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## LAW REPORTING*

### ENGLISH REPORTS—(*Contd.*)

Criminal cases are found reported from very early times, for the matter of that, as early as the Year Books, but, as was to be expected from the rudimentary nature of the criminal law and procedure, the slender opportunities available for the defence of presenting their case either before the trial Court or before any other higher tribunal, and the amorphous nature of the rules of evidence, criminal cases do not figure as prominently in the early reports as civil cases and no modern digest, it will be found, gives references to pre-revolutionary period cases. To some of them I have already made reference. I have referred among others to the case of two lovers entering into a pact for suicide and one of them withdrawing and subsequently put up for murder. This is reported in Moore. A case in Anderson emphatically asserts that the reason for the arrest of a man should be clearly set forth so that he may test its validity before the superior Courts. For an illustration of the excessive technicality of the old criminal procedure of England, I referred to a case in Levinz where a coroner's inquest was quashed because the Latin word *Emerget* was inadvertently used for the word *Immergit*. A man was found as having feloniously thrown himself into the river and in the said river *"seipsum emergit"* and so killed and murdered himself. *Emergit* in Latin means "rose out of"—a man rising out of the river and so killing oneself was absurd. It was an obvious slip for *Immergit, i.e.,* plunged. But the Court was powerless to so

*The eleventh of a series of lectures arranged by the University of Madras delivered by Mr B. Sitarama Rao, Vakil, High Court.

treat it. In 4 Modern Reports, there is a case seriously discussing whether a sentence of death only without a further direction "that the entrails be taken out and burnt in his sight" did not render the sentence wholly illegal. *Regina* v. *Fooley*, a case reported in 12 Modern Reports 242, has full twelve pages of argument. But the first report dealing mainly with criminal cases is that by Sir John Kelying. He was a Chief Justice of the King's Bench. The Report though scrappy is considered of great authority. The Judge seems to have been in the habit of settling the points that might arise at the trials beforehand by private consultation with Crown Counsel. Seeing that at this period of time the accused had not the benefit of counsel, the points had largely to be settled by discussion between Crown Counsel and the Judge and it did not matter much whether they did it in Court or outside. The cases that he reports are of the years 1662 to 1669.

But the most valuable accounts that we have of trials are to be found in the volumes known as State Trials. They are not Reports of the ordinary kind. They aim at giving a complete account of the trial in all its stages —the examination of witnesses, the address of counsel, the interruptions of Judges, the discussions on points of evidence and otherwise, the summing up of the Judges, the verdict and the rest as far as possible *verbatim*. The cases reported are mostly of constitutional importance, but some trials of ordinary offences and good many trials for witchcraft and heresy are also reported. They are of the greatest importance as affording materials for the proper history of the Criminal Law of England in all the stages of its growth. The description that we gave above of the contents does not apply to the earlier volumes dealing with the times before the Tudors. The accounts of trials for the period are fragmentary, having been derived from monkish annals or other historical documents where no complete account of the *verbatim* kind could, in the very nature of things, be expected. The first edition of these State trials appeared in 1719 as an anonymous publication. The collection was made from various unconnected sources. Wherever the publishers had intimation that there was to be found any matter worth reporting, there they went, offering large amounts. Old libraries, solicitors' records, counsels' manuscripts, newspaper accounts and every possible avenue was laid under contribution and there is no doubt the whole thing is a

marvel of publishing enterprise. Nundcoomar's case is to be found reported *verbatim*. The first edition was in four volumes. From time to time further volumes containing additional matter were added and finally an edition of State Trials in 34 volumes known as Howell's State Trials appeared. Matter appearing disjunctively without any apparent order in the older editions was re-arranged in chronological order with considerable additional matter. The undertaking was so gigantic that it took 17 years to pass through the press. Sir John Copley (subsequently Lord Lyndhurst) is said to have recommended the reading of it to every lawyer. He used to say that he first learnt there how to cross-examine a witness. Another series of State Trials bring them up to 1858. The trials of the pre-revolution period are of little practical value to the ordinary lawyer as the rules of evidence had not yet developed and the mode of trial differed very considerably from what it is at present. During the Tudor period and for some time longer, the trials were largely excited altercations between counsel for prosecution and the accused, the counsel putting his questions or making his speech bit by bit and the accused denying it or arguing it out or calling upon the prosecution to place his accusers before him. Witnesses were rarely produced. Depositions, confessions, letters, etc., were produced but only if the accused demanded it and the Court thought fit to direct it, witnesses were examined. Torture was freely availed of for the purpose of ascertaining the truth At the end of the wrangle between the counsel and the accused the Judge summed up and the jury returned their verdict. We find there the monstrous sentences passed by Star Chamber Judges duly recorded. Belief in the miracles plays a large part in those early trials. The right of the accused to have the witnesses examined in his presence was clearly laid down only after the revolution but the practice seems to have been slowly growing. The trial of Suffolk witches by Hale in 1665 is to be found in those volumes; they do not reflect any credit upon the Judge whose reputation is otherwise very high.

Hale is the author of the history of the Pleas of the Crown which is a book of great authority and must have contributed a good deal to settle the law. He did not live to complete it and it was published after his death. It shows a depth of thought and comprehensiveness of design which puts it in quite a different category from Coke's third institute dealing with crimes.

He begins by investigating matters of excuse, infancy madness, misadventure, ignorance, compulsion and necessity and considers all the more important crimes successively which is the order adopted you will notice by the Indian Penal Code. His second volume deals with the whole subject of Criminal Procedure in capital cases. A great part of the book has become obsolete and a great deal of it is occupied with technical details and minute and hardly intelligible distinctions. The great merit of Hale is that he discusses principles in a manner not done before.

Another work of great authority is Hawkins' Pleas of the Crown. It is more or less like Bacon's Abridgment but exclusively confined to Pleas of the Crown. Unlike the modern Digests, it is not arranged alphabetically but deals with the subject under various headings like Indictments, Coroner, Attainder, Outlawry and so forth. The other well-known books of practice are East, Russel, Archbold and Roscoe which according to Sir James FitzJames Stephen repeat each other and abstract an immense number of reported cases adding practically nothing to the history and theory of the subject.

The next book we have to notice is Foster's Reports (1743-1761) with his discourses on treason. His writings have done much to settle that branch of the law. He wrote at a time when there was still room for improvement of the law by discussions, meant to show, not what had, as a fact, been decided in reported cases, but what it would be reasonable to decide on general grounds. Viewed in this light his discourses are admirable. They are perfectly clear, disencumbered of all unnecessary details and full of good sense and good feeling. The law as laid down by him has been more or less accepted since. But he is also responsible for some artificial doctrines connected with the law of murder such as that if a man shot at a tame fowl and accidentally killed a man, he is guilty of murder, but if he intended to shoot at a wild fowl and killed a man, he is guilty of manslaughter.

Another writer who has done much by his writing for Criminal Law is Blackstone. The chief merit of his work is that it presents a distinct and trustworthy picture of the Criminal Law of his time while yet the idea of recasting it had not made any progress and belief in the wisdom of its principles remained unshaken.

Leach's reports (1730-1815) is another report dealing exclusively with criminal cases. Russel and Ryan deal with the period 1799-1823. Lewin's Crown Cases (1822-1838) report cases on the Northern Circuit of the period. Lewin is said to be an inaccurate reporter and we have already referred to the amusing way in which some of his headnotes and indexes are prepared, but we find cases from Lewin referred to both in text-books and digests. Moody covers the period (1824-1844) and Denison (1844-1854). The second volume in Denison was reported by Pearce and so it is called sometimes Denison and Pearce's Reports. It reports judgments of Crown Cases reserved and other cases. Temple and Mew's Criminal Appeal Cases are in one volume and cover three years (1848-1851), an eloquent commentary on the paucity of criminal appeals in England. It was the beginning of appeals and people had not yet been familiar to the new practice. We have fairly large number of criminal appeals now. Dearsley (1852-1856), Dearsley and Bell (1856-1858), Bell (1858-1860) and Leigh and Cave (1861-1865) are the other reports that bring us up to the Judicature Act. In the Law Journal Reports there is a section dealing with the duties of Magistrates and the Magistrates' cases coming before the Superior Courts. Central Criminal Court Sessions papers deal with the cases of the Central Criminal Court in London from 1834 to 1912. Cox's Criminal Cases are a useful and oft-quoted series that began in 1843 and are still current. Ever since the institution of Law Reports up to the Judicature Act, L. R. Crown Cases reserved used to report cases coming before that Court; but since, the cases are reported in the King's Bench Reports. If perchance a case goes up to the House of Lords, it will be found reported there. Since the establishment of the Court of Appeal, we have a separate set of reports known as the Criminal Appeal Reports dealing with cases dealt with by that tribunal.

We have now come to the end of our survey of the English Law Reports from the earliest times and this, I think, is the fitting place to present a connected account of the evolution of the Law Reports in England.

