Annex D.18

R. v Stoddart (Joseph)

Court of Criminal Appeal | May 21, 1909 | (1909) 2 Cr. App. R. 217

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***217 Joseph Stoddart**

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Court of Criminal Appeal

21 May 1909

(1909) 2 Cr. App. R. 217

Lord Chief Justice , Mr. Justice Darling , Mr. Justice Phillimore , Mr. Justice Bray , and Mr. Justice A. T. Lawrence

May 7, 8, 14, 15, 21, May 28, 1909

Analysis

Burden of proof—Where a primâ facie case is made out and the defendant, by his defence, offers an explanation, the jury should be directed that the burden of proof that the offence charged has been committed is still on the prosecution, and if upon a review of the evidence on both sides they are in doubt, they ought to acquit. It is a misdirection to tell them that because the evidence for the prosecution established a primâ facie case, the burden of proof is shifted to the defendant.

Joinder of counts alleging misdemeanours—If no application is made at the trial to put the prosecution to election, the Court will not entertain a complaint that the defence was embarrassed.

Venue—Obtaining by false pretences—Where the valuable thing obtained is posted in this country for delivery in a foreign country, an indictment is triable by the Court within whose jurisdiction is the place of posting: T. S. Jones (1 Den. C. C. 551; 1850) followed.

This was an appeal against conviction on leave granted by Walton J., and on grounds involving questions of law, and an application to call further evidence.

The case was argued on April 23rd and 24th, before Darling, Bray and A. T. Lawrence JJ., who desired that it should be heard by a fuller Court.

The appellant was indicted, with one Catling, before the Recorder at the Central Criminal Court on January 20th, 1909 [1] , for conspiracy with each other, one Jones, and certain persons unknown to defraud by false pretences, and for obtaining money (through postal orders for various sums) from two persons, Funnell and Carter, by false pretences with intent to defraud each. (Details of the counts will be found in the judgment.) After a hearing lasting twenty-three days Stoddart was found guilty on February ***218** 25th of obtaining money by false pretences (from Carter only) and of the conspiracy, and sentenced to eighteen months' imprisonment with hard labour, and was also ordered to pay the taxed costs of the prosecution under sect. 6 (1) of 8 Edw. 7, c. 15, the Costs in Criminal Cases Act, 1908 . Catling was acquitted of the charges as to false pretences, but the jury were unable to agree in his case as to the conspiracy, and were discharged. Ultimately that charge was not further proceeded with.

Gill, K.C . (with him *Abinger, L. Green* and *A. D. A. M'Gregor*), for the appellant, who was present, on bail. The charge had reference to coupon competitions which, it was alleged, were either lotteries, or within the latter part of sect. 1 of 16 & 17 Vict. c. 119, the Gaming Act, 1853 . The competitions were carried on in the following manner. Circulars were sent to persons who were known to have taken part in previous coupon competitions, containing a coupon. Upon the coupon was printed information with regard to forthcoming football matches, and an intending competitor selected the winners of these matches by marking his choice upon the coupon. Any number of guesses were permitted in each competition, a trifling fee being charged in respect of each. £300 was offered as the first prize, to be divided among the successful nominators of most correct returns (*i.e.* , in eleven or twelve matches at most), and a further sum of £100 was offered for the next best group of selections. When the coupons were filled in, they had to be sent to an office at Middelburg, Holland, and arrive there on the Saturday evening of the day on which the matches, to which the particular competition related, were played. On arrival the letters were opened and the postal orders checked, and then the coupons were stamped and put in bundles alphabetically arranged. Any person who thought he or she had been successful in the competition, had to send in a claim to reach Middelburg by the Wednesday morning following the Saturday upon which the matches were played. The rules of the competition provided that each competitor had to bear the risk of any mistake or non-delivery by the Post Office. Successful competitors were informed of the result of the competition in the next circular. These circulars were headed *Football Record, Racing Record* and *Football Sport. Football Sport* was the venture of one Price, which appellant financed for three numbers, when they disagreed about money matters—a few days before the prosecution began. (The ***219** summons was issued on September 24th, and the first hearing was October 1st.) In addition to the circular informing a competitor of his success, another circular was sent to him relating to betting transactions carried on by a firm of Drew & Co., at the same office at Middelburg. This was a business also belonging to the appellant, the idea being that a competitor having won money in a football competition, might desire to use that money for betting purposes. The office at Middelburg was managed by a man named Klinge, assisted by a number of clerks, who opened the coupons when they arrived at Middelburg, and Klinge sent the names of winners to the appellant, who lived in England. The circular containing the names of winners was based upon the returns from Middelburg. Klinge, with the assistance of others, from 1907 onwards arranged and carried out a fraud upon the appellant. The procedure was as follows:—A coupon, filled in after the results of the matches on a particular Saturday were known, was inserted among the coupons at Middelburg. Some fictitious name and address was appended thereto, and in due course the name was sent over to the appellant in England among the winners to whom prize money should be paid. In some cases money was sent in a registered letter to the address given, where by arrangement the money was collected at the instance of one of the parties to the fraud. The appellant had sworn that all this was done without his knowledge by persons acting against his interest. The appellant had carried on business as a betting agent and proprietor of similar competitions for over twenty years. For a long time he had been in conflict with the City authorities and the Anti-Gambling League as to whether these competitions were lotteries within sect. 1 of the Gaming Act, 1853 . The funds resulting from the competitions connected with the circulars already mentioned were paid into a Dutch bank, but afterwards brought to England, whence payments to winners were made direct. In October, 1907, the appellant began to be dissatisfied with the way things were going at Middelburg—he had not himself been there since January, 1907—and in consequence he sent his son-in-law, Catling, over to Holland to investigate the matter. As a result of this arrangement, the appellant, by a letter dated November 27th, 1907, agreed with Catling, that on condition of his super-intending the work at Middelburg, he should thenceforth have half profits in all future *Football Record* competitions. From that time ***220** onwards, Catling went over to Holland on Friday night, and returned by the Sunday night boat. At Middelburg one Windust also had an office, and carried on a business similar to that of the appellant. Windust was not only a business rival, but a person actuated by great hostility towards the appellant. It was in September, 1908, that Windust, having got hold of two men—one, Cowley, who had been dismissed in June, 1908, from the appellant's employ, and the other, Price, with whom the appellant had disagreed—induced them to prepare statements in the presence of a London detective, Inspector Collison, upon which the prosecution against the appellant was begun at the Mansion House, where the two men gave evidence.

