The Ceylon Law Review.

A Weekly Journal of Legal Information.

Edited by
Isaac Tambyah, Advocate,

WITH THE ASSISTANCE OF
V. Grenier and W. Sansoni, Advocates.

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Our New Volume.

THE seventh volume will consist of 48 weekly parts. The day of issue has been altered from Friday to Monday. We have made arrngements for quite a va iety of reading matter to please and profit our readers. It gives us great pleasure to announce that Mr. F. De Vos the well known Advocate and Dutch scholar of Galle, who needs no introduction to our readers, has kindly consented to translate for the *Review* hitherto untranslated portions of Sande's *Decisiones Frisicæ*. A first instalment appears in this number.

Our *Appeal Court Notes* will be fuller than heretofore, more in the nature of reports than summaries, and we hope to continue to earn the appreciation of outstation readers. Reports of hitherto unreported cases, civil and criminal, will be issued regularly from May with the *Review* but separately paged. The *Review*, we are proud to note, has been of some service to the Supreme Court in the Puttalam Full Bench case decided on April 8, 1910.

The subscription to this volume of 18 weekly numbers is Rs. 10·50, payable in advance.

Editorial Notes.

Excellence may be a characteristic of all addresses to the jury by Counsel for the accused in the Colombo Criminal Sessions Court, but it is not often that it befalls that the presiding Judge pays such a tribute as the Hon'ble Mr. Justice Wood Renton did on the 6th instant to Mr. Guy Grenier, from whom, said His Lordship, the jury had heard "an excellent speech, which had lost nothing in force by reason of its being comprehended within reasonable limits in point of time".

The Trojan of old and the Sinhalese villager have at least one point in common. We have the authority of the learned Police Magistrate of Matara for saying so, for commenting on the defence raised before him in P. C. Matara Case No. 29946, argued shortly before the holidays. that learned Judge thus wrote :—"As regards the other part of the defence I hold it to be utterly false. Punchiappu is admittedly accused's adopted son and accused's wife accepts a present of venison from him. The Sinhalese villager is much too wary to be so easily entrapped. Like the Trojan of old, he declares '*Timeo danaos et dona ferentes*'."

No indulgence to the dilatory, whether they be counsel, proctors or litigants! If the unbelieving desire to be referred to any more concrete instances in which the Supreme Court has declined to permit the relisting of an appeal, we commend the following to their notice:—Argument had been heard on behalf of the appellant and judgment had been reserved. A few hours later, it was brought to the notice of their Lordships that Mr..... had been retained for the respondent. Would their Lordships permit the case to be relisted or consent to call upon Mr..... to support the judgment, if on consideration it appeared to be bad? Said Mr. Justice Wood Renton :—"I do not think we can allow this. Argument has already been completed. Steps should have been taken in time to retain Counsel."

In another case Counsel moved under section 769 of the Civil Procedure Code for the relisting of an appeal, on the ground that when retained he had made a wrong note

of the number of the case. Their Lordships declined to grant the indulgence prayed for.

In case No. 32217 of the Police Court of Panadura, the accused was committed to stand his trial, for rape, before the current Criminal Sessions. On the day of trial, it being brought to the notice of the presiding judge that the prosecutrix and the accused were willing to marry each other, his Lordship ordered that proceedings should be stayed and notified to the accused that on his producing a certificate of marriage at the next sessions he would be discharged.

In P. C. Puttalam 2978 (April 8, 1910) execution of the learned Magistrate's order was stayed by a telegram. The case was between two Moors and the Magistrate sent for a witness in attendance and informed him that his fence would be removed. Full discussion of the case is pending.

A Proctor applied on April 8, 1910, to the vacation Judge for an order on the District Judge of Ratnapura to grant him his annual certificate. The certificate is obtainable annually on March 25, which this year happened to be Good Friday. The four following days were also statutory holidays. The District Judge on being moved on the 30th declined to grant the certificate. Wood Renton, J., under Ord. No. 12 of 1848 sections 4 and 6 made order.

In 537 C.R. A'pura 5724 (24. 30. 10) Grenier, J., doubted the propriety of a party to an action impugning a document and, at the same time, basing an argument upon an assumption to the contrary.

We invite attention to the information in this number about the General Council of Advocates, and to the forthcoming election.

Wanted:

A NEW EDITION of PEREIRA'S

Laws of Ceylon, Vol. II.

"Confusion takes place when materials belonging to different owners become inseparably mixed."

—Pereira's *Laws of Ceylon*, ii. 279.

