PHILIPPINE LAW JOURNAL

Vol. VI DECEMBER, 1919 No. 8

CO-OWNERSHIP AND PARTNERSHIP IN SPANISH LAW COMPARED

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Part One
INTRODUCTORY

Only Chapter
PRELIMINARY CONSIDERATIONS

1. *Reasons for the Study.*—Distinguished writers on jurisprudence have fundamentally assigned "conservatism" to be one of the three defects that every system of law should avoid. (Salmond, Jurisprudence, pages 23-25; Holland, Jurisprudence; Lee, Historical Jurisprudence.) The truth of this statement, however, seems to have been blindly adopted and erroneously extended by many, as will be hereinafter seen, to a far logical and untenable view that the law of co-ownership should have been included in that of partnership, or viceversa, thus simplifying our present civil law.

The cause for this merciful confusion is found in the fact that our present Spanish laws of co-ownership and partnership have similar provisions; thus, for instance, articles 392 and 1665 provide for two or more persons holding or placing in common fund a certain thing. Not only were there similar provisions but there are others that are entirely the same; for examples, articles 394 and 1695, No. 2 as to the manner of using the property in common; articles 395 and 1695, No. 3, as to the right of one member to compel the other to contribute to what he has expended in the preservation of the property; and many others in other respects.

However, to follow that view is dangerous. It would mean ignorance on the subject, and is tantamount to denying the importance of the legal institutions of partnership and co-ownership, and to proposing a law less progressive than its actual progressiveness. It is, therefore, neither progress, nor "conservatism," but extreme retrogression which the expounders are advocating. To deviate these mischievous consequences, a thorough study of the subject becomes important.

Speaking of the importance of the study of co-ownership, Manresa, the learned commentator on the Civil Law, has the following to say: "The study of community of

property, apart from its relations to social sciences and economic problems, and from its manifestations in the administrative law, is, as to the private law, of highest and undeniable importance. We could say with illustrious Fornari (Della Comunione dei Beni, Introd., par. 5) that 'community has a vast power which extends over the whole field of the civil law, making its influence felt in the principal institutions of that law'. Examples, in support of this thesis, are the community created by marriage, the co-ownership in pro-indiviso inheritances, the forcible community in easement of party-wall and waters, the condominion in certain cases of ownership by adjunction, etc., etc.' In another passage, the same author said: 'The influence of the community is so vast that its effects are ostensibly made felt in some other contracts, such as that of the *colonato parciario* originating from lease, and even in purchase and sale when, as Fornari says (Della Comunione dei Beni iii), this is transformed into partnership upon the issuing by the owner of a factory, established for the development of an industry, of shares on account (cuentas en participación), thus giving the members the ownership of the realty and the usefulness of the business." (3 Manresa, 364-365.)

On the other hand, the importance of the law of partnership is known to the whole legal world. Bearing in mind that no nation "could long exist without partnerships," the necessity or usefulness of partnership, recognized by those whose capital is not sufficient to undertake certain preconceived enterprise, or to ably conduct an established business, becomes immediately evident. To strengthen the human weakness and to supply the deficiency of the individual effort is, therefore, the main purpose of the partnership law.

A study on the subject being important, resort to a comparison of the two systems of law was deemed necessary and as a commendable means to settle hardship, doubt and confusion.

II. *Terminology—*

A. *Names Given.*—There are several names given to the law of co-ownership. Our Civil Code in its Book II, tit. III, calls it "Community of Property" (Comunidad de Bienes); while one author adopts the word "condominio" (3 Sanchez Roman, 172). Other commentators had interchangeably used the terms "copropiedad" and "comunidad de bienes." (3 Manresa, 364 et seq.; Planas, Instituciones del Derecho Civil Español, 1er Curso, p. 399.)

