The Ceylon Law Review.

A Weekly Journal of Legal Information.

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

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Editorial Notes.

"Books are published with an expectation, if not a desire, that they will be criticised in reviews".—Lord Hatherley in *Chatterton* v *Cave* [1877] L. R. 3 A. C. 492.

In computing the appealable time in criminal cases no day is to be excluded. (Cr: Pro: Code, sec. 339). The contrary was urged in 158 P. C. Kandy 21599 (15. 4. 10) on the authority of *Wickremesooriya* v *Appusingho* [1895] 1. N. L. R. 178.

The absence of a party's proctor from his station is no cause beyond the suitor's control to justify not appealing in time, nor is any neglect, miscalculation or default on the proctor's part an excuse [1907] 10 N. L. R. 376, [1908] 11 N. L. R. 25. The case is hopeless when, in addition to any such circumstance, an appeal has not been advised (24. 3. 10. S. C). There is no precise judicial statement of causes beyond the suitor's control. The death of the appellant's proctor's child on the last date for filing the appeal has been held such a cause (C. R. Jaffna 585, S. C.

M. 22. 10. 08), but not the appellant's own illness. (C. R. Panwilla 2047. S. C. M. 14. 2. 10).

Proctors waiting for the very last date to apply for the yearly certificate run great risks. On the motion to the, Supreme Court of one who had posted his application on March 30th (March 25—29 being holidays), Grenier, J., said," I hope he won't do it again".

We have been informed, what we are slow to believe, that there is at one of the Colombo Police Stations a list of alleged touts with a parallel list of patrons. In the interests of the Profession the matter deserves notice, and the police authorities should be called to account for an apparent libel.

The Police Magistrate of Kalutara has been trying to enhance the value of headmen's connection with crime and justice by insisting on the production of a headman's report as a condition precedent to the issue of process. His refusal to grant process on a duly attested plaint, for this reason, has been condemned by the Supreme Court (19. 4. 10).

"I held the warrant against the man's chest and said, 'In the name of His Majesty the King I arrest thee' ". A fiscal's peon arresting a civil debtor in the village of Ahangama has been capable of so much solemnity! What is the average peon's capacity for truth?

The Police Magistrate of Jaffna seems to be doing strange things. He summarily convicted a man of grievous hurt but dispensed with the Doctor's evidence on the ground that "the defence had not made out a case". (192 P. C. Mallagam 29976. 20. 4. 10).

The Full Court has held (132 D. C. Galle 7879. 23. 3. 10) that an interlocutory partition decree *inter partes* may not be set aside, modified or altered by the Court passing it. As a rider to it may be noted (199 D. C. Int: Jaffna 6202. 20. 4. 10) that the party appealing against the

amending of a decree must shew that he has been prejudiced thereby.

The view taken by the learned Judges in the last case is as ununderstandable as their Lordships' difficulty in taking in the idea of an undivided 14 lachams out of 24. The appellant had been decreed a life interest over another person's 10 lachams, and the decree was amended to give that other 9 lachams. The extent of prejudice to the life-interest holder is mathematically representable by the difference between 9 and 10.

Mr. A. Drieberg who has been acting for some time as additional District Judge of Colombo is to be congratulated on his promotion to act for Mr. Loos from April 26. Mr. Drieberg's place will be taken by Mr. E. W. Jayawardene whose appointment is significant in that he is the first Sinhalese lawyer after Mr. Felix Dias to hold so high an office.

Intentional Insult.

The facts in *Cader Batcha* v *Dunn* (P. C. Hatton 9282, S. C. M., 15. 3. 10) are:—The complainant, manager of Abdul Cader & Co, proceeded one day to the accused's estate with a Fiscal's officer to seize the property of a Kangany under his writ. The accused, having reasons to suspect that the complainant had made attempts to seduce his coolies, was not disposed to welcome him to the estate. Accordingly Dunn abused Cader Batcha in very vulgar terms, making references to the Moorman's mother and sister. The accused, at his trial under Penal Code section 484, admitted :

> I was very angry and lost my temper. He (Batcha) did not say anything insolent to me. He denied having tampered with my coolies.

