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Rogues Unmasked.

(BY ROBERT HAWTHORNE. B. A., PH. D.)

This is the tittle of a book, advance chapters of which have been sent us. Some of the chapters are headed, *Loafers*, *Commercial Thieves*, *Missionaries and their Converts*, *Rogues in the Madras Presidency*. There is such a deal of plain speaking in the book as likely to create some stir and sensation wherever it may be read. The author knows his business, however, for he is aware of the wisdom of Goethe's words :

> Strike not thoughtlessly a nest of wasps.
> But, it you strike, strike hard.

The author is a member of a firm of detectives in Poona, and he must be presumed to write from experience. As a specimen of his style we give the following :

I honour an honourable tradesman, but if retail trade ceases to be respectable, I cannot honour it in the aggregate, though here and there I may find an honest man, I emphatically declare that the actual age in which we live has palpably and visibly deteriorated and degenerated. I assert it as a fact within the last thirty years there has been a great moral deterioration and lowering of standard of thought and life. Look around and you will see slop houses, slop furniture, slop raiment, and slop dramas. Slop Philanthropy that gives its annual hundred rupees to a public charity, or gives its fifty for the conversion of the "heathen" to Christianity, in order that the glasses on the table of a public dinner may ring at the munificent donation of a wealthy man has slop for its father, slop for its mother, and is itself slop. If not exactly conscience money, these rupees are the tribute to hypocrisy, that smooth and snug idol, which is set up in the temples of the world for half mankind to worship.

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Can a Negative Servitude be Acquired by Prescription*?

ANSWERED AFFIRMATIVELY:—Voet, 8, 4, 6.

ANSWERED NEGATIVELY:—Bessel, *Zivil Archiv.* 13, 19, sec. 24.

Prædial servitudes are of three classes—those with which is connected the right of the owner of the dominant tenement to do something on the servient tenement (*jus faciendi*); those with which is connected the right to have some construction or other on the servient tenement (*jus habendi*); and those with which is connected the right to forbid the owner of the servient tenement to do something or other on his own property (*jus prohibendi*). These classes are briefly, but perhaps (inasmuch as the word *servitus* really relates to the condition of subjection of the servient tenement as opposed to the *jus* of the owner of the dominant tenement) not very appropriately, described as *servitutes faciendi*, *servitutes habendi* and *servitutes prohibendi*. The *servitutes faciendi* coincide with the servitudes usually known as rural servitudes; the *servitutes habendi* and the *servitutes prohibendi* are coincident with those that generally pass under the name of urban servitudes.

The *servitutes prohibendi*, forming one of the two classes corresponding to the so-called urban servitudes, are also known as negative servitudes, inasmuch as the owner of the tenement subject to any of them may not do certain things, by virtue of the right of prohibition on the part of the owner of the dominant tenement.† The other servitudes may thus be termed positive ones.

With regard to the acquisition of the positive servitudes by prescription, it is a rule that they may be acquired under certain conditions by the constant exercise of enjoyment for a certain number of years of the same capacities that constitute such a servitude when established by agreement. But with regard to negative servitudes—those that entitle the owner of one tenement to prohibit the owner of another tenement from doing a certain thing on the latter tenement—it does not seem possible to conceive any way in which they can be acquired by prescription, remembering always that no prescriptive

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* S. A. L. J. XXVI. 8.

† In the judgment in *Jordaan* v. *Winkelman* (Buch. 1879. p. 86) a certain rural servitude was, in imitation of the example of counsel in the case, termed a negative servitude, but wrongly so. It may be added that the classification of servitudes as urban and rural is for various reasons not a very satisfactory one.

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rights can be acquired by violence. Voet (8, 4, 6), indeed, referring to the Roman Law, adduces the case of a work which has been interrupted by the *operis novi nunciatio*, and which thereafter has not been proceeded with for the period of prescription; but the *operis novi nunciatio*, which acted in the manner of a temporary interdict (but which, as a matter of fact, was never introduced into the legal system of Holland), was a merely preliminary and provisional measure which had to be followed up at once by a declaratory action at law, and it cannot, therefore, be properly taken into account in considering the question of prescription.