In Ceylon people are more prone to express opinions in private than in public. This is specially true of writers and reviewers of books. Mr. Walter Pereira's ponderous second volume of the *Laws of Ceylon* is an example of insipid book-making, colourless and characterless. It is utterly devoid of discussion, and there are places without number in the book where the learned autho.'s own opinion might have added considerably to whatever enlightenment is derivable from his compilation. As it is, the work is an ill-assorted mass of miscellaneous information. It is grossly deficient in individuality. There is no authorship which impresses the reader. There is no criticism, very little comment, much diffuse summarising of Roman-Dutch writers done into English, first-hand and second-hand, with an excusable exhibition of Latin phrases, some unpardonable French* and very irrelevant Dutch.†

The most serious shortcoming of the book is its lack of arrangement, its highest merit is that it makes accessible in English, in one collection, some very useful Roman-Dutch opinions on many matters of legal interest. An excellent index saves it from utter neglect. Except for a subdued local colouring usually indicated by "with us" (after the manner of Voet), "in Ceylon" or the citing of a Ceylon case, the reader is constantly in danger of believing that all the statements of law in the book hold good in Ceylon. Mr. Pereira has refrained from private judgment, we had almost said judicious discrimination, to the immense peril of the average reader. All Roman-Dutch law is not law in Ceylon, and consequently, a

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* p. 120, "The wife had no *persona standi in judicio* either in her own right or *en outre droit*." The whole sentence is capable of being translated into pure English.

† p. 285. Why give *kinderen* in brackets against "children" and not against the word "enjoy"?

p. 169. Freemen [*poorters.*]

striking feature of so pretentious a treatise as this should have been a scholarly inquiry into the extent to which the mediaeval jurisprudence of Holland is in force in modern Ceylon.

Without any qualification, caution, or warning comment it is laid down that a husband unheard of for five years is presumed to be dead (p. 99), a person guilty of rape may not marry his victim (p. 97), the heir may deduct the Falcidian portion (p. 292), an executor cannot alienate the estate without the consent of the heirs (p. 295), and that prescriptive rights cannot be claimed in respect of public roads (pp. 276, 397). This last is very bad law, for there is the positive opinion of Voet to the contrary (Voet 13. 7. 7; 44. 3. 11; Maasdorp's *Cape Law* ii 83) ‡ We have heard this heresy repeated on Mr. Pereira's authority, and we desire most emphatically to refute it on Voet's.

The Law, even if correctly stated, is in places very meagre.

This huge quantity of ill-digested information from the Dutch jurists, from Burge, from Morice, from Dicey, (Part ii, ch. iv. is largely Dicey without Dicey's excellent arrangement) interspersed with a few local statutes, a good number of local and foreign cases§ (stray ones from South Africa included) has no claim to be called the *Laws of Ceylon* unless and until it is so altered, amended and recast, along lines of least confusion, as to make a coherent, connected whole with more marked indications of literary workmanship, order, method, arrangement. A thoroughly revised edition is wanted in which the law will be more lucidly, less vaguely, stated than in this.

‡ See xi. N. L. R. 41, L. R. 10 H. L. 378.

§ At p. 181 we read "Under the English law the property of the Crown in the seashore is limited by the line of medium high tides... .. It is, however, not lawful for any person to collect salt naturally formed etc., etc. (Ord. No. 6 of 1890)." The two paragraphs are inartistically and illogically adjacent. One has no bearing on the other.

Decisiones Frisicæ.

(Johan van den Sande.)

Lib. III.

Translated by F. H. de Vos, Barrister-at-Law, Galle.

I.—De Obligationibus.

(lib. 3. tit. 1. def. 1.)

A natural obligation cannot arise on a contract prohibited by the municipal law.

By a Placaat of the States of Friesland of the 15th July 1595 it was prohibited to contract with a minor or *filiusfamilias*, and a contract entered into against this prohibition with such persons was declared to be so invalid, that it could not afterwards be confirmed by ratification, nor could sureties be validly given for the same. It follows therefore that from such a contract no natural obligation arises if one regards the effect ascribed by the Civil Law to natural obligations, such as retention, compensation, suretyship, *constitutum*, exception, etc For whenever the law declares an act void and of no effect, the creation of a natural obligation is impeded. *Doctores in Dig. 46. 1. 46. Cod. 1 14. 5. Argentræus ad consuet. Britanniæ art: 214 gl. 2 Ferdinandus Vasquis lib. 4 controvers. cap. x. num. 1 2. 3. Jacobus Canterius, part. 2. variar. resolut. cap. 1. num. 49, 50.* And therefore, if a minor, after attaining majority, or a *filiusfamilias*, after becoming *sui juris*, undertakes to pay a debt contracted when he was a minor or *filiusfamilias*, such undertaking will not be valid as often decided by our Court.(1) But this Placaat being too irregular and too great a departure from the common law was advisedly left out in the edition of the new statutes in the year 1602, so that now in Friesland questions of contracts of minors and *filiifamilias* are decided to the contrary according to the rule of the common law.(2) But the court held that a contract entered into before the publication of the new statutes, and ratified after such publication, was governed by the Placaat of 1595.(3)

II.—De mutuo, exceptione non numeratæ pecuniæ et Scto. Macedoniano.