Bracton's Note-book was compiled from the Court-records and though in a sense, is the earliest attempt to give precedents in a connected form, cannot be considered a Law Report in the proper sense of the term. The earliest instance of a Law Report is the Year Book. The Year Books cover the period 1292-

1537, but even here the Year Book from 1292-1328 cannot be properly regarded as a report as it contains only extracts from the rolls. Reporting proper begins from the time of Henry III. But even when it becomes a report, it varies very considerably from the modern conception of a report. It more resembles a newspaper report. It is an exact transcript of what takes place in Court with what is relevant and irrelevant, the arguments of Counsel, the observations of the Judge and the reflections of the reporter. There is no attempt to present a whole case from the commencement to the end. Being at the start, only student's note-books, the report begins and breaks off according as the student happens to be present or to be away. Names of parties and the dates are not given. The report is generally a discussion as regards the pleadings, the form of action and the venue—matters of importance at that time. These discussions are far from being orderly and are a mere jumble presenting the greatest difficulties to the reader to disentangle the Judge's observations from the Counsel's and the reporter's. The Books of Assizes and Longo Quinto though presenting in the main the same features, are more regular, and approximate more and more to the modern conception of the Law Report. In the beginning, matter is not arranged in the chronological order. It is only after some time that the report is arranged according to years, the feature from which these reports derive their name. In the Year Books we have clear indications of the various theories as to reporting whether the report should contain the pleadings, the discussion and the judgment or whether these should be presented separately, whether the matter should be arranged chronologically or according to subject-matter, whether the report alone should be given or whether superadded, should appear the pleadings, the note and institutional instruction. The experiments resulted finally in favour of the chronological and complete reporting, omitting the picturesque elements. The reports for a long time used to have the characteristic of lawyer's note-books containing cases copied from other's note-books and decided long before the time of the reporter in addition to cases noted down by the writer and sometimes also further accumulations till the time of the publication which so often took place long time after the death of the reporter. The first publication to be called reports are Dyer's Reports, the name till then given to them being Annals, Commentaries and Cases. Though called

reports they are not full and are merely notes of cases made by a busy man for his own use. It must have been also noticed by you that most of the early reports were reports of cases either argued by the reporter or decided by him. The first regular reports, in fact one of the best are those of Plowden. They contain all the essentials of a good report. The headnotes, the pleadings, the arguments and the judgments with the reasons are all given intelligently and with sufficient fulness. They were published during the lifetime of the reporter unlike most other reports of the time. From the point of view of a perfect law report, Coke's Reports can hardly take a high place. No doubt he gives a statement of facts, the substance of what was said on both sides and the resolutions of the Courts. But as all arguments are confessedly presented in his own singular manner, the result is utter confusion and one is unable to see what is Coke's own inference and what the Judge's decision. Coke himself being a great authority, that circumstance does not detract from the value of the report as authority. In fact, with most of the reports of those times, the imperfect reporting is made up in professional estimation by the authority of the reporter. As we noticed before, even in Bacon's time, reports were considered to have grown enormously and various suggestions were made by him for their improvement and simplification. He was for a revised edition of the reports omitting whatever was a mere reiteration of well-known principles, or had been overruled or had grown useless. He was also for an official Digest. His other suggestion was official reporting, but that, as we have seen, was not particularly a success and the experiment was not repeated. A more interesting suggestion is that of Lord Campbell, an *auto de fe* every 10 years—an inquisition in fact every 10 years consigning every useless case to destruction. The circumstance that some of the reporters reported only their own cases, has led to their arguments being given at inordinate length, a propensity which cannot be said to have altogether disappeared even this day in reporters. The fact that reporters have not the choice of reporting only their own cases has kept the evil in reasonable check. The first specialisation appears when Chancery cases came to be separately reported. Carey was the first regular reporter in Chancery. There were a few reports exclusively of Crown cases, or Practice cases or even of Exchequer cases fairly early but they are not many nor was there regular reporting of each Court separately till we come to comparatively recent times.

The very nature of these reports is such that they are of varying degrees of fulness and authority but have the virtue of acting as mutual correctives and supplements giving as a net result a fairly adequate report of the case, but the process of piecing together necessarily involved considerable labour. The haphazard reporting reached its acme in Keble who printed his notes as he took them in Court, the report of the same case appearing in a dozen or more places according as the case progressed. Of the Restoration period reports, Saunders is the best. In the hands of Saunders, reporting became a fine art and the skill with which he presents facts, arguments and the conclusions is very remarkable. But even his reports labour under this defect that you do not have the judgment of the Court in sufficient fulness. Though the reports were from manuscripts of great lawyers their publication sometimes was the result of commercial venture and oftentimes without sufficient guarantee as to their accuracy. Reporting itself as a commercial venture began with the Modern Reports. Lawyers were employed by some publisher and in some of the volumes the cases are reported in a conversational form noting the interruptions and other exact words of the Court. Though there have been some good reporters like Plowden, Saunders, Pere Williams and others, Burrow's Reports, as we said before, really marked an epoch in reporting. He does reporting with great care giving a full statement of facts, pleadings, arguments and judgments. Though it is still the substance of the judgment that is given, the report is full. The method of Burrow was adopted by East, Maule and Selwyn, Barnewal and Alderson and others. From Burrow's time reports are published by the author himself, but term reporting began only with Durnford and East. Ever since, reporting has been term by term if not earlier as in the case of Weekly Reporter, Law Journal, Law Times, and finally the Law Reports which are published monthly. From the time of George III. we have reporters confined exclusively to each Court, which naturally has led to fuller and larger reporting than was possible under the old haphazard system of reporting. Specialisation as to reporting has gone on not only according to Courts but also according to subject-matter. The first has led to separate reports as to House of Lords, Privy Council, the Court of Appeal in Chancery, the Rolls Court, Vice-Chancellor's Courts, King's Bench, Common Pleas, Exchequer Court, Probate and Divorce, Admiralty and Ecclesiastical Courts, Election Courts, and so

forth. According to subject-matter, you have Crown cases, Bail Court, *Nisi Prius* cases, Criminal cases, Insolvency, Exchequer, Equity, Mercantile cases, Patent cases, etc. The genesis of the so-called authorised reports we have already traced and how though it did confer certain special privileges on the reporter it did not afford any guarantee either as to the punctuality of the report or its accuracy, on the other hand how it made for great costliness and dilatoriness. Some of them were inferior to their less favoured rivals. The necessity for maintaining the size sometimes led them to print a lot of useless matter. The latest experiment is the present system of reporting under the authority of the Council of Law Reporting. The Council is not an official body and has neither special privileges nor any monopoly of reporting. Originally it started with three Editors. Now it has only one Editor with several reporters. The appointment of reporters, as is wont in England, goes on lines settled by custom and vested interests. The House of Lords, for instance, appoints its own reporters. The practice is to submit the judgments to the Judges concerned after making such verbal corrections as may appear essential and to report them with such further modifications as they might suggest. If any doubt arises the counsel engaged also are consulted; in fact every attempt is made to maintain accuracy. There is no rule as to what cases are to be reported, either that all written judgments should be reported or that only cases involving questions of law should be reported. According to Sir Frederick Pollock, who was the Editor till recently, utility to the profession is the only test that was adopted by him. The object of the Council is to place authentic reports of all the valuable decisions of the English Courts at the disposal of the profession at the actual cost incurred in bringing them out. Whereas under the old regime one had to pay £30 to secure a set of authorised reports, under the present regime it could be had at £4-4*s*. which owing to war conditions, had to be raised to £6-6-0 but has since been reduced to £5-5-0. Though it cannot be denied that the English Reports maintain a high degree of finish, still complaints are not wanting. It had been fondly hoped that in the face of efficient reporting at nominal cost, unofficial publications would disappear but as a matter of fact they have not disappeared nor do they show any prospect of disappearing. Before we consider the rules that are observed or should be observed in reporting, we may take a glance over the system of reporting adopted in different countries in Europe and America.

In France, every decision is required to be in writing and to disclose on the face of it the grounds and the reasons on which it is founded. And when the signature of the Prefect is affixed, it is the duty of another officer to see them entered in the register. The register is open for inspection to the public and it is open to any one to make a selection of such decisions for publication. But they are not official publications.

In Italy, all judicial decisions are to be read aloud in Court and authentic minutes of judicial opinion should be recorded in the register of the Court. Compilations of the decisions of four principal Courts are published by non-official editors who make proper selection of cases with head-notes, marginal notes and annotations. There is so much protection as is involved in the purchase of certain number of copies of La Legge Roman —a journal of judicial and administrative proceedings containing in an abridged form notes taken from the register of important decisions.

In Denmark, it is competent for any one to take down, print and publish reports of which he has himself taken notes. The only authentic version is that in the records of the Court where the judgments with the reasons of the Judges are entered under the hand of the Judge. Selections are made by direction of Courts and may also be made by competent private publishers.

In Norway and Sweden, judgment is always to be in writing and in every case ought to be entered on the protocols of the Courts. In the Supreme Court of Appeal, votes are given separately and the Registrar is to record the final judgment or conclusion without grounds or reasons. Records supply authentic record and the publication is open to free trade.

In the United States of America, judgments are generally in writing. In most of the States and in the Supreme Court there are Official Reporters who are remunerated by salary as well as a portion of the profits. Reporters are generally appointed by State, but there is the same freedom in reporting as in England, and there is considerable private reporting as official publications rarely appear soon after the judgment. In the official publications, no arguments of counsel are given. In the State of New York reports are priced under statute. As I have said before the publication of Law Reports is a speciality in England and the countries that follow its rule as to precedents and countries that follow the other system naturally have not quite the same kind of reporting.

