

Court by the Honourable LLOYD and KEMBALL, JJ., on the 12th September 1872, whether the accused has committed an offence, I forward the proceedings for the orders of the Judges of the said Court.”

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The reference was heard by BAYLEY and WEST, JJ.

PER CURIAM:—The Court will not interfere, as the salt having in this case been legally appropriated, its dishonest removal was theft.

*Record and Proceedings returned.*

[ORIGINAL CRIMINAL JURISDICTION.]

REG. v. PESTANJI DINSHA' AND ANOTHER.

*Statement of Judge conclusive—Refusal of Judge to reserve point of law not reviewable—Summing up by judge—Non-direction—Certificate by Advocate General—Abetment of murder by impossible means—Sorcery—Privy Council—Leave to appeal.*

The statement of a Judge, who presides at a criminal trial, is, up on a case reserved under the 25th clause of the Charter of the High Court, or upon a case certified by the Advocate General under its 26th clause, conclusive as to what has passed at the trial. Neither the affidavits of bystanders or of jurors nor the notes of counsel or of short-hand-writers are admissible to controvert the statement of the Judge.

It is in the discretion of the Judge, who presides at a criminal trial, whether or not he will reserve a point of law for the opinion of the High Court, and such discretion will not be reviewed by the High Court sitting as a court of review, under clause 26 of the Letters Patent.

*Semble.* Non-direction by a Judge is not a matter upon which the Advocate General should grant a certificate under clause 26 of the Letters Patent.

In considering whether a Judge has misdirected the jury, the tenor and general effect of the whole summing up should be looked at, and if, upon the whole summing up, the court is of opinion that substantially the proper direction has been given to the jury, it will not interfere, though the Judge has omitted to direct the jury expressly on some important point.

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Whether abetment to murder by sorcery or other impossible means is an offence under the Penal Code.—*Quære.*

In criminal cases the High Court will not, in general, grant leave to appeal to the Privy Council, unless some important question of law or practice, or jurisdiction is involved.

Considerations that guide the Court in granting leave to appeal in such cases, stated, and instances in which such leave has been granted, mentioned.

AT the First Criminal Sessions of 1873, before BAYLEY, J., and a Special Jury, Pestanji Dinshá and Sakhárám Rághobá were charged as follows:—

I. That they, the said P. D. and S. R., heretofore to wit on the 11th of December 1872 at Bombay, did instigate one Kakishá Illáhibaksha to murder one Nicholas DeGa, and did thereby abet the commission of an offence punishable with death against the Acts, &c.

II. That they, the said P. D. and S. R., afterwards to wit on the day and year last aforesaid, did instigate one Kakishá Illáhibaksha to murder one Rose Mary DeGa, &c., (following the wording of the former charge).

The evidence given at the trial, which consisted of that of persons who overheard the conversation, showed that Pestanji Dinshá and his accomplice Sakhárám Rághobá instigated Kakishá Illáhibaksha to kill the two DeGas, named in the charges, but that when speaking to Kakishá Illáhibaksha, with reference to the means by which the deaths were to be brought about, Pestanji Dinshá expressly told Kakishá that he was not to use poison but was to “polish off” (*sáf karná*) the DeGas by means of *illam*. Kakishá Illáhibaksha, the person instigated, was, at the time of the instigation, in the employment of the Police.

It was contended for the prisoners at the trial: I—that the intention of the prisoners was not a serious intention to kill, and II—that if, in fact, such an intention did exist in their minds, it was clear, upon the evidence, that their intention was that the deaths should be brought about by means of sorcery only, and that instigation to murder by sorcery did not constitute the offence of abetment of murder within the meaning of the Penal Code.

*Anstey* and *Inverarity* were of counsel for the prisoner Pestanji Dinshá.

*Marriott* and *B. Tycbji* were of counsel for the prisoner Sakháram Rághobá.

The Honourable *A. R. Scoble* (Advocate General) and *Ferguson* appeared for the prosecution.

*Anstey*, before addressing the jury for the first prisoner, asked the presiding Judge to rule that there was no case to go to the jury, but the learned Judge held that there certainly was a case to go to the jury, and *Anstey*, thereupon, addressed the jury both on the law and the facts.

At the close of *Anstey's* address, his junior counsel, by his direction, asked the learned Judge to reserve, under clause 25 of the Letters Patent, for the opinion of the High Court, the point of law "whether instigation to murder by sorcery constituted any offence at law," but the learned Judge declined to do so, saying that he did not think there was at present (then) any question of law to be reserved.

The further material incidents that occurred at the trial are fully detailed in the judgment of the Full Court.

The jury found the prisoners guilty, and they were each sentenced to seven years' rigorous imprisonment.

