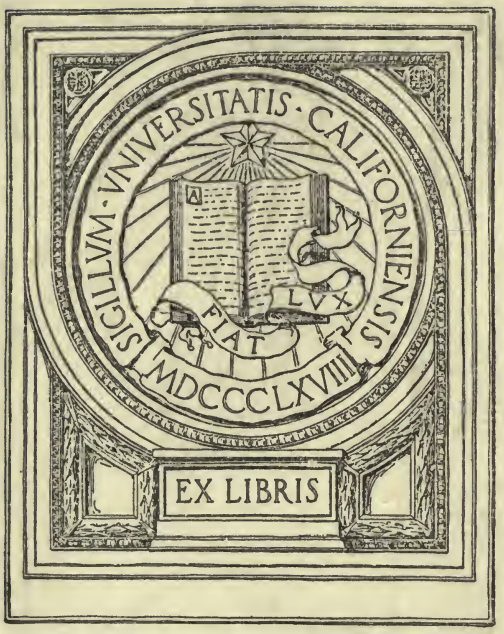

LATIN-AMERICAN COMMERCIAL LAW

BY

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PREFACE

This volume is designed to serve both a scientific and a practical purpose. In teaching Latin-American commercial law in Columbia and in New York universities, I met with great difficulties because of the lack of any book which could serve as a text. This deficiency is at least partially responsible for the fact that as yet the special study of the commercial law of Latin-America, comparatively, has not been undertaken, to my knowledge, in other universities of the United States. As the pioneer in these courses, I considered myself under obligations to serve that need by the preparation of this volume.

My purpose, however, is also to satisfy a practical need of lawyers and business men. Of all branches of private law throughout the world, the law of trade and commerce is perhaps more nearly uniform in its provisions than any other. And yet, to the lawyer trained in the system of the common law, the commercial law in the civil law countries presents difficulties and peculiarities, partly by reason of its character as a distinct branch of private law, and partly by reason of its civil law origin and influence. This need of the lawyer, and the practical need of the business man for a descriptive and interpretative work I have sought to meet. A glossary of Spanish legal terms has been added.

The commercial law of the various countries of Latin-America is sufficiently uniform in its fundamental principles to warrant systematic treatment in one volume; yet its variations in detail require careful examination and differentiation.

The method adopted in this volume is to present the rules as they are found in the code of Spain and in the codes which follow it, and then to present in groups or systems the variations found in the other codes of Latin-America. When it has seemed useful, illustrations from judicial decisions have been quoted and cited.

I have taken the Spanish code as a basis because, on the one hand, it is in force in Cuba and Porto Rico, and because, on the other hand, the draftsmen of the codes of Latin-America, with the exception of Haiti and Santo Domingo, which adopted the French code, were inspired by the Spanish commercial law. The codes of Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Nicaragua, Paraguay and Uruguay show the influence of the Spanish commercial code of 1829, and the others that of the Spanish commercial code of 1885.

As the commercial code of Cuba, apart from recent amendments, is the same as that of Spain, and the commercial code of Paraguay the same as that of Argentina, I shall omit references to Cuba and Paraguay, except when some special law or when an important decision of their courts seems to warrant it.

The subject of maritime law, a very special branch of commercial law, has not been included in this volume.

In the preparation of this work I was particularly fortunate in having secured the collaboration of Professor Edwin M. Borchard, prominently known by his excellent contributions to the literature of international and comparative law. He is professor of international and comparative commercial law at Yale University; he made in 1915 an extended investigation of commercial law in South and Central America for the United States Government, and a part of his research was published in his "Guide to the Law and Legal Literature of

Argentina, Brazil and Chile." With that rich equipment and the notes of his investigations in Latin-America, he has made valuable suggestions and additions, and principally, with his better knowledge of English has made a revision of the book invaluable for the English-speaking reader. I gratefully acknowledge his helpful collaboration.

In view of the growing importance of Latin-America in the world of commerce and of the widening interest of the United States in the field of comparative law, I entertain the hope that this book will serve both a scientific and a practical end.

T. E. O.

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For a proper understanding of references herein to money in Latin-American countries the following table will give the relation between the monetary units used to the dollar.

Countries are grouped according to their monetary standard.

GOLD STANDARD

Countries	*Unit*	*Value in U. S. money*
Bolivia	Boliviano	$0.38932
Costa Rica	Colón	0.43336
Cuba	Peso	1.00
Ecuador	Sucre	0.48666
Peru	Pvn. pound	4.86656
Porto Rico	Am. dollar	1.00
Santo Domingo	Am. dollar	1.00
Uruguay	Peso	1.03424
Venezuela	Bolivar	0.19295

The monetary unit referred to in the commercial code of Peru is the sol, which is worth $0.48666 U. S.

GOLD EXCHANGE STANDARD

Countries	*Unit*	*Circulation*	*Value in U. S. money*
Argentina	Peso	Paper	$0.42449
Brazil	Milreis	Paper	0.32444
Mexico	Peso	Gold	0.4986
Nicaragua	Córdoba	Silver	1.00
Panama	Balboa	Gold	1.00

The unit referred to in the codes of Nicaragua is the peso with a nominal value of $0.435.

SILVER STANDARD

Countries	*Unit*	*Value in U. S. money when silver is at 55cs an ounce*
Honduras	Peso	$0.39786
San Salvador	Peso	0.39786

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Countries	*Unit*	*Value in U. S. money*
Chile	Peso	about $0.20
Colombia	Peso	about 0.01
Guatemala	Peso	about 0.05
Haiti	Gourde	about 0.25
Paraguay	Peso	about 0.07

In Latin-American countries the sign $ is used to indicate the monetary unit of each country. Sign is derived from the letters PS as an abbreviation in the Spanish style of the word "pesos" (meaning weights) used since early colonial times before the mints started to coin money. When, therefore, the sign $ is used it must be understood that it refers to the monetary unit referred to in the text. In Brazil the sign $ is used after the figures relating to the milreis *e. g.*, 300$000, which must be read 300 milreis.

ABBREVIATIONS

When after a number indicating an article or section of a code or law no mention is made of any special code or law, it must be understood that such number belongs to the code of commerce or to the special law mentioned in the body of the chapter; otherwise and except in cases of special indication, the letters

c. c. mean Civil code

p. c. mean Political constitution

c. p. mean Code of civil procedure.

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LATIN-AMERICAN COMMERCIAL LAW

CHAPTER I

INTRODUCTORY AND GENERAL MATTERS

Whether or not there is any prospect of bringing about uniformity in the non-commercial part of the private law of the countries of the world, there is no question that the ever growing intercourse among the nations induced by trade and commerce has given great impetus to the gradual unification of commercial law. Many factors have contributed to this movement, incidental to the economic necessity for certainty in the law—treaties, international conferences, special publications on commercial law and courses in universities. These are constantly demonstrating the advantages to be derived from the abandonment of mere local commercial traditions, suitable to an epoch of isolation, and the adoption instead of common rules in matters of commercial law, which in its very nature is cosmopolitan.

As an illustration of this movement of unification we may mention the organization in Brussels in 1862 of the *International Association for the Advancement of Social Science*, and in 1873, of the *Institute of International Law* and the *Association for the Reform* and *Codification of the Law of Nations*, now known as the International Law Association. The Belgian government, with a view to procuring the unification of commercial legislation, promoted the holding of the international congresses of Antwerp and of Brussels, which met in 1885 and in 1886 respectively. In the history of this movement in America, the South American Congress on private international law, which met in 1888 and 1889 in Montevideo is worthy of notice. In 1889 a maritime congress met in Lisbon; and in 1900 the International Congress

of Stock Corporations and the International Congress of Industry for the discussion and regulation of commercial international relations met in Paris. The International Congress of Maritime Law met in Geneva in 1892 and finally the Hague Conferences for the unification of the law of bills of exchange met in 1910 and 1912.

One of the most important instruments operating to promote uniformity is to be found in certain legal journals published in various countries whose sphere of interest covers the entire world and who lay before their domestic public an accurate knowledge of the way in which different problems having an international interest have been solved in each country. They have thus inspired that interchange of ideas which is the best guide to law makers. The most notable of these publications are Clunet's *Journal du Droit International*, (Paris) published since 1874; and the *Tables Générales*, 4 v. (1905); Darras' *Révue de Droit International Privé*, (Paris) since 1905; Horn's *Nouvelle Révue pratique de Droit International Privé*, (Paris) since 1905; the *Annuaire de Législation Comparée*, since 1871; in Belgium, *Révue de l'Institut de Droit Comparé*, since 1908; *Revue de Droit International et de Législation Comparée*, since 1869; in Italy, *Archivio Giuridico*, since 1868; *Rivista Italiana per le Scienze Giuridiche*, since 1886; Anzilotti's *Rivista di Diritto Internazionale*, since 1906; *Rivista di Diritto Commerciale*, since 1903; in Germany, Niemeyer's *Zeitschrift für Internationales Privat- und Strafrecht*, (Leipzig), since 1891; *Zeitschrift für vergleichende Rechtswissenschaft*, since 1878; *Jahrbuch der internationalen Vereinigung für vergleichende Rechtswissenschaft*, since 1895 and the monthly *Blätter* of the same society; Kohler's *Zeitschrift für Völkerrecht*, since 1906; and Goldschmidt's *Zeitschrift für Handelsrecht*, since 1858; in Spain, the *Revista de los Tribunales y de Legislación Universal*, (Madrid) since 1875; García Moreno, and Rodriguez, *Colección de las Instituciones Politicas y Juridicas de los Pueblos Modernos*, 34 vols., and Dalman and Olivart's *Revista de Derecho Internacional*, (Madrid) since 1905; in Holland, the recently established *Bulletin* of the Inter-

national Intermediary Institute; in Argentina, Zeballos' short-lived *Bulletin Argentin de Droit International Privé*, 1903–10.*

Special attention should be directed to the important publication *Handelsgesetze des Erdballs* or Commercial Laws of the World, begun in Germany late in the eighties which has now, in a new edition in some 30 volumes, been issued in English, German, French and Spanish and contains the original text and a translation of the codes and statutes of the various countries of the world relating to commercial law.

Among the American writers, who have contributed to the dissemination of information concerning foreign law, we may mention E. S. Zeballos in Argentina, and Arosemena Garavito in Colombia, Rodrigo Octavio, de Freitas, and Bevilaqua in Brazil, and in the United States, Joseph Wheless, Clifford S. Walton, Phanor J. Eder, R. J. Kerr and Edwin M. Borchard, whose Guides to foreign law, published under the auspices of the Government, have laid a foundation for the more scientific study of comparative law by lawyers and legislators in the United States.

Among the treaties mention should be made of those entered into by seven countries of South America at the Congress of Montevideo covering matters relating to civil and commercial law, civil procedure, copyright, trade-marks, patents, and criminal law, and the treaties on private international law entered into in 1893, 1894, 1900 and 1905 by all the countries of Europe, with the exception of England and Turkey, at the Hague. The Hague Convention of 1912 on bills of exchange and checks has been adopted by several countries of Europe and Latin-America.

Courses in comparative law have been inaugurated in nearly all the universities of Europe and of many of the Latin-American countries. In Mexico, as far back as 1880 there was a course of comparative law in the national school

* The Journal of the Society of Comparative Legislation (London), published since 1899 and the Annual Bulletin of the Comparative Law Bureau of the American Bar Association now published as one of the quarterly numbers of that Association's Journal constitute useful repositories of information on comparative law.

of jurisprudence. In the United States, only two or three law schools have thus far recognized the great practical and scientific importance of comparative law by the institution of courses.

Of all the branches of law, the one of greatest practical international interest is commercial law. All business men have an interest in the study of the law which regulates commercial transactions and governs rights and obligations in other countries with which they are brought into contact. While certain common-law practitioners may frown upon the term commercial law, it has, nevertheless, a very practical significance for jurists throughout the world.

It may here be pointed out that the existence of commercial law as an independent branch of private law has been a matter much discussed in countries of the civil law. It has divided jurists into three groups, namely: the civilists, the mercantilists, and the partisans of a separate contractual law for both civil and commercial acts.

The civilists contend that there is no such special independent branch of law as commercial law, but that it is only a complement of the civil law. Resting upon the general principles of civil law, *e. g.*, those referring to the capacity of persons, to the essential requisites for the validity of contracts, etc., it makes special and exceptional provision for commercial matters but is governed by the rules of civil law in the matters not expressly comprised within the specific provisions of law governing commercial transactions.

The mercantilists argue that mercantile law has an independent character; that if it embraces the general principles of the civil law, this is due to the fact that both branches of law find their source in general legal principles; that the mercantile law is the branch which has aided in a larger way in amplifying and humanizing civil law, and has helped its evolution; that mercantile law classifies persons into traders and non-traders, into principals and auxiliaries, and this with important practical consequences, and it rejects, on the other hand, the distinction between citizens and foreigners which civil law admits; whereas the civil law classifies prop-

erty into real and personal, devoting greater attention to the former, mercantile law considers real property as of secondary, and personal property as of primary importance; whereas the civil law, from an economic viewpoint, has as its main object those acts which relate to the production and consumption of wealth, mercantile law is concerned with circulation; the individual subject of legal relations in civil law aims to satisfy his own necessities, whereas in commercial relations he has in view the necessities of others; thus, persons, objects and acts of commercial law differ from those of civil law.

Finally, there is a third group which maintains that the law relating to contracts, whether mercantile or civil, must constitute a separate branch of law. It bases its ideas on liberty, the necessary foundation for all contracts, on the inconvenience of establishing social classes, and on the uncertainty of all classifications.

This variety of opinion has had its immediate effect in positive legislation. The system that considers mercantile law as a mere exception to the civil law has been adopted by the mercantile codes of Chile,[1] Ecuador,[2] Guatemala,[3] Haiti,[4] Honduras,[5] Mexico,[6] San Salvador,[7] Santo Domingo,[8] and Venzuela.[9] In all these codes we find it provided that in cases not specifically covered by the commercial code, the provisions of the civil code are to be applied.

The mercantile or German doctrine has been adopted by Spain,[10] Colombia,[11] and Peru.[12] The commercial codes of these countries prescribe that cases not specified in them shall be governed by the commercial customs generally observed, and in default of both, by the rules of civil law. The provisions of the Colombian code deserve literal quotation, because they express the most advanced ideas on this point:

Article 2. "Mercantile customs shall have the same

[1] Art. 2. [2] Art. 4. [3] Art. 2.
[4] Art. 18. [5] Art. 3. [6] Art. 6.
[7] Art. 2. [8] Art. 18. [9] Art. 8.
[10] Art. 2. [11] Arts. 2, 34. [12] Art. 2.

authority as the law, provided they are not contrary thereto expressly or tacitly, and when the acts which constitute the custom are uniform, well-known and reiterated over a long period of time, in the judgment of the court, in the place where the transaction to which the rule is applied has occurred."

Article 3. "In default of local customs which may suggest a solution for doubtful points in commercial transactions, foreign mercantile customs of the most advanced countries may be offered in evidence, provided that they have the characteristics set forth in article 2, and that the customs are proved according to the law of procedure."

Article 4. "Mercantile customs and usages shall serve as a rule for determining the meaning of words or technical terms of commerce and for construing commercial acts and conventions."

Argentina has a mixed system. In the introduction to its commercial code it is provided that in cases unforeseen in it the provisions of civil law must be applied; but in later sections it leaves to judges the power to decide in accordance with commercial custom, should it be necessary to do so, in order to give to contracts and commercial acts their proper effect, according to the presumptive will of the parties when they failed to follow the rules of the law.

The third system is followed by England, by the United States and by Switzerland in its federal code of obligations.

In addition to the commercial law, commercial customs and usages, and the civil law, there is another source of positive commercial law, namely, *jurisprudencia*, which in Latin-America, as in all countries following the civil law system, constitutes the body of rules established by the courts in deciding practical cases. But the weight given to judicial decisions varies greatly. In England and the United States the historical origin of the municipal law in the principle of *stare decisis* has endowed judicial decisions with a conclusive authority unknown to civil law countries, although the heterogeneous growth of the mass of decisions in modern times has, in the attempt to preserve the principle,

sacrificed its purpose and tended to bring confusion instead of certainty, mazes of rules—often conflicting—instead of fundamental principles.

The Spanish traditions present the mercantile law as the result of decisions of the consulates, chiefly those of Barcelona and Bilbao. Yet when the commercial code of 1829 was drafted, no mention was made of court decisions among the sources of the law. Nevertheless, there are writers who maintain that in spite of the silence of that code, *jurisprudencia* in mercantile matters is one of the sources of law,[13] and a decision of the Supreme Tribunal of Justice of June 28, 1894, expressly so declares.[14]

In Latin-American countries, the constitutional principle of the division of the sovereignty into three independent powers has led to the doctrine that the courts cannot decide cases which might arise in the future, just as the legislature cannot enact rules for the past by means of provisions having retroactive effect. The Chilean code provides: "Judicial decisions are not binding except with respect to the cases in which they are actually rendered."

This by no means implies that the decisions of the courts have no authority whatever, but that they have none as a source of positive law. A settled "practice" has very considerable authority as a doctrine supplying the deficiencies of legislation, whose rules, because of the general way in which they are framed, require adaptation to the varied conditions of the concrete facts of life, provided such adaptation or interpretation does not prove erroneous in the light of legal science. Hence for a Latin-American lawyer the codes and scientific works which comment thereon or which study the principles of law, are of more interest and authority than mere judicial records.

Nevertheless, it must be observed that, in most of the countries of Latin-America, as in the United States, the courts have power to disregard an unconstitutional statute

[13] Blanco Constans, Francisco. Estudios elementales de derecho mercantil. Madrid, Hijos de Reus, 1910.

[14] Spain, *Gaceta* of November 9, 1894.

or to declare it so when deemed at variance with constitutional provisions; in that case such decisions naturally have greater force than the statute, and constitute limited precedents.

In reference to Brazil an exception to the foregoing rule may be noted, in that article 59, section 88 of the constitution invests judicial decisions with binding power. That article reads: "In cases that involve the application of the laws of the States, the Federal court shall consult the *jurisprudencia* of the local tribunals, and vice versa, the State courts shall consider that of the Federal tribunals, when the interpretation of the laws of the Union is involved."

Order of preference in the application of the sources of law.

In the French system, which is followed by the codes of Chile, Guatemala, Haiti, Honduras, Mexico, San Salvador, Santo Domingo and Venezuela, the order of preference in the application of the sources of law is: first, the mercantile law; second, the civil law; third, commercial customs; fourth, *jurisprudencia* and doctrine.

In the German-Italian system, followed by Spain, Costa Rica, Ecuador and Peru the order is: first, the commercial law; second, commercial customs and usage; third, civil law; fourth, *jurisprudencia* and doctrine.

In the Colombian system, the order is: first, the mercantile law and commercial customs, which have the same force as the law; second, the mercantile customs of the most advanced countries; third, commercial usage; fourth, the civil law.

Different forms of enunciating the law.

Before entering upon an outline of the history of Latin-American commercial law, it is proper to say that the evolution in the enunciation of the law is marked by somewhat the following stages: first, an act, by creating legal relations between persons with respect to things or acts, requires a law to define those relations; second, a group of laws governing acts of the same kind calls for a compilation that makes consultation easier; third, traditions well rooted

and defined in a series of laws and compilations produce the idea of a fundamental unity and harmony among them and call for a systematic and succinct restatement of the law expressing that unity; and a methodical classification that briefly embodies the principal rules and facilitates the interpretation of the law through the independence of its parts. This evolution has taken place in the fundamental branches of the law in many countries, and is continuing with the discovery of new facts and new relations. The different stages of this evolution are illustrated in various legal systems.

The first system embracing special independent laws, is that of England. The second system, that of compilation, was followed by the Roman law in the imperial epoch and by the Spanish law at the time of the law of Seven Parts (*Siete Partidas*), of the *Nueva Recopilación*, the *Recopilación de Leyes de Indias*, and *Novísima Recopilación*. In the United States there is a tendency toward the compilation of laws, as may be seen in the so-called codes of civil procedure. The third system is that of codification, inaugurated by Germany with the *Allgemeine Landrecht* of Prussia, greatly extended by France and followed very closely by Spain, where the traditions and the existing compilations presented the materials indispensable to codification; and as these legal traditions and compilations had already been communicated to the Spanish colonies of America, they became established institutions when the colonies became independent states. They were thus indebted to Spain for a system which allowed them to follow the modern movement of private law. It suits their character and necessities so well that all the unrest created by the inadequacy of their political institutions has not destroyed the fundamentals of their private law. All the countries of Latin-America possess a commercial code.

Historical Data. Civil and commercial law.

Civil law is the product of the history and customs of every community; the better it adapts itself to those communities the more it is likely to differ from that of other communities

and the better it serves for the settlement and adjustment of the relations between private citizens. The laws governing the family and real estate are the conservative basis upon which the civil law is founded.

This specialization of civil law was more noticeable in times when the means of communication were few and slow, and when there was no opportunity for the interchange of ideas and for mutual influence. The law of the city, on the other hand, sufficed to regulate mercantile relations between citizens. Moreover, in ancient times trade was considered a sordid occupation by some peoples, notably by the Romans; therefore mercantile law could hardly develop.

The necessity of commerce, however, compelled the Romans themselves to provide in some way for the arrangement of the differences which arose between citizens and foreigners, according to principles taken from what was called the *jus gentium;* they found their place in the edict of the *prætor peregrinus.* Based on equity and common sense, they were gradually incorporated in the civil law.

The nucleus of the formulation of the commercial law is not found, however, in the interchange between citizens and foreigners within the city, where all parties had to submit themselves to the local authority of the laws and officers of the city. It is found in maritime commerce, where the universal need was felt for a rule which, instead of preserving the distinctive characteristics and formalities of the civil law, could obtain the common assent of all peoples by sheer force of its equity and reason and by its eminently human character.

Maritime law was the first branch to be detached from the old trunk of the civil law, consecrated by the religion, customs and history of the city; even the Romans, so jealous of their law that they would not extend it to the different social classes of the city, accepted the Rhodian law which was adopted by the ancient peoples who inhabited the Mediterranean coast. But very few of the texts of that law were preserved in the Digest of Justinian; they comprise rules governing the crews of vessels and other persons who engage

in maritime commerce, considering them as a separate class, and establishing rules governing vessels, the risks of navigation and the method of compensating them.

Spain, while a colony of Rome under the laws of the mother country, was conquered by the Visigoths. But as the Roman civilization of the natives was superior to that of the conquerors, the Roman spirit soon penetrated the mind of the victorious race, a fact that was revealed by the adoption of the idea of codifying the customs and rules of the Germanic tribes in a code similar to the Roman compilations. The resulting work was the code called of Euric or of Tolosa, made especially for the people of the conquerors' race. Later the code of Alaric or *Breviarium Aniani* or *Lex Romana Visigothorum* was issued to regulate the rights and obligations of the Roman population of Spain. Thus, the law was not territorial, generally binding on all persons; instead, the individual was subject to a given personal law according to his origin.

This confusion ceased when the *Fuero Juzgo, Codex legum* or *Liber Gothorum,* was issued in the late seventh or early eighth century intended to govern the Goths as well as the Romans in Spain. The unimportance of commerce at that time is indicated by the small number of mercantile laws in that compilation.

It is worth noticing that when an epoch of mercantile activity was initiated in the twelfth and thirteenth centuries certain resulting movements in the field of law were prominently reflected in Spain. On the one hand, the civil law preserved the local traditions; on the other hand, the mercantile law endeavored to transcend the limits of the country and win an acknowledged authority over all the Mediterranean countries. The first was the product of royal authority, the second the work of private initiative in the consulates or corporations of traders. The former was an inland law, the latter a maritime law. The civil law had its origin in Roman traditions, in canon law, in provisions of councils in which the clergy had preponderating influence; while the commercial law was born of the study of popular

customs, at home and abroad, undertaken by merchants. The civil law found its paramount expression in the famous book of Alfonso the Wise, called the *Siete Partidas* (Seven Parts); the commercial law, in the no less famous compilation called *Consulado del Mar* or methodical arrangement of the decisions of the consulate of Barcelona in Spain, which, although not authorized by any monarch, was the basis of mercantile law throughout the Mediterranean coasts, in France, in Italy and even in England. Its provisions comprise all commercial acts and contracts, except maritime insurance and bottomry loan, which were not yet in use.

It may be observed that neither the *Siete Partidas* nor the *Consulado del Mar* received the sanction of the king, nor had they any authority other than that derived from traditions and the learning of their authors or compilers. Nevertheless, the *Partidas* were recognized as subsidiary law a century after their publication by the grandson of Alfonso.

Besides Barcelona, Bilbao, in the northern part of Spain, by reason of its dealings with the northern peoples, had different traditions from those of the Mediterranean, and also had a consulate which formulated and compiled its ordinances at four different times—in 1459, when the profession of brokers was regulated for the first time, in 1560 and in 1565, and finally, in 1737, when new ordinances, the most important of the four, were issued.

Modern times.

With the discovery of America the mercantile activity of Spain increased and the attention of the monarchs turned especially and directly to commercial law, which theretofore had grown spontaneously. Numerous rules were promulgated governing maritime commerce, brokers, the textile trade, weights and measures, contracts of resale, peddlers, mercantile contracts in general, bills of exchange, banks, fairs, ship building, seamen, etc. All these provisions were compiled in two books which appeared successively and were called respectively the *Nueva Recopilaciôn* (1567) and the *Novísima Recopilación de Leyes* (1805).

At the same time the consulates, in order to meet the new requirements of commerce, were actively engaged in the formulation of mercantile law by means of regulations and ordinances, which were afterwards confirmed by the monarchs. The most famous of these collections of ordinances were the *Ordenanzas de Burgos*, 1495, 1511, 1514 and 1520; those of the same city governing maritime insurance of 1537; the *Ordenanzas de Sevilla* approved by Charles I in 1554 and those of the same city in 1555 governing maritime insurance on navigation to and from the West Indies; the *Ordenanzas de Barcelona* of 1763 and those of Valencia of 1773.

The *Nuevas Ordenanzas de Bilbao* of 1737, as already observed, were in force in the Spanish colonies of America, and constituted their mercantile law when they became independent nations. The last of these nations to repeal the *Ordenanzas de Bilbao* were Uruguay in 1865, Chile in 1867, Paraguay in 1870, Guatemala in 1873, and Mexico in 1884. The *Nuevas Ordenanzas de Bilbao*, except in details of style, were almost a commercial code, in the modern acceptance of that word. In order to appreciate the advanced position of Spain in commercial matters at this early date, we may enumerate the subject of the various chapters of these *Ordenanzas*. The book contains 29 chapters, entitled as follows: 1 to 8, The Régime of the Consulate; 9, Merchants and their Books; 10, Mercantile Companies; 11, Contracts; 12, Commission or Mercantile Agency; 13, Bills of Exchange; 14, Notes and Drafts; 15, Exchange Brokers; 16, Ship Brokers; 17, Bankruptcy; 18, Chartering of Vessels; 19, Shipwrecks; 20, Average; 21, Manner of Settling Gross Average; 22, Insurance and Policies; 23, Bottomry Loan; 24, Captains of Vessels; 25, The Main Pilot of This Port; 26, Steersmen; 27, Rules to be followed in the Mouth of the River; 28, Carpenters and Calkers; 29, Stevedores and Bargemen.

The commercial codes.

The work of codification begun in Germany in the middle of the eighteenth century and vastly stimulated in France

under the auspices of Napoleon I, was imitated everywhere; Spain, with the rich material afforded by her prior legislation, followed naturally. In 1829 she issued her first commercial code, in the framing of which the French code, the *Ordenanzas de Bilbao*, the *Consulado del Mar*, the consular decisions, the theoretical doctrines of Spanish writers and of the celebrated Pardessus were taken into consideration. The rapid expansion of commerce and of means of transportation made necessary the revision of this code; and a commission was appointed for that purpose as early as the year 1834. Finally, in 1885 a new commercial code, still in force, was enacted; it adopted modern ideas concerning mercantile law, considering it as independent of the civil law and the result of special activities and social functions. The code is composed of four books, the titles of which are: 1, Merchants and Commerce in General; 2, Special Commercial Contracts; 3, Maritime Commerce; 4, Insolvency, Bankruptcy and Prescription.

More recently new laws, royal decrees and royal orders were promulgated, complementing or modifying the code. The most important of these are: the law of June 25, 1908, amending article 137 of the code relating to corporations; that of August 21, 1893, on maritime mortgages, covering one of the most notable deficiencies of the code; that of May 16, 1902, on patents; that of June 10, 1897, modifying some of the provisions respecting suspension of payments; the royal decree of December 31, 1885, approving the regulations for the government of commercial exchanges; the regulation for the execution of the law of September 13, 1888, which considers the certificate or note of sale drawn up by the exchange or by commercial brokers as public instruments; the royal decree of December 26, 1885, approving the regulations for the mercantile registry, and that of February 12, 1886, ordering the same regulations to be enforced in Cuba and Porto Rico; the regulations for the mercantile marine published by royal order of January, 1 1885; the ordinances of custom-houses promulgated by royal decree of October 15, 1894, and the royal order of

January 16, 1896, approving the regulations for the operation of custom-houses.

The commercial law in Latin-America.

It may be useful to present an outline of the external history of the commercial law in each of the countries of Latin-America. It is necessary to bear in mind that during the colonial period all the Latin-American countries were governed in commercial affairs by royal orders issued after the careful study of a specific case by the *Consejo de Indias*, the ruling being in many cases inspired by the experiences of the *Casa de Contratación de Sevilla*, an institution established by the Spanish kings with a view to controlling the trade with the American colonies. All these provisions were later incorporated in the *Recopilación de Leyes de Indias* (1680), which, however, was not intended to supply all the rules of commerce; indeed, the laws of the *Consulado del Mar* and the *Ordenanzas de Burgos* were a very important part of the commercial law until the *Ordenanzas de Bilbao* were published in 1737. This book was the "commercial code" of America when the independence of the former Spanish colonies was achieved, and the *Ordenanzas* continued in force up to the date of the publication of the respective national commercial codes.

Argentina.

The code of commerce was first enacted as a law by the province of Buenos Aires on October 6, 1859, and was afterwards adopted as a code by the whole nation on September 10, 1862.

A draft of the civil code for the Republic of Uruguay, prepared by Dr. Eduardo Acevedo, and the codes of Spain, Brazil, Holland, and Würtemberg were the sources from which the provisions of the Argentine code were taken.[15]

The many criticisms of the code made necessary a general revision which was undertaken by a special commission,

[15] See Borchard, Guide to the law and legal literature of Argentina, Brazil and Chile, p. 76.

and as a result of its studies a new commercial code was promulgated on October 9, 1889, and went into operation on May 1, 1890.

Important amendments and laws on related matters have been enacted, the most important being law number 4156 of December 30, 1902, which repealed all of Book IV on bankruptcy; law number 9643 of September 30, 1914, amending the law of warrants; a law of August 5, 1878, the first 24 articles of which were ordered incorporated in the code of commerce; law number 8867 of February 6, 1912, dispensing foreign corporations, under condition of reciprocity, from the requisite of previous authorization by the government in order to engage in business in Argentina, as as required by article 287 of the code; law number 8875 of February 23, 1912, known as the law of debentures, making substantial changes in the power of corporations to issue bonds; law number 5125 of September 19, 1907, amended by law number 6788 of October 21, 1909, obliging corporations to submit their balance sheet to the Department of Justice at stated intervals or a general inspection.

Bolivia.

The code of commerce enacted on November 12, 1834, was inspired by the Spanish code of 1829. It contains no provisions for maritime commerce; moreover, it does not provide for insurance, except in cases of transportation of goods, nor for current accounts and checks.

The principal laws that modify or supplement the commercial code are the following: that of November 5, 1840, granting absolute liberty in the stipulation of interest on loans, and establishing, in the absence of express agreement of the parties, 6% per annum as legal interest; the constitution modified the code by prescribing that foreigners have the same civil rights as Bolivians; the law of August 8, 1842, which provides that all commercial cases must be submitted to the commercial courts, even when the merchants are not matriculated; that of May 10, 1850, providing that all merchants must be registered even though they

have not the capital specified in article 9 of the commercial code; that of July 9, 1858, abolishing the conciliation procedure to avoid litigation in commercial matters; that of February 6, 1863, suppressing the commercial courts; that of September 3, 1890, providing rules for banks of issue.

Brazil.

Inasmuch as Brazil was a Portuguese colony, the source of its law is to be found in Portugal, which, during the Roman and Visigothic domination, followed the same fate as the rest of the Peninsula; the Roman law, in the forms that it had in the Breviary of Alaric, in the *Fuero Juzgo*, and even in the *Siete Partidas*, was considered in Portugal as subsidiary legislation. Moreover, the influence of canon law was as important in Portugal as it was in Spain, together with the local charters or *foraes* which appear to have underlain the system of law of those times, when every community had to guard its own safety both from political troubles at home and from conquerors abroad. At the end of the fourteenth or at the beginning of the fifteenth century the first compilation of laws under the name of *Libro das Leis Antiguas* was issued. In 1436 the *Ordenaçoes de Don Duarte* and in 1447 the *Ordenançoes Alfonsinas* completed the earliest Portuguese law. In 1505 King Manuel ordered a revision of the *Alfonsinas*, including the subsequent law, and the ensuing compilation was called by the name of that king. When the Portuguese kingdom was united with that of Spain in 1580, king Philip II, made a new revision of the laws of Portugal and in 1603 issued a new compilation known by the name of *Ordençoes Philippinas* or, more commonly, *Codigo Philippino*. This compilation has remained the foundation of the law of Brazil since its independence, for it was adopted on October 20, 1823, as one of the laws of the empire, and with other laws afterwards enacted, was in operation until January 1, 1917, when the new civil code went into operation.

In the matter of commercial law on June 25, 1850, Emperor D. Pedro II promulgated the commercial code of the Brazilian Empire; it was divided into three parts: 1, Mari-

time Commerce; 2, Commerce in General; 3, Bankruptcy; and a title with another enumeration of articles contains procedural rules for the administration of justice in commercial cases. The codes which contributed to the formation of the Brazilian code were the Portuguese of 1833, the Spanish of 1829, the Dutch of 1838 and the French of 1810.

LAWS WHICH HAVE AMENDED OR SUPPLEMENTED THE CODE OF COMMERCE

Owing to the modern necessities of commerce, the Brazilian commercial code has experienced many important and partial amendments or additions, and in fact a new draft has been prepared which has not been enacted by Congress. The principal supplementary laws are: Decree No. 9549 of January 23, 1886, governing civil and commercial procedure; decree No. 2044 of December 3, 1908, on bills of exchange and promissory notes; decree No. 434 of July 4, 1891, governing stock companies; decree 177 A of September 15, 1893, relating to obligations of stock companies (debentures); law No. 3129 of October 14, 1882, on patents and its regulation in decree No. 8820 of October 30, 1882; decree No. 916 of October 24, 1890, establishing a register of commercial firm names; decree No. 9210 of December 15, 1911, regulating the *Junta Commercial* or chamber of commerce; decree No. 6651 of September 19, 1907, regulating pawn shops in the Federal District; decree No. 149 B of July 29, 1893, on instruments to bearer; law No. 973 of January 2, 1903, creating a voluntary register of securities, documents and other papers and its regulation by decree No. 4775 of February 16, 1903; law No. 496 of August 1, 1898, and Law No. 2577 of January 17, 1912, relate to copyright; decrees Nos. 8248 and 8249 of September 22, 1910, containing the regulation of merchandise brokers and creating the brokers' exchange; decree No. 354 of December 16, 1895, reorganizing the body of public security brokers and its regulation in decree No. 2475 of March 13, 1897; decree No. 4985 of October 3, 1903, in reference to the validity of transactions

outside the stock exchange; decree No. 4270 of December 10, 1901, governing the functions of domestic and foreign insurance companies; decree No. 123 of November 11, 1892, governing navigation between the ports of the Republic; and decree No. 4968 of May 24, 1872, containing the consular regulations.

Chile.

After the independence of Chile was declared on September 18, 1810, a number of laws were promulgated. But as their consultation and their enforcement were difficult, a commercial code was ultimately drafted and enacted which went into operation on January 1, 1867. It contains a preliminary title and four books: 1, concerning merchants and commercial agents; 2, concerning contracts and mercantile obligations in general; 3, concerning maritime commerce, and 4, concerning bankruptcy. The influence of the Spanish and French commercial codes is apparent throughout. It gained in its time the approval of scientific codifiers, and was taken as a model by other countries of America, especially by Colombia and Guatemala.

LAWS WHICH AMEND OR SUPPLEMENT THE COMMERCIAL CODE

The law of August 1, 1866, contains the regulations of the commercial registry; the law of September 1, 1866, that of brokers; on June 23, 1868, imprisonment for debts of a merely civil character was abolished, except when debtors are guardians; on September 6, 1878, article 452 of the code was amended, providing that the assignor of shares of stock is bound to contribute to the payment of the debts of the company up to the amount he owed on the price of the transferred shares, provided such debts existed prior to the publication of the transfer, and it also prescribes that a special register of registered shares must be kept. The law of September 12, 1877, provides rules for the appointment of inspectors of limited companies. Articles 1350, 1412, 1457, 1459, 1460, 1461, 1463, 1489, 1528 and 1533, referring to

bankruptcy, were amended by the law of January 11, 1879; paragraphs one of article 355 and two of article 440 were likewise amended by law 1020 of January 31, 1898; the law of November 19, 1904, regulated the operation of national and foreign insurance companies; finally the code of civil procedure, published on August 29, 1902, and in force since March 1, 1903, has repealed, supplemented or amended a great number of the provisions of Book IV relating to bankruptcy.

Colombia.

The first code of commerce was enacted on June 1, 1853, for the republic of Nueva Granada, and it governed in its departments up to the adoption of the federal system, in which every one of the former departments, converted into states, had power to issue their own codes; the state of Panama, exercising said power, published on October 6, 1869, the code of commerce on land, which, after the readoption of the central system of government, became the commercial code of the nation according to law 57 of 1887. The same law provided that the maritime law of March 10, 1873, was also to be generally observed in the Republic. These codes went into effect on July 15, 1887. The code of commerce on land has a preliminary title and two books; Book I refers to merchants and commercial agents, and Book II, to contracts and commercial obligations in general.

The sources of this code were the Spanish, the French and the Chilean codes.

LAWS WHICH AMEND OR SUPPLEMENT THE COMMERCIAL CODE

Law 62 of 1887 contains certain prohibitions for railroad constructors; law 153 of 1887 deals with bank-notes in circulation; law 27 of 1888 gives power to the government to supervise stock corporations and repeals articles 553 and 556 of the code; law 124 of 1888 deals with the inscription in the registry and the governmental authorization of foreign corporations; law 65 of 1890 refers to commercial books; law

77 of 1890 grants liberty to corporations to fix the rate of interest, discounts and commissions; law 111 of 1890 authorizes the government to create chambers of commerce; law 24 of 1890 amends articles 552 and 582 of the code relating to commercial companies; law 46 of 1898 governs the circulation of bank-notes; laws 2 and 37 of 1906 impose certain obligations on foreign corporations; law 4 of 1907 regulates the industry of transportation; law 40 of 1907 obliges foreign corporations to comply with certain requisites relating to the administration of justice.

Laws of May 24, 1856; 56 of 1867; 84 of 1877; 35 of 1875; 59 of 1876; 18, 4, 37, 738 and 899 of 1907; 328 of 1910; 649 of 1910; 167 of 1912; decrees 290, 374, 493, 929 of 1912 and 934 of 1915 all relate to river navigation.

Costa Rica.

The first four books of the commercial code of Costa Rica were issued in January, 1850, and the fifth was enacted in 1853. This code is almost a copy of the Spanish commercial code of 1829, as is indicated by its name: "Spanish Code of Commerce, as amended by a commission of the Supreme Government of Costa Rica in order to assist the commerce of the Republic."

The code has had many important amendments, the principal ones of which arose out of the enactment of a new civil code on January 1, 1888, relating to merchant minors, to married women and to foreigners; the law of September 11, 1892, on commercial and industrial trade-marks; the laws of October 15, 1901, changing the conditions for being considered a merchant; of June 21, 1901, relating to mercantile registry; of July 5, 1901, relating to bookkeeping; of November 26 and 29, 1909, on transportation; of November 25, 1902, relating to bills of exchange; of November 24, 1909, on commercial associations. The law of July 23, 1901, relates to the sale or transfer of a mercantile establishment. Articles 941 to 1117 of the code, on bankruptcy, have been repealed and the provisions now in force in their stead are titles VII and VIII, Book III of the civil code, title IX, Book I of the code

of civil procedure and law of the 14th and the 15th of October, 1901, on bankruptcy. Articles 1118 to 1169, governing mercantile courts, have been repealed with the abolition of these courts. The law of February 3, 1915, and its regulation of April 4, 1915, govern warehouses.

Cuba.

The Spanish commercial code which has been in force in the island since May 1, 1886, experienced important alterations after the independence of the island.

Article 1 of the Military Order 400 of 1900, made inscription in the commercial registry an essential requisite for being considered a merchant; it contains new regulations for commercial registry, and a resolution of the Secretary of Justice of August 7, 1901, explained the meaning of article 9 of Order 400. Order 34, Chapter VIII of 1902 refers to land occupied by railways, easements enjoyed by them and registration. During the Spanish régime the books of merchants were subject to stamp duties; these were abolished by the Treasury Department of the United States on June 10, 1899. Military Order 79 of 1900 reëstablished the commercial brokers and Order 166 of 1901 governs the bonds of brokers and the reëstablishment of their college or board; on August 9, 1902, the regulations for the college or board of brokers in Havana were issued. By Military Order No. 103 of March 6, 1900, notaries may substitute for brokers in attesting, and can also make translations. An instruction of December 1, 1893, as amended by law of September 27, 1902, levies a tax upon insurance corporations. Order No. 34 of 1902, article 4, chapters IX, XV and XVII repealed article 184 and following, and the part of 930 which refers to railways. The same Order and Order number 117 of 1902 now govern the contract of transportation by railway. Fire insurance companies must give a bond of $75,000 and life insurance companies of $25,000, according to Order 181 of 1899; and surety companies must deposit a bond of $25,000, according to Orders 97 of 1899 and 27 of September, 1902. Order 416 of October 9, 1900, relates to the drawing of checks by those

who are unable to sign. Decree of October 25, 1909, refers to the obligation of banks and mercantile companies to inscribe in the Department of Justice, setting forth certain details of their business. A decree of the military governor of the island of November 13, 1900, levies an income tax of 8% on the net profits of banks and commercial stock corporations, except mining companies and savings banks, 6% on railway and navigation public service companies, and 2% on insurance corporations, except those of mutual character that do not distribute profits. The order of May 8, 1900, order 276 of July 5, 1904, and circular number 31 of September 30, 1909, refer to navigation. The War Department of the United States on June 22, 1901, published new custom-house ordinances, and orders 122 and 155 of 1902 refer to sanitation and quarantine.

