The Ceylon Law Review.

A Weekly Journal of Legal Information.

Edited by

Isaac Tambyah, Advocate.

Vol. VII.] Oct. 31, 1910. [No. 27.

Editorial Notes.

We have often attempted to secure strict compliance with journalistic proprieties, in one important respect. If anything appears in this Review calling for comment such comment should be addressed in the first instance to the editor. It should not be addressed to third parties,—a course unmeaning and unfair, and even unmanly.

Sworn translators of courts are not always well chosen. There are men absolutely incompetent. They little realise how heavy their responsibility is. "A misplaced bracket in the translation of P5. is responsible for much expensive litigation," said Middleton J.,—on September 24, 1910, upon the third appeal in a temple case. The Supreme Court has almost invariably allowed rectification of suspected or doubtful renderings. The translation filed of record and acted upon by the parties in 217 C. R. Pan. 9614, September 26, 1910, was superseded by a new translation. In other cases too this has been allowed. A regrettable exception was a D. C. Col. case in which the appellant's rights depended upon the construction of a deed and he was silenced by the product of the sworn blunderer of the court below.

The parties in D. C. Col. 29325, inquired into on Oct. 29, 1910, had entered into an agreement modifying the decree, and the plaintiff had accepted a sum of money

and *a third party's prommissory note* in full satisfaction of his claim. The third party subsequently allowed the note to be dishonoured. Thereupon on writ issued in breach of the agreement the debtor moved for payment to be certified in terms of the receipt. The third party's note undoubtedly released the judgment debtor completely : 2 C. L. R. 143. Pothier i. 393, 5, N. L. R. 150, Burge iii. 788, Voet 46, 2. 13, Maasdorp iv. 173. In proceedings under Civil P. Code 349 by the debtor can the creditor ask the District Court to set aside the contract of release on the ground of fraud? Is not the proper court the Supreme Court ?

The full court judgment of October 18, 1910, in *Raman Chetty* v. *Vinayagu Kangany* has restored to kanganies the safeguards of Ord. 9 of 1909 temporarily suspended by the judgment of June 2, 1910. A kangany arrested under the old judgment declared insolvency while in jail. He moved the District Court of Colombo (October 28, 1910) for release on the strength of the Full Bench ruling. The detaining creditor pleaded the Insolvency Ordinance and somewhat faintly urged the fact that the debtor was a *trader* as well as kangany. Might the *trader* not be arrested, leaving the kangany alone ? The judge thought not, and he released the kangany-trader on the main ground that he had been wrongly cast into prison.

We are glad to hear that there is going to be a *Matrimonial Rights Ordinance* for the Tamils, also a *Hindu Temporalities Ordinance*. The draft bills will appear before December. It is possible that both measures, the latter more than the former, will meet with opposition in the North. The effect of a *Hindu Temporalities* ordinance will be to make temple managers who at present find their business very lucrative conform to rules calculated to render them more accountable to the public than heretofore.

The Attorney-General, we learn, has declined to accept the Bar Council resignation. The proper course will no doubt be adopted by summoning a general meeting of Advocates to make arrangements for a Council. It will be a Council not more alive to its sense of dignity corporate and individual than to its supreme consciousness of duty and loyalty to the Bar.

Balasingham's Digest
1908—1910.

All digests are useful, and Mr. Balasingham's Digest of Ceylon case-law is absolutely indispensable. We know that in some outstations the Digest has even superseded the original reports. The present volume is faultlessly compiled. It covers

New Law Reports Vols. 1 & 2.
Current Law Reports Vol. 1.
Balasingham's Reports Vol. 4.
Appeal Court Reports Vols. 3 & 4.
Tambyah's Reports Vol. 6.
Leader Law Reports Vol. 1 & 3.
Leembruggen's Reports Vol. (1905). [1 & 2.
Supreme Court decisions (Weerakoon's Reports) Vols.

The digest spreads over 194 pages of double-columned matter exceedingly well arranged. An advertisement elsewhere gives particulars as to sale of copies.

Decisiones Frisicæ.

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

XX.

(lib. 3. tit. 4. def. 15.)

The relief of *l. 2. C. de rescind. vend.* does not apply to the sale of an inheritance.

