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Isaac Tambyah, Advocate.

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The "Times" and the Snails.

The *Times of Ceylon*, in a leading article in its issue of October 12, 1910, finds fault with our observations on His Excellency the Governor's comparison of proctors to snails. We are charged with perversion, credited to be unintentional, of the point of the parable. The *Times* (probably with the aid of a Hultsdorf commentator) explains the allusion as indicating mere numbers. No one can however deny—at any rate no one familiar with the use of the word in literature—that His Excellency the Governor, as reported, left his words open to the construction of something quite uncomplimentary, if not of actual loathing and scorn. In the Book of Leviticus it is written, "These shall be unclean unto you among the *creeping things* that creep upon the earth...the lizard the *snail*, and the mole; these are unclean to you among all that creep." The Psalmist compares his enemies to the snail "which melteth and passeth away." Shakespeare, in the well-known passage describing the seven ages of man speaks of the school-boy as "*creeping* like a snail unwillingly to school." The other references to snails in Shakepeare are not more flattering:" Thou snail, thou slug, thou," and "I had as lief be wooed of a snail". In one of the songs by the same poet occurs this wish," Worm nor snail do no offence". It is thus clear that snails

are referred to rightly as creeping things and the references are not intended to convey any favourable or flattering opinion. What is clearer is that snails are not used to express multitude, like leaves in Vallambrosa, stars of the sky, sand of the sea. If the interpretation of the *Times* be an authoritative statement of what His Excellency meant to say, rather than what he actually said, we hasten to express our regret for our misunderstanding, and to rejoice at the enriching of English phraseology by the addition to it, already full of expressions denoting number and multitude, one from the East—"As snails of Kalutara".

Editorial Notes.

Our attention has been drawn to an anomaly in the local Statute Book. The Partnership Act, 28 and 29 Victoria Chap. 86 passed in 1865, is the original of our Ordinance No. 21, 1866. The English Act has been repealed by the Act of 1890, while our ordinance remains untouched. In this connection a question may be raised, in respect of another side of partnership law, viz whether the Limited Partnership Act of 1907 which requires registration is applicable in Ceylon. That Act provides for a registrar under the Companies' Act to register limited partnerships. Can a limited partnership be effected in Ceylon under our Joint Stock Companies Ordinance of 1861?

Two men were appointed in 1895 to value an intestate estate on representation that the administratrix had undervalued it. The valuation by the assessors showed Rs. 20,000 over the valuation by the administratrix. The assessors claimed their fees Rs. 977. In 1906 the then District Judge of Badulla referred the claim to the Attorney-General who by letter informed the judge that Rs. 157 would be reasonable. In 1908 the then District judge made order that the assessors might claim their original full amount. After an appeal in 1909 (see Tamb. Rep. vii. 106) the assessors renewed their application in due form and in July 1910 a third District Judge made order "in terms of the authority of the Attorney-General's letter." In

appeal against the order the Supreme Court disregarded the letter which was found filed of record though no evidence had been given by any one in respect of it.

The Madras High Court, Benson and Krisynasamy Ayer J. J., in *Narayana* v. *Logalinga* (1909) I. L. R. 33 Madras 312, has held that a sale in favour of a minor is void, on the authority of the Privy Council ruling in *Bibee* v *Ghose* (1903) I. L. R. 30 Cal. 539. Benson J. says "A sale is a transfer of ownership in exchange for a price . . . and it is, in my opinion, impossible to conceive of a price being settled except as the result of an agreement between the parties. In other words a sale necessarily involves the idea of a contract as its foundation and the Privy Council has held that a contract by a minor is not merely voidable at the option of a minor but is void".

A debtor, to defraud his creditor, executed a deed of sale of all his lands in favour of a third party, on the understanding that in the event of the property being seized at the instance of the creditor the nominal vendee was to claim it. Though, before the notary, money passed from the buyer to the seller, the debtor's object in executing the deed was to put the property out of the creditor's reach. There was no delivery of the deed. The third party vendee sued the vendor in ejectment and the latter pleaded the circumstances of the transaction in defence. The District Judge rejected the defence on the ground that the defendant could not set up his own fraud. In appeal, 183 D. C. Galle 9985 (S. C. M. 4. 10. 10) the Supreme Court followed 13 N. L. R. 187 and upheld the defence on the main ground that the plaintiff, a party to a fraud, could not be allowed to seek the assistance of the court to have his fraud upheld.

