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The Fate of the Roman Law in the West.

(*Translated from the Dutch of L. A. Warnkoenig.*)

BY A. E. BUULTJENS. B. A., (*Cantab*) Advocate, Matara

Of the fate of the law of Justinian in the Western provinces of the old Roman Empire, the opinion of all is not quite the same; several have laid down that it was at the beginning of the Middle Ages buried in oblivion, and at last when the twelve Pandects were discovered it was restored by the authority of the Emperor Lotharius II. As this part of the history of Roman Law has been in our days elaborated by the care of the most learned writers it is easy for us to expound the fate of the body of Roman Law among the peoples of Western Europe.

After Justinian had finished the war with the Ostrogoths and brought Italy under his sway, he then published his laws and founded a school of law at Rome in the year A. D. 554, a little while after the Northern part of Italy was occupied by the Lombards A. D. 568. The Exarchates remained under the rule of the Greeks up to the year 752. Then the Franks overthrew the Lombards and ruled over Italy, and afterwards the German Emperors.

It has been noted that in the Middle Ages the lights of all learning were extinguished in Europe; wretched wa

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the state of culture in Italy : the barbarian Lombards and the ancient inhabitants of Italy were both equally overwhelmed. Hence it is not strange that there was hardly any study of law, just as there was none of learning and of the liberal arts.

The law of Justinian was in use in the provinces forming the Exarchates not less than in the other Eastern parts of the Empire ; neither the Lombard Kings, as has been believed, nor the Frank Kings and Emperors drove it out. Following the customs of other German nations, they wished that their subjects should use a two-fold law, the Romans the Roman Law, and the Lombards the so called barbarous law. The ancient order of the municipalities, therefore, seems to have been preserved, and, as a rule always observed. Citizens were governed by the Roman Law. After the whole of Italy was subjected to the Lombards and afterwards to the Franks, the same rule was observed, so that a Roman by nation lived under the Roman Law, and a barbarian under a barbarian law : and the litigants previously professed before the judges by what law they desired that their controversies should be settled. This general custom of profession of the law continued up to the XII century until by the fusion of the diverse races, one nation only existed. Nevertheless in certain districts even up to the XIII and XIV centuries instances of such professions are found, in the year 1388.

A large number of witnesses proves the use of the Roman, and particularly of the Justinian Law, and in addition the clerics, to whom many privileges had been granted in the constitutions of the ancient Emperors and especially of Justinian, used the Roman Law. They chiefly followed the Novels, according to the Epitome made by Julian.

The School of law too founded by Justinian seems to have endured during all this time, having been transferred to Ravenna and afterwards restored to Bologna (Bononia). Lastly there remains a work of the Institutes composed in Italy in the 10th or 11th century, which also testifies to the authority of the Roman Law ; this has been somewhat frequently published under the name of Brachylogus or body of laws, and is very similar to Justinian's Institutes. The age of this work has been greatly disputed. It was oftener published in France than in Belgium in the 16th century. Very recently it was published at Frankfort, 1743, edited by Senckenberg, and at Louvain by Nelis 1761, but Savigny defines the quality of the work. See *Themis* V. 266.

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Therefore it naturally happened that when the liberty of the people was restored and the culture of literature was reborn, the study of the Roman Law flourished. Especially as the fame of the ancient emperors and of the Roman Laws was great, the more curious people were stirred to investigate the most celebrated collection of law.

The first Kings of the Burgundians, Wisigoths, and Franks had preserved among their subjects the authority of the Roman Law : we have treated above of the collections made by them. Many proofs exist, which shew that throughout the whole of the Middle Ages in the southern provinces of France, even after they had been occupied by the Franks, these continued to be used on behalf of the inhabitants Roman in origin, while the barbarians professed Germanic Laws. Savigny offers several proofs c. ix. p. 101—119. The Justinian Law became also known there not only among the clerics, but also in portions of the former Burgundian Kingdom ; the books of this law were consulted in decisions, and the business of law was founded upon its precepts. Extracts of the Roman Law taken from all parts of the Corpus Juris are extant, dedicated to the count of Valence [in Dauphinè] by their author Petrus ; it seems to have been composed in those portions of France. Lastly several bishops skilled in the Roman Law are praised in France in the middle ages, viz. Hincmar [Archbishop] of Rheims, Petrus Damianus, Lanfranc (died 1089) and the Blessed Ivo Bishop of Chartres (Carnotensis) [1035—1115].