The complainant swore :

> The language annoyed me. Accused's language tended to make me break the peace.

The learned Police Magistrate of Hatton (Mr. E. T. Millington) acquitted the accused, holding that the accused, "received sufficient provocation to justify him in using strong language."

In appeal, his Lordship the Chief Justice delivered the following judgment :

The language, which the complainant deposes and the defendant does not deny that the defendant used, was foul and inexcusable. But mere verbal abuse, however reprehensible it may be, is not punishable under section 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 person who used it intended, or knew that it was likely, to cause the person to whom it was addressed to break the peace, or commit some other offence. The Magistrate has given his reasons very shortly. He has not found that the accused had such knowledge or intention, and I think he would not have so done, if it had occurred to him that it was desirable to state expressly whether he so found or not. 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. I do not feel, therefore, that I c n interfere with the Magistrate's decision.

We are not concerned with contrasting the dignified silence of the Moorman with the vituperative volubility of the Englishman, nor to inquire into the extent to which Mr. Dunn's estate environment is responsible for his fluency in the rhetoric of filth. It may, however, be questioned whether language found to be "foul and inexcusable" is not sufficient under section 484 of the Ceylon Penal Code, under the circumstances of the present case.

It has been held in India that, to constitute the offence of intentional insult, it is sufficient if the insult is of a kind calculated to cause the other party to lose his temper and say or do something violent (4 Bomb. L. R. 78). What is to be looked to is the likelihood of the person insulted being led to break the peace (*Chunder* v *Jatadhari* [899] 1. L. R. 26 Cal. 653 ; *R* v *Moti Lall* [1901] 24 All. 155, though, through fear, such person may feel no disposition to break it (*R* v *Jogaya* [1887] 1. L. R. 10. Mad. 353).

Undoubtedly intention or knowledge has to be found (P. C. Matara 5119. 13. 5. 01.) and when there is not even an averment of provocation the section does not apply (P. C. Panadure 29691. 15. 3. 09). Intention or knowledge may, however, be inferred from the words used. "The law makes punishable the insulting provocation which, under ordinary circumstances would cause a breach of the peace to be committed". (Collins, C.J., and Parker, J., in *R* v *Jogaya* [1887] 1. L. R. 10. Mad 353). It is true that the words of section 484 " with intent etc" may not be overlooked (P. C. Neg. 22879. 13. 12. 97), but, in criminal law, intent and knowledge are often inferable from words and conduct. Were they not inferable in this case ?

Decisiones Frisicæ.

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

IV.

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

A *universitas* is bound to pay the money which is taken on loan by its manager on a special mandate, although such money was not used for the purposes of such *universitas*.