There has been an extension of the principle of liability for costs in 167 D. C. Kalutara 3880 (S C. M. 6. 10. 10.) Three of the admitted co-owners of the property sought to be partitioned conceded the correctness of the averments in the plaint, but they gave evidence in favour of the thirteenth defendant in his contest with the plaintiff as to his share. For this they were cast in costs. We are not sure that the order is altogether in keeping with the principles governing the award of costs.

An interesting lecture was delivered on October 5, 1910. mainly for the benefit of law-students, by Sir Allan Perry M. D. The subject was State Medicine. The length of time covered by the lecture did not in any way detract from its merit of being extremely informative. The lecturer dealt with hygiene as based on certain well-recognised principles of almost universal application. The history of the principles was traced in a very attractive manner from the times of Moses down to the present day. In this part of the lecture Sir Allan Perry just touched the out-skirts of a vast subject, for the sanitary laws of the Jews might well deserve treatment in a lecture by itself. The reference to Eugenics, a branch of knowledge comparatively unheard of in Ceylon except by readers of the London *Times*, suggested immense legislative possibilities for the future. We greatly regret that we are not permitted to publish the full-text of Sir Allan Perry's most edifying discourse.

The questions raised by Mr. Wille's searching study of majority among Mahomedans, in this number, will, we feel sure, greatly interest the learned.

Sanjiva Row's Criminal Procedure Code.

This is a book of over 1,000 pages on the Indian Code of Criminal Procedure of 1898, the basis of our present Code. The arrangement of the notes is on the same lines as the learned author's works on Civil Procedure and Evidence. Under each section there is grouped the case law on the subject. Each section and sub-section receives the amplest treatment of elucidation. That section of the code most often resorted to as curing all sorts and conditions of legal infirmities, Sec. 425 in the Ceylon Code, corresponding to Sec. 537 in the Indian, has devoted to it thirty-two closely printed pages of case annotation. We should like local attention to be drawn to the judicial interpretation of the scope of the section in India. There is quite a large body of authorities noted in this book to the effect that the errors which can be cured by this section are formal defects of procedure and not substantive defects, the section is intended to remedy not absolute illegalities but purely formal defects which

may have arisen through judicial inadvertence or neglect. The numerous examples from case law as to what are and what are not vitiating irregularities under this section present its interpretation in a very clear light. A portion of the section not usually taken notice of is in the words, "Unless such error.....has *in fact* occasioned a failure of justice." There is a case cited at page 1339 to show that the words "in fact" were introduced into the Code to emphasise the duty of the court to go into the merits.

The clear, attractive and illuminative style of annotation is unflaggingly sustained from the first page of the book to its last. The work, like all else bearing the learned author's name, is exceedingly well done. To the Ceylon practitioner we cannot recommend a more useful time-saving and withal thoroughly reliable case annotated book on the Criminal Procedure Code than the one under notice.

A melancholy interest attaches to the book. It is the last of Mr. Sanjiva Row's productions. Soon after completing it Mr. Sanjiva Row died at Guntour last month at the early age of forty, his brief life crowded with achievements which made its very regrettable shortness far more helpful to his fellowmen than many a long term of years barren of good deeds.

Marriage and Majority of Mahomedan Women.

BY G. A. WILLE, PROCTOR, S. C. COLOMBO.

In view of the fact that most Mahomedan women receive dowries, that such property is intended to be at their absolute disposal chiefly no doubt for their own benefit but also with power to them, if they are so minded, to use it for family necessities or to aid their husbands, who are for the most part traders in business, and that Mahomedan women generally marry before the age of 21 years, it is a question of practical value to them and their husbands whether marriage confers majority on a Mahomedan woman so as to enable her to deal with her property.