(lib. 3. tit. 2. def. 1.)

The renunciation of the exception of *non numerata pecunia* shifts the burden of proof on the defendant or person raising the plea.

The Jurists are divided in opinion as to whether a plea of *non numerata pecunia* could be renounced, as is seen from *Didac. Covarru. lib. 2. resol. 4. num. 13. vers. Quid si renuntiatio. Matth.*

(1) 25 Feb. 1606. Freerck Claas, plaintiff, *v.* Telger & Hesel Van Feyrsma, defendant.
14 March 1607. Hubert Cornelis, plaintiff, *v.* Frans Jarichs deft.
25 March 1608. Aede Van Eysinga appellant *v.* Herman van der Wolde, respondent.

(2) 19 Nov. 1612. Niclaas Sasker, plaintiff. *v.* 1 Hero van Hottinga 2 John van Herema, curators of Hessel van Herma, defendant.

(3) 27 Oct. 1610. Doytse van Wynia, plaintiff, *v.* Gabbe Jans, deft

Colerus de Process. executiv part. 1. cap. x. num. 210 et seqq. Joachimus a Beust in l. 1. ff. de jurejurand. Joh. Zangerus in tract. de except. non num. pecun. Julius Pacius ad rubr. C. de non numerat. pecun. num. 19 et alios. In this conflict of opinion the rule observed is that the renunciation is valid to this extent that the creditor is not bound to prove that the money was paid by him (which burden of proof would otherwise lie on him), but the debtor, who renounces the plea, is bound to prove that the money was not paid to him. Adopting this rule the court condemned the heirs of a debtor who had renounced the exception, they having failed to prove that the money was not paid to the deceased debtor, this exception being afterwards raised by them and they being allowed to prove this fact.

III.—27 Oct. 1607. **Nitterl Jenckes**, plff.

v.

Tub Yghe ... deft.

(lib. 3. tit. 2. def. 2.)

That a son emancipated, according to the Frisian Laws by marriage cannot take the benefits of the Senatusconsultum Macedonianum.

It is clear law that a son emancipated by marriage is not allowed the benefit of the Senatusconsultum Macedonianum. *Dig. 14. 6 1, Sec. 1. Dig. 14. 6. 3. Sec. 4.* Hence the *glossa Dig. 14. 6. 1. Sec 3* says: "Although" "he may be consul or hold any other office." This statement of the law which goes to the extent of affording a filiusfamilias, who was a consul the benefits of the Senatus consultum Macedonianum was amended by Justinian *in Novell. 82 et Auth. sed Episcopalis. C. de Episc. et cler* "For," he says, "when everyone becomes *sui juris* by such office, the Senatusconsultum ceases to operate." And Petrus Costalius *ad Dig. 14. 6. 1.* does not agree with this *glossa* because such *filiifamilias* are released from the *patria-potestas*, not as regards loss, but as regards their gain and advantage, lest their rights be endangered *l. municeps, 23. ff. ad Municipalem.* This argument of Costalius, although it applies to other cases in which the advantage of the *filiusfamilias* is principally provided for, cannot rightly to applied to the Senatusconsultum Macedonianum, which although it is inferentially to the profit of the *filiusfamilias*, yet the principal object of it is to regard the parents in whose power the son, who took the money on loan, is, whose interest it is to see that no money be lent to the son on account of the risks which might thereby be imposed on the parents. For if a *filiusfamilias* is allowed at his own will, to borrow money, when he is much involved in debt and burdened with liabilities he will begin to desire the death of his parents, and indeed go so far as to conspire to kill them. This danger to domestic life is removed by this emancipation for he who is emancipated by marriage or any other manner brings up his own family and has his property separate from that of his father and therefore the father is not more exposed to the designs of the son than to the plots of any one else. See *Hugo Donellus, lib. 12. comment. cap. 24, vers. Propositum vero est.* Therefore, as the mischief of the Senatusconsultum Macedonianum does not apply to a married son, it ceases to operate as regards him, and it follows that if a married son borrowed money, he cannot take advantage of the Senatusconsultum, and our court has so ruled.(4)

(4) 23 Oct., 1619. *Jan Jeyns v. Albertus Monckerus.*

Modified Responsibility for Crime.