Subsequently, upon a certificate of the prisoners' counsel as to the direction given by the learned Judge in his charge to the jury, the Advocate General granted a certificate, under clause 26 of the Letters Patent, which, omitting the formal portions, ran as follows:—

"And whereas the said Pestanji Dinshá and Sakháram Rághobá were respectively found guilty by the said jury upon the said charges and were, therefore, severally sentenced, by the said Mr. Justice BAYLEY, to rigorous imprisonment for the term of seven years; and whereas it has been represented to me that the said Justice did direct the said jury with regard to the said charges that evidence of a simple intention to kill, without reference to the means to be employed to cause death, was sufficient in law to warrant the conviction of the said Pestanji Dinshá and Sakháram Rághobá upon the said charges; and whereas it may be doubtful whether the said direction of the said

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1873. Justice to the said jury is warranted in law, NOW I, Andrew Richard Scoble, Her Majesty's Advocate General at Bombay, do, under and by virtue of the powers to me entrusted by the Letters Patent for the High Court of Judicature for the Presidency of Bombay, bearing date the 28th of December 1865, hereby certify that in my judgment the said point of law, so alleged to have been decided by the said Mr. Justice BAYLEY, namely, that evidence of a simple intention to kill, without reference to the means to be employed to cause death, is sufficient in law to warrant a conviction of abetment of murder, should be further considered by the High Court."

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The case came on for argument before a Full Court consisting of WESTROPP, C. J., GIBBS, SARGENT, BAYLEY, and MELVILL, JJ., on the 11th day of March 1873.

*The Honourable A. R. Scoble* (with him Ferguson), in support of the conviction, stated that though, on the representation of counsel for the prisoners, he had, as Advocate General, given the above certificate, he did not admit as a fact that such a direction, as was therein alleged to have been given, had in fact been given. [BAYLEY, J., said that he had not given such a direction to the jury]. The Judge's statement is conclusive: *Gibbs v. Pike* (a). [WESTROPP, C.J., referred to *R. v. Grant* (b). and *Everett v. Yoellus* (bb).]

The Court then suggested that the certificate might be amended by the Advocate General so as to make it represent what actually took place at the trial. The Advocate General assented to this being done, and an amended certificate was then drawn up. It is set out in the judgment of the Court.

*Anstey* and *Inverarity*, for Pestanji Dinshá, argued that abetment of murder by sorcery was not an offence under the Penal Code, and cited *R. v. Cassidy* (c), *In re Jotee Ghorae* (d), Notes to Mayne's Penal Code under Sec. 511, *R. v. Isaacs* (e), *R. v. Scudder* (f), and referred to Section 108 of the Penal Code 2nd Explanation.

(a) 9 M. & W. 351. (b) 3 N. & M. 106. 5 B. & Ad. 1081.

(bb) 4. B. & Ad. 681, 683.

(c) 4 Bom. H. C. Rep. 17. Cr. Ca. (d) 1 Calc. W. Rep. Cr. R. 7.

(e) 9 Jur. N. S. 212. S. C. 32 L. J. Mag. Ca. 52. (f) 3 Car. & P. 605.

Assuming that there cannot be an abetment to murder by sorcery, then we contend that, under the circumstances, the refusal of the Judge to reserve the point of law, coupled with his omission to tell the jury that instigation to murder by sorcery was not an offence, and with his saying, in the presence of the jury, that there was no point of law to be reserved, might have led the jurors to believe that abetment to murder by sorcery was an offence. The conduct of the Judge, under these circumstances, amounted to a misdirection: *Queen v. Nawab Jan (g)*, *Queen v. Elahee Buksh (h)*. [BAYLEY. J.—Is non-direction a matter for a bill of exceptions? *M'Alpine v. Mangnall (i)*, *Anderson v. Fitzgerald (j)*.] No. That is the rule in civil cases; but there another remedy is provided—a new trial can be moved for. On the point of non-direction see also *Elliott v. South Devon Railway Co. (k)*; *Gregory v. Tuffs (l)* and *Goldicut v. Beagin (m)*. In fact there has been a mistrial, and this court will, upon that fact being shown, set aside the conviction and sentence: *Reg. v. Aaron Mellor (n)*. The tendency of the whole evidence goes to show that the prisoners intended to kill by sorcery only, but it is sufficient for us to show that there is evidence to that effect.

We contend that the charges are bad for not stating that the offence, which the prisoners were charged with abetting, was not committed. This court can now take cognizance of that objection: *R. v. Webb. (o)*. We say this Court has no power to do otherwise than quash the conviction. It has no power to grant a new trial in cases of felony: *Queen v. Bertrand (p)*, *Queen v. Murphy (q)*. This is a new offence created by the Penal Code and is substantially a felony—see *Queen v. Mellor (supra)*, *Queen v. Martin (r)*.

*Marriott and B. Tyebji* followed for Sakháráp Rághobá.

(g) 8 Calc. W. R. Cr. R. 19. (h) 5 Ibid 80. (i) 3 C. B. 496.  
 (j) 4 H. L. Cas. 484. (k) 2 Ex. 725. (l) 1 C. M. and R. 310.  
 (m) 11 Jur. 544. (n) 1 Dears. & B. 468. See Per Coleridge pp, 490, 491.  
 (o) M. & Rob. 405.  
 (p) L. Rep. 1 P. C. C. 520. (q) 2 Ibid. 35, 535. (r) L. R. 1 Cr. Ca. 378.

