favouritism be done away with. Your Lordship the Chief Justice and the Honourable Attorney General, I will in due course seek your assistance to formulate such generally accepted guidelines for the appointment of silks.

Regaining the lawyer.

In our day to day work, we still continue to call each other at the Bar, "my learned friend", even when leaders of the Bar would refer to the most junior member who has just entered the profession. This salutation is not devoid of meaning. It reflects truly our position as being members of a learned and noble profession. It reflects the sanctity and the esteem in which the general public holds a member of this profession. However my learned friends, it is time that we as a profession took serious note of the erosion of the confidence of the Bar in the eyes of the General Public of this country and the serious lapses on the part of the members of the Bar. We must strive hard to maintain the hallowed traditions of the Bar. It is the responsibility of the senior members of the Bar to inculcate the junior members, with the traditions of the Bar, the ethics of the Bar and the conduct of a lawyer in general. The Bar Association undoubtedly should perform its duties in this regard towards the junior members. It is our responsibility to strive to regain the dignity and respect of its membership in the eyes of the general public for which your Association, would be deeply committed during my tenure of office, for which your cooperation is indispensable.

Junior members of the Bar

We have come a long way from the time when a total number not exceeding 20 -25 would be the aggregate number of new entrants annually to both branches of the profession. Now we have an average of 400 or more entering the profession annually. The large inflation in the number of new entrants to the profession need not cause despair. No doubt it is a matter of concern but please be assured that it is not a matter of anguish, provided proper planning is done and appropriate structures are created. We must take heart from the fact that world is changing and developing at a rapid pace, where in its multi faceted, multi dimensional fabric, the need for legal expertise in diversified forms has become very important. The need for legal expertise in spheres beyond the conventional litigation and conveyancing, keeps growing by the day. The Bar has to equip itself in such a manner that it would appropriately guide and facilitate opportunities particularly for the junior members to adopt themselves to fit in to these roles.

Are we ready to meet the challenges of globalization

Another area which is equally challenging the legal fraternity concerns innovations in Information and Communication Technology (ICT). This has great potential for our lawyers, specially the young lawyers, since today we live in an era where transactions are speedily and effectively carried out through the press of a button. Internet law has become a more prospective area of practice in developed countries. Although Sri Lanka has to go a long way to fully realize the benefits of ICT, there is already a vibrant IT sector in the city based commercial and government sectors. E commerce has become an attractive field of trade for established private sector. It is important that we, the Bar equip ourselves to be familiar and also to specialize in legal issues of ICT. Your Association has taken cognizance of the need for these developments as in the other more developed jurisdictions, and under my stewardship, I look forward to take the initiative in this quest, for which I am sure I will have your fullest support and cooperation, particularly of those eminent and senior lawyers of the Bar.

General welfare of the membership.

It is still a matter of concern that facilities in many courts, throughout our country is far from adequate. Under my stewardship together with the executive committee, your Association intends to prevail upon the authorities and to ensure the carrying out of a series of welfare projects, mainly to improve the infrastructure which would benefit both the Bar and the numerous litigants seeking relief from the temple of justice.

I am also concerned about the outstation members of the Bar. Their grievances should be looked into. The Zonal Presidents should be vested with greater responsibilities to deal with the problems faced by them, and to constantly draw the attention of this Association to such problems and to the reasonable needs of the outstation members of the Bar.

I take this opportunity to thank very sincerely, all my colleagues, and instructing Attorneys for their continued support and cooperation extended to me to-date in the profession.

In the discharge of my duties as your newly inducted President, I now look forward for the cooperation and support of each and every member of the Bench and the Bar.

News on new Committees appointed on 24.4.2004 will appear in the next issue

JUDGEMENTS TO BE CITED

1- ADMINISTRATIVE LAW-1

Ref: 1/4/2004 – Rs. 25.00

Actions based on contracts without any statutory underpinning are not subject to judicial review by way of writ of certiorari

Office Equipment Ltd. vs. Urban Development Authority

C.A. Application No. 1062/2000

Decided by K. Sripavan, J on 5.9.2003

The Court of Appeal held that the petitioner cannot succeed in this application for writs of certiorari and prohibition on the basis of a written agreement between the parties promising suitable alternative accommodation.