Charge of the Hon. Mr. Justice Wood Renton to a Sinhalese Jury in case No. 16 (P. C. Pan. 32392), S. C. Crim. Sessions, April 6, 1910.

It is for an accused to establish its truth : and he may do this in any way he pleases. He is in no way bound to get into the box or to call witnesses He is perfectly entitled to rely on the evidence given by witnesses for the prosecution, on his counsel's speech and on every argument and consideration which can be put before the jury.

At the same time the burden of establishing that plea rests on him, not on the crown.

It seems to me that there are two separate ways in which the plea of insanity can be taken account of in Courts of justice. If the jury are satisfied—I am going to quote from the text of the Penal Code—that, at the time when the thing was done, the accused by reason of unsoundness of mind was incapable of knowing the nature of the act or that he was doing wrong, he is entitled to a verdict of Not Guilty.

If you feel that the facts can be put as high as that, it is your duty to find that the accused did the act but that he is not guilty in consequence of his unsoundness of mind.

On the other hand, a man is not entitled to be acquitted on the ground of insanity solely because he is eccentric. It would be a very dangerous doctrine of the law to lay down and for a jury to apply that mere eccentricity constitutes unsoundness of mind. To entitle an accused to an acquittal, you must be satisfied, gentlemen, not merely that he was insane but that he was prevented by his insanity from knowing the nature of the act which he did. So far I have spoken of the one door at which the plea of insanity enters into our Courts. And I need not tell you that where insanitly of that kind is established there is no danger to the public in returning a verdict of not guilty. For the accused is not free : he is merely sent to an asylum instead of being sent to prison or to the scaffold.

And I would now say to you, gentlemen, that there is a second door through which the plea of insanity can fairly pass under your consideration. It is open to a jury—here I am following the law as it is now applied in England—to reason with themselves in this way :—It is competent for you to say you do not think the accused was so insane as not to know perfectly well the kind of thing he was doing :

he had quite enough sense of that: at the same time there are circumstances in the case which in our view, shew he was not quite the ordinary man." If you hold these facts to be proved, gentlemen, and if you believed that there was here something like provocation given to the accused at the spot, it would be open to you to say, "Yes, he is responsible: but it is only a modified responsibility". It would be open to you to convict him only of a lesser offence, of culpable homicide not amounting to murder.

So you see there are three possible verdicts which you could return in this case. In the first place, that the accused is fully responsible and in that case he would be guilty of the crime of murder. In the second place that he is not responsible at all, but only did the act. If you took that view I would ask you to return a verdict finding that he did the act, at the same time excusing him on the ground of insanity. And then, in the last place, you might say that it is a case of modified responsibility, that he is not quite the normal man. Perhaps there had been some ill feeling between him and the deceased, or some abuse at the spot—perhaps some abuse or provocation which would constitute no excuse in the case of a man who is perfectly sane but would constitute an excuse and could fairly be taken account of in the case of a man who is partially sane. So if you took the third course it would amount to finding him guilty of culpable homicide not amounting to murder. [His Lordship then dealt with the evidence in the case, the facts deposed to being shortly as follows :—The only notable fact at the time of the act itself was that the accused had a "fierce look". As regards his past, the accused always spoke sensibly enough, though, owing to such and such acts as burning books and drinking the dissolved ashes, abusing devils and absent people, and sacrificing a goat and a fowl in the hope of finding hidden treasures, he was looked upon by his relatives as being of unsound mind]. Taking that evidence, and it is the only direct evidence on the point, you may ask yourselves whether it is sufficient to entitle the accused to a complete acquittal. It has no bearing on his state of mind at the time when the thing was actually done and the law says that a jury must be satisfied not only that the man was of unsound mind at the time of the criminal act but that it deprived him of all knowledge of the nature of what he was doing. Two other witnesses have been called on behalf of the prosecution. [His Lordship here referred to the evidence of the police headman and another witness who said that to their knowledge the accused had shewn no symptoms of insanity]. So if that evidence stood alone, it would be for you to say if the accused has raised a plea of insanity at all. At the

