The Ceylon Law Review.

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Edited by
Isaac Tambyah, Advocate,

WITH THE ASSISTANCE OF
V. Grenier and W. Sansoni, Advocates.

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Hulftsdorp in Mourning.

The Chief Justice desires that members of the Bar should during the period prescribed for mourning on the occasion of the death of His Late Majesty King Edward the Seventh, wear mourning when appearing in Court.

The mourning for King's Counsel and officers of the Crown consists of white cuffs of lawn or muslin with mourning bands, i. e., ordinary bands with a white seam down the middle.

For the Junior Bar mourning bands only.

By order

(Signed) W. H. Nelson,

May 11, 1910. *Registrar.*

Exclusive Criminal Jurisdiction of Village Tribunals.

By Ord. No. 24 of 1889, sections 28 and 34, Village Tribunals have exclusive jurisdiction over

1. Petty assaults, that is to say, assaults which may adequately be punished by no higher punishment than a fine of Rs. 20 or rigorous imprisonment for two weeks.

2. Petty thefts, that is to say, thefts where the property stolen does not exceed in value Rs. 20, or where the theft is not preceded or accompanied by violence to the person, and which may adequately be punished by no higher punishment than a fine of Rs. 20 or rigorous imprisonment for two weeks.

3. Malicious injury to property or boundaries, where the damage does not exceed Rs. 20.

4. Cattle trespass under Ord. No. 9 of 1876.

The jurisdiction of these tribunals has been extended by Ord. No. 3 of 1908 to reach certain offences under the Roads Ord. No. 10 of 1861. By virtue of rules framed under Ord. No. 24 of 1889 Village Tribunals have jurisdiction over the offences of "gambling, cock-fighting &c."

The tendency of police magistrates to divest themselves of jurisdiction in favour of village tribunals in respect of offences above the powers of such tribunals is illustrative of ingenious evasiveness, though sometimes of persistent perversity. As an instance of the latter may be mentioned P. C. Negombo 13419 (May 11. 1910) where, though the offence of criminal trespass was disclosed on the facts, the magistrate referred the complainant to the village tribunal, disregarding, and even criticising, an illuminative Supreme Court ruling to the contrary, P. C. Negombo 13160, March 8, 1910. A magistrate is not competent to evade jurisdiction (Koch's Reports, 18). In *Samaranaike* v. *Eloris*, 6. N. L. R. 369 it has been held that a person, entering the house of another and rushing at him in a defiant manner and causing damage to property to the extent of Rs. 20, is *prima facie* liable for criminal trespass, and that a police court may not evade jurisdiction in such a case. Where ordinarily a village tribunal has sole jurisdiction over a matter but the Government Agent, acting under the ordinance, relieves it of such jurisdiction, the proper police court may not decline to hear the case, (P. C. Anuradhapura 29331. 19. 2 08), just as a magis-

trate may not cancel an order of reference to a village tribunal (P. C. Balap. 15429. 3. 8. 96). Though property, for example timber, worth Rs. 12 be the subject of theft, yet where the circumstances shewed criminal trespass a magistrate cannot get rid of jurisdiction, (P. C. Colombo 95098. 2. 11. 05).

The jurisdiction of a village tribunal is exclusive to the extent defined in the ordinance. It can try a case under Penal Code, 343 (P. C. Pan. 23082. 16. 5. 06). Its jurisdiction is not lost by the fact of previous convictions (P. C. Pan. 24693. 1. 2. 07), unless they are village tribunal convictions (P. C. Tang. 12741. 29. 12. 98).

The ordinance No. 24 of 1889 does not define "petty". Causing hurt, an offence under Penal Code, 314, is not a *petty* assault (P. C. Kandy 11540. 22. 5. 99; P. C. Kandy 4984. 9. 5. 06; P. C. Matara 18561. 11. 5. 06) and a village tribunal has been denied jurisdiction in a case where the complainant had been caused two contused injuries by the accused, (P. C. Colombo 64274. 11. 6. 00). Though a case of malicious injury to property to the extent of Rs. 20 damages is cognizable by a village tribunal (*Appuhami* v. *Louisa*, 3 Bala. 179; Ord. 24 of 1889 Sec. 28), yet "malicious injury" is not the same as "mischief" (P. C. Kandy 11540. 22. 5. 99). The theft of a buffalo even if it is worth under Rs. 20 is not petty (P. C. Bala. 31353. 1. 4. 08.)

It has been held, in *Jansz* v. *Perera* 9 N. L. R. 74, that gaming Ord No. 17 of 1889 has no application in places brought under Ord. No. 24 of 1889 and in which there are rules as to gambling and cock-fighting. Accordingly, the offence of keeping, or permitting the use, of a common gaming house is triable by a Police Court, (*Ratwatte* v. *Kadoris*, 1 Curr. L. R. 155.)

