MEMORANDUM OF THE CODE COMMISSION

(*Continued from the January Issue*)

ARTICLE 522—Justice Reyes proposes that the words "after judicial summons" should be eliminated, because a possessor, originally in good faith, may become aware of the unlawfulness of his possession even before judicial summons, and if he persists in holding out against the person legally entitled to the possession, he should be liable for the deterioration or loss of the thing.

The reason for adding the words "after judicial summons" is based on the following opinions of Manresa:

"x x x. El art. 457 solo tiene en esta parte una explicacion posible. El Codigo llama poseedor de buena fe al que la ha tenido hasta el momento del litigio, aun suponiendo que por la citacion pierda ese caracter, cosa discustible: sigue llamandole poseedor de buena fe para distinguirle de que siempre la tuvo mala o laperdio anteriormente. El art. 457 se refiere a ese poseedor de buena fe, que, ante el despecho o la con conviccion de pedder lo que se habia acostumbrado a mirar como suyo, intencionalmente destruye la cosa, la ocuita, deteriora, etcetera, en el periodo que media desde la citacion hasta la entrega, cuando ya puede sostenerse que se poseedor de mala fe. Alguna razon hay, porfue esta mala fe dudosa es obra de una ficcion, pues, en realidad, hasta que la sentencia se hace firme, el poseedor puede sequir creyendo que la cosa es suya; tal vez por eso solo pena el art. 457 en, ese caso, el dolo, la intencion injusta, el proposito de perjudicar."

ARTICLE 562—Justice Reyes states that the description of "usufruct" misses two fundamental characteristics, namely; that it is a real right, and that it is of temporary duration.

These qualities are perfectly well-known and understood. At any rate, they are more properly to be dealt with in a treatise and not in a civil code.

The emphasizing of the form and substance, which is also done in Art. 467 of the old Civil Code, is necessary because the usufructuary in the enjoyment of the property right go so far as to impair the form and substance of the thing. This abuse is all too frequent. Therefore, it is necessary to make an express limitation to that effect. Of course, title or the law may dispense with this condition, and so a statement to that effect is made in this article.

ARTICLE 587—Justice Reyes states that by translating "caucion juratoria" as merely a promise under oath, the idea of the Code of 1889 is left truncated and unintelligible.

It being evident that this Art. 587 has been taken from Art. 495 of the old Civil Code, and inasmuch as the "caucion juratoria" has a historic and established meaning in connection with said source (Art. 495 of the old Code), there is no need of stating in detail the meaning the promise under oath.

ARTICLE 611—Justice Reyes suggests that this article be amended to provide expressly that "successive usufructs shall not exceed the limits fixed by Art. 863."

Although the amendment is not absolutely necessary because, as Manresa says, a successive usufruct "casi exclusivamente se constituye por ultima voluntad" and therefore the limitations fixed by Art. 863 in almost all cases of successive usufruct applies, and although the principle of Art. 863 is applicable by analogy in cases of successive usufructs created inter vivos, nevertheless for purposes of clarification in the rare cases of successive usufruct created inter vivos, the proposal of Justice Reyes is accepted by the Code Commission.

ARTICLE 613—Justice Reyes proposes that in lieu of "immovable," the term should be "immovable estate." The proposed amendment would not improve the wording, if such improvement is necessary, but no improvement or change is necessary because it is self-evident that an "immovable" by destination, such as machinery or, by analogy, like real rights over immovable property, can not be dominant or servient estates.

ARTICLE 621—Justice Reyes thinks that the words "forbade, by an instrument acknowledged before a notary public" is unpleasantly vague. He says that, in the first place, it gives no clear idea of the content of the instrument to be notarized.

Our comment is that the rest of the sentence under discussion clearly shows the content of the instrument. The whole sentence says, "x x x from the day on which the owner of the dominant estate forbade, by an instrument acknowledged before a notary public, the owner of the servient estate, from *executing an act which would be lawful without easement.*"

Furthermore, Justice Reyes asks, "How is the servient to know of the prohibition?" He, therefore, suggests that document must be served upon the owner of the servient estate.

