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# Company Law in Latin America

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## COMPANY LAW IN LATIN AMERICA†

LATIN America is one of the few remaining fields for free enterprise and initiative and is of especial interest as a field for foreign investment. The American lawyer or business executive can feel at home in dealing with corporate practice in the countries to the South, in contrast to his experience with some of their other legal institutions. While differing vastly in details, business corporation law is fundamentally the same the world over, the same economic phenomena and the same general concepts producing similar results. Some of the countries are far in advance of others in industrial and financial development, but the retarded ones tend to be guided in their legislation by the more progressive nations and by the views of their leading authorities. There is a confraternity among Latin jurists which tends to bring about a measure of uniformity in fundamental concepts that is not without influence on the course of legislation and

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† This is the first of two installments of this article. The second, which will discuss Protection Afforded Stockholders and Creditors, will appear in the Winter Issue of Volume XXVII of the *Notre Dame Lawyer*. Limitations of space and the general inaccessibility of foreign material have rendered it advisable not to attempt to cite authority for every assertion of fact and law; several are based on the writer's practical experience and accordingly he invites the reader to accept him on faith. [Editor's note.]

judicial decisions. A synopsis, as is here attempted, of the main trends of corporation law, past, present and future, in Latin America is accordingly feasible, and I hope not without value.

## I.

Industrial development, and with it the stock corporation on any general scale, came late to Latin America, although there were ample precedents in colonial times.

In 1441, the Portuguese had established the Lagos Company, which apparently was in all essentials a stock company; it was organized for maritime, chiefly slave, trade. The King of Portugal himself was an important shareholder while a large part of the capital was furnished by Jewish merchants. The King appointed two directors, the remainder were elected by the shareholders. Later, overseas trade became a monopoly of the Crown. When this was relaxed, towards the end of the 16th century, several other companies were formed; in 1577, a shipping company, *Companhia das Naus*, was established and about the same time, the *Companhia de Trazida*; in 1587, the *Companhia Portuguesa das Indias Orientaes* was organized, but it did not operate. Spurred by the example of the English and Dutch companies, grandiose projects were formed. One in 1635 came to nought; another company whose 61 articles were approved by the King of Portugal on August 27, 1628, was designed to be the greatest in the world, but in result, its operations were confined to the Iberian peninsula. In 1649, the long projected Brazilian company, *Companhia do Commercio do Brazil*, finally came into being when its articles and by-laws including a twenty-year trading privilege were approved by royal patent of March 10, 1649. Jews convicted by the Inquisition were required to invest in the company in lieu of having their property confiscated. It was expropriated by the Crown in 1694, the shareholders being indemnified by 5% bonds.

Several other companies, including several for the Brazilian trade, were organized in the latter part of the 17th century.<sup>1</sup>

The index of legislation of the middle of the 18th century contains frequent references to another company for Brazilian trade, the *Companhia do Pará e Maranhão*, to a monopolistic wine company and to a tobacco company. An attempt seems to have been made by decree in 1766 to make the notes (*apólices*) of these "general companies" legal tender, but the decree was relaxed in favor of foreign merchants in 1768, and finally repealed in 1770.<sup>2</sup>

The Portuguese law of August 30, 1770, on the Mercantile Registry, refers to stock companies when it speaks of Corporations, public associations (*sociedades*) and employment in general companies and large scale *sociedades*. Further growth of corporate enterprise is shown by the confirmation by royal letters patent of an insurance company under the name of *Companhia Permanente* on August 11, 1791.<sup>3</sup>

In what appears to be the earliest treatise on commercial law in Portuguese, the author, Da Silva Lisboa, deals only with partnerships, not corporations, but he does say that the principal mercantile associations are the insurance companies, the banks of deposit and discount and the exclusive (chartered) companies.<sup>4</sup> The earliest reference to a stock

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<sup>1</sup> Fitzler, *Ueberblick ueber die Portugiesischen Uebersee Handelsgesellschaften des 15-18 Jahrhunderts*, 24 *VIERTELJAHRSCHEFT FÜR SOZIAL UND WIRTSCHAFTSGESCHICHTE* 282 (1931); 25 *id.* 209 (1932), citing *inter alia* 4 *Provas da Historia Genealogico* (1718). See also *Índice Chronologico Remisivo da Legislação Portuguesa*, 75 (Dec. 10, 1624), 160 (March 10, 1649), 258 (January 4, 1690), 271 (Dec. 24, 1696) (1805); DIFFIE, *LATIN AMERICAN CIVILIZATION, COLONIAL PERIOD* 681 *et seq.* (1945), citing 2 SIMONSEN, *HISTORIA ECONOMICA DO BRAZIL*, 181 *et seq.* (1937). See also CESARINO, *ORIGINE DAS SOCIEDADES ANONYMAS NO BRASIL, COM SUA EVOLUCAO HISTORICA* (1935).

<sup>2</sup> *Índice chronological, Remisivo da Legislação Portuguesa parte 2a*, 40, 41, 60, 74, 80, 92 (1805). See also: *Instituição da Companhia geral do Grao e Maranhão* (1775); *Instituição da Companhia geral da agricultura das vinhas do Alto Douro* (1756); *Review of the discussions relating to the Oporto Wine Company* (1814).

<sup>3</sup> 2 DA SILVA LISBOA, *PRINCIPIOS DE DIREITO MERCANTIL* (1798-1804) 528 (6th ed., Mendes de Almeida).

<sup>4</sup> 2 *id.* at 499. FERREIRA BORGES, *JURISPRUDENCIA DO CONTRACTO MERCANTIL DE SOCIEDADE* (2d ed. 1844), the first book on that subject, devotes only five pages, chiefly a resume of French law, to the stock company.

company I have found in Brazil itself is the Bank of Brazil, founded in 1808.

Spain was late in chartering companies for colonial trade or for domestic monopolies. Spanish trade with the Indies was carried on by individual merchants and partnerships organized into guilds (*consulados*) which, among other functions, exercised jurisdiction in commercial causes and became a source of the Law Merchant. None of the Spanish codes or texts before the independence of the Spanish American countries, not even the ordinances adopted by the guild of Bilbao in 1737, refer to stock companies, although they do deal with partnerships. The ordinances of Bilbao constituted the chief code of mercantile law for the Spanish colonies and for the Spanish American countries until well into the 19th century.<sup>5</sup>

The *consulados* or guilds in Spain were active in recommending the formation of companies for trade. From 1629 on, the Seville guild urged the development of such a project. A Spanish author published a book on shares in Amsterdam in 1688.<sup>6</sup> The Barcelona guild was instrumental in the formation of the Universal Mercantile Company of Catalonia approved by the *Cortes* (legislative body) of 1702, but no Barcelona company began operations until 1755. In practice, if not in theory, the merchants associated in the Seville *consulado* resembled the exclusive English and Dutch trading companies of the same period.<sup>7</sup> One company apparently

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<sup>5</sup> The ordinances of Bilbao continued in force in Peru until 1853, in El Salvador to 1855, in Mexico to 1869, in Guatemala to 1877, and in Honduras until 1881.

<sup>6</sup> PENSO DE LA VEGA, *CONFUSION DE CONFUSIONES* (1688). *Dialogos curiosos entre un philosopho agudo, un mercader discreto y un accionista erudito, describiendo el negocio de las acciones, su origen, su etimologia, su realidad, su fuego y su enredo* (i.e. *CONFUSION OF CONFUSIONS*). Curious dialogues between an acute philosopher, a discreet merchant and a learned shareholder, describing the business of shares, their origin, their etymology, their realities, their vitality and their complications. Cited by I RODRIGUEZ RODRIGUEZ, *TRATADO DE SOCIEDADES MERCANTILES* 317 (1947).

<sup>7</sup> SMITH, *THE SPANISH GUILD MERCHANT. A HISTORY OF THE CONSULADO 1250-1700* 56 n. 2, 110, 125 (1940).

was formed about 1666 without royal grant, for privateering.<sup>8</sup>

The earliest stock company of which I have found positive mention was a trading company formed in 1714 for trade with Honduras and Caracas. It had a capital of 400,000 pesos divided into 100 shares. Profits or losses, the latter they asked God to forbid, were to be divided pro rata. This pious wish did not prevent complete failure.<sup>9</sup> The Caracas Company (*Real Compañia Guipuzcoana de Caracas*), on the contrary, had better fortune and a consistently good dividend record. It was organized by royal charter (*cedula*) of September 24, 1728, and enjoyed special privileges; it was deprived of them in 1781, and a few years later (1785) was dissolved.<sup>10</sup> The organization of the company, as contrasted with the statement of its special franchises and duties, was left to private enterprise. The rules for its internal administration were based on a commission's study of the organization of foreign companies, especially the Company of Ostend (Belgium). The shares were of a par value of 500 *pesos escudos* each. The board of directors consisted of five members, who were required to own at least 10 shares each, and no two could be related within the second degree of consanguinity. At least every five years they were required to call a *junta* or general meeting of shareholders, at which holders of eight shares or more had the right to vote. The *junta* was required to hear a full report of the directors' management; it could elect or depose any official, pass rules and declare dividends.<sup>11</sup>

In the same year, 1728, a private non-monopolistic company was formed to engage in fishing and whaling. It failed

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<sup>8</sup> HUSSEY, *THE CARACAS COMPANY 1728-1784* 18 (1934).