The indictment contained eleven counts—four for conspiracy, and seven for obtaining money by false pretences. The trial lasted twenty-three days, and so complicated did the issue become that it was impossible for the appellant to have a fair and unprejudiced trial. The subject-matter of the charge should have been divided into two indictments, the method adopted having led to the utmost confusion. The first count alleged a conspiracy between the appellant, Catling, a man named Jones, and other persons unknown, and was worded as widely as possible. The second, third, and fourth counts were to the same effect, dealing with competitions connected with *Football Record, Racing Record* and *Football Sport* respectively. If the first count was good, the last three were quite unnecessary. There followed seven charges of false pretences, which were quite enough to answer at one time without the issue being fogged with questions of conspiracy. It was true that no objection was taken at the trial, but that fact should not prejudice the appellant if his case was never satisfactorily before the jury. (Gibson, 18 Q. B. D. 537; 56 L. J. M. C. 49; 56 L. T. 367; 35 W. R. 411; 16 Cox C. C. 181; 51 J. P. 742; C. C. R. ; 1887;

Bertrand, L. R. 1 P. C. 534; 36 L. J. P. C. 51; 4 Moore, P. C. N. S. 460; 16 L. T. 752; 16 W. R. 9; 10 Cox, C. C. 618 ; 1867.)

Two of the witnesses called by the prosecution to establish fraud were cross-examined on the appellant's behalf. One of them, a man named Funnell, was alleged by the defence to have been a competitor, competing under different names, and to have thus won £400 in one year—once £300 and once £150, ***221** and perhaps a good deal more—he admitted the £400. It eventually transpired that he must have been connected with the conspiracy against Stoddart, whereby fictitious winners were introduced. When the prosecution dropped counts 5, 8, 9, 10 and 11, Funnell's case was abandoned. There remained only Mrs. Carter.

It is necessary to deal separately with the counts. In one charge, known as the Butterworth case, it appeared that £300 was offered as a prize for the correct selection of the Derby winners in 1908. Three persons—Naylor, Heirli and Butterworth—and two others were returned by Klinge as sharers of the prize. Naylor turned out to be an alias for Funnell. Heirli was a genuine winner, as his evidence shews. Cowley gave evidence to the effect that he had been directed by appellant to call himself Butterworth, and to go to Gravesend to find a place to which letters might be sent. It was suggested by the prosecution that £100 was sent to Gravesend in the name of Butterworth, and reduced into the appellant's possession again by the interposition of Cowley. As a matter of fact, it was proved that the appellant, having received the three names from Klinge, drew a cheque for £300. This cheque was produced at the trial. Appellant gave this cheque to Catling to cash so as to pay £100 to each of the winners. Catling got three notes for £100, and posted three registered letters to Naylor, Heirli and Butterworth. The first two named received the £100, but within half an hour of the letter to Butterworth being registered, the note which ought to have been enclosed in it was cashed at the Bank of England. The registration of the letters was made at the Lombard Street Post Office on June 16th, 1908. On June 19th a sum of £90 in gold was paid into Catling's account. The note cashed had Butterworth's indorsement upon it. That indorsement was said to have been made by Jones, who was Catling's right-hand man and confidential assistant. He was also a director of Catling & Co., process engravers. There was no proper direction to the jury upon this case, no reference to changing the note into cash, and no reference as to the payment into Catling's account. If a man was to have a fair trial, it was necessary to direct the minds of the jury to each count. There was no proper direction with regard to Jones, who had disappeared. The case had been engineered by Windust, for he had been heard to say to Cowley—whom the appellant had ***222** dismissed—“Have you made up your mind to do as I want you to do? If so, I can shop the b—.” Broadly speaking, the defence had never been put at all, which was contrary to the rulings of this Court. (Mason, 2 Cr. App. R. 59 ; 1909; Warner, 73 J. P. 53; 25 T. L. R. 142; 1 Cr. App. R. 227 ; 1908; Carman Deana, 25 T. L. R. 399; 2 Cr. App. R. 75 ; 1909; and see Bray v. Ford, (1896) A. C. 44; 65 L. J. Q. B. 213; 73 L. T. 609; H. L.)

In other cases, where prize money was entrusted to Catling, no trace of payment to winners had been found. Some of the notes, however, had been traced to Jones's possession. An accountant, Mr. Cash, was called by the prosecution to prove, that, after examining the appellant's banking account, he was unable to trace payments out of it which had been stated, in the various circulars issued, to have been won and paid to specified individuals. In dealing with one of the cases of alleged bogus winners, known as Browning's case, the Recorder said, referring to Mr. Cash's evidence: "The moment the prosecution had established the fact that not a farthing had been paid to one of the persons who are alleged to have received the sum of £60, the burden of proof was thrown upon Stoddart, he being charged with fraud in that connection, to show that in fact he had paid it."

Proceeding in the summing-up the Recorder further said: "Directly you have established that there is no trace anywhere of one of them having been paid, that no trace can be found of a farthing having been paid to him, the burden of proof is shifted on to Stoddart to shew that he had in fact paid it, and that is what he has set up; he was bound to do it; he could not help himself." These passages constituted a grave misdirection, for it was obvious that the appellant might have paid away money for these winners from funds other than those in his banking account, or by cheques other than those identified by Mr. Cash as being drawn for the payment of prize money. There was no doubt as to the Recorder's meaning, for he afterwards said that the case was analogous to the shifting of the onus of proof where a man was found in possession of recently stolen property. The burden of proof was not shifted by the evidence of Mr. Cash.

Throughout the whole of the proceedings an element of prejudice and hostility towards the appellant was noticeable. On the third day of the trial the learned Recorder impounded a document, an assignment of a debt to the appellant, and later, in the presence ***223** of the jury, it being suggested that the date of a letter put in evidence on behalf of the appellant had been altered, the appellant was told that his bail would be increased, and that two sureties in £5,000 (instead of £2,000) each would be required. The suggestion made was that the appellant was guilty of some fraud in connection with the letter. On the 13th day of the trial the learned Recorder said: "It is no answer to this case, so far as Stoddart is concerned, to say that he himself was the subject of fraud by his own servants unless he can shew that in every one of the cases brought against him he has been the victim of a conspiracy by his servants. You see what I mean. It is no answer to say that in half-a-dozen cases he was defrauded by his servants without his knowledge, if you find that there are cases in which the evidence shews he was a party to the conspiracy." In other words, the learned Recorder said that the burden of proof was upon the appellant, when in fact it was upon the Crown.

With regard to the false pretences charges, as embodied in the sixth and seventh counts—the only ones left after Funnell's case was abandoned—evidence was given by a Mr. and Mrs. Carter as to her being induced to enter the competitions owing to the circular stating that a certain J.

Browning had won money in previous competitions. They were never asked the time-honoured question, whether they parted with their money relying upon that statement. They both won sums of money in the competitions, and duly received a remittance. The statement in the circular was admittedly untrue, but the prosecution had to prove that it was made fraudulently, as well as untruly. The explanation of the statement being made at all was to be found in the fact that the name of Browning was sent over from Middelburg to London as the name of a winner, and the appellant printed the name as a winner in the circular subsequently issued. Everything possible had been done to lull the appellant into a false belief that Browning was a genuine person, and the appellant in his evidence stated the fact that he handed Catling a cheque for £45 wherewith to pay him. An exchange slip was produced which shewed that Catling had cashed the cheque for eight £5 notes and £5 in gold. Catling admitted that the slip was in his handwriting, but said he gave the proceeds to the appellant. Browning's prize was £60, but the £15 was accounted for by a "deduction" slip, in Klinge's writing, as £15 was to be used to bet with Drew & Co. The case of ***224** Foster was similar. Mrs. Carter was supposed to have relied upon the representation that prize money had been paid to a man of that name at a given address, but in fact she sent in her second coupon before she had seen that Foster was a winner. In that case the cheque for £100 given to Catling by the appellant was produced. The appellant, as appeared from the exchange slip, had directed that this cheque should be changed for a £100 note, to be sent to Foster. The person who drew the money drew it out in gold, the slip having been altered. The handwriting of the alterations was not proved the defence alleged it was Catling's. Catling denied this, and said he had never had the £100 at all, that the slip had been obtained from the bank after the prosecution was instituted and then altered, which involved a charge of forgery against the appellant. The bank manager proved that the slip as originally filled up was for a £100 note, and was altered before the bank stamped it. The only evidence suggested to shew that appellant knew that Browning and Foster were bogus winners was the dealing with his bank account—*i.e.* , whether cheques were drawn or not.

