may not be criminal or tortious does it follow that a conspiracy by two or more persons to this end is not indictable? The difficulty with regard to this third class of conspiracy has always been to define its limits or give it a label which will include all its manifestations. It was referred to by Viscount Simon in *Crofter Hand Woven Harris Tweed Company, Limited, and Others* v. *Veitch and Another* [1942] A.C. at page 439, as one in which
" the purpose aimed at, though not perhaps specifically illegal, was one
" which would undermine the principles of commercial or moral conduct"
The late Professor Kenny in the llth Edition of his Outlines of Criminal Law at page 290, in a passage which is repeated in later editions, wrote:
" An unlawful purpose. The term ' unlawful' is here used in a sense which
" is unique; and unhappily has never yet been defined precisely. The pur-
" poses which it comprises appear to be of the following species:
" (1) . . .

" (2) ...

" (3) ...

" (4) Agreements to do certain other acts which (unlike all those

" hitherto mentioned) are not breaches of law at all. but which never-
" theless are outrageously immoral or else are in some way extremely
" injurious to the public."

He gives a number of examples.
An instance in modern times is to be found in the case of *Reg* v. *Newland & ors*. [1954] 1 Q.B. 158, where the Appellants had been convicted of conspiring to effect a public mischief by obtaining and distributing on the home market for eventual retail sale decorated domestic pottery which by orders made under the Defence General Regulations manufacturers and registered exporters were permitted to supply for export only. The orders did not in terms deal with persons who obtained such goods from a manufacturer representing that they were for export and then having obtained them sold them on the domestic market. It was contended on behalf of the Appellants that there was no such offence known to the law as set out in the indictment. In delivering the judgment of the Court of Criminal Appeal Lord Goddard, L.C.J. said: "It is much too late to object that a conspiracy to effect a
" public mischief is an offence unknown to the law. There have been at
" least three reported cases during the present century in which that charge
" has been made and convictions upheld: *Rex* v. *Brailsford* [1905] 2 K.B.
" 730; *Rex* v. *Porter* [1910] 1 K.B. 369; and *Rex* v. *Bassey* [1931] 47

" T.L.R. 222 The Court is well aware of the caution with which

" they should approach the consideration of an offence which is alleged
" to consist of doing acts which tend to effect public mischief as, if extended,
" it might enable judges to declare new offences which should be the business
" of the legislature. The objections to such a course were forcibly pointed
" out by Sir Fitzjames Stephen, the most prominent institutional writer on
" criminal law in the last century, in his History of the Criminal Law, vol. 3,
" page 359. We think that we may say that the Court should approach the
" subject at least with the same degree of caution as much be exercised
" when a plea in a civil action that something has been done contrary to
" public policy ... No one has ever attempted to define what may or
" may not constitute a public mischief and we have certainly no desire
" to increase the number of criminal offences by adding to the category of
" misdemeanours. But there are two points which in our opinion do not
" make it necessary for us to consider whether there is here any attempt
" to create a new offence. In the first place it is well known that there may
" be many acts which if done by an individual would not be indictable, or
" even actionable as a tort, and yet may become both actionable and criminal
" if done by a combination of persons as the result of a conspiracy, and
" for this really elementary proposition we need only refer to *Quinn* v.
" *Leathern* [1901] A.C. 495."

My Lords, I have referred to this case as in my opinion the decision of the present and other similar cases does not depend upon the label which

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is to be attached to a particular conspiracy. Can it be doubted that a conspiracy to corrupt public morals is a conspiracy to effect a public

mischief? Is it to be said that a conspiracy to sell decorated domestic pottery in the home market by means of devices contrived to evade the object of Board of Trade Orders is a criminal conspiracy but an agreement to do acts calculated to corrupt public morals is not? Suppose Parliament tomorrow enacts that homosexual practices between adult consenting males is no longer to be criminal is it to be said that a conspiracy to further and encourage such practices amongst adult males could not be the subject of a criminal charge fit to be left to a jury? Similarly with regard to a conspiracy to encourage and promote Lesbianism today, or incestuous sexual intercourse in the year 1907? My Lords, if these questions are to be answered in the negative I would expect to find some clear authority during the past centuries which would justify such an answer. I know of none.

