PERERA *v.* WHITE.

D. C., Colombo, 14,093.

1900.
October 10.

Advocate and client—Retainer and fee—Application to Supreme Court to apportion counsel to advise applicant in conduct of his case—Refusal of counsel to take up a case.

A retainer given to an advocate in a case means that he is to hold himself ready to accept a brief with a fee.

If the retainer is not followed by a brief and fee, the counsel is at liberty to appear on the other side upon retainer and fee.

An advocate cannot decline a fee capriciously.

If a party to a litigation should retain the whole roll of advocates, so as to leave his opponent without the advice and aid of counsel, it would amount to a public scandal, and the Supreme Court would feel justified in interfering to apportion advocates to such party.

But where a plaintiff has retained several advocates, and there are other members of the bar of standing and position who have not been applied to by the defendant,—

Held, on motion made by the defendant to apportion counsel to advise him in his defence, that the Supreme Court had no reason to interfere.

ON the 10th October, 1900, *Elliott* appeared for the defendant, Mr. Herbert White, the Acting Mayor and Chairman of the Municipal Council of Colombo, against whom an action for alleged libel had been brought by Mr. Charles Perera, a Member of the Municipal Council of Colombo, and moved the Supreme Court, in the circumstances set forth in a petition of the defendant supported by an affidavit of his proctor, to apportion to the defendant advocates to advise him in his defence in the said case.

It appeared that the plaintiff's action was for the recovery of Rs. 30,000 as damages for libel said to be contained in certain memoranda written by the defendant in reference to matters connected with the Municipal Council of Colombo, of which the

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petitioner was Acting Chairman; that summons had been served on him to appear before the District Court of Colombo and answer the plaint on the 10th October, 1900; that the petitioner had appointed the firm of Messrs. Julius & Creasy, Proctors, to act for him in the said action, and had instructed them to engage advocates of merit and experience to advise, plead for, and support him in his defence to the said action; that Mr. Frank Liesching, a partner of the firm of Julius & Creasy, sought to engage the services of the Acting Attorney-General, Mr. H. L. Wendt, on behalf of the petitioner, but was informed that as a Law Officer of the Crown he thought it best not to act for either plaintiff or defendant, and that he had already informed the plaintiff so; that in view of the above expression of opinion on the part of the Attorney-General, Mr. Liesching did not think it advisable " to " apply to any of the Crown Counsel, but sought to engage the " services of Advocates J. R. Weinman, Walter Pereira, B.W.Bawa, " and H. J. C. Pereira, but they, one and all, informed me " (Mr. Liesching averred in his affidavit) " that they had been " consulted as to the above action by the said Charles Perera, and " did not think that under these circumstances they could act for " the said Herbert White; that the plaint in the said action has been " settled by Advocates T. Sampayo and James van Langenberg, " and Advocates R. H. Morgan, A. de A. Seneviratne, James Peris, " and H. Jayawardena are all Members of the Colombo Municipal " Council, and they feel that they cannot under the circumstances " fittingly act as counsel for either party, especially as it may be " necessary to call upon one or more of them to give evidence in " this action. The advocates named or referred to above are, I " believe, all those now regularly practising in the Colombo Courts " on their civil side, who are generally considered leading members " of the bar. I verily believe that if the help of one or more of " the said advocates consulted by the said Charles Perera is not " apportioned to the said Herbert White, the said Herbert White " will be prejudiced in his defence of the said action by reason of " his being unable to secure the services of an advocate of skill, age, " and experience to advise and appear for him in the said action. " The said Herbert White has accordingly instructed me to apply " to the presiding Judges of the Ceylon Courts to apportion to him " the help of two of the advocates above referred to."

