

Introductory Remarks to the Question about the Origin of the Provisions in “Civil and Commercial Code”

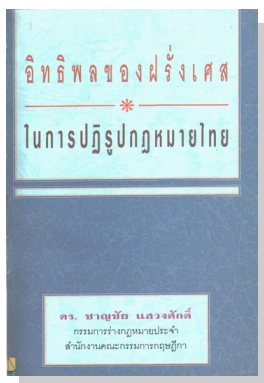
Due to the problem of the lack of detailed accurate documents about the drafting process of the code “ประมวลกฎหมายแพ่งและพาณิชย์”, the identification of the roots and origin of its provisions is one of the basic subject for academic research of this code; it is quite true especially in regard with “บรรพ ๑ และ ๒”

What were their roots and origin? Was it true that the code had been modeled on the Japanese Civil Code? What was the role of the German Civil Code in the formation of the code? Just these questions drove me to start to translate it into Japanese and German in the 1990s. Meanwhile, I have already released three different versions of the translation of Book I and II as follows:

1. ประมวลกฎหมายแพ่งและพาณิชย์ ฉบับเก่า (พ.ศ. ๒๔๖๖) บรรพ ๑ (available [here](#))
ประมวลกฎหมายแพ่งและพาณิชย์ ฉบับเก่า (พ.ศ. ๒๔๖๖) บรรพ ๒ (available [here](#))
2. ประมวลกฎหมายแพ่งและพาณิชย์ ฉบับเดิม (พ.ศ. ๒๔๖๘) บรรพ ๑ (available [here](#))
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3. ประมวลกฎหมายแพ่งและพาณิชย์ ฉบับปัจจุบัน (พ.ศ. ๒๕๓๕) บรรพ ๑ (available [here](#))
ประมวลกฎหมายแพ่งและพาณิชย์ ฉบับปัจจุบัน (พ.ศ. ๒๕๖๘) บรรพ ๒ (available [here](#))
(The last ones are out of date, waiting for updating)

Alongside these works, I gathered basic information about the historical background of the codification project at the beginning of the 20. Century in the Kingdom of Siam. There are several standard works on the subject, for instance:

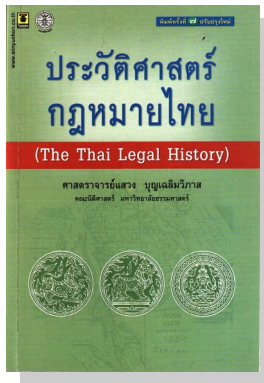
A.



ดร.ชาญชัย แสวงศักดิ์
กรรมการร่างกฎหมายประจำ
สำนักงานคณะกรรมการกฤษฎีกา
อิทธิพลของฝรั่งเศสในการปฏิรูปกฎหมายไทย

สำนักพิมพ์นิติธรรม พ.ศ. ๒๕๓๙

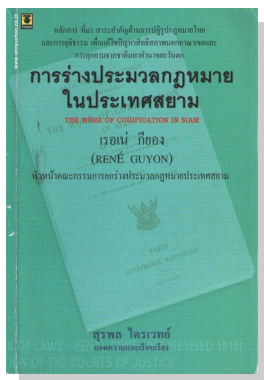
B.



ดร.แสง บุญเฉลิมวิภาส
รองศาสตราจารย์ มหาวิทยาลัยธรรมศาสตร์
ประวัติศาสตร์กฎหมายไทย
(The Thai Legal History)

วิญญูชน พ.ศ. ๒๕๔๓

C.

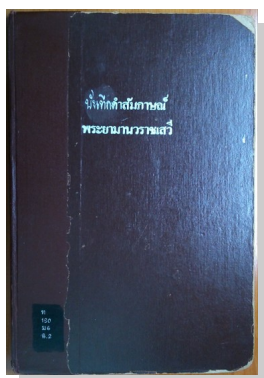


คำแปลไทย โดยสุรพล ไตรเวทย์
การร่างประมวลกฎหมายในประเทศไทย
โดย เรอเน่ กียอง

The Work of Codification in Siam
by René Guyon (1919)