I have, I think, sufficiently indicated my view that the decision of this case does not depend upon a detailed examination of the old authorities in order to ascertain whether in every case the act or acts in question, whether performed or proposed, constituted common law misdemeanours in themselves at the date of the decisions. If they did. then the conspiracy alleged was admittedly criminal, but if they did not it would in my view be equally criminal if the acts were of a nature to satisfy a jury that they were wrongful in the sense of being calculated to corrupt and deprave public morals. I therefore do not propose to refer to the cases where individuals have been convicted of the common law misdemeanour of public indecency by exposure or other indecent acts in the face of the public such as that of *Sir Charles Sedley,* 1 *Siderfin* 168, in the year 1663, or other similar cases culminating in 1875 with that of *Reg.* v. *Saunders & Hitchcock* 1 Cox 116 where the Defendants were held to have been properly convicted on counts charging them with keeping a booth on Epsom Downs for the purpose of a disgusting and indecent exhibition to which they invited all persons within the reach of their voices. This was held to constitute a common law misdemeanour. Counsel for the Appellant argued with force that such cases are distinguishable from the present and other cases where the acts though immoral were not acts of indecency done in the face of the public, but as I do not consider it necessary to explore this aspect of the case I turn, therefore, to the authorities which are more immediately relevant, namely, those in which conspiracy was charged. In *Rex* v. *Delaval & ors.,* 3 Burr. 1435, in the year 1763, the charge was that the Defendants had joined in an unlawful combination and conspiracy to remove a girl, an infant about eighteen, out of the hands of the Defendant Bates (musician) to whom she was bound an apprentice by her father (a gentleman's coach-man) without the knowledge or approbation of her father and to place her in the hands of Sir Francis Delaval for the purpose of prostitution, for which purpose she was discharged by Bates, her master, from the indentures of her apprenticeship to him, in consideration of £200 (the penalty of them) paid to him by Sir Francis ; and was then bound by the usual indentures of apprenticeship to Sir Francis. The charge went on to set out the part played by Fraine, the attorney, in drawing up the indentures and the agreement between Sir Francis and Bates.

Having adjourned the motion for an information against the Defendants for conspiracy in order that the Court might be satisfied that the girl's father was not a party to the conspiracy and being satisfied that such was not the case. Lord Mansfield delivered the judgment of the Court. He described the conspiracy as one " to put this young girl (an apprentice to one of " them) into the hands of a gentleman of rank and fortune, for the purpose

" of prostitution ; contrary to decency and morality, and without the know-
" ledge or approbation of her father ; who prosecutes them for it, and has
"now cleared himself of all imputation, and appears to be an innocent
" and an injured man."

" Thus she has been played over, by Bates, into his hands, for this purpose.
" No man can avoid seeing all this ; let him wink ever so much.

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" I remember a cause in the Court of Chancery, wherein it appeared.
" that a man had formally assigned his wife over to another man: and Lord
" Hardwicke directed a prosecution for that transaction, as being notoriously
" and grossly against public decency and good manners. And so is the
" present case.
" It is true that many offences of the incontinent kind fall properly under
" the jurisdiction of the Ecclesiastical Court, and are appropriated to it
" But, if you except those appropriated cases, this Court is the *custos*
" *morum* of the people, and has the superintendency of offences *contra*
" *bonos mores:* and upon this ground, both Sir Charles Sedley and Curl,
" who had been guilty of offences against good manners, were prosecuted
" here.
" *However, besides this, there is, in the present case, a conspiracy and*
" *confederacy amongst the defendants: which are clearly and indisputably*
" *within the proper jurisdiction of this Court."* (The italics are mine.)

My Lords, some writers have been at pains to point out grounds upon which this case might have been decided, but I suggest it is not necessary or even permissible to go outside the expressed reasons of Lord Mansfield. Furthermore, it is to be observed that at that date not only was there no crime of abduction of a girl over sixteen, not being an heiress (see Holdsworth, Vol. 4, pages 504 and 515), but the girl's master was willing and she was not in the custody of her father. There is no such tort as seduction in the absence of loss of services which was not and could not have been alleged, and there is no mention of breach of contract anywhere in the case.

It is clear and compelling authority in support of the existence of the crime of conspiracy to corrupt the morals of an individual and *a fortiori* of the public. In *Reg.* v. *Means and Chalk* (1851) 4 Cox 425 the indictment contained three counts. The third count alleged that the accused " did between them-
" selves conspire, combine, confederate, and agree together wickedly, know-
" ingly, and designedly to procure by false pretences, false representations.
" and other fraudulent means, the said Johanna Carroll, then being a poor
" child under the age of twenty-one years, to wit the age of fifteen years, to
" have illicit carnal connexion with a man, to wit, a certain man whose
" name is to the jurors aforesaid unknown, contrary to the form of the statute
" in such case made and provided, and against the peace of Our Lady the
" Queen, her Crown and dignity."

