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REMINISCENCES OF THE BAR*

BY

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(*Continued from Vol. XLVII, page 66.*)

I now come to Sir Bhashyam Aiyangar's great rival at the bar, Sir S. Subramania Aiyar, then Mr. Subramania Aiyar. Mr. Subramania Aiyar came to Madras in the year 1885. He had been enrolled in the year 1869, but he was practising in Madura till 1885. His reputation, however, preceded him to Madras as perhaps the ablest lawyer-advocate in the mofussil. For a lawyer in the mofussil, it requires very considerable effort to keep himself fully in touch with law for the simple reason that the Judges before whom the practitioners have to appear do not care very much for law. But Mr. Subramania Aiyar had managed to keep himself fully abreast of all legal literature and when he came to Madras he came not as one ill-equipped for fight against leaders here, but as one who had been trained and improved by his practice in the mofussil. As an advocate his reputation had certainly spread to all the southern districts and I am not sure if he was not known to the people of the Telugu districts also. The immediate reason for his transfer to Madras was his appointment as a member of the local Legislative Council. I have been told by the late Mr. C. R. Pattabhirama Aiyar that when first appointed to the Legislative Council Mr. Subramania Aiyar had no intention to transfer himself to Madras but only to visit Madras on occasions, and that he asked Mr. Pattabhirama Aiyar to spare him a room in his house when he came to Madras. However, latterly he changed his mind and settled here in 1885. From

*A series of lectures delivered to the apprentices-at-law in 1918.

the moment he settled in Madras to the day he left the bar in 1895 (when he was appointed Judge on the death of Sir T. Muthuswami Aiyar) his career here was one of distinguished success just as it had been in Madura and the adjoining districts. From the moment of Sir Subramania Aiyar's arrival Rajah T. Rama Rao lost his position of prominence. He had been one of the leaders of the bar and was a rival of Sir Bhashyam Aiyangar, but after Sir S. Subramania Aiyar's arrival the two great rivals at the bar were Sir Subramania Aiyar and Sir Bhashyam Aiyangar. They generally appeared against each other and occasionally clients who could afford to have a syndicate of lawyers on their side, like rich Nattukottai Chetties and Zemindars, arranged to engage both on their side so as to leave no opportunity to their opponents of engaging either. As a lawyer Sir Subramania Aiyar's reputation was inferior only to that of Sir Bhashyam Aiyangar. He had a remarkable memory for case-law and he could give you the volume and the page and the name of the case. As an advocate, he was one of the most remarkable men that I have ever seen, and a man of extraordinarily quick perception. I spoke to you on the last occasion about the time taken by Sir Bhashyam Aiyangar in going through the pleadings, how slowly and carefully he went through every line of the pleadings and other references in the case. The time that Sir Bhashyam Aiyangar took was of course not wasted but he was a very slow and careful reader. With Sir Subramania Aiyar it was quite different. You may give him a record of 500 pages or 1,000 pages ; he would go through it with extraordinary rapidity, a rapidity which was quite consistent with his remembering all the leading facts of the case. He was a man of extraordinary rapidity in reading and of great quickness of apprehension. He marshalled his facts excellently and put them before the Judges in the most effective and telling way. It was often a pleasure to contrast the two great rivals and their methods. Sir Bhashyam Aiyangar was exceedingly careful in his preparation, took a lot of time and when he appeared in Court, was very slow, measured, guarded in his utterance and never committed himself to a single statement of fact or law which he might have occasion afterwards to retract, and sometimes was so slow and measured as even to give rise to a little impatience on the part of his hearers. Sir Subramania Aiyar, on the other hand, was an extremely rapid speaker. His words

came in a torrent. A man of highly emotional nature, he was a gifted speaker, one of those few men to whom eloquence came naturally, not as a result of any preparation. Nobody who heard Sir Subramania Aiyar speak would ever suppose that his eloquence was the result of any consumption of midnight oil. Another great advantage he had was an excellent knowledge of human nature which was due to two or three circumstances, partly to his long practice in the mofussil and his conduct of original suits which brought him in contact with all descriptions of characters in the witness-box and in the persons of his clients and partly also to the fact that he had the faculty of sympathy and imagination. If you want to judge of a person's character aright you must, to a large extent, be able to put yourself in his position which means imagination. In arguing questions of evidence he had no superior at all, nor in the presentation of facts. It was only in arguments on pure questions of law that Sir Bhashyam Aiyangar could be said to be his superior and it was only he who could be said to be his superior. There used to be numerous occasions when Sir Subramania Aiyar's eloquence found opportunities for display. There was one case which made a very indelible impression upon my mind, the case of a Mahant of Tirupati, against whom a criminal prosecution had been launched. There was an application for removing the flag-staff of the temple and ascertaining whether a large quantity of gold coins and other treasure which had been buried under the flag-staff at the time when he was put in possession had or had not been misappropriated by the Mahant. There was no denying the fact that there was treasure put in there at the foot of the flag-staff when it was erected. The question was whether it had not been removed. Naturally the Mahant who was defended by Mr. Norton resisted the application with all his might. He invoked the religious sanctity of the flag-staff and he appealed to the Court to avoid a sacrilege which would ring throughout the orthodox world and he advanced every possible argument against digging up the site of the flag-staff. Mr. Norton went on for over three hours. It was in the old High Court before the Chief Justice Sir Arthur Collins and another Judge. Sir Subramania Aiyar's turn then came. He was then acting Government Pleader. He spoke for less than an hour but the effect was electric. All Mr. Norton's arguments were

smashed completely within that short space of less than an hour. He wound his magnificent speech, a speech of real eloquence with that well-known saying *'Fiat justitia ruat caelum'* which means as you know, 'Let justice be done even though the heavens fall.' He asked whether the Judges would allow it to be said that justice should fail because a flag-staff was going to fall. It was one of the best speeches I have ever heard from him, compact, condensed, and full of vigour and eloquence, just like him. That was of course only one of the occasions. There have been several occasions when he used to speak like that. A man of a highly emotional nature and high-strung nerves, he could easily work himself up on any subject which appealed to his feelings. As an advocate in the conduct of his case he was exceedingly fair, fair to his opponents and fair to the Bench before which he appeared and he recognised the obligations which forensic ethics lays upon all practitioners. He was never in the habit of bullying people or brow-beating his opponents or trying to prevent them from getting a hearing. He was one of those men who, as they grow older get mellower and mellower and whose nature becomes more and more pleasant. His ideal of conduct rose day by day. He was one of those men who have always before their mind's eye the very highest ideals of professional ethics associated with the traditions of the English bar, and every day he consciously made an effort to rectify any little imperfection he might detect in himself to rise from a lower self to a higher self and to follow the very highest standards of conduct. It was he that first introduced, if I remember right, the practice in the Vakils' Section of the bar of paying a fee to persons whom you might ask to appear for you in your absence in the conduct of your case. Before his days there was no settled practice in that respect. If a senior vakil wanted to go elsewhere and handed over his case to a junior, he seldom thought of paying his junior. In fact it may be said it was non-existent before him and as to paying any other persons who might appear on your behalf that was a matter between the client and the other vakil who might be engaged or it may be that the client might require the vakil he originally engaged to refund some portion of the fee, but it was all a matter for arrangement between the vakil and the client. It was Sir Subramania Aiyar who introduced the practice of paying a portion of his fee to any junior to whom the case was entrusted

by him during his absence and he found means and opportunities of encouraging many a junior whom he considered promising in this manner. I might mention one other characteristic of Sir Subramania Aiyar and that was his sweet reasonableness. There was no man who was more freely open to conviction, who was ready to listen to anybody fully and then make up his mind. He was incapable of any harsh or unkind sentiment or word against any one.

Among those who belonged to my set were the late Mr. V. Krishnaswami Aiyar, Mr. P. R. Sundara Aiyar and Mr. T. R. Ramachandra Aiyar. Mr. T. R. Ramachandra Aiyar is the only one alive. Mr. K. Naraina Rao was also of the same set but he died a year or two ago. As regards the influence exercised by Sir Bhashyam Aiyangar and Sir Subramania Aiyar upon the new generation, the influence of Sir Bhashyam Aiyangar was more marked than that of Sir Subramania Aiyar. It is unnecessary to go into the question why it was so. But there it was. Sir Subramania Aiyar did not exercise the same influence upon moulding the ideals and methods of the next generation. What appealed to the set was the great thoroughness, circumspection and devotion to law which characterised Sir Bhashyam Aiyangar and it set the tone to all young men who joined the bar in my time and certainly to all of us who were settled in Mylapore, so much so that the late Mr. Anandacharlu used to make complaints in a good-humoured way against our having been Bhashyamised. Sir Bhashyam Aiyangar had a magnetic influence over all the young vakils there, so that the observation was not without foundation. We had a Vakils' Association in the eighties. The first Secretary was, I think, Mr. S. Gopalachari who afterwards became a Subordinate Judge and then a District Judge. He was succeeded by Mr. K. P. Sankara Menon. He died as a High Court Judge in Trivandram. Between 1885 and 1889 the Society began to languish. It had hardly even a local habitation in the High Court. We succeeded in getting a room eventually in the old High Court, but a change for the better began when the secretaryship devolved on the late Mr. Krishnaswami Aiyar. He brought all the energy of his personality to bear upon the work of the Association and it began a vigorous career under his initiative towards the end of the eighties. One of the first things that was done by the Vakils' Association was, small perhaps though it may appear to you, the introduction of the

practice of Vakils wearing gowns. That was due to the initiative of the Vakils' Association. The circumstances that led to it were these : If the Vakils wanted to enter any Court —the Sessions Court or any other Court—they were turned out by the Court-keeper because he did not know who was who. We felt it a great grievance. We wanted some means of recognition by which we might pass any dragon of a Court-keeper. That was one of the reasons which prompted us to ask for the introduction of the practice of wearing gowns. Of course I do not say that that was the sole reason. There were more substantial reasons. We wanted recognition of our status, because whether in the matter of general education and attainments or in the matter of legal qualifications we felt we were not a whit inferior to the other section of the bar which considered itself to be solely and pre-eminently entitled to be called 'the bar.' We thought we had as much right to a recognition and to similar privileges in the way of vestments as the barristers. It was fortunate that we had then on the bench Sir Arthur Collins, the old Chief Justice, and Mr. Justice Parker, who was a Civilian Judge. Sir Arthur Collins, whatever his other defects or deficiencies, was not obsessed by any special love of his own branch of the bar. He liked to treat the vakils and barristers equally and impartially. So, thanks to him, we got the privilege. I am sure you all appreciate the advantages of that privilege which your predecessors secured.