The committee appointed by the Bar for the consideration of ways and means for proper reporting did not recommend monopoly of citation though we find Lord Lindley was in favour of it. The utter futility of such a provision has been demonstrated in India.

According to Lord Lindley the defects that are to be avoided by reporters are (1) Reporting cases which are valueless as precedent, (2) Long Reports of complicated facts not necessary to understand the legal principle involved, and (3) Long head-notes giving the facts of the case and the conclusion couched in this fashion—Where so and so did so and so, etc., etc., held in the circumstances plaintiff had no cause of action. His view is that only legal pith of the case and nothing more should appear in the head-note. The reporter should report according to the same high authority only cases which introduce or appear to introduce a new principle or a new rule or modify an existing principle or which settle a doubtful question or it must be a peculiarly instructive case with the rider that on the whole it is better to err on the side of too much reporting than too little. He is against the reporting of cases on the construction of documents unless they are on the construction of common forms or introduce a new principle of construction. Interpretation of Acts of Parliament or rules of Court, and cases on unsettled points of practice are also fit subjects for reporting. In England, the practice cases are reported in the Weekly Notes. He is for the reporting of only so much of facts and arguments as are necessary for the elucidation of the principle of law arising in the case. Speedy reporting and good index are the other essentials of good reporting. He is against reporting a judgment simply because it is a written judgment or omitting one delivered offhand for if such judgments had been omitted, most of the famous judgments of Jessel would have gone unreported. One has only to state it to realise the incalculable loss law would have sustained by such a course. The practice uniformly followed by the Editor of the Law Reports in England is to hold back a judgment which is under appeal. In the Law Reports you never find a case without the arguments fully exhibited The usual practice of inefficient reporting all over the world, viz., to state that the facts and arguments appear in the judgment is never adopted. The facts are extracted from the judgment and separately printed at the commencement of the report.

The causes of over-reporting and inefficient reporting in England are analysed and shown to be the following by a competent observer. First, there is a general desire not to be outbid by the other journals. Secondly, there is a tendency in the Bar to over-estimate the importance of early reporting and larger reporting however inefficient it might be. Another thing that operates is the desire to make the journal self-sufficient. If the fact that a case is reported in some other journal should be regarded a reason for not publishing it in yours, your subscriber will have to subscribe for a number of journals to be equipped with all cases. The interest of the reporters to see their own cases reported contributes its due share to over-reporting. The desire of the counsel appearing to see themselves in print also contributes its share. Nor is the vanity confined to reporters and counsel. The Judges also are sometimes bitten by this ambition and the reporters cannot help pandering to it. However much the talk of the value of old and unquestioned cases, there is a constant demand by the Bench for the latest case and the reporter who lags behind in this respect cannot expect encouragement either from the Bar or the Bench. Laziness of the reporter also has not a little to do with indiscriminate reporting. Sound discretion is to be exercised in rejecting a case, none need be for admitting one. And then there are considerations of bulk which have to be borne in mind by the reporters. They have to bring out a certain number of pages and the pages have got to be filled up somehow or other. The only way of counteracting these vicious tendencies is by educating the profession and no less the Bench on the utter folly of these courses. Multiplicity of report, without any difference in substance, is the bane of the profession. It is not, however, by conferring monopoly that the end in view can be achieved but by encouraging efficient and prompt reporting. If these criticisms are called forth by the conditions in England, how much more in this country where there seems to be a feeling that however well-settled a principle, there is some suspicion attaching to it unless it is periodically affirmed. It is on this principle that most of the reports in India are acting. A case may do no more than follow a Privy Council judgment and yet it is reported as if the ruling of the Privy Council is to be buttressed by the approval extended to it by a single Judge of an obscure Court in a corner of India. Arguments are rarely given—facts much less. The reader is left to his own devices to find out the facts as best he can and he is always met by the

sapient remark that the facts are to be found in the judgment. The head-noting is also very defective. Hardly any head-note brings out all the points decided in a case and the defect of the head-note goes to the Digest and the lawyer who depends on the Digest for his law is after a veritable will-o'-the-wisp. The semble, the quære and even the *obiter* of the Privy Council is of much greater importance than the judgments of many a single Judge. This aspect of the case is always forgotten by the reporter in India. The only way in which improvement in this direction can be attained is by educating the legal profession to a proper conception as to the essentials of good reporting and the need for it. Just as you won't have an inferior article though it is cheap, if the legal profession is educated into a frame of mind which would reject bad reports, we may be able to see the end of the present confusion and waste of life.

Abridgments are the precursors of the Digest and have been in vogue from very early times. There is a constant reference in the Year Books themselves to abridgments. One of the Year Books, that of the reign of Richard II, seems to be an abridgment from a regular Year Book. An abridgment or a common-place book was considered essential to every student. Sir Mathew Hale points this out in his preface to Rolle's abridgment. The earliest abridgment proper that we have is that of Statham published in 1490. In 1509 or so, an abridgment of the Book of Assizes by Pignon was published; in 1514, FitzHerbert's abridgment, in 1568 Brooke's. These are Digests of case-law like Mew's or Chitty's. They adopt the alphabetical order which was later on in the 17th century adopted by the Legal Encyclopædias. Rolls' abridgment is the first of the new type suggested by Bacon. It was prepared by him for his own use. It was published after his death by Sir Mathew Hale with a preface giving a historical summary of the development of Common Law up to the time of restoration. The main topics are arranged in the alphabetical order but each topic is divided into sub-heads in the logical order. Hughes published his abridgment in 1660-1662 and Nelson 1725-1762. D'Anvers proceeded up to Error in 1737. His work was taken up by Viner who began with F. His abridgment was published between 1741 and 1756. He had the imprimatur of the Judges for his undertaking. There are two other Digests which are famous and have the same authority as text-books—Comyn's Digest translated from French published in

1762 and Bacon's abridgment which Maine calls "our classical English Digest". Between 1841 and 1844 there appeared two editions of Petersdorff's abridgment. The Current Digest going under the name of Mews was started by Chitty and continued by Fisher.

The lawyers' note-books which on publication became elevated to the dignity of reports naturally contained marginal notes, references and reflections of the lawyer responsible for them and some of them appear in the published editions of the Reports. This suggested the idea of publishing annotated editions of the reports. One such is Williams' edition of the Saunder's Reports which is more or less a text-book in the guise of notes on cases. The notes digest the entire known case-law of the time on the topic of pleadings and have won for themselves a place as an authority. Similarly, the notes of Cox add value to Pere Williams' Reports. They apparently inspired Smith to publish his leading cases. White and Tudor have their leading cases in Equity. Other ventures of the kind are Cobbet's Leading Cases, Finche's Leading Cases, Bigelow's Leading Cases, etc.

The Law Reports supply the same place in the building up of the English Jurisprudence as the great text-books of Papinian, Ulpian and Savigny in the Civil Law. While the great Doctors of Civil Law published and improved their texts, the ambition of the English Jurists was to leave lasting monuments of their legal culture and juristic thought in the judgments enshrined in the Law Reports. It is the considered opinion of Bryce that Judges like Hardwicke, Mansfield, Stowell, Jessel, Cairns and Bowen are worthy to be ranked with aforementioned great jurists by reason of their contributions to the legal literature of the world.

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## RELATION OF OATH OR AFFIRMATION TO THE OFFENCE UNDER S. 193, I. P. C.

By Dr. S. Swaminathan.

According to Sir Edward Coke (3 Inst. 164) the offence of perjury can be committed only when a lawful oath is administered in some judicial proceeding and an oath is said to be a religious asseveration by which a person renounces the mercy

and imprecates the vengeance of Heaven if he does not speak the truth. Bentham says: "By the term 'oath', taken in its largest sense, is universally understood a ceremony composed of words and gestures, by which the Almighty is engaged eventually to inflict on the taker of the oath, or swearer, as he is called, punishment in quantity and quality, liquidated, or more commonly unliquidated, in the event of his doing something which he, the swearer, at the same time and thereby engages not to do or omitting to do something which he in like manner engages to do. Correlative to the term 'oath' is the term *perjury* and it conjugates to perjure oneself, perjured, perjurious; among which perjury is understood as designation of the conduct, whether positive or negative, which stands in opposition to the conduct engaged for, as above."

In England, according to Blackstone, the offence was anciently punished with death and afterwards by banishment or cutting out the tongue. Then it became forfeiture of goods. Under a Statute of Elizabeth the perjurer was liable to the penalty of perpetual infamy and a fine and in default of payment it was imprisonment and he was to stand with both ears nailed to the pillory. By comparatively modern statutes the expression 'oath' includes also affirmation and declaration.

The Muhammadan Law relating to *Yameen Ghamoos* was even stricter than the mediæval notions current in Europe as to the sanctity of an oath or a *jus jurandum*. The Doctors of Islam argued that an *yameen ghamoos* being a calling God to witness to a falsehood, is a crime of great magnitude and there is no expiation for such a deadly sin, being a disrespect shown by the swearer to the name of God of his own free option. The Prophet has declared *"whosoever sweareth falsely the same shall God condemn to hell"*. A valid oath may be taken by the swearer affirming "if I say anything contrary to truth, may I be deprived of the Prophet and of the Koran".