[Bray J.: The Lottery Acts might be a good reason why winners were not paid by cheques drawn in their favour.]

With regard to the conspiracy charges, these were charges alleging a conspiracy between the appellant, Catling, Jones and persons unknown. The jury disagreed upon Catling's case, and there was absolutely no evidence connecting the appellant with Jones; they were in fact almost strangers.

[The Lord Chief Justice : Would not the expression in the indictment "persons unknown" include Klinge?]

Klinge was known at the time the prosecution was started, and was called as a witness, and if the prosecution knew that he was an alleged conspirator, he ought to have been named in the indictment. An accused person is entitled to know with whom he is charged. (Walker, 3 Camp. 264 (1812) ; Thompson (1851), 16 Q. B. 832; Dears. C. C. 3; 20 L. J. M. C. 183; 51 Jur. 453; 5 Cox C. C. 166; Q. B.) The prosecution never attempted to prove that there was a case of conspiracy with persons unknown. ***225** It is true that by 14 & 15 Vict. c. 100, s. 1 , there is a power of amendment in immaterial matters, but it was not for the prisoner's counsel to suggest amendments in the indictment.

[The Lord Chief Justice : Assume that there was a proper direction, and that there was evidence that the appellant conspired with Klinge, must we interfere because Klinge's name is not in the indictment?]

Yes; the rules of criminal pleading stated that every ascertained person must be named. (Robinson, Holt's Nisi Prius, 595 ; 1817.) A defendant is entitled to have each count put separately to the jury, and in this case it was peculiarly necessary, to do justice, that the jury should have been directed on each.

As to dealing with the counts as separate indictments, counsel referred to the judgment of Hawkins J. in Paul (1890), 25 Q. B. D. at 202; 59 L. J. M. C. 138; 17 Cox C. C. 111; 62 L. T. 845; 38 W. R. 704; 54 J. P. 677; C. C. R. Appellant was entitled to have his real case presented to the jury, and it could not be assumed that no injustice had been done through what had happened—the law was now the same in criminal as in civil appeals. Counsel referred for an instance of "substantial wrong or miscarriage" caused by misdirection to the judgments of the noble and learned lords in Bray v. Ford (above, p. 222), where a verdict was set aside, and to Dyson (1908, 2 K. B. 454; 77 L. J. K. B. 813; 99 L. T. 201; 72 J. P. 303; 24 T. L. R. 653; 1 Cr. App. R. 13 .) The counts in this case illustrated the extreme of laxity in pleading. There could have been no conspiracy with Price, if for no other reason than that there was no evidence connecting him improperly with the appellant: from first to last he never said a word against appellant. But Price did implicate Catling directly. During the trial mention had been made of twenty-two bogus winners representing thirteen competitions. [Counsel was discussing the evidence of various witnesses in detail when the Lord Chief Justice remarked that the Court could not consider minutely the evidence of every witness.] But the close intimacy and business relations of Catling and Jones would be sufficient to conceal from the appellant the real state of affairs. In this connection a witness for the prosecution named Singer gave evidence that Jones had asked him if he would let his name and ***226** address be used, inasmuch as he (Jones) could not use his own for fear the appellant would think he was "working something dirty." In conclusion the learned Recorder had directed the jury that a witness, Miss Gardiner, was entirely under the appellant's influence and devotedly attached to him. As a matter of fact she had left the appellant's employment before the prosecution started. Moreover, the jury were told that although the appellant had put a defence before them, the facts involved shewed that it was dishonest. Such direction was most improper. With regard to Catling's case, the direction amounted to a statement that if they found the appellant's story in conflict with Catling's, and if they were not convinced of the truth of the appellant's story, they must convict him. This was said, although there was no more reason for believing Catling's story than the appellant's. Then take D'Avyet's case—

[Bray J.: This was the first of the conspiracy cases, and if he was not guilty of that, there is a strong presumption in his favour as to the others.]

The cases of Barnes and of a number of others—called Barnes's case because that name was the first of six, all winners, and five certainly bogus winners—were not before the alderman, and the notice given was very short; there was thus great difficulty in obtaining evidence in rebuttal. As to the Singer and Morris cases it was clear that there was a plot to deceive appellant. The Recorder did not point out to the jury the bearing which the cases of Deacon, White and Williams, in which Stoddart's defence was overwhelmingly established, had upon the credibility of his defence on other cases. He should have directed them that these cases pointed strongly to Catling's guilt. Except Catling's evidence there was no direct testimony against appellant at all. There was no evidence of conspiracy between Stoddart and Jones, and the Recorder ought so to have directed the jury, and to have told them to disregard as against Stoddart all the evidence relating to Jones. They ought to have been so directed, specifically, in Robinson's case. (Wright on Conspiracy, p. 71.) He ought also to have told the jury to disregard the previous conviction for carrying on a lottery and the illegality of the business. (Lee (1908), 72 J. P. 253; 1 Cr. Ap. R. 5; 24 T. L. R. 627; (1909) 2 Cr. Ap. R. 41; (1908) 1 Cr. Ap. R. 155 ; Warner , above, p. 222), whereas he emphasised these points in his summing-up, and mentioned that appellant had been in prison for some offence of the sort. A misdirection of fact is fatal to a conviction, just as much as one of law. (Beauchamp (1909), 25 T. L. R. 330; 2 Cr. Ap. R. 40 ; Sovoski (1908), 72 J. P. 435; 1 Cr. Ap. R. 98 ; Coleman (1908), 72 J. P. 425; 24 T. L. R. 798; 1 Cr. Ap. R. 50 .) Because of the elements of prejudice involved in the case, the Recorder should have been more than usually careful to direct the jury as to the real evidence on each count. There was never any case put to the jury, in the opening or in the evidence, of conspiracy with persons unknown. There was an attempt by Catling's counsel to prove conspiracy—after the summons was issued—between Stoddart and Jones by introducing (although it could only be evidence against his own client) a conversation between Mrs. Catling and Jones in Catling's presence, but not appellant's, which was a confession by Jones implicating Stoddart. (See Dibble (1908), 72 J. P. 498; 1 Cr. Ap. R. 155 .) A day or two afterwards Jones disappeared. This conversation should have been excluded, and in any case the Recorder should have warned the jury in his summing-up to disregard it, and should at the same time have pointed out that the evidence showed that Catling procured Jones's disappearance. There was no reference to his disappearance.

