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Содержание

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THE O'CONNELL CASE – WAS THE JUDGMENT RIGHTLY REVERSED?

The astounding issue of the Irish State trials will constitute a conspicuous and mortifying event in the history of the times. A gigantic conspiracy for the dismemberment of the empire was boldly encountered at its highest point of development by the energy of the common law of the land, as administered in the ordinary courts of justice. That law, itself certainly intricate and involved, had to deal with facts of almost unprecedented complication and difficulty; but after a long and desperate struggle, the law triumphed over every obstacle that could be opposed to it by tortuous and pertinacious ingenuity: the case was correctly charged before the jury; most clearly established in evidence, so as to satisfy not them only, but all mankind; the jury returned a just verdict of guilty against all the parties charged – the court passed judgment in conformity with that verdict, awarding to the offenders a serious but temperate measure of punishment – imprisonment, fine, and security for good behaviour. The sentence was instantly carried into effect —

"And Justice said – I'm satisfied."

But, behold! a last desperate throw of the dice from the prison-house – a speculative and desponding appeal to the proverbial uncertainty of the law; and, to the unspeakable amazement and disgust of the country, an alleged technical slip in the conduct of the proceedings, not touching or even approaching, the established merits of the case either in fact or law, has been held, by the highest tribunal in the land, sufficient to nullify the whole which had been done, and to restore to liberty the dangerous delinquents, reveling in misrepresentation and falsehood concerning the grounds of their escape on punishment – in their delirium of delight and triumph, even threatening an impeachment against the officers of the crown, against even the judges of the land, for the part they have borne in these reversed proceedings!

Making all due allowance for these extravagant fooleries, it is obvious that the event which has given rise to them is one calculated to excite profound concern, and very great *curiosity*. The most sober and thoughtful observers are conscious of feeling lively indignation at the spectacle of justice defeated by a technical objection; and public attention has been attracted to certain topics of the very highest importance and delicacy, arising out of this grievous miscarriage. They are all involved in the discussion of the question placed at the head of this article; and to that discussion we propose to address ourselves in spirit of calmness, freedom, and candour. We have paid close attention to this remarkable and harassing case from first to last, and had sufficient opportunities of acquainting ourselves with its exact legal position. We deem it of great importance to enable our readers, whether lay or professional, to form, with moderate attention, a sound judgment for themselves upon questions which may possibly become the subject of early parliamentary discussion – Whether the recent decision of the House of Lords, a very bold one unquestionably, was nevertheless a correct one, and consequently entitling the tribunal by whom it was pronounced, to the continued respect and confidence of the country? This is, in truth, a grave question, of universal concern, of permanent interest, and requiring a fearless, an honest, and a careful examination.

The reversal of the judgment against Mr O'Connell and his companions, was received throughout the kingdom with perfect amazement. No one was prepared for it. Up to the very last

moment, even till Lord Denman had in his judgment decisively indicated the conclusion at which he had arrived on the main point in the case, we have the best reason for believing that there was not a single person in the House of Lords – with the possible exception of Lords Denman, Cottenham, and Campbell – who expected a reversal of the judgment. So much has the public press been taken by surprise, that, with the exception of a fierce controversy between the *Standard*, and *Morning Herald*, and the *Morning Chronicle*, which was conducted with great acuteness and learning, we are not aware of any explanation since offered by the leading organs of public opinion – the Times has preserved a total silence – as to the legal sufficiency or insufficiency of the grounds on which this memorable judgment of reversal proceeded. We shall endeavour to do so; for while it is on this side of the Channel perfectly notorious that the traversers have been proved guilty of the enormous misdemeanours with which they were charged – guilty in law and guilty in fact – on the other side of the Channel we find, since commencing this article, that the chief delinquent, Daniel O'Connell, has the amazing audacity, repeatedly and deliberately, to declare in public that he has been "acquitted on the merits!" Without pausing to find words which would fitly characterize such conduct, we shall content ourselves with the following judicial declaration made by Lord Brougham in giving judgment in the House of Lords, a declaration heard and necessarily acquiesced in by every member of the court: —

"The whole of the learned judges with one voice declare, that on the merits, at any rate, they have no doubt at all – that on the great merits and substance of the case they are unanimously agreed. That a great offence has been committed, and an offence known to and recognisable by the law; that a grave offence and crime has been perpetrated, and an offence and crime punishable by the admitted and undoubted law of the land, none of the learned judges do deny; that counts in the indictment to bring the offenders, the criminals, to punishment, are to be found, against which no possible exception, technical or substantial, can be urged, all are agreed; that these counts, if they stood alone, would be amply sufficient to support the sentence of the court below, and that that sentence in one which the law warrants, justifies, nay, I will even say commands, they all admit. *On these, the great features, the leading points, the substance, the very essence of the case, all the learned judges without exception, entertain and express one clear, unanimous, and unhesitating opinion.*" And yet all the proceedings have been annulled, and the perpetrators of these great crimes and offences let loose again upon society! How comes this to pass? is asked with astonishment wherever it is heard of, both in this country – and abroad.

The enquiry we propose is due with reference to the conduct and reputation of three great judicial classes – the judges of the Irish Queen's Bench: the judges of England: and the judges of the court of appeal in the House of Lords. Familiar as the public has been for the last twelve months with the Irish State Trials, the proceedings have been reported at such great length – in such different forms, and various stages – that it is probable that very few except professional readers have at this moment a distinct idea of the real nature of the case, as from time to time developed before the various tribunals through whose ordeal it has passed. We shall endeavour now to extricate the legal merits of the case from the meshes of complicated technicalities in which they have hitherto been involved, and give an even *elementary* exposition of such portions of the proceedings as must be distinctly understood, before attempting to form a sound opinion upon the validity or invalidity of the grounds upon which alone the judgment has been reversed.

The traversers were charged with having committed the offence of conspiracy; which, by the universally admitted common law of the land for considerably upwards of five hundred years, exists "*where two, or more than two, agree to do an illegal act*– that is, to effect something in itself unlawful, or to effect by unlawful means something which in itself may be indifferent, or even lawful."[1] Such an offence constitutes a *misdemeanour*; and for that misdemeanour, and that misdemeanour alone,

[1] See the Judgment of the Judges, ordered by the House of Lords to be printed, (and from which the quotations in this article have been made,) read to the House of Lords by Lord Chief-Justice Tindal, on the 2d September 1844.

the traversers were *indicted*. The government might, as we explained in a former Number,[2] have proceeded by an *ex-officio* information at the suit of the crown, filed by the Attorney-General; but in this instance, waiving all the privileges appertaining to the kingly office, they appeared before the constituted tribunal of the law as the redressers of the public wrongs, invested however with no powers or authority beyond the simple rights enjoyed by the meanest of its subjects – and preferred an *indictment*: which is "a written accusation of one or more persons, of a crime or misdemeanour, preferred to and presented on oath by a grand jury."[3] Now, in framing an indictment, the following are the principles to be kept in view. They were laid down with beautiful precision and terseness by Lord Chief-Justice De Grey, in the case of Rex. *v.* Horne – 2 Cowper's Rep. 682.

"The charge must contain such a description of the crime, that the *defendant* may know what crime it is which he is called upon to answer; that the *jury* may appear to be warranted in their conclusion of 'guilty,' or 'not guilty,' upon the premises delivered to them; and that the *court* may see such a definite crime, that they may apply the punishment which the law prescribes."

There may be, and almost always are, several, sometimes many, counts in a single indictment; and it is of peculiar importance in the present case, to note the *reason* why several counts are inserted, when the indictment contains a charge of only one actual offence. First, when there is any doubt as to which is the proper mode, in point of *law*, of *describing* the offence; secondly, lest, although the offence be legally described on the face of the indictment, it should be one which the *evidence* would not meet or support. The sole object is, in short, to avoid the risk of a frequent and final failure of justice on either of the above two grounds. Technically speaking, each of these counts is regarded (though all of them really are only varied descriptions of one and the same offence) as containing the charge of a distinct offence.[4] For precisely the same reason, several counts were, till recently, allowed in civil proceedings, although there was only one cause of action; but this license got to be so much abused, (occasioning expensive prolixity,) that only one count is now permitted for one cause of action – a great discretion being allowed to judge, however, by statute, of altering the count at the trial, so as to meet the evidence then adduced. A similar alteration could not be allowed in criminal cases, lest the grand jury should have found a bill for one offence, and the defendant be put upon his trial for another. There appear, however, insuperable objections to restricting one offence to a single count, in respect of the other object, on peril of the perpetual defeat of justice. The risk is sufficiently serious in civil cases, where the proceedings are drawn so long beforehand, and with such ample time for consideration as to the proper mode of stating the case, so as to be sufficient in point of law. But criminal proceedings cannot possibly be drawn with this deliberate preparation and accurate examination into the real facts of the case beforehand; and if the only count allowed – excessively difficult as it continually is to secure perfect accuracy – should prove defective in point of law, the prisoner, though guilty, must either escape scot-free, or become the subject of reiterated and abortive prosecution – a gross scandal to the administration of justice, and grave injury to the interests of society. If these observations be read with attention, and borne in mind, they will afford great assistance in forming a clear and correct judgment on this remarkably interesting, and, *as regards the future administration of justice*, vitally important case. There is yet one other remark necessary to be made, and to be borne in mind by the lay reader. Adverting to the definition already given of a "conspiracy" – that its essence is the mere agreement to do an illegal act – it will be plain, that where such an agreement has once been shown to have been entered into, it is totally immaterial whether the illegal act, or the illegal acts, have been *actually done or not* in pursuance of the conspiracy. Where these illegal acts, however, have been done, and can be clearly proved, it is usual – but not necessary – to *set them out* in the indictment for a conspiracy. This is called *setting out the overt acts*, (and was

[2] State Prosecutions, pp. 9, 10. No. cccxxxix. Vol. lv.

[3] Blackstone's Commentaries, vol. i. p. 302.

[4] Several distinct offences may undoubtedly be included, in as many counts, in one indictment.

done in the present instance,) not as any part of the conspiracy, but only as statements of *the evidence* by which the charge was to be supported – for the laudable purpose of giving the parties notice of the particular facts from which the crown intended to deduce the existence of the alleged conspiracy. They consisted, almost unavoidably, of a prodigious number of writings, speeches, and publications; and these it was which earned for the indictment the title of "the *Monster* Indictment." It occupies fifty-three pages of the closely printed folio *appendix* to the case on the part of the crown – each page containing on an average seventy-three lines, each line eighteen words; which would extend to *nine hundred and fifty-three common law folios*, each containing seventy-two words! The indictment itself, however, independently of its ponderous appendages, was of very moderate length. It contained eleven counts – and charged a conspiracy of a five-fold nature —*i. e.* to do five different acts; and the scheme of these counts was this: – the first contained all the five branches of the conspiracy – and the subsequent counts took that first count to pieces; that is to say, contained the whole or separate portions of it, with such modifications as might appear likely to obviate doubts as to their *legal* sufficiency, or meet possible or probable variations in the expected *evidence*. The following will be found a correct abstract of this important document.

The indictment, as already stated, contained eleven counts, in each of which it was charged that the defendants, Daniel O'Connell, John O'Connell, Thomas Steele, Thomas Matthew Kay, Charles Gavan Duffy, John Gray, and Richard Barrett, the Rev. Peter James Tyrrell, and the Rev. Thomas Tierney, unlawfully, maliciously, and seditiously did combine, conspire, confederate, and agree with each other, and with divers other persons unknown, for the purposes in those counts respectively stated.

The first count charged the conspiracy as a conspiracy to do five different acts, (that is to say,)

"*First.* To raise and create discontent and disaffection amongst her Majesty's subjects, and to excite such subjects to hatred and contempt of the government and constitution of the realm as by law established, and to unlawful and seditious opposition to the said government and constitution.

"*Second.* To stir up jealousies, hatred, and ill-will between different classes of her Majesty's subjects, and especially to promote amongst her Majesty's subjects in Ireland, feelings of ill-will and hostility towards and against her Majesty's subjects in the other parts of the United Kingdom, especially in that part of the United Kingdom called England.

"*Third.* To excite discontent and disaffection amongst divers of her Majesty's subjects serving in her Majesty's army.