The Lord of the Manor of Wonseraded, on the 27 April 1607, received authority from his Council to borrow money to the extent of 8000 guilders. Thereafter, on the 18 May 1613, he received fresh authority to borrow another sum by which the previous creditors should be paid off. By virtue of the first authority, he, on the 4 May 1607, borrowed 1000 guilders from Titius and again, on the 15 May 1613, the sum of 450 guilders from the said Titius, and thereafter died leaving more debts than assets. The Council on being sued by Titius for the payment of the money, raised the plea that the Lord of the Manor appropriated the money to his own use and not for the purposes stated in the mandate, and that the Council was therefor not liable to pay the same. The Court, overruling this plea, condemned the Council in the payment of the first 1000 guilders, which, in accordance with the first mandate, were borrowed from Titius, who having trusted the Council and followed its mandate was not bound to prove that the 1000 guilders were used for the purposes stated therein, as in the case of a shipowner who is bound when the master had borrowed money, although the money, borrowed for the purpose of repairing the ship, was not used for that purpose but converted to his own use. And the creditor is not bound to prove that the master spent the money for the purposes for which it was lent but he can say that it is the shipowner's own fault for having employed such a master. *Dig. 14.1.1 Sec. 9.* And it is not necessary, says Africanus *Dig. 14. 1. 7*, to bind the creditor that he took upon himself to see to the repairs of the ship and did the work of the master, which would be certainly the case if he had to prove that the money was expended in repairs It is sufficient if he had advanced money for the repair of the ship and the ship was in such a state that she needed repairs. It is the same if a broker is appointed to buy goods, and being forced to borrow money, borrows from a creditor, in which case, although the latter cannot prove that the money was used in buying goods, has nevertheless the *actio utilis Dig.14.3.13.* So, in the present case, it is enough that Titius, in advancing the 1000 guilders, had followed the authority of the Council, which fact should not prejudice a creditor in good faith. And these aforesaid laws which speak of ship-masters and brokers, apply not only to private but privileged persons, such as religious communities, colleges, as, following others, is stated by Petrus Costalius *ad d. l. ult. ff de exercit* act. Hartmannus Pistoris *lib. 1. quaest. 37. num. 49 et 50.* Alexander Trentacinquius *lib. 2. resolut. tit. actionibus resolut. 1. num. 7.* And lastly, according to Bartolus *in l. civitas ff. de rebus credit. num. 7.* it is sufficient in this case for the

creditor to prove that the Lord of the Manor had special authority to borrow the money And in order to prevent fraud on the part of such a faithless agent or director, Mornacius *ad d. l. ult. ff. de exercit. act.* gives this advice that there should be inserted in the authority the following, or similar, conditions :—

That what the director shall do by virtue of the authority shall be of no effect and shall be valid only if the creditor when he advances the money, undertakes the agency and looks to the director for the money, or if he does not advance the whole amount comprised in the mandate he should see that that part only should be endorsed on the mandate, which being filled up, it would be vain to contend that his liability extended to anything above the sum mentioned in the mandate. Thus far Mornacius. Other considerations apply to the 450 guilders which were advanced, not within a year according to the tenor of the first mandate, but long afterwards, and moreover before the last mandate, and were therefore lent without authority from the Council. And therefore the Court thought that a further inquiry should be instituted as to whether this money was spent for the purposes of the Council. (1)

V. De deposito.

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

That under the condition of a deposit a person other than the depositor has the *actio utilis*.

It is a certain and general rule in all contracts that a third party neither incurs any liability nor acquires any right on the contract of others. *Dig. 44. 7. 11. Cod. 4. 50.* Sometimes however a third party has the *actio utilis* on the contract of others, as in the case where the person who gave my property as a deposit agreed that it should be restored to me, in which case I have the *actio utilis depositi. Cod. 3 42. 8 Dig. 16. 3. 26* as to which see Deckherus *lib. 2. dissert. xi. num. 28.* Hence when Maevius deposited his papers with Gaius on the condition that he should restore the same to no one except him when he returns from his war, but if he should happen to die the same should be returned to Titius, Maevius having died in the war, the Court ruled on the 19th March 1605 that Titius could rightly bring an *actio utilis*.

(1) Judgment thus given 13 Feb. 1617.

Reynolt van Intema plaintiff

v.

Johan van Herema *cum socio*, having authority on behalf of Wonseraded.

Appeal Court Notes.

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

22. **Previous conviction—Police Court proceedings.**

Where a P. M. in sentencing an accused took into consideration a previous conviction for a different kind of offence,

Held, he was not entitled to do so. 68 P. C. Galle 30796, 2nd March 1906 followed.

187. P. C. Tangalle 27509. 19. 4. 10.

☆ ☆ ☆

23. **Proctor, appearance by—Police Court complaint in.**

A complainant in the Police Court has the right to appear by Proctor. See sections 189(3), 199 Crim. Pro. Code.