The relief of *d. l. 2.* cannot apply to the sale of an inheritance on account of the uncertainty of the heir's claim or of the value of the estate as regards the debts which might daily come to light after a long time, and it can be an inheritance although there is nothing in it, yea, the sale of an inheritance is valid although it is *damnosa*, for the vendor shares both the profit and the loss *Dig. 18. 4. 2 Sec. 9.* Hence it is often stated that the nature of an inheritance does not admit of a price. And therefore, as to constitute the sale of an inheritance its extent is not necessary, so also it is not necessary to consider what the price is, as it is in vain to compare the amount of the price with the extent of the inheritance. Jacobus Cujacius *Consult. 48.* Johannes Baquet *part. 2 du droict d'Aubiene cap. 22.* Monacius *ad l. qui nondum certus 4, c. de hered, vendit.* And the Court has so held.*

XXI.

(lib. 3, tit. 4. def. 16.)

If the value of a thing sold was clearly, at the date of

* 15th July 1626. Syurt Joris van Grausteyn, plaintiff *v.* Meyne Hendricksz, defendant.

sale, uncertain, and thereafter it turns out that there was enormous lesion, *l. 2* will nevertheless not apply.

Titus had sold to Gaius and Sempronius for 1000 guilders a piece of land out of a certain acreage to be mined by him within ten years, and reserved to him what was not dug within that time. It so happened that the vendors, within the space of five years, dug so much turf, which, after deducting expenses brought them in three times what they had paid for the land Hence Titus, thinking that he had suffered enormous lesion, sought the relief under *l. 2 Cod. de rescind. vendit.l* The question is:—Was his claim well founded? The Court was divided in opinion. Some said that enormous lesion was amply proved and that therefore the claim of the plaintiff under *l. 2.* should be allowed. Others thought that the evidence of the plaintiff was quite irrelevant, as he undertook to prove, not the value of the land at the time of the sale, which would have helped to ascertain whether he could be said to have suffered loss, but the amount of profit which the vendees had enjoyed from the land after the sale. For, generally, in questions of lesion, regard should be had to the time of the sale and evidence should not be directed to what happens afterwards. *Cod. 4. 44. 8.* for the Emperors direct that the sale should be rescinded when there is less given than half the just price at the time of the sale, as stated by Arius Pinellus *ad l. 2. C. de rescind. vendit. part, 1. cap. num. 18 in fine.*

Besides, the profits to be derived were clearly uncertain at the time of the sale, for it could not be ascertained how deep the peat land was and how much peat could be dug out from it yearly. And further, these profits were subject to various conditions, the uncertainty of the weather, for in a wet summer there cannot be dug so much as in a dry summer, and the possibility of the digging being interfered with by the enemy. These and similar circumstances rendered the profits uncertain and they could not be correctly ascertained at the date of the sale. Hence it is laid down that as regards greater profits, in consequence of the uncertain results by way of profits, contracts cannot be rescinded. *Cod. 4. 33 17.* And this is the reason why many say that *l. 2.* does not apply in a sale of profits, as not only the mode of their enjoyment but also their value is uncertain. *Cod. 4. 32. 17, 23.* Brodeaun *in addit. ad* Georg. Loupt *in let. L. num. XI. ubi plures citat.* Gerard Maynard *lib. 2. decis. 61.*, nor in the sale of a usufruct, on the ground of uncertainty Mornacius *ad d. l. 2.*

Following this opinion the court thought fit that before final decision there should be ascertained the value of the land at the time of the contract and order was therefore made for opening points of office (*po poncten van officie.*) † It must be stated here as an *addendum* that the value of a thing, according to Bartolus *ad. C. d. 4. 44. 2* should be proved, not by witnesses but by honest and experienced appraisers, because, as he says, the value of a thing cannot be judged by the eye but must be ascertained by one's judgment. This view is approved by Mornacius who says that it is adopted by the French *ad. d. l. rem. majoris ubi addit.* He says also that a certain Magotius, a patron of the Fisc, used to say that the processes by which valuations are arrived at are diabolical and it is not always easy, yea oftentimes impossible, to extricate ourselves from the difficulties of appraisement caused by witnesses.

† 20th December, 1624. N. N., plaintiff *v.* N. N., defendant.

Judicial Commissions to Foreign Courts.

Circular Despatch From The Secretary of State for Foreign Affairs.