Elliott, for applicant.—My motion that defendant be apportioned counsel to help him in his defence before the District Court of Colombo is justified by our Common Law practice as declared by Voet in his *Commentary on the Pandects* (3. 1. 11.). The counsel named in the affidavit have all declined to appear

for reasons stated therein. [BONSER, C.J.—But did your proctor tender them a retainer and fee?] He asked them whether they would appear, and they declined. [BONSER, C.J.—But that is not giving counsel a retainer. The ordinary practice is for a solicitor or proctor to send to the chambers of the barrister or advocate a retainer, which means that counsel is to hold himself ready to accept a brief with a fee.] What happened was this: our proctor asked each of them, "Will you appear on behalf of the defendant?" and they replied, "We have been already retained by the plaintiff." [BONSER, C.J.—If the retainer is not followed by a brief and fee, the counsel is free to appear for the other side upon retainer and fee. It will be time enough to consider your motion when a retainer and fee have been actually offered to the counsel named in the affidavit and refused.] They have constructively refused the retainer and fee. [BONSER, C.J.—An advocate is not at liberty to decline a fee capriciously. Have you served notice on the advocates whose malpractice you suggest?] I do not say there has been any malpractice. I only say that, on the strength of this affidavit, we are unable to secure the services of any leading member of the bar. The Acting Attorney-General, on behalf of himself and his brother officers, think that they had better not appear. [BONSER, C.J.—That is his own opinion only. I see no reason whatever why the Law Officers of the Crown should not appear in this case. Assuming that it is desirable for the Attorney-General to keep himself free to give advice to the Government, you have not applied to the other Law Officer of the Crown, who is the Solicitor-General, nor to any of the Crown Counsel.] We assumed that they stood in the same category as the Attorney-General. [BONSER, C.J.—I see there are about thirty-two advocates on our roll.] That is true, but without casting any slur upon my brethren we desire to have the services of a senior member or two. [BONSER, C.J.—In this country is there any difference between seniors and juniors?] Unlike in England, where the distinction between seniors and juniors rests on the practice of taking silk, Voet rests the distinction upon age, merit, and experience. [MONCREIFF, J.—"Junior" is a man who takes junior briefs, and a "senior" is one who takes leading briefs. In the Scotch Bar there is no taking of silk.] What we want is an advocate who takes leading business. We cannot get the services of one such. [BONSER, C.J.—It seems to me you are entirely out of court, because you have not applied to the Solicitor-General or to the Crown Counsel, nor offered a retainer and fee to the other counsel you have named. I cannot understand the reason given by some of them

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that, because they have been consulted by the other side, they cannot appear for your client. If no fee was given to them at the time of consultation, it would not be a breach of etiquette to accept a fee proffered for the other side.] If I am to take your Lordship's opinion as a ruling on the etiquette of the profession, it will relieve me of a considerable difficulty.

BONSER, C.J.—

This is a mere speculative or, I may say, a sporting application. What the real object of it is I am unable to say, but 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.

The application is one, so far as I know, without a precedent in this Island. It is said that the plaintiff has engaged a certain number of advocates, whose names are mentioned, who are all respectable men in respectable practice to appear for him, and that others who are equally respectable have declined to appear for the plaintiff because they are afraid that they may in some way or other be involved in litigation. It is said that the Acting Attorney-General thought it advisable not to act for either party in view of his being a Law Officer of the Crown. I do not quite see how his being a Law Officer of the Crown is an impediment to his appearing in this case. But he is not the only Law Officer of the Crown. It may be that it is desirable that one of them should be free to take an unprejudiced view so as to be able to advice the Government, but there is another Law Officer of the Crown and it does not appear that any application was made to him or to any of the Crown Counsel. I notice, too, that there are other members of the bar of standing and position, who have not been applied to by the defendant, and under these circumstances I do not see that there is any foundation whatever for this application, even if it had been quite clear that this Court had the right to interfere. I do not say that it has no right to interfere. If a party to litigation should retain the whole roll of the advocates, it would amount to a public scandal and might occasion injustice. In that case, this Court might feel justified in interfering, but no such case has been shown to have arisen here. There are a number of competent advocates who have not been applied to, and there is no reason that I know of why these gentlemen should not take up the case.

MONCREIFF, J.—I am of the same opinion.