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Edited by
Isaac Tambyah, Advocate,

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

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Acceptance of Gifts.

A noteworthy instance of judicial disagreement is afforded by the unsettled state of the law as to acceptance of gifts. The doubt and uncertainty besetting the law on this subject are matters of more than mere academic lament. It is a positive hardship. It has worked downright injustice to the fatherless and the widow, depriving the principles of the law of the very semblance of equity and fair dealing. The man in the street, in his bewilderment, will probably be justified in saying harsher and ruder things of this branch of the law. Let us look at the Common law. It is laid down[2] :

Donations are not valid unless they are accepted by the donee and thus receive his assent. For benefits or gifts are not acquired by an unwilling person,[3] so that without acceptance donations are ineffectual for lack of *duorum consensus* which donations in common with other kinds of agreements and alienations require.[4] And although a donation may certainly be made not only to one who is present, but also to one who is absent, by means of a letter.....or by means of a messenger, and although a donation may thus be effected by means of a third person,[5] yet it is not valid before acceptance.[6] This rests on the principle enunciated by Pomponius that a mere entry in an account does not make a man a debtor, and similarly the fact of our intending to make a donation to a person, even though we enter it in our accounts as owing to him, does not constitute a donation.

2. *Voet* 39. 5. 11 ; Grotius 3. 2. 12.
3. *Digest* 39. 5. 19. 2.
4. *Digest* 39. 5. 10 ; 44. 7. 55 ; 42. 1. 18 ; 38. 2. 8 ; See *Wellappu* v *Mudalihami* [1903] 6 N. L. R. 233.
5. *Digest* 39. 5. 4. 10. 27. 32, *Codex* 8. 54. 5. 6.
6. *Digest* 39. 5. 19 ; 11. 2. 38 ; Sande *Decisiones* 5. 1. 1.

A seeming exception is in favour of dotal pacts.[8] Non-acceptance affords the donor an opportunity to revoke. This is not unjust since, as Voet says,[9] it is only by acceptance that the ownership of the thing gifted or the right to demand it would have to be acquired by him, for otherwise a donation may be acquired by a person against his own will.[10]

Under the Roman-Dutch law [11] acceptance takes place in the following ways :

(1). By a letter,

(2). By a messenger fulfilling the functions of a letter,

(3). By a slave acting for his master even when the donee is unable by lack of judgment to accept, *e. g.* an infant,

(4). By guardians or curators,

(5) By an agent or notary or functionary under a special mandate,[11 (a)]

(6). By ratification of an unmandated notary's or agent's acceptance.

Thus, acceptance is a purely formal act to express willingness to benefit by the donation. It would seem to satisfy the law sufficiently if the donee's willingness be somehow reasonably shewn. Perhaps, the impression is right that suggests itself from the above consideration that *acceptance is solely in the interests of the donee*, that it is a matter in respect of which the donor and the donee have to be satisfied, and that the rest of the world has no manner of concern in it. Therefore it is that *acceptance is presumed* in some cases, for instance in the case of a dotal pact, the reason given by Voet [12] being that when the marriage with a view to which the donation is made has taken place acceptance is from the very circumstance considered to have intervened.

Similarly, when property gifted to minors was found in the possession of the parents, such possession was held to be the minor's possession, and if the duty and interest of the parent clashed, the presumption was held to arise in favour of *duty* as against interest.[13] The converse of this is illustrated by *Wellappa* v *Mudalihamy*.[14] It was a case of possession by the donor of property gifted to a minor followed by revocation. The possession was not on be-

7. *Digest* 39. 5. 26.
8. *Voet* 39. 5. 10. Dotal pacts are not the same as dowry deeds.
9. *Voet* 39. 5. 13,
10. *Voet* 39. 5. 13. citing *Dig* : 33. 5. 1. 19. 2.
11. *Voet* 39. 5. 12, 13.
11.(a) *Grotius* 3. 2. 12 ; *Tillekeratne* v *Tennekoon*, Ram. Rep. 1843-55 p. 155.
12. *Voet* 39. 5. 11, *ad. fin.*
13. *Govt Agent S. P.* v *Carolis* [1896] 2. N. L. R. 72.
14. [1903] 6. N. L. R. 233.

half of the minor. Again, acceptance is presumed where the deed of gift is delivered.[15] It has recently been presumed [16] from the conduct of the donee and from other circumstances which shewed that the donee did not refuse the gift that there was an acceptance though by a stranger. Dias, J., was right when he thought [17] that acceptance was not a link of title but a mere matter of evidentiary detail.

