

## A Restatement of the Modern Roman-Dutch Law

ON the first day of the present century there came into force throughout the German Empire the great German Civil Code (*Bürgerliches Gesetzbuch*), the preparation of which had occupied a number of the best legal intellects of Germany for more than twenty years. In England its appearance was hailed with enthusiasm by F. W. Maitland, then Downing Professor of the Laws of England at Cambridge University, as 'the most carefully considered statement of a nation's law that the world has seen',<sup>1</sup> and he commended to his own countrymen the example of the Germans who, he said, were 'facing modern times with modern ideas, modern machinery, modern weapons'.<sup>2</sup>

Although Maitland's exhortations did not lead to any result in England in the way of general codification, it is of interest to note that his enthusiasm for simplified restatement of law was responsible for a friend of his Cambridge undergraduate days undertaking in distant Ceylon a much more formidable task than that of restating the law of England. In the Preface to the first volume of Sir P. Arunachalam's *A Digest of the Civil Law of Ceylon*, published in 1910, which was an attempt 'to make a digest of the existing law (of Ceylon) which might be used in the preparation of an authoritative code',<sup>3</sup> the author acknowledges that his friend Maitland 'was much interested in the project and helped me with advice and encouragement'.<sup>4</sup>

In England also, on the suggestion of the Berlin Society for Comparative Jurisprudence and Political Economy, a *Digest of English Civil Law*, modelled on the pattern of the German Civil Code, was planned under the general editorship of Professor Edward Jenks and published in the years between 1911 and 1917. Lawyers in Ceylon, however, will naturally be more interested in attempts to restate the Roman-Dutch Law, the common law of Ceylon and of South Africa, as applied in modern times by the courts of those two countries: for, to restate the Roman-Dutch Law, 'to explore what seems a gloomy and

intricate forest guarded by old-world dragons',<sup>5</sup> is obviously a much more difficult task than to restate the law of England which has already been tolerably well expounded in many modern text-books.

The first such attempt at restating the modern Roman-Dutch Law, Sir P. Arunachalam's *A Digest of the Civil Law of Ceylon*, already referred to, was unfortunately never completed. The first volume, dealing with *Persons, Natural and Juristic*, was all that appeared before the distinguished author turned his attention from law to politics and philosophy. No other systematic restatement of Ceylon law in the form of a code has ever been attempted. Consequently Ceylon lawyers will be particularly interested in the appearance of a work published in South Africa,<sup>6</sup> edited and to a large extent written by Professor R. W. Lee, (one of the original contributors to *A Digest of English Civil Law*), which restates the South African Law of Obligations in the form of a code.

Professor Lee, the greatest living authority on the Roman-Dutch Law, (the study of which as a living system in South Africa and Ceylon he has done so much to foster), needs no introduction to Ceylon lawyers. His *An Introduction to Roman-Dutch Law*, ever since its first appearance in 1915, has come to be accepted by both practising lawyers and students as the most convenient work of reference on the subject. The new book entitled *The South African Law of Obligations*, prepared under his editorship, will consequently be welcomed by users of the *Introduction* as in effect constituting a revised commentary on and supplement to the earlier work. A little more than two-thirds of the new book is by Professor Lee himself. The sections on Delict, Quasi-Contracts, Mandate or Agency, Partnership, Loan for Consumption, Loan for Use, Deposit, Carriage of Goods and Passengers, and Hotel-keepers Liability, (not all of which are from his pen), will be found especially useful as supplementing the rather concise treatment of these topics, (which was all that was possible in an elementary treatise), to be found in his *Introduction*.

If ever the Roman-Dutch Law as applied in Ceylon or South Africa has to be codified, the present work will inevitably be largely availed of by the draftsmen of the code. Even practising lawyers or laymen who need a handy source of information from which an answer to a question of principle can be readily obtained may confidently turn to the new book for a concise statement of essential principles uncomplicated by an elaboration of details. Law-students may, perhaps, find the narrative form of the *Introduction* more to their liking on a first acquaintance with the subject, but even they will find in the Articles of *The South African Law of Obligations* a revised and concise statement of the law which will be invaluable especially for revision. The

5. *ibid.* p. vii.

6. *The South African Law of Obligations*, edited by R. W. Lee, published by Messrs. Butterworth & Co. (Africa) Ltd., 1, Lincoln's Court, Durban, South Africa, 1950.

1. Introduction to *Political Theories of the Middle Age*, being a translation by Maitland of Otto Gierke's *Das deutsche Genossenschaftsrecht*. Cf. also: 'Never yet, I think, has so much first-rate brain power been put into an act of legislation'. Maitland, *op. cit.* in n. 2 *infra*.

2. *The Making of the German Civil Code*, reprinted in *Collected Papers of F. W. Mailland* (edited by H. A. L. Fisher), Volume 3, pp. 474-488.

3. Preface, p. viii.

4. *ibid.* p. xiii.

new work will also be found useful for comparative study of English and Roman-Dutch law, for the sections dealing with Contract are for the most part from the pen of Professor Lee, who was also responsible for the corresponding portions of *A Digest of English Civil Law*.

An enumeration of the chief points on which the treatment in the new work is a correction of or an improvement on that in the earlier book will, perhaps, be found useful by practitioners and students. One of the few incorrect propositions in the *Introduction* appears on page 307 of the Fourth Edition (published in 1945), where the measure of compensation for necessary improvements to property is said to be the extent to which the value of the land has been enhanced: in other words, the measure applied to *useful* improvements has here been applied also to *necessary* improvements. This view, in spite of loose judicial statements to that effect, is not borne out by the old texts,<sup>7</sup> and in Article 390 of *The South African Law of Obligations* the measure of compensation for necessary improvements is now correctly stated to be the cost of the work. In Article 713 of the Third Title of the third part on Quasi-Contracts (written not by Professor Lee, but by Mr. A. M. Honore) the mistake is however repeated.

