The Ceylon Law Review.

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

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Editorial Notes.

We have received with thanks the first number of the *Ceylon Law Students' Magazine*, edited by Mr. Arthur V. Perera. After a short royal *In Memoriam* is an appreciation by Mr. Christie Seneviratne of his Lordship the Chief Justice who "is not in the roll of common men, ... as a judge irreproachable, calm, unimpassioned . . . . a delightful talker, a charming raconteur." The illustration—a faithful likeness facing the letterpress—is excellent. The Hon. Mr. Justice Wood Renton contributes an article on Advocacy, which we take over into our columns. We note that the Magazine is used as an advertising medium. The editor and all others responsible for this new venture have our good wishes.

In connection with the educated Ceylonese seat in the Legislative Council we are pleased to find the names of three lawyers mentioned, Messrs P. Ramanathan, H. J. C. Pereira, and W. N. S Aserappa.

A noteworthy instance of judicial disregard of the intention of the Legislature is afforded by the recent pronouncement of the Supreme Court (per Hutchinson,

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C. J., and Van Langenberg, J.,) that Ord. No. 9 of 1909 has no retrospective effect and that a cooly is liable to arrest for debts incurred before Oct. 1, 1909. The proceedings in Council, at the time of the passing of the Ordinance, clearly showed the retrospective effect of the statute, but the Legislature *non dixit quod voluit.*

Advocacy.

[*By the Hon. Mr. Justice Wood Renton.*] *

I can think of no subject better suited for treatment in the pages of the new official journal of the Law Students' Union than the history and traditions of the great profession to which so large a section of the members of that Union will soon belong. Neither the limits of space, nor the time at my disposal will permit me, however, to attempt any contribution on such ambitious lines. In the pages of such books as Forsyth's *Hortensius*, excellent materials for the study of the history of advocacy will be found. I pass from this aspect of the question by simply urging you strongly to make yourselves thoroughly acquainted with the story of what the Bar in ancient, in mediaeval, and in modern times has done, to master the English case law in which the rights and duties and functions of advocates have been clearly defined and to study the best examples of forensic eloquence which are now so readily accessible to everybody. I propose to myself, in the meantime, the homelier task of submitting for your friendly consideration some observations which have occurred to me, from time to time, in the course of my work during the past five years in Ceylon. I will assume that the imaginary student, whom I am addressing, has just passed his Final Examination, and, with high hopes and a sufficient equipment of legal knowledge, is about to commence work at the Bar. I would say to you in the first place, cultivate the faculty of making a clear, brief, and interesting presentation of the facts which you have to submit to the Court or to the jury. Nothing is more prejudicial to your chances of success than the bad habit, as difficult to get rid of as it is easily acquired, of creating, by involved, reiterated, and bald expositions of facts, a state of hopeless confusion, so far as your efforts are concerned, in the mind of the tribunal

* C. L. St. Mag. i. 5.

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by which your client's interests, or perhaps his liberty or his life, have to be disposed of.

In the next place, and the following remarks have special application to the Court of Assize, make up your mind at the very outset of your career to have nothing to do with petty scenic effects. Do not, for example, assume an expression of pained surprise when you are told by a village witness that he had made a statement in the Police Court, which the Magistrate has not recorded, or that he would have made such a statement, if he had been asked about the subject, or if the rising tide of his eloquence had not been summarily suppressed by the Bench or by the Bar. We all know, and only jurymen who are serving for the first time are unware of the fact, that any one of these three alternative statements may be perfectly true. Do not suggest to the jury by word or look that they involve any reflection on the efficiency or the probity of the Magistrate, or that they necessarily constitute in themselves a ground for discrediting the witness' evidence as a whole. Even if the jury are ignorant of the character and limitations of Police Court proceedings at the time when you put your scenic effect before them, you may be sure that the Judge will see that they apprehend the real state of matters, before they retire to consider their verdict, and that, when they find out that you have been acting, they will be inevitably prejudiced against your case. No gift of advocacy is of such great value as the virtue of sincerity. I do not mean, of course, that you are to express your own personal convictions in regard to the truth of your case. In his defence of Palmer, the Rugeley poisoner, Mr. Serjeant Shee, in the heat of his peroration, told the jury that he believed in his soul in the innocence of his client. In replying for the Crown, Sir Alexander Cockburn, who was then Attorney General, asked what his friend Mr. Serjeant Shee would have thought of him if he had informed the jury what *his* personal view of the prisoner's guilt or innocence was; and Lord Campbell, who presided at the trial, directed the jury to pay no attention to that part of the argument of counsel for the defence. The rule, alike in England, in Ceylon, and, I believe, in all English-speaking countries, is the same. No advocate is entitled to tell the jury what he thinks personally of his case. What I mean by the gift of sincerity is the power of being real in your art, of scorning to secure an effect, which in most cases will be only momentary, by any kind of meretricious device.

