

and delivered to her at her husband's house, and she has retained possession of it for nearly four years. Her husband has acquiesced in this possession, and has taken no steps to repudiate his liability, except to say now that it was purchased without his authority. Under the circumstances deposed to, I think defendant is liable both for the machine and the other goods supplied. Judgment for plaintiff for £14 16s 7d, together with costs.

POLICE V. LAWRENCE,
POLICE V. CHIGNALL.

Before C. C. Kettle, Esq., D.J. and S.M., at Auckland, October 8, 1906.

Obscene and indecent pictures—
“*Offensive Publications Act, 1892*”—“*Police Offences Act, 1884,*” section 24—*Test of indecency.*

The obscenity or indecency of pictures must in many cases depend upon the manner, extent and circumstances in, to, or under which the sale, publication, or exhibition is made.

Defendants were charged with selling copies of the famous pictures “Psyche's Bath” and “Psyche at Nature's Mirror.”

Informations dismissed.

Martin for defendants.

JUDGMENT.

The defendants are picture dealers carrying on business in Newton, and they are charged by the police with selling copies of a famous picture by the well-known artist, Lord Leighton, viz., “Psyche's Bath,” and a picture by a German artist, Paul Thumann, “Psyche at Nature's Mirror,” to a constable who was expressly sent to the defendants' shops to buy them in order that proceedings might afterwards be taken against the defendants for a breach of “The Offensive Publications Act, 1892.” The informations against the defendant Lawrence allege that the defendant “did sell ‘indecent’ pictures, viz., ‘Psyche's Bath,’ and ‘Psyche at Nature's Mirror’ contrary to the said Act.” The information against the

defendant Chignall alleges "that the defendant did sell an indecent picture, viz., 'Psyche's Bath' contrary to the said Act." The sale of these (one at 3s. 6d. and two at 2s. each) to the constable was admitted by the defendants. They also admitted that they stocked these pictures for sale to any person who wished to buy them, and also exhibited them in their shop windows where they could be seen by persons passing along the street. The statute law of New Zealand relating to obscenity and prohibiting the sale of indecent and obscene pictures, books, etc., is to be found in three Acts, viz., "The Police Offences Act, 1884," and the Acts amending the same, "The Offensive Publications Act, 1892," and the amendments thereof, and "The Criminal Code Act, 1893."

Section 24 of "The Police Offences Act, 1884," No. 24, provides that "Any person who commits any of the next following offences shall be liable to imprisonment with hard labour for any term not exceeding one year: (1) Wilfully offers for sale or for distribution, or exhibits to public view in any public place, or who exposes or causes to be exposed to view in the window or other part of any shop or other building situate in a public place, any indecent or obscene book, paper, writing, print, picture, drawing or representation. (2) Sings any obscene song or ballad, or writes or draws any obscene or indecent word, figure or representation, or uses any profane, indecent or obscene language in any public place, or within the view or hearing of any person passing therein or residing in such public place. (3) Wilfully and obscenely exposes his person in any public place or within the view thereof, or wilfully does any grossly indecent act in any such place, or within the view thereof, whether alone or with any other person."

Section 3 of "The Offensive Publications Act, 1892," No. 42, provides that "Whoever affixes to or inscribes on any house, building, urinal, closet, wall, hoarding, gate, fence, pillar, post, board, tree or anything whatsoever so as to be visible to any person being in or passing along any street, road, public highway, footpath or place of public resort, or whoever delivers or attempts to deliver, or exhibits to any

inhabitant or to any person being in or passing along any street, road, public highway, footpath, or place of public resort, or who throws down the area or into the yard, garden, or enclosure of any house, or who exhibits to public view in any shop, house or place, or whoever sells, offers, distributes or shows any picture or printed or written matter which is of an indecent, immoral, or obscene nature, or which the Court shall be satisfied is intended to have an indecent, immoral or obscene effect, shall on summary conviction, be liable to a penalty not exceeding five pounds, or, in the discretion of the Court, to imprisonment for any term not exceeding three months, with or without hard labour, and on a second or subsequent conviction shall, on summary conviction, be liable to a penalty not exceeding ten pounds, or in the discretion of the Court, to imprisonment for any term not exceeding six months, with or without hard labour. See also sections 4 and 5. By the amending Act of 1894 the punishment, where the offence is of a gross nature, is twelve months' imprisonment, and by the further amendment Act of 1905 it is enacted that mere ignorance of the nature of the objectionable publications, except as therein mentioned, is no defence.