Ecuador.

The first code of commerce of Ecuador was enacted by the Congress on April 27, 1878, but was not promulgated until March 1, 1882. It was amended by law on April 21 and 25, 1884, and on July 30, 1906, the Executive, by virtue of authority vested in him, published a new and amended edition which went into effect on October 25, 1906. The Spanish, French and Venezuelan codes are the main source of the commercial code of Ecuador.

The law of November 5, 1898, governs banks; that of August 25, 1892, relates to foreigners, their status, rights and duties. On January 1, 1902, the law regulating custom-houses, issued on October 14, 1901, went into effect. The law of October 5, 1909, governs foreign corporations doing business in Ecuador.

Guatemala.

The code of commerce of Guatemala was published July 20, 1897, and went into effect on September 15 of that year. The Spanish and Chilean codes entered into its composition; it is divided into four books like the Spanish code.

The principal laws that amend or supplement the code are

the following: Decree No. 208 of April 9, 1878, adds a title to the code dealing with brokers and auctioneers, and a regulation accompanying said decree was issued the same day; regulations governing commission agents were issued May 26, 1902; a decree of April 30, 1906, published October 18 of the same year relates to carriers; a decree of January 28, published April 15, 1903, governs foreign companies; a law of January 28, 1903, deals with coöperative companies; a provision of July 7, 1903, relates to stock corporations; a provision of January 29, 1907, governs public service companies; a decree of December 12, 1877, amends articles 689 and 690 of the code of commerce in regard to banks; a law of June 25, 1903, governs banks and banking; a provision of June 19, 1903, governs reports that must be rendered by banks and brokers; a provision of December 22, 1903, relates to the meetings of shareholders of banks; a law of February 26, 1894, establishes the chamber of commerce and a law of July 17, 1892, regulates the consular service.

Haiti.

The code of commerce was promulgated March 28, 1826, and went into effect July 1, 1827. It is identical with the French commercial code.

The most important laws that have amended the code are: the law of October 9, 1830, as amended by that of September 25, 1863, on mercantile jurisdictions; a decree of August 12, 1843, on nationality and navigation of merchant ships; those of July 16, 1857, amending articles 61, 626 and 645 of the code of commerce, and of May 28 of the same year re-establishing the commercial courts; decrees of February 6 and March 26, 1858, on stock exchanges.

Honduras.

On August 27, 1880, the first commercial code was promulgated; it went into operation on January 1, 1881, and on September 15, 1898, a new code was enacted which has been in effect since February 1, 1899.

On May 7, 1902, a law was published on trade-marks and

industrial drawings; on February 8, 1906, the law in regard to foreigners went into effect which, with the decrees of March 6, 1866, on the rights and privileges of foreigners, and that of April 10, 1895, on the status of aliens, govern the matter of aliens in Honduras.

Mexico.

The *Ordenanzas de Bilbao* were in force in Mexico as in all the other colonies of Spain; but it must be understood that they were merely subsidiary to the orders and decrees issued by the Consulate of Mexico, as that Consulate answered an inquiry by the Viceroy in 1785. Later their enforcement was made compulsory by orders of February 22, 1796, and April 27, 1801.

After the independence of Mexico the *Ordenanzas* continued in force until 1854, in which year the code of commerce, named after the minister who authorized its publication, *Côdigo de Lares*, went into operation. Its draft was inspired by the Spanish code of 1829 and by the French code, and it was considered a monument of Mexican legislation. The political hatred against the dictatorship of Santa Anna induced the Congress indiscriminately to nullify all laws issued by him, including the above mentioned code, and the old *Ordenanzas de Bilbao*, entirely inadequate to the times, thus remained in effect until 1884. In the meantime the commercial development of the country had reached such a degree through the establishment of banks and the construction of the main railway lines, that the necessity of new and definite principles was felt in commercial affairs. The constitution was amended in order to enable the Congress to frame a general mercantile law and a general banking law for the whole country.

The commercial code of April 15, 1884, was thereupon promulgated; but owing to the haste with which it was drawn, it was subject to much criticism and was soon replaced by the present code of September 15, 1889.

One of the most interesting features of Mexican history from the legal, economic and political viewpoints, is the

struggle between the banks and the Government and the events which led to the adoption of the present banking law with its peculiar characteristics. The following laws have been passed supplementing or amending the code: the law of December 11, 1885, and its regulation of December 20, 1885, on the commercial registry; that of February 16, 1900, on general deposit warehouses; that of December 16, 1892, on insurance companies, which went into operation January 1, 1893; a decree of December 12, 1893, authorizing the Government to dispense with the fulfillment of certain legal requisites by marine insurance companies, and a corresponding circular of the Minister of Finance of January 30, 1894; law of June 1, 1906, relating to the stamp tax; law of December 15, 1881, which governs railways and its regulation of July 1, 1883; laws of March 11, 1842, granting foreigners the right to possess lands and real estate in Mexico, and the law of May 28, 1886, which governs the matters of foreigners and naturalization.

The new political constitution of 1917 changed many of the principles which the law theretofore had maintained; Article 27 provides that the nation possess direct dominion of mineral fuels, petroleum and hydrocarbons, solid, liquid or gaseous; that only Mexicans by birth or naturalization and Mexican companies have the right to acquire ownership in lands, waters and their appurtenances, or to obtain concessions to develop mines, waters or mineral fuels in the republic of Mexico. The nation may grant the same right to foreigners, provided they agree before the department of Foreign Affairs to be considered Mexicans in respect to such property, and accordingly, not to invoke the protection of their Governments in respect to the same, under penalty in case of breach, of forfeiture to the nation of property so acquired. Within a zone of 100 kilometers from the frontiers and of 50 kilometers from the sea coast, no foreigner shall, under any condition, acquire direct ownership of lands and waters. Commercial stock companies cannot acquire, hold, or administer rural properties except in so far as it is necessary for their establishment, at

the discretion of the Executive. All contracts and concessions made by former governments from and after the year 1876 which shall have resulted in the monopoly of lands, waters and natural resources of the nation by single individuals or corporations are declared subject to revision and the Executive is authorized to declare null and void those which seriously prejudice the public interest. Some of these provisions impair the vested rights of foreigners, and have therefore given rise to international difficulties.

By decree of April 13, 1918, the Executive established a duty of 10% ad valorem on the exportation of petroleum and its products; the law of February 12, 1834, established consular agencies and the regulations of September 16, 1871, govern the consular service; the law of November 26, 1859, contains the rules of Mexican law relating to commercial agents in the territory of the Republic; general custom-house ordinances were issued June 12, 1891; the law of November 29, 1897, as amended by the law of June 4, 1902, authorizes stock corporations, limited partnerships, railways, mining and public works companies to issue bonds or securities.[16]

Nicaragua.

Pursuant to the law of March 9, 1868, the government appointed a commission to draw up a commercial code which was approved by Congress on February 1, 1869, and went into effect on March 22 of the same year. The code follows essentially that of Spain. Regarding foreigners the code has been supplemented by the law of October 3, 1894, and regarding patents by that of October 14, 1899.

Panama.

In discussing Colombia, mention was made of Panama,

[16] On April 9, 1917, President Carranza issued a law regulating family relations in Mexico, and in article 270 he parts with the old system of legal partnership in case of matrimony, and establishes instead, that husband and wife shall retain their respective property and the right to administer it, and the products of the property and accessions thereto shall not be communal but shall belong exclusively to the person who owns the property.

which was formerly a department or province of that republic. The Colombian code of commerce originated in the former State of Panama and it was in force in that country from its independence in 1903 until the 1st of July, 1917, when the new code of commerce prepared by Dr. Luis Anderson of San José, Costa Rica, went into force. This code was carefully and scientifically drafted and contains the most advanced principles of commercial law. It contains a preliminary title and three books. Book I deals with merchants, their capacity and obligations, commercial enterprises and commercial institutions and contracts; book II relates to maritime commerce; and book III deals with bankruptcy and statute of limitation.

Paraguay.

By virtue of decrees of the Paraguayan Congress of October 5, 1903, the Argentine commercial code was adopted in its entirety as the law of Paraguay with all the amendments thereof since October 5, 1889, the date of its enactment.

The only railway company in Paraguay seems to be "The Paraguay Central Railway Co." which, with the consent of the Government has adopted regulations which repeal articles 162, 187 and 204 of the commercial code, referring to the liability of carriers. By law of December 8, 1906, every check must bear a stamp of 20 céntimos.

Peru.

On June 15, 1853, the *Ordenanzas de Bilboa* were repealed by the adoption of the first commercial code, copied from the Spanish code of 1829; and on February 3, 1902, the present code of commerce was promulgated. Its authors were inspired mostly by the corresponding Spanish code of 1885, adding, however, a title on auctioneers and another on current accounts, taken from the Argentine code; they provided that emancipated minors may engage in business; and the title relating to bills of exchange was replaced by that of the Italian law.

The code, furthermore, has been amended or supplemented in certain particulars by the following laws and decrees: that of October 8, 1888, concerning mercantile pledges; of December 14, 1888, concerning checks; of January 2, 1889, establishing mortgage loans; of April 19, 1902, regulating the mercantile registry; of March 2, 1888, and August 29, 1898, regulating the commercial exchange of Lima; of January 28, 1869, January 2, 1896, and of November 9, 1897, on patents; of October 2, 1860, regulating brokers; of November 29, 1907, governing mortgage bonds; of December 21, 1895, relating to companies that engage in aleatory contracts, such as contracts of insurance, life rent, gambling or any other contract, the effect of which depends upon an uncertain event, and the corresponding decrees of June 23, 1897, November 9, 1897, and November 20, 1901; the consular regulations of 1897; the law of November 8, 1907, on the provisioning of vessels; and that of September 28, 1896, on summary execution of judgment.

San Salvador.

The first commercial code of Salvador was promulgated December 1, 1855, together with another called *Enjuiciamiento para las causas de comercio*. The first was taken from the Spanish code of 1829 and the second from the Spanish law of July 24, 1830. They were found inadequate and, after many substantial amendments, a new code was finally published May 1, 1882, in the elaboration of which the former code was taken into consideration; and this may account for the fact that it became necessary to adopt radical reforms. These were made in the new commercial code, now in force since March 17, 1904. The commission charged with the framing of this code was inspired by the codes of Spain (1885), Chile, Italy and Portugal and introduced notable changes in the commercial law of the country.

After the promulgation of the code a few important amendments were made: the law of March 14, 1905, explained in detail articles 18, 53, 243, paragraph III, 685 and 694; the law of May 5, 1906, amended articles 2, 73, 250,

paragraph II, 252, and 806 to 810, inclusive, and decrees of April 30, 1907, amended paragraphs 4, 5 and 7 of article 243.

Santo Domingo.

The disturbed condition of the country was reflected in the commercial law until June 5, 1884, when the French code, having been translated by a commission, was declared the law of the Republic.

Since 1884 fees for industrial and commercial licenses have been in operation, enforced by the decree of May 10, 1884, law number 1818 of 1879, and the decree of July 2, 1883. The consular law, number 468 of 1857, has been amended by decree number 876 of 1865. The law of February 17, 1899, provided for taxes on alcoholic liquors in the city of Santo Domingo, and on December 10, 1905, that tax was extended to the entire Republic.

Uruguay.

The fact that the author of the commercial code of Argentina was an Uruguayan, Dr. Eduardo Acevedo, contributed to its adoption as the code of Uruguay on May 26, 1865, with certain amendments in regard to legal majority, fixed at 21 for merchants. It coördinated commercial and civil procedure and changed more than 250 articles of the Argentine code. Furthermore, the new code was submitted, primarily for the revision of the section on bankruptcy, to a committee, and on December 31, 1878, the fourth book was repealed and substituted by a new one. The code had already been modified by the law of notaries of December 3, 1878, which constituted an addition to title XV of book II. By law of June 1, 1892, on stock corporations, the preventive settlement between a debtor and his creditors was introduced; a new law of October 2, 1900, again changed book IV of the code relating to bankruptcy, and finally by law of January 25, 1916, the matter of bankruptcy was radically changed. Other laws modifying or supplementing the code of Uruguay are those of June 2, 1893, on liquidation of

limited companies; of July 17, 1909, and of November 13, 1885 on patents; the law of January 9, 1912, on navigation between the ports of the Republic; the law of May 21, 1906, on the consular service and consular tariffs; and the law of December 20, 1879, on warrants. The by-laws of the "*Centro Comercial*" inscribed in the public Registry of Commerce on June 6, 1888, with authorization from the government, contain important rules of a general character in relation to the function of the chamber of commerce and to exchange brokers.

Venezuela.

A commission appointed by the merchants of Caracas in 1860 prepared a project for a commercial code, which was approved by the Government and went into operation February 15, 1862. On August 8, 1863, some slight amendments were made. This code was repealed by the adoption of a new one on April 27, 1873, in the elaboration of which the codes of Spain (1829), France and Italy were consulted. Another code was later enacted, having as its basis the former code of 1873, the German code of 1900 and the Italian code of 1882.

Other laws of importance are: the banking law of June 16, 1910, the law of trade-marks of May 18, 1877, the law regulating the consular service of June 25, 1910, the law of June 10, 1898, regulating the postal service and that of June 3, 1899, regulating the telegraphic service.

CHAPTER II

COMMERCE IN GENERAL

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The definition of commerce.

It was observed in the previous chapter that commerce has been the subject-matter of special codes in all the Latin-American countries. These codes govern commercial acts and contracts, as well as the rights and duties of merchants; hence it is very important to distinguish when a contract or an act is commercial or non-commercial and when a person may be considered a merchant. The law of the United States does not make this distinction, except in cases of bankruptcy.

There are three definitions of commerce, depending upon the point of view:

1st. Economists consider the objective or economic side of commerce. Among their many definitions we may select that given by Cangiano: "Acts facilitating the transmission of goods to the consumer, changing their place, accumulating them and accomplishing all other acts incidental thereto are called commerce."

2d. Jurists, on their part, direct attention to the subjective element in commerce, and define it in the manner of

Pardessus: "The various negotiations, the object of which is to effect or to assist in effecting changes of natural or industrial products with a view to deriving a profit therefrom."

There is in every commercial act a legal element which involves the rights and powers, the duties and liabilities of the parties involved in it; but this element alone is not enough to distinguish commerce from other legal transactions, nor is it enough to say that the object of commerce is to effect exchanges, because one of the characteristics of commerce, which serves to distinguish it from merely civil acts, is the function of intermediation between producer and consumer.

Vidari gives a definition which combines the legal with the economic element, regarding commerce as a "group of acts of mediation between producer and consumer, undertaken habitually and with a view to speculating, or to promote or increase the circulation of wealth in order to make supply and demand easier and quicker."

In our opinion, however, this definition of commerce is not complete for a legal conception of the word. Modern ideas concerning commerce are now clear enough to allow us to add a new element to that definition, an element which explains the variations found in the enumeration of commercial acts in the different codes, a circumstance responsible for the general opinion, shared by Lyon-Caen, that the law-makers have not had any specific plan in view in making the enumerations.

The circulation of wealth is one of the most important factors in the welfare of a community; so important that a prominent French economist has said that all economic troubles are problems of circulation. This circumstance reveals that law-makers have, consciously or unconsciously, arrived at the conclusion that everything relating to commerce is not so much a matter of private as of public interest and the merchant, although moved by his personal interest, is performing a public function and is in some respects a public functionary. This new element in the definition of commerce, social function and publicity, explains many details of commercial law, for example, the obligation of

merchants to matriculate and register and to keep books and records with a strict observance of certain rules, the formalities of commercial contracts, the modern ideas concerning bills of exchange, and the provisions referring to bankruptcy and procedure; and it explains also that variety in the enumeration of commercial acts in the different countries, which, at first glance, appears bewildering, but which is merely the result of the different ways in which the circulation of wealth affects each community, the peculiar obstacles presented, and the special manner in which circulation is to be promoted, as viewed by the national law-makers. With this in mind, we can understand that the different lists of commercial acts in each country are not the consequence of any lack of scientific plan, but the necessary effect of the application of the same scientific principle to different natural or social circumstances.

3d. We may now define commerce as the social function of mediation between producer and consumer, which, exercised habitually and with a view to speculation, serves to promote or increase the circulation of wealth.

In this definition we find three elements—the social, commerce being not an undefined group of acts, but a social function; the economic, consisting in exchanges which produce the circulation of wealth or promote or increase it; and finally, the legal, consisting in the relation created between the producer and the mediator or trader on the one hand, and the mediator or trader and the consumer, on the other hand. As the final result of this mediation is the profit or loss realized by the mediator, we include the idea of liberty and private enterprise as the only way to differentiate commerce from the collectivistic conception of it, which, emphasizing its social aspect, makes it a governmental function.

Commercial acts.

If the interchange of merchandise is the ultimate aim of commerce, all other acts considered commercial may be called so simply because they facilitate it, although there are

acts which, beginning only as a means to aid commerce, later become commercial, notwithstanding that the purpose of the parties was not commercial, as, for example, bills of exchange and, frequently, the contract of transportation; but with the exception of a few cases, we may uphold the principle that all acts which do not involve mediation in the interchange of merchandise or products, are only commercial if they help that interchange. With this explanation we are in a better position to understand the following table of commercial acts:—

- COMMERCIAL ACTS
  - PRINCIPALS: Purchase and sale for resale with the purpose of making profit from the difference in cost and selling price.
  - AUXILIARIES
    - 1. The object of which is to overcome the obstacles of space: overland and sea transportation.
    - 2. The object of which is to overcome obstacles of time: all contracts in which credit is involved.
    - 3. The object of which is to overcome at the same time obstacles of space and of time: bills of exchange and documents payable to order or to bearer.
    - 4. The object of which is security against uncertainty in business: insurance contracts against every kind of accident on land and sea, or cases of gross average or partial damages, pledges, mortgages, or surety.
    - 5. The object of which is to overcome obstacles arising from limitation of individual means: partnerships and corporations, contracts with brokers, agents, factors and commercial clerks, stock exchange or hiring of services.

We state in this table that all contracts in which credit is used have as their object the effort to overcome the obstacle of time, and this may be briefly explained. A merchant who borrows money does so because he desires *at the present time* something which he feels sure he will be able to have in the near future, and he wishes to avail himself of an opportunity of to-day; credit, therefore, overcomes an obstacle of time. Bills of exchange are in many cases now, and always were in former times, instruments which prove the existence of a previous contract of exchange of money, but at the same time they are instruments of credit and circulation; for this reason we classify them among acts which serve to overcome at once time and space, as do bank-notes, drafts, checks, and certain other documents of similar character which may be transmitted from place to place to pay debts, balance accounts, and facilitate circulation.

To illustrate this point we may cite certain examples. An artist buys canvas and colors, and after painting a picture sells the canvas and colors, obtaining a great profit in the difference of price at which he bought and at which he sells them. Yet this is not a commercial act on the part of the painter, for the painter is not a mediator; his act involves merely production, not circulation, the canvas and colors having been for him merely a necessary implement for his creative art. The physician in the country who sells to his clients the medicine he buys from the druggist, does not undertake a commercial act, for the medicine is only an accessory in the exercise of his profession. The pharmacist who confines himself to the filling of medical prescriptions is not performing any commercial act; but if he sells patent medicines or chemicals, he may be considered a merchant. (Paris, April 15, 1837, Dalloz, *Répertoire de jurisprudence de Commerce*, 105.) A tanner who sells the wool of the hide he dresses, is not a merchant, for his occupation is not to mediate between the seller of wool and the wool miller; the tanner is devoted to production, for he sells that which he produces and the by-products of his industry.

The contractors of works are not merchants even though

they supply the materials.[1] The purchase of real estate is not a commercial act.[2] The purchase of materials for the construction of a building is not a commercial act for the purchaser, but is commercial for the seller.[3] Gambling in a lottery is not commercial.[4] A person who, executing a contract, goes to a forest to cut timber for some one else does not perform a commercial act.[5] Purchase and sale of cattle has been held in Colombia to be a civil industry.[6] The purchase of furniture and utensils for use in a commercial house is not a commercial act.[7]

The codes of Argentina,[8] Chile,[9] Colombia,[10] Ecuador,[11] Guatemala,[12] Haiti,[13] Honduras,[14] Mexico,[15] Panama,[16] San Salvador,[17] Santo Domingo,[18] Uruguay,[19] and Venezuela [20] contain a list of commercial acts; but those of the other Latin-American countries and of Spain have no such list. In Bolivia, however, the law of August 8, 1842, gives a brief enumeration of acts which must be considered as commercial.[21]

Examining the provisions of the Spanish commercial code in order to learn which acts are considered mercantile, we may reduce them to the following list:

1. Purchase and sale of corporate merchandise, stocks

[1] Tribunal de Jujuy, Argentina, *Boletin Oficial de Jujuy*, Nos. 111 and 112.

[2] Corte de Bucaramanga, Colombia, March 18, 1891, vol. V, p. 1581, 2. However, if this purchase of real estate is made with a view to selling it with a profit it is a commercial act.

[3] Cartajena, Colombia, Dist. Jud. de Bolivar, April 28, 1897, *Gaceta Judicial*, vol. X, p. 924.

[4] Panama, October 1, 1892, *Registro Judicial de Panama*, vol. VI, p. 37.

[5] Panama, June 14, 1897, *ibid*, vol. X, p. 128.

[6] Popayán, March 6, 1895, *Repertoria Judicial*, No. 341, 3. We do not think that this decision can be supported according to legal principles and the provisions of article 20, paragraph I of the commercial code of Columbia.

[7] Costa Rica, Canosa v. Castille, Casacion, September 8, 1899. *Corte de Casacion Sentencias*, 1899, p. 258.

[8] Art. 8. [9] Art. 3. [10] Art. 20.
[11] Art. 3. [12] Art. 3. [13] Art. 621.
[14] Art. 3. [15] Art. 75. [16] Art. 2.
[17] Art. 3. [18] Arts. 632, 633. [19] Art. 7.
[20] Art. 2.

[21] Articles of codes will be cited by their number after the country whose code is cited.

and bonds, state and provincial securities, incorporeal rights, real estate, *choses* in action and negotiable instruments, undertaken with the purpose of mercantile speculation or profit.

2. The purchase and sale of vessels.

3. Money exchange, bills of exchange, drafts, promissory notes payable to order or to bearer or checks or letters of credit issued by one merchant to another for mercantile purposes.

4. Agency or contracts between a principal and his clerk or his factor or broker when they have a mercantile purpose.

5. Overland transportation of merchandise or of any article if the carrier is habitually engaged in transportation or in carrying maritime freight.

6. Deposit when made as a consequence of a mercantile transaction, or when made in general warehouses.

7. Insurance when the insured pays a single or a periodical and fixed premium as a consideration therefor.

8. Security, pledge and mortgage when they guarantee a commercial obligation.

9. Loans for commercial purposes.

10. Commercial partnerships, corporations and joint adventure.

11. Accounts current for mercantile purposes.

12. Quasi-contracts in connection with the ownership of vessels or common average, stranding or fortuitous shipwreck.

The acts listed in this enumeration are substantially the same as those which the other codes consider as commercial. Nevertheless, the code of Mexico declares that the sale of products of a farm, made by the owner or cultivator thereof is a commercial act, a provision which cannot be reconciled with the principles generally accepted.

As some of the codes contain a list of commercial acts and all of them deal at length with each of these acts, it has not been considered necessary to enumerate those that are not commercial; nevertheless the codes of Colombia,[22] Mexico,[23]

[22] Art. 22. [23] Art. 77.

and Venezuela [24] make such an enumeration, and as the list given by the Colombian code may serve as an illustration of the general rules established above, it may be quoted:

"The following are not commercial acts:

"1. The purchase of objects destined for the domestic consumption of the buyer, or the sale of the excess of his stock.

"2. The purchase of articles that serve for the elaboration of artistic works or the sale of products of a civil industry.

"3. Purchases made by public officers or employees of objects destined for the public service.

"4. Sales made by farmers or cattle-raisers of the fruits of their farms or of their flocks."

As the nature of the transaction depends in many cases upon the purpose of the parties to it, the same act may frequently have a different character, commercial for one of the parties and civil or non-commercial for the other. The consequences of this difference bring about differences in the rights and obligations of the parties. The commercial code of Mexico is in this respect more precise than others in stating, in Article 1050:

> "When, according to the aforesaid articles 4, 75, and 76, of the two parties entering into a contract, one engages in a commercial act and the other only in a civil one and this contract gives rise to a judicial litigation, it shall be governed by the precepts of this book, if the party who undertook the commercial act is the defendant; on the contrary, when the defendant is the party who undertook the civil act, the suit shall be carried on according to the rules of the civil law."

The codes of, Argentina,[25] Chile,[26] Colombia,[27] Ecuador,[28] Guatemala,[29] Haiti,[30] Honduras,[31] San Salvador,[32] Santo Domingo[33] Uruguay,[34] and Venezuela [35] provide in a general way that the code of commerce is applicable to merchants

[24] Arts. 4, 5, 6.
[25] Art. 6.
[26] Art. 1.
[27] Art. 1.
[28] Art. 1.
[29] Art. 1.
[30] Art. 620.
[31] Art. 1.
[32] Art. 1.
[33] Art. 631.
[34] Art. 6.
[35] Art. 1.

and even to non-merchants who engage in commercial acts.

Argentina [36] and Nicaragua [37] differ from the other countries in prescribing that "Business, the subject-matter or the purpose of which is commercial, or in which at least one of the parties to the contract is a merchant, shall be governed by the law and the jurisdiction of commerce."

In Brazil [38] and Panama [39] when an act is commercial for one of the parties, all the contracting parties are subject to the commercial law with regard to the consequences and effects of such act.

If there is any doubt in reference to the character of an act, the rule is that it must be regarded as a civil act, because the commercial law is special and strictly construed.

Conflict of law.

As the laws of all countries do not agree in the matter of classification of commercial acts, conflicts may arise. Two systems have been proposed for settling the difficulty.

The first proposes that the law which decides upon the validity of the act, that is, the law of the place where the contract was made, is the one that must determine its classification as civil or commercial, and the application of this principle serves to establish whether any special evidence for commercial acts must be admitted in a given case. In matters referring to the jurisdiction of commercial courts [40] the laws of the country in which the suit is brought are determinative.[41]

The other system provides that in all conflicting cases the determining law is that of the place where the suit arises.

The latter solution in our opinion is the best. Commerce is a social function, and the public interest in every country is involved in the classification of acts as commercial or non-

[36] Art. 7.
[37] Art. 12.
[38] Art. 10 of Decree No. 737 of Nov. 25, 1850.
[39] Art. 4.
[40] See the chapter on procedure.
[41] Asser et Rivier, *Eléments de droit international privé*, Paragraphs 91 and 92; Holtzendorff, *Encyclopedie der Rechtswissenschaft*, article written by M. de Bar, entitled *Internationales Privatrecht* (4th edition, p. 698).

commercial. Due to this fact, classifications vary in the different countries. If in certain points foreign law must be consulted, that is due to some special reason; for example, the purchase of real estate for resale is non-commercial in Santo Domingo but may be commercial in Cuba; if a contest arises in Santo Domingo in reference to purchase of real estate made in Cuba, the existence of the contract may be proved by the means provided by the Cuban commercial law, because the law of the place where the contract is made governs the formalities of the acts; [42] but its classification as civil or commercial, affecting the jurisdiction of the courts in the case must be governed by the law of Santo Domingo.

[42] Lyon-Caen, *Traité de droit commercial*, I, pp. 192, 195.

CHAPTER III

Commercial Law in Federal Countries

CONSTITUTIONAL LAW

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The South American countries may be divided into two groups: 1. Those having a federal form of government; 2. Those having the unitary form. The federal republics are Argentina, Brazil, Mexico and Venezuela.

From the standpoint of business and commercial law this distinction is important; because, while in countries having the unitary system, all the laws emanate from a single central legislature, in countries having the federal system, the law in certain matters is enacted by the national congress, and in other matters by the state legislatures, depending upon the constitutional division of power, and it is necessary for the business man to know whether he is to look to the federal or to the local authorities in a particular case.

The general principle governing this matter is that, as in

the United States, the states are presumed to possess all sovereign powers not expressly delegated to the federal government by the constitution.

Argentina.

In Argentina, the states or provinces retain all the powers not delegated by the constitution to the federal government, and also those which they expressly reserved by special agreements at the time of their coming into the Union.[1]

Brazil.

The constitution of Brazil is not so definite and precise, as it provides that the states shall in general exercise any power or right not denied to them by a provision, expressed or implied, in the constitution. The word "implied" gives rise to different interpretations which may impair the sovereignty of the states, and leaves uncertain the line of demarcation between the central and local governmental authority.[2]

Mexico.

The Mexican constitution is very concise and clear on this important matter, because it establishes without any conditions or ambiguity, that the powers not *expressly* granted by it to the federal authorities are understood to be reserved to the states.[3]

Venezuela.

In Venezuela, all powers not granted expressly to the national government reside in the states.[4]

COMMERCE AND TAXING POWER

The State, in Latin-America as in other civilized parts of the world, has the power of eminent domain over real

[1] Const. Art. 104.

[2] Const. Art. 65–2.

[3] Constitution of 1857, Art. 117. Identical with article 124 of the constitution published by Carranza on January 31, 1917. See English translation by Branch published as a supplement to the Annals of the Academy of Political and Social Science, 1918.

[4] Const. Art. 106.

property and, except as constitutionally restricted, an unlimited taxing power.

Even though the federation in Latin-America, historically considered, is only a fiction, because there never were sovereign states which entered into a federal pact, the fiction has been carried out to its logical consequences, and each of the states or provinces (as the Argentine constitution with greater propriety calls them) is considered as having reserved its power of eminent domain, in the absence of any contrary provision in the federal constitution. This is the basis for the rule in the matter of taxation that the right and power to impose direct taxes upon real estate is vested in the states or provinces while the federation or nation may impose indirect taxes only.

This theory is not expressly established in the constitution of Argentina and Mexico,[5] but it is in Brazil [6] and in Venezuela.[7]

As commerce with foreign countries affects international relations, it is always a matter for the national government to enact the laws governing such commerce and to regulate the amount of taxes and duties to be levied upon imports or exports.[8]

Argentina.

In Argentina as in the other countries now under consideration all custom houses are national and are governed by tariff laws enacted by Congress; moreover, with a view to prevent any hindrance to foreign commerce on the part of

[5] The Carranzista constitution of Mexico departs from this theory, establishing in article 27: "The ownership of lands and waters comprised within the limits of the national territory is vested originally in the nation." This is an historic truth which has been overshadowed by the fiction of the federation, and the consequence of its recognition is that the federation may impose direct taxes on real estate in Mexico.

[6] Const. Art. 9. [7] Const. Art. 27.

[8] The anomalous situation created by the power of local authorities in Latin-America to impose taxes and license fees on commercial travellers and their samples is now in process of adjustment and improvement by the conclusion of treaties between the United States and various countries of Latin-America, providing for a single fee or tax payable at the port of entry.

the provinces, it is provided that the circulation in the interior of the republic of articles, goods, and merchandise of all classes introduced into the country through the national custom houses, shall be free from duties. Articles of national or foreign production or manufacture, and cattle of all kinds, when passing from the territory of one province into the territory of another, are exempt from transit duties. The same freedom is enjoyed by the vehicles, ships, or animals used for their transportation, and no other duty, under any name, may be levied upon said articles and vehicles because of the mere fact of their transit through the country.[9]

By virtue of these principles, the national congress has sole power to legislate with respect to custom houses and foreign commerce and to establish import duties, which, as well as the valuation on which they are to be based, must be uniform throughout the whole nation. The national congress may likewise lay export duties.[10]

The national congress also has power to make rules for the free navigation of the rivers in the interior of the country; to declare as ports of entry those deemed fit for that purpose; to establish or abolish custom houses (except that the custom houses for foreign commerce existing in each state at the time of its coming into the Union, cannot be abolished); and likewise to regulate commerce with foreign countries, by land and sea, and that of the states among themselves.[11]

Furthermore, the federal congress is given power to enact civil, commercial, penal, and mining codes, reserving to the provincial courts, however, jurisdiction of all cases relating to these matters when the parties or the subject-matter are otherwise within provincial jurisdiction. Similarly, these codes are enforced in the federal courts when the parties or the subject-matter are otherwise within federal jurisdiction. The rules of procedure in the provincial courts are within the control of the provinces. The federal congress exclusively is empowered to enact legislation on bankruptcy, count-

[9] Const. Arts. 9 to 11.

[10] Const. Art. 67.

[11] Const. Art. 67, sections 9 and 12.

erfeiting of money, and forgery of national public documents.

The Congress is likewise authorized to provide for all matters conducive to the prosperity of the country generally, the progress and welfare of the provinces, and the enlightenment of the people, by promoting industrial enterprises; foreign immigration; the construction of railroads and navigable canals; the settlement of the public lands; the introduction and establishment of new industries; the importation of foreign capital; the exploration of interior rivers; the granting of proprietary privileges, for a limited time; and rewards and other privileges.[12]

The federal government must defray the expenses of the nation with the funds of the national treasury, derived from the proceeds of import and export duties; from the sale or lease of federal public lands; from the postal service; from taxes levied by the federal Congress, equitable and in proportion to the population; and from moneys obtained through

[12] Const. Art. 67, section 11. See laws No. 816, of October 10, 1876, on postal service; No. 750½ of October 7, 1875, on telegraphic service; No. 4930 of November, 1905, on postal and telegraphic tariffs; the parcel post convention between Argentina and the United States was signed on March 12, 1915. No. 2873 of November 24, 1891, on railways, and its regulating decree of September 10, 1894; also law of September 30, 1907; No. 4712 of September 29, 1905, organizing the consular service; No. 4280 of January 4, 1904, on consular tariffs; No. 4934 of December 20, 1905, on patents; No. 3975 of November 23, 1900, on trade-marks and cattle brands; the law of October 19, 1876, and its regulation of March 4, 1880, on immigration; Law No. 3952 of October 6, 1900, which gives private persons the right to sue the government civilly; Law No. 7029 of 1910 on the protection of the state against undesirable immigration; a new law of August 2, 1919, establishing several requisites for persons entering Argentina has just come into force; law No. 4167 of January 8, 1903, and its regulations of Nov. 8, 1906, on public lands; law of Oct. 4, 1906, on the exploitation of forests; the Rural Code for the national territories adopted by law No. 3088 of August 11, 1894, and amended by law No. 7071 of Sept. 13, 1910; Law No. 6546 of 1910; Law No. 845 of July 13, 1877, adopted the decimal metric system of weights and measures. Law No. 4661 of August 31, 1905, imposes Sunday rest in certain states; No. 5291 of September 30, 1907, restricts work of women and children in factories; Law No. 9688 governs employer's liability in cases of accidents; Law No. 4475 of September 26, 1904, approved the sanitary convention signed at Rio de Janeiro on June 12, 1904, by Argentina, Brazil, Paraguay and Uruguay; Law No. 1672 of Aug. 25, 1885, governs extradition in the absence of treaty.

loans and financial operations authorized by Congress for urgent national necessities and for works of national public utility.[13]

The provinces, on the other hand, may conclude, with the consent of the federal Congress, inter-provincial treaties for purposes of economic interest and public utility; and they may promote by means of protective laws and with their own resources, industrial progress, immigration, the construction of railways and navigable canals, the settlement of the provincial public lands, the introduction of foreign capital, and the exploration of their rivers.[14]

An examination of the budgets of the Argentine provinces discloses that the revenues are derived in a general way from taxes on the following items: stamped paper, stamp taxes, certificates, agricultural products, marks and brands for cattle, promissory notes, licenses, direct taxes, scholarships, fines imposed by administrative or judicial authorities, vacant inheritances, slaughter houses, weights and measures, and federal subsidies for education. Every one of the provinces has, furthermore, special taxes, according to the character of their industries and resources, as, for instance, Santa Fé, upon quebracho; Córdoba, on irrigation; Entre Ríos, licences for the use of threshing machines and cattle raising; Tucumán and Salta, on sugar and chemical analysis; Mendoza, on wines; San Juan, on pastures; Rioja, on mines; Buenos Aires, on quarries, etc.

From an opinion given by the Attorney General of Argentina to the government it is apparent that the provinces do not always confine themselves to the limits of their power of taxation, and often trench upon the ground of the federation, imposing duties which directly or indirectly affect foreign commerce.[15]

[13] Const. Art. 4. [14] Const. Art. 107.

[15] The tax levied by the municipality of the Capital of the Republic of $.50 each per head of cattle, introduced in said capital for veterinarian inspection as a differential tax which does not burden the animals slaughtered within the municipality, is a real tax levied on the transit of goods, and therefore at variance with articles 10 and 11 of the national constitution. Case DXLVI *Compañía Sansineva v. Municipalidad de la Capital*, Federal Court of Appeals,

Brazil.

In Brazil, the federal government has the exclusive power to establish duties on imports from foreign countries, and dues on the entry, departure and stay of vessels; but the coasting trade in national products is free of duties, as is foreign merchandise which has already paid an import duty.[16] The federal government is forbidden to give preference to the ports of any state against those of others.

The states alone are competent to impose taxes on exports of merchandise produced in their own territory. It is lawful for a state to levy duties on imports of foreign goods only when said goods are intended for consumption within its boundaries; but it must in such case turn over to the federal treasury the amount of duties collected.[17]

The states as well as the Union are forbidden to impose duties on the products of a state or of a foreign country, while in transit through the territory of another state, or from one state to another; nor can duties be levied on the vehicles or vessels in which they are transported.

The Union as well as the states are authorized to create, cumulatively or otherwise, any sources of revenue, provided they are not in contradiction with the provisions above set forth.[18]

Under the Brazilian constitution of 1889, the federal Congress alone is competent to regulate international commerce and that of the states with each other and with the city of Rio de Janeiro, establish custom houses, create or abolish warehouses, and legislate with respect to the navigation of rivers running through more than one state or extending into a foreign territory.[19]

The national Congress is invested with the exclusive power to legislate with reference to the civil, commercial and

December 30, 1903, Juan R. Serú, *Fallos de la Exma. Camara Federal de Apel. de la Capital*, Vol. VII, p. 102.

[16] Arts. 7, 8.

[17] Art. 9.

[18] Arts. 11, 12.

[19] Art. 34.

criminal laws of the republic and the rules of procedure in the federal courts.[20] The national Congress is also invested with power, but not exclusive, to encourage, within Brazil, the development of letters, the arts and sciences, as well as immigration, agriculture, industry and commerce, provided that the privileges granted for such purposes do not interfere with the action of the state governments.[21]

The only restriction upon the Union in the matter of the levying of taxes over which it has jurisdiction is to be found in article 8 which provides that any taxes levied by it shall be uniform in all the states.

A distinction is made between direct [22] and indirect taxes. The latter are imposed upon certain acts of production, consumption or circulation of wealth regardless of the person who pays the tax; the former are levied directly upon a certain person, and they burden wealth itself.

Certain federal taxes in Brazil are direct, such as those referring to patents and licenses; others are indirect, such as stamp taxes on certain acts and contracts, according to decree number 3564, of January 22, 1900, and those on importations, exportations and others collected by the custom houses.

The states may collect direct taxes, such as the territorial licenses, industries and professions, incomes and poll-taxes; and indirect taxes, such as those on exports, in the case of article 9 of the constitution, and all taxes on acts or contracts, whether civil or commercial.

The municipalities can, as a rule, impose all taxes that the constitution does not reserve to the Union, unless otherwise provided by the state constitution. Some of the states, Amazonas,[23] Rio Grande do Sul,[24] Bahia,[25] and Minas Geraes,[26] reserve the tenth part of taxes upon land and urban real estate to the municipalities. As a rule the municipal

[20] Art. 34. [21] Art. 35.

[22] These words are not used in the United States constitutional sense of "direct" and "indirect," but in the usual economic sense.

[23] State Const. Art. 23. [24] State Const. Art. 24.

[25] State Const. Art. 109. [26] State Const. Art. 76.

revenues are derived from the following sources: industries and professions (in concurrence with the states), merchandise offered for sale in fairs or public markets, cattle raising, slaughter houses, funeral services, tolls, street pavements, vehicles, etc. In the state of Maranhao [27] the municipalities can only impose taxes on industries and professions by means of additional taxes not exceeding the amount levied by the state.

The constitution of the state of Rio de Janeiro [28] forbids the municipalities to levy taxes on industries and professions as long as the financial difficulties of the state may last; in the meantime the state pays back to the municipalities 20% of the net product of such taxes levied by it.

The states impose stamp taxes upon all transactions occurring within their respective jurisdictions and on domestic business and they may also levy taxes on their postal and telegraphic services.[29]

The federal congress has exclusive power to levy taxes on federal postal and telegraphic services,[30] but the states may levy a tax on their own postal and telegraphic services within the limits of their respective territory.[31] The state of Rio Grande do Sul has, since 1899, been authorized by its legislature to establish a postal service, but thus far has not exercised the power.

The states have the power to establish telegraphic lines between different points of their own territories and between those points and places in other states which are not provided with a federal telegraphic service, it being understood, however, that the Union may acquire the ownership thereof when required by the general public interest.[32]

The right of the Union and of the states to legislate in regard to railways and the navigation of internal waters is to be regulated by a federal law.[33]

The railway service in Brazil may be divided into four

[27] Law of May 24, 1893.
[28] State Const. Arts. 42, 51.
[29] State Const. Art. 94.
[30] Const. Art. 7.
[31] Const. Art. 9, par. 1, No. 2, par. 4.
[32] Art. 9, section 4.
[33] Art. 13.

classes: that of the Union, that of the states, that of the municipalities, and that of private industry. The laws referring to railways are many, the most important being No. 1664 of October 27, 1855, on expropriation for the construction of railroad lines; No. 1930 of April 26, 1857, on their conservation and policy; Law 2450 of September 24, 1873, on railways; No. 5561 of February 28, 1874, and No. 6995 of 1878, on concessions and guaranty of interest; No. 7959 of December 29, 1880, on concessions; No. 109 of October 14, 1892, regulating the jurisdiction of the federal government and the state to grant railway concessions; No. 6787 of December 19, 1907, and No. 9076 of November 3, 1911, on supervision.

Mexico.

Article 124 of the Mexican constitution of 1857 provided: "From the first of June, 1858, the *alcabalas* and interior customs shall be abolished in the whole republic."