The East India Company when it was called upon to assume the functions of the Sovereign power found regularly established courts of law dispensing justice after trial according to the rules of the Muhammadan Law of Evidence. A Hindu in order to qualify to bear testimony took an oath in the mamool form with a *Thulasi leaf* and Ganges water in the hollow of his right hand palm. A Muslim took his oath by the Koran. The earlier regulations took the close parallelism between the oath insisted upon by the Courts in India as a

matter of universal principle and took it for granted that the maxim *"In judicio non creditur nisi juratis"* as a principle of universal application. The preamble to India Act (V of 1840) is in these terms:—

"Whereas obstruction to justice, and other inconveniences have arisen in consequence of persons of the Hindu or Mahomedan persuasion being compelled to swear by the water of the Ganges, or upon the Koran, or according to other forms which are repugnant to their consciences or feelings:

"It is hereby enacted, that except as hereinafter provided, instead of any oath or declaration now authorised or required by law, every individual of the classes aforesaid within the territories of the East India Company shall make an affirmation to the following effect:—

"I solemnly affirm, in the presence of Almighty God, that what I shall state shall be the truth, the whole truth and nothing but the truth".

The Indian Penal Code advisedly refrained from using the term 'perjury' and what is punishable under S. 193, Indian Penal Code, is *the intentional giving of false evidence* though S. 191, which defines *"giving false evidence"* introduces, "being *bound by an oath*" as one of the alternative elements constituting the offence. But where the law imposes an obligation upon a person to speak *truly* in particular circumstances, an intentional speaking of an untruth would equally constitute the giving of false evidence even though the speaker was not under oath. Thus S. 175 of the Code of Criminal Procedure empowers a police officer holding an inquest to examine witnesses and requires persons summoned by the police officer to attend and to answer *truly* all questions subject to certain exceptions not material here. An inquest witness intentionally stating an untruth would render himself liable under S. 193 having regard to the Explanation 2 to that section.

Leaving aside for the present the class of cases where an express provision of law requires a person to state the truth, the question arises whether an oath or affirmation is essential to constitute the offence under S. 193. The real fact is, the cumbersome ceremony of taking an oath or making an affirmation like numerous other ceremonies in this country has entirely outgrown its usefulness. Mahmood, J., in 1888, thus expressed his personal views in *Queen-Empress* v. *Maru* (1).

"My own past experience both as a member of the Bar and as a Judge of the Courts of first instance warrants my saying that in the vast majority of cases the solemn affirmation introduced by Act V of 1840 in

1. (1888) I L R 10 A 207 at 214.

lieu of the older form of oath is not treated or felt by native witnesses as binding upon their conscience. And in view of this circumstance it is a question of great importance how far our law of perjury in the apportionment of punishment should be applied to cases in which a native witness, to whom no such oath as is binding upon his conscience has been administered, has not spoken the truth after the solemn affirmation provided by the law, and which affirmation he feels not binding upon his conscience. I am aware of the reasons which induced a philosophical jurist of the eminence of Jeremy Bentham to object to the whole theory of administering oaths"

It cannot be denied that in spite of the oath or affirmation there is a very large amount of false evidence given before the Courts in this country just as there was in England an immense amount of perjury when that offence was punishable with death more especially among the jurors who had to try the perjurers. The statute law in India has long ago recognised this fact when it enacted S. 13 of the Indian Oaths Act (X of 1873) in these terms:—

S. 13—"No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever, in the form in which any one of them is administered shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth."

The word *omission* in this section has been authoritatively interpreted by the High Courts to include intentional omission and not to be limited to accidental or negligent omission. *Queen* v. *Sewa Bhogta* (2) and *Re China Venkadu* (3). If a Judge conducting a judicial proceeding may advisedly refrain from administering an oath or affirmation to a witness without in any way affecting either the admissibility of the deposition as legal evidence in the case or the obligation of the witness to state the truth, it is as good as the opening words of S. 191 regarding a *person bound by an oath to speak the truth* having been repealed. In fact this was exactly what was decided by a Division Bench of the Calcutta High Court in *Gobind Chandra Seal* v. *Queen-Empress* (4) where Norris and Beverley, JJ., held that the law was clear that the offence of giving false evidence may be committed although the person giving evidence has been neither sworn nor affirmed.

The process of administering oath or affirmation consumes an appreciable fraction of the Court's time and at present serves only the purpose of making the average country witness,

2. (1874) 14 Beng. L R 294 (F B). 3. (1913) I L R 38 M 550.
4. (1892) I L R 19 C 355.

unaccustomed to the atmosphere of a law court, thoroughly confused without in any way adding to the dignity or the solemnity of the judicial proceedings. It is high time that some future Repealing and Amending Act should take note of the existing statute law as interpreted by the Full Bench in *Queen* v. *Sewa Bhogta* (2) and by the Division Bench in *Gobind Chandra Seal* v. *Queen-Empress* (4) and make consequential amendments not only in S. 191, Indian Penal Code, but also in several cognate sections of the Penal Code, the Code of Criminal Procedure and in other enactments and do away with the entire useless and antiquated ceremony of swearing in of witnesses before their evidence is recorded.

## SUMMARY OF ENGLISH CASES.

*In re* QUINTIN DICK : CLONCURRY (LORD) *v.* FENTON, 96 L J Ch. 9.

*Will—Names and Arms Clause—Forfeiture for non-compliance—Expression "refuse or neglect" as denoting exercise of will—Heir-at-law being ignorant of rights under will—Effect.*

The testator directed that his estate should be held by his trustees to the use of his sister during her life and after her death to various other persons and their male issue. The will contained a names and arms clause in the following words:—"Every person who shall be entitled to the possession and enjoyment of the said estate after my sister shall and do within three months after he shall become entitled to the same.... take upon him and use in all writings the surname of Dick only and use the arms of Dick only and I do hereby direct that in case any person so entitled shall refuse or neglect to take my said surname and arms his interest in the estate shall cease and the same shall devolve to the next beneficially entitled". The sister died in 1864 and the last of her issue died in December, 1923. The trustees took out summons in April, 1924 to determine if there was any heir-at-law and it was eventually found out that one *B* living in Canada was entitled to take the estate. It appeared that the said *B* had all along been ignorant of his rights. The question arose whether there was a forfeiture of *B's* interests because of the names and arms clause.

*Held*, that *B* did not *refuse or neglect* to take the name and arms and that consequently had not forfeited his interest in the

2. (1874) 14 Beng. L R 294 (F B). 4. (1892) I L R 19 C 355.

estate. The expression 'refuse or neglect' does not cover every class of omission; it merely applies to a case where the person has present to his mind the question whether he will or will not comply with the condition.

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PARKER AND COOPER, LIM. *v.* READING AND JAMES, 96 L J Ch. 23.

*Company—Transaction* intra vires *and beneficial to company—Assent by corporators at different times separately—Validity.*

*Held,* that where the transaction is *intra vires* and honest and especially if it is for the benefit of the company it cannot be upset if the assent of all the corporators is given to it. It does not matter in the least if that assent is given at different times all the corporators discussing and agreeing to it one with another separately.

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*In re* A DEBTOR, 96 L. J. Ch. 28 (C. A.).

*Married woman—Actress engaged for producing scenes—Actress receiving fixed payment and paying others for production of scenes—Whether "carrying on a trade or business" within the meaning of S.* 125 (1) *of the Bankruptcy Act,* 1914—*Meaning of the words "trade" and "business".*

S. 125 (1) of the Bankruptcy Act, 1914 provides that "Every married woman who carries on a trade or business.... shall be subject to the bankruptcy laws as if she were a *feme sole*". A married woman who was till then an actress was engaged in giving performances on the stage involving the incurring of liabilities and was paid a fixed sum and after paying what was necessary for the production of the scenes she retained the balance as her profits.

*Held,* that under those circumstances she must be deemed to "carry on a business" within the meaning of the section.

*Per Scrutton, L. J.* :—"The words 'trade' and 'business' do not mean the same thing..... The word 'trade' is often confined to buying and selling commodities. Where to draw the line between what is a profession and what is a trade is a matter which it is not possible to deal with any general definition. 'Business' is a much wider term than trade. The word 'business' at least covers a continuous occupation involving liabilities to others."

MANLEY *v.* SARTORI, 96 L. J. Ch. 65.

*Partnership—Death of partner—Rights over entire assets —Surviving partners carrying on business with partnership assets—Right of executors of deceased partner to share in profits—Presumption as to business being carried on with partnership assets.*

*Per Romer, J.* :—"The rights of a deceased partner or his legal representatives are rights over all the assets of the partnership. He has an unascertained interest in every single asset of the partnership, and it is not right to regard him as being merely entitled to a particular sum of cash ascertained from the balance sheet of the partnership as drawn up at the date of his death. Where in such a case the surviving partners instead of realising the assets and distributing the proceeds among the parties in accordance with their rights and interests, choose to carry on the business and make profits by virtue of the employment of any of the partnership assets, then, subject no doubt to making a proper allowance to the surviving partners for their trouble in so carrying on the business, such profits belong to all the persons interested in the partnership assets by means of which the profits have been earned in accordance with their rights and interests in those assets .... Where the surviving partners continue to carry on the partnership business *prima facie* they are carrying it on by reason of their possession of the assets of the partnership; and the executors of the deceased partner are *prima facie* entitled to a share of the profits proportionate to his share in the assets of the partnership. It is for the surviving partners to show, if they can, that the profits have been earned wholly or partly by means other than the utilisation of the partnership assets".

