NOTE

for the Committee of Translation

Good Faith.

Section 18 of the Code of Obligations reads as follows: "Every person is bound to act in good faith in exercising his rights and in performing his obligations".

Section 18 was not included in the three Preliminary Drafts of the Code of Obligations. It has been proposed in 1913 by Mr. G. Padoux, adopted and inserted in the fourth Draft (1914), and henceforth passed without any further discussion or alteration.

Section 18 comes from section 2 of the Civil Code of Switzerland, the translation of which it is literally (Section 2: Chacun est tenu d'exercer ses droits et d'exécuter ses obligations selon les règles de la bonne foi).

As I told previously to the Committee, the French Commissioners are of opinion that the construction of this section must be wide. In the Swiss Code, it has been put in the very beginning of the Code and governs it. Moreover, it is included in the Civil Code and not in the Code of Obligations (general provisions of the Civil Code applying to the Code of Obligations unless otherwise specified). At last, the wording "exercer ses droits" in French language has a wide meaning and may cover creation, alteration or termination of all juristic acts.

The intention of the French Commissioners, when

including section 18 in the Siamese Code of Obligations, has been undoubtedly to do the same and to give a general rule which would be in any case a guidance for the Courts in matter of good faith considered as an element of all juristic acts. I remind that sections 1 to 39 of the present Draft Code of Obligations are general ones; if a Civil Code could have been published at once and the same time, sections 1 to 39 would come in the beginning of such a Code, and the Book on Obligations would have begun by section 40.

The construction of the words "exercising his rights" has not been limited by the draft-men to the exercise of a right already existing, and they have tried to point out their intention by the place of the Section in the Code (as made in the Swiss legislation). In their intention, section 18 applies to all juristic acts, that is to say, to the creation, termination or alteration of rights by a manifestation of the will of a private individual (definition given by Dr. Schuster).

The Committee has admitted that it is a part of a complete capacity of persons to enjoy a permanent capacity to acquire all the specific rights determined by law. For instance, every-body enjoys the right to be an owner, to be a creditor, to endorse a bill or a promissory note, to make or receive a gift, etc. And one enjoys such right, as long as one lives, no matter he exercises them specifically by becoming on a certain day the owner of a specific thing, the creditor of a named debtor, the endorser of such specified promissory note, etc., or not. In other words, the right to be an owner or a creditor is a general right, and the right of A to be the creditor

of B is the specific application of his general right. Again for the general right of A to become the possessor of a bill of exchange and to claim payment of it, which becomes a specific application of it when specific payment of a bill is claimed.

This interpretation is not a new one. Many legislations have specified that some people, after having been sentenced for such or such ofrences, incur a "deprivation of their civil rights" (what has been called a "civil death"). They can no longer be or become in the future owners, creditors, guardians, agents, etc. This can-not be explained unless if we agree that civil rights are not necessarily specific ones in given cases, but general ones which are included in the permanent juristic capacity of every body.

Now, the attention of the French Commissioners has been directed upon this point that the words "exercising his rights", which are the translation of "exercerses droits", which have not the same extent in English language and may be constructed in a narrower way, and consequently not extended to all juristic acts.

The French Committee quite agree with the observation and is quite prepared to take it into great consideration, so that no misconstruction may be made in the future.

If the Commission of Codification will agree upon this construction of section 18, no difficulties can arise in the application of the system of good faith as it stands in the Code of Obligations. But to insure such a construction, the Committee of Redaction see two ways: either to make illustrations under section 18 to fix the interpretation, or to modify the wording of

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section 18 to enlarge it.

As to section 18, it has been objected also that there is no sanction expressly specified.

The position of the question seems to the Committee to be as follows.

Section 18 was not intended to be only a statement of some moral or theoretical, but not practical, bearing. Section 18 can be made use of before the Law Courts, because section 19 specifies that every body is presumed to act in good faith; and this compels one who claims that another person was not in good faith to bring evidence that this other person has acted in bad faith. If such an evidence is conclusively brought, shall ever a Court enforce a juristic act made in bad faith by such other person? Moreover, section 20 says that good faith is no defence if not coupled with due care: it follows that one is entitled to claim the voidity of a juristic act or contract by alleging that the other party was not acting in good faith. If good faith is or may be a defence, a contrario bad faith is or may be a ground for cancellation.

Sanctions for the good or bad faith appear hardly in the Civil Law. The legislations rely upon the Courts:

1) to ascertain if there is good or bad faith, and, 2) when satisfied there is bad faith (especially when bad faith is forbidden by law, like under section 2 of the Swiss Code, a contrario) ~~and~~, ——————————

—— to cancel a contract or a juristic act for the benefit of the party who was in good faith and is always

damaged by bad faith directed against him. The silence of the Civil Law comes from this fact that questions of good or bad faith are always very delicate ones and mere questions of facts, and that no Court seems reluctant to consider that they are empowered to cancel in case of bad faith, so much the more when a provision of law directly orders parties to act in good faith.

The French Committee are of opinion that, with section 18 the duty and power of Courts in this matter will be obvious and sufficient. Moreover, in matter of obligations, there are special rules, such as:

a) Fraud (which means always bad faith) entails defective consent and voidability;

b) Mistake as to an essential element of the contract (which may have been made on account of the bad faith of the other party) also entails defective consent and voidability.

It seems that there is no necessity to provide for a special sanction of section 18. This would probably be very difficult to draft, and the other legislations seem to have good reasons not to have done it, and to have relied upon the Courts to deal with the matter after a general guidance like section 18.

24th. August 1920.