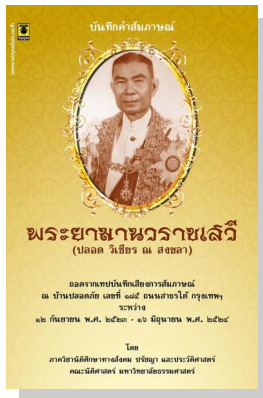
วิญญูชน พ.ศ. ๒๕๕๐

Through the study of these publications, I realized that there were no clear and decisive answer to our questions. Apparently, the drafters did not leave any official documents or records about the drafting procedures of the code. Instead, the authors of the books mentioned above cited the record of the interview with the leading drafter of the code, พระยามานวราชเสวี, which was carried out on 12 September 1980, 10 December 1980, and 16 June 1981:

D₁.

ภาควิชานิติศึกษาทางสังคม ปรัชญา และประวัติศาสตร์
บันทึกคำสัมภาษณ์ พระยามานวราชเสวี
พ.ศ. ๒๕๒๓

The interviewers were professors of the Faculty of Law, Thammasat University. This is a typed document and not officially published. It was available only at the library of the Thammasat University.

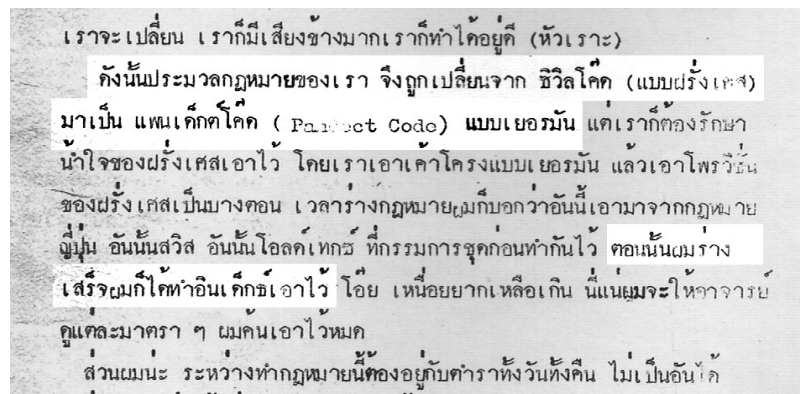
D₂.

(Published Version of the same)

วิญญูชน พ.ศ. ๒๕๕๗

* For unknown reasons, the document was not published over 30 years. Now, it is finally available for everyone

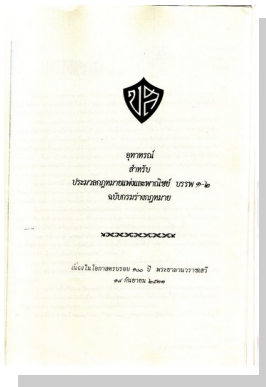
In the interview, *Phraya Manava Racasevi* told briefly the story of the drafting work of the code, especially he described how he prevented the initial concept (Draft 1919) developed by the French advisors and achieved his own idea to draft Book I and II after the Japanese Civil Code.

(D₁. p.4; D₂. p.23)

“[...] In this way, our code has been changed from Civil Code (French style) to Pandect Code in German style. [...] At the time, after the drafting has been finished, I created an index [...]”

So, he created a table of foreign provisions which were referenced as samples and models. He told that this table covered the provisions Secs. 1 to 1420 (D₁. p.6; D₂. p.25). This table, “*ที่มาของกฎหมายในประมวลกฎหมายแพ่งและพาณิชย์ บรรพ ๑-๕*” — we will call it simply “*Phraya Man’s Index*” — was an unpublished document stored in the Office of the Council of State (สำนักงานคณะกรรมการกฤษฎีกา). In 1990, this table was published as an appendix to the centennial publication compiled by the Bangkok University:

E.



พระยามานวราชเสวี
อุทธรณ์สำหรับประมวลกฎหมายแพ่งและ
พาณิชย์
บรรพ ๑ – ๒ (ฉบับกรรมาญกฎหมาย ๒๔๖๘)
เนื่องในโอกาสครบรอบ ๑๐๐ ปี พระยามานวราชเสวี
๑๘ กันยายน พ.ศ. ๒๕๓๓

Besides the “Index”, this book included also the bibliography of the books which were donated to the library of Bangkok University after the death of พระยามานวราชเสวี, “*Phya Manava Rajsevi Library*”.