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HARMS (INCORPORATED) *v.* EMBASSY CLUB, LTD., (1927) 1 Ch. 526 : 96 L J Ch. 84 (C. A.).

*Copyright—"Sole right to produce work..... in public"—Performance in proprietary club attended by members and guests—Infringement—Tests for deciding whether there has been performance "in public"—Copyright Act,* 1911, *S.* 2.

"Copyright" is defined by S. 2 of the Copyright Act, 1911, "to mean the sole right to produce or reproduce the work..... in public". Where a proprietary club had a paid orchestra and a performance therein was attended by a large number of

persons some of whom were members and others guests, and it appeared that the author had been materially prejudiced by such performance

*Held* by the Court of Appeal affirming a judgment of Eve, J., in (1926) Ch. 870 that there was a performance "in public" so as to constitute an infringement of copyright.

*Per Lord Hanworth, M. R.* :—"In considering whether there has been a performance "in public" the following tests may be applied:—"First, whether there has been any injury to the author, and here profits is a very important element. Next, whether there has been the admission of any portion of the public with or without payment. Then one has to consider whether or not the performance is a domestic one..... a matter of family and household concern only. Then again it requires consideration where the performance took place".

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WHYTE, RIDSDALE AND CO. *v.* ATTORNEY-GENERAL, (1927) 1 Ch. 548.

*Interpretation of Statutes—Act containing general prohibition against import of goods containing synthetic organic dyestuffs—Protection of dyemaking industry as object—Importation of artists' colours containing small quantity of synthetic organic dyestuff if prohibited—Dyestuffs (Import Regulation) Act,* 1920, *S.* 1, *Sub-sec.* (1).

S. 1, Sub-sec. (1) of the Dyestuffs (Import Regulation) Act of 1920 provides that with a view to the safeguarding of dyemaking industry the importation into the United Kingdom of all synthetic organic dyestuffs, ..... shall be prohibited. The question arose whether certain artists' colours and materials containing a small quantity of synthetic organic materials could be imported. It was contended that the importation of such products would not have the effect of prejudicially affecting the dyemaking industry and that consequently they could be imported.

*Held,* that the Act contained a general prohibition of any importation of synthetic organic stuffs and that the colouring materials sought to be imported fell within the said prohibition.

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*In re* WAIT, (1927) 1 Ch. 606 : 96 L. J. Ch. 179 (C. A.).

*Sale of goods—Contract for sale of unascertained goods—Bankruptcy of vendor after payment of price and before deli-*

*very—Buyers whether entitled to claim specific performance or equitable assignment of goods sold—Sale of Goods Act*, 1893, *S.* 52.

On November 20, 1925 *W* entered into a contract for the purchase of 1000 tons of western white wheat imported into England from the United States of America by the vessel *Challenger*. On November 21, 1925 *W* agreed with certain persons to sell 500 tons of wheat per *Challenger*. On January 4, 1926 the Bills of Lading arrived and were signed by the consignee and immediately thereafter *W* rendered his sub-purchasers a provisional invoice and received cash for the value of the goods. On February 24, 1926 a receiving order was made and *W* was adjudicated insolvent on March 5. Meanwhile, the *Challenger* had arrived on February 28. On an application by the sub-purchasers it was contended that the trustee in bankruptcy should specifically perform the contract of November 21, 1925 or in the alternative that there should be repayment of the money advanced to *W*.

*Held*, by the majority of the Court of Appeal (Sargant, L. J. dissenting) reversing a judgment of the Divisional Court in (1926) Ch. 962 that the goods contracted to be sold were neither "specific" nor "ascertained" within the meaning of S. 52 of the Sale of Goods Act and that consequently the remedy of the sub-purchasers was to obtain damages and not specific performance. Nor could it be said that at any time there was an equitable assignment which ever gave the sub-purchasers a beneficial interest in the goods.

*Per Sargant, L. J.* :—"There had prior to the bankruptcy been created in favour of the sub-purchasers equitable rights of the nature of equitable assignment or equitable lien in respect of the wheat, which were enforceable against the bankrupt and which prevented the wheat vesting in the trustee otherwise than subject to those equitable rights."

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*In re* MADAME TASSAND & SONS, LIMITED, (1927) 1 Ch. 657.

*Company—Rights of preference and ordinary share-holders —Articles providing for equal division of profits—Division of surplus assets as profits.*

A company was incorporated in 1889 with a capital of £200,000 in £1 shares and by the memorandum it was provided

that the original shares and also any increase of capital might be guaranteed or deferred shares. 75,000 of the original shares were issued and fully paid up. In 1902 the company resolved that 50,000 of the unissued shares should be issued as preference shares entitling the holders to a fixed cumulative preferential dividend of £5 per cent. in priority to the ordinary shares, but not conferring any priority as regards capital. Nearly 30,000 shares were subscribed for. In 1925 the whole of the company's premises and their contents were destroyed by fire. The company recovered money from the insurers and the question arose how the surplus left after paying the debts and the return of the capital should be divided as between the ordinary and preferential share-holders. One of the articles of the company provided that subject to the rights of members entitled to shares issued upon special conditions the profits of the company shall be divisible among the members in proportion to the amount paid up on the shares held by them respectively.

*Held,* that the surplus assets were profits of the company within the meaning of the Article and that they should be distributed amongst all the share-holders *pro rata* in proportion to the amount paid up on their shares.

*Per Eve, J.* :—"The surplus assets are profits of the company and equally so whether the surplus represents excess of receipts over payments in previous years accumulated as reserve funds for particular or general purposes, but never so applied, or whether it is derived from the realisation of the company's property at prices in excess of the value placed upon it in the company's books and accounts".

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BOORNE *v.* WICKER, (1927) 1 Ch. 667.

*Sale of Good-will—Vendor's duty not to solicit customers —Rule whether applicable to vendor's executor.*

*Held,* that the principle in *Trego* v. *Hunt,* (1896) A. C.7, that a vendor of the good-will of a business ought to be restrained from soliciting customers of the business is equally applicable to the case of an executor of the vendor, who is bound to carry out the contract.

*Per Tomlin, J.* :—"Where a man has entered into a contract for the sale of a business which it falls to his executor to complete, in my judgment the executor who, on completion of the contract, proceeds to solicit the customers of the old firm is doing the very thing condemned by Lord Macnaughten in

*Trego* v. *Hunt.* He may or may not have actual knowledge of who the customers of the firm are, though he certainly has every opportunity of ascertaining them, but whether or not he has actual knowledge of them, it seems to me to be against common honesty that he should be free at one and the same time to complete his testator's contract and to snatch away from the purchaser the property which he is affecting to convey to him."

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GEORGE BANHAM & Co. *v.* F. REDDAWAY & Co., (1927) A. C. 406 : 96 L. J. Ch. 117 (H. L.).

*Trade-mark—Application to register—Mark not distinguishable in England—Applicant agreeing to limit use of mark to goods exported to foreign countries—Registration whether compulsory—Trade-marks Act,* 1905, *S.* 9 (5).

Where in an application for the registration of a trade-mark it was found that the mark was not distinguishable from other marks in England but the applicant showed that he did not use the said mark in England and that he would use the same only on goods exported to foreign countries

*Held,* that the whole idea of a trade-mark was to register it for use in England and that a mark otherwise not registerable did not become registerable because the applicant consented to a condition that he would only use it in certain other places.

*Per Lord Dunedin* :—"The registration of a proposed trade-mark is not an absolute right. It is a privilege which under certain circumstances so far approximates to an absolute right that it must be granted..... What has to be considered is the possible confusions or difficulties which might arise in consequence of the grant of the trade-mark or the possible impairment of the rights of innocent traders to do that which it would be their natural mode of conducting their business..... It is one thing to limit the use of a trade-mark registered in this country by declaring that it is only to be used in certain countries besides this: it is quite another to try and make a mark *ex hypothesi* unregisterable here effective as a trade-mark elsewhere by saying that its use would be applied to certain other specified countries. The whole idea of a trade-mark register is for use in this country, and I cannot think that merely affixing the mark in this country when *ex hypothesi* that mark when affixed cannot be used in this country at all meets the intendment of the Act."

VINCENT *v.* SOUTHERN RAILWAY CO., (1927) A. C. 430 (H. L.).

*Railway company—Statutory duty to post look-out man—Delegation if permissible—Liability of company for default of agents—Contributory negligence of workmen—Claim for damages under Lord Campbell's Act—Prevention of Accidents Rules,* 1902, *R.* 9.

R. 9 of the Prevention of Accidents Rules provides as follows: "With the object of protecting men working in or near lines of railway..... the railway companies shall in all cases where any danger is likely to arise provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men and the persons employed shall be expressly instructed to act for such purpose. . . "

One day two workmen who were engaged in repairing the locking bar on the down line of a railway company saw a down train approaching and stepped aside for safety, not seeing the up train they went on to the up line, were struck and killed by the up train. It appeared that the Railway company had by its rules expressly delegated the function of keeping the look-out to the foreman or other man in charge of the gang for the time being. In an action for damages under Lord Campbell's Act by the widow of one of the victims

*Held,* that the accident was due not to any negligence or breach of duty on the part of the company but was due to the carelessness of the workmen themselves; that assuming there was no look-out man employed it was due to the neglect of the deceased because that duty had been delegated by the Railway company to the gang and that therefore the representatives could not recover for the consequences of the default of the deceased.