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*Scoble* in reply :—It was in the discretion of the Judge whether or not he would reserve a point of law and that discretion cannot be reviewed: *Newton's Case* (s), *R. v. Charlesworth* (t), *R. v. Webb* (supra), *Queen v. Stubbs* (u), *Winsor v. Queen* (v), *Reg. v. Dáydál Jáírúj* (w), and judgment of Crampton in *Conway and Lynch v. Queen* (x).

An omission to direct is not a misdirection: *Anderson v. Fitzgerald* (supra). The whole summing up must be looked at, and the court must see what its general effect is: *R. v. Russell* (y). The whole tenor of the summing up of BAYLEY, J., as appears from the statement that the judge has drawn up (and which must be deemed to be correct: *R. v. Mellor*), was to point out to the jury that in his opinion abetment of murder by sorcery was not an offence, and that the prisoners intended to kill by means other than supernatural. I contend, in any case, that non-direction is not matter for the granting of a certificate under clause 26 of the Letters Patent. There must be some point of law *decided*. The cases cited from the Calcutta High Court have no application. They were decided upon the Criminal Procedure Code which does not apply to trials by jury in the High Court.

He also cited *R. v. Higgins* (a), *Queen v. M'Pherson* (b), and distinguished the cases cited on the other side. He also contended that abetment to murder by sorcery was an offence, inasmuch as death might be caused by sorcery indirectly, and that, even if that were not so, intention to kill, followed by an overt act of instigation, constituted an abetment of murder, under Sec. 109 of the Penal Code.

*Anstey* was heard upon the new cases cited. He argued that killing caused by indirect means was not an offence, and referred to *R. v. Martin* cited at page 674 of *Russell on Crimes*.

(s) 13 Q. B. 716. (t) 31 L. J. Mag. Ca. 25 (u) 1 Jur. N. S. 1115.  
(v) L. R. 1 Q. B. 289, 390. (w) 3 Bom. H. C. Rep. Cr. Ca. 20. (x) 7. Ir.  
L. R. 149, 165. (y) 6 B. & Cr. 566. (a) 2 East 5. (b) 1 D. & B. 197.

On the 24th of March, the judgment of the Court was delivered by—

WESTROPP, C. J., (who, after reading the charges and the original certificate of the Advocate General, proceeded):—

The representation on which that certificate was given, was contained in the concluding passage in a certificate of counsel for the prisoners, which appears to have contained other matters, with reference to which, however, the Advocate General has not certified any point for the consideration of this court. With those matters, therefore, we are not concerned. It will be observed that the Advocate General was careful, in the manner in which he worded his certificate, not to bind himself to the accuracy of the representation made to him, that the Judge did direct the jury that evidence of a simple intention to kill, without reference to the means to be employed to cause death, was sufficient in law to warrant the conviction of Pestanji Dinshá and Sakháram Rághobá upon the charges. The learned Advocate General, in opening the case to this court, informed us that he did not understand the learned Judge to have given any such direction to the jury. The learned Judge also positively states to us that he did not so instruct the jury; and in the summary (which he has furnished to us and to the learned counsel at both sides) of the remarks upon the case which he did address to the jury, there is not a trace of any such direction. The statement of the Judge, who presides at a trial, whether it be in a criminal or civil case, is, as to what has taken place at the trial, conclusive. Neither the affidavits of bystanders, nor of jurors, nor the notes of counsel, nor of short-hand writers are admissible to controvert the notes or statement of the Judge: *Rex v. Grant* (c), *Everett v. Youells* (d), *Gibbs v. Pike* (e). And in *Reg. v. Aaron Mellor* (f), Coleridge J., at page 131, says: "I apprehend that we are bound to give credence to the statement of the Judge, and to take what the Judge so

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(c) 5 B. & Ad. 1081, 1807; S. C. 3 Ne. & M. 106.

(d) 4 B. & Ad. 683, 684. (e) 9 M. & W. 351.

(f) 27 L. J. N. S. 121. Mag. Ca.

1873. states to be incontrovertibly the fact. It is suggested this is not a record, but we have no more power of contradicting the statement of a learned Judge reserved for our consideration, than we have the power of contradicting any allegation upon a record"; and Martin B. (p. 137) says: "We must consider the statement of the Judge as absolute verity, and we ought to take his statement precisely as a record, and act on it in the same manner as on a record of court, which of itself imports absolute verity." The learned Judge informs us that what occurred was this:— At the close of the case for the prosecution, Mr. Anstey, for the defence, asked the learned Judge whether, in his opinion, there was any case to go to the jury; and he replied that he thought that there certainly was. Thereupon, Mr. Anstey, on behalf of the prisoner Pestanji Dinshá, addressed the jury upon the law and the facts, and, in the course of that address, contended that there was not any evidence of an instigation to murder in any other manner than by sorcery, witchcraft, or other supernatural means; and that such an instigation was not an abetment within the Penal Code, inasmuch as it was impossible to perpetrate murder by any such means. Subsequently, but before the learned Judge addressed the jury, Mr. Inverarity, who was junior counsel with Mr. Anstey, and in his temporary absence, asked the Judge to reserve, under the 25th clause of the Letters Patent of 1865, as a point for the determination of the Full Court, the question "Whether instigation to murder by sorcery constituted any offence at law?" and the learned Judge declined to do so, saying that he did not think that there was at present (then) any question of law to be reserved. Mr. Marriott, who was of counsel with Mr. Badrudin Tyabji for Sakhárám Rághobá, in addressing the jury, also contended that the instigation to murder by supernatural means alone could not constitute any offence within the Penal Code, and that the evidence did not show an instigation to murder by any other means, and expressed to the jury a hope that the learned Judge would put three questions to the jury:—1.— Whether there was a real intention that the DeGas should be murdered? 2.— Whether that intention was that they should