Another event that relates to the bar is connected with the history of legal journalism. *The Madras Law Journal* was brought into existence in the year 1891. The men who took the chief initiative in starting it were Mr. Salem Ramaswami Mudaliar, Sir C. Sankaran Nair, Mr. V. Krishnaswami Aiyar and Mr. P. R. Sundara Aiyar. They were the original four editors of the *Madras Law Journal*. Even before that time Madras had led the way in legal journalism. *The Indian Jurist* had been started long before and had been run by Mr. Scharlich who was the first Barrister-at-Law and the Chief Presidency Magistrate in Madras. After the *Indian Jurist* came to an end the *Madras Jurist* was started. That was conducted by Mr. Nelson, a distinguished member of the Civil Service. He conducted the *Madras Jurist* for some time and it died within a few years after the *Madras Law Journal* came into existence. No other presidency had any legal

journal to boast of and we may therefore fairly claim the credit of having been the first in the field of legal journalism. Mr. Salem Ramaswami Mudaliar died in 1892. Sir C. Sankaran Nair retired in 1893. I joined it in 1893 and it has continued ever since and I believe it continues to flourish. The *Calcutta Weekly Notes* was started years after we entered the field. I think it was in 1896 or 1897 that the *Calcutta Weekly Notes* was started. They applied to me for all information as to what journals we were taking and exchanging and a number of other things. And years after the *Calcutta Weekly Notes* came the *Allahabad Law Journal.* Since that date numerous other law journals have sprung up. But the credit of being pioneers in the field of legal journalism belongs to this presidency and the credit of having conducted the longest-lived periodical belongs to the Vakils of Madras.

I may pass on to mention another institution. I am perhaps applying too great a name when I call it an institution. It was quite an informal affair that we used to have in those early days but it was certainly a most valuable gathering and contributed not a little to the advancement in legal knowledge of those who joined it. We had a sort of an informal debating society for law. Once a week we used to meet in Sir Subramania Aiyar's house every Saturday at 11 o'clock. It was not a debating society with any special organisation or to which anybody who paid a fee could claim admission. It was confined only to a few. The members were Sir Subramania Aiyar, Sir Bhashyam Aiyangar, Mr. T. Subba Rao, Mr. V. Krishnaswami Aiyar, Mr. P. R. Sundara Aiyar, Mr. V. C. Desika Chariar, myself and probably two or three more. I do not think it comprised more than a dozen. What we did was, we discussed the important decisions in the Indian Law Reports. The four series were distributed among four of the juniors. We had to read the cases and propose for discussion such decisions as were considered questionable. We did not trouble ourselves with any unimportant questions or with decisions the soundness of which was not open to question. But any important questions as to which there was a doubt as to the correctness of the decision were brought up for discussion. The discussions were generally most edifying and helped to clarify ideas, and very often many of the results of those discussions appeared in the *Law Journal* in one form or other. It was an institution of great value. It went on for about two

or three years and then shared the fate of other institutions of excellent intentions in this country.

I will now pass on to say a few words about some of the Judges then and the Judges that succeeded them. Sir Arthur Collins joined about July, 1885. His reign lasted for the long period of 14 years. He retired in 1899. One of his merits I have already referred to, *i. e.*, his impartiality between the different sections of the bar. He was a nice pleasant old gentleman in talk in private life. But in Court he put on an air of great dignity and very stiff-backed dignity in which he was not a little helped by his fine physique and appearance. But when I refer to these two merits I think I have fairly exhausted his merits. As a lawyer he had very little equipment. He had been known to have had some criminal practice in England and there was a story related of him by Montague Williams in his *Leaves of a Life*. Collins wanted to put some questions before a Judge whose name I now forget and then the Judge said 'I think you had better not put the question.' Collins pressed again. Then the Judge repeated, 'Well, if you want to put the question I am quite willing, but you must take the risk.' Then Collins at once withdrew his question and sat down. He knew whom he could place confidence in and he found out soon after he came here that if he sat with Sir T. Muthuswami Aiyar he would be fairly safe. So he generally sat with Sir T. Muthuswami Aiyar. Sir T. Muthuswami Aiyar used to dictate judgments and he used actually to take them down. The position of dictatorship had been acquired by Sir T. Muthuswami Aiyar on various grounds—his vastly superior knowledge of law, his vastly superior natural abilities and his enormous experience in different spheres of judicial and executive work gave him a great advantage over all his colleagues so that they always treated his opinions with deference and were willing to be guided by him. It was only long afterwards that one or two of the Judges began to kick against the pricks. But for the whole of ten years during which I knew Sir T. Muthuswami Aiyar whenever he sat in a bench with another colleague, he used to dictate and that colleague used to write down whether he was senior or junior. In cases where Sir T. Muthuswami Aiyar reserved judgments he used to write himself. Sir Arthur would pretend to put in a word here and there as if he also contributed some-

thing by way of discussion just as a Professor of Sanskrit in the Presidency College under whom I studied used to have the translation and the original side by side on a sloping desk so that it could not be seen by the pupils and he used to give out the meanings of the stanzas as if independently of the translation. That was the sort of artifice which Sir Collins often employed, and during all the fourteen years of his Chief Justiceship the number of judgments which he himself wrote could be counted on one's fingers. Very few judgments were written by him—a most remarkable contrast to his gifted predecessor, Sir Charles Turner. You may probably by hunting the Reports for fourteen years find two or three Full Bench judgments which simply give the facts of the case and then state in the result 'I agree with so and so.' There was another trait of Sir Arthur Collins which may be mentioned here. He was generally willing to allow any kind of argument in civil cases and in criminal appeals. He had an idea, however, that criminal revisions ought to be discouraged and he started the practice and maintained it throughout his time—as soon as a person got up and argued a criminal revision petition on behalf of the accused, Sir Arthur Collins would say 'Mr.—will you sit down or shall I give notice for enhancement of sentence?' This had a magical effect upon the person supporting the petition on behalf of the accused, for naturally people thought that it would be better not to run the risk of enhancement. They were rather content with the punishment already meted out to their clients. The same disposition of hostile attitude to criminal revision petitions was maintained by another Judge, but he did not threaten to enhance so often. But he simply would not listen. I will mention him later on. In civil work Sir Arthur generally sat with Sir T. Muthuswami Aiyar in the more important cases and in the less important with Mr. Justice Parker who he knew would be quite safe especially in dealing with questions of fact. Mr. Parker had, of course, the civilian bent of mind and was quite a fair-minded man, a very fair specimen of a Civilian Judge. Naturally he would convert every question of law into a question of fact and avoid a decision on the law just as with Sir Bhashyam Aiyangar the tendency was the other way, to convert every question of fact into a question of law, and if there was any room for introducing any question of law and disposing of the case upon that question without bothering

himself with questions of fact. Mr. Parker was a good and patient Judge, but, as I said, with an inveterate tendency to avoid questions of law, an attitude which, as you know, is very unsatisfactory to a junior practitioner who wants to make a show of his knowledge of law or even to a senior vakil who finds his points of law ignored. Mr. Shephard was another Judge. He was a Judge of very quick apprehension—exceedingly quick. He would turn over pages with the eye of an eagle. You may go on arguing and he would refer to matters something like 20 pages or 50 pages off. He would light upon particular passages, upon whatever he wanted, with quick rapidity. But he had also the defects of his merits. While you were arguing something on the facts he would not be listening to you but would turn over the leaves and refer to something else 20 pages off. An extremely impatient Judge, he was very quick in following the arguments and was a really good lawyer, but he was not known to be always sound. This impatience was one of his most noted characteristics. Very often if you are arguing a first appeal on a question of evidence he would ask you 'Very well, who is your best witness ? A. B. is your good witness. We do not believe him. What is the good of going on with him ?' Once we knew that defect we said 'All my witnesses are important.' So we used to avoid any answer which would sell us away. And he was a Judge in whose eyes it made no difference whether the question in dispute was one which affected property worth Rs. 100, or a lakh of rupees or the life of a person. He would treat all with the same impartiality. But barring this impatience he was otherwise a very pleasant Judge. He never showed temper and the only thing that he did was to hustle. But hustling had a very perturbing effect on the practitioners, especially a young practitioner. There was another Judge, Mr. Justice Davies. He was the father of the present Principal of the Law College and no greater contrast can be conceived than that between the manners of the father and the manners of the son. You have in the son one of the pleasantest, nicest men we can meet, thoroughly good-humoured and genial. The father was very different. He was exceedingly rough in manners and he used very strong language and was very impatient. But he was a Judge who wanted to do justice. He did it in his own fashion. He was a conscientious Judge. As for the matter of that, if you care to examine the psychology of most of the

