III.

Decision to separately promulgate the Books I and II (October 1921 - December 1922) and appointment by the King of a Revising Committee (June 1922).

Sommaire des événements d'octobre 1921 à juin 1922

La révision du Code par la Commission de Codification (I et II du présent Volume VI) étant terminée, M. Guyon a ~~proposé~~ soumis au Ministre de la Justice la récapitulation ~~faite~~ des modifications dernières ainsi proposées au texte de 1919, et la traduction siamoise. (octobre 1922).

M. Guyon a ensuite exposé qu'à son avis il y avait lieu de promulguer de suite les Livres I et II ainsi prêts (novembre-décembre 1922). Un préambule a été rédigé à cet effet (~~mars~~ 1923).

Le Roi a adopté l'opinion de M. Guyon sur la publication séparée des Livres I et II mais décida de nommer un "Revising Committee" pour une révision finale de l'ensemble de ces livres, en anglais et en siamois, sous la Présidence du Prince Dévawongse (Juin 1923).

On trouvera dans la présente Part III de ce Volume VI les documents relatifs à ces événements.

Promulgation du Code des Obligations

Le 12 octobre 1921, le Ministre de la Justice a examiné avec M. Guyon le point de savoir s'il serait opportun de publier dès maintenant et séparément la Partie Générale du Code des Obligations — déjà traduite & examinée et prête — sans attendre la Partie des Contrats spécifiques, qui est en cours de traduction.

Il a été convenu que je ferais un rapport sur ce point, exposant les arguments pour et contre, et qu'il serait soumis au Roi.

12 octobre 1921

Arguments pour une publication immédiate :—

1) la partie est générale et gouverne tout le droit civil siamois;
2) elle s'applique donc même à des lois déjà en cours (Partnerships et C^ies, Associations) dont elle éclaire le fonctionnement;
3) elle s'applique aussi à toutes les matières du droit dont les Cours ont journellement à faire l'application;
4) c'est la partie la plus difficile pour le juge : un délai supplémentaire pour l'étudier sera utile, la mise en vigueur de tout le Code devant être fixée à la même date.
5) il y a un intérêt moral, vis-à-vis des puissances étrangères, à montrer que la Codification se réalise : surtout au lendemain du Traité américain et avec la clause de "reasonable time" qu'il contient.

Arguments contre une publication immédiate—

1) Le Code a attendu 13 ans ; il est un peu puéril de vouloir gagner cinq ou six mois maintenant, et de ne pas le publier complet en raison de cette hâte inattendue.
2) Le lecteur, mal au courant de l'étendue d'un Code, des matières qu'il peut contenir, et de notre programme, risquera de croire que les 387 articles publiés constituent tout le Code Civil, ou au moins tout le Code des Obligations, et il sera déçu par la brièveté de l'ouvrage. Il faudrait tout au moins remédier à cette impression défavorable par un communiqué sur les intentions du Gouvernement.

Mr. R. Guyon to H. E. Chao Phya Abhai Raja, Minister of Justice, President of the Commission of Codification.

Bangkok 19 th. October 1921.

Your Excellency,

I beg to submit to you the Report of the alterations suggested by both the Committee of Redaction and the Committee of Translation to the Draft Code of Obligations 1919 before the promulgation of the same.

The present Report concerns the first Part of the Code (sections 1 to 387) which contains any kind of general provisions of civil law, and is now translated into Siamese and ready to be promulgated and published.

Another Report will follow further to contain the alterations in the second Part of the Code (sections 388 to 1463) when ready for translation and promulgation.

I remain, your most faithful servant.

ALTERATIONS

TO THE

DRAFT CODE OF OBLIGATIONS 1912

BEFORE PROMULGATION.

First Part: GENERAL (Sections 1 to 387).

"PARTS"

The sub-divisions of Chapters (numbered as I, II, III, IV, etc.) shall be called "Parts".

8

The Committee of Translation suggest the addition of the word "bye-laws" which is used in the present Siamese texts of this kind.

18

The word "private" to be deleted: because it adds nothing to the word "agreement", and is only likely to induce the Courts to misconstructions.

18

This section has been reconsidered and a note submitted to that effect by the French Committee (see Annex I to the present Report).

As a consequence, it is suggested to redraft the section as follows:

"Creation, extinction or modification of rights, and fulfilment of obligations must be made in good faith".