Accordingly after the study of the Roman Law began to flourish in Italy, it was easily introduced into those parts of France also, so that it quickly obtained the highest authority there.

But the city of Bologna had that most celebrated school, from which the authority of the Justinian Law was propagated throughout all Europe. In the XI Century a certain Pepo is said to have taught law there ; but in the beginning of the XII century a more eager study of it began there. The author of the new school and of the renascent jurisprudence is said to have been IRNERIUS (1115—1140), previously a student of literature. He began to explain the books of the Justinian Law and to illustrate them with notes or glosses. He had several disciples who succeeded him in teaching ; their fame drew to Bologna disciples from all parts of Western Europe, so that that school of law became the most flourishing for several centuries.

By what reasons Irnerius was urged to begin to

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interpret the law is unknown; but to-day it is agreed that it was not done by the authority of any Emperor [Hunter says he occupied a high post under the Emperor Henry V], and that the discovery of the Florentine Code was not the cause of the study restored by him. The Emperors however patronised that school and desired to propagate the authority of the Roman Law everywhere; hence they contributed very much to the prosperity of its study.

The Words of Budd Phear.

Withdrawal of Prosecution.

It is seldom indeed that it can be discreet on the part of the court to permit such a course to be taken [withdrawal], for nothing so surely as this leads to the institution of false charges and gives rise to embittered feelings and useless litigation amongst the parties.

Phear, C. J., [1878] 1 S. C. C. 6.

Judge's reply to Petition of Appeal.

The addition to the record, after appeal by the magistrate, of a long note of that which took place in court, made by way of reply to the petition of appeal is irregular. If material facts were discovered by the magistrate to have been from any cause omitted from the record of the proceedings and trial in the shape in which the record was originally made up, then the correction ought tobe made, as a formal amendment of the record itself, in the proper place where the amendment is needed, and the amendment, when so made, should be brought to the notice of the appellant before the case is sent up to this Court.

Phear, C. J., [1878] 1 S. C. C. 6.

Composite Suits.

Suits of the kind [e. g. partition] are in reality composite suits, for each defendant is, or may be, practically in the situation of a plaintiff relative to all the other parties

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for the only ground upon which such suits are entertained is to avoid as far as possible, circuity of action, and multiplicity of suits.

Phear, C. J., [1878] 1 S. C. C. 20.

Mere Decrees.

There is no magic in a decree or order of court and no Court of Justice has intrinsic power or authority itself to affect property before it, or to give or to deal with title thereto. It can only, by judicial decision between or against parties, cause them . . . to exercise such proprietary decrees.

Phear, C. J., [1878] 1 S. C. C. 71.

Ministerial and Judicial Discretion.

The position of the District Judge's in entirely reasonable when the application, made by the motion of which he speaks, is for the exercise by the Court of a purely ministerial discretion, and when the statement of the proctor affects nothing but the interest of his own client. For instance, with a record showing an unsatisfied judgment, the bare statement of the proctor, on the record, of the judgment-creditor, that he applies on behalf of his client for the issue of a writ of execution to the fiscal, entitles him at once to have the order for the writ. But it is otherwise when the application is such as to call upon the Court to exercise a judicial discretion between parties, for then the applicant must furnish the Court with the requisite materials for the support of the judicial conclusion he asks the Court to come.

Phear, C. J., [1878] 1 S. C. C. 73.

Bare Word of Counsel.