Sanchez Roman in adopting the term "condominio" philosophically explains thus: "*condominio* is the expression of a state of co-ownership (copropiedad), which in itself may exist without the necessity nor subordination to another system of law or to another juridical motive that might produce it; thus it may either be an incident, an effect and a consequence of pre-existing juridical motives and causes that might have produced or presumed it, and under the influence of the rules of these, its development is realized. The mere fact of co-ownership between two or more persons who

are not bound by any tie other than that of co-ownership in a thing itself, is a case of *condominio* proper, whose development would not be influenced by no other rule than these of *condominio* itself; but the case of a *condominio*, as a consequence of conventional partnership or from a legal partnership, such as that of marriage, or of a transitory state of community and indivision in the property inherited, are markedly distinct juridical species in all of which cases "condominio" is exhibited as an incident of juridical conditions (partnership, marriage, testamentary succession) under whose superior influences all the vicissitudes of *condominio* would come to be submitted. In each and every one of them, in one hypothesis as well as in the other, there is a manifest result of *community of property*, and only in this sense the synonymy of this idea with that of *condominio* may be deemed as licit, and to thus justify the substitution of this term for that of *community of property* that the Code employs; on the other hand, when *condominio* is a result of those facts or juridical conditions, it will constitute a juridical entity dependent upon the influence of its origin and not upon the system of law on property, which may by itself develop in an independent manner." (3 Sanchez Roman, 172-173).

Still another no less eminent commentator, Muscius Scaevola, suggests another term. Criticizing the designation made by the Code, he says: "The term 'community of property' cannot be accepted. It is not because it is inexact: the term more consonant to critics is that of 'property in common'. It is a case where there are several persons; therefore, the adequate name should be 'property in common' in contradistinction to singular property appearing in the Portuguese Code, but reserving in all cases the term 'communitty of property' to express the union of the relations existing between the participants of the things in common." (7 Scaevola, 124.)

Holding a neutral position in this war-distinctions, Professor Planas in his Instituciones has wisely said: All those terms "may be accepted without difficulty." (Page 399.)

B. *The Proposed Term.*—While there is a partial truth in the last statement of Professor Planas, the writer, however, believes that the term "copropiedad" or "co-ownership" is more consistent with practical ground and consonant with the legal view of ownership; he shares with the opinion of Scaevola to the extent that the term used by the Code cannot be accepted. That this is true is seen from the wording "community of property"; the word "property," in common parlance, simply means that property *quae tangi possunt*—that which is tangible, visible, material or corporeal; while the provisions of the Code on Co-ownership apply equally to property *quae tangi non possunt*—that which is intangible, invisible, immaterial, or incorporeal or *rights*. (Art. 392, par. 1.) A new bar student, entirely unacquainted with technical phrases of the law, having come from the large mass of the common people and, consequently, speaking the ordinary language, might be easily misled by the name "community of property" that the Code employs.

The term "property in common," moreover, should not be adopted; for, that term may also mean confusion in the mind of the new law student. Does not that phrase suggest the property owned by the State which is known as "common"property? This is an extreme vulgarism.

The writer further believes that the term given by Sanchez Roman should not be used; it is not because it is incorrect, but because it is not of easy understanding and use. Sanchez Roman himself states that "the idea of 'condominio' represents the notion of a real right, and in this sense it may only have for subject-matter a *corporeal*, specific and determinate thing." (3 S. R. 173.) As the writer has said the provisions of the Code on co-ownership apply not only to things corporeal but also to that of incorporeal or rights (art. 392, par. 1.); hence, the name "condominio" destroys the very essence of ownership in common as provided by the Civil Code in its Book II, Tit. III.

To avoid "vulgarisms," the writer is of the opinion that the reasonable designation would be that of "co-ownership," the preposition *co* indicating plurality of persons owning a thing jointly with each other, and the noun *ownership* referring to either tangible or intangible property. Only this term "may be accepted without difficulty."

Part Two
EXPOSITIVE

Chapter One
ORIGIN AND HISTORY

I. *Of Partnership.*—If "the roots of the present lie deep in the past," surely, the history of both partnership and co-ownership need be studied, in order to explore the evil "roots" of the present legal cancer—the confusion between co-ownership and partnership.