In view of the decision in *Muthiah Chetty* v *Dingiri et al* reported in on 10 N. L. R. p. 371, in which it is held that marriage does not confer majority on a Kandyan woman who is a minor by age, it appears to be considered that the answer to the question as regards Mahomedan

women must also be in the negative. This assumes that the same line of reasoning applies to both cases, and so applied the argument in the case of Mahomedan women would be as follows: The Mahomedan law fixes the age of majority and does not recognise majority by operation of law. Ordinance No 7 of 1865 supersedes that law by making 21 years the age of majority for all persons, saving the attainment of majority by operation of law. Therefore the age enacted by the Ordinance is the only qualification for majority in the case of Mahomedans.

While, however, the Kandyan law is applicable to Kandyans in its entirety it is a question how much of the general Mahomedan law is applicable to the Mahomedans of Ceylon. Does that part of it which fixes the age of majority—it in fact seems to recognise two periods of majority—apply to them? If the answer be no, then, according to the reasoning in the case cited above, as the code of Mahomedan law applicable to them, *i. e.* that of 1806, is silent on the subject of majority, the common law of the land will apply and marriage will confer majority on them —unless (a point to be discussed later) a Mahomedan marriage be considered to be so far different from the marital relation contemplated by the Roman-Dutch law that this incident of the married state should not be regarded as following from it.

Now the Mahomedan law appears to stand, as regards the extent of its applicability to Mahomedans in Ceylon, on a different footing from the Kandyan law which has been conserved to the Kandyans by the Convention of March 2nd 1815. The laws and institutions that subsisted under the ancient Government of the United Provinces and which under the Proclamation of 23 September 1799 and the Charter of 1801 were to continue to be administered in Ceylon, would appear to be embodied, so far as concerns the Mahomedans in Ceylon, in the Code of 1806 and in such customs and usages as can be completely proved.

As stated by Judge Berwick in D. C. Colombo 59, 578 reported in Grenier 1873-74 p 28, in which the issue was whether the Roman-Dutch law of fidei commissum was applicable to Mahomedans, and in which the Supreme Court upheld the view taken by the District Judge: "It is not to be supposed that the whole immense body of Mahomedan jurisprudence is law here or that the dealings of Mahomedans in Ceylon are solely or even principally regulated by it. Only such parts of that system are law here as have been specially introduced into the island either by express legislation or by ancient continuous and inveterate custom or usage.. ...It must give place to the ordinary law of the country which in the last resort is

the Roman-Dutch law whenever there is no inveterate and established practice to the contrary". And in *Ibhrahim Saibo* v *Mahomed* (3 N. L. R. 16) Bonser C. J. said dealing with the question of a Mahomedan widow selling her husband's property in order to pay the debts of the estate: "The code of Mahomedan law to which I have referred is silent as to the power of a widow to administer the deceased husband's estate, and that being so I think that we must resort to the law of the land. It was laid so long ago as the time of Chief Justice Sir Edward Creasy that a surviving spouse can alienate the property of the estate to pay debts". Sir Edward Creasy's decision of course related to a spouse to whom the common law applied, and after citing the cases in which the decision was followed although none of them related to Mahomedan women, Bonser C. J. gave judgment in favour of the Mahomedan widow's action.

It is true the cases regarding questions of inheritance enumerated in the Code of 1806 have been interpreted by the aid of, and supplemented from, the general Mahomedan law, but then inheritance is one of the matters expressly dealt with by the code, and it may well be, as Phear C. J. remarked in *Sarifa Umma et al* v *Mahomed* (1 S. C. C. 88) that the enactment does not in any way interfere with the operation of the general provisions of the Mahomedan law with regard to inheritance. It cannot be ignored also that at times the general Mahomedan law has been invoked in respect of other questions as if the Code of 1806 and established usage did not exhaust the law peculiarly applicable to the Mahomedans in Ceylon, and it was even laid down on this very question of majority in a case reported in Ramanathen 1843-55 p 133 (the decision purporting to be based on the Hedaya Vol 3 p 482 which does not quite appear to support it and Macnaghtan's M. L. Ch 8 p 62) that according to Mahomedan law majority is attained at the completion of the sixteenth year, although the Roman Dutch law was, in the very next breath, invoked to establish the tacit or indirect emancipation of the plaintiff from the parental power. In another case reported on page 63 of Vanderstraten's Reports, it was assumed that sixteen was the age of majority for Mahomedans. And here it may be remarked that according to the authority of Ameer Ali the Islamic system recognises two distinct periods of majority *i. e.* puberty, having reference to emancipation from the patria potestas, and the age of discretion having reference to the assumption by minors of the management and direction of their property, and that among the Hanafis and the Shiahs puberty is presumed on the completion of the fifteenth year, and that both sects generally speaking