The territorial jurisdiction of a village tribunal is restricted to the subdivision in which it is established, though an offence be committed by a person not resident within such division, (*Goonetilleke* v. *Punchisingho*, 3 Bala. 113; *Carolis* v. *Fernando*, 1 A. C. R. 69).

An objection to jurisdiction may be taken at any stage, (P. C. Pan. 23082. 16. 5. 06.)

Obiter.

Selected by Guy O. Grenier, Advocate

Recording Evidence.

The Supreme Court would call the attention of the Commissioner to the great difficulty and waste of time in the consideration of the evidence caused by the extremely awkward manner in which the evidence of the different witnesses runs into that of each other in the record. Every witness' name should be numbered in numerical order; should be written in a larger and bolder hand than the rest of the manuscript; should be underlined; and should be partly written in the margin which should be always left for the purpose; and besides this a clear blank space should be left between it and the evidence of each witness.

Per Berwick, J., in *Ahamadu Ali* vs. *Sinna Tamby* [1879] 3 S. C. C. 7.

The Police.

It is not desirable that the police should themselves be the breakers of the law by entrapping a person into and inciting him to the breach of the law, which he had no intention to commit, under the pretence (a most suspicious pretence at the best) of procuring convictions for the very offences the commission of which they have planned, and to which they are accessories... Police to be really serviceable should be respected, instead of exposing themselves to be dreaded and mistrusted by the people. Nor is there any reason why they should have recourse to such practices.

Per Berwick, J., in *Suppayah* vs. *Ramalingam* [1880] 3 S. C. C. 10.

Warrants.

It need hardly be observed that warrants in serious criminal cases should never be stayed upon the undertaking of the accused man's proctor that he will produce his client. Such undertakings are, of course, absolutely worthless in point of law, and are no security whatever for the production of the party charged. In the present case it was not creditable to the proctor to enter into an undertaking, which he must have known he had no power to fulfil, for the party charged was in no way subject to his control, and, if he did not choose to appear, the proctor had no means of securing his attendance.

Per Cayley, C. J., in *Parrington* vs. *Appuwa* [1880] 3 S. C. C. 19.

Unlicensed Proctors.

No motion can properly be made by any one except in the presence of the judge in chambers or in open court. If this system—and it is the only right one—were rigidly enforced, as it ought to be, the occupation of those court and village pests—unlicensed proctors—would cease.

Per Berwick, J., in *Punchi Appu* vs. *Caro Appu* [1880]3 S. C. C. 36.

Service of Process.

There is far too much disposition on the part of suitors and fiscal's officers in this country to a perfunctory service of process and to forget or ignore that such service is no mere matter of form, but that its object is the furtherance of justice, and that the first step in the doing of justice is to take the best possible means, and if necessary to exhaust every possible means, of informing a party of the steps that are being taken against him. It is to be hoped that the publication of our judgment in the present case will check this error, and serve as a guide and rule of conduct to all persons concerned in the obtaining, allowing, or service of process.

Per Berwick, J., in *Simon Fernando* vs. *Bastian Silva* [1880] 3 S. C. C. 44.

Reception of Documentary Evidence.

But the simple flinging in of the whole paper-book in another case is an unmeaning act which should not be permitted by courts of first instance, and which occasionally leads to almost ludicrous mistakes on the part of judges of first instance, such as the decision of issues upon evidence oral or documentary given in the course of a different case, and not in the case under investigation.

Per Cayley, C. J., in *Abraham Peiris* vs. *Juanis Peiris* [1880] 3 S. C. C. 83.

Police Courts.

The object for which Police Courts were created is the prompt and summary disposal of minor crimes and offences. It should always be borne in mind that the efficiency of a Police Court depends to a very large extent upon the promptness of its proceedings.

Per Cayley, C. J., in *Noncho* vs. *Karolis* [1880] 3 S.C.C.89.

Where Imprisonment is Preferable to a Fine.

Large fines like this—and a fine of fifty rupees is a large fine to impose upon a Sinhalese villager—are punishments which, in my opinion, should be very seldom inflicted on a Sinhalese villager. [They entail] a distress culminating in a forced sale of the land—a most heavy punishment to a Sinhalese villager, and the weighty and grave consequences of which it is difficult to exaggerate, and which I have no hesitation in pronouncing to be a more severe punishment than the longest term of imprisonment which the police magistrate can inflict.