As to the false pretence counts (6 and 7) there was no real case, especially on the 7th count (Mrs. Carter's second case, *i.e.* , Foster's), and even if there was, the jury should have been told to regard the evidence admissible on those counts only.

Further, there was no jurisdiction to try the false pretence counts in England, because the offence, if any, was committed in Holland. The obtaining is the gist of the offence; that must be within the jurisdiction. (Buttery, cited 4 B. & Ald. 179; 5 D. & R. 619; 3 B. & C. 703 ; after 1757.) By 7 Geo. IV. c. 64, s. 12, an offence begun in one county and completed in another may be tried in either, but that does not affect foreign countries. (Ellis, (1899) 1 Q. B. 230; 68 L. J. Q. B. 103; 79 L. T. 532; 47 W. R. 188; 62 J. P. 838; 19 Cox C. C. 210; C. C. R.) Cases under that statute are not in point.

[Phillimore J.: But T. S. Jones (1 Den. C. C. 551; 4 Cox C. C. 198; 4 New Sess. Cas. 353; 19 L. J. M. C. 162; 14 Jur. 533 ; 1850) was not decided upon the statute; the prisoner, it was there held, makes the postmaster his agent.]

It was, in fact, covered by and within the statute, and it was so argued. In this case the prisoner has precluded the agency of the Post Office by the terms of his offer to the competitor, who agrees that the proprietor is not to be responsible for any postal error or non-delivery. “An offerer, if he chooses, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance.” (Per Thesiger, L.J., in Household Insurance Co. v. Grant (1879), 4 Ex. D. at p. 223; 48 L. J. Ex. 577; 41 L. T. 298; 27 W. R. 858 .)

[Phillimore J.: This is not a case of contract, but of delivery.]

The prisoner has been ordered to pay the taxed costs of the prosecution—between £2,000 and £3,000. The case was committed to the December sessions, and should normally have been tried before the Costs in Criminal Cases Act came into force, on Jan. 1st, 1909. The main charge of conspiracy between Stoddart and Catling failed, as did also the five counts for false pretences relating to Funnell.

Muir (with him *Leycester*), for the City Police, was required to direct his attention mainly to the alleged misdirection as to onus of proof, and to the effect on Stoddart's defence of the sub-conspiracy against him.

In order to appreciate the point as to onus of proof, the Court must have before it the case which was presented for the prosecution. With regard to the counts for false pretences, the evidence adduced would have been the same if they had gone to the jury alone. They alleged overt acts in pursuance of a conspiracy. The following cases of bogus winners implicated Stoddart directly:—D'Avyet, Foster, Morris, Barnes, Rolandson and Rowley. The following contained evidence of conspiracy with persons unknown:—D'Avyet, Browning, Willis and Deacon. The Butterworth case implicated Stoddart, Catling and Jones; the Price case implicated Catling directly. The real object of appellant's combination with Price was to get him out of the way as a rival, but the importance of ***229** this case was that it afforded also evidence of the settled course of business of introducing bogus winners. As to the sub-conspiracy, the evidence was open to either view, that the cases spoken to by the witnesses Robinson and Singer—viz., that they took bogus addresses at the request of Jones and got prize-money there—might or might not have been known to Stoddart. In any case it was not a conspiracy to defraud Stoddart, even if he did not know of it; he only paid what he must in any case have paid. The persons really defrauded were the genuine winners who thus got less than their proper share.

With regard to D'Avyet, Stoddart undoubtedly retained the £300. He admitted this. His registered letter to D'Avyet (in which he declined to send prize-money to any but the coupon address) was a dummy and a sham, and his explanation that he was holding the money in case D'Avyet turned up was not consistent with the fact that in a later issue D'Avyet is alleged to have been paid. In Browning's case, admittedly, no one received £60. A person unknown arranged for letters to be sent to 259, Broadway, W. Hendon, but never called again. No original written list of winners containing Browning's name, sent by Klinge to London, was produced.

[Bray J.: But there must have been one sent, or how did they get the names of that week's genuine winners?]

It was not produced, because if it had been, Browning's name would not have been there.

The accountant, Mr. Cash, shewed that no money was drawn out of Stoddart's bank for Browning. No registered letter was either delivered or called for at the address given. That was enough to shift the onus on to Stoddart. Moreover he accepted that position and took upon himself to satisfy the jury that he had provided the money. The only practical question for the jury was, “Do you believe Stoddart?” Exactly the same kind of evidence was given in Willis's case. In Foster's case no letters, it was proved—no registered letters were sent, and, if they had been, would not have been received at the address given, and would come back through the post, as no such name was known there. Therefore Stoddart was the only party who could benefit by the fraud. ***230**

[Phillimore J.: Unless Stoddart gave Catling the money, and Catling did not post it.]

That could only be if Catling knew beforehand that Stoddart would give him the money to pay Foster. The £100 cheque alleged to have been for Foster was, according to the prosecution, in fact drawn for the purpose of paying the consolation prizes of £100 in the next competition, which was the one in which McNulty (with regard to whom the charge was abandoned) was the winner of the premier prize of £300; Catling did not say this, but said that it was for some competition other than Foster's.

The case of Roe, which was in effect that of Rolandson and Rowley, was a strong case. Roe swore that Stoddart paid him £5 for the use of his (real) address, which he said he wanted to frustrate people whom he suspected of swindling him: at that address the name of Rolandson was to be used. The same address with the name of Rowley appears in the Barnes case. Stoddart was the only person proved to have known his address, or able to make use of him. Rolandson and Rowley were printed as winners.

Barnes's case was very significant: both Stoddart and Catling are agreed that all six winners were bogus. As to three of them, it might be that Stoddart thought three were genuine, for he drew a cheque for £243: 18 *s.* 0 *d.* , the exact sum due to three winners of £81: 6 *s.* 0 *d.* each. As to the other three, of whom Rowley was one, no persons of the given names were known at the respective addresses; no money was drawn out of the bank for them; and no registered letters were sent. Appellant's explanation of this case was absurd.

Morris's case was that a registered letter was sent to a bogus winner at an address that did not exist, produced in Court, opened, and found to contain Stoddart's advertisements.

The case of Singer was involved in the same competition as Morris's. Bank-notes were traced to Jones which had been sent to Singer, and to Stoddart which should have been sent to Morris.

So far from being unfair to Stoddart, the Recorder did not always accept the suggestions of the prosecution, but several times put in his favour points which the prosecution had pressed against him.

In the cases where Robinson was the witness the Recorder did ***231** not give the direction complained of as to the onus of proof, because, in fact, the money was traced out of Stoddart's account. On the contrary, he directed the jury to acquit Stoddart of any conspiracy in respect of those cases.

Stoddart and Windust had for some time been accusing each other of publishing bogus winners, and asking in their publications what the Director of Public Prosecutions was doing.

[Darling J.: Has the Director investigated Windust's business?]

No.

