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.

Vol. VII.] June 13, 20, 1910. [Nos. 9, 10.

Sanjiva Row's Civil Procedure Code.*

In 1908, by Act V. of that year, the Legislature of India amended the Civil Procedure Code which forms the basis of O'Kinealy's *Commentaries* and Hukm Chand's more exhaustive treatise on the procedure of civil courts in British India. The new Code consists of 158 sections and 51 Orders with Rules under each Order. The bulk of the old Code (which is mainly the Ceylon Civil Procedure Code) is retained as a section or a rule, while there is a considerable quantity of new matter. On this new Code much has been written in India. We have seen the works of Mullah and Woodroffe.

We have been favoured by the manager of the Law Printing House, Madras, with a set of the volumes of Mr. Sanjiva Row's treatise on the Code of 1908. The volumes are two in number, they cover 3300 pages, and the cases noted are over 25350. There can be no doubt that the work is on a gigantic scale. Its voluminousness, however, by no means lessens its excellence of execution or usefulness of purpose. On the other hand, any attempt at compression of the immense amount of learning

* The Code of Civil Procedure 1908: with the case-law thereon. By T. V. Sanjiva Row, First Grade Reader. Two vols. published by the Law Printing House, Mount Road, Madras, 1909. Price Rs. 25·30.

represented by these two volumes would reduce the work to the level of uselessness. Mr. Sanjiva Row deserves the thanks of the legal profession in India and Ceylon for giving it what is preeminently a practitioner's book. In some treatises, undoubtedly of great merit, one has to wade through a mass of cases and comments to reach a point, and often the reader is bewildered by the confused grouping of judgments, though under topical headings. In the work before us recourse is had to a singularly original arrangement of text and comment and case-law with the aid of typographical facilities, that the survey of authorities under a topic or sub-topic is easy and pleasant. The text is immediately followed by the corresponding provision of the old Code, and attention is briefly drawn, in special type, to the points of difference (if any). What follows is the case-law presented on a plan calculated to arrest the eye and ensure attention. Each case-summary has its distinctive topical heading, and is numbered. Thus, under the general heading, *Scope*, *Applicability* and *Construction of the Act* are the following among other notes reproduced from Vol. i p. 11

(8) **Interpretation of Statutes. Council Proceedings.**

It is not competent for courts to refer to proceedings of the Legislature as legitimate aids to the construction of law. 22 C. 788 (**P. C.**) = 22 I. A. 107 ; 22 C. 1017 (**F. B.**) *reversing* 21 C. 732 ; 14 C. 721 (**F. B.**)

(9) **Construction of Statute. Reference to Debate on Bill.**

For the purpose of construing an Act, the court would be acting wrongly in referring to the debate on the bill. 18 B. 133.

(10) **Reference to Marginal Notes.**

Marginal notes are no part of an enactment and the scope of the section should not be limited to what is stated in the marginal notes, if the section is wider than such marginal notes, 23 C. 55 ; 25 C. 858 = 2 C. W. N. 577. **But** see 20 C. 609 ; 8 C. W. N. 699 = 26 A. 393 = 31 I. A. 132 = 1 A. L. J. 384 = 7 O. C. 248 (**P. C.**)

(11) **Construction of Statute. English Law.**

The Law of procedure in England is not quite the same as that in India, and English authorities on the subject are not safe guides for determining a question of procedure in this country 8 C. W. N. 493 ; 21 C. 732.

The above specimen is sufficient to convince the practitioner of the economy, elegance, and convenience of the arrangement whereby he can know at a glance the main point of a ruling, its character as Full Bench or Privy Council, parallel refereuces and conflict of case-law where such occurs.

As illustrations of the fulness of treatment of a topic—each section is broken into topics illuminated by an abundance of case-law—may be mentioned the manner in which the learned author deals with *Suits* (Vol I, 83) and *Res Judicata* (Vol. I. 222). The first subject covers 133 pages under the following headings, with sub-headings :

1. Suits on agreements, illegal, immoral and opposed to public policy.
2. Suits relating to social, religious and caste matters.
3. Suits relating to religious rites and ceremonies.
4. Suits relating to temple matters &c.
5. Suits for damages.
6. Suits for contribution.
7. Suits relating to co-sharers.
8. Suits on contracts.
9. Suits relating to easements.
10. Suits relating to thoroughfares.
11. Suits relating to hereditary offices and dignities.
12. Suits relating to partition.
13. Suits against Municipalities.
14 Suits against Government and Public Servants.
15. Suits on decrees.
16. Probate.
17. Suits for costs.
18. Suits on the ground of fraud &c.
19. Benami Suits.
20. Suits under Hindu Law &c.
21. Suits relating to minors and guardians.
22. Suits for possession.