*Per Viscount Cave, L. C.* :—"The duty of a company in any case of danger is an absolute duty to provide a look-out man and to see that he is instructed to act; and if in any case it were proved that the foreman to whom, under the company's regulations, this duty was entrusted had failed in his duty and had not appointed a look-out man, the company might well be held liable for injury happening to any member of the gang other than the foreman himself."

*Per Lord Sumner* :—"It is not a breach of the rule on the company's part to delegate to the foreman (as an incorporated company must delegate to some one) the duty of posting a look-out man *ad hoc*, who has been previously instructed, equipped and provided for the purpose."

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LAKE *v.* SIMMONS, (1927) A. C. 487 (H. L.).

*Insurance Policy—Exception clause as to theft by customer—Goods obtained by fraudulent pretences—Formation of contract—Relation of 'entrusting to customer' if constituted—General and special customer.*

*L* a jeweller became insured by a Lloyd's policy underwritten by *S*. The perils insured against were loss or damage to any property arising from any excuse with certain exceptions set out. The exception clause provided that the insurers were not liable for "loss by theft or dishonesty committed by ..... any customer in respect of goods entrusted to him by the assured.... unless such loss arise when the goods are deposited for safe custody with such person". It happened that *E* a practised criminal made representations to *L* that she was the wife of a well-known man and after making several purchases at short intervals and paying for the same on her own account she obtained two valuable jewels for approval and feloniously appropriated the same to her use. In an action by *L* against *S* on the policy for recovering the value of the jewels

*Held*, by the House of Lords reversing a judgment of the Court of Appeal in (1926) 2 K. B. 51 and restoring a judgment of McCardie, J., in (1926) 1 K. B. 366, that the insurers never intended to deal with *E* except as the wife of the well-known personage, that there was no *consensus ad idem* for the formation of a valid contract and that the relation of "entrusting to a customer" within the meaning of the exception clause did not arise. Also, that *E* was not a customer of the insured *quoad* the goods, the possession of which was handed over to her, within the meaning of the exception, though she may have stood in the relation of customer in other transactions.

*Per Viscount Sumner*:—"The natural meaning of 'entrusted' involves that the assured should by some real and conscious volition have imposed on the person, to whom he delivers the goods, some species of fiduciary duty".

REPUBLICA DE GUATEMALA *v.* NUNEZ, (1927) 1 K. B. 669 (C. A.).

*Conflict of Laws—Assignment of English debt in Guatemala—Parties domiciled in Guatemala—Validity of assignment in question—Law of domicil applicable.*

One *C* domiciled in Guatemala, and being there at the time, deposited in an English Bank in England a sum of money, thus creating a debt due by an English debtor, which must be demanded in England, but which, having been demanded in England, could be recovered by suit against the debtor in whatever jurisdiction he could be found. Some years after one *N* also a Guatemalan subject claimed the deposit from the English Bank. He produced a document passing between himself and *C* in Guatemala, both parties being then domiciled there, purporting to be an assignment or donation of the English debt. It was proved that if the effect of the document was to be determined by the law of Guatemala, the document was invalid, if by English Law there was a valid assignment. The question arose which law applied.

*Held,* by the Court of Appeal affirming a judgment of Greer, J., that English Courts should decide the question according to the law of Guatemala, and therefore *N* had no claim to the money.

*Bankes, L. J.* based his decision on the ground that the law of *domicil* was applicable to such a case. Scrutton and Lawrence, JJ., decided on the ground that either the law of *domicil* or the law of the place where the assignment took place was applicable.

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LEONARD *v.* WESTERN SERVICES, LTD., (1927) 1 K B 702.

*Motor omnibus—"Plying for hire", what constitutes—Town Police Clauses Acts,* 1847 *and* 1889.

*W* were the owners of a number of motor omnibuses and ran a regular service in some districts. *L* entered an omnibus one day and purchased a return ticket; she then got out in a district wherein *W* had no licence to ply for hire. Subsequently *L* got into another omnibus at that place and returned to her district.

*Held,* on those facts that the latter omnibus was not 'plying for hire' within the meaning of the Town Police Clauses Acts, 1847 and 1889.

*Per Salter, J.* :—"In order to constitute 'plying for hire' within the meaning of the Acts there must be a general invitation by the person in charge of the vehicle to members of the public to make contracts with him for carriage in the vehicle."

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MOLTHES REDERI AKTIESELSKABET *v.* ELLERMAN'S WILSON LINE, LTD., (1927) 1 K. B. 710.

*Shipping—Charterparty—Sub-charter for voyage—Shipowner's lien for freight—Bill of Lading contract one between shipper and shipowner.*

"In every case where bill of lading freight is received by the agent nominated by the charterers the shipowner can intervene and claim freight in the hands of the agent as his money. This is a result of holding that the bill of lading contract is one between the shipowner and shipper and not a contract between the charterers and the shipper. The legal right to the freight is in the owner and not in the charterer and the former can intervene at any time before the agent has received the freight and say the collections should be on his behalf. If the agent then collects the freight the shipowner can sue for it as money had and received".

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MARTIN *v.* BENSON, (1927) 1 K B 771.

*Costs—Disallowance for good cause—Contemptuous damages awarded in action for slander—Proper order as to costs—Rules of the Supreme Court, O.* 65, *R.* 1.

O. 65, R. 1 of the Supreme Court Rules provides that where an action is tried with a jury the costs shall follow the event unless the Court for good cause shall otherwise order. Where in an action for slander the plaintiff was awarded 1 3|4*d* by way of damages, *held*, that the proper order was that the defendant need not pay the plaintiff's costs.

*Per McCardie, J.* :—"The Judge must exercise his discretion as to costs, not only unfettered by, but wholly independently of any view expressed by the jury on that particular matter.... The smallness of the damages is an important element to be considered but it is not conclusive. But in the absence of special circumstances the Court may disallow costs where contemptuous damages are awarded..... In such cases the action should be regarded as oppressive and as one that should not have

been brought and that therefore 'good cause' exists for disallowing costs."

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REX *v.* CORY BROTHERS & Co., (1927) 1 K B 810.

*Corporation—Indictment for felony and for crimes involving personal violence—Legality—Criminal Justice Act,* 1925, *S.* 33.

S. 33 of the Criminal Justice Act, 1925 provides that "where a corporation is charged with an indictable offence the examining Justices may.....make an order empowering the prosecution to present..... a bill in respect of the offence..." A corporation was charged with the offence of manslaughter and an offence under the Person Act, 1861.

*Held,* that a corporation could not be indicted for a felony or for crimes involving personal violence and that this rule was not modified by S. 33 of the Criminal Justice Act.

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KREDITBANK CASSEL *v.* SCHENKERS, (1927) 1 K. B. 826 (C. A.).

*Company—Articles of Association providing for delegation regarding signing Bills and cheques—Branch manager forging bills—Company whether bound.*

The doctrine that persons dealing with limited liability companies are deemed to have notice of the company's articles of association and need not inquire whether the domestic arrangements necessary to carry out the power of delegation there given applies only to a genuine transaction and not to a forged document.

A company by its articles had authority to delegate the power of drawing and endorsing bills but in fact it did not delegate anybody; but one of its branch managers as such signed bills of exchange and fraudulently obtained credit. The bills being subsequently dishonoured the drawee sued the company.

*Held,* by the Court of Appeal reversing a judgment of Wright, J., in (1926) 2 K. B. 450—

(1) that there being no proof that the person dealing with the company had knowledge of the existence of the power of delegation given to the company he cannot be heard to say that he acted upon it. *Houghton and Co.* v. *Nothard; Lowe* v. *Wills,* (1927) 1 K. B. 246 followed;

(2) the rule that persons dealing with a company must be deemed to have notice of the articles of association was inappli-

cable because the bills of exchange were forged documents. *Ruben's Case,* (1906) A. C. 439 applied;

(3) that it was not within the ostensible authority of the branch manager to sign bills for the amount and in the form he did.

The action was consequently dismissed.

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REX *v.* DAILY MIRROR *Ex parte* SMITH, (1927) 1 K. B. 845.

*Contempt of Court—Newspaper publishing photograph of accused before trial—Question of identity in issue—Liability of newspaper for contempt.*

"In the publication of a photograph no less than in narrative, it is the duty of a newspaper to take care to avoid publishing that which is calculated to prejudice a fair trial.... There is a duty to refrain from the publication of the photograph of an accused person where it is apparent to a reasonable man that a question of identity may arise".

Where at a time when the accused had been arrested upon a charge of attempting to shoot a police officer and had been brought before the Justices upon the charge and before the proceedings were completed two newspapers published the photograph of the accused

*Held,* that the newspapers were liable to be charged for contempt of Court because the identity of the accused was in issue in the case and the accused had been prejudiced regarding the same.

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IMPORTERS COMPANY *v.* WESTMINISTER BANK, (1927) 1 K. B. 869.