With regard to the corroboration of Cowley, it is true that there were certain discrepancies of date between him and the witness May Andrews, but it was for the jury to choose between them.

[Bray J.: If the jury believed Price they must have convicted Catling.

The Lord Chief Justice : I do not understand, in view of a great deal of the evidence, how they could have acquitted Catling while convicting Stoddart.

Darling J.: They did not acquit Catling altogether; they disagreed on some counts.]

Great light is thrown upon the case by what occurred after the summonses were issued. Stoddart attempted to get Catling out of the country. He brought Klinge over to England on Sept. 29th, and between then and Oct. 8th, as the prosecution suggested below, Klinge manufactured a number of documents which were afterwards produced by Stoddart. All the passages with regard to onus of proof should be read together. In all the instances in which the Recorder imposed upon him the burden of proof Stoddart accepted the position.

[Darling J.: But the direction complained of is that given after the defence. ***232**

Bray J.: That is to say, because Stoddart has given evidence, there is an onus upon him which there would not otherwise have been.]

The moment the prosecution have shewn that on the face of it winners have not been paid, the onus is upon the person who has the materials and facts in his possession.

[Bray J.: In Willis's case it is Stoddart's oath against Catling's. Can it there be right to say that the burden is upon Stoddart? Why more than upon Catling?]

In that case there was some evidence to corroborate Catling, and he was not the person who drew the prize-money out of the bank, and Stoddart was. If there is a *primâ facie* case made out, and the jury are not satisfied with Stoddart's explanation, they ought to convict him.

The Recorder told the jury that the sub-conspiracy was no defence, unless they were satisfied that Stoddart did not himself conspire.

[Bray J.: That is to say, if you are in doubt you are to convict.]

Not very happily put, but later on he puts it, “if you are satisfied that there are cases in which he was concerned.”

Even if I am wrong on this point, there has been no "miscarriage of justice," and the case comes within the proviso to sect. 4 of the Criminal Appeal Act .

Gill , in reply. There was a miscarriage of justice; Stoddart did not have a fair trial. The facts have been stated in this Court with great detail, and in a most hostile spirit. For instance, with regard to Foster the case put forward here is quite different from that made in evidence at the trial. The McNulty charge which was abandoned had no relation to the consolation prizes, but to the first prize of £300; and Catling's story about the £100 cheque was always that he never had it. ***233**

The whole of the work connected with the competitions was carried on abroad. The coupons were sent to Holland, the list of winners compiled there, and all the arrangements were there carried out by Klinge under the supervision of Catling, but all the time appellant was in England. Windust had never accused the appellant, as had been stated here, of publishing fictitious winners. The appellant had published extracts from papers with regard to a case in which Windust was concerned.

[Darling J.: If Windust was attacking the appellant at that time, the appellant would be very unlikely to do that of which he was accused.]

The errors into which the learned Recorder was led were due to the way in which the case was presented. The multiplicity of charges was likely to cause a miscarriage of justice. Upon the question of misdirection as to onus of proof, further reference was made to O'Doherty (1848), 6 State Trials, 875 ; Abrath v. The North Eastern Railway Co. (1883), 11 Q. B. D. 440 , at 452; *per* Brett M.R. (1886), 11 Ap. Cas. 247 ; 55 L. J. Q. B. 547 ; 55 L. T. 63 ; 2 T. L. R. 416 ; 50 J. P. 659; H. L. Counsel also read a passage from Wigmore on Evidence, vol. iv., sect. 2513 note, p. 3562. That referred to the judgment of Mr. Justice Weaver, in The State v. Brady (1902), Ia., 91 N. W. 801 :—

> "The use of the terms 'presumption of guilt' and ' *primâ facie* evidence of guilt' with reference to the possession of stolen goods has perhaps been too long indulged in by Courts and text-writers to be condemned; but we cannot resist the conclusion that, when so employed, these expressions are unfortunate, and often misleading …. 'Presumptions' of guilt and ' *primâ facie* ' cases of guilt in the trial of a party charged with crime, mean no more than that from the proof of certain facts the jury will be warranted in convicting the accused of the offense with which he is charged."

The effect of the whole of the summing-up was that if the appellant could not explain every single case, he could not succeed in his defence.

The Lord Chief Justice

read the following written and considered judgment of the Court:—

In this case an indictment was preferred against the appellant ***234** Joseph Stoddart and a person named Frederick Catling. The indictment originally contained eleven counts, the first four charging the two defendants with conspiracy with one Jones and other persons unknown to defraud the public, and the last seven with obtaining money from persons named by false pretences. Upon the direction of the Recorder the defendants were acquitted on the fifth, eighth, ninth, tenth and eleventh counts. The appellant Joseph Stoddart was found guilty on all the remaining counts. Frederick Catling was acquitted on the sixth and seventh counts, charging him with obtaining money by false pretences, and the jury being unable to agree were discharged from giving a verdict on the counts alleging conspiracy. The case lasted twenty-three days. The appellant Joseph Stoddart by his notice of appeal alleged thirty-six matters in respect of which it was contended that the learned Recorder had misdirected the jury, and he further raised certain points as to the alleged improper admission and rejection of evidence. With many of these points it will not be necessary to deal in detail, as they were not mentioned in the course of the argument; others allege in different forms the same misdirection.

In order to understand the way in which the various questions arise it is necessary to state in general outline the case as presented by the prosecution. The defendant Joseph Stoddart had an office in London and an office in Middelburg, in Holland. Stoddart was the proprietor of and issued during the year 1907 and part of 1908 a publication entitled *Football Record* . This publication announced that £400 was every week divided amongst competitors, £300 by way of a first prize to be divided amongst the competitors who predicted twelve correct results and £100 divided among those competitors who predicted eleven correct results. There were certain other rules as to distribution of money in the event of no competitors being entitled to the first prize, the announcement being that £400 was divided every week amongst competitors. Up to the beginning of October, 1907, the business in London had been managed by Joseph Stoddart and his clerk, a Miss Gardiner, and the business in Middelburg had been conducted by a man of the name of Klinge, assisted by other persons. By the rules of the competition the competing coupons had to be posted in time to reach Middelburg on the evening of Saturday in each week, the claims had to be posted on the Monday following, so as to reach ***235** Middelburg on the Wednesday morning, and the names of the winners were published in subsequent numbers of

Football Record , and the amounts afterwards remitted to the persons alleged to be the winners. There was no evidence that the defendant Frederick Catling, who was a son-in-law of Stoddart, had any connection with the business until the first week in October, 1907; but from that date he used to visit Middelburg every week to superintend the business there, and also gave assistance to the business in London. Between October 12th, 1907, and September 24th, 1908, according to the evidence, the names of thirteen bogus winners were published—that is to say, the names of thirteen persons were published as winners who either did not in fact exist or to whom no prizes had been sent. The amount paid in prizes during this period was upwards of £22,000, and the amount which ought to have been paid to the bogus winners had they been genuine was the sum of £1,500. The evidence for the prosecution established, and it was not disputed by the defendant, that the thirteen supposed winners in question were bogus winners, and that their names and supposed addresses ought never to have appeared in the numbers of *Football Record* as genuine winners.

