

1910 ought to exercise his discretion the arbitrator will act on the well-known judicial principles to which I have referred.

CRIGHTON  
AND  
LAW CAR  
AND  
GENERAL  
INSURANCE  
CORPORATION,  
LIMITED,  
*In re.*

*Judgment accordingly.*

Solicitors for applicant: *Richardson Sowerby, Holden & Co.,*  
for *Foley & Munro, Bolton.*

Solicitors for respondents: *Nicholson, Graham & Jones.*

J. E. A.

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[COURT OF CRIMINAL APPEAL.]

April 21, 22 ;  
May 2 ;  
June 13.

THE KING v. ELLIS.

*Criminal Law—False Pretences—Evidence of other Frauds—Admissibility—Questions tending to shew that Prisoner has committed Offence other than that with which he is charged and is of bad character—Opening Speech for Defence—Evidence of Good Character—Admissibility of Evidence of Bad Character—Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1 (f).*

Whether a question put to a person charged with a crime and called as a witness tends to shew, within the meaning of s. 1, clause (f), of the Criminal Evidence Act, 1898, that he has committed or been convicted of or charged with any offence other than that with which he is then charged cannot be decided by looking merely at the single question. Each question must be judged by the light of others asked before and after. The object of the enactment is that it should not, except in the specified circumstances, be suggested to the minds of the jury by means of any questions put to the prisoner that he has committed another offence. Any question or series of questions which would reasonably lead a jury to believe that he had committed another offence would tend to shew that the prisoner had committed that other offence. If a question does so tend, it is quite immaterial whether it would be admissible on other grounds. It is the duty of the judge not to wait for any objection to the question from the prisoner's counsel, but to stop the question himself, and to direct the jury to disregard it and not allow it to influence their minds.

A general examination on behalf of a prisoner as to the surrounding circumstances is not evidence of good character so as to entitle the prosecution to prove or to cross-examine as to other offences or convictions. Sub-clause (ii.) of clause (f), s. 1, of the Criminal Evidence Act, 1898, is intended to apply to cases where witnesses to character are called, or where evidence of the good character of the prisoner is sought to be elicited from the witnesses for the prosecution. It is to

this class of evidence that the statute refers, not to mere assertions of innocence or repudiation of guilt on the part of the prisoner, nor to reasons given by him for such assertion or repudiation.

The appellant was convicted upon an indictment for obtaining from D. cheques by false pretences. The indictment alleged that he sold various articles of virtù to D. under an agreement that he was to charge D. the cost price plus 10 per cent. profit; that the appellant represented to D. that the cost was much in excess of the real cost; and that by this means he had obtained from D. much larger sums than he was entitled to. The appellant gave evidence on his own behalf, and in cross-examination questions were put to him suggesting that in other transactions he had obtained money from D. by alleging that certain china figures were genuine pieces of old Dresden china, whereas he knew that they were not:—

*Held*, that the alleged false pretences in representing the articles to be genuine old Dresden china when they were not so were entirely distinct from those with which the prisoner was charged, and that, as upon that ground evidence of the false representations with regard to the articles being genuine old Dresden china was not admissible to shew that he was guilty of the false pretences with which he was charged, the questions put in cross-examination were improperly allowed, inasmuch as they tended to shew that the appellant had committed an offence other than that with which he was charged, and that the conviction must be quashed, as the jury must have been influenced by the questions and answers.

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APPEAL by Arthur Thomas Ellis against his conviction.

The appellant was indicted at the Central Criminal Court for obtaining certain valuable securities, namely, cheques, from one Charles John Dickins by false pretences. Mr. Dickins died before the trial, which took place before the Recorder on March 11, 12, 14, 16, and 17, 1910. The false pretences alleged in the indictment related to certain articles of virtù which the appellant had sold to Mr. Dickins under an agreement by which the appellant was to charge Mr. Dickins the cost price to the appellant of the articles plus 10 per cent. profit. The indictment contained six counts. It was alleged in each count that certain articles of virtù therein mentioned had been sold by the appellant to Mr. Dickins under an agreement by which he was to charge Mr. Dickins the cost price plus 10 per cent. profit. The false pretences alleged were that he had represented to Mr. Dickins that the cost was much in excess of the real cost of the articles respectively, and that by this means he had obtained from Mr. Dickins the cheques with intent to defraud.