So much has been written on the subject of cross examination that I might almost pass it by with a reference

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to Mr. Harris's excellent "Hints on Advocacy." But perhaps three observations may be forgiven me, of which the first and second relate to the intellectual, and the third to the moral side of forensic life. (1) Keep in mind Sir Alexander Cockburn's adage—"When you have made a point, leave it alone." (2) Be very cautious in cross-examining an obviously truthful witness on points of detail. If you neglect this rule, the chances are that you will triumphantly elicit, by what is sometimes miscalled "a searching cross-examination," just the evidence that your opponent needs to complete his case. (3) Remember also that the very latitude of the powers, which the law allows you as a cross-examiner, imposes upon you, if you are the type of man with which we desire to see the legal profession recruited, the necessity of using them fairly and wisely. You have no right to confuse or browbeat a witness. Cross-examination, said the late Sir James Stephen, is the touchstone by which we separate the men who exercise their profession from those who only disgrace it. In the course of a few years you may be a Crown Counsel, and it may be your lot to cross-examine a prisoner on trial for his life. If this unpleasant duty falls to you, bear in mind that he is scarcely in the position of an ordinary witness. I do not mean that he should not be cross-examined, perhaps cross-examined strongly, but remember that he has a deep stake in the enquiry, and treat him as gently as you can. Do not lose sight of the fact that, in very many cases of this character, you are speaking to the dying.

There are only two points more that I wish to make before closing this homily, which I hope has not wearied you. If you carry out conscientiously the study of the history of advocacy and also of its rules, which I recommended at the beginning of these remarks, your pride in the former will gradually make it impossible for you to be disloyal to the latter. You will associate yourself with the efforts that are being made by all the best men at the Bar in Ceylon to keep the unwritten law of your profession intact. I need not tell you that it is by the rules of English advocacy that you are here bound. You owe them loyalty in themselves. But, apart from that, they have every claim to your obedience on intrinsic grounds. The distinction drawn in English forensic history between the two branches of the legal profession is not an arbitrary one. The range of legal administration is so wide that its efficiency is undoubtedly promoted by the existence of two separate classes of practitioners, by one of which the preparatory work of litigation is done, while the functions of the other are consultative and forensic. Moreover, the Bench is practically recruited

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from the Bar; and in order that the judicial faculty may be developed in forensic practice, the maintenance, with the utmost strictness possible under the circumstances, of the line of demarcation between the two branches of the legal profession is essential. Although there is no fixed "rule of the profession" in England prohibiting a barrister from receiving instructions from his client direct in non-contentious cases, and although, if I remember rightly, the Widow Blackacre was wont to interview her Counsellor without the presence of an attorney, the practice has been characterised by the Bar Council in England as "undesirable"; and there can be no doubt but that it is easier for an advocate to give, as he is bound to give, judicial advice on cases submitted to him for opinion, when the name and the identity of his client are little more to him than $a + b$ in an algebraic problem, than where he is brought into direct contact with the client without the intervention of a solicitor. On one point, however, there is no room for any diversity of opinion or of practice. You have no right as an advocate to go over, out of court, their proofs with the ordinary witnesses to questions of fact, whom you propose to examine. This rule is as reasonable as it is fixed. It is impossible for a trained mind, however innocently and honestly inclined, to come into contact with witnesses under such circumstances, and particularly with witnesses belonging to the very intelligent races that we have to deal with in Ceylon, without conveying to them the kind of evidence which will best suit the case of the litigant on whose behalf they are to be called