Our observation is that there is no necessity for any express provision that the instrument should be served because the words "the owner of the dominant estate forbade" perforce require that the instrument be served. How can it be reasonably conceived that there could be a prohibition unless it is conveyed to the owner of the servient estate?

ARTICLE 624—Justice Reyes recommends that the word "continued" on line 4 should read "be exercised." His reason is that while both estates belong to the same owner, there can be no easement.

It is true, strictly speaking, that there is no easement under Art. 613, which requires that there be two owners. However, this is a special kind of an easement which is created by a special situation. It will be noted, in this connection, that the first two lines of Art. 624 refer to "the existence of an apparent sign of easement *between two estates* established or maintained by the owner of both." There is no intention in the Article to imply that an ordinary easement exists, because it is expressly stated that the easement is *between the two estates* establishd or maintained by the owner of both. Therefore, the Code Commission does not agree with the proposed amendment.

ARTICLE 626—Justice Reyes makes these observations: "Why limit the easement to the tenement (not immovable, see comment to 613) *originally* contemplated? So long as the burden is not increased (as it is prohibited by Art. 627) what does it matter that the dominant estate is enlarged?"

As already stated, the article under consideration is not taken from any provision of the old Civil Code. It does not apply to a case where, for example, in an easement of right of way, the dominan estates is enlarged. It is an embodiment of the following observations by Manresa:

"Solo puede usarse la servidumbre para utilidad del predio o de la parte de predio en cuyo favor fue establecida, y en el modo y forma que resulte del titulo, de la costumbre en el caso de posesion y prescripcion, cuando esta sea admisiable, o de la ley que limita la servidumbre a lo estrictamente necesario para el destino y el conveniente uso del predio dominante con el menor daño posible para el sirviente. Asi, en terminos generales, *el que tiene derecho a tomar agua para el riego de toda su finca o una parte de ella, no puede destinarla al riego de otra finca o de otra porcion.*" (Vol. 4, p. 573).

ARTICLE 657—Justice Reyes suggests a redrafting of this article as follows:

"Existing easements of right of way for the passage of

PAY YOUR INCOME . . .

(*Continued from page 93*)

informed that the inventory list as required be filed within thirty (30) days after the close of the taxable period of the taxpayer. With reference to the granting of extensions of time within which to file income tax returns, the general public is also informed that the Bureau is adopting a strict policy on such extensions and only in meritorious case will such extensions be granted. The requests for extensions shall be filed directly with the Chief of the Income Tax Division in duplicate and the approval and disapproval will be stamped on such requests upon presentation to this Office.

"The filing of the 1953 4th quarterly return on withholding tax, Form W-1, together with the filing of the alphabetical list of employees, and of Form W-3 will be on or before January 31, 1954.

"The last day for filing of income tax returns covering all incomes earned in 1953 is March 1, 1954.

(Sgd.) SILVERIO BLAQUERA
Deputy Collector of Internal Revenue"

livestock shall be governed by the ordinances and regulations relating thereto, and in the absence thereof, by the usages and customs of the place.

"Whenever it is necessary to establish hereafter a compulsory easement of right of way or for a watering place for animals, the provisions of this Section and those of Articles 640 and 641 shall be observed. In this case the width shall not exceed 10 meters."

The Code Commission disagrees with the proposal, because it is necessary to retain paragraph 2 of the article in question, which fixes the width of animal paths and animal trails. This should be done, regardless of any historical background in Spain, because it is desirable to fix a maximum width for animal paths and animal trails, otherwise the easement, if it is too wide, may be prejudicial to landowners.

ARTICLE 668(2)—Justice Reyes states that express reference to Art. 621 is necessary to clarify the meaning of the phrase "formal prohibition." However, such express reference is not necessary because Justice Reyes himself says, "*Obviously* this means the notarial instrument provided for in Art. 621."

ARTICLE 669—Justice Reyes states that to impose a 30 cm. sq. limit on *windows* is "to undermine the well being of household owners."

In the first place, these are not *windows* but mere openings to admit light at the height of the ceiling joists or immediately under the ceiling. It is very evident that openings at such a height, that is, immediately under the ceiling, are not intended as windows for people to look through or get fresh air, but they are merely, as the article itself says, "openings to admit light."