Under the name of *alcabalas* was meant a duty paid on merchandise entering a town, except when in transit. This was a great hindrance to commerce because of the formalities which the law required in order to avoid smuggling, and it was also a great burden upon the people, because the duty on the same merchandise often had to be paid in several different towns. This state of affairs was intended to be changed by article 124 of the constitution; but owing to the disturbed condition of the country at that time, the constitution was frequently amended and the period for the suppression of the *alcabala* and interior customs extended up to the first of May, 1896, on which date a law was passed by the Congress amending article 124 as follows: "The Federal Government shall have exclusive power to levy duties on merchandise imported, exported or passing in transit through the national territory, as well as to regulate at all times, and if necessary to forbid for the sake of public safety or for police reasons, the circulation in the interior of the Republic of all kinds of goods, regardless of their origin; but the Federal Government shall have no power to estab-

lish or decree in the Federal District and Territories the taxes and laws to which Clauses VI and VII of Article III refer.[34]

Article III just referred to provides:

1. No state shall have power to: Coin money, issue paper money, stamps or stamped paper;

2. levy taxes on persons or property passing through its territory;

3. prohibit or tax, directly or indirectly, the entry into its territory, or the withdrawal therefrom, of any merchandise, foreign or domestic;

4. burden the circulation or consumption of domestic or foreign merchandise with taxes or duties to be collected by local custom houses or subject the said merchandise to inspection or require it to be accompanied by documents;

5. enact or maintain in force laws or fiscal regulations discriminating, by taxation or otherwise, between merchandise, foreign or domestic, on account of its origin, whether this discrimination be established with regard to similar local products or to similar products of foreign origin;

6. issue bonds of the public debt payable in foreign coin or outside the Federal territory; contract loans, directly or indirectly, with any foreign government; assume any obligation in favor of any foreign corporation or individual, requiring the issuance of certificates or bonds payable to bearer or negotiable by endorsement."[35]

Article 112 of the same Constitution provides: "No state shall without the consent of the Congress:

"1. Establish tonnage dues or other port charges or impose taxes or other duties upon imports or exports."[36]

[34] Article 131 of the Carranzista constitution is identical with Art. 124 of the constitution of 1857.

[35] Article 117 of the new constitution is identical with article 111 of the constitution of 1857 in the matter of taxes.

[36] Identical with article 118 of the new constitution.

The most important items of the federal budget are import and export duties in the maritime or boundary custom houses, the stamp taxes upon all contracts, bills of exchange, promissory notes, checks, receipts, and petroleum, which has become one of the most valuable sources of income of the government, taxes on tonnage, lighthouses, warehouses in the ports, according to the tariff of March 1, 1887, and decree of August 1, 1888, etc. The law of stamp tax amended by decree of July 1, 1917, levies a tax of 60% upon all taxes imposed by states. This in our opinion is unconstitutional. Direct taxes also produce a considerable revenue to the government, principally the duties on wool and cotton mills, alcohol, inheritances, patents, mines, and the proceeds of the sale of public lands.

The state budget is composed of direct taxes, the most important of which are taxes on farms and houses, professions, licenses, inheritances and fines imposed by state judicial authorities. The municipal budget is also formed by direct taxes on licenses for peddlars and tradesmen, for theatres and public entertainments, and for funeral services, and certain indirect taxes, such as those imposed for the slaughtering of animals, lotteries, etc. Beside this the municipalities receive the proceeds of fines imposed by administrative or municipal judicial authorities, and those derived from the sale of strayed animals or lost objects, etc.

The federal Congress is invested with power to promulgate the commercial and mining codes which shall be binding throughout the whole republic,—the commercial code including banking law.[37]

The Constitution further invests Congress with the power to enact laws on citizenship [38] and colonization or land settlement;[39] to enact laws on the general means of communication and on post roads and post offices; [40] to determine the waters

[37] Art. 72, amended by law of December 14, 1883.

[38] The matter of citizenship is governed by articles 11 and 29 of the law of May 28, 1886.

[39] Colonization is governed by the law of December 15, 1883, and its regulation of July 17, 1889.

[40] The general ways of communication are governed by the law of June 5,

subject to the federal jurisdiction and to enact laws as to their use and development; to establish mints, regulate the value and kinds of the national coin, fix the value of foreign moneys and adopt a general system of weights and measures.[41]

Article 85 of the 1857 constitution gives the executive the power to grant exclusive privileges for a limited time, and according to special laws, to discoverers, inventors, or improvers in any branch of industry.[42]

Venezuela.

The states of the Venezuelan federation have bound themselves to reserve to the federal government jurisdiction over and the power to regulate oversea and inland navigation, wharves, and national roads; but the government is not allowed by means of taxes or franchises to restrict inland navigation unless, by the building of artificial works, *e. g.*, dams, locks, etc., federal work should be necessary. National roads are those passing through and beyond one state or territory or the Federal District. The states have likewise bound themselves not to establish custom houses—which are reserved to the national government alone—and not to impose taxes upon products destined for exportation; not to establish duties on live-stock, products, goods or any other national or foreign merchandise before it is offered to the consumer; not to prohibit the consumption or transit of

1888, and June 6, 1894, and by the general railway law of Dec. 16, 1881; and regulations of July 1, 1883, amended by law of Oct. 1, 1894. The law of Dec. 14, 1910, relates to the use of waters. The Post Office service is governed by the postal code of Oct. 23, 1894, in force since Jan. 1, 1895, the decree of Jan. 26, 1899, and the regulation of the same date.

[41] Const. Art. 72, sections 21 to 23, is equivalent to corresponding paragraphs of article 89 of the new constitution. The law regulating the monetary system of Mexico was that of March 25, 1905, which has not been repealed in spite of the great disturbances in the monetary system during the revolution. Decree of May 24, 1905, establishes the equivalence of the Mexican peso with foreign coins; on November 13, 1918, a decree changed the alloy of the silver coins.

[42] This is identical with paragraph 15 of article 89 of the new constitution. The law of August 25, 1903, and its regulation of September 24, of the same year govern the matter of patents and exclusive privileges to inventors or improvers in any branch of industry. The law of August 25, 1903, and its regulation of September 24, 1903, relates to trade-marks.

live-stock, or industrial or other products of other states, or to burden said consumption with greater or smaller taxes than are paid on similar products in the respective localities; and not to levy taxes, the collection of which requires the coöperation of the fiscal administration of the nation. To every state is reserved the right to dispose of its natural products in the manner established by the constitution.[43]

The states bind themselves also to confine the sources of their budget to the following:

1. The proceeds of the duties, called territorial taxes, levied in all the custom-houses of the republic;
2. the total amount of the duty on mines, public lands and salt pits;
3. the portion of the duty levied upon alcohol established by law;
4. the amount of the duties imposed on the exploitation of their natural products;
5. the yield of the stamped paper according to law.

No duties can be levied upon exports.[44]

The power to legislate with respect to and to administer post offices, the telegraphic service and telephones, resides in the federal government.

The powers of the federal Congress in relation to domestic commerce are:

1. To establish the national taxes and to authorize their levy;
2. to enact the national codes and laws according to the constitution;
3. to regulate the type, value, alloy, weight, and coinage of the national coin, gold being the monetary standard; and to provide for the admission of foreign coins;
4. to grant concessions for the construction of general means of communication;
5. to regulate and make uniform all weights and measures of the nation in accordance with the decimal metric system.[45]

[43] Art. 19—sections, 9, 10, 11, 12, 13, 14.
[44] Art. 117.
[45] Art. 58.

The Executive has power to regulate the postal, telegraphic and telephonic service, whether public or private, granting or suppressing federal stations and offices as required by public utility.[46]

Neither the legislative, executive, or any other power or authority in the republic can in any case or for any reason, issue fiat money, or declare bank notes and other evidence of value represented by paper to be legal tender. The coinage of moneys, either of silver or nickel, cannot be ordered without previous authorization of the national Congress given through the same procedure established for the enactment of law.[47] The law of May 18, 1877, governs trade and industrial marks and the law of May 25, 1882, governs patents.

BANKS

Argentina.

The federal government has power to establish in the Capital a national bank, with branches in the states, and with the privilege of issuing bank notes.[48] The only prohibition upon the states in regard to banks, is that they cannot issue bank notes, except with the consent of the federal Congress.[49]

Brazil.

The federal Congress has the exclusive power to create banks of issue, to legislate with regard to such issue, and to levy taxes on it.[50] The liberty of the states to create and legislate with regard to other kinds of banking institutions is implied. This matter of banking is governed by laws of

[46] Art. 79, par. 10. [47] Art. 119. [48] Art. 67, section 5.

[49] Art. 108. Law No. 4507 of Sept. 29, 1904, organizing the *Banco de la Nación*, decree of Dec. 9, 1904, as amended by decree of Sept. 26, 1905, regulating the bank; law No. 1804 of Sept. 14, 1886, organizing the *Banco Hipotecario Nacional* and its regulating decree of Dec. 18, 1886.

[50] Art. 34, section 8. The law of June 20, 1913, regulates the banking system of the republic. Law of Dec. 22, 1906, decree of Dec. 31, 1910; Law of Dec. 29, 1906, creating the *Caixa de Conversao;* Law of Nov. 28, 1907, authorizes the establishment of agricultural banks.

Nov. 24, 1888, March 8, 1890, decree 233 of 1896, Law of Dec. 31, 1896, Law of Dec. 22, 1906, decree of Dec. 31, 1910, Law of Dec. 29, 1906, creating the *Caixa de Conversao*, and law of Nov. 28, 1907, authorizing the establishment of agricultural banks.

Mexico.

In Mexico the federal Congress was authorized to legislate in regard to banks by the amendment to section X, article 72 of the Constitution, hereinbefore mentioned, and the Congress, using this faculty, reserved to the federal government the power to grant concessions for the establishment of banks of every kind.[51]

Venezuela.

We have already observed that neither the legislative nor the executive, nor any other authority may in any case and under any consideration issue paper money, or declare, as legal tender, bank notes or any other evidence of value represented by paper.[52]

PUBLIC LANDS AND MINES

Argentina.

The constitution makes a distinction between national and provincial lands; the federal Congress can provide for the use, sale and disposition of the former[53] whereas the provinces have jurisdiction over the latter.[54]

Although in regard to mines, the constitution gives power to the federal Congress to enact the code which is to regulate

[51] The banking law of Mexico is that of March 19, 1897, as amended by law of 1908.

Article 28 of the new constitution provides that there shall be no private or governmental monopolies of any kind whatsoever in the United States of Mexico . . . excepting those relating to coinage of money, postal, telegraphic or radiotelegraphic services, the issuance of bills by a single banking institution to be controlled by the federal government. . . .

[52] Art. 119. [53] Art. 67, section 4. [54] Art. 107.

rights in them, the mines themselves belong to the Union or to the provinces, according to the location of the mine.[55]

The mining code of Argentina was promulgated on December 8, 1866, and went into operation on May 1, 1887. It divides mines into four classes:

1. those to which the soil is an accessory, which belong to the state and can only be exploited by virtue of a concession granted by competent authority. To this class the following substances belong: gold, silver, mercury, copper, iron, lead, tin, zinc, nickel, cobalt, bismuth, manganese and antimony, as well as coal, lignite, anthracite, bituminous, mineral oils, arsenic and precious stones;
2. those which, on account of their importance, are preferably granted to the owner of the soil, and those which by the condition of their stratification are destined to common utilization as placers, dross-heaps, borates, salpetre, salt-pits, etc.;
3. those belonging exclusively to the owner of the soil, as of materials for construction;
4. those belonging to the nation or province according to their location.

Brazil.

The federal Congress has exclusive power to enact laws regarding lands and mines belonging to the Union.[56] Congress can also subject to special legislation those parts of the territory of the Republic needed for the establishment of arsenals or other establishments or institutions for federal use.[57] The mines and vacant lands situated in the states are within the control of the states;[58] but the Union has the

[55] Const. Art. 67, section 11 and Art. 7 of the Code of Mines.

[56] Art. 34, section 29.

[57] Art. 34, section 31.

[58] At the time of the Empire there were doubts and controversy on mines and mineral waters but there is no doubt now that they belong to the owner of the soil; neither the former provinces nor present states have any rights in mines and mineral waters. Decision of the *Supremo Triunal*, No. 2027 of Nov. 8, 1911, App. civ.

privilege to occupy that portion of the territory which may be necessary for the defense of the frontier, fortifications, military construction and federal railways. National property which may not be necessary for the service of the Union shall pass to the dominion of the states in whose territory it may be situated.[59]

Mexico.

The federal Congress has power to make rules for the occupation and sale of public lands and establish the price thereof.[60] This principle has developed the theory that the Union alone has power to lease, sell or dispose of the public lands.[61]

The amendment to section X, article 72, of the Constitution of December 14, 1883, gives Congress the power to legislate in the matter of mines; and here also the law [62] has provided that they belong directly to the nation. As there is, however, no express constitutional renunciation by the states of such direct ownership, the constitutionality of this law may be open to question.[63]

[59] Art. 64.

[60] Art. 72, section 24.

[61] Law of March 26, 1894, and its regulation of the 5th of June of the same year, governs the matter of public lands (*Terrenos Baldíos*) and the procedure to obtain land concessions.

Article 27 of the new constitution provides: The ownership of lands and waters comprised within the limits of the national territory is vested originally in the nation which has had and has the right to transmit titles thereof to private persons, thereby constituting private property.

[62] Art. 1 of the Mining Law.

[63] The mining law was promulgated on November 25, 1909, and went into effect January 1, 1910. The regulating decree of this law was promulgated on Dec. 16, 1910. According to the provisions of this law, mines belong to the nation or to the owner of the soil as is provided for in Arts. 1 and 2 which we quote: "The following properties belong directly to the nation and are subject to the provisions of this law:

"1. The formations of all inorganic substances which may constitute deposits in the form of veins, beds, or masses of any kind, whose composition may be different from that of the surrounding rocks, such as those containing gold, platinum, silver, copper, iron, zinc, and bismuth, including those which contain sulphur, arsenic and tellurium, rock-salt and precious stones;

"2. The gold and platinum placers."

Article 2: The following are the exclusive property of the owner of the soil:

Venezuela.

The federal Congress has power to pass upon titles or concessions to mines and sales or conveyances of public lands or any other national property.[64]

"1. The beds or deposits of mineral fuel, in all their form and varieties.

"2. The beds or deposits of bituminous substances.

"3. The beds or deposits of salts which may crop out on the surface.

"4. The surface or underground springs of water which are subject to the provisions of the common law and the special laws relating to waters, but without prejudice to the provisions of Article 9.

"5. The bog and flat-iron, steam-tin and ochres."

These provisions have been radically changed in the new constitution, which provides in article 27 that: "In the Nation is vested the masses or beds constituting deposits whose nature is different from the components of the soil, such as minerals from which metals and metaloids used for industrial purposes are extracted; beds of precious stones, rock-salt and salt lakes formed directly by marine waters, products derived from the decomposition of rocks, when their exploitation requires underground work; phosphates which may be used for fertilizers; solid mineral fuels; petroleum and all hydrocarbons, solid, liquid or gaseous. By decree of April 13, 1917, a tax of 10% ad valorem on the exportation of mineral oil and its products was laid. By law of June 29, 1919, the mining industry was subjected to three kinds of taxes:

(*a*) on the ownership of the mines;

(*b*) on the mineral production;

(*c*) on the smelting, coining and assay of metals.

The decrees of Carranza in relation to mineral fuels, which have aroused great opposition, have concentrated interest around the legal condition of the owners of the soil in places where those mineral fuels exist. In order to have a proper understanding of the question it is necessary to take into consideration the following legal provisions: Royal order of Philip II of January 10, 1559, appropriating the mines of gold, silver and quicksilver to the crown and Royal treasury and the grounds of that resolution; Royal order of November 28 and decision of the Council of December 26, 1789, declaring that the mines of coal belong to the owner of the soil where they are found;

Royal decree of August 18 and resolution of the Council of September 15, 1790, submitting the coal mines to the exploration and right of claim by any explorer, and granting a right of preference to the owner of the soil and an indemnity in case the mine is granted to its discoverer or the person who asked for it; Resolution of the Council of State of August 5, 1793, submitting the coal mines to expropriation when for reasons of public interest it was necessary, provided previous and proper compensation was paid to such owner. Art. 22, title 6, of the *Reales Ordinanzas de Minería* of January 15, 1784; Mining law of November 25, 1909; Decree of Carranza of February 19, 1918; Circular of March 11, 1918; decrees of May 18, June 31, August 9, and August 13, 1918. A bill has been introduced in the Congress regulating article 27 of the new constitution in relation to the mineral fuels, but it has not yet been passed.

[64] Law of June 26, 1915, regulates in Venezuela the matter of public lands,

and law of June 26, 1915, and its regulations of March 8, 1916, govern the matter of mines. According to articles 8 and 9 of this law the administration of mines is vested in the federal government and the right to exploit them may be acquired by concessions granted by the federal executive. Article 10 provides that titles and contracts referring to mines require the approval of the national congress, but article 3 provides that mines of coal, naphtha, petroleum, asphalt, and tar which do not belong to individuals or corporations are inalienable and the federal executive must administer them directly, or by means of contracts for their exploitation under the regulations dictated by the executive.

CHAPTER IV

MERCHANTS

BRAZIL.—Bento de Faria, Antonio: Das marcas de fabrica e de commercio e do nome commercial. Rio de Janeiro, 1906.

Carvalho de Mendonça, José Xavier: Das firmas ou razoes commerciales. Decr. n 916 de 24 de outubro de 1890.

Martins, Samuel: Successoes commerciaes. Recife, 1914.

Nogueira Almeida, J. L. de, e Fischer. Jr. G.: Marcas industriaes e nome commercial. São Paulo, 1910. 2 v.

Ouro Preto, Affonso Celso de Assis Figueiredo, Visconde de . . . Marcas industriaes e nome commercial; lei n 3346 de 14 de outubro de 1887 e regulamento n. 9828 de 31 a decembro de 1887 . . . Rio de Janeiro, 1888.

MEXICO.—Mercado, Manuel: Capacidad de los menores comerciantes. Rev. de Leg. y Jur. Mexico, 1895. 2nd sems.

From the point of view of legal science the distinction between merchants and non-merchants is indispensable, designed as it is to distinguish a group of persons who perform a certain social function. From a practical point of view the distinction has important legal consequences; for upon merchants as a class the law, in civil law countries, imposes special duties. For example, a merchant is bound to keep books in the form established by law, usually involving the taking of inventories and balance sheets at stated periods, and the keeping of letter-press books and correspondence files; he must record in the public commercial registry where he resides, certain financial facts connected with his business or changes therein, *e. g.*, his matrimonial contracts; he must give immediate notice of insolvency and state his liabilities. His transactions are presumed to be commercial in the absence of proof to the contrary; he is privileged to be named a member of a chamber of commerce, and to be elected to the commercial courts in countries where that institution exists. Furthermore, there are contracts whose classification as commercial or "civil" depends upon the character of the

parties thereto, as agency, commission, brokerage, transportation, etc.

A mercantile person may be an individual or an association of individuals, comprising corporations and partnerships.

Mercantile persons are also classified into:

(*a*) principals, who trade on their own account; and

(*b*) auxiliaries, who trade for others, such as brokers, agents, captains of vessels, pilots, etc.

Argentina, Panama,[1] and Uruguay [2] do not consider a person who trades for others as a merchant.

Systems of defining merchants.

The Latin-American codes in defining merchants follow different systems, namely:

1. *The French or subjective system.* This system takes into consideration only the qualifications of the subject of commerce, *i. e.*, the merchant himself. According to this system merchants are:

(*a*) those who, having legal capacity to trade, customarily devote themselves thereto;

(*b*) commercial or industrial associations formed in accordance with commercial law.[3]

2. *The Munzinger system* (erroneously named Swiss, for Switzerland makes no distinction between merchants and non-merchants) originated in the draft of a commercial code for Switzerland, prepared in 1864,

[1] Argentina, 1, Panama, 28. [2] Art. 1.

[3] Spain, 1; Argentina, 2; Brazil, 1 and 4; Chile, 7; Colombia, 9; Costa Rica, law of October 5, 1901; Ecuador, 2; Guatemala, 5; Haiti, 1; Honduras 7; Mexico, 3; Panama, 28; Peru, 1; San Salvador, 4; Santo Domingo, 1; Venezuela, 10.

All the circumstances of the case must be taken into consideration to determine whether a person is a merchant. Spain *Sup-Trib.*, April 25, 1896, *Gaceta* of May 11, 1896.

The habitual performance of acts governed by the commercial code or of an analogous nature determines the qualifications of a merchant. Spain *Sup-Trib.*, July 8, 1907, *Gaceta* of October 23, 1908.

In contracts which are commercial for one of the parties and civil for the other, the law applicable is that corresponding to the character of the defendant's act. Cartagena (Colombia), decision of April 28, 1897, *Gaceta Jud.* of District of Bolivar, vol. 10, p. 924.

by Munzinger. This system has also been called objective. It defines a merchant as one who has been inscribed or should be inscribed in the commercial registry. Its author explains that with this definition it is unnecessary to inquire whether a person inscribed in the registry should be inscribed or not. The fact of his inscription is conclusive and dispenses with further investigation. The code of Brazil followed this system in its Art. 9; but owing to the fact that when a person was classified as a merchant he became subject to the jurisdiction of the commercial courts, which, composed of merchants, were more expeditious in their proceedings than the civil courts, it became a valuable privilege to be a merchant. Many acts of civil character were commercialized by subsequent statutes, and finally decree number 916 of October 24, 1890, established the registry of firms, with an optional character. The sphere of operation of mercantile law was thus widened and the definition of a merchant in Brazil is no longer objective.

3. *The combined system.* This system defines a merchant as a person who, having legal capacity to trade, has matriculated [4] himself as a merchant, carries on commercial transactions and engages in commerce as an habitual occupation.[5]

Habitual occupation in commerce.

We have seen that habitually engaging in business is one

[4] *Cf. infra,* Chapter VI.

[5] Bolivia, 1; Nicaragua, 1; Uruguay, 1 and 32.

Article 1 of the supreme decree of Bolivia of August 8, 1842, provides that all commercial acts must be submitted to the commercial courts even though the merchants involved therein are not matriculated, nor possess the capital required therefor by the commercial code. The supreme decree of February 14, 1843, abolished the commercial courts and thereafter all cases involving commercial acts were within the jurisdiction of the civil courts.

After an opinion rendered by a commercial judge the government of Uruguay on July 27, 1867, decided that the inscription in the *matrícula* of merchants was not an indispensable requisite for a person to be legally considered a merchant. Uruguay thus approaches the first system.

of the tests for classifying a person as a merchant. Most of the codes do not establish any presumption in this respect, leaving the point to be decided by the court according to the evidence of each individual case.

The codes of Spain,[6] Colombia,[7] Guatemala,[8] Panama and Peru,[9] provide that there is a legal presumption of habitual occupation in commerce when a person has an establishment for making purchases and sales, or when he announces to the public by means of circulars, papers, placards or permanent signs in public places, that he has an establishment for carrying on any transactions that the code of commerce classifies as commercial acts; and actually engages in said occupation.

In Brazil,[10] and Uruguay,[11] a person is regarded as a merchant from the date of his inscription in the *matrícula*.

Capacity.

We find three systems in Latin-America in reference to the capacity of merchants:

1st, capacity is governed by civil law; [12]

2d, commercial capacity for persons not under parental authority is attained at twenty-one years, differing thus from that established by the civil code; [13]

3d, no special mention is made of the capacity of merchants and therefore the rules of the civil code must be followed.[14]

MINORS

Minors may engage in business when they have received parental authorization therefor in legal form. With this authorization and with the distinctions and qualifications presently to be noted they may in general engage in com-

[6] Art. 3. [7] Art. 18. [8] Art. 17.
[9] Panama, 29; Peru, 3. [10] Art. 9. [11] Art. 39.
[12] Argentina, 9; Bolivia, 2; Brazil, 1; Colombia, 11; Costa Rica, 3; Ecuador, 6; Guatemala, 7; Mexico, 5; Nicaragua, 2; Panama, 12; Uruguay, 8.
[13] Spain, 4; Peru, 4.
[14] Chile, Haiti, Honduras, San Salvado, Santo Domingo, Venezuela.

mercial acts or deal with their property, provided the instrument granting the parental authorization has been duly registered.[15]

This authorization to trade may be given when the minor has reached the age of 21 in Spain,[16] Peru,[17] and Costa Rica,[18] and the age of 18 in Argentina,[19] Brazil,[20] Guatemala,[21] Haiti,[22] Santo Domingo,[23] and Uruguay.[24]

Other commercial codes are silent on this point probably because the rules of the civil code are applicable.

Form of authorization.

In the Latin-American codes we find four systems:

1st, that of the codes which require an express authorization in writing; [25]

2d, that of the codes in which the authorization may be either expressed and in writing or implied and proved by means of acts which make it presumptive; [26]

3d, that of Brazil,[27] Panama and Uruguay,[28] which admit a tacit authorization only when the father associates himself in business with his son, the latter being over 21 years of age in Brazil, and over 18 in Uruguay;

4th, that of the other codes which apply to this matter the provisions of the civil law.

Powers of minors who have been authorized to trade.

In examining the powers and privileges which authorization confers on merchant minors we find five systems:

[15] Spain, 4; Argentina, 10; Brazil, 1; Chile, 9; Colombia, 15; Costa Rica, 4; Ecuador, 9; Guatemala, 8 and 9; Haiti, 2; Honduras, 9; Mexico, 6; Panama, 14; Peru, 5; San Salvador, 6; Santo Domingo, 2; Uruguay, 9; Venezuela, 11.

[16] Art. 4. In Cuba, after the law of June 19, 1916, majority is fixed at 21 years of age.

[17] Art. 4. [18] Art. 4. [19] Art. 10.

[20] Art. 1. [21] Art. 7. [22] Art. 2.

[23] Art. 2. [24] Art. 9.

[25] Guatemala, 9; Haiti, 2; Mexico, 6; Santo Domingo, 2; and Venezuela, 11.

[26] Argentina, 12; Ecuador, 9. [27] Art. 1.

[28] Panama, 14; Uruguay, 11.

1. that of the codes which invest the minor with the same powers as a person of full age, capable of undertaking acts of administration or management, selling and mortgaging his property and appearing in court in person or by proxy; [29]

2. that which allows a minor to mortgage his real estate, to appear in court, and to undertake acts of administration; [30]

3. that which allows him to mortgage his real estate and to perform acts of administration; [31]

4. that which allows him to appear in court and to perform acts of administration; [32]

5. that which is silent on the matter, it being governed by the provisions of the civil code.[33]

A minor in Chile,[34] Ecuador,[35] Honduras[36] and San Salvador [37] need not be authorized or *emancipado* in order to trade with his personal capital (*peculio*) and to bind it to cover obligations arising out of his transactions.

The codes of Spain,[38] Panama, Peru,[39] and Venezuela [40] declare that minors who have not reached the age at which

[29] Brazil, 25, decrees No. 169 A of January 19, 1890; Art. 2, and No. 370 of May 2, 1890; Art. 120; Mexico, 7; Panama, 13 and 14.

By acts of management or administration is meant every transaction not involving the alienation of real estate. The words *acto de administración*, are opposed to *actos de dominio* or *actos de disposición*, which imply the alienation or mortgaging of real estate, or of personal property when the management of the business or the usual expenses do not require such alienation.

Powers of emancipated minors are the same as those of persons of legal age. Cuba, *Tribunal Supremo*, decision of August 2, 1904, *Gaceta* of October 14, 1904.

[30] Chile, 9, 18; Ecuador, 10; Guatemala, 11, 15.

[31] Argentina, 19; Colombia, 15; Costa Rica, 6; Haiti, 6; Santo Domingo, 6.

[32] Honduras, 18.

[33] A minor in Bolivia, when authorized to do business, may appear in court, enter into contracts and administer his real estate, but may not dispose of it. Art. 248 c. c. Decision of the *Corte Suprema* of Dec. 24, 1892. *Gaceta Judicial*, No. 633, p. 8.

[34] Art. 10. [35] Art. 11. [36] Art. 10.

[37] Art. 7.

A minor is *emancipado* when his father or mother under whose authority he has been, waives said authority by giving him absolute liberty to dispose of his person and property, or when he marries.

[38] Art. 5. [39] Panama, 15; Peru, 5. [40] Art. 13.

they may be emancipated, as well as persons not having legal capacity may continue, by means of a legal representative, the trade of their parents or predecessors in interest. This power is not given in other codes. The Spanish code of 1829 did not contain such authorization and when a minor or incompetent person inherited a commercial enterprise his guardians had to dispose of it.[41]

MARRIED WOMEN

Legal partnership and property in relation to marriage.

It has been considered that the unity which must prevail in family relations, requires that only one of the spouses have the representation of the common interest. The force of tradition has invested the husband, as the head of the family, with this representation and has incapacitated the wife, an incapacity which, though of different origin than that of a minor, produces analogous effects.

Most of the codes of Latin-America provide that by the mere fact of matrimony, in the absence of any special antenuptial agreement or marriage settlement to the contrary, a partnership is formed by the operation of the law; that is, a legal partnership, the management of the wife's property being vested in the husband.[42]

This, the most common system of matrimonial property

[41] A minor less than 18 years of age cannot engage in commerce in Brazil, not even through or with the concurrence of his father or guardian. Carvalho de Mendonça *op. cit.*, vol. 2, par. 27, Art. 386 c. c.

[42] The only codes that have departed from the traditional legal partnership are those of Costa Rica, 76 c. c., Honduras, 169 c. c. and Panama, 1,163 c.c. In Mexico, Carranza by decree of April 16, 1917, established new provisions for the government of family relations in the Federal District and Federal Territories. Art. 270 of said decree declares that the consorts shall retain the ownership and administration of their respective property; hence the proceeds of and accessions to said property are not common. Article 44, however, declares that the wife cannot establish a commercial enterprise without her husband's permission, unless the latter has abandoned her or has no property of his own and is incapacitated to work. Moreover, husband and wife, if of legal age, have full power to manage their property and to dispose of it, without the husband requiring the consent of the wife, or the latter, the authorization of her husband, not even to appear in court. Arts. 45, 46.

arrangement, is known as the system of legal partnership (*sociedad legal*).[43] Besides the husband's management of the partnership property, one of its distinguishing characteristics is that on the dissolution of the marriage the respective spouses or their representatives receive back the amount originally contributed to the partnership, plus half of the increase or profits. This matter is often of vital interest to creditors. Matrimonial property may be divided into the following classes:

(*a*) property which forms the fund or capital of the legal partnership;

(*b*) property which belongs to the husband, the proceeds of which go to the partnership;

(*c*) property belonging to the wife, the proceeds of which go to the partnership;

(*d*) property belonging exclusively to the husband;

(*e*) paraphernalia or property belonging exclusively to the wife;

(*f*) dowry or property of the wife, the proceeds of which are received by the husband for the expenses of the family.

Authorization to trade given to the wife.

Notwithstanding the general disability to engage in trade, this authorization having once been conferred, and she having entered into business, she may freely enter into commercial contracts without need of further special authorization and, naturally, her transactions may affect the matrimonial property, as will be noted presently.

Conditions of authorization.

The wife must have attained a certain age before she may be authorized to trade. This age varies from country to country: In Chile [44] she must be over 25, in Spain,[45] Argentina,[46] Bolivia,[47] Guatemala,[48] Honduras,[49] and Nic-

[43] This system prevails in Louisiana.

[44] Art. 11. [45] Art. 6. [46] Art. 14.

[47] Art. 3. [48] Art. 10. [49] Art. 11.

argua [50] over 21; in Costa Rica[51] over 20 years; in Brazil,[52] Colombia,[53] Mexico,[54] and Uruguay[55] over 18, and in Peru[56] over 16 years. Other countries are silent on this matter hence it may be inferred that the wife in those countries can be authorized to trade therein when she is of legal age.

In Chile [57] the wife, being over 21 years of age, and in Honduras [58] the wife being over 18 and under 21 years of age, can be authorized to engage in commerce under the following conditions:

1. If the husband is of legal age, the authorization may be given in a formal deed; if he is a minor, judicial approval of his act is necessary;

2. The decree of approval must be registered and published according to law.

Form of authorization.

There are three systems prevailing with regard to the authorization conferred on the wife:

1. The authorization may either be expressed in writing or may be tacit, when the wife trades with the knowledge of her husband, who does nothing to manifest his disapproval.[59]

In Brazil [60] the authorization may also be tacit when, prior to the marriage, the wife had already been a merchant and the husband has not, after marriage, withdrawn the authorization in writing addressed to all persons formerly in commercial relations with her, filed in the mercantile registry and published in the local papers.

2. The authorization must be given in a public instrument.[61]

[50] Art. 3. [51] Art. 5. [52] Art. 1.
[53] Art. 12. [54] Art. 8. [55] Art. 18.
[56] Art. 6. [57] Art. 12. [58] Art. 12.

[59] Spain, 7; Argentina, 15; Chile, 11 (only when the wife is over 25 years of age); Ecuador, 12; Guatemala, 12; Peru, 7; Uruguay, 19; Venezuela, 14.

[60] Art. 29.

[61] Bolivia, 3; Brazil, 1; Colombia, 12; Mexico, 8; Panama, 17.

A bankrupt may authorize his wife to trade. Brazil *Tribunal de Justicia de S. Paulo*, May 4, 1893. *Gaceta Jurídica de S. Paulo*, vol. 32, p. 88.

3. The codes of Haiti, Nicaragua and Santo Domingo are silent with respect to the form of the authorization.

The authorization is to be registered in the commercial registry.[62]

It is not to be presumed that the wife is authorized to trade when she merely helps her husband in his business, deals in his stead and has no separate business.[63]

Uruguay[64] states another case in which the authorization is not to be presumed, namely, when the wife enters into a commercial association, unless it is expressly stipulated and published that she is to have a share in the management of the affairs of the company or association.

The order and unity of the family furnish the reason why the law has given the husband the power of authorizing his wife to trade. This fact explains why the courts have not been given the same power. It is expressly so provided by the codes of Argentina,[65] and Uruguay,[66] but in case the husband unreasonably refuses his consent to have his wife appear in court, when she has been previously authorized to trade, the court may supply the necessary consent.

Withdrawal of authorization.

The husband may freely withdraw the authorization to trade expressly or by implication granted to his wife; the withdrawal must be expressed in a public deed, duly inscribed in the commercial registry and published in the official papers.[67] In Guatemala[68] the inscription in the registry is not required. In Ecuador[69] the authorization cannot be withdrawn without judicial approval. In Spain,

[62] Spain, 6; Argentina, 14; Brazil, 5; decree No. 596 of July 19, 1890. Art. 48; Ecuador, 28; Mexico, 21; Panama, 17; Uruguay, 25; Venezuela, 22.

[63] Chile, 14; Ecuador, 13; Guatemala, 14; Panama, 31; Santo Domingo, 5; Uruguay, 17. Acts performed by a woman in the management of a commercial house while her husband was in prison bind the latter, for she acted in his stead. Brazil, Judge of 1st Instance of S. Paulo, March 11, 1898, and *Tribunal de Justicia of S. Paulo*, May 24, 1899, *Gaceta Jurídica de S. Paulo*, vol. 22, p. 63.

[64] Art. 16. [65] Argentina, 16. [66] Art. 20.

[67] Spain, 8; Argentina, 21; Brazil, 28; Chile, 13; Mexico, 10, 17, 21, IX; Panama, 21; Peru, 8; Uruguay, 25; Venezuela, 25.

[68] Art. 13. [69] Art. 20.

Brazil, Mexico and Peru, the withdrawal of the authorization must be made known to other merchants by means of circulars.

The codes of Bolivia, Colombia, Haiti, Nicaragua, San Salvador and Santo Domingo are silent on this important matter.

If the withdrawal has not been published and inscribed, it will not produce any effect as against third parties. In Mexico it does not operate until ninety days after its publication in the papers and in the commercial establishment of the wife.[70]

Cases in which authorization is unnecessary.

The wife can trade without her husband's authorization—

1. when she is separated from her husband by virtue of a final decree of divorce;[71]
2. when her husband has been subjected to guardianship;
3. when her husband is an absentee, his whereabouts being unknown and his return not expected.[72] Mexico and Panama add to these the case when the husband has been deprived of his civil rights.

The other codes are not so explicit, but the force of facts is superior to the lawmaker's foresight. Divorce, even though it does not break the conjugal ties, puts an end to the common living and matrimonial partnership; the submission of the husband to guardianship renders him unable to give his consent, and his absence in the legal meaning of the word carries with it the presumption of death. Under such circumstances the wife could not be left under a perpetual disability because of a matrimonial unity which does not in

[70] Article 44 of the above mentioned decree of April 12, 1917, provides only that the husband, two months previous to the withdrawal, must notify his wife of the same in writing.

[71] Divorce, according to most Latin-American codes, does not liberate the spouses from the matrimonial bonds; it only liberates them from the obligation of living together and puts an end to the matrimonial partnership and to the authority of the husband.

[72] Spain, 11; Ecuador, 14, 18; Mexico, 8; Panama, 17; Peru, 11.

fact exist or which cannot be represented by the husband. For these reasons, notwithstanding that the Brazilian code makes mention only of divorce among the circumstances which permit the wife to trade without the husband's authorization,[73] Carvalho de Mendonça,[74] an eminent authority on commercial law, mentions absence and subjection of the husband to guardianship among the circumstances which liberate a married woman from the requisite of marital authorization. Bolivia[75] like Brazil, refers only to the case of divorce. Colombia[76] mentions the case of separation of property, *i. e.*, when there is no legal or contractual partnership between the spouses. Chile,[77] Guatemala[78] and Venezuela[79] refer to separation of property and divorce.

The codes of Chile[80] and Venezuela[81] require judicial authorization in the cases above mentioned where the wife can trade without the consent of the husband, if she is a minor.

Property liable for the commercial obligations of married women.

In matters relating to property that may be affected by the results of the commercial transactions of a married woman, it is necessary to make certain distinctions between the cases where the woman trades (*a*) with and (*b*) without the expressed or implied authorization of her husband.

In the first case there are four systems, as follows:

1st. The property of the wife, that of the matrimonial partnership and that of her husband are responsible for the commercial transactions of the wife.[82]

2d. Her own property and that of the matrimonial community (conjugal partnership) are responsible.[83]

[73] Art. 1.

[74] Carvalho de Mendonça. *Tratado de Direito commercial Brazileiro*, S. Paula, Cardoso Filho, 1910.

[75] Art. 3. [76] Art. 12. [77] Art. 16.

[78] Art. 10. [79] Art. 17. [80] Art. 16.

[81] Art. 17.

[82] Chile, 15; Ecuador, 15; Haiti, 5; Santo Domingo, 5.

[83] Spain, 10; Argentina, 14; Colombia, 13; Guatemala, 10; Mexico, 9; Nicaragua, 4; Panama, 22; Peru, 10; Uruguay, 18; Venezuela, 16.

A promissory note signed by a woman without her husband's authorization

3d. Her own property and her share in the conjugal partnership are responsible.[8]

4th. Only her own property is responsible.[85]

When a woman trades without her husband's authorization the matrimonial property is liable according to the following systems:

(*a*) property of her own and that of the partnership arising from her dealings; [86]

(*b*) her own property and the profits of the partnership; [87]

(*c*) only her own property.[88]

Power of a merchant woman to sell and mortgage real estate.

A married woman, authorized to trade, has power to dispose of real estate, with limitations according to the following systems:

1st. She can sell and mortgage her own property and that of the conjugal partnership.[89]

2d. She can sell and mortgage her own property.[90]

3d. She can mortgage only her own property.[91]

gives rise to an action against her, and binds her own property. Argentina, *Camara de Apelación commercial, Camissa v. Stant*, March 5, 1914. *Jurisp. de los Trib. Nacs.*, March, 1914, p. 170.

[84] Brazil, 27.

Property acquired in commerce by a married woman is liable for all obligations of her husband arising during the marriage under the régime of partnership. Brazil, *Tribunal de Just. de S. Paulo*, Feb. 27, 1902, *Gaceta Jur. de S. Paulo*, vol. 29, p. 170.

The creditors of a married woman and those of her husband have an equal right to property obtained by her in commerce. *Trib. de Just. de S. Paulo*, May 4, 1903, *Gaceta Jur. de S. Paulo*, vol. 32, pp. 89–90.

[85] San Salvador, 8.

[86] Spain, 12; Peru, 12.

[87] Ecuador, 18; Mexico, 9.

[88] Colombia, 13; Guatemala, 10; Uruguay, 18.

[89] Spain, 10; Peru, 10; Colombia, 13.

[90] Chile, 17; Haiti, 7.

[91] Argentina, 19; Bolivia, 4; Ecuador, 16; Guatemala, 11; Mexico, 9; Uruguay, 24.

Powers of a merchant woman to appear in court.

The codes of Guatemala,[92] Mexico,[93] and Venezuela,[94] grant a woman who has been authorized to trade the power to appear in court.[95]

The codes of Chile [96] and Uruguay [97] expressly prohibit a merchant woman from appearing in court without special authorization of her husband.

Art. 19 of the code of Panama provides that a merchant married woman cannot enter into any partnership or any form of association which may bind her illimitably, without special authorization of her husband, set forth in the contract of association.

FOREIGNERS

The most liberal principles are, as a rule, established in Latin-America in reference to foreigners, who in many cases due to diplomatic protection, enjoy in effect greater privileges than citizens.[98] Notwithstanding the opinion of Fiore that the Italian civil code of 1865 was the first to establish civil equality between the alien and the citizen, it is a fact that Andres Bello incorporated this liberal provision in the Chilean civil code in 1855, while, in Mexico the principle was recognized as far back as 1822, in the constitutional basis of

[92] Art. 92. [93] Art. 9. [94] Art. 16.

[95] Article 22 of the commercial code of Argentina is at variance with articles 188 and 190 of the civil code, because while the former positively prohibits the woman from appearing in court without the consent of her husband or that of the court, the latter assumes that the woman is authorized thereto by the mere fact that she exercises publicly some profession or industry in matters referring to said profession or industry. It seems that the commercial law, because it constitutes in Argentina an exception to the civil law, should prevail in this matter, but this is not the case, because the matter relates to family relations, and to rights and obligations of the spouses, which are exclusively governed by the civil law. Such is the doctrine of the article of the draft of amendments to the commercial code. *Cf.* Obarrio. *Commentarios al código de comercio*, vol. I, p. 78, and *Jurisprudencia Comercial*, vol. 3, p. 386.

A married woman does not need her husband's authorization to appear in court when he is subject to guardianship. Bolivia, *Corte Suprema*, March 18, 1882, *Gaceta Jud.*, No. 505, p. 8.

[96] Art. 18. [97] Art. 22.

[98] *Cf.* Borchard, E. M. Diplomatic protection of citizens abroad. New York, 1915, sec. 33 *et seq.*

February 22d of that same year, and in the previous decree of January 9, 1822. Nevertheless, there are some exceptions to the favored position of a foreigner, which it is necessary to point out.

The Spanish code [99] provides that foreigners and commercial associations, corporations and partnerships, organized in foreign countries may do such business in Spain as they have legal capacity to engage in under the law of their country, whereas in all matters relating to the organization of their business within the territory of Spain, to their commercial acts and to the jurisdiction of the courts, they are subject to the Spanish law. This provision is to be understood without prejudice to the stipulations of international treaties.

Even though the phraseology of the law in other countries may be different and in some cases reference is made not to the law of the country but to the law of the domicil, as, for example, in Argentina, the fundamental principles of international law upon this matter are accepted, as expressed in article 15 of the Spanish code, by all the Latin-American countries which follow the principle of equality between foreigners and citizens in commercial matters.