<sup>9</sup> HUSSEY, *Antecedents of Spanish Trading Companies*, 9 *HISPANIC AM. HIST. REV.* 1, 20 (1929). He states, *id.* at 7, that a 1624 project included a plan for a company to be formed in Mexico by the residents there.

<sup>10</sup> 2 MOSES, *THE SPANISH DEPENDENCIES IN SOUTH AMERICA* c. 17 (1914); ARELLANO MORENO, *ORIGENES DE LA ECONOMIA VENEZOLANA* (1947).

<sup>11</sup> HUSSEY, *THE CARACAS COMPANY 1728-1784* 60 *et seq.* (1934).

and was reorganized and taken over by the Caracas Company. The Royal Philippine Company was created in 1733, but did not become effective.<sup>12</sup>

The Havana company founded by Havana merchants received its formal charter or *cedula* on December 18, 1740. The capital was 1,000,000 pesos, divided into shares of 500 pesos each. Holders of eight shares or more could vote at the general meeting where the president and five directors were elected. It prospered at the outset and in 1745 declared a cash dividend of 30% and a stock dividend of 100%. Dissension between Cuban and Spanish interests, however, led to protracted litigation.<sup>13</sup>

Something like a boom in stock companies ensued. There was much agitation for the organization of monopolistic trading companies on the model of the Dutch, British and Portuguese companies. Some were organized, but there was equally strenuous opposition. The leading economist of his day, Uztariz, referring to the Dutch East India Company, said:<sup>14</sup>

Such a company would rather be injurious than useful here . . . [for] the vivacity of the nation can never be reconciled to it, or engage with the coolness and temper such projects stand in need of, to succeed, and be permanent, or have all that patience, which the slowness of the returns demands; especially since there arises no profits in the first years, when usually the expenses run higher than the gains.

These traits of the Spanish character, in addition to the most highly marked individualism in the world, partially explain the late development of the corporation in Spanish America.

The warnings of the economists did not deter the merchants from organizing companies and seeking special privileges. The Barcelona merchants, after finally overcoming the

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<sup>12</sup> HUSSEY, *op. cit. supra* note 11, at 170 *et seq.*, 203; Schurz, *The Royal Philippine Company*, 3 HISPANIC AM. HIST. REV. 491 (1920).

<sup>13</sup> HUSSEY, *op. cit. supra* note 11, at 207 *et seq.*

<sup>14</sup> 1 UZTARIZ, *THEORY AND PRACTICE OF COMMERCE* 180 *et seq.* (Kippax's transl 1751).

Andalusian monopoly, succeeded in obtaining a charter for their *Real Compania de Comercio para las Islas de Santo Domingo, Puerto Rico y La Margarita* (1755). Many essentially monopolistic corporations, designed for purely domestic ends, also existed in Spain. No less than five were founded in the two years, 1746-8, but none had an encouraging career.<sup>15</sup>

The trade of Seville having declined, its guild *circa* 1762, proposed the organization of a stock company in which foreigners were to be invited to take shares, for trade with the Indies, and were to be granted "great, real and permanent" privileges. The government rejected the project, chiefly because of the proposal to admit foreigners to the exclusive trade with the Indies.<sup>16</sup>

The *consulado* (guild) of Bilbao fathered projects in 1628 and 1668 to found a company on the model of the English and Dutch companies, but they never came to fruition. In 1736, the *Compania de navegacion y comercio de Buenos Aires, Tucuman y Paraguay* was projected. The text of the plan and the detailed by-laws have come down to us. The capital was to be 2,000,000 pesos, divided into 4,000 shares of 500 pesos each. Full negotiability of the shares was provided and a stock register was to be kept. They were contemplated as an investment for widows and orphans. Since there was considerable opposition to the company's demand for special privileges, they were never obtained. Another project was put forward in 1764 for a Louisiana company,<sup>17</sup> and in 1783 in Alicante for a company to operate in New Spain (Mexico).<sup>18</sup>

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<sup>15</sup> HUSSEY, *op. cit. supra* note 11, at 217 et seq.

<sup>16</sup> ANTUNEZ Y ACEVEDO, *MEMORIAS HISTORICAS SOBRE LA LEGISLACION Y GOBIERNO DEL COMERCIO*, etc. 276 (1797).

<sup>17</sup> 1 GUIARD Y LARRAURI, *Historia del Consulado de Bilbao* 245; 2 *id.* at 344 et seq., 366 (1918). Incidentally, this is an important source book for United States colonial shipping history.

<sup>18</sup> 1 RODRIGUEZ RODRIGUEZ, *op. cit. supra* note 6, at 6, 7.



The most important Spanish company for colonial investors was the National Bank of San Carlos created by royal *cedula* or charter of June 2, 1782.<sup>19</sup> The authorized capital was 15,000,000 pesos divided into 150,000 shares; one-half was allocated for subscription in Spain and other European countries, the other half to the colonies. Shares could be acquired by any persons, including religious orders and their members, with the right to assign or endorse them freely, according to the laws governing bills of exchange, at a higher or lower price than that paid by them.

Contrary to earlier practice in Spain, aliens whether resident or non-resident could hold shares in their own name and vote personally or by proxy. A wise and enlightened principle was included, which unfortunately has been abandoned in recent decades throughout the world: foreign shareholders were guaranteed that in the event of war with the countries of which they were subjects, their stock was to be protected by the Law of Nations and they were to enjoy it as in peacetime. Upon their death, their shares were to pass to their heirs in conformity with the law of their nationality.

Some of the provisions of the charter are still current in the corporation statutes in Spanish America. The business management of the bank was to be vested in the shareholders, acting through eight directors elected by the majority. Directors were required to own fifty shares each, which were inalienable during their term of office. To prevent the inconveniences of unduly large shareholders' meetings, a holding of twenty-five shares was required for voting and no one could vote more than twenty-five. Voting by proxy

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<sup>19</sup> A few articles of the *cedula* are reproduced in NOVISIMA RECOPIACION, Lib. 9, Tit. 3, Law 6. The entire charter is to be found in 3 EXTRACTO PUNTUAL DE LAS PRAGMATICAS, CEDULAS, ETC. DEL SENOR D. CARLOS III CAP. XII, 292 *et seq.* (1793). Previously banking in Spain and the colonies had been restricted to partnerships with unlimited liability. HEVIA BOLANO, LABERINTO DE COMERCIO 18 (1619). There was a precedent for the guarantee to foreigners in a project for a company in 1688, to be formed in the Netherlands. Hussey, *Antecedents of Spanish Trading Companies*, 9 HISPANIC AM. HIST. REV. 17 (1929).

was authorized. It was the duty of the attorney general of the nation to attend meetings, without vote, and insure that the basic laws of the bank were followed.

Strenuous efforts were made to place stock in the colonies and substantial subscriptions were received, chiefly from local public funds, on the strength of an implied promise that branches of the bank would be opened in the principal cities of America. None in fact were opened. Moneys received in Spain from the colonies after the subscription books had been closed were, by a gracious act of benevolent despotism, invested in the King's pet project, the Royal Philippine Company, under the guise of giving the investors the full advantages.<sup>20</sup> There was active speculation in the bank's shares in Paris.<sup>21</sup>

In the Spanish colonies themselves, several stock companies were projected, and a considerable number were organized. A pamphlet was issued in Lima, Peru, in 1732, advocating foreign trading companies.<sup>22</sup> From a letter addressed by the *Consulado* of Lima to the King on August 29, 1738,<sup>23</sup> it appears that a company was organized to discover and work mines. The fate of this company is not disclosed. Towards the latter part of the 18th century several mining companies apparently were formed.<sup>24</sup>

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<sup>20</sup> VASQUEZ, DOCTRINAS Y REALIDADES EN LA LEGISLACION PARA LOS INDIOS 342-56 (1940); Carrera Stampa, *Las Instituciones de Credito en la Epoca Colonial*, 4 EL FORO 225, 242 (1947). The investment from the Indians' funds alone was 114,329 pesos. One hundred printed copies of the minutes of the stockholders' meeting of December, 1785, were distributed in Mexico. For the Royal Philippine Company, see Schurz, *supra* note 12, at 491.

<sup>21</sup> 1 SANTILLAN, MEMORIA HISTORICA SOBRE LOS BANCOS NACIONALES DE SAN CARLOS, etc. 21 (1865).

<sup>22</sup> *Reflexiones sobre ventajas del comercio maritimo por companias extranjeras de accionistas asi en general como en especial respecto de Indias* (Lima 1732) (not verified).

<sup>23</sup> EL INDICE DEL ARCHIVO DEL TRIBUNAL DEL CONSULADO DE LIMA CON UN ESTUDIO HISTORICO DE ESTA INSTITUCION POR ROBERT SYDNEY SMITH 167 (1948). The Lima *consulado* was technically abolished by a law of 1876, but because the law was not immediately promulgated, the *consulado* continued until 1887.

<sup>24</sup> I have in my possession a stock certificate of one of these companies.