Chief Justice Jarvis, in giving judgment at page 427, said : " It is unneces-
" sary to discuss the first and second counts, and upon them we give no
" opinion, because we all think that the third is a good count; the court
" being clearly of opinion that a conspiracy to solicit prostitution, being
" against good morals and public decency, is, *independently of the statute,*
" an indictable offence." (Italics are mine.) *Reg.* v. *Howell and Bentley* (1864) 4 F. & F. 160 was a case of conspiracy to solicit, persuade and

procure an unmarried girl of the age of seventeen to become a common prostitute. A count so framed was upheld. Bramwell, B., said: " I believe " that it is not an offence at common law for a woman to be a common " prostitute. But, in my opinion, that is not the criterion. There are many " unlawful things which are not the subject of criminal proceedings of any " kind. ... We have all the necessary ingredients of the offence of con- " spiracy." In *Rex. v. Britt, Carre, Berg & ors.* (1927) 20 Grim. App. Reps. 38 the second count in the indictment charged the above-named and three others with conspiracy to corrupt public morals and the particulars thereof were that they on divers days therein stated " conspired together and " with other persons unknown to debauch and corrupt the minds and morals " of such persons as should be induced or permitted to come to certain " premises being the basement flat No. 25 Fitzroy Square in the said county " and there remain tippling whoring and behaving in an obscene and dis- " orderly manner." Berg pleaded not guilty to both counts. He was found not guilty on count 1 which charged him with aiding and abetting Britt and Carre in keeping a disorderly house, but guilty on count 2. The Court of

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Criminal Appeal in the present case were in error in saying that all the accused named in that count pleaded guilty. Inspection of the original indictment shows that Berg in fact pleaded not guilty to both counts. The report of the hearing before the Court of Criminal Appeal is not very satis- factory, but as Berg had been acquitted on count 1 he must have been appealing against his conviction on count 2, and this is confirmed by the argument of his Counsel (Mr. Byrne) at page 40. The original indictment shows that the report is inaccurate in its description of the conspiracy count. The words " disorderly house " do not in fact appear in count 2 but only in count 1. All the appeals were dismissed by a court presided over by Avory, J., who stated that the gist of the indictment was that the accused were lewd and immoral persons assembled for the purpose of unnatural practices.

Finally, in 1960 there was the unreported case of *Reg.* v. *Dale & ors.* in which the accused were convicted at the Central Criminal Court on a count in an indictment charging a conspiracy to corrupt and debauch such persons as should resort to a certain disorderly house therein named.

It was further contended for the Appellant that in any event the particulars in the indictment and the evidence adduced in support thereof were insufficient to support a conviction for conspiring to corrupt public morals. It was said that neither fornication nor prostitution are illegal and that in any event there is no precedent for holding that such conduct tends to corrupt and deprave adult males.

My Lords, I think that these were matters for the decision of the jury and that the learned Judge was right in ruling that there was a case to be left to them. There was material in this case to support the view that some of the advertisements in the magazines indicated that the advertisers were willing to take part in acts of sexual perversion. This element was, I think, conclusive against the Appellant's submission, but I am not to be taken as expressing the view that in the absence of this feature the case should have been withdrawn from the jury who must be the final arbiters in such matters, as they are on the question of obscenity. They alone can

adequately reflect the changing public view on such matters through the centuries. As regards lack of precedent, apart from the recent cases of *Britt & ors.* in 1927 and *Dale & ors.* in 1960, I would remind your Lordships of the words of Parke, J. in *Mirehouse* v. *Rennell* (1 Cl. & Fin. 527) at page 546: " The case, therefore, is in some sense new, as many others are " which continually occur ; but we have no right to consider it, because " it is new, as one for which the law has not provided at all; and because " it has not yet been decided, to decide it for ourselves, according to our " own judgment of what is just and expedient. Our common-law system " consists in the applying to new combinations of circumstances those rules " of law which we derive from legal principles and judicial precedents; and " for the sake of attaining uniformity, consistency and certainty, we must " apply those rules, where they are not plainly unreasonable and incon- " venient, to all cases which arise; and we are not at liberty to reject " them, and to abandon all analogy to them, in those to which they have " not yet been judicially applied, because we think that the rules are not " as convenient and reasonable as we ourselves could have devised. It " appears to me to be of great importance to keep this principle of decision " steadily in view not merely for the determination of the particular case, " but for the interests of law as a science."