My last counsel to you is this. Remember that, equally with the Judges, who have belonged to your own profession, and who are as keenly jealous of its independence and prestige and honour as you can ever be, you are a minister of justice. You are bound to do everything in your power to see that true and pure and speedy justice is meted out to all classes of this great community in the different capacities in which they come before the Courts of Law. I cannot but feel that, if this view were more fully grasped than it is, the work of our Courts would be more quickly and better done. There are motions for postponements in the Courts of first instance that would not be made; there are cross-examinations that would be omitted, or at least greatly curtailed, there are speeches that would be comprised within quite modest limits. The country has the right to demand of you, as well as of us, that everything in your power shall be done to prevent the far too great delays which at present intervene between the initiation and the determination of legal proceedings in this Colony, and which too often tempt

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litigants to take the law into their own hands. I have often felt in the Assize Court, when trying men for acts of violence committed in those wretched land disputes that supply the materials for half the crime of the country, that the slow movements of the Courts of law themselves have had much to do with the unfortunate position in which the prisoners stand. Of course, that is no reason for not punishing the offender, when guilt is brought home. But it certainly imposes upon us, who are members of a common profession, and who, although exercising different functions, are equally officers of the law, a very clear and imperious duty of taking counsel together, with a view to remedying a state of things which is a grievous injury to the happiness and welfare of the Colony.

I do not believe that there is any country, within or without the limits of the British Empire, in which the Bench is, or could be treated by the Bar with greater courtesy, consideration, and forbearance, than is the case in Ceylon. It is just because the relations between the Bench and the Bar are so excellent, it is just because the Judges, present and future, are so deeply interested in the kind of standard which the rising generation of lawyers, destined in time to take the place of some of the very able and honourable men now practising in our Courts, will set before itself, that I have ventured to speak to you not in the tones of conventional flattery but in the spirit of sincerity which I have urged you to cultivate in the exercise of your profession.

Decisiones Frisicæ.

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

VI.—De Emptione, Venditione.

(lib. 3 tit. 4. dep. 1.)

On the prohibited alienation of a domain.

Philip II, King of Spain, when he ruled over Friesland, sold to Johannes Ratallerus for 5000 guilders, fifty acres of fen-land alleging with transfer that he was obliged to sell some property of his domain in order to meet the expenses of the war that had then arisen, and that, for that reason, he had sold this fen-land in Dantumadul to the said Ratallerus in derogation of the ordinance or laws proclaimed in their provinces against the alienation of domains, adding the following words : —"Of certain knowledge and in the plenitude of his power."

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This sale was registered in the books of the Royal Treasury. The King not being recognised as such when the whole country fell under the States, the Solicitor-General, on behalf of the State, sought to vindicate this land from the heirs of the purchaser, on the ground that the king could not, without the consent of the State, sell these parts of his domains. The defendant pleaded that this fen-land did not belong to the domains, and even if it formed part, the alienation thereof being made under necessity, should be held good, as the king had expressly declared that all laws and ordinances to the contrary should have no effect in this case, and has besides made the alienation "of certain knowledge and in the plenitude of his power." And it was further contended that the exception based on the ***persona*** of the king was a bar to the plaintiff, the State having succeeded to the king, and that therefore there should apply to his case the rule that he who is liable to an action for eviction, as defendant is repelled by the exception if he is the plaintiff. Towards the decision of this controversy the following points were discussed :—

1. Whether this fen-land in question formed a part of the domains of Friesland?
2. If it is part, whether the domains could be alienated?
3. If not, whether the sale having been effective on grounds of necessity, it can stand in the present case?
4. Whether the plaintiff-States can be repelled by the exception based on the *persona* of the king?