Judges, what they think of themselves, I am sure you will find that there are very few who are not conscientious according to their own lights and according to their own estimate. Mr. Justice Davies was anxious to do justice. There is no doubt about that, and especially in criminal appeals. For instance, in criminal appeals he had an inveterate prejudice against the Police, and against the evidence for the prosecution. Of course persons who appeared for the accused might consider it a very fine and noble trait in a Judge that he should have a wholesome distrust of Police evidence. But it very often led to failure of justice. On the whole he was considered a good criminal Judge by appellants in criminal appeals, but as to criminal revisions and anything of that sort, nobody who had one wished it to go before him. He was dead against criminal revisions. By some means or other he would simply refuse to listen, the same motive which weighed with Sir Arthur Collins. He would very often burst out into uncontrollable fury and you could hear his voice at the other end of the building if he spoke in this Court. But it is strange how widely people's opinions differ. Civilians considered him the ablest Judge after Holloway, which I think a blasphemy for Holloway was undoubtedly one of the greatest lawyers among Civilians. Sir Arthur Collins was succeeded by Sir Charles Arnold White as Chief Justice. He was a fine, pleasant and good-natured Judge. He was soft. He was a good Judge on the Original Side. His appreciation of evidence was good, but he was not a strong Judge. He was satisfactory so far as manners and his relationship to the bar were concerned. Upon the question as to whose fault it is that leads to a waste of judicial time, there have been two points of view, one taken by the Judges and one taken by the bar. The bar thinks that it is the fault of the Judges and the Judges think that it is the bar that wastes time. I dare say such conflict of opinion still prevails and it is not likely to disappear at any time. So far as the bar is concerned, they would always think that it is the fault of the Judges, and having been a member of the bar myself, I am more disposed to agree with the bar. At Simla I met Mr. (then Sir) Earle Richards who was then Law Member of the Viceregal Council. He had not then taken silk. I was talking to him about some of the occupants of the Bench here without any excess of respect. He said 'Look here, I must confess that I share that wholesome contempt for the Bench which the junior bar

feels.' The real state of things is this: If you see that the Judge understands and follows your argument, and if he makes it clear that he understands, there you have nothing further to urge and you can be shut up at once. So long as he has not been able to follow you or has not been able to make up his mind, you go on hammering at him in the hope that by dint of constant repetition, you may wear him out or make an impression upon him. The Judges think that it is not due to their own slowness to grasp a point. They grasp it fairly enough, but it is the practitioner who is constantly repeating and repeating, and if they shut up the practitioner, there is likely to be a howl in the periodicals and newspaper press. They think it better to put up with the lesser of the two evils and to allow him to go on. My own experience is that the fault lies with the Bench. If a case were argued before able Judges, the case could be gone through in a fraction of the time which it takes before other Judges and you have the satisfaction that you have been heard and understood. We have known cases where, for instance, an admission list 10 pages long, containing nothing but wretched miscellaneous matter, would occupy 3 or 4 days before a Judge, whereas before one of our really able Judges it could be finished within 4 o'clock or even earlier. This waste of time is, partly at any rate, due to the constitution of the personnel of the Bench. If Sir Arnold White was often slow in making up his mind, there was another Judge who erred on the opposite side and that was Mr. Boddam—very quick in making up his mind. Mr. Boddam was altogether a quick Judge. He was generally on the Original Side. He was a good cross-examiner, a good speaker, and possessed a beautiful, clear, ringing voice and was good at *extempore* judgments. But he had the knack of making up his mind long before he went through the case. He began the examination of the witness and put questions which favoured his own view and was greatly impatient towards questions which did not favour his view. He was not known for soundness of judgment. He was quick in judgment and resourceful. He found one way of preventing appeals against his judgment. It was found that a large percentage of appeals were successful against his judgments, and he refused to give copies of his notes of evidence (and he was supported in that by Sir Arthur Collins) and enunciated the doctrine that it was his private property. 'It is my notes of evidence

and you have no right to ask copies. You must take your own notes and read them if you want before the Appellate Court.' Of course it was done with the deliberate object of shutting out appeals against his judgments, but all the same it did not have that effect and unfortunately the number of appeals did not suffer appreciably any decrease. Each party relied upon his own notes and the Judges upon the notes of the Judge in the Original Court. Altogether it took a much longer time and the result was often the reverse of satisfactory. Boddam was very quick, witty, full of humour and pleasantry but he had this unfortunate failing of making up his mind at too early a stage and taking an one-sided view and shaping the subsequent development of the case according to his own prepossessions. During the last few years that I remained in the bar there was a change for the better in many ways. The new generation of Judges are men who generally are not wanting in patience and quite willing to listen and altogether more pleasant, and I understand also that they make no difference between one practitioner and another. Things are altogether much more agreeable for practitioners now, I believe, than in my earlier days.

SUMMARY OF ENGLISH CASES.

SWAN *v.* SINCLAIR, (1925) A. C. 227.

Easement—Right of way—Abandonment—Non-user and acquiescence in obstruction—If amounts to.

The non-user of a right of way for upwards of fifty years, coupled with the fact that throughout that period the person having such right acquiesced in the continuance of obstruction across the roadway will be good ground for inferring a release or abandonment of the easement. (1924) 1 Ch. 254 affirmed.

OWNERS OF S. S. MELANIE *v.* OWNERS OF S. S. SAN ONOFRE, (1925) A. C. 246.

Shipping—Salvage—Reward when payable—Tests of.

Per Lord Phillimore :—Success is necessary for a salvage reward. Contributions to that success, or as it is sometimes

expressed, meritorious contributions to that success, give a title to salvage reward. Services, however meritorious, which do not contribute to the ultimate success, do not give a title to salvage reward. Services which rescue a vessel from one danger but end by leaving her in a position of as great or nearly as great danger though of another kind, are held not to contribute to the ultimate success and do not entitle to salvage reward. Wherever the service has been meritorious, the Court leans towards supporting a claim for salvage. The mere fact that the claimant has brought the ship to a position or spot where the ultimate salvor has found her does not of itself show that the bringing to that spot was a contribution to the ultimate success.

GLASBROOK BROTHERS, LTD. *v.* GLAMORGAN COUNTY COUNCIL, (1925) A. C. 270 : 94 L. J. K. B. 272.

Contract—Police protection—Special services—Agreement to pay for—If legal—Consideration—Public policy.

During a colliery strike, the Police informed the owner that arrangements had been made to maintain order and afford protection to those who continued in work, but the manager wanted that a strong Police force should be billeted on the premises. This the Police authorities agreed to do only on condition the manager agreed to pay specially for those services. The terms were accepted, but afterwards the manager refused to pay. *Held,* by a majority of the House of Lords (Lord Carson and Lord Blanesburgh *dissenting*) the agreement to pay was valid and it was not void for want of consideration or as being against public policy. (1924) 1 K. B. 879 affirmed.

Per Viscount Finlay :—It is the duty of the Police to give adequate protection to all persons and to their property. In discharging this duty those in control of the Police must exercise their judgment as to the manner in which that protection should be afforded. But if a particular person desires protection of a special sort, there is no ground of public policy which makes a charge for such services illegal.

Per Lord Shaw :—If under the particular circumstances, protection could be afforded only by means of a special force established on the premises, no charge can be exacted from a private citizen for the performance of a public duty.

Per Lord Carson :—Any attempt by a Police authority to extract payment for services which fall within the plain obligations of the Police should be firmly discountenanced by the Courts.

MUNICIPAL COUNCIL OF SYDNEY *v.* CAMPBELL, (1925) A. C. 338.

Land acquisition—Compulsory purchase—Power to acquire given for particular purposes—Ulterior object.

A body such as a Municipal Council which is authorized to take land compulsorily for certain specified purposes, will not be permitted to exercise its powers for different purposes and if it attempts to do so, the Courts will interfere. Where proceedings of the Municipal Council, authorizing such an acquisition are attacked on the ground the purchase was for an ulterior purpose or object, the party impeaching it must prove the same.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* ONTARIO METAL PRODUCTS COMPANY, LTD., (1925) A. C. 344.

Life insurance—Statements made by the insured—Inaccuracies—Effect of.

One of the questions which a person who wished to insure his life had to answer in writing was to state the physicians who had treated him or whom he had consulted during the preceding five years and the nature of the complaint. The insured, who had never been ill in bed, during that period was, however, working too hard and taking his business too seriously and used to take hypodermic injections as against his run-down condition ; but he did not state this fact or disclose the name of the practitioner who gave him the injections. Under the terms of the policy issued, no policy was to be avoided by reason merely of any misrepresentation or inaccuracy in a statement unless it was a misrepresentation of a fact, material to the contract. *Held,* it was a question of fact in each case whether, if the matters concealed or misrepresented had been truly disclosed, they would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or have stipulated for a higher premium.