We have seen that acceptance may be by a messenger, slave, authorised agent, notary or public functionary, a guardian or curator, and it may even be by a stranger. [18] It has been held that a major brother may accept on behalf of a minor donee.[18] So may also a grandmother accept.[19] A minor himself might, if he has attained years of discretion, accept without any interposition especially where the father is donor.[20]

It would be noticed from the foregoing statements of the law that the rule as to acceptance is allowed a very generous latitude of action, that the letter of the Roman-Dutch law as to who may accept for a minor has been departed from by the Supreme Court being liberal enough to let a brother, a grandmother, a stranger to accept—and these are not natural guardians—and that the law looks for acceptance, or would presume it, solely for satisfying itself as to the receiver's willingness, and (where a donee is a minor) it is the *donee's advantage* that is paramount in consideration. Our task in respect of case-law is greatly lightened by the above survey of principles which makes us approach with an easy conscience the duty of criticising judicial inconsistencies. Let us also remember one other point in connection with principles. It seems to be one of radical importance. *The Roman-dutch law nowhere declares that a donation to a minor is void unless accepted by a natural guardian*, but all that it does state is that guardians may accept. Voet says *non etiam dubium quin tutores pro infantibus recte acceptent.*[22] Acceptance of a minor's gift is not restricted to his natural guardian, nor is it laid down in Voet that, where there is no natural guardian,[24] a guardian has to be appointed by Court.[25] Assuming that the Roman-Dutch law is that

15. *Silva* v *Ondaatjie* 1. S. C. R. 19. Production of the deed is sufficient proof of acceptance, Ram. 1843—55, p. 155.
16. *Tissera* v *Tissera* [1908] 2. S. C. D. 36.
17. In *Tissera* V *Tissera* too, acceptance was treated as a matter of evidence only.
18. *Lewishamy* v *Silva* [1906] 3. Bal. 43.
19. *Francisco* v *Costa* [1889] 8. S. C. C 189.
20. *V. D. Kecsel* 485; *Babaihamy* v *Martinahamy* [1908] 11 N. L. R. [232.
22. *Voet* 39. 5. 12.
23. *Voet* 39. 5. 12.
24. If *tutor* means only natural guardian.
25. Argument in *Muthupillai* v *Velupillai* [1909]. 1. Curr. L. R. 74.

none but a natural guardian may validly accept a gift on behalf of a minor, we have to consider two sets of cases. *Silva* v *Silva*[26] is typical of those which lay down that acceptance by anyone other than a guardian, natural or legal, is bad in law. This was followed in *Muttupilai* v *Velupilai*.[27] In these cases the acceptance was by an uncle. The commonsense and reasonableness of the law were severely tested by the facts in the second case. A Tamil girl of six months was abandoned by its mother after her father's death. The child was taken care of by the mother's sister with whom it lived since its desertion by the mother. The mother was persuaded to donate some lands to the child and she did so by a deed of gift accepted on the face of it by the mother's sister's husband, and the lands were possessed by that man for the girl as the girl herself could not naturally exercise any act of possession personally. The girl was fatherless and practically motherless, her aunt and aunt's husband being mother and father to her from her sixth month to tenth year. Under the circumstances who could accept the gift more naturally and reasonably than the uncle? Wendt, J., held the acceptance bad on two grounds—the acceptance was not by a legal or natural guardian, the possession by the uncle was unauthorised possession.

Minors are favoured in law, and the Roman-Dutch law as to acceptance of gifts for minors is very wide,[28] but, even if it were not wider in its scope, the words of Clarence, J., are most apposite when the law would not favour a minor :

> The commonsense of the English law knows little of the casuistical subtleties which are to be found in the Roman-Dutch authorities, and though the Roman-Dutch law is still common law here, in my opinion, there is no law in force which prevents this point (acceptance by grandmother, followed by possession) from being decided upon what I think a plain commonsense principle, whether we view the matter as one of Roman-Dutch acceptance or of delivery in point of conveyancing or of the creation of a trust. Since the parents, when they executed this conveyance, allowed the grandmother to accept on behalf of the infant, and to take possession of the property, I can see nothing wanting to clothe the gift with reality [29].

The full-bench case of *Kadirai Ammal* v. *Nathan Kangany* [30] has settled the law as to tranfers good under the Roman-Dutch Law but bad under Ord. No. 7 of 1840. The question of acceptance of gifts was touched upon but not dealt with. It is hoped that the law as to acceptance would receive speedy, authoritative exposition.

26. [1908.] 3. A. C.R. 179 following *Avichari Chetty* [1903]3 A.C. R. 4.
27. [1909] 1 Curr. L. R. 73.
28. Dias. J, in *Francisca* v *Costa* [1889] 8. S. C. C. 189.
29. *Franciso* v. *Costa* [1889] 8 S. C. C. 189, per Clarence, J.
30. [1910] 2 Curr. L. R. 76.

Obiter.

(Selected by G. G.)

Fiscal's Sales.

More harm than possible good will be done if the public learn to distrust these sales as liable to be set aside on some technical objection or dissatisfaction with the price which the property realizes. Bidders will refrain from bidding and property will necessarily be sacrificed.

Per Burnside, C. J., in *Wettesinghe* vs. *Jayan* [1891] 2 C. L. R. 33.

False Issues.