Section 139 of "The Criminal Code Act, 1893," No. 56, provides that: (1) "Every one is liable to two years' imprisonment with hard labour who knowingly, without lawful justification or excuse, (a) Publicly sells or exposes for public sale or to public view or distributes for public sale or to public view any obscene book or other printed or written matter, or any picture, photograph, model, or other object tending to corrupt morals; or (b) Publicly exhibits any disgusting object or any indecent show. (2) No one shall be convicted of the crimes above mentioned if he proves that the public good was served by the acts alleged to have been done. (3) It shall be a question of law whether the occasion of the sale, publishing or exhibition is such as might be for the public good, and whether there is evidence of excess beyond what the public good requires, in the manner, extent, or circumstances in, to, or under which the sale, publishing, or exhibition is made, so as to afford a justification or excuse therefor;

but it shall be a question for the jury whether there is or is not such excuse. (4) The motives of the seller, publisher, or exhibitor shall in all cases be irrelevant. The provisions of these statutes relating to obscenity being "in pari materia," must, I think, be read together when the question as to whether any picture, or book, etc., sold or exhibited is, or is not, indecent or obscene, has to be decided. In the present case the question which I have to determine is whether the sale by the defendants, who are picture dealers, of copies of Lord Leighton's famous picture "Psyche's Bath," and Paul Thumann's picture "Psyche at Nature's Mirror" to a constable who was expressly instructed by his superior officer to purchase them in order that a prosecution might follow, is a breach of "The Offensive Publications Acts," before referred to. With regard to the picture "Psyche at Nature's Mirror," it was not seriously contended by the police at the hearing that this picture is indecent or obscene.

The best definition of the words "obscene" and "indecent" that I have been able to find is "that which is offensive to decency, chastity, delicacy and good morals; impure; expressing or representing to the mind or view something which delicacy, purity, and decency forbid to be exposed. There are numerous decisions of the English and American Courts on statutes somewhat similar to those in New Zealand relating to obscenity and indecency, and I will quote a few passages from the judgments of some of the learned judges in two leading cases. In the American case of the "People v. Mueller" (New York Court of Last Resort, 48, American Reports (1885) 635), where the defendant was indicted and convicted by a jury for selling and exhibiting obscene and indecent pictures or photographs of women in the nude, the learned Judge who delivered the judgment of the Court, said: "It is evident that mere nudity in painting or sculpture is not obscenity. Some of the great works in painting and sculpture, as all know, represent nude human forms. It is a false delicacy and mere prudery which would condemn and banish from sight all such objects as obscene simply on account of their nudity. If the test of obscenity or indecency in a picture or statue is

its capability of suggesting impure thoughts, then indeed all such representations might be considered as indecent or obscene. The presence of a woman of the purest character and of the most modest behaviour and bearing may suggest to a prurient imagination images of lust and arouse impure desires and so may a picture or statue not in fact indecent or obscene. The test of an obscene book was stated by Cockburn, C.J., in "Regina v. Hicklin" (L.R. 3, Q.B. 369), to be whether the tendency of the matter charged as obscenity is to deprave or corrupt those whose minds are open to such immoral influences, and who might come into contact with it. We think it would also be a proper test of obscenity in a painting or statue, whether the motive of the painting or statue, so to speak, "as indicated by it," is pure or impure, whether it is naturally calculated to excite in a spectator impure imaginations, and whether the other incidents and qualities, however attractive, were merely accessory to this as the primary or main purpose of the representation. . . . The fact that a picture has been publicly exhibited (in a gallery) would not necessarily determine its character as decent or indecent. Indeed there is but little scope for proof bearing upon the issue of decency or obscenity beyond the evidence furnished by the picture itself. . . . We do not doubt that whether a publication is obscene or not may in some cases depend on circumstances. . . . The statute is an important one, and while it should have a reasonable and not a strained construction, at the same time it ought to have such a practical interpretation by the Court and jury as will subserve the important purpose of its enactment. In this case the jury found that the pictures which were the subject of the prosecution were indecent and convicted the defendant.

In the well-known English leading case of "The Queen v. Hicklin" (L.R. 3, Q.B. 365), Lush J. said:—"It does not follow that because such a picture (Venus in the Dulwich Gallery) is exhibited in a public gallery, that photographs of it may be sold in the streets with impunity." Blackburn, J., said: "The argument (that the motive or intention of the seller was all important) to meet the present case must go the length that

the object being good, or at all events innocent, would justify the publication of anything however indecent, however obscene, and however mischievous." Cockburn, C.J., said: "A medical treatise with illustrations necessary for the information of those for whose education or information the work is intended, may in a certain sense be obscene, and yet not the subject for indictment; but it can never be that these prints may be exhibited for anyone, boys and girls, to see as they pass. The immunity must depend upon the circumstances of the publication." . . . "Now it is found here as a fact that the work which is the subject-matter of the present proceedings was, to a considerable extent an obscene publication, and, by reason of the obscene matter in it, calculated to produce a pernicious effect in depraving and debauching the minds of the persons into whose hands it might come. . . . I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those into whose hands a publication of this sort may fall. . . . I take it therefore, that apart from the ulterior object which the publisher of this work had in view, the work itself is, in every sense of the term, an obscene publication, and that consequently as the law of England does not allow of any obscene publication, such publication is indictable. We leave it therefore that the publication itself is a breach of the law."

