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Editorial Notes

The Franchise Ordinance is nearly law. It has been, notwithstanding the formal character of the introduction all expected, very warmly and impressively supported by the acting Attorney-General. The opposition to the measure has been not less striking.

This does not mean that the Ordinance is above criticism or improvement. The reasons given elsewhere, in this number, by Messrs A. De. A. Seneviratne. H. A. Jayawardene and F. de Zoysa should suggest the desirability of a strong and representative demand for amendment. We think that the Bar and Council, like the English Bar Council, should discuss important enactments.

Municipal corruption was insinuated but not established in 80 C. R. Col. 16387 (S.C.M. 3 0 10). A man purported to keep a book containing municipal gratuities and reliance was placed on the entries in that book to allege and prove illegal gratification. Grenier J. very rightly declined to accept evidence capable of easy fabrication and indefinite expansion.

The trial of a kangany in one case for harbouring many coolies was considered in 5 10 P. C. Amisawella 4575 (S. C.

M. 3 10 10). The case of *Egan v. Selambaram* (1908) 3 A.C.R. 109 does not appear to have been cited to the Court by learned counsel. There it was expressly held that the harbourer could be tried in one prosecution for harbouring many coolies.

In *Sekady Pulle v. Fiscal C. P.* (1910) 13 N. L. R. 219 the Full Court has held that the Fiscal is not a necessary party to an application under Civil Procedure Code sec. 282. This was on a reference to the full Bench by Wood Renton and Grenier J. J. in the absence of judicial authority on the point. The arguments as reported do not show that their Lordships' attention was drawn to D.C. Jaffna 3685 (1837) Morgans' Digest sec. 447. There Rough C. J. and Jermie J. were of opinion that the Fiscal being the person under whose authority the sale was effected was a necessary party.

The Forms in schedule 2 of the Civil Procedure Code are often disregarded. The code itself in places, recognises and enjins the use of the Forms. They have to be followed (3 C. L. R. 32) if consistent with the enactment (9 N. L. R. 66), but they are not to restrict the clear meaning of the section (2 C.L. R.16). In 178 (D.C. Colombo 994) S.C. M. 3 10 10) the Form has been given, no doubt rightly, a far higher place than that hitherto accorded it. From Form No 90 where it is said that the security bond by an administrator is in favour of the secretary, or the secretary for the time being it has been construed that the Form was a statutory recognition of a bond in favour of the secretary being in favour of his successor.

The Colombo Law Library has been enriched by the addition of one hundred volumes of the *Law Times* Reports. They contain a greater number of commercial cases than any similar publication.

Mr. Dissanayeke's motion for discussion before the general meeting of Advocates next week is rather a sweeping one. He proposes to do away by one resolution three rules which the Bar Council had been at considerable pains to propound. The full agenda of the meeting is given on another page.

Decisiones Frisicæ.

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

XVIII.

(lib 3. tit 4. def. 13.)

The benefit of *lex 2. C. de rescind. vend.* is given to a vendee and can be set up by him by way of an exception or defence.

A vendee being sued by the vendor for the purchase money pleaded that he was, through ignorance, deceived to the extent of more than half of just value and gave abundant proof of this fact. Hence our Court condemned the defendant, not in the price agreed on, but in the just value of the thing sold which it bore at the time of the sale, or its restitution.* Although some would deny the benefit of *lex 2* to a vendee as he was not coerced to buy but did so of his own free will, often with the intention of committing a fraud and sometimes buying for an extravagant price, being moved thereto for reasons of convenience, neighbourhood or climate, or because he was educated there, or his parents were buried here. So that there are great points of difference between a vendor and vendee, ill-will for instance on the part of the vendee, poverty on the side of the vendor, the former buying to add to his possessions, the latter selling to diminish his, as nicely put by Satiranus *lib. 5. de providentia.* And so thinks Carolus Molynaeus *ad consuetud. Paris.tit. 1. Sec. 22. num. 47 et segq. et in tract. de contract. usurar. quaest. 14. num. 176.* Jacobus Cujacius *lib. 16. obs. cap. 18. et lib. 23. cap. 31. et in Mercatoro suo lib. 2. cap. 13.* Ludovicus Charondas *lib. 7 respons. du droict. observée en France. respons. 209* where it was so decided by the Court of Paris, *et in memorabil. verb Acheteur et in verb Mineur.* Johannes Baque. *in tract· du droict d'Aubeine part. 2. cap 22. num. 24.* Antonius Faber *decad. 8. err 7. Gerrard Maynard lib. 3. dec. 58* who says that it was so decided by the Court of Toulouse Georgius Loue *on Recueil des arrests notab. in lit. L. num X* Jacobus Montholonius *en Arrests prononces en robes Rouges. arrest.77* and Mornacius *ad d. l.2.*sufficiently shows that this is the settled practice of the French Court.