With the history of partnership, the world over is acquainted; but the reproduction of its origin seems to be necessary. Professor Scott Rowley has accurately traced the historical evolution of the partnership law, thus: "From a historical viewpoint, it is probably a safe assertion that no other branch of the law has so interesting a development as has the law of partnership relations, nor has any other legal relation been handed down from generation, thru varied nations, conditions and periods, with such uniformity in principle and in practice. Nearly a thousand years before the Mosaic law was given to the Jews, the Babylonians, in the celebrated Code of Kharmurabi, had developed a system of partnership law which, in its basic elements, differed but little from our modern law, emphasizing the principle of division of *profit* and loss. It is perhaps safe to assume that the Babylonian pertnership, modified as it passed thru Jewish, civil and common law to meet changing conditions, is really

the forerunner and the model of our present-day partnership." (Rowley, The Development of Partnership Law, XXIV Case & Comment, page 367.)

II. *Of Co-Ownership.*—

A. *In Rome.*—Coming to the history of co-ownership, it should be understood that this is of ancient origin. It was known to the Romans, altho in an unfinished and imperfect manner. Its immediate precedents could be found in co-ownership produced by the confusion of boundaries among neighbor properties and in inheritance cases; illustratively, the Twelve Tables had already with *actio finium regundorum* to settle the disputes regarding boundaries of neighbor properties, and with *actio familiae erscincundae* to divide among the heirs the property inherited by them. These were the first manifestations of co-ownership in the earliest history of legislation.

Following the process of elaboration, the Roman legislator became interested in the study of the subject and have later given it a more comprehensive form, engrafting upon the Roman law ring a set of diamond rules, which attracted the eyes of many countries and induced the latter to manufacture their own. As an illustration many provisions of the Roman law may be cited, the most important being the following, found in its Code and Digest:

Codex, Lib. III, Tit. XXXVII. Communi dividundo.

Codex, Lib. III, Tit. XXXVIII. Communia utriusque judicii tam familiae erscincundae quam communi dividundo.

Codex, Lib. IV.. Tit. LII. De Communium rerum alienatione.

Codex, Lib. VI, Tit. XLIII. Communia de legatis et fideicomissis et de in remissione tollenda.

Codex, Lib. VI, Tit. LIX. Communia de successionibus.

Codex, Lib. VII, Tit. VII. De servo communi mannumisso.

Codex, Lib. VII, Tit. XV. Communia de manumissionibus.

Codex, Lib. VII, Tit. XXX. Communia de usucapionibus.

Dig. Lib. VIII, Tit. IV. Communia praediorum tam urbanorum quam rusticorum.

Dig. Lib. X, Tit. III. Communi dividundo.

Dig. Lib. VIII, Tit. II, Law 26: nulli enim res sua servit. (No one can have easement upon his own property.)

Dig. Lib. VIII, Tit. II, Law 27; par. 1: si in area *communi* aedificare velis, *socius* prohibendi jus habet. (The co-owner can not build upon the property held in common without the consent of the partner (or others.) Cf. art. 397, Spanish Civil Code.)

Dig. Lib. X, Tit. III, Law 14, par. 2: si conveniat, ne omnino diviso fiat, hujusmodi pactum nullus vires habere manifestissimum est: sin autem intra certum tempus quod etiam ipsius rei qualitate prodest, valet. (The stipulation of not dividing the thing in common is void; but the stipulation of not dividing it for a certain period of time is valid. Cf. arts. 400, Spanish Civil Code; 681, Italian Code; and 2180, Portuguese Code.)

