

Yet Mr. Pfeffer is no purist. For example, he believes that chaplains in the armed forces may even be necessary "under the constitutional guarantee of freedom of conscience." For a soldier is deprived of the opportunity to go to the church of his own choice; the government has the duty to furnish him, insofar as it can do so, "a substitute in the form of a traveling church." Tantalizingly he says that so, too, "much of the exemption that religion enjoys under tax laws may likewise be justified under the 'free exercise' clause." These instances illustrate the approach of the author: he thinks in terms of principles, but never forgets that principles have limits and margins and shadows, and that when a principle seems to contradict common sense, it is best to sit up and count a hundred.

One ends the book with a feeling of deep respect and gratitude for the author. One feels also a heightened regard for the work of the Commission on Law and Social Action, for it must have been out of the felt needs and work of this important civil liberties agency that the book had its origin. Finally, one ends the book with the conviction that, as the author says, "religion has achieved in the United States a high estate unequalled anywhere else in the world" under our constitutional system of the separation of church and state and freedom of religion—for which we say: *laus Deo!*

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Uncommon Law. By A. P. Herbert. London: Methuen & Co., Ltd. Reprinted with additions, 1952. Pp. xxii, 494. \$3.25.

Codd's Last Case. By A. P. Herbert. London: Methuen & Co., Ltd., 1952. Pp. viii, 152. \$2.50.

Sir Alan Patrick Herbert is the *enfant terrible* of the British Isles. He was, until the position recently was abolished, an Independent Member of Parliament for Oxford University. His activities in that distinguished House included the introduction of a Marriage Bill which ultimately became the Matrimonial Causes Act of 1938 and achieved the impossible by reforming the English law of divorce. They also included the laying of an information against certain fellow members of the House for selling liquor without a license, which resulted in a decision¹ in King's Bench that the august precincts in which the offense occurred were beyond the jurisdiction of any court of law.

He is the author of fiction of some note; both *The Water Gypsies* and *Holy Deadlock*, the novel which finally broke the back of the divorce laws, are well worth anyone's trouble. He has also written innumerable comic operas, revues, skits, and bits of light verse, doggerel and otherwise. Whenever a pompous head is uplifted, he has been there to smite it down. Since 1924 he has been one of the leading lights on the staff of *Punch*.

¹ *Rex v. Sir R. F. Graham-Campbell, ex parte Herbert*, [1935] 1 K.B. 594.

Among his other qualifications, he is a barrister of the Inner Temple, who never had a case. In other words he read law in his youth, but the inoculation was unsuccessful. Like most of us who once have been exposed to the malady, however, he cherishes an abiding affection for the common law, having duly in mind the scriptural authority that whom the Lord loveth, he chasteneth. For nearly thirty years he has contributed from time to time to *Punch* a series of quasi-judicial opinions, which have been published off and on in various small volumes entitled *Misleading Cases in the Common Law*, *More Misleading Cases*, *Still More Misleading Cases*, and the like. Once before many of them were collected in a larger volume in the first edition of *Uncommon Law*. The present two volumes contain all of the best, and some of the rest.

These "misleading cases" purport to have been written by such well-known wearers of the robe as Lords Lick, Arrowroot, Mildew, Sheep and Bottle, and that noted sufferer from hay fever Mr. Justice Wool, assisted or occasionally confused by distinguished counsel such as Sir Ethelred Rutt, K.C., and Sir Humphrey Codd, K.C., both of whom have been in later years translated to the bench. They concern questions of the day arising out of facts which never have occurred before on land or sea, and they are not lacking in legal difficulty. When defamatory words are recorded on a phonograph record, which is played in public, is the defendant to be charged with libel or slander? When a golfer lapses into profanity after his fifteenth unsuccessful attempt to get out of a hazard and is prosecuted under the Profane Oaths Act, is he to be assessed at the five-shillings rate applicable to "gentlemen"—or in other words, is a golfer ever a gentleman? A politician, after the usual campaign promises, is elected to office and draws his salary; is he guilty of obtaining money under false pretenses? Is a defendant who gives tips on the races properly charged with fortune-telling? When an automobile travelling a temporarily submerged road collides with a rowboat navigating the overflow, does the rule of the road or the law of the sea prevail as to whether they turn right or left?

Some of the cases present knotty points indeed. There is, for example, the problem of the British citizen who died while crossing the International Date Line, and his heir who came of age on a day vanished from the calendar of the deceased. Sir Alan does this one in style, with a learned note on the law as to fractions of a day, which I shall certainly cite to an amazed court the next time these facts come my way. There is also Mr. Justice Codd's last case, which deals with the necessity of crying "Stop!" before shooting a burglar, and will no doubt have an irresistible appeal to anyone who is assembling another torts casebook. There is also the best discussion in all legal literature of the reasonable man of ordinary prudence, who "will inform himself of the history and habits of a dog before administering a caress," who "never swears, gambles or loses his temper, uses nothing except in moderation, and even while he flogs his child is meditating on the golden mean"—although, as the opinion quite properly concludes, there is no mention anywhere in the law of such a thing as a reasonable woman.

Starting with these fascinating situations, where "the facts of the case are intelligible to the least instructed layman and the only persons utterly at sea are those connected with the law," these decisions proceed with inexorable and convincing, if slightly daft, logic to conclusions with which we are compelled to agree although we know better. The Division of Probate, Admiralty and Divorce, or of Wills, Wives and Wrecks, is obviously right in its decision that one part of its jurisdiction must terminate, because marriage is a lottery or gaming transaction, in which "the element of skill is negligible and the element of chance predominates," so that "the Court cannot according to law assist or relieve the victims of these arrangements, whether by way of restitution, separation or divorce." Youthful counsel seems to be to be quite correct in his contention that a decision of the House of Lords is so much in the nature of an act of God that the losing party should not be mulcted for costs. The Minister of Agriculture and Fisheries is clearly sound in his position that a stranded whale which is the property of the crown under the ancient doctrine of fish royal does not fall within the responsibilities of his department, since a whale is not a fish. I agree fully with the Bow Street-magistrate who held that a check written on the side of a cow was a negotiable instrument, and my entire accord and sympathy goes out to the Lady Chancellor who exercised a lady's prerogative of housecleaning and threw out the Woolsack. It is difficult to refrain from mentioning more—there are ninety cases altogether in the two volumes, and most of them are wonderful. They are indispensable for the library of anyone who likes to season his law with a little levity.

I find myself regretting that Sir Alan never was in fact elevated to the Bench. His impact upon the law of England would have been a thing worth journeying to see. There have not been many good judicial humorists, for all too obvious reasons. Minturn of New Jersey was a master of the mock heroic, and there have been others who now and then have let themselves go, usually on the recurring topic of the scrub bull and the pedigreed heifer, which has become the theme song of American legal humor. Few of them ever approached these Misleading Cases. Mr. Justice Herbert would obviously have been irrepressible. The least that one can say is that some few segments of the common law would have been a different, and a far more diverting thing.

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Civil Rights in Immigration. By Milton R. Konvitz. Ithaca, New York: Cornell University Press, 1953. Pp. xii, 216. \$3.50.

"I have assumed," writes Dr. Konvitz in his preface, "that there are many Americans, in and outside of our colleges and universities, who would like to have in a book of about sixty thousand words an objective, critical evaluation