No exercise of judicial discretion by an English Court of justice (probably not even a judgment of the House of Lords, its quasi-legislative character notwithstanding) which is not based on duly proved facts is of any operative validity. If the courtesy due from the Bench towards the Bar obliged the court to dispense with legal evidence, and to take instead from the lips or pen of counsel the facts necessary to justify its exercise of judicial discretion in the case of issuing a rule of court it is difficult to see why this courtesy should not have the like effect on the occasion of the trial of a regular suit.

Phear, C. J., [1878] 1 S. C. C. 73.

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Proctor's Duty towards his client's Money.

Nothing can be clearer than that it is peculiarly incumbent upon proctors to know the law affecting their own responsibilities and even to advise the courts with regard to it There is certainly nothing in that branch of the law which can serve to reduce an act which, on the part of an ordinary agent, would be something very like embezzlement, to anything less in the case of a proctor. It may be that there is some serious mistake prevalent in the profession with regard to a proctor's right of remedy against his client, being a party to a suit, in regard to his bill of costs for work done in the suit. But if so, we cannot see any ground of justification for the mistake. The principle of equity which governs the proctor's right in such a case is exceedingly simple and well ascertained. [Proctor has a lien on fund in court.]

Phear, C. J. [1878] 1 S. C. C. 77.

Mahommedan Code of 1806.

The enactment applies only to a series of special cases therein set out in succession, and does not profess to furnish any principle of inheritance capable of being applied generally. Unfortunately, the series of cases so given is not exhaustive.

Phear, C. J., [1878] 1 S. C. C. 88.

Sequestration to keep the peace.

The suggestion that breaches of the peace were taking place might be an excellent ground for invoking the aid of the executive power in the shape of the local police or headman, to quell disturbance or preserve order, but could not justify a court of equity in interposing a sequestration.

Phear, C. J. [1878] 1 S. C. C. 100.

First Impressions.

The most careful or conscientious magistrate or judge cannot safely trust his first impressions of the commonly very imperfect testimony given at the trial as constituting a sufficiently safe foundation for convicting the complainant of having made a false charge.

Phear, C. J. [1879] 2 S. C. C. 24.

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The Roman-Dutch Law in the Reports.

(*By G. Grenier, Advocate*).

Heirship.

"Heirship is the succession to all the rights of the deceased, and this comprehends both his advantage and disadvantage, as well as that existing against himself and towards others : from which, however, are excepted personal *actions* and personal duties which expire with the person." VenLeeuwen, Censura Forensis Pt. 1. 3. 1. Sec. 1.

Per Giffard, C. J., and Byrne, J., in *Vanderstraaten* vs. *de Latre* [1820] Ram : '20-'33 p 2.

Liquidated Debt.

" Compensation must be a debt liquidated, pure and existing" VanLeeuwen, Censura Forensis pt. i. 4. 36. Sec. 3. " A liquidated debt is that which is founded upon clear right," says the Institute, "as upon the confession of the opposite party or where the question is one merely of law, and the fact of a debt is not denied"—Sec. 30. Instit de action.

Per Giffard, C. J., and Byrne, J., in *Vandestraaten* vs. *de Latre* [1820] Ram : '20- '33 p. 3.

Advocate's Ignorance of the Law.

In like manner (he has been speaking of judges) neither is an advocate answerable, who falls into mistake through ignorance of the law. For though it be disgraceful to a doctor and one professing the *laws* to be ignorant of the very law itself, yet would it be very unjust and hard measure to them if, in so diffuse and difficult a science as law and practice,—amidst such a variety of opinions and in such a crowd and procrastination of causes very often not allowing full time for deliberation—they should themselves be held liable to the hazard of every suit, in case anything fell out either through their imprudence or want of experience—VanLeeuwen, Censura Forensis.

Per Giffard, C. J., and Byrne J. in *Gambs* vs. *Krikenbeck* [1820] Ram : '20-'33 p. 5.

The Validity of Wagers.

VanLeeuwen in his Censura Forensis says upon the subject of the general law, sponsiones nostratibus *Weddengen* quæ quatenus sub conditione casuali vel pendente a fortuna et dubio eventu factæ sunt, nullo jure prohibitæ

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censentur, pt. 1. lib. A. c. 14 Sec. 11, and he quotes, in support of his assertion, the case in Sande, in which the Court determined in favour of a wager to recover the amount of which an action had been brought. Van-Leeuwen then goes on to say that by the laws of France, wagers, unless where a deposit was made, were void, but he adds quod de moribus nostris affirmare non ausim.