After considering a number of authorities K. Sripavan, J held:-

"Learned Counsel for the petitioner strenuously contended that the contractual relationship between the petitioner and the respondent did not affect the writ jurisdiction of this court to quash an arbitrary action of the respondent.

".....certiorari lies only against persons or bodes, the source of whose authority to make decisions or orders affecting the rights of subjects, is legal. The action of private individuals or bodies that are based on contract without any statutory underpinning are not subject to judicial review by way of writ of certiorari. Hence, the submission of the learned Counsel for the petitioner that the respondent acted arbitrarily and in violation of the principles of natural justice in taking the impugned decision marked x5 cannot succeed. For the reasons stated, I dismiss the petitioner's application, in all the circumstances without costs."

2- ADMINISTRATIVE LAW-2

Ref: 2/4/2004 - Rs. 40.00

The Courts are not precluded from exercising the power of judicial review when facts and circumstances warrant such interference to rectify an apparent injustice – legitimate expectation of parties to a fair hearing – when proprietary rights of a subject are infringed by compulsory acquisition compensation must be adequate, realistic and reasonable – discretion in deciding compensation must be property exercised.

Indrani Swarnalatha Marie Periis v. Acquiring Officer/Divisional Secretary, Divisional Secretary, Kolinnawa and two others

C.A. No. 364/2003

Decided by Udalagama, J on 15.10.2003

The learned Deputy Solicitor General raised a preliminary objection to this application on the basis that the petitioner had an alternative remedy in that the latter was entitled to canvass the award under the provision of section 18 of the Land Acquisition Act and as such due to the existence of an alternative remedy that the petitioner was precluded from seeking relief by way of prerogative writ.

Overruling the objection and allowing the application for writ, Udalagama, J held:-

"I am, however, unable to subscribe to this view as this court is not precluded from exercising the power of judicial review as the present application presents peculiar facts and circumstances which warrant interference by this court to rectify an apparent injustice. Besides the acquisition proceedings having commenced as far back as 1980 and the owner is denied due compensation for the last 24 years, and it is now a tenet of administrative law that no discretionary power is unreviewable.....

".....In any event there is no absolute or unfettered discretions in public law; discretions are conferred in public functionaries in trust for the public to be used for the public good and the propriety of the exercise of such discretion is to be judged by reference to the purpose of which they were so entrusted.

"Besides the petitioner also has a legitimate expectation to a fair hearing.

".....Discretion in deciding compensation must be properly exercised. *Premachandra Vs. Major Jayawickrema* and others, 1994 2 SLR p.90.

".....Natural justice is concerned also with the observance of fair procedure in the context of public decision making. Natural justice also entails the component of the right to receive reasons for a decision.

".....Natural justice also means that a party is entitled to a reasoned consideration of his case and whether or not the parties are also entitled to be told the reason for the decision. If they are withheld, once judicial review commences the decision may be condemned as arbitrary and unreasonable....

3- CIVIL PROCEDURE CODE -1

Ref: 3/04/2004 Rs. 30.00

Section 704 and 706 of the Civil Procedure Code – Defendant cannot appear without leave in a summary action on liquid claim – service of summons on Directors of the Company – Section 442 of the Companies Act - Section 39 of Judicature Act – no belated objection to jurisdiction can be permitted

JUDGEMENTS TO BE CITED

Nutrena (Private) Ltd.
Vs- Quality Food Distribution (Private) Limited

C.A. L.A. No. 29/2001
D.C.Mt.Lavinia Case No. 135/98/S

Decided by Ms. Shiranee Tilakawardena J, on 25/03/2002

Ms. Shiranee Tilakawardena, J held:-

The summons was issued on the 1st Respondent defendant Company but fiscal had reported to Court that the defendant Company had vacated the address given in the plaint (vide journal entry No. 105 dated 14.09.98). Thereafter the Registered Attorneys for the Plaintiff by a motion dated 10.11.1998 moved for summons to be served on any one of the directors of the Defendant Company in terms of section 442 of the Companies Act No. 17 of 1982.