The practice, which is a growing one, of giving judgments one side or the other on issues which the pleadings do not raise, and which neither the parties themselves nor their legal advisers ever contemplated or anticipated, however it has been fostered, has no doubt given us much legal dicta, dependent on mere speculations involving more or less bad or useless law The result has been chaos and confusion.

Per Burnside C. J. in *Silva* vs. *Ossen Saibo* [1892] 2 C. L. R. 81.

Appeals.

The apparent object of the law is to guard against frivolous or vexatious or insufficient appeals.

Per Burnside C. J. *Assaun* vs. *Billimoria* [1892] 2. C. L. R. 87.

Safeguarding the Revenue.

I think it would be very untortunate if in a Colony like this we encouraged or permitted that looseness in the application of the stamps laws which has become almost a part of the practice and procedure of our minor Courts, and I make bold to say that it is a matter of extreme importance, if the Legislature says that a blue stamp shall be used on a particular instrument, that we should not adjudge that a green one will do as well. Nor do I see that it is ridiculous that a distinction should exist in the colour or shape of stamps indicating particular instruments. On the contrary it appears to me to be orderly and sensible and calculated to prevent frauds or the revenue and in the stamping of instruments. But whatever our own opinion may be, it is the Legislature which has prescribed it and that should be sufficient for us.

Per Burnside, C. J., in *Watson* vs. *Allagan Kangany* [1892] 2 C. L. R. 91.

Unsettled Law.

I have once before had with regret to confess my ignorance of the exact state of the law in Ceylon in regard to executors and administrators, and I repeat what I said before, that for the sake of the community I am ready to subscribe to any proposition of law on this important matter which is clear and precise and cannot be possibly mistaken, so long of course as I do not merit it to be fundamentally vicious as law.

Per Withers, J., in *Nonohamy* vs. *Perera* [1893] 2 C. L. R. 154.

The Supreme Court.

I desire to conserve, not to abridge, the jurisdiction of this Court.

Per Lawrie, A. C. J., in *Pieris* vs. *Silva* [1893] 3 C.L.R. 23.

Private Defence.

We ought not to impose restrictions on the common law right of private defence of a man's property, except where the Legislature has plainly created such restrictions.

Per Clarence, J., in *Canthapillai Odyiar* vs. *Murugesu* [1891] 1 C. L. R. 91.

It is the instinct of self-protection which the law places paramount to the protection of the person of the wrong-doer, and when that instinct is aroused by a well-founded and reasonable apprehension of danger, the law will not be critical to condemn in the interests of the malefactor the fitness of the weapon which may be available at the moment, and which, under the promptings of the first law of nature, is made use of against him.

Per Burnside, C. J., in *The Queen* vs. *Perera* [1889] 9 S. C. C. 2.

Village Talk.

A procedure to be administered with much caution, and especially so in a country where criminal procedure is largely made use of for purposes of mere oppression and annoyance, and in which testimony is proverbially untrustworthy in an exhorbitant degree; and I am disposed to regard with jealousy and disfavour the proposal to base any judgment of a criminal character upon mere statements of witnesses as to village rumours and village talk-settlements cheap and easy to make, and on which it would be difficult to maintain a prosecution for perjury.

Per Clarence, J., in *Jusoop* v . *Poddappu*[189] 9 S.C.C. 84.

Debts.

We are not to presume that a man is otherwise than desirous to pay his debts.

Per Clarence, J., in *Multevrasatta* vs. *Weerakoon* [1890] 9 S. C. C. 88.

The Appellate Court.

I do not think this appeal court should assume the functions of a public prosecutor in order to secure a conviction on a criminal charge.

Per Burnside, C. J., in *Power* vs. *Rengasami* [1891] 9 S. C. C. 153.

Duty of the Prosecution.

It is always the business of the prosecution to establish the necessary facts without reasonable doubt against the person who is accused of the criminal offence, and it is especially so in cases like the present where the committing of the offence is designed and brought about by the police officers themselves in order that they may obtain a conviction and possibly a share in the fine.

Per Phear, C. J., in *Uman Sarpo* vs. *Seodoris Fernando* [1879] 2 S C. C. 58.

The Police and Witnesses.

The arrest and detention in this fashion of persons standing in the situation of witnesses in a criminal case amounts to assault and false imprisonment of the worst and most mischievous form and there can be no doubt that in the event of an offence of this sort coming to be tried before this Court and a conviction being arrived at, exemplary punishment will be inflicted, whatever may be the rank of the offender.

Per Phear, C. J., in *Gooneratna* vs. *Abeyratna* [1879] 2 S. C. C. 90.

False Charges.

In a country like this, false accusations are unhappily so common, and parties having at most some cause for merely civil complaint are so prone to distort the circumstances into the semblance of material for criminal prosecution.

Per Clarence, J., *Fernando* vs. *Boake* [1883] 5 S. C C. 171.

The Police.

It would be intolerable if a member of the police force or anybody else were permitted to intrude himself

between private individuals and the public in offences which especially affect the individual and initiate and carry on a prosecution in his own name, even perhaps against the wish or interest of the party especially injured.