My attention has also been directed to the decision of a London Magistrate in the case of Henry Jacobs reported in 37 J.P. 235-6. In this case Mr. Kynnersley, the Magistrate, said:—"It is very probable that as Counsel for the defence stated, the photographs were copies of works of art by distinguished masters, but it would depend on circumstances whether such representations of naked women were obscene or not. In galleries or museums mixed with other pictures or sculpture, and looked at merely as beautiful works of art, these would not be so considered, but it would be monstrous to say that a collection of 500 photographs of naked women in all imaginable attitudes offered for sale as these were and some of them actually exhibited in the window of a shop in a public thorough-

fare within 100 yards of King Edward's school, where 500 boys were educated, were not obscene or indecent. If a boy in the school purchased one of these photographs, he would not dare to show it to his mother or sisters, and why not? Because he would be told it was an obscene and indecent print. It was impossible to conceive anything more calculated in the words of the indictment 'to debauch and corrupt the morals of youth, and to raise and create in their minds inordinate and lustful desires.' Such an exhibition could not be tolerated in Birmingham, and he should order the whole of the 500 photographs to be destroyed."

It will be noticed that in all these cases it was decided that the pictures were of a libidinous character, and that the intention of the sellers or publishers was immaterial.

Now, dealing with the picture "Psyche's Bath," which forms the subject of the present prosecution, I am of opinion that it would be a gross libel on the famous works of such a great artist as Lord Leighton to characterise the picture as indecent. In my opinion, a pure-minded and unprejudiced critic, viewing it without impure thoughts as a work of pure art of a high order, should see nothing but refinement and beauty in every feature. There is an entire absence of impure suggestions, nothing lewd, obscene, indecent, scandalous, or lascivious in the attitude and posture, nothing offensive to decency and good morals. The picture is not, to use the words of the statute, "intended to have an indecent, immoral, or obscene effect." In my opinion the defendants, in selling the picture to the constable under the circumstances before referred to, did not commit a breach of the Act, and the informations must therefore, be dismissed. It is not necessary for me to decide, and I wish it to be clearly understood, that I do not hold that photographs of these pictures as postcards ought to be indiscriminately exhibited, and sold to boys and girls. A great deal must depend upon "the manner, extent, and circumstances in, to, or under which the sale, publishing, or exhibition is made," or to again quote the words of Lord Chief Justice Cockburn in Regina v. Hicklin: "The immunity must depend upon the circumstances

of the publication," and the statement of the American Judges in *The People v. Mueller*: that "whether a publication is obscene or not may in some cases depend on circumstances."

The pictures which have been made the subject of the present prosecution are vastly different from the libidinous post cards which I condemned some days ago. The former are works of true and pure art, while the latter are the productions of those who wish to fill their pockets with money by catering for the unwholesome appetites of those whose prurient minds turn towards, and who love to dwell upon all that is sensual and lewd, obscene, indecent, and lascivious. I am convinced that the sudden outburst of public indignation has been caused by the indiscriminate and unfettered exhibition and sale of the thousands upon thousands of libidinous postcards which are exhibited and can be procured in many (there are noole exceptions) shops in every city and town in New Zealand. In my opinion it is the duty of the authorities and of all lovers of true and pure art to in every legitimate manner suppress the sale and exhibition of all such objectionable productions.

If it be true that the indiscriminate sale and exhibition in shop windows of works of pure art such as "Psyche's Bath" and "Psyche at Nature's Mirror" is prejudicially affecting public morals to any appreciable extent, it may be the duty of the representatives of the people now in Parliament assembled to legislate on the subject. I notice that a Bill to amend the Offensive Publications Acts has already been introduced, and, when the debate on it takes place, the subject will no doubt be thoroughly ventilated and intelligently discussed and dealt with.

The informations are dismissed.

Note.—Referring to the report of case "*Police v. Barrip*" (Vol. 1, part 2, Oct. 1, 1906, page 157), the postcard "Psyche" which Mr Kettle condemned in that case was not Lord Leighton's "Bath of Psyche" but a libidinous French production.—Ed. M. and D. Ct. Reports.