same time I think you may fairly look at the evidence of the assistant Medical Officer of the Lunatic Asylum. He is an expert, he had the accused under his observation for a full month and he tells us that the accused had an idea that he had to sacrifice life under a compact with the devil who, as his part of the bargain, would shew him hidden treasures. So, you see, it is the same kind of behaviour of which his sister has spoken as having existed long ago and if you believe the evidence of his sister and the brother it would go some way in shewing that the accused is not quite the normal man. It would tend to shew that although he was running a boutique and could be sensible, still he was under the influence of ideas which we would call insane. If you come to that conclusion you must look again at the two doors at which I have said the plea of insanity enters into courts of law. It would be open to you, if you thought that at the time he took the stone he thought he was carrying out this compact and was taking away Thelenis' life in the hope of finding treasures, to acquit him on the ground of insanity. It would be open to you to do that because the facts would shew that he had not at the time any real or true sense of the kind of thing he was doing or that it was wrong. At the same time, you will have to ask yourselves whether that fact has been proved, whether at the time he killed Thelenis the accused was acting under that kind of delusion at all. And in that connection you must remember the circumstances under which the killing took place. It will be necessary to keep in mind the picking of the nuts, his title to which was disputed, and that it was not till Thelenis had pursued him into his own compound and had dared to question him that he got the stone. So if you interpreted the fact in that way the door of complete acquittal is closed and you have to turn to the other door and the question of modified responsibility. In that connection you may fairly take account of the following circumstances :—the dispute as to the land, his being followed into his own compound and being questioned, in all probability abused. Lastly, you may take account of the medical evidence and that of his relations, if you believe it you will take account of all that evidence that he was not quite up to the usual standard. Of course if you were dealing with some men like ourselves, these circumstances would constitute no provocation at all ; on the other hand it is open to you, and it is for you alone to say whether, in the case of one who is only partially sane, they amount to provocation of the kind that would entitle him to ask you not to convict him of murder but of the lesser charge of culpable homicide not amounting to murder.

V. G.

General Council of Advocates.

Minutes of the Twenty-Sixth Meeting held on Wednesday, 23rd March, 1910.

(Subject to Confirmation.)

Present.—The Hon. the Attorney-General (A. G. Lascelles, K. C.,) in the Chair, the Solicitor-General (Walter Pereira, K. C.,) and Messrs. T. de Sampayo, K. C., B. W. Bawa, J. VanLangenberg, James Pieris, F. M. de Saram, and F. A. Hayley (Honorary Secretary).

1. The minutes of the last Meeting were read and confirmed.

2. The Council considered the Report of the Committee appointed to meet his Lordship the Chief Justice and discuss the proposal that there should be a Weekly Appeal List on the lines suggested in the Registrar's letter of 5th February, 1910. The Report was in the following terms :—

"The Committee has the honour to report that, at an interview which took place on Tuesday, 22nd March, at 10 a. m. when there were present the Hon. the Chief Justice, the Hon. Mr. Justice Wood Renton, Messrs T. de Sampayo, K. C., B. W. Bawa, A. St. V. Jayewardene, and F. A. Hayley (Mr. VanLangenberg being unavoidably absent), it was decided that no change should be made in the present system. It was suggested that the Registrar should be requested to keep in the Registry a list of cases which have been typed and are ready for hearing in due course.

(Signed) THOMAS DE SAMPAYO
" B. W. BAWA
" A. ST. V. JAYEWARDENE
" F. A. HAYLEY
} *Members of Committee.*

Resolved.—That the Report be recorded.

3. The Council considered the Draft of an Order for regulating the Procedure under the "Appeals (Privy Council) Ordinance, 1909," which had been submitted by the Registrar for the Council's consideration.

Resolved.—That Council has no suggestions to make with regard thereto.

4. The Council considered a letter, dated 17th March, 1910, from the Registrar of the Supreme Court, conveying a request from the Chief Justice and the Judges of the Supreme Court for the decision of the Council as to whether or not it is consistent with the traditions and etiquette of his profession for an Advocate—

(*a*) To present to the Registrar, either in person or through his clerk, a Proctor's Bill of Costs for taxation and to receive the same back when taxed.

(*b*) To sign, stamp and make application for typewritten copies under the Civil Appellate Rules 1908.

(*c*) To file civil motions and applications in the Registry or to take any steps, such as obtaining necessary signatures or affixing stamps to documents – and other than drafting or advising– towards completing papers necessary for any motion or application so filed.