When I had the first opportunity to look into the “Index”, I had already prepared my own table of references for the provisions in Book I and II through the translation work. I compared the “Index” and the result of my research, and I recognized certain differences between the both tables. For this reason, I decided to proceed with a comparison study between the “Index” and my own recognition. According to the comparison result, I released an “*extended Index*” with corrections and complementary entries:

F. **Phraya Man's Index for Book I and II of the Civil and Commercial Code for the Kingdom of Siam (as of 1925) with Supplementary Entries by the Translator:** available [here](#).

G. **Remarks about the Selection of the Model Provision**

- * For each provision, I chose a most important model provision from the entries and marked it with an asterisk. I recorded the reason for my choice for each provision in a memorandum: available [here](#) (sorry, only in Japanese).

Inaccuracy Question of the “Index”

In this comparison research, however, I identified 36 entries which seemed to be *inaccurate probably due to simple mistakes*. The provisions in question are those as follows:

- in Book I;
Secs. 20, 27, 82, 83, 114, 118, 154, 157, 177
 - in Book II;
Secs. 206, 213, 228, 295, 301, 308, 317, 322, 337, 348, 367, 379, 387, 388, 391, 402, 403, 408, 413, 415, 434, 438, 447, 448
- *) 6 entries 27, 367, 387, 388, 403, and 438 are to acknowledge as “appropriate”, and the entries 20 and 391 were marked as “inaccurate [??]” due to my mistake (as of the confirmation on 24. September 2021).

Accordingly, I reached the conclusion that the “*Phraya Man’s Index*” suffered certain *inaccuracy*. Moreover, there were also *missing entries*. Some samples could be presented as follows:

- **Sample 1:** Entries for Secs. 82 and 83 in the original “*Phraya Man’s Index*”

| ๑๔๖ ♦ บันทึกคำสัมภาษณ์พระยามานวราชเสวี | | | | |
|--|--------------|----------|--------|---------------------|
| New Text | Old Text | Japanese | German | Miscellaneous |
| 62 | 72 | | | Plan.vol.I, No. 636 |
| 82 | 55 par.1; 86 | 37 | | |
| บันทึกคำสัมภาษณ์พระยามานวราชเสวี ♦ ๑๔๗ | | | | |
| New Text | Old Text | Japanese | German | Miscellaneous |
| 83 | | 39, 41 | 80 | Br. 24 |

(Source: D₂. p.146, 147)

Secs. 82 and 83 read in English:

82. – A foundation must be created by an instrument in writing containing the following particulars:

- (1) The name of the foundation,
- (2) Its objects,
- (3) The address of its office, if any,
- (4) Provisions as to its property,
- (5) Provisions as to the appointment and dismissal of its managers.

83 – If a foundation is created by an act inter vivo, the provisions relating to Gifts apply mutatis mutandis.

If it is created by will, the provisions relating to Inheritance apply mutatis mutandis.

The models or samples named in the “Index” are following provisions:

• **Secs. 55 and 86 of the “Old Text”**

มาตรา ๕๕ บุคคลซึ่งศาลได้แสดงว่าเป็นคนวิกลจริตตั้งนั้นแล้ว ถ้าทำการใดแต่ลำพังตน ไม่มีผู้แทน โดยชอบธรรมอนุมัติด้วยใจรู้ การนั้นย่อมเป็นโมฆียะ

Section 55. – If an act is done alone by a person whom the Court ordered to be a person of unsound without consent by his lawful representative, the act is voidable.

มาตรา ๘๖ ตราสารตั้งมูลนิธินั้น ต้องมีข้อความสำคัญดังต่อไปนี้

- (๑) ชื่อของมูลนิธิ
- (๒) วัตถุประสงค์ของมูลนิธิ
- (๓) ที่ตั้งสำนักงานของมูลนิธิ แม้จะพึงมี
- (๔) ข้อบังคับสำหรับจัดการมูลนิธิ
- (๕) การแต่งตั้งผู้จัดการทั้งหลายของมูลนิธิ

Section 86. – The instrument creating a foundation must contain the following particulars:

- (1) The name of the foundation
- (2) Its object
- (3) The address, if possible, of its principal office,
- (4) The rules for its management,
- (5) The appointment of its managers.