But Voet, who is always clear and, as later in time, a better authority, gives the distinction [between betting and gambling] justly. and it is that which the English statutes have adopted : etsi enim circa ludos in quibus de virtute certamen est, sponsionem facere liceat; in aliis tamen, ubi pro virtute certamen non sit, non licet, ad Pand. 11.5. 8. and in another place, he is explicit as to the distinction, and the ground of it, pericli pretium constitui ibidem permittitur si modo in aliam speciem non cadat—ib.

Per Giffard, C. J , and Ottley, J., in *Nagel* vs. *de Quaker* [1820] Ram : '20-'33 pp 54-55.

Communio Bonorum.

There is no principle more firmly established in the Roman Dutch Law than that the death of either party totally extinguishes the communio bonorum between married people : Omnis societas (says Sande) morte alterius sociorum finitur nec ad haeredem socii transit etiam ex pacto, lib 2 tit. def. 9. " All partnership is concluded by the death of one partner, nor can it pass to the heir of the deceased even by agreement ;" see also Van-Leeuwen's Dutch Roman Law, 4 23 Sec. 7, p. 413.

In *Rosayro*, vs. *Casie Chetty* [1820] Ram: '20-33 p. 56.

Arrest on Civil Warrant.

Notandum tamen quascunque res aut personas singulari aliquo jure ab arrestis exemptas, ob fugae dilapidationis, aut rerum amovendarum celandarumve suspicionem, arrestari nihilominus posse quia fugitivi et bona sua fraudandorum creditorum causa celantes nullo privilegio juvantur. VanLeeuwen, Censura Forensis pt. 2. lib. 1 Ch. 15. Sec. 38.

Per Giffard, C. J.. and Ottley, J , in re application for a writ of Habeas Corpus. [1826] Ram : '20-'33 p. 87.

The Crown as Creditor in an Insolvent Estate.

In other cases, when the Crown is a creditor with others of an insolvent estate, it has no further right than other

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creditors. Vanderlinden's Institutes, lib. 1 Ch. 12. Sec. 2 p. 174, Henry's translation.

Per Marshall, J., in *the King* vs. *De Bedier* [1830] Ram: '20-'33 p. 156.

Joint Liability

Si plures simul damnum dederint, adversus singulos hæc æstimationis et ejus quod interest persecutio in solidum concessa est, sic ut unius praestatione cæteri non liberentur eum sin quisque, non alieni delicti paenam solvat; sive constet aequaliter omnes occidisse dum simul trabem dejecerunt hominemque oppresserunt, sive alter tenuerit occidendum, alter interemerit; sive plures percusserint in rixa forte, nec appareat cujus ictu laesio aut caedes facta sit. "Voet's Commentary on the Pandects," lib. 9, title 2. Sec. 8.

At dubitatum quandoque fuit an singuli rixantes et tumultuantes in hanc mulctam teneantur, an vero una mulcta ab omnibus sit solvendo: et curiae magis placuit (15 julii anno 1624) singulos in solidum hanc mulctam solvere teneri. Sande's Decisiones Frisciae p. 595.

Wrong doers are bound by natural law to make reparation each *in solidum*, provided that on the one paying, the other be exonerated.

Grotius, book 3, c.32 Sec. 15. p. 434, Herbert's translation

So if the debt arises from an injury committed by four persons, each is debtor for the whole in respect of the person suffering the injury, but as between themselves, each is only debtor for his share in the injury that is to say, for a fourth of the whole.

Pothier, vol 1. p. 409 (Evans' translation.)

Si non singuli in solidum, sed generaliter tu et collega tuus una et certa quantitate condemnati estis; nec additum est, ut quod ab altero servari non posset, id alter suppleret: effectus sententiae pro virilibus portionibus discretus est. Ideoque parens pro tua portione sententiae ab cessationem alterius ex causa judicati convenire non potes. The Code Bk. 7. tit 55.