The "Times of Ceylon" October 25, 1910, states :—

The following copy of a circular despatch on the subject of "Commissions Rogatoire" and Letters of Request—commissions for the examination of witnesses—addressed by the Secretary of State for Foreign Affairs in July last year to His Majesty's representatives abroad has been received from Lord Crewe by the local Government and sent out to the various judicial departments:—

Under the provisions of a rule recently made by the Supreme Court of judicature, Letters of Request for evidence in civil and commercial cases pending before foreign tribunals can now be transmitted through this department to the proper judicial authority for execution without a direct application to the courts being required from the agents in this country of the parties concerned.

Prior to the making of this rule His Majesty's Government were not in a position to take any action with regard to such Letters of Request. I request that you will communicate this information to the Government to which you are accredited, and that you will at the same time explain that the court of any foreign country which desires evidence to be taken in the United Kingdon in any civil or commercial proceeding pending before it, and for that purpose forwards through the diplomatic channel a " Commission Rogatoire" or letter of Request, for such evidence should be requested to send with such commission or letter of request, a list of questions to be put to the witnesses respectively, together with a translation thereof into English. In giving effect to such "Commission Rogatoire" Letter of Request, in the United Kingdom, the Commissioner and the official person having charge of the execution of the request, will be empowered by the British Court to which it is addressed to ask the witness such further questions as may appear to either of them desirable for the purpose of giving full effect to the wishes of the foreign court.

In the circular letter enclosing the despatch Lord Crewe explains the despatch. The last paragraph of the explanation runs thus : "You will note that this arrangement is confined to civil and commercial cases, and does not extend to criminal cases."

Concerning Forcible Speech.

Lawyers have been sometimes found fault with especially by sympathetic laymen, for the use of forcible language. To illustrate that the same form of speech is praiseworthy or blameworthy according as the speaker is viewed with favour or disfavour by the critic we give below a leading local newspaper's doctrine of free speech with its own illustrative commentary.

The Times of Ceylon
Oct. 20, 1910

It is nowadays considered a mark of independence and of citizenship to insult and assail those in power.

[To above effect *re* Bar meeting speeches, &c.]

The Times of Ceylon
Oct. 25, 1910

Dimbulla Planters' Association. The Franchise Bill *discussed and vigorously criticised* by the chairman.

The Chairman said : ..... Friends in England have been snubbed, and in Ceylon our representatives on the Commission which sat to discuss matters were summarily dismissed, and dismissed in a manner which *I greatly doubt My Lord of Crewe venturing to adopt towards his coachman.* The Hon. the Low-Country Member, in opposing the second reading of this Bill, said that Ceylon was not yet ripe for the elective principle. The men on the spot must always be better able to judge of local conditions than one who is not personally conversant with them and certainly much better than one who is evidently *no statesman, but a mere politician.* The manner in which the Secretary of State for the Colonies has treated His Excellency seems to me most unfair. It is probable, however, that our Ruler is not Lord Crewe but whoever for the time being, is able to

frighten his Lordship. I, personally, think that we should make greater use of friends in Parliament in the early stages, and when questions like this are yet in the bud, *Parliamentary influence should be brought to bear upon our timid tyrant; for a tyrant he has proved to us, and timid he must be if he is frightened by the Radicals in the House of Commons.*

THE COMEDY PLAYED IN THE COUNCIL CHAMBER last month would have been amusing had it not been almost disgraceful. I maintain that it is most disrespectful to appoint persons to represent Communities' opinions and then publicly and almost contemptuously to ignore them.

As to the Bill, it is difficult to discover why the natural aspirations of the Ceylonese could not have been satisfied, without all this upset, and why we Europeans are deprived of one member Lord Crewe alone knows; personally I do not think it will make much difference. We shall be forunate, indeed, if, in the future as in the present and in the past, we are able to induce the right men to represent us. They gain very little that I can see, and the only reward for all they have to put up with is our cordial appreciation of their services. Of course we ought to have our third member, but as *the Legislative Council appears only to be a sort of elaborate*

registry office it is quite unimportant. In regard to voters' qualifications, I should like to see all jurors who have been in the Island for one year qualified to vote. To disfranchise a man for nearly six years, as would happen if a newcomer arrived just after an election, might possibly be felt to be a hardship. A man who is thought fit to judge on a matter of life and death is surely fit to vote for *this Comic Opera Council, which, after all, must be about the oddest on earth.*

Logic does not appeal to the Britisher, but this is—well, what is it? Composed partly of Government officials who must vote on order and partly of nominated members and partly of elected representatives, *the only thing wanting is the hereditary element to complete a medley mustered to stage a fatuous farce.* As far as we rural folk are concerned, we cannot do better than adopt the suggestion that has been made and at once register ourselves as voters through the District Associations, and at the next annual general meeting of the P. A. let us choose our member precisely as we have always done, and when the time comes let us all vote for him. (Applause).

