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Edited by

Isaac Tambyah, Advocate.

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Editorial Notes.

The resolution of the Bar Council as to fee books (see Law Review vii. p.176) has necessitated a requisition for a general meeting of advocates. The rule calls for consideration not on the ground that it is undesirable to be businesslike and methodical but rather on the possibility of compulsory submitting of the books to a taxing officer. It is the unknown that causes disquietude. Does the rule imply the likelihood of outside inspection, checking and other acts of official interference? If it does, then there is reason in the fear that advocates may find themselves on the same "Departmental" plane with notaries headmen and surveyors. It may, however, be that the present apprehensions are ill-founded. What is wanted is a clear statement as to the scope of the rule.

Some good suggestions have been made here and there for the consideration of the Bar Council. The Council might frame rules,

(1) As to the transferring of briefs

(2) As to seniors having juniors. Why should not the transferring of a brief imply the transferring of the fee? Would it be a hardship for seniors of fifteen years' practice and more to make it a point not to appear in any case without a junior?

There is an anomaly about the working of the rule as to the lowest fee an advocate may receive. It is well known that private advocates prosecuting in District Courts are given R 7·50 a case. The new rule—old as tradition—might well be enforced to the advantage of D. C. prosecutors and the abolition of the practice of underpayment.

Lawrie, J., once said that every opportunity should be given to witnesses to speak the truth. Accordingly a witness in a case was acquitted because his second statement was a correction of his immediately preceding inaccurate statement. The complainant appellant in P. C. Mallagam 409 S. C. M 2. 9. 10 was less fortunate. He admitted he had had two cases against the accused, but denied an old case. However, on the summons in that case being speedily shown him he promptly admitted the third case. His conviction under Cr. P. Code Section 440 was affirmed.

The Judgment in *Muttusamy* v *Alagamma* [1910] vii Tamb. Rep. 82, confirms the view of the Supreme Court in earlier judgments as to the sufficiency of the prosecutor's authority when it is ratified by the Superintendent. The only point about which some doubt may be expressed is as to whether a prosecution unauthorised at first but ratified as in *Muttusamy* v *Alagamma* discloses any irregularity at all. His Lordship Mr. Justice Middleton treats the previous want of authority, as an irregularity but a negligible one.

During the course of the argument in D. C. Criminal Negombo 2816 September 16, 1910 Mr. Elliott, counsel for the appellant, strongly commented on the prejudice to an accused person arising from the circumstance that in an indictment before the District Court, the District Judge is unavoidably influenced by that part of the indictment which sets out the accused's previous convictions.

Mr. Elliott's suggestion to have in such cases two indictments, one containing the charge in respect of which there is the trial, and the other the counts relating to previous convictions, the latter document to be with the prosecutor till verdict is a good one.

Bonser C. J. *R.* v *Fernando*, 1 Br. 54 recommended under similar circumstances the association of assessors with the judge.

The native physician referred to in the article on perjury at p 146 of this volume as one of the defence witnesses in *R* v *Velupulle* was proceeded against for perjury in that he had contradicted the fortunate Chinniah.

The proceedings have terminated in the discharge of the native doctor. It is a matter of some import how fares it with Chinniah in the light of the proceedings thus closed.

The dictum of Wood-Renton J. in *Annamalai* v *Silva* [1907] 2 A. C. R. 33 that the addition of the signature of a witness to a promissory note, at a later stage than the actual making of it, is a material alteration was cited in *Velupulle* v *Mutlupulle* P. C. Point Pedro 13080 September, 12,1910 but was not followed.

Decisiones Frisicæ.

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

IX.

(lib. 3, tit. 4, def. 9.)

Where there is imminent peril of eviction, security should be given on account of the case already instituted and pending, not on account of all other cases.

It is the common opinion of the jurists that where there is an imminent risk of eviction at the commencement of a contract, the vendor should give security not only in respect of the case already instituted but generally against all evictions and all events that may occur, partly because the Emperors have ordained that security should be given against imminent eviction *Cod. 8. 45. 24.* and partly because the vendee fears, not without good reason, that if once there is an action against him, other actions also against him will follow. And as it is allowed to the vendee on account of the action already instituted, to demand security by way of exception, and as this security is customarily given for all evictions, it appears, not without reason, that this security should be estimated more according to its proper nature than according to the nature of the contract, which is altered by reason of the case already instituted or by the cause which gave rise to it, and hence generally security should be given, as it is better that the vendee should be secure against the imminent peril he fears than that the vendor should get the profit which he seeks in bad faith. It is thus laid down by Bart. Bald. Salicetus *ad. d. l. si post perfectam* and of this opinion is Hartmannus Pistoris *lib 3. quaest. jur. quaest. 6. num. 5 et. 6.* and Jacobus Cancerius *part. 1. variar. resolut. cap. 13. num. 27.* Others to the contrary urge that no security is necessary