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be murdered by supernatural means? 3.—Whether it was intended by the prisoners that the murder should be by any material means? The learned Judge, at the close of Mr. Marriott's address, charged the jury. We shall presently refer to what he said. The jury returned a verdict of guilty against both prisoners. Mr. Marriott then moved in arrest of judgment on the ground that both counts in the indictment (or rather charges, as they have been styled since Act. XIII. of 1865 which abolished grand juries in the Presidency towns), were insufficient in law, because it was not alleged in them that the offence, namely, the murder, alleged to have been abetted, was not committed. The learned Judge refused to arrest the judgment, and then passed sentence upon the prisoners. The representation on which the Advocate General's certificate was grounded, that the Judge had instructed the jury that evidence of a simple intention to kill, without reference to the means to be employed, was sufficient in law to warrant a conviction, being, as, on the information of the learned Judge, we were bound to assume, contrary to the fact, and the certificate of the Advocate General, therefore, unsustainable in fact, the case must have ended there, had not the Advocate General, on the suggestion of the Court, amended his certificate so as to render it more conformable to the circumstances of the case as stated by the learned Judge. We must not for a moment be understood as impeaching the *bond fides* of the counsel for the prisoners in certifying, as they did, to the Advocate General. Three of those learned counsel were present when the Judge summed up, Mr. Anstey being absent: Nothing is more common than for men honestly to differ in their recollections as to what occurs in court or at a public or private meeting. We had not long ago a striking specimen of such discrepancies in the suit of *The Bank of Bombay v. The Oriental Bank*, in which men of undeniable honour and veracity gave widely varying narratives of the proceedings at the meeting at which a loan of 25 lakhs was agreed to be made to Prem-

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1873. chand Raichand. The law has made the Judge the final authority as to what takes place before him at a trial; and that authority this Court must recognize. The Court, however, thought it desirable and suggested to the learned Advocate General that he should amend his certificate, in order that such of the facts, stated by the learned Judge to have occurred, as it was alleged on behalf of the prisoners amounted to a misdirection on the part of the Judge to the jury, should be brought before this Court. Where points of law are reserved under the English Statute 11 & 12 Vict. ch. 78, the Court for Crown Cases Reserved expects the cases to be submitted in a complete form, and will ordinarily refuse to send back a case to the Judge who reserved the points for amendment: *Reg. v. Holloway (g)*. Sometimes, however, it will do so, not on the application of counsel, but if, on the argument, the case appears to have been imperfectly stated: *Reg. v. Hilton (h)*. If counsel should think that a material point has been omitted, it has been considered to have been proper for him to communicate with the Judge who reserved the case, and suggest any amendment that, in his opinion, may be necessary: *Reg. v. Smith (i)*. The Advocate General gracefully and promptly yielded to the suggestion; for it was no more, of this court, which had neither the intention nor the right to dictate to him in the matter. (See the remarks of Sir Richard Couch in *Reg. v. Dayal Jairaj (j)*). And in making that suggestion we did not commit ourselves to any final expression of opinion as to whether it would be possible, consistently with the actual circumstances of the case, for the Advocate General so to amend his certificate as to satisfy the requirements of the 26th clause of the Letters Patent of 1865.

The certificate of the Advocate General, as amended, after stating the charges, conviction, and sentences, as before, proceeds as follows:—“ And whereas *it has been represented to*

(g) 1 Denison C. C. 370.

(h) Bell C. C. 20. (i) 14 Jur, 92: 4 Cox. C. C. 42; 1 Den. C. C. 570.

(j) 3 Bom. H, C, Rep. Cr. Ca. 22.

*me* that the said Justice did, in the presence and hearing of the jury, refuse to reserve, for the opinion of the said High Court, the point of law following, that is to say, 'whether instigation to murder by means of sorcery is an offence or not,' and did not instruct the jury, in his summing up, that instigation to murder by means of sorcery was not an offence, but, on the contrary, did tell the jury and did say, in their presence and hearing, that there was no point of law in the case to be reserved for the opinion of the said High Court; and whereas *it has been further represented to me*, on behalf of the said Pestanji Dinshá and Sakárám Rághobá that the said rulings and proceedings of the said Justice constitute error in the decision of a point or points of law; and whereas, in my judgment, it is desirable that the point or points of law *so alleged* to have been decided by the said Justice should be further considered:—Now I, Andrew Richard Scoble, Her Majesty's Advocate General at Bombay, do under and by virtue of the powers to me entrusted by the Letters Patent for the High Court of Judicature for the Presidency of Bombay, bearing date the twenty-eighth day of December, one thousand eight hundred and sixty-five, hereby certify that in my judgment the said point or points of law, so alleged to have been decided by the said Justice, should be further considered by the High Court."