"*Fourth.* To cause and procure, and aid and assist in causing and procuring, divers subjects of her Majesty *unlawfully*, *maliciously*, *and seditiously* to meet and assemble together in large numbers, at various times and at different places within Ireland, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such assemblies and meetings, changes and alterations in the government, laws, and constitution of the realm by law established.

"*Fifth.* To bring into hatred and disrepute the courts of law established in Ireland for the administration of justice, and to diminish the confidence of her Majesty's subjects in Ireland in the administration of the law therein, *with the intent* to induce her Majesty's subjects to withdraw the adjudication of their differences with, and claims upon, each other, from the cognisance of the said courts by law established, and to submit the same to the judgment and determination of other tribunals to be constituted and contrived for that purpose."

[This count sets out as *overt acts* of the above design, numerous *meetings*, *speeches*, and *publications*.]

The second count was the same as the first, *omitting the overt acts*.

The third count was the same as the second, only omitting from the *fourth* charge the words "unlawfully, maliciously, and seditiously."

The fourth count was the same as the third, omitting the charge as to the army.

The fifth count contained the first and second charges set forth in the first count, omitting the overt acts.

The sixth count contained the fourth charge set forth in the first count, omitting the words "unlawfully, maliciously, and seditiously," and the overt acts.

The seventh count was the same as the sixth, *adding* the words "and especially, by the means aforesaid, to bring about and accomplish *a dissolution of the legislative union* now subsisting between Great Britain and Ireland."

The eighth count contained the fifth charge set forth in the first count, omitting the overt acts.

The ninth count contained the fifth charge set forth in the first count, omitting the intent therein charged, and the overt acts, but *adding* the following charge – "And to assume and *usurp the prerogatives of the crown* in the establishment of courts for the administration of law."

The tenth count was the same as the eighth, omitting *the intent* stated in the fifth charge in the first count.

The eleventh count charged the conspiracy to be, "to *cause and procure large numbers of persons to meet and assemble together* in divers places, and at divers times, within Ireland, and by means of unlawful, seditious, and inflammatory speeches and addresses, to be made and delivered at the said several places, on the said several times, respectively, and also by means of the publishing, and causing and procuring to be published, to and amongst the subjects of her said majesty, divers unlawful, malicious, and seditious writings and compositions, *to intimidate the Lords Spiritual and Temporal, and the Commons* of the Parliament of the United Kingdom of Great Britain and Ireland, and *thereby* to effect and bring about changes and alterations in the laws and constitution of this realm, as now by law established."

The indictment was laid before the grand jury on the 3d November 1843, and, after long deliberation, they returned a true bill late on the 8th of November. After a harassing series of almost all kinds of preliminary objections, the defendants, on the 22d November, respectively pleaded "that they were not guilty of the premises above laid to his charge, or any of them, or any part thereof: " – and on the 16th January 1844, the trial commenced at bar, before the full court of Queen's Bench, viz. the Right Honourable Edward Pennefather, *Chief-Justice*, and Burton, Crampton, and Perrin, *Justices*, and lasted till the 12th February.

The Chief-Justice – a most able and distinguished lawyer – then closed his directions to the jury.

"I have put the questions to you in the language of the indictment. It lies on the crown to establish – they have undertaken to do so – that the traversers, or some of them, are guilty of a conspiracy, such as I have already stated to you – a conspiracy consisting of five branches, any one of which being brought home, to your satisfaction, to the traversers or traverser, in the way imputed, will maintain and establish the charge which the crown has undertaken to prove."

The jury were long engaged in discussing their verdict, and came once or twice into court with imperfect findings, expressing themselves as greatly embarrassed by the complexity and multiplicity of the issues submitted to them; on which Mr Justice Crampton, who remained to receive the verdict, delivered to them, in a specific form, the issues on which they were to find their verdict. They ultimately handed in very complicated written findings, the substantial result of which may be thus stated: All the defendants were found guilty on the whole of the last eight counts of the indictment, viz., the Fourth, Fifth, sixth, seventh, Eighth, Ninth, Tenth, and Eleventh counts.

Three of the defendants – Daniel O'Connell, Barrett, and Duffy – were also found guilty on the whole of the *Third* count, and on part of the First and Second counts – [that is to say, of all the first and second counts, except as to causing meetings to assemble "*unlawfully, maliciously, and seditiously*."]

Four other of the defendants – John O'Connell, Steele, Ray, and Gray – were also found guilty of a part of the First, Second, and Third counts – viz., of all, except as to causing meetings to assemble *unlawfully, maliciously, and seditiously*, and exciting discontent and disaffection in the army.[5]

As soon as these findings had been delivered to the deputy-clerk of the crown, and read by him, a copy of them was given to the traversers, and the court adjourned till the ensuing term.

It should here be particularly observed, that it has been from time immemorial the invariable course, in criminal cases, as soon as the verdict has been delivered, however special its form, for the proper officer to write on the indictment, in the presence of the court and jury, the word "*Guilty*," or "*Not Guilty*," as the case may be, of the whole or that portion of the indictment on which the jury may have thought fit to find their verdict; and then the judge usually proceeds at once to pass judgment, unless he is interrupted by the prisoner's counsel rising to move "*in arrest*," or stay of judgment, in consequence of some supposed substantial defect in the indictment. But observe – it was useless to take this step, unless the counsel could show that *the whole indictment* was insufficient, as disclosing in no part of it an offence in contemplation of law. If he were satisfied that there was one single good count to be found in it, it would have been idle, at this stage of the proceedings, to make the attempt; and it very rarely happens that every one of the varied modes of stating the case which has been adopted is erroneous and insufficient. If, then, the motion was refused, nothing else remained but to pass the sentence, which was duly recorded, and properly carried into effect. No formal or further entry was made upon the record – matters remaining in *statu quo*– unless the party convicted, satisfied that he had good ground for doing so, and was able to afford it, determined to bring a writ of error. *Then* it became necessary, in order to obey the command contained in the writ of error, to "make up the record" —*i. e.* formally and in technical detail to complete its narrative of the proceedings, in due course of law; for which purpose the verdict would be entered in legal form, generally (if such it had been in fact) or specially, according to its legal effect, if a special verdict had been delivered.

To return, now, to the course of proceedings in the present instance.

After desperate but unsuccessful efforts had been made, in the ensuing term, to disturb the verdict, the last step which could be resorted to in order to avert the sentence, was adopted – viz., a motion in arrest of judgment, on the main ground that the indictment disclosed in *no part* of it any indictable offence. It was expressly admitted by the traversers' counsel, in making the motion, that if "the indictment did disclose, with sufficient certainty, an indictable offence in all or any of its counts, the indictment was sufficient;" and it was then "contended, that *not one* of the counts disclosed, with sufficient certainty, that the object of the agreement alleged in it was an indictable offence." The court, however, was of a different opinion; and the Chief-Justice, in delivering his judgment, thus expressed himself – "It was boldly and perseveringly urged, that there was no crime charged in the indictment. If there was one in any count, or in any part of a count, that was sufficient." So said also Mr Justice Burton – "We cannot arrest the judgment, if there be *any* count on which to found the judgment" – the other two judges expressly concurring in that doctrine; and the whole court decided, moreover, that *all* the counts were sufficient in point of law. They, therefore, refused the motion. Had it been granted – had judgment been arrested – all the proceedings would have been set aside; but the defendants might have been indicted afresh. Let us once more repeat here – what is, indeed, conspicuously evident from what has gone before – that at the time when this motion in arrest of judgment was discussed and decided in the court below, there was no more doubt entertained by any criminal lawyer at the bar, or on the bench, in Ireland or England, that if an indictment contained one single good count it would sustain a general judgment, though there might be fifty bad counts in it, than there is of doubt among astronomers, or any one else, whether the earth goes round the sun, or

[5] Two of the defendants' (the two priests) names do not appear in the record of the verdict, as one of them (Tyrrell) died before the trial, and as to Tierney, the Attorney-General entered a *nolle prosequi*.

the sun round the earth. Had the Irish Court of Queen's Bench held the contrary doctrine, it would have been universally scouted for its imbecility and ignorance.

Having been called up for *judgment* on the 30th May, in Trinity term last, the defendants were respectively sentenced to fine and imprisonment, and to give security to keep the peace, and be of good behaviour for seven years; and were at once taken into custody, in execution of the sentence. They immediately sued out writs of error, *coram nobis*– (*i. e.* error *in fact*, on the ground that the witnesses had not been duly sworn before the grand jury, nor their names authenticated as required by statute.) The court thereupon formally affirmed its judgments. On the 14th June 1844, the defendants (who thereby became *plaintiffs* in error) sued out of the "High Court of Parliament" writs of error, to reverse the judgments of the court below. On the writ of error being sued out, it became necessary, as already intimated, to enter the findings of the jury, according to the true and legal effect of such findings, upon the record, which was done accordingly – the judges themselves, it should be observed, having nothing whatever to do with that matter, which is not within their province, but that of the proper officer of the court, who is aided, in difficult cases, by the advice and assistance of counsel; and this having been done, the following (*inter alia*) appeared upon the face of the record: – The eleven counts of the indictment were set out *verbatim*; then the findings of the jury, (in accordance with the statement of them which will be found *ante*;) and then came the following all-important paragraph – the entry of judgment – every word of which is to be accurately noted: —

"Whereupon *all and singular the premises being seen and fully understood* by the court of our said Lady the Queen now here, it is considered and adjudged by the said court here, that the said Daniel O'Connell, for his offences aforesaid, do pay a fine to our Sovereign Lady the Queen of two thousand pounds, and be imprisoned," &c., and "enter into recognisances to keep the peace, and to be of good behaviour for seven years," &c. Corresponding entries were made concerning the other defendants respectively.

This Writ of Error, addressed to the Chief-Justice of the Queen's Bench in Dublin, reciting (in the usual form) that "manifest errors, it was said, had intervened, to the great damage" of the parties concerned; commands the Chief-Justice, "distinctly and plainly, *to send under his seal the record of proceedings* and writ, to Us in our present Parliament, now holden at Westminster; that the record and proceedings aforesaid having been inspected, we may further cause to be done thereupon, with the consent of the Lords Spiritual and Temporal, in Parliament assembled, for correcting the said errors, what of right, and according to the law and customs of this realm, ought to be done." The writ of error, accompanied by a transcript of the entire record of the proceedings below, having been duly presented to the House of Lords, then came the "*assignment of errors,*" prepared by the counsel of the plaintiffs in error – being a statement of the grounds for imputing "manifest error" to the record; and which in this case were no fewer than thirty-four. The Attorney-General, on the part of the crown, put in the usual plea, or joinder in error – "*In nullo est erratum;" Anglicè*, that "*there is no error in the record.*" This was in the nature of a demurrer,[6] and referred the whole record – and, be it observed, *nothing but* the record – to the judgment of the House of Lords, as constituting the High Court of Parliament. It is a cardinal maxim, that upon a writ of error the court *cannot travel out of the record*; they can take judicial notice of nothing but what appears upon the face of the record, sent up to them for the purpose of being "inspected," to see if there be any error *therein.*

The judges of England were summoned *to advise*[7] the House of Lords: from the *Queen's Bench*, Justices Patteson, Williams, and Coleridge, (Lord Denman, the Chief-Justice, sitting in judgment as a peer;) from the *Common Pleas*, Chief-Justice Tindal, and Justices Coltman and Maule; from the *Exchequer*, Barons Parke, Alderson, and Gurney. Lord Chief-Baron Pollock did not attend, having

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[6] *Comyn's Digest*, title *Pleader*, 3 B. 18.