As regards the first point. Although the defendants denied that this fen-land belonged to the domains, it clearly appeared to form part of the said domains from the deed of transfer on which the defendants rely. For it states by way of inducement : ' that as we have thought fit to " " sell a part of our domains " and again " for which end we have set " " apart and separated the said fen-land from our domains in Friesland " etc. For separation presupposes that it originally formed part of the domains. Besides that the Stewards of the King's Domains had taken on themselves the administration of this fen-land, is shown by the said deed of transfer. Therefore it formed part of the domain. *Dig. 32. 3. 91 Sec. 3. 6. Papon. tit. 1. arrest 7 in fin.*

Thirdly the king of Spain had no patrimonial property in Friesland· Kings and Princes can have two kinds of patrimonial property, some public, some private, but seldom private. And in a case of doubt all property is supposed to belong to the State as stated by Johannes Duath : *de testam. num. 6. vers. Regum. Electorum p 37.*

Lastly, some of the witnesses declared that this land, which formerly belonged to private persons, was occupied and acquired by the king as being vacant and ownerless. Which again furnishes proof that the king possessed it as part of his domain. For ***bona vacantia*** belong to the Emperor's or King's Fisc, and are regarded as part of the domain. *Cod. 10. 10. 13. Sec. ult. F. 2. tit. 86.*

Granted therefore that this land belonged to the Frisian Domain, there follows the other question whether the Domain, or part thereof, could be alienated by the Prince. That it could not be done without the consent of the States is commonly accepted as law, as, following other writers, is laid down by Carolus Molynaeus *ad consuet. Paris. tit. 1. Sec. 2. gl. 4 num. 17.* Firdmandus Vasquius *lib. 1 controv. cap. 1 num. 10 et seqq. et cap. 4 num. 4. et seqq. cap. 5 num.* 3 *et seqq.* Emanuel Soarez in *thesaur. recept sent. in lit. P. num. 268,*

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Guido Papae *dec. 239 num. 1.* Ant. Capyt. *dec. 121 num. 2.* Octavianus Cacheranus. *dec. 239 num. 7 et 20.* Petrus Heigius *part. 1. quaest. 19.* Which alienation is prohibited not by any special law but by the general law of all States, and, as it were, by the *Jus Gentium*, as Jacobus Cujacius says *in cap. intellect. X. jurejurand.* although, as regards the Frisian domain, there is not wanting special law, for the Emperor Charles V, father of Philip II, in his treaty or agreement with the States of Friesland promised that he would not alienate, hypothecate, or otherwise transfer the lands of Friesland. And King Philip, not only under the general law of all States and the *jus gentium*, but also in accordance with his own confession, having made special laws against the alienation of the domain in the Nederlands, and specially under the treaty of his father, had prohibited the sale of the Frisian domain or the part thereof in question. And he had not therefore the right to release himself from the obligation of these laws and treaties and to infringe the same.

For the prince is, like a private individual, bound by his engagements and contracts entered into either with citizens or foreigners. Bodinus *de Republ. lib. 1 cap. 8 num. 100.* Ferdinands Vasquius *lib. 1. controvers. cap. 2.* Vincentius Cabotius *lib. 2. disput. cap. X.*

And hence the derogatory clause relating to the plenitude of power inserted in the deed of sale, avails nothing, for the domain could not be alienated by the Prince, neither of certain knowledge, his own motion nor by the plenitude of his power, as stated by Andreas de Isernia *in cap. 1 Sec. similiter potest colum. 1. vers. in his functionibus de capitaneo qui Curt vendidit.* Lucas de Penna *in l 2 C. de jure Republ. ad finem lib. XI.* Carol. Molynaeus *d. Sec 1. gl. 5 num. 45.*

There follows the third point whether this sale is good as being brought about by the necessities of war.

It is true the reason of necessity or of war renders the alienation of the Domain permissible in order to meet the expenses of war and the wages of soldiers. Renatus Chopinus de domaniis Franciæ *lib 12. tit. 14. num. 4. et seqq.* But the war, for which this alienation was made, was unjust, undertaken to establish the absolute sovereignty of Spain to destroy the true religion, its followers and to repress the liberty of the country.