But the general doctrine of the Jurists extends this benefit and rightly, even to the vendee if he buys for more than the just price and is deceived in more than half of the just price *gl. et Doctores ad d.l. 2.* Fr. Duarenus *ad l. si quis cum aliter ff. de verb. oblig.* Jonannes Robertus *lib. 2. animad. cap. 13.* Andr. Fachin. *lib. 2 controvers. cap 16*, for where there is equal reason there must be the same rights, if only the benefit is conceded not to the person but to the case. *Dig. 9. 2. 32. Dig 13. 5. 31. Dig. 50. 17. 68.* But the same reason can hold good in the case of the vendee as in that of the vendor, because, even the vendee is sometimes forced by necessity to buy a thing for a greater price that it is a worth. And the relief is attached not to the person but to the case viz lesion, for the benefit is given to the vendor not because he is the vendor but because he was damnified, as stated by Hugo Donellus *ad, d l. 2. num. 7.* Hence, in the aforesaid case.

* 19 May 1607.
Rynck Roelefs. plaintiff *v.* Yme Peeters, defendant.

our Court thought that the vendee was entitled to this relief (although defendant) by way of an exception, for this relief can be claimed not only in the plaint but alsoby way of answer and plea, Matth. Wesenb. *consil. 42. num. 103.* for the rule of law says that to him who is given a right of action should all the more be competent the right to take the exception. *Dig. 43. 18. 1. sec. 4.*

XIX.

(Lib. 3, tit. 4, def. 11.)

That a vendee, who is condemned to supplement the just price under *lex 2. c. de rescind. vend.*, is not bound to pay interest except after litis contestation.

When a sale has been rescinded for enormous lesion the vendee has his election either to retain the thing by making good the just price or to return the thing on receiving the price paid by him If he elects the former, the question is whether he is bound to pay the interest on the balance? Augustinus Beroo *in cap cum dilecti. in fin. et cap ad nostram. num. 25. de empt. et vendit* thinks he must, where he says, if the vendee elects to pay the just price, he is also bound to pay the interest on the amount supplemented. But it is the better opinion that he is not so bound unless there was a litis contestation For the Emperor's *Cod, 4. 44 2.* cast no greater burden on the vendee than that of supplementing the just price and they do not direct payment of interest on the balance. Besides the thing sold and its price are *relata*, of which the characteristic is that what is laid down with regard to the one applies equally to the other. But in cases of sales the law is that the vendee can retain the fruits enjoyed before litis contestation, although he has to restore the thing sold (See Definition XII. *circa finem*) Therefore he is not bound to pay interest except after litis contestation for after this date the vendee restores even the profits. And our Court has so ruled on the question of interest†

Receipts on Bills of Costs.

"With respect to the allowance of Advocate's fees on the taxation of costs, their Lordships the Judges of the Supreme Court have been pleased to direct that no such fees be allowed on taxation unless a receipt for the same, signed by the Advocate, is produced before the taxing officer when the bill is taxed, such receipt if necessary to be stamped.

(Sigd) G. GRENIER,
Registrar."

Sept. 1895.

† July 1626.
Syurt Jouis van Gransteyn *v*, Meyne Hendricks.

The Franchise Ordinance.

Opinions of Advocates Seneviratne, H. Jayawardene and De Zoysa.

Mr. Seneviratne is of opinion :

The property qualification of special jurors is an anomaly. It is foreign to the context. It is objectionable to have H. E. the Governor as the ultimate referee in election disputes. The construing of the statute should be left to the judges.

Mr. H. Jayewardene says :

Power should be granted to the Supreme Court or a single judge of the Court to inquire into and decide all objections concerning validity of elections. Such an inquiry will be far more satisfactory and command the confidence of the country more than the practically private inquiry contemplated by the Ordinance. The safeguards ensured by publicity will necessarily be wanting in the inquiry which may or may not take place. I am of opinion that the *locum tenens* should be nominated by the permanent member so as not only to secure a continuity of policy but to keep the political conscience alive to the responsibilities due to the electorate. A government nominee, as an elected member's substitute, cannot in the ordinary course of things be expected to represent the permanent member in regard to his answerableness to his constituents for the futherance of his policy and the fulfilment of his pledges.

Mr. De Zoysa thinks :

The ordinance though satisfactory on the whole has some glaring defects of principle. (1) The power given to H. E. the Governor to adjudicate upon the validity of an election is a usurpation by the Executive of judicial functions which, in the hands of an arbitrary ruler, would be the means to veto on grounds of official caprice the success of a popular member. (2) The Governor's right to nominate an elected member's substitute is an invasion upon the privilege granted to the electorate to be represented by a man directly responsible to it. It is just as without precedent as the power vested in the Governor to interpret the law. (3) Now that government servants are given the privilege of voting it is but fair that the Clerical Examination should be recognised as one of the qualifying tests.

General Council of Advocates.

Special General Meeting.

On the requisition of twenty-six Advocates, a special General Meeting of Advocates will be held in the Colombo Law Library on Friday, October 14, 1910, at 4 p. m., for the consideration of the following rule passed at the meeting of the Council on the 5th of August last, viz.:—

"That it is a rule of the profession that every Advocate "should keep a regular fee book and enter in it every fee "paid together with the name of the Proctor by whom it "was sent."

Mr. R. L. Pereira has given notice that he will move—

(*a*) "That before any rule affecting the whole body of Advocates is passed, such draft rule should be posted up on the Notice Board for at least one month."