The subject of *Res Judicata* covers a wider statutory area in India than it does in Ceylon—the entire law being stated in the Ceylon Code in a few lines in a subsidiary portion of a section – and hence writers on the Indian Code find justification for devoting considerable space to the subject. We cannot therefore grudge the subject the 134 pages Mr. Sanjiva Row sets apart for it. It is, however, not the quantity of matter that appeals to us : it is rather the lucid and informative manner in which the vast mass of learning deriveable from Indian case-law on the subject is presented. The plan is successfully sustained throughout the three thousand pages of this elaborate work. Mr. Sanjiva Row is to be congratulated on his making the study and practice of civil procedure quite a pleasure. It is a great achievement. We are using no mere reviewer's platitude when we say that Mr. Sanjiva Row deserves nothing but praise for his book. To the student of principles as well as to the practitioner this book is calculated to be of immense service, and we have no doubt that, side by side with works bearing more pompous credentials, Mr. Sanjiva Row's treatise on the Code will find a place on the shelves of every lawyer's library.

Decisiones Frisicæ.

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

VII.

(lib. 3 tit. 4. def. 2.)

That immoveable property, bought and not proclaimed and possessed for a year without the consent thereto obtained, reverts to the Fisc, but not to the prejudice of parties who desire retractation.

According to the Roman Law each person is his own master and arbiter in respect of the retention or renunciation of his own property. *Cod. 4. 35. 21. Cod. 1. 9. 9* which right was a little curtailed by the Duke of Saxony, then hereditary sovereign of Friesland, as he ordered that immoveable property should not be sold or alienated without the consent of the Magistrate having jurisdiction over the place where the same was situate, to acquire which consent a tax (which they call *consent-geldt*) had to be paid. Which rule, on the abolition of the sovereignty and restitution of the former liberty of the Frisians, nevertheless remained in force as part of the Frisian law. And such consent was obtained as of old only by three proclamations on Sundays in the church and on three court-days in the court of the place where the land was situate, so that those persons might be informed of the same who might have any right of retractation, or perchance anything to say in respect of such alienation in order to conserve their rights, as stated by Benatus Choppinus *de moribus Parisiensibus et auct. fund. lib. 1 tit. 4.* And if no one raised any objection to the sale or alienation, the same was approved by the Magistrate with his sanction and the property sold passed to the purchaser or his assignee.

And this consent was thought so indispensable that if any one without it had possessed the property sold or alienated, for a whole year, he was deprived of the ownership of the same, of which one fourth went to the informer and three-fourths to the State *lib. 1 Ord-tit. XI.* But it is often a matter of dispute whether the property is confiscated to the prejudice of those who have a right of *retractus*. And the Court favoured the view that the fault of the vendee in not seeking the consent or seeing that the three proclamations are made, should not prejudice or stand in the way of the person seeking the *retractus*, but the *retractus* holds good to this extent that the Fisc has its rights conserved not to the property itself, which goes to the person seeking the *retractus*, but to its appraised value or price. And it was so decreed on the 27th Oct 1600.*

---

* Peter Hanckes appellant *v.* Fidde Goyckes respondent. 17th Feb. 1601.

Juff. Wompek Van Mockana plaintiff *v.* Tieffe Eyntes defendant. 13th July 1609.

Eve Alma appellant *v.* Lieuwe Bolis respondent.

VIII.

(lib. 3. tit. 4. def. 3.)

The purchaser of an inheritance cannot without his consent, be sued by a creditor of the inheritance, except in certain cases.