Per Clarence, J., in *Tikerala* vs. *Salmon Appuhami* [1880] 3 S. C. C. 135

Land Disputes.

Cases of this kind require the carefullest scrutiny. Disputants must not use unnecessary violence in asserting even well-founded claims; but it has to be borne in mind that charges of this kind are frequently false and usually over-stated, both as to the character of the assault and the number of the complainant's opponents accused of taking part in it.

Per Clarence, J., in *Tikerala* vs. *Salmon Appuhami* [1880] 3. S. C. C. 135.

Judicial Opinion.

It should be remembered that a mere expression of opinion on the part of a judge is not an order or sentence. An order must be properly formulated and be distinct and definite, conveying on the face of it such information as is necessary for carrying it into effect.

Per Cayley, C. J., *Palaniappa Chetty* vs. *Duckworth* [1881] 4 S. C. C. 125.

Proctors.

In future it must be understood that this Court will reject any appeal which is signed by a proctor other than the proctor who appeared for the appellant in the court below, unless such last mentioned proctor be dead, or unless the leave of the court has been obtained by the appellant for changing his proctor.

Per Cayley, C. J., in *Wace* vs. *Helena Hami* [1881] 4 S. C. C. 49.

Proctors

Where a party appears in an action by a proctor at all

he should appear by one proctor, and one only. That is to say, one proctor and one only should appear on the record as the proctor of that party in the action—the proctor having the carriage of the party's case, to whom the Court and other parties in the action will look. It might be very embarrassing if a party appeared by more than one proctor .....But I certainly see no reason why the proctor appearing on the record as a party's proctor should be restricted to be one individual gentleman. I see no reason whatever why a firm of proctors carrying on business in partnership should not appear on the record as the proctor of a party.

Per Clarence, J., in *Rossiter* vs *Elphinstone* [1881] 4 S. C. C. 54.

A Good Word for Petition Drawers.

But it was urged that though proctors might be assisted by their clients, though relations might assist relations and friends, there was a body of persons called petition-drawers who neither for love nor money could be permitted to write a court of requests pleading. They have been called village pests, and men altogether beyond the control of the courts. Let me say a good word for petition drawers. I do not speak of those whose real occuption is unscrupulous touting and the exciting of petty litigation, but there are, I know, many who work hard at their own tables, who are the letter-writers and account-keepers of many ignorant people. I acknowledge I am largely indebted to many petition-drawers for having put in plain English words, complaints, and explanations which it was very right I should hear, and which the petitioner would have had much difficulty in conveying to me had there been no petition-drawer to help him.

Per Lawrie, J., in re Rule Nisi on Commissioner Noyes [1885] 7 S. C. C. 33.

The Detection of Crime.

I know how difficult it is to detect certain offences..... But I cannot help thinking that these ends may be attained without having recourse to measures, not only underhand in themselves, but which amount to an actual incentive to commit a wrong. The doctrine propounded by some, that almost anything is justifiable to detect crime, must have its limits.

Per Fleming, A. C. J., in *The Queen* vs. *Pedronappu* [1885] 7 S. C. C. 77,

Administrators.

It would be great improvement in the practical working of our laws were all executors and administrators forced to close their administration a year after appointment, except in exceptional cases where the heirs consent or where the court is satisfied that a longer time is necessary.

Per Lawrie, J., in *Mack* vs. *Fernando* [1885] 7 S. C. C. 84.

Care Required in Framing Charges in Criminal Cases.

At the same time I would impress upon those whose duty it is to frame these charges the necessity of considering with every care in the first instance what charge the facts as laid before the court warrant, and secondly, what section of the Code the charge when framed really alleges a breach of. The general provisions of the Ceylon Penal Code which allow irregularities in many instances to be condoned, are no doubt most useful in their way, but it is impossible to say when they may or may not be taken advantage of inasmuch as this Court has, before the condoning an irregularity to feel satisfied that no failure of justice has been occasioned.

Per Fleming, A. C. J., in *Amarekoon Appu* vs. *Dingi Appu* [1885] 7 S. C. C. 86.

The Use of the Knife.

In my opinion, offenders who have used a knife should not be tried in the police court summarily,—all such cases should be committed for trial either before the District Court or Supreme Court.

Per Lawrie, J , in *Sodaichy* vs. *Sinnappu* [1885] 7 S. C. C. 97.

Usury Laws.

Usury laws savour too much of a combination of the many against the few, without a just regard for the rights of property and the freedom of trade. They are savoury no doubt to the borrower, who sees in them, perhaps, what he may learn to consider, special intervention on his behalf, affording protection against himself; but in this respect, I think we should not, in sympathy with one side, forget our obligations to the other. All our sympathy with the borrower would be no answer to the legitimate complaint of the lender, that his legal rights have been violated.