In the second place, to increase the size to "not less than one meter square" would be dangerous because the wall where the opening is may be just a few inches from, or in fact, it may be on the boundary line, as Art. 669 applies only when the distances in Art. 670 are not observed. (That is to say two meters for direct views or 60 cm. for indirect views.) This being the case, even if there is an iron grating as well as a wire screen, it would be easy for thieves and other persons criminally inclined to destroy the grilles and the wire screen in order to go through the opening, which would be large enough to allow a person to go through.

ARTICLES 669-672; 674; 677-681—Justice Reyes says that these articles do not refer to easements but to restrictions of the right of ownership and should be placed elsewhere. He refers to his notes to Art. 431.

We also refer to our observations under Art. 431. And also to our comment on Art. 682 and 683 immediately following.

ARTICLES 682 and 683—Justice Reyes believes that these articles on easement against nuisance are improperly placed in the chapter on "Easements."

However, we believe that this is the most logical place for these articles, for these reasons:

1. According to our comment on the proposed amendment to Art. 431, no separate chapter on the limitations of ownership should be incorporated in the Code. In addition to the reasons already set forth under Art. 431, we submit that in such proposed separate chapter on limitations to ownership, in order that it may fully serve its purpose *all the limitations of ownership must be stated and explained.* Now, according to Sanchez Roman, there are many such limitations, and he outlines them as follows:

LIMITACIONES DEL DOMINIO.
Contenido de la relacion juridica, DOMINIO
POR RAZON:

"I. Del dominio eminente del Estado:
- a. Imperio general de las leyes.
- b. Mas especial y concreto de los reglamentos y ordenanzas.
- c. Servicios fiscales.
- d. Expropiacion forzosa y otras formas de utilidad publica.
- e. Servidumbres legales.
- f. Explotacion del subsuelo.

"II. De la voluntad del transmitente:
- a. Por contrato.
- b. Por ultima voluntad.

"III. De la propia voluntad del dueño. (creacion de los derechos reales limitativos del dominio.):
- a. Servidumbres:
  - Reales.
  - Personales.
- b. Censos:
  - Enfiteutico.
  - Consignativo.
  - Reservativo.
- c. Hipoteca.
- d. Prenda.
- e. Superficie.
- f. Retracto.
- g. Inscripcion arrendaticia.

"IV. De un conflicto de derechos particulares:
- a. Los nacidos de la posesion civil.

(Vol. 3, p. 93)

In order to make the proposed chapter serve a useful purpose, it would have to be drafted and developed in accordance with the foregoing outline. The result would be that practically the rest of the Code concerning easements, usufruct, mortgage, pledge, redemption (retracto) and lease record, as well as possession, would have to come under the chapter. In addition all the subjects coming under Numbers I and II of Sanchez Roman's outline referring to the "Dominio eminente del Estado" and "la voluntad del transmitente" including contracts and wills would also logically come within the chapter. The result would be fantastic!

2. There is nothing absolute and definitive about the propriety or impropriety of using the term "easement" or "servitude." For example, Manresa classifies usufruct as a "servidumbre personal"; then Art. 531 of the old Civil Code provides: "Tambien pueden establecerse servidumbres en provecho de una c mas personas, o de una comunidad, a quienes no pertenezca la finca gravada."

3. In English and American law, easement and nuisance are dealt with together. Tiedeman on Real Property says, under the heading of "Easements," (Sec. 622, p. 596): "*Legalized nuisances.*— Where one acquires from the owners of the land in the neighborhood by grant or prescription the right to do things which without such license would be a nuisance, and for which an action would lie, he is said to have acquired *an easement in the lands to commit the nuisance,* free from liability for the consequences."

In the "English and Empire Digest," vol. 19, pp. 178-179, under the subject of "Miscellaneous Easements," we read: "By lapse of time, if the owner of the adjoining tenement, which, in the case of light or water, is usually called the servient tenement, has not resisted for twenty years, then the owner of the dominant tenement has acquired the right of discharging the gases or fluid, or sending smoke or noise from his tenement over the tenement of his neighbor."

ARTICLES 684-687

Justice Reyes says these articles do not create an easement.