We may classify the Latin-American countries into the following systems:

1st. Those which declare that foreigners and citizens enjoy legal equality in relation to commerce.[100]

[99] Art. 15.

[100] Spain, 15; Argentina, 6; Brazil, 39; Chile, 57, c. c.; Colombia, 19; Costa Rica, 21 c. c., 12 Const. and Art. 14 of the law of Dec. 21, 1886, which repealed art. 19 of the code of commerce; Guatemala, 18; Paraguay, law of May 20, 1845, Art. 1; Uruguay, 31.

The Spanish law of July 4, 1870, relating to foreigners was in force in Cuba, and according to the military government's declaration of Jan. 1, 1899, it is still in force in the island.

A law which imposed unequal contributions or taxes upon foreigners other than those imposed upon citizens was held unconstitutional. Brazil, *Corte de Apelação de Capital Federal*, May 9, 1898, *Revista de Jurisprudencia*, vol. 4, pp. 59–76.

In reference to Brazil see also Const., article 13, decrees No. 123 of Nov. 11, 1892, and No. 2,304 of July 2, 1896.

2d. Those which leave the matter to be decided by treaties and in default thereof proclaim the principle of reciprocity.[101]

3d. The code of Nicaragua,[102] which, while declaring equality between foreigners and citizens in commerce, subjects that equality to the condition that he possess a commercial establishment in the republic.

In Venezuela the law of June 24, 1919, declares that aliens shall enjoy the same rights as Venezuelans with the exceptions established in the same or other laws. Aliens are divided into two classes, resident and transient. Aliens, in arriving in Venezuela, shall present themselves within

[101] Mexico, 12, 14 and article 32 of law of May 28, 1886; Bolivia, 6.

Article 33 of the Mexican constitution of 1857 provided that aliens are entitled to the guarantees granted to man by the first section of that constitution, except that in all cases the government has the right to expel *pernicious* foreigners.

This provision was a source of insecurity for foreigners in that country.

The new constitution provides as follows: . . . "but the *executive* shall have the exclusive right to expel from the republic forthwith, and *without judicial process, any foreigner whose presence he may deem inexpedient.*

Article 27 of the same constitution provides, with reference to foreigners as follows:—"Only Mexicans by birth or by naturalization and Mexican companies have the right to acquire ownership in lands, waters and their appurtenances, or to obtain concessions to develop mines, waters or mineral fuels in the Republic of Mexico. The Nation may grant the same right to foreigners, provided they agree before the Department of Foreign Affairs to be considered Mexicans in respect to such property, and accordingly not to invoke the protection of their governments in respect to the same, under penalty, in case of breach, of forfeiture to the Nation of property so acquired. Within a zone of 100 kilometers from the frontiers, and of 50 kilometers from the sea coast, no foreigner shall under any condition acquire direct ownership of lands and waters."

"Commercial stock companies shall not acquire, hold, or administer rural properties. Companies of this nature which may be organized to develop any manufacturing, mining, petroleum or other industry, excepting only agricultural industries, may acquire, hold or administer lands only in an area absolutely necessary for their establishments or adequate to serve the purposes indicated, which the Executive of the Union of the respective State in each case shall determine."

"Excepting charitable corporations and banks no other civil corporation may hold or administer on its own behalf real estate or mortgage loans derived therefrom, with the single exception of buildings designed directly and immediately for the purposes of the institution."

[102] Art. 11.

fifteen days before the highest political authority in their place of residence to prove their identity, their intentions of settling in Venezuela and the business or occupation in which they intend to engage. Aliens shall observe strict neutrality in regard to Venezuelan national affairs. Those who infringe this neutrality shall be considered dangerous persons and may be deported from the republic. They shall not have the right to take recourse to diplomatic means until all legal means have been exhausted and it is evident that justice has been defaulted. They shall have the right, like citizens, to indemnity from the government for damage caused intentionally in times of war by legally constituted authorities acting in their official capacity. Entry to Venezuela is forbidden to aliens disturbing the public peace, or whose presence may jeopardize the international relations of the republic.

CHAPTER V

MERCANTILE REGISTRY

SPAIN.—Estadística del registro mercantil formada por la dirección general de los registros. . . . Ed. oficial. Madrid, 1901.

An extensive report on the registration of commercial firms and associations in the various countries of Latin-America, including English translations of the texts of the law, is printed in the British Parliamentary Papers, House of Commons Sess. Papers, 1908, vol. 107 [Cd. 4420].

Object of the commercial registry.

Publicity is one of the characteristic needs of commerce. The more advanced the methods of doing business, the greater the benefits derived from publicity.

It is necessary, however, to distinguish between two classes of necessity met by publicity, the one economic, the other legal. The first is voluntarily undertaken by merchants in any manner they may deem most suitable—by means of the press, by signs, labels, marks, pictures or any other device to attract the attention and patronage of the public.

As the very effectiveness of this method of economic publicity, however, may subject the public to deception, the law has created a system of publicity designed not for the benefit of the merchant chiefly, but for the protection of the public. This system is the Commercial Registry. Economic publicity is a privilege widely exercised by merchants; legal publicity is its natural corresponding obligation.

The distinction between the *matrícula* and the Commercial Registry and the evolution of the one into the other will be explained presently.

Matrícula of merchants.

When mercantile law regulated not commercial acts as such, but the acts of a certain class of the community, it was necessary to have a list of merchants in every locality and

that list was the first form of publicity adopted by the law. Such was the origin of the *matrícula* which still exists in Argentina,[1] Bolivia,[2] Brazil,[3] Ecuador,[4] Nicaragua,[5] Panama [6] and Uruguay.[7]

The *matrícula* was kept in the beginning by administrative authorities, who passed upon the title of an applicant to admission thereto. Now only Bolivia,[8] Nicaragua[9] and Panama [10] preserve this system. In Panama [11] however, decisions rendered by the governors of the provinces refusing to matriculate a merchant may be revised by the courts.

In Argentina,[12] in Brazil,[13] Colombia,[14] Ecuador [15] and Uruguay,[16] the *matrícula* is kept by the commercial court.

Contents of the matrícula.

The *matrícula* must contain, in Argentina [17] and Uruguay [18]: *a*, the name, status and citizenship of the merchant, and in case of a partnership or corporation, the names of the partners and the firm name adopted; *b*, the line of business engaged in; *c*, the location of the enterprise; *d*, the name of the manager, factor or employee at the head of the house; and *e*, the papers showing the capacity to trade in case of a married woman or a minor.

In Brazil [19] the same information is required except the merchant's line of business.

In Bolivia [20] the party must furthermore state the capital invested in the business and whether the trade is retail or wholesale.

Ecuador [21] also requires in case of a partnership, the names of the unlimited partners, a copy of the signature of the managers and of the circulars advertising the establishment, the continuation or the alteration of the commercial organization or business.

[1] Art. 25. [2] Art. 8. [3] Art. 4.
[4] Art. 21. [5] Art. 6. [6] Art. 45.
[7] Art. 32. [8] Art. 8. [9] Arts. 6, 7, 8.
[10] Art. 48. [11] Art. 53. [12] Art. 25.
[13] Art. 4. [14] Art. 32. [15] Art. 21.
[16] Art. 32. [17] Art. 27. [18] Art. 34.
[19] Art. 5. [20] Art. 10. [21] Arts. 22, 25.

Panama [22] requires: *a*, the commercial name of the party or firm; *b*, the name, age, status and citizenship of the individual or individuals who are represented in the firm name; *c*, the line of business; *d*, the date on which the person commenced or intends to commence business; *e*, the location of the main office; *f*, the name of the manager, factor or employee in charge of the establishment; *g*, the memorandum of inscription in the commercial registry, in case of a partnership or corporation; *h*, the documents duly registered, showing the legal capacity to trade of emancipated minors and married women; *i*, a copy of the signature of the merchant.

Effects of the matriculation.

Argentina provides that the inscription in the *matrícula* confers the following privileges and advantages: *a*, the books of matriculated merchants possess evidential value; *b*, the merchant can request a mercantile moratorium; [23] *c*, they can request a rehabilitation after bankruptcy; *d*, they can perform the functions of a receiver.

In Bolivia the law of Aug. 8, 1842, provides that merchants even though not matriculated are subject to commercial courts.

Panama[24] provides that when a merchant fails to comply with the requirements of the *matrícula*, he can be compelled by the competent authorities to do so under penalty of a fine of from twenty-five to one hundred *balboas*, (=U. S. dollars) and until he does comply he cannot enjoy any of the benefits the law grants to merchants. It likewise provides [25] that a commercial name registered in the *matrícula* cannot be registered by anyone but the owner thereof or his authorized

[22] Arts. 49 to 51.

[23] The benefits of the moratorium granted by creditors must be extended to a person when by reason of the lapse of time after matriculation it is not to be presumed that he matriculated himself with the sole purpose of enjoying the benefits thereof. Argentina, Camara de Apelación de la Capital Federal, Jurisp. Com., vol. I, p. 119. Ser. 5ª, vol. 36.

Cf. Infra, Chapters on Bankruptcy. The *rehabilitación* is the reëstablishment of the bankrupt in the exercise of his civil rights lost by bankruptcy.

[24] Art. 46. [25] Art. 52.

agent, thus recognizing and protecting the right of property in a commercial name; and, finally, it provides that only matriculated merchants are allowed to register their papers in the commercial registry.

Modern codes have experienced considerable difficulty in enumerating the benefits derived from matriculation, so that most of them are silent on this particular point.[26]

As a matter of fact matriculation, in subjecting merchants to the law of commerce, does not intend to confer on them a privilege, for while that law is sometimes beneficial, it often is not; but on the contrary matriculation imposes on merchants strict obligations and only aims to foster the circulation of wealth for the well-being of the community.

The Spanish code of 1829, following the tradition, provided for the matriculation of merchants; but at the same time it introduced the institution of the commercial registry, recording facts in relation to the financial condition of a merchant for the information of the public. It provided for the inscription in the registry of documents relating to the dowry of the merchant's wife, the pecuniary stipulations of the matrimonial contract, articles of organization of partnerships or corporations, and powers of attorney given by merchants.[27]

On the other hand, the new code of Spain omitted the *matrícula* as superfluous and devoted more attention to the commercial registry. Chile, Costa Rica, Honduras, Mexico, Peru, San Salvador and Venezuela have adopted this single system of legal publicity.

Method of publicity established in Mexico.

Mexico [28] also requires a merchant: *a*, to announce the

[26] In Brazil it has been so difficult that several times it has been necessary to make explanations, as in decree No. 930 of March 10, 1852; order of the Ministry of Justice No. 188 of July 2, 1853; decision No. IV of July 6, 1857, rendered by the commercial courts of the capital and of Bahia, Pernambuco and Maranhao; decree No. 1597 of May 1, 1855; and decree No. 596 of July 19, 1890.

[27] Argentina, 25–35; Bolivia, 8–20; Ecuador, 21–27; Nicaragua, 13, 14; Panama, 45–55; Uruguay, 32–45.

[28] Art. 17.

opening of his establishment by means of circulars addressed to merchants in his own town, or of the place where he has branches or other commercial connections. These circulars must contain the name of the establishment or office, its location and purpose, the name and signature of the person in charge of its management; in case of a partnership or corporation, its character, name of the manager, the firm name and the persons authorized to sign it, and a statement of their houses, branches or agencies, should there be any; *b*, also to announce by means of circulars any changes made in the foregoing details; *c*, to publish in the official paper, and in default thereof in some other paper, the above mentioned circulars, as well as notice of the fact that the house has been put in liquidation or that the business has been wound up.

Organization of the commercial registry.

The Commercial Registry is an office of the state, which, under the direction of a public official called the Registrar, is designed to inscribe commercial persons and such acts relating to mercantile enterprises as the interests of commerce may require.

Article 16 of the Spanish and Peruvian codes reads:

"In each of the capitals of the provinces there shall be a commercial registry, divided into two separate books: the first for individual merchants, the second for partnerships and corporations. In the provinces of the coast and in those inland provinces in which navigation may be carried on, the registry must have another book for the inscription of vessels."

Argentina [29] and Uruguay [30] provide that there must be as many books in the office of the registry as there are kinds of commercial acts to inscribe; that is, five volumes in Argentina and four in Uruguay.

Bolivia [31] and Venezuela [32] require a single book.

[29] Art. 35.
[30] Art. 46.
[31] Art. 25.
[32] Art. 21.

In Costa Rica,[33] besides the book for the general register, there is a special book for powers of attorney.

In Chile,[34] Ecuador, Honduras, Mexico, Nicaragua and San Salvador no mention is made of the number of books.

Acts and contracts subject to inscription in the registry.

The kinds of commercial acts or contracts which must be inscribed vary from country to country, and we may classify the Latin-American codes in this respect into two systems:

(*a*) those which follow the Spanish code of 1829;

(*b*) those which follow the Spanish code of 1885.

1st System: The documents which must be inscribed are: *a*, those which specify the property managed by the merchant, but belonging to his wife; *b*, articles of organization of a partnership or corporation; *c*, powers of attorney given to factors and clerks; *d*, authorization to married women and to minors to do business, and revocations thereof.[35]

Bolivia, Honduras and San Salvador do not require the inscription of the authorization given to married women and to minors.

Chile, Ecuador, Honduras and San Salvador require the inscription of documents specifying the property which belongs to the merchant's children.

In Ecuador, licenses for brokers and judicial declarations of bankruptcy require inscription.

2d System. On the registration page of every merchant or commercial association there shall be recorded:

a, name or firm name; *b*, line of business; *c*, date on which the business was begun or is to begin; *d*, the principal residence or home office, specifying the branches already established; and in addition, each branch must be registered in the registry of the province in which it is located; *e*, deeds (public instruments) of

[33] Arts. 2–5 of law No. 13 of June 21, 1901.

[34] Decree of August 1, 1866, regulates the Commercial Registry in Chile.

[35] Argentina, 36; Bolivia, 21; Chile, 22; Ecuador, 28; Honduras, 22; Nicaragua, 14; San Salvador, 12; Uruguay, 47.

organization of commercial associations, whatever their object and name; as well as notices of all changes, liquidation and dissolution of commercial associations; *f*, general powers of attorney, as well as their revocation, given to managers, factors, clerks, and other agents; *g*, the authorization given by the husband to his wife to engage in business and the legal or judicial authorization granted to the married woman for the administration of her property in case of the absence or incapacity of her husband; *h*, the revocation of the authorization to trade given to the wife; *i*, deeds constituting dowries, matrimonial contracts and instruments proving that the property belongs to the merchant's wife; *j*, the issue of shares, bonds, and the obligations of railways and every kind of corporation engaged in public works, credit, et cetera; expressing the series, number and denomination of securities of every issue; their interest, amortization and redemption, should these be shown; the total amount of the issue; and the property, works, rights, or mortgages, if any, pledged or liable for their payment; there shall also be recorded in accordance with the foregoing provisions, issues of securities by private parties; *k*, the issue of bank-notes, stating the date, kind, series, amount and denomination of every issue; *l*, the certificates of industrial property, trade-marks and patents granted in accordance with the law.

Foreign commercial associations wishing to establish themselves or create branches in Spain must present and have filed in the registry, besides their by-laws and the documents required for Spanish companies, a certificate issued by the Spanish consul stating that they have been constituted and authorized in accordance with the laws of their respective country of origin.

In the register of vessels notice shall be taken of:—

The name of the vessel; her equipment; the system and power of her engines; if a steamer, the nominal or indicated horse-power; place of construction of hull and engines; year of construction; material of the hull, stating whether of

wood, iron, steel or of mixed substances; main dimensions of length, breadth of beam and depth of hold; gross and net tonnage; distinctive signal by which she is known in the international code of signals; and lastly, the names and residences of the owners of the vessel. There must also be recorded any change effected in the ownership of the vessel or in any of the foregoing details, as well as the imposition, modification or cancellation of liens or obligations of every kind upon the vessel.

This system is substantially followed by the codes of Mexico,[36] Panama,[37] Peru,[38] Costa Rica[39] and Venezuela,[40] but principally in the first three. Mexico and Panama require in addition that the documents relating to a minor's authorization to trade, and in Mexico, that the property of the merchant's children managed by him, be inscribed. Peru relieves from the requirement of registry, bank-notes, bonds or securities; but extends it to brokers' licenses and to declarations of bankruptcy, their revocation, the appointment of receivers and the rehabilitation of the bankrupt. Venezuela requires the inscription of the authorization given to the father or guardian for continuing the business belonging to a minor; of the sale of a commercial enterprise or its stock in bulk or in portions, in such manner that the owner ceases to carry on the enterprise; and of licenses granted to brokers.

New system of Cuba.

According to article 2 of the regulations of December 21, 1885, for the commercial registry of Spain, in force in Cuba by virtue of royal decree of February 12, 1886, the registrars of property in the capital of every province, and in default of such, the agents of the government in the municipal courts were to take charge provisionally of the commercial registry; and military order No. 400 of September 28, 1900, provided that the registrars of property in the capital of each province shall provisionally take charge of the commer-

[36] Art. 21. [37] Arts. 57–58. [38] Arts. 15 to 22.
[39] Art. 2 of decree of June 21, 1901. [40] Art. 22.

cial registry as long as the commercial registrars were not appointed, their jurisdiction being confined to the limits of the province. Military order No. 400 has been complemented by decree No. 1056 of 1908, which establishes the commercial registrars, decree No. 65 of 1909, and others of minor importance.

The same order 400 of 1900, provides in article 1 that after the date of its promulgation "all merchants or industrials, owners of establishments wholesale or retail, in every line of commerce or industry shall inscribe the same in the commercial registry," and article 4 prescribes that in case the inscription is not made within eight days after the merchant or industrial starts business or opens his establishment, he will be fined $25.00 United States currency. Finally article 19 of the order imposes upon registrars the obligation of notifying the Treasury Department of cases in which persons have become liable to said fine. Married women who trade must state that fact in the commercial registry.[41]

A most important change introduced by order 400 enables any merchant or industrial inscribed in the commercial registry, who has an evidence of credit consisting in a promissory note, an account current, or receipt signed by another inscribed merchant, and originating in money loaned or goods supplied or services rendered, to inscribe his credit in the registry, presenting the original document and swearing to the authenticity of the debtor's signature. The inscription is to be made by means of an entry signed by the creditor under oath in the corresponding book of the register, and a full copy of the document recorded. Should the debt be evidenced by a public instrument executed by the debtor, the personal appearance, the oath of the creditor and the full copy of the document are not necessary, the abstract of the document being sufficient.

Order 34 of 1902 in the matter of railway lands contains some provisions relating to the commercial registry.

[41] Art. 29, of the regulations of December 21, 1885.

Enforcement of the law of commercial registry.

There are four systems followed for the enforcement of the law of commercial registry, namely:

1. *The German system.* According to this system the failure to register is punishable by fine. This practice is followed by Cuba, as we have observed, by Bolivia,[42] providing that in case a document which must be registered is produced in court without prior registration, the parties must pay a fine of 5% of the amount expressed in the document. Ecuador [43] imposes a fine of one hundred pesos ($48.70 U. S.) upon the parties who fail to register and twenty pesos upon the public official before whom the document was executed, or the judge who issued the decrees or judgments which ought to have been, but were not registered in the commercial court and in the office of the registrar; and imposes a fine of twenty pesos upon the clerk of the commercial court who fails to draw up an abstract of the papers inscribed or fails to preserve the abstract for six months. Venezuela [44] has a like provision with the difference that the fine imposed is 500 bolivars ($96.50 U. S.) for the parties and 100 bolivars for the officials, judges and clerks. In San Salvador the fine is imposed only upon the parties and the amount is from 25 to 100 pesos (from about $10 to $39.78 U. S.).

2. *The Spanish system.* Although inscription is not compulsory upon individual merchants but only upon commercial associations and with respect to vessels, the law endeavors indirectly to effect the registration of certain kinds of commercial instruments by individual merchants as well as by associations, by depriving the unregistered commerical instrument of legal effect as against third parties. It will be recalled that the purpose of the institution is to give publicity to certain kinds of acts and contracts.[45]

[42] Art. 31. [43] Art. 31. [44] Arts. 24, 25, 26.

[45] Spain, 24, 26 to 29; Costa Rica law of June 21, 1901, Art. 4; Mexico, 26 and 27; Panama, 68; Peru, 24, 26 to 29.

In Mexico, the bankruptcy of a merchant who has failed to inscribe his documents, is considered fraudulent.

The new code of Panama has devised a useful system which is calculated to avoid serious difficulties. It provides that besides the definite inscription in the commercial registry, provisional inscription covering the following documents can be made in the same books in which the definite ones are entered:

(*a*) matrimonial stipulations, whether entered into before or after marriage;

(*b*) demands for separation of matrimonial property or *interdicción* of merchants; [46]

(*c*) documents of transfer or mortgage of vessels;

(*d*) minutes of partnerships or corporations embodying decisions as to the reduction or increase of the corporate capital, or the merging or extension of the period of duration of commercial associations;

(*e*) all other acts subject to registration, when the registrar is in doubt as to the legality of a definite inscription of such documents. These provisional registrations are made definite, as to those referred to under letter *a*, when the certificate of marriage is presented; as to those covered by letter *b*, when a final judgment is obtained; as to those covered by letter *c*, when the contract is produced; as to those covered by letter *d*, when a certificate is presented, showing that there was no opposition to the decision taken or that the opposition was deemed irrelevant; as to those covered by letter *e*, when a judgment declares unfounded the doubts of the registrar. These provisional registrations lapse if, six months after they have been made they

Commercial associations are bound to comply with the law of registry, but failure to do so does not deprive them of the rights derived from contracts entered into by them. Mexico, Segunda Sala del Tribunal Superior del Distrito Federal, Ruiz y Hermanos *v.* Mijares, Sept. 11, 1911, and Juzgado 5. Menor del Distrito Federal, Singer Mfg. Co. *v.* Gutierrez, Nov. 6, 1889, *Aunario de Leg. y Jur. Sec. de Jur.*, vol. VII, p. 31.

[46] By *interdicción* is meant the status of a person who has been declared incompetent to contract obligations on account of insanity.

are not made definite, unless they refer to shares, or deprivation of rights (incompetence), or separation of matrimonial property, in which case the provisional inscription lasts until a final judgment is rendered.

3. *The Chilean system.* The difference between the Chilean and the Spanish system lies in the fact that according to the former, documents not registered do not produce any effect upon the parties to them, but produce their full effect with respect to third parties.[47] Nevertheless, in Argentina and Uruguay partners in rights or interests acquired by the association cannot avail themselves of lack of registration as a defense.

4. *System of Nicaragua.* According to the Nicaraguan code,[48] unregistered contracts of commercial associations are without legal effect among the associates; but with respect to the obligations contracted with a third party, they are binding only between the latter and the contracting associate. Unregistered powers of attorney are entirely null and void.

Connection between the commercial registry and the general registry of property.

Notwithstanding the independence of the commercial from the civil law, the commercial codes of Spain [49] and Peru [50] provide that the merchant's wife has a right of preference over the other creditors of her husband with respect to all real property and rights in it belonging to her, notwithstanding the fact that the corresponding documents are not recorded in the commercial registry, provided they have been entered in the registry of property.

Mexico [51] and Panama [52] provide, in a general way, that

[47] Chile, 24; Argentina, 41; Honduras, 24; Uruguay, 52, 53.

The fact of inscribing articles of agreement of a commercial association implies an acknowledgment that it is intended to engage in commerce. Argentina, *Jur. Com.*, vol. 2, p. 116, Ser. 5ª.

In order to have a commission agent inscribed in the commercial registry he must prove that he is a merchant. *Ibid.*, vol. 1, p. 166, Ser. 4.

[48] Arts. 17, 18. [49] Art. 27. [50] Art. 27.

[51] Art. 26. [52] Art. 67.

notwithstanding the omission of inscription in the commercial registry of documents relating to real estate or rights in it, they have legal effect as to third parties provided they have been entered in the registry of property according to the civil law.

Foreign commercial associations.

Foreign commercial associations desiring to establish branches in the country must record in the commercial registry, in addition to their by-laws and other documents required by the national law for all national commercial associations, a certificate from the national consul to the effect that said associations have been organized in accordance with the laws of the country of origin.[53]

In Argentina, by law number 8867 of February 6, 1912, foreign corporations are dispensed, under condition of reciprocity, from the obligation imposed on them by article 287 of the commercial code, of obtaining a preliminary authorization from the Executive in order to do business in Argentina; they need merely show that they are regularly constituted in their home countries and register their by-laws.

In Mexico [54] foreign commercial associations must inscribe the first certified copy (*testimonio*) of the "protocolization" [55] of their by-laws, articles of agreement and other papers referring to their organization, the inventory and last balance sheet, if they have any, and a certificate that they have been organized and authorized according to the law of the country of origin, issued by the Mexican diplomatic representative accredited to that country, and in his absence, by the Mexican consul. Documents proceeding from foreign countries and subject to registration must first be protocolized in Mexico.

In San Salvador the code [56] provides that articles of agree-

[53] Spain, 21; Peru, 21.

[54] Art. 24.

[55] By *testimonio* is meant the first certified copy made by the notary of a deed entered in his *protocolo* or notarial book; and by *protocolización* the filing of a document among those regularly kept by a notary in his *protocolo* or in the appendix thereof.

[56] Art. 12.

ment and by-laws of commercial foreign associations which establish branches in the republic, the document appointing a manager or agents and a copy of the recording of said documents and contracts in the court of commerce of the domicile of the aforesaid association, are subject to registration.

The commercial house or firm (casca de comercio).

The commercial *house* or firm is the combination of everything that constitutes the assets and liabilities of a commercial enterprise.

The characteristic feature of a commercial firm is its stability; the owner may change, but the firm may last for generations. The firm is a real entity and by means of its commercial activity a sphere of action is created for it. The commercial house may have credit independently of its owner, who may sell or transfer his interest; and considering it as a whole and as a unit, the firm may be the subject of rights, privileges, powers and immunities which require special attention on the part of the law, as they have attracted the special attention of writers like Endemann and Lyon-Caen. Unfortunately in Latin-America only three countries, Brazil, Panama and Venezuela, have a special section in their laws covering this matter, although the substance of the system may also be found in the codes of other countries.

Decree number 916 of October 24, 1890, in Brazil, provides that the registration of a commercial firm is optional, but the consequences of non-registration of a merchant or firm are:

(*a*) the commercial books do not constitute evidence;

(*b*) the declaration of bankruptcy of a debtor cannot be demanded;

(*c*) a settlement with creditors cannot be entered into.

On the other hand, registration of a firm produces the following benefits:

(*a*) irrebuttable evidence of the existence of the firm;

(*b*) a presumption that the firm is distinct from any other;

(*c*) a right to forbid the inscription of any other similar or homonymous firm.

The existence of a commercial firm may terminate:

(*a*) by the death of the merchant or the voluntary abandonment of his occupation;

(*b*) by liquidation of a commercial association;

(*c*) by the change of a partnership to a corporation.

The firm name cannot be assigned or transferred; it is inherent in the person who bears it, and to assign or transfer it would create a fictitious firm. Merchants or partners of commercial associations who transfer the enterprise to some one else, may authorize him to add to his own name the words: "Sucesor de . . ." (successor of) the vendor firm. The transferee having this right may prohibit his transferor from using the firm name.

Panama provides that every merchant must use a firm name, and inscribe it in the *matrícula* and in the commercial registry; that no one else may use said name, with judicial redress against any one who prepares to use it;[57] that the name of partnerships must include the name of one or more of the partners with some addition indicating that it is a partnership or limited partnership; and it must likewise be made clear when the name applies to a corporation.[58] On the other hand, an individual merchant cannot use a name which may suggest the idea of association, even in case of the total transfer of a commercial house to him by an association.[59] The commercial name must not suggest an enterprise not related to the actual business.[60] When one of the partners retires from a partnership, the firm name may continue unchanged, with the consent of the retiring partner or his heirs, the consent being published in the local paper.[61]

Venezuela provides [62] that an individual merchant cannot use any other firm name than his own; the firm name of a partnership must contain at least the name of one of the partners, with some indication that the firm is a partnership; a limited partnership must be designated by the name of one

[57] Arts. 36, 37. [58] Art. 39. [59] Art. 41.
[60] Art. 40. [61] Art. 43. [62] Arts. 29 to 34.

of the general partners and some indication that it is a limited partnership.

Every new firm must be distinct from other firms already registered.

The successor in the use of the firm name must add some statement to show that he is a successor.

The assignment of a mercantile firm name independently of the corresponding commercial house is prohibited.

When there is a change in a partnership, either because of the entrance of a new partner or the retirement of one of the former partners the firm may subsist, but the permission of the retiring member is necessary if his name is included in the firm.

CHAPTER VI

COMMERCIAL BOOKKEEPING

BRAZIL.—Carvalho dé Mendonça, José Xavier. Dos libros dos commerciantes. Estudo theorico-pratico. São Paulo, 1906.

General principles.

Bookkeeping, although a matter of convenience and personal benefit to the merchant himself, is, from the point of view of the law, a matter of social interest, an institution created principally for the benefit of third parties. The speed with which mercantile transactions are accomplished makes the fulfillment of the formalities of civil contracts an impossibility; hence the difficulty of adducing evidence in case of dispute. The book records kept by merchants are, indeed, the only trace of many mercantile contracts. By making the appropriate entries in their books, merchants are considered, by the law, as agents for the other parties to the transaction and this is a part of their social function.

On the other hand, merchants habitually make efforts to gain the good will and confidence of the public, which are business assets; but as a corresponding obligation to the benefit they derive from that confidence and credit, the law compels them to keep accurate records of their acts, in order that evidence may be at hand to prove them deserving of credit. In case of insolvency they can thus account to their creditors and to the community for the use they have made of that social confidence, and the court is enabled either to impose upon them the penalty incurred by unworthy persons having a quasi-public social status or is in a position to declare with certainty that the insolvency was due to circumstances beyond the control of human foresight, and that the merchant is still worthy of the public's confidence, and may continue in business. These general principles will serve as an aid in comprehending the legal rules of bookkeeping.

Books prescribed by the law.

A merchant may keep as many books as he thinks the management of his business requires; but the law makes it compulsory to keep some books with certain prescribed requisites considered appropriate for social security. The essential books are the journal and the letter-copying books, but the law of the different countries varies on this point. In dealing with the books required, we may divide the codes into the following groups:

1. Those which require five books or classes of books, namely: *a*, inventory and balance sheet; *b*, journal; *c*, ledger; *d*, letter and telegram copying book; *e*, minute book for partnerships and corporations and other books which the law may specially prescribe.[1]

2. Those which require four books, namely: *a*, inventory and balance sheet book; *b*, journal; *c*, ledger; *d*, letter and telegram copying book.[2]

3. Those which require three, namely: *a*, inventories; *b*, journal; *c*, letter copying book; *d*, minute book for partnerships and companies.[3]

4. Finally the code of Brazil,[4] which only requires the journal, letter-copying book, and minute book for partnerships and stock companies.

Besides these books generally required, various provisions of the law in each country mention other books needed for special purposes, as for brokers, companies, pawnshops, etc.

The law makes no distinction between individuals and associations, inscribed or not inscribed, natives or resident foreigners, ignorant or learned; all are bound to keep books, if they are merchants. But a distinction is made in certain countries with respect to the amount of capital of the trader

[1] Spain, 33; Costa Rica, law of July 5, 1901, articles 1, 8; Honduras, 25; Mexico, 33, 48; Peru, 33; Uruguay, 65; Panama, 73.

[2] Bolivia, 32; Chile, 25; Colombia, 27; Ecuador, 35, 54; Guatemala, 20; Nicaragua, 19, 37; Venezuela, 35–50.

[3] Argentina, 44; Haiti, 8, 9, 10; San Salvador, 18, also requires a minute book for partnerships and corporations; Santo Domingo, 8, 9, 10; Uruguay, 55.

[4] Brazil, 11.

or the character of the business. The countries may be divided into two groups:

1. Those which make no distinction; [5]

2. Those which distinguish between large and small dealers, or wholesalers and retailers.[6]

By a retailer is meant:

(*a*) In Argentina and Uruguay, one who sells: things that are measured, by the meter or by the liter; things that are weighed, in quantities smaller than ten kilograms; things that are counted, in single packages;

(*b*) In Chile, Honduras, San Salvador and Venezuela, one who habitually sells directly to the consumer;

(*c*) In Brazil, one whose capital is not over five contos of reis (about $1,500. U. S.), in Costa Rica, not over two thousand colonos ($1,000 U. S.), in Mexico, not over two thousand pesos ($1,000 U. S.), and in Panama, not over one thousand balboas. ($1,000 U. S.)

Small traders are not obliged to keep books in Brazil, Costa Rica and Mexico. They need keep only one book, comprising journal and statements, in Chile, Honduras, Panama, San Salvador and Venezuela. In Argentina the only concession in their favor is that they must draw up a balance sheet every three years only. In Uruguay a retailer is bound only to make an entry every day in his journal with the total amount of cash sales and another with the total amount of sales on credit.[7]

Inasmuch as the law of June 1st, 1906, of Mexico, which makes a distinction between traders according to the size of their capital, is directed to fiscal purposes only, some doubt may arise whether or not the code of commerce, which makes no distinction, is thereby amended.

[5] Spain, Bolivia, Colombia, Guatemala, Haiti, Nicaragua, Peru and Santo Domingo.

[6] Brazil, law No. 2024 of Dec. 17, 1908, article 167, No. 7; and decree No. 3564 of January 22, 1900; Chile, 30; Costa Rica, law of July 5, 1901, article 1; Mexico, law of June 1, 1906, article 167; Honduras, 42; Panama, 74; San Salvador, 36, 37; Uruguay, 3, 62; Venezuela, 40.

[7] Art. 58.

External form of mercantile books.

Merchants are required to present the books prescribed by the law, bound and paged, to the judicial authority of the district in which they have their commercial house, for official authentication. On the first page of every book the judge inscribes a signed statement of the number of pages contained in the book, and every page must be stamped with the seal of the court.[8]

Mexico [9] and Nicaragua [10] establish these requisites, but the books must be authenticated by an administrative authority.

In Haiti [11] and Guatemala [12] the judge is required to authenticate the books and mark their pages with his *rubrica* [13] every year. In Uruguay [14] the books must be presented every year to the commercial court in Montevideo or to the judge of first instance in other departments, in order to have the number of pages written in them certified.

In Chile [15] and Ecuador [16] the books are not authenticated.

Merchants may also keep any other books they may deem advisable, according to their business methods. These books do not require authentication, but they may be authenticated at the request of the merchant.[17]

Internal formalities.

Merchants, besides fulfilling all other requirements pre-

[8] Spain, 36.

During the Spanish régime in Cuba the books of merchants were subject to the stamp tax; but this tax was abolished by order of the United States Treasury Department on June 10, 1899. Argentina, 53; Bolivia, 33; Brazil, 13; Colombia, 31; Costa Rica, law of July 5, 1901, article 11; Guatemala, 34; Honduras, 29; Panama, 76; Peru, 36; San Salvador, 22; Santo Domingo, 11; Uruguay, 65; Venezuela, 36.

[9] Mexico, 34 and stamp tax law of June 1, 1906, article 171.

[10] Nicaragua, 24. [11] Art. 10. [12] Guatemala, 34.

[13] By *rubrica* is meant a flourishing line habitually drawn by every person below his signature.

[14] Art. 2 of law of January 25, 1916.

[15] Art. 30. [16] Art. 35.

[17] Spain, 23; Brazil, 10; Argentina, 43; Bolivia, 52; Chile, 28, 40; Colombia, 27, 34; Costa Rica, 17; Ecuador, 48; Guatemala, 45; Haiti, 8; Honduras, 27; Mexico, 33; Nicaragua, 19; Panama, 72; Peru, 34; San Salvador, 20; Santo Domingo, 8; Uruguay, 54; Venezuela, 44.

scribed by the law, must keep their books in a clear form; in the order of dates, without intervals, interlineations, erasures or blots; and without any substitution or tearing out of a sheet, or any other mutilation whatsoever.

As soon as a merchant discovers a mistake or omission in the entries in his books, he must correct it by means of a new entry explaining the error clearly and making the correct entry. If some time has elapsed since the mistake or omission occurred, the merchant must make the entry noting the fact of the correction at the margin.[18]

Language in which commercial books must be kept.

Commercial books must be kept in the language of the country.[19]

The penalty for failure to comply with this provision is a fine of 30 to 300 pesos in Bolivia and Mexico,[20] from 20 to 200 in Colombia, from 50 to 500 in Guatemala,[21] from 100 to 500 in Honduras,[22] and from 50 to 110 in San Salvador. In Ecuador [23] and Venezuela [24] the effect of the failure is that the books do not constitute legal evidence.

Argentina,[25] Brazil,[26] Chile,[27] Costa Rica,[28] Nicaragua,[29] and Panama [30] expressly authorize foreigners (Chile, Costa Rica and Panama authorize any person to keep books in a foreign language) to keep their books in their own language; but in case of a judicial contest the relevant parts of the book must be translated.

The codes of Spain, Haiti, Peru, Santo Domingo and Uruguay are silent on this matter.

[18] Spain, 43, 44; Argentina, 54; Bolivia, 43; Brazil, 14; Chile, 31, 32; Colombia, 37, 38; Costa Rica, law of July 5, 1901, article 12; Ecuador, 41, 42; Guatemala, 35; Haiti, 10; Honduras, 36, 37; Mexico, 36; Nicaragua, 25; Panama, 77; Peru, 43, 44; San Salvador, 29, 30; Santo Domingo, 10; Uruguay, 66; Venezuela, 41, 42.

[19] Bolivia, 42; Colombia, 32; Ecuador, 35; Guatemala, 21; Honduras, 26; Mexico,36; San Salvador, 19; Venezuela, 25.

[20] Mexico, 37. [21] Guatemala, 37. [22] Honduras, 26.

[23] Art. 23. [24] Art. 43. [25] Art. 66.

[26] Art. 16. [27] Art. 26.

[28] Art. 13 of law No. 20 of July 5, 1901.

[29] Art. 13 of the bookkeeping law.

[30] Art. 78.

The statement and balance book.

The statement and balance book is to be started by the merchant when he begins business, with the following entries:

1. an exact statement of his assets, in the form of cash, securities, credits, bills receivable, movable and real property, goods and items of every kind appraised at their proper value;

2. an exact statement of his liabilities and all pending obligations, if any;

3. a statement of the exact difference between his assets and his liabilities, a difference which constitutes the capital with which he begins business.

Moreover, every year the merchant must draw up and sign in the same books, and under his responsibility, the balance sheet of his business, with all the above mentioned details, and in accordance with the entries of the journal, without reserve or omission.[31]

The journal.

The first entry in the journal must consist of the items of the above mentioned statement, divided into as many accounts as the system adopted may require. Daily entries must follow thereafter, stating the credit and the debit of the respective account. When the transactions are numerous, whatever their amount, or when they take place outside the domicil of the commercial house, but refer to the same account, or when they are made on the same day, they may constitute a single entry. But when the transactions are stated in detail, their corresponding entries must follow the order in which they took place. There must be entered also, on the date when they were taken from the cash box, all amounts which the merchant uses for his domestic expenses, and these amounts are to be entered under a special account opened in the ledger for that purpose.[32]

[31] Spain, 37; Argentina, 48; Bolivia, 38; Chile, 29; Colombia, 36; Costa Rica, law of July 5, 1901, art. 4; Ecuador, 39; Guatemala, 25; Haiti, 9; Honduras, 37; Mexico, 38; Nicaragua, 23; Panama, 79; Peru, 37; San Salvador, 23; Uruguay, 59; Venezuela, 39.

[32] Spain, 38; Argentina, 45; Bolivia, 34; Brazil, 12; Chile, 27; Colombia, 33;

The ledger

The ledger must contain a credit and a debit side, with separate accounts for object and person with which or with whom the merchant deals according to the system of accounting adopted; and the entries, under each account, must be in strict chronological order.[33]

Letter and telegram book.

All letters and telegrams which a merchant may write in reference to his business, must be transcribed in the copying book, either in handwriting or by means of some mechanical copying device; this transcription must be in the successive order of dates and must include the subscribing clause and the signature.[34]

The bookkeeper.

Merchants may keep their books themselves or through a bookkeeper. Because of the great importance of the books, which may constitute evidence against the owner and may be of decisive influence in case of bankruptcy, the functions of a bookkeeper are of a most delicate character. The legal character of a bookkeeper is that of an agent, whose acts bind his principal. Hence questions may arise concerning the powers of the bookkeeper, and in this respect the Latin-American codes may be divided into three groups:

Costa Rica, law of July 5, 1901, art. 5; Ecuador, 36; Guatemala, 22; Haiti, 8; Honduras, 38; Mexico, 39; Nicaragua, 20; Panama, 81; Peru, 38; San Salvador, 24; Santo Domingo, 8; Uruguay, 56; Venezuela, 37.

[33] Spain, 39; Bolivia, 35; Colombia, 35; Costa Rica, law above mentioned, art. 7; Ecuador, 38; Honduras, 32; Mexico, 40; Nicaragua, 22; Panama, 83; Peru, 39; San Salvador, 25; Venezuela, 38.

[34] Spain, 41; Argentina, 51, 52; Bolivia, 45; Brazil, 12.

The commercial court of Rio de Janeiro in its opinion of February 3, 1851, decided that letters, copies of accounts, invoices and instructions accompanying the same, should be transcribed in full; the merchant being allowed to divide the copying book into two volumes—one for registering letters and the other for registering invoices and accounts.

Chile, 46; Colombia, 61; Costa Rica, 9; Ecuador, 54; Guatemala. 55; Haiti, 9; Honduras, 34; Mexico, 42; Nicaragua, 37; Panama, 84; Peru, 41; San Salvador, 27; Santo Domingo, 9; Uruguay, 63; Venezuela, 50.

1. Those codes which require that a power of attorney be given formally by the merchant to the bookkeeper, in order that the latter may in his bookkeeping represent the merchant.[35]

2. Those codes according to which the mere fact that the merchant entrusts somebody with the keeping of his books constitutes a presumption that he has given the bookkeeper due power therefor, unless the contrary be proved.[36]

3. Those codes which are silent in this respect, leaving to the discretion of the court the appreciation of the facts and the application of the general principles of law.

Commercial books as a means of evidence.

From the theory we have advanced that a merchant is engaged in an occupation of a quasi-public character, it might be inferred that his books would be open to free inspection by persons interested in his transactions. But that is not so, since the conduct of business requires privacy, without which the great stimulus of private interest, the propulsive force making wealth circulate universally, would be greatly weakened. This explains why the law in Latin-America provides that no official inquiry can be made by judges or courts or any other authority, in order to determine whether merchants keep their books in accordance with the provisions of the commercial law; nor can investigation or general examination of their bookkeeping be made by public authority. The production in court or delivery for general inspection of books, correspondence and documents of a merchant cannot be demanded in a suit or ordered by a judge, except in case of liquidation, general succession or bankruptcy.[37] But an *exhibition* of books may be ordered on

[35] Bolivia, 33, 166, 168; Guatemala, 44; Uruguay, 75.