except for imminent eviction, for the reason that as from the nature of a contract *repromissio absque satisfactione* is generally sufficient and that as the action which is already instituted against the vendee gives the occasion for security it is also a reason why the effect should be limited to the cause and the security only restricted to this action but the contract, in other respects preserves its own force and character. And this is the opinion of Fulgosius *in l. habitationem sec. final. ff. de periculo et commod. rei vend.* Antonius Rubaeus *in l. non solum sec. movte num. 80. ff. de nov. oper. nunt.* Guilielmus Mudaeus *ad tit. de. act. empt. tit. Quomod de evict. cavend.* And Petrus Helgius thinks that this is the sounder view as a matter of law, part *1. quaest jur. quaest. 36. num. 60. in fine* and the Court has adopted this view in its judgments.*

XV.

(lib. 3, tit. 4, def. 10)

He who buys a land on the condition that he will pay the purchase money notwithstanding any intervention or protest, can, nevertheless, on eviction being imminent, ask for security before payment of the price.

Titius sold a land publicly under the following, among other conditions:

"That the vendee should pay the purchase notwithstanding any intervention or protest." Caius bought the same. When however this sale was proclaimed in the usual manner, Livius protested that he did not consent to the sale unless his then pending hypothecary action was secured to him by which he had begun to proceed against his land.

Caius, the vendee, fearing the result of his action, claimed as against the vendor, that, as at the commencement of the contract, eviction was imminent, he should be given proper security in respect thereof before he pays the purchase money, or that the vendor should consent to the purchase money being deposited in Court. The vendor to the contrary contended that he, by virtue of the contract was not bound to do either. The question therefore arose, What is the effect of this contract? And it appeared that it was of no greater force than if it had been agreed that the vendor would not be liable for eviction, that he would not be bound to make good any eviction, which condition being interposed, if the thing were evicted, the price that was paid could nevertheless be recovered. For it is contrary to good faith that the vendee should lose both the thing and the price, *Dig. 19. 1. 11. sec. 18.* Hence it follows that, if at the commencement of the contract there is imminent peril of eviction, the vendor, who stipulated that he would not be liable to eviction, will nevertheless be liable to give security for the restitution of the price if the thing is evicted, as Hermannus Pistoris *lib. 3 quaest. 6. num. 7.*, following Petrus Surdus and others, point out.

For the like reason, although this condition, annexed to the sale, says that the vendee, notwithstanding the intervention or protestation of

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* 10 July 1601 Mattheaus Pieters, plaintiff *v.* Hessel van Hermana, defendant.

† 26 October 1601.
Geert Hans Piel, plaintiff *v.* Bonne Meynses, defendant.

a third party, is bound to pay the price, yet on the ground of imminent peril of eviction, the vendor is bound to give security for the restitution in case of eviction, before the vendee can be compelled to pay the price.

Nor does it make any difference that in the present case it is urged against the vendee that he was aware that the land was mortgaged to the person who has brought the hypothecary action and that as he (the vendee) knew that the land was another's or bound to another, he cannot ask repetition of the price on eviction. *C. 8. 45. 27.* on the authority of which it is laid down to this effect by Gullielmus Fornerius *lib 2. select. cap. 13.* Joachimus Mynsingerus *cent. 6. obs. 37 in fine* Andr. Fachin *lib. 2. controv. cap. 39.* Maschot *lib. 2. resolut. cap. 19.* Franciscus Stephanus *decis. 8. num. 4. 5. 6.*

For in addition to what Jacobus Cujacius *in d. l. si fundum* and Petrus Faber *lib. 1. semest. cap. 17. vers. sed. quid. existimandum* (to which add Louet in his *Recueil in lit. A. num. 13.*) have said that this *lex* does not treat of the repetition of the price, but of the recovery of what the vendee has paid as cost to the person vindicating or to the mortgage creditor seeking his rights on the hypothec it may also be answered that in the present case the question is not the repetition of price but whether the vendee, who has not yet paid the price, can retain it till proper security is given against the eviction which is imminent. Which statement should be taken as altogether sound because the right of retention is more easily granted than the right of an action *Cod. 4, 32, 4, Dig, 44, 4, 14. Dig. 50. 17. 156. sec. 8* especially in the present case where both the vendor and the vendee knew that the land was encumbered, and therefore the rule applies that, everything being equal, the condition of the possessor is better *Dig. 50, 17. 128. Dig. 12. 5. 3. Dig. 12. 5. 4. sec. 3. cod. 4. 7. 5.*

And the Court so ruled.*

English Bar Rules.