MARTIN *v.* STOUT, (1925) A. C. 359.

Contract—Breach of—Locality of breach—Contract to be performed outside country—Repudiation in England—Effect of.

Where parties entered into a contract to be performed in Egypt and one of them repudiated the contract by a cable from England, the breach took place in England and the Egyptian Court has no jurisdiction to entertain a suit for damages.

Where a contract is to be performed on a future day or is dependent on a contingency, and one of the parties to the contract repudiates it and shows by word or act that he does not intend to perform it the other party is entitled to sue him for breach of the contract without waiting for the arrival of the time fixed for performance or the happening of the contingency on which the contract is dependent and is himself absolved from the further performance of his part of the contract. If he elects to do this, the contract is completely at an end, and the party in default is not entitled to an opportunity to change his mind. But the repudiation of a contract by one of the parties to it does not of itself discharge the contract. It only gives to the other party the option of either treating the contract as at an end, or of waiting until the stipulated time has arrived or the contingency has happened.

In re COHEN : *Ex parte* COHEN, (1924) 2 Ch. 515.

Bankruptcy—Practice—Right of trustee to rely on admissions in affidavit filed by opposite party—Fraudulent preference—Voluntary payment—Essentials of.

Under the practice of the Bankruptcy Court, the trustee in bankruptcy cannot rely on admissions made in an affidavit filed by the opposite party before the latter elects to make use of it at the hearing of the application.

The trustee in bankruptcy applied to set aside a certain payment made by the bankrupt as a fraudulent preference. The evidence disclosed that the payment was made voluntarily without any pressure being exercised at a time when bankruptcy was imminent. *Held*, by the majority of the Court of Appeal (Pollock, M. R. dissenting) in the absence of any other reason forthcoming to explain the payment, the Court could infer it was a case of fraudulent preference. Under

S. 44 of the Bankruptcy Act, 1914, the payment must have been made by a person unable to pay his debts as they fall due; the payment must prefer one creditor over others and the dominant motive for the payment must be a motive to prefer the particular creditor to whom the payment was made. Case-law discussed.

SLACK *v.* LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LTD., (1924) 2 Ch. 475.

Easement—Ancient lights—Obstruction threatened—Slight interference with plaintiffs' rights—Compensation in damages.

In an action for injunction and damages for obstruction of ancient lights the Court found there would be an infringement of plaintiffs' rights but that it was small in extent. *Held* though the general rule is that when a right is invaded, an injunction will be granted, yet if the injury is small and capable of being estimated in money and compensated for by a money payment and at the same time it would be oppressive to the defendant to grant an injunction, then damages in lieu of injunction should be awarded.

BRADFORD *v.* GAMMAN, (1925) 1 Ch. 132.

Partnership—Covenant to pay debts and indemnify outgoing partner—No demand made for debts due—If compulsorily payable.

A covenant in a partnership agreement to pay all the partnership debts and to indemnify an outgoing partner or the estate of a deceased partner against debts and liabilities does not entitle such person to insist upon the immediate payment of debts for which no demand for payment has been made ; the obligation to make good the indemnity by payment and the right to enforce the covenant arises when the demand is made and not before.

In re, STANLEY AND COMPANY, LTD., (1925) 1 Ch. 148.

Bankruptcy—Fraudulent preference—Setting aside of—Trustee if could recover payment from person preferred—Bankruptcy Act, 1914, *S.* 44 (1).

Where a transfer made by a bankrupt is challenged within three months of its date as being fraudulent and void, the statute not only contemplates the setting aside of the same, but enables the trustee in bankruptcy to recover payment from the person actually preferred. (*Cf.* Provincial Insolvency Act V of 1920, S. 54).

BALDRY *v.* MARSHALL, (1925) 1 K. B. 260 : 94 L. J. K. B. 208.

Sale of goods—Purchase of motor-car—Demand for a comfortable car suitable for touring purposes—Implied condition as to fitness—Express exclusion of warranty—Sale of Goods Act, S. 14 (*corresponding to Ss.* 114, 115, *Indian Contract Act*).

A person who wanted to purchase a motor-car went to a firm which was specialising in Bugatti cars and told them he wanted a car which would be comfortable and suited for touring purposes. They told him a Bugatti car would answer the requirements and sold him one, with a guarantee for twelve months against defects in manufacture but the guarantee "expressly excluded any other guarantee or warranty." On trial the car was found unsuited for the purposes of the purchaser, whereupon he sued the firm for return of the purchase money. *Held,* there was an implied condition in the contract as to the fitness of the car for a particular purpose, which condition was distinguishable from a warranty and was in no way excluded by the terms of the contract. The plaintiff was therefore entitled to recover the purchase money.

Per Bankes, L. J. :—The mere fact that an article sold is described in the contract by its trade name does not necessarily make the sale one under a trade name. The test to apply is, whether the buyer specified it under its trade name in such a way as to indicate that he was satisfied, rightly or wrongly, it would satisfy his purpose and that he was not relying on the skill or judgment of the seller, however great it might be.

Per Atkinson, L. J. :—If the buyer purchases the article in reliance on the seller's assurance that it will answer his purpose, the fact that it is described in the contract by its trade name will not have the effect of excluding the condition.

COMMERCIAL AND ESTATES COMPANY OF EGYPT *v.* THE BOARD OF TRADE, (1925) 1 K. B. 271.

International Law—Angary—Seizure of goods of neutral by a Sovereign—Liability to pay compensation—How enforced—Right of suit.

The right of a belligerent to requisition the goods of neutrals found within its territory is known in International Law as the right of angary and involves an obligation to make full compensation for the same. The rights and obligations flowing from such an act are recognized by the municipal law. International usage would justify the Sovereign of the neutral owner in claiming on his behalf fair compensation if withheld, but this does not mean the owner of the goods is debarred from suing to enforce his rights.

BRIGHTON COLLEGE *v.* MARRIOTT, (1925) 1 K. B. 312 : 94 L. J. K. B. 250.

Income-tax—Carrying on trade, profession or vocation —Company formed to carry on College—Income to be applied solely for the institution—Excess of receipts over expenditure—Liability to tax—Charity—Exemption—Income-tax Act, 1918, *Sch. D.*

A limited Company was formed with the idea of running a College, and by the memorandum of association, the income was to be used solely for the purposes of the institution and no bonus or dividend was to be paid. There was a surplus of income received from fees after deducting expenses and part of it was used to pay off mortgage debts incurred in acquiring property for the College. *Held,* reversing the decision of Rowlatt, J. that the surplus was assessable to income-tax, as the Company must be deemed to be carrying on a trade, profession or vocation within the meaning of Sch. D of the Income-tax Act, 1918.

Per Pollock, M. R. :—Charity, in its legal sense, comprises trusts for the advancement of education, but the fact that profits when made were to be devoted solely to the advancement of a charity, will not induce an exemption.

Quaere : Whether the case of a school where education is paid for only in part by fees, the rest being defrayed out of trust funds stands on a different footing ?

ROWNTREE AND COMPANY, LTD. *v.* CURTIS, (1925) 1 K. B. 328.

Income-tax—Deduction—Company—Setting apart sum to constitute a fund for invalids, etc.—If money laid out for the purpose of trade—Income-tax Act, 1918, *Sch. D.*

A Company which earned large profits in a particular year set apart a big sum of money and constituted it into a fund for supporting their invalid labourers. A trust was created and ordinarily it was only the income that was to be utilised for the said purpose. The Company claimed the amount to be treated as a deduction for purposes of income-tax. *Held,* the sum was not money laid out or expended for the purposes of trade, profession, employment or vocation, and as such no deduction was permissible with respect to it.

Per Pollock, M. R.:—Where once profits have been ascertained, the destination or use to which the same may be put does not alter their character. When a deduction is claimed, the onus is on the subject to prove that the amount claimed as deduction was laid out for earning profits.

HARTLAND *v.* DIGGINES, (1925) 1 K. B. 372.

Income-tax—Company—Payment of salary to employees free of tax—Basis of assessment—Income-tax Act, 1918, *Sch. E.*

A Company used to pay to the Income-tax authorities the tax payable on the salaries of their employees, but gave the latter their full pay without deducting the amount paid by them as income-tax. *Held,* in ascertaining the income of any of these employees, the amount paid by the Company as income-tax on his behalf should be taken into consideration. The fact that the payments were made voluntarily does not affect the question. (1924) 2 K. B. 168 affirmed.

WHELAN *v.* HENNING, (1925) 1 K. B. 387.

Income-tax—Shares in Ceylon—Dividends declared in prior years and tax paid thereon—Assessment on the basis of the preceding three years' average—No dividend declared—Liability—Basis of taxation—Income-tax Act, 1918, *Sch. D, Case V, R.* 1.

A person resident in England owned a number of shares in Ceylon, which were yielding dividends and in respect of which income-tax was being paid. In the year in question, no dividends were declared, but still the Crown claimed to levy tax on the average income of the preceding three years under Sch. D, Case V of the Act. *Held,* in the case of an assessment falling under Sch. D, Case V, the liability to pay depends on the actual receipt of income during the year of assessment and not on the source of income and hence there was no liability to pay income-tax when there was no income. (1921) 2 A. C. 222 followed.