186 P. C. Kalutara 13217. 18. 4. 10.

☆ ☆ ☆

24. **Crim: Pro: Code Ch. xv.—Report of headman—Summons.**

Where an accused is charged with criminal trespass and mischief, the plaint being drawn and signed by proctor, it is not a condition precedent to the issue of process that there should be a report from a headman, even as to the amount of damages sustained. Process should issue after the examination of the complainant.

114 P. C. Kalutara 12403. 19. 4. 10.

☆ ☆ ☆

25. **Jurisdiction concurrent—Option of plaintiff.**

Where two Courts have concurrent jurisdiction a plaintiff is not bound to bring his action in the Court which is nearer to the land in question.

18. C. R. Kegalle. 18. 3. 10.

☆ ☆ ☆

26. **Partition Ordce. No. 10 of 1865—Prayer for sale only.**

Where in a partition action the plaintiff prayed for a sale and the D. J. being of opinion that the case was not one in which the land could be sold with advantage dismissed the entire action,

Held, the plaintiff should have been granted a decree for partition. (Decree under sec. 4 directed to be entered and case sent back).

259 D. C. Colombo 26673. 14. 3. 10.

27. **Buddhist Temporalities Ordce. No. 3 of 1889 sec. 48 and No 8 of 1905 sec. 41.**

Where the sanction of the Governor is necessary to validate a bequest, such sanction is not nugatory because it is obtained subsequent to the bequest.

16. D. C. Anuradhapura, 182. 17. 3. 10.

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28. **Decisory oath, Ordce No. 9 of 1895—Record—Absence of defendant—Notice of trial date.**

Where the only entry in the record regarding the taking of a decisory oath was to the effect—"Oath has not been administered. Trial to-morrow,"

Held, it was clear duty of the D. J. in terms of sec. 9 sub-sec. 4 of Ordce No. 9 of 1895 to have recorded as part of the proceedings, not only the nature of the oath, or the application proposed, but the fact of the refusal of the party challenged, together with any reason which he might have assigned for his refusal.

Per Wood Renton, J.,—The Judge who disregards that procedure is doing grave injustice to the parties whom he compels to have resort to the Appeal Court, for the purposes of having the consequences of his neglect of it rectified. (Case sent back).

Where on the trial day referred to above, Proctors on both sides were present but the appellant's proctor said he had no instructions and judgment was given against him on the respondent's proctor calling his evidence,

Held, unless there was before the judge evidence—of which there should have been a clear entry on the record—that the appellant was aware of the date fixed for trial, the duty of the judge was to have given him an opportunity of calling his evidence.

25 D. C. Kurnegalle 3622. 17. 3. 10.

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29. **Partnership agreement—Non-notarial—Ord. No. 7 of 1840—Pleadings.**

In an action for dissolution of partnership and an account of the profits and losses resulting from the working of a plumbago pit, where the defendants in their answer expressly admitted the existence of the partnership but said that, after a final adjusting of accounts between the parties, the plaintiffs had voluntarily withdrawn from the partnership and where the parties went to trial on an issue directed towards ascertaining the date of the termination of the partnership,

Held, that to allow the defendants to set up in appeal sec. 2 of Ord. 7 of 1840, owing to the fact that the partnership agreement was non-notarial, would be in the cir-

cumstances tantamount to permitting the prepetration of a fraud.

Hunt v. *Wimbledon* L. B. (1878) 4 Common Pleas Div. 48, and *Young* v. *Leamington, Corporation of* (1883), 8 Ap. Cas. 517 commented on.

Perera v. *Amarasooriya* (1909) 12 N. L. R. 87 does not conflict with the numerous decisions of the S. C. to the effect that sec. 2 of Ord. 7 of 1840 should not be allowed to perpetrate and cover fraud.

264 D. C. Kegalle 2632. 15. 3. 10.

* * *

30. **Scheme under sec. 639 of Civil Pro. Code.**

Before the aid of a Court is invoked under sec. 639 of the Civil Pro. Code an attempt should be made by the parties between themselves to agree upon a scheme for the investment of the trust monies.