Per Burnside, C. J., in *Heyzer* v *Plorishamy* [1883] 5 S. C. C. 203.

Petition Drawers.

If this were permitted [the name of a person calling himself a petition drawer appearing on the record as acting for the suitor] these unlicensed persons over whom the court has no control would be virtually assuming the place of the licensed proctors, who are officers of the court and subject to its control.....I wish it to be understood that the practice, which the commissioner says is not objectionable, is considered not only most objectionable, but it is as well highly irregular and unauthorized, and will not in future be tolerated by this court.

Per Burnside, C. J., *Appuhamy* vs. *Pinhami* [1883] 5 S. C. C. 197. 198.

Piecemeal Judgments.

I believe it is not uncommon in District Courts for such piece-meal judgments to be entered up, but the practice is not one which commends itself to my mind as a wholesome one. In my experience here there is considerable disposition displayed on the part of litigants to delay trial of their main issues. This practice of allowing judgment to be entered up at an intermeditate stage for a part of a plaintiff's claim fosters and encourages such dilatoriness, besides leading to all sorts of interlocutory proceedings, appeals included, which materially hamper and delay the progress of actions.

Per Clarence, J., in *Ameresekere* vs. *De Alwis* [1882] 5 S. C. C. 101.

Ambiguous verdicts.

All criminal trials must end in a verdict of guilty or not guilty, and it is irregular to avoid a distinct finding by a sentence which probably means that the accused is not guilty of the offence with which he has been charged, but that it is plain that he has committed another offence, or that he is a bad character, and therefore that it would be well to bind him over to keep the peace, or in default to keep him in jail for a month.

Per Lawrie, J., in *Allis* vs. *Eraneris* [1881] 6 S.C.C. 73.

Insolvency Proceedings.

The object of insolvency proceedings is to enable honest but unfortunate debtors to commence life again, freed from the incubus of debt incurred by reason of those unavoidable misfortunes or casualities to which all human efforts are subject. For such there will ever be a generous sympathy but we must not in our sympathy with the debtor forget the creditor.

Per Burnside, C. J., in *In Re Spooner* [1884] 6 S.C.C. 131.

Proctors and Instructions.

The proctor is expected to take instructions before he files his pleadings, and according to the admission of these gentlemen who appeared for the intervenients, they seem to have filed the petitions of intervention without knowing any thing about their clients' case. This is a very objectionable practice, and the Supreme Court cannot pass it over without expressing its strong disapprobation of it.

Per Clarence, J., in *Silva* vs. *Saymeris* [1878], 1 S.C.C. 43.

Proctors unauthorized.

I pause here for myself to say I repudiate any suggestion or authority which would give countenance to the position that one proctor may sign another proctor's name for him, and that his right to do so should rest on the bare assertion one way or the other of the parties themselves. I cannot conceive anything more calculated to prejudice and endanger the interests of suitors or to jeopardize the fair name of honourable members of the profession and subject it to the acts of ohers less scrupulous.

Per Burnside, C. J., in *Assauw* vs. *Billimoria* [1892] 2 C. L. R. 87.

"Substantial Justice".

Great evil results from admitting questions of title to land being disposed of on fictitious causes of action or by some haphazard procedure, on the specious ground that it leads to substantial justice. If litigants appeal to the law, their disputes should be settled by recognized judges, or what is the use of trained judges? What is called substantial justice on one side too often inflicts most substantial injustice on the other.

Per Burnside, C. J., in *Lenohamy* vs. *Samuel* [1892] 2 C. L. R. 103.

Corporal Punishment.

Corporal punishment by lashing is in an eminent degree a violent and degrading, not to say barbarous, remedy; and the reckless use of it reflects little less dishonour on the tribunal which inflicts it, than on the unfortunate sufferers. It ought in reason to be limited to the cases of hardened offenders (i. e., who have shewn themselves impervious to any reforming or prevential influence proceeding from other forms of punishment), and to crimes of violence, and to those which are considered by native society to be of a flagitious and disgraceful character.

Per Phear, C. J., in *Sawiya* vs. *Jayan* [1879] 2 S. C. C. 14.

Delay.

Nothing is so prejudicial to the administration of justice, and harassing and oppressive to suitors, as procrastination and delay in conduct of judicial proceedings, and those who occasion them incur a grave responsibility.

Per Burnside, C. J., in *The Queen* vs. *Bettoris* [1884] 6 S. C. C. 68.

Directions of the Supreme Court.

There is the judgment of a superior appellate tribunal, which the tribunal subject to such jurisdiction is bound to, and legally must, obey, and the judge, however transcendental his attainments may be, who loyally recognises this duty, runs no risk of sacrificing his judicial status, but sets an example of dutiful obedience to constituted authority, which better becomes his high position than yielding only when it must be hazardous any longer to disobey.

Per Burnside, C. J., in *The Queen* vs. *Bettoris* [1884] 6 S. C. C. 67.