In re, MEREDITH : DAVIES *v.* DAVIES, 94 L. J. Ch. 87.

Will—Bequest to son—Son predeceasing testator leaving children—Codicil reciting death and lapse of bequest—Mistake of law—New legacies to children—"Contrary intention"—Wills Act, S. 33 (corresponding to Indian Succession Act, S. 96).

A testator by his will gave a share of his furniture to his son, a legacy of £100 and a share of his residuary estate. The son, however, predeceased the father. Whereupon, the latter made a codicil which recited the death of his son and the consequent lapse of what was given to him under the will. He created some new legacies in favour of the children of his deceased son and in other respects left the will unaltered. *Held,* though under the law there was no lapse consequent on the son's death, the recital of the fact of death and his belief in lapse, coupled with the fact that no provisions were made to prevent a lapse, amounted to a "contrary intention" within the meaning of S. 33 of the Wills Act (which corresponds to S. 96 of the Indian Succession Act). The legacies to the grandchildren were valid.

ROSE AND FRANK CO. *v.* CROMPTON AND BROTHERS, LTD., 94 L. J.K. B. 120.

Contract—Agreement to be binding in honour—Ousting of jurisdiction of Courts—If enforceable—Goods ordered and accepted—Legal consequences.

A firm of merchants in the United States had been for a long time carrying on business with an English firm. In 1913

they entered into a new arrangement including therein a third party and towards the end of the document appeared the following clause : " This arrangement is not entered into nor is this memorandum written, as a formal or legal agreement and shall not be subject to legal jurisdiction in the Law Courts either of the United States or England, but it is only a definite expression and record of the purpose and intention of the three parties concerned, to which they each honourably pledge themselves with the fullest confidence that it will be carried through with mutual loyalty and friendly co-operation." Disputes subsequently arose and one of the parties brought an action to enforce his rights under the contract. *Held* by the House of Lords affirming the decision in (1923) 2 K. B. 261 that the contract was one of honour only and unenforceable at law.

But though the contract was not enforceable, if in pursuance of it, goods had been ordered by one party and the order had been accepted by the other, the usual legal incidents would follow.

REX *v.* HARRIS, 94 L. J. K. B. 164.

Criminal trial—Jury—Plea of not guilty—Indictment charging him with previous conviction.

Where a person has pleaded " not guilty " to an indictment and is about to stand his trial, he ought not to be invited to plead to another indictment which recites a previous conviction in the presence of those who, as jurors, will have to try him.

INLAND REVENUE COMMISSIONERS *v.* CORNISH MUTUAL ASSURANCE COMPANY, 94 L. J. K. B. 237.

Corporation tax—Mutual insurance company—No shareholders—Insurance limited to property of members—If carries on trade or business—Finance Act (1920), *Ss.* 52, 53.

A mutual fire insurance company was incorporated under the Companies Act as a company limited by guarantee, but without any share capital. Its object was to insure the property of only its members. Its articles were substantially the same as those of an ordinary commercial company except that they were silent as to profits and dividends, there being no shareholders. The income consisted of entrance fees and

contributions of members. *Held,* it was carrying on a trade or business of insurance and was liable to pay Corporation profits tax. Case-law discussed.

The fact that the mutual insurance company deals only with its own members does not lead to the conclusion it does not carry on any trade or business.

THE GRIT, 94 L. J. P. 6.

Shipping—Defect in berth—Duty of wharfowner to give warning—Common Law duty.

A wharfowner who makes no charge for the use of the wharf or the loading appliances thereon and takes no part in the work of loading but who derives profit by being paid for the carriage of goods to the wharf owes a duty under the Common Law to take reasonable care to see whether the berth, which is the essential part of the use of the wharf, is safe, and if it is not safe, and he has not taken such reasonable care, to warn the persons with whom he has dealings that he has not done so.

PARTINGTON *v.* PARTINGTON, (1925) P. 34.

Divorce—Adultery of petitioner found in prior divorce proceedings—Effect of—Practice.

In proceedings for divorce commenced by a husband, the co-respondent alleged that the petitioner himself had been guilty of various acts of adultery, which were the occasion of prior divorce proceedings between the parties concerned therein and that the Court had found that he had committed adultery. *Held,* the decision in the prior case would only be evidence against him but was not conclusive.

In re, GRIFFIN : GRIFFIN *v.* ACKROYD, (1925) P. 38.

Probate—Party to action if can be appointed administrator pendente lite.

There is no absolute rule of law against appointing a party to an action propounding a will administrator *pendente lite.* It is not necessary that all parties should consent to such an appointment.

THE PALUDINA, (1925) P. 40.

Shipping—Collision—Suit for damages—Burden of proof—Presumption when arises.

In an action for damages due to collision the plaintiff must always show, in a case in which he complains of damage resulting from negligence, that the negligence was the direct cause of the damage. Where there is an interval between the alleged negligence and the resulting of the damage, the onus is on him to prove also that the chain of causation connecting the damage with the negligence is complete. But in some cases of collision where damage follows immediately, unless it is proved that there is some other cause, a Court may presume that the damage was directly caused by the negligence causing the collision.

CORRESPONDENCE.

To

THE EDITOR,
THE MADRAS LAW JOURNAL,
MYLAPORE, MADRAS.

SIR,

Would you or any of your readers kindly enlighten me fully on the points that I am going to submit to you in connection with the choosing of jurors in Sessions trials in the moffussil.

1. In the District of Rangpur, to which I belong, there is a practice of obtaining persons happening to be present either in the Court premises or in the Court compound, to serve as jurors in Sessions trials in cases of deficiency of persons summoned as contemplated by S. 276, proviso (2) of the Code of Criminal Procedure. The practice prevailing here is to get any person handy and put him into the jury-box without caring to ascertain whether the names of those persons appear on the jury list as prepared under S. 321 of the Criminal Procedure Code. The question that I propound for your consideration is whether such a course is permissible under proviso (2), S. 276, Criminal Procedure Code, or whether that proviso requires that persons present in Court asked to make up a deficiency of jurors should also be persons on the jury list but who may not have been summoned to serve as jurors on that occasion.

To me it seems that they should be persons already on the jury list. My reasons are the following :—

(2) S. 276, Criminal Procedure Code, enacts, in the first instance, that the "jurors shall be chosen by lot from the *persons* summoned to act as such, etc." Then come the provisos, of which the second runs as follows: "In case of a deficiency of *persons summoned*, the number of jurors required may, with the leave of the Court, be chosen from *such other* persons as may be present."

Now it is a recognised rule of interpretation that a word is to be considered as used throughout a statute in the same sense, more specially should it be so when the same word is being used in an almost similar collocation in a single section of a statute. Granting this, the word "persons" in the first part of S. 276 necessarily means "persons" already on the jury-list summoned under S. 326 of the Code of Criminal Procedure. The expression "such other persons," therefore, should mean persons already on the jury-list but not summoned for the trial—the word "other" meaning "other than summoned," and the entire expression "such other persons" meaning "such persons as aforesaid," that is, persons on the list, the word "such" being referrable to the context as appearing in the first part of the section and the word "other" differentiating them by the single criterion of *not being summoned.*

If this were not so, then, in my humble opinion, the words "such other" as qualifying "persons" would become meaningless surplusage, as there is no other conceivable context to which those words are referrable; because if the Legislature intended that non-jurymen present in Court could make up the deficiency then obviously the language would have been different, for instance, "such persons as may be present and otherwise fit to serve as jurors."

S. 321, cls. (1) and (2), Criminal Procedure Code, seem to me to fortify my contention. These clauses clearly imply that there is such a thing as a due qualification for a juror, however small that qualification may be, S. 325 of the Code unmistakably indicates that whereas members of a special jury should possess *superior* qualification in respect of property, character or education, those of the common jury are to possess a measure of qualification, however small, in respect of these things; and the only guarantee that the Code recognises of these qualifications being possessed by jurymen is the joint enquiry by the Sessions Judge and the Collector, as required by S. 321 of the Code. The proper interpretation of S. 276, proviso (2) of the Code should therefore be this: that when a person already on the jury-list happens to be present in Court, the legal presumption of his fitness is already there and will be acted upon by the Court until that presumption is displaced by a successful challenge to the polls as contemplated by S. 278 of the Code.

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In the making up, therefore, of a deficiency by persons present, the proviso only dispenses with the initial summoning by a preliminary lot (*vide* S. 326, Criminal Procedure Code) and does not dispense with any other legal requirement.

The principles of natural justice appear also to be in favour of this interpretation. Ss. 312 to 327 provide for elaborate precautions against the jury turning out to be a body of men not in every respect fit for the work with which the law entrusts them. In these circumstances the Legislature could not possibly have permitted the springing as a surprise upon an accused person of every lounger in the Court premises as an eligible juryman knowing as we do the kind of persons who ordinarily loiter about in Courts, a juryman thus picked out is more often than not, an undesirable person and yet the slovenly practice of the Rangpur Courts is to ask the Judge's Nazir, whenever there is a deficiency, to go out into the Court compound and make a roving search in the *Panwallahs'* shops for any stray loiterer in the clothes of a *Bhadralog* to come and serve as juror, and when such an item of mortality makes his appearance in Court, the accused are solemnly asked to deliver their challenges, if any, as if the accused have a mental note of everything that can be said about every man in the street.