The way in which these frauds were carried out was that certain persons filled up a coupon at Middelburg after the result, with a false name and address, and returned the bogus name to Stoddart in London as being among the winners. Letters were then addressed to the bogus winners at the same time as letters to the genuine, and the prize money afterwards put into envelopes addressed to them. The letters to bogus winners were either intercepted before they were sent off, or arrangements made to get possession of them at the address given. The examination of the coupons and of the claims subsequently sent in took place at Middelburg, and the names of persons who appeared to be entitled to any share in the prizes were returned to London. If any doubt arose upon the coupon itself, it was sent to London for investigation, and any inquiries would be made from the London office. All the money required to be distributed among the winners was provided by Stoddart, and the envelopes in which registered letters were sent out were prepared sometimes by Stoddart and his clerk, Miss Gardiner, but it was stated after October, 1907, mainly by Catling and Jones, assisted by ***236** Miss Gardiner, and that Miss Gardiner addressed the registered envelopes. The defendant Stoddart denied that he had any knowledge that any of the thirteen bogus winners were, in fact, bogus, and further gave evidence that he had provided the money for distribution among them all, and had parted with the whole amount except one sum of £300, alleged to have been won by a man named d'Avyet, which he said he still held for him. Stoddart's case was that the frauds and false publications of winners' names were done entirely without his knowledge, and the money retained by the defendant Catling and other persons in league with him, who were conspiring to obtain from him (Stoddart) the money supposed to be due. The money was remitted to the various winners in bank-notes or cash, and the cheques by which money was drawn from week to week did not specify the name of any particular winner, but were drawn to “self,” and then cashed so as to obtain the necessary notes and other money for division. This brief outline of the facts will be sufficient to follow the points in respect of which it is alleged that the Recorder misdirected the jury.

Before, however, dealing with the suggestions made as to misdirection, Mr. Gill, on behalf of the appellant, raised several contentions with which the Court must deal.

It was contended that the Court had no jurisdiction to try and convict on the counts for obtaining money by false pretences, inasmuch as the postal orders and letters containing money were received by the defendant's agent at Middelburg, and that by the rules of the competition Stoddart was only responsible for money received there. In the opinion of the Court there is not the slightest ground for this objection to the jurisdiction. The false pretence, if made, was to induce the persons to part with money and send it to Middelburg, either by postal order or in stamps or cash, and when the postal orders and letters containing money were posted in London or within the jurisdiction of the Central Criminal Court for transmission to Middelburg, there to be received by the defendant, the offence was complete. In R. v. T. S. Jones (above, p. 227) a similar contention was raised and decided against the defendant, and that case has been followed in many others. (See Archbold's Criminal Pleading, 23rd ed., 609.) It was further contended, on the authority of R. v. Thompson (above, p. 224), that, as the jury did not find Catling guilty on the conspiracy ***237** counts, the Recorder ought to have directed the jury to acquit Stoddart, and that there was no evidence of any conspiracy with persons unknown, and that as soon as Klinge's name was known as one of the persons taking part in the conspiracy to publish the names of bogus winners his name ought to have been inserted in the indictment, and that therefore the proceedings were bad. We are wholly unable to follow this objection. The first four counts alleged that the defendants Stoddart and Catling conspired together and with Jones and divers other persons whose names are unknown. Had there been no persons involved in the conspiracy other than Stoddart and Catling, if the jury had acquitted Catling, Stoddart could not have been convicted. There was evidence for the jury that Stoddart was connected with Jones, Klinge, and possibly other persons. No objection of any kind was raised at the trial, and in our opinion the defendant Stoddart is not entitled to rely upon any such point in order to invalidate his conviction.

It may well be that in a particular case it is undesirable that an investigation of more than one misdemeanour should proceed at the same time, and the experience in this case is sufficient to shew how much wiser it is to try defendants for the real offence they have committed instead of for a lesser offence. No doubt it may be said that in each case where a person was induced to compete upon the faith of the advertisements, which were in fact untrue, there was an obtaining of money by false pretences, but the real offence here was not the obtaining of an individual subscription so much as the conspiring to establish a scheme whereby the public were induced to subscribe money and to compete upon the faith that the prizes were given to genuine winners, whereas in fact either the amounts stated were not in fact distributed or were being participated in by persons who had fraudulently sent in correct coupons. There is, however, one conclusive answer to the contention as to the joinder of counts—namely, that if the defendants were in any way embarrassed by the joinder of the counts for false pretences and conspiracy the learned judge might have been asked to call upon the prosecution to elect. Where a trial such as this has been conducted without any application being made by the learned counsel who appeared for the defendants upon a matter upon which the judge would no doubt have exercised his discretion, it certainly cannot be raised by way of objection, as it ***238** is attempted on the present appeal. There is no doubt, as was pointed out in R. v. Paul (above, p. 225), there are many cases in which, if a defendant is being tried upon an indictment charging more than one misdemeanour, it may be necessary to point out to the jury that certain evidence can only be considered in connection with some counts and should be disregarded as to others. In this case we agree with the argument urged by Mr. Muir that the evidence of conspiracy would be to a great extent the same as that which would be given in order to shew that the pretences made were false, and was relevant to the counts as to false pretences in order to negative mistake and to shew the intent with which the names of bogus winners were inserted. In our judgment the Recorder sufficiently distinguished between the counts, and no valid objection can be taken to his summing-up on this head.

It was further urged on behalf of the appellant that the conviction could not stand because the defendant Stoddart had never had a fair trial, and in support of this view it was said that the Recorder misdirected the jury in not directing them specially that Stoddart was innocent of having altered the date of a certain letter, and that the increase of bail of £10,000 ordered at a certain stage of the trial was improper, and further in not directing the jury that he, the Recorder, was wrong in having ordered increase of bail and a certain document connected with the witness Price to be impounded. These two arguments referred to an incident which occurred during the trial in which, a suggestion having been made that the date of the letter might have been altered, the Recorder did increase the bail and did order certain documents to be impounded. This incident occurred on the third day of the trial, and the counsel for the prosecution on the next day expressly stated that there was no ground for the allegation and the Recorder reduced the amount of bail. The incident was not further referred to, and to suggest that in a summing-up which occurred after twenty-two days' hearing it was misdirection not to have again referred to this incident and to have stated that he, the Recorder, was wrong in acting as he did, is in our judgment groundless, and, as we have before observed, the conduct of no case lasting such a length of time can be free from criticism, especially by those who examine the case without having been present at the trial.

It was further contended that the learned Recorder misdirected the jury in the passage at page 16 of the summing-up as to the ***239** witness Gardiner. The direction suggested in the defendant's notice of appeal is not to be found in the summing-up of the Recorder. He quoted an answer which was given by Catling, and felt it his duty to caution the jury as to the evidence of the witness Gardiner. It is, in our opinion, quite impossible to contend that what he said amounted to misdirection, or to adopt the suggestion that in consequence of this statement the verdict must be set aside. Some caution as to the position of Miss Gardiner with reference to the defendant

Stoddart and the weight of her evidence was clearly necessary, and it is no part of the duty of this Court to criticize the particular form of words used if, as in this case, it cannot be properly suggested that they involve misdirection in law upon some material part of the case.