The purchaser of an inheritance, although he bought it on the condition that he would satisfy the creditor of the estate, is not bound against his will to undertake the defence of such hereditary actions as is laid down by the Emperor Antonius *Cod. 4. 39. 2.* For the creditor of the inheritance has nothing to do with such purchaser and therefore he has no action against him. Indeed, if the purchaser of the inheritance, of his own free will takes up the defence of the action of the creditor of the inheritance and contests the action, for the debt, it is not considered that the creditor acts irregularly but that the purchaser had entered into a tacit agreement with the creditor that he will not sue the vendor and on this election of the purchaser the plea of a tacit fact not to sue is competent to the vendor. *Cod. 2. 3. 2.* But the purchaser of an inheritance is not bound against his will to undertake the defence of actions against the estate except where he has bought an insolvent estate from the Fisc *Cod. 4. 16. 2. Dig. 49. 14. 41.* or where the vendor is insolvent, for then the purchaser is taken to be sued *in subsidium. Dig. 30. 1. 94 Sec. 1. Dig. 2. 10. 1 Sec. 6.* These cases excepted, creditors would rightly sue, not the vendee but the vendor, and it is right that what the latter may have paid the creditors should be recovered by him from the vendee on the stipulation which is generally interposed between the vendor of the inheritance and the vendee.*

Sawer's Digest: History of the Printed Copy.

The Editor, Ceylon Law Review.

SIR,—Can you or any of your readers give me any information as to the history of the printed copy of Sawer's Digest of Kandyan Law? Mr. Ondaatje who brought out the third edition says that it is a copy of the second edition which Austin says was printed by Mr. Campbell of Hultsdorf. Who was Mr. Campbell and why did his edition contain only part of Sawers' notes? This edition (or Mr. Ondaatje's copy of it) is the one ordinarily referred to in the courts where it is assumed to contain the whole of Sawer's opinions. As a matter of fact, the original manuscript of Sawer's has many other notes in some of which he has corrected his first impressions and arrived at an opinion directly opposed to his earlier view. Perera (see Perera's Armour p. 59) refers to a note of Sawer's which he says is omitted in Mr. Campbell's edition. It seems probable therefore that the first edition contained at all events some of these notes. I am anxious to discover who published the first edition and whether copies of it are extant.

I am, Yours Faithfully,

F. A. H.

* 25th Feb 1622.
Yda Schette Dr. plaintiff v. Antje. Hinne Dr. defendant.

The Greek Jurists.

(Translated from the Dutch of L. A. Warnkoenig.)

BY A. E. BUULTJENS, B. A., (*Cantab*) Advocate, Matara.

As the Law of Justinian was sanctioned for the people in the Eastern Empire, who used the Greek language as their vernacular, it necessarily happened that Greek versions and commentaries of different parts of it were there composed. Justinian himself had permitted such versions and summaries.

Several jurisconsults contemporary with him, out of such a number of those who had written the *corpus juris*, are praised as authors of the interpretations of that law, and their various notes or *scholia* are believed to be extant to this day. They are Thalelæus, Stephanus, Cyrillus, Dorotheus, Anatholæus, Isidorus and others who are said to have translated the Digest and the Code into Greek. [Hunter adds the names of Theodorus of Hermopolis, Gobidas or Cubidius, Anastasius and Philoxenus and Symbatius.]

Specially famous is THEOPHILUS whose Greek Paraphrase of the Institutes is extant and of no little use. Whether he was the same author as that Theophilus, the distinguished Constantinopolitan, who, with Tribonian and Dorotheus by the authority of Justinian, composed the Institutes, was long a matter of dispute among the learned, but it is almost agreed on at the present day by all. This paraphrase was first published in Greek by Viglius Zuichemus; several editions of it were made with Latin versions, but the most perfect one was in the XVIII th Century by Otto Guil. Reitzius, published at "Hagæ comitum" 1751. 2 Vols. 4°

Another distinguished Constantinopolitan is JULIAN, most celebrated for the Novels of Justinian translated into Latin and published in epitomia in the year A. D. 570. This work obtained the highest authority in Western Europe during the whole of the Middle Ages, and greatly contributed to propagate the Roman Law there. These Epitomes were regarded during the Middle Ages as the Novels themselves, so that those under the name of Authenticarum should be distinguished from the work of Julian. The most accurate editor of this work is Franc. Pithœus. The edition of Pithœus is found in the works of Pithœus on the Code and Novels, Paris, 1689, folio, p. 403. We obtain several Novels to-day by no other means than from Julian's Epitome.