[36] Spain, 35; Argentina, 62; Honduras, 28; Mexico, 35; Panama, 87; Peru, 35; San Salvador, 21.

[37] A general succession is that in which a merchant succeeds another as his heir or as the transferee of the whole commercial house.

petition of a party, or *ex-officio*, when the person to whom they belong has any liability or legal interest in the case. The exhibition must be made at the place of business of the merchant, in his presence, or in the presence of a person delegated by him, and the inspection must be confined exclusively to the points in litigation.[38]

There are two exceptions to this rule—one in Costa Rica [39]

[38] Spain, 45 to 47; Argentina, 57 to 59; Bolivia, 55 to 57; Brazil, 17 to 19; Chile, 41 to 43; Colombia, 55 to 57; Costa Rica, 14, 15, law of July 5, 1901; Ecuador, 49 to 51; Guatemala, 46 to 49; Haiti, 14, 15; Honduras, 38 to 40; Mexico, 42 to 44; Nicaragua, 31, 33; Panama, 88 to 89; Peru, 45 to 47; San Salvador, 31 to 33; Santo Domingo, 14, 15; Uruguay, 70 to 72; Venezuela, 45 to 47.

The fact that a merchant, party to a suit against another merchant, cannot designate exactly the date of the entry or even the special book in which the entry was made or a certain and specified document of the adverse party, is not an obstacle to the examination of the books in the office of the merchant and cannot be considered as a general inspection of said books, provided that the applicant refers to facts clearly stated. Cuba, *Trib. Sup.*, May 29, 1900, *Jurisp. del Trib. Sup. en mat Civil*, vol. 4, p. 261.

The constitutional guaranty that one cannot be compelled to give testimony against himself, includes the provision that one need not produce his books and private papers as proof of his own fault. Argentina, Camara Federal de Apelación, Capital de Buenos Aires, May 14, 1914, *Jurisp. de los Tribs. Nacs.* May, 1914, p. 37.

The plaintiff cannot compel a railway company, the defendant, to produce its correspondence with the Director General of Railroads nor communications referring to service which is not of the nature of a mercantile enterprise. Argentina, Camara Federal de Apel. Corboda, April 24, 1913, Velazquez *v.* F. C. Argentino del Norte, *Jur. de los Trib. Nacs.* April, 1914, p. 98.

The examination of the mercantile books of the defendant, in case of forgery of a patent, is not contrary to the principle that nobody can be compelled to give testimony against himself, because it is an examination made by experts and not testimony. Argentina, Cam. Fed. de Apel. La Plata, August 6, 1913, Agar Cross y Cia. Ltda. *v.* Stein y Cia., *Jurisp de los Tribs. Nacs.* August, 1913, p. 72.

The judge has no power to compel a party to a suit to produce his commercial books in order to take a copy of entries relating to the subject-matter of the suit when requested by the opposing party. Colombia, Panama, Decision of October 31, 1896, *Registro Judicial de Panama*, vol. VII, p. 254.

The commercial books have the character of public documents in the cases referred to in article 56 (cases of liquidation, succession or bankruptcy) of the code of commerce. Among these books the auxiliaries are included. Medellin, Colombia, Decision of August 3, 1898, *Cronica Judicial de Antioquia*, vol. XIV, p. 3145.

[39] Costa Rica, 42.

where pawnshops must show to the government agent the special book that the law of July 16, 1887, requires, the inspection being confined to fiscal purposes; and the other in Mexico, where art. 346 of the law of June 1st, 1906, authorizes the inspectors of the stamp tax to inspect the special book of sales that merchants or industrials have to keep, as well as the stub book of invoices. If they find irregularities in the books the inspectors may ask for all papers relating to the transactions of the merchant during any month, but not beyond one year; if new irregularities are discovered in this way the inspectors may ask for papers corresponding to another month, and so on, without exceeding one year.[40]

Panama [41] makes it obligatory upon every merchant to account to persons with whom he deals any time those persons so request. The accounts must be in accordance with the entries in the books of such merchant, who is bound to deliver the accounts at his place of business, unless otherwise stipulated. For commercial transactions of a continuous character, accounts must be submitted to the other party every year—otherwise at the conclusion of the transaction. The obligation of accounting is considered fulfilled when all differences arising from the accounts are settled.

Evidential value of commercial books.

In order to establish the probative force or evidential value of mercantile books, we must distinguish between two cases [42]—one when the suit is between two merchants, and the other when one of the parties is not a merchant.

Evidential value of books between two merchants.

In this case the following rules are to be applied:

[40] Arts. 346 to 348 of law of June 1, 1906.

[41] Panama, 96 to 99.

[42] Evidence taken from books kept in foreign countries is irrelevant. Argentina, *Jurisprudencia Comercial de la Camara de Apel.* Buenos Aires, vol. 9, p. 545, Ser. 3ª.

1. A merchant's books constitute irrebuttable evidence against him, but the other party cannot accept entries favorable to himself while rejecting others unfavorable to him. Having accepted this means of evidence, he is subject to the consequences of the whole of it, both for and against him.[43]

2. If entries in the books exhibited by two merchants should not agree and those of one have been kept with all the formalities above mentioned, while those of the other contain defects or lack the requisites prescribed by the commercial code, the entries in the book correctly kept must be admitted as against those of the defectively kept books, unless the presumption thereby arising in the merchant's favor is overcome by other evidence legally admissible.[44]

[43] The entries in the books of a merchant constitute evidence against him, provided they are taken as they are, with all the details given and without additions or arbitrary interpretations. Cuba, Supremo Tribunal, June 2, 1904, *Jurisp. de la Trib. Sup.* en Mat. Civ., vol. 22, p. 718.

Statements of the minute book of a corporation constitute evidence. Mexico, Tribunal Superior del Distrito Federal, 2ª Sala, Banco Mexicano de Comercio e Industria S. A. *v.* Moran, Nov. 1, 1910, *Diario de Jurisp.*, vol. 24, p. 473.

The entries made in commercial books constitute perfect evidence against the owner of said books. Mexico, D. F. Juzgado Primero de la Civil Zaccagna *v.* Compañía Italiana de Construcciones, S. A., Nov. 15, 1911, Tribunal Superior del D. F. 3d Sala, *Diar. de Jurisp.*, vol. 25, p. 705; Rio del Campo *v.* Ricardo del Rio y Compañía, May 2, 1912, *Ib.*, vol. 26, p. 449; January 9, 1907, Tribunal Superior del D. F. 3ª Sala; Alvarez *v.* Lucio Rodrigo y Cia, Sept. 23, 1908, *Ib.*, vol. 15, p. 603.

In a suit between a principal and his agent the entries made in the book of the former constitute evidence against the latter. Mexico, Tribunal Superior del D. F., "La Nacional" *v.* Remy, Oct. 1, 1909, *Diario de Jurisp.*, vol. 19, p. 265. Cf. art. 1295.

The evidence derived from commercial books is acceptable only in matters which refer to the subject-matter of the suit. Uruguay, Alta Corte de Justicia, Montevideo, August 17, 1909, *Fallos de la Alta Corte de Justicia*, vol. 1, p. 334.

The evidence taken from the commercial books is of special importance even though they have not been marked with the *rubrica* of the commercial judge in case of a dispute between the merchant and his bookkeeper. Argentina, Cam. 2 de Apel. Civ. La Plata, August 14, 1913, Raidel *v.* Schellenberg, *Jurisp. de los Tribs. Nac.*, August, 1913, p. 269.

[44] Irregularities in keeping the books may be attributed to other persons than the merchant; furthermore, it does not constitute a crime when the

3. If one of the merchants should not present his books or should state that he does not possess any, those of his adversary, kept with the required formalities, constitute evidence against him, unless it is proved that the absence of said books is caused by *force majeure*, and always reserving the privilege to adduce evidence against the entries exhibited by other means legally admissible in judicial proceedings.

4. If the books of the contending merchant possess all the legal requirements and are contradictory, the judge or court must resolve the conflict by other evidence, evaluating its weight and probative force according to the general legal rules of evidence.[45]

There are, in addition, certain peculiar provisions which warrant mention.

Brazil [46] discriminates between partial defects relating to special entries, and general defects which relate to the external formal requirements of the books. Books that are

purpose has not been to commit a fraud, but to prepare a proposition of settlement; nor is it a crime to attribute exaggerated values to real estate if this has not been done with a view to obtaining an unlawful benefit. Argentina, Cam. de Apel. Crim. Buenos Aires, Oct. 14, 1913, *Jurisp. de los Tribs. Nacs.*, Oct., 1913, p. 274.

Entries in the regularly kept books of a merchant constitute full evidence against the merchant who does not keep his books in proper form. Costa Rica, Corte de Casación de Costa Rica, Sept. 16, 1904, Sandoval Escofie *v.* Ruiz Ramirez, *Sentencias de la Corte de Casación*, 1904, p. 637.

Entries in the books of a merchant constitute evidence against another merchant who fails to produce his own books. Costa Rica, Corte de Casación de Costa Rica, Sept. 16, 1904, Sandoval Escofie *v.* Ruiz Remirez, *Ib.*

Books of commerce regularly kept constitute evidence in favor of their owner against the merchant who has no books or has not kept them correctly. Mexico, Tribunal Superior del D. F., 2ª Sala, Compañía Comercial Pan Americana, S. A. *v.* Leon, February 17, 1908, *Diario de Jurisp.*, vol. 14, p. 548.

Commercial books will not constitute evidence when the entries in the ledger do not correspond with those of the journal; when cash sales are mixed up with installments paid on account of a promissory note, or when they are at variance with invoices. Mexico, Tribunal Superior del D. F., Contreras *v.* Rodriguez, August 26, 1912. *Diario de Jurisp.*, vol. 27, p. 185.

[45] Spain, 48; Argentina, 63; Bolivia, 46 to 48; Brazil, 23, 25; Chile, 34, 38, 39, 35, 36; Colombia, 40, 44, 45, 47, 48; Costa Rica, 16; Ecuador, 45, 46, 47; Mexico, 1295; Guatemala, 51, 52; Honduras, 41; Panama, 90; Peru, 48; San Salvador, 34; Uruguay, 76.

[46] Brazil, 15.

partially defective do not constitute evidence with respect to acts referred to in the defective entries; external defects deprive the books entirely of probative force.

In Colombia [47] books not only do not constitute evidence when irregularly kept, but also when the owner has been convicted of perjury, fraudulent bankruptcy or forgery of documents of any kind.

In Costa Rica [48] the books of merchants do not constitute evidence against small traders.

In Nicaragua,[49] when the merchant does not present his books or when they are defective, those of his opponent constitute irrebuttable evidence, unless the former proves that his books were lost without his fault.

In Venezuela,[50] the provision respecting the probative force of the books is somewhat laconic, namely: "Books kept in accordance with the former articles may constitute evidence between merchants with respect to acts of commerce."

Evidential value of books between a merchant and a non-merchant.

In this matter, we find the following systems:

1. *System of the Spanish code.* The books constitute evidence against the merchant because the law does not make any distinction.[51]

2. *System of Chile.* The books of merchants are only a means of evidence in commercial cases and between merchants.[52]

[47] Art. 54. [48] Art. 18. [49] Art. 28.

[50] Art. 43.

[51] Spain, 48; Bolivia, 46; Costa Rica, law of July 5, 1901, Art. 16; Ecuador, 47; Guatemala, 40; Honduras, 41; Mexico, 1295; Nicaragua, 34; Peru, 48; San Salvador, 34; Venezuela, 43.

[52] Chile, 25; Argentina, 63; Uruguay, 76.

Commercial books only constitute a means of evidence between merchants and in regard to commercial affairs. Argentina, Jurisp. Comercial de la Camara de Apel. Buenos Aires, vol. 9, p. 471, Ser. 3ª. When the case does not refer to commerce the commercial books are only a foundation of evidence (*principio de prueba*), if the litigation is between merchants. Argentina, Jurisp. Com. de la Camara de Apel. Buenos Aires, vol. 4, p. 46, Ser. 5ª.

3. *System of Colombia.* Books in this case constitute only a foundation of evidence (*principio de prueba*), that is, they must be supported by further evidence.[53]

4. *System of Brazil.* Books may constitute full evidence against the merchant, but only a foundation of evidence against the non-merchant.

Books subject to inspection.

All books, principal and auxiliary, including those which are required by the law and in addition those which the merchant deems fit to keep, are subject to be exhibited in the cases and under the conditions above mentioned, inasmuch as all of them may afford evidence in a particular case; but only the codes of Argentina [54] and Uruguay [55] explicitly provide that merchants may be compelled to exhibit their auxiliary books as well as the obligatory ones.

Auxiliary books as evidence.

Three systems are followed by the codes with reference to the evidential weight of auxiliary books:

First system. They cannot constitute evidence in favor of their owner except when the obligatory books are lost without fault of the owner.[56]

Second system. They constitute evidence if they are kept with all legal formalities.[57]

Third system. They may or may not constitute evidence, according to the general rules of evidence in those countries whose codes do not provide for this case.

Result of failure to exhibit books.

In a suit in which a merchant having been regularly

[53] Colombia, 49; Panama, 91.

[54] Art. 61. [55] Art. 74.

[56] Argentina, 65; Chile, 40; Colombia, 52; Costa Rica, 17; Guatemala, 53; Panama, 92; Uruguay, 78.

Entries made in books which are not obligatory according to the law will not constitute evidence. Costa Rica, Corte de Casación de Costa Rica, Aug. 26, 1911. Knohr Hijos *v.* Avendano, *Sentencias de la Corte de Casación*, 1911, 2nd semester, p. 222.

[57] Bolivia, 52; Ecuador, 48; Venezuela, 44.

requested by the judge to exhibit his books fails to do so or conceals them, the books of his opponent constitute conclusive evidence against him.[58]

The codes of some countries provide in such case that the books of the opposing party constitute conclusive evidence, provided no other evidence is produced to rebut the entries exhibited.[59]

If one of the parties to a suit offers to accept, as evidence, the entries in the books of his opponent, and the latter fails to exhibit them without good reason, the court may accept as conclusive the sworn statement of the petitioner.[60]

Duty to preserve commercial books and papers.

We may divide the systems adopted by the codes, as follows:

1. The merchant must preserve his books up to the time of the complete liquidation of the business.[61]

2. He must preserve them for a certain period after the liquidation of the business; this period being five years in Spain,[62] Ecuador,[63] Honduras,[64] Panama,[65] Peru[66] and San Salvador;[67] ten years in Haiti,[68] Mexico,[69] Santo Domingo,[70] and Venezuela;[71] and twenty years in Argentina[72] and Uruguay.[73]

3. He must preserve his books for the period established by the statute of limitation in Brazil.[74] The period of limitation runs from one to twenty years, depending on the subject-matter.[75]

[58] Argentina, 56; Bolivia, 59; Brazil, 20; Chile, 33; Colombia, 39; Ecuador, 44; Nicaragua, 28; Uruguay, 68.

[59] Spain, 48; Costa Rica, 16; Guatemala, 51; Honduras, 41; Mexico, 1295; Panama, 90; Peru, 48; San Salvador, 34.

[60] Chile, 37; Colombia, 46; Ecuador, 52; Guatemala, 42; Venezuela, 48.

[61] Bolivia, 54; Chile, 44; Colombia, 59; Guatemala, 54.

[62] Art. 49. [63] Art. 19. [64] Art. 42.
[65] Art. 93. [66] Art. 49. [67] Art. 35.
[68] Art. 10. [69] Art. 46. [70] Art. 10.
[71] Art. 49. [72] Art. 67. [73] Art. 80.
[74] Art. 10. [75] Brazil, 442–449.

CHAPTER VII

AUXILIARIES OF COMMERCE

SPAIN.—Capdeville, Edmundo: La bolsa al alcance de todos. Las operaciones en la Bolsa de Madrid, Paris, Bruselas. Madrid, 1905.

Lastres, Francisco: Operaciones de bolsa. Contratación sobre efectos públicos de los corredores de comercio y de los agentes de bolsa. Madrid, 1878.

Maluquer y Viladot, Juan: Irreivindicación de los efectos al portador en los casos de robo, hurto o extravío. Estudio sobre las bolsas de comercio y sus agentes mediadores. Anotado con la jurisprudencia . . . prólogo de Antonio Maura. Barcelona, 1901.

Montero y Vidal, José: La bolsa, el comercio y las sociedades mercantiles. 3d ed. Madrid, 1883.

MEXICO.—Pizarro Suárez, Ismael: Formalidades de los contratos celebrados ante corredores. Rev. de Leg. y Jurisp. 1899, 2nd semes, p. 72.

Functions of persons who are auxiliaries of commerce.

The term "auxiliaries of commerce" is applied to those classes of aids such as factors, clerks, brokers, etc., who have become almost essential to modern commerce. The auxiliaries of commerce have two functions to perform, the one economic and the other legal. The economic function consists of the help they furnish to merchants; for the latter would find it physically impossible to attend personally to all their business at home and abroad; on the other hand, the employment of auxiliaries of commerce is an application of the principle of subdivision of labor, which permits of quicker and more efficient work.

Besides those persons who are characterized as auxiliaries of commerce there are others who also aid commerce by supplying necessary help and subdividing labor, such as bankers and carriers. The latter are not, however, considered as auxiliaries, although their acts are "auxiliary" to commerce. They are independent merchants, deriving profits from the transaction, though their business serves others also; while the auxiliaries of commerce are not independent merchants, derive no personal profit from the business

transaction as such, but from the service alone. They are only a continuation, so to speak, of the personality of their principal, who derives the profit from the commercial transaction.

The legal position of auxiliaries of commerce involves features of the contracts of agency and of the hiring of services.

Kinds of auxiliaries of commerce.

There are two kinds of auxiliaries, namely: dependent and independent.

Dependent auxiliaries of commerce.

The law divides dependent auxiliaries into three classes: *a*, factors; *b*, clerks; *c*, *mancebos* (subordinate employees, shop clerks, office boys, etc.).[1]

Other countries admit the distinction between factors and clerks only.

Factors.

The manager of an industry, commercial house or factory, duly empowered to contract in all matters concerning it, as the owner considers suitable, is a factor in the legal acceptance of the word.[2]

Capacity.

The capacity of a person to act as a factor is not uniformly regulated in the Latin-American codes. They may be divided into three groups:

1. Those which prescribe that the capacity to act as a factor is governed by the general rules of the code of commerce; [3]
2. Those which provide for a minimum age limit—

[1] Spain, 283, 292, 293; Honduras, 196, 205, 206; Peru, 277, 286, 287.

[2] Spain, 283; Argentina, 132; Bolivia, 149; Colombia, 435; Ecuador, 113; Honduras, 196; Mexico, 309; Nicaragua, 92; Panama, 619; Peru, 277; Uruguay, 147; Venezuela, 102.

[3] Spain, 282; Argentina, 132; Honduras, 195; Mexico, 310; Panama, 603; Peru, 276; Uruguay, 133.

Chile,[4] and Colombia,[5] seventeen years; Ecuador,[6] fourteen years; Nicaragua,[7] twenty years;

3. Those which make this matter depend upon civil law.[8]

Power.

Powers of attorney given to factors must be in writing and registered in the commercial registry. Colombia and Guatemala do not require registration of the power.[9]

Only San Salvador[10] provides that the power may be either oral or in writing.

Powers of factors.

Factors must transact business and make contracts in the name of their principals, and in all instruments which they subscribe in such capacity they must state that they do so by virtue of a power of attorney, or in the name of the person or association they represent.

When factors transact business in the manner described above, the obligations they contract are for account of their principals. Any actions at law arising therefrom must be brought against the principals; the property of the factor is bound when it is mixed with that of the principal.

Contracts made by factors of a manufacturing or commercial enterprise, which by common knowledge they represent, are deemed to have been made for the account of the principal, whether actually disclosed or not, and notwithstanding any excess of his powers, or misappropriation of the goods, subject-matter of the contract; provided the contract involve an object within the normal business of the establish-

[4] Art. 338. [5] Art. 452. [6] Art. 115.

[7] Art. 93. [8] Costa Rica, 120; Guatemala, 115.

[9] Spain, 21, 282; Argentina, 133; Bolivia, 21, 150; Brazil, 74; Chile, 339; Colombia, 453; Costa Rica, 121, 122; Ecuador, 116; Guatemala, 116; Honduras, 22, 195; Mexico, 21, 310; Nicaragua, 94; Panama, 604; Peru, 21, 276; Uruguay, 134; Venezuela, 103.

The power of a factor must be entered in the registry of the commercial court, in Guatemala.

[10] Art. 138.

ment, or if it can be proved that the acts of the factor were authorized by his principal or subsequently ratified in express terms or by positive acts.[11]

A contract made by a factor in his own name binds him directly to the other party, but if the transaction was undertaken for the account of the principal, the other party may bring action against the factor or the principal.[12]

Obligations of factors.

Factors have the general obligations of agents [13] but the law specifies certain duties which are derived from their peculiar functions. They must:

1. Transact business in the name of their principals, as already observed;
2. Keep the books of the establishment under their charge; [14]
3. Fulfill their functions during the period stipulated, if the contract has fixed such a period;
4. Give their principals one month's notice of termination of their service, if there is no fixed period of service.

Disabilities of factors.

Factors are forbidden:

1. To trade for their own account or interest themselves in their own name or in that of another person, in transactions of the same character as those they are engaged in for their principals, unless expressly authorized thereto by the principals. Should they do business

[11] The factor of a commercial house whose power is general is entitled to do all acts required in the management of the establishment, without other restrictions than those expressed in the deed of power. Spain, Trib. Sup., October 16, 1861.

[12] Spain, 284 to 287; Argentina, 135 to 139; Bolivia, 150 to 155; Brazil, 75, 76; Chile, 340; Colombia, 454; Guatemala, 117 to 120; Honduras, 197 to 200; Mexico, 311 to 316; Nicaragua, 95, 96; Panama, 605 to 609; Peru, 278 to 281; San Salvador, 138 to 141; Uruguay, 136 to 140; Venezuela, 103 to 105.

[13] *Cf. infra*, chapter on Commercial Agency.

[14] Argentina, 145; Bolivia, 156; Chile, 341; Colombia, 455; Costa Rica, 133; Nicaragua, 100; Panama, 615; Uruguay, 146.

without this authorization, the profits thereof inure to the principal, and the losses to the factor personally.[15]

2. To assign or delegate their power of attorney to another person without the consent of the principal.[16]

Liabilities of factors.

Factors are liable: *a*, for fraud or negligence in the performance of their duties; *b*, for infringement of the orders of their principals; *c*, for assigning or delegating their powers without specific authorization; *d*, for acts done in their own name in case the other party brings an action against the principal; *e*, for breach of the contract by leaving their positions before the time stipulated, or before one month after notice in case there is no stated period in the contract; *f*, for penalties which the factors may incur by reason of violation of fiscal laws and governmental regulations in their management of the business, when the penalties are enforced against the property of their principals.[17]

Rights of factors.

Factors are entitled:

1. To be compensated for their services;

2. To be indemnified in case they incur, while accomplishing their duties, some extraordinary expense, or if

[15] Spain, 288; Argentina, 141; Bolivia, 158; Brazil, 84; Colombia, 444; Costa Rica, 127; Ecuador, 131; Guatemala, 121; Honduras, 201; Mexico, 312; Nicaragua, 97; Panama, 611; Peru, 282; San Salvador, 142; Uruguay, 142; Venezuela, 106.

[16] Spain, 296; Argentina, 161; Bolivia, 158; Brazil, 95; Costa Rica, 142; Ecuador, 130; Guatemala, 131; Honduras, 209; Panama, 633; Peru, 289.

[17] Spain, 287, 296, 297, 299; Argentina, 139, 143, 154, 157, 158; Bolivia, 155, 157, 162, 163; Brazil, 78, 81, 82; Colombia, 438, 443, 445, 449; Costa Rica, 126, 130, 142 to 144, 147; Ecuador, 129, 132, 135, 139; Guatemala, 120, 124, 131, 132, 133, 136; Honduras, 200, 209, 210, 212; Mexico, 314, 317, 327, 328; Nicaragua, 98, 105; Peru, 281, 290, 291, 293; Panama, 609, 612, 613, 626, 629, 630, 633; San Salvador, 142, 152, 153; Uruguay, 143, 155, 157, 158, 162; Venezuela, 105, 111.

The obligation of a factor to pay damages because of his malice, negligence or abuse of power, ceases when through some act, it may be inferred that the principal ratified the act or contract subject-matter of the complaint. Spain, Trib. Sup. April 18, 1868, *Gaceta* of May 11, 1868.

they have suffered some loss regarding which there was no express agreement between them and their principal;

3. To be paid their compensation when, by reason of some unforeseen event, unavoidable on their part, they are unable to render their stipulated services, provided the incapacity to serve does not exceed three months;

4. To be given one month's notice when they are discharged, provided their contract has no fixed term, or else to be paid one month's compensation;

5. Not to be discharged before the period stipulated, unless by their conduct the principal has good reason to do so.[18]

Rescission of the contract between the factor and his principal.

If a contract between a merchant and his factor or employee has a fixed period to run, the former cannot discharge the factor nor the latter leave his position while the contract is in force, under pain of liability for damages.

Principals, however, may discharge their factors and employees even though the term of service under the contract has not expired, for the following reasons:

1. Fraud or breach of trust in the business entrusted to them;

2. The transaction of some commercial business without the principal's authorization;

3. Serious disrespect to and lack of consideration for

[18] Spain, 298, 299, 302; Argentina, 155 to 158; Bolivia, 159, 162, 163; Brazil, 79 to 82; Chile, 332, 335, 336; Colombia, 445, 449, 450; Costa Rica, 143, 144, 148, 149; Ecuador, 132, 135, 136; Guatemala, 132, 133, 137; Honduras, 211, 212, 215; Mexico, 326, 328; Nicaragua, 104, 106, 107; Panama, 627, 628, 630, 634; Peru, 288, 289, 296; San Salvador, 152, 153, 154; Uruguay, 156 to 159; Venezuela, 111, 112.

The share that a merchant gives to his factor or clerk in the profits of the business do not constitute a gift, as their "cause" is not the liberality of the merchant, but an interested motive, namely, to create a stimulus which may induce the clerk to greater exertion. Spain, Trib. Sup. Feb. 16, 1899; *Col. Leg. de Esp.; Jur. civ.*, vol. IV, sec. I, 1899, p. 298.

the principal or members of his family or business house.[19]

Employees may leave the service of their principals, even though the term of their contract has not expired, for the following reasons:

1. Non-payment of salary or remuneration at the time agreed upon;
2. Non-compliance with any of the other stipulations in favor of the employee;
3. Bad treatment or serious offenses on the part of the principal.[20]

Nicarauga [21] leaves the appreciation of the causes to the discretion of the commercial courts.

CLERKS

Character of a clerk.

Merchants may entrust other persons, besides factors, with the constant management, in their name and for their account, of one or more departments of their business.

The acts of these special employees or agents only bind the principal with respect to transactions within the scope of the department or business entrusted to them.[22]

Powers of clerks.

The matter of the legal form of the power of attorney

[19] Spain, 300; Argentina, 159, 160; Bolivia, 164; Brazil, 84; Chile, 333; Colombia, 446, 448; Costa Rica, 145, 146; Ecuador, 133; Guatemala, 134; Honduras, 213; Mexico, 330; Panama, 631, 632; Peru, 294; San Salvador, 153; Uruguay, 160, 161; Venezuela, 111.

[20] Spain, 301; Argentina, 159; Bolivia, 162; Brazil, 83; Chile, 334; Colombia, 447, 448; Costa Rica, 145; Ecuador, 134; Guatemala, 135; Honduras, 214; Mexico, 331; Panama, 631, 632; Peru, 295; San Salvador, 153; Uruguay, 160, 161; Venezuela, 111.

[21] Art. 104.

[22] Spain, 292; Argentina, 146; Chile, 343; Colombia, 457; Costa Rica, 135; Ecuador, 119 to 121; Guatemala, 127; Honduras, 205; Mexico, 309; Nicaragua, 101; Panama, 618; Peru, 286; San Salvador, 145; Uruguay, 147; Venezuela, 102.

It can never be understood that an employee is serving with a commercial firm without compensation. Primera Sala del Trib. Sup. Mexico, March 20, 1909. Diar. de Jur., vol. 17, p. 233.

given to clerks has caused a difference of opinion among law-makers. This is due to the circumstance that by the mere fact that a person is employed in a commercial house, the public presumes that he has power to represent it at least in a special branch; but the functions of employees are at times so restricted that a merchant cannot be held responsible for all acts of his employees. The systems followed by the codes are as follows:

1. *System of Spain.* The power of attorney may be the result of an oral or written agreement, but associations must publish said agreement in a public notice or by means of circulars sent to their correspondents.[23]

2. *System of Chile.* Merchants must give powers in writing to clerks or employees entrusted with the management of a special department which may require the signing of documents or any similar acts creating rights and obligations, as, for example, drawing bills of exchange, collecting and giving receipts for money, etc. Such a power must be registered in the commercial registry.

Nevertheless, a person tendering a receipted bill, is deemed authorized to collect the amount therein stated.

When merchants send circulars to their correspondents making known that their employees are authorized to enter into contracts with the persons to whom the circulars are addressed, the contracts entered into in that respect are valid. Circulars are more frequently used in Latin-America than they are in the United States as a means of communicating information or giving notice as required by law.

Similar circulars are necessary in order that correspondence signed by an employee may be binding upon the employing merchant.[24]

3. *System of Brazil.* Brazil requires a written power

[23] Spain, 292; Honduras, 205; San Salvador, 145; Peru, 286.

[24] Argentina, 147, 149; Bolivia, 166 to 170; Chile, 343 to 345; Colombia, 457 to 459; Costa Rica, 135 to 137; Ecuador, 121, 122; Guatemala, 127; Nicaragua, 101; Panama, 620 to 622; Uruguay, 148 to 150; Venezuela, 107, 108.

Under the name "cajero" (cashier) in Bolivia is meant every shop clerk, 166.

duly registered in the commercial registry, under penalty of depriving the clerk of all the rights of his position; but acts done by employees *within* the commercial house are valid and binding upon the merchant even though they have no formal power.[25]

4. *System of Mexico.* The acts of employees are binding upon their principals in all transactions within the scope of their authority. The law does not require any formal power for employees as it does for factors.

Traveling agents, authorized by means of letters or other documents, to enter into contracts, bind their principals to the extent of the powers granted therein.

Functions of clerks which do not require a special power.

Clerks, by the mere fact of employment in a commercial house and rendering their services within the establishment, have power to carry out the usual daily transactions of their department, according to the nature and importance of the house. When they are salesmen in a retail store they are considered as authorized to collect the amount of the sales they may effect and their receipts given in the name of the principal are valid and binding on the principal. The same power is vested in clerks who sell in wholesale stores, provided the sales are for cash and payment is made in the store; but when the collections are to be made outside the store, or when they are the proceeds of credit sales, the receipts must necessarily be signed by the principal or his factor or manager, or by an agent authorized to make collections.

When a merchant entrusts a clerk with the duty of receiving merchandise and the latter receives it without comment as to its quantity or quality, his acts of receiving have the same legal effect as if made by the principal.[26]

[25] Brazil, 74, 75.

[26] Spain, 292 to 295; Argentina, 151, 153; Bolivia, 171, 172; Chile, 346; Colombia, 460, 461; Costa Rica, 139, 141; Ecuador, 123; Guatemala, 128, 130; Honduras, 205 to 208; Mexico, 321, 322, 324; Nicaragua, 102; Panama, 623, 625; Peru, 286 to 289; San Salvador, 148, 149; Uruguay, 152, 154; Venezuela, 109.

Capacity of shop clerks.

Notwithstanding the silence of the codes in the matter of the capacity of shop clerks and the natural inference that the capacity of such employees is governed by the general principles of the civil law, the fact is that merchants do employ and have always employed minors as shop clerks. No difficulty has ever been experienced from that practice with respect to matters in which no formal power is required, although where it is required, legal capacity is necessary. This illustrates the effect of commercial custom as a source of law independent and above statute law.

Only the codes of Colombia [27] and Ecuador [28] expressly provide that minors over fourteen years may be shop clerks, when duly authorized by their parents, guardians or husbands, as the case may be.

Other rules applicable to shop clerks.

With the limitation as to powers of attorney and other special provisions relating to clerks already mentioned, all the rules relating to the rights, duties, powers and liabilities of managers or factors, including the rescission of the contract of employment, are applicable to commercial clerks.

INDEPENDENT AUXILIARIES OF COMMERCE

Brokers.

Even though the main function of a merchant is to mediate between producer and consumer, merchants cannot personally deal or be directly acquainted with every interested producer or seller or with every interested consumer or buyer. In many cases he trades *in absentia* in one or more foreign countries simultaneously. On the other hand, there are persons who, lacking capital to trade on their own account, are useful to the merchant because of the knowledge they possess of sellers and buyers in the locality. Such persons are brokers whose function it is to facilitate commerce by their mediation between sellers and merchants

[27] Colombia, 456.

[28] Ecuador, 115, 120.

on the one hand, and merchants and buyers on the other. In this mediation they operate not in the special interest of any of the parties, but for the sole purpose of bringing them to an agreement by negotiation. They are, then, impartial witnesses and their testimony can be used as evidence more trustworthy than that of the parties themselves or other witnesses who may not have been aware of all the circumstances of the transaction. For this reason, the law charges them with special functions in the matter of evidence.

When states, using their credit for the construction of public works, and undertaking the enormous expenditures of modern governmental administration, issue bonds and other securities, they need, like merchants, some dependable intermediaries to sell such securities and obtain the best market for them, a circumstance which is responsible for the creation of a special class of brokers.

Brokers may be defined as independent auxiliaries of commerce, who seek by negotiation to bring prospective commercial buyers and sellers into agreement, with legal authority to authenticate the ensuing transaction. Brokers, therefore, perform two functions: the one economic, the other legal.

As to the economic function of brokers, *i. e.*, in bringing the parties to an agreement, the codes of Latin-America follow two systems:

1. *French system.* In this system, there are only official brokers; all brokers must fulfill special requisites and must obtain a license to engage in that occupation.[29]

Mexico requires that the license be renewed every year by the supreme political authority of the Federal or state government.

[29] Argentina, 88; Bolivia, 66; Brazil, 38, 39; Haiti, 75, 76; Honduras, 43; Mexico, 54, 55; Nicaragua, 42; Santo Domingo, 74; Uruguay, 90, 91.

Transactions transferring the shares of corporations or public securities, or any other securities quoted in the exchange are void unless made through the corresponding official brokers. Brazil, Law No. 1083 of 1860, arts. 2, and 31 and decree No. 2733 of 1861, arts. 1 to 3.

Bolivia imposes a fine of ten per cent of the amount of the transaction upon any person who acts as a broker without proper license, and banishment in case of recurrence, and a fine of five per cent on the merchants who permitted the mediation of the unlicensed broker, those merchants being jointly responsible for the fine imposed upon the broker.

2. *Spanish system.* Brokers are divided into two classes: unlicensed and licensed or official; all brokers may freely perform the corresponding economic function.[30]

As to the legal function, that is, the power to authenticate commercial contracts, only licensed official brokers may exercise it, because it is a public function.

Brokers as officials who authenticate contracts.

Brokers, as officials vested with power to authenticate commercial transactions, must be citizens; in Argentina, Nicaragua, Salvador and Uruguay residents only can be brokers, and must:

(*a*) keep the book or books required by law in order to enter therein a memorandum of every brokerage transaction conducted through them;

(*b*) give to each of the parties a copy of the memorandum, signed by the broker, comprising all the essential points covered by the transaction;

(*c*) certify the authenticity of the contract at the end of each copy thereof, giving the parties, when so required, a copy;

(*d*) certify the delivery of the things, the subject-matter of the contract of purchase and sale, when the parties so desire;

(*e*) issue certified copies of the memorandum entered in their books when the parties to the transaction so require;

(*f*) keep a daily record of the prices of commodities,

[30] Spain, 89; Chile, 80; Colombia, 68, 69; Ecuador, 72, 96; Panama, 107; Peru, 89; San Salvador, 39; Venezuela, 82.

bonds and securities on the exchange, for determining judicial questions which may arise as to quotations;

(*g*) send to other brokers and the interested parties a daily note of the transactions in bonds and securities, in which they have rendered service.[31]

Associations of brokers.

In Spain and Peru there are bodies of brokers which also have a notarial character. In every commercial center there may be established a body or association of exchange brokers (*colegio de agentes de bolsa*), another of commercial brokers (*colegio de corredores de comercio*), and in maritime centers, one of shipbrokers (*colegio de corredores intérpretes de buque*). These associations are composed of individuals who have obtained admission after proving that they possess the qualifications already mentioned. These associated agents and brokers (*agentos còrredores e intérpretes colegiados*) may exercise the notarial functions in the cases stated.[32]

Mexico provides also for an institution of the same name (*colegio de corredores*) but its functions are of an administrative character.[33]

Brokers' books.

Official brokers must note in their books in separate entries all transactions in which they may have taken part, with particulars of names and domicil of the contracting parties, and the subject-matter and terms of the contracts. In sales they must state the quality, amount and price of the articles sold, the place and date of delivery and the manner in which the price is to be paid. In the negotiation of bills of exchange, they must enter the dates, place of issue

[31] Spain, 102, 103, 105, 106 to 109, 111; Argentina, 91, 95, 101 to 103; Bolivia, 79, 80, 85, 88, 89, 94, 95; Brazil, 46, 47, 50, 52, 53, 58; Chile, 56, 61, 71, 73, 78; Colombia, 74, 76, 79, 81, 82; Ecuador, 77, 78, 94; Haiti, 78, 79, 83; Honduras, 56 to 60; Mexico, 63, 64, 67, 68; Nicaragua, 41, 45, 47, 49, 51; Panama, 112, 120 to 122; Peru, 102, 103, 105, 106 to 109, 111; San Salvador, 44, 48 to 51; Santo Domingo, 73, 78, 84; Uruguay, 92, 94, 95, 102 to 104; Venezuela, 80, 81, 88.

[32] Spain, 90; Peru, 90.

[33] Mexico, 73.

and payment, terms and due dates, names of the drawer, endorsers and drawee, of the transferor and purchaser and the exchange rate agreed upon. In insurance there must be stated, with reference to the policy, its number and date, the names of the underwriter and of the insured, the object of the insurance, its amount, the premium agreed upon, and in an appropriate case, the place of loading and unloading, and a precise and exact statement of the ship or the means of transportation.[34]

Probative force of brokers' books.

Certified copies taken from brokers' books constitute complete evidence like those taken from the books of notaries.[35]

Venezuela, however, provides that the courts may order brokers to produce their books in order to compare the copies of the contracts given to the parties with the corresponding original entry, and ask the brokers for any other explanation that the judge deems proper.[36]

[34] Spain, 92, 102, 107; Argentina, 105, 108; Bolivia, 96, 99; Brazil, 47 to 50; Chile, 66, 76 to 79; Colombia, 76 to 79; Ecuador, 77; Haiti, 83; Honduras, 56; Mexico, 64; Nicaragua, 49; Panama, 121; Peru, 93, 102, 107; San Salvador, 49; Santo Domingo, 84; Uruguay, 92, 93; Venezuela, 80.

Besides the books provided for by the code of commerce in Brazil, brokers must keep a stub-book authenticated by the collector of the stamp tax. Brazil, Decree No. 2490 of 1859.

[35] Spain, 93; Argentina, 208; Bolivia, 94; Brazil, 52, 122; Costa Rica, 209; Ecuador, 82; Mexico, 66; Nicaragua, 45; Panama, 244; Peru, 93; Uruguay, 192; Venezuela, 130.

The evidential force attributed by the law to the memoranda and certifications of brokers depends entirely upon the circumstances that their books are kept strictly in accordance with the provisions of the commercial code. Spain, Trib. Sup., April 3, 1888; *Gaceta* of Nov. 26, 1866.

Accounts or entries in the books of an exchange broker have not the character of authentic documents. *Ib.*

When the books of brokers are kept in accordance with the law, the statements therein constitute full evidence. Brazil, *O Direito*, vol. 15, p. 473.

The probative force of the books of brokers when there is a doubt between the two copies of a contract made through a broker, does not exclude any other means of evidence specially when the broker has contracted in his own name, as he is authorized to do; because that would be equivalent to leaving to his discretion the rights and obligations of his principal. Spain, Trib. Sup., Feb. 20, 1897, *Gaceta* of March 21, 1897.

[36] Art. 81.

The system of Chile is quite different. The books of brokers in that country do not prove the actual existence of the contracts to which they may refer; but if the parties admit their existence, the books prove the character and terms of the transaction.[37]

The memorandum of the contract that brokers give to one another and to the parties concerned constitutes evidence against the brokers but not in their favor.[38]

Requisites that brokers must fulfill.

There are four requisites that an applicant must fulfill in order to obtain a license or appointment as a broker, in the countries where official brokers are provided for, namely, citizenship, competence, honesty and an official bond as security. Not all of these requisites are mentioned in every code; several of them fail to provide for one or more of the qualifications stated, as appears in the following analysis.

Citizenship.

Citizenship is required by Spain,[39] Bolivia,[40] Brazil,[41] Chile,[42] Honduras,[43] Mexico [44] and Peru.[45]

In Argentina,[46] San Salvador and Uruguay [47] the code refers to domicil instead of citizenship, and in Nicaragua [48] the mere fact of residence suffices.

Competence.

Evidence of competence must consist in the fact that the applicant has practical knowledge of trade and commerce by reason of having been a merchant for a certain number of years.[49]

In Bolivia the broker must pass an examination.

[37] Art. 60.

[38] Spain, 103; Chile, 61; Honduras, 57; Panama, 120 and San Salvador, 48.

[39] Art. 94. [40] Art. 68. [41] Art. 39.

[42] Art. 48. [43] Art. 50. [44] Art. 54.

[45] Art. 94. [46] Art. 89.

[47] San Salvador, 43; Uruguay, 90. [48] Art. 42.

[49] Argentina, 89; Boliva, 68, 70; Brazil, 39; Chile, Art. 5 of the law of September 1, 1866; Honduras, 46; Mexico, 54.

Honesty.

Honesty and well-known integrity must be proved by the testimony of three registered merchants.[50]

Security.

The broker is required to give an official bond in the amount fixed by the government in Spain; [51] in Bolivia,[52] of $3,000; in Brazil, brokers of the city of Rio de Janeiro must give a bond for 10,000 milreis, those of the cities of Bahía, Pernambuco, Manañón, Pará, Ceará, Alagoas, Sergipe and Rio Grande do Sul, for from 500 to 10,000 milreis; [53] in Chile, $1,000 to $5,000; [54] in Ecuador, $1,000 to $2,000; [55] in Honduras, $500 to $2,000; [56] in Mexico, the amount is to be regulated in every state and in the Federal district and Federal territories; [57] in Panama, 5,000 balboas; [58] in Peru, the amount is to be determined by regulations; [59] in San Salvador, $2,000; [60] in Santo Domingo, $10,000 as a maximum; [61] and in Venezuela, from 1,000 to 12,000 bolivares.[62]

Women brokers.