According to this Section, a document may be served on Company by delivering in terms of form 48 on any of the directors.

It is salient to note that in their statements of objections dated 25.08.1999 and 06.09.1999, whilst both directors specifically denied their personal liability neither made an application in terms of section 704 of the Civil Procedure Code to appear and defend on behalf of the Company nor disclaimed liability of the Company. According to Section 706 the application for leave to appear and defend must be made by the defendant

The fact that the Directors of the Company have been served with summons in terms of Section 442 of the Companies Act does not give the directors the status of the company. The learned District Judge has erred in law in permitting the 2nd and 3rd Respondents to file an answer, when they have not been made parties to this action. The 2nd and 3rd Respondents in this case have sought to challenge the jurisdiction of this Court, even though no such challenge had been raised in the original Court. In these circumstances in terms of section 39 of the Judicature Act No. 2 of 1978, they are not entitled to object to the jurisdiction in this Court.

4- CIVIL PROCEDURE CODE -2

Ref: 4/4/2004 Rs. 20.00

Right to apply for leave to appeal against an order in respect of execution of decree – District Judge's failure to give reasons for his order

Manage Jinasena –v- Kuwaneshwari Chinniah

C.A. Application No, 466/2001
D.C. Hambantota Case No. 656/L

Decided by Gamini Amaratunga, J and Jagath Balapatabendi, J on 14.1.2003.

This revision application had been filed by the Plaintiff Judgment Creditor Petitioner against the order made by the learned District Judge of Hambantota refusing his application, made under section 763 of the Civil Procedure Code for the execution of decree pending appeal.

Jagath Balapatabendi, J (with Gamini Amaratunga, J agreeing) held:-

".....a party who is dissatisfied with an order made in respect of an application for execution of decree pending appeal has a right to make an application for leave to appeal against such order. In deciding whether leave to appeal should be granted this Court has to consider the reasons on which the learned judge has based his order.

".....The learned District Judge's failure to give reasons for his order refusing the execution of the decree pending appeal alone is sufficient for us to set aside his order dated 17.10.2000. But there is another reason. The 1st judgment debtor respondent was dead when the order was made. Perhaps the learned Judge was not aware of this fact when he made his order. But this again is a factor which prompts us to set aside the impugned order....

".....This application has been made mainly on the ground that the Court has failed to give reasons for its decision. In this instance, I invoke the maxim *'Actus curiae reminem gravabit'* (An act of Court shall prejudice no man). This maxim which is founded upon justice and good sense prompts me to say that the parties shall bear their own costs in this application as well as in the proceedings in respect of the application for the execution of the decree pending appeal...."

5- EVIDENCE

Ref:5/4/2004 – Rs. 40.00

Documents marked at the trial without objection - is a waiver of objection – no belated objection permissible

Cinemas Limited –v- The Building Materials Corporation

C/A No. 226/94(F)
D.C. Colombo 3807/ZL

Decided by Udalagama, J and Nanayakkara, J on 20.01.2004

The Plaintiff in D.C. Colombo Case No. 3807/ZL instituted action against the defendant seeking inter alia a declaration of title to the premises in suit.

The trial in the lower Court proceeded on 13 issues and the

JUDGEMENTS TO BE CITED

learned Additional District Judge subsequent to the hearing of evidence, by his impugned judgment dated 26.01.94 dismissed the plaintiff's action with costs. Being aggrieved therewith, the plaintiff-appellant appealed therefrom.