Besides, however just the cause may have been, yet the alienation could not have taken place without the consent of the States, and previous consideration of the matter and decree. For the same solemnities which are required for the alienation of the property of minors or of the Church ought to be observed in the alienation of domains. *Cod. 11. 31. 3* Johannes Bodinus *de Republ. lib. 1, Cap. 8. num. 2* Johan Papon *lib. 5. tit. 10. num. 2* Chopoinus *de domanio lib. 3. cap. 15. in fin et cap 18 num. 14. Guido Papæ decis. 239 et ibi in annotat. Mattheus.* But in the present case the consent of the State was not asked nor given nor was there a decree of the Court interposed in respect of this alienation, and what is more, this land was sold without previous public proclamations, which were necessary in all cases *l. 1. et ibi Dionysius Gothofredus l 6. et ibi Jacobus Cujacius, C. de fide instrum et jur. hastæ.* Indeed it would seem from the tenor of the deed that the King and the Council were deceived in many ways, as in the said deed the said fen-land is described as situate in Dantumadul whilst it lay in Thietzercksteradeel: also it is said to be 50 *roeder* in breadth although it is triangular in shape and there is no side which does not

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exceed 100 *roeder*, from which the fraud of the vendee is apparent in that he decreased the extent of this fen-land and suppressed its true extent, and induced the King's Council by *suppressio veri et suggestio falsi* to sell the same not without fraud. For he is guilty of fraud who suppresses what he should disclose *Dig. 21. 1. 14. Sec. 9.* Cravetta *consil. 387. num. 24 et consil 741 num.* And this sale can rightly be said to have been vitiated by fraud although in other respects all the other solemnities were observed, for, although the words "of certain knowledge" remove all suggestions of surprise, *glossa in cap. 2. X. de filiis Presbyt.* Alexander *consil. 116, in. fin. volum. 6.* yet this theory cannot apply to the present case where it is clearly shown that no such knowledge existed. Carolus Molynaeus *ad consuet. Paris. tit. 1 Sec. 5. num. 73.* Catellianus Cotta *in memorabil. in verb. ex certa scientia.*

It now remains to consider the last point whether the States in seeking to vindicate this land can be repelled by any exception based on the *person* of the King. For it may appear at first sight that the rule of law is applicable here that he who is liable to an action for eviction as defendant is repelled by the exception if he is plaintiff, and that he who succeeds to the rights of another is affected by a plea based on the status of the other. But these rules do not hold good in this case. For, in the first place, this sale, which was effected contrary to law, is so null and void that the King himself who sold it could go against it. For when an act is for the public good declared null and of no effect by the law (as in the present case) the vendor can go against his own act. *Cod. 11. 47. 7. lib. XI. notant* Arius Pinellus *in. l. 2. C. de bonis Matern. part. 3. num. 73. Andr. Teraquel de retract. consang. Sec. 26. gl. 2. num. 6.* And the Jurists state that the King who has alienated the property of the Crown can himself vindicate the same *Corietus de potest. regia. quaest. 95. num. 60,* Ferdinandus Vasquius *de success. creat. circa Sec. 10. num. 248,* who are cited and followed by Velascus *consult. 69. num. 14.* And therefore, for a greater reason, the successors of the King can vindicate the domains illegally sold by him and reduce them to their former constitution, which proposition was laid down by Matth. de Afflictis with respect to the King of Naples, *in constit. Neapolit. quaest. 24 et decis. 240 num. 8* And it is certain that a thing which has been alienated with a decree can be re-claimed by the Fiscal himself. *Cod. 10. 3.* Ludovicus *in Pandectis juris Gallici lib. 1. cap. 23. et lib. 2 resp. 1.*

Lastly the States of Friesland hold the domains, not by way of succession or confiscation, but, the King having abdicated, *per privationem.* The Court accordingly condemned the widow and heirs of the purchaser to make restitution of the pen-land. (1)

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(1). 24th March 1607. The Solicitor-General, plaintiff.

v.

Juff Yda Van Loo, Geneveva Van Rattaller, Elisateta Margareta Van Rattaller defendants.

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Obiter

(*By G. O. Grenier, Advocate.*)

An Improper Practice.

The sending of letters by litigants to judges on any matter connected with the suit, is a highly improper practice, and ought to be discouraged as much as possible.

Per Creasy, C. J., Vand : 1869 p 6.

Assertion of Civil Rights.