Women cannot be brokers in Argentina,[63] Bolivia,[64] Chile,[65] Ecuador,[66] Nicaragua,[67] or Uruguay.[68]

Kinds of brokers.

The occupation of brokerage has been subdivided in every country according to the necessities of the general subdivision

[50] Spain, 94; Argentina, 89; Brazil, 39; Honduras, 46; Mexico, 54; Nicaragua, 42; Panama, 108; Peru, 94; Venezuela, 83.

[51] Spain, 94.

Bonds given by exchange brokers are required not only in the interest of the State as a guaranty for their dealings in state securities, but also for the benefit of individuals as a pledge for the proper conduct of the business intrusted to them. Spain, Trib. Sup., July 8, 1905; *Gaceta* of Feb. 15 and 16, 1906, p. 48.

[52] Art. 68.

[53] Art. 41, and decree No. 5549 of 1874.

[54] Arts. 52 and 53 and article 4 of law of September 1, 1866.

[55] Art. 74. [56] Art. 47. [57] Art. 58.

[58] Arts. 108, 109. [59] Art. 94. [60] Art. 41.

[61] Art. 90. [62] Art. 71. [63] Art. 88.

[64] Art. 74. [65] Art. 55. [66] Art. 76.

[67] Art. 42. [68] Art. 89.

of labor, although in some instances the classes of brokers appear to have been planned more from a theoretical point of view than from real necessities of commercial practice.

In Mexico we find five classes of brokers, namely: 1, exchange brokers; 2, merchandise brokers; 3, insurance brokers; 4, transportation brokers; 5, ship brokers.[69]

In Peru there are four classes: 1, exchange brokers; 2, mercantile brokers; 3, shipbrokers; 4, auctioneers.[70]

In Santo Domingo there are four classes: 1, merchandise; 2, insurance; 3, ship; 4, overland and marine transportation brokers.[71]

In Spain there are three classes, the first three mentioned under Peru.[72]

Colombia has: 1, exchange brokers; 2, mercantile brokers; 3, auctioneers.[73]

Haiti has three: 1, merchandise; 2, insurance; 3, shipbrokers.

There are brokers and auctioneers in Argentina,[74] Brazil,[75] Ecuador,[76] Haiti,[77] San Salvador [78] and Uruguay.[79]

[69] Art. 52. [70] Art. 94. [71] Art. 77.

[72] Art. 94.

The only licensed brokers existing now in Cuba are official brokers (*corredores colegiados*); there are no official agents or exchange brokers (*agentes colegiados de cambio y bolsa*).

The tariff for the compensation of brokers was issued by the governor of Cuba on August 14, 1887. The bond that brokers must give is fixed by article 3 of the Order No. 79 of 1900, which prescribes that after the license has been given to a broker, and he has paid the corresponding duties, he must give a bond as follows:

For a first class license $5,000.

For a second class license $4,000.

For a third class license $1,500.

The class depends upon the importance of the city.

First class is for Havana.

Second class is for Santiago de Cuba, Cien Fuegos, Matanzas, Cárdenas, Camagüey and Sagua la Grande.

Third class is for other places.

A broker cannot exercise his profession as long as he has not given the bond. Licenses are granted for a previous payment of $12.

[73] Arts. 65, 92, 106. [74] Arts. 84, 89. [75] Art. 35.

[76] Arts. 70, 100. [77] Art. 77. [78] Arts. 39, 61.

[79] Art. 88.

In Chile,[80] Bolivia,[81] Nicaragua[82] and Venezuela [83] there is only one class of brokers.

Obligations of brokers in general from the economic view point.

The obligations of brokers in general are three: 1, diligence; 2, good faith; 3, secrecy.[84]

DILIGENCE

Brokers must be sure of the identity and capacity of the parties to the transactions they initiate or negotiate, and also of the authenticity of their signature. When some of the parties have not the free management of their property brokers cannot act for them unless a proper authorization therefor is given in accordance with the law.[85]

GOOD FAITH

Brokers are obliged to initiate every transaction with precision and clearness, refraining from making representations which may mislead. They can not trade for their own benefit, nor acquire for themselves merchandise, the negotiation of which has been charged to them, under pain of answering for faults of the seller or of the buyer.[86]

SECRECY

Secrecy must be used by brokers in the transactions they

[80] Art. 48. [81] Art. 65. [82] Art. 41.

[83] Art. 74.

[84] Transactions carried through by exchange brokers in behalf of a third party are governed by the law of agency. Argentina, *Jurisprudencia* Comercial y Criminal, vol. 3, p. 53, 3d Ser.

[85] *Cf. infra*, chapter on Bankruptcy.

Spain, 95, 96; Argentina, 96, 108, 111; Bolivia, 87, 97; Chile, 56, 71; Colombia, 70; Ecuador, 80; Honduras, 51; Mexico, 67; Nicaragua, 44; Panama, 100; Peru, 95, 96; San Salvador, 44; Uruguay, 97; Venezuela, 76.

[86] Spain, 95, 96; Argentina, 98, 99, 1051; Bolivia, 77, 96, 99; Brazil, 59; Chile, 57; Colombia, 71, 75, 83; Ecuador, 78; Honduras, 51, 52; Mexico, 67; Nicaragua, 46; Panama, 112; Peru, 95, 96; San Salvador, 44, 45; Uruguay, 100, 106, 107.

All advantages obtained by an exchange broker in transactions made for the

undertake. They must not reveal the names of the parties, unless it is required by the nature of the transaction or by the law, or in case the interested parties consent. [87]

Disabilities of brokers.

Brokers are forbidden:

1. To trade for their own account;
2. To be insurers of maritime risks;
3. To negotiate bonds or merchandise in behalf of individuals or associations which have suspended payment or been declared bankrupt, unless they have been discharged;
4. To obtain for themselves merchandise, the negotiation of which has been charged to them, under pain of answering for faults of the seller or the buyer;
5. To give certificates not directly taken from their books;
6. To be cashiers, bookkeepers or employees of any merchant or mercantile concern.[88]

Brokers are discharged from their functions, or at least temporarily suspended in the exercise thereof, as the case may require, when they do not fulfill the obligations or when they violate the prohibitions imposed upon them by law, or defraud or deceive the principal for whom they act.[89]

Liability of brokers for the obligations of the parties.

As a rule brokers are only liable to pay damages for their

account of others are for the benefit of the principal. Argentina, Jur. Com., vol. 1, p. 303, Ser. 3ª.

[87] Spain, 95; Argentina, 100; Bolivia, 76; Brazil, 56; Nicaragua, 46; Panama, 112; Peru, 95; San Salvador, 44; Uruguay, 101.

Publicity given by brokers to transactions made through them after they were consumed is not against the obligation of secrecy imposed upon brokers. Brazil, Decree No. 2733 of 1861, art. 13.

[88] Spain, 96; Argentina, 105, 108; Bolivia, 96, 99; Chile, 57; Brazil, 59; Colombia, 83, 84, 87; Eucador, 78; Haiti, 84; Honduras, 52; Mexico, 68; Nicaragua, 52; Panama, 113; Peru, 96; San Salvador, 45; Santo Domingo, 85, 86; Uruguay, 106.

[89] Spain, 97; Argentina, 110; Brazil, 52; Chile, 50; Colombia, 83, 86, 90; Ecuador, 79; Haiti, 86; Honduras, 54; Mexico, 69; Nicaragua, 53; Panama, 115; Peru, 97; San Salvador, 46; Santo Domingo, 87; Uruguay, 96.

negligence, fault, or fraud, but they are not liable as sponsors or guarantors of the parties. Exchange brokers, however, are responsible to the buyer for the delivery of the merchandise or securities sold, and to the seller for the price thereof, when it is a cash transaction.[90]

In Panama [91] and Venezuela [92] a broker who does not disclose the name of the one party to the other makes himself responsible for the fulfillment of the contract, and in so doing he is subrogated to the rights of the party for whose benefit he performed the contract.

The bankruptcy of a broker is always considered fraudulent.[93]

Compensation of brokers.

The compensation of brokers is a matter generally left to tariffs and local usages; but some of the commercial codes have provisions in the matter. Argentina [94] prescribes that in case one broker has carried through the transaction, he may receive compensation from both parties. When more than one broker has mediated in the transaction each has a right to receive compensation from his principal only.

In Argentina [95] and in Panama [96] compensation is due even

[90] Spain, 101; Argentina, 97; Bolivia, 92; Brazil, 55; Chile, 67; Panama, 117; Peru, 101; San Salvador, 47; Uruguay, 98.

[91] Art. 119. [92] Art. 78.

[93] Argentina, 112; Chile, 64; Ecuador, 81; Haiti, 88; Honduras, 63; Mexico, 70; San Salvador, 54; Santo Domingo, 89.

[94] Art. 111. [95] Art. 111.

[96] Art. 127.

Notwithstanding that a non-official broker has no action to recover compensation as such broker, his services must be paid for under article 1627 of the Civil Code. Cámara de Apel. Com., Buenos Aires, December 26, 1912, *Jur. de los Tribs. Nacs.*, Dec., 1912, p. 332.

A broker who has lent his services in a contract of purchase and sale subject to a condition precedent, has no right to demand compensation if the purchase is not realized because the condition does not take place without the seller being liable therefor. Cam. de Apel. Com., Buenos Aires, Nov. 5, 1912, *Ib.*, Nov., 1912, p. 285.

A person is entitled to compensation when he works as a broker, even though he is not registered in that capacity, if he appears in the registry as a commercial agent. Corte de Apel. Com., Buenos Aires, April 18, 1914. *Ib.*, April, 1914, p. 264.

though the transaction is not completed owing to the fault of one of the parties, or when after it was begun by a broker, the party entrusts its conclusion to another broker or the party concludes it himself.

In Bolivia, brokers, in purchase, exchange, insurance or freight contracts, are paid one-half per cent of the amount of the transaction by each party, a quarter per cent on transactions in gold and silver, and in discounts of negotiable instruments two per cent per thousand from each party.[97]

In Colombia the maximum compensation is five per cent, each party paying half.[98]

In Panama [99] in the absence of special agreement, the broker is paid in accordance with the local usages.

In Venezuela a broker is not entitled to compensation if he does not conclude the business.[100]

Non-official brokers are not entitled to compensation in Bolivia,[101] Colombia [102] and Panama.[103]

Statute of limitations.

Rights of action against brokers are extinguished by limitation after five years in Guatemala,[104] two years in Spain,[105] Argentina,[106] Brazil,[107] Chile,[108] Colombia,[109] Ecuador,[110] Honduras,[111] Panama,[112] Peru,[113] and Uruguay,[114] and one year in Mexico.[115]

AUCTIONEERS

Requisites and obligations of auctioneers.

In order to be an auctioneer a person must satisfy all the requirements necessary to be a broker; and his obligations

A broker has no right to receive any compensation when the contract subject-matter of his services was not validly perfected. Cam. 2a de Apel. Civ., Buenos Aires, May 16, 1914, *Ib.*, May, 1914, p. 189.

[97] Art. 93. [98] Art. 88. [99] Art. 104.
[100] Art. 79. [101] Arts. 104, 105. [102] Art. 69.
[103] Art. 110. [104] Art. 1189. [105] Art. 946.
[106] Art. 851. [107] Art. 446. [108] Art. 63.
[109] Art. 91. [110] Art. 98. [111] Art. 62.
[112] Art. 125. [113] Art. 975. [114] Art. 1020.
[115] Art. 1043.

are also the same, namely, diligence, good faith and secrecy regarding the name of the principal for whom he sells. They must show their diligence by advertising in the best way and in ample time the terms of the auction, the things for sale, and the place, day and hour of the sale. Their good faith must be shown in the way they attract bidders, without misrepresentation concerning the quality, weight or measure of the articles offered.[116]

Manner of carrying on an auction.

Two systems may be noted as to the manner of carrying on an auction:

1. *The system of Argentina.* Sales at auction cannot be suspended and the goods must be sold to the highest bidder, whatever the amount offered.[117]

2. *System of Chile.* The auctioneer may suspend the sale and postpone the auction when the bids do not reach the price fixed in the owner's instructions; should there be no special instructions, the auctioneer may accept the highest bid.[118]

In Venezuela a previous advertisement of the minimum price is required.

Books of auctioneers.

Auctioneers must keep three books:

1. A diary of entries, in which they must note all articles received for sale, stating their amount, weight, trade-marks or signs, name of the person from whom received, that of the person for whose account they are to be sold and the terms of sale.

2. A book of sales, in which they must record daily the sales made, the name of the person for whose ac-

[116] Argentina, 113, 114, 115; Brazil, 68, 70, 89; Chile, 81, 87; Colombia, 106, 107, 110, 111; Ecuador, 100, 101, 104; Honduras, 68, 71, 74; Peru, 116 to 118; San Salvador, 61, 63, 65; Venezuela, 90, 94.

[117] Argentina, 117; Ecuador, 106; Honduras, 76.

[118] Chile, 89; Colombia, 113; Panama, 133; San Salvador, 67; Uruguay, 118; Venezuela, 96.

count they were made, and that of the buyer, terms of payment and other necessary specifications.

3. A book of accounts current with every consignor.[119]

Obligation of accounting.

Within two days after the sale, the auctioneer must send to the consignor a signed account of the sale of his goods.[120] In Ecuador the period is five days, including the day of sale.

The auctioneer must deliver the balance due on the account when the account is presented to the consignor, in Colombia, Ecuador, Honduras, Panama and San Salvador; and within eight days after the sale in Argentina, Brazil, Chile, Peru, Uruguay and Venezuela.

[119] Argentina, 118; Brazil, 71; Chile, 85; Colombia, 108; Ecuador, 102; Honduras, 72; Panama, 129; Peru, 121; San Salvador, 64; Uruguay, 119; Venezuela, 92.

[120] Argentina, 119; Brazil, 72; Chile, 93; Colombia, 117; Honduras, 80; Panama, 136; Peru, 122; San Salvador, 71; Uruguay, 120. In Venezuela the period is four days, under article 100.

CHAPTER VIII

INSTITUTIONS FOR HELPING COMMERCE

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Legal relations are affected not only by what the parties expressly stipulate, but also by certain external circumstances, such as the place where a contract is concluded, to which the law attaches certain consequences. Spain, Peru and Panama devote one section of their respective codes to transactions taking place in a store open to the public. These countries as well as Venezuela also regulate commerce in a fair (*feria*). Spain, Argentina, Brazil, Ecuador, Panama, Peru and Venezuela provide for transactions concluded in exchanges. In Mexico the Federal government has entered into a contract with private parties for the establishment of an exchange in the city of Mexico, guaranteeing them certain privileges for a period of fifty years; this contract was approved by Congress on October 19, 1887, and thus far is the only enactment relating to this important matter.

In Uruguay the exchange of Montevideo was established by private parties as a corporation, its by-laws being approved by the Government in accordance with the provision of article 405 of the code of commerce; on August 14, 1907, and on September 19 of the same year, the Ministry of Finance made the declaration that the aforesaid corporation had furnished evidence of owning the capital necessary according to the law of June 2, 1893. The corporation was then definitely constituted.

Spain, Argentina, Brazil, Mexico, Panama, Peru and Uruguay have also regulated general warehouses of deposit and warehouse receipts.

We shall discuss in order the provisions governing these different matters.

PUBLIC STORES

Definition.

By a public store is meant any commercial house established by a merchant whose name is inscribed in the commercial registry, or by a merchant not inscribed, provided the store is open to the public for eight consecutive days, or has been advertised by means of signs in the locality or announcements to the public or in the local papers.[1]

Goods bought in public stores become automatically the property of the buyer.

Statutes of limitation require a certain lapse of time before the buyer of a thing, though in good faith, can be sure that he will not be deprived of it by another's action. This fact would make the situation of those who buy in a public store uncertain to such a degree that commerce in general would suffer. This consideration has induced the law to declare that a person who buys in a public store acquires instantaneously ownership of the things bought, thus barring any action against him by a lawful owner, the rights of the latter against the unlawful seller being reserved.[2]

On the other hand, and as an application of the same principle, money paid by a buyer as the price of merchandise bought in a public store cannot be recovered by a person who claims to have been dispossessed thereof.[3]

Purchases and sales are presumed to be for cash.

Purchases and sales made in public stores are presumed to be for cash, unless otherwise provided.[4]

FAIRS

Character of fairs.

Fairs are gatherings of producers, consumers and mer-

[1] Spain, 85; Peru, 85.
[2] Spain, 85; Panama, 167; Peru, 85.
[3] Spain, 86; Panama, 167; Peru, 86.
[4] Spain, 87; Peru, 87.

chants from different places who seek thus to overcome the difficulties created by distance, in order to display and dispose of their merchandise or to obtain what at their customary residence could not be secured. Fairs as a rule have been the subject-matter of administrative provisions; but private interests are also involved, inasmuch as the main object of such gatherings is to trade. The designation of place and time in which fairs are to be held as well as the police regulations to be observed are matters for the administrative authorities.[5]

Contracts entered into during a fair must be speedily executed in order to avoid differences difficult to settle among parties who often live at a considerable distance, and under different jurisdictions. Consequently contracts of purchase and sale made for cash must be executed within twenty-four hours, after which, if none of the parties has demanded the fulfillment of the other's obligation, the contract is nullified and all earnest money is forfeited.[6]

Questions arising out of contracts entered into at fairs must be decided at an oral hearing (*juicio verbal*) by the municipal judge of the place where the fair is held, provided the merchandise in question is not worth more than fifteen hundred pesetas ($300 U. S.) in Spain,[7] two hundred fifty balboas ($250 U. S.) in Panama,[8] two hundred soles ($85 U. S.) in Peru.[9] In Venezuela, the questions must be decided by one of the aldermen (*regidor*) of the town; no specific amount is fixed for his jurisdiction.[10]

EXCHANGES

In the matter of exchanges certain questions have arisen which have been greatly discussed from the points of view of free trade, ethics and economics. The most important of these is whether or not the seller of quoted merchandise of securities need be an actual and lawful possessor of what

[5] Spain, 82; Panama, 163; Peru, 82; Venezuela, 71.
[6] Spain, 83; Panama, 165; Peru, 83.
[7] Spain, 84.
[8] Panama, 166.
[9] Peru, 84.
[10] Art. 72.

he offers for sale. Another question is whether or not the exchange transactions can be concluded on terms freely fixed by the parties, and whether or not contracts may be made optional at the discretion of one of the parties who may withdraw from the transaction by paying the difference in price between that of the day of the contract and the day of its performance. All these questions are intimately related and may be summarized thus: Is gambling in business a lawful pursuit?

From a legal point of view the question is to determine whether the seller needs to be the owner of the thing sold, as the code Napoleon requires, or whether the contract of purchase and sale of things not belonging to the seller, is valid, in accordance with the system of the Roman law. From the economic view point the question is directly related to the freedom of commerce and to the effect of speculation on future prices. From the ethical point of view gambling has been considered an evil to such an extent that ethical considerations against gambling would have led to a general condemnation of exchange transactions on time and of those contracts in which the offerer was not the actual possessor of the offered goods or securities; but experience has shown that all measures taken by the law in order to avoid this type of business have proved not only unsuccessful but rather harmful owing to the methods employed by the parties to disguise the real character of their contract and to evade the provisions of the law.

We therefore find two systems in this respect, as follows:

1. Transactions entered into on an exchange must be performed as the parties have stipulated either for cash or on credit, as a closed transaction or as an option with or without premium. Actions arising out of these contracts are enforceable in the courts.[11]

[11] Spain, 75; Peru, 75.

Exchange transactions are valid even though they imply a gamble, the success of which is the result of a difference in quotations; inasmuch as the person who supports the validity of said transactions acted as an agent of the defendant, and did not disclose the name of his principal. Spain, Trib. Sup., Dec. 26, 1905; *Gaceta* of Sept. 19, 1906, p. 154.

2. All exchange transactions which, under the guise of a lawful contract, cover gambling, are strictly forbidden. They cannot be enforced in courts, and the parties thereto are subject to fine.

Purchases and sales which do not obligate the parties to make delivery but only to pay differences in price between the day of the contract and the day of maturity are unlawful and unenforceable. When a transaction proves to be lawful for one of the parties and aleatory (gambling) for the other, it can produce legal effects only in favor of the party acting in good faith.[12]

Ecuador practically adopts this same system, but confines it to public securities only, providing that contracts relating to them must be performed at the most on the day following acceptance; the seller must deliver the securities before the exchange is closed, and the buyer must then pay the price.[13]

The law is silent in Brazil and Venezuela. Ecuador is silent also as to all transactions relating to goods and securities other than public securities.

Liability of collegiate exchange brokers.

When a transaction has been entered into through a collegiate exchange broker who has not disclosed the name of his principal, and who delays the fulfillment of the contract, the other party to it has the choice, at the next meeting of the exchange, between giving up the contract after notice to the governing board of the college of brokers, or enforcing performance of the contract. In the latter case, the enforcement must be effected through a member of the board, who must sell or buy the goods agreed upon for the account of the defaulting broker; the rights of the latter against his principal being reserved. The board must, if necessary, liquidate the security or bond given by the defaulting broker in order to pay any balance due on the transaction.[14]

[12] Argentina, 78, 79, 80; Panama, 142, 143, 144.

[13] Art. 65.

[14] Spain, 77; Peru, 77.

In Argentina [15] and Panama,[16] the exchange brokers are subject to the general duties of brokers and are liable for the transactions executed by them only in case they violate their duties.

Public functions of exchange brokers.

The exchange must keep records of the daily transactions concluded in it. These transactions must serve to determine the current price of merchandise, freight, and discounts in exchange of drafts and loans. These records may serve as evidence of prices in the locality in case of judicial litigation.[17] Spain and Peru provide in detail for the method in which exchange brokers must keep these records.

After a transaction in quoted securities or goods is perfected through an exchange broker the latter must draw up and sign a note and deliver it to the announcer of the exchange, who, after reading it to the attendants, must pass it to the board of associated exchange brokers (*junta sindical*).

Transactions entered into through a collegiate exchange broker covering public securities must be announced in the exchange *viva voce* as soon as they are concluded, and a corresponding note must be served on the board (*junta sindical*). Of other contracts notice must be given in the *Boletín de Cotización* (quotation sheet) stating the maximum and the minimum price of commodities, freights, discount and interest rates on loans.

After the business hours of the exchange the board (*junta sindical*) must convene and examine the notes delivered by the collegiate exchange brokers, and the notices of the trans-

[15] Art. 82. [16] Art. 148.

[17] Spain, 79, 80; Argentina, 83, 84; Brazil, 33; Ecuador, 67; Peru, 79, 80; Venezuela, 66, 67.

The circumstance that the exchange in Cuba has not the character of an official institution is no obstacle to taking into consideration, together with other evidence, a report of the same tending to demonstrate the existence of a commercial usage in the locality. Cuba, Trib. Sup., Dec. 19, 1906; *Gaceta* supplement of March 3, 1907.

Article 31 of the code of commerce in establishing a method of proving the price of securities does not mean that other means of evidence are to be rejected. Spain, Trib. Sup., Jan. 10, 1903; *Gaceta* of Feb. 27, 1903, p. 143.

actions as given to the board. It must then draw up the memorandum of quotations and send a copy thereof to the commercial registry.

GENERAL WAREHOUSES

General character and functions.

Among the most beneficial institutions auxiliary to commerce are general warehouses. They are establishments in which every kind of merchandise can be deposited; and besides care in its preservation, the depositor obtains certain documents which represent the merchandise. The economic functions of warehouses are very important: they make storage easier and less expensive; they give to depositors a means of utilizing credit by issuing certificates of deposit, constituting negotiable paper; they facilitate the sale of said goods by avoiding the necessity of moving them from place to place, the formalities of delivery being confined merely to the transfer of the certificate to the buyer.

As for the legal functions of warehouses of deposit, they are governed first of all by their regulations or by the special law relating to them, then by the provisions of the commercial code dealing with those institutions or with deposit in general, and lastly by the civil code.[18]

In Spain, Mexico, Peru and Panama the matter of warehouses of deposit is governed by the commercial code, but in regard to the requisites for establishing them in Mexico the laws of March 19, 1897, and February 16, 1900, are controlling. In Argentina warehouses are governed by law No. 928 of September 5, 1878; in Brazil by decree No. 1102 of November 21, 1903, and in Uruguay by decree of December 20, 1879, to the articles of which reference is made in the quotations hereafter.

Requisites for establishing deposit warehouses.

There are different systems in regard to the method of establishing a warehouse. They are as follows:

[18] Spain, 310; Peru, 304.

1. *System of Spain.* No requisites are provided for by the law; hence, entire liberty is left to persons to establish and conduct warehouses. But as the title of the code is headed "*Compañias de almacenes generales de depôsito*" some authorities maintain that only associations can undertake business of this kind, whereas others would accord this privilege freely to individuals.[19]

This system is also followed by Peru.

2. *System of Argentina.* The deposit of merchandise and the power to issue certificates of deposit and warrants is confined to custom houses and applies to goods imported from foreign countries.[20] The executive power may authorize the deposit of domestic products in the fiscal warehouses [21] and may also authorize private individuals to establish such warehouses.[22]

3. *System of Brazil.* Every person or legal entity with commercial capacity can establish general warehouses of deposit, and for that purpose must state before the Board of Trade (*Junta Commercial*) of the corresponding district: *a*, the firm name and domicil of the party; *b*, the name, location, number, space, convenience and safety offered by the warehouses; *c*, the character of the merchandise to be received on deposit; *d*, the kind of transactions and services which they propose to undertake.[23] To this statement there must be added the internal regulations of the warehouse and those of auction rooms, if any; the tariff of compensations for deposit and other services; a certified copy of the articles of organization duly registered, in the case of associations. If the regulations do not infringe the provisions of the law, the Board must provide for the inscription of the applicant in the *matrîcula* and for the publication of notices containing the statement, regulations and tariffs; after this formality the warehouses

[19] Blanco y Constans, Derecho Mercantil, Madrid, 1910, vol. 1, p. 636.
[20] Art. 1. [21] Art. 30. [22] Art. 33.
[23] Art. 1.

may begin business. The Government can also designate through the Minister of Finance the custom houses and through the Minister of Labor, Commerce and Public Works the depots of Government railways which may issue certificates of deposit and warrants.[24]

4. *System of Mexico.* Only by concession of the executive power can general warehouses of deposit be established. They are divided into two classes: *a*, those which receive on deposit domestic products or even foreign products which have already paid their import duties, a class of institutions which can be established anywhere in the country, at the discretion of the national Executive; and *b*, those which, in addition to such merchandise, are authorized to receive foreign goods which have not yet paid import duties; these can only be established at the frontiers or at ports where there is a custom house. A minimum capital of five hundred thousand pesos is required.[25]

5. *System of Panama.* General warehouses of deposit are always subject to the inspection of the Government, and cannot commence business until they furnish a guaranty satisfactory to the Minister of Finance. The Government bonded warehouse like general warehouses can also issue certificates of deposit and warrants, and the public administration is in that case responsible for the merchandise.[26]

6. *System of Uruguay.* Only the custom house at Montevideo is authorized to issue certificates of deposit to the order of the depositor, on request of the interested party, and when the value of the goods exceeds $1,000, (about $1,034 U. S.)[27]

Character of the documents issued by general warehouses of deposit.

The documents issued by general warehouses of deposit

[24] Arts. 2, 3.

[25] Art. 6 of the lawof March 19, 1893, and article 3 of the law of Feb. 16, 1900.

[26] Art. 188.

[27] Art. 2 of the law of Dec. 10, 187.

may be classified as private instruments or as public instruments, depending upon whether the issuing warehouses are private enterprises or custom houses and other institutions controlled by the government according to law.

As to the warehouse, the documents constitute evidence of the deposit, involving the incidental consequences to the bailee. As to the bearer of a certificate of deposit, it constitutes evidence of title to the property deposited, even against creditors of the depositor. As to the bearer of a warrant, it is equivalent to a pledge authorizing a demand for the sale of the goods if the debt is not paid when due.[28]

The documents issued by general warehouses produce two effects: one evidences title to the deposited merchandise, while the other is made for the purpose of pledging it. As a consequence of these two different purposes, the documents may be different; one being the certificate of deposit, the other the warrant. They are issued in separate instruments.[29]

Spain,[30] Peru,[31] and Uruguay [32] do not require the issuing of two documents; they have created a system designed to use credit in connection with the certificate of deposit. By it, there are two ways of transferring the certificates—one with a view to convey the title to the goods, the other to pledge them.[33]

Kinds of certificates.

The certificates can be issued payable to a certain person or his order, or to bearer.[34] In Argentina,[35] Mexico,[36] and Panama,[37] the certificate of deposit and the warrant are indorseable even if issued in the name of a certain person. In Brazil [38] they are always indorseable.

Effects of indorsement.

The indorsement of the certificate of deposit together with

[28] Spain, 195, 196; Argentina, 9, 10, 11; Brazil, 21, 23; Mexico, 341; Panama, 179 to 182; Peru, 199, 200.

[29] Argentina, 1; Brazil, 15; Mexico, 344; Panama, 169.

[30] Art. 194. [31] Art. 198. [32] Art. 9.

[33] Spain, 196; Peru, 200. [34] Spain, 194; Peru, 198. [35] Arts. 12, 13.

[36] Art. 344. [37] Art. 173. [38] Art. 15.

the warrant conveys full title to the indorsee, who can withdraw the goods from the warehouse or renew the period of deposit or divide them in different packages or lots at his discretion. He is not subject to any claim arising against the previous holders; he need only pay the transportation or warehouse charges.

The indorsement of the certificate alone conveys title to the merchandise, subject to the payment of any debt due the holder of the warrant. The transfer of the warrant without the certificate gives the indorsee a right of pledge or lien on the goods.[39]

Requisites of the certificate and warrant.

The requisites with which the certificate and the warrant must comply differ from country to country as follows:

(*a*) designation of the kind of document, whether certificate of deposit or warrant; [40]

(*b*) name of the enterprise; [41]

(*c*) name and domicile of the bailor.[42] In Brazil and in Mexico the profession of the bailor must also be stated, and in Peru these indications are not necessary when the document runs to bearer;

(*d*) place where the deposit is made and period of its duration; [43]

(*e*) nature and amount of the merchandise deposited, designated by its usual name in commerce, its weight, the state of wrappers or containers, trade-marks, and all identifying descriptive characteristics; [44]

(*f*) the quality of the merchandise.[45] In Brazil the quality must be stated when there are several things of the same kind in the warehouse;

[39] Spain, 195, 196; Argentina, 9, 10, 11; Brazil, 17, 18; Mexico, 344; Peru, 199, 200; Panama, 174.

[40] Bolivia, Panama.

[41] Argentina, Bolivia, Panama.

[42] Argentina, Brazil, Mexico, Panama.

[43] Argentina, Brazil, Panama.

[44] Spain, Argentina, Brazil, Mexico, Panama, Peru.

[45] Argentina, Mexico, Panama.

(*g*) name of the insurer of the merchandise and amount of the insurance; [46]

(*h*) statement of the fiscal duties which the goods are liable to pay, as well as other charges they may incur; [47]

(*i*) statement whether the charges have been paid; [48]

(*j*) signature of the manager; [49]

(*k*) period of the deposit; [50]

(*l*) date of issue of the document; [51]

(*m*) in Argentina, the certificate must furthermore contain the following statement: "*No se entregarán las mercaderías á la presentación de este certificado, sin estar acompañado del warrani y ambos con endoso en forma, si se hubiesen transferido.*" (The merchandise shall not be delivered on the presentation of this certificate, unless it is accompanied by the warrant, and both duly indorsed, if they have been transferred.)

The certificate as well as the warrant must be detached from a stub-book.[52]

Spain and Peru summarize these requisites by providing that the certificate and the warrant (*resguardo*) must state the kind of merchandise, with the amount represented by each of them. This brief statement is not construed as excluding the other requisites of a regular document, such as date, name of the enterprise, signature of the bailee, place of deposit, etc., as mercantile usages requires.[53]

Failure to pay the debt guaranteed by the warrant.

In case the holder of a warrant is not paid at the expiration of the agreed period, in countries which separate the certificate of deposit from the warrant, he must protest the warrant just as in the case of a bill of exchange.[54]

The holder of a warrant or certificate can demand the sale

[46] Brazil, Panama.
[47] Brazil.
[48] Argentina, Mexico, Panama.
[49] Argentina, Brazil, Panama.
[50] Argentina, Brazil.
[51] Argentina, Brazil.
[52] Argentina, Brazil, Mexico, Panama.
[53] Blanco y Constans, Derecho mercantil, vol. 1, p. 638.
[54] Argentina, 18; Brazil, 23; Mexico, 348; Panama, 182.

of the merchandise covered by the document and the payment of his claim with the proceeds, without having recourse to a court.[55]

The sale must be demanded from and ordered by the manager of the warehouse, in Spain,[56] Argentina,[57] Mexico,[58] Panama,[59] and Peru.[60] In Brazil [61] the holder of the warrant can sell the goods through a broker or auctioneer of his own choosing.

Period for selling the goods.

The laws of Spain, Peru and Uruguay do not provide for any special period during which the merchandise, subject-matter of the deposit, must be sold.

In other countries, the period varies as well as the consequences of not carrying on the sale within such period, as follows:

In Argentina [62] the period is fifteen days from the date of the protest, and the holder of the warrant loses his rights against its indorsers if he fails to demand the sale within that period or if he leaves the document unprotested.

In Brazil [63] the period is ten days from the date of the memorandum of protest; if this period elapses without the sale being held, the holder preserves his rights of action against the first indorser only and against all the indorsers of the certificate of deposit.

In Mexico [64] the period is eight days, but no provision is made in case of failure to sell the goods within that period; the effect of this silence of the law is that the holder retains only the ordinary right of action of a pledgee.

In Panama [65] the holder of a warrant loses all his rights against the indorsers if he has not made protest

[55] Spain, 196; Argentina, 19; Brazil, 23; Mexico, 348; Panama, 182; Peru, 200.
[56] Art. 196. [57] Art. 20. [58] Art. 348.
[59] Art. 182. [60] Art. 200. [61] Art. 23.
[62] Art. 20. [63] Art. 25. [64] Art. 23.
[65] Art. 348.

or demanded the sale of the merchandise within ten days after maturity of the debt. He only preserves his rights against the debtor, but the law does not clearly establish who the debtor is.

Liabilities of general warehouses.

General warehouses of deposit are liable for the identity and preservation of the merchandise deposited according to the law of deposit for hire.[66]

In Brazil [67] warehouses are not responsible for the identity of goods closely resembling other deposited goods of the same kind, but are liable merely to deliver the correct quantities of goods of the same kind and quality.

[66] Art. 186.

[67] Spain, 198; Argentina, 31, 34; Mexico, 357; Panama, 188; Peru, 202; Uruguay, 16.

Not because a warehouse is located in the custom house, is the government responsible for the careful preservation of the goods therein deposited; only the owner or manager thereof is liable. Mexico, Sup. Trib. Fed., Dec. 12, 1898; *Jurisp.*, 1898, p. 298.

Besides the institutions named in the body of this chapter, the chamber of commerce warrants mention. In regard to the functions of this institution article 8 of Royal decree of Spain, Dec. 29, 1911, reads as follows:

"All Commercial Chambers created in accordance with the law and these regulations shall be consultative bodies to the public administration and shall be heard on proposed treaties of commerce and navigation, as well as in commercial covenants and arrangements; on the amendment of custom tariffs and ordinances, consular tariffs, port arbiters, the formation and amendment of railway tariffs and maritime transportation enterprises assisted by the state, especially when they refer to a particular region; on the modification of official valuation of commodities, on proposed changes in taxes directly affecting commerce, industry or navigation; on the creation of monopolies; on projects of public works related with industrial and commercial life, which must be executed within the corresponding district; on mercantile usages and practices within their territory, and on the creation therein of commercial exchanges, colleges of brokers, general warehouses or any other establishment of a mercantile character rendering public service; on amendments to the code of commerce and, in general, on social legislation (*sobre los projectos de leyes sociales*) and on bills regarding social reforms.

CHAPTER IX

COMMERCIAL ASSOCIATIONS (1)

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The law of the Latin-American countries on commercial associations traces its origin to the French commercial code and the later French legislation. It regards the stock corporation as a normal development of the commercial partnership, which is a legal entity. The theoretical origin of the stock corporation in Anglo-American law is quite differ-

ent. The partnership not being regarded as a legal entity, the legal personality of the corporation is deemed to be specially conferred by the State through the grant of a charter, analogous to the municipal corporation or the old monopolistic public service companies.

These historical differences between the Latin-American and Anglo-American conception of the stock corporation account for other primary distinctions between the two systems: [1] the Latin-American codes have but one general classification of commercial associations which include the general partnership, the limited partnership, and the stock company; whereas the Anglo-American law regards as fundamental the distinction between the unincorporated and the incorporated association. The Latin-American stock company is organized under a general law like a partnership; the Anglo-American stock company, historically regarded as an exceptional method for undertaking great enterprises, required the special endorsement of a charter from a jealous, if not suspicious, state. The administrative control over corporations in Latin-America contrasts with the judicial control characteristic of Anglo-American law.

Legal character of commercial associations

The legal character of commercial associations is explained from two opposite points of view by two groups of writers, namely, the "individualists" and the "socialists."

The former consider the individual as a subject of innate rights. Society they regard as the result of the renuncia-

[1] All the Latin languages denote by some single word both the partnership and the corporation. In Spanish that word is *sociedad* which also means a union of persons, families or peoples; or a natural or contractual group of men who have an end to prosecute by coöperation. The Spanish word "*compañía*" has a very similar meaning, and the law uses each of these generic words interchangeably to designate either the partnership or the corporation. We use the English word "association" as a substitute for "*sociedad*" or "*compañía*" to cover both groups but, as the Spanish word "*asociación*" is reserved by the law to designate a transient state of association without forming a fixed unit, as the "*sociedad*" or the "*compañía*" implies, we shall use the words "momentary association" or "joint adventure" with the connotation of the Spanish legal term "*asociación*."

tion by each person of his primary liberties in order to enjoy the benefits of other men's coöperation. Society, they say, has been created for the protection of personal rights. In order, therefore, to be a subject of rights, it is necessary to be a person—so when two or more individuals associate for a common purpose and establish a fund or capital to carry it out, the law creates an entity out of that association of natural persons and endows it with the legal substantive attributes of a person possessing rights and duties, independently of and even in opposition to the rights and duties of the associates.

The "socialists," on the other hand, say that man could not renounce any right in favor of society, because the very idea of a right is inconceivable without the idea of society; that an individual in isolation exercising rights is an impossibility, that the idea of right itself is a metaphysical conception, because man naturally lives in association or groups and performs social functions. If his aims coincide or harmonize with those of the community, those aims are protected, otherwise they are forbidden. There are, then, no rights, but functions. According to this theory, when a group of persons establishes a common fund to pursue an end which is coöperative with the functions of the community, that end and the fund designed to attain it are protected, even against the individual will of each one of the associates, so long as the conditions necessary to reach the end are deemed satisfied.

These ideas regarding the character of associations have been slowly elaborated and the codes of Latin-America show the uncertainty of the doctrine by their definition of the character of associations. None of them, however, have thus far accepted the "socialistic" theory, although in various branches of commercial law the influence of that theory may be observed.

With respect to the character of commercial associations the Latin-American codes may be divided into the following systems:

1. Those which expressly recognize commercial as-

sociations (not "*asociaciones*" or momentary associations) as legal entities.[2]

2. Those which expressly recognize the character of legal entities in stock corporations (*sociedades anônimas*) only.[3]

3. Those which are silent on the subject.[4]

4. Those which imply in their definition the idea of a community rather than that of an independent entity. Among these we may note the code of Colombia,[5] which provides that the firm name "expresses the mutual power that the associates give to one another to trade with and to bind themselves to third parties." According to this provision the association has no rights other than those of the associates.[6] Argentina [7] and Uruguay [8] provide that "the firm name is equivalent to the signature of each one of the associates; it binds all of them as if each had actually written his signature."

[2] Spain, 116; Costa Rica, article 2 of the law of Nov. 24, 1909, to which reference is always made throughout the chapters dealing with commercial associations; Ecuador, 262; Mexico, 89, 90; Panama, 251; Peru, 124; Venezuela, 204.

The legal entity created by organizing a mining corporation is distinct from its individual members, whose rights are confined to their shares, representing the interest they have in the profits or losses. Spain, Supremo Tribunal, Nov. 16, 1893; *Gacetas* of Jan. 1st and 3d, 1894.

An association cannot be considered as existing when the question of its existence has been submitted to the courts. Spain, Supremo Trib., Oct 27, 1877; *Gaceta* of Nov. 23, 1877.

[3] Chile, 424; Colombia, 550; Guatemala, 300; Honduras, 283.

[4] The legal entity of commercial associations is recognized in the following decisions of the courts of Brazil: August 1, 1884; *Tribunal de Relação da Corte, O Direito*, v. 35, p. 204, and April 20, 1886, *O Direito*, v. 97, p. 562 *et seq.;* by the *Camara de corte de Appelaçao*, on June 21, 1909, *Revista de Direito*, v. 13, p. 138; by the 2a *Camara da Corte de Appelaçao* on Oct. 20, 1905, *O Direito*, v. 29, p. 293, and August 20, 1907; *O Direito*, v. 105, p. 295; by the *Camaras Reunidas da Corte de Appelação* of Nov. 3, 1909, *Revista de Direito*, v. 15, p. 332. Carvalho de Mendonça, Tratado de Direito Commercial Brazileiro, v. 3, p. 80.

[5] Art. 482.

[6] It is presumed that a partnership does not exist and, therefore, that there is no legal entity when the firm name is not formed in accordance with the provisions of article 481 of the commercial code; *Tribunal Supremo del Dist. del Pacífico*, Colombia, Sept. 21, 1895, *La Justicia*, v. 5, p. 1055.

[7] Art. 303. [8] Art. 455.

When all the associates have individually signed a contract, they are jointly liable just as if they had signed with the firm name. This provision, which is substantially the same as that of Bolivia,[9] may support the theory that the character of a commercial association is that of a community rather than that of an independent entity.

The differences in the definition of commercial associations, however, have not prevented the codes from adopting and accepting uniformly the practical consequences of the theory of a legal entity.

Consequences derived from the character of commercial associations.

Commercial associations always have:

1. A name or firm name;[10]
2. A domicil independent of that of the associates;[11]

[9] Art. 226.