I have not been able to find out any case-law directly bearing upon the scope and exact meaning of proviso (2) to S. 276, Criminal Procedure Code, but a reference to the corresponding English Law makes at least two things clear :

Firstly,—(and here I am speaking subject to correction from such materials as are available to me here at mofussil)—Talesmen or, as they are more properly called, *tales de circumstantibus,* who are the English equivalents of the supplementary jurors as under S. 276, proviso (2) cannot be had at a trial at bar [*vide* Halsbury, Vol. XVIII, p. 253, footnote (*a*)] not on the trial of an indictment under the commission of Gaol Delivery and Oyes and Terminer (*vide* Burn's *Justices of the Peace,* Vol. III, p. 970, 29th Edition).

By the 6 Geo. IV, c. 50, S. 37 (Jury's Act, 1825) Talesmen can, of course, be had before a Court of Assize and the words " shall appoint so many of such other *able men* of the county then present as shall make up a full jury " as appearing in the statute have, of course, been interpreted as seeming to point to persons whose names are or might be in the Jurors' Book. [*Vide* Halsbury, Vol. XVIII, p. 253, footnote (*a*)]. But the learned commentator does not appear to be sure of this interpretation and at the same time observes that " a custom to try by *tales de circumstantibus* in an inferior Court is bad because such would admit of trial by persons both " profligate and unfit " (Halsbury,

Vol. XVIII, p. 253). The net result of the above seems to be that although the words "able men of the county present" might be held to include persons other than those on the jury-list this is a meaning which is not yet an absolutely decided meaning. The words of the Indian Statute [S. 276, proviso (2)] are, however, different as I have already pointed out and it can be very well argued that the Indian Legislature although providing for *tales* did not intend to reproduce the English Statute in its entirety, but with the reservation that "Tales" must be from persons who are on the jury-list.

I would, therefore, propound my first question as follows :—

(*a*) Under S. 276, proviso (2) of the Code of Criminal Procedure, is it permissible, in order to make up the deficiency of jurymen, to requisition the services of persons present in Court whose names are not on the jury-list ?

I have a second question to lay before you, namely, in whatever way my first question is answered, whether in the affirmative or negative. What should be the proper method of bringing before the Court the supplementary jury as contemplated by S. 276, proviso (2) ?

The method followed here is for the Court to take the initiative in the sense that without the application of either the prosecutor or the accused the Sessions Judge asks the Nazir to go into the Court compound and find out some persons to serve as jurors and these persons are brought up in about five minutes. Is that a legal or a regular procedure for calling up these jurors ?

The corresponding English Statute, 6 Geo. IV, S. 37, lays down that, "Every such Court upon request made for the King by any one thereto authorised or assigned by the Court or on request made by the parties, plaintiff or demandant, defendant or tenant, in any action or suit, whether popular or private, *shall command the Sheriff or other Minister* to whom the making of the return shall belong, to name and appoint, etc. ; and the Sheriff or other Minister aforesaid shall at such command of the Court return such men *duly qualified* as shall be present or can be found to serve on the jury and shall add and annex their names to the former panel, etc."

Thus in England Talesmen are brought up through the same channel through which the original panel are returned, namely, through the Sheriff or other Minister appointed on that behalf. The reason for this rule can be gathered from the succeeding words of the Statute which makes it obligatory upon the Sheriff to return men *duly qualified* which implies an obligation upon him to make some sort of an enquiry into the fitness of the men whom he returns as Talesmen.

Is there any reason why the same rule should not apply here, namely, jurors under S. 276, proviso (2) be required to be returned by the District Magistrate on the analogy of S. 326, Criminal Procedure Code, by which persons drawn by lot in open Court are required to be summoned by the District Magistrate.

In view of the recognised fact that Talesmen are always more or less deceptive their return through the District Magistrate is only a necessary guarantee of their fitness.

My second question is therefore this—

"In choosing jurymen under S. 276, proviso (2) is it permissible for the Court to ask the Nazir to bring up persons from the Court compound, or should the District Magistrate, who is charged with summoning jurors, under S. 326, be requested to name and appoint jurymen as under S. 276, proviso (2) ?

And also, is it permissible for the Court to take the initiative himself or should he require to be moved in that behalf by either the Prosecutor or the accused, regard being had to the English Statute as also to the words "with the leave of the Court" in proviso (2), S. 276, Criminal Procedure Code ?

I remain,
Yours faithfully,

RUNGPUR,
14—4—25.

BIDHURANJAN LAHIRI,
Vakil, High Court.

JOTTINGS AND CUTTINGS.

General Average.—It is refreshing and encouraging to discover that our inability to appreciate the logic or morality of "General Average" is due not to our own ignorance or stupidity, but to the faults of the system itself. On Wednesday, 11th February, Mr. C. H. Johnson, of the Thames and Mersey Marine Insurance Co., Ltd., read a paper, at a meeting of the Insurance Institute of Liverpool, dealing drastically with the subject, under the title : "General Average : Abolition, International Codification, or Reform ?" Having exposed the demerits of the principle, by enumerating the increased variety of losses which, in modern developments, are all made good under General Average, he dealt with the practical politics of abandoning the present system, and expressed his own preference for the suggestion first put forward in 1895 by Mr. Douglas Owen, that General Average

sacrifices should lie where they fall. He could see no such substantial objection, whether on the part of shipowners, shippers, or underwriters, as to outweigh the advantages which would accrue to all in the simplification of business. As to international codification, Mr. Johnson was in favour of proceeding with deliberation and even hesitation. Codification is, as English lawyers especially will agree, dangerous machinery to employ. Of its charms many are superficial, and its effect is often to produce arbitrary rules difficult to adapt to the ever-changing requirements of trade and human affairs. He preferred to rely upon the existence of the York-Antwerp Rules, and upon the feasibility of their adaptation from time to time, as a means of attaining the international standards desired. In this context we note that the Executive Council of the International Law Association is already contemplating its agenda for the Marseilles Conference, to be held in September, 1926, and the scope of its programme appears to be such as readily to include practical treatment of this important matter.

—*The Law Journal,* February 21, 1925, p. 160.

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Protection of Foot Passengers.—Within a few days of the decision of the Divisional Court as to sparks from steam rollers (*Moss* v. *Christchurch R. D. C.,* to which we referred last week, *Ante,* p. 159), Avory, J. was called upon to try another uncommon accident case. In *Blake* v. *Fulham Borough Council* (*Times,* 12th inst.), a highway authority were repairing a highway, and their workmen were engaged in breaking up the existing concrete. They were driving into it a steel wedge, and a chip of some material or other flew into the eye of a passing boy. In his summing up to the jury the learned Judge put the matter thus : " The duty of the defendants in doing work on the road is to take reasonable precaution against injury to persons lawfully using the highway. What are reasonable precautions must depend on the experience of mankind. Ought the defendants, as reasonable persons, to have foreseen the probability of danger arising if they did not take adequate precautions, as by the use of screens, to prevent chips of material from flying on to passers-by ? Evidence has been given that the authorities at Fulham have no record of any similar accident, and that the same position exists at Westminster. But in both places it appears that the autho-

rities have had experience of damage being done to shops abutting on the footway by chips flying on the windows and breaking them. In Fulham they have adopted the practice of putting up canvas screens to protect the windows where there are shops abutting on the highway. If the defendants have had experience that material flies from the road on shop windows, ought it not to have occurred to them that chips may equally well fly into the faces of passers-by? If you come to the conclusion that the defendants ought, as reasonable persons, to have foreseen such a possibility, you will be justified in saying that the defendants have been negligent in not taking precautions to prevent it." The jury found for the plaintiff, awarding him over £1,300. In both these cases operations dangerous in the absence of precautions were being carried on, and in both the unexpected happened through a chain of untoward circumstances. In the steam roller case there was evidence that spark arresters minimised the danger, but were not infallible. They were fitted in very few cases, and then only when specially requested. Drivers did not like them because they interfered with the draught. No doubt if there had been a spark arrested the decision would have gone the other way. In the chip case, there was evidence that effective steps were not only possible, but were in fact taken to protect shop windows, and therefore should have been taken to protect passengers. In our view it is right that public bodies should be made to pay for injuries received by innocent persons, notwithstanding the fact that the work is being done for the public benefit and under statutory powers, unless it can be clearly shown that no known appliance or remedy exists for preventing the possibility of accident.

—*The Law Journal,* February 28, 1925, p. 183.

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Lord Birkenhead on Lord Somers, K. C.—Lord Birkenhead in his "English Judges" in the *Empire Review* has arrived this month at Lord Chancellor Somers. There is too much of interest in the sketch for us to deal with it at present, but one point offers an interesting coincidence with what we have said above as to suing the Crown for breach of contract by petition of right. For modern practice the availability of a petition of right for this purpose was established in 1874 by *Thomas* v. *The Queen* (L. R. 10 Q. B. 31), the judg-

ment in which was delivered by Blackburn, J., on behalf of himself and Quain and Archibald, JJ. Lord Birkenhead refers to this and points out that the judgment was based on the authority of *The Bankers' Case* (14 How. St. Tr. 1). An account of that case, which was one of great historical and legal interest, is given in L. R. 10 Q. B. at p. 39 *et seq,* and also by Lord Birkenhead ; the point relevant for the present purpose is that, while Lord Holt and Lord Somers, before whom (as well as many other Judges) it came in its various stages, differed in the result, yet both gave reasons justifying the use of a petition of right in cases of contract. With regard to the Crown Procedure Committee's report, we understand that there have been statements in the Press as to what it will contain, but these, we believe, are unauthorised, and pending the publication of the report we make no comment on them.