In Mexico, the first stock company has not been traced, but in the latter third of the 18th century several were organized.<sup>25</sup> The Guatemalan Indigo Growers Society (*Sociedad de Cosecheros de Anil*) of 1782 was more in the nature of a cooperative society than of a stock corporation.<sup>26</sup> The Bank of Havana had been organized before 1785.<sup>27</sup> A seal fishery company was operating in Buenos Aires in 1802.<sup>28</sup>

The "mining partnership," later taken over into the law of our Western states, made the basic idea of corporations familiar, since it was divided into 24 shares, called *barras*, which were transferable without effecting dissolution of the partnership. They originated in Mexico, then called New Spain, and were regulated by the famous *Ordenanzas de Minería de Nueva España* of 1783, which were in force by express enactment or by tacit recognition throughout Spanish America. These ordinances created a mining guild in New Spain, which in turn organized a bank to finance the industry. The bank was not, however, a separate entity.<sup>29</sup> Both the commercial guilds (*consulados*)<sup>30</sup> and the mining guilds gave the colonials some experience in corporate organization. But on the whole the marked individualism of the Spanish character did not furnish a spur to the spirit of association on a large scale.

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<sup>25</sup> Carrera Stampa, *supra* note 20, at 252. See also DAHLGREN, *MINAS HISTORICAS DE LA REPUBLICAN MEXICANA* (1887); DELGADO, *LAS PRIMERAS TENTATIVAS FUNDACIONES BANCARIAS EN MEXICO* (1945).

<sup>26</sup> 30 *HISPANIC AM. HIST. REV.* 336 (1950).

<sup>27</sup> Schurz, *supra* note 12, at 499. Two of the directors of the Havana bank as well as directors of Spanish banks (San Carlos, Banco de los Gremios, Seville) were on the board of the Royal Philippine Company.

<sup>28</sup> 2 LEVENE, *HISTORIA ECONOMICA* 162 (1926).

<sup>29</sup> See HOWE, *THE MINING GUILD OF NEW SPAIN AND ITS TRIBUNAL GENERAL 1770-1821* (1949).

<sup>30</sup> *Consulados*, following the Spanish models, were established in Mexico 1592, Lima 1593, Caracas and Guatemala 1793, Buenos Aires and Havana 1794, Cartagena, Santiago de Chile, Guadalajara and Vera Cruz 1795, Montevideo 1812, and in Valparaiso 1839. The Chilean *consulados* survived until 1865, the Guatemala *consulado* until 1871. See SOLORZANO, *POLITICA INDIANA LIB. VI, Cap. XIV, Nos. 23-25* (1647); *NOVISIMA RECOPIACION LIB. 9, Tit. 2*; Smith, *The Institution of the Consulado in New Spain*, 24 *HISPANIC AM. HIST. REV.* 61 (1944); 1 OLAVARRIA AVILA, *MANUAL DE DERECHO COMERCIAL* 159, 160 (1950).

The interesting thing to note about these Portuguese, Spanish and colonial companies is that, in contrast to the rule laid down by Coke and Blackstone and which is still followed in our law, they did not derive their corporate personality from the sovereign, but only their special monopolistic privileges. The corporate or legal personality came from men associating themselves, under the Law Merchant, into a "company." All "companies," whether formed as a general partnership or a limited partnership (*compania en comandita*) had a legal personality separate and apart from that of the individual members. This separate or corporate personality adhered automatically to this new form of company, the stock company or *anonima* as it was soon to be called. In Spain, as in Portugal,<sup>31</sup> insurance was effected by companies without royal grant, and other companies conducted business without special charter.

This concept was continued in the Spanish Commercial Code of 1829, which did not require governmental approval for a corporation. It did require judicial approval; the articles and by-laws had to be passed upon and approved by the Commercial Court, but this was limited to verifying whether the papers were in conformity with law. The concept that corporate personality emanates from the free will of the parties, not from an act of State, continues to be the underlying theory of the law in Latin America, even in some of the countries where special government authorization is required in order to do business. In others, the creation of a new juristic person is the result of compliance with numerous formalities of which government approval is only one.

Argentina is one of the countries where government intervention has gone furthest, yet a recent writer was nevertheless able to state:<sup>32</sup> "The law does not *create* corporations; it simply recognizes, expressly or impliedly, their

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<sup>31</sup> Insurance companies were first subject to regulation in Portugal by Regulations of August 30, 1820. FERREIRA BORGES, *op. cit. supra* note 4, at 36.

<sup>32</sup> 1 SATANOWSKY, ESTUDIOS DE DERECHO COMERCIAL 61 (1950).

existence as realities." This, I believe, on historical and analytical grounds, correctly represents general Latin American law.

There has never been confusion, as there has been in our law, between the business corporation and other corporations—foundations, associations and political entities. The business corporation was an exclusive creation of the Law Merchant. Whatever its remote origins in Roman Law, business company law has been little influenced, except in phraseology, by medieval theories relating to other types of corporations. The codes deal separately with juristic persons, under the general title of persons, and with the *societas* under contracts.

The Spanish Law Merchant like our common law was based on a premise of realism. The stock company is not a creature of sovereign power. It is not the State which gives it life. There is no concession theory. Nor is there any need for a legislative grant of limited liability; it flows automatically, under the Law Merchant, from the association of individuals in a stock company. Contrary to the history of our own law, no legislative authority was required for the limitation; the codes and statutes are merely declaratory of the existing law.<sup>33</sup>

During the colonial era, factories (we would today call them branches) were established by the South Sea Company in Panama, Cartagena and other ports.<sup>34</sup> The slave trade to Venezuela was for a time in the hands of a foreign company. Neither of these forerunners had any influence on the later development of corporation law. It was otherwise with

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<sup>33</sup> See Rooney, *Maitland and the Corporate Revolution*, 26 N. Y. U. L. REV. 24 (1951).

<sup>34</sup> A VIEW OF THE COASTS, COUNTRIES AND ISLANDS WITHIN THE LIMITS OF THE SOUTH SEA COMPANY (1711); 1 LEVENE, *op. cit. supra* note 28, at 287. The Panama branch was flourishing in 1732 when its agents befriended COCKBURN, THE UNFORTUNATE ENGLISHMAN, 155 *et seq.* (2d ed. 1773). The first edition (1733) of this book was published under the title A JOURNEY OVER LAND, FROM THE GULF OF HONDURAS TO THE GREAT SOUTH SEA.

the British mining and other companies which flooded into Mexico, Peru, Colombia and other countries following independence.<sup>35</sup> They were the first stock companies known in the Spanish American countries, with the exception of the few colonial companies above referred to. These British companies laid the practical groundwork and many of the forms for the later development. Throughout the 19th century, foreign companies or domestic companies controlled by foreign capital overshadowed purely national companies. Foreign capital investment is still an important factor in all of the Latin American countries and predominant in the economy of several of them. Its influence in shaping corporate usages and practices has been preponderant. These practices, or rather the economic realities behind them, have at times been in conflict with rigid statutory provisions and have created a dilemma for the courts: whether to interpret the law falsely to accord with the facts or to throttle progress.<sup>36</sup>

Perhaps the first stock company in Argentina was the bank, "*Caja Nacional de Fondos de Sud América*," organized in 1818. It attracted no deposits and folded up. In 1822, the *Banco de Buenos Aires* was organized as a stock company. It is interesting to note how English practice was followed in the legal name of the Bank — "The Directors and Company of the Bank of Buenos Aires."<sup>37</sup>

Similarly, the earliest native stock company in Colombia was the Bank of Venezuela. British influence is vividly seen

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<sup>35</sup> Rippy, *Latin America and the British Investment Boom of the 1820's*, 19 J. MODERN HIST. 122 (1947). In Colombia, the most important of these companies was the Colombian Mining Association, whose chief engineer was the famous Robert Stephenson. For the Mexican companies, see WARD, MEXICO, WITH ACCOUNT OF THE MINING COMPANIES (2d ed. 1828). A wild venture was the River Plata Mining Association; see HEAD, REPORTS RELATING TO THE FAILURE OF THE RIO PLATA MINING ASSOCIATION (1827).

<sup>36</sup> 1 RIVAROLA, SOCIEDADES ANONIMAS 3 *et seq.* (1935). Rivarola is the only writer I have met who stresses the importance of foreign influence.

<sup>37</sup> PEREZ, BANCOS Y MONEDA EN LA ARGENTINA 21, 23 (1944).

in the law, dated April 5, 1825,<sup>38</sup> authorizing its establishment with a capital of two million pesos, divided into 20,000 shares. The subscribers, their heirs and successors were deemed a corporation or civil association under the name of "The President, Directors and Company of the Bank of Venezuela." Throughout the charter, British phraseology is predominant with unnecessary provisions (from the Spanish point of view) as to the corporate powers, including the right to sue and be sued and to have "a common seal" (an unintelligible phrase in Spanish).