consider discretion and puberty to go together, with the result that the personal emancipation of minors which occurs on their attaining puberty carries with it the emancipation of their goods from the hands of their guardians and they then become entitled to take over the charge of their own property, and Ameer Ali adds that it is only subject to this principle of two distinct and concurrent periods of majority that the Indian Majority Act (No. 9 of 1875) operates to make the 18th year the age of majority.

As regards usage, although the Code of 1806 (extended in its operation by Ord No 5 of 1852) purports to embody the usages, as well as the laws strictly so called observed by Mahomedans in Ceylon, well-established usage has of course a place in the law applicable to them. In D. C. Colombo 29129 (Vanderstraten's Reports Appendix B) Lawson D. J. said "The court therefore is of opinion that it went far enough in its former decision in rejecting the authority of any treatise on Mahomedan law as binding and conclusive in any action between Mahomedans in this country, without evidence of some special custom existing here to prove the applicability of the law as cited, and that it is bound to administer the law according to such special custom when satisfactorily proved." The Supreme Court ultimately upheld the finding of the District Judge but not before sending the case back for complete and satisfactory evidence of the custom, existence of which was in issue in the case. Now so far from 16 or any other age recognised by the Mahomedan law having been according to custom the age of majority among the Mahomedans of Ceylon is it not the case that the idea has always prevailed among them that marriage confers majority and that their dealings have been conducted under that understanding? Should they not have the benefit of the usage? And does not the ruling of our courts that under the Roman-Dutch law marriage confers majority on a woman who is under 21 years of age, rest rather on local usage than on a strict interpretation of that law? The question therefore is whether the occasional references made by our courts to the general Mahomedan law have much weight or whether we should not rather adopt the proposition suggested by the dicta quoted above that as the Code of 1806 is silent on the subject of majority, and usage if any is on the side of the common law, that law applied to the Mahomedans of Ceylon on the question of majority prior to Ordinance No. 7 of 1865 and applies to them subject to that ordinance.

The question that remains for consideration is whether there is anything in the nature of the Mahomedan marriage which would justify the exclusion of such an incident

as majority in the case of Mahomedan spouses. Doubt on the point is justified by the dictum of Bonser C. J. in *Tillekeratne* v *Samsedeen et al* (4 N. L. R. 65) that "we should be wrong if we held that all the incidents of marriage which are monogamous necessarily attended polygamous marriages." Assuming that polygamy is not, as it really is, an extremely rare phenomenon of Mahomedan social life in Ceylon, Chief Justice Bonser's statement is of course different from saying that no incident of a monogamous marriage should be held to attend a polygamous marriage, and as we have already seen, the Roman Dutch law was applied in the case of Mahomedans to the questions of fidei commissum and a widow's right to alienate her husband's property. Is then the incident of majority one which should not be held to attend a Mahomedan marriage? Now it may be reasonable to say that as regards, for instance, control over the property of the wife it is fair that a Mahomedan husband should not have the same privileges as the husband of a monogamous marriage. But the idea underlying the principle that marriage confers majority is no doubt that marriage implies the attainment of years of discretion and also brings with it responsibilities which require for their due discharge the privileges and powers of majority, and in this view it is difficult to see why the incident of majority should be regarded as one that should not attach to a Mahomedan marriage. As we have seen above, the general Mahomedan law presupposes maturity of understanding in the case of Mahomedans at an earlier age than that recognised in the Roman-Dutch law as the age of majority, and it would appear to be in keeping with the spirit of Mahomedan law, as explained by Hamilton in his preliminary discourse to the Hedaya, that a Mahomedan wife should have certain special privileges by way of compensation for the general hardness of her lot. It is also worthy of note that the age limit enacted by the Marriage Registration Ordinance (No. 19 of 1907) for females, except the children of European and Burgher parents, is twelve years and there is the safe-guard of Sec. 363 of the Penal Code, as well as the age of puberty, against the possibility of Mahomedan females marrying at an earlier age. As a matter of fact they do not marry until some years later, and if a marriage were contracted at an earlier age than our twelve Courts of law would no doubt not hesitate to declare it invalid so far as regards contracts or dealings with property entered into by the minor before reaching that age. There would be not even usage to support such a marriage.