—*The Law Journal,* March 7, 1925, p. 210.

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The Doctrine of Coercion.—As the result of a case which attracted a considerable amount of attention at the time, it will be remembered that a Committee was appointed in 1922, with Mr. Justice Avory as Chairman, to consider the question of the ancient doctrine that a woman who commits a crime in the presence and under the coercion of her husband is not responsible therefor, and that such coercion is presumed in law whenever a wife commits a crime other than murder or treason in her husband's presence. Mr. Justice Avory's Committee recommended the abolition both of the rule and of the presumption, and that in this respect a married woman should be on the same footing as any other member of the public. The Criminal Justice Bill of 1923dealt with the matter by proposing to abolish the presumption of coercion, leaving a wife to establish coercion in fact if she could, and the Lord Chancellor, in resisting an amendment providing for the abolition of the whole doctrine, said that, whilst he was prepared to recommend the abolition of the presumption, he was not prepared to adopt the whole recommendation of Mr. Justice Avory's Committee.The clause in the 1923 Bill is reproduced in the Bill just introduced into the House of Commons, so that apparently it is still proposed to abolish only the presumption of coercion. We are bound to say that it seems to us that, having regard to the present position of women in the State, there is no justification for

retaining the doctrine at all, and we think that women generally would be disposed to resent the suggestion that, in these days, they are capable of being coerced by their husbands into crime. It is, to say the least, a little strange that a Government which on one day presents a Bill—the Guardianship of Infants Bill—reciting that Parliament has by the Sex Disqualification (Removal) Act, 1919, and various other enactments, "sought to establish an equality in law between the sexes, and that it is expedient that this principle should obtain with respect to" the subject matter of the Bill, should, within a week or two, present another Bill dealing with the relations of husband and wife in a manner which suggests that a wife may be so much under the influence of her husband as to be liable to be coerced by him into crime which she would not otherwise commit.

—*The Law Journal,* March 14, 1925, p. 234.

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The Reporting of Unpleasant Cases.—Something like a year ago an attempt was made in both Houses of Parliament to curb the reporting, in excessive detail, of "Unpleasant Cases." The project was also debated amongst leading representatives of the newspaper world, but nothing came of it. Since then we have had two such exposures as render all which have gone before positively dull and even respectable in comparison. We have now reached a point at which the most tolerant may justifiably moralise, and at which even the most broadminded must ask where, if anywhere, is the line going to be drawn ? The arguments are strong for maintaining the freedom of the Press, and equally, for keeping within the strictest limits any system of trial *in camera.* On the other hand, it is clearly an intolerable state of affairs in which our daily newspaper, however carefully chosen, contains such matter that, often for days on end, it must not be left about where it may be read by any boy or girl for whose moral education we are responsible ! A certain section of the Press has made an admirable effort to mitigate the evil, but it has achieved no success, and we are forced to the dismal conclusions that a people gets what Press it deserves and that our deserts are small. Probably the remedy lies neither with the Press nor with Parliament, and these widely-advertised scandals are but an acute illustration of the mischiefs resulting from a popular and too easy tolerance. If such treatment was meted out to that small section of society which produces these cases as nine

out of every ten decent-minded people think it deserves and wishes to goodness it might receive, it and its indecent antics would become unfashionable and not worth a newspaper's while to report at such length. And this, no doubt, is the better way, but we notice that Sir Evelyn Cecil has reintroduced his Bill " to regulate the publication of reports of judicial proceedings in such a manner as to prevent injury to public morals," and the Bill deserves, and will no doubt receive, sympathetic consideration. Meanwhile, the law on the subject is to be appreciated from the leading case of the *Queen* v. *Hicklin* (L. R. 3 Q. B. 361), an authority which was much referred to in last year's debate upon this subject in the House of Lords.

—*The Law Journal,* March 14, 1925, p. 234.

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Trials in Camera.—The question of the publication in the popular Press of reports of matrimonial causes is, of course, different from that of the jurisdiction of the Court to direct that a case shall be heard *in camera.* This was the subject of Lord Moulton's famous dissenting judgment in the Full Court of Appeal in *Scott* v. *Scott* (1912, P. 241), a judgment which was upheld by the House of Lords (1913, A. C. 241). The result ultimately arrived at was that, in general, the High Court has no jurisdiction, even with the consent of the parties, to exclude the public from the hearing of suits save in certain cases necessary to secure the ends of justice. These are suits affecting wards of Court and lunatics where the jurisdiction is really of a domestic nature ; and suits in which publicity would destroy the subject matter in dispute, such as suits involving secret processes. These are particular and well-recognised cases. But the Court cannot act on a general jurisdiction to exclude the public whenever this seems to be required on grounds of decency. Such general jurisdiction can only be exercised on the ground that publicity is incompatible with the attainment of justice : where—to quote an instance given by Lord Haldane, C.—the evidence is of such a character that it would be impracticable to force an unwilling witness to give it in public ; though he only put this as a possible exception. It was, however, acted on in *Moosbrugger* v. *Moosbrugger,* (29 T. L. R. 658). The part which Lord Moulton took in securing the result in *Scott* v. *Scott* forms an interesting episode in his son's life of him.

—*The Law Journal,* March 14, 1925, p. 234.

Creepers and Trespass.—If any member of the legal profession should hereafter be moved to write a book on the law relating to neighbours, the judgment of the Divisional Court in *Simpson* v. *Weber* (*Times*, 12th ult.) will no doubt find a place in the chapter devoted to the amenities of the back garden. The action was for trespass; and it appeared that the defendant had a Virginia creeper in his garden which grew up the side of the plaintiff's house, and from time to time reached the gutter, when the plaintiff had to cut it back to prevent it from choking the gutter. The County Court Judge refused to interfere with the creeper by injunction, but he made a declaration that a trespass had been committed and awarded £2 damages, and it was against the declaration and the damages that the defendant appealed. That, in the absence of any evidence of an easement, it is a trespass to allow one's creeper to grow against a neighbour's wall was recognised many years ago in *Pickering* v. *Rudd* (1815, 1 Stark. 56), where the position of the parties was reversed, as it was the owner of the offending creeper who sued his neighbour for cutting part of it away; but Lord Ellenborough told the jury that the only question was whether the defendant (a hair-cutter, who wanted to set up a show-board where the creeper grew) had done any damage to the tree which could be avoided, and the plaintiff failed to get a verdict from the jury, or even a rule *nisi* from the Court of King's Bench. The present case, however, differs from *Pickering* v. *Rudd* in one important respect. When the creeper was planted, the two houses belonged to the same owner, and the Court applied the rule laid down in a series of cases, such as *Pwllbach Colliery Co.* v. *Woodman* (1915, A. C. 634), that, in case of a severance, it is the intention of the parties which must be considered. They inferred that the intention in this case was that the creeper should remain and be allowed to grow against the plaintiff's wall, and therefore that the declaration could not stand. At the same time they agreed that the defendant had committed a trespass in allowing the creeper to obstruct the gutter and upheld the judgment for £2 damages. We doubt whether an intention to grant an easement ought to be inferred in the case of a plant which is continually growing, so that its condition may have become quite different from what it was at the time of the severance. It was a similar consideration which led the House of Lords to hold in *Lemmon* v. *Webb* (1895, A. C. 1). that a right could not be obtained by prescription for one's

trees to overhang a neighbour's land. Moreover, in view of the judgment, the legal position will be awkward if in the course of time the wall should need to be re-pointed, and the defendant should object to the removal of the creeper for that purpose.

—*The Law Journal,* March 14, 1925, p. 235.

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Trust for the Promotion of Sport.—Trusts for the promotion of sport may in certain circumstances be regarded as trusts for charitable purposes, and an instance where such a trust has been held to be a charitable trust is in the case of *In re Gray ; Todd* v. *Clough Taylor* (*Times,* 26th ult.), where certain legacies were bequeathed on trust to form the nucleus of a regimental fund for the promotion of sport. It is quite clear from *In re, Nottage* (1895, 2 Ch. 649), that a gift, the object of which is the encouragement of a mere sport or game primarily calculated to amuse individuals apart from the community at large, is not charitable, although such sport or game is to some extent beneficial to the public. It is otherwise, however, where such a gift is not given primarily for the encouragement of a sport or game, but with an ulterior motive, which in itself is charitable. Thus in *In re Manette* (1915, 2 Ch. 284), a bequest to Aldenham School for the purpose of building Eton fives courts or racquet courts or some similar purpose was held to be good as a charitable bequest ; and so, too, was a bequest to the headmaster of the school for the purpose of providing a prize for some event in the school athletic sports every year, because in effect such a gift was given for the purpose of education, and in the words of Eve, J. "no boy can be properly educated, unless at least as much attention is given to the development of his body as is given to the development of his mind." The gift in the case of *Re Gray* (*supra*) is accordingly to be regarded as a charitable gift, as the gift was made with the object of promoting the efficiency of the Army, and no distinction can in such circumstances be drawn between mental efficiency (see *Re Good,* 1905, 2 Ch. 60), and physical efficiency.