[7] This is the proper expression. See *M'Queen's Practice of the House of Lords,* p. 256. "They are summoned *for their advice in point of law*, and the greater dignity of the proceedings" of the Lords. – (*Blackst, Comm.* p. 167.)

advised the Crown in early stages of the case, as Attorney-General: Mr Justice Erskine was ill; and the remaining three common law judges, Justices Wightman, Rolfe, and Cresswell, were required to preside in the respective courts at *Nisi Prius*. With these necessary exceptions, the whole judicial force – so to speak – of England assisted in the deliberations of the House of Lords. The "*law*" peers who constantly attended, were the Lord Chancellor, Lords Brougham, Cottenham, and Campbell. It has been remarked as singular, that Lord Langdale (the Master of the Rolls) did not attend in his place on so important an occasion, and take his share in the responsibility of the decision. Possibly he considered himself not qualified by his *equity* practice and experience to decide upon the niceties of criminal pleading. Several lay peers also attended – of whom some, particularly Lord Redesdale, attended regularly. The appeal lasted for many days, frequently from ten o'clock in the morning till a late hour in the evening; but the patience and attention of the peers and judges – we speak from personal observation – was exemplary. For the crown the case was argued by the English and Irish Attorney-Generals, (Sir W. W. Follett and Mr T. B. C. Smith;) for O'Connell and his companions, by Sir Thomas Wilde, Mr M. D. Hill, Mr Fitzroy Kelly, and Mr Peacock, all of whom evinced a degree of astuteness and learning commensurate with the occasion of their exertions. If ever a case was thoroughly discussed, it was surely this. If ever "justice to Ireland" was done at the expense of the "delay of justice to England," it was on this occasion. When the argument had closed, the Lord Chancellor proposed written questions, eleven in number, to the judges, who begged for time to answer them, which was granted. Seven out of the eleven related to the merest technical objections, and which were unanimously declared by the judges to be untenable; the law lords (except with reference to the sixth question, as to the overruling the challenge to the array) concurring in their opinions. Lord Denman here differed with the judges, stating that Mr Justice Coleridge also entertained doubts upon the subject; Lords Cottenham and Campbell shared their doubts, expressly stating, however, that they would not have reversed the proceedings on that ground. If they had concurred in reversing the judgment which disallowed the challenge to the array, the only effect would have been, to order a *venire de novo*, or a new trial. With seven of the questions, therefore, we have here no concern, and have infinite satisfaction in disencumbering the case of such vexatious trifling – for such we consider it – and laying before our readers the remaining four questions which tended to raise the single point on which the judgment was reversed; a point, be it observed, which was not, as it could not in the nature of things have been, made in the court below – arising out of proceedings which took place after the court below, having discharged their duty, had become *functi officio*. Those questions were, respectively, the first, second, third, and last, (the eleventh,) and as follow: —

Question I.– "Are all, or any, and if any, which of the *counts of the indictment, bad in law*– so that, if such count or counts stood alone in the indictment, *no judgment* against the defendants could properly be entered upon them?"

Question II.– "Is there any, and if any, what defect in the *findings of the jury* upon the trial of the said indictment, or in the *entering* of such findings?"

Question III.– "Is there any sufficient ground for *reversing the judgment*, by reason of any defect in the indictment, or of the findings, or entering of the findings, of the jury, upon the said indictment?"

Question XI.– "In an indictment consisting of counts A, B, C, when the verdict is, *guilty of all generally*, and the counts A and B are good, and the count C is bad; the judgment being, that the defendant, '*for his offences aforesaid*,' be fined and imprisoned; which judgment would be sufficient in point of law, if confined expressly to counts A and B – can such judgment be reversed on a writ of error? Will it make any difference whether the punishment be discretionary, as above suggested, or a punishment fixed by law?"

The above questions may be stated shortly and substantially thus: – Are there any *defective counts* in the indictment? Any defective *findings* of the jury? Any defects in *entering* the findings? Can judgment be reversed on any of these grounds? If one only of several counts in an indictment be bad; a verdict given of "guilty" generally; judgment awarded against the defendant "for *his offences*

aforesaid," and the punishment discretionary – can judgment be reversed on a writ of error? The whole matter may now, in fact, be reduced to this single question: Can a judgment inflicting fine or imprisonment be reversed by a court of error, because that judgment proceeded on an indictment containing both *bad and good* counts, and in respect of which *some* of the findings of the jury were either defective or defectively entered? – Let us now listen to the decision of that venerable body of men, who are, in the language of our great commentator, "*the depositaries of the laws, the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land.*"[8] The questions which they had thus to consider, moreover, were not questions of rare, subtle, unusual, and speculative, but of an ordinary practical character, such as they were concerned with every day of their lives in administering the criminal law of the country.

First, then, were there any bad counts in the indictment?

The judges were unanimously of opinion that two of the counts were bad, or insufficient in law – and two only – which were the sixth and seventh counts. They hold positively and explicitly, that the remaining nine counts were perfectly valid.

The Chief-Justice (Tindal) thus delivered this unanimous opinion of himself and his brethren on this point.[9]

"No serious objection appears to have been made by counsel for the prisoners, against the sufficiency of any of the counts prior to the sixth. Indeed, there can be no question that the charges contained in the first five counts, *do amount in each to the legal offence of conspiracy, and are sufficiently described therein*.

"We all concur in opinion as to the eighth, ninth, and tenth counts, (no doubt whatever having been raised as to the sufficiency of the eleventh count,) that the object and purpose of the agreement entered into by the defendants and others, as disclosed upon those counts, is an agreement for the performance of an act, and the attainment of an object, which is a violation of the law of the land."

With reference to the sixth and seventh counts, in the form in which they stand upon their record, the judges were unanimously of opinion, that these counts "did not state the illegal purpose and design of the agreement entered into between the defendants, with such proper and sufficient *certainty* as to lead to the *necessary* conclusion that it was an agreement to do an act in violation of the law." They did not show what sort of fear was intended by the alleged intimidation, nor upon whom it was intended to operate, nor was it alleged that the "physical force exhibited" was to be *used*, or *intended* to be used.

Observed, therefore, on what grounds these two counts – two only out of eleven – are held defective: they are deficient in that rigorous "*certainty*" now held requisite to constitute a perfectly legal charge of crime. To the eye of plain common sense – we submit, with the deepest deference, to those who have held otherwise – they distinctly disclose a *corpus delicti*; but when stretched upon the agonizing rack of legal logic to which they were exposed, it seems that they gave way. The degree of "certainty" here insisted upon, would seem to savour a little (possibly) of that *nimia subtilitas quæ in jure reprobatur; et talis certitudo certitudinem confundit*: and which, in the shape of "certainty to a certain intent in every particular," is rejected in law, according to Lord Coke, (5 *Rep.* 121.) It undoubtedly tends to impose inevitable difficulty upon the administration of criminal justice. Sir Matthew Hale complained strongly of this "strictness, which has grown to be a blemish and inconvenience in the law, and the administration thereof; for that more offenders escape by the over-easy ear given to exceptions in indictments, than by their own innocence." – 12 Hal. P. C. 193; 4 Bla. Co. 376. The words, in the present case, are pregnant with irresistible "inference" of guilt; an additional word or two, which to us appear already implicitly there, as they are actually in the eleventh count, would have dispersed every possible film of doubt; and Lord Brougham, in giving judgment,

[8] 1 *Blackstone's Commentaries,* p. 69.

[9] Opinions of the Judges, &c. – (Pp. 1-3.)

appeared to be of this opinion. But now for the general result: The indictment contained two imperfect counts, and nine perfect counts, distinctly disclosing offences not very far short of treason.

Thus, then, the first question was answered.

To the *second* question the judges replied unanimously, "that the *findings of the jury* in the first four counts were not authorized by the law, and are incorrectly entered on the record." One of the judges, however, and a most eminent judge, (Mr Justice Patteson,) being of a contrary opinion.

Thus we have it unanimously decided by the judges, whose decision was acquiesced in by the House of Lords, that there were two bad counts, (the 6th and 7th,) on which there were good findings by the jury, and, with the exception of Mr Justice Patteson, four good counts, (the 1st, 2d, 3d, and 4th,) on which there were bad findings. The effect of this twofold error was thus tersely stated by Mr Baron Gurney, and adopted by the Lord Chancellor.[10]

"I cannot distinguish between a bad finding on a good count, and a good finding on a bad count. They appear to me to amount to precisely the same thing – namely, that upon which no judgment can be pronounced. The judgment must be taken to have proceeded upon *the concurrence of good counts and good findings*, and upon nothing else."

Here, then, at length, it seems that we have hit upon a *blot*– a petty, circumscribed blot to be sure, upon a vast surface of otherwise unsullied legal sufficiency; but still – in the opinion of the judges – a blot.

What was to be held the effect of it? Or had it *any* effect?

The traversers' counsel, at the bar of the House of Lords, took by surprise every one whom they addressed – all their opponents, all the judges, all the law lords, and all the legal profession, as soon as they had heard of it – by boldly affirming, that if this blot really existed, it would invalidate and utterly nullify the whole proceedings from the beginning to the end! They hammered away at this point accordingly, hour after hour – day after day – with desperate pertinacity; being compelled from time to time, during their hopeful argument, to admit, that up to that moment the rule or custom which they were seeking to impeach had been universally acted upon from time immemorial, to the contrary of that for which they were contending. This strange and novel point of theirs gave rise to the third and eleventh questions put to the judges. These questions are substantially identical, viz., whether a single bad count in an indictment on which there has been a general verdict of guilty, with judgment accordingly, will entitle the fortunate defendant to a reversal of that judgment?

We heard a considerable portion of the argument; and listened to *this* part of it with a comfortable consciousness that we beheld, in each counsel arguing it, as it were, a viper gnawing a file! If *this* be law, thought we, then have many thousands of injured gentlemen been, in all human probability, unjustly hanged, and transported for life or for years, been fined, imprisoned, sent to the tread-mill, and publicly whipped; for Heaven only knows how many of the counts in the indictments against – say Mr Fauntleroy; Messrs Thistlewood, Brunt, Tidd, and Ings; Messrs Greenacre, Courvoisier, and many others – have been defective in law! How many hundreds are now luxuriating in Norfolk Island who have, on this supposition, no just right to be there; and who, had they been but *popular* miscreants, might have collected sufficient funds from their friends and admirers to enable them to prove this – to try a fall with justice and show her weakness; to overhaul the proceedings against them, detect the latent flaws therein, return in triumph to the bosom of their families and friends, and exhibit new and greater feats of dexterity in their art and mystery! Why should not that "*innocent*" convict – now passing over the seas – Mr Barber, on hearing of this decision, soon after his arrival at the distant paradise to which he is bound, take new heart and remit instructions by the next homeward bound ship for a writ of error, in order that he may have *his* chance of detecting a flaw in one of the many counts of *his* indictment?

[10] Opinions of the Judges, p. 23.

But, to be serious again, how stands the case in the present instance? Of eleven counts, six must be in legal contemplation expunged from the record: four, (the first, second, third, and fourth,) because, though in themselves sufficient in law, the findings upon them were technically defective; and two, (the sixth and seventh,) because they were technically defective in point of law, though the findings on them were unobjectionable.

Then there remain five perfect counts with five perfect findings, in the opinion of all the judges and of all the law lords; those five *counts* containing the gist of the whole charge against O'Connell and his confederates – those five *findings* establishing that the defendants were guilty of the offences so laid to their charge. Blot out, then, altogether from the record the six counts objectionable on the above-mentioned grounds, how are the other five to be got rid of? Thus, said the traversers' counsel. We have the entire record before us containing all the eleven counts and findings, both good and bad; and we find by the language of the record itself, that the judges, in passing sentence, *took into consideration all the eleven counts*, as if they had been valid counts with valid findings – for the judges expressly inflicted punishment on each of the traversers "*for his* offences *aforesaid*." Is it not therefore plain to demonstration, that the measure of punishment was governed by reference to six —*i. e.* a majority – of eleven counts, which six counts had no more right to stand on the record, entailing liability to punishment on the parties named in them, than six of the odes of Horace? The punishment here, moreover, being discretionary, and consequently dependent upon, and influenced by, the ingredients of guilt, which it appears conclusively that the judges took into their consideration?

Such was the general drift of the reasonings of the traversers' counsel. What was their effect upon the assembled judges – those experienced and authoritative expositors of the law of the land? Why, after nearly two months' time taken to consider and ponder over the various points which had been started – after anxious consideration and communication one with another – they re-appeared in the House of Lords on the 2d of September; and, led by one who will be on all hands admitted to be one of the most experienced, gifted, profoundly learned, and perfectly impartial and independent lawyers that ever presided over a court of justice – Sir Nicholas Tindal – seven out of *nine* of the judges expressed a clear unhesitating opinion, that the third and eleventh questions should be answered in the negative – viz. that the judgment was in no way invalidated – could be in no way impeached, by reason of the defective counts and findings. The two dissenting judges who had been *hit* by the arguments of the traversers' counsel, were Baron Parke and Mr Justice Coltman – the latter speaking in a confident, the former in a remarkably hesitating and doubting tone. The majority consisted of Chief-Justice Sir Nicholas Tindal, Mr Justice Patteson, Mr Justice Maule, Mr Justice Williams, Mr Baron Gurney, Mr Baron Alderson, and Mr Justice Coleridge.