A still earlier mention of stock companies is found in Colombian legislation<sup>39</sup> granting a pearl fishery concession to the company of Rundell, Bridge and Rundell. The law included the proviso that the concessionaires be obligated to admit as shareholders any Colombians who at any time desired to become interested in the franchise. Other joint stock companies, foreign and native, were organized for public works shortly after independence. The first mining law of Colombia made special provision for large-scale mining companies.<sup>40</sup>

In Mexico, the earliest legislative reference is in Decree No. 367 of October 7, 1823,<sup>41</sup> which authorized aliens to acquire "*acciones*" in mines, but it is not certain whether this actually meant stock or merely interests in mining partnerships. A law of May 27, 1831, mentions a roadbuilding company (*compañia poblana*), but it is not clear whether the reference is to an existing or a contemplated company. The textbooks continued silent.<sup>42</sup>

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<sup>38</sup> 2 CODIFICACION NACIONAL No. 221, p. 56 (1924). Columbia at that time included Venezuela and Ecuador.

<sup>39</sup> Decree-Law of Aug. 11, 1823, [1823] 1 CODIFICACION NACIONAL No. 143, p. 280 (1924). The reference to "companies" in Law of July 31, 1823, is ambiguous; it may mean partnerships. *Id.* No. 123, p. 244.

<sup>40</sup> Law of Oct. 24, 1829, Art. 9 [1829] 4 CODIFICACION NACIONAL No. 589, pp. 92, 94 (1926).

<sup>41</sup> 1 DUBLAN Y LOZANO, LEGISLACION MEXICANA (1876); SCHMIDT, CIVIL LAW OF SPAIN AND MEXICO 337 (1851) translates "*acciones*" to mean "stock."

<sup>42</sup> The 1851 edition of the NUEVO FEBRERO MEXICANO quotes only the 1829 Spanish Code; in the appendix of forms it gives none for stock companies, although a number of partnership forms are given.

In Chile, the earliest reference in legislation was a decree of May 2, 1827, by which the government assigned the irrigation canal of Maipo to a company with an authorized capital of 750,000 pesos, managed by a board of five directors who were required to hold at least four shares each. At shareholders' meetings, each share entitled the holder to one vote, cast in person or by proxy, but no individual was allowed to have more than twenty shares.<sup>43</sup> As the shareholders were the holders of irrigation rights, it was in effect a cooperative society.

More important historically was the Santiago-Valparaiso Railway Company. A law of August 28, 1851, authorized the construction of the railway and provided that the President of Chile invite the inhabitants of the country to form a stock company for that purpose, the government participating in the amount of 2,000,000 pesos. Subscriptions were obtained from a private group for a like amount and the government subscribed its quota. The first general meeting of shareholders was called to be held at the *Consulado* in Valparaiso on April 5, 1852. The articles of association and by-laws were approved by the Executive on July 8, 1852. Article nine provided that the shareholders were liable only up to the amount of their shares. To qualify for membership on the Board of Directors, five in number, the directors were required to own 50 shares, inalienable during their term of office.

The approval of the articles by the government was ostensibly required only because it was the major shareholder, but this procedure set the pattern for subsequent legislation in Chile. The law of Stock Companies of November 8, 1854, provided that stock companies exist only by virtue of a decree of the government authorizing them. Stock companies then existing and not approved by special action of the legislature, were required to seek the necessary

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<sup>43</sup> ZENTENO, EL BOLETIN DE LAS LEYES 148 *et seq.* (1861).



executive authorization within six months, under penalty of being considered general partnerships.<sup>44</sup>

In Peru, the earliest reference to corporations in the legislative record is to the decree of December 24, 1825,<sup>45</sup> admitting a British mining company into the republic. Also, a bank was projected in 1831 as a stock company.<sup>46</sup> The earliest reference I have found to domestic corporations is a presidential decree of November 15, 1845, authorizing the construction of a railway from Lima to Callao by means of a stock company. A proposal on behalf of a London company was rejected.<sup>47</sup>

The earliest legislative reference in Uruguay is the Law of July 2, 1857, authorizing *Manu y Ca.* to establish a bank of issue, deposit and discount:<sup>48</sup>

. . . with authority in addition to its limited liability and own capital, to admit associates and capitalists with liability limited solely to the amounts they subscribe, issuing certificates of stock representing such capitals in the manner, form and conditions which they deem advisable in this market [i.e. Montevideo] or outside.

But there is no doubt that stock companies, not seeking special privileges, could be formed without legislative or executive authority. A law of July 17, 1839, expressly provided that commercial causes should be decided by the Uruguayan laws, the Ordinances of Bilbao, mercantile usage and practices, the Spanish compiled laws, and the *Partidas*,<sup>49</sup> in the order named in case of silence on the matter in-

<sup>44</sup> 20 *Boletín de las Leyes* 37, 94, 102 (1852). The Copiapo railway company had been previously organized and in the same year, 1852, a telegraph company was organized. *Id.* at 258, 265; 22 *id.* at 400 *et seq.* (1854).

<sup>45</sup> 2 *Colección de Leyes, Decretos y Ordenes* 1881-1830 No. 233, p. 194 (1832).

<sup>46</sup> *Proyecto de un Banco Nacional aprobado por el Supremo Gobierno y presentado al Congreso Constitucional de 1831* by Jose Paulino Acevedo (1832).

<sup>47</sup> OVIEDO, *COLECCION DE LEYES, DECRETOS Y ORDENES 1821-1859* Nos. 2300, 2301, pp. 133, 134 (1861).

<sup>48</sup> 2 *Colección Legislativa del Uruguay* 114 (1876).

<sup>49</sup> A Spanish code of laws divided into seven parts which was compiled about the year 1250. It was a codification of the customary law of all the Spanish provinces, the canon law as administered in Spain and the Roman law. BLACK, *LAW DICTIONARY* 1024 (4th ed. 1951).

volved.<sup>50</sup> Since none of the statutory sources named above treat of stock companies, they were to be dealt with according to mercantile usage.

As to the origin of the stock company in statutory law, as distinguished from its origin arising out of usage, it came to Latin America in its present form through the French Code of Commerce of 1807, and the Spanish Commercial Code of 1829. The Spanish Code was far superior to the French as a work of codification since the latter, for the most part, was simply a reproduction of earlier French ordinances. The French Code did, however, recognize and regulate for the first time the *société anonyme*, using the term in a sense different to that of Pothier and others of the 18th century.<sup>51</sup> It was called "anonymous" to distinguish it from partnerships in which the name of one or more of the partners constituted the firm name or style. In the *anonyme*, the use of the names of individuals was prohibited and the company was to be known by its principal object. This is still the law under a few of the codes, but is disregarded in practice and the modern statutes permit the use of personal names, under appropriate safeguards.<sup>52</sup> The French *anonyme* passed into the Spanish and Portuguese languages

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<sup>50</sup> 1 *Collección Legislativa del Uruguay* 434, 435 (1876). The *Consulado* of Montevideo was created by decree (*auto*) of the Captain General, May 23, 1812, to be governed by the royal *cedula* of June 30, 1794, which created the *Consulado* of Buenos Aires. 1 *Id.* at 571 *et seq.* It was finally abolished May 22, 1858, 2 *id.* at 166.

<sup>51</sup> The earlier *societe anonyme* was merely a joint venture. The anonymous partnership authorized by the Irish Parliament in 1782 was more like our present limited partnership. FORMOX, FOUNDATIONS OF MODERN COMPANY LAW 44 (1923).

<sup>52</sup> *E.g.* Colombia, Law 26 of 1922; Spain, Royal Order June 12, 1925, despite a seemingly contrary provision in the Commercial Code; Brazil, art. 3, Decree-Law 2627 of 1940. Curiously enough, the latest code, that of Honduras, provides that any person who allows his name to appear in the denomination of the company shall be liable *in solido* and without limit for the corporate operations. Article 91 CODIGO DE COMERCIO, DECRETO 73 (1950); *La Gaceta*, May 6, 1950. This may be due to the influence of 1 RODRIGUEZ RODRIGUEZ, *op. cit. supra* note 6, at 284, who considers the practice dangerous and believes that it should be made illegal. In Peru, despite the language of the Code seemingly to the contrary (art. 160), personal names are used since there is no express prohibition. LEON MONTALBAN, DERECHO COMERCIAL 294 (1943).

as *sociedad anonima* or *compania anonima* and *sociedade anonima*, respectively.

The early commercial codes in Latin America were copies or adaptations of the French and the Spanish Codes referred to above.<sup>53</sup> The first relatively new codifications were those of Brazil, 1850, and Chile, 1865. Parts of the Brazilian Code are still in force, but the chapter on corporations has been repealed in its entirety. The Chilean Code, however, still forms the main basis for the corporation law of that country. The Argentine Code of Commerce of 1889 and the Uruguayan Code of 1889 play the same fundamental role. The proper and logical place for the law on stock companies is in the commercial code, but the actual or assumed exigencies of regulating this form of business organization have led to the enactment of special laws or decrees without awaiting the slower process of a total revision of the code. Only Guatemala (1942) and Honduras (1950) have in recent years adopted new commercial codes. It is with these special enactments that we are here principally concerned in noting the modern trend.

## II.

The French Code grouped together under the general head of *société* the three forms of (1) general or collective partnerships, (2) the limited partnership or *société en commandite*, and (3) the *anonyme* or stock company.<sup>54</sup>

The Spanish Code of Commerce of 1829, like the French Code, dealt with the stock company as merely a variant of partnerships.