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There was a second indictment against the appellant, which was not tried and which was not before the Recorder, except indirectly as hereinafter stated, under which the appellant was charged with further false pretences, which included the following :—(a) That he had obtained money from Mr. Dickins by falsely pretending that a certain china figure, described in an invoice sent to Mr. Dickins on July 17, 1900, as a figure of Countess Cozier, was a genuine piece of fine old Dresden china and that he had acquired it on July 16, 1898, as a genuine piece of fine old Dresden china. (b) That he had committed a similar fraud in falsely representing that a certain china group, described in an invoice dated December 30, 1902, as a fine old Dresden group of two noblemen in masonic costume dividing the globe, was a piece of genuine fine old Dresden china.

In all the six cases the subject of the indictment which was tried entries had been made in the appellant's books which apparently shewed the cost to him of the articles as well as the prices he charged Mr. Dickins. These entries were the evidence on which the prosecution relied as shewing the real cost, and if they in fact shewed the real cost, it was clear that the appellant had obtained more from Mr. Dickins than he was entitled to. The appellant's case was that they shewed only part of the cost, and that he had paid more for the articles than the figures shewn in the books, and that he had only charged Mr. Dickins the actual sums he had paid plus 10 per cent.

Before any criminal proceedings were commenced the executors of Mr. Dickins had brought an action against the appellant for damages for fraud. The original statement of claim in that action alleged fraud in the sale of a considerable number of articles not including any of those mentioned in the six counts, but this statement of claim was afterwards amended by including all the articles in the six counts. At the trial before the Recorder evidence was given on the part of the prosecution that the action mentioned above came on for trial; that the then defendant (the present appellant) attended the trial on the first day, but not subsequently; that he was not called as a witness to deny the fraud, nor were any witnesses called on his behalf; and that the verdict passed for the plaintiffs with large damages. It

was further shewn that after the first day of the trial of the action the appellant had gone abroad and had remained there till after the criminal proceedings were commenced.

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Upon the argument of the present appeal it did not clearly appear whether at the trial before the Recorder the prosecution put in all the proceedings in the action, but it was clear that the result of the action transpired at the trial before the Recorder, and no objection was then made on behalf of the appellant. It was also given in evidence at the trial before the Recorder that Grantham J., who tried the action, had ordered the documents to be impounded, and no objection was taken with regard to this evidence.

At the trial before the Recorder, counsel on behalf of the appellant made certain observations in his opening speech for the defence which it was contended in the Court of Criminal Appeal by the prosecution tended to establish the appellant's good character, but the Court of Criminal Appeal held that the observations were not of that nature. In the examination-in-chief of the appellant at the trial before the Recorder his counsel asked questions relating to his purchase of the business, to his general relations with Mr. Dickins, and to other transactions under the cost price plus 10 per cent. agreement. Counsel on behalf of the prosecution objected, and the appellant's counsel did not further pursue that line of examination. At the trial before the Recorder the appellant gave evidence on his own behalf, and in cross-examination the following questions were put to him by counsel for the prosecution. Questions numbered 2056 to 2074 (in the transcript of the shorthand note of the evidence) were directed to proving by means of entries in the appellant's books that he bought a figure of Countess Cozier from one Hoffman on July 16, 1898, under the description "Figure of a Lady in crinoline and green cloak" for 30*l.* and sold it the same day to Mr. Dickins for 430*l.* under a much more elaborate description. Question 2076.—"In your day-book is this what the lady in crinoline has developed into: 'A figure of Countess Cozier of fine old Dresden porcelain of exceptional quality, in large crinoline, beautifully painted with detached bunch of flowers in gold trellis medallion, with long flowing train of green colour on Louis XV.

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plain ormolu mount,' 430*l.* ? ” Question 2077.—“ The figure of Countess Cozier is well known in Dresden china circles, is it not ? ” The answer of the appellant to the question was that it was a well-known and valuable piece. Question 2081.—“ Do you suggest that by that day-book entry, and the invoice which tallies exactly with it, you were not representing to Mr. Dickens that that was the Countess Cozier, the well-known Dresden china piece ? ” This line of cross-examination was followed up: Question 2088.—“ Do you tell the jury that you before that date, July, 1900, did not know of the Countess Cozier as a very important piece of Dresden china ? ” The appellant replied in the negative to this question. A number of questions (2089 to 2097) were then asked the appellant which were directed to shew that he was an expert and must therefore have known of the existence of that well-known valuable piece of china, and that the article he sold was not that piece. Questions 2103 to 2113 were directed to shew that Hoffman, from whom he bought that piece, was also an expert and would never have sold such a valuable piece of china if it were genuine for 30*l.* Question 2170.—“ This is a photograph, is it not, of the piece that you sold for 430*l.* ? ” At this point of the cross-examination counsel for the appellant interposed with an objection that the cross-examination was irrelevant and that it related to a fraud not in the indictment which was being tried. The Recorder, however, overruled the objection upon the ground that the cross-examination was taking place for the purpose of suggesting to the jury that there had been fraud in cases other than those set out in the indictment which was being tried. Accordingly the cross-examination was allowed to proceed, and the appellant was asked to admit statements which had been made by Mr. Alfred Dickens, a witness, at Bow Street when he was giving evidence in support of the charge in the second indictment, and a photograph and a pencil sketch, both of which had been put in evidence at Bow Street, were handed to the jury to shew that the appellant's explanation must be untrue. Questions 2208 to 2255 related to what was called at the trial before the Recorder the Peter the Great and Augustus the Strong piece of china, i.e., the china group mentioned in the invoice of December 30, 1902, and which

was the subject of the second indictment. The questions were directed to shew by means of entries in the appellant's books that he had bought the article for 30*l.* or perhaps 60*l.* from one Woolman and had resold it to Mr. Dickins for 440*l.*

At the end of the evidence the Recorder refused to allow evidence to be given by the prosecution in reply as to the Cozier case.

The jury acquitted the appellant on counts 2 and 3, but convicted him on counts 1, 4, 5, and 6.

The grounds of the appeal were (*inter alia*), first, that as the jury returned a verdict of not guilty on counts 2 and 3, there was no evidence on which they could properly return a verdict of guilty on any of the remaining counts. Secondly, that the Recorder was wrong in law in admitting evidence of the proceedings in and of the result of the civil action and in calling upon the appellant to explain why he did not give or call evidence at the trial of that action. Thirdly, that the Recorder was wrong in law in permitting questions and documents to be put to the appellant in cross-examination for the purpose of shewing that he was guilty of frauds of a different nature to that alleged in the indictment which was being tried and which formed the subject-matter of an indictment on which the appellant was not being tried.

The appeal was first argued on April 21 and 22 before Lord Alverstone C.J., Bray J., and Pickford J., but the Court considered head 3 of the grounds of appeal mentioned above a point of so much importance and difficulty that it was advisable to have it argued before a Court of five judges, and accordingly the appeal came on for hearing on May 2 before a Court consisting of Lord Alverstone C.J., Jelf J., Bray J., A. T. Lawrence J., and Lord Coleridge J.

*Reginald J. White*, for the appellant. The fact that the jury returned a verdict of not guilty on two counts shews that there was no evidence on which they could convict the appellant on the four other counts. The Recorder wrongly admitted in evidence the result of the civil action against the appellant. The evidence

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that the defendant did not give evidence at the civil trial was also inadmissible. The questions put to the appellant in cross-examination as to the Countess Cozier and the Peter the Great and Augustus the Strong pieces of china were inadmissible as being contrary to the provisions contained in s. 1, clause (f), of the Criminal Evidence Act, 1898. (1) The offence with which the appellant was charged in the indictment which was being tried was that of obtaining cheques from Mr. Dickins by means of false representations as to the cost price of the articles. The questions put in cross-examination tended to shew that the appellant had committed offences of a totally different character, namely, obtaining cheques from Mr. Dickins by false representations that articles were genuine old Dresden china when they were not so, and the proof of these frauds was not admissible evidence to shew that he was guilty of the offences charged in the indictment before the Court. The questions were therefore in direct contravention of clause (f) of s. 1 of the Act of 1898 as being questions "tending to show that" the appellant had committed offences other than those wherewith he was then charged: *Reg. v. McDonnell*. (2) The questions related to charges contained in another indictment which was not then before the Court. Even if the questions tended to shew system on the part of the appellant they were not admissible, as no question of system was before the jury. The only question was whether the statements to which the indictment before the Court referred were true or false. The questions tended to shew that the general character of the appellant was bad and that he was a fraudulent person:

(1) Criminal Evidence Act, 1898, s. 1, clause (f): "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

"(i.) the proof that he has committed or been convicted of

such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

"(ii.) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character . . . ."

(2) (1850) 5 Cox, 153.

*Rex v. Bond.* (1) Even if the questions were admissible, as the facts suggested by them were never proved, the Recorder ought to have directed the jury that they must disregard them.

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*Bodkin* and *Leycester*, for the prosecution. [They were requested by the Court to confine their argument to the point raised by the third ground of appeal, namely, whether the questions put to the appellant in cross-examination were admissible.] The appellant's evidence was in conflict with the entries in his books, and the questions were put in order to test, with regard to other entries, whether other transactions had been carried out with Mr. Dickins in the same way. Cross-examination as to the truth or falsity of an explanation is not contrary to the provisions of the Criminal Evidence Act, 1898. The questions were put with a view to testing the credibility of the appellant. *Chitson's Case* (2) shews that credibility is not the same thing as credit, i.e., character. If the questions tended to shew a system of fraud they were admissible: *Rex v. Bond.* (1) Counsel for the appellant in his opening speech raised the question of the prisoner's good character. Where there is a plan to defraud a person, evidence that the plan was carried out by defrauding that person in various ways may be given. The questions tended to shew the various phases of the plan and thus to prove its existence. All the cases with regard to which the questions were put could have been included in one indictment. The decision in *Blake v. Albion Life Assurance Society* (3) shews that, in order to prove that a particular person was the victim of a fraud, evidence of similar frauds committed against other persons may be given. Much more, therefore, may evidence be given of other similar frauds committed against the same person. Even if the questions were not strictly admissible, no substantial miscarriage of justice has occurred, and the Court can therefore dismiss the appeal under s. 4, sub-s. 1, of the Criminal Appeal Act, 1907. No objection was taken until question 2170, about the photograph, was asked. [*Rex v. Fisher* (4) was also referred to.]

*Reginald J. White* in reply. The questions were inadmissible as they related to frauds of an entirely different nature to that

(1) [1906] 2 K. B. 389.

(3) (1878) 4 C. P. D. 94.

(2) (1909) 2 Cr. App. R. 325.

(4) [1910] 1 K. B. 149.



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*Cur. adv. vult.*

June 13. The judgment of the COURT (Lord Alverstone C.J., Jelf, Bray, A. T. Lawrence, and Lord Coleridge JJ.) was read by

BRAY J. In this case the appellant was indicted under six counts for obtaining moneys by false pretences from the late Mr. C. T. Dickins in respect of articles of virtù sold by him to Mr. Dickins. It was alleged that the articles had been sold by him to Mr. Dickins under an agreement that he was to charge Mr. Dickins the cost price plus 10 per cent. profit. The false pretences alleged were that he had represented to Mr. Dickins that the cost was much in excess of the real cost of the articles respectively, and that by this means he had obtained from Mr. Dickins much larger sums than he was entitled to. The jury acquitted him on counts 2 and 3, but convicted him on counts 1, 4, 5, and 6. We have now to give our reasons for our decision on all the points argued. We will deal first with those that we did not think it necessary to have argued before the larger Court. The first point raised by Mr. White, who appeared for the appellant and put his points most clearly and ably before us, related to the entries in the appellant's books. In all the six cases entries had been made in the books which apparently shewed the cost to him of the articles as well as the prices he charged Mr. Dickins. These entries were the evidence on which the prosecution relied as shewing the real cost, and if they in fact shewed the real cost it was clear that the appellant had obtained more from Mr. Dickins than he was entitled to. His case was that they shewed only part of the cost, and that he had paid more for the articles than the figures shewn in the books, and that he had only charged Mr. Dickins the actual sums he had paid plus 10 per cent. Mr. White urged that by their finding on counts 2 and 3 the jury had destroyed the presumption on which the prosecution had rested their case, that they had found in those

(1) (1830) 4 C. &amp; P. 386.

(2) (1906) 22 Times L. R. 720.

(3) [1910] 1 K. B. 149.

two cases that the entries in the books did not shew the whole cost, and that, if they did not shew the whole cost with regard to the articles mentioned in counts 2 and 3, there was no presumption that they shewed the whole cost of the articles mentioned in the remaining counts. We are of opinion that this argument is not sound. When the evidence is looked at it appears that there were good reasons why the jury should have accepted the appellant's explanation in the two cases and have rejected it in the others. The fact that there was a good explanation in the two cases would, no doubt, tend to weaken the presumption in the others, but would not destroy it. It was for the jury to decide the strength of the presumption.

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The next point was that evidence as to certain civil proceedings which had been taken by the executors of the late Mr. Dickins against the appellant was wrongly admitted. It appeared that before any criminal proceedings had been taken the executors of Mr. Dickins had brought an action against the appellant for damages for fraud. The original statement of claim alleged fraud in the sale of a considerable number of articles not including any of those mentioned in the six counts, but this statement of claim was afterwards amended by including all the articles in the six counts. Evidence was given on the part of the prosecution that the case came on for trial; that the appellant was present on the first day, but not subsequently; that he was not called as a witness to deny the fraud, nor were any witnesses called on his behalf, and the verdict passed for the plaintiffs with large damages. It was further shewn that after the first day the appellant had gone abroad and had remained there till after the criminal proceedings were started. It appears to us that this evidence was admissible as shewing the conduct of the appellant when the charges were made against him. It is, as a rule, admissible to shew what is the conduct of a prisoner when he is charged with the offence alleged in the indictment. If he denies the charge, it is evidence in his favour; if he is silent, it may be evidence against him; if he admits it, it will be strong evidence against him. In this case it was suggested by the prosecution that his conduct in leaving the country instead of going into the witness-box to deny the charges was strong evidence against him. We are clearly of

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opinion that this conduct of his was evidence against him and properly admissible. It was none the less admissible because the charges of fraud were first made in civil proceedings. The value of this evidence was, of course, for the jury. It does not clearly appear that the prosecution put in all the proceedings. They would not, in our opinion, be entitled to have the part of the statement of claim which contained the other charges read to the jury, but that part was not read. It did appear what the verdict of the jury was, but that was sure to come out, and no objection was made. It did also appear that Grantham J., who tried the action, had ordered the documents to be impounded. This, no doubt, should not have been stated, but no objection was taken, and the matter is not one of sufficient importance in our opinion to justify an appeal. The real importance of the evidence given was the conduct of the appellant, and that we hold to have been clearly admissible.

We now come to the points argued before the larger Court. It was contended on the part of the appellant that questions had been put to him in cross-examination tending to shew that he had committed an offence other than that wherewith he was then charged in violation of the provision in s. 1, clause (f), of the Criminal Evidence Act, 1898, and that the appellant had been wrongly required to answer such questions, and, further, that the Recorder had wrongly directed the jury in his summing up that the evidence so given was relevant evidence which should be considered by them in forming their opinion as to whether the appellant was guilty of the offences charged. It appears that there was a second indictment, under which the appellant was charged with further frauds, which included the following:—  
(a) That he had obtained money from Mr. Dickins by falsely pretending that a certain china figure, described in an invoice sent to Mr. Dickins on July 17, 1900, as a figure of Countess Cozier, was a genuine piece of fine old Dresden china, and that he had acquired it on July 16, 1898, as a genuine piece of fine old Dresden china. (b) That he had committed a similar fraud in falsely representing that a certain china group, described in an invoice dated December 30, 1902, as a fine old Dresden group of two noblemen in masonic

costume dividing the globe, was a piece of genuine fine old Dresden china. This piece of china was referred to at the trial as a group of Peter the Great and Augustus the Strong pushing the world. The indictment was not, of course, before the jury, except indirectly, in the argument as hereinafter\* stated, and it is only now referred to as explaining the cross-examination. For the purpose of our judgment it is quite immaterial whether these frauds had been made the subject of another indictment or not. It was argued by Mr. White, the appellant's counsel, that questions were put to the defendant in cross-examination tending to shew that the defendant had committed these two frauds. It will be convenient to consider, first, what is the meaning of the words of the statute—"Any question tending to show that he has committed . . . any offence," &c. It is plain that it must include many more questions than the simple question whether the prisoner has committed a particular offence. It is also plain that whether the question "tends to show" cannot be decided by looking merely at a single question. Each question must be judged by the light of others asked before and after. The object of the enactment is that it should not be suggested to the minds of the jury by means of any questions put to the prisoner that he has committed another offence. Any question or series of questions which would reasonably lead a jury to believe that it was being imputed to the prisoner that he had committed another offence would, in our opinion, tend to shew that the prisoner had committed that other offence. It does not in the least depend on the object of the counsel putting the question. The words of the Act are not "with a view to show," they are "tending to show." Moreover, if they do so tend, it is quite immaterial whether the evidence would be admissible or the question admissible on other grounds. As we read the statute, when a prisoner is charged with offence A, questions tending to prove offence B are not to be asked unless the proof of offence B is evidence of offence A. If it were otherwise the protection of the prisoner would be liable to be destroyed by a side wind. This disposes also of the proposition that the questions were admissible as going to the general credit of the witness. Nothing goes more to the general credit of a witness than a

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previous conviction; but no question tending to shew this is to be asked.

We will now refer to the questions that were put in the Countess Cozier case in order to see whether they come within our definition of the words "tending to show." They are questions 2056 to 2207. On examination of these questions it will be found that they are directed to prove the allegations necessary to shew that the appellant had committed this fraud. Questions 2056 to 2074 are directed to proving by means of entries in his own books that he bought this Countess Cozier from Hoffman on July 16, 1898, under the description "Figure of a Lady in crinoline and green cloak" for 30*l.* and sold it the same day to Mr. Dickins for 430*l.* under a much more elaborate description. This suggested a fraud. Then come questions 2076, 2077, and 2081. Now what is the meaning of these questions? What would they convey to a jury? Surely that he had bought a piece of china of little value from Hoffman for 30*l.* and had sold it to Mr. Dickins on a representation that it was the well-known Dresden china figure of Countess Cozier, the very false pretence charged in the second indictment. This line of cross-examination is followed up: "Q. 2088.—Do you tell the jury that you before that date, July, 1900, did not know of the Countess Cozier as a very important piece of Dresden china?" And when the appellant denied this, there come a number of questions, 2089 to 2097, directed to shew that the appellant was an expert, and must therefore have known of the existence of this well-known valuable piece of china, and that the article he sold was not that piece. Questions 2103 to 2113 are directed to shew that Hoffman, from whom he bought this piece, was also an expert and would never have sold such a valuable piece of china if it were genuine for 30*l.* We come now to question 2170. "Q.—This is a photograph, is it not, of the piece that you sold for 430*l.*?" It was at this point that Mr. Elliott interposed with an objection that the cross-examination was irrelevant and that it related to a fraud not in the indictment. It is most important to observe the answer of the Recorder to this objection. "Mr. Elliott: What possible bearing it has on any of the transactions named in the indictment I do not know. The Recorder: It is cross-

examination for the purpose of suggesting to the jury that there had been fraud in cases other than those set out in the indictment." This seems to us to make it quite clear how those questions were interpreted at the time, namely, as tending to shew that the appellant had committed another fraud in the sale of this Countess Cozier to Mr. Dickins for 430*l*. Applying the test we have indicated—namely, would these questions reasonably lead a jury to believe that it was being imputed to the appellant that he had committed this other fraud?—our answer must be that a jury would quite reasonably and properly take this same view. The objection was overruled by the Recorder and the cross-examination was allowed to proceed, and the appellant was asked to admit statements which Mr. Alfred Dickins had made in the witness-box at Bow Street when he was giving evidence in support of the charge in the second indictment, and the photograph and a pencil sketch, both of which had been put in evidence at Bow Street, were handed to the jury to shew that the appellant's explanation must be untrue. So much for the Countess Cozier fraud. Questions 2208 to 2255 relate to the Peter the Great and Augustus the Strong piece of china. It is unnecessary to go through these questions in detail. They are directed to shew by means of entries in his books that the appellant had bought the article for 30*l*. or perhaps 60*l*. from Woolman and had resold it to Mr. Dickins for 440*l*. Reading these questions and bearing in mind the questions put with reference to the Countess Cozier fraud, we come to the conclusion that these also "tended to show" that the appellant had committed another offence.

Now, if it be established, as we think it has been, that these questions, or some of them, tended to shew that the appellant had committed another offence, the statute provides that they shall not be asked or answered unless (1.) the proof that he has committed such other offence is admissible evidence to shew that he is guilty of the offence wherewith he is then charged, or (2.) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character or has given evidence of his own good character. We need not refer to the other cases in which the statute

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provides that such questions may be asked, as it was not suggested they were applicable here. Dealing first with (1.), was the proof that he had committed the Countess Cozier or Peter the Great frauds admissible evidence to prove the frauds with which he was then charged? In other words, could evidence of those frauds have been given by the prosecution? It was argued by Mr. Bodkin that the judgments in *Rex v. Bond* (1) supported his proposition. We think they shew the contrary. In his judgment Lord Alverstone C.J. said: "The general rule of law applicable in such cases can be clearly stated. It is that, apart from express statutory enactments, evidence tending to shew that the accused had been guilty of criminal acts other than those covered by the indictment cannot be given unless the acts sought to be proved are so connected with the offence charged as to form part of the evidence on which it is proved." Ridley J. agreed with this judgment, and Kennedy J. and Bray J. agreed with the principle so enunciated by Lord Alverstone C.J., so that four of the seven judges (a majority) laid down this principle; but when the other judgments are referred to, it will be seen that they differ not so much as to the principle, but as to the application of the principle to the facts of that case. In our opinion the law on this subject is laid down with perfect accuracy by Channell J. in *Rex v. Fisher*. (2) He said, in delivering the judgment of the Court of Criminal Appeal (Lord Alverstone C.J., Channell and Lord Coleridge JJ.), "In other words, whenever it can be shewn that the case involves a question as to there having been some mistake or as to the existence of a system of fraud, it is open to the prosecution to give evidence of other instances of the same kind of transaction, notwithstanding that the evidence goes to prove the commission of other offences, in order to negative the suggestion of mistake or in order to shew the existence of a systematic course of fraud." Then, applying those principles to the case he was dealing with, where the prisoner was charged with obtaining a pony and cart by making certain statements, he proceeded: "The falsity of these statements is not proved by giving evidence that in other cases the prisoner made other false

(1) [1906] 2 K. B. 389.

(2) [1910] 1 K. B. 149.

statements, though it does tend to shew that the prisoner was a swindler. But there is no rule of law that swindling is, as regards proof, different from any other offence, and if a man is charged with swindling in a particular manner, his guilt cannot be proved by shewing that he has also swindled in some other manner. We are of opinion that the evidence as to the other cases was inadmissible in this case, because it was not relevant to prove that he had committed the particular fraud for which he was being charged, in that it only amounted to a suggestion that he was of a generally fraudulent disposition. On the other hand, if all the cases had been frauds of a similar character, shewing a systematic course of swindling by the same method, then the evidence would have been admissible."

Applying these principles to the present case, we are of opinion that proof that the defendant had committed the Countess Cozier or the Peter the Great frauds is not admissible evidence that he was guilty of the frauds with which he was charged. As we have already pointed out, the frauds with which the defendant was charged were making false representations as to the cost price of the article and so obtaining from Mr. Dickins more than the cost plus 10 per cent. In the Countess Cozier and Peter the Great cases there had been no agreement by the defendant to charge only cost plus 10 per cent. The frauds were in representing the articles to be genuine old Dresden china when they were not so. The transactions were entirely distinct. The frauds were not of a similar character. There was no systematic course of swindling by the same methods. It was argued by Mr. Bodkin that there was some connection between one of the six cases in the indictment which was tried, namely, the Worcester cups case mentioned in count 4, and the Countess Cozier frauds, because in each case the article had been originally bought from Hoffman, and because in each case the entries in the books shewed payments to Hoffman. When the evidence is carefully looked at it will be seen that it is a fallacy to say that there was any connection between the two transactions. The prosecution were affirming, not denying, the entries in the books of payment to Hoffman, and the defendant was not suggesting any further payments to Hoffman, but to a different person altogether named

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Dopson. But, however that may be, the statute says that the test is to be whether the proof that he has committed such other offence is admissible evidence to shew that he is guilty of the offence charged. It is to be observed that at the end of the evidence the Recorder refused to allow evidence of the prosecution in reply as to the Cozier case, and so he shrank from saying that the evidence was proof of the charge in the indictment, which was the logical corollary of his admission of the cross-examination.

We come now to the second ground on which these questions might be properly put. Mr. Bodkin suggested that Mr. Elliott had in his opening speech to the jury endeavoured to establish the appellant's general good character. We do not think that this was so, but if it were so, that is not within the statute; he must have asked questions of the witnesses for the prosecution, or he must have given evidence with a view to establish the appellant's good character. It was said that in the examination-in-chief of the appellant Mr. Elliott had asked questions relating to his purchase of this business, to his general relations with Mr. Dickins, and to other transactions under the cost plus 10 per cent. agreement. In our opinion it would not be correct to say that the appellant had given evidence of his own good character. It may or may not have been relevant to go into other sales on the cost price plus 10 per cent. basis. Mr. Bodkin thought it was not and objected, and Mr. Elliott did not further pursue that line of examination, but its object was not to set up the appellant's good character, it was to negative fraud. In our opinion, if we were to give the slightest colour to the idea that a general examination as to the surrounding circumstances was such evidence of good character as to entitle the prosecution to prove or to cross-examine as to other offences or convictions, we should deprive the prisoner of the protection which the statute has given him. Sub-clause (ii.) of s. 1, clause (f), of the Criminal Evidence Act, 1898, was not intended to apply to a case like this. It was intended to apply to cases where witnesses to character were called, or where evidence of the good character of the prisoner was sought to be elicited from the witnesses for the prosecution. In civil actions evidence of good character is not, as a rule, admissible. It is admissible in criminal cases, and it is to this class of evidence

that the statute refers, not to mere assertions of innocence or repudiation of guilt on the part of the prisoner, nor to reasons given by him for such assertion or repudiation. The evidence given by the appellant here in examination-in-chief could not possibly have been objected to in a civil action as being "evidence of good character." It is to be observed that it never was suggested for a moment at the trial that the appellant had given evidence of good character, nor was it suggested by Mr. Bodkin on the first argument of this case. He said the point had occurred to him from reading Mr. Elliott's opening, but this, as we have pointed out, is not within the sub-section. Now these are the only two grounds on which the statute, so far as it is applicable to the cases now under consideration, permits cross-examination of the prisoner as to the commission of other offences. They both fail, in our opinion, and it follows that the questions put in cross-examination were not admissible.

But it was said that Mr. Elliott's objection came too late. Now it is true that he might have objected earlier, and no doubt this Court must be careful in allowing appeals on the ground of the reception of evidence that ought not to have been admitted when no objection has been made at the trial by the prisoner's counsel. Here, however, the objection was taken, though not at the earliest opportunity. It was argued on its merits and overruled, and the jury were informed not only when the objection was overruled, but afterwards in the summing up, that this evidence was relevant. No one was misled in the slightest degree by any delay in making the objection, and it would work a grave injustice if we were to refuse to allow the appeal here on the ground of some possible mistake on the part of the appellant's counsel. But there is another reason. The statute provides that the prisoner shall not be asked, and if asked shall not be required to answer, these questions. In our opinion these words were intended to afford a double protection to the prisoner. The statute provides that the question shall not be asked. The reason of this is plain, because in most cases the mischief is done by the asking of the question. The jury naturally assume that no such question would be put unless there was foundation for it, and the more

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objection is made to it by the prisoner's counsel, the stronger to their minds becomes that assumption. It is most damaging to the prisoner's case for his counsel to get up and argue that a question is inadmissible because it tends to shew that the prisoner has committed another crime. In this case, in order to make his objection clear, Mr. Elliott was obliged to tell the Recorder in the hearing of the jury that there was another charge pending against the appellant which was contained in another indictment. This of itself, unless removed by some clear statement from the Recorder that they must dismiss the question from their minds, must prejudice the jury. That is the reason, in our opinion, why the statute forbade the question even being asked. In our opinion it is the duty of the judge not to wait for any objection from the prisoner's counsel, but to stop such questions himself, and if by mischance the question be put, it is equally the clear duty of the judge to direct the jury to disregard it and not let it influence their minds.

There being, therefore, in our opinion, a clear misreception of evidence, it would have been unnecessary to consider whether there was also a misdirection in the summing up but for the fact that it was argued lastly that there had been no miscarriage of justice. This Court has laid down quite clearly the rule to be applied in cases of misreception of evidence or misdirection in law. It is stated by Channell J. in *Rex v. Fisher* (1) in these words : " In the circumstances of this case, we cannot come to any other conclusion but that the jury may have been influenced by the evidence of the other cases, and, therefore, although there was sufficient evidence to convict the prisoner without the evidence as to the other cases, in accordance with the rule laid down in this Court, the conviction cannot stand." Ought we to say here that the jury may have been influenced by these questions and answers ? A large part of the summing up was devoted to the stories of the Countess Cozier and Peter the Great fraud, whereas according to our view of the law the jury should have been told to dismiss these two matters from their consideration. The issue with regard to the charges in the indictment was a perfectly clear one. It was this : Were the

(1) [1910] 1 K. B. 149.

entries in the defendant's books to be taken to shew the whole cost, or did the defendant pay other sums? In other words, what credit was to be given to the defendant's evidence? Now the evidence as to these two other frauds was put before the jury as matter which they ought to take into consideration when they were deciding as to what credit should be given to the defendant's evidence. It is quite clear from the summing up that the jury were invited to consider whether these two cases were not very damaging to the defendant's credit, and that the jury could hardly have failed to draw an inference hostile to the defendant on the point. We feel bound, therefore, to say not only that the jury may have been influenced, but that they must have been influenced. On these grounds the Court is of opinion that the appeal must be allowed and the conviction quashed.

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*Conviction quashed.*

Solicitor for appellant : *Julius A. White.*

Solicitor for prosecution : *Director of Public Prosecutions.*

J. E. A.