The allegation, in that certificate, that the Judge, in the presence and hearing of the jury, refused to reserve the point of law therein mentioned, most certainly when taken alone, states no error in law. It was rightly argued for the Crown that it was completely a matter of discretion with the learned Judge whether he should reserve for this Court any point of law. The 25th clause of the Letters Patent of 1865 is this: "And we do further ordain that there shall be no appeal to the said High Court of Judicature at Bombay from any sentence or order passed or made in any criminal trial before the court of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court. But it shall be *at the discretion of any such court* to reserve any point or points of law for the opinion of the said High

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 Court." The exercise of the discretion of the Judge is not a matter reviewable under Clause 26 of the Letters Patent: *Reg. v. Dayál Jairáj (k)*, per Couch, C.J. The certificate then continues to state, as represented to the Advocate General, that the Judge "did not instruct the jury, in his summing up, that instigation to murder by means of sorcery was not an offence, but, on the contrary, did tell the jury and did say, in their presence and hearing, that there was no point of law in the case to be reserved for the opinion of the said High Court." The first part of this allegation, viz., that the Judge "did not instruct," &c., is an averment of an omission, and no more, on the part of the learned Judge. It simply puts forth a non-direction by him, not a misdirection. Here it will be proper to refer to some of the principal authorities relating to this point. They are for the most part cases decided on bills of exceptions. It is true that a bill of exceptions will not lie in any criminal case, whether of felony or of misdemeanour. This is because civil causes only are within the Statute of Westminster the 2nd: *In re Hayes and Rice (l)*, *Sir Harry Vane's case (m)*, *Rex. v. McDonnell (n)*, *Reg. v. Alleyne (o)*, *Reg. v. Esdaile (p)*, and 3 Russ. Cr. L. by Greaves, p. 212. If, in England, the Judge who presided at the trial was of opinion that an illegality had occurred in it, he might formally, in his discretion, forbear to pass sentence or respite the judgment, until the opinions of the fifteen Judges were obtained. For this course was substituted the right to reserve questions of law under the Stat. 11 & 12 Vict. ch. 78, which, to a considerable extent, resembles the provision made in the 25th clause of the Letters Patent, which has been already mentioned. To the 26th clause, empowering the Advocate General to certify a question of law, there is not any corresponding section in the Stat. 11 & 12 Vict. ch. 78. The power under the Stat. 11 & 12 Vict. ch. 78, and under the Letters Patent, to

(k) 3 Bom. H. C. Rep. Cr. Ca. 28. (l) 3 Jo. and Lat. 568.

(m) 2 Harg. State Trials 450. (n) Hud. and Br. 439.

(o) Dearsley C. C. 505. 509; S. C. 1 Jur. N. S. 373, (p) 1 F. and F.

reserve questions of law, is, in criminal cases, to a considerable extent analogous to the mode of raising questions of law in civil causes by a bill of exceptions. In *M'Alpine v. Mangnall* (q), counsel for the defendants in error said that the bill of exceptions did not, as it ought to do, show how the Lord Chief Justice did direct the jury; it merely stated that he declined to direct them in a particular way. And counsel for the plaintiff in error, in reply, said that a refusal on the part of a Judge to direct in a way in which he is bound in point of law to direct, is a misdirection. But Baron Parke said: "That which you complain of here is a non-direction, which clearly cannot be made the subject of a bill of exceptions," and, finally, in giving judgment, said: "It is misdirection, and not non-direction, that is the proper subject of a bill of exceptions." In *Anderson v. Fitzgerald* (r), Mr. Baron Parke, in giving the unanimous opinion of the English Judges, said: "With respect to the second question proposed by your Lordships, we answer, that the exceptions, on the issue joined on the second and third pleas, are not sustained, and that on a formal ground. The bill of exceptions should have stated what directions the Judge gave, as it is misdirection, not non-direction, which is the proper subject of a bill of exceptions." In *Gregory v. Cotterell* (s), the third exception was "that evidence of the practice at the offices of the sheriff's officers and of the officers' clerks ought not to have been admitted, and that the Judge ought to have directed the jury to disregard it," and it was held "that evidence of the practice at the office of the sheriff's officer was admissible; and that the exception was defective, inasmuch as misdirection, and not non-direction, was the proper subject of a bill of exceptions." Jervis, C. J., after observing that evidence of the practice was constantly received as against the sheriff, said: "But the best answer to that objection is that the form in which it is pleaded and presented to the Court is a defective form, because it has been held (*M'Alpine v. Mangnall*, in error 3 C. B. 496, and *Anderson v. Fitzgerald*, 4 H. L. C. 484, 17

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(q) 3 C. B. Rep. 496. (r) 4 Ho. Lds. Cases 484.