Article 333 of *The South African Law of Obligations*, read with the preceding Article, corrects the first sentence of the second paragraph of page 296 of the *Introduction* which deals with the remedies of the purchaser in the event of eviction. The sentence in the *Introduction* might, therefore, be amended to read something like the following:—'In case of eviction the purchaser may claim a refund of the price and damages (if the price has not been paid, damages only) measured by the increase, if any, in the value of the property at the date and place of eviction, together with costs incurred in respect of the eviction, as well as any compensation to which the purchaser as *bona fide* possessor may be entitled for necessary and useful improvements if he has not recovered these from the true owner'. Again, the word 'lessor' in the first line of page 309 of the *Introduction* is a slip for 'lessee', as will be seen from the correct statement in Article 387 on page 102 of *The South African Law of Obligations*.

These are the chief instances of *Corrigenda* in the *An Introduction to Roman-Dutch Law* which have been corrected in *The South African Law of Obligations*. Many examples are also to be found in the new book of *Addenda* to the *Introduction*, which in some respect or other are improved or revised statements of what was less fully or less clearly expressed in the *Introduction*.

Thus, no mention is made on page 288 of the *Introduction*, where acceptance of gifts is dealt with, of the time when acceptance may be made

by a donee: Article 271 of *The South African Law of Obligations* supplies this omission. The attitude of the modern courts of South Africa and Ceylon to the *stipulatio poenae* was in the *Introduction* all too concisely summed up (at page 268) by the statement that 'the modern law has taken over the English distinction between Penalties and Liquidated Damages'; but Articles 215 to 218 of *The South African Law of Obligations* remedies that defect by a clear explanation of that distinction. Similarly, 'duress of goods' which is not explained in note 8 of page 233 of the *Introduction* is explained and distinguished from 'duress' in Article 59 of *The South African Law of Obligations*. Article 62 of the latter work, which deals with the three constructions that are possible when a statute attaches a penalty to the doing of an act, is a fuller and more accurate statement than the corresponding sentence on page 237 of the '*Introduction*' which leaves ambiguous the relation between the two terms 'illegal' and 'void'. Again, Article 210 of *The South African Law of Obligations*, which deals with the power of a contracting party who has performed his obligations only in part to sue the other, is a fuller and clearer statement than the corresponding sentence in note 1 of page 264 of the *Introduction*. Finally, the substance of Article 259 of *The South African Law of Obligations*, which mentions what is in effect an exception to the ordinary presumption of Roman-Dutch Law that a co-debtor cannot be made liable *in solidum* unless there is a special agreement to that effect, might well have been incorporated, even as a footnote, on page 285 of the *Introduction*.

The printing and the binding of the new book, which have been done in South Africa, are quite up to the standard of the best English work and leave nothing to be desired. As already mentioned,<sup>8</sup> Mr. Honore is incorrect in not pointing out in Article 713 that the measure of compensation for necessary improvements is not the same as for useful improvements. Apart from this, only three slight mistakes have been detected. 'Ruben' in Article 385 should be 'Rubin', and 'guaarntee' in Note 3 to Article 379 gives an Afrikaans like touch to 'guarantee'; while the reference in the last line of Article 260 to 'Lee, 290' seems to be wrong.

In his Preface to *The South African Law of Obligations*, Professor Lee explains the circumstances in which what was intended to be the first volume of a comprehensive digest of the civil law of South Africa has had to be published as a separate work; but he says that 'the editors do not abandon the hope of completing the work in a second volume which would include the Law of Property, the Law of Succession and the Law of Persons'. The present writer had the privilege, whilst working at Oxford under Professor Lee's direction in 1947, of reading through Professor Lee's manuscript of a digest of the Law of Succession, and it is earnestly hoped that in the not too distant future

7. See the present writer's *The Roman-Dutch Law of Fideicommissa* (1949), p. 144 and notes 62 and 63 at p. 162.

8. See p. 138 *supra*.

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the projected second volume of the *Digest of the Civil Law of South Africa* will see the light of day.

In Ceylon there is much glib talk nowadays of the necessity of codifying our law on modern lines by people who forget that, as Mr. Gladstone once said in the House of Commons, a comprehensive account of the existing law is necessary before that law can be amended.<sup>9</sup> A restatement of our law on the model of Sir P. Arunachalam's pioneer but unfinished *A Digest of the Civil Law of Ceylon* and of Professor Lee's *The South African Law of Obligations* is, therefore, a vital necessity, not merely as a basis for possible codification in the future but also as a work of reference for students and practitioners.<sup>10</sup> Perhaps when the staff of the Law Department of the University of Ceylon is increased, and the burden of routine teaching which at present falls on its shoulders is reduced, it will be the privilege of the University to present to the lawyers of this country the comprehensive *Digest of the Civil Law of Ceylon* which is long overdue.

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9. quoted in Sir P. Arunachalam's, *A Digest of the Civil Law of Ceylon*, Vol. I, Preface, p. viii.

10. See the present writer's article, *The Uncertainty of Our Law—a Plea for a Restatement*, in the *Ceylon Daily News* of 5th and 6th April, 1946.