*Banker and Customer—Banker receiving payment on behalf of another bank—Customer bank subsequently proved to have no title—Liability of banker—Collecting bank whether "receives payment"—Bills of Exchange Act,* 1882, *S.* 82.

S. 82 of the Bills of Exchange Act, 1882 provides that "where a banker in good faith and without negligence receives payment for a customer of a cheque.... and the customer has no title.... the banker shall not incur liability to the true owner of the cheque for having received such payment".

*Held,* that the word 'customer' in the section can mean another bank for whom the bank claiming protection collects a

cheque as agent; also that the expression 'receives payment' applies not only to a receiving bank but also to a collecting bank.

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*In re* ROPUER SHIPPING COMPANY AND CLEEVES WESTERN VALLEYS ANTHRACITE COLLIERIES, (1927) 1 K. B. 879 (C. A.).

*Shipping—Claim for demurrage—Owners using vessel for bunkering—Claim not sustainable for that period—Burden of proof.*

In order that demurrage may be claimed by the owners of a vessel they must at least do nothing to prevent the vessel being available and at the disposal of the charterers for the purpose of completing the cargo.

*Held,* on the facts that demurrage could not be claimed during the period when the vessel was used by the owners for bunkering and was therefore not available for the charterers.

*Per Sargant, L. J.* :—"When it is shown that, by the act of the owners, the vessel has been placed in a position which renders her unavailable for the charterers' purposes in loading the cargo, it is for the owners who claim demurrage to show that the charterers had not in fact cargo available for loading during the period the vessel was used for bunkering".

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KOECHLIN ET CIE *v.* KESTENBAUM BROTHERS, (1927) 1 K B 889.

*Bill of Exchange—Foreign Bill—Endorsement in foreign country and acceptance in England—Validity of endorsement to be determined by foreign law—Bills of Exchange Act,* 1882, *S.* 72.

A Bill of Exchange was drawn and endorsed in France and accepted in England. It appeared that the endorsement was not by the payee but by his agent and that such endorsement though valid under French law was invalid under the English law.

*Held,* that under S. 72 of the Bills of Exchange Act, 1882, the validity of the transfer of the Bill of Exchange must be governed by the law of the country in which the transfer took place and that consequently there was a valid endorsement.

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REDERI AKTIEBOLAGET ACOLUS *v.* W. N. HILLAS & Co., 96 L J K B 186 (H L).

*Shipping—Charterparty—Provision that expenses for discharging cargo should be borne by charterer—Same to be borne by ship under port custom—Which prevails.*

A charterparty provided that the cargo was to be loaded and discharged according to the custom of the port and that the cargo was to be taken from alongside the steamer at charterers' risk and expense. The question arose as to who should bear the cost of putting up a staging from the ship to certain rails and carrying the goods across the staging and placing it on bogies on those rails. The charterers pleaded that there was a custom of the port under which the expense in dispute was to be paid by the ship.

*Held,* that the custom of the port could not override the express provisions of the charterparty and that consequently the charterers were liable for the expense.

(1922) 1 A. C. 397 applied.

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GALE *v.* MOTOR UNION INSURANCE Co., 96 L J K B 199.

*Insurance—Two policies of insurance—Provisions in each policy denying liability in case of insurance with others and for rateable distribution—Construction—Rateable distribution as meaning half and half.*

The claimant had insured with two companies against loss resulting from motor collision. Each of the policies provided that if there was another operative insurance, it, the policy in question, could not be used to give any indemnity, but each policy also provided that if there were two policies which were operative then there was to be rateable contribution or payment. In an action for indemnity against both the companies

*Held,* that the proper construction of the clauses was that the provision as to rateable distribution qualified the preceding clause denying liability and that the proper award was that the claimant should be paid rateably by the two companies, that is in the proportion of half and half.

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HOUGHTON & Co. *v.* NORTHARD; LOWE *v.* WILLS, 96 L J K. B. 25 (C. A.).

*Company—Contract by director not in the course of business—Validity—Power of delegation vested in Board of Directors—No delegation in fact—Third party whether entitled to assume delegation.*

An ordinary director, acting without authority in fact, is not capable of binding a company by a contract with a third party which is not in the ordinary course of business, merely on the ground that the third party assumed that the director had been given authority by the Board to make a contract. In such a case it is immaterial that the articles of association contain wide powers of delegation by the Board of Directors.

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SHUTTLEWORTH *v.* COX BROS. & Co., 96 L J K B 104 (C. A.).

*Company—Alteration of article by special resolution—Test of* bona fide*—Interference by Court—Companies Act*, 1913, *S.* 13.

The power given to a company under S. 13 of the Companies Act "to alter or add to its articles by special resolution" must, like all other powers conferred on majorities, be exercised *bona fide* and for the benefit of the company. The true judges of the interests of the company in such a case are the shareholders acting in good faith. Their decision is not liable to be set aside unless it is so outrageous and oppressive that no reasonable man could arrive at such a conclusion.

*Allen* v. *Gold Reefs of West Africa*, (1900) 1 Ch. 656 applied.

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## JOTTINGS AND CUTTINGS.

*Clearing the Bar.*—It was not until the case of *Malan* v. *Young* in 1889 (6 T L R 38) that any attempt was made to exclude the public from a Court in which ordinary civil proceedings were in progress. The action was one of libel and slander Sir Charles Russell, Q. C., Mr. Finlay, Q. C. and Mr. Blake Odgers represented the plaintiff and Mr. Frank Lockwood, Q. C., Mr. Collins, Q. C. and Mr. Cagney the defendant. When the case was called on Sir Charles Russell intimated that it had been agreed between himself and his learned friends that, in the interest of third parties, it was desirable that the hearing should be in private. Denman, J., doubted whether he could give effect to their wish, but after consulting with some of his colleagues, stated that if the case were tried before him without a jury he would hear it in "camera". The jury was accordingly discharged and the Court cleared.

Some members of the Bar, not engaged in the case, were present on this occasion. One Village Hampden—Mr. Gould, Q. C.—asserted his right to remain in Court, but the Judge, having intimated that force would be employed if necessary, he peacefully withdrew.

—*The Law Journal*, April 23, 1927, p. 416.

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*Family and State in Criminal Jurisprudence.*—Insufficient attention has been drawn in the English Press to the extraordinarily interesting peculiarity of French criminal procedure, of which an instructive illustration has recently been afforded by *L'Affaire Daniels* at Boulogne. Here a French leader of the Paris Bar, instructed by the family of the deceased English lady, has attended the preliminary investigation by a magistrate and has put forward claims on behalf of the family of the deceased, *e.g.*, for an exhumation of the body, which has been supported by the order of the Court. It is not generally known except by lawyers who have had occasion to follow French judicial proceedings, *e.g.*, in a murder prosecution—that there are three parties to the case, not—as in England—two only. There is the Republic, the accused, and the next friend of the deceased, usually a member of his family. The latter has not only a right to be present and to put questions in cross-examination of witnesses, but he also has a right to be heard by the jury on the issue as to the damages which the accused, if found guilty, may, under French law, be held liable to pay the relatives.

—*The Law Journal*, May 7, 1927, p. 439.

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*Deterrent Sentences.*—The question of what are the objects of punishment is one which gives rise to a good deal of discussion, and on which there is a considerable difference of opinion. Some there are who hold that the particular crime of which the prisoner has been convicted should alone weigh with the Judge, and that the object of a penal sentence should be less to punish than to reform; others take the view that one of the matters to be borne in mind is the deterrent effect which the sentences inflicted for a particular offence may have on those minded to commit similar crimes. We do not propose to enter into a discussion on the ethics of punishment, at any rate at the moment; it is probably true to say that certain classes of crime can be checked by the deterrent effect of the sentences inflicted upon

persons convicted of such crimes, and that, in other classes of crime, this consideration does not apply. If there is one class of offence in which severity on the part of the judges is more likely than another to be salutary in checking the commission of other offences, we imagine that that is blackmail, and, for this reason, and quite apart from the merits of the particular case, we are glad to observe that the Lord Chief Justice has, this week, dealt with a gang of blackmailers convicted before him at the Old Bailey in a manner which will make blackmailers generally consider very carefully whether their game is likely to be worth the candle.

*The Law Journal*, May 28, 1927, p. 507.

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*The Good Lawyer and the Bad Cause.*—It is fitting to pass on for the benefit of those lawyers whose consciences are open to assault the advice which McCardie, J., at the "Reading" aforesaid, approved and quoted from the patriotic and pious Dr. Johnson: "How can a righteous man accept a brief for a party whose cause was bad?" Dr. Johnson: "Who can know whether a party is in the wrong until a judge decides the issue?" Sometimes, of course, the party himself knows and opens his mind to his counsel as a good patient will to his medical adviser. And in criminal causes there may be difficulties. Many a prisoner has, in the cells, told true things to his visiting counsel; and there is the case where an accused person sent a messenger to counsel with the declaration that he was not guilty; and that, after acquittal "half the swag" should be the advocate's reward. No; upon the whole, it would appear that Dr. Johnson's formula is inadequate; and McCardie, J., should know it.

—*The Law Journal*, May 28, 1927, p. 524.