30

Instead of: "which version was considered to be the origin................." say: "which version was intended to govern", the document executed in the Siamese language shall govern".

32

We have been of opinion that the illustration for this section is too complicate and has better to be substituted by the following one:

Illustration. - On the 1st. of July 2463 at 10 a.m. A lends to B 100 baht to be returned on the 1st. of September 2463. B is not obliged to return the money on this day at 10 a.m., but only before the end of the day.

48 2nd. par.

The words "in execution of the contract" are objectionable, because the word "execution" has not been used in the other parts of the Code, and is not advisable owing to the habitual use of the word "performance" in similar cases.

It is suggested to substitute "in execution of the contract" by "as a performance of the contract".

52

Illustration to be deleted.

54

Minor alterations of wording in the illustration: instead of "retrospective effect", to read "stipulation".

60

Minor alterations in the wording of the illustration.

61

Minor alterations in the wording of the illustration.

62

Minor alterations in the wording of the illustration.

Misprinting to be corrected, the second figure being "400" instead of "500".

74

Illustrations to be added to this section, as follows:

Illustration. - I. - A is a creditor of B for 10,000 baht money borrowed. At the time of performance, B asks for a delay, but A does not allow it and threatens B to exercise against him his rights of action for the recovery of the sum due and to seize B's properties if the latter does not immediately pay the money due or does not mortgage a property of his own as security.

B, fearing seizure of his properties, mortgages his house for the benefit of A. There is no duress from A.

II. - A, a cashier in B's firm, has misappropriated 1,000 baht from his employer. B discovers this criminal misappropriation when examining his cash-accounts, but does not warn the police because he takes in consideration that A was up to the present day a good employee. B orders A and his wife to come to his office, when he makes A confess his robbery and he threatens to send him to Court if there is no immediate return of money, or if A's wife does not consent to mortgage her own property as security of this return. A's wife, to save the honour of her husband, consents to do so. There is no duress from B and the mortgage is valid.

79

Two words "or fraud" have been omitted in the printing.

85

Minor alterations in the wording of the illustration.

86

"Invalidity" to be substituted by "voidity".

95

Instead of: "If the manager has not undertaken to act contrary............", to read: "If the manager has undortaken to act not contrary............................"

96

Instead of: "If the manager has not undertaken to act contrary..............", to read: "If the manager has undertaken to act not contrary............................"

108

Minor alterations in the wording of the illustration I.

109

Illustration to be deleted here, and transferred after section 111.

111

The beginning of the illustration to be modified as follows:

"Illustration (sections 109, 110 and 111). - A delivers to B an elephant, market value 2,000 baht, believing that such prestation was due. In fact, the prestation was not due. A is entitled to restitution from B.

If the elephant is still in B's possession............etc."

113

Illustration. - Reference to section "109" to be substituted by reference to section "111".

117

First paragraph. - The word "for" (before "charges") to be deleted.

Illustration. - To be modified in order to be clearer, as follows:

"A is ordered under section 105 to restore to B a house which had been unduly delivered to him by B.

a) A has incurred 200 baht expenses in repairing the roof of the house and he has paid 50 baht house tax on it. B must reimburse these 250 baht to A. If A has leased the house and collected 150 baht rent, he is entitled to keep such rent if he was in good faith (section 114). But then these 150 baht profits must be deducted from the 250 baht to be reimbursed to him, that is to say that B would have finally to reimburse 100 baht balance;

b) If A has ascertained at a certain

time that the house was is on the verge of falling in owing to floods, and has had to make 5,000 baht for the ground works, this is an expense for preservation. Then B must reimburse to A 5,000 baht; and no deduction shall be made of any rent collected by A and which he is entitled to keep on account of his being in good faith".

119

This section is to be read as follows: "If the person who has in bad faith unduly received a property has made alterations in, or additions to it, he must return the property after having put it in its former condition at his own expense. If it is impossible to put it in its former condition or the property would be damaged thereby, he must return it in such condition as it is and he is entitled to no compensation for any increase of value accruing to the property from such alterations or additions, and he is liable to pay compensation for any decrease of value resulting from the same".

N.B. - The words which are new (underlined words) have been added to make clear an idea which was understood, but has better to be fully explained especially in the Siamese version.