• **Arts. 37, 39, 41 of the Japanese Civil Code;**

第三十七條 社團法人ノ設立者ハ定款ヲ作り之ニ左ノ事項ヲ記載スルコトヲ要ス

- 一 目的
- 二 名称
- 三 資産ニ關スル規定
- 四 事務所
- 五 理事ノ任免ニ關スル規定
- 六 社員タル資格ノ得喪ニ關スル規定

Article 37 – Any person who intends to form an incorporated association must prepare the Articles of incorporation and specify the following matters:

- (1) Purposes;
- (2) Name;
- (3) Location of the office;
- (4) Provisions regarding the asset;
- (5) Provisions regarding the appointment and dismissal of directors;
- (6) Provisions regarding the acquisition and loss of membership status.

第三十九條 財團法人ノ設立者ハ其設立ヲ目的トスル寄附行為ヲ以テ第三十七條第一号乃至第五号ニ掲ケタル事項ヲ定ムルコトヲ要ス

Article 39 – Any person who intends to form an incorporated foundation must provide for the matters set forth in items 1 to 5 inclusive of Article 37 in the act of endowment which is intended to form such foundation.

第四十一條 生前處分ヲ以テ寄附行為ヲ為ストキハ贈與ニ關スル規定ヲ準用ス

Article 41 – The provisions relating to gifts shall apply mutatis mutandis to acts of endowment in the form of inter vivos dispositions.

• **§ 80 of the German Civil Code**

§ 80. Zur Entstehung einer rechtsfähigen Stiftung ist außer dem Stiftungsgeschäfte die Genehmigung des Bundesstaats erforderlich, in dessen Gebiete die Stiftung ihren Sitz haben soll. Soll die Stiftung ihren Sitz nicht in einem Bundesstaate haben, so ist die Genehmigung des Bundesraths erforderlich. Als Sitz der Stiftung gilt, wenn nicht ein Anderes bestimmt ist, der Ort, an welchem die Verwaltung geführt wird.

Section 80. – In addition to the foundation business, the establishment of a foundation with legal capacity requires the approval of the federal state in whose territories the foundation is to have its seat. If the foundation is not to have its seat in a federal state, the approval of the Federal Council is required. Unless otherwise specified, the seat of the foundation is the place where the administration is carried out.

Apparently, we can identify following *inaccuracy*:

1. Sec. 55 of the “Old Text” has nothing to do with the contents of Sec. 82.
2. Art. 37 of the Japanese code is a provision about “association”. Art. 39 employs Art. 37 to “foundation”. In this sense, the both provisions should be referenced for Sec. 82.
3. Art. 39 of the Japanese code and § 80 of the German code do not deal directly with the subject of Sec. 83.

Accordingly, I put “[??]” to referenced provisions as a marking for inaccuracy and

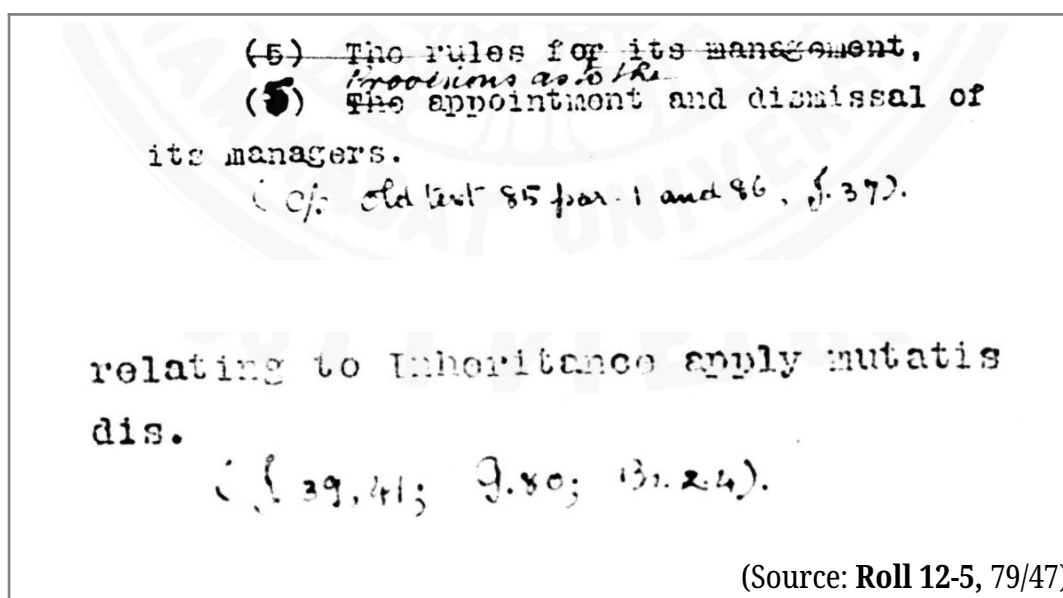
inserted complementary entries with “[]” in my table “**Phraya Man's Index for Book I and II**” (F. cited above) as follows:

| | | | | |
|----|-----|---------------------------|---------------------------------------|----------|
| 81 | 110 | * 84 | 34 <I.41,42; II.23,70> | 80 |
| 82 | 112 | 55 par.1 [??] : 86 | * 37 [, 39] <I.44(II)(III); II.26,51> | [81, 85] |
| 83 | - | | 39 [??], * 41 <I.58,59,62; II.71,72> | 80 [??] |
| 84 | 119 | | * 40 | |
| 85 | | * 85 [85 par.1; 87 par.1] | 341 <I.44, 49; II.22,70> | 792 801 |

(Source: F. p.17)

Archives of the History of Thai Codification

Long time, I had no opportunity to confirm whether my recognition of “inaccuracy questions” is reasonable or not. This situation has changed since the “Archives of the History of Thai Codification” have become accessible for public in 2020 (its list is available [here](#)). These archives are collections of documents which have been preserved in the library of the “Office of the Council of State”. The archive “Roll 12- 5 (Vol.79)” contains the drafting materials which *Phraya Manava Racasevi* probably referred to. Its parts for references of Secs. 82 and 83 look like as follows:



(Source: Roll 12-5, 79/47)

Based on this evidence, we could confidently conclude following points:

1. The entry “Old Text 55” at Sec. 82 was incorrect due to careless mistake. The correct reference was “Old Text 85 par.1”.

มาตรา ๘๕ มุถุนินั้น จะต้องก่อตั้งขึ้นด้วยทำตราสารลงไว้เป็นลายลักษณ์อักษร

Section 85 – A foundation shall be created by an instrument in writing.

2. The entries “J.39” and “G.80” were correct. In other words, they were inaccurate due to substantial misunderstanding.

Of course, the questions who wrote these references based on what would be other matters.

- **Sample 2:** Entries for Secs. 226 and 228 in the original “Phraya Man’s Index”

| บันทึกคำสัมภาษณ์พระยามานวราชเสวี ♦ ๑๕๓ | | | | |
|--|----------|----------|----------|---------------|
| New Text | Old Text | Japanese | German | Miscellaneous |
| 208 | 356 | 493 | 294, 295 | |
| 226 | | | | |
| 227 | | 422 | | |
| 228 | | | 231 | |

(Source: D₂. p.153)

Secs. 226 and 228 read in English:

226. – A person who is subrogated to the rights of a creditor is entitled to exercise in his own name all the rights which the creditor had in respect of the obligation including any security for it.

By real subrogation, a property is substituted for another property in the same juristic person as the previous one.

228. – If, in consequence of the circumstance which makes the performance impossible, the debtor acquires a substitute or a claim for compensation for the object owed, the creditor may demand delivery of the substitute received or may himself claim for compensation.

If the creditor has a claim for compensation on account of non-performance, the compensation to be made to him is diminished, if he exercises the right specified in the foregoing paragraph, by the value of the substitute received or of the claim for compensation.