Cod. Lib. III, Tit. XXXVII, par. 3: Ad officium arbitri, qui inter te et fratrem tuum dividendis bonis datus fuerit, ea solo pertinent, quae manent communia tibi et illi. Nam ea, quorum partem is vendidit, cum emptoribus tibi

communia sunt et adversos singulos arbitrum petere debes, si ab illorum quoque societate discedi placeat. Cum autem regionibus dividi aliquis ager inter *socios* non potest, vel ex pluribus singuli aestimatione justa facta unicuique sociorum adjudicantur, compensatione invicem pretti facta eoque, cui majoris res pretti obvenit, ceteris condemnato. (That is, the division of the thing in common can be made by co-owners themselves or by arbitrators. Cf. art. 402, Spanish Civil Code.)

Cod. Lib. IV. Tit. LII, par. 3: Falso tibi persuasum est comunii predii portionem *pro indiviso*, antiquam communi dividundo judicium dictetur, tantum *socio*, non etiam extraneo posse distrahi. (The portion belonging to a co-owner can be alienated to a stranger, altho' co-ownership is still existing. Cf. art. 399, Spanish Civil Code.)

These are the most interesting provisions of the Roman law on the subject of co-ownership, and from which it may be observed that the Roman legislator had been freely using the words *socio*, *socios*, or *sociorum* (meaning co-owners, indeed.) Altho they have been unscientifically and unsystematically laid down, the legal world had been furnished with solid foundation of the subject.

B. *In Foreign Countries, Spain and Philippines.*—The Roman law, characterized by an author as "a model for studying legal development" (Lobingier, Evolution of the Roman Law, page 7), became, as Sir Maine has said, "the source of fundamental legal conceptions." (Maine, Village Communities, page 376.) Most of the foreign countries of the globe have felt Roman influence, and their legislators, appreciating the valuable experiences acquired by the Roman people in their way of legislating, and seeing the importance of the legal institutions established by the latter—have embodied in their respective system of laws, rules and principles of co-ownership more or less sound, more or less different from one another, or more or less numerous. Such was the attitude of Italy (Bk. II, Tit. 4, art. 683 et seq., Civil Code), France (arts. 1837-59, Code Napoleon), Austria (Part II. Chaps. 16 and 27, Arts. 361, 825-41), Portugal (Part III, Tit. 3, Arts. 1275-6, 2177-8, 2180 and 2185), and Holland (Arts. 582, 628) in Europe; Chile (Book IV, Art. 2304), Guatemala (Bk. IV, Art. 2266), Colombia (Bk. IV, Tit. 33), Uruguay (Arts. 580, 1716-7), Mexico, Louisiana and Argentina, in America.

Spain, the successor to Rome in almost all the latter's legal provisions, has not been less wise in appropriating to her own system of law the doctrines of co-ownership. In the words of Manresa, "aside from customs which, according to the adequate phrase of a writer, are not written anywhere else, we would find in the Fuero Juzgo the idea of co-ownership," when it provides for the establishment of conjugal partnership, community in pastures, indivision of tenements between Goths and Romans, communal ownership in certain public buildings." (3 Manresa, 365; but as to Scaevola & Planas' opinions that Fuero Juzgo is silent on the point, see 7 Scaevola, 109, and Planas Instituciones, page 412.) In her Fuero Real, three fundamental provisions can be found: the first relating to imprescriptibility of things had by co-ownership and inheritance

(Bk. II, Tit. II, Law 1 et seq.); the second, to rules for the division of the thing held in common, by virtue of which no partition can be made if damage should arise, but the thing should be sold or leased and the proceeds or profits thereof are to be divided; and the third, to the rule for the effectiveness of the easement of party-wall, whereby each co-owner must give to the one desiring to build the party-wall one-half of their own property for the foundation. (Bk. III, Tit. IV, Laws 2 and 5.)