Although several new constitutions were published by the succeeding Emperors, yet the Justinian collection of laws was observed as the law for several centuries in the Græco-Roman Empire, until the time of BASIL, the Macedonian, who began to reign in the year A. D. 866. This Emperor formed the plan of reforming the law; and after he had published a small work, under the title of *Prochiron ton nomon* or *Ecloga*, consisting of 40 titles (A. D. 876), he undertook to collect into one whole the entire Justinian law translated into Greek. His son Leo, surnamed the Philosopher, completed this work with the aid of a certain jurisconsult, Sabbathius Protospathorus (A.D. 886). In A. D. 910, Constantine Porphyrogenetus [son of Leo, *Hunter*] ordered that a revised edition of it should be made, and this has come down even to our times. The name of this collection, consisting of six parts and 60 books, is *Tôn basilikôn diataxeon b'blia*, "The books of the imperial constitutions" which are commonly called BASILICA. These books were drawn from all parts of the Justinian law, so that the titles of the Digests, Code and Institutes are joined together in the same books, and the changes made by the Novels of Justinian or the later Emperors were added. Greek versions and interpretations composed in previous centuries were added to them. But the texts of the Justinian Law are not restored in the BASILICA accurately and in the very words; many are too briefly indicated and as it were by an index; examples are drawn rather from other sources; not rarely the texts seem to have been somewhat incorrectly understood by the Greek interpreters. Entire titles too of texts are wanting in the Basilica. Some have been altered by accident or design. Nevertheless the authority and utility of this work is not slight for interpreting innumerable passages of the Justinian law: wherefore it is to the interest of every learned jurisconsult to be able to consult the Basilica. We have already previously noticed that very many fragments formerly lost have been restored from the Basilica into the *corpus juris* of Justinian.

At the Renaissance the books of the Basilica also began to be collected, and this chiefly in France. Manuscript codes containing them were obtained in the West when the Greek empire was overthrown by the Turks [A. D. 1453.]. By the study of those who were jurisconsults those books were made a part of public law, as we shall see below. At last, in the year A. D. 647,* the Basilica was put into type and published at Paris by the care of Annibal

* Hunter gives the date 1667.

Fabrotus in vii volumes ; but only xxxvi of those books are entire, vii others are in parts and of the remaining xvii only fragments are contained in that edition. A Latin version of the entire work was added to it. In the year 1752 in the Thesaurus of Meermann, C. Guil. Otto Reitzius published a supplement of that edition containing iv books. In the same Reitzius' edition of the paraphrase of Theophilus, the Greek titles on the signification of words and on the rules of law are also published. All the books of the Basilica are preserved entire in the royal library of Paris. In the same Basilica too there are annotations which are thought to have been in great part brought out for the interpretations and notes on the books of the Justinian Law made by previous jurisconsults of whom we have spoken. These annotations are wont to be added in editions of the Basilica. [No complete Mss. of the whole work remains, but a very able re-construction was attempted by Professor C. W. E. Heimbach, of Jena (1883—1870). from Mss. of various periods and of complementary contents—an undertaking that has been characterized as one of the most important literary works of the nineteenth century. *Hunter*.]

Lastly there remains a Synopsis or *Ecloga Basilicarum*, formerly composed in alphabetical order, but in A. D. 1575 rearranged by its Editor Leunclavius according to the order of the books and titles of the Basilica itself. Besides this collection of Greek law, many Novels of the Greek Emperors also remain, which translated into Latin we have noticed among the additions to the body of the Roman Law. Leunclavius collected them in ii. volumes, Frankfort 1596 in his *Græco-Roman Law*.

Lastly there lived in the Græco-Roman Empire, after the Basilica was composed even up to its overthrow, various writers on law, among whom are distinguished Michæl Psellus [A. D. 1020—1105] who reduced the precepts of law into brief verses under the name *Synopsis of the laws* ; Eustathius [A.D. 960—1000] who wrote a book on the computation of times, which Cujacius has published ; and Constantine Harmenoplus in particular who died at Constantinople in 1382, very celebrated by his work entitled *Prochiron ton nomon* consisting of six books which translated into Latin is very lately too praised by many. It was first published by Adamæus at Paris in 1540, & J. O. Reitzius brought out the best edition in the Supplement to the Thesaurus of Meerman 1780.