Resolved.—The council is of opinion that the practices, as to which the Council's decision is asked by their Lordship the Chief Justice and the Judges of the Supreme Court, appear to have existed for so many years (one of which practices, namely the filing of civil motions and applications in the Registry, having apparently arisen as a result of certain expressions of opinion by the Supreme Court), that they can scarcely be said to have been hitherto entirely contrary to the traditions and etiquette of the Bar in this Colony: that such practices are, however, wholly undesirable, and should for the future be considered breaches of professional etiquette, and should be treated as such by the Council.

The Hon. Secretary was instructed to reply to the Registrar requesting him to thank their Lordships for bringing the matter to the notice of the Council and to inform him of the resolution passed.

The Hon. Secretary was further instructed to forward to the Secretaries of the District Courts an extract from the minutes embodying the resolution, and to request them to bring the resolution to the notice of the Proctors practising in the various Courts.

5. The Hon. Secretary brought to the notice of the Council the fact that under Rule XIII. (2) Mr. Allen Drieberg, who had been appointed Acting Additional District Judge of Colombo, had temporarily ceased to be a member of the Council.

Mr. E. J. Samarawickreme was thereupon nominated to take the place of Mr. Drieberg until the expiration of the term of Mr. Drieberg's appointment.

F. A. HAYLEY,
Hon. Secretary,
General Council of Advocates.

The following letters have been addressed to every Advocate in Ceylon.

(I)

DEAR SIR,

The annual election of members of the Council will be held in April of this year. I have the honour to forward herewith a voting paper, and to call your attention to the following rules :—

RULE III.—The Council shall consist of—

(1) The Attorney-General and the Solicitor-General.

(2) Twelve practising Advocates [hereinafter referred to as the elected members] to be elected by the whole body of Advocates.

RULE VI.—Of the elected members, not less than 4 shall, if available, be Advocates of at least ten years' practice at the time appointed for the close of the election

RULE X.—Every Advocate desirous of voting shall return his voting paper to the Secretary having filled in the names, to the number to be elected, of the Advocates for whom he votes, four at least of whom shall be Advocates who at the time appointed for the close of the election shall have been at least ten years in practice.

Voting papers must be returned to the Honorary Secretary on or before April 30, 1910, that being the day appointed for the close of the election.

For your information a list of Advocates who will have been at least ten years in practice on April 30, 1910, is attached, but is not guaranteed to contain the names of all such Advocates.

I am, &c.

F. A. HAYLEY,
Hon. Secretary.

LIST OF ADVOCATES OF TEN YEARS' PRACTICE.

T. de Sampayo, K. C.	H. J. C. Pereira.
W. Drieberg.	C. B. Elliott.
R. H. Morgan.	W. N. S. Aserappa.
J. R. Weinman.	E. W. Jayewardene.
J. T. Blaze.	G. S. Schneider.
A. de A. Seneviratna.	I. Tambyah.
F. H. de Vos.	H. A. P Chandrasegara.
James Peiris.	E. H. Prins.
A. Kanagasabai.	C. Vanderwall.
C. A. Labrooy.	L. Maartensz.
B. W. Bawa.	A. L. R. Aserappa.
J. VanLangenberg.	E. J. Samarawickrame.
F. M. De Saram.	C. E. Victor Corea.
H. A. Jayewardene.	W. E. Barber.
C. E. De Vos.	P. F. Ondaatje.

(II)

DEAR SIR,

As several important questions relating to professional etiquette have lately been decided by the Council, and as other questions are likely to be submitted in the near future, the Council is of opinion that steps should be taken to make its decisions more widely known than heretofore. It is some years since subscriptions were called for, and funds are now needed to cover the expenses incurred in printing and circulating the decisions of the Council. I am instructed therefore to draw your atten-

tion to rule XXIV (see below) and to request you to pay your subscription for the current year. A new election of Members of the Council will be held shortly, particulars of which, with a voting paper and copy of the rules, will be sent you. I need scarcely remind you how essential it is to the interests of the Profession that the General Council of Advocates should be supported by all Members of the Bar. Copies of the decisions of the Council, and extracts from the minutes of the Proceedings at the Meetings of the Council, will be forwarded to those Members of the Bar only whose subscriptions have been paid.

I am, &c.

F. A. HAYLEY,
Hon. Secretary,
General Council of Advocates.

Rule XXIV:—For the purpose of meeting the expenses necessary to give effect to these regulations, every advocate in actual practice in Ceylon shall pay to the Treasurer of the Council in the month of June each year, commencing from June, 1901, an annual subscription of Rs. 10. Any advocate making default may, after due notice to him, be declared by the Council to have forfeited all rights under the regulations including the right to take part in the proceedings of the meetings of the Council and of all General and Special Meetings of advocates convened under these Regulations. The Council may, however, on such terms as to it may seem proper, restore to such advocate such rights as aforesaid.