These are the only provisions of the former Spanish laws, scanty indeed. With the legislative advent of the Partidas, this scantiness was cured but slightly and in an unsystematic way, for its provisions are scattered in different subjects. For example, in Partida 3, Tit. 5 "De los Personeros," law 10, action for partition was granted among other persons to those "que fueron herederos o *aparceros* de una misma heredat o de otra cosa que les pertenezca comunalmente." Law 55 on purchase and sale confirms the rights of each participant to sell his share in the community, or to take the portion belonging to his co-participant in preference to a stranger. Title 22, law 22, as to when an action instituted by a person would benefit others, says: "et aun dezimos que si *algunos fuesen* aparceros o deviseros, o *compañeros sobre alguna heredat o otra cosa cualquier que hubiesen de so uno*, si el uno de estos compañeros moviese demanda contra otro que fuese vecino de illos, diciendo que el campo, o la casa o la heredat de aquel su vecino debía alguna servidumbre a la heredat del demandador, et de sus compañeros, si el juyzio fuere dado por él contra el demandado, no tan solo tiene pro a el, mas aun a todos sus compañeros; et si por aventura el juyzio fuere dado contra él, non empesciere a los otros sus compañeros, pues que no fueron ellos por si nin otri por su mandado en demandar aquel pleito." Title 32, law 26, in giving rules as to "como deben cobrar las misiones o ganar la parte de los otros aquel que repare la casa o el edificio que *había con otros de comun*," jumbles co-ownership with quasi-contract.

In Partida 5, tit. 10, law 11, provisions relating to partnership were made applicable to co-ownership, and the terms "partner" and "co-owner" were indistinctly used. Lastly, Partida 6, tit. 15, law 1, defines partition of inheritance as "departimiento que hacen los omes entre si *de las cosas que han comunalmente* por herencia *o por otra razon*" and establishes the form of making the division.

The Novisima Recopilación had not changed nor in any way altered the provisions of the Partidas; it only supplemented the latter with two provisions, one of which is Lib. X, tit. XIII, law 9 as to "tanteo y retracto" (computation and redemption), and the other is Lib. XI, tit. 8, law 2 as to the imprescriptibility of the action for partition of the thing held in common.

While the Partidas is recognized as the "most valuable monument of legislation," "unequaled by any medioeval code, for its spirit and justice and for natural arrangement and for knowledge" (Dunham, History of Spain and Portugal, Vol. IV, pages 109, 131-132; 4 Phil. Law Journal 205), however, its medicinal force, applied to the

body of laws of Spain which was then suffering the disease "scantiness," was not sufficient to put the status of co-ownership in its normal and sound position: definite concept of co-ownership was not given, nor were there rûles established for its existence. The law of co-ownership remains, t' 'n, as defective and incomplete as in the antiquity; for this reason, Professor Planas as authoritatively said that the decisions of the Spanish Court had been settling, though slowly, various doubts that in practice occurred. (Planas, Instituciones, 1er Curso, p. 413.)

The period of codification in Spain came; and it was only at this time that the committee on codification, seeing the chaotic condition of the Spanish Civil Law, began to give the law of co-ownership its ultimate shape and due form, as it appears in our Civil Code. By the publication and promulgation of this Code in Spain in 1889 and its subsequent extension and enforcement in the Philippines in July 31, of the same year, the meagerness of the former Spanish legal provisions have automatically disappeared in its entirety.

This is the legislative history of the present law of co-ownership, generously handed down by Rome to Spain and by the latter to the Philippines. Speaking of this immemorial gift to the Philippines, Judge Lobingier, said "To-day it (Spanish Civil Code) still stands as a monument to Spanish legislative capacity and joined with the new legislation which has superseded the obsolete Code of Commerce, it seems destined to continue as the basis of Philippine private substantive law." ("The Spanish Law in the Philippines," Annual Bulletin of the Comparative Law Bureau of the American Bar Association, Juiy 1, 1911.) And the writer may add that thru' the enactment of the Civil Code,—the colossal piece of Spanish legislation, constituting the valuable heritage of the Philippines,—Spain may rightly say with Napoleon "I will go down in history with the code in my hand."