As clearly seen in the “*Phraya Man’s Index*”, Sec. 226 has no reference. However, I was quite sure that this provision was modeled after Sec. 6 of the “Old Text”. Also, regarding Sec. 228, § 231 of the German code as a reference for Sec. 228 seemed to be quite implausible. It must have been “§ 281” instead:

- **Sec. 6 of the “Old Text”**

มาตรา ๖ บุคคลผู้รับช่วงสิทธิแห่งเจ้าหนี้อาจใช้สิทธิทุกประการซึ่งเจ้าหนี้ได้มีตามผลแห่งหนี้ ฤ
ประกันแห่งหนี้ได้

Section 6 – A person who is subrogated to the rights of a creditor can exercise all the rights which the creditor had in respect of the effects of the obligation or of any security for it.

- **§§ 231 and 281 of the German Civil Code**

§ 231. Wer eine der im § 229 bezeichneten Handlungen in der irrigen Annahme vornimmt, daß die für den Ausschluß der Widerrechtlichkeit erforderlichen Voraussetzungen vorhanden seien, ist dem anderen Theile zum Schadensersatz verpflichtet, auch wenn der Irrthum nicht auf Fahrlässigkeit beruht.

Section 231. – If a person does any of the acts described in section 229 in the mistaken assumption that the requirements necessary to exclude unlawfulness are satisfied, he is obliged to pay damages to the other party, even if the mistake does not result from negligence.

§ 281. Erlangt der Schuldner in Folge des Umstandes, welcher die Leistung unmöglich macht, für den geschuldeten Gegenstand einen Ersatz oder einen Ersatzanspruch, so kann der Gläubiger Herausgabe des als Ersatz Empfangenen oder Abtretung des Ersatzanspruchs verlangen.

Hat der Gläubiger Anspruch auf Schadensersatz wegen Nichterfüllung, so mindert sich, wenn er von dem im Abs. 1 bestimmten Rechte Gebrauch macht, die ihm zu leistende Entschädigung um den Werth des erlangten Ersatzes oder Ersatzanspruchs.

Section 281. – If, in consequence of the circumstance which makes the performance impossible, the debtor acquires a substitute or a claim for compensation for the object owed, the creditor may demand delivery of the substitute received or assignment of the claim for compensation.

If the creditor has a claim for compensation on account of non-performance, the compensation to be made to him is diminished, if he exercises the right specified in par. 1, by the value of the substitute received or of the claim for compensation.

Accordingly, I noted my consideration in my table “**Phraya Man's Index for Book I and II**” (F. cited above) as follows:

| | | | |
|-----|-------|------------------------------------|-----------------|
| 225 | | [419] <Prop. 391 - 393> | * 290 |
| 226 | * [6] | [304, 423] <Secur. 133, Prop. 339> | |
| 227 | | * 422 <I.223(II); II.218> | [255] |
| 228 | | | 231[??] * [281] |
| ๒๒๘ | | | |

(Source: F. p.23)

After the release of the “**Archives of the History of Thai Codification**”, I found the following notations in the archive “**Roll 12- 5 (Vol.79)**”, which

confirmed my consideration:

subrogation, the property is
for another property in the same
ition as the previous one. (C. Code 616.).

foregoing paragraph, by the value
substitute received or of the clai
pensation.

(C. 281).

(Source: Roll 12-5, 79/128)

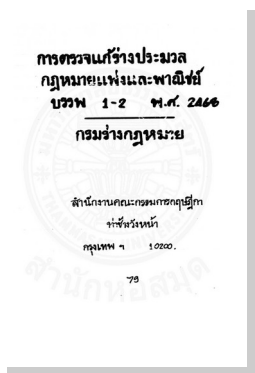
It is quite likely that the person who prepared the "***Index***" was not careful enough as he checked the document.

Digitizing the Archive “Roll 12-5” and Recollecting the Referencing Data

Apparently, we have to rebuild the referencing table of foreign provisions based on ***the handwritten memorandums*** to each provision of Book I and II in English, which are included in the archive “***Roll 12-5***”, in order to confirm or correct the entries in the “***Phraya Man’s Index***”.

We use the following document in the “[Archives of the History of Thai Codification](#)” as main resource:

I.