In a country like this any attempt of parties to use force in the maintenance of their rights should be promptly discouraged. Slight brawls readily blossom into riots with grievous hurt and murder as the fruits. It is therefore all the more necessary that Courts should be strict in discountenancing all attempts to use force in the assertion of such civil rights as are in dispute in the present case.

Per Bonser, C., J., in *Perera* vs. *Gunatileke* [1900] 4 N. L. R. 183.

I quite agree with the Magistrate that it is very desirable that persons should not be allowed to go into lands which are in the occupation of owners and pluck nuts with the intention of asserting a claim or right. If they have any right or claim they must press it in the Civil Courts.

Per Bonser, C. J., in *Cassim* v. *Kandappa* [1901] 5 N. L. R. 312

The Supreme Court.

I am determined that this Court shall not be made a theatre in which persons desirous of becoming so may make themselves notorious. If they wish for this, they have the columns of the public press open to them, which will afford them ample opportunity for any such purpose.

Per Bonser, C. J., in *Perera* v. *White* [1900] 4 N.L.R. 212.

The Police.

It is a sign of weakness in the Police to bring complaints for escape from custody instead of catching the man themselves and keeping him when they catch him. Constables from whose custody they escape should, I think, be punished for feebleness and neglect of duty.

Per Lawrie, J., in *Gressy* v. *Perera* [1901] 5 N. L. R. 118.

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The Civil Procedure Code.

The Court and practitioners have considerable difficulty in administering the provisions of the Civil Procedure Code, which may, without disrespect, be termed a chaotic compilation. It would defy the skill of the most learned lawyers to interpret and make any consistent sense of a great deal of it. But District Judges are for the most part not trained lawyers, and they therefore have to work under considerable difficulty, and that they work the Code as well as they do is, I think, a matter creditable to them

Per Bonser, C. J., in *Karuppan Chetty* v. *Anthonayake Hamine* [1902] 5 N. L. R. 304.

Appeal Court Notes.

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

72. Public Servant—Sec. 180 Penal Code.

The Registrar-General is a public servant within the meaning of Sec. 180 of the Penal Code.

S. C. 78 D. C. Galle 13668. 1. 6. 10.

73. Prescription of Action—Work and Labour—Ord. 22 of 1871.

Where a Kangany who had undertaken certain weeding contracts on an estate was sued by the superintendent for the re-payment of advances made him and the value of labour supplied by the superintendent himself. *Held* the claim for labour supplied was not one for work and labour done under Sec. 9 of Ord. No. 11 of 1817but came within Secs. 8 and 11.

S. C. 134 C. R. Kegalle 9741. 1. 6. 10.

74. Promissory Note—Material Alteration—*Onus*.

Where a defendant pleads that a promissory note on

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which a plaintiff sues has been materially altered, the onus of proving this is on the defendant.

S. C. 140 C. R Matale 8934. 1. 6. 10.

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75. **Decisory Oath—Consent**

Where one defendant was not present in Court when the plaintiff accepted the challenge of another defendant to take a decisory oath but the oath was taken in the presence of the absent defendant's son who was in no way authorised to agree to a decisory oath, *Held* the absent defendant was not bound by the oath.

S. C. 127 C. R. Balapitiya 7326. 1. 6. 10.

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76. **Quia Timet Action.**

Where a deed purported to convey the whole corpus of a certain land, although the transferor had only a life interest in it, an action by the *dominus* for a declaration of his title and that the transfer be declared void, except as regards the life interest, is maintainable as a quia timet action.

S. C. 109 C. R. Anuradhapura 5813 24. 5. 10.

☆ ☆ ☆

77 **Proctors declining to act.**

Where a defendant who had been examined under Sec. 219, Civil P. C. was noticed by a Proctor purporting to act on behalf of plaintiff, (who had in fact revoked his proxy and engaged another proctor) to shew cause why writ should not issue and on the returnable date neither proctor would support the motion and the application was dismissed for want of prosecution.

Grenier, *J.*—Reversed an order of the Commissioner who held that a subsequent application was in the circumstances barred and gave plaintiff an opportunity of proceeding with his application.

S. C. 125 C. R. Chilaw 11571. 30. 5. 10.

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