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*Witchcraft and the Law.*—It is interesting, if a little surprising, to find a confession of belief in witchcraft, but Mr. Montague Summers in his *History of Witchcraft*, published last year—which contains much curious learning about witches and demons and their ways from the earliest times—comes to the conclusion that, while the witch persecutions were in general due to "atrocious extravagances" and the "idlest superstition", yet there is no way of accounting for "a huge number of cases" save by "acknowledging the reality of witchcraft and diabolic contracts". And he fortifies himself with a long

list of eminent men who all firmly believed in witchcraft. It begins with St. Augustine and comes down to William Blackstone, and among the intermediate names are Lord Bacon, Sir Edward Coke, and Sir Matthew Hale. We are not concerned to argue the question, and it is quite true that great judges have in this respect failed to rise above the superstitions of their times and have taken part in witch trials and witch killings that form one of the darkest passages in the history of the Criminal Law. The number who suffered, both here and on the Continent, is incredible. "It was sufficient", it has been said, "to be aged, poor, or half-crazed to ensure death at the stake or on the scaffold". Quite recently Lord Birkenhead, in his *Fourteen English Judges*, has excused Hale for his part in the trial of the Suffolk witches in 1662, on the ground that "the law affirmed the existence of witchcraft and made it an offence and Hale himself believed in witchcraft". And Judge Parry, who, in his chapter "Concerning Witchcraft and Wizardry", tells of the persistence of the superstition in remote country districts, thinks that Hale, "a civilised and learned man", need not be scoffed at for beliefs which have lasted for 300 years since his time. In any case Hale was no worse than the judges of a later day who lent themselves to the infliction of capital punishment for petty offences which would now be met by probation. However, in an age which is not exactly an age of robust faith, it is, as we have said, interesting to find a serious author asserting that there must be something in witchcraft after all.

—*The Law Journal*, June 11, 1927, p. 545.

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*The Judiciary and the Executive.*—It is the considered opinion of many that there is a real danger lest the "constitutional balance" between the executive and judicial functions of the State may be seriously upset by the growing tendency of the Legislature to transfer large judicial and even law-making powers to the various government departments. The powers conferred on the Minister of Health under the Public Health (Smoke Abatement) Act, referred to in these columns recently is merely the latest example of a long series; a tendency so marked that some critics profess to see in it a deliberate policy having for its object the transfer of power into the "safe" hands of the permanent Civil Service, which may be trusted to preserve much of what it has been given throughout the short and uncertain lifetime of a modern Parliament. For (it is

said), however reforming or revolutionary a Government may be, the altering of the *status quo* is of necessity a long and tedious business, even with the hearty co-operation of the Civil Servants; and powers conferred on the "Minister" are powers nearly always in fact exercised by the expert and permanent secretary or other permanent head of the Department. The facts appear to be all against the existence of a policy, but the tendency is indisputable. It is due in large measure to the extension of Government interference and control to matters formerly regarded as entirely outside its province: Public Health, Urban Administration, Railways, Roads, Broadcasting, are a few. In such and similar matters, the "Ministers" have and exercise powers which would have astounded the politicians and constitutional lawyers of last century. They can compulsorily take away land and other property from the lawful owners, can destroy rights acquired by purchase or inheritance, and can do by the stroke of the pen that which formerly required the authority of a special Act of Parliament.

—*The Law Journal*, June 11, 1927, p. 547.

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*The Judges' Warning.*—It may be assumed that the frequent protests of the Lord Chief Justice—as in a recent case where he pointed out that a Minister could at once nullify the effect of a judgment of the High Court by merely issuing an order under the authority conferred on him by Act of Parliament—are not without foundation, and it is noteworthy that Eve, J., the senior Chancery Judge, and one extremely unlikely to be stirred by groundless apprehension, has "heartily supported the protests which from time to time had been uttered by the Lord Chief Justice and others against attempts of the Executive to invade the territory of the magistracy. If the administration of justice was to be continued in this country upon the principles upon which it had been firmly established, and which alone were acceptable to the people, it was of the utmost importance that the line of demarcation between the Executive and the Magistracy should be studiously and strenuously maintained ..... our Courts offered a more satisfactory arena for the assertion of right and the remedy of wrong than any Government Department, however august, and he hoped every effort would be made to control any insidious attempt of the

Legislature to curtail the right of every citizen to have recourse to the Courts." No doubt the citizen feels that Parliament, which gave these powers, can take them away. But the taking away will not be an easy or a painless performance, and we agree with the Judges that prevention is better than cure.

—*The Law Journal*, June 11, 1927, p. 547.

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*Machiavelli.*—Those who are interested in theories of statecraft have been celebrating the 400th anniversary of the death on June 22, 1527, of Nicolo Machiavelli, the writer of *Il Principe*. Machiavelli stood for the divorce of morality and politics. As to why he took this line there are opposing views. Amid the internecine struggles of Italian States, he may have thought that the strong ruler—the Prince—regardless of means so he gained his end, was the only way to restore Italy to unity and greatness. The parallel with modern conditions in Italy and Russia is too obvious to call for comment, save to note the difference that character or circumstances have saved Italy from the crimes which have marked the present *regime* in Russia, and which have recently been repeated in a specially revolting form. This view of Machiavelli's teaching so impressed those times that Shakespeare, some hundred years later, in the Third Part of *King Henry the Sixth*, made Gloucester boast that he could

"Set the murderous Machiavel to school."

Or was Machiavelli, writing in banishment from Florence, only fawning on Lorenzo de' Medici, to whom his work was addressed, in the hope of being recalled to favour? This is speculation, but as to the tendency of his work there is no doubt. He recapitulates the means by which Cæsar Borgia attained to power, and on serious examination of his whole conduct, he sees "nothing to be reprehended." And force and fraud are equally useful to a prince. "A Prince who is wise and prudent cannot or ought not to keep his parole, when the keeping of it is to his prejudice, and the causes for which he promised removed." It may be long before the practice of politics, national and international, is based completely on the canons of humanity and morality, but Machiavelli's disregard of these canons seems to have shocked his own times as much as it shocks the present.

—*The Law Journal*, June 25, 1927, p. 593.

*Swift, J., utters a Good One*.—The observation which recently fell from the lips of Mr. Justice Swift, when he expressed the view that in a certain matter a brother Judge had "lapsed into inadequacy," is generally regarded as one of the best of its kind, and its originality has not yet been impeached.

Perhaps the classic example of the mode in which a judge may convey an impression not wholly favourable of one of his judicial brethren is that of Bowen, L. J. : "In coming to the Court of Appeal, the judgment of my brother Kekewich in your favour is like putting to sea on Friday—unfortunate, but not necessarily fatal." Mathew, L. J., achieved a double in one sentence when he remarked that "his brother Kekewich had misdirected himself in point of law by attaching undue weight to an *obiter dictum* of his brother Ridley."

Counsel have sometimes ventured to suggest that the judge who tried the case was wanting in judicial prestige. "This, my lords, is an appeal from Mr. Justice Dash, but there are other reasons for saying that the appeal should be allowed" is the traditional exordium in opening an appeal in such cases. Mr. Upjohn, K. C. (a courageous advocate), opening an appeal from the Divisional Court, said that he was appealing from a judgment of Mathew, J. "But I thought," said the Master of the Rolls, "this was an appeal from the Divisional Court?" "It is true," replied Upjohn, "that Chief Justice Coleridge was also present." It should perhaps be explained that from time to time Lord Coleridge closed his eyes during the course of an argument.

—*The Law Journal*, June 25, 1927, p. 610.

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## BOOK REVIEWS.

THE ART OF CROSS-EXAMINATION, Vol. I, by Messrs. P. Ramanatha Aiyar and P. Raghava Aiyar, revised, enlarged and brought up to date by Mr. K. S. Venkatrama Aiyar, B. A., B. L., High Court Vakil. Published by the Globe Publishing Company. Price Rs. 3-8-0 per volume.

The learned authors of this book have dealt in the course of this volume with the principles and precedents of the art of cross-examination. Several books have been published on this subject here and in England. The art of cross-examination comes largely by experience but there are principles which a

beginner has to learn before starting on this very difficult art. As it is gained largely by personal experience and the observation of the conduct of cases by eminent advocates, the authors have done well in paying greater attention to the collection of precedents than to the enunciation of mere principles, as illustrations and precedents leave a clearer and more lasting impression than a statement of the principles. The authors have mainly attempted to collect as far as possible instances where success has been attained in cross-examination by eminent advocates in different countries and in different times. The book is therefore likely to be not only full of instruction but of great interest.

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CONTRACT ACT MADE EASY—QUESTIONS ON THE INDIAN CONTRACT ACT WITH FULL ANSWERS, by Mr. N. K. Ponkshe. Price Rs. 1-4-0.

In these pages the author has selected the questions on the Indian Contract Act from the various law examinations of the Indian Universities for the last twenty-five years and the answers to them are given concisely and clearly with the important case-law thereon. If the object of the publication is to supplant the well-known treatises on the Indian Contract Act to the student of law one cannot but regret its publication. We venture to think that the object of the author is on the other hand that after the student has carefully studied the leading treatises on the subject he should take to this book to collect his thoughts and clarify his answers to the questions from the treatises he has already studied. We believe that the readers of this book will not abuse it by leaving out the treatises and relying upon it solely for securing a pass in the examination.

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