Per Burnside, C. J., in *Carpen Chetty* vs. *Herft* [1886] 7 S. C. C. 182.

Appeal Court Notes.

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

40. **Removing posts from Crown land without a permit.—Rule 22 under chapter iv of Ordinance 16 of 1907.**

On the Supreme Court writing back to the Police Magistrate for the copy of rules made under the Forest Ordinance under which the accused appellant was convicted, viz Rule 22 under Chapter iv of Ordinance 16 of 1907, the Police Magistrate answered that there was no rule 22 and that accused was convicted under Section 22 of 16 of 1907,—

Held, *Hutchinson*, *C. J.* —In the absence of any rules the cutting of posts from Crown Land does not seem to be an offence punishable under Section 22 of the Ordinance.

55 P. C. Matara 29537. 15. 3. 10.

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41. **Section 219 Civil Procedure Code—Due diligence—Presumption.**

Where a notice is issued upon the debtor to get the debtor up for examination, the issue of such notice is a strong presumption that the District Judge had decided that the plaintiff had in fact proved that he had exercised due diligence in endeavouring to obtain execution of the first writ. Section 219 presupposes that before the issue of an order to orally examine debtor, the creditor is entitled to the enforcement of an order for the recovery of debts.

10 D. C. Inty Kurunegalle 1983. 2. 3. 10. Middleton & Wood Renton, J. J.

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42. **Criminal trespass and assault—Jurisdiction of V. T. Secs. 433 and 314 Penal Code.**

Where upon a complaint to a Police Magistrate that a certain accused was guilty of criminal trespass and assault in that he entered complainant's land and assaulted him, the P. M. referred him to the V. T. treating the case as one of simple assault, the complainant appealed with the A. G's sanction,—

Held, *Grenier*, *J.*—Criminal trespass being an offence not triable by the V. T. the P. M's order was wrong, and (following the judgment in P. C. Negombo 13160, 8.3.10.) sent the case back to be proceeded with according to law.

P. C. Negombo 13419. 11. 5. 10.

43. **Master and Servant—Refusal to work—Asst Supdt of Estate complainant—No Contract to serve complainant.**

Where a cooly refused to obey the orders of the Assistant Superintendent of the Estate and was convicted of an offence under Sec. 11 of Ord: 11 of 1865,—

Held, *Hutchinson*, *C. J.*—That as there was no contract between the complainant and the accused (but between the accused and the complainant's master viz, the Supdt. of estate) the accused was not liable to a penalty for refusing to obey the orders of the complainant.

143 P. C. Panadura 32639. 22. 3. 10.

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44. **Action for interest on the principal amount expended on goods sold—Principal paid.—**

Held, *Wood Renton*, *J.*—Although principal debt is not in existence having been paid, an action will lie for interest alone.

Held also, Although the agreement to pay was made *in respect of* goods sold, the debt thus incurred was prescribed not in one year but in 3 years.

23 C. R. Colombo, 2. 5. 10.

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45 **Deed, interpretation of— Fraud.—Transfer.**

Per Hutchinson, *C. J.*—I do not assent to the supposition upon which the D. J. acted, that a transfer to A, which is alleged to have been obtained by fraud, can be treated as a transfer to somebody else ; for until the deed of transfer is set aside by an order of the Court it is not void merely because it is obtained by fraud, and in no case can a transfer to A be treated as a transfer to L.

317 D. C. 902. Tangalle 3. 5. 10.

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46. **Claim inquiry—Formal order on agreement operates as estoppel, though resulting from misunderstanding—Restitutio in integrum,**

Where at a claim inquiry it was recorded as an agreement between the parties that the claimant's claim to 8/9th of the property seized should be upheld and that "1/9th which having been previously sold to one of the debtors be declared saleable under the seizure" and a formal order upholding the claim to 8/9th was accordingly made by the Commissioner,—

Held, that in spite of the Commissioner having at the trial of the Sec. 247 action accepted the explanation of plaintiff's (claimant's) proctor that what he meant at the claim inquiry was that the claim to 8/9th should be allowed and that the one-ninth should be left to be

fought out in the Sec. 247 action, the court had no right to vacate its own order and that the formal order of the court at the claim inquiry constituted an estoppel to the Sec. 247 action. (Leave reserved to the plaintiff to move the S. C. on proper materials in proceedings in *restitutio in integrum*)

10. C. R. Balapitiya 7358. 2. 5. 10.

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47. **Money decree—Mortgage action—Sec. 337 Civil Procedure Code.**

A decree in mortgage action for the payment of the money due on the bond, and in default thereof, for the sale of the mortgaged property and the realisation of any balance of the debt still remaining unpaid after such sale is "a decree for the payment of money" within section 337, although a special mode of enforcing payment is indicated in it in case of default. *Don Jacovis* v. *Perera* (1906) 9 N. L. R. 166 followed.