"The Flogging of Vagrants*"

This is a "Humanitarian League" publication. It is a strong protest against the lashing of vagrants. Vagrants are those persons who succeed in earning any of the

* By Joseph Collinson, Hon. Sec. of the Criminal Law and Prison Reform Committee: Published by the Humanitarian League, 53, Chancery Lane, London.

three statutory diplomas, *idle and disorderly*, *rogue and vagabond*, *incorrigible rogue*. The law conferring these unsavoury titles on unfortunate men is of the year 1824. In Ceylon it is in force as ordinance No. 4 of 1841. It is the Georgian statute with slight local modifications. An "incorrigible rogue" is liable to be lashed both under the English Act and the Ceylon Ordinance. Says Mr. Collinson:

> The worst parts of the statute are exclusively English, flogging being illegal in the other portions of the United Kingdom. The Scotch and Irish have never adopted it, and its infliction would be contrary to their laws. With regard to Scotland, the Lord Advocate stated in the House of Commons in 1902, in resisting the attempt of an English Member of Parliament to assimilate the Scotch law with ours, when the Scottish Vagrancy Bill was passing through Committee, that the *Scotch* people would not tolerate a punishment of this degrading character in their country. The susceptibilities of all classes of the community, he observed, would be severely offended if such a retrograde penalty were reimposed. No inconvenience appears to have been caused in these countries from the want of power to flog vagrants, and after nearly ninety years of flogging under our medieval Vagrant Act the question may well be asked: Has there been any material reduction in English vagrancy as compared with Scotch and Irish?

Mr. Collinson rightly finds fault with the terms, *vagrant*, and *rogue*. A pedlar, says he, is only a vagrant in the same sense that a commercial traveller or an inspector of schools is a vagrant. The word *rogue*, again, perpetuates an obsolete meaning, since thieves are not dealt with as vagrants.

He quotes the *Catholic Times* of Jan. 24, 1908, as to lashing "vagrants": "It is shameful that, in the twentieth century, despite all our progress in humanitarian sentiment, sleeping out should be regarded as a high crime against the State, deserving of the lash."

In Ceylon under the Vagrants' Ord. No. 4 of 1841 we are not aware of *a single instance of lashing* during the last twenty-five years, and it may be safely stated, to the credit of the people of Ceylon, that prosecutions of *incorrigible rogues* have been almost unknown in recent times.

Lashing, as a punishment, is, however, in force in Ceylon in the case of persons convicted of grave offences such as rape, robbery, &c. as provided for by Ord. No. 16 of 1889. The Court of Appeal has always, in considering the question of lashes, limited the propriety of that form of punishment to offences committed in a brutal or cruel manner (Tambyah's *Penal Code* i. 65).

No Appearance : Appeal Dismissed.

The Civil Procedure Code provides (Sec. 769) that the Supreme Court may, for sufficient cause shewn, re-instate an appeal once dismissed for want of appearance. Under the rules now in force, however, reference to the section is almost useless. Counsel must be personally present when the case is called or his appearance must have been entered in the Registrar's minutes sheet. It would seem that the latter step is as good as personal appearance, at least, to the extent of saving a case from *instant* dismissal. We give below an instance of the rules and an exception:

325 D. C. Appeal
April 26, 1910.

This was eleventh and last in the list. It was called at 11· 12, out of its turn and time, and dismissed for want of appearance. After the dismissal of this case, the last in the list, earlier cases were taken up and argued, and by the close of the day some of such earlier cases had not even been reached.

It was a senior's brief held by a junior. Counsel was not present nor appearance entered with the Registrar.

Relisting refused.

294 D. C. Appeal
May 4, 1910.

This was fourth in the list and called in the ordinary course, the earlier cases having been disposed of, save two which were standing over. It was a senior's brief held by a junior. Counsel was not present nor appearance entered with the Registrar.

Relisting refused.

Later, the senior applied and *the case was relisted* on May 6.

Payment of Rent

in Advance to Lessor, who Sells the Leased Property*.

When a lessee has paid rent in advance to the owner, who sells the leased property within the period for which payment has been made, may the lessee be obliged to pay rent over again to

* S. A. L. Journal xxvii. 17.

the purchaser from the time of the sale of which he has notice, if the owner appropriates the money paid?

ANSWERED AFFIRMATIVELY :—Voet, 19, 2, 19 ; cited *Van Wyk's Trustee* v. *Van Wyk* (13 S. C. 503).

ANSWERED NEGATIVELY :—Schörer, *ad Grotium*, 3, 19, 16 : (*Arg.*) *Botha's Executor* v. *Du Plooy* (14 S. C. 420).