265 D. C. Colombo. 28036. 16. 3. 10.

* * *

31. **Resistence to apprehension, See 2 Ord. No. 11 of 1887.**

Where after a warrant of arrest is placed on to an accused's body and he is informed that he is arrested "in the name of His Majesty" he gets free and escapes, an offence under sec. 2 of Ord. No. 11 of 1887 is committed as he should instead have gone away quietly with the officer. (See sec. 369 Civil Pro. Code.)

206 P. C. Galle 47203. 20. 4. 10.

Correspondence.

The Editor,

"Ceylon Law Review."

DEAR SIR,

Your lively criticism of "The Laws of Ceylon," (vol. ii.) recalls Pope's celebrated line :

"What oft was thought but ne'er so well expresst."

Yours faithfully,

W. A. G.

22. 4. 10.

Mr. J. A. Perera on the Law Review.

Our attention has been drawn to last Saturday's *Times* containing a letter over the initials of Mr. J. A. Perera, Proctor of the Supreme Court. It is headed "The mystery of a belated review" and refers to what appeared last week in this Journal, "Wanted: A New edition of Pereira's Laws of Ceylon." His not writing to us in the first instance is not quite straightforward, and is in breach of a good rule of literary courtesy. We suspect the letter is a composite production. Mr. Pereira himself claims to write on behalf of almost all Hultsdorf, for he says, "We at Hultsdorf &c, &c," though he does not disclose whom he represents.

Mr. J. A. Perera does not meet one word of our criticism, but gives what, in his opinion, must have prompted the writing of that criticism. His irrelevant inquiry into motives obscures the main issue, "*Is the criticism correct?*" Assuming, for the sake of argument, the imputed foundation of the reviewer's base motives, *is there any justice in the criticism itself?* This, Mr. J. A. Perera does *not* face. His method is colloquially known as "bluff".

Instead of furnishing arguments he descends to personalities, which, in polemics, always form the last refuge of the destitute. The plight of a man driven to that is most pitiable.

There is much in the letter that is very unbecoming, highly improper and most cowardly. We have nothing but contempt to bestow on its abusiveness.

Mr. J. A. Perera refers to a "fulsome biographical sketch" of Mr. Walter Pereira in our fourth volume. We are not disposed to betray editorial secrets as to the authorship of that sketch, but it is sufficient to say that nothing then said is inconsistent with the reviewer's position in Vol. VII. p. 4

The first notice of the *Laws of Ceylon* (Law Review, Vol. II) is quoted by Mr. J. A Perera. We had there said: "The book bears the impress of sound scholarship." We maintain that that statement is not inconsistent with the reviewer's position in Vol. VII. p. 4. No one has said anything in the *Review* against Mr. Walter Pereira's learning, but is it not conceivable that a learned man may fail to write a good book?

Would not Mr. J. A. Perera, before his next attempt at fault-finding and abuse, study the art of courteous and cultured criticism?

KING EDWARD VII.

Born, Nov. 9, 1841.

Ascended the throne, Jan. 23, 1901.

Died, May 6, 1910.

"BREAK NOT, O WOMAN'S-HEART, BUT STILL ENDURE;
BREAK NOT, FOR THOU ART ROYAL, BUT ENDURE,
REMEMBERING ALL THE BEAUTY OF THAT STAR
WHICH SHONE SO CLOSE BESIDE THEE THAT YE MADE
ONE LIGHT TOGETHER . . . . . MAY ALL LOVE,
HIS LOVE, UNSEEN BUT FELT, O'ERSHADOW THEE,
THE LOVE OF ALL THY SONS ENCOMPASS THEE,
THE LOVE OF ALL THY DAUGHTERS CHERISH THEE,
THE LOVE OF ALL THY PEOPLE COMFORT THEE,
TILL GOD'S LOVE SET THEE AT HIS SIDE AGAIN."

TENNYSON.