It was further contended that the conviction must be set aside on the ground of misreception of evidence, in that evidence was given of a conversation between Mrs. Catling and Jones which took place when Stoddart was not present. In our judgment no valid objection can be taken to the reception of the evidence. It must be remembered that Catling was also on his trial, and it was material for him to establish that he did not know before a certain date that Jones had written out a claim and cashed a note, and he (Catling) was entitled in his own defence to have that statement corroborated by the evidence tendered. The Recorder could not have rejected the evidence, Catling being upon his trial and entitled to corroborate his own evidence. Moreover the Recorder distinctly told the jury that the conversation was not evidence against Stoddart, and the matter was not further referred to in the summing-up. It was further contended that the conviction could not be supported because a witness, De Friese, had not been ordered to give a certain explanation of a passage in a letter, but when the matter came to be examined there was found to be no ground for this suggestion, and it was withdrawn by Mr. Gill.

The next point as to which it is suggested on behalf of the appellant that there was a misdirection is as to the evidence given on Stoddart's behalf that the names of the bogus winners were inserted by Catling and in furtherance of a conspiracy unknown to him (Stoddart) to obtain money from him. The passages mainly relied on are, first, that at page 13 of the summing-up:—“When we come to examine these cases in detail together, I must say I do not think the evidence supports him. What I do think ***240** is that there is very strong evidence for your consideration in this case that there was a conspiracy within a conspiracy; that is to say, that Stoddart was the man who was the lion, if I may say so, and that the others, wherever they come in, had a little conspiracy on their own account, and when we come to examine the cases I think you will find there is considerable ground for coming to that conclusion. That is why I very early in the case cautioned you by saying that it is no answer for Stoddart to say, ‘I can shew that these men have been conspiring together to defraud me.’ That is not an answer to the case, unless you are satisfied that he did not himself conspire to defraud, or did not obtain money by false pretences himself.” In our judgment, then, there was in this respect no substantial misdirection; on the contrary, we think it was correct to tell the jury that the existence of a subordinate conspiracy to defraud Stoddart would not be any answer to the case made by the prosecution unless they were satisfied that Stoddart did not himself conspire to defraud or did not obtain money by false pretences.

It was further urged that the Recorder misdirected the jury in saying that Stoddart was carrying on an illegal business and that it was scandalous. This probably refers to the passage at page 25 of the summing-up. While we quite agree that it was very important that in such a case the jury should be told that the indictment in respect of which the defendant was being tried was not in any way based on the illegality of the scheme of competition, we observe the fact that the business was being largely carried on at Middelburg because it would have been illegal to have carried it on in England was more than once referred to by the counsel on both sides, and in our judgment it cannot be successfully contended that the jury did not consider the real questions raised or that we ought to interfere because of the passages above referred to, or of any suggestion of prejudice.

The counsel for the appellant went even further and contended that the fact that the learned Recorder had ordered the defendant Stoddart to pay the costs of the prosecution supported the contention that he, the defendant, had not had a fair trial. In our opinion, the case was eminently one in which it was right to order the defendant, if convicted, to pay the costs. With reference to the contention urged by the appellants that he (Stoddart) did not have a fair trial and that the learned Recorder was himself ***241** influenced by prejudice, as was contended on behalf of the appellants, and allowed the jury to be influenced by such prejudice, we think that a fair consideration of the summing-up as a whole shews conclusively that there is no ground whatever for such a suggestion. The learned Recorder pointed out to the jury that they were in fact trying sixteen or seventeen cases. He examined each one of them in detail. As to ten or twelve separate charges he expressed his opinion in favour of the defendant Stoddart; as to another he pointed out that the case was too doubtful; and as to five others he expressed an opinion adverse to the defendant Stoddart. In our opinion the careful examination of these cases by the Recorder and the expressions of opinion in favour of Stoddart in the cases in which he considered the evidence insufficient or doubtful rebut entirely the suggestion that he allowed himself to be influenced by prejudice in the conclusion at which he arrived in each case.

There remains to be considered a very important point raised by Mr. Abinger at the conclusion of the trial, and in respect of which he applied for leave to appeal, and that is as to the direction of the learned Recorder that the *onus* of proof had been shifted from the prosecution to the defendant. This raises a very important question, and, in our opinion, the only question of difficulty in the whole case—namely, as to the proper direction as to *onus* of proof where *primâ facie* evidence has been given on the part of the prosecution which, if unanswered, would raise a presumption upon which the jury might be justified in finding a verdict of guilty, and the defendant has called evidence to rebut that presumption. Presumptions of fact which afford evidence of guilt vary in degree. As pointed out at p. 340 of the twenty-third edition of Archbold, facts and circumstances may raise a presumption so strong that guilt necessarily follows, or they may raise a presumption upon which the jury might be directed that if satisfied by the evidence that the facts alleged by the prosecution are established and no explanation is offered, they, in some cases, ought to find a verdict of guilty, or they may be of so little weight that the jury ought to be told that they raise no presumption which calls for an answer from the defendant. In our opinion when it was once established that, in repeated issues of the paper of which the defendant Stoddart was the proprietor, a series of announcements had been published for a number of weeks stating that certain persons, ***242** whose names and addresses were given, had gained prizes, and that in the event of no scrutiny being demanded the amounts would be sent to them on named dates, and when it was proved that subsequently, as in the month of May, 1908, an announcement was made recording the results of thirty competitions and stating that thirteen competitors had received prizes as to whom it was, in fact, proved that they were bogus competitors and that no money had been received in respect of these prizes by any *bonâ fide* competitors—when this was established and proved, evidence had been given which called for some explanation, and had the case rested there, the Recorder would have been justified in telling the jury that in the absence of any explanation they would be justified in finding that Joseph Stoddart was a party to a conspiracy to put forward false representations in order to defraud the public. The question, however, in this case is as to the direction which ought to be given where, as in this case, the defendant gave and called evidence in answer to that *primâ facie* case. It seems to us that the jury should have been told that if they accepted the explanation given by and on behalf of Stoddart, or if that explanation raised in their minds a reasonable doubt as to his guilt, they should acquit him, as the onus of proof that he was guilty still lay upon the prosecution. If upon the whole evidence the jury are left in a real state of doubt the prosecution has failed to satisfy the onus of proof which lies upon them.