(s) Exchequer Chamber in Error from the Court of Q. B. 2 Jurist N. S. 16

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Jur. 995) that the exception must not take an objection to the Judge not doing what he ought to have done, but must object to some positive act which he did." In *Jefferys v. Boosey* (t) Lord Chief Justice Jervis said: "The party who excepts to the ruling of a learned Judge must show clearly, upon his bill, that the learned Judge was wrong. Every fair intendment must be made in favour of the summing up, and if, therefore, it is not apparent upon the record that the direction was wrong, the verdict must stand." In *Sedly v. M'Gowan* (u), Crampton J. says: "But, secondly, was the Judge bound to direct the jury in the terms required by the defendant's counsel? I think not. In my apprehension, an exception lies to any rule made by the Judge at the trial, or to what a Judge says in his charge, or any part of it, but not to what he does not say or refuses to say. A Judge is not by law compelled to charge at all, though in many (indeed in most) cases it would be right and expedient so to do. The exception should be for *mis-direction* not for *non-direction*. \* \* \* Upon this ground merely, therefore, the first exception in this case should be overruled."

On motions for new trials, where the question whether a verdict is against the weight of evidence may be raised, the Court gives more consideration to the point whether a Judge has omitted to give a proper direction to the jury than upon a bill of exceptions. It would appear to be "a good ground for a new trial that a direction has been left so bare as to require an explanation to prevent the probability of its being misunderstood." But, even on motion for a new trial, non-direction is only a ground for granting a new trial, where the verdict is against the weight of evidence: *Ford v. Lacy* (v), *The Great Western Railway of Canada v. Braid* (w). See also *Gregory v. Tuffs* (x), *Elliott v. The South Devon Railway Company* (y). And in *The D. of Newcastle v. Broxtowe* (z), it was said, on a motion for a new trial, in a case of alleged

(t) 4 H. of L. Cases 941.

(u) 7 Ir. C. L. Rep. 434.

(v) 30 L. J. N. S. 351 Exch.

(w) 1 Moo. P. C. C. N. S. 101, 122

(x) 1 Cr. M. and R. 310.

(y) 2 Exch 725.

(z) 4 B. &amp; Ad. 280.

misdirection, that it is only in those cases in which the Court is satisfied that the jury has been led to a wrong conclusion that it ought to interfere. The same doctrine has been frequently laid down. What the Court looks to is whether "complete and substantial justice has been done; if so, there is no reason to grant a new trial" (a). These, it is true, were all civil cases, but the principle is equally sound in criminal cases. In *Reg. v. Russell* (b), which was a motion for a new trial in a criminal case, Crompton, J., said: "It is dangerous to pick out particular expressions from a Judge's summing up and to criticise them verbally, when he is substantially correct in the direction he gives the jury." Proceedings under the 25th and 26th clauses of the Letters Patent of this Court, or under the Stat. 11 & 12 Vict. ch. 78. in England, bear a much closer analogy to a proceeding upon a bill of exceptions than to a motion for a new trial, and the Court is much more limited in its action than it would be in a motion for a new trial, where the question, whether a verdict has been against the weight of evidence, may be entertained. In cases under the Stat. 11 & 12 Vict. ch. 78, the Court will not consider an objection which has not been reserved, even though it may be deducible from the case itself: *Reg. v. Smith* (c). The case of *Reg. v. Elahee Buksh* (d), followed in *Reg. v. Nawab Jan* (e), was much relied upon by the counsel for the defence as showing that an omission to direct will be treated as an actual misdirection. But, for that purpose, those cases are not in point upon questions reserved by a Judge or certified by the Advocate General at the Original Jurisdiction Side of the High Court, where the procedure in criminal cases is not regulated by the Criminal Procedure Code, but, in the main, by the English practice as it existed in the Supreme Court, save where altered by special legislation, or by the Charter of

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(a) 2 Term Rep. 4; 2 Bing. 483 and per Burrough J. 495; 1 B. & Ad. 145; 6 Exch. 213; 12 C. B. N. S. 776; 11 M & W. 401; 16 C. B. 227.

(b) 23 L. J. N. S. 173, 177 Mag. Ca

(c) 14 Jur. 92.

(d) 5 Calc. W. Rep. Cr. R. 80.

(e) 8 Ibid 19.