The remarks just submitted are also applicable to these articles on "Lateral and Subjacent Support". In the American and English law "lateral and subjacent support" is considered an easement.

Tiedeman on Real Property, sec. 618, pp. 590-591, under the topic of "Easements," says: "*Right of lateral and subjacent support.* — As an incident to the right of property in lands, the proprietor cannot make excavations upon his land, which will deprive the adjoining land of that lateral support which is necessary to keep it from falling in. In the same manner, where there is a separate ownership in the surface, and the mines beneath, the owner of the mines cannot, by working them, so weaken the subjacent support to the surface as to cause it to cave in. The cases are numerous in which the right to lateral and subjacent support is claimed and conceded, and the general principles determine the character and limitations of both kinds of support. *These are natural rights of easements,* which are independent of any covenant or grant."

Likewise, the "English and Empire Digest," vol. 19, pp. 172-174 deals with "Easement of Support". And the same volume, p. 8, quotes Lord Shelborn in one case thus:

"From the view which I take of the nature of the right to support, *that it is an easement,* not purely negative, capable of being granted, and also capable of being interrupted, it seems to me to follow that it must be within Prescription Act, 1832 (c. 71), S. 2, unless that section is confined to rights of way and rights of water.

"x x x I think it is clear that any such right of support to a building, or a part of a building *is an easement* x x x."

Lastly, Sec. 801 of the California Civil Code provides: *"Servitudes attached to land.* The following land burdens, or *servitudes* upon land, may be attached to other land as incidents or appurtenances, and are then called *easements*:

"13. x x x x the right of receiving more than natural support from adjacent land or things affixed thereto."

ARTICLE 692

Justice Reyes says: "An easement acquired by prescription can not be called voluntary, because precisely it is acquired against the will of the owner. This Article logically belongs to section 3 of Chapter 1 entitled 'Rights and Obligations of Owners of the Dominant And Servant Estates."

This article is an exact reproduction of Art. 598, old Code. Attention is invited to the words "in a proper case" under Art 692. on the first line. Suppose "A" and "B" enter into a contract whereby "A", the owner of the dominant estate, acquires a right of way through the land of "B" for purposes of merely hauling crops and transporting agricultural implements, such as plows, harrows, etc. Later on, "A" establishes a large factory, and he uses the right of way without any authority from "B", for large trucks everyday for hauling the goods manufactured. If this unauthorized use of the right of way continues for ten years, this new method of using the right of way is acquired by prescription, under Art. 632, although the original easement has been created by contract and is a voluntary easement. This is the interpretation of Sanchez Roman (Vol. 3, p. 648) who, not finding Article 598 misplaced, says:

"El régimen juridico por el que se gobierna el *contenido* de la relacion juridica de servidumbre, cuando son de la clase de las *voluntarias*, es el asunto del art. 598, segun el cual ha de atenderse: *primero*, al titulo de su constitucion; *segundo*, en su caso, a la posesion de la servidumbre adquirida por prescripcion, toda vez que, segun el art. 547, por este medio se adquiere, no solo la servidumbre misma, sino la *forma* de prestarla; y *tercero*, en defecto de los anteriores origenes, ha de atenderse a las disposiciones del Codigo que le sean aplicables. En todos estos casos, bajo el influjo de la limitacion general de *no contrariar a las leyes ni al orden publico*."

ARTICLE 694 (5)

Justice Reyes states the hindrance or impairment of the use of the property should be qualified by expressly providing that such hindrance or impairment is not authorized, or is excessive or unreasonable or unnecessary.

Such an addition would indeed be "excessive", or "unnecessary" because the word "nuisance" implies *ex vi termini* that it is not authorized, or is excessive, unreasonable or unnecessary. Besides, attention is invited to the following words in Art. 695: "although the extent of the annoyance, danger or damage upon individuals may be unequal." Lastly, the very words "hinders or impairs" imply that the act of the defendant is unauthorized, or is excessive, unreasonable or unnecessary, otherwise it would neither be a hindrance to, or an impairment of, the use of property.

Title IX. Registry of Property

Justice Reyes suggests that an article be inserted requiring the registers of deeds to keep a special book for recording of contracts of marriage settlements.