Si plures una sententia condemnati sunt, executio fieri debet non in solidum, sed pro virili tantum parte, etiamsi omnes sint simpliciter condemnati, ad unam et certam quantitatem, hoc modo, Titium et Caium et Sempronium L. Titio in centum condemno. Et hoc utique verum est,

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etiamsi caeteri non sint solvendo, et cum revera singuli ante condemnationem fuerint in solidum obligati quia (ut paulo ante diximus tit. super) per judicatum prioris obligationis novatio unducitur, et prodest judicatum singulis, ita ut quisque videatur condemnatus, in parte sua et absolutus a solidi exactione : quae quidem interpretatio et in stipulatione locum habet, 11 Sec. 1. ff. 1. *De. Duobus reis.* At dices, iniquum esse ut res adjudicata prosit ei contra quem est judicatum, quia ante condemnationem tenebatur in solidum, nunc tenetur pro parte virili. Respondes, hic non omnino judicatum esse contra eum, nam ex parte absolvitur quodammodo, scilice a solidi exactione : Res judicata non prodest judicatot quatenus est condemnatus; sed solum ex accidenti ei, prodest, respectu jus quod in condemnatione est omissum, id est, quatenus absolutus est a solidi exactione, qui ante condemnationem tenebatur in solidum. Perezius.

Unless the judgment expresses that each defendant is bound in solidun non tenentur singuli nisi ad viriles, Faber—Codex Fabrianus p. 870.

Eos qui una sententia in unam quantitatem condemnati sunt pro portione virili ex causa judicati conveniri, et si ex sententia, adversus tres dicta Titius portionem sibi competentem exsolvit : ex persona cæterarum ex eadem sententia conveniri eum non posse.

Pandects, book 42. tit. 1 Sec. 43.

Si plures condemnantur in una sentetia, non censentur in solidum damnati, sed quilibet pro parte : quod Bartotus de eo etiam casu intelligit, ubi duo in solidum alias tenentur, et divisionis beneficio renunciarunt : nam nihilominus novum exsententia exurgit beneficium divisionis, quia est, quod creditori imputari possit, cur non contra unum egerit.

Brunnemann 42. 1. 43.

Per Creasy, C. J. Morgan, and J., in *Lindsay* vs. *Oriental Bank Corporation* [1860] Ram. '60—62 pp. 58—60.

Possessory Action.

The possessory action of the Roman Dutch Law lies only where a party who has had possession for more than a year and a day is dispossessed by force ; it is a summary remedy, and judgment given in it no way determines the title to the land, but leaves that an open question.

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Per Morgan, J., and Lawsen, J., in *Umma Haminey* vs *Edery Baademeya* [1860] Ram. 60—'62 p. 22.

Intervention.

The Roman Dutch Law requires a party seeking to intervene to file his articles of intervention, shewing summarily his interest to justify such intervention.
Gaill's Obs. lib. 1. Obs. 69 et seq.

Per Morgan, J. and Lawson J. in *PandiHesinghe* vs. *Punchy* [1860] Ram : '60—'62 p. 22.

Injury by Brute Animal and liability of owner.

It is a general rule of Roman-Dutch Law that the owner of a brute animal, which has injured another person, is liable for such injury, but the degrees of liability vary according to the nature and the habits of the animals and the circumstances under which the injury was inflicted. The authorities on this branch of the law are most fully collected in the *Commentary* of Voet in the ninth book of the *Pandects*, tit. "Si quadrupes pauperiem fecisse dicatur." VanLeeuwen in the 39th chapter of his fourth book, being the chapter on "Obligations arising from causes similar to crimes" is explicit on this subject. He also treats of it in the 31st chapter of his "Censura Forensis." To these may be added Vanderwater's Commentary on the ninth chapter of the 4th book of the Institutes, the Commentary of Vinnius on the same, Groenewegen de legibus abrogatis. p. 54, and Grotius, pp. 252 253. Herbert's Translation.