We have no hesitation in expressing our opinion, that the judgments delivered by this majority of the judges stand on the immovable basis of sound logic, accurate law, and good sense; and lament that our space will not allow us to present our readers with the many striking and conclusive reasonings and illustrations with which those judgments abound. We can but glance at the *result*– leaving the *process* to be examined at leisure by those so disposed. The artful fallacies of the traversers' counsel will be found utterly demolished. The first grand conclusion of the judges was thus expressed by the Chief-Justice —

"I conceive it to be the law, that in the case of an indictment, if there be one good count in an indictment upon which the defendants have been declared guilty by proper findings on the record, and a judgment given for the crown, imposing a sentence authorized by law to be awarded in respect of the particular offence, that such judgment cannot be reversed by a writ of error, by reason of one or more of the counts in the indictment being bad in point of law."

The main argument of the traversers' counsel was thus disposed of —

"It was urged at your lordships' bar, that all the instances which have been brought forward in support of the proposition, that one good count will support a general judgment upon an indictment in which there are also bad counts, are cases in which there was a motion in *arrest of judgment*, not

cases where a *writ of error* has been brought. This may be true; for so far as can be ascertained, there is no single instance in which a writ of error has been ever brought to reverse a judgment upon an indictment, upon this ground of objection. But the very circumstance of the refusal by the court to arrest the judgment, where such arrest has been prayed on the ground of some defective count appearing on the record, and the assigning by the court as the reason for such refusal, that there was one good count upon which the judgment might be entered up, affords the strongest argument, that they thought the judgment, *when entered up*, was irreversible upon a writ of error. For such answer could not otherwise have been given; it could have had no other effect than to mislead the prosecutor, if the court were sensible at the time, that the judgment, when entered up, might afterwards be reversed by a court of error."

The grand argument derived from *the language of the judgment*, was thus encountered: —

"I interpret the words, 'that the defendant *for his offences* aforesaid, be fined and imprisoned,' in their plain literal sense, to mean *such offences as are set out in the counts of the indictment which are free from objection, and of which the defendant is shown by proper findings on the record to have been guilty*– that is in effect the offences contained in the fifth and eighth, and all the subsequent counts. And I see no objection to the word offences, in the plural, being used, whether the several counts last enumerated do intend several and distinct offences, or only one offence described in different manners in those counts. For whilst the record remains in that shape, and unreversed, there can be no objection in point of law, that they should be called 'offences' as they appear on the record."

Now, however, let us see the view taken of the matter by Mr Baron Parke – a man undoubtedly of acute and powerful mind, as well as accurate and extensive learning. It is impossible not to be struck by the tone of diffidence which pervades his judgment; and it was *delivered* in a very subdued manner, not usual with that learned judge; occasioned doubtless by the pain with which he found himself, on an occasion of such transcendent importance, differing from all his brethren but one. He commenced by acknowledging the astonishment with which he had heard counsel at the bar question the proposition *which he* (Baron Parke) *had always considered*, ever since he had been in the profession, *perfectly settled and well established*, viz. that in criminal cases one good count, though associated with many bad ones, would, nevertheless, suffice to support a general judgment. But "he had been induced to *doubt* whether the rule had not been carried too far, by a misunderstanding of the *dicta* of judges on applications *in arrest of judgment*."

To enable the lay reader to appreciate the novel doctrine which has been sanctioned in the present case, it is requisite to understand clearly the distinction to which we have already briefly adverted, between a motion in *arrest of judgment* and a *writ of error*. When a defendant has been found guilty of an offence by the verdict of a jury, judgment must follow as a matter of course, "*judgment* being the sentence of the law pronounced by the court upon the matter contained in the record."[11] If, however, the defendant can satisfy the court that the indictment is entirely defective, he will succeed in "*arresting,*" or staying the passing of judgment; but if he cannot, the court will proceed to *give judgment*. That judgment having been entered on the record, the defendant, if still persuaded that the indictment is defective, and consequently the judgment given on it erroneous, has one more chance; viz. to *reverse* the judgment which has been so given, by bringing a writ of error before an appellate tribunal. Now, the exact proposition for which the traversers' counsel contended was this – that the rule that "one good count will sustain a general judgment, though there are also bad counts in the indictment," is applicable to that stage only of the proceedings at which a motion is made in arrest of judgment; *i. e. before the judgment has been actually given*, and not to the stage at which a writ of error has been obtained, viz. *after the judgment has been actually given*.

[11] 3 *Blackstone's Commentaries*, p. 395.

This proposition was adopted by Mr Justice Coltman; while Mr Baron Parke – for reasons substantially identical with those of Lords Denman, Cottenham, and Campbell – declared himself unable to overthrow it.

As to the "opinion that one good count, properly found, will support a judgment warranted by it, whatever bad counts there may be," Mr Baron Parke said, – "I doubt whether this received opinion is so sufficiently established by a course of usage and practical recognition, though generally entertained, as to compel its adoption in the present case, and prevent me considering its propriety. After much anxious consideration, and weighing the difficulties of reconciling such a doctrine with principle, I feel so much doubt, that I cannot bring myself to concur with the majority of the judges upon this question."

Without for one moment presuming to suggest any invidious comparison, we may observe, that whatever may be the learning and ability of the two dissenting judges, the majority, with Sir Nicholas Tindal at their head, contains some of the most powerful, well-disciplined, long-experienced, and learned intellects that ever were devoted to the administration of justice, and all of them thoroughly familiar with the law and practice in criminal proceedings; and as we have already suggested, no competent reader can peruse their judgments without feeling admiration of the logical power evinced by them. While Mr Baron Parke "*doubts*" as to the soundness of his conclusions, they all express a clear and *decisive* opinion as to the existence of the rule or custom in question as a rule of law, and as to its reasonableness, utility, and justice.

The reading of these judgments occupied from ten o'clock on the Monday morning till three o'clock in the afternoon, when the House adjourned till Wednesday; having first ordered the opinions of the judges to be printed. There were a considerable number of peers (among whom was the Duke of Cambridge) present, and they listened attentively to those whom they had summoned to advise them on so great an occasion. Lords Brougham, Denman, Cottenham, and Campbell sat near one another on the opposition side of the House, each with writing-tables before him; and they, together with the Lord Chancellor, appeared to pay close attention to what fell from the judges. The House of Lords on these great occasions presents a very interesting and impressive appearance. The Chancellor sits robed in his usual place, surrounded by the judges, who are seated on the woolsacks in the centre of the house, all in their full official costume, each rising to read his written judgment. If ever man made a magnificent personal appearance among his fellows, it is Lord Lyndhurst thus surrounded. At the bar of the house stood, or sat, the majority of the counsel engaged on each side, as well as others; and the whole space behind was crowded by anxious spectators, conspicuous among whom were Messrs Mahoney and Ford, (two tall, stout, shrewd-looking men,) the Irish attorneys engaged on behalf of the traversers. They and their counsel appeared a trifle less desponding at the conclusion of Baron Parke's judgment; but the impression was universal that the Chancellor would advise the House to affirm the judgment, in accordance with the opinions of so overwhelming a majority of the judges. No one, however, could do more than guess the inclination of the law lords, or what impression had been made upon them by the opinions of the judges. When therefore Wednesday, the day of final judgment upon this memorable and agitating case, had arrived, it is difficult to describe the excitement and anxiety manifest among all the parties who densely crowded the space between the door and the bar of the House. There were, of course, none of the judges present, with the exception of Mr Baron Rolfe, who, in plain clothes, sat on the steps of the throne, a mere private spectator. There were about a dozen peers on the ministerial benches, including Lord Wharncliffe, Lord Redesdale, Lord Stradbroke, and others; and several peers (including Lord Clanricarde) sat on the opposite benches. Lords Cottenham and Campbell sat together, frequently in communication with each other, and occasionally with Lord Denman, who sat near them, at the cross-benches, busily engaged in referring to books and papers. Lord Brougham occupied his usual place, a little nearer the bar of the House than Lords Cottenham and Campbell; and on the writing-desks of all three lay their written judgments. All the law-peers wore a serious and thoughtful expression of countenance –

which you scrutinized with eager anxiety in vain for any sign of the sort of judgments which they had come prepared to deliver. The traversers' leading counsel, Sir Thomas Wilde and Mr Hill, both stood at the bar of the House in a state of very perceptible suspense and anxiety. The Attorney-General for Ireland sat in his usual place – almost motionless, as usual, from first to last – very calm, and watching the proceedings with deep attention, seldom uttering more than a passing syllable to those who sat next to him, *i. e.* the English Solicitor-General, and Mr Waddington, and Mr Maule of the Treasury. After judgment had been briefly given in Gray's case, a few moments' interval of silence elapsed – the silence of suppressed anxiety and expectation. At length the Lord Chancellor, who had been sitting with a very thoughtful air for a few moments, slowly rose from the woolsack, and advanced to his proper post when addressing the House, viz. at about a couple of yards' distance to the left of the woolsack. Finding that his robes, or train, had in some way got inconveniently disarranged, so as to interfere with the freedom of his motions, he occupied several seconds in very calmly putting it to rights; and then his tall commanding figure stood before you, in all that tranquil grace and dignity of appearance and gesture, for which he has ever been so remarkably distinguished. During the whole time – exactly an hour – that he was speaking, his voice clear and harmonious as usual, and his attitude and gesture characterized by a graceful and easy energy, he never once slipped, or even hesitated for want of an apt expression; but, on the contrary, invariably hit upon *the very* expression which was the most accurate, appropriate, and elegant, for conveying his meaning. He spoke with an air of unusual decision, and entirely *extempore*, without the assistance of a single memorandum, or note, or law-book: yet the greater portion of his speech consisted of very masterly comments on a great number of cases which had been cited, in doing which he was as familiar and exactly accurate, in stating not only the principles and distinctions involved, but the minutest circumstances connected with them, as if the cases had been lying open before him! His very first sentence put an end to all doubt as to the conclusion at which *he* had arrived. These were his precise words – the last of them uttered with peculiar emphasis: – "My lords, I have to move your lordships that the judgment of the court below in this case be *affirmed*." He proceeded to compliment the judges on the patient and laborious attention and research which they had bestowed upon the case. "My lords," said he, "with respect to all the points submitted to their consideration, with the exception of one question – for in substance it *was* one question – their opinion and judgment have been unanimous. With reference to that one question, seven of the learned judges, with the Chief-Justice of the Common Pleas at their head, have expressed a distinct, a clear, and decided opinion against the objections which were urged. Two other learned judges have expressed an adverse opinion. I may be permitted to say – and all who were present to hear them must agree with me – that it was an opinion accompanied with much doubt and much hesitation. I think, under these circumstances, that *unless your lordships are thoroughly and entirely satisfied that the opinion of the great majority of the judges was founded in palpable error*, your lordships will feel yourselves, in a case of this kind, bound by their decision to adhere to and support their judgment, and act in conformity with it." After briefly stating the only question before them – viz. "whether, there being defective counts in the indictment, and other counts with defective findings on them, a general judgment can be sustained?" – he proceeded, "Your lordships will observe that this is a mere technical question, though, I admit, of great importance – never presented to the judges of the court below, not calling in question their judgment in substance – but arising entirely out of the manner in which that judgment has been entered up, by those whose province it was to discharge that particular duty." He then made the following decisive and authoritative declaration, which all who know the accurate and profound learning and the vast judicial experience of the Chancellor will know how to value. "Allow me, my lords, to say, that *it has always been considered as a clear, distinct, and undoubted principle of the criminal law of England, that in a case of this nature a general judgment is sufficient*; and from the first moment when I entered the profession, down to the time when I heard the question agitated at your lordships' bar, I never heard it called in question. I have found it uniformly and constantly acted upon, without doubt, without hesitation. I find it in all treatises, in all text-writers

on the subject – not questioned, not doubted, not qualified, but stated broadly and clearly. Now for the first time it has been stated – and Mr Baron Parke himself admits that it *is* for the first time – that that rule applies only to motions in arrest of judgment. I never before heard of such a limitation. I am quite sure that there is no case to sanction it, no decision to warrant it, no authority to be cited in support of it. I am quite satisfied, after all I have heard on the subject, that there is no ground whatever for the doubt – no ground whatever for the exception now insisted upon. * * * It is not necessary that the judgment should be awarded *with reference to any particular count*. No such decision can be cited. No one not in the confidence of the judges can tell in respect of what the judgment was awarded, *except with reference to the record itself*. If there be defective counts, does it by any means follow that the judges, in awarding judgment, appointed any part of it with reference to the defective counts? There is no similarity between the two cases: you cannot reason or argue from one to the other. You must assume, unless the contrary is distinctly shown, that what the judges have done in that respect is right; that the judgment, if there be any part of the record to support it, proceeded upon that part. In writs of error, you are not allowed to *conjecture*, to decide on *probabilities*, you must look to the record; and unless the record itself, on the face of it, shows, not that there *may* have been, but that there has been manifest error in the apportioning of the punishment, you cannot reverse the judgment. You upon conjecture reverse the judgment; and if afterwards you were to consult the very judge by whom it had been pronounced, you might find that he had at the time taken that very point into consideration. You are therefore running the hazard of reversing a judgment on the very grounds which were present to the mind of the judge at the moment when that judgment was pronounced." As to the statement, that judgment was awarded against each defendant "for his offences aforesaid," – thus argued the Chancellor: —