My Lords, the Solicitor-General supported the conviction and the judgment of the Court of Criminal Appeal on count 1 of the present indictment on two alternative grounds, (1) that conduct calculated and intended to corrupt public morals is indictable as a substantive offence and consequently a conspiracy to this end is indictable as a conspiracy to commit a criminal offence, alternatively (2) a conspiracy to corrupt morals is indictable as a conspiracy to commit a wrongful act which is calculated to cause public injury.

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The Court of Criminal Appeal dismissed the appeal on the ground that the case fell well within the first of these propositions. I have, I hope, sufficiently indicated that I prefer to base my decision on the second, but in so saying I must not be taken as rejecting the first.

A further submission by the Appellant must now be mentioned. It was argued that in any event count 1 offended against the provisions of section 2 (4) of the Obscene Publications Act, 1959, which reads :

" 2.—(4) A person publishing an article shall not be proceeded " against for an offence at common law consisting of the publication o! " any matter contained or embodied in the article where it is of the " essence of the offence that the matter is obscene."

My Lords, I agree with the judgment of the Court of Criminal Appeal that the short answer to this argument is that the offence at common law alleged, namely, conspiracy to corrupt public morals, did not " consist of " the publication " of the magazines, it consisted of an agreement to corrupt public morals by means of the magazines which might never have been published.

Finally it was said that the learned Judge did not sufficiently direct the jury as to the meaning of the words "debauch and corrupt" in count 1, and one passage in particular in his charge to the jury was subjected to criticism in which he said: " Well. Members of the Jury, no doubt you will " take the view that whatever else you may have to decide in this case

" it is quite unnecessary for you to decide the merits or demerits of extra-
" marital intercourse. And, really, the meaning of debauched and corrupt
" is again, just as the meaning of the word induce is, essentially a matter
" for you. After all the arguments, I wonder really whether it means in
" this case and in this context much more than lead astray morally. You
" will have to consider it in your own minds, and, as I say, you must
" put your own interpretation on the meaning of the words." The words
" lead astray morally " were objected to and were said to amount to a misdirection. In this and other passages later in his judgment he makes it clear that it is for the jury to construe and apply these words to the facts proved in evidence and reach their own decision, and neither in the passage cited nor in the judgment as a whole can I find anything that amounts to misdirection.

For these reasons I am of opinion that the appeal with regard to the conviction on count 1 also fails.

Lord Morris of Borth-y-Gest

My lords,

I have had the privilege of reading in advance the speeches which have been delivered by my noble and learned friend on the Woolsack and by my noble and learned friend, Lord Tucker, and I am in agreement with them.

The Appellant was convicted not only on the two counts which are before your Lordships but also on a third count, which was one of publishing an obscene article contrary to section 2 of the Obscene Publications Act, 1959. The article in question consisted of one issue of the Ladies Directory. Before they could convict of that charge the jury had to be satisfied that the Appellant published the article and that it was obscene. It is provided by the Act that for the purposes of the Act an article is deemed to be obscene if its effect taken as a whole is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it. The jury must have Been satisfied that the effect of the article was to tend to deprave and corrupt those who were likely to read or see if. While I concur with your Lordships in thinking that the provision

contained in section 2, subsection (4). of the Act did not debar the prosecution from presenting and passing the charge contained in Count 1, I have wondered whether they might not in this particular case have been content to put matters to the test by reference only to the other counts. It was the Appellant who conceived and carried out the plan of producing the publications in question. He did so for his own gain. The conspiracy features of his conduct added little in this case to the real gravity of his actions.

I join, however, with those of your Lordships who affirm that the law is not impotent to convict those who conspire to corrupt public morals. The declaration of Lord Mansfield (see *Jones v. Randall,* 1774, Lofft. 383)

that " whatever is contrary, *bonos mores est decorum,* the principles of " our law prohibit, and the King's Court, as the general censor and guardian " of the public manners, is bound to restrain and punish ", is echoed and finds modern expression in Kenny's Outlines of Criminal Law (17th Edn.) in the statement that agreements by two or more persons may be criminal if they are agreements to do acts which are outrageously immoral or else are in some way extremely injurious to the public. There are certain manifestations of conduct which are an affront to and an attack upon recognised public standards of morals and decency and which all well-disposed persons would stigmatise and condemn as deserving of punishment. The cases afford examples of the conduct of individuals which has been punished because it outraged public decency or because its tendency was to corrupt the public morals.