[10] Spain, 126; Argentina, 291, 299, 300; Bolivia, 231; Brazil, article 2 of the law of Jan. 17, 1890 and 302, 315 of the code of commerce; Chile, 352, 365 *et seq.;* Colombia, 467, 481, 482; Ecuador, 227; Costa Rica, articles 5, 6, 41 of the law of Nov. 24, 1909; Guatemala, 237, 245 to 253; Haiti, 20, 30; Honduras, 220, 228 to 236; Mexico, 95, 101 to 103; Nicaragua, 142, 148; Panama, 293; Peru, 134; San Salvador, 169, 177 to 185, 231; Santo Domingo, 21, 23, 30, 43; Uruguay, 395, 453; Venezuela, 205, 302.

[11] Spain, 21; Argentina, 291; Bolivia, 29; Brazil, 301; Chile, 426; Colombia, 467; Costa Rica, article 5 of the law of Nov. 24, 1909; Ecuador, 263; Guatemala, 237; Honduras, 220; Mexico, 95; Nicaragua, 6, 14; Panama, 293; Peru, 21; San Salvador, 169; Uruguay, 397; Venezuela, 206.

By domicil of a commercial association is meant not the place where most of its business is located but where the head office and management are found. Colombia, *Trib. Sup. del Sur del Tolima,* Dec. 2, 1892; *Crónica Judicial del Tolima,* v. 5, p. 2114.

The domicil of an association, established in the articles of organization or in its by-laws, is not changed even though the association has branches in other places. Spain, Sup. Trib., June 4, 1883; *Gaceta* of Aug. 1, 1883.

A contract by virtue of which one of the parties agrees to do some service for the other, receives an amount of money in order to perform that service and stipulates for a certain per centum return in the benefits derived from the business with which the services are connected, is a contract of agency and not a partnership because there are missing certain essential elements of a partnership, such as a firm name and the manner in which the same should be used. Spain, Trib. Sup., Feb. 11, 1911; *Gaceta* of Dec. 18, 1911, p. 105.

3. A nationality that is also independent of that of the associates. In Argentina, however, the law does not take into consideration the nationality of an association, but only its domicil. In determining nationality of an association, either one of two systems is followed:

(*a*) the nationality of an association is governed by the law of the place of its organization; [12]

(*b*) the nationality of an association is governed by the law of the place in which it has the main seat of its business; [13]

When a corporation binds itself to make a payment either in cash or in shares of its own stock it entitles the creditor to demand payment in cash because it is forbidden to corporations to acquire their own shares. This conclusion holds even though the corporation is established in a foreign country if the case refers to acts done or contracts entered into by its representatives in Spain. Spain, Trib. Sup., Oct. 19, 1910; *Gacetas* of March 14 and 15, 1911, p. 110.

[12] Spain, 15; Brazil, 301; Chile, 468; Colombia, 593; Costa Rica, 151; law of Nov., 1909; Guatemala, 332; Venezuela, 293.

The courts of a country are possessed of proper jurisdiction to declare the bankruptcy of a foreign corporation which has its main business in the country, owns real estate there, and when most of its members are citizens of that country. Spain, Trib. Sup., Jan. 17, 1912; *Gaceta* of April 13, 1913, p. 53.

An association, the capital of which is divided into shares of equal value, which is managed by a board of seven persons elected every five years by the general meeting of shareholders and whose purpose is gain, is a *sociedad anónima* or corporation in so far as concerns acts performed in Spain and the payment of taxes, whatever its classification may be according to the law of the country of its main office. Spain, Trib. Sup., Oct. 17, 1910; *Gacetas* of Dec. 18 and 22, 1910, p. 48.

A mercantile association is Spanish not when its members are Spaniards but when it is incorporated in accordance with the Spanish law, is subjected to the Spanish law and is registered in the commercial registry, complying with all other requisites of the law to engage in commerce; those of Art. 151 of the Code of Commerce are among such requisites. Spain, Trib. Sup., Oct. 12, 1906; *Gacetas* of June 15 and 16, 1907, p. 309.

[13] Argentina, 286; San Salvador, 299, 300.

The existence of an association is governed by the law of its domicil.

A plaintiff who states that according to a foreign law the association he represents subsists after the death of the managing partner, is obliged to prove the existence of that law. Mexico, 3a Sala del Supremo Tribunal del Distrito Federal. January 2, 1908, Ruiz Hernández *v.* Mijárez. *Diario de Jurisp.*, v. XVI, p. 513.

The XXI resolution of the International Congress of Stock Companies in

4. Property that belongs exclusively to the association.[14] The most important of all the legal provisions governing the relations between the associates and third parties is derived from the fact that the property of the association is considered as distinct from that of the associates—a rule which has been adopted in order to increase the credit of associations and safeguard their creditors against all contingencies that may arise in the individual fortunes of the associates.

Some of the consequences of this distinction are:

(*a*) the interest or shares of the associates are classified by law as personal property, notwithstanding that most of the capital of the association may consist of real estate; [15]

(*b*) the partnership or corporate capital is not common property but the exclusive property of the association; therefore none of the associates may dispose of any part of that capital, no matter how small, without being civilly or even in some cases criminally liable; [16]

1900 reads: "The nationality of an association, the capital of which is divided into shares must be determined by the place where its main establishment is or by the country where the residence of the association is fixed by the by-laws." The power of attorney given to a person in a foreign country to represent a foreign association must be given in accordance with the laws of the place where it was issued. He does not need to present the copy of the articles and by-laws of the association protocolized in Colombia. Colombia, Trib. Sup. del Dist. Jud. de Panama, June 22, 1897, *Registro Judicial de Panamá*, v. X, p. 119.

"The judge of the place where a corporation 'resides' has jurisdication over questions arising between such corporation and its members whatever the nationality of the latter may be." Argentina, Cam. Fed. de Ap. Paraná, June 23, 1913, *Jurisp. de los Tribs. Nacs.*, June, 1913, p. 68.

[14] Spain, 125, 170, 173; Argentina, 292, 401 to 407; Bolivia, 253 to 256, 260; Brazil, 289, 292, 301, 333; Chile, 352, 375; Colombia, 467, 493 to 505; Costa Rica, 5, 6, of the law of Nov., 1909; Ecuador, 261, 287; Guatemala, 237, 254 to 256; Haiti, 43; Honduras, 220, 237 to 239; Mexico, 95, 108; Nicaragua, 156; Panama, 257 to 260; Peru, 133, 177, 180; San Salvador, 169; Santo Domingo, 43; Uruguay, 395; Venezuela, 216.

[15] Spain, 335 c. c.; Argentina, 2352 c. c.; Costa Rica, 256 c. c.; Mexico, 689 c. c.; Chile, 567 c. c.; Colombia, 655 c. c.; Panama, 327 c. c.; Uruguay, 462 c. c.; Venezuela, 454 c. c.

[16] Spain, 135; Argentina, 417; Brazil, 333, 334; Chile, 381, 404; Colombia,

(*c*) the associate capital is a guaranty for the association creditors, excluding absolutely those of the associates; the latter have only the power to substitute themselves in the rights of their debtors after the liquidation of the association, except in the case of stock corporations, when the creditors may be paid with shares.[17]

506, 529; Costa Rica, 20 to 23; Ecuador, 280; Guatemala, 258, 281; Honduras, 264; Mexico, 131; Nicaragua, 177; Panama, 258; Peru, 143; San Salvador, 189, 212; Uruguay, 475, 476, 480; Venezuela, 287.

In order to organize an association it is required that every one of the associates contribute something to the common fund. Ecuador, una Sala, Corte Superior de Quito, June 27, 1913, Arellano *v.* Valdivieso; *Gaceta Jud.*, Year XI, n. 25, p. 1429.

The title to property contributed by the associates is vested in the association. Spain, Sup. Trib., Feb. 23, 1884.

Associates cannot demand the property which comprises the associate capital so long as the division of that capital is not carried out in accordance with the authorized method of liquidation. Ecuador, Corte Superior de Quito, April 24, 1913, Valasquez *v.* Guallichico; *Gaceta Judicial*, Year XIII, n. 40, p. 1549.

A *de facto* partnership which has not been constituted in a public instrument, nor registered in the public registry is not governed by the code of commerce, but by the civil code, according to which the ownership of the property acquired with common funds belongs in common to the co-owners; if one of the co-owners possesses exclusively a certain part of the common property, he by no means acquires title to it by lapse of time even though in possession more than ten years, because he lacks good faith and a clean title. Spain, Trib. Sup., May 31, 1912; *Gaceta* of July 13, 1913, p. 447.

[17] Spain, 174; Argentina, 417; Bolivia, 301, 302; Brazil, 292; Chile, 380; Colombia, 505; Costa Rica, 23; Ecuador, 266; Guatemala, 257; Honduras, 240, 241; Mexico, 152; Nicaragua, 161, 188; Panama, 273; Peru, 181; San Salvador, 188; Uruguay, 478; Venezuela, 209.

An insurance company which has reduced the amount of its capital cannot compel persons who took a policy before such reduction was made to pay the stipulated premiums; it produces the rescission of the contract unless the insured has agreed to the reduction of the capital which is the guaranty of all the policies. Spain, Trib. Sup., Feb. 17, 1912, La Polar *v.* Diaz de Mendoza; *Gacetas* of May 3 and 5, 1913, p. 163 and March 25, 1913, Sociedad Teatro Calderón de Valladolid *v.* La Polar; *Gacetas* of 13 and 17 of Dec., 1913, p. 220.

In spite of the fact that an association is in liquidation it is considered as a legal entity whose rights and obligations are distinct from those of the partners or associates, and property entered in the public registry as possessed by the association is not affected by personal liabilities of its members. Spain, Trib. Sup., March 6, 1900; *Gaceta* of March 18, 1900.

In case of bankruptcy of an association, the individual creditors of an asso-

Mexico makes the following distinction: the above mentioned rule is applicable when the debt of an associate is contracted after the formation of the association; but when it is contracted before that time the individual creditor is entitled to ask for the liquidation of the association and to be paid immediately. This is also the rule in Honduras.[18]

(*d*) As the associates in a partnership are guarantors for the association, the creditors of the association may not attach individual property of the associates, until they have exhausted all the property of the association.[19]

5. Legal capacity to trade, to bind themselves and to bind third parties in dealing with the association; [20]

6. Capacity to sue and be sued. There has never been any doubt as to this capacity; it is a consequence of the power of contracting and acquiring rights and

ciate do not compete with those of the association, but when the latter are paid off the former can enforce their rights upon the remainder belonging to associate debtors. Spain, Trib. Sup., Dec. 29, 1870; *Gaceta* of Jan. 29, 1871.

[18] Art. 240.

[19] Spain, 237; Argentina, 443; Bolivia, 305; Brazil, 350; Costa Rica, 42; Mexico, 151; Nicaragua, 191; Panama, 328; Peru, 230; Uruguay, 506.

According to article 237 of the commercial code individual property of general partners, which was not included in the association fund, can be attached for the payment of the associates' liabilities only after their individual property has been exhausted. Spain, Trib. Sup., May 23, 1898, *Colección Legislativa de España, Jurisp. Civil*, 1898, v. II, p. 344.

[20] Spain, 116; Brazil, 316; Chile, 387; Colombia, 512; Costa Rica, 45, 48, 49 of the above mentioned law; Guatemala, 275; Honduras, 255; Nicaragua, 155; Panama, 301; Peru, 124; San Salvador, 203.

The lack of agreement among the associates in regard to articles bought by one of them, is not an obstacle to the fulfillment of the contract of purchase and sale entered into by one of the associates whose name is included in the firm name. Argentina, Cam. de Apel. Com. Buenos Aires, Feb. 15, 1913, Chedil Burbo y Cia. *v.* Camblor Hermanos, *Jurisp. de los Tribs. Nacs.*, Feb., 1913, p. 131.

Corporations as legal entities enjoy the same rights as individuals in acquiring real estate, when the general meeting of the members of the board of directors has authorized them to do so in accordance with their by-laws approved by the Executive of the Nation. Argentina, Camara 2a de Apel. Civ. Buenos Aires, Nov. 21, 1912, Iturrisa *v.* Conoso, *Jur. de los Tribs. Nacs.*, Nov., 1912, p. 219.

obligations and in some of the commercial codes it has been expressly established.[21]

Method of establishing commercial associations.

An association must comply with two requisites:

1. That two or more persons bind themselves to place in a common fund some of their property or their industry or both with a view to obtaining profits;

2. That the commercial organization be established in accordance with the provisions of the commercial codes.

Kinds of association.

Considering the first of these two requisites the codes of Spain [22] and Peru [23] declare that mutual insurance companies are not commercial, because their purpose is not to make profits but to distribute the losses of a few persons among a larger number of others similarly situated. The codes of Argentina, Mexico, Panama and San Salvador consider these associations as commercial, owing perhaps to the circumstance that they generally engage in commercial transactions, although they do not directly intend thereby to profit financially. The other codes do not mention coöperative associations; their classifications therefore must be made according to their functions.

In creating a common fund as the capital of the association the persons who organize it may graduate their liability in three different ways. This criterion of liability consti-

[21] Argentina, 297, 404; Brazil, 304 and article 19 of decree 434 of July 4, 1891; Chile, 379, 398; Colombia, 520 to 523; Ecuador, 339; Costa Rica, 45 *ib.;* Guatemala, 275; Honduras, 258; Mexico, 124; Nicaragua, 163; Panama, 301; San Salvador, 203; Venezuela, 220, 293.

[22] Art. 124.

An association is mercantile notwithstanding that it was organized as a cooperative or mutual one, when it possesses capital divided into shares and enters into business with a view to making profits and to dividing them among its shareholders. Spain, Trib. Sup., Oct. 6, 1914; *Gacetas* of Jan. 9 and 11, 1915, p. 40.

[23] Art. 132.

tutes the most important basis of classification of associations, namely:

1. Associations in which all the members under a firm name are jointly and severally liable (*in solidum*) for the transactions and debts of the association. This class is called "*sociedad en nombre colectivo.*" Its equivalent in Anglo-American law is the general partnership.[24]

2. Associations in which some of the members contribute a certain amount of the group fund, their liability being limited to the amount of their contribution, while other members are unlimitedly and jointly liable. This is called the "*sociedad en comandita*" which may be either simple or with shares. It is equivalent to the limited partnership of Anglo-American law.

3. Associations in which a common fund is created with fixed contributions, called *acciones* (shares), the management of the fund being entrusted to a group of persons or directors—subject to removal at certain periods—who represent the association. The liability of every member is limited to the amount of his contribution unless he incurs some additional responsibility by his acts. This type of association is the "*sociedad anônima*" or stock corporation.[25]

[24] The fact that in a complaint the members of a defendant commercial association were individually mentioned, without using the firm name of the latter, does not constitute a legal defect in the form of the complaint, when the proceedings show that the action is brought against the association for whose benefit the acts that originated the complaint were performed. Argentina, Cam. Fed. de Apel. La Plata, April 9, 1913, Fogha y Buffa *v.* Serralta, Tavarella y Cía, *Jurisp. de los Tribs. Nacs.*, April, 1913, p. 56.

The fact that an attorney brings a suit in behalf of an association by virtue of a power given individually by the persons who form the association, cannot serve as a basis for a demurrer alleging lack of personal capacity on the part of the attorney, even though in the deed of power the circumstance that the associates acted in behalf of the association was not mentioned. Buenos Aires, Cam. de Apel. Com., July 15, 1913, Iuri Hermanos *v.* Serrito, *Jurisp. de los Tribs. Nacs.*, July, 1913, p. 232.

[25] Spain, 122; Argentina, 301, 313, 372; Bolivia, 225 to 228; Brazil, 295, 311; Chile, 348, 370, 424, 470; Colombia, 463, 487, 550, 596; Costa Rica, 2; Ecuador, 262, 267, 275, 285 to 287; Guatemala, 233, 249, 300, 334; Haiti, 19 to 29; Honduras, 216, 232, 283, 316; Mexico, 89, 100, 154, 163; Nicaragua, 141;

Besides these three classes of association, which are considered as legal entities, the law also recognizes momentary associations or joint adventures and "associations in participation," not having the character of legal entities nor possessing any firm name. No legal formality is required for their formation and their existence and conditions may be proved by any legal evidence.[26]

Associations of capital and industry.

Argentina,[27] Brazil [28] and Uruguay[29] mention a special association which is called "association of capital and industry."

Panama, 297, 330, 359; Peru, 130; San Salvador, 167, 231, 302; Santo Domingo, 19; Uruguay, 403, 425, 453; Venezuela, 204.

[26] Spain, 239 to 243; Argentina, 395 to 402; Bolivia, 288 to 290; Brazil, 325 to 328; Chile, 507 to 511; Colombia, 629 to 633; Costa Rica, 301 to 305; Ecuador, 346 to 351; Guatemala, 371 to 375; Haiti, 47; Honduras, 216; Mexico, 92; Nicaragua, 194; Peru, 232 to 236; San Salvador, 331 to 336; Santo Domingo, 47; Uruguay, 444; Venezuela, 204.

A momentary association is not subjected to the formalities provided for the constitution of commercial partnerships or corporations, and the agreement between the associates determines the purpose, manner of signing, amount contributed and conditions of liquidation; such an association is not a legal entity, lacks a firm name, associate capital, and domicil; and its formation, modification, dissolution and liquidation can be proved by all legal means. The manager is supposed to be the only owner of the business with regard to strangers. Chile, Corte de Apel. Iquique, Chile, March 16, 1896; *Gaceta de los Tribs.*, 1896, p. 903.

Momentary associations have no legal entity distinct from that of their members.

In a momentary association, the object is to carry on without firm name, one or several transactions, its members being jointly liable with respect to third parties.

In an "association in participation" two or more persons have an interest in a business conducted by one or several persons under the name of the latter, whether in an individual or a firm name. Between those members who do not conduct the business and third parties there is no privity nor right of action.

Momentary associations as well as associations in participation are true associations with the difference that they have not a firm name or common capital and, therefore, have no legal entity.

When there are several members in an association in participation the one who contracts in behalf of all requires formal power in order to bind the other members. Mexico, 2a Sala del Trib. Sup. del Dist. Fed., Jan. 8, 1908, E. Marquardt y Cia. *v.* Castellot Hnos., *Diario de Jurisp.*, v. 14, p. 441.

[27] Arts. 383 to 391. [28] Arts. 317 to 324. [29] Arts. 435 to 443.

Such an association may or may not adopt a firm name. In the first case the rules of general partnership are applied and in any case the partner who contributes the capital is unlimitedly and jointly liable for all the transactions of the asssociation. The industrial partner cannot contract in behalf of the association, nor is he bound with his own property for the obligations of the association. A mere industrial associate is not obliged to pay back to the common fund money he may have received as his share of profits, except in case of fraud on his part.

Legal formalities to constitute a commercial association. The organization of a commercial association and participation in the benefits of the law for its protection are matters not left entirely to the will of the parties, for they affect or may affect the community. Consequently, special legal forms have been established in order to obtain the benefits of a legal entity for an association. There are three systems which control these legal formalities:

1. The organization is effected by means of a public instrument drawn by a notary and duly registered and published.[30]

2. The organization of a general or limited partnership may be effected by means of a public or a private instrument, but that of corporations requires a public one. In both cases the instrument must be registered and published.[31]

[30] Spain, 119; Bolivia, 21, 231; Chile, 350, 425, 474; Colombia, 465, 551, 598; Costa Rica, 4; Ecuador, 326, 327; Guatemala, 235, 300, 338; Mexico, 93, 19; Nicaragua, 154, 1411; Panama, 287, 288; Peru, 127; San Salvador, 167, 231, 307.

The existence of an association is proved by means of the public deed of organization. Mexico, 2a Sala del Trib. Sup. del Dist. Fed., January 8, 1908, E. Marquardt y Cia. *v.* Castellot Hnos., *Diario de Jurisp.*, v. 14, p. 441.

Article 553 of the code of commerce of Colombia required that domestic as well as foreign corporations be authorized by a decree of the government, before starting business, but now law 124 of 1888 established a new system; the authorization of the Government is no longer necessary; corporations have only to protocolize their articles and by-laws. Colombia, Tribunal Sup. del Dist. Norte de Tolima, Jan. 15, 1892, *Crónica Jud. del Tolima*, v. 5, p. 2122.

[31] Argentina, 289, 293, 294; Haiti, 39, 40, 42.

3. The organization may be effected by means of either a private or a public instrument which must be registered and published.[32]

In Argentina [33] and Uruguay [34] the organization of a commercial association can be effected orally when the amount of its capital is not over one thousand pesos.[35]

All contracts which amend, supplement or modify the articles of organization of a commercial association require the same legal formalities as the original contract.[36]

Effects of the non-fulfillment of legal formalities.

There are six different systems with respect to the effects of failure to comply with the legal requisites of form in the organization of an association. They are as follows:

First system. The contract is valid between the associates, but void so far as concerns actions against

Even though an association is of the kind that must be organized by means of a public instrument, the lack of this requisite does not prevent accomplished facts from producing their effects, when in any way the existence of the association is proved. Argentina, Camara I de Apel. de lo Civil, Buenos Aires, Oct. 30, 1913, De la Cuesta *v.* Bunge, *Jurisp. de los Tribs. Nacs.*, Oct., 1913, p. 203.

[32] Brazil, 300 to 302; Santo Domingo, 39, 40, 42; Uruguay, 393.

[33] Art. 289. [34] Art. 393.

[35] An association is legally organized even though only a private instrument is executed, and persons contracting with such association can compel it to comply with its obligations. Spain, Trib. Sup., Dec. 2, 1902; *Gaceta* of Jan. 12, 1903, p. 31.

[36] Spain, 119; Argentina, 295; Bolivia, 232; Chile, 350; Colombia, 465; Costa Rica, article 4 of law of Nov. 24, 1909; Ecuador, 330; Guatemala, 235; Haiti, 46; Honduras, 218; Mexico, 94; Panama, 289; Peru, 127; San Salvador, 167; Santo Domingo, 46; Uruguay, 396; Venezuela, 305.

When a commercial association amplifies its scope by engaging in new lines of business, it is necessary to execute a new instrument stating these modifications, even though the capital remains unchanged; and the association is considered as a new one for the payment of taxes on its incorporation. Spain, Trib. Sup., Nov. 8, 1906; *Gaceta* of July 22, 1907, p. 361.

An association is extinguished *ipso facto* and must be liquidated when the period of its duration has elapsed. The members of an association can, before the expiration of the established period, agree to an extension of the same; but it is necessary to execute the agreement in a public instrument with all legal requisites for the organization of an association. Spain, Trib. Sup., July 8, 1903; *Gaceta*, Oct. 6, 1903, p. 106.

third parties; the latter may enforce their rights against the directors. All stipulations not included in the public instrument which contains the articles of organization are void.[37]

Second system. As to the associates the contract is valid with respect to the past but not to the future; that is, every associate may at any time ask for the dissolution of the association, but he must abide by the stipulations contained in the contract. Third parties may take advantage of the contract of association against the association itself or against its members; but the associates cannot avail themselves of the existence of the association as a defense against third parties, who as defendants are only liable according to civil law to return what they have received in case they do not comply with their obligations.[38]

Third system. The contract is entirely void; if it has been embodied in a private instrument, its only effect is that the associates can be compelled to execute the contract in a public deed.[39]

Fourth system. The contract is void as between the associates; third parties can bring their actions against each of the associates, who are jointly liable. If the contract is embodied in a private instrument the associates can be compelled to execute a public instrument.[40]

Fifth system. The contract is void between the contracting parties, but they are jointly liable with respect to third parties.[41]

[37] Spain, 119, 120; Peru, 127, 128.
See note 35, decision of Dec. 2, 1902.

[38] Argentina, 296, 297; Brazil, 303, 304; Ecuador, 331; Uruguay, 399, 400. The existence of a partnership can be proved by the admission of one of the members thereof. Buenos Aires, Cam. Fed. de Apel. de La Plata, May 6, 1914, *Jurisp. de los Tribs. Nacs.*, May, 1914, p. 52.

[39] Bolivia, 235, 236.

[40] Chile, 350, 351, 357; Colombia, 468, 472; Guatemala, 236, 239; Honduras, 219, 222; Panama, 287, 296; San Salvador, 170, 171.

[41] Costa Rica, 8; Haiti, 41; Mexico, 96, 97; Santo Domingo, 41.

Sixth system. The contract is entirely void as to all parties.[42]

Prescription or statute of limitations.

Regarding this matter, the following systems may be noted:

System of Spain. Actions by associates against the association and vice versa are barred by prescription after three years, counting from the date of inscription in the commercial registry, from the separation of the associate or from the dissolution of the association, as the case may be. The right to collect dividends or payments due on account of profits or of a part of the capital belonging to an associate is barred by prescription after five years, counting from the date on which the payment was ordered.

Actions against managers of associations are barred after four years, counting from the time they give up their positions.[43]

Mexico [44] and Panama [45] follow the same system, the only difference being that the prescriptive period is, in all these cases, five years in Mexico and three in Panama.

System of Chile. Actions are subject to special limitation only when they are brought against associates who are non-liquidators. The period of limitation in that case is five years after the inscription in the regis-

[42] Nicaragua, 154.

[43] Spain, 947, 949; Peru, 958, 960.

Actions by commercial associations against their members for the payment of the amount of their contribution or subscription are barred by limitation according to rules governing limitation of actions. Spain, Trib. Sup., March 25, 1915; *Gacetas* of 15 and 16 Oct., 1915, p. 250.

Besides the stipulation for a certain per centum of the profits of a partnership in favor of an employee of the firm, the employee may validly and independently agree with some of the partners to have another per centum of the profits belonging to said partners. The actions of the employee for the portion of profits to which he is entitled is not barred by limitation by the lapse of five years if the partnership has not yet been liquidated. Spain, Trib. Sup., July 13, 1910; *Gaceta* of Oct. 13, 1910, p. 37.

[44] Art. 1045. [45] Art. 1652.

try and publication of the deed of dissolution of the association. This prescription does not arise when the associates themselves effect the liquidation or in case of bankruptcy of the association. Actions of creditors against liquidators and those of associates among themselves are barred by the lapse of time fixed by the civil code.[46]

Sysiem of Argentina. Actions arising out of the articles of association or out of transactions of the association are barred after a period of three years, provided the contract of association has been legally published. That period must be counted from the day when the obligation became due, or from the date when the deed of dissolution or liquidation of the association was published, when the obligation is not due. In regard to obligations derived from the liquidation of the association the period runs from the date on which the final balance sheet was approved.[47]

System of Venezuela. The provisions of the code of Venezuela differ essentially in many respects from the other systems. The joint liability of associates and their successors ceases after five years, counting from the dissolution of the association and from the proper publication of the corresponding deed. This provision is not applicable when the termination of the association is due to bankruptcy. After the period of prescription has been interrupted by the institution of a judicial action against the debtor or debtors, a new period begins which lasts for the regular period of limitation.

When the five years above referred to have elapsed, the creditors have a right of action against the liquidators up to the total amount of the associate funds still undivided, and against every one of the associates in proportion to the amount they may have received as capital and profits in the liquidation.

[46] Chile, 419 to 423; Colombia, 545 to 549; Costa Rica, 33; Guatemala, 296 to 299; Haiti, 64; Honduras, 279 to 282; San Salvador, 227 to 230; Santo Domingo, 64; in Uruguay four years is the period of limitation, 1019.

[47] Art. 848.

Should the credit mature after the dissolution of the association the period of five years begins when the credit becomes due.

Liquidators who have paid liabilities of the association with their personal funds have no more right to be paid than any other creditors.

Method of settling differences arising among the associates.

The Latin-American codes may be divided into four groups:

1. That which provides for a compulsory arbitration of all differences.[48]

2. That which requires a special stipulation in the articles of organization as to whether or not the differences must be arranged by arbitrators.[49]

3. That of Chile to the same effect, adding that in the absence of any stipulation in the articles of organization, it is taken for granted that the settlement must be made by arbitrators.

4. That of the other codes which leave this matter to the discretion of the parties.

[48] Bolivia, 306; Brazil, 294; Haiti, 51; Nicaragua, 155; Uruguay, 511.
[49] Colombia, 467; Guatemala, 237; Honduras, 220.

CHAPTER X

Commercial Associations (2)

GENERAL PARTNERSHIP

(*Sociedad Colectiva*)

Characteristics of a general partnership.

Perhaps the oldest form of commercial association is that in which the associates place their property and their industry or either of these elements in a common fund in order to obtain and share the resulting benefit. The characteristic feature of this association is that the transactions are carried on under a common name, called the firm name (*razón social*) and that all the associates are jointly and unlimitedly liable for the transactions of the association.[1] This type of association is known as the general partnership (*sociedad colectiva* or *sociedad en nombre colectivo*).

The firm name.

The general partnership must transact business under the name either of all its members, or of several or of only one of them, it being necessary to add in the last two cases the words "and Company" (*y Compañía*). The collective name is the firm name or common signature, in which the name of a person not a partner cannot be included.

Those who, although not members of the firm, allow their names to be included in the firm name are subject to joint and several liability for firm debts, besides any penal liability that may be applicable.[2]

[1] The code of commerce does not authorize the establishment of combined associations possessing at the same time the character of partnerships and corporations. Colombia, Trib. Sup. del Dist. del Pacífico, Dec. 16, 1898, *La Justicia*, v. 5, p. 1459.

[2] Spain, 126, 127; Argentina, 299, 303; Bolivia, 226, 238; Brazil, 315, 316;

After the partnership is dissolved the use of its firm name is a forgery, and the inclusion in it of the name of a person not a partner is a fraud (*estafa*).[3]

Unlimited and joint liability of general partners.

All the members of a general partnership, whether managing partners or not, are personally and jointly and severally liable with all their property for transactions carried on and debts incurred in the name and for the account of the partnership, when undertaken under the firm name and by a person authorized to use it.[4]

Any stipulation made with a view to avoiding this unlimited and joint and several liability is void.[5]

Nevertheless, in Argentina,[6] Bolivia,[7] Nicaragua,[8] and Uruguay,[9] a limited partner can be admitted. In our opinion, however, such admission changes the character of the partnership into a "*comandita*" or limited partnership, as in Panama, where the law provides [10] that in such

Chile, 365 to 370; Colombia, 481 to 487; Costa Rica, 42; Ecuador, 267, 269, 270; Guatemala, 245 to 249; Haiti, 20 to 22; Honduras, 228 to 232; Mexico, 100 to 103; Nicaragua, 142, 143; Panama, 297 to 300; Peru, 134–135; San Salvador, 177 to 181; Santo Domingo, 20, 21; Uruguay, 402, 453–454; Venezuela, 213, 214, 217.

The firm name must be formed by the names of all the associates or by the name of one of them, adding the words "y compañía," Brazil, Decree No. 916 of Oct. 24, 1890, article 3.

There is a presumption that there is no partnership or a legal entity of that character, when the firm name is not constituted in accordance with the provisions of article 481 of the commercial code. Colombia, Trib. Sup. del Dist. del Pacífico, Sept. 21, 1895, *La Justicia*, v. 5, p. 1055.

[3] Chile, 367; Colombia, 484; Guatemala, 247; Honduras, 230; Panama, 298; San Salvador, 179.

[4] Spain, 127; Argentina, 302; Bolivia, 238; Brazil, 316; Chile, 370; Colombia, 487; Costa Rica, 42; Ecuador, 269; Guatemala, 249; Haiti, 22; Honduras, 232; Mexico, 100; Nicaragua, 143; Panama, 327; Peru, 135; San Salvador, 181; Santo Domingo, 22; Uruguay, 454; Venezuela, 214.

Partners of a general partnership are unlimitedly liable with all their property for the obligations of the firm. Spain, Trib. Sup., June 23, 1903; *Gaceta* of Sept. 3 and 4, 1903, p. 70.

[5] Chile, 370; Colombia, 487; Guatemala, 249; Honduras, 252; Panama, 327; San Salvador, 181; Uruguay, 456; Venezuela, 214.

[6] Art. 312. [7] Art. 243. [8] Art. 146.

[9] Art. 464. [10] Art. 327.

a case the word "*limitada*" must be added to the firm name.

Cases in which the use of the firm name does not bind the partners.

The use of the firm name does not bind the general partners when employed by a non-managing partner or a person not authorized to use it. With respect to this point, however, we find five different systems in Latin-America:

1. *System of Spain.* The rule is absolute; the partnership is not responsible for the use of the firm name by unauthorized persons.[11]

2. *System of Argentina.* An unauthorized person, in using the firm name, can bind the partnership when his name is included in that of the firm—the right of the partnership to recover damages arising therefrom being reserved.[12]

3. *System of Chile.* When a non-authorized partner uses the firm name the partnership is not bound, unless it has derived some benefit therefrom, in which case the liability is limited to the amount of such benefit.[13]

4. *System of Colombia.* The partnership in that case can only be held liable:

(*a*) if the other contracting party proves that the partnership has fulfilled other obligations contracted in the same form;

(*b*) if the obligation brought some benefit to the partnership, in which case the liability is limited to the amount of such benefit.[14]

5. *System of Panama.* Panama adopts a combined system, for the partnership may be bound in two cases:

(*a*) when the name of the person who used the firm name was included in it, and [15]

(*b*) when the obligation has brought some benefit

[11] Spain, 128; Mexico, 105; Peru, 136.

[12] Argentina, 305; Bolivia, 239; Costa Rica, 50; Nicaragua, 143; Uruguay, 457.

[13] Chile, 373; Guatemala, 252; Honduras, 235; San Salvador, 184.

[14] Colombia, 491.

[15] Panama, 317, 318.

to the partnership, in which case its liability is limited to the amount of the benefit.

In some countries the partnership is not bound by the managing partners, even though they use the firm name,

(*a*) when they do so in transactions that are known to be entirely outside the line of business of the partnership; [16]

(*b*) when besides that fact the other party to the transaction knows that circumstance, yet notwithstanding, enters into the contract.[17]

Requisites of the partnership agreement.

The codes differ in their requirements as to the statements that must be included in the instrument of organization of a partnership. We append a list of the facts required to be stated in one or more of the Latin-American countries, mentioning in the footnotes the countries exacting the specific requirement.

1. Name and domicil of the partners;
2. Firm name of the partnership;
3. Name of the managing partner who may use the firm name;
4. Amount contributed by every partner;
5. Period of duration of the partnership;

The foregoing five items are required by all the codes.

6. Line of business of the partnership; [18]

[16] Argentina, 302; Brazil, 316; Costa Rica, 49; Uruguay, 454.

When it has been proved that the manager of a partnership has used the firm name in transactions beyond the scope of the partnership, without being authorized by the partners or without the partnership deriving a benefit from those transactions, only the manager is bound thereby. Brazil, Trib. de Justicia de S. Paulo, June 11, 1895, and August 6, 1896, *Gazeta Juridica*, v. 12, pp. 184, 189, and *Revista Mensal*, v. 1, pp. 167, 168.

The sale of real estate belonging to a partnership, made by its manager without proper authority, when the buyer knew that circumstance and still accepted it, binds the partner alone in damages and not the partnership. Spain, Trib. Sup., Oct. 25, 1873; *Gaceta* of Nov. 1, 1873.

[17] Chile, 374; Guatemala, 253; Honduras, 236; San Salvador, 185.

[18] Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Guatemala, Honduras, Mexico, Panama, San Salvador, Uruguay, Venezuela.

7. Proportionate shares of benefits and losses accruing to the respective partners; [19]

8. Domicil of the partnership; [20]

9. Form in which the liquidation must be made; [21]

10. Amount of money that each partner is allowed to draw annually for his personal expenses; [22]

11. Whether the differences arising between the partners are or are not to be settled by arbitrators; [23]

12. Cases in which the partnership must be dissolved before the termination of the period of its duration; [24]

13. The compensation to be paid to managers; [25]

14. Manner and periods in which an inventory, a balance sheet and a distribution of profits must be made; [26]

15. Form in which announcements and publications concerning the partnership must be made.[27]

[19] Argentina, Bolivia, Brazil, Chile, Colombia, Guatemala, Honduras, Mexico, Nicaragua, Uruguay.

[20] Argentina, Chile, Colombia, Guatemala, Honduras, Mexico, Nicaragua, Panama, San Salvador.

[21] Argentina, Chile, Colombia, Guatemala, Honduras, Mexico, Panama, Uruguay.

[22] Chile, Colombia, Guatemala, Honduras, Nicaragua.

[23] Bolivia, Brazil, Chile, Colombia, Guatemala, Honduras, Nicaragua. When in the articles of organization of a partnership the formation of a board of arbitrators for deciding questions arising between the partners is established, all differences about the character of the associates or about any other point are subject to the cognizance of that board. Buenos Aires, Camara de Apel. Com., Feb. 25, 1913, Padró *v.* Bodró y Hedilla, *Jur. de los Tribs. Nacs.*, Feb., 1913, p. 138.

All differences arising between partners during the life of the partnership, whatever their character, must be decided by arbitrators, unless otherwise stipulated in the articles of organization of the association. Argentina, Cam. II de Apel. Civil, Buenos Aires, Sept. 2, 1913, Canepa *v.* Vélez, *Jurisp. de los Tribs. Nacs.*, Sept., 1913, p. 261.

[24] Mexico, Panama. [25] Spain, Peru. [26] Panama.

[27] Panama.

The articles of the codes relating to the above mentioned countries are as follows:

Spain, 125; Argentina, 291; Bolivia, 231; Brazil, 302; Chile, 352; Colombia, 467; Costa Rica, 5; Ecuador, 327; Guatemala, 237; Haiti, 43; Honduras, 220; Mexico, 95; Nicaragua, 155; Panama, 293; Peru, 133; San Salvador, 169; Santo Domingo, 43; Uruguay, 395; Venezuela, 302.

In a judicial case in which the rescission of a contract of partnership is de-

Employees and partners.

When a person renders services to the partnership not on the basis of equality with the partners, but as a subordinate, either under contract or as a term of the partnership agreement, but not as a member of the firm, he cannot be considered as a partner, notwithstanding the fact that, as a compensation for his services, he receives a part of the profits.[28]

Composition of the firm capital.

The contribution of a partner may consist of patents, privileges, concessions, artcraft, industry, cash, credits, or property of any kind; if it is personal or real property, rules must be fixed for its valuation, if no value has been assigned to it by mutual agreement.[29]

Management.

As a consequence of the fact that all the partners are jointly liable for transactions carried on under the firm name, all of them have a right to share in the management of the common affairs, unless they vest that right in one or more of their associates; in that case these alone represent the partnership.[30]

If the management of a partnership has not been entrusted by special stipulation to one or more of the associates, all of

manded, provided the amount of capital contributed by the partners is over one thousand pesos and the contract was not executed in a public instrument, the judge must confine himself to declaring the nullity of the contract without taking into consideration other issues. Argentina, Camara Federal de Apel. Córdoba, Sept. 16, 1913, Iolde *v.* Roldano, *Jurisp. de los Tribs. Nacs.*, Sept., 1913, p. 119.

[28] Costa Rica, 54; Ecuador, 271; Uruguay, 462; Venezuela, 211. See note 43, Decision of July 13, 1910.

[29] Spain, 172; Argentina, 406; Bolivia, 231; Brazil, 287; Chile, 376; Colombia, 493; Guatemala, 254; Honduras, 237; Mexico, 95; Panama, 302; Peru, 179; San Salvador, 169; Uruguay, 395; Venezuela, 212.

[30] The legal presumption that the partners, by the mere fact of their organizing the partnership constitute themselves agents of one another, giving to one another the power to bind themselves unlimitedly and jointly, is an exception to the general rules of law, which has been established to help the diffusion of credit. Brazil, Rio de Janeiro, Camara Civ. da Corte, June 16, 1898, *Revista de Jurisp.*, v. 3, pp. 336, 339.

them have the power to transact business and the partners present must reach an agreement with respect to all contracts or obligations that may concern the copartnership. If there is no agreement between the partners or the managers, the codes follow different systems, namely:

System of Argentina. The decision of questions which do not modify the articles of organization of the partnership or which are not beyond its scope, is made by majority of votes, the votes being counted by the amount of capital represented.[31]

The code of Mexico provides also that when a single person represents the majority interest, the vote of at least one other partner must be added.

System of Chile. Decisions in matters which do not affect the articles of organization or the scope of the association can be made by majority of votes, counting the number of voters; if one more than half the number of votes is not obtained the proposed contract or act cannot be entered into or carried out.[32]

System of Spain. The law does not provide for any special method of settling differences between the partners in the matter of management. It requires only that they agree. Nevertheless, taking into consideration the character of a general partnership, it has been inferred that in case opinion is not unanimous, the decision is to be made by a plurality of votes.[33]

Character and functions of managers of commercial associations.

Managers of commercial associations are considered factors, and all that has been said in regard to the latter is applicable to the former. Nevertheless, if the appointment of the manager is made as one of the stipulations of the partnership contract, he cannot be removed in case his ad-

[31] Argentina, 412; Brazil, 331; Mexico, 121; Uruguay, 473.

[32] Chile, 386, 390; Colombia, 514, 515; Guatemala, 266, 267; Honduras, 249, 250; Panama, 313; San Salvador, 197, 198.

[33] Spain, 129; Bolivia, 237; Mexico, 113, 114; Peru, 137.

ministration is bad and injurious to the partnership. In that case the other partners can appoint a co-manager to supervise all the transactions or else they can demand the rescission of the contract before the proper court.[34]

Under these circumstances, in Argentina,[35] Ecuador[36] and Uruguay,[37] a manager can be removed during the life of the association for legal cause, but the partners cannot appoint a co-manager.

In Panama[38] managers, in the case mentioned above, can be removed by unanimous consent of all the partners.

There is one case in which the minority prevails in matters of administration, at least in Spain[39] and Peru;[40] and that is, when one of the managers expresses his opinion against the contracting of a new obligation. If the obligation is contracted, in spite of that opinion, the contract is binding, but the manager or managers who contracted it are liable for any loss that the partnership may suffer thereby.

In Chile[41] Colombia,[42] Guatemala,[43] Honduras,[44] Panama[45] and San Salvador,[46] each of the co-partners has a privilege to oppose any act or contract proposed by another, unless it refers to the mere preservation of common property. Such opposition suspends temporarily the execution of that act or contract until the majority of the partners decides

[34] Spain, 132; Bolivia, 258; Colombia, 525; Guatemala, 277; Honduras, 260; Mexico, 116; Nicaragua, 166; Peru, 140; San Salvador, 207.

When in the articles of organization of a partnership it was stipulated that every partner was a manager and could give a power of attorney to represent the association, a power given by some of the partners to an attorney to represent the partnership in a suit is valid. Spain, Trib. Sup., May 31, 1890; *Gaceta* of Oct. 14, 1890.

A person who contracts in behalf of a partnership can deny that he has any individual liability by proving that he was authorized to enter into the contract by his co-partners or that it was included within his powers as representative of the association. Buenos Aires, Cam. de Apel. Com., Sept. 27, 1913, Cataneo *v.* Cardey, *Jurisp. de los Tribs. Nacs.*, Sept., 1913, p. 413.