"But independently of this, my lords, let us look at the record itself, and see whether, on the face of the record, there is any ground whatever for this objection. Every record must be construed according to *its legal effect*– according to its legal operation. You cannot travel out of the record. Now, what is the judgment? Why, 'that the court adjudges the defendant, *for his offences aforesaid*, to be fined and imprisoned.' What is an 'offence' on this record? There are two counts defective: but why? Because they charged, according to the unanimous opinion of the judges, NO offence. There were *facts* stated, but not so stated as to constitute an indictable offence. When you consider this record, then, according to its language and legal interpretation, can you say that when there is an award of judgment for the offences on the record, that judgment applies to those counts which bear on the face of them no offence whatever? That is, my lords, an incongruity, an inconsistency, which your lordships will never sanction for one moment. The argument which applies to defective counts, applies to valid counts on which erroneous findings are entered up. When judgment is given for an 'offence' on the record, it is given on the offence of which the defendant is properly found guilty; and he is *not* found guilty on those counts on which the erroneous findings are entered up. My lords, the conclusion to which I come on the record is, that when the judgment is awarded 'for the offences aforesaid', it must be confined to those offences stated on the record which are offences in the eye of the law, and of which the defendant has been found guilty by the law – namely, those offences on which the finding was properly made. It is not, however, necessary to rest upon that: but if it were, I am of opinion, and I state it to your lordships, that in this case, the record, considered according to the proper and legal acceptation and force of the terms – and that is the only way in which a local record can be properly considered – must be taken as containing an award of judgment for those offences only which are properly laid, and of which the parties have been found guilty. On the face, therefore, of the record itself, there is no defect whatever in this case."

His lordship, after a luminous commentary on a great number of authorities, thus proceeded – "Now, my lords, it is said that there is *no express decision* upon the subject. Why, if a case be so clear, so free from doubt, that no man, no attorney, barrister, or judge, ever entertained any scruple concerning it – if the rule have been uniformly acted upon and constantly recognised, is it to be said,

that because there is no express decision it is not to be considered *law*? Why, that argument leads to this conclusion – that the more clear a question is, the more free from doubt, the more uncertain it must be! *My lords, what constitutes the law of this country? It is – usage, practice, recognition.* For many established opinions, part of the acknowledged law of the land, you will look in vain for any express decision. I repeat, that practice, usage, recognition, are considered as precedents establishing the law: these are the foundations on which the common law of the country rests; and it is admitted in this case, that the usage is all against the principle now contended for by the plaintiffs in error. No case, no authority of any kind, can be adduced in its favour: it is now admittedly, for the first time, urged in this extraordinary case. And I ask, my lords, if you will not recognise the decision of the great majority of the judges on a question of this kind, involving the technicalities of the law, with which they are constantly conversant? When, on such a point, you find them – speaking by the eminent and able Chief-Justice of the Common Pleas – pronouncing a clear and distinct opinion, it must be a case clear from all doubt – a conviction amounting to actual certainty, upon which alone you would be justified in rejecting such authorities. * * * It is on these grounds, and on the authorities which I have cited, that I assert the universal recognition of the principle which I contend has been acknowledged law from time immemorial."

Such was the emphatic, clear, unwavering judgment, deliberately pronounced, after long examination and consideration, by one of the very greatest intellects ever brought to bear upon the science of the law, and of vast judicial experience in the administration of every department of the law – criminal law, common law, and equity.

Lord Brougham then rose, and delivered partly a written, partly an oral judgment – characterized by his lordship's usual vigour and felicity of reasoning and illustration. He entirely concurred with the Lord Chancellor, and assigned reasons, which certainly appeared of irresistible cogency, for adopting the opinion of the judges, whom, in a matter peculiarly within their province, their lordships had summoned to their assistance, who had bestowed such unexampled pains upon the subject, and were all but unanimous. The following was a very striking way of putting the case: – "If the doubts which have been thrown upon this judgment be allowed to have any weight in them, it goes the length of declaring, that *every thing which has been decided in similar cases* was mere error and delusion. Nothing can be more dangerous than such an impression. I cannot conceive any thing more appalling than that it should be held, that every one of the cases similarly decided ought to be reversed; that the judgments without number under which parties have been sent for execution *are all erroneous judgments, and ought to have been reversed*, and *must* have been reversed, if they had been brought before the last resort!"

Lord Denman then rose; and though it was generally understood – as proved to be the fact – that he intended to express a strong opinion against the disallowance of the challenge to the array, we believe that no one expected him to dissent upon the great and only point on which the appeal turned, from the opinions of the great majority of his brother judges, and from the Chancellor and Lord Brougham. We waited with great interest to see the course which Lord Denman would take upon the great question. He is a man of strong natural talents, of a lofty bearing in the administration of justice, and an uncompromising determination on all occasions to assert the rights and protect the privileges of the subject. Nor, though a man of unquestionably very strong Whig opinions, are we aware of his having ever allowed them to interfere with his eminent and most responsible judicial duties. Whatever may be our opinion as to the validity of his conclusions on the subject of the challenge to the array, it was impossible not to be interested by the zealous energy, the manly eloquence, with which he vindicated the right of the subject to the fullest enjoyment of trial by jury, and denounced what he considered to be any, the slightest interference, with that right. At length his lordship closed his observations on that subject, and amidst breathless silence, fell foul, not only of the two counts which had been admitted to be defective – the sixth and seventh – but "*many others of the counts!*" which, he said, were open to objection, and declared that the judgment could not be sustained.

Lord Denman's judgment (to which great respect is due) was, as far as relates to *the point* of the case, to this effect: – He had an "unconquerable repugnance" to assuming that the judges had passed sentence on the good counts only; for it was in direct contradiction to *the notorious fact*, that the judges had pronounced certain counts to be good; and it was also against the *common probability* of every case. He admitted the general opinion of the profession to have long been, that a general judgment, if supported by one sufficient good count, was not injured by a bad one associated with it. "I know," said his lordship,[12] "what course I should have taken if pressed to give judgment at the trial, and had given it. If nothing had taken place respecting the validity of any part of the indictment – but much more if its validity had been disputed, but established – I should leave apportioned the sentence to the degree of criminality that was stated in all the counts which were proved in evidence." – "I see no inconvenience in compelling a judge to form an opinion on the validity of the counts, before he proceeds to pass judgment. He ought to take care that a count is good before he allows a verdict to be taken, or at least judgment to be entered upon it; and great good will arise from that practice. I am deliberately of opinion that this is a right and wholesome practice, producing no inconvenience, and affording a great security for justice. * * * In criminal cases, all difficulty may be entirely avoided by the court passing a separate judgment on each count, and saying, 'We adjudge that on this count, on which the prisoner is found guilty, he ought to suffer so much; that on the second count, having been found guilty, he ought to suffer so much; whether the count turn out to be good or not, we shall pronounce no opinion; that question would be reserved for a superior court. A court of error would then reverse the judgment only on such counts as could not be supported in law – leaving that to stand which had proceeded on valid charges." – "Where a felony was established, requiring a capital punishment, or transportation for life, the number of counts could make no difference; because the punishment pronounced on any one exhausted the whole materials of punishment, and admitted of no addition." – "The current notion, that one count alone could support any sentence applicable to the offences stated in the whole indictment, can be accounted for only by Lord Mansfield's general words, needlessly and inconsiderately uttered, hastily adopted, and applied to a stage of the proceedings in which they are not correct in law."

Then came Lord Cottenham – a cold, clear-headed lawyer, cautious, close, and accurate in his reasonings, and very tenacious in adhering to his conclusions: possessing the advantage of several years' judicial experience – as an equity judge. Thus he addressed himself to *the point* of the case: —

"Is there error upon the record?"

* * * Did not the court below pass sentence upon the offences charged in the *first*, *second*, *third*, *fourth*, *sixth*, and *seventh* counts in the indictment, as well as upon the offences charged in the other counts? The record of that court tells us that it *did*; and if we are to see whether there be any error on that record, and adopt the unanimous opinion of the judges, that those six counts, or the findings on them, are so bad that no judgment upon them would be good, how can we give judgment for the defendant, and thereby declare that there is *no error* in the record? The answer which has been given to this objection appears not only unsatisfactory, but inadmissible. It is said that we must presume that the court below gave judgment, and passed sentence, only with reference to the unobjectionable counts and findings. That would be to presume that which the record negatives. By that record the court tells us that the sentence on each defendant was 'for his offences aforesaid,' after enumerating all those charged in the indictment. Are we, after and in spite of this, to assume that this statement is false, and that the sentence was upon one-half only of the offences charged? * * * We can look to the record only for what passed in the court below; and as that tells us the sentence was passed

[12] We quote from the edition of Lord Denman's judgment, sanctioned by himself, and edited by D. Leahy, Esq., (one of the counsel in the cause.)

upon all the offences of which the jury had found the defendants guilty, we cannot presume to the contrary of such a statement. It would be the presumption of a fact, the contrary of which was known to all to be the truth. The argument supposes the court below to have been right in all particulars; but the impossibility of doing so on this record was felt so strongly, that another argument was resorted to, (not very consistently with the judgment, for it assumes that the jury may have been wrong upon every count but one,) namely, that a court of error has to see only that there is *some one offence properly charged*, or a punishment applicable to it inflicted; and then, that being so, that as to all the other counts the court below was wrong – all such other counts or findings being bad.

"Consider what is the proposition contended for. Every count in an indictment for misdemeanour is supposed to apply to a different offence: they often do so, and always may; a prosecutor having the option of preparing a separate indictment for each, or of joining all as one. If he adopt the former course, he must, to support the sentence, show each indictment to be right. If he adopt the latter course – viz. going upon one indictment containing several counts, and one sentence is pronounced upon all the counts, according to the proposition now contended for; suppose the sentences to be bad on all the counts *but one*, that one applying to the most insignificant offence of the whole; a court of error, it is said, has no right to interfere! That is to say, it cannot correct error except such error be *universal*; – no matter how important that error, no matter how insignificant the portion which is right, nor what may have been the effect of such error! The proposition will no longer be 'in *nullo* est erratum,' but that the error is not —*universal*. If neither of these arguments prove that there is manifest error upon the record, and it is not for a court of error to enter into any consideration of the effect which such error may have produced, it has no power to alter the verdict, and can form no opinion of its propriety and justice from mere inspection of the record, which is all the judicial knowledge a court of error has of the case. *Upon what ground* is it to be assumed, in any case, that the court below, if aware of the legal insufficiency of any of the counts, or of the findings upon them, would have awarded the same punishment? It *could*, probably, do so in many cases – but in many it as certainly would not. If the several counts were only different modes of stating the same offence, the insufficiency of some of those counts could not affect the sentence; but if the different counts stated – as they well might – actually different misdemeanours, and, after a verdict of guilty *upon all*, it were found that some of *such* counts – that is, that some of the misdemeanours – charged, must be withdrawn from the consideration of the court, by reason of defects in either the counts themselves or the findings upon them, it cannot, in many cases, be supposed that the sentence could be the same as if the court had the duty thrown upon it of punishing *all the offences charged*. This may be well illustrated by supposing an indictment for two libels in different counts – the first of a slight, the other of an aggravated character – and verdict and judgment upon both; and the count charging the malignant libel, or the finding on it, held to be bad. Is the defendant to suffer the same punishment as if he had been properly found guilty of the malignant libel?" The reason why the rule in civil actions does not apply to *motions in arrest of judgment* in criminal cases, is plainly this: – because the court, *having the sentence in its own hands*, will give judgment 'on the part which is indictable' – and the failure of part of the charge will go only to lessening the punishment. These reasons, however, have plainly no application to *writs of error*; because *a court of error* cannot, *of course, confine the judgment to those parts which are indictable, or lessen it, as the different charges are found to fail*."