120

In order to have a better discrimination of the words "intentionally" and "negligently", it is suggested to redraft the section as follows:

"Whoever intentionally causes injury to another person, or whoever causes such injury negligently, that is to say, under any of the following circumstances:

1) By omission of such care as may be expected from a person or ordinary prudence, or

2) By omission of such skill and care in a profession as may be expected from a person exercising such profession, or

3) In disobedience to any law, bye-law or lawful order,

is said to commit a wrongful act and is bound to make compensation to the injured person".

123

The illustration is objectionable, and it is proposed to give no illustration for this section which is perfectly clear by itself.

124 and 125

It is suggested: first, that the rank of these two sections be reversed, to be read more logically; second, that the Court may, instead of being bound, decide the proportion in which the compensation must be borne by the wrongdoers, because, as a rule, the present practice of the Siamese Courts is repugnant to decide upon points which have not been submitted by the parties themselves.

In order to meet these suggestions, the following alterations are proposed:

124. - If a wrongful act has been committed by several persons, the several wrongdoers are jointly liable for the payment of the whole of the compensation to the injured person unless otherwise decided by the Court.

125. - As between the several wrongdoers themselves, the Court may decide the proportion in which the compensation must be borne by each of them.

126

Instead of: "by section 91 of the Penal Code", to read: "by the Penal Code".

This section deals with self-help and the second sentence says that a creditor who uses self-help contrary to the provisions of sections 127 and 128 commits a wrongful act and has no defence by alleging "that he was ignorant that his act was wrongful or that his ignorance was not due to his own fault".

This second sentence has been objected to as being unuseful or even not exact.

Since the creditor commits a wrongful act, we are governed by section 120 (definition of wrongful acts), and generally the wrongful act specified in section 129 will be committed by "omission of care".

On the other hand, to say that it is no defence to say that the creditor's "ignorance was not due to his own fault" appears somewhat difficult to understand for the reader. And, moreover, it has never been possible to exonerate oneself from liability for wrongful act by one alleging that one was ignorant without one's fault.

The first sentence of the section seems to be sufficient and it is suggested to delete the second sentence of the section.

130

Second paragraph. - To delete the word "lawful" (in "lawful command"). This word is objectionable, because the command, which was to be obeyed by the injuring person as being a subordinate, has probably been something not lawful in itself.

Cf. the words: "who <u>wrongfully</u> gave the command".

133

The words "as refer to restitution made" are to be deleted as having no utility.

135

To say "for medical treatment" instead of "during illness".

Cf. de Becker's Japanese Code Commentary under section 710.

136

To say "for medical treatment" instead of "during illness"; Cf. 135.

To say "or" instead of "and" in the enumeration of parents.

187

Instead of: "by section 96 of the Penal Code", to read: "by the Penal Code".

138

The name of Division II (Of Some Particular Kinds of Obligations) has been objected to. The English word "Particular", it is said, has not the meaning of the French word "Modalités" which is used in the Swiss Code. To come nearer to the French wording, it is deemed convenient to say: "Of Various Kinds of Obligations".

146

Minors alterations in the illustration.

151

Misprinting. To read: "149" instead of "146".

164

Illustration: Instead of: "debt", to say: "sum due".

165

Second paragraph. Instead of: "he is entitled to.................", to say: "the debtor may..........."

This second paragraph becomes section 166.

166

This section shall be numbered 167.

167

This section shall be numbered 168.

168

This section shall be numbered 169.

169

This section shall be numbered 170.

170

This section shall be numbered 171.

171

The suppression of this section has been requested because the solution which is proposed in section 171 has been given up about twenty years ago in Siamese law and is disfavoured as being unfit for the customs of the country.

Any way, the matter may be reconsidered when the Civil Procedure Code shall be drafted.

177

The reference "167" to be substituted by "168".

184

Omission in printing. Instead of: "in favour of one joint debtors", to read: "in favour of one of the joint debtors".

185

The suppression of this section has been requested in the same conditions as for section 171 (see herebefore).

186

This section shall be numbered 185.

187

This section shall be numbered 186.

188

This section shall be numbered 187.

189

The first paragraph of this section shall be numbered 188.

The second paragraph shall become section 189 reading separately as follows:

"If the release is granted to a debtor personally, his share only in the obligation is extinguished to the extent of the release".