Per Creasy, C. J., and Morgan, J., in *Folkard* vs. *Anderson* [1860] Ram. '60—'62 p. 69.

Right of Way.

A right of way (or more correctly a liberty to a right of way) is a prædial servitude, and Voet is decisive as to this being immoveable property. His words (Com. ad Pand. 1. 8. 20.) "Servitutes prædiales quod spectat, non dubium quin rerum immobilium numero veniant." See also Vanderlinden's Institutes, bk. 1, ch. 2.

Per Creasy C. J. Sterling J. and Morgan J. in *Ayanker Nager* vs. *Sinatty* [1860] Ram. '60—'62 p. 77.

Is a wife's share liable in a civil action, not a criminal prosecution, for delict amounting to crime?

The writings of Grotius, VanLeeuwen, Wesel, Groenewegen and Rodenberg do not expressly deal with this question...VanLeeuwen (Censura Forensis 1. 1 22,), in

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dealing with the wife's liability, specifies cases of criminal prosecutions only, but he gives a reason for the wife's non-liability to the Treasury in a criminal prosecution, which would make her also not liable to a plaintiff in a civil action for the husband's crime. He says "The wife and husband enter into no partnership in crime, and therefore neither party is bound by the misfortune of crime committed by another." It is proper however to observe that other writers repudiate the idea of the wife's liability depending on any relation of partnership. But there is one explicit authority on the subject and a very high one: Vanderkeesel, who is clearly in the wife's favour. He states the question broadly: "What is the law when the husband has been condemned in a pecuniary penalty, either criminal or civil, by means of a delict?" (Si ex causa delicti in mulctam pecuniariam sive criminalem fuerit condemnatus). He reasons the matter very clearly and decides emphatically in the wife's favour: Quicquid ex delicto solvit maritus, sive causa sit criminalis, illud ex ejus servisse vel bonorum communium vel communis lucri solvendum esse nec quicquam uxorem conferre tenui.

Per Creasy C. J. Temple J. and Thomson J. in *Corey* vs. *Fernando* [1861] Ram: '60—'62 p. 96 and 97.

Mens rea.

Crime considered in general is all punishable transgression of the law, *wilfully and from an evil mind*, which is very narrowly considered: so that where no public ground or evil intention is mixed with the deed, it cannot be punished as a crime. VanLeeuwen p. 453.

Per Creasy C. J. Temple J. and Thomson J. in *Fernando* vs *Fernando* [1861] Ram '60—'62 p. 99

Three Fence Sticks: Three Months R. I.

The accused in P. C. Jaffna 457 was charged with mischief in that he had removed from a boundary fence *three sticks*, and with intentional insult. There was already pending, at the time of the prosecution, a civil case by the accused's mother in respect of the land

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whereon stood the fence. It would seem that on two occasions the accused had been warned by the magistrate not to meddle with the fence. Accordingly the learned magistrate Mr. G. F. Roberts wrote this interesting judgment.

These previous warnings apparently passed unheeded by the accused. He had evidently marked out his course of action to harass the woman Thangamuttu on account of this fence inspite of the requirements of law and order of the community in which he lives. A man of this description is a social pest of the worst type destructive to the rights of life and property that are ultimately the fundamental bases of the security of the community.

Mr. Justice Wood Renton recently dealt severely with a criminal pest of this type who without a shadow of right persisted in causing mischief to another person's property. This case has much in common with it. With regard to the insult I believe that accused did abuse the complainant when pulling up the sticks The witnesses for the prosecution were respectable and gave their evidence straightforwardly. It is easy to conceive that such intentional insult, after the previous exploits of the accused might have provoked a breach of the peace. Hence I find accused guilty of insult also (Sec 484). For the protection of life and property this accused must be given a heavy sentence that I hope may deter him from continuing his destructive tendencies in the future. I sentence him to 3 months R I (secs 409 & 484.)

The conviction of the unfortunate victim of destructive tendencies was affirmed in appeal on June 17, 1910.