As regards the fate of the Roman Law in the Turkish Empire, the common opinion of the learned regarding

it was that it clearly fell into disuse or perished : that this opinion is false has at length been proved in our days ; for we learn that the Græco-Roman law has to-day authority and use among the Greeks ; that the book of Harmenopulus translated into modern Greek, and often published at Venice, is there preserved in place of a Code of Laws ; in the more important cases the Basilica is wont to be consulted. But the Turks use their own law.

We cannot here pass over the Greek collection of the maritime laws of the Rhodians which exists in several manuscripts of the codes and separately and moreover published as a part in the Basilica (book 53, title 8). Whether their collection was anterior to the Basilica or not is a controverted point among scholars : that it contains the genuine laws of the Rhodians has begun to be lately proved in *Themis*. *Others* regard it as substituted.

By what authors the use of the Basilica has been made in interpreting passages of the laws of Justinian, has been diligently indicated by the famous Ch. G. Hanbold in his work : Manual of the Basilica, Leipsiz, 1819, I. V. 4" shewing a comparison of the law of Justinian with the post-Justinian Greek law.

Professional Etiquette.

At a meeting of the General Council of Advocates held at Hultsdorf on Tuesday, June 14th, 1910, the following question was submitted for the decision of the Council:—

"Whether it is in accordance with etiquette for an Advocate to accept a fee in any civil or criminal matter, or to appear in any civil or criminal trial, enquiry or appeal in any Court, otherwise than on the instructions of a Proctor except in the case of (a) Counsel being assigned by the Court (b) Crown Counsel appearing on behalf of the Crown."

Resolved :—The answer is in the negative.

We suppose this rule applies also to appearances before the Attorney-General, Solicitor-General, Crown Counsel, Mayor, Government Agent, Inspector of Police, &c., &c.

Counsel's Fees.

Last year there was some talk of having a fixed scale of counsel's fees. The idea was to settle the minimum. Reference was made to a Rule of the Supreme Court dated Nov. 25, 1835, which ran :

No advocate shall accept any fee under £3.15.0, provided, however, that he shall not be hereby restricted from undertaking the case of a person who sues or defends in *forma pauperis*.

This rule was rescinded on July 7, 1838. It is right, therefore, to say that there is at present no written rule on the subject. It is quite a different matter whether there should be any such restrictive rule.

Transfer of Proctor's Warrant.

There has been a variety in the procedure as to applications for transfer of warrants. In some instances an affidavit and petition were accepted as sufficient. In others, the Supreme Court directed the papers to be sent to the judge before whom the applicant sought to practise. The most satisfactory course appears to be that indicated in the matter of the application of Mr. Silva. It was ordered by Wood Renton, J., that these should be filed with the petition, affidavit and motion :

(1) A certificate from the judge whose court the proctor was leaving that all arrangements have been made for unfinished work.

(2) A certificate from the judge in whose court the proctor desires to practise that there is room for him.

(S. C. minutes : May 13, 1910.)

Obiter

(*Selected by G. O. Grenier, Advocate.*)

Value of Professional Integrity.

The high character of the Counsel and of the proctor for the plaintiff makes it certain that they would not have *advised* a "vexatious" action.

Per De Wet, C. J., [1882] Wendt, p. 28. *Dhammajoti Unanse* vs. *Paranatala.*

Cancellation of Stamps.

Now to my mind it is not necessary that the person cancelling a stamp should with his own very fingers write on it the date of cancellation. The Legislature is not likely to have meant that no one should be able to cancel a stamp who could not write figures.

Per Clarence, J. [1882], Wendt, 43. *Assary* vs. *Assary.*

Speedy Criminal Trials.

Of all cases, criminal cases are those which should be promptly decided, but in this case a criminal charge has been allowed to be pending against the accused for nearly ten months, and it is not yet disposed of.

Per Dias, J., [1882] Wendt 71. *Queen* vs. *Herat Sinno.*

Legislators Criticised.

On this part of the judgment, the learned Queen's Advocate, who appeared in support of this appeal, animadverted in strong terms on the memory of two eminent men who at one time occupied the chief seat on this bench. The learned District Judge did not in terms refer to any persons, but criticized the legislation of 1868. If, however, his remarks were meant to apply to the eminent persons* referred to by the learned Queen's Advocate, all that I can say is that the remarks are as undeserved as they are uncalled for.