(*b*) "That the subscription payable by each Advocate be reduced from Rs. 10 to Rs. 5 per annum."

Mr. E. S. Dassenaike has given notice that he will move—

(1) "That rule No. 2 passed at meeting of General "Council of Advocates on August 5, 1910, be deleted."

(2) "That rule No. 1 passed on same day be deleted."

(3) "That rule No. 3 passed on same day be deleted."

(See *Law Review*, vii. p. 175.)

The Last Word.

The strong terms in which His Lordship Mr. Justice Wood Renton condemned, in 120 D. C. Batticaloa 569 (S. C. M. 30-9-10.), the practice of judicial annotation of an appeal petition might indeed have been stronger:

"I regret to see that the learned District Judge has appended to the motion of the appellant's Proctor filing petition of the appeal the following comment (Record page 99): A most impudent appeal; but I have no option but to accept it: In my opinion that is a most improper observation, into which the learned District Judge should not have allowed himself to be betrayed. It has been frequently pointed out by the Supreme Court, *Talasinghe* v *Gabriel* (1893) 3 C. L. R. 43 that an appellant is entitled in his petition of appeal to the last word, and the only

circumstances under which the right of a judge of first instance to offer comments on a petition of appeal has been recognised are where such a petition contains allegations of fact, that have not been adjudicated on in the Court below, and which the judge regards as incorrect or misleading."

In P. C. Galle 16038 (S. C. M. 7. 95), Lawrie J said: "Let the accused have the last word in the petition of appeal".

As to magistrates' letters to the Supreme Court in refutation of the petition of appeal we would refer our readers to the *Ceylon Law Review*, Vol vi p. 21. &c.

Notes of Cases.

16. **Trade Mark—Distinctive Word.**

A well known descriptive word if used deceptively ceases to be a distinctive trade-mark word.

In re Leopold Cassella and Co (1910) 2 Ch 240, C. A.

17. **Donatio Mortis Causa—Subsequent Legacy.**

Where a donor had made a Donatio Mortis Causa, the mere fact that he subsequently makes a will by which he gives to the donee a legacy of equal amount does not raise the presumption that the legacy was intended as satisfaction of the donation.

Hudson v Spencer (1910) 2 Ch 285

18 **Insurance—Life policy -Notice.**

Where a person lends money on the security of a policy of life assurance which is not handed over to him, he has, if it is in the hands of a prior mortgagee, constructive notice of the prior mortgage, and cannot obtain priority by giving notice to the assurers before the prior mortgagee gives notice. *Spencer* v *Clarke* (1878) Ch D 137 followed.

In re Weniger's Policy (1910) 2Ch 291.

19. **Public Health—Sale of unsound meat—Ignorance.**

Where meat intended for human consumption is exposed for sale and is condemned as unsound, the person in whose premises the meat is found is guilty under the Public Health Act. 1875 even if he is not aware of the unsoundness of the meat.

Hobbs v Winchester Corporation (1910) 2K. B. 471, C. A.

20. **Statement, made in presence of prisoner—Contents when admissible.**

The contents of a statement alleged to have been made in presence of a prisoner cannot be given in evidence unless and until the Judge has satisfied himself from the depositions, that the prisoner by his answer to the statement, whether by words or by conduct acknowledged the truth of the statement.

R. v Norton (1910) Crim. Appeal. Court 2. K. B. 496.

21. **Indian Civil Procedure Code of 1882 Sec. 456—guardian ad litem—Absence of affidavit—Presumption.**

Where a guardian was appointed for minor defendants and the decree was impeached on the ground of absence of affidavit under C. P. C, 456, and the record did not show whether an affidavit was filed or not, it was held, that in the absence of evidence to the contrary the presumption was everything was rightly done.

Monnu Lal v Dastagir (1910) 6 Citator, P. C. 1

22. **Res Judicata—Dissmissal of suit to pay deficient court fee—Decision on merits—Second suit**

A suit decided on the merits was dismissed for failure to pay deficient court fee and a second was brought on the same subject. Held that the second suit was not barred as the decision of the first case on the merits was not necessary the case being dismissable for failure to pay court fees.

Irawa v Saty appa (1910) 6 Citator Bombay Cases 47

23. **Last Will—Caveat.**

The Caveator must have interest in the estate derived from the deceased by inheritance or otherwise and the title of the deceased must be undisputed.

Bikarjee v *Meruanjee* (1910) Citator Bombay Cases 82

24. **Civil Court—Religious rites, ceremonies and doctrines—Custom.**

In suits relating to religious rites ceremonies or doctrines if the principal question is about the right to an office the matter is of a civil nature. A claim to officiate at the cremation ceremony in a particular place for a gratuity is enforcable in a civil court. A custom creating a monopoly is unreasonable.

Monidasi v *Panihati Municipality* (1910) 6 Citator, Bengal Cases 163.

25. **Usufructuary Mortgagee—Compromise—sale.**

The entering of a simple money decree by consent in a suit for possession by usufructuary mortgagee against mortgagor no bar to sale of mortgaged property without separate suit.

Gonesh Singh v Debi Singh (1910) 6 Citator Allahabad 83