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<sup>53</sup> See Eder, *Law and Justice in Latin America*, 1 LAW: A CENTURY OF PROGRESS 39 (1937).

<sup>54</sup> New York adopted the limited partnership in 1822, and other states followed. One special form of it, the limited partnership with shares assigned to the special partners, we did not adopt. It was, however, recognized by all the Latin-American codes, but was not availed of in practice; only in the Argentine did it ever attain any importance, and it has now practically died out there.

This may partially explain why the organization of companies under the 1829 Code led to a wave of speculation. One writer said: <sup>55</sup>

Under the favor of these rules directed to gather capital proportionate to the great improvements needed by the country, we have recently seen a cloud of stock companies whose shares gained fabulous premiums from the moment of offer. These premiums, growing every minute, caused such obfuscation that even persons proof against the fever of mining, fearful of the fate of the public funds and lacking confidence in the stability of the Bank, contributed their capital to stock companies. It was a spectacle to see how shares and offers of shares flew from hand to hand; how they were purchased for cash and time purchases were haggled over; how gaily money was risked and debts assumed without measure. It could be said that the shadow of John Law needled the tardy so that all believers rushed without discretion to their ruin. Only thus could such a great whirlwind of papers of all sizes and colors be formed that specie disappeared and all confidence was lost. The crash of so many fortunes and the general clamor that was raised against the speculation that had destroyed them necessitated other enactments that could give assurance to the utility and morality of mercantile stock companies. The fruit of this urgency was the law of January 28, 1848 and the Regulations of February 17, 1848.

Article 1 of the 1848 law provided that no company, the capital of which was divided in whole or in part into shares, could be constituted except by virtue of a statute or of a royal decree. It was not long, however, before Spain reverted to the principle of freedom of association.

A corporation in our law is a legal entity deriving its existence from the State, whereas a partnership is a creature of contract without an entity apart from its members. A partnership, in contrast to the corporation, rests solely on the partners' common law right to contract with each other.<sup>56</sup> On both points, the Law Merchant of the Latin countries is in contrast to our law. Corporations and part-

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<sup>55</sup> ESCRICHE, *DICCIONARIO DE LEGISLACION Y JURISPRUDENCIA* 1469 (9th ed. 1907).

<sup>56</sup> 18 C.J.S. 389.

nerships alike are embraced under the general concept of *societas*. Neither derives its existence from the State; both flow from the right of association and freedom of contract; both are legal entities separate and apart from the members.

Our law also recognizes the contractual conception of a corporation. A corporate charter, it is said, is a "contract" of a threefold nature, in that it forms a basis for a contract between the State and corporation, the corporation and its stockholders, and between stockholders themselves.<sup>57</sup>

The sharp theoretical distinction in our law between partnerships and corporations was not made in these codes or in their followers. Both forms of business organization were species of a single genus, the *societas*; both were juristic persons, legal entities separate and apart from the associates; the prospective associates were at liberty to choose whichever form they desired. The shareholders in a corporation were considered partners, but their liability was limited to the amount of their contributions, as in special or limited partnerships.

The theory of contract dominated legal and political thought of that epoch. Marriage was a contract; even the organization of political society was deemed to be based on contract, Rousseau's concept of the social compact. So naturally the *société*, the business corporation, was but another species of contract. This conception of the corporation still survives in the language of the codes and statutes with one or two exceptions, but it is today either completely rejected in doctrinal writings or tortured into a special category far from the orthodox contract. What has been called in continental literature the "crisis of contract" has nowhere been in stronger evidence than in connection with the stock company. There was never any echo of the doctrine of the *Dartmouth College* case,<sup>58</sup> that a corporate

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<sup>57</sup> *In re National Mills, Inc.*, 133 F. (2d) 604, 609 (7th Cir. 1943).

<sup>58</sup> *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629 (U.S. 1819).

charter constituted a contract with the State. It was considered merely as a contract between the associates; the rights of a corporation did not flow from an act of divine grace of the Sovereign, but from the principle of freedom of association, long recognized by the Law Merchant and eventually finding its recognition in constitutional law.

The insufficiency of the ordinary concept of contract to explain the complicated phenomena of the modern corporation is generally recognized in doctrinal writings, although most of the codes embody this idea. A view that has been gaining ground, under the inspiration of Hauriou's work<sup>59</sup> and that of his disciples, is that the corporation is an "institution." The institutional theory of law is not very clearly defined. We are familiar with the view that marriage, for instance, is an institution, not a contract; but otherwise this theory has not made headway in our law.

Hauriou's theory of the institution was in part based on the stock company. It has been developed by his disciples into many fields and is now put forward as a substitute for the contract theory of the corporation.<sup>60</sup> The general theory it is said:<sup>61</sup>

. . . would seem to reduce itself to the statement of the importance in the structure and evolution of society of the permanent organizations which serve the collective interest. In their totality they constitute the individuality of the state.

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<sup>59</sup> Hauriou, *An Interpretation of the Principles of Public Law*, 31 HARV. L. REV. 813 (1918).

<sup>60</sup> The chief exponent is GAILLARD, *LA SOCIETE ANONYME DE DEMAIN* (1935), and it has an ardent advocate in De Sola Canizares, *La teoria de la institucion como base para la reglamentacion de las sociedades por acciones*, 1 REVISTA TRIMESTRAL DE DERECHO COMERCIAL, No. 5, June 1947, Bogota 5, and in report to the Third Congress of Comparative Law, (unpublished 1950). It is also approved by Serkovic, *La Sociedad Anonima*, 11 REVISTA DE DERECHO Y CIENCIAS POLITICAS 77 (1947); 12 *id.* at 75; and by RETAIL, *ADMINISTRATION ET GESTION DES SOCIETES COMMERCIALES* 13 (2d ed. 1947). Micou, *Corporate Financing under Latin American Law*, 22 CORNELL L. Q. 490, 508 (1937), gives a summary. The theory is strongly criticized by 1 SATANOWSKY, *op. cit. supra* note 32, at 91 *et seq.*, who also maintains that we are confronted not with a "crisis of contract," but with a crisis of individual liberty. 1 *id.* at 128 *et seq.*

<sup>61</sup> 4 ENCYC. SOC. SCI. 280 (1932).

As applied to corporations, it is explained as having three main elements: a central directive idea — profit; the vesting of authority as an organized power; the communion of all members of the group around the directive idea and its realization.

There is one paradox resulting from the application of the institutional theory as a basis for the business corporation. Hauriou's whole philosophy was to lay stress on liberty, on individualism, on the primary importance of private enterprise as the sole path of progress for any society, on the validity of custom and on the subordination of public law to private law. The theory of the institution as applied to corporations works to the contrary in practice. It tends to justify the increasing intervention of the State in corporate affairs; it tends to absorb the corporation into public law, to make corporation law a part of administrative law, a retrogression to the days of the early quasi-political chartered companies which were instruments of an all powerful mercantilist State. It is not surprising, therefore, to find writers who, while dissatisfied with the classic theory of contract, do not accept the institutional theory.

The theory of the institution has been officially endorsed in Cuba. The preamble to Decree-Law No. 842 of April 20, 1936, establishing a Central Registry for stock companies in order to avoid conflicting names, states: <sup>62</sup>

Even though stock companies like other associations [*societades*] have their origin in and are based on a contract, it is universally recognized that they are vested with the character of institutions and that, joined with the private interests of each shareholder, there is a collective interest and hence it is appropriate to adopt special provisions in regard to them.

The preamble further stated that in conformity with the demands of the present era as expounded by writers, a constant and effective intervention by the State was required; but the decree went no further than to provide

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<sup>62</sup> 2 NUNEZ, CODIGO DE COMERCIO 45 *et seq.* (1939).

for the Central Registry and Cuba remains a country where corporations are free from government control.<sup>63</sup> The Registrar is authorized to refuse registration to a company whose articles fail to meet the legal requirements; but he must present grounds for his decision and an administrative appeal is allowed from his rulings.

Another theory that has had some following is that the corporation is a "complex act"; that it is an aggregate of parallel declarations of will having an identical content and for an identical purpose. While a contract produces effects only between the contracting parties, the complex act influences the legal sphere of third parties. In a contract, there are conflicting interests; in the complex act, the interests are parallel. This theory is criticized on the matter of fact ground, that in corporations also, there are conflicting interests. The essential nature of a *societas* is not the coincidence of interests, but the community of purpose, the common object.<sup>64</sup>

The chief difficulty of the contract theory is that while the incorporators are presumably familiar with the contract they are signing, it is going against the facts to consider that subsequent holders of shares are acquainted with the articles of association; very often they deal in shares as vehicles of speculation and nothing more. To say they are presumed to know the articles may serve to overcome the difficulty as a matter of legal technique, but it departs from the basic notion of contract. Moreover, it is of the essence of contract that it cannot be modified except by mutual accord of the parties. In the corporation, on the other hand,

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<sup>63</sup> A Decree of September 12, 1940 for government supervision has not been applied.