Book Notices.

1. The Law of Crimes: by Ratanal Ranchoddas, B.A. L.L.B. and D. K. Thakore, B.A. 5th edition 1909.

Mr. Ratanal, as the senior author of the *Law of Crimes* and editor-in-chief of the *Bombay Law Reporter* is known to us in Ceylon as a prolific writer. His *Unreported Cases* and the *Law of Torts* are works widely known, used, found useful, and referred to in India. The *Bombay Law Reporter* is issued every fortnight. He has however found time to produce this fifth edition of the *Law of Crimes*. Copies of the previous editions are current in this country. The work in its second edition contains about 500 pages, in the fifth it contains 920 pages, that is 125 more than in the fourth. Not a single Indian decision whether reported in the authorised or private series of Law Reports is omitted. In addition to the vast accession of case law, a feature of the work is an appendix containing eight of the most principal Indian criminal

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Acts. The present edition appears to be carefully brought up to date, and the several parts of the commentaries have been entirely re-written. Over 4000 cases, each case bearing its date, are found noted under the various sections of the Indian Penal Code. With slight differences, or more accurately with some difference, the Ceylon Penal Code is similar to the Indian. At any rate on the bulk of the sections Indian case law is wont to be cited and applied. Those in Ceylon who already use the *Law of Crimes*, and find it serviceable—and there are many such—will greatly appreciate the importance of possessing a copy of the latest edition of a work which, in point of practical assistance to the lawyer, has taken a very high place among commentaries on the Penal Code. Like its predecessor, it is marked by every effort of skilled authorship to present to the reader, the vast amount of case-law in an acceptable and attractive manner with judicious comments and moderate criticism.

2. The Current Index, 1909: by T. V. Sanjiva Row. The Law Printing House, Mount Road, Madras, 1910.

Mr. Sanjiva Row has year by year shown himself increasingly worthy of the confidence the legal profession in India seems to have in his various aids to case-law. He seems to enjoy a kind of monopoly in digesting and indexing. The various monthly digests of Indian cases of the year 1909 he has consolidated in this a very neatly bound volume of about 900 pages. The matter is arranged in parallel columns, and by every available method that ingenuity can devise, the book is rendered exceedingly easy of reference. The digest is not a mere reproduction of head-notes but almost next, in point of serviceableness, to the original Reports themselves. As a specimen of fulness of treatment we give the following from the civil part of the book :—

FOREIGN JUDGMENTS.

Foreign judgment, suit on—Judgment passed en parte, whether can be enforced in the forum of another country subject to the same sovereign—Private International law, rules of—Authority of—British Parliament recognising jurisdiction must be clean and express—Charter of 1833 (Ceylon) Sec. 24—Ceylon Ordinance II. of 1889, Secs 9, 704—" Appear or defend the action " meaning of —Obtaining of leave to defend action, whether amounts to voluntary submission to the jurisdiction of the Court—Decision of the foreign Court otherwise than on the merits of the case—Effect on its enforcement in a Court in British India.

Appellant obtained a decree against the respondent, in a suit instituted by him in a court in Ceylon, on a pro-note. The suit

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having been instituted under the summary procedure provided by Chapter LIII of the Ceylon ordinance II of 1889 (analogous to section 532 of Act XIV of 1882) defendant appeared by an attorney and applied for leave to defend the suit. Leave was granted him on condition of his furnishing security. The respondent did not furnish security, and did not appear at the trial, when judgment was passed against him during his absence. The respondent having left Ceylon and settled in British India, appellant brought the present suit against him in a British Indian Court. The respondent pleaded want of jurisdiction, as (1) under the rules of private International Law, the judgment of a foreign court passed *in absentem* could not be enforced in a British Indian Court (2) the respondent did not appear at the trial, and there was no decision on the merits.

Held (1) that though Ceylon and British India owed allegiance to the same Sovereign, the enforceability of the judgments of the courts of either country or those of the other was guided by the rule of Private International Law viz that the judgment of a foreign court passed against the defendant *in absentem* cannot be enforced against him in a court in British India (a).