Cheques should be made payable to the Treasurer, General Council of Advocates, Colombo Law Library.

Appeal Court Notes.

(By W. Sansoni and V. Grenier, Advocates.)

1. **Partition Ord. No. 10 of 1863.—Commission payable.** An order refusing an application for payment of commission to the commissioner in a partition case *qua* auctioneer, is appealable as it comes within the terms of section 19.

Where the D. J. refused to allow the commissioner commission *qua* commissioner on the ground that he had earned commission *qua* auctioneer, *Held*, the Judge was so entitled to exercise his discretion under section 10.

S. C. 22, D. C. Col. 28562, 24. 3. 10.

2. **Police Ordinance—No. 16 of 1865, section 85.**

In a prosecution under section 85 of the Police Ordinance it is not necessary that the complaint should be made by a Police Officer.

S. C. 169, P. C. Mallakam 27934, 24. 3. 10.

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3. **Evidence—Tracing of survey plan—Bona fide claim of right—public way.**

Where a tracing of "the Town Survey of 1867-68" was not signed by anyone and there was nothing to show by what authority the town survey was made or how it was authenticated, *Held* the tracing was not admissible.

Where an accused is not alleged to have known anything about a town survey which showed a verandah obstructed by the accused as part of the road reservation and where the accused is shown to have known that the verandah had for 30 years or more been used in the way in which he claimed to use it, *Held*, the accused ought to have been held to have made in good faith a claim or right to do what he did.

Quantum of evidence to prove a verandah part of the public way indicated.

S. C. 128 M. C. Col : 13969. 22. 3. 10.

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4. **Criminal Pro: Code section 147—Institution of criminal proceedings—Sections 180, 208, Penal Code.**

A complaint made and signed by a S. H. O. "for S. I" (Senior Inspector) is sufficient compliance with section 147 of the Crim : Pro : Code.

Per Hutchinson, C. J.—I do not think that by giving the information to the police he instituted or caused to be instituted criminal proceedings against Mendis. I think it is probable that the object, or one of the objects of section 180 was to provide for cases like this which might not be within section 208.

S. C. 138. P. C. Panadure 32637. 22. 3. 10.

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5. **Hire and Service Ordce, No. 11 of 1865, Sec. 11—Prosecution unauthorised.**

Where in a prosecution for neglecting to work, under sec. 11, the complaint, which purported to be by the Asst. Superintendent of the Estate, was unsigned and there was no evidence that the prosecution was authorised by the Superintendent or the accused's employer, or that he knew of it, *Held*, on the authority of 2. N. L. R. 72 and 6 N. L. R. 120 the P. M. ought not to have issued summons. S. C. 143 P. C. Kalutara 13342. 22. 3. 10.

6. **Fact, question of.**

Per Hutchinson, C. J.—Unless it clearly appears that the decision is wrong or some wrong reason is given or some obvious mistake made which vitiates the finding of the Magistrate on the facts, the finding ought not to be disturbed.

S. C. 151–5 P. C. Kegalle, 11997. 16. 3. 10.

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7. **Perjury—Identity of accused.**

In a prosecution for perjury, where after proof that the accused did give evidence in a certain case, the record of this case was put in evidence, with the following note by the judge, "see the evidence of the accused of 28th April, pages 21-25", *Held*, this was sufficient proof of the identity of the accused.

S. C. 27 P. C. Jaffna 2326. 16. 3. 10.

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8. **Mischief, Sec. 409 Penal Code—"Wrongful loss".**

In a prosecution for causing mischief, where the evidedce shewed that, although the accused knew he was likely to cause some loss, he did not intend or know that he was likely to cause "wrongful" loss, *Held*, the conviction could not be supported.

S. C. 123. P. C. Negombo. 13099. 15. 3. 10.

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9. **Abuse, sec. 484, Penal Code—Intention.**

Mere verbal abuse, however reprehensible it may be, is not punishable under sec. 484 unless it appears from the circumstances, from the terms of the abuse itself, and having regard to the person to whom it was addressed, that the accused knew it to be likely that a breach of the peace or some other offence would be committed by the person abused or intended this result.

Per Hutchinson, C. J.—I do not think that I can say that the mere foulness of the language used is by itself sufficient to prove such intention or knowledge.

S. C. 138. P. C. Hatton 9282. 15. 3. 10.

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10. **Confirmation of sale, secs. 282, 284. Civ: Pro: Code.**

If it is proved that a fiscal's sale actually took place and the requirements of sections 282 and 283 are complied with, the purchaser is *prima facie* entitled to have the sale confirmed.