Voet answers the question put above in the affirmative on the authority of Barbosa and of Wesel, who also cites Barbosa. As, however, Barbosa gives as the reason for the proposition advanced by himself that the lessee might have safeguarded himself by demanding security from the lessor for repayment, it would seem that he refers to the case where a lessee pays to the lessor whilst aware that the property was to be or has been sold. In any other case the proposition does not seem justifiable. In the Dutch *Consultations* (1, n. 287) a case is mentioned where a person obtained a lease of certain premises from another for a certain period, the consideration for the lease being a sum of money due by the lessor to the lessee. When the lessor sold the property it was held that the purchaser could not demand payment of rent from the lessee. This opinion went upon the ground that in this matter the seller and purchaser stood in the position of cedent and cessionary, and that the lessee's defences with regard to payment of rent against the sellers, as if he were cedent, were also available against the purchaser, as if he were cessionary. There can be but little doubt that this is the correct view. To show this more clearly it will be necessary to investigate what are the relations to each other in law of the seller, the purchaser and the lessee in matters of this nature.

In Roman law when a leased property was sold the agreement of lease remained unaffected and in full force, but as no privity existed between the purchaser and the lessee, the purchaser might, if he chose to do so, eject the lessee. In such a case the lessee would have an action for damages against the lessor on the ground of this breach of the agreement of lease. There was no doubt an element of inequity, and one, moreover, which, especially in the case of agricultural lands, appears to be against public policy, in the strict application of these principles of law. The rules of Roman-Dutch law, with regard to these matters were the same as those of the Roman law, with this modification, however, that the purchaser was not entitled to eject the lessee so long as he was able and willing to pay to the purchaser the rent as it fell due (*Botha's Executor* v. *Du Plooy*). The Dutch rule was expressed by the maxim *Huur yaat voor koop*. In Roman law, again, the

lessor might enter into an agreement with the purchaser that the latter was not to eject the lessee: but by virtue of the rule that no one could enter into a stipulation with another on behalf of a third person in such a way as to establish privity between the latter two persons, if the purchaser did eject the lessee notwithstanding such agreement, only the lessor would have had an action against the purchaser for this breach of their agreement. In Roman-Dutch law, however, the principle has been recognised that one person may effectively stipulate on behalf of a person when such third person adopts the stipulation, with the consequence that the third person will acquire an action for breach of performance against the person who made the stipulation in his favour. Perhaps then the position of a lessee in the case of a voluntary sale of leased property may at the present day be juridically construed as if every agreement for such a sale tacitly contained a clause that the purchaser shall not eject the lessee, and that he shall have a power from the seller to collect the rents *in rem suam*. Such a restraint upon the purchaser existed in Roman law with regard to leased lands belonging to the Fiscus when sold; in this case and to this extent the principle that a lease prevails over a sale also there applied (Voet, 19, 2, 19). In whatever way the lessee's rights are established, he, and only he, may waive them. Moreover, it is certain that in the case of a voluntary sale by the owner his contractual relation with the lessor remains unimpaired notwithstanding the sale of the leased property. This relation seems analogous to the case put by Voet (24, 3, 22 and 33, 4, 5), where according to Roman law, if a husband has let for a term of years dotal property whilst he is the owner, but which subsequently reverted to the wife after a divorce, he nevertheless remained liable as lessor to the lessee. A lessee then, we may take it, is obliged to pay rents to the purchaser after a voluntary sale only when he has notice of the sale, as in the case where rents have been ceded to a cessionary of whom the lessee has notice.

In connection with this matter reference may also be made to some of the facts of the case in *Botha's Executor* v. *Du Plooy*. At a sale in execution of certain leased property the person to whom the right to the rents had been ceded by the lessor as collateral security for a debt of £150 due to him by the lessor, lodged a protest and the property was thereupon put up to auction and sold subject to the lease. Subsequently the lessor paid the amount of the debt to the cessionary, who ceded back to the lessor the rights originally ceded to himself. In an action instituted by the lessor against the lessee for payment of

rents, the Chief Justice remarked: "It is true that the cessionary protested against the sale unless his rights were preserved, and it may well be that after such protest he would have been entitled to claim the rent until his debt was satisfied." He further held that inasmuch as the purchaser had bought upon notice only that the cession had been made as collateral security for a debt (in other words, that he would have no claim to the rents only so long as the debt remained unpaid), as soon as the debt was paid he became entitled to the rents. This supports the view that a purchaser of leased property does not become entitled to the rents immediately and simply from the fact that he has acquired the property. The position taken up by Voet thus does not seem to be a defensible one.

Sale in Execution of Leased Property.*

Does the principle that "hire prevails over a sale" apply to sales in execution?

ANSWERED AFFIRMATIVELY:—Voet, 19, 2, 17; Matthaeus *de Auctionibus*, 1, 13, 7, and 1, 7, 20.

ANSWERED NEGATIVELY:—*Wiber* v. *Mahodini* (21 S. C. 645).