It is now necessary to examine the passages in the Recorder's summing-up upon which the point, raised by Mr. Abinger and argued before us by Mr. Gill, was based. The first of these passages occurs on page 12 of the shorthand notes of the summing-up, and refers to the case of a bogus winner of the name of Browning whose name appeared as a winner of £60 in the *Football Record* No. 22, published on November 2nd, 1907. It is in the following terms:—"The moment the prosecution had established the fact that not a farthing had been paid to one of the persons who are alleged to have received the sum of £60, the burden of proof was thrown upon Stoddart, he being charged with fraud in that connection, to shew that in fact he had paid it. You follow me; the burden of proof is upon him. Under ordinary circumstances the burden of proof is in the first instance upon the Crown. They allege a man has been guilty of fraud and they have to prove it; but when, as in this case, you find that Stoddart is sending out ***243** to the world that people have won £60, and have received that £60, and when upon investigation it is found that the money has not been paid, then the burden of proof is upon him." The next passage occurs on page 20, in which the Recorder used the following language:—"It has been admitted that the burden of proof is upon Stoddart that he paid this money and he has endeavoured to shew it in that way. If you do not believe his evidence then he ought to be convicted, and I think upon that seventh count, as upon the sixth count of the indictment, you ought to acquit Catling. I come next to the case of Willis, which, I am thankful to say, I think I can dismiss with a very few words. It is a question really in Willis's case of oath against oath. Willis, of course, is a bogus winner. Mr. Cash, when he comes to investigate the case, finds no trace of £60 having been paid at all. The burden of proof is again upon Stoddart—a very unlucky man that Stoddart—to shew that the money had been paid." Again, on page 31, dealing with the case of Deacon, the Recorder said:—"As I have said before, so it is here in this case, that the presumption is against Stoddart. Directly you find people have not been paid it puts him upon giving an explanation as to why they were not paid, and it imposes upon you the obligation of asking yourselves the question—Had Stoddart given a reasonable explanation or has he not ? If you think he has given a reasonable explanation, you ought to act upon that, or if there are two explanations, an explanation by Stoddart and an explanation by Catling, each of them saying that it is the other who is guilty, then if this case stood alone you would be in this position, you would have to say—'Whom am I to believe?'"

If these directions had been addressed to what may be called a minor incident in the case, as, for instance, some particular question of fact set up by the defendant as an incident in or a part only of his defence, it would be necessary to consider the question of the alleged misdirection from a different point of view. But in dealing with them it must be borne in mind that the one substantial issue raised by the defendant Stoddart from the beginning to the end of the trial was that the insertion of the bogus names and addresses as winners was the act of Catling, Klinge and other persons who were conspiring to unlawfully obtain a part of the prize money which he (Stoddart) was supplying, and it seems to the Court that the jury ought to have been told that the prosecution having given ***244** *primâ facie* evidence from which the guilt of the defendant might be presumed, and which, therefore, called for explanation by the defendant, the jury ought to consider the evidence upon both sides, and if upon a review of the whole of the evidence they were satisfied that the prosecution had made out the case that the defendant Stoddart was a party to the conspiracy they should convict him, but that if their minds were left in a state of doubt they ought to acquit him, as the burden of proving the defendant's guilt was still upon the prosecution. The passages which have been cited at length are the only passages in the summing-up which bear directly upon the question of the onus of proof. The concluding words of caution at the end of the summing-up cannot be said to qualify the specific direction to which attention has been called. In the opinion of the Court the jury may have thought that if Stoddart had not proved that he had supplied moneys in every case they must convict him, whereas the direction ought to have been that they must be satisfied, after consideration of all the evidence, that the Crown had proved that Stoddart was a party to the conspiracy, and, if in doubt, they ought to acquit him. It is in failing to adequately explain this that the Court is of opinion that there was a substantial misdirection. Moreover, the direction in this case was the more important, because, inasmuch as the learned Recorder told the jury that in a great majority of the cases he considered that the existence of a conspiracy to defraud Stoddart was made out, it was, therefore, for them to consider whether a conspiracy might not extend to all the cases as to which the prosecution had given evidence. Had there been any other passages qualifying this direction or directing the jury in accordance with the law as we have stated it, the conclusion might be different; but the passages cited are the only specific directions given by the learned Recorder to the jury, and the general caution at the conclusion of the summing-up as to entertaining a reasonable doubt does not appear to the Court to modify the effect of these directions as to onus of proof.

Notwithstanding the view which we have expressed, we have had seriously to consider whether we ought not to dismiss the appeal under the proviso of sub-sect. 1 of sect. 4 of the Criminal Appeal Act, 1907 , on the ground that no substantial miscarriage of justice has actually occurred. This, in our opinion, raises a question of great difficulty. The explanation given by Stoddart ***245** as to many of the cases was most unsatisfactory. There was, in the opinion of the Court, strong evidence against him to support the view taken by the jury; but we cannot say that the facts established are inconsistent with his innocence. Attention was called upon this point to the judgment of this Court in R. v. Dyson (1908, 72 J. P. 272, and 1 Criminal Appeal Reports, at p. 15) , in which in delivering the judgment of the Court dealing with this proviso I said that we could not in that case say that if they had been properly directed the jury must have come to the conclusion which would have supported the conviction. We think it is open to consideration whether the word “must” is not too strong, and whether the proper question is not, whether if properly directed the jury would have returned the same verdict. We are unable to come to the conclusion that in this case if the jury had been properly directed they would have thought that the facts proved were inconsistent with the defendant's innocence, and might not have had a doubt whether the prosecution had failed to satisfy them that the defence set up by Stoddart, that the bogus winners were inserted without his knowledge by persons conspiring against him, was not made out. The fact that the jury were not agreed as to Catling's guilt and returned no verdict against him on the conspiracy counts affords some ground for this contention, that, under a proper direction, the jury might have had a reasonable doubt as to Stoddart's guilt.

This appeal has brought out in strong relief the absolute necessity in the interests of justice of this Court having the power in exceptional cases to order a new trial. Such a power would be rarely exercised; but if there be in any case strong evidence upon which the jury, if properly directed, might have found a verdict of guilty, in the interests of justice the Court should have the power to direct a new trial.

We cannot part from this case without making some observations which may, we trust, be of service with reference to the practice of this Court. As appears from the judgment which has just been delivered, the case for the appellant was conducted by making a minute and critical examination, not only of every part of the summing-up, but of the whole conduct of the trial. Objections were raised which, if sound, ought to have been taken at the trial. Probably no summing-up, and certainly none that attempts to deal with the incidents as to which the evidence has extended over a ***246** period of twenty days, would fail to be open to some objection. To quote Lord Esher's words in Abrath v. The North-Eastern Rail. Co. (above, p. 233):—“It is no misdirection not to tell the jury everything which might have been told them. Again, there is no misdirection unless the judge has told them something wrong or unless what he has told them would make wrong that which he has left them to understand. Non-direction merely is not misdirection, and those who allege misdirection must shew that something wrong was said or that something was said which would make wrong that which was left to be understood." Every summing-up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively. This Court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should be introduced. This Court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice [2] . Its work would become well-nigh impossible if it is to be supposed that, regardless of their real merits or of their effect upon the result, objections are to be raised and argued at great length which were never suggested at the trial and which are only the result of criticism directed to discover some possible ground for argument. The judgment of the Court must be that the appeal must be allowed and the conviction quashed.

Conviction quashed .

Representation

Solicitors for the Appellant: Alpe & Ward. Solicitor for the Respondents: The City Solicitor. ***247**

Footnotes

1 150 Sessions Papers, C. C. C. 501 .

2 Cf. p. 207, above.

(1909) 2 Cr. App. R. 217