190

The wording of the first paragraph is slightly altered as follows:

"The joint debtor who has satisfied the creditor is subrogated to the rights of the creditor against the other joint debtors up to the amount satisfied by him on behalf of such other joint debtors".

202

The attention of the Commission of Codification has been called upon the use of the words "distress", "attachment" and "seizure" in the Siamese legislation.

After a careful examination of the respective meaning of these words in English, the Commissioners have been of opinion that to use only the word "seizure" is sufficient and more proper for the Siamese language, provided that distinction between a seizure before or after judgment shall be made when necessary. (Cf. the word "saisie" in French).

Several sections of the Code of Obligations have been altered accordingly.

Section 202 shall read: "An obligation seized by an order of a Court, before or after judgment, cannot be transferred by the creditor".

213

Section 213 deals with the right and conditions of transfer of rights which are subject to litigation.

Upon the request of the Committee of

Translation, this important question has been reconsidered and discussed again (see Annex II to the present Report).

After this examination, it has been decided that section 218 of the Draft would be substituted by the following one:

"Any transfer of right for a reciprocal prestation, whilst subject to litigation, is void".

229

See note for section 202.

Section 229 shall read: "If the debtor performs the obligation notwithstanding an order for seizure before or after judgment.. ...."

259

Instead of: "from the moment when", to read: "after".

268

Instead of: "before", to read: "at the time when".

270

Illustration II has been redrafted.

287

The English version has been modified in order to be clearer.

No. 1 shall read: "if he has received the earnest money, he is entitled to forfeit it";

No. 2 shall read: "if he has delivered the earnest money, he can claim double amount of earnest money".

289

Instead of: "from the time when", to read: "after".

310

See note for section 202.

Section 310 shall read: "If the property of a debtor has been seized by order of the Court in execution of a judgment........."

315

Misprinting: the reference "294" to be substituted by "314".

325

See note for section 202.

Section 325 (second paragraph) shall read: "The lessor can object to such movables being removed until he has been satisfied, and seize them if necessary to prevent their removal".

328

See note for section 202.

Section 328 (third paragraph) shall read: "Provided that such monies or properties be seized by order of the Court, either before or after judgment, before they are paid or delivered to the debtor";

A misprinting is to be corrected: the words "by the creditor" have been omitted (line 2, after "exercised").

338

The practice of the Siamese Civil Procedure (Civ. Pr. Code, s. 83) is that civil actions provided for by section 338 are exercised in the name of the creditor.

The Committee of Translation have requested that the words "in the name of the debtor" be substituted by "in the name of the creditor".

No difficulty. The words "in the name of the debtor" have been the translation of the French meaning "au nom du débiteur" what means as well in English "on behalf of the debtor".

It is then proposed to say, to be clear and complete: "in his own name on behalf of the debtor".

340

In this section, to say that the defendant "can have such action dismissed" would mean, according to the Siamese Civil Procedure, that the costs should be borne by the plaintiff (creditor suing in the name of the debtor).

Of course, the costs must be borne by the defendants; to avoid any difficulty, it is suggested to redraft the section as follows:

"The judgment creditor can exercise a right of action belonging to the debtor for the whole amount due to the debtor, irrespect tive of the amount due to the creditor. But the defendant can satisfy the creditor by paying the amount due to him, provided that, if the original debtor joined as a plaintiff, he may proceed to judgment for the balance".

343

The Committee of Translation have requested that the Drafting 1910 be taken again for this section: so that the words "judgment creditor" by the ends of No. 2 and No. 3 be substituted by the words "creditor". The wording would be very clear without such a repetition.

The Committee of Redaction have no objection against the alteration, being understood that no misconstruction may arise, and that any way the "creditor" named by the ends of Nos. 2 and 3 is and remains the "judgment creditor" named by the beginning of the section. Of course, in law, it is necessary that the creditor entitled to exercise the action specified in section 343 be a creditor the title of which is anterior to the transfer or renunciation made by the debtor in fraud of the creditor's rights. The consequence being that the date of the title must be known and ascertained accurately and undisputedly. Then, as in Siam there is no better way to have such date made sure and definite than a judgment of a Court, it is necessary that ~~a~~ the creditor be always a judgment creditor.

344

Same objection has been raised against this section as against section 340, viz: the word "dismissed" would, according to the Siamese Civil Procedure, mean that the plaintiff has to bear the costs and fees of the case.