The Colombo Club.

The so-called Colombo Club is not a person known to the law. If a body of gentlemen chose to represent themselves as the Colombo Club and contracted a debt to plaintiff he was bound to sue them as defendants in the case. I am not aware of any law which authorises the Colombo Club to sue or to be sued by any corporate name.

Per Dias, J., [1882] Wendt 101. *Peris* vs. *Colombo Club.*

Physical Removal of Proctor.

To remove a proctor from the Court while actually engaged in conducting his client's cause was a measure of extreme harshness, justifiable only on the supposition that the proctor was misconducting himself to the extent of obstructing or disturbing the business.

Per Clarence, J., [1882] Wendt 119. *Bawa* vs. *Ashmore et al.*

---

* Sir Richard Morgan and Sir Edward Creasy.

I think that a Commissioner of Requests has clearly power to turn out of Court any one who obstructs or disturbs the business of the Court, even though such person be an advocate or proctor actually engaged in a pending case.

Per Clarence, J., [1882] Wendt 120. *Bawa* vs. *Ashmore et al.*

Trial by Jury.

Trial of criminal cases by a judge and jury was imported into this country from England, and since its introduction we have always followed the course pursued in English Criminal Courts in such cases; and one of the fundamental rules of the system is, that the jurors are the sole judges of the facts, from whose judgment there is no appeal. On the other hand, all questions of law and practice which may arise in the course of the trial are to be decided by the presiding judge, whose decision thereon is conclusively binding on the jury. But in certain cases power is given to the presiding judge to reserve for the consideration of the Collective Court any matter of law or practice about which he may entertain doubts.

Per Dias, J., [1882] Wendt 142. *Queen* vs. *Buye Appu.*

Notice of Affidavits.

It hardly needs to be said that when a party intends to use affidavits the proper course is to give copies beforehand to the other side.

Per Clarence, J., [1882] Wendt 252. *Arookiampulle.* vs *Sambo.*

Accomplices.

The entire evidence is that of informers if not accomplices, who, although they went to the place for the purpose of detecting crime, assert that they themselves gambled, and for this reason their evidence required corroboration, which it does not appear to have received in any material particular .... Where the law creates an offence attended with highly penal consequences, the conviction of an accused shall be subject to those recognised principles and rules of law and evidence which are wisely conserved as safeguards and the violation of which is hazardous to the administration of justice.

Per Burnside, C. J., [1883] Wendt 282. *Silva* vs. *Silva.*

Tenancy.

It is no doubt to be presumed in the absence of material to the contrary that an over-holding tenant continues to

hold at the old rent, but that presumption may yield to circumstances.

Per Clarence, J., [1883] Wendt 309. *Jacobs* vs. *Ebert.*

Proctor paying Costs.

As at present advised I am of opinion that plaintiff's costs in the Court of Requests should be paid by his proctor, whose incompetence appears to have been the primary cause of these mistaken and embarrassing proceedings.

Per Clarence, J.,[1883] Wendt 312. *Cotton* vs. *Campbell.*

Courts and the Public.

There can be no doubt of the right of a judge to do such acts as are necessary to preserve order in the Court, but a general order like the one issued by the Magistrate is not right, as every Court of justice is open to the public, who have a right to enter it not only as parties concerned in suits but even as spectators, provided they conduct themselves in a proper and orderly manner, so as not to disturb the proceedings of the Court.

Per Dias, J., [1881] Wendt 362. *Soyza* vs. *Browne.*

Comment in Petitions of Appeal.

It need hardly be observed that the remarks of the plaintiff's proctor in the petition of appeal as to the manner in which the defendant in his (the proctor's) opinion gave his evidence are altogether improper.

Per Cayley, C. J.,[1881] Wendt 361. *Soyza* vs. *Browne.*

Appeal Court Notes.