The maxim *huur gaat voor koop* applies to the case of voluntary sales effected subsequently to the lease. Voet states that it also applies in the case of sales in execution, and Matthaeus remarked that it does so *a fortiori*. Several writers, however, make mention of the fact that the practice with regard to this matter varied in different parts of Holland in accordance with local statutes. In Amsterdam, for instance, the lessee was entitled to remain in occupation of the leased property only for a limited period after the sale in execution. The rule in South Africa appears to be that the lease holds good in spite of a sale in execution when the property has been expressly sold subject to the lease (*Botha's Executor* v. *Du Plooy*, 14 S.C. 414); or where the lessee has at the time protested against the sale without the lease (*Wiber* v. *Mahodini*, 21 S. C. 645; cf. *Botha's Executor* v. *Du Plooy*, 14 S. C.

* S. A. L. Journal, XXVII. 20.

414); or even, according to a decision of the High Court of the Orange Free State, where the purchaser was aware of the lease (*Fichardt & Co.* v *Webb*, 6 C.L.J. 258: cf. *Maling* v. *Hargreaves*, 25 S.C. 123).

In *Wiber* v. *Mahodini* the Chief Justice remarked that the lease effected in favour of the defendant had not been specially mentioned at the sale in execution, "and a purchaser therefore might fairly assume...that there was no lease upon the property." True enough, the lease in this case came in conflict with the rights of the purchaser, who was a prior mortgagee, and it was thus not absolutely necessary to settle definitely the question now discussed: yet the remark of the Chief Justice appears to imply a general principle that when a purchaser at a sale in execution is left in ignorance of the existence of a lease he is not bound thereby. This principle would seem to be in accordance with the views expressed in the case of *Lange* v. *Liesching* (Foord, 55) with the regard to the rights of a fideicomsary heir in respect of a sale in execution of the property subject to the *fideicommissum*. If the view be correct that the rights of a lessee after a voluntary sale arise from a tacit stipulation in his favour contained in the contract of lease that he shall not be ejected by the purchaser, it is obvious that in a case of a sale in execution no such tacit stipulation can be implied. As a general rule, therefore, it would appear that a lease cannot prevail as against a sale in execution.

Appeal Court Notes.

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

32. **Administratrix also sued personally—Sec 35 (2) Civil P. C.**

When a medical practitioner brought an action to recover his fees due for attendance on a deceased person against his widow personally and where, on objection by the defendant's proctor that any contract entered into between the plaintiff and defendant would be void unless made with her husband's consent, plaintiff's proctor moved and was permitted to amend his plaint by adding a claim against the defendant in her representative capacity as the administratrix of her late husband's estate.

Held Sect. 35 (2) of the Civil Procedure Code did not apply to the case which was really not one of two different claims.

S. C. 45 C R Negombo 17404. 28. 4. 10.

33. **Ordce. No. 9 of 1909—Certificates under Sec. 26—No appeal.**

No appeal lies from an order made by a P. M. under Sect. 26 of Ordce. No. 9 of 1909, there being no criminal cause or matter pending at the time and the order not being made in any such case.

Gunesekere v. *Jayaratne* 1 Bal. 154 and *R.* v. *Mack* 1 Bal. 194, approved.

S. C. 221 P. C. Hatton A. 25. 4. 10.

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34. **Ordce. No. 13 of 1891 (Arrack) Sec 9—Certificate C Schedule IV.**

Per Grenier, J. :—I do not think that the Ordinance ever intended that in case the tavern keeper who had the authority of the renters to sell arrack in the tavern fell suddenly ill, he was not in a position to engage temporarily the services of one or two persons to sell on his behalf. (conviction set aside).

S. C. 139, 140 P. C. Matara 29671, 22. 4. 10.

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35. **Petition of appeal, point of law not taken in—Revision—Compensation Sec. 197 (1) Crim. P. C.**

Per Middleton, J. :—It is laid down in 4 N. L. R. p. 25 that no point of law not contained in the petition of appeal will be allowed to be argued in appeal. Following that case I shall hold that on the question of the imposition of the fine no appeal lies.....I have considered whether I would deal with the matter in revision but I do not feel disposed to do so.

Under Sec. 197 (1) Crim. P. C. a magistrate has power only to inflict a fine and order compensation in a case instituted on a complaint under Sec. 148 (1) (*a*). Where a case is instituted under Sec. 148 (1) (*b*) by means of a written report by a headman no order for compensation can be made. (See. 1 N. L. R. p. 326).

S. C. 231. P. C. Anuradhapura 33882 26. 4. 10.

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36. **Mortgage—No title in mortgager to shares mortgaged—effect of owning other shares.**

Where a person mortgaged 13/55 of a land, reciting in the mortgage bond the deed under which he claimed those shares and when in a subsequent partition action the deed was held to have passed no title to the mortgagor,

Held the fact that the mortgagor had other shares in the land under a different title did not give him a saleable interest in the subject matter of the mortgage,

S. C. 44 D. C. Negombo 7003 21. 4. 10.

37. **Insolvent Ordinance, 7 of 1853 Sec. 110—Technicality.**

Where the report of an assignee makes it clear that he represented to the court that a proved debt had really been paid and settled and where the proctor for the insolvent then moved under sect. 110 with a view to the expunging of the debt,

Held it was hypercritical to refuse the motion merely because it was made by the insolvent and not by the assignee.