The same modification is proposed as for section 340, that is to say:

"In such action, the Court shall hold the plaintiff as duly satisfied if the defendant pays off the judgment creditor's claim".

356

See note for section 202.

Section 356 shall read: "A debtor cannot notify set off after the obligation has been seized by order of the Court, either before or after judgment".

359

Instead of: "at once", to read: "at the same time".

363, 364, 365 and 366

These sections deal with prescription and consider the following points:

shall prescription be set up by the Court itself, when the parties did not do so ?

shall prescription be set up as a defence at any stage of the proceedings and in any Court ?

The question is an important one, and the Committee of Translation have requested to reconsider the questions from the Siamese point of view.

The French Committee have quite agreed that section 363 of the Draft entitling the Court to set up themselves the prescription as a defence when the parties did not do so, is contrary to the practices of many other Codes (French, German, Swiss, Japanese, etc.).

The reason to adopt this provision twelve years ago, was, as we read in the Preparatory works, that it was feared that the parties in this country were often unaware of their own rights. And the point was rather much discussed.

But twelve years have elapsed and the French Committee are quite prepared to admit that such fears may be given up at the present time. They propose therefore to cancel section 363 and to say:

"When prescription has not been set up as a defence, the Court cannot dismiss the claim on the ground of prescription".

As to section 364, the position is not so clear. Indeed, the present practice is not only that the defence of prescription cannot be set up before the Dika Court for the first time, but that even it cannot be set up before the Appeal Court for the first time. This is the English Law, which is contrary to the Continental Law in the matter. The French Committee are of opinion that the point requires some consideration more, and can hardly be decided and settled up for a special case like that of section 364 alone: as a fact, the point is connected with the whole Civil Procedure, and it would be better to reserve it, to say nothing in the Code of Obligations, and to have a full consideration of the matter when coming to the examination of the Civil Procedure. It may be noted that the Japanese Civil Code has done so.

This suggestion having been adopted, to avoid renumbering of the whole Codes it has been proposed:

to cancel section 364;

section 365 being numbered 364;

section 366, paragraph 1, being numbered 365;

section 366, paragraphs 2 and 3, being numbered 366;

Illustration of 366 accordingly.

386

This section deals with period of prescription for obligations resulting from judgments, etc. The Committee of Translation have suggested that the end of the section (whatever the original cause of action may have been) is objectionable because it has been avoided in the Code to use the word "cause", which besides is ambiguous in the present section. It has been agreed that no doubt may arise as to the interpretation of the section if the said words are deleted, and it is suggested to do so.

18 th. October 1921.

ANNEX I.

NOTE

concerning Section 18 (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 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 driots" 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 one 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 had 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 offences, 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 cannot 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 intention of the French Commissioners has been directed upon this point that the words "exercising his right", which are the translation of "exercer ses droits", 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 are 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 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 <u>no defence</u> 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), 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 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.

(24 th. August 1920)

ANNEX II

NOTE

concerning Section 213.

Section 213 reads as follows:

"If a right is transferred for a reciprocal prestation whilst subject to litigation, the debtor can satisfy the transferee by reimbursing to such transferee the value of such prestation together with interest and costs of action, if any".

This section deals with a question which is well-known: the right and conditions of selling rights which are subject to litigation.

The solution of section 213 embodies the Continental law in the matter (see France C. C., s. 1699; Italy C.C., s. 1546; Switzerland s. 188; Egypt, s. 354, 355; etc.). It had been adopted by the Commission of Codification, after a careful examination of the point, as the most convenient to protect both the interests of the creditor and of the debtor:

a) the creditor of a right subject to litigation is not denied the power to have this right sold as any other right if he thinks it convenient; and in many cases there may be real advantage for the creditor to sell such right to a third person who is fitter and in a better condition than himself to sue the debtor or who can give him at once money which he would have otherwise to wait for many days, to deny the creditor the power to sell a right subject to litigation is really to forbid him to transfer something which belongs to him, contrary to the general rules of the Civil law;

b) on the other hand, it is necessary to protect the debtor against the consequences of a sale of a right subject to litigation, to avoid his being sued by persons who have a personal interest to trouble him or his family, or are more rapacious than the original creditor would be. And it is also a well-known and undesirable practice that some business men would be induced to make a trade and profit of such transfers, by buying rights subject to litigation at a small price, to make a benefit by recovering the whole value of the debt in Court. But the opinion of the French Committee was that the provision of section 213 is precisely sufficient to defeat such ends and to protect the debtor: because the buyer of the right is really frustrated of any objectionable benefit and shall often refrain to buy if the debtor may free himself from such buyer by reimbursing the price of the transfer together with interests due and costs of action.