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the High Court (see the Letters Patent of 1862, Sec. 38, and of 1865, Sec. 38). Those Calcutta cases were governed by the Criminal Procedure Code of 1861, and were not upon points reserved by a Judge or certified by the Advocate General, but were appeals from trials in the Mofussil before juries. Peacock, C. J., to a considerable extent, grounds his remarks in *Reg. v. Elahee Buksh*, as to the duty of a Judge in summing up, upon Sec. 379 of the Criminal Procedure Code. On an appeal from the Mofussil, the High Court has a much wider sphere of action than upon clauses 25 and 26 of the Letters Patent in cases on the Original Jurisdiction Side. But even supposing that upon the present occasion we were disposed to allow to ourselves a greater latitude than seems to be permitted, in cases reserved under the Stat. 11 & 12 Vict. ch. 78, in England, and to inquire whether the alleged non-direction in this case amounted to misdirection, and had misled the jury or was likely to mislead them, and further to assume, for the sake of argument, as true the proposition of law, not perhaps unreasonably put forward for the defence, (but as to which we do not now intend to give any opinion\*), "that an instigation to murder by sorcery or other means of similar character alone could not constitute an abetment within the Penal Code," we have come to the conclusion that the Court ought not to interfere with the convictions had in this case.

It is not alleged that the Judge, at any stage of the trial, laid down as a proposition of law that an instigation to murder by sorcery or such like means is abetment within the Penal Code. His refusing to reserve for this Court the question, whether it is or is not, was not any intimation of an

\* See 3 Campbell Rep. 73, 76, where, upon an indictment on 43 Geo. III. c. 58, Sec. 2, Lawrence J. said: "It is immaterial whether the shrub was savin or not, or whether it was capable of procuring abortion, or even whether the woman was actually with child. If the prisoner believed at the time that it would procure abortion and administered it with that intent, the case is within the Statute, and he is guilty of the offence laid to his charge."

opinion that it is. It was perfectly consistent with that refusal that he might be of opinion that it was not within the Penal Code, and that he intended, when addressing the jury, to convey to them that view of the law. Mr. Marriott expressed to the jury a hope that the Judge would put three questions to the jury, but neither he nor any other counsel asked the Judge to tell the jury that such an instigation was not a penal offence, and the Judge accordingly did not refuse so to instruct them. We shall now proceed to consider whether he did in fact so instruct them expressly or by implication. (The Court then proceeded to consider whether the learned Judge had in effect told the jury, that instigation to murder by sorcery or such like means alone was not an offence, and came to the unanimous conclusion "that the tenor of the Judge's address to the jury was that, in order to determine whether or not the prisoners were guilty of the charges of abetment brought against them, it was absolutely necessary that the jury should, upon the evidence and the inferences deducible from it, consider and determine whether the instigation to murder was an instigation to murder by any means other than sorcery or poison; and that though the learned Judge did not *in totidem verbis* tell the jury that an instigation to murder by sorcery alone would not constitute the offence charged against the prisoners, yet that his summing up was fully tantamount to an instruction to that effect, and it was morally certain must have been so understood by the jury." And with reference to certain remarks that had been made in the course of the case as to the learned Judge having expressed his opinion to the jury on the facts, the Court quoted the observations of Crampton, J., in the *Queen v. O'Connell* (a), and the remarks of Lord Tenterden in *Rex v. Burdett* (b). The convictions and sentences on the prisoners were accordingly affirmed.)

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*Convictions and sentences affirmed.*

(a) 7 Ir. L. Rep. 304.

(b) 4 B. &amp; A. 167.

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*Inverarity* on behalf of Pestanji Dinshá and *Marriott* on behalf of Sakhárám Rághobá moved, before a Court composed of the same Judges as above, on the 7th April for leave for the prisoners to appeal from their respective convictions and sentences to the Privy Council, and also from the judgment of the Court in the point of law certified by the Advocate General.

WESTROPP, C.J. :—We willingly accept the passage quoted to us by Mr. Marriott, on behalf of the prisoners, from the judgment of the Privy Council, delivered by Sir John T. Coleridge, in *The Queen v. Bertrand (f)*, as correctly laying down, so far as it extends, the grounds upon which leave to appeal against a decision in a criminal case ought to be granted. He said—“It is not necessary, and perhaps it would not be wise, to attempt to point out all the grounds which may be available for the purpose; but it may safely be said, that when the suggestions, if true, raise questions of great and general importance, and likely to occur often, and also where if true, they show the due and orderly administration of the law interrupted, or diverted into a new course, which might create a precedent for the future; and also where there is no other means of preventing these consequences, then it will be proper \* \* \* to entertain an appeal.” In that case an innovation of great importance had been made in a colonial court—a new trial had (at the instance of the accused, who had been convicted of murder,) been granted in a case of felony,<sup>1</sup> and for such a course there was only one solitary precedent—*The Queen v. Scaife (g)*, of which Sir J. T. Coleridge, expressing the opinion of the Privy Council, spoke as a “decision which has taken no root in our law, and borne no fruit in our practice.” We altogether fail to perceive in the present case any “question of great or general importance and likely to occur often” and showing “the due and orderly administration of the law interrupted or diverted into a new course which might create a precedent for the future, and where there is no other means of preventing these conse-

(f) L. Rep. 1 P. C. 530.