<sup>64</sup> 1 RODRIGUEZ RODRIGUEZ, *op. cit. supra* note 6, at 21. Rodriguez accepts Ascarelli's views that the corporation is a plurilateral contract. He points out, 1 *id.* at 24, that bilaterality is not of the essence of a contract and that Article 1792 of the Mexican Civil Code furnishes a basis for recognition of plurilateral or open contracts. Ascarelli's views are expounded in numerous works, especially PROBLEMAS DAS SOCIEDADES ANONIMAS (1945). 1 FERREIRA BORGES, INSTITUCOES DE DIREITO COMMERCIAL 240 (1946), also espouses them.



the articles can be modified by vote of a specified majority of the shareholders.

The writers who do not reject entirely the concept of a contract hold that it is a contract of a special nature, which they have named a "plurilateral" contract; it is not the only plurilateral contract, but the most important of the species. The corporation arises from a contract of this special type and becomes a new entity, a juristic person. In this unique contract, while each party is the possessor of rights and obligations, the obligations do not run to each party but to all. Expressed in a mathematical symbol, the ordinary contract would be represented by a straight line, each party being at one extremity of the line; the plurilateral contract would be represented by a circle.

Where the corporation is formed by subscriptions and the parties are not present, the obligations of the subscribers would run towards all the others.<sup>65</sup> Fraud or other vice of consent does not vitiate the plurilateral contract, unless it comes from all other parties and impossibility as to one party does not affect the others. Deliberation and action is by a majority; this is prohibited in other contracts where unanimous consent is required. Perhaps the main characteristic of the plurilateral contract is that it is "open" — new parties may enter and become vested with the same rights as the original parties possess.

The Brazilian statute of 1940 avoids the use of the word "contract." The author of the law states that it is impossible to explain and resolve the problems of the stock company within contractual rules. It is not constituted by a contract, but by a concurrence of parallel wills, by a plurality of unilateral acts.<sup>66</sup>

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<sup>65</sup> Two methods of organization are provided by the codes and statutes; simultaneous organization and "successive" organization which is, organization by subsequent subscriptions. The second form is more complicated and extremely rare in practice.

<sup>66</sup> De Sola Canizares, *Les Societes Commerciales en Amerique Latine*, 2 Cahiers de Legislation et de Bibliographie Juridiques de l'amerique Latine, No. 5,

The concept of contract or of partnership, entails as a necessary consequence, that the minimum possible number of shareholders is two; <sup>67</sup> thus, the concept of the so-called "one-man" or uni-personal company is repugnant to it. In fact, not only for incorporation, but for the continued existence of the corporation, many of the Latin American codes or statutes require a larger number of incorporators and shareholders. In practice this is evaded by the use of dummies, but this device is fraught with a potential danger for the legality of all the shares passing into a single hand is not recognized there as it is in this country. We have become so callous to the use of dummies to conceal the uni-personal nature at time of incorporation, that we fail to see the inherent absurdities of going through this procedural fiction. Iowa, as far as I know, is the only state that has permitted incorporation by a single individual.<sup>68</sup> Proposals have been made in Latin America to give the single trader limited liability without incorporation and without resort to dummy partners or dummy shareholders. However, none of these proposals have been enacted into law.

Under the present state of the law in Latin America, if the number of shareholders falls below the minimum number, the corporation theoretically becomes a nullity and is subject to dissolution. The authorities are predominantly in accord with this view.<sup>69</sup> There is one decision of an Argentine court to the contrary, but it has been criticized.<sup>70</sup> There are dicta of lower courts in Cuba supported by an

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151, 197 (1950), quoting Miranda. The Guatemala Code of Commerce also avoids the word contract in its definition of the stock company, art. 384 (1942).

<sup>67</sup> Two incorporators are permissible in Chile, Cuba, Nicaragua, Peru and Uruguay.

<sup>68</sup> IOWA CODE § 491.2 (1946).

<sup>69</sup> 1 RODRIGUEZ RODRIGUEZ, *op. cit. supra* note 6, at 281, 499. TELLADO, LAS SOCIEDADES COMERCIALES EN LA REPUBLICA DOMINICANA 416 (1939). In Haiti recently, a corporation was dissolved because it had only one shareholder. De Sola Canizares, *supra* note 66, at 90.

<sup>70</sup> *Camara Comercial*, June 22, 1927, 25 JURISPRUDENCIA ARGENTINA 296; FERNANDEZ, CODIGO DE COMERCIO ANOTADO (1946).

eminent authority<sup>71</sup> and a decision of the Supreme Tribunal of Spain also to the contrary. The Spanish court held that courts cannot extend the grounds for dissolution expressed in the code and that since transfer of all shares into the hands of a single owner is not expressly stated as a ground for dissolution, it does not affect the existence of the company.<sup>72</sup> This decision would undoubtedly be given weight in Cuba and Peru, where the Spanish code is in force.

Where bearer shares are used, it is exceedingly difficult to enforce the theoretical rule. The recent Colombian compilation<sup>73</sup> attempts to meet this difficulty. The decree provides that dissolution resulting from acquisition by one sole person shall be evidenced when only one person attends the shareholders' meeting as sole shareholder, when he collects all the dividends or when by any other trustworthy means the directors verify this ground for dissolution. It is hard to envisage law less realistic. The decree throws doubt on the previous law as generally understood whereby dissolution took place if the number of shareholders fell below the statutory requirement of five. The new decree provides as a cause for dissolution, the acquisition of all the shares by a sole person, natural or juristic.<sup>74</sup> In any event, no effective procedure seems to be provided, since the Superintendent of Shares Companies was given no express power, as he is in other cases (e.g., loss of 50% of the capital) to declare a dissolution. Nevertheless, he would undoubtedly terminate the company's authority to do business.

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<sup>71</sup> DÍEHO, LA SOCIEDAD A RESPONSABILIDAD LIMITADA 19 (1936).

<sup>72</sup> *Tribunal Supremo*, April 11, 1945; DE RAYO Y RODRIGUEZ, LA COMPANIA ANONIMA 113 (1949).

<sup>73</sup> Decree 2521 of July 27, 1950; 7 REVISTA DE LA SUPERINTENDENCIA DE SOCIEDADES ANONIMAS, No. 20, art. 190 (August 1950); the Decree has also been published by the REVISTA TRIMESTRAL DE DERECHO COMERCIAL (1950) under the title *Sociedades Anonimas (Regimen Legal en Colombia)*.

<sup>74</sup> 7 REVISTA DE LA SUPERINTENDENCIA DE SOCIEDADES ANONIMAS, No. 20, art. 187 (August 1950).

## III.

It was the Spanish Law of January 28, 1848<sup>75</sup> that the Latin American codifiers had before them as a model. Hence the Brazilian Code of 1850, the Law of 1854 incorporated in the Chilean Code of 1865, the Argentine Code of 1859-1862, and the Uruguayan Code of 1865 required the executive power to approve the articles of association. This did not mean that the charter emanated from the State, but merely that the executive was to pass on the conformity of the articles to the law, theoretically a merely ministerial act. In nearly all the other countries, the liberal movement in Europe was influential and the requirement for government approval was either never enacted or speedily abolished.

Despite the strong influence of French, Spanish and Italian law, the principle of freedom of association was not universally followed in Ibero-America. Executive authority is required in Argentina, Bolivia, Chile, Guatemala, Haiti, Honduras, Uruguay, and since 1938, in Colombia. In none of these is the mercantile theory openly denied, but the corporation bureaus tend to stretch their authority to the limit of, or beyond, the law. Under the guise of determining whether or not a proposed corporation meets the requirements of the statutes, they exercise an arbitrary discretion which goes unchallenged, since no lawyer or business man cares to antagonize the authorities or delay his start by appeal to the courts. Rare is it to find men with sufficient enthusiasm to maintain that struggle for law essential to its preservation. Assertion of rights when trampled on is the price of law.

In some Ibero-American countries, executive authorization is not required for ordinary business corporations but only for special types of business. The exceptions have become more and more numerous. Banking, insurance,

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<sup>75</sup> See text at note 55, *supra*.

hydro-electric and other utility corporations, public works, oil and mining are the most frequent instances, and authorization for these rests in the discretion of the president or ministers. These exceptions, of vital importance as they are, are beyond the scope of this article.

The modern tendency has been in the direction of a retrogression to state intervention with the substitution of bureaucratic authority for general laws. As with all bureaucracies, they have tended to usurp powers not given them by statute. Not infrequently these usurpations have later been confirmed by statute or by executive decrees having the force of law. We cannot go into detailed study of all the countries, but must select a few of the leading ones for the purpose of this article.