It need hardly be added that a good deal of what has been stated above applies to Mahomedan males as well as

females, and if marriage does not confer majority on the latter it will not do so in the case of females either. And yet the case of females is stronger, seeing that arguments drawn from a Mahomedan wife's position which may be urged against marriage confering majority in her case, will not apply to her husband. Such arguments however really touch the policy of the matter, with which strictly we need have no concern. The question is whether according to the law applicable to Mahomedans in Ceylon marriage confers majority.

Notes of Cases.

Criminal Procedure Code—Judicial Proceedings.

The definition of judicial proceeding in the Criminal Procedure Code is not exhaustive. It includes civil execution proceedings.

Bahadur v *Malick* (1910) I. L. R. 37 C al 642 F. B.

27. **Husband and wife—Separation deed—Custody of child —Spoliation.**

By separation deed husband was to have custody of child but wife was to see the child at certain seasons. The boy visited the mother and after the end of the visit was detained by the mother. Held mother guilty of a sort of spoliation.

Clara butt v *Clara butt* (1910) 27 S. A. L. J. 437

28. **Defamation—Corporation—Right to sue.**

A corporate body which does not carry on business cannot sue as a corporation for defamation, and if the members wish to sue as individuals they cannot join in one action.

Bhika v *Prema* (1910) 27 S. A. L. J. 467

29. **Caste—Property rights not involved—Civil court jurisdiction.**

In cases of caste dispute where right to property is not involved a civil court has no jurisdiction.

Narsey v *Kooverji* (1909) 34 Bomb 467

30. **Solicitor's costs—Lien assets in receiver's hands—Charging order—Money in a previous partnership suit.**

A solicitor has a lien for costs over assets of partnership in receiver's hands.

A decree holder against a partnership firm may not issue execution against assets in receiver's hands in a previous suit but must ask for a charging order. Ridd *v* Thorn (1902) 2 Ch 344, Kewnie *v* Atrill (1886) 34 C H. D. 345 followed.

Ismail & Co. v. *Rabibai* (1909) 34 Bomb 484

31. **Land acquisition—Compensation—Test of valuation.**

Income of property is only an element for valuation demand and original cost may be considered (1909) 34 Bomb 486

32. **Child—Custody—Minor's contract—Delegation of guardianship—Child's intelligent preference.**

Courts in ordering custody of children must take into account physical, moral and religious welfare, and a court may remove child from parent's custody if cruelty or corruption is apprehended. A child's preference is to be considered. A parent cannot delegate guardianship by any contract and such contract is revocable A minor's contract of apprenticeship is voidable.

Pollard v *Rouse* (1910) 33 Madras 288

33. **Minor—Sale to.**

A sale in favour of a minor is void. Bibee *v* Ghose (1903) 30 Cal 539 followed.

Narayana v *Logalinga* (1909) 33 Madras 312.

34. **Civil procedure code of 1882 Sec. 43—Ceylon code Sec 34 Omission of part of cause of action—Joint promissor.**

Omission in a previous suit against one joint promissor of part of cause of action no bar to a suit against another promissor for portion omitted. King v Hoare followed (1844) 13 M. & W. 494 considered.

Raman julu v. *Aravanmudu* (1909) 33 Madras 317

35. **Water right—Servitude of abutment.**

A servitude of abutment may be claimed against an upper proprietor by a riparian proprietor who has right to use stream water.

Strath Somer's estate company v. *Du Preez* (1910) 27 S. A. L. J. 439