(g) 17 Q. B. 238.

quences." If we were of opinion that anything had occurred which prevented the accused persons from having a fair trial, as, for instance, that they had been probably prejudiced by an omission on the part of the learned Judge who presided at the trial to give a proper direction to the jury whereby the jury may have been misled; and were further of opinion that under Sec. 26 of the Letters Patent of 1865 we could not interfere with the conviction, we would recommend the prisoners to the favourable consideration of Government, and would not subject them to the expense and delay of an appeal to the Privy Council, and we have no doubt that our recommendation would, under such circumstances, receive due attention. But as we were of opinion that the charge of the Judge to the jury clearly implied that the law was, as the prisoners' counsel contended it to be, viz., that it was necessary that an instigation to murder by means other than sorcery was necessary in order to constitute an abetment to murder within the Penal Code, we saw no reason to suppose that the prisoners had been prejudiced, or that the jury could have been misled in the sense placed on that word by the counsel for the defence. We do not think that this case at all approaches in importance any of those cases in which leave to appeal to the Privy Council has been heretofore granted by the Courts in India established by Royal Charter. There are only three such cases known to us, viz., 1.—*Pooneakhoty Moodeliar v. The King* (*h*), where there was a plea, in the year 1816; denying the jurisdiction of the Recorder's Court in Bombay over the accused, who stood charged with uttering a forged receipt for money with intent to defraud the East India Company in camp at Serroor in the Deccan, then part of the dominions of the Peishwa. The prisoner was a native of Arcot, but, at the time of the offence, was serving in the Bombay Army at Serroor. 2.—*Aga Kurboolie Mahomed v. The Queen* (*i*), where there was a difference of opinion amongst the Judges of the Supreme Court at Calcutta as to whether a new trial should in that case (a misde-

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(*h*) 3 Knapp 348.      (*i*) 4 Moo. P. C. C. 239.

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meanour) be granted or not. The third case was *Nga Hoong and others v. The Queen (j)*, where there was a very important question as to whether a murder committed upon an island in the Bay of Bengal, which at high tide was covered with water, fell within the jurisdiction of the Supreme Court at Calcutta, Colvill, C.J., and Buller, J., holding that it did, and Jackson, J., holding that it did not. The Privy Council agreed with the latter, and quashed the capital conviction had in that case. It appears, then, that in those cases in which leave to appeal was granted, there was either a difference of opinion amongst the Judges, or an important question of jurisdiction, or both. On the other hand, in some cases of much greater importance than the present case, leave to appeal has been refused. In *Reg. v. Eduljee Byramjee and others (k)*, where one of the prisoners was sentenced to death and the others to transportation for life for murder, the Supreme Court of Bombay refused leave to appeal to the Privy Council. It was contended in that case for the prisoners that there had been misdirection by the Judge, and a verdict by the jury against the weight of evidence. In *Reg. v. Alloo Paroo, and others (l)*, which was a case of transportation for life for destroying a ship, the same Court refused leave to appeal, although there was an important point of law in the case. In those two cases (especially *Reg. v. Eduljee Byramjee and others*) when unsuccessful attempts were made to obtain from the Privy Council the permission to appeal which had been refused by the Supreme Court of Bombay, and in *Reg. v. Bertrand (m)*, it is manifest that their Lordships of the Judicial Committee were of opinion that "interference by Her Majesty in Council in criminal cases is likely in so many instances to lead to mischief and inconvenience, that in them the Crown will be very slow to entertain an appeal by its officers on behalf of itself, or by individuals. The instances of such appeals being entertained are

(j) 7 Moo. Ind. App. 72 ; 1 Boulnois Rep. 189, 281.

(k) 5 Moo. P. C. C. 276. S. C. 3 Moo. Ind. App. 468.

(l) 5 Moo. P. C. C. 296; S. C. 3 Moo. Ind. App. 488; Perry Or. Ca. 551.

(m) L. Rep. 1 P. C. 530.

therefore very rare," and Sir J. T. Coleridge referred to three cases as establishing those opinions—*In re Ames and others* (n), *Reg. v. Joykissen Mookerjee*'(o), and *The Falkland Island Company v. the Queen* (p). In the present case, there has neither been any difference of opinion amongst the Judges who compose this Court, nor any question of jurisdiction, nor has there been decided in it any other question of great or general importance, which would justify us in sending such a case as this any further. The authorities, to which we have referred, satisfy us that, if we were to grant permission to appeal to Her Majesty in Council on the present occasion, we should exceed our duty.

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*Leave to appeal refused.*

[APPELLATE CIVIL JURISDICTION.]

*Cross Special Appeals Nos. 175 and 223 of 1872.*

No. 175.

RANCHHOD JAMNA'DA'S ..... *Appellant.*

LALLU HARIBHA'I ..... *Respondent.*

January 27.

No. 223.

LALLU HARIBHA'I ..... *Appellant.*

RANCHHOD JAMNA'DA'S..... *Respondent.*

*Breach of Contract—Relief—Mandatory Injunction—Damages.*

Where the plaintiff and the defendant, being owners respectively of two adjoining houses and the verandahs immediately in front of those houses, agreed that they should keep the verandahs open and not build upon them or divide them by a wall :—

(n) 3 Moo. P. C. C. 409.

(o) 1 Moo. P. C. C. N, S. 272. (p) 1 Ibid 299.