การตรวจแก้ร่างประมวลกฎหมายแพ่งและพาณิชย์

บรรพ 1 – 2 พ.ศ. 2468

กรมร่างกฎหมาย

[Roll 12-5](#) (Vol.79)

Period: [18 ก.ค. 2468 – 18 พ.ย. 2568]

In the first step, the draft for the revised Civil and Commercial Code of 1925 (so-called “***New Text***”) in English is to be digitized based on this source:

- Digitized Draft Civil and Commercial Code of 1925, Book I: available [here](#)
- Digitized Draft Civil and Commercial Code of 1925, Book II:
 - Title I: available [here](#)
 - Title II – V: available [here](#)

In the next step, all the handwritten memorandums are to be extracted and put into the comparison with the entries in the “***Phraya Man’s Index*** (ที่มาของกฎหมายในประมวลกฎหมายแพ่งและพาณิชย์)”

- Comparison: Phraya Man's Index and the Memorandums, Book I & II: available [here](#)
- Result of the Comparison: Reconfirmed Inaccuracy in the Phraya Man’s Index: available [here](#)

Inaccuracy Reconfirmed

According to the comparison between the entries of the “*Phraya Man’s Index*” and the memorandums in the archive “Roll 12-5”, certain inaccurate entries were reconfirmed. The important ones of them are listed as follows:

| Provision # | Inaccurate entries | Missing or correct entries |
|-------------|--------------------------------|-------------------------------------|
| 17 | | Austria 25; It. 924 |
| 35 | | de Becker principles p.11, 12 |
| 38 | | G. 1438, 1519 |
| 40 | | Dika 664/2465 |
| 43 | | Old text 27 |
| 53 | | Fr. 112, 114 |
| 66 | | Old text 76 |
| 82 | Old text 55 par.1 | Old text 85 par.1 |
| 85 | Old text 85 | Old text 85 <u>par.2</u> |
| 99 | Arg. 2349 | Arg. 234 <u>6</u> |
| 100 | | Huebner No.25 p.165 |
| 101 | | S.C. 713 |
| 107 | Huebner | Huebner <u>No.27 p.175</u> |
| 113 | | S.O. 19 – 21 |
| 114 | S.C. 19 – 22 | S. <u>O.</u> 19 – 22 |
| 116 | | Arg. 94, 95, 128 |
| 118 | Old text 94 | <u>L.</u> 94; Sch. p.93 |
| 129 | | Fr. 1117 |
| 144 | Plan. I. No.32 | Plan. Vol.I No. <u>325</u> |
| 154 | Old text 210 | Old text 21 <u>1</u> |
| 172 | | Br. 172 V |
| 179 | | Old text 442 |
| 183 | | Draft of Capacity of 1919 s.82, 85 |
| 186 | | G. 207 |
| 189 | | G. 704, 559, 560 |
| 191 | | Plan. Vol.II No.648 |
| 192 | | Baud. Vol.28 No.105; S.O. 141 par.3 |
| 213 | Old text 331, 334; G. 249, 251 | old text 331 – 334; G. 249 – 251 |
| 221 | | G. 301 |

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| 226 | | Old text 6 |
| 228 | G. 231 | G. 281 |
| 231 | | German Law on Application of Civil Code sect. 52; S.C. 822 |
| 232 | | German Law on Application of Civil Code sect. 53 |
| 238 | | Plan. Vol. II No. 325 |
| 251 | | J. 303 |
| 268 | | J. 192 – 195; Book on Thing 118 |
| 295 | Old text 246 – 260 | Old text 246, 256, 257, 260 |
| 317 | Old text 291 – 292 | Old text 292 |
| 321 | | Old text 297, 298; G. 364 |
| 323 | | Sect. 464 |
| 326 | | Old text 304 – 306; S.O. 88 – 90; G. 371 |
| 330 | | Sect. 207 |
| 337 | G. 368 | G. 383 |
| 348 | J. 513 | J. 512 |
| 350 | Fr. 1274 – 1277 | Fr. 1274, 1275, 1277 |
| 354 | G. 145 | G. 148 |
| 361 | | S. 130 [??] [old test 130] |
| 369 | | Fr. 1612 – 3 |
| 372 | | Book III Sect. 567 |
| 399 | Old text 164, 167 | Old text 164 to 167; G. 681 |
| 401 | | Old text 161, 162; G. 683; S.O. 422 |
| 402 | Old text 152 | Old text 162 |
| 415 | | S. 938 – 40 |
| 434 | G. 826 – 823 | G. 836 – 838 |
| 448 | S.O. 50 | S.O. 60 |