The mere lapse of years does not deprive him of this right. D. C. Colombo 79987, Koch 30 disapproved.

S. C. 23 C. R. Panadure 1399. 22. 3. 10.

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11. **Unnecessary seizure, effect of.**

A seizure of property which is unnecessary by reason of an already existing seizure does not operate against the validity of the first seizure.

S. C. 274, D. C. Kurunegalle 3572. 1. 4. 10.

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12. **Hindu Temple, right to enter—Barber caste.**

According to the Hindu religion and custom persons of the barber caste have no right to enter a temple and the managers of a temple are accordingly entitled to restrain by injunction such persons from entering the temple and might also be awarded damages.

S. C. 310 D. C. Jaffna 5611. 22. 3. 10.

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13. **Civil Pro: Code sec. 84—Vacating of order illegal.**

Where instead of making an order nisi, on the non-appearance of the plaintiff, the D. J. dismissed his action but the S. C. in appeal ordered that on plaintiff depositing security for costs within a certain time, the D. J's order was to stand as an interlocutory decree in terms of sec. 84 of the Civil Pro. Code,

Held, on the expiry of 14 days from the deposit of security, the original order of the D. J. became absolute and was not then liable to be set aside by the D. J.

S. C. 196. D. C. Chilaw, 3965. 22. 3. 10.

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14. **Costs of appeal—Time of deposit of security, sec. 756 C. P. C.**

The provisions of sec. 756 of the Civil Pro : Code are imperative and the time allowed by the Code may not be extended.

S. C. 9. D. C. Batticaloa 3215. 23. 3. 10.

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15. **Title, warranty of—Damages, measure of.**

The measure of damages recoverable in consequence of a breach of warranty is the amount of loss incurred in consequence thereof.

Where a plaintiff, before purchase and warranty had spent money in developing a land relying on the defendant's verbal promise to sell,

Held, plaintiff could claim such amount on defendant's failure to warrant and defend successfully.

S. C. 239. D. C. Colombo, 24?90. 23. 3. 10.

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16. **Res judicata—Point taken too late.**

Where a plea of *res judicata* did not appear to have been taken in the lower Court, or referred to in the judgment or in the petition of appeal, *Held*, it was too late for the appellant to take it in appeal.

S. C. 297. D. C. Negombo, 7501. 23. 3. 10.

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17. **Chetty principal, initials of—Personal action by agent.**

The mere use by the plaintiff of the initials of a chetty whose attorney he had been, does not disentitle him to judgment in a case where, though he affixes the initials to his name in the caption of the plaint, says nothing about his sometime principal and sues as if on a contract entered into by himself.

S. C. 269. D. C. Galle 9364. 22. 3. 10.

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18. **Costs—Discretion of Court.**

Where extra costs were incurred by a defendant by reason of the plaintiff having exaggerated his claim but no application was made in the Court below that the defendant should be compensated therefor, *Held*, in every case it is a matter for the discretion of the Court and appeals merely for costs should not be encouraged.

S. C. 284 D. C. Kandy 19880. 23. 3 10.

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19 **Vacating of finding.**

When a judge has found on the question of the genuineness of one deed and in appeal, by consent, the case was sent back for proof of another deed which the judge had held not proved, *Held*, he had no power to re-open the question of the previous deed.

S. C. 34 C. R. Point Pedro 12278. 24. 3 10.

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20 **Joinder of plaintiffs—Separate cause of action—Right of way—Decree, essentials of.**

Where in an action for a declaration of a right of way seven plaintiffs sue jointly, alleging that they are the

proprietors of a certain tract of fields, *Held*, each plaintiff has do prove his right independently of the others, this being in fact a case of seven separate actions included in one.

A decree declaring a right of way should specify the land in respect of which the right exists and the beginning, the course and the end of the way.

S. C. 1. C. R. Kegalle 8549. 24. 3. 10.

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21. **Partition—Commissioner's fees.**

Where in a partition action, the Commissioner has been appointed on the plaintiff's motion, it should be the practice for the plaintiff to be liable to him for his survey fees.

Silva v. *Gunetilleke* (1891) 1. C. L. R. 45 not accepted as laying down a general rule to the effect that a Commissioner should proceed for recovery of his fees in the partition suit itself.

S. C. 462 C. R. Kalutara 1273, 18. 3. 10.

Notice.

Owing to pressure of space we are obliged to hold over for next week a criticism of a criminal judgment to which a valued correspondent has drawn our attention.