"The only inconvenience," added his lordship, "which can arise from the rule we are laying down, will be, that the prosecutor must be careful as to the counts on which he means to rely: *the evidence at the trial* must afford him the means of making the selection – and the defendant has now the means of compelling him to do so."

Such was, in substance, Lord Cottenham's judgment. He read it in his usual quiet, homely, matter-of-fact manner, as if he were not at all aware of, or cared not for, the immense importance and public interest attaching to the publication of the conclusion at which he had arrived.

Then rose Lord Campbell. In a business-like and satisfactory manner he went briefly over all the points which had been made by the plaintiffs in error, disposing of them all in favour of the crown, (expressing, however, doubts on the subject of the challenge to the array,) till he came to the point – which he thus approached: – "I now come, however, to considerations which induce me, *without hesitation*, humbly to advise your lordships to reverse this judgment." He was brief but pithy in assigning his reasons.

"According to the doctrine contended for on the part of the crown," said his lordship, adopting two cases which had been put by, we believe, Mr Peacock in his argument, "the following case may well happen. There may be an indictment containing two counts, A and B, for separate offences; A being a good count, B a bad one. The court below may think A bad and B good; and proceed to sentence the defendant to a heavy punishment merely in respect of B, which, though it may contain in reality not an offence in point of law, they may consider to contain one, and of signal turpitude. On a writ of error, the court above clearly sees that B is a bad count; but cannot reverse the judgment, because there stands count A in the indictment – and which, therefore, (though for a common assault only,) will support the heavy fine and imprisonment *imposed in respect of count B*! Let me suppose another case. An indictment contains two counts: there is a demurrer[13] to each count: each demurrer is overruled, and a general judgment given that the defendant, 'for his offences aforesaid,' shall be fined and imprisoned. Is it to be said, that if he bring a writ of error, and prove one count to be bad, he shall have no relief unless he shows the other to be bad also?"

He concluded a brief commentary (substantially identical with that of Lord Cottenham) on the authorities cited, by affirming that "there was neither text-book, decision, nor *dicta* to support a doctrine so entirely contrary to principle."

This is how his lordship thinks the like mischief may be obviated in future: —

"If bad counts are inadvertently introduced, the mischief may be *easily* obviated by taking a verdict of acquittal upon them – by entering a *nolle prosequi* to them, or by seeing that the judgment is expressly stated to be on the good counts only, which alone could prevent the bad counts from invalidating the judgment upon a writ of error."

As to the notion that the judges were uninfluenced in passing sentence by the first three counts, on which there were numerous findings, he observed, that – "We cannot resort to the *palpably incredible fiction* that the judges, in violation of their duty, did not consider the guilt of the parties aggravated by the charges in these three counts, and proportionally increase their punishment."

After an unsuccessful attempt on the part of one or two lay peers who had not heard the whole argument, to vote – which was resisted by both the Lord Chancellor and Lord Wharncliffe, and Lords Brougham and Campbell – the Lord Chancellor finally put the question: —

"Is it your lordships' pleasure that this judgment be reversed? – As many as are of that opinion, will say '*Content*.' As many as are of a contrary opinion, will say '*Not Content*.'"

"*Content!*" exclaimed Lords Denman, Cottenham, and Campbell.

"*Not Content!*" said the Lord Chancellor and Lord Brougham.

Lord Chancellor. "The *Contents* have it. The judgment is Reversed."

The instant after these pregnant words had been uttered, there was a rush of persons, in a state of the highest excitement and exultation, towards the door; but the lords calmly proceeded to give judgment in a number of ordinary appeal cases. The Attorney-General for Ireland, who had been watching the whole of the day's proceedings with close attention, heard the result with perfect composure; but as several portions of the judgments of Lords Denman, Cottenham, and Campbell were being delivered, a slight sarcastic smile flitted over his features. As we have mentioned him, let us take this opportunity of bearing testimony to the very great ability – ability of the highest order –

[13] A "*demurrer*" is the mode by which any pleading, civil or criminal, is denied to be (whether in form or substance) sufficient in point of *law*; and a *plea* is the mode by which is denied the *truth* of the *facts* which the pleading alleges.

with which he has discharged *his* portion of the duty of conducting these proceedings, unprecedented in their harassing complexity and their overwhelming magnitude. He has manifested throughout – 'bating a little irritability and strictness in petty details at starting – a self-possession; a resolute determination; a capability of coping with unexpected difficulty; a familiarity with constitutional law; a mastery over the details of legal proceedings; in short, a degree of forensic ability, which has been fully appreciated by the English bar, and reflects credit upon those who placed him in his arduous and responsible office. In terms of similar commendation we would speak of the Irish Solicitor-General, (Mr Sergeant Green.) Accustomed as we are to witness the most eminent displays of forensic ability, we feel no hesitation in expressing our opinion, that the Solicitor-General's reply at the trial, and the Attorney-General's reply on the motion for a new trial, were as masterly performances as have come under our notice for very many years.

We have thus laid before our readers, with the utmost candour and care, this truly remarkable case; and at a length which, though considerable, is by no means incommensurate with its permanent interest and importance. We believe that we have, in the foregoing pages, furnished all persons, of average intellect and information, with the means of forming for themselves a sound opinion as to the propriety or impropriety of reversing the judgment of the court below. We have given the arguments on both sides with rigid impartiality, and supplied such information, in going along, as will enable the lay reader thoroughly to understand them. This is a question which all thinking persons must needs regard with profound interest and anxiety. If, in the deliberate opinion of the country, the judgments of the High Court of Parliament are habitually, though unconsciously, warped by party and political feelings and prejudices; if, with such views and intentions, they have strained and perverted the law of the land, wickedly sheltering themselves under the unfortunate difference of opinion existing among the judges, those who have been guilty of it will justly stand exposed to universal execration. It is no light matter even to propose such a possibility as that of profligacy or corruption in the administration of justice; above all, in the highest tribunal in the land – the place of last resort for the subject. It is always with pain and regret that we hear, even in the height of political excitement and hostility, the faintest imputation from any quarter on judicial integrity. We have watched this case from first to last; and especially examined over and over again, in a spirit of fearless freedom, the grounds assigned for reversing the judgment, and the position and character of those by whose *fiat* that result was effected. We cannot bring ourselves to believe any thing so dreadful as that three judicial noblemen have deliberately violated their oaths, and perpetrated so enormous an offence as that of knowingly deciding contrary to law. Those who publicly express that opinion, incur a very grave responsibility. We are ourselves zealous, but independent supporters of the present government; we applaud their institution of these proceedings; no one can lament more bitterly than we do, that O'Connell should, like many a criminal before him, have escaped from justice through a flaw in the indictment; yet with all this, we feel perfectly satisfied that the three peers who reversed the judgment against him, believed that they were right in point of law. When we find so high an authority as Mr Baron Parke – as far as politics are concerned, a strong Conservative – declaring that he cannot possibly bring himself to concur in opinion with his brethren; that another judge – Mr Justice Coltman – after anxious deliberation, also dissents from his brethren; and when we give each of these judges credit for being able to appreciate the immense importance of *unanimity* upon such a case as the present, had it been practicable – can it seem really unreasonable or surprising, that a corresponding difference of opinion should exist among the peers, whose judicial duty it was to decide finally between the judges? It *is*, certainly, a matter calculated to attract a *moment's* attention, that the judgment should have been reversed by the votes of three peers who concur in political opinion, and opposition to the government who instituted the prosecution. But in fairness, put another possible case. Suppose Lord Abinger had been alive, and had concurred with the Chancellor and Lord Brougham, would not another class of ardent partisans as naturally have remarked bitterly upon the coincidence of opinion between the peers whose three voices concurred in supporting the judgment of the court below?

While we thus entirely exonerate Lords Denman, Cottenham, and Campbell from all imputation of intentionally giving effect to party and political bias, it is difficult to suppose them, or any other peer, entirely free from *unconscious* political bias; but in the nature of things, is it not next to impossible that it should be otherwise, in the case of men who combine in their own persons the legislative and judicial character, and in the former capacity are unavoidably and habitually subject to party influences? When a Judicial question is under consideration, of such extreme doubtfulness as almost to justify a vote either way, (we must deal with men and things as we find them,) can it excite great surprise, if even in the most honourable minds a political bias should *unconsciously* evince its presence, and just turn the scale?

But here the case has turned upon one single point of the purest technicality, which the House of Lords has deemed sufficient to cause a reversal of the judgment of the court below; and the question is, have they done rightly? Are they right or wrong in point of strict law? In the language of Mr Justice Williams – the objection raised in behalf of the traversers "is purely of a technical nature, and to be examined in the same spirit of minute and exact criticism in which it was conceived."[14]

The dry question, then, is this: Is it a rule, a principle, a custom, of English law, that one good count will sustain a general judgment upon a writ of error in a criminal case, although there should be also bad counts in the indictment? Is that a "custom or maxim of our law," or is it not? First, then, how is this to be ascertained? The illustrious commentator on the laws of England, Mr Justice Blackstone,[15] shall answer: —

"Established *customs*, *rules*, and *maxims*, I take to be one and the same thing. For the authenticity of these maxims *rests entirely upon reception and usage*; and the only method of proving that this or that maxim is a rule of the common law, *is by showing that it hath been always the custom to observe it*. But here a very natural and very material question arises: how are these customs or maxims to be known; and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositaries of the laws —*the living oracles, who must decide in all cases of doubt*, and are bound by an oath to decide according to the law of the land."

These judges were appealed to by the House of Lords upon the present occasion; and by an overwhelming majority "distinctly, clearly, and decidedly" declared that the rule in question was a rule of the English law. *They had heard all the arguments calling its existence in question* which Lord Denman, Lord Cottenham, and Lord Campbell had heard; they were *in the daily and hourly administration of that branch of the law with reference to which the question arose*; they took ample time to consider the matter, and deliberately affirmed the existence of the rule, and the valid grounds on which it rested. The highest legal authority in the land, the Lord Chancellor, corroborated their decision, declaring that it "has always been considered as a clear, distinct, and undoubted principle of the criminal law, that one good count could sustain a general judgment on a writ of error." Are Lord Lyndhurst and Sir Nicholas Tindal, with eight of the judges, palpably and manifestly wrong? It is certainly *possible*, though not, we presume, very probable.

We fully recognise the *right* of the judicial peers to examine the validity of the reasons assigned by the judges, and to come to a conclusion opposite to theirs. We apprehend that the long recognition, alone, of the existence of a rule, does not prevent its being impeached on sufficient reasons. Lord Tenterden, as cautious and accurate judge as ever presided over a court of justice, thus expressed himself in delivering the judgment of the court on a question of mercantile law[16]– "It is of great importance, in almost every case, that a rule once laid down, and firmly established, and continued to be acted upon for many years, should not be changed, *unless it appears clearly to have been founded*

[14] Opinions of the Judges, p. 19.

[15] Vol. I., pp. 68-9.

[16] Williams v. Germaine, 7 Bar. and Cress. 476.

on wrong principles." Have, then, Lords Denman, Cottenham, and Campbell, succeeded in showing the rule in question to have been founded on wrong principles?