(2) That neither by the section 23 of the Charter of 1833, nor by Sec. 9 of ordinance No. II of 1889 (Ceylon Legislative enactments Vol. II p. 576), are the Ceylon Courts empowered by the British Parliament to adjudicate in a matter, in which the cause of action arose within their jurisdiction, so as to bind by their decree a defendant who is a resident of British India and a subject of the British Crown, although he never resided in Ceylon at the time of the action or submitted himself to the jurisdiction of the Court. Such jurisdiction having regard to the principles of International Law, would be recognised in British India, if it was conferred by the Supreme Legislature, by express and clear words (b)

(3) That a decree based on a contract imposing personal obligation upon an absent foreigner is not countenanced by the comity of nations, only because the defendant entered into the contract in the territory of the *forum* which passed the decree (c).

(4) That the defendant though he was *ex parte* at the trial, must be deemed to have voluntarily submitted to the jurisdiction of the Ceylon Court, as he applied for leave to defend the action.

(5) The words "appear or defend" in Sec. 704 of the Ceylon Ordinance II of 1889 are the equivalent of "appear and defend" and clearly refer to appearance for the purpose of defending the action in accordance with the leave granted, and do not imply that appearance for the purpose of obtaining leave is not to be deemed appearance in the action at all.

(4) It is not even necessary that the submission must be by an act done in the course of the action itself, for it can be constituted by a contract to that effect, entered into between the plaintiff and the defendant previously to the action (d).

(7) A judgment of a foreign court, which does not decide upon the merits of the dispute, for instance, if a suit is dismissed as being passed by the law for limitation of suits prevailing in that Court, cannot be pleaded as a bar to a suit instituted in the court of the plaintiff's domicile in the same cause of action (e), **Shaik Atham Sahib v. Davud Sahib**, 3 Ind. Case 190.

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Munro and Abdur Rahim, J. J.

References:—(a) 22 C. 222=21 I. A. 171; 28 C. 641, D; 29 C. 509; (1908) 1 K. B. 302=77 L. J. K. B. 180; 98 L. T. 304, 24. T. L. R. 85, Halsbury's Laws of England, Vol. VI p. 291, R. (b) 22 C. 222=21 I. A. 171 (1908) 1. K. B. 302=77 L. J. K. B. 180; 98 L. T. 304; 24 T. L. R. 85, R. (c) 22 C. 222=21 I. A. 171; 29 M. 69, 29 M 339 at p. 279: 1 M. L. T. 71: 16. M. L. J. 238; R. (d) 1908 1 K. B. 302; 77 L. J. K. B. 180; 98 L. T. 304; 24 T. L. R. 85; 55 L. J. N. S. (Q. B D.) p 39; 2 M. 407; 18 M. 327, R (e) I P. D. 393; (1904) P 41; 73 L. J. P. 2; 89 L. T. 481; 8 Asp. M. C. 497, R.

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Appeal Court Notes.

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

84. **Ord. No. 16 of 1865, Sec. 53 (3).**

Where the evidence only shewed that the accused had left his rickshaw by the side of the road with no one in charge of it, *Held* in the absence of anything to shew that his doing so, or that the position in which the rickshaw was placed, was a source of danger or inconvenience to the public, no offence had been committed.

S. C. 333 P. C. Negombo 13596. 15. 6. 10.

85. **Vendor and Vendee—Eviction not suffered.**

When the vendor had given the vendee a deed of sale *ex facie* valid of the vendee, being given vacant possession of the land had entered thereon and possessed it ut dominus *Held* the case was distinguishable from *Ratwatte* v. *Dullewe* (1907) 10 N. L. R. 304 and the vendee had no cause of action against his vendor, unless he has been legally evicted or unless the breach of some express covenant is relied on.

Fernando v. *Jayawardene* (1896) 2 N. L. R. 3090 and *Vanderfooten* v. *Scott* (1908) distinguished.

S. C. 5, C. R. Batticaloa 6219. 14. 6. 10.

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