—*The Law Journal,* March 14, 1925, p. 236.

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A Tax on Betting.—In the case of *Graham* v. *Green* (*Times,* 12th inst.) Rowlatt, J., analysed the process of betting,

in this particular instance on horse-racing, with a view to ascertaining whether the profits made by the habitual practice of it could fall within the definition of profits of a "trade, profession, employment, or vocation." To read his judgment is to realise that, easy as it is to arrive at the conclusion that such profits are not assessable to income-tax, as falling within the above definition, it is by no means so easy to define the reasoning upon which such conclusion is based. The argument, *contra,* has for starting-off ground the former decision of Denman and Hawkins, JJ., that a bookmaker's profits fall within the definition. If, then, the net profits of a person habitually and systematically *taking* bets are assessable, why are not the net profits of the person habitually and systematically *making* bets assessable to the same extent and for the same reason ? To justify his present decision consistently with the reasoning of that past decision (*Partridge* v. *Mellandine,* 18 Q. B. D., 276) the Judge was hard put to it to find the essential and convenient phrase; but eventually he hit upon an expression which illuminates the distinction: "organised effort." The bookmaker organises the bets he takes upon a system which, whatever its success, involves the one becoming correlated with the others. The bookmaker's client merely picks up, on each occasion, what he can find; and though, on each occasion, he may search with intelligence and upon *data,* and though the occasions may repeat themselves habitually and even upon the basis of some system, he does not organise the whole process into one continued effort involving a calculation applicable to the whole series of occasions. Whether this method of reasoning be conclusive or not, instinct suggests that the principle arrived at is a decisive one and that the judicature is as unable, as the legislature is apparently unwilling, to extract revenue from the widely prevalent "habit" of betting.

—*The Law Journal,* March 21, 1925, p. 260.

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Improper Questions to Witnesses.—In the case of *Rex* v. *Baldwin,* reported in the *Times* newspaper of Tuesday last, the Court of Criminal Appeal addressed some elementary, but much-needed remarks to the world at large as to the inaptitude, to say the least, of a particular type of question very frequently put to witnesses these days. The reference was to the interrogation which invites a witness to state, not facts within

his cognizance, but the effect of evidence already given, whether by himself or by others ; and a typical form of it was quoted : " Is your evidence to be taken to suggest. . . ?" Apart from the special class of witnesses known as " expert," it is, of course, a first and universally recognised rule that the function of the witness is to state facts within his knowledge; it is no more his function to review his own or anybody else's evidence than it is to comment upon the law applicable to the case. Nevertheless, witnesses are incessantly being invited, as the Court pointed out, to embark upon arguments, the motive of the invitation being consciously or unconsciously, to initiate and profit by a discussion between a skilled, professional controversialist (the advocate) and an unskilled amateur (the witness). The invitation should, of course, be politely but firmly refused, but not every witness knows that he may so refuse, and not many of those, who know, dare refuse. The observations of the Court of Criminal Appeal deserve the most careful attention of all concerned, and there are included in that category very many more persons than those comprised in the Bar practising in criminal Courts. Indeed, the last-named are, in the majority, men of the younger generation, more severely disciplined in Court by the Bench, and less likely to err in such matters than their seniors. If the observations are universally read, marked, learnt, inwardly digested, and acted upon, a noticeable difference will be observed in the methods of some of the best-known advocates of the day, and even learned Judges, to a large extent, will mend their ways with witnesses.

—*The Law Journal,* March 21, 1925, p. 260.

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Lord Blanesburgh and Enemy Property.—Lord Blanesburgh gave an interesting account at the Annual Reception by the Law Society's Teaching Staff last week of some aspects of his work during the war in the administration of enemy property. Better known as Sir Robert Younger—we always regret these changes, which hide the identity of men whose merits in their earlier career have made them familiar—Lord Blanesburgh was one of the influences during the war, and also since, which controlled the extremes of hostility. This was shown by his work on behalf of prisoners of war, and by his work in connection with the relaxation of the Treaty Charge on ex-

enemy property. That Treaty Charge, as he showed in his Address to the Glasgow Juridical Society in 1923, is opposed to well-settled principles of International Law, and though Lord Blanesburgh has been bound to accept it, yet his work as Chairman of the Committee to advise on the release of property subject to the change has been eminently useful, and has done much to mitigate distress, of which the Marquis of Salisbury said in the House of Lords, "These things are very pathetic, and I wish they had never occurred" (*Hansard*, July 24, 1923, p. 1342.)

—*The Law Journal*, March 28, 1925, p. 281.

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A "Dum Casta" Clause.—In the course of the *Dennistoun Case*, Mr. Justice McCardie held (*Times*, 13th inst.) that a *dum casta* clause could not be implied in a separation agreement. He did not profess to found his decision upon authorities, but in fact it appears to be in accordance with well-settled principle and practice. The Court, it has been said [*per* Lord Esher, M. R., in *Hamlyn and Co.* v. *Wood and Co.*, (1891, 2 Q. B., p. 491), has no right to imply a stipulation in a written contract unless an implication necessarily arises that the parties must have intended that the suggested stipulation should exist, and the same rule seems to apply to verbal contracts when once it has been ascertained what the contract really was. With regard to a *dum casta* clause, there is the special consideration that it is not a "usual" term in a separation deed. The question was considered by Kay, J., in *Hart* v. *Hart* (18 Ch. D. 670), where several conveyancers were examined as to the practice, including Mr. Wolstenholme and all of them said that they would not think of introducing such a provision unless specially instructed to do so; though a general covenant by the husband to pay a periodical sum to the wife has been held to be controlled by a recital that the payment was to be so long as she remained chaste (*Crouch* v. *Crouch*, 1912, 1 K. B. 378). The circumstances in the *Dennistoun Case*, perhaps seem to have supported the learned Judge's decision.

—*The Law Journal*, March 28, 1925, p. 282.

BOOK REVIEWS.

THE PHILOSOPHY OF LAW, by Roland R. Foulke of the Philadelphia Bar.

This book, as its name itself indicates, contains a clear exposition of the fundamental principles of law and their ethical and philosophical basis. The value of the book consists in the examination of the jurisdic principles without entering into the details of each branch of the law which is appropriate to a text book on the various subjects. The nature of the questions considered can be gathered from a mere statement of some of the main topics, *viz.*, conduct and factors determining conduct, law, the philosophy of law, political power and jurisprudence. The book is one of great value and will be found of great use to the jurist and legal philosopher, not to speak of the student of law.

M. C. SARKAR'S CIVIL COURT PRACTICE AND PROCEDURE, IVth Edition.

This is the fourth edition of a book which was originally intended for beginners and junior members in the profession of law. Its scope has now been considerably widened and it embraces all the necessary information upon the various branches of processual law such as The Civil Procedure Code, The Rules of Practice, Court Fees, The Provincial Small Cause Courts Act, The Succession Certificate Act, Probate Administration Act, Registration Act, Limitation Act, etc.; and a selection of the important decisions under the various enactments has been carefully made and given in their appropriate places. The other parts of the book deal with the examination of witnesses with the special reference to the Indian Evidence Act and contain model forms of plaints, written statements, petitions, notices, deeds and others. The variety of subjects dealt with will, we are sure, render the book one of useful reference to the busy practitioner.

LEADING CASES, by S. C. Das, M. A., LL. B., Vakil, High Court, Allahabad, Part I.

The aim of this work is to bring out the salient points in the leading cases and to mark the lines along which the later development of the law laid down therein has taken place. The judgments of the leading cases are given and

are followed by a statement of its application and development in later cases. The plan is that adopted in the well-known Smith's *Leading Cases*, although the author does not profess to have examined the law or discussed it with anything like the fulness of that well-known work. Even with the modest aim set before the author he has brought out a publication which will be found of use to the practitioner and the student alike.

THE PUNJAB ACTS: CIVIL, CRIMINAL AND REVENUE, 1798 to 1924, by Mr. P. Hari Rao, B. A., B. L., High Court Vakil, Madras.

It is with great pleasure that we announce the publication by the Law Printing House, Madras, of the Punjab Acts: Civil, Criminal and Revenue passed between 1798 to 1924. Since the publication of the Punjab Acts by them in 1912 a large number of enactments have been passed by the Central and the Punjab legislatures and it is only fitting that the present publication should appear with all the important enactments of the Punjab, North West Frontier Province and Delhi with all their legislature changes and foot-notes of case-law brought up to date. It may be mentioned that each enactment is prefixed by its history from its beginning upto date. The amendments, additions and repeals have been incorporated in the body of the Act and marked by figures corresponding to which are given in the foot-notes, the enactments by which they are made with the necessary explanation. The foot-notes giving the important decision will be found very useful. The exhaustive index in the end will also be greatly appreciated. It is superfluous to add that the get up of the book by the Law Printing House leaves nothing to be desired.

We are glad to acknowledge the receipt of Part III of "Subject Index of Case-law" by Mr. T. G. Ananthanarayana Aiyar, B. A., B. L., Vakil, High Court, Madras.

We are glad to acknowledge the receipt of "The American Bar Association, London Meeting, 1924," being the impressions of the social, official, professional, and juridical aspects thereof published by the Frank Shephard Company. New York.

[END OF VOLUME XLVIII.]