After as close and fair an examination of the judgments given in the House of Lords as we are capable of bestowing upon any subject, we have arrived at the conclusion that the Chancellor and judges were plainly right, and the peers who differed from them as plainly wrong. They doubtless believed that they were eradicating an erroneous and mischievous practice from the administration of criminal law; but we entertain grave fears that they have not duly considered the many important reasons and necessities out of which that practice originated, and which, in our opinion, will require the legislature either to restore it, or devise some other expedient in lieu of it – if one so efficacious *can* be found – after a very brief experience of the practical mischiefs and inconveniences which the decision of the House of Lords will entail upon the administration of criminal justice.

Mr Justice Coltman observes,[17] that "in old times an indictment contained one single count only;" and that, "now it has become usual to insert *many* counts." It *has* become usual – it should rather be said *necessary*; but why? Because of the rigid precision which the law, in spite of the subtle and complicated character of its modern mode of administration, has long thought fit to require for the protection of the subject, in the statement of an offence charged against an individual. Unless that degree of *generality* in framing criminal charges, which has been so severely reprobated, in the present instance, by Lord Denman, and which led the judges unanimously to condemn the sixth and seventh counts, shall be henceforth permitted, justice *must*, so to speak, be allowed to have many strings to her bow; otherwise the very great distinctness and particularity which constitute the legal notion of *certainty*, are only a trap and a snare for her. There is a twofold necessity for allowing the reasonable multiplication of counts: one, to meet the difficulty often arising out of the adjustment of the statement in the charge to the evidence which is to support it; and the other, to obviate the great difficulty, in many cases, of framing the charge with perfect legal certainty and precision. Look for a striking illustration at the sixth and seventh counts of this very indictment. Few practical lawyers, we venture to think, would have pronounced them insufficient, before hearing those numerous astute and able arguments which have led the judges to that conclusion; and what if these had been the *only* counts, or one of them the sole count? Of course, justice would have been defeated. Now the rule, custom, or practice – call it what you will – which has been annulled by the House of Lords, was admirably adapted to meet, in combination with the allowance of several counts, the practical and perhaps inevitable difficulties which beset the attempt to bring criminals to justice; to prevent any injurious consequences from either *defective* or *unproved* counts; and we think we may truly state, that no single instance as adduced during the argument, of actual mischief or injury occasioned to defendants by the operation of this rule – we believe we may safely defy any one now to produce such a case. It is certainly possible for an anxious straining ingenuity to *imagine* such cases; and where is the rule of law, which, in the infirmity of human institutions, cannot be shown capable of occasioning *possible* mischief and injustice?

One important distinction has not, we venture to think, been kept constantly in view by the House of Lords in arriving at their recent decision; we mean, the distinction between *defective* counts and *unproved* counts. It was principally in the former case that the annulled rule operated so advantageously for the interests of justice. Let us suppose a case. A man is charged with an offence; and the indictment contains three counts, which we will call A, B, C – each differently describing the same offence. He is proved in court to have actually done an act to which the law annexes a punishment, and a general verdict and judgment, awarding the correct *kind* of punishment, are given and entered. If it afterwards became necessary to "make up" the record —*i. e.* to enter the proceedings in due and full form – it might appear that count A was essentially defective, as containing no "offence" at all. But what did that signify – or what would it have signified if count B had also been bad –

[17] Opinions of the Judges, p. 17.

provided count C was a good one, and warranted the punishment which had been inflicted? The only consequence was, that the indictment was a little longer than it turns out that it needed to have been. Though several hooks had been used in order to give an additional chance of catching the fish, that was not regretted, when, the fish having been caught, it turned out that two out of the three had not been strong enough; and that, had they alone been used, the fish must have escaped.

Let us see how the new rule laid down by the House of Lords will operate in future, in such a case as the one above supposed; bearing in mind that it will have to be acted upon, not merely by the judges of the superior courts at the assizes, but by the chairmen – the *lay* chairmen – of the courts of Quarter-Sessions. Let us imagine the indictment to be a long one, and each count necessarily complicated in its allegations and refinements, to meet very doubtful facts, or very doubtful language in an Act of Parliament. A great number of prisoners are to be tried; but, nevertheless, the judge (lay or professional) has mastered the formidable record, and points out to the jury two bad counts, A and B, as either not hitting the facts of the case or the language of the act – possibly neither. He orders them to be quashed, or directs a verdict of not guilty upon them. He then has the verdict and judgment entered accordingly on count C, (the count which he considers good.) The record is afterwards made up; a writ of error brought; the only count on which the judgment is given being C, the court of error *decides that it is bad*, reverses the judgment, and the prisoner is discharged; or the country is put to the expense and trouble of bringing, and the prisoner unjustly harrassed by, fresh proceedings, which may, perhaps, end as disastrously as before!

To escape from these serious difficulties, it is proposed by Lord Denman,[18] to leave the legal sufficiency of the counts for discussion before a court of error, and to pass, not one sentence, but three distinct sentences on each count respectively, apportioning to the offence thereby apparently charged, the degree of punishment due to the guilt disclosed. Keeping his eye on the alarming possibility of a reversal of judgment, what difficulties will not beset the path of the judge while engaged on this very critical duty? And why may not the indictment, for *necessary* caution's sake, contain, as there often are, ten, fifteen, or twenty counts? we shall then have ten or fifteen distinct sentences delivered in open court – engrossed on the record – and dangling at once around the neck of the astounded and bewildered prisoner. Is *such* a method of procedure calculated to secure respect for the administration of justice, even if, by means of such devices, the ends of justice should be ultimately secured, though it is easy to imagine cases in which such devices would, after all, fail; and we had framed several illustrations of such possibilities, but our limits forbid their insertion: instances illustrating the mischievous operation of the rule, equally in cases of defective and unproved counts – of felonies and misdemeanours – and in the latter case, whether the indictment contained several offences, or only varied statements of one offence. In the case first put, what a temptation the new rule holds out to criminals who may be able to afford to bring a writ of error, and so seriously embarrass the administration of justice! And if too poor to do it, he will, under the operation of the new rule, be suffering punishment unjustly; for the only count selected may be bad, or some one only of several may be bad, and the judgment ought to be reversed. What was the operation of the old rule? Most salutary and decorous. No public account was taken of the innocuous aims, so to speak, taken by justice, in order to hit her victim. If he fell, the public saw that it was in consequence of a blow struck by her, and concerned themselves not with several previous abortive blows. The prisoner, knowing himself *proved* actually guilty, *and the numerous chances existing against him on the record*, if he chose to make pettifogging experiments upon its technical sufficiency, submitted to his just fate.

Let us take one more case – that of *murder*: we fear, that on even such solemn and awful occasions, the new rule will be found to operate most disadvantageously. There are necessarily several, possibly many, counts. Mr Baron Parke[19] admits, that here the old rule should apply; viz. a general

[18] Judgment, (by Leahy,) p. 36.

[19] Opinions of the Judges, p. 28.

judgment of death, which shall not be vitiated by one, or several bad counts, if there be a single good one. The new rule since laid down, says, however, the contrary; that judgment must be reversed for a single bad count. Lord Denman, to meet this difficulty, would pass sentence "upon some one"[20] of them, and thereby exhaust the materials of punishment, and so in effect give a "judgment for one felony." *But how is the record to be dealt with?* If the prisoner choose to bring a writ of error, and show a single bad count, must not the judgment be reversed if entered generally? And if entered on one count with not guilty on all the others; and that one count proved bad, while even *a single one* of the rejected counts is good, and would have been supported by the evidence given at the trial, the prisoner can plead *autrefois acquit* to a fresh indictment, and so get off scot-free, after having been incontestably proved guilty of the act of murder! Suppose then, to avoid so fearful a result, separate sentences of death be passed, to say nothing of the unseemliness of the transaction in open court, which *might* be avoided: but how can it be avoided *on the record*, upon which it must be entered? Mr Baron Parke pronounces that such a procedure would be "*superfluous, and savour of absurdity*,"[21] and that therefore, "in such a case, the general judgment *might* be good!" Thus, in order to *work* the new rule, Mr Baron Parke is forced to make the case of murder a double exception – viz. to the *adoption* of the new rule at the trial, and then to the *operation* of the new rule before the court of error, which must then hold that a single bad, or a dozen bad counts, will *not* vitiate a general judgment, if sustained by one good count! Does not all this suffice to show the desperate shifts to which even two such distinguished judges are driven, in order to support the new rule, and conceal its impracticability? Then why should the old lamp be exchanged for the new?

We entertain, we repeat, very grave apprehension that the House of Lords has treated far too cavalierly the authority of the great Lord Mansfield, than whom a more enlightened, learned, and cautious a judge probably never administered justice among mankind. He was not a man accustomed, in delivering his judgments, to "utter things *needlessly* and *inconsiderately*," as he is now charged with doing;[22] and when he declared the established rule of criminal law to be that which has now been so suddenly abrogated, he spoke with the authority which nearly thirty years' judicial experience attaches to the opinion of a responsible master-mind. We ask with deep anxiety, what will be the consequences of thus lightly esteeming such authority? – of impugning the stability of the legal fabric, by asserting one-half of its materials to consist merely of "law taken for granted?"[23]– and, consequently, not the product of experience and wisdom, and to be got rid of with comparative indifference, in spite of the deliberate and solemn judgment of an overwhelming majority of the existing judicial authorities of the land.

The rule just abrogated has, for a long series of years – for a century and a half – obviated a thousand difficulties and evils, even if it should be admitted that the end was gained at the expense of some imperfections in a speculative and theoretical point of view, and with the risk of *possibly* inflicting injustice in some case, which could be imagined by an ingenious and fertile fancy. The old rule gave ten chances to one in favour of justice; the new one gives ten chances to one *against* her. We may be mistaken, but we cannot help imagining, that if Lord Cottenham, unquestionably so able as an equity judge, had, on the maxim *cuique suâ arte credendum*, given a little more weight to the opinions of those whose whole lives had been passed, not in equity, but criminal courts, or had seen for himself the working of the criminal law, he would have paused before disturbing such complicated – necessarily complicated – machinery, and would not have spoken of the consequences as being so very slight and unimportant – nay, as so very beneficial.

[20] Judgment, &c., p. 43.

[21] Opinions of the Judges, p. 28.

[22] Lord Denman's judgment.

[23] Ditto.

It was suggested by the three peers, that the old rule had no better foundation than the indolence, slovenliness, and negligence of practitioners, whom the salutary stringency of the new rule would stimulate into superior energy and activity. We cannot help regarding this notion, however – for the preceding, among many other reasons – as quite unfounded, and perhaps arising out of a hasty glance at the alterations recently introduced into *civil* pleadings and practice. But observe, it required *an act of Parliament* to effect these alterations, (stat. 3 and 4 Will. IV. c. 42,) the very first section reciting the "*doubts which might arise as to the power of the judges to make such alterations without the authority of Parliament*;" and yet the state of the laws calling for such potent interference was in an incomparably more defective and mischievous state than is imputed to the present criminal law. Then, again, any practical man will see in a moment, that the strictness of the new system of civil pleading, which to this moment occasions not infrequently a grievous failure of justice, with all the ample opportunities afforded for deliberate examination and preparation of the pleadings, cannot be safely applied to criminal law for many reasons, principally because it rarely admits of that previous deliberation in drawing the indictment, which must be based upon the often inaccurate statement of facts supplied by the depositions; and because a defect in them is, generally speaking, irremediable and fatal, and crime goes unpunished. If the new rule is to be really acted upon in future, we must, in some way or other, alter the whole machinery of the criminal law: but how to do so, without seriously interfering with the liberty of the subject, we know not.