In allowing the appeal, **Udalagama,** J (P/CA) with **Nanayakkara J** agreeing held:

"Perusing the proceedings in the trial court it is evident and clear that the plaintiff's Counsel in the trial court closed his case marking in evidence P1 to P11 significantly without any objection from counsel who did appear for the defendant-Corporation. I am of the view that those documents establish the plaintiff's averments as appearing in the plaint upon those documents tendered and marked at the interim injunction inquiry that preceded the trial. Accordingly I would hold that documents produced and marked in one part of the same proceedings becomes part of the record. In any event as stated no objection was forthcoming to the marking of the said documents at the close of the plaintiff's case and authorities on the subject hold that such documents so marked are for all purposes evidence.

"In *Sri Lanka Ports Authority vs. Jungoline Boat East,* 1981 1 SLR 18(SC) Chief Justice Samarakoon held "if no objection is taken when at the close of the case documents are read in evidence they are evidence for all purposes of the law. This is the cursus curiae of the original civil courts." In one another decision in *Balapitiya Gunananda Thero vs. Thalalle Mettananda Thero,* G.P.S. de Silva, J., following the earlier authority and disagreeing with the basis of the argument that provisions of section 457 of the Administrations of Justice Law (now repealed) held inter alia that in any event objecting to evidence so admitted is belated. This court too in *Faiz vs. Sitti* a case reported in the BASL news of July 2001 followed the aforesaid dicta and held that the failure to object at the close of the case when documents are tendered in evidence, the failure to so object was in fact a waiver of the right to object.

"In the light of the above decision, I am inclined to the view that the learned Additional District Judge was in grave error when he rejected the documents tendered in evidence in respect of the plaintiff's title and the defendant in fact on documents P1 to P5, on a balance of probability has established title to the balance portion referred to above the plaintiff was entitled to consequent to the transfer on deed No. 850 also referred to above which extent is depicted as lot A2A in plan No. 3065 aforesaid.

6- INJUNCTION

Ref: 6/4/20004 *Rs. 30.00*

In deciding on injunctive relief it has to be considered whether a prima facie case has been established or not – the plaintiff must reveal that legal right of his is being infringed as opposed to rights which he claims – balance of convenience also has to be considered.

L.S.D. Pieris and another –v- Colombo Municipal Council

Decided by N. Gamini Amaratunga, J and Gamini Abeyratne, J on 2.09.2003

This leave to appeal application was preferred against an order of refusal to issue an Interim Injunction by the learned Additional District Judge of Colombo.

Gamini Abeyratne, J (with N. Gamini Amaratunga, J agreeing) held:-

".....It appears to this Court that the learned trial judge has not lost sight of the principles which should be the criterion for guidance in a matter of his nature when the process of evaluation is indulged in as to whether Injunctive relief should be granted or not. Accordingly, it has been considered whether a prima facie case has been established or not. It is also axiomatic that the plaintiff-petitioner must reveal that legal right of his is being infringed as opposed to rights which he claims. It is redundant in the opinion of this Court to engage in an academic discourse or detailed analysis of the facts and the law at this juncture. Suffice it to state that it is manifestly clear that it would be justifiable to conclude that in the light of the documentary material which substantiates the submissions made by the defendant-respondent that this roadway is in fact a public roadway.....

".....The learned Trial Judge has also addressed his mind to the Balance of Convenience as set out in the case *Yakkaduwa Sri Pragnaratne Thero vs. Minister of Education* 76 NLR 506 as tow ether greater harm will be suffered by the defendant-respondent if injunctive relief is granted by Court than the harm the plaintiff-petitioner would suffer if it was refused. Equitable considerations also prevailing the learned Trial Judge has in the ultimate analysis concluded that this is a fit case for refusal of Injunctive relief.

"A Fortiorari, this Court is inclined to the view that there is no other alternative other than affirming the order of the learned Additional District Judge of Colombo and refusing the application of the plaintiff-petitioner."

7- LAND DEVELOPOMENT ORDINANCE

Ref: 7/4/2004 *Rs. 30.00*

Permit under Land Development Ordinance not transferable without G.A.'s consent – but

JUDGEMENTS TO BE CITED

Permit holder can sue trespasser for ejectment – estoppel cannot be invoked to negative a statute.