*Argentina:* The Spanish code of 1829 was adopted in a few provinces (states): Mendoza, Corrientes and San Juan. When the first national Code of Commerce was adopted in 1862, the legislation in force throughout the country with the exception of these three provinces was the old Spanish law which contained no provision concerning stock companies. The hazardous political life of Argentina, before union was finally attained, gave little time for thought about laws regulating stock companies. The 1889 Commercial Code of Argentina, still in force, came largely from abroad and was based on the Italian and Portuguese codes. However, the Spanish idiosyncrasy could not be uprooted by paper statutes. In 1889, the progress of the country had scarcely begun and nearly all limited companies were of English origin with English capital and enterprise. Even purely Argentine companies frequently adopted English names for the sake of prestige. Consequently, corporate practice notwithstanding the statute, became firmly molded on British lines. Even when not controlled by foreign interests, the natural tendency was to imitate the established foreign procedures and forms. The result has been an amalgam of

all these varying sources. The courts have had difficulty in reconciling economic practice and facts with rigid provisions in the statute. Although custom is not a source of commercial law in Argentina as in other countries, and cannot abrogate a statute, nevertheless the courts have tended at times to disregard the statute and enforce custom. They have been placed, as already noted, in an unfortunate dilemma: either to give a false interpretation to the statute, which generates a disrespect for law, or to throttle progress. The Code came during the Baring crash, an unfortunate time in the economic history of the country. From 1882 to 1890, 404 corporations had been organized, but in the crash more than 200, with an authorized capital of 300 million pesos, failed. In nearly all of these, the administrative officials in their search for power, exaggeratedly claimed that there had been abuses and even criminal offenses. A decree of March 21, 1890 provided for executive intervention and executive decrees have progressively strengthened state control.<sup>76</sup>

The steps for the organization of a company are as follows: 1. Execution of the articles of association (which also include what we put into our by-laws) before a notary public; 2. Application to the General Inspection of Justice, with presentation of the articles and the minutes of the original meeting. Approval is granted upon finding that the documents are in conformity with the requirements of the code and statutes and that the object of the company is not against public policy. Once approval is advised by the *Inspeccion*, the application goes to the Ministry of Justice, which ordinarily relies upon the action of the *Inspeccion*. The file is referred to various government departments, e.g., the anti-trust authorities, the Enemy Property Board and the tax authorities. The presidential decree, countersigned by the Minister of Justice, granting incorporation, is then

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<sup>76</sup> RIVAROLA, *op. cit. supra* note 36, at 3 *et seq.*, 92 *et seq.*; FERNANDEZ, *op. cit. supra* note 70, at 840 *et seq.*

issued; 3. Theoretical existence as a legal entity commences with the presidential decree, but the company cannot yet begin business. A certified copy of all the proceedings, including the presidential decree, must be entered on the books of a notary public. All the papers are then presented to the Commercial Court which issues an order directing publication and recording in the Mercantile Register. When publication and recording are completed, the company obtains its permanent account books and can then commence business.<sup>77</sup>

By Decree of November 17, 1908, replaced by Decree of April 27, 1923, wide powers were given to the Corporation Bureau, the *Inspeccion de Justicia*. The writers are nearly unanimous in the view that many of these powers are without statutory authority,<sup>78</sup> but promoters naturally anxious to avoid delay have accepted administrative rulings. The Argentine Code orders imperatively that the articles *must* be approved if they are in conformity with the law and not contrary to public policy, but the Code is silent as to the remedy for the abuse of this power. The courts have refused to interfere with the executive's discretion.<sup>79</sup> Companies which refuse or hinder inspection and supervision by the *Inspeccion* are subject to forfeiture of their corporate franchise by administrative act. The decree authorizes inspectors to attend and even to preside at meetings; the *Inspeccion* can force a call for meetings and it has the widest powers of audit. Every company must obtain au-

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<sup>77</sup> BENSON, ORGANIZING A BUSINESS UNDER ARGENTINE LAW (1947); MARVEL & O'FARRELL, MEMORANDUM ON COMPANY LAW (3d ed. 1951).

<sup>78</sup> FERNANDEZ, *op. cit. supra* note 70, at 496 *et seq.* ROJO CARDENAS, CONTRALOR POR EL ESTADO DE LAS SOCIEDADES ANONIMAS 49 (1947).

<sup>79</sup> 1 RIVAROLA, *op. cit. supra* note 36, at 23; ROJO CARDENAS, *op. cit. supra* note 78, at 51 *et seq.*, citing Standard Oil, S.A. v. La Nacion, Camara Federal de la Capital, March 10, 1944, 1 JURISPRUDENCIA ARGENTINA 618 (1944). The plaintiff attacked as unconstitutional the resolution of the executive, which denied authority to increase the capital of the company. The appellate court, reversing the lower court, held that the executive was the sole judge of "public interest." There was a dissenting opinion with which Rojo Cardenas agrees, holding that unappealable executive discretion infringes the sphere of judicial power.

thority from the *Inspección* to fix the date of its meetings and must present its balance sheet and report to the *Inspección*. Pursuant to a decree of October 31, 1923, copies of minutes of meetings must be presented to the *Inspección* within fifteen days.<sup>80</sup> A balance sheet must be prepared every quarter and must be submitted to the *Inspección*. Although the text of the decree is rigorous, supervision by the *Inspección* is not too burdensome or hindering in practice.<sup>81</sup>

*Chile:* The Chilean Constitution enumerates among the special powers of the President the authority<sup>82</sup> "to grant juridical personality to private corporations and to cancel the same; to approve the by-laws by which they are governed, to reject the same, and to accept modifications."

The first Chilean law was that of November 8, 1854, which was substantially incorporated into the Commercial Code of 1865. The President's only duty, in granting authorization to a stock company, was to see that the legal requirements were duly followed. Legally, the President cannot refuse authorization if the articles of association contain no violation of the statutes.<sup>83</sup>

The tightening of government control and the expansion of government intervention has been the continuous characteristic of Chilean jurisprudence since the 1854 law. The *Inspección General de Sociedades Anónimas* was created in 1928 to carry out the presidential function.<sup>84</sup> The name of this bureau was changed to *Superintendencia de Sociedades*

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<sup>80</sup> FERNANDEZ, *op. cit. supra* note 70, at 840 *et seq.*

<sup>81</sup> De Sola Canizares, *supra* note 66, at 184; BENSON, *op. cit. supra* note 77, at 31. As a result of the federal system, the provinces (states) also have established "inspections," the federal inspection applying only to the Capitol and national territories. ROJO CARDENAS, *op. cit. supra* note 78, at 113 *et seq.*

<sup>82</sup> Quoted from THE CONSTITUTIONS OF THE AMERICAS, articles 72, 155 (Fitzgibbon ed. 1948). *Estatutos*, therein translated "by-laws," includes the articles of association as well as what we know as by-laws.

<sup>83</sup> HERRERA REYES, *SOCIEDADES ANONIMAS* 15, 71 (1935).

<sup>84</sup> Law of 4404 of September 10, 1928.



*Anonimas* by the basic law still in force.<sup>85</sup> The chief purpose is to prevent frauds on the part of promoters and managers, and the underlying principle is that prevention is better than punishment.

The procedure for incorporation is, from our point of view, exceedingly complicated and cumbersome. The first step is the preparation of a prospectus, the contents of which are prescribed in considerable detail.<sup>86</sup> Next is the execution of the articles of association before a notary public. A petition to the Ministry follows, which refers the matter to the Superintendency for a report on the legal and *economic* aspects of the company. Based on this report, the President may either: (1) deny authorization, stating his reasons (there is no appeal from an adverse decision); (2) require modification of the articles or by-laws; or (3) issue a decree of existence. The succeeding steps are the formalities of publicity — registration in the Mercantile Registry and publication in the Official Gazette. When these have been accomplished, the administrative proceedings start afresh with a like petition to the Ministry, report by the Superintendency, which requires proof of payment of the amount subscribed by a certificate of a bank, and finally, the President issues a decree of installations which fixes the time when the company is to begin operations.

The same formalities are required for any amendment to the charter. If the amendment is to increase the capital, authorization is not granted except upon proof to the Superintendency that the increase is absolutely and immediately necessary and that it will be of benefit to the business and to the country.<sup>87</sup>

In spite of these cumbersome formalities and restrictions, business has adjusted itself to them. There are active stock exchanges of high standing in Santiago and Valparaiso,

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<sup>85</sup> Decree-Law 251 of May 20, 1931.

<sup>86</sup> *Id.*, art. 86.

<sup>87</sup> 2 OLAVARRIA AVILA, *op. cit.* *supra* note 30, at 136-49.

both originally organized as private enterprises without government intervention.

*Colombia:* In Colombia, the procedure for incorporation is almost as cumbersome as in Chile. A Superintendency of Share Companies was authorized wide powers by Law 58 of 1931, but was not actually established until Decree 1984 of 1939. The Ordinances of Bilbao had remained in force in Colombia until 1853, when the country (at the time called New Granada) substantially adopted the Spanish Commercial Code of 1829. It remained in force only a few years, a federal system being established and most of the sovereign states enacted their own codes for governing interior commerce. The provisions of the Code of Commerce of the State of Cundinamarca on corporations were almost a literal copy of those of the Santa Cruz code of Bolivia of 1834, the corporate articles of which were taken from the Spanish Code of 1829. This Cundinamarca Code was adopted by three other states. No government authorization was required; simply submission to the court for approval as to legality, in practice never refused, of the notarial instrument. After centralization, the requirement for government authorization (although permissible under the Constitution of 1886) was abolished, not to be reinstated until 1939. Incorporation was simple and many of Colombia's leading corporations date from this period.

Colombia's constitution vests the President with authority to exercise supervision over banks of issue and other establishments of credit and over mercantile corporations in accordance with law.<sup>88</sup> The corporation law presently in effect<sup>89</sup> is the compilation of prior statutes and rulings, with some additional material. It differs from the Chilean law in that for the ordinary company, no prospectus or signature of the president is required, except for foreign corpora-

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<sup>88</sup> GIBSON, *THE CONSTITUTIONS OF COLOMBIA* 427, 428 (1948).