Chapter Two

VIEWS ON THE LAW OF CO-OWNERSHIP

I. *First (or Roman) Theory: Co-Ownership a Quasi Contract.*—After the legislative development of the law of co-ownership has been traced, an exposition of the conflicting tendencies on the same becomes interesting and of paramount importance. Three theories have from time to time been advanced by authors, jurists, and legislators, some of which have been incidentally adverted to in the preceding chapters. The first of these is, that co-ownership has the status of a quasi contract, and it should be considered as a mere quasi contract because it is "a licit and purely voluntary act from which reciprocal obligations among the interested parties, or with a third person, arise." This doc'rine has its root in the Civil Law of Rome when its Inst., Book 3, title 27, par. 3, provided:

> Si inter aliquos comunis sit res, sine societate, veluti quod pariter eis legata donatava est, et alter eorum alteri ideo teneatur comuni dividundo judicio,

quod solus fructus ex ea re perceperit, aut quod socius ejus solemni eam rem necesarias impensas fecerit, non intellegitur propie ex contractu obligatus esse, quippe nihil inter se contraxerunt: sed quia non ex maleficio tenetur, quasi ex contractu teneri videtur." (If among several persons there be something, without a partnership being formed, because it has been donated or bequeathed, and one is obliged with respect to the others by an action comuni dividundo for having received the fruits for himself alone, or for the necessary expenses advanced by another,—it can not be understood that he is bound by a contract, for, nothing has been agreed upon between them; but, as it cannot also arise from a delict, it seems to be bound by a quasi contract.) Hence, this view may be designated as the "Roman Theory."

Following the above tendency, Ulpiano and Pothier have maintained that while co-ownership does not always require a contract, for it may arise from a fortuitous or accidental event, it is a real quasi contract of *Joint negotiorum gestis*. (3 Manresa, 367, 375.) More "conservative" is still the position taken by the Codes of the Southern American countries, such as Chil·, Guatemala and Colombia which also regarded co-ownership as a quasi contract. (Bk. IV, tit. 33, art. 2304 of Chile, and art. 2266 of Guatemala.)

That this theory cannot be accepted or sustained is undeniable. Ignoring the truth in the fact that law is a progressive science and that with time everything is subject to mutation, change or alteration, the forementioned codes and defenders of the view have incurred in a common error and have overlooked that "conservatism" is one of the defects of every system of law. Take, for instance, the case wherein A and B own in common a house in Manila which was jointly administered by each of them since 1916; A went to Spain in January 2nd, 1919, while B to the United States in January 7, and both without leaving any substitute to take their respective places in the administration of the house, nor was their respective departure communicated to one another. In September, 1919, a typhoon left the house in a ruinous condition; and to preserve the property, C, a friend to A, made urgent repairs. Hitherto, there is negotiorum gestio in which the *domine negotie* A and B are bound to reimburse the gestor C who becomes a lien holder, if not a co-owner, to A and B. In November, A and B appeared, and came to an agreement with C, that C should not receive any reimbursement for his expenses and administration, but to become a co-owner to the extent of what he has expended; this proposition having been accepted by the parties and the act of C having been approved and ratified the negotiorum gestio ceases according to articles 1692 and 1893 of the Civil Code. The life of the quasi contract is then extinguished, but the life of co-ownership still continues. Can it now be said that the co-ownership which resulted from that express agreement is still a quasi contract of negotiorum gestio?

II. *Second (or French) Theory: Co-Ownership a Partnership.*—While in Rome, co-ownership has been erroneously conceived as a juridical aspect of a quasi-contract, its legislators, in drafting the Roman law, have been wise in not confounding co-

ownership with partnership by saying, when it distinguished the action *comuni dividundo* from action *pro socio*, that *"comuni dividundo judicium ideo necessarium fuit, quod pro socio actio magis ad personales invicen praestationes pertinet quam ad communium rerum divisionem."* (Dig. Lib. X, tit. III.)