A stoppage of a work on his own property by one person in deference to the protests or prohibition of the owner of another property, for any time whatsoever, cannot constitute a ground of acquisition by prescription; this can only be established by an actual doing or having. A different view would be in conflict with two well-known principles of law.

In the first place, every person may, in the absence of special legislation to the contrary, do in respect of his own ground whatever he pleases, without having any need to fear that any legal consequences detrimental to himself may ensue, so long as he does not encroach on the rights of others. The right of doing includes the right of refraining from doing, and it does not matter what motive prompts such refraining; the motive, in fact, may be something quite independent of another's prohibition. In the second place a tenement can be released from an urban servitude only by a *usucapio libertatis* (the establishment by prescription of, as it were, a liberating counter-servitude) or, as it is not infrequently described, by adverse user; it cannot be released therefrom merely through a prohibition that is acquiesced in for the period of prescription. Still less, therefore, can it acquire an urban servitude by a mere prohibition directed against another property, though the prohibition be so acquiesced in. Suppose, for instance, the owner of tenement A enjoys the right of forbidding the owner of tenement B to raise a wall on the latter tenement in such a manner as to obstruct the view from a window of a house on tenement A. The owner of tenement A himself builds a wall intended for some purpose or other, obstructing the view from his window. After a while he begins taking down this wall again, whereupon the owner of tenement B prohibits him from doing so, alleging that the owner of tenement A has no right of view over tenement B; the owner of tenement A then discontinues the breaking down, and this state of things continues for thirty years. The owner of tenement B has not thus

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acquired a right of prohibition of view as against the owner of tenement A; in fact, he has by our law not thus even obtained a release of his own tenement from the servitude upon it, inasmuch as there has been no adverse user on his own property during that period. The adverse user in this case would have been the building by the owner of tenement B of a wall on his own property obscuring the view from the window on tenement A; so long as he does not do this, the fact that the owner of the other property has not chosen to exercise his right of view for thirty years does not deprive the latter of the right to do so whenever he chooses. In this respect our law differs from English law, in which the doctrine of "ancient lights" has been accepted even in cases where there has been no prohibition. The two principles above referred to may be summed up by saying that where no obligation of activity is imposed upon a person by law then merely through inaction on his part in asserting his rights, without more, no rights can be acquired against him nor will he forfeit rights once acquired by himself.

Obiter.

(*Selected by G. O. Grenier, Advocate.*)

Proctors.

It is the duty of every proctor to carefully peruse the proceedings on being employed to draw any petition of appeal or other pleading.

Per Carr, J., in *Punchyhami* vs. *Kattady Kale*, Ram. '48-'55, p. 10.

It is of the greatest consequence to the character of the profession, the safety of the parties, and the due administration of justice to require of and from all proctors proper care in the business entrusted to them by their clients, and more especially where the clients are ignorant and illiterate; and to afford full redress to injured parties, where any proctor is deficient in requisite care.

Per Stark, J., in *Candappa* vs. *Vanderstraaten*, Ram. '48-'55, p. 26.

If a proctor considers that he cannot conscientiously, or with due regard to his professional character and respectability, sign a petition of appeal in the usual

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form, he should inform his client thereof, and, that he was at liberty to g t his grounds of appeal taken down by the Secretary.

Per Carr, C. J , in *Appu Naide* vs. *Andoo Lebbe.* Ram. '48-'55, p. 35.

Evidence.

The Police Magistrate is not bound to hear a long list of witnesses when satisfied that the prosecution, or defence, as it may be, is false, but considering it possible that the first witnesses called upon whom reliance is placed may have been bought over by the opposite side, it is advisable that the court should have as much evidence as will preclude all possible doubt.

Per Temple, J., in *Armogam* vs. *Wayeewu.*
Ram. '48-'55, p. 107.

Liberty of Subject.

The liberty of the subject is a precious right which should be preserved and protected with jealous care, and not interfered with but on clear grounds.

Per Stark, J., in *Halyburton* vs. *Broughton.* Ram. 48'-'55, p. 120.

The Moormen of Ceylon.