Although this should be the subject of an amendment to the special laws concerning registration of property, however, for purposes of clarification, the proposed amendment is accepted.

CONCLUSION

The foregoing observations on the proposed amendments to Book II of the new Civil Code are respectfully submitted to the code committees of both Houses of Congress. The Code Commission earnestly hopes that said observations will be given due and careful consideration not only by the committee members but also by the Congress as a whole. If this is done, we are confident that only those amendments will be made which have been accepted or initiated by the Code Commission. We respectfully urge that with the exceptions just mentioned, the new Civil Code be left intact for the next two years, for these reasons:

1. The legal profession needs at least two more years to meditate upon the philosophy of the reforms, most of which are very new to the majority of lawyers, judges and law professors. Very few of the legal profession have read the new Code entirely.

2. Many of the proposed amendments stem from the natural reaction to an innovation, especially because the legal profession all over the world is conservative. But most of these "innovations" in the new Civil Code have been derived from the laws of other countries which they have by experience understood the justice and wisdom of the provisions.

3. Other suggested changes on the new Civil Code are due to a mistaken interpretation of the article in question, as already shown in this memorandum and in the previous memoranda as well as in public hearings heretofore held before the code committees.

4. Still other recommended amendments seek to fill gaps. The existence of many gaps in a civil code is inevitable. No civil code in the world can cover all possible situations. Even the longest civil code — which is that of Argentina — has not been able to forsee the numerous doubts that have arisen since its enactment in 1869. The same thing can be said of the Spanish Civil Code of 1889. It is of the nature of a civil code that is only the *basic* private law. Details are furnished by special laws and court decisions. A legal system gradually built up by the courts upon the foundation of codes and statutes is the best and soundest type.

5. The new Civil Code of the Philippines should be improved and developed as the other civil codes in the world have been improved and developed: by interpretation through judicial decisions. Such an interpretation is the wisest and most advisable because the solution comes, not from mere abstraction or theory but from reality.

6. Only a very small portion of the legal profession has come forward with proposed amendments. Only two jurists have suggested changes. But by waiting for two more years, the code committees of Congress would hear from other jurists, and from the legal profession as a whole. Thus, the code committees would have before them at least four or five times more than the number of amendments now suggested. In this way, the code committees would have a more comprehensive view of the orientation of how and on what bases the new Civil Code should be amended.

7. If Congress should effect a general overhauling of the new Civil Code during this session, there would be a tendency not to undertake the study and consideration of other amendments submitted by the legal profession during the next two or three years. Many of the future proposed amendments will likely be better than those already submitted to the code committees of Congress because the legal profession will have had more time to reflect on the new Code. But such coming proposed amendments will probably not be taken up. So it would be advisable to wait at least two more years, so that when the Congress is ready to undertake a broad revision of the new Civil Code, the better future recommendations will be studied.

8. The Code Commission has accepted or initiated many amendments. It is earnestly submitted that considering the seven foregoing reasons, such accepted or initiated amendments should be the only ones to be approved during the current session.

Respectfully submitted,

JORGE BOCOBO
Chairman, Code Commission

Manila, February 17, 1951.

"The trouble is that lawyers necessarily acquire the habit of assuming the law to be right. It is their business to advise people what the law is and to endeavor to defend people in the exercise of their legal rights. As a rule, the pure lawyer seldom concerns himself about the broad aspects of public policy which may show a law to be all wrong, and such a lawyer may be obvious to the fact that in helping to enforce the law he is helping to injure the public Then, too, lawyers are almost always conservative. Through insisting upon the maintenance of legal rules, they become instinctively opposed to changed, and thus are frequently found aiding in the assertion of legal rights under laws which have once been reasonable and fair, but which, through the process of social and business development, have become unjust and unfair without the lawyers seeing it. I am conscious that I have myself argued cases and drawn papers and given advice in strict accordance with laws whose wisdom it had never occurred to me to question, but which I should now, after many years of thinking what the law ought to be, condemn."

—Letter, November 16, 1906 to Gen. John C. Black of the U.S. Civil Service Comm.; as quoted in I Jessup, Elihu Root, page 208.