Notwithstanding this plausible idea of the Roman legislator, diverging opinions were not lacking. Roman jurists, according to an author, had seriously advanced a new but contrary idea "that co-ownership was nothing more but a rudimentary form of the contract of partnership, an incidental association without the solemnities of an agreement." (3 Manresa, 374.) This opinion may be perhaps accounted for by the rigidity and formalism of the Roman law: in Rome property was not conceived but subject to a state of absolute individualism, and, in its consequence, agreement as a source of co-ownership was not admitted.

Whether this view is true or not, the fact is that subsequent legislations have gone to the same direction and on the same road. First of these was the Siete Partidas of Spain, promulgated in 1343, which, as has been stated in a previous chapter, had laid confusion in the use of the terms "co-owners" and "partners" and in the application of the provisions regarding partnership to co-ownership. (Part. 5, Tit. 10, law 11.) The second piece of legislation, worthy of mention, was the Code Napoleon, promulgated in March 21, 1804, (Rose, Am. Law Rev. XL, 851-3), in which partnership is markedly and greatly confused with co-ownership (see Arts. 1837-39); and, lastly, the most recent enactment is the Code of Holland which, adopting the Code Napoleon, provides that *community property* are those belonging in a collective manner to a *juridical* person. (Art. 582; see also Art. 628.)

The writer confesses that he is not very positive in explaining why the Code Napoleon had been inspired by this theory. Considering that this Code had for sources (1) the customs of Paris; (2) the Justinian's legislation, in Bk. III, Tit. 27 of which co-ownership was treated as a quasi-contract and not as a partnership; and (3) the commentaries of Domat and Pothier, the latter having sustained that co-ownership was not always an involuntary and incidental partnership, but a quasi-contract of negotiorum gestio (see page 15, supra); and considering, further, that the said Code had been drafted by four learned Frenchmen, one being "profoundly versed in the *Roman law*," and all of them are mature men and *conservatives* (XL Am. Law Rev. 845-51), one is naturally driven to a perplexing situation, and forced to conclude that the four French legislators had been, perhaps, influenced by the customs, if any, prevailing in Paris at the time of codification of the French laws, or that they have been inspired by a different criterion progressive in character. Hence, this theory may be called the "French Theory."

Not only when the Justinian's Institutes governed Rome, nor in Spain when the Partidas were in force, or in France at the time of the enactment of the Code Napoleon, but also in *ipsissima Hispania* after the publication of the present Civil Code,—

the same opinion that co-ownership is partnership had been urged. With this view Mr. Otero y Valentin in his treatise of "La Persona Social," concurs by saying: "If partnership, as it is logical, enjoys the juridical personality, the patrimony of the latter must have the concept of co-ownership. * * * 'Colectiva' is also an association by shares, just as is a scientific partnership or a public corporation (corporación oficial), and nevertheless there is nothing farther in them to exist co-ownership." (Otero y Valentin, La Persona Social, pages 312, 315.) The same "blunder" was committed in the Philippines, as will be noticed in the course of the discussion of this thesis, and the writer fears that it may still be committed by Filipino lawyers in open twentieth century.

The idea, however, is no longer a debatable question. Modern conceptions had already discarded and abandoned it as a groundless view. For example, the Italian author, Ricci, says: "Co-ownership is nothing more but a material condition of things as to its manner of being, condition that is also found in partnership; while the latter, not only results from a condition or manner of being of the things, but it also possesses a life and an organism that are found in partnership only. * * * * * Co-ownership, considered as such, may be said to be a condition of inertness and immobility, when it is created by the fact that the thing belongs to several persons, there being yet no division made among them; while partnership is a means and life when it constantly tends to accomplish an object which consists in *profits*. (9 Curso Teorico-Practico de Dch. Civil, page 2 et seq.)

More explicit is the expression given by Sanchez Roman when he said that "Co-ownership is an idea which results from a condition of the property or things with relation to plurality of persons who have rights over them; while partnership has only for true basis the will of the partners in order to create partnership; co-ownership, therefore, being created upon the condition of the subject-matter and the contract of partnership arising from the will of the contracting parties." (4 S. R. 520.)