40 D. C. Matara 3009. 2. 5. 10.

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48. **Setting aside sale Sec. 282 Civ: Pro: Code—Notification of grounds—Mrterial irregularity.**

Section 282 of the Civil Procedure Code only requires the grounds of the irregularity to be notified to the Court within a prescribed period of 30 days. Such notice to the Court need not be by petition, to which the purchaser is made a party, to be presented within 30 days of receipt of the Fiscal's report.

Where a notice of a sale of land contained no boundaries of the land out was also inaccurate as regards the village in which the land was situated, and where there was no publication at all and where the land had actually been disposed of at about 1/12 of its real value,—

Held, there had been a material irregularity and "substantial damage" had been sustained whether resulting from the irregularity or not. Sufficient proof held to exist by the causal relation between the irregularity and the damage to satisfy requirements of section 282 (D. C. Colombo Inty 28868 S. C. 43 referred to).

58 C. R. Balapitiya 6542. 4. 5. 10.

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49. **Possessory action—Co-owner—Sufferance.**

Where the evidence shews that a lessor and co-owner, through whom plaintiff claims, was in possession of the property claimed only by the sufferance and permission of the other co-owner,—

Held on the authority of Fernando v Fernando (1909) 4 Bal: p. 170, that his possession is not of the character

necessary to lay a foundation for the possessory remedy.
33 C R. Negombo 17154. 4. 5. 10.

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50. **Deega, marriage in—Right not lost as against strangers.**

There is no question as to the general proposition that by the Kandyan law a deega married daughter forfeits her rights of inheritance from her father as against certain specified classes, e. g., sons or daughters settled in the father's house in bina (Armour pp. 54. 55,) and Sawyer states that daughters must take husbands chosen by their brothers in the event of their parents being dead, and must go out with them in deega. It does not follow, however, and I can find no authority for holding, that a deega married daughter is not entitled to a relative declaration of title as against a stranger.
329 D. C. Kandy 4. 5. 10.

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51. **Possessory action—Length of possession—Ord 22 of 1871, Sec. 4.**

Possession for a year and a day prior to ouster is not necessary for maintaining a possessory action. All that is required is that the action must be brought within a year of ouster, and there must be proof that the plaintiff was dispossessed otherwise than by process of law. The proviso to Sec. 4 of Ord: 22 of 1871 does not preserve the Roman-Dutch law as to the length of possession required before ouster.
304 D. C. Kandy 18314. 22. 4. 10. Hutchinson, C. J., & Middleton, J.

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52. **Encroachment—Building on another's land—Acquiescence—Compensation.**

It depends on all the circumstances whether defendant ought to be allowed the option of (1) offering to pay plaintiff compensation for the encroachment, or (2) buying the whole of plaintiff's land or as much as is rendered useless by the encroachment. If the circumstances. i. e. bad faith, plaintiff's knowledge and acquiescence—defendant's bona fine right—Plaintiff's delay in bringing the action—show that the defendant is in no way to blame, he should be allowed the option. But if the plaintiff had neither acquiesced nor was guilty of unreasonable delay, the defendant should be ordered to remove the encroachment however small (in this case, a balcony overhanging plaintiff's land).
295 D. C. Negombo 7433. 22. 4. 10. Hutchinson, C. J., & Middleton.

53. **Defamation—Petition to Provincial Registrar—Privileged communication—Delay of judgment, six months.**

Where one Registrar of Marriages sent a petition to the Provincial Registrar making certain statements defamatory of another registrar (plaintiff).

Held, Middleton & Wood Renton, J. J.—Such petition is a privileged communication,—

Renton, J:—On the great delay that there has been between the close of the trial and the delivery of judgment:—"The effect of delays of the kind is to weaken every comment which is made by the judge on the fact and the evidence, and to convert an appeal Court into a Court of First Instance deprived of the advantage of having seen the witnesses under examination and cross-examination".

238 D. C. Colombo, 27121. 3. 3. 10.

Notices.

1. Index to Vol. VI. will shortly be issued to subscribers. It will contain a complete index to *Appeal Court Notes.*

2. Our *Reports*, commencing with this issue, will be of such hitherto unreported cases as may be of practical utility. They are separately paged. The *Reports* are edited by the Editor-in-chief and Mr. Guy O. Grenier, Advocate.