Barrister acting as Spokesman for a Deputation

Some London contractors were forming a deputation to wait on a public body in London for the purpose of urging certain views of the contractors in reference to the public body's system of issuing licenses for certain purposes. A representative of a firm of one of such contractors requested a Barrister to act as spokesman for the deputation and offered him, through his clerk, a fee of.....guineas. The Barrister suggested that a solicitor should be instructed to deliver a brief, but the contractor's representative declined to do this on the ground of expense, saying that the matter was non-contentious business. Not being sure whether the fact that the

* 20 December 1628.
Pieter Gerrits, plaintiff *v.* Cornelis van Voort, defendant.

public body was not a judicial tribunal of any kind made any difference, the Barrister asked the Council's opinion as to the course he should adopt. The Council replied that the general rule is that a Barrister should not appear as an advocate on behalf of a client without the intervention of a solicitor, and that in the opinion of the Council the rule is applicable to the facts set out above.

Barrister Recommending another Barrister as his Leader or Junior.

A Barrister ought not to recommend another as his leader or junior. And such questions as, Who is the best man for a witness action in such a court ? Which leader is the *persona grata* in such a Court ? Do you get on all right with *X* as your leader ?—are improper questions, and should not be answered.

Commissions or Presents from Barristers.

Any Barrister who gave any commission or present to any one introducing business to him would be guilty of most unprofessional conduct which would, if detected, imperil his position as a Barrister.

Agreement to wait for fees until received by Solicitor.

It is a breach of professional etiquette for counsel to whom a brief has been delivered by a solicitor to agree with that solicitor that he, Counsel, will wait for payment of the fees payable on that Brief until that solicitor shall have received them from his lay client.

Agreement to take fixed fee for all cases.

It is a breach of professional etiquette to make an agreement with a solicitor to do all his cases of a particular class at a fixed fee in each case, irrespective of the amount claimed or of the circumstances of each case.

Agreement to take less fee than allowed on Taxation.

It is a breach of professional etiquette habitually to accept a less fee on a brief in the County Court than that commonly allowed on taxation to a successful party in an action for the amount of the claim in question, *e.g.*, a fee of one guinea in a claim under the Employer's Liability Act for £300.

The propriety of the amount of a brief fee must be determined in each case by reference to the circumstances of the particular case. It would not be a breach of professional etiquette to accept a less fee than that commonly allowed on taxation if in other respects it were a proper one.

Return of fee.

Where a Barrister accepts a brief upon express undertaking that he will personally attend throughout the case, he ought, if he does not so attend, to return his fee.

Signing for fees before payment.

The signing of lists of fees for taxation without having received the money is improper, and a breach of professional etiquette.

K. C'S to have Juniors.

A King's Counsel in accordance with a long-standing *Rule of the Profession*, cannot hold a brief for the plaintiff on the hearing of a Civil Cause in the High Court, Court of Appeal, or the House of Lords, without a Junior. It is the usual practice of King's Counsel to insist upon having a Junior when appearing for a defendant in like cases, and also when appearing for the prosecution or for the defence on trials of criminal indictments.

K. C'S brief held by Juniors.

It is undesirable that a King's Counsel who is briefed without a Junior, should have his brief held for him by a Junior, and that henceforth it be considered a *Rule of the Profession* that he should not do so.

In the course of a Review in the *Law Magazine and Review* for August 1910, the Editor remarks:

> It seems superfluous to point out that the junior counsel, when his leader is present, does *not* open the case, the junior counsel *can* practise in the higher Courts without a leader; that King's Counsel *can* and *do* when required, without breach of professional etiquette, practise in the lower Courts; that King's Counsel *do* see their clients and witnesses before the trial, and that solicitors are not therefore the only lawyers who come in contact with the witnesses; and that solicitors also have right of audience in the Lower Courts.

Indian Bar Rules.

(*From Act xviii. of 1897.*)

Sec. 6. The High Court may from time to time make rules consistent with this Act as to the following matters (namely) :—

(a) The qualifications, admission, and certificates of proper persons to be pleaders of the subordinate Courts,

and of the revenue-offices situate within the local limits of its appellate jurisdiction, and, in the case of a High Court not established by Royal Charter, of such court.

(b) The qualifications, admission, and certificates of proper persons to be mukhtars of the Subordinate Courts, and, in the case of a High Court not established by Royal Charter, of such court.

(c) The fees to be paid for the examination and admission of such persons; and

(d) Suspension and dismissal of such pleaders and mukhtars.

All such rules shall be published in the local official *Gazette*, and shall thereupon have the force of law: Provided that, in the case of rules made by a High Court not established by Royal Charter, such rules have been previously approved by the Local Government.