We affirm, therefore, that the old rule – viz. that one good count would support a general verdict and judgment, though the indictment contained bad ones also – was a beneficial rule, calculated to obviate *inevitable* difficulties; and its policy was so transparent to all the great intellects which have, both as judges or counsel, been for so long a series of years concerned in criminal cases, that no one ever thought of questioning it. The supposition of the three peers is one not very flattering to the distinguished predecessors, with the great Lord Mansfield at their head – all of whom it charges with gross negligence, ignorance, and, in plain words, stupidity – in overlooking, from time to time, a point so patent and glaring. The Lord Chancellor's answer to their argument is triumphant; and we refer the reader to it.[24] We respectfully and firmly enter our protest against Lord Denman's mode of getting rid of the efficacy of a custom or practice which has been so long observed by the profession; and regard it as one calculated to sap the foundations of the common law of the land. An opinion, a practice which has stood its ground for so long a series of years *unchallenged*, amidst incessant provocation to challenge it – and that, too, in the case of men of such vigilant astuteness, learning, and determination as have long characterized the English Bench and Bar – rest upon as solid grounds as are conceivable, and warrants it subversion only after profound consideration, and *repeated evidence of its mischievous operation*. Was any such evidence offered in the argument at the Bar of the House of Lords, of persons who had suffered either a kind or a degree of punishment not warranted by law? None: but several cases were put in which – in spite of past experience to the contrary – inconvenience and injustice *might possibly* be conceived to occur hereafter!

What, then, led to this error – for error we must call it? Let us candidly express our opinion that the three peers were fairly "*overpowered*" – to adopt the frank acknowledgment of one of the most distinguished among them – by the plausible fallacies urged upon them, with such unprecedented pertinacity and ingenuity, by the traversers' counsel. They have been influenced by certain disturbing forces, against which they ought to have been vigilantly on their guard, and which we shall now venture to specify, as having occasioned their *forgetfulness of the true province of a court of error*– of the functions and duties of the members of such a court. A court of error occupies a high, but necessarily a very limited, sphere of action. Their observations and movements are restricted to the examination of a single document, viz. the record, which they are to scrutinize, as closely as possible, without regard to any of the incidents which may have attended the progress of the events narrated in it, if

[24] Ante.

these incidents do not appear upon record: and they must be guided by general principles – not such as might properly regulate a certain special and particular case, but such as would guide them in all cases. And this is signified by the usual phrase, that they "must not travel out of the record." Now, we defy any one to read the judgments of the three peers, without detecting the undue influence which one extrinsic and utterly inadmissible fact has had upon their minds; viz. the fact, that the court below had actually *affirmed* the validity of the two bad counts. They speak of its being "*against notorious facts*" – against "*common probabilities*," a "palpably incredible fiction" – to conclude from the language of the record, that the "offences" there mentioned did not include the pseudo offences contained in the sixth and seventh counts. In this particular case, it *did* undoubtedly happen, in point of fact, that the court below decided these counts to be valid counts: but the court of error can take no cognisance whatever of extrinsic facts. *Their* only source of information —*their* only means of knowledge, is *the record*– beyond the four corners of which they have no power, no authority, to cast a single glance; and within which are contained all the materials upon which, by law, the judges of a court of error can adjudicate and decide. The Court, in the present case, ought thus to have contemplated the record in the abstract – and with reference to the *balance of possibilities* in such cases, that the court below had affirmed, or condemned the vicious counts: which very balance of possibilities shows the impropriety of being influenced by speculations based on matters *dehors* the record. However numerous and mischievous may have been the errors committed by the inferior court, *a court of error* can take no cognisance of them, if they do not appear specifically and positively upon the record, however valid may be the claim which these errors may notoriously prefer *to the interference of the executive*. Consider what a very serious thing it is – what a shock to the public confidence in the administration of justice – to reverse a judgment pronounced after due deliberation, and under the gravest responsibilities, by a court of justice! The law and constitution are properly very tender in the exercise of such a perilous power, and have limited it to the case of "manifest" error – that is, not the vehement, the immense *probability* that there has been error – but the certainty of such error *necessarily and exclusively appearing from the record itself*. To act upon speculation, instead of certainty, in these cases, is dangerous to the last degree, and subversive of some of the fundamental principles of English jurisprudence. "Judgment may be reversed in a criminal case by writ of error," says Blackstone, "for notorious (*i. e.* palpable, manifest, patent) mistakes in the judgment, as when a man is found guilty of perjury, (*i. e.* of a misdemeanour,) and receives the judgment of felony." This is the true doctrine; and we submit that it demonstrates the error which has been committed in the present instance. Let us illustrate our case by an example. Suppose a man found guilty under an indictment containing two counts, A and B. To the offence in count A, the legislature has annexed one punishment only, viz. *transportation*; to that in count B, *imprisonment*. The court awards sentence of transportation; and, on a writ of error being brought, the court above pronounces count A to be bad. Here it appears inevitably and "manifestly" *from the record*, that there has been error; there is no escaping from it; and consequently judgment *must* be reversed. So where the judgment is the infliction of punishment "for his offen*ces*" aforesaid: there being only two offences charged, one of which is contained in a bad count, containing therefore no "*offence*" at all. Apply this principle to the present case. Does this record, in sentencing the defendant "for his offences aforesaid," *conclusively* and *necessarily* show that the court regarded the sixth and seventh counts as containing "offences," and awarded punishment in respect of them? We unhesitatingly deny it. The merest tyro can see that it is *possible*– and, if so, where is the necessary error? – that the judges excluded the vicious counts from their consideration; that they knew the law, and could discern what were and what were not "offences;" and annexed punishment to only true "*offences*" in the eye of the law. The word "offence" is a term of art, and is here used in its strictest technical sense. What is that sense? It is thus defined by an accurate writer on law: "an *offence* is an act committed *against a law*, or omitted

when the law requires it, and punishable by it."[25] This word is, then, properly used in the record – in its purely technical sense. It can have no other meaning; and an indictment cannot, with great deference to Mr Baron Parke,[26] contain an "offence" which is not "legally described in it;" that is, unless any act charged against the defendant be shown upon the face of the indictment to be a breach of the law, no "*offence*," as regards that act, is contained in or alleged by the indictment. The House of Lords, therefore, has exceeded the narrow province and limited authority of a *court of error*, or has presumed, upon illegal and insufficient grounds, that the Irish judges did not know which were, and which were not "*offences*," and that they did, in fact, consider those to be offences which were not, although the record contains matter to satisfy the allegation to the letter – viz. a *plurality* of real "offences." Where is Lord Campbell's authority for declaring this judgment "*clearly* erroneous in awarding punishment for charges which are *not offences in point of law*?" Or Lord Cottenham's, for saying that "the record states that the judgment was *upon all the counts, bad as well as good*?" They have none whatever; their assertions appear to us, with all due deference and respect, purely arbitrary, and gratuitous fallacies; they do violence to legal language – to the language of the record, and foist upon it a ridiculous and false interpretation. We admit, with Lord Cottenham, that "where the sentence is of a nature applicable *only* to the bad counts," it is incurably vicious, and judgment must be reversed – it is the very case which we put above; but how does that appear in the judgment under consideration? Not at all. The two cases are totally different.

And this brings us to another palpable fallacy – another glaring and serious error into which we cannot help thinking the House of Lords has fallen, and which is abundantly evidenced by their judgment: viz. that a court of error has any concern whatever with, or can draw any inference whatever from, the amount of punishment. The reasoning of the judges is here perfectly conclusive. "If a sentence be of the kind which the law allows, the *degree* of it is not within the competence of a court of error. If a fine be an appropriate part of the sentence of a court below, the excess of it is no ground of error. What possible line can be drawn as to the reasonableness and excess, so as to affect it with illegality? It is obvious there can be none. If in *this* case, the sentence had been *transportation*, the sentence would have been *illegal*: Why? Because not of *the kind* authorized by law in such a case." Any presumption, therefore, made by a court of error, from the *amount* of punishment awarded, as to which of the counts had been taken into consideration by the judges in giving their judgment, is manifestly based upon insufficient and illegal grounds. Can these principles have been duly pondered by the lords? We fear not. Look at Lord Cottenham's supposition of two counts for libel: one for a very malignant one, the other for one comparatively innocuous; and a sentence of heavy fine and imprisonment passed, evidently in respect of the malignant libel, which a court of error decides to be no libel at all. Lord Cottenham appears to rely greatly on this supposed case; but is it not perfectly clear, that it is not a case of error *on the record*– and therefore totally inapplicable to the case which he had to consider? The defendant would have certainly sustained an injury in that case; Where is the remedy? There is *no legal* remedy, any more than there is when a man has been wrongfully *acquitted* of a manifestly well-proved crime, or unjustly convicted of a felony. The mercy, or more properly the sense of *justice* entertained by the *executive*, must be appealed to in either case; such power of interposition having, in the imperfection of human institutions, been wisely reserved to the supreme power to afford redress in all cases where the law cannot. Lord Cottenham's reasoning appears to us, in short, based upon two fallacies – a *petitio principii*, in *assuming* that judgment was entered upon all the counts; the *question* being, *was* it so entered? The other is, that a court of error is competent to infer, from the *amount* of punishment, that a defendant has been sentenced upon bad counts. Again: the three peers admit, that if a sole count contain a quantity of aggravating, but really "*irrelevant stuff*" (to adopt Lord Denman's expression,) it will not prejudice the judgment, provided the count also

[25] West's Symbolography, and Jacob's and Tomlin's Law.

[26] Opinions of the Judges, p. 29.

contain matter which will legally support that judgment. Why should the judges be given credit for being able to discard from consideration these legally extrinsic matters in a single count, and not also, by the exercise of the very same discretion, be able to discard, in considering the record, irrelevant and insufficient counts, such as in the eye of the law have no existence, are mere nonentities?

For these, and many other reasons which might be assigned, had we not already exceeded our limits, we have, after a close and a candid study of the judgments delivered by the three peers, and the convincing, the conclusive judgments of the great majority of the judges, come, without hesitation, to the conclusion, that the Lords have not merely decided incorrectly, but have precipitately removed a chief corner-stone from the fabric of our criminal law, and have incurred a very grave responsibility in so doing. We cannot help thinking, that they have forgotten the fundamental distinction which our constitution makes between "jus *dare*" and "jus *dicere*." *Jus dederunt, non jus dixerunt*– an error, however, easily to be accounted for, by a reference to their double capacity, and the confusion it occasions between their judicial and legislative functions. We view with grave apprehension the power exercised by three members of the House of Lords, of overturning so well-established a rule and custom as that attested to them by the judges. What security have we for the integrity of our common law? In the face of the judges' decisions, how decorous and dignified would have been the conduct of the House of Lords in giving way, even if they had differed from the judges; lamenting that such *was* the law of the land, and resolving to try and persuade the legislature to alter it, as has often been done. Witness the statute of 1 and 2 Geo. IV. c. 78, passed in consequence of the decision of the House of Lords in *Rowe* v. *Young*, 2 Brod. and Bing. 165. The House of Commons has resented such interference with the laws by the House of Lords; who, in the case of *Reeve* v. *Young*, (1 Salkeld, 227,) "*moved by the hardship of the case*, reversed the judgments of the courts below, contrary to the opinion of all the judges." But the House of Commons, "*in reproof of this assumption of legislative authority in the Lords*," immediately brought in the 10 and 11 Will. III. c. 16, which passed into a statute.[27] May we venture to suggest that the elaborate, and long, and deeply-considered opinions of the judges of the land, who had been summoned by the Lords to advise them, were worthy of more than the single day, or day and a half's examination which they received before they were so peremptorily pronounced to be "*clearly* erroneous?" And may we, with no little pain, suggest to Lord Campbell, that the array of *Gamaliels* at whose feet he had *sate* during his whole life – whose feet he had indeed so very recently quitted – whose integrity, whose profound learning, whose sagacity, none has had larger experience of than he – are entitled to look at his cavalier-like treatment of their best services, with a feeling stronger than that of mere surprise? In concluding this long article – in expressing our conviction of the error of the Lords – we feel one consolation at all events – that if we err, we err in good company; and that we are not conscious of having transgressed the limits of legitimate discussion, in exercising as undoubted a right of its kind, as these three peers exercised in branding so overwhelming a majority of the judges of the land with the imputation of ignorance of those laws which all their lives had been spent in administering. The very existence of the ancient common law of the land is put in jeopardy by such a procedure as that which we have been discussing; and our honest conviction, however erroneous, that such is the case, will suffice to excuse the freedom of our strictures; if, indeed, we require an excuse for echoing the stern declaration of on forefathers —*Nolumus leges Angliæ mutari*

[27] 2 Bla. Comm. 169; and see Mr Christian's Note.

Конец ознакомительного фрагмента.