<sup>89</sup> Decree No. 2521 of July 27, 1950; 7 *REVISTA DE LA SUPERINTENDENCIA DE SOCIEDADES ANONIMAS*, No. 20 (August 1950).

tions. Otherwise the procedure is substantially the same: notarial instrument, registry, publication and finally, two applications to, and two resolutions by, the Superintendency.

The corporation must give notice in advance to the Superintendency of all shareholders' meetings and copies of the minutes must be sent to it.<sup>90</sup> The Superintendency has the right of inspection at any time;<sup>91</sup> the right to impose fines,<sup>92</sup> and *inter alia* the power to delist from the stock exchange, subject to approval by the Ministry, any company for violation of the legal prescriptions; the right to suspend or revoke the authority to do business for a like violation or for *ultra vires* acts.<sup>93</sup> Any person may denounce irregularities or violations.<sup>94</sup> In certain situations there is an appeal to the Council of State.<sup>95</sup>

The requirement for prior government authorization has met with constant opposition in all countries on diverse grounds: that it is an unconstitutional restriction on the right of freedom of association; that the supposed protection to the public is illusory; that the task is beyond the capacity of States with poorly organized civil services; that it is a hindrance to progress; that it infringes on the constitutional separation of powers; that it is an obstacle to commerce without corresponding benefits; that tutelage by the law is better than tutelage by the government; that judicial functions should not be entrusted to the administration;<sup>96</sup> and

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<sup>90</sup> *Id.*, art. 103, 104.

<sup>91</sup> *Id.*, art. 275. A company can, upon somewhat burdensome proof and procedure, obtain exemption from this inspection.

<sup>92</sup> *Id.*, art. 274.

<sup>93</sup> *Id.*, art. 288.

<sup>94</sup> *Id.*, art. 289.

<sup>95</sup> *Id.*, art. 290.

<sup>96</sup> E.g., I SEGOVIA, CODIGO DE COMERCIO 361 (1892); CRUCHAGA, DE LA REGLAMENTACION DE LA SOCIEDAD ANONIMA EN CHILE (1882); SANTELICES, LOS BANCOS CHILENOS (1893); VARELA, LA INTERVENCION DE LOS GOBIERNOS EN LA SOCIEDAD ANONIMA 101 (1908); VARGAS SALINAS, LAS SOCIEDADES ANONIMAS 46 (1923); 1 RIVAROLA, *op. cit. supra* note 36, at 23 *et seq.* See also ROJO CARDENAS, *op. cit. supra* note 78, at 38; ESQUIVEL OBREGON, LATIN AMERICAN COMMERCIAL LAW 189 (1921). This work contains a useful summary of the corporation laws then existing, which can be compared to De Sola Canizares' recent comprehensive studies. Note 66 *supra*.

that it is violative of principles dear to the adherents of 19th century economic liberalism, including the present unregenerate writer. A recent Chilean writer<sup>97</sup> not only defends it, but goes further and urges the Superintendency to assure that corporations conduct themselves so as to fulfill their social function in a country like Chile, one of the most socialized in the world.

One element which has not been sufficiently stressed is that bureaucratic control tends to stereotype corporate organization, thus choking the evolution of new types of securities and techniques of management. If stereotyped by-laws are presented to the corporation bureau, the course of trite law will run smooth. Though the requirements of business are infinite and variations from the norm are indispensable, trouble ensues if innovation be attempted.

Even the best drafted statutes are not always crystal clear. There is always scope for interpretation, especially as to what is mandatory or merely supplementary or optional, what is a matter of public policy which cannot be set aside by the parties, and as to what rights can be waived. Commentators and courts differ widely in their interpretations.

The Law Merchant, a joint product of business men and their legal advisers who were unhampered by restrictive legislation, was always alert to evolve new forms and techniques; witness, the negotiable instrument, the stock company itself, and in recent times, the commercial letter of credit and the trust receipt. Codes should be drafted with sufficient flexibility to permit this evolution. It is to be feared, despite the general intent of its draftsmen, that our pending draft Commercial Code<sup>98</sup> does not sufficiently provide for this flexibility and freedom.

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<sup>97</sup> 2 OLAVARRIA AVILA, *op. cit. supra* note 30, at 135.

<sup>98</sup> UNIFORM COMMERCIAL CODE, Proposed Final Draft No. 2 (Spring 1951).

Brazil, Costa Rica, Cuba, the Dominican Republic, Mexico, Panama, Peru and El Salvador require no government authorization for incorporation. The historical record does not disclose that abuses have been more frequent in these countries than in the countries where authorization is required. The Panama law closely follows our more liberal statutes and was modeled after the law of Florida. It has become, as it was designed to be, a favorite site for incorporation. The 1946 constitution<sup>99</sup> permits companies, associations and foundations that are not contrary to morality or the legal order to be formed and to obtain recognition as juridical persons.

*Brazil:* In Brazil, the first general corporation law<sup>100</sup> adopted the French name of "anonymous company." It provided for government authorization, based according to the report of the Minister of Justice on the need to verify that the object of the company was lawful, that the capital was sufficient for the proposed purposes and that the articles gave the shareholders due control. No substantial change was made in the Commercial Code of 1850. Its scanty provisions on stock companies were amplified by later laws.<sup>101</sup> The purpose of examination of the articles of association by the Government was to see that the object of the company did not conflict with morality or create a monopoly; where there is an issue of stock for property, that the true value was duly appraised. Under British and French influence freedom of origination was permitted, the prior governmental authorization being replaced by detailed statutory regulation and full publicity. Numerous laws and decrees were later enacted, making codification necessary. This was effected in 1940.<sup>102</sup> The Code was drafted in accord with the modern spirit and it contains some happy innovations.

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<sup>99</sup> THE CONSTITUTIONS OF THE AMERICAS, *op. cit. supra* note 82, at 610.

<sup>100</sup> Decree of January 10, 1849.

<sup>101</sup> Law 1083 of August 22, 1860 and Decree 2711 of December 19, 1860.

<sup>102</sup> Decree-Law No. 2627 of September 26, 1940.

Under it, there has been a great increase in corporate activity, an indication that the law is working well; but it must be borne in mind that Brazil has been enjoying an era of prosperity, as have most of the Latin American countries, and the present law has yet to stand the test of a depression.

No government authorization is required for organization, but the Commercial Registrar is entrusted with quasi-judicial functions and has the delicate task of passing on the conformity of the articles (and of any amendments) with the statute. The *Junta de Commercio* (the mercantile registry) of Sao Paulo has rejected a great many charters. Accordingly, it is current practice, accepted as valid, to authorize the directors, in the certificate or instrument of incorporation, to accept modifications suggested by the Registrar. Opinions differ whether there can be any appeal from his decisions. The decision of the Registrar, however, accepting and filing a charter is not *res judicata*; the nullity of the corporation may still be declared by the courts provided the declaration has no retroactive effect.<sup>103</sup>

*Mexico*: In corporate organization matters, Mexico prefers judicial supervision to administrative control. The articles of association are submitted to the Commercial Judge to pass upon their conformity with the law, after the Attorney General's office is heard. There is no executive intervention except for certain classes of companies: banking, insurance, etc. Public issues, however, may be strictly supervised by the Securities and Exchange Commission (*Comision Nacional de Valores*). Influence from the United

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<sup>103</sup> 2 DA SILVA LISBOA, *op. cit. supra* note 3, at 604; De Sola Canizares, *supra* note 66, at 195 *et seq.*, based chiefly on the treatise of the author of the law, 2 MIRANDA VALVERDE, *SOCIEDADES POR ACOES* (1941); ASCARELLI, *op. cit. supra* note 64, at 487 *et seq.* The doctrine as to the nullity of corporations is an unfortunate importation from France, generally adopted in Latin America. It has sometimes been rigorously applied. In one case in my practice, the Colombian Superintendent of Share Companies ruled that a company that had been operating for 28 years was a nullity because of a slight delay in registering in the Commercial Registry, and ordered its dissolution. However, the tendency of the courts is to mitigate the rigors of this doctrine.

States seems to have been strong here. By law of December 30, 1939, the requirements for the sale of shares to the public were specified, including authorization by the executive exercised through a commission. The present statute, repealing and replacing that of 1939, is the Decree of February 11, 1946, and the regulations of January 15, 1947. The Commission, *inter alia*, authorizes or denies listing on the stock exchange; passes upon maximum and minimum rates of interest on bonds; has full rights of supervision and inspection; and has authority over public offerings of securities not listed on the stock exchange. The Commission is authorized to convene stockholders' meetings and to pass upon the value of property given as consideration for stock listed on the Exchange. Dealers must receive authorization from the Commission.<sup>104</sup>

Perhaps the system of government control or the possibility of government inspection as a deterrent to malpractice has inspired the confidence of investors, but this writer is inclined to believe that other factors have been more influential.

(To be concluded)

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<sup>104</sup> 10 ANUARIO FINANCIERO DE MEXICO 1949 1008-18 (1950).

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