It is admitted that the manager of a partnership can appoint a representative who may represent the partnership in the courts. Colombia, Trib. Sup. del Distrito de Bolívar, July 13, 1892; *Gaceta Judicial*, v. 6, p. 545.

[35] Art. 409. [36] Art. 280. [37] Art. 471.
[38] Art. 303. [39] Art. 130. [40] Art. 138.
[41] Arts. 388 to 391. [42] Arts. 513 to 516. [43] Arts. 265 to 268.
[44] Arts. 248 to 251. [45] Arts. 311 to 314. [46] Arts. 196 to 199.

whether the act or contract is advisable. The decision of the majority binds the minority only when it concerns mere administrative matters or acts within the scope of the association. Should there be more than two opinions and none of them is supported by one more than half the number of votes, the managers must refrain from undertaking the transaction.

If, notwithstanding the opposition of one or more associates, the transaction is undertaken, the partners are bound thereby, but the associate who entered into the act or contract is liable in damages.

Privileges of the partners.

As a natural consequence of the character of a partnership its members, besides other privileges derived from the contract of organization, have the following:

1. To divide among themselves the profits obtained in proportion to the amount of their contribution, unless otherwise stipulated.[47]

Share of profits of the partner who contributes his services (socio industrial). When in the partnership agreement the share of the profits to be received by partners who have contributed their services only has not been provided for, they must receive their share in the following proportion:

(*a*) in Spain,[48] Argentina,[49] Brazil,[50] Chile,[51] Colombia,[52] Guatemala,[53] Honduras,[54] Peru [55] and Uruguay,[56] the same amount as the partner who contributed the least capital;

(*b*) in Mexico,[57] they receive the proportion stated above, but if there are several partners of that kind, half of all the profits must be divided among them;

[47] Spain, 140; Argentina, 291; Bolivia, 292; Brazil, 330; Chile, 382; Colombia, 507; Costa Rica, 17; Ecuador, 261; Guatemala, 259; Honduras, 242; Mexico, 126; Panama, 267; Peru, 148; San Salvador, 190; Uruguay, 470.

[48] Art. 140. [49] Art. 387. [50] Art. 330.
[51] Art. 383. [52] Art. 508. [53] Art. 260.
[54] Art. 242. [55] Art. 148. [56] Art. 470.
[57] Art. 126.

(*c*) in Nicaragua, the average profit divided among those who contributed capital; [58]

(*d*) in San Salvador [59] the portion assigned by arbitrators.

2. To inspect the management and the bookkeeping, and to make all objections they may consider proper in the common interest, in accordance with the partnership agreement or with the general principles of law.[60]

3. To be paid by the partnership the expenses they may have incurred and the damages they may have sustained as a direct or indirect consequence of the common transactions in their charge; but not to be paid any indemnity for damages sustained by the partners arising out of some fault of their own or out of unforeseen events, or in other cases independent of the partnership transactions they were carrying out.[61]

4. To engage in or undertake any mercantile occupation or transaction, provided it is not of the same character as the business in which the partnership is engaged, unless there is a special stipulation to the contrary.[62]

5. To retain any profits they may obtain from extraneous commercial occupations or transactions they may undertake, without sharing them with the partnership nor binding it thereby.[63]

Obligations of partners.

All the members of a general partnership are obliged:

1. To pay into the common fund the amount of capital they agreed to contribute.[64]

[58] Art. 171. [59] Art. 191.

[60] Spain, 133; Bolivia, 242; Brazil, 290; Costa Rica, 22; Chile, 403; Colombia, 528; Honduras, 263; Mexico, 123; Panama, 270; Peru, 141; San Salvador, 210; Uruguay, 392.

[61] Spain, 142; Argentina, 414; Bolivia, 297; Nicaragua, 174; Panama, 319; Peru, 150; Uruguay, 475.

[62] Spain, 137; Argentina, 309; Bolivia, 240; Chile, 404; Colombia, 529; Ecuador, 272; Guatemala, 281; Honduras, 264; Mexico, 131; Peru, 145; San Salvador, 212; Uruguay, 461; Venezuela, 219.

[63] Spain, 134; Bolivia, 298; Peru, 142.

[64] Spain, 170; Argentina, 404; Bolivia, 253 to 256; Brazil, 289; Chile, 378;

In cases where the partnership agreement is silent as to the date on which the contribution must be paid, a demand before a notary or judge is necessary in order to establish when a partner is in default in complying with this obligation. To avoid that annoying proceeding, some countries have enacted special provisions to supply the silence of the contracting parties, as follows:

(*a*) the codes of Chile,[65] Colombia,[66] Guatemala,[67] Honduras [68] and San Salvador [69] provide that the payment must be made at the time the contract is signed;

(*b*) those of Argentina [70] and Uruguay [71] provide that it must be made on the day the contract is signed:

(*c*) that of Costa Rica [72] provides that it must be made within three days after the execution of the contract;

(*d*) Spain [73] and Peru [74] require the payment to be made at the time of the opening of the cashier's office.

2. To share equally the losses of the enterprise.[75] Partners who contribute services only are not obliged to bear losses, unless otherwise stipulated.[76]

3. To guarantee the title to property contributed by them in case of eviction and the payment of credits (*choses* in action) contributed by them to the common fund.[77]

Colombia, 495; Costa Rica, 13; Guatemala, 255; Honduras, 238; Mexico, 108; Nicaragua, 163; Panama, 293; Peru, 178; San Salvador, 186; Uruguay, 466.

[65] Art. 378. [66] Art. 495. [67] Art. 255.
[68] Art. 238. [69] Art. 186. [70] Art. 403.
[71] Art. 465. [72] Art. 13. [73] Art. 171.
[74] Art. 178.

[75] Spain, 141; Argentina, 408; Bolivia, 293; Chile, 382; Colombia, 507; Costa Rica, 17; Guatemala, 259; Honduras, 243; Mexico, 126; Nicaragua, 172; Panama, 299; Peru, 149; San Salvador, 190; Uruguay, 470.

[76] Spain, 140; Argentina, 387; Brazil, 330; Chile, 383; Colombia, 508; Guatemala, 260; Honduras, 242; Mexico, 126; Nicaragua, 171; Peru, 148; San Salvador, 191; Uruguay, 470.

[77] Argentina, 407; Colombia, 497, 499; Costa Rica, 15; Mexico, 108; Nicaragua, 164; Uruguay, 469; Venezuela, 212.

When one of the partners contributes a credit to the common funds, its

Disabilities.

Partners are forbidden:

1. To apply the funds of the partnership or to use the firm name for business on their own account.[78]

2. To engage in transactions on their own account without the previous consent of the co-partners, when the association is not confined to a specified business.[79]

3. To draw from the common funds a larger amount than has been assigned to each partner for his personal expenses.[80]

4. To demand the delivery of the amount they have contributed to the common funds before the liquidation of the enterprise.[81]

5. To assign their interest in the partnership or subsitiute another person in their stead without the previous consent of their co-partners.[82]

Mexico provides, furthermore, that in case a partner wishes to dispose of his interest, his co-partners have a

amount must not be credited to his account until it has been collected. If the credit could not be cashed, or if the partner refuses to cash it, he is responsible to the partnership for its amount. Buenos Aires, Camara II de Apel. civil, Sept. 2, 1913, Ciannone y Covvi *v.* Giannone, *Jurisp. de los Tribs. Nacs.*, Sept., 1913, p. 255.

[78] Spain, 135; Argentina, 415; Brazil, 333; Chile, 404; Colombia, 529; Costa Rica, 20; Guatemala, 281; Honduras, 264; Mexico, 131; Nicaragua, 169; Panama, 321; Peru, 143; San Salvador, 212; Uruguay, 476; Venezuela, 287.

[79] Spain, 136; Argentina, 308; Bolivia, 241; Chile, 404; Colombia, 529; Costa Rica, 55; Ecuador, 272, 273; Guatemala, 281; Honduras, 264; Panama, 321; Peru, 144; San Salvador, 212; Uruguay, 460; Venezuela, 218, 219.

The circumstance that article 137 of the code of commerce forbids a partner to engage in the same kind of trade in which the partnership deals, is not proof that a partner has not actually engaged in such trade. If he has done so he is responsible to the partnership, but the latter is not bound with respect to the party contracting with him. Spain, Trib. Sup., Oct. 21, 1904; *Gacetas* of Nov. 16 and 18, 1904, p. 302.

[80] Spain, 139; Argentina, 416; Bolivia, 299; Chile, 404; Colombia, 329; Costa Rica, 21; Guatemala, 281; Honduras, 264; Panama, 322; Peru, 147; San Salvador, 212; Uruguay, 477.

[81] Chile, 381; Colombia, 505; Guatemala, 258; Honduras, 241; San Salvador, 189.

[82] Spain, 143; Argentina, 418; Bolivia, 262; Brazil, 334; Chile, 404; Colombia, 529; Costa Rica, 22; Guatemala, 281; Honduras, 264; Mexico, 106; Nicaragua, 175; Panama, 325; Peru, 151; San Salvador, 212; Uruguay, 480.

preference in purchasing it, if they pay an amount equal to that offered by some one else (*derecho al tanto*).

Special disabilities of industrial co-partners.

A partner who contributes his services only (*socio industrial*) cannot engage in business unless expressly permitted to do so by his co-partners. In reference to this prohibition the codes may be divided into two groups:

(*a*) those which make the disability absolute; [83]

(*b*) those which prohibit the partner from undertaking trade or transactions that may distract him from the business of the partnership.[84]

Liabilities of partners.

The liabilities of a partner are:

1. In case a partner is in default in paying his contribution, the co-partners may bring an action for the rescission of the contract or for payment, and, in both cases, for the payment of damages.[85]

2. In case a partner applies the common funds or uses the firm name for business on his own account, he forfeits to the partnership all benefits he may derive from the transaction or transactions thus undertaken; and the rescission of the contract may be demanded, so far as he is concerned, without prejudice to the duty of returning the funds he may have used and making good to the partnership the losses and damages it may have suffered thereby.[86]

Brazil provides, furthermore, that the partner must

[83] Spain, 138; Argentina, 384; Mexico, 112; Nicaragua, 170; Peru, 142.

[84] Chile, 406; Colombia, 531; Costa Rica, 57; Guatemala, 283; Honduras, 266; San Salvador, 214.

[85] Spain, 170, 171; Argentina, 405; Bolivia, 256; Brazil, 289; Chile, 379; Colombia, 498; Costa Rica, 14; Ecuador, 280; Guatemala, 256; Honduras, 239; Mexico, 111; Nicaragua, 163; Peru, 178; San Salvador, 187; Uruguay, 466.

[86] Spain, 135; Argentina, 419; Bolivia, 260; Brazil, 333, 336; Chile, 404; Colombia, 529; Costa Rica, 20, 28, 52; Guatemala, 281; Honduras, 264; Mexico, 131; Nicaragua, 169; Panama, 321; Peru, 143; San Salvador, 212; Uruguay, 477.

pay back four times the amount he applied to his own business.

3. In case a partner draws a larger amount of money than that which has been assigned to him, he is compelled to refund it just as if he had not fully paid in the amount of his contribution to the partnership.[87]

When it is not possible to compel a partner to refund the excess money he has drawn, Argentina, Chile, Colombia, Guatemala and Uruguay authorize his co-partners to withdraw a proportionate amount of their interest, thereby reducing the capital of the partnership.

4. In case a partner has undertaken some transaction for his own account, where the business of the partnership is undefined, without the previous consent of his co-partners, he must turn in to the common funds any profit he may have derived from such transaction, but must personally suffer the loss, should there be any.[88]

In Ecuador the action to compel a partner to turn in to the common funds any profits or to pay any losses, lapses after three months from the day on which the other partners obtained knowledge of such transactions.

5. In case some damage is incurred by the partnership due to fraud, abuse of powers, or gross negligence on the part of one of the partners, he is obliged to make it good should the partners so require, unless there has been an act of approval, or an express or implied ratification.[89]

6. When, in spite of the opposition of the majority of the partners some of them engage in an act or enter into a contract which was opposed, the latter are obliged to indemnify the partnership for any loss it may sustain.

[87] Spain, 139; Argentina, 416; Bolivia, 299; Chile, 404; Colombia, 529; Guatemala, 291; Honduras, 264; Panama, 322; Peru, 144; San Salvador, 212; Uruguay, 477.

[88] Spain, 136; Argentina, 308; Chile, 404; Colombia, 529; Costa Rica, 55, 56; Ecuador, 274; Guatemala, 281; Honduras, 264; Peru, 144; San Salvador, 212; Uruguay, 460; Venezuela, 220.

[89] Spain, 144; Argentina, 413; Bolivia, 300; Brazil, 316; Mexico, 115, 131; Nicaragua, 173; Peru, 152; Uruguay, 474.

Admission of a new partner.

If a new partner is admitted, the old partners are responsible for the liabilities of the partnership contracted before his admission, even though the firm name is changed thereby. A stipulation to the contrary is without effect as to third parties.[90]

[90] Ecuador, 294; Costa Rica, 43; Venezuela, 207.

CHAPTER XI

Commercial Associations (3)

CORPORATIONS AND MANNER OF ESTABLISHING THEM

Origin of commercial corporations.

With the development of modern science and industry and the necessity for obtaining vast amounts of money for the building and operation of railways, canals, steamship lines and other prodigious enterprises, the partnership has proved a form of association altogether inadequate, since it is necessary to have mutual confidence among the persons that form the association; hence the number of associates could not be very large nor could the duration of the enterprise last longer than the average period that a man can depend upon his personal energy and efficiency.

To meet the new necessities a new type of association was created, or rather a form developed, such as existed in Italy during the latter part of the Middle Ages, in which the capital contributed and not the personal character of the associates was the primary consideration. This capital was managed by a group of directors or administrators, whose powers were revocable at the will of the associates; and the latter had nothing to fear for their personal wealth since their liability for the result of common transactions was limited to the amount of their contribution.

The supervision of corporations.

The partnership was then called an "association of persons," while the corporation was called an "association of capital." The members of the former were called "partners" (*socios*) and their contribution "interest" (*parte* or *aportación*); the associates of the latter were called "share" or "stockholders" (*accionisias*) and their contribution

"shares" (*acciones*). The idea of a personal association was so foreign to the corporation that in many cases the persons who have an interest in the corporate business of the latter do not know each other.

The limitation of the liability of the associates, the great number of persons usually interested in a corporation, the fact that these persons may live at great distances and, therefore, cannot personally exercisec ontrol over the management of the common funds in which they perhaps represent but a very small proportion, suggested from the beginning the idea that the government ought to supervise directly the establishment and operation of corporations, in order to prevent fraudulent practices by which a great number of persons might suffer damage and become discouraged in participating in enterprises of importance for the general welfare.

It was soon discovered that the interference of the Government did not create that security which was hoped for, but on the contrary proved in many cases an obstacle to the freedom of commerce and a handicap without corresponding benefit. Therefore, the system was changed and instead of government interference, the desired object was sought in great publicity for every important act of the corporate administration in order to enable interested persons and the public in general to ascertain the most important acts of the management of the corporation and thus safeguard their interests.

Among the countries of Europe, England, France and Spain have abolished every form of governmental interference; and in America, Cuba, Porto Rico,[1] Costa Rica,[2] Mexico,[3] Peru,[4] Santo Domingo [5] and Venezuela,[6] have adopted the principle of the most complete liberty and at the same time the most ample publicity. But in some of the

[1] Spain, 117. [2] Art 4 of the law of Nov. 24, 1909. [3] Art. 166.
[4] Art. 125.
[5] Art. 37. Borchard, Guide to Law and Legal Literature of Argentina, Brazil and Chile, p. 87.
[6] Art. 233.

Spanish-American countries, the old system of governmental authorization still prevails.

Argentina.

In Argentina, domestic corporations cannot be finally established until the Executive has granted authorization therefor. This authorization is granted when the establishment, organization, and by-laws of the corporations are in accordance with the provisions of the commercial code, and their object is not contrary to public policy.[7]

Bolivia.

Before commencing business, corporations must frame their by-laws, which, together with the articles of incorporation, are subjected to the inspection and approval of a commercial judge.[8] By article 5 of the decree of March 25, 1887, corporations are legally constituted by means of an Executive authorization issued by the Minister of Industry. In order to obtain this authorization, the following documents must be presented:—authentic copies of the articles of incorporation, of the by-laws, of the minutes of the meeting in which the corporation was organized, showing the names of the board of directors and a certificate evidencing the payment of a part of each share.

Brazil.

Article 1 of the Federal Act of January 17, 1890, provides great liberty in the establishment of corporations. They require no governmental authorization, except in the case of banks and credit institutions, corporations dealing in food supplies, and foreign corporations, which require governmental authorization in order to do business in the republic. The requisites for obtaining this authorization are as follows:

1. The by-laws must declare the maximum period, never more than two years from the date of the authori-

[7] Art. 318.

[8] Art. 247.

zation, within which a corporation engaged in banking is to invest at least two-thirds of its capital in the country;

2. These corporations are subject to the law of Brazil in all matters concerning the legal relations of the corporation with its creditors, stockholders and other interested persons domiciled in Brazil; occasional absences do not impair domicil;

3. The authorization having been obtained, corporations must comply with the general requirements of the law for their establishment, under penalty of the nullity of the proceeding.

Chile.

Corporations are constituted by virtue of a Presidential decree authorizing them.

This authorization is equally necessary to modify the by-laws, to extend the term of corporations established for a limited period, and to dissolve them before the expiration of their term, and in other cases provided for by the law.[9]

A petition to organize a corporation is not to be considered unless it is signed by a number of subscribers representing at least a third part of the shares into which the capital is divided, and accompanied by an authentic copy of the articles of incorporation approved at a general meeting of subscribers.[10]

The code forbids the authorization of corporations which are contrary to public policy, to law or to good morals.[11]

It is equally forbidden to extend the Executive authorization to corporations when it appears that the created capital is not real, that its collection is not sufficiently assured, that it is not large enough for the magnitude of the enterprise, or that the management of the corporation does not guarantee good administration or afford the shareholders means of supervising the activities of the manager and the privilege of learning how the corporate funds are invested.[12]

The establishment of a corporation of indefinite duration

[9] Art. 427. [10] Art. 428. [11] Art. 429.
[12] Art. 430.

must not be authorized, except when the enterprise in which it is engaged has by its nature a fixed and known term.[13]

In his authorization the President fixes a period within which the portion of the corporate funds with which he deems it necessary to begin business must be paid in, and also the period within which the shares needed to complete the corporate capital must be sold. He also fixes the portion of the profits or assets that must constitute the reserve fund, if it has not been fixed in the by-laws or if in the judgment of the President it is not sufficiently large.

The value of shares issued for a past consideration in favor of some members and of shares which represent the interest of persons who contribute their services only must not be taken into consideration in fixing the portion of the capital with which the corporation may begin business.[14]

Upon its being proved that there is in the treasury of the corporation the amount above mentioned, the President issues a decree stating that the corporation has been legally organized and naming the date on which business must be commenced.[15]

If the terms set have lapsed and the cash proportion fixed has not been paid in or the subscription of the capital has not been completed, or the corporation has not begun business, the authorization becomes ineffective, unless the President, in the first case, reduces the portion of cash which must be paid in, or, in the second case, allows the corporation to reduce its capital, or, in the third, grants an extension.[16]

Colombia.

The system of Chile has been adopted in Colombia. In addition, corporations organized to engage in an enterprise of public utility, need to be authorized by an act of the legislature.[17]

Ecuador.

The authorization of the legislature is necessary to estab-

[13] Art. 431. [14] Art. 433. [15] Art. 334.
[16] Art. 435. [17] Arts. 553, 593.

lish corporations or limited partnerships, a portion of whose capital is divided into shares, when said corporations or limited partnerships are organized to construct general roads, canals for navigation, railroads, or public utility enterprises requiring public franchises.[18]

Other corporations or limited partnerships with shares cannot be established without the approval of the judge of the commercial court. Banking corporations are subject to the provisions of the banking laws.

Approval is also necessary to extend the term of companies established for a limited period and to dissolve them before expiration of the term in cases provided for by the law.[19]

Guatemala [20] and **Honduras** [21] follow the same system as Chile with the difference that the persons who sign the application to the Government must represent at least two-thirds of the capital.

Haiti.

A corporation can be established only by the authorization of the President of Haiti, after approval of its articles.[22]

In **Mexico**, the law of March 19, 1897, as amended by the law of June 19, 1903, governs all matters relating to banks of issue (*bancos de emisión*) mortgage banks (*bancos hipotecarios*) and *bancos refaccionarios* or banks of finance or promotion, issuing treasury bonds to cover loans to industry and agriculture for short terms, but longer than the usual commercial loan. These institutions as well as warehouses of deposit can only be established by special concession to individuals or corporations; but the operation thereof can only be undertaken by a corporation duly organized in the Republic.

The number of individuals to whom a concession can be granted must not be less than three; within four months after the concession, they must show that the corporation which

[18] Art. 288. [19] Art. 289. [20] Arts. 303 to 307.
[21] Arts. 286 to 290. [22] Art. 137.

is to carry on the business has been organized and the concession transferred to it. Associations for banking purposes must comply the following requisites: (*a*) the number of shareholders must be not less than seven; (*b*) the capital cannot be less than a million pesos; (*c*) the capital must be wholly subscribed and fifty per cent of it must have been paid in, the increase or decrease thereof having to be sanctioned by the Minister of Finance; (*d*) the domicil of the bank must be at the place in Mexico where the main house (*casa matriz*) of the institution is established; (*e*) the shares must be in a person's name so long as they are not fully paid; (*f*) a reserve fund must be created with ten per cent of the yearly net profits, until it reaches at least a third of the corporate capital; (*g*) the organizing basis of the association and its by-laws must be submitted to the approval of the Minister of Finance before the bank commences business, to determine its compliance with the provisions of the code of commerce and the law of credit institutions; (*h*) there must be deposited, in government bonds, in the Treasury of the Nation or in the Banco Nacional de Mexico at least twenty percent of the amount which the bank must have in cash to commence business.[23]

The federal constitution drafted in Quaretaro in 1917 provides that there shall be a single bank of issue for bills, controlled by the federal government.[24]

Nicaragua.

In order to establish a corporation, it is necessary that its articles be approved by the Government. When the purpose of the corporation is to establish banks of issue, to construct national roads, railroads or canals, or when it solicits a franchise or charter that the legislature must grant, an act of Congress is necessary for the establishment of the corporation.[25]

San Salvador.

When a concession is granted to a corporation, its regu-

[23] Arts. 1 to 14. [24] Art. 28. [25] Art. 148.

lations and by-laws must be submitted to the Government for approval.[26]

Uruguay.

A corporation requires the authorization of the executive, and when it is designed to operate a franchise, it also requires the approval of the legislature.[27]

Characteristic features of corporations.

The fundamental and distinguishing characteristics of stock corporations, when compared with other forms of commercial association, are four:

1. The liability of the members for all obligations and losses of a stock corporation is limited to the amount or share that they bound themselves to contribute. All liabilities for the obligations contracted and for the management, incurred by persons legally authorized thereunto by articles and by-laws, lie upon the corporate capital and the accrued profits.[28]

2. The directors are not necessarily appointed at the beginning in the articles of incorporation or in the by-laws; even when they are so appointed, their functions are only for a certain period and they must be succeeded by those elected by the majority of the stockholders at the general meetings. These directors are the agents of the corporation.[29]

3. The stockholders are not allowed to inspect the books and correspondence freely as in the case of partnerships, except at the time and under the conditions established in the by-laws and regulations, because

[26] Art. 240. [27] Art. 405.

[28] Spain, 153, 154; Argentina, 313, 315; Bolivia, 249; Brazil, article 2 of law of Jan. 17, 1890; Chile, 424; Colombia, 550; Costa Rica, 67; Guatemala, 300; Honduras, 283; Mexico, 163; Nicaragua, 151; Panama, 362; Peru, 161, 162; San Salvador, 253; Santo Domingo, 33; Uruguay, 403–410; Venezuela, 204.

[29] Spain, 122, 155; Argentina, 335, 336; Bolivia, 248; Brazil, 9, law of Jan. 17, 1890; Chile, 424, 457; Colombia, 550, 582; Costa Rica, 67; Ecuador, 286; Guatemala, 321; Haiti, 31; Honduras, 283, 304; Mexico, 187; Nicaragua, 141; Panama, 438; Peru, 130, 163; San Salvador, 259; Santo Domingo, 31; Uruguay, 405; Venezuela, 228.

secrecy, so indispensable in commerce, would be impossible and competitors might have constant opportunity to become acquainted with competitive information ruinous to the corporation.[30]

Costa Rica creates an exception to this rule by providing that every shareholder or group of shareholders who represents one-tenth of the incorporated capital may demand that the condition of the corporation be examined and reported, provided the petitioners deposit their shares in court with the amount necessary to pay the expenses of the examination. This affords wide protection to minority interests.[31]

In Venezuela,[32] the managers must allow the shareholders, at any time, to inspect the shareholders' transfer book and the minute book.

4. The corporation has no firm name; its name must be taken from its object and purposes. This name is the property of the corporation and cannot legally be used by any other corporation.[33]

Legal form of the articles of incorporation.

There are three systems with respect to the legal form of the articles of incorporation, namely:

1. *System of Spain.* The articles of incorporation must be embodied in a public instrument, that is to say, drafted by or before a notary public who incorporates in his notary's book every clause of the contract.[34]

[30] Spain, 158; Argentina, 340, 360; Bolivia, 296; Brazil, 16 *ib*; Chile, 462; Colombia, 587; Ecuador, 309; Guatemala, 326; Honduras, 309; Mexico, 199; Nicaragua, 167, 168; Panama, 456; Peru, 166; Venezuela, 248. The shareholders of a corporation have no right to examine the administration of same, nor make any inquiry in regard to it, except at the time and in the form provided for in its by-laws. Cuba, Trib. Sup. Havana August 21, 1902, No. 43. *Jurisp. del Trib. Sup.*, v. 14, p. 127.

[31] Art. 108. [32] Art. 248.

[33] Spain, 152; Argentina, 314; Bolivia, 248; Brazil, 2 *ib.;* Chile, 424; Colombia, 550; Costa Rica, 67; Ecuador, 285; Guatemala, 300; Haiti, 29, 30; Honduras, 283; Mexico, 163 to 165; Nicaragua, 148; Panama, 259; Peru, 160; San Salvador, 231; Santo Domingo, 29, 30; Uruguay, 404; Venezuela, 205.

[34] Spain, 119; Argentina, 289; Bolivia, 231; Chile, 350; Colombia, 551;

2. *System of France.* The articles of incorporation may be embodied in a private instrument.[35]

3. *System of Venezuela.* Within a period of ten days after the general incorporation meeting of the subscribers, the directors must make a declaration in the commercial registry of the domicil of the corporation, in which they must state specifically that all the formalities of the law for incorporating the company have been fulfilled. As an evidence of said declaration they must present a list of the subscribers, a statement of the cash paid in on account of shares of stock, a copy of the minutes of the incorporating meeting and a copy of its by-laws to be filed. Within the same period of ten days, the aforesaid declaration must be published in the newspapers.[36]

Facts that the articles of incorporation must show.

The articles of incorporation, in addition to statements common to other commercial associations, must contain the following information. The footnotes indicate the names of the countries whose codes require the respective details:

1. The number of shares into which the corporate capital is divided and by which it is represented.[37]

2. The period or periods within which the portion of the capital, not subscribed at the time of incorporation, is to be contributed; otherwise, a statement of the

Costa Rica, 231; Ecuador, 326; Guatemala, 301, 335; Haiti, 40; Honduras, 284; Mexico, 93; Nicaragua, 154; Peru, 127; San Salvador, 231.

[35] Brazil, 3 *ib.* and article 300 of the code of commerce; Santo Domingo, 40; Uruguay, 393.

Title to real estate contributed to the treasury of a corporation passes regardless of the fact that no public instrument has been executed, because a corporation can be organized in a private instrument; and thus article 11 of the law of September 15, 1855, relating to the formalities of purchase and sale of real estate, has no application. Brazil, Tribunal de Justicia de S. Paulo, Sept. 20, 1899, *Revista de Jurisp.*, v. 7, pp. 333, 334.

[36] Art. 244.

[37] Spain, Chile, Colombia, Costa Rica, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, San Salvador, Uruguay.

person or persons authorized to determine the time and manner in which the installments are to be paid.[38]

3. The periods and manner or occasion of calling and holding general ordinary and extraordinary meetings of stockholders.[39]

4. The submission to the vote of the majority of the stockholders, duly called and held, of such matters as may properly be brought before them.[40]

5. The manner of counting votes and the number of votes necessary to pass a resolution, at ordinary as well as at extraordinary meetings.[41]

6. The amount of capital subscribed, the amount paid in and how it is made up.[42]

7. The advantages, privileges or preferences that the promoters reserve for themselves.[43]

8. The number of managers and supervisors and their functions.[44]

9. The powers of the general meeting, requisites for the validity of its resolutions and for voting and the method of representing the corporation.[45]

10. The statement whether the shares are to be transferable by endorsement, or payable to bearer.[46]

11. The method of supervising the administration of the corporation.[47]

12. A transcript of the receipt showing that ten per cent of the value of the shares has been paid in.[48]

[38] Spain, Argentina, Chile, Colombia, Costa Rica, Guatemala, Honduras, Peru, San Salvador, Uruguay.

[39] Spain, Peru, San Salvador.

[40] Spain, Peru, San Salvador.

[41] Spain, Panama, Peru, San Salvador.

[42] Spain, Argentina, Chile, Colombia, Costa Rica, Guatemala, Honduras, Mexico.

[43] Argentina, Panama, Mexico.

[44] Spain, Argentina, Brazil, 10 *ib.*; Costa Rica, Mexico, Panama, Peru.

[45] Argentina, Chile, Colombia, Costa Rica, Guatemala, Honduras, Nicaragua, Panama.

[46] Argentina, Costa Rica, Panama.

[47] Costa Rica, Nicaragua.

[48] Brazil, 3 *ib.*

13. The amount or proportion of the profits which are to constitute the reserve funds.[49]

14. The amount of losses upon the occurrence of which the dissolution of the corporation is to take place.[50]

Two methods of establishing a corporation.

There are two methods which may be followed in establishing a corporation: (*a*) by means of an agreement signed by all the organizing members; and (*b*) by means of a public subscription called for by a group of persons, named promoters. Not all the codes describe these systems at length and some of them are silent in the matter; but as neither form is opposed to other rules of law they have been practically accepted, except in San Salvador, where the code authorizes only the first system.[51]

We may divide the codes in this respect into three systems:

1. That which expressly admits both methods; [52]
2. That of the code of San Salvador, which authorizes

[49] Chile, Colombia, Costa Rica, Guatemala, Honduras, Mexico, Nicaragua, Panama, 378, 380.

Nullity due to the lack of essential requisites in the organization of a corporation cannot be pleaded by stockholders who were present at the incorporating meeting and approved the acts done contrary to the law or by-laws. Brazil, Trib. de Just. de S. Paulo, Feb. 15 and Oct. 30, 1908, *Revista de Direito*, v. 20, p. 332.

Questions relating to the validity or nullity of the contract contained in the articles of incorporation of an association cannot be subjected to the decision of arbitrators, notwithstanding the fact that the contract, the nullity of which is the matter at issue, establishes that all questions arising between the shareholders and the board of directors must be submitted to the cognizance of arbitrators; because questions of that kind involve principles of public policy that only the law courts can decide. Mexico, Trib. Sup. Dist. Fed., 3a Sala, Dec. 17, 1906, Townsend y Villasana *v.* Comp. Minera de San Rafael y Compañía, *Diar. de Jurisp.*, v. 10, p. 185.

[50] The articles of the respective codes of the above mentioned countries are as follows:

Spain, 151; Argentina, 292; Bolivia, 231; Brazil, 3 *ib.;* Chile, 426; Colombia, 552; Costa Rica, 6; Guatemala, 302; Honduras, 285; Mexico, 95; Nicaragua, 156; Panama, 293; Peru, 159; San Salvador, 231; Uruguay, 406.

[51] Art. 231.

[52] Argentina, 319, 320; Brazil, article 3, *ib.;* Costa Rica, 70, 71; Mexico, 166; Panama, 366; Venezuela, 233, 234.

the organization of a corporation only by means of a public instrument; [53]

3. That of the other codes, which are silent.

The two methods are described in the codes of Argentina and Mexico more minutely than in any other; the provisions of these codes may therefore be regarded as affording the most information in the matter.

Code of Argentina.

(*a*) *Method of organization by means of an agreement of all the persons concerned.* When all the persons concerned have subscribed the required capital and fulfilled all other requisites, they can definitely constitute the corporation, executing the corresponding public deed, filing it and publishing it for fifteen days with the by-laws, authorization and other documents relating to the establishment of the corporation.[54]

(*b*) *Method of public subscription.* When, in order to establish a corporation, a public subscription is resorted to, the promoters must constitute it provisionally by executing the necessary articles, which must be recorded and published for ten days in the place of incorporation. When these requirements have been fulfilled, the plan for the subscription may be issued, containing:

1. The date of the provisional establishment, the office in which the corporate instrument was executed and recorded, and the periodicals in which it was published;

2. The kind of business in which the corporation is to engage its capital, the number of shares and conditions of subscription and payment;

3. The exceptional advantages that the promoters reserve for themselves;

4. The names and residences of the members of the board of directors, if already appointed;

5. The call for a general meeting of the subscribers, which is to be held within a period of three months, for the incorporation of the company.[55]

[53] Art. 231. [54] Art. 319. [55] Art. 320.

The subscription having been obtained, the promoters must at the general meeting held on the date fixed, furnish documentary evidence that the legal requisites have been fulfilled, together with a draft of the by-laws in accordance with the basis of subscription, should the by-laws not have been already accepted at the time of the provisional incorporation.

At this meeting each subscriber can have only one vote, whatever the number of shares he may have subscribed for.[56]

The meeting decides by a majority of votes whether the company shall or shall not be incorporated. Should the decision be in the affirmative, the members then discuss the by-laws and appoint the board of directors, if this has not already been done. The minutes of this meeting must be presented to the Executive, together with the by-laws and evidence of the fulfillment of all the legal requisites, for the necessary authorization. When the latter has been obtained, all the above mentioned documents must be recorded. The company is then duly incorporated.[57]

Code of Mexico.

(*a*) *Method of organization by agreement of all the persons concerned.* When the corporation is to be established by agreement it is merely necessary that all the persons concerned draw up and sign a public instrument, with all the legal requisites thereof. A certificate of the appraisement of bonds, securities, or personal or real property contributed by one or more members must be added to the articles of incorporation. The by-laws must be approved at the first meeting called according to the provisions of the articles.[58]

(*b*) *Method of organization by public subscription.* When the corporation is to be established by means of public subscription, it is necessary:

1. To publish a programme;
2. To subscribe the capital;
3. To hold a general meeting to approve and ratify the establishment of the corporation;

[56] Art. 322. [57] Art. 323. [58] Art. 175.

4. To protocolize the minutes of the general incorporation meeting and the by-laws.[59]

The programme written and signed by the promoters must contain a complete draft of the by-laws of the proposed corporation with all explanations that may be deemed necessary, the amount of capital to be paid in immediately, and the evidence of the appraisement of any securities, bonds, chattels or real estate which one or more members may contribute to the corporation. The by-laws must contain all the legal requisites and, furthermore, must indicate the manner of calling and convening the first general meeting.[60]

The subscription of shares is to be stated in one or more copies of the programme which must contain the full name or firm name and residence of the subscriber, the number of the shares subscribed, the date of the subscription and the statement that the subscriber knows and accepts the draft of the by-laws; the whole attested by two witnesses.[61]

In order to proceed to the establishment of the corporation, the corporate capital must have been fully subscribed and ten per cent of the cash subscriptions paid in.

If the whole or a part of the capital consists of bonds, securities, personal or real property, these items must be represented by shares fully paid.

If the ten per cent that must be paid in cash is not paid within the period fixed by the promoters, the shares must be considered as unsubscribed.[62]

The amount requested by the promoters is to be paid by the subscribers to the credit institution or commercial house designated for that purpose. The amount so deposited is to be turned over to the directors appointed at the first general meeting, after the protocolization and registration of the necessary documents.[63]

[59] Art. 167.

By protocolization is meant the filing in a public notary's office of any legal document in order not only to preserve it in safety, but to obtain afterwards authentic copies thereof.

[60] Art. 168. [61] Art. 169. [62] Art. 170.

[63] Art. 171.

After the capital is subscribed and the deposit is made, a general meeting must be called, the purpose of which is:

1. To acknowledge and approve the deposit made at the request of the promoters, as well as the valuation assigned to the bonds, securities, personal or real property which one or more members may have contributed to the corporation. Those who contributed such bonds, securities, personal or real property have no vote in the matter;

2. To discuss and approve the by-laws;

3. To discuss the share or portion of the profits that the promoters have reserved for themselves;

4. To appoint the directors and supervisors, who must fulfill their functions during the period established in the by-laws.[64]

A list of shareholders signed by those attending the general meeting, with a statement of the number of shares and votes they possess, must be included in the minutes of the meeting.[65]

After the general meeting has been held and the minutes have been drawn up, the minutes and the by-laws must be protocolized and registered.[66]

Necessary requisites for organizing a corporation.

In addition to the Government's authorization established in some of the codes, as already observed, other requisites are provided for, namely:

1. A minimum proportion of the capital must be subscribed before organization is perfected. In this respect the codes may be divided into four groups:

(*a*) that of the codes which require the total capital to be subscribed; [67]

(*b*) that of the codes which establish a minimum; Argentina,[68] Panama [69] and Uruguay [70] require

[64] Art. 172. [65] Art. 173. [66] Art. 174.

[67] Brazil, 3 *ib.;* Costa Rica, 69; Ecuador, 294; Mexico, 170; San Salvador, 232; Venezuela, 235.

[68] Art. 318. [69] Art. 371.

[70] Art. 3 of the law of May 31, 1893.

twenty per cent, Colombia,[71] one-third, and Guatemala, two-thirds of the capital; [72]

(*c*) that of the code of Chile [73] which leaves this matter to the discretion of the Executive;

(*d*) that of the codes which are silent, thus leading to the inference that the whole capital must be subscribed.[74]

2. Minimum number of members. Some of the codes fix the minimum number of members required for organizing a corporation: Argentina [75] and Panama [76] require ten; Brazil [77] and Santo Domingo seven; and San Salvador [78] five.

3. A certain proportion of the capital subscribed must be paid in. In Argentina,[79] Brazil,[80] and Mexico,[81] it is ten per cent; in Chile [82] and Colombia,[83] the President of the Republic fixes the amount; in Costa Rica [84] and in Venezuela [85] it is twenty per cent; in Santo Domingo [86] and Uruguay [87] twenty-five per cent; and in San Salvador [88] one-third of the capital.

Privileges reserved by promoters.

The organization of a corporation requires preliminary work and effort of varying difficulty on the part of the promoters or founders. The law, while admitting the promoter's claim to special rewards, regulates his privileges as follows:

In Argentina,[89] promoters cannot, with the exception below mentioned, reserve any premium or special advantage to themselves, or any shares or bonds which are not paid for like others offered for subscription, even though they constitute compensation for concessions gratuitously granted

[71] Art. 558. [72] Art. 305. [73] Art. 433.
[74] Spain, Bolivia, Haiti, Honduras, Nicaragua, Peru, Venezuela.
[75] Art. 318. [76] Art. 361. [77] Art. 3.
[78] Art. 231. [79] Art. 318. [80] Art. 3.
[81] Art. 170. [82] Art. 433. [83] Art. 559.
[84] Art. 69. [85] Art. 235. [86] Art. 42.
[87] Art. 3 of law of May 31, 1893. [88] Art. 235.
[89] Art. 321.

by the Government; except when those advantages do not exceed ten per cent of the capital or of the net profits for a period no longer than ten years.

In Costa Rica [90] the only lawful promoters' advantage consists of ten per cent at most of the net profits of the enterprise for a period not longer than four years; this preference is to be computed and paid after the approval of the corresponding balance sheet, provided the first general meeting of shareholders had no reasonable ground to oppose it.

In Brazil [91] any concession to the promoters can be made only after the organization of the corporation and the preference can consist only of a share in the net profits of the enterprise.[92]

[90] Art. 74. [91] Art. 3.

[92] By the words "after the organization of the corporation" is meant not a time after the corporation has entered upon its functions, but after the subscribers have declared in a public instrument their will to organize a corporation (art. 72 of decree no. 434) or else when, in the general meeting for the organization, the promoters declare that it has been incorporated (art. 75, decree no. 434).

Promoters are those persons who plan the organization of a corporation, draw its by-laws and, in such character, present themselves before the public, sign and publish the programme, start the subscription, make the deposit of the necessary documents, receive the first payments made by the subscribers, call the general meeting, and take all other steps necessary as preliminaries to incorporate the association, engaging the liability thereof. Brazil, Rio de Janeiro, Camara Civil da Corte de Apel., May 20, 1890; 2a Camara da Corte de Apel., May 8, 1906, and Camara Commercial, Nov. 22, 1904, Carvalho de Mendonça, *op. cit.*, v. 3, p. 320.

Those persons, promoters or strangers, who have contributed their services to the organization of a corporation, may receive compensation in commissions or in a certain percentage of the profits, etc. Brazil, decree no. 343, arts. 10 and 20, decree no. 1362 of Feb. 14, 1891. These commissions or shares due the promoters may be taken from the capital. Art. 7, decree no. 1362 of Feb. 14, 1891.

When in a general meeting of stockholders a decision was recorded to compensate the promoters in some way, such decision cannot be revoked at a later meeting, because the decision when agreed to by the promoters constitutes a bilateral contract which cannot be rescinded, except by mutual consent of both parties. Brazil, Camara Com. do Trib. Civil e Criminal, Rio de Janeiro, June 14, 1892, in Montenegro, *Trib. Judiciarios*, v. I, pp. 5, 8.

A deposit of ten per centum of the value of the shares subscribed made in the name of the promoters is not proper, because the corporation is not safe-

In Ecuador [93] and Venezuela [94] the promoters can obtain only a share in the net profits of the corporation, but no limitation is placed on that share; and they must also be reimbursed for all the expenses incurred in organizing the corporation.

Liabilities of promoters.

Before the corporation is constituted and during the time in which the promoters are engaged in organizing the preliminary work, such as obtaining subscriptions and taking the steps necessary to hold the first meeting, all the legal interest of the prospective corporation and sometimes the advances in money made by the subscribers are vested in the promoters; they are therefore accountable either to the corporation, if organized, or to the persons who entrusted to them moneys subscribed, for funds in their hands.

The modifications of this rule, as found in various codes, may be classified into the following systems:

1. The promoters are jointly and unlimitedly liable for all their transactions up to the definite organization of the corporation, and their rights, if any, against the same are reserved. Should the corporation not be organized, the expenses and consequences of their acts designed to effect its organization are borne by the promoters, without their having any right of action against the subscribers; they are, furthermore, unlimitedly and jