The rule should be even more strict in criminal cases. (2) It was incompetent for the jury to look at a drawing made by a witness unless it was made a production. This was analogous to the case where a witness, not on the prosecutor's list was examined, which was held to be a ground of suspension—*Wynn* v. *Lindsay*, Nov. 12, 1883, 5 Coup. 370, 11 R. (J.C.) 18.

Counsel for the respondent were not called upon.

LORD JUSTICE-CLERK—The first question here is, whether it is an illegal thing in a criminal trial that the jury should see documents produced at the trial in the jury room. There is no question raised as to their seeing them in the jury box, and I cannot see the distinction in this particular between the jury box and the jury room. The cases quoted indicate that in certain particular cases it has been held that it was not wise that the jury should see the productions in their room, but I do not find in them any indication of any incompetency or illegality in the matter. On the contrary, its competency seems to be recognised. In the case of *Robertson* (Feb. 19, 1849, John Shaw, 186) the prosecutor desired that the jury should have the documents produced with them in the room, plainly indicating that the object was to secure a conviction, and the Lord Justice-Clerk, while he did not think it right in these circumstances for the jury to have them, expressed no opinion that it was incompetent. In the other case of *M'Gall* (March 13, 1849, John Shaw 194), which occurred shortly afterwards, the Lord Justice-Clerk, when it was proposed that the jury should have the documents in their room, said—"Gentlemen, you had better not have them." With these expressions as to the advisability, in particular cases, of not allowing the jury to have the documents I may express my entire concurrence. In many cases such a course might be very undesirable. But advisability is quite a different thing from competency or legality, and I can see no incompetency or illegality in the jury having the documents if the judge, in the exercise of his discretion, thinks it right that they should. In a case tried before me some time ago, which did not turn upon a question of handwriting, but on a question of making up modern documents to resemble documents of antiquarian interest, I see that I said that the jury might take the documents with them when they retired. In that case I think it would have been quite right. I entirely concur in the opinion that in many cases it may be right for the judge, in the exercise of his discretion, to advise the jury not to take the documents. As to the question what would happen if the jury refused to take that advice, and insisted on having the documents, I say nothing. In ninety-nine cases out of a hundred they would accept the judge's advice; when they do not, it will have to be decided whether they they have a right to insist on having the documents. Meanwhile I have no doubt that it is competent for them to have them if the judge so directs.

The only other point in the case is, whether a tracing having been made by a witness while in the box, and handed to the jury, any illegality was thereby committed. I think there is nothing before us to indicate any illegality. Many things spoken to by a witness may require illustration, and the witness may illustrate them on the spot. That is for the convenience of everybody, and it would be a great pity if there were any restriction on such a convenient use of illustration. I always quite understood that when a witness produces anything in the box for the sake of illustration, that does not make a production in the case. On the contrary, any article thus used ought in the ordinary case to be taken away by the witness. Here it was left, but I am not able to say that there was anything illegal in the proceedings. All such matters are very much in the discretion of the presiding judge, and where there is no absolute illegality committed we ought not to interfere. I therefore think the suspension should be refused.

LORD STORMONTH DARLING and LORD PEARSON concurred.

The Court refused the suspension.

Counsel for the Complainer — Laing. Agents—Philip, Laing, & Harley, W.S.

Counsel for the Respondent—Sol.-Gen. Dickson, Q.C.—Mackenzie, A.-D. Agent—W. J. Dundas, C.S., Crown Agent.

Monday, October 23.

(Before the Lord Justice-Clerk, Lord Stormonth Darling, and Lord Pearson.)

WOOD AND WIGHT *v.* LORD ADVOCATE.

Justiciary Cases — Fraud — Relevancy — Sending Fraudulent Telegrams.

An indictment set forth that A and B, "having devised a fraudulent scheme to fabricate telegrams pretending to make *bona fide* bets on horse races, and to send such telegrams after the races to which they referred had actually been run, in pursuance of said scheme" did send certain telegrams to C bearing the post-office code letters C L, pretending that the said telegrams were handed in at 3·35 p.m., at an hour before a certain race was run, said telegrams having been in fact handed in at an hour later than 4·25 p.m., after the hour at which the said race was run, and after the accused had received information of the result of the said race, and did thus induce C to pay the sum of £150 to D, with whom they had an arrangement to share the profits of bets. *Held* that this was a relevant charge of fraud at common law.

Justiciary Cases — Indictment — Cumulative Charge.

It is competent to libel, on the same

facts, an offence at common law and a contravention of a statute.

Justiciary Cases—Jurisdiction—Sheriff—Post Office Act 1837 (7 *Will. IV. and* 1 *Vict. cap.* 36), *sec.* 37.

By section 37 of the Post Office Act 1837 it is provided, *inter alia*, that an offence under the Act, if committed in Scotland, may be tried "either in the High Court of Justiciary at Edinburgh, or in the Circuit Court of Justiciary to be holden by the Lords Commissioners of Justiciary, within the district where such offence shall be committed, or within any county or place within which the offender shall be apprehended or be in custody, as if his offence had been actually committed there." *Held* that the provision did not take offences under the Act out of the jurisdiction of the Sheriff, and that a charge under it had been properly tried by a Sheriff and jury.

Per the Lord Justice-Clerk—"In all cases in which by statute the proper sentence is limited to two years, the Sheriff, sitting with a jury, has jurisdiction, unless excluded by special provision."

Justiciary Cases—Service of Indictment—Desertion of Diet—Criminal Procedure (Scotland) Act 1887 (50 *and* 51 *Vict. cap.* 35), *sec.* 42.

Section 42 of the Criminal Procedure Act 1887 provides—"When at the second diet the diet has been deserted *pro loco et tempore* . . . it shall be lawful after the date of such second diet to give notice to such accused person in the form of Schedule N to this Act annexed, or another copy of the indictment, to appear to answer such indictment at another diet. . . . Provided always that such notice shall be given for a diet to be held not sooner than nine clear days subsequent to such notice." *Held* that this section only applied to cases where the existing indictment was proceeded with, and that if a diet was deserted *pro loco et tempore* and a new indictment served, its provisions had no application.

John Wood, telegraph clerk, and Daniel Wight, innkeeper, both residing in Hawick, were indicted on a charge in the following terms—"That having devised a fraudulent scheme to fabricate telegrams pretending to make *bona fide* bets on horse races, and to send such telegrams after the races to which they referred had actually been run, in pursuance of said scheme (1) you did on 26th October 1898, in the Railway Telegraph Office, in the station of the North British Railway Company at Hawick, send, or cause to be sent, to James Hogg, farmer, Blackhouse, in the county of Berwick, the telegrams No. 1 and No. 3, set forth in the schedule hereto annexed, and to George William Smith, commission agent, 15A Bishopgate Street, Leeds, in the county of York, the telegram No. 4, set forth in said schedule, all bearing the Post-Office code letters C L, pretending that the said telegrams were handed in for transmission at the said telegraph office at 3·55 p.m. on said date, at an hour before the said New Nursery Plate Race was run on the said date at Newmarket, in the county of Cambridge, said telegram having been in fact handed in for transmission at the said telegraph office at an hour later than 4·25 p.m. on said date, and later than the hour at which said New Nursery Park Plate Race was run, and after you had received information purporting to convey to you the result of said race, and thus did induce the said James Hogg to pay the sum of £150 to William Cooper Cairns, draff and cumin contractor, 4 Polwarth Terrace, Edinburgh, with whom you share or have an arrangement to share the profits or losses of bets made by you under the name of 'Wheat,' and to pay the sum of £150 to William Pringle, commercial traveller, 79 Lothian Road, Edinburgh, with whom you share or have an arrangement to share the profits or losses of bets, made by you under the name of Pringle, and did also induce the said William George Smith to pay the sum of £30 to you the said Daniel Wight; and (2) you did on 14th October 1898, in said telegraph office, send or cause to be sent to Thomas Howie Lindsay, farmer, Nethermains, Chirnside, in the county of Berwick, an agent of the said James Hogg, the telegram No. 5, set forth in said schedule, bearing the Post-Office code letters B C W and B E respectively, pretending that the said telegrams had been handed in for transmission at said telegraph office at 2·18 p.m, and 2·25 p.m. respectively, on said last-mentioned date, at an hour before the Middle Park Plate Race was on said last-mentioned date at Newmarket aforesaid, said telegrams having been in fact handed in for transmission at said telegraph office at an hour later than 2·51 p.m. on said last-mentioned date, and later than the hour at which said Middle Park Plate Race was run, and after you had received information purporting to convey to you the result of said Middle Park Plate Race, and did thus induce the said James Hogg to pay the sum of £21, 17s. 6d. to the said William Cooper Cairns, and the sum of £21, 17s. 6d. to the said William Pringle; and (3) that you, the said John Wood, on the dates set forth in the second column of the foresaid schedule, in the said telegraph office, being then and there engaged in the work of the Post-Office, did forge the telegrams set forth in said schedule by writing the Post-Office code letters set forth in the third column of said schedule in line with said telegrams respectively, indicating that said telegrams had been handed in for transmission at said telegraph office at the hours set forth in the fifth column of said schedule in line with said telegrams respectively, said telegrams having been in fact handed in for transmission at said telegraph office at hours later than the hours set forth in the sixth column of said schedule in line with said telegrams respectively, and did utter the said telegrams as genuine by transmitting the same by telegraph at the place and on the dates respectively above set forth,

and did thus contravene sec. 11 of 47 and 48 Vict, cap. 76; and (4) that you, the said Daniel Wight, on the dates set forth in the said schedule, did in the said telegraph office solicit or endeavour to procure the said John Wood, he being then and there engaged in the work of the Post-Office, to commit a contravention of section 11 of 47 and 48 Vict. cap. 76, and did thus contravene section 36 of 7 Will. IV. and 1 Vict. cap. 36."

The telegram referred to as No. 1 of the schedule was in the following terms: "Hogg, Reston. Put me ten pounds each way. Gaiety, Wheat." The others were in similar terms, and the above indictment was served in place of a previous one, the diet on which had been deserted *pro loco et tempore*.

At the first diet the following objections were taken to the relevancy of the indictment—"That the facts stated in the indictment did not relevantly show a common law crime, and that it is defective in so far as it does not specify the mode by which the alleged fraudulent scheme to fabricate telegrams pretending to make *bona fide* bets was carried out, or that any bets were made at all, or any benefit received, nor is it alleged that the panels, or either of them, actually made bets: That the words on the eleventh line from the top of the first page, 'or cause to be sent,' should be deleted: That the word 'pretending,' on line seventeen of the first page, should be deleted, and the word 'indicating' substituted: That the words 'an hour before' on line nineteen, and 'an hour later' on line twenty-two are too vague: That the words 'and after you had received information purporting to convey to you' on lines twenty-four and twenty-five, the time of receiving information and the mode should be given: That it is incompetent on the same facts to libel a common law crime and a statutory offence: And that the court, consisting of the Sheriff and a jury, has no jurisdiction to try the panels for the alleged statutory contravention."

The Sheriff-Substitute (BAILLIE) repelled the objections.

The accused then pleaded not guilty.

The case was tried before the Sheriff of Roxburgh (VARY CAMPBELL) and a jury at Jedburgh, on August 14, 1899, when the accused were found guilty under charges 1 and 2, and charges 3 and 4 were found not proven. Wood was sentenced to six months' imprisonment, and Wright to nine months.

They brought a suspension, and pleaded, *inter alia*—"(4) No jurisdiction to the Sheriff sitting with a jury having been conferred by any statute, the objection to trying the statutory offences libelled on should have been sustained, but both the Sheriff and Sheriff-Substitute having repelled that objection, and the Sheriff having proceeded to try the complainers on the charges libelled, and they having been greatly injured and prejudiced thereby, suspension and liberation should be granted as craved."

Argued for the complainers—(1) There was no relevant charge of fraud at common law. It was not stated, except by reference to a schedule, that any bets had been made, and the charge really was no more than a statement that the accused sent certain telegrams wrongly dated, whereby A was induced to pay money to B. That was not a common law offence. (2) It was incompetent to make a cumulative charge on the same set of facts, *i.e.*, to charge both an offence at common law and under the statute—*Reid* v. *Gentles*, Sept. 24, 1857, 2 Irv. 704. (3) The Sheriff had no jurisdiction to try the statutory charge. Sec. 37 of the Post Office Act 1837 (quoted in rubric) defines the Court by which such offences should be tried, and impliedly, if not expressly, excludes the Sheriff. Where the Legislature establishes one jurisdiction all others are necessarily excluded. The accused were prejudiced by evidence on statutory charges being led, although no conviction was obtained under them. (4) The notice required by section 42 of the Criminal Procedure Act 1887 (quoted in rubric) had not been given.

Argued for the respondent—The charge was relevant, and the schedule referred to showed that a bet had been made. (2) It was perfectly competent to libel both a common law offence and a statutory charge, even if the facts were in all respects the same, which was not the case here. In *Reid* v. *Gentles*, *ut supra*, the objection was there were two common law charges of embezzlement of the same sum.

No argument was desired on the third and fourth points.

LORD JUSTICE-CLERK—It is quite proper that we should have had a full debate on some of the points raised in this case, but on consideration of these it does not appear to me that any ground has been stated on which we can interfere with the convictions complained of.

Objection is taken to the relevancy. The indictment sets forth that the prisoners entered into a false and fraudulent scheme to make money for themselves by sending telegrams pretending to make *bona fide* bets on horse-races, and which, if they had been handed in at the professed hour, would bear to be handed in before the particular race was run, and would be accepted by the person to whom they were addressed as a *bona fide* bet on that race; whereas the fact was that the telegram was handed in and sent off after the prisoners both knew that the race had taken place, and after the winner's name was known to them, and that the money made by the bets so made was to be divided between the parties. I am quite satisfied that that is a perfectly relevant charge, and the offence if proved was fraud.

The second point raised was whether, on the facts stated, it was competent not only to charge the accused with the common law crime of fraud, but also to charge cumulatively a statutory offence of forgery under the Post Office Statutes. In regard to that this general remark falls to be made. Where a statutory crime has in fact been

committed, it is not the view of the law that the offender should elude punishment for the offence merely because he is also guilty of a common law charge, and here arises the consideration of the distinction between the administration of justice under statute and at common law. In statutory offences the law prescribes an arbitrary punishment up to a certain fixed amount, and under the common law a punishment only limited by the powers given by the law to the particular tribunal trying the case. This being the law our practice is that where a statutory crime has been committed, as well as a common law crime, it is reasonable and proper that the judge trying the offender should have both these offences brought under his notice in passing sentence.

As to the jurisdiction of the Sheriff to try the offences set forth in the third and fourth charges I entertain no doubt. These charges set forth that the one prisoner solicited or indnced the other—a person engaged in the Post Office—to forge certain telegrams, that being a statutory offence quite independent of the crime of fraud previously libelled; and that Wood had similarly committed the statutory offence of forging these telegrams. In this case the question is rather academic than practical. I do not assent to the proposition that the reading of the evidence in regard to the statutory charges was calculated to prejudice the prisoner's defence on the common law charges. Next, it is said that though there might have been jurisdiction in the Sheriff sitting alone and trying the case summarily, there was none in him sitting with a jury and trying the case on indictment. Now, in all cases in which by statute the proper sentence is limited to two years' imprisonment, the Sheriff sitting with a jury has jurisdiction unless excluded by special provision. It is said that section 37 of the Post Office Act reserves such cases to the High Court. I cannot assent to that view. That section I read, not as restricting the common law jurisdiction of the Sheriff, but as securing the more effectual prosecution of such offences, and in Scotland that is arrived at by providiug that in the High Court a man may be tried within the district where such offence shall be committed, or in any county or place within which such offender shall be apprehended or be in custody." The provision is entirely for the convenience of carrying out the prosecution, and is confined to cases which the prosecutor may think fit to bring in the High Court. It does not make it competent to a sheriff to try an offender merely on the ground that he has been apprehended within the sheriffdom, but, on the other hand, it in no way derogates from the right of the Sheriff to try accused persons for any offence committed within the sheriffdom for which the punishment is one which the Sheriff is competent to pronounce.

Next, it is said that the first diet having been deserted *pro loco et tempore* on 13th July 1899, it was incompetent to serve a new indictment until the period prescribed in section 42 of the Criminal Act of 1887 had expired. I cannot agree to that proposition. When a criminal diet has been deserted *pro loco et tempore* for any reason, it is open to the prosecutor at any time to serve a new indictment. That section merely makes it competent to the prosecutor, in place of serving a new indictment, to serve a notice on the accused that he will be tried under the old indictment on a certain date, and after the expiry of the *inducice* prescribed in the section.

Lord Stormonth Darling and Lord Pearson concurred.

Tho Court refused the suspension.

Counsel for the Complainer—Salvesen—A. M. Anderson. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondent—Sol.-Gen. Dickson, Q.C. — Fleming, A.-D. Agent—W. J. Dundas, C.S., Crown Agent.

COURT OF SESSION.

Friday, October 20.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

KERR *v.* EMPLOYERS LIABILITY ASSURANCE COMPANY, LIMITED.

Process—Dominus litis—Expenses.

An employer was insured against liability for accidents to his workmen under a policy containing a condition that if proceedings were taken to enforce any claim the insurance company should, if they so desired, "have the absolute conduct and control of the defences, in the name and on behalf of the employer," and that they should indemnify him against the expenses of such proceedings.

A workman raised an action of damages for personal injury against the employer, and obtained decree against him for a sum of damages and for his expenses.

The defence was in fact conducted and controlled by the insurance company in name of the employer.

The employer having become insolvent the workman raised a separate action against the insurance company for the purpose of recovering his expenses in the original action.

Held (1) that the action was competent, and (2) (on a proof) that the company were the true *dominus litis* in the original action, and that they were accordingly liable for the pursuer's expenses therein.

Observed that the relation between the nominal party to a suit and the *dominus litis* is not necessarily that of agent and principal—*Fraser* v. *Malloch*, 25 R. 619, *explained*.