it is said that there is a measure of vagueness in a charge of conspiracy to corrupt public morals and also that there might be peril of the launching of prosecutions in order to suppress unpopular or unorthodox views. My Lords, I entertain no anxiety on those lines. Even if accepted public standards may to some extent vary from generation to generation, current standards are in the keeping of juries who can be trusted to maintain the corporate good sense of the community and to discern attacks upon values that must be preserved. If there were prosecutions which were not genuinely and fairly warranted juries would be quick to perceive this. There could be no conviction unless twelve jurors were unanimous in thinking that the accused person or persons had combined to do acts which were calculated to corrupt public morals. My Lords, as time proceeds our criminal law is more and more being codified. Though it may be that the occasions for presenting a charge such as that in Count 1 will be infrequent, I concur in the view that such a charge is contained within the armour of the law and that the jury were in the present case fully entitled to decide the case as they did.

I would dismiss the appeal.

Lord Hodson

my lords,

I am in full agreement with the speeches which have been delivered by my noble and learned friend on the Woolsack and by my noble and learned friend, Lord Tucker, and wish only to add a few sentences on the first count.

I am wholly satisfied that there is a common law misdemeanour of conspiracy to corrupt public morals. The judicial precedents which have been cited show conclusively to my mind that the Courts have never abandoned their function as *custodes morum* by surrendering to the Legislature the right and duty to apply established principles to new combinations of circumstances. The words of Parke. J. in *Mirehouse* v. *Rennell* (1 Cl. & Fin. 527) at page 546 read by my noble and learned friend, Lord Tucker, are not out-dated and in my opinion are applicable to this case. I would stress that in applying the law to the facts which now fall for consideration I do not rest upon the narrow ground that here was a conspiracy to issue a

public invitation to indulge in sexual perversion which so outrages public decency as to constitute a punishable offence. It is unnecessary to dwell upon the details of the publications which your Lordships have been obliged to look at. It is sufficient to say that although there are descriptions of sexual eccentricities which to persons of normal instincts may be fairly described as perverted, these eccentricities add nothing to the substance of the charge of conspiracy to corrupt public morals. They amount in the main to the use of theatrical trappings usually associated with prostitution and irregular sexual intercourse but are in themselves neither more nor less unlawful than prostitution itself.

I will not add to what has already been said about the word " unlawful ", agreeing as I do that it has not to be narrowly construed as connoting the commission of a criminal offence.

It has been contended before your Lordships that these advertisements ought to be treated as if they tended only to corrupt the morals of men and should be treated on a different footing from advertisements which would tend to corrupt the morals of women, since the law has shown anxiety to protect women from predatory males who have conspired to debauch them whereas there is no instance of any anxiety in the converse direction. Even if there is any validity in this distinction, which in these days when much is heard of the equality of the sexes I am not disposed to admit, it has no application to the present case. The advertisements no doubt are primarily directed to male persons but are not so limited. They were exposed for sale and available to both sexes. They are, as a cursory examination reveals, designed to glamorise prostitution and to show by the prices charged to prostitutes for advertising their wares the profits likely to be realised from engaging in their occupation. In the ordinary use of language it seems to me to be plain that the publication of these advertisements to both sexes may properly be held by a jury to tend to corrupt public morals.

That prostitution is not a punishable offence does not involve, as I have already indicated, that it is regarded as a lawful activity. If it were lawful such a case as *Pearce* v. *Brooks,* L.R. 1 Ex. 213, must have been differently decided. Even if Christianity be not part of the law of England, yet the common law has its roots in Christianity and has always regarded the institution of marriage as worthy to be supported as an essential part of the structure of the society to which we belong. I do not see any reason why a conspiracy to encourage fornication and adultery should be regarded as outside the ambit of a conspiracy to corrupt public morals. It is suggested, as I understand it, that this throws the net too wide and in some way it is desirable to show a tenderness towards prostitution as a recognised and necessary evil. I do not accept this approach.

Since a criminal indictment is followed by the verdict of a jury it is true that the function of *custos morum* is in criminal cases ultimately performed by the jury by whom on a proper direction each case will be decided. This, I think, is consonant with the course of the development of our law. One may take, as an example, the case of negligence where the standard of care of the reasonable man is regarded as fit to be determined by the jury. In the field of public morals it will thus be the morality of the man in the jury box that will determine the fate of the accused, but this should hardly disturb the equanimity of anyone brought up in the traditions of our common law.

I would dismiss the appeal.

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