Sec. 12. The High Court may suspend or dismiss any pleader or mukhtar holding a certificate issued under Sec. 7 who is convicted of any criminal offence implying a defect of character which unfits him to be a pleader or mukhtar, as the case may be.

Sec. 13. The High Court may also, after such inquiry as it thinks fit, suspend or dismiss any pleader or mukhtar holding a certificate as aforesaid:—

(a) Who takes instructions in any case except from the party on whose behalf he is retained or some person who is the recognised agent of such party within the meaning of the Code of Civil Procedure, or some servant relative or friend authorised by the party to give such instructions or

(b) Who is guilty of fraudulent or grossly improper conduct in the discharge of his professional duty or

(c) Who tenders, gives or consents to the retention out of any fee paid or payable to him for his services, of any gratification for procuring or having procured the employment in any legal business of himself or any other pleader or mukhtar or

(d) Who directly or indirectly, procures or attempts to procure the employment of himself as such pleader or mukhtar through, or by the intervention of, any person to whom any remuneration for obtaining such employment has been given by him, or agreed or promised to be so given or

(e) Who accepts any employment in any legal business through a person who has been proclaimed as a tout under Section 36 or

(f) For any other reasonable cause.

Sec. 14. If any such pleader or mukhtar practising in any Subordinate Court or in any revenue-office is charged in such Court or office with taking instructions except as aforesaid, or with any such misconduct as aforesaid, the presiding officer shall send him a copy of the charge and also a notice that, on a day to be therein appointed, such charge will be taken into consideration. Such copy and notice shall be served upon the pleader or mukhtar at least fifteen days before the day so appointed, on such day, or on any subsequent day to which the enquiry may be adjourned, the presiding officer shall receive and record all evidence properly produced in support of the charge, or by the pleader or mukhtar, and shall proceed to adjudicate on the charge. It such officer finds the charge established and considers that the pleader or mukhtar should be suspended or dismissed in consequence he shall record his finding and the grounds thereof, and shall report the same to the High Court, and the High Court may acquit, suspend or dismiss the pleader or mukhtar.

Any District Judge, or with his sanction any Judge subordinate to him, [any Judge of a Court of small causes of a Presidency-town,] any District Magistrate, or with his sanction any magistrate subordinate to him, and any revenue authority not inferior to a Collector, or with the Collector's sanction any revenue-officer subordinate to him, may, pending the investigation and the orders of the High Court, suspend from practice any pleader or mukhtar charged before him or it under this section.

Every report made to the High Court under this section shall :—

(a) When made by any Civil Judge subordinate to the District Judge, be made through such Judge ;

(b) When made by a Magistrate subordinate to the magistrate of the District, be made through the Magistrate of the District and the Sessions Judge.

(c) When made by the Magistrate of the District, be made through the Sessions Judge.

(d) When made by any Revenue-officer subordinate to the chief Controlling Revenue-authority, be made through such Revenue-authorities as the chief controlling Revenue-authority may, from time to time, direct.

Every such report shall be accompanied by the opinion of each Judge, Magistrate, or Revenue-authority through whom or which it is made.

Sec. 36. (1) Every High Court, District Judge, Sessions Judge, District Magistrate and Presidency Magistrate, every Revenue-officer, not being below the rank of a Collector of a District, and the Chief Judge of every Presidency Small Cause Court (each as regards their or his own Court and the Courts, if any subordinate thereto) may frame and publish lists of persons proved to their or his satisfaction, by evidence of general repute or otherwise, habitually to act as touts, and may, from time to time, alter and amend such lists.

(2) No person's name shall be included in any such list until he shall have had an opportunity of showing cause against such inclusion.

(3) A copy of every such list shall be kept hung up in every Court to which the same relates.

(4) The Court or Judge may, by general or special order, exclude from the precincts of the Court any person whose name is included in any such list.

(5) Every person whose name is included in any such list shall be deemed to be proclaimed as a tout within the meaning of section 13, clause (e) and section 22, clause(d).

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The All India Civil Court Manual.

(*By T. V. Sanjiva Row, Madras.*)

Mr. Sanjiva Row, two of whose works we have reviewed in this journal, has prepared and published a collection of Indian Statutes under the above heading. He gives in the volume before us, which is the first of the work, the Imperial Acts of India in 1152 pages. Each statute has prefixed to it a chronological table showing its history. The various amendments and modifications are so incorporated as to make reference easy, and to leave no doubt as to whether a statute has been in any way amended or not. A foot-note in bold type shows statutory changes where they occur. The case-notes are indicative more than exhaustive. The book is exceedingly well got up by the Law Printing-House. The indefatigable energy of Mr. Sanjiva Row shown in the output of legal literature for which he is responsible seems by no means to interfere with the high quality of his achievements.