David Mary –v- Elakakuttu Pechchimuthu

C.A. No. 508/93(F)
D.C.Trincomalee Case No. 1539/L

Decided by Udalagama, J, Dissanayake, J and Somawansa, J on 23.10.2003

The basis of the plaintiff's claim for a declaration of title was a permit issued under the provisions of the Land Development Ordinance No. 16 of 1969 as amended

Udalagama , J (with Dissanayake, J and Somawansa, J agreeing) held:

".....The defendant-respondent appears to have obviously dispensed with a search of the Land Registry also to his own peril. In any event the title that could be lawfully conveyed on deed 617 is the title the plaintiff-appellant in this instant case is entitled to and nothing more. The plaintiff's title is derived form the permit referred to above and is that of a licensee and as unambiguously provided for in section 46 of the Land Development Ordinance as stated above is not transferable.

".....It is also manifest as held earlier that the Land development Ordinance specifically vide section 46(1) precluded the holder of a land on a permit from executing in any way an instrument alienating in whatever manner the land without the written consent of the Government Agent.

"It is also settled law that a permit holder is entitled to sue a trespasser – *Perera v. Attorney-General* 55 NLRT 155.

"I am of the view that deed No. 617 referred to above is void ab initio and of no force in law.

"Reference has also been made to the concept of estoppel as to the conduct of the plaintiff and the purported transfer of the land, the subject matter of this suit. It is also settled law that estoppel cannot be invoked to negative the operation of the Statute – *Beasley v. Hallwood* – 2AER 27

NEW DEVELOPMENTS IN LAW

"Excepted Premises" under the Rent Act No. 07 of 1972

REGULATIONS made by the Minister of Housing and Plantation Infrastructure under Section 43 read with subsection (5) of Section 2 of the Rent Act, No.7 of 1972 published in the Gazette Extraordinary No.1305/17 of the 9 September 2003 widen the scope of "excepted premises". The same is reproduced as follows:-

Regulation

1. The schedule in the Rent Act, No.7 of 1972 is hereby amended by the addition of the following new items immediately after Item 4 thereof-

"(5) Any premises of which the landlord is a Co-operative Society registered under the Co-operative Societies Law No.5 of 1972 or any other law, the State, a Public Corporation, a Public Authority or a company registered under the Companies Act, No.17 of 1982, shall be excepted premises for the purpose of this Act.

(6) Any premises of which the tenant is a Local Authority, a Co-operative Society registered under the Co-operative Soc eties Law No.5 of 1972 or any other law, the State, a Public Corporation, a Public Authority or a company registered under the Companies Act, No.17 of 1982, shall be excepted the purpose of this Act."

2. The Notification published in the Gazette Extraordinary No.1241/16 dated 20th June, 2002 is hereby rescinded.

ARTICLES FOR NEXT ISSUE OF LAW JOURNAL

BAR ASSOCIATION
LAW JOURNAL –[2004]
Volume X – Part II

Preparations are being made to publish the next issue of the Bar Association Law Journal.

Articles are invited for publication in that Journal.

The writers of the Articles are requested to have in mind the interests of the readers who are largely practitioners of law in various Courts. Therefore, we seek articles of interest to practitioners of law in Sri Lanka.

The articles should not exceed six (6) pages of "A-4" size.

The text of the articles can be e-mailed to neela@sri.lanka.net.

CLOSING DATE: 15th June 2004

BASL LAWYERS' DIRECTORY

An updated and revised Edition is to be published soon.

The members of the BASL are requested to send in their entries to the BASL before 30th May 2004 in the following format:-

Surname: .....
Other names/initials:.....
Address(O).....
.....
Address(R) .....
.....
Telephone: (O) .....
Telephone: (R) .....
Telefax: .....
E-mail: .....
Branch: .....
BASL Membership No: .....
Type of membership: Life /Ordinary (If you are in arrears of subscriptions please pay the same before sending your entry).

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