S. C. 35 D. C. Kalutara 131 20. 4. 10.

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38. **Letter, omission to reply to—Adverse inferences.**

Per Wood Renton, J.:—It was pointed out, moreover, by Lord Esher, M. R., in the case of *Wiedemann* v. *Walpole* (1891) 2. Q. B. 534, that there were circumstances, for example in business and mercantile litigations, in which the courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer if he means to dispute the fact that he did so agree. It appears to me that the present case falls within the category indicated by Lord Esher in the passage, the effect of which I have just summarised. [His Lordship here set out the facts]. I think that the learned District Judge was right in drawing, from his omission to reply, the adverse inference that the facts alleged in it were true.

S. C. 313 D. C. Colombo 27445 22. 4. 10.

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39. **Bona fide claim of right by accused.**

Per Middleton, J.:—It is not at all clear to me that upon the matter in the record the claim put forward by the 1st accused is in fact a *bona fide* claim of right.

I think also that it is quite possible in the assertion of a so called *bona fide* claim of right to act in contravention of the law, and the Roman Dutch law in this country most strongly discourages the use of violence or force in the assertion of civil rights. If a man is injured the law intends that he should seek his redress in the courts of the land.

S. C. Ratnapura, 12333. 28. 4. 10.

Cullings.

"To be a priest, and possibly a high priest in the temple of justice, to serve at her altar and aid in her administration; to maintain and defend those inalienable rights of life, liberty and property upon which the safety of society depends; to succour the oppressed and defend the innocent; to maintain constitutional rights against all violations whether by the Executive or by the Legislature, or by the resistless power of the Press, or, worst of all, against the ruthless rapacity of an unbridled majority; to rescue the scapegoat and restore him to his proper place in the world—all this seemed to me to furnish a field worthy of any man's ambition."—Mr. Choate, at Lincoln's Inn, April 14, 1905.

Lord Erskine's full-bottomed wig was purchased and exported to the coast of Guiana in order that it might make an African warrior more formidable to his enemies on the field of battle.

"Sir, it is wrong to stir up law-suits, but when once it is certain that a law-suit is to go on, there is nothing wrong in a lawyer's endeavouring that he shall have the benefit rather than another. I would not have a lawyer wanting to himself in using fair means. I would have him inject a little hint now and then to prevent his being overlooked."—Dr. Johnson.

The Madras Law Journal (xvi. 71) relates the following dialogue between Judge Tillinghast of Rhode Island and a waitress:—'Mary, you have been in the country how long?"

"Two years sorr."

"Do you like it?"

"Well enough."

"But you have many privileges in this country which you'd not have in Ireland. For instance, at home you would never be in a room with a Justice of the Supreme Court and chatting familiarly with him".

"But torr, son, you would never be a judge at home."

A young lawyer was consulted by a merchant as to a consignment of China silk not being up to contract mark. The young man consulted a senior and the senior, strong in Digests, said,

"I have looked in all the Digests under China and under Silk, and can't find a thing which bears on thi scase."

An Irish Judge once had a case in which the prisoner who knew only Irish was accorded a special interpreter.

The prisoner said something to the interpreter but the latter did not convey it to the judge.

"What does he say?" asked the judge.

"Nothing my Lord."

"We all heard him. What was it?"

"Nothing to do with the case, my Lord."

"Answer me, sir, what did he say?"

"Well, my Lord, you'll excuse me, but he said: "Who's that old woman with the red bed curtain round her, sitting up there?"

"And what did you say?"

"I said, "That is the old boy that's going to hang yez."

Lord Mansfield once exclaimed to Mr. Dunning, "Oh, if that be the law, I may burn my law books". "No, my Lord, better *read* them".

"Always remember that the judges are forced to listen to you," was the advice Lord Menaghten received when he was a young and diffident member of the Bar. When judge he observed, "That was a great comfort to me, and many judges heard arguments from me which they would not have heard but for that advice. Sometimes I think, sitting where I do now, that the secret has got abroad. I think the barrister knows I am glad to listen to him, and is paying me off in my own coin, and then I listen patiently even if the argument is repeated once more."

"From time immemorial, in probably every country under the sun, those words have been used by angry men. The expression had nothing appropriate to the particular occasion or person. This seems to be a conventional insult.

It means nothing, or at least nothing more than that the man is angry." Lawrie, J., in P. C. Badulla, 9430, 18, 11, 98.

"The Police Magistrate praises the inquirer's detective acumen. It was of the simplest kind, and I am not surprised when the inquirer says that the police constable of Weylan began to laugh." Lawrie, J., in P. C. Balapitiya, 20059.30.4.00.

"Many people there are in this country who never see a Gazette to the day of their death, and very mischievous would be the consequence if they were bound by a notice inserted in it."—Lord Kenyon in *Graham* v *Hope* [1794] 1 Peeks N. P. Ca: 158.