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

78. **Kandyan Law—Unmarried daughters inheriting—Subsequent Deega marriage.**

Per Van Langenberg, A. J.—The first point argued was that as these two women were unmarried at the time of their father's death, they succeeded to the inheritance and their subsequent marriage in deega did not affect their right. (*Dingiri Menika* v *Heen Hamy et al. Leader L. R* 1. 8)...The respondent referred us to several authorities showing that the daughter does in these circumstances forfeit her share of her father's estate and it was so expressly decided in a case reported in *Austin's Reports*

p. 164, South Ct. No. 14991. This decision and others to the same effect were cited and followed by Sir Archibald Lawrie in D. C. Kurunegala 434/140, 1 & 15 May 1894 (*Modder's Kandyan Law* p. 55). In my opinion both Ran Menika and Muthu Menika were divested of their rights to the paternal estate by marrying in deega.

Hutchinson, C. J., after commenting on *Dingiri Menika* v. *Heen Hamy et al* (*uti. sup.*) thought that decision wrong.

S. C. 430 D. C. Badulla, 23/1. 8. 6. 10.

* * *

79. **Surety—Action by—C. P. C. 339—Assignment.**

Per Wood Renton, J.—All that the S.C.had to decide, and did in terms decide,in the case of *Muttiah Chetty* v. *Marikar* (1907, 1908) 11 N. L. R. 50. was that, as Sec. 339 of the Civil P. C. enacted not merely a rule of procedure but one of substantive law, the respondent could no longer execute his decree against the principal debtor. There is nothing in that decision which, in my opinion, can deprive the respondent of his right to bring such an action as the present, which is in substance one by a surety, who has paid the whole of the judgment debt due by the principal debtor to recover from the latter the amount so due. Under the Roman Dutch Law (see *Barber & Macfayden's* translation of *Cens For.* 1. 4. 17.secs. 24 & 25) there can be no doubt but that such an action was maintainable. *Assen & Saibo* v. *Ludovici* (1851) Ram. 43—55, p. 154, approved.

S. C. 417, D C Puttalam 2118. 16. 6. 10.

* * *

80. **C. P. C. 247—Right under planting agreement—Failure of proof—Relevancy of other title.**

In a Sec. 247 action by the judgment creditor against the successful claimants, where the claimants failed to prove their rights under the planting agreement relied on but "the judge nevertheless found them entitled to half the trees either under some new verbal agreement with the successor in title of the first landowner or else by prescription." *Held* per Hutchinson, C. J., It seems to me however, that whatever rights the defendants may have, they must have under the planting agreement, and I think they might have proved their right in this present action. I cannot agree that the question of their right could not be decided in the present action, because the landowner is not a party.

S. C. 38, D. C. Chilaw 3417. 15. 6. 10.

81 **Dewale lands—Value of Services—Jurisdiction—C. P. C Section 9.**

Per Wood Renton, J.:—The plaintiff appellant brought this action as trustee of Pattini Dewala in Kandy, against certain tenants of the said Dewale, for the recovery of Rs. 340·40, being the value of their services as such tenants. It is admitted . . . that none of the proposed defendants reside with the jurisdiction of the D. C. . . . . Under these circumstances the learned D. J. held that the action has been wrongly brought in Kandy and has accordingly dismissed it. In my opinion the conclusion at which he has arrived is a sound one . . . . . I do not think that the provision in the last clause of Sec. 15 of the Service Tenure Ordinance of 1870 can possibly have the effect of converting the present action into one brought in respect of the land, (Clauses (*a*) and (*c*) of Sec. 9 of A. and P. C. held to apply to case).

Ratwatte v. *Polambegodde* (1901) 5 N. L. R. 143 distinguished.

S. C. 87, D C. Kandy 20331. 9. 6. 10.

* * *

82 **Ord. 10 of 1861, Sec. 71.—Penal Code Sec. 289.**

Per Wood Renton, J.:—The question of the meaning of the words "adjacent or near "in Sec. 7, of Ord. No. 10 of 1861 is a question of fact

Sec. 289 of the Penal Code does not speak of "obstruction" . . . Sec. 71 of Ord. No. 10 of 1861 confers on the public officers referred to therein an express right to enter upon such land as the appellants under the circumstances of this case discloses. As cor-relative to that right, there must be a statutory duty on the part of the owner of the land to permit the Statutory right to be exercised.

S. C. 334 P. C. Batticaloa 29440. 15. 6. 10.

* * *

83 **Penal. Code Sec. 266.**

Under Sec. 266 of the Penal Code it is necessary that guilty knowledge should be established as having existed at the time of the sale itself.

S. C. 318 P. C. Panadure 33203. 15. 6. 10.

* * *