Even French authors, such as Pothier, Treilard and Douvergier, have condemned the same idea found also in the Code Napoleon. Treilard said: co-ownership is a species of partnership between persons united by any act independent of the will, such as in co-inheritance; while Douvergier said that co-ownership is created by blood ties, and partnership is established for the only object of *profits*. Pothier is more clear when he said that co-ownership was not always an involuntary and incidental partnership, because partnership is formed *in all cases by means of an express agreement*. (3 Manresa, 367.)

The above were the antagonistic and incongruent views in foreign jurisdictions. The Philippine view, on the other hand, did not differ therefrom, but on the contrary they both keep in fine parallelism. Thus, in the case of Gallemit *vs.* Tabiliran (20 Phil. 241), the litigants verbally agreed to purchase a piece of land, each party was to pay by halves and the land to be divided also by halves. After the purchase, the de-

fendant, a piece justice, held the land alone and collected the fruits solely for his own benefit. After the plaintiff's demand to divide the land was refused, an action for this purpose was brought, the attorney for the plaintiff alleging that said property was purchased "under a verbal civil contract of *partnership*." The attorney for the defense, on the other hand, contended that in order that a demand for the division of a realty acquired *jointly* and *undividedly* by two or more parties, it is necessary to show the existence of a contract of *partnership*. The issue brought for the decision of the court being whether under the facts of this case a contract of partnership should be first shown in order to prosper the action for the division of the thing held in common—the Supreme Court held in the negative, saying that "the contract entered into in this case relates to the acquisition of the land by the two purchasers, not *for the purpose of undertaking any business, nor for its cultivation in partnership*, but solely to divide it equally between themselves."

Two views may be gathered from this case: the first is that advocated by the lawyers for both parties that co-ownership is a partnership, and the second is that elaborated in the opinion of the court that co-ownership is not a partnership, because the co-ownership relation (as to the land in controversy) was created by the litigants, "not for the purpose of undertaking any business, nor for its cultivation in partnership"—i. e., not for profits. The first view followed that suggested by Roman jurists, Siete Partidas, Code Napoleon, Dutch Code and Otero y Valentin; while the second concurred with the modern view defended by Pothier, Ricci, Scaevola, Sanchez Roman and Manresa. (3 Manresa, 364 et seq.; 4 S. R. 520; 9 Ricci, 2 et seq.; 7 Scaevola 105 et seq.)

For the view of the Supreme Court that co-ownership is not a quasi-contract, see the case of Smith et al., *vs.* Lopez et al., 5 Phil. 81.

III. *Third (or Modern) Theory: Co-Ownership, an Independent Juridical Institution.*—With progress and civilization of the time, a third theory, neutralizing the first two views, was born. It strikes a happy mean between the first and second, and while admitting that from quasi-contract may spring the life of co-ownership, and recognizing that partnership may imply co-ownership, yet co-ownership has not either the character of a partnership itself or of a quasi-contract. According to this theory, therefore, co-ownership is neither a quasi-contract nor even a partnership; but it is an entirely different, separate and independent legal institution. This was the view maintained by modern authors, among whom are Vitalevi, Ricci, Scaevola, Sanchez Roman and Manresa, and by court decisions, Spanish and Filipino; hence, this theory may be designated as the "Modern Theory."

It may be observed that this theory is the best in point of reason, principle and justice, preserving as it does the independent and separate existences of the three legal institutions of quasi-contract, partnership and co-ownership. It may also be observed from the exposition of the different views that the second false theory has been

greatly advocated. If its constant practice in the future and that misconception and misunderstanding on the law of co-ownership would not be checked on time, the rights of a party plaintiff or defendant entrusting his case to a lawyer who has a confused and vague idea between the laws of partnership and co-ownership, would be at a stake, and due justice would not be given him. Hence this paper is mainly written for this purpose.

(To be Continued)