In other words, the opinion of the Commission of Codification, when passing section 213, has been that this provision conciliates both the natural right of a creditor who sells what belongs to him and the interest of the debtor to be sufficiently protected against undesirable practices.

The French Committee are still of opinion that the system of section 213 is the best in law and logic. But they are quite willing to agree that the point in section 213 is not merely a question of law, but also a question of practices in each country. No doubt that there may be countries where the practice of selling and buying rights under litigation may be so grievous that the law is induced to purely and simply prohibit it. Upon this point, the Committee of Translation seem to be of opinion that it would be necessary to do so in Siam, in the present conditions.

Prohibition seems to have been the tendency of the Courts and lawyers in the last years. And a special law has been issued in the matter on the 10th. January 2457 which forbids advocates to buy rights subject to litigation.

The French Committee have no reason to

oppose considerations based upon the conditions which may make a prohibition desirable in Siam. But they would like to look after the precedences which may justify prohibition, and they have found the following:

a) first, Roman Law did prohibit transfers of rights under litigation; but this policy was reversed by Justinian, which, allowing such transfers, did only empower the debtor to free himself by reimbursing the price of sale to the buyer;

b) second, in English Law, the practice is certainly disfavoured, though there is no provision of law to that effect, but only "cases" in the matter. The French Committee call the attention upon this point that the transfer of rights under litigation as provided by section 213 however is not what is called maintenance or champerty in English Law. "Maintenance" is the giving of assistance or encouragement to one of the parties to an action by a person who has neither an interest in the action nor any other motive recognized by law as justifying his interference (Laws of England, w: "action", No. 81). "Champerty" is a particular kind of maintenance, namely, maintenance of an action in consideration of a promise to give the maintainer a share in the subject matter or proceeds thereof (Ibid. No. 84).

Maintenance or champerty therefore are not transfers of rights under litigation by sale or otherwise. As to the purchase of rights under litigation, the English cases seem to have made a distinction as follows: purchase of property is lawful, even when the purchaser will have to defeat existing adverse claims, provided the purchaser's real object was to acquire an interest in the property; but purchase of right to bring an action either alone or jointly with the debtor would be unenforceable according to some "cases" (Ibid. No. 88). However exceptions are made, and we read in a more recent English case (Fitzroy v. Cane, 1905) that "a creditor may assign his debt so as to enable another to sue for it, though such other's wish to enforce the debt arises from ill-feeling towards the debtor" (Ibid.).

Then, the Committee will see that prohibition of the transfer of rights under litigation could only rely upon a transitory period of the Roman Law which was the most premitive one, and upon some "cases" (but not law) in English Courts.

Of course, the question of forbidding some special persons to buy rights under litigation (such as barristers, advocates, etc.) is quite another question, upon which no long discussion may arise; and this is practically made in every country, like in Siam now, even when such countries allow transfers of rights under litigation.

If the Siamese Committee are of opinion that the conditions of the country are such as to recommend the prohibition, the protection of the present section 213 being taken as insufficient, the French Committee would not object to such a consideration that they are incompetent to fully appreciate.

But in this case, it would not be sufficient to repeal section 213. To repeal section 213 without substituting it by anything else would have the consequence that the transfer of rights under litigation would be legal, without any guarantee being longer provided to protect the debtor. Because, first, the prohibition of the transfer of rights under litigation is not in fact one of these questions where public policy could be argued by Courts to prohibit such a natural right (so much the more when we see many other countries which take as lawful the exercise of this right). Because, second, a law having prohibited in Siam barristers to transfer or be transferred rights under litigation, one would argue a contrario that such a law is in force on account of every body being as a rule entitled to make such transfer when not specially prohibited to do it.

If the Siamese Committee would propose to prohibit the transfer of rights under litigation, it would be necessary to substitute section 213 by another one providing for such a prohibition, and the Committee of Redaction would be prepared, of course, to draft it.

(18 th. February 1921)