We quite agree with the *Times* in its appreciation of the Dimbulla speech. It was an outspoken, vigorous and manly deliverance worthy of the praise bestowed upon it. But, what we fail to see is that similar criticism of those in authority by non-planting critics should be "perversion," "misrepresentation," citizenship falsely so called and bogus independence.

Contracts with Matrimonial Agents.*

Can an agreement with a matrimonial agent for the payment of a reward upon the completion of a marriage brought about by his agency be enforced by an action at law?

ANSWERED AFFIRMATIVELY :—Bynkershoek *Quaestiones Juris Privati*, 2, 6.

ANSWERED NEGATIVELY:—*King* v. *Gray* (24 S.C. 544)

The Supreme Court of Holland decided in the year 1723, according to Bynkershoek, that an agreement for the payment of a reward upon the completion of a marriage was enforceable by an action at law. And that eminent jurist entirely indorses this decision. The tendency in modern times, however, seems to be to look upon agreements of this nature as being against public policy, and the decision of the Supreme Court of the Cape Colony in *King* v. *Gray* was given in conformity with this tendency. The arguments in favour of the two opposing views are fully set forth in the places above cited.

Appeal Court Notes.

117. **C. P. C. 248—Fine—Construction of Deed.**

1 When a person sued under C. P. C. 247 on the strength of a deed, the construction of which was not quite clear, *Held* her claim was not frivolous.

2. Before a fine can be imposed under C. P. C. 248 it must be found and declared in the judgment that the claim was altogether groundless and wilfully preferred to delay execution.

217 C. R. Panadure, 9514. Sept. 26, 1910.

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118. **Divided share—Prescription—Plaintiff admitted to unfined share—separate suit not barred.**

Plaintiff claimed by prescription a divided half of a land. Defendant denied, but at trial admitted that plaintiff's predecessor was entitled to an undivided share, and plaintiff admitted that defendant's vendor was co-owner. D. J. holding prescription not proved dismissed action, refusing to declare plaintiff entitled to admitted

* 27 S. A. L. J. 380.

undivided half. Dismissal affirmed. "If they are so advised (plaintiffs) and prove their title to an undivided half they will not be debarred from that by the decree in their action.

172 D. C. Kalutara, 4069. Sept. 27, 1910.

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119. **Due diligence—Duty—Excuse.**

1. The execution creditor must prove due diligence, on a second application for writ.

2. Presumption of want of due diligence, by omission to examine debtor under C. P. C. 219, held rebutted by the fact that the plaintiff had been engaged in lengthy litigation in order to establish defendant's title to property mortgaged by defendant, and which the creditor wished to seize under the writ.

121 D. C. Chilaw 3418, Sept. 28, 1910.

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120. **Due diligence—Long time.**

Judgment was in Oct. 1903. Feb. 15, 1904, decree assigned. April 26, 1910, substitution of assignee. April 27, 1910, application for re-issue of writ. As there was no explanation of the long period of time since the date of assignment without any step being taken to obtain, still less of the delay of the original applicant in obtaining execution under writ, order for writ set aside.

233 C. R. Batticaloa, 8874. Sep. 21, 1910.

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121. **Postponement—Discretion.**

"We are generally unwilling to interfere with the discretion of the court which refuses a postponement to enable a party to call a witness, whom, for anything that appears, he might have had ready." S. B. as indulgence.

Hutchinson, C. J., 115 D. C. Kalt. 131. 22. 9. 1910.

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122. **Partition—Paper title—Prescription—Wrongful dismissal.**

D. J., ordered, "Plaintiff [meaning 3rd plaintiff] discloses no title. He has no deed before 1908, and his title must be proved by prescription. This he fails to do, and I dismiss his case with costs." The 3rd plaintiff claims by deed of 1908, and other plaintiffs claim by inheritance from admitted owner's children. It does not follow that because they have no deed, therefore they must prove title by by prescription possession.

437 D. C. Neg. 7480 Sept. 21, 1910