All Her Majesty's subjects of every race, of every clime, of every creed are equal in the eye of the law and with regard to the Moormen in particular, whatever cause the Moormen of Ceylon may have had in former ages to complain of the oppression or intolerance of the rulers of this island, there has not been the slightest ground for such complaint ever since Ceylon has been under the British Government. Nor does it become them or any of them to speak of themselves, as has been done in these proceedings, as a degraded tribe, when it is well known that, as a class, they are generally, and the Court believes deservedly, respected on account of their intelligence and their industry and commercial energy.

Per Creasy, C. J., Sterling, C. J., & Temple, C. J., in re application of Aysa Natchia for a writ of habeas corpus, Ram. '60-'62, p. 132.

A Vulgar Error.

It is a mere vulgar error that a judge is bound to write down all that is asked by advocates and all that is said by witnesses.

Per Creasy, C. J., Sterling, J. & Temple, J., in re a Proctor. Ram. '60-''62. p. 137.

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A bad habit.

The habit of Advocates repeating the answers of witnesses is too common. And it is done by many of them, whether the evidence is important or trifling. It is frequently a habit acquired by those who wish to spin out their examination or cross-examination, and who are not sharpwitted enough to follow up one question rapidly by another: while repeating one answer, they are really thinking over the next question. It is a habit which the best English Judges have often censured, and which one very eminent circuit Judge, the late Baron Guerney, never would allow.

Per Creasy, C. J., Sterling, J. & Temple, J., in re a Proctor. Ram. '60-'62. p. 138.

The Judicature.

The duty of the judicature is to administer laws, not to make them, and not to annull them by refusing to convict under them when cases are clearly proved.

Per Creasy, C. J., Temple, J. & Thomson, J., in *Rex* vs *Santia Adial*, Ram. ''63-''68 p. 119.

A Romantic Decree.

The drake was adjudged to be put up to public auction and sold to the highest bidder and the proceeds to be divided equally between the plaintiff and the defendant. This is not a judgment. The Commissioner's duty is to hear and determine and this judgment determines nothing. Such a form of decree may suit the Arabian Nights' Entertainment, but is not agreeable to the prosaic character of the Court of Requests.

Per Temple, J., & Thomson, J., in *Duffy* vs. *Waring* Ram. ''63-''68. p. 126.

A highly Unprofessional Practice.

It appears that these persons were in the habit of frequenting the precincts of the Police Court, and earning their livelihood (or a portion of it) by introducing suitors to certain proctors practising in that court, and receiving a reward or commission from the proctors to whom the clients were introduced, in consideration of the service so rendered. There is no doubt that the prevalence of a system of this kind is a great evil, not only as giving to unprofessional persons over whom the judges have no immediate control, and for whose character there is no guarantee of any kind, a direct interest in encouraging litigation, but also as supplying unprincipled persons of

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this class with opportunities of defrauding ignorant native suitors of their money, under colour of procuring for them professional advice and assistance. Cases of dishonesty of this kind have been brought to our notice, in which the offenders have been severely punished; and a system that gives rise to such evils is deserving of the most emphatic condemnation. But it must not be forgotten that the existence of this practice of employing what are called "out-door proctors," is not due to persons who are so employed, but to those practitioners who employ them; and the Supreme Court concurs with the view expressed by the police magistrate that the conduct of such practitioners in soliciting business by making use of the services of persons of questionable repute to bring them clients and then rewarding these persons with a share of the fees, is highly unprofessional and discreditable. The practice is, we believe, condemned by all the respectable members of the legal profession, and it is one which the proctors themselves can and ought to put down.

Per Cayley, J., in *Rudd* vs. *Abdul Cassim*, Ram. '72-'76 pp. 117-118.

Appeal Court Notes.

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

65. **Prescription—Action to set aside a deed—Failure of consideration.**

An action to set aside a deed purporting to be a transfer for valuabie consideration, but which was proved to be a deed for the performance of a trust, is prescribed in three years under Section 11 of Ord: 22 of 1871 and not in 10 years under Section 6 of Ord: 22 of 1871.

356 D. C. Chilaw, 3496.

S. C. M. 24. 5. 10.

Hutchinson C. J. and
Van Langenberg, A. J.

66. **Contempt of Court—Refusal to answer questions in Cross-examination Sec. 140 C. P. C.**

Where a Plaintiff, who was a Moorish woman, refused to answer questions in cross-examination, and her action was therefore dismissed, *Held* The dismissal of the action

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was wrong under Sec. 140 of the Civil Procedure code.

The decree of the District Court was set aside and the case sent back for retrial—The appellant was to pay the costs of the appeal.

366. D. C. Batticaloa 3160, 18 May 1910.

Hutchinson C. J. & Van Langenberg A. J.

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67. **Prejudging Case—Irregular.**

"This conviction [under Sec. 315, Penal Code] must be set aside and the case sent back for a new trial before another Magistrate. The P. M. should not have refused to hear the defence. From his notes I find that appellant's counsel desired or offered to put his client into the witness box to deny the charge and to call Baba Singho to support him, but the Magistrate ruled in the following terms :—" This defence seems to be totally inadequate and I refuse to proceed further " and convicted the appellant. It is difficult to see how the Magistrate was able to decide on the adequacy or otherwise of the defence before he had heard it from the appellant and his witness."

S. C. 300 P. C. Galle 48096. 19. 5. 10.—Grenier, J.

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68. **Contempt of Court, *Sec.* 172 Penal Code—*Sanction* of A. G.**

Where a witness was convicted of contempt of Court, because he did not attend on a summons that had been served on him, the P. M. purporting to act under Sec. 172 of the Penal Code *Held*, the Magistrate should not have proceeded in this summary manner but should have charged the witness, if he desired to be the prosecutor, before another Magistrate . . . . Besides, such an offence cannot be taken cognizance of by any Court except with the previous sanction of the A. G.

S C. 170-173 P.C. Panadura 32694. 18. 5. 10.—Grenier, J.

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69. **Donation—Revocation—Judicial proceedings—Notice of prior unregistered deed.**

A deed of donation can only be revoked after suitable proceedings *ad hoc* in a competent Court and a transfer by the donor, after purporting to revoke the deed by another deed notarially executed but without the assistance of a Court, conveys no interest adverse to that of the donee and does not by virtue of prior registration render the deed of donation void.

Where such a transferee was an attesting witness to the original deed of donation and takes his transfer with

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knowledge that the deed of donation has not been declared void by a competent Court *Held* such notice prevents his pleading prior registration as this amounts to dolus malus.

S.C. 138 C.R. Batticaloa 15096. 30. 5. 10.—Grenier, J.

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70. **Master and Servant—Desertion—Notice—" Personally signify—Ord. 9 of 1909.**

Upon a prosecution for desertion from service, the accused pleaded that they had given their employer a month's previous notice by means of a letter drawn up by a petition-drawer to which they had attached their signature by means of marks (crosses). The letter was registered and posted.

Grenier, *A. J.*:—The notice appears to have been drawn out by a petition-drawer and contains a number of crosses and only two signatures which I understand are those of the Kanganies in whose " gang " the appellant was a cooly. As to who made these crosses there is no proof on the face of the document itself as they have not been authenticated. There is a note by the petition-drawer at the end of the numerous crosses on this document to the following effect :—" First and last signed in my presence and the marks of others were obtained by the first." I think the Superintendent was justified in not accepting this notice as a personal signification by the appellant and others that they were going to quit." *Held also* The one month must be reckoned as commencing from the day on which the letter was received by the employer.

153-154. P. C. Avisawella-6573.

18 May 1910. Grenier, J.

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71. **Shooting a thief—Private defence of Property.**

The accused, a watcher, was convicted of shooting the complainant in the buttocks and sentenced to six months rigorous imprisonment. The accused pleaded the right of private defence of property, his act being justified by the complainant—a notorious thief—running away with some cocoanuts from his land. The complainant had been found guilty of the theft and convicted. *Held* The accused was acting well within his rights in defending his property against a man who was in the act of committing an offence in respect of that property.

302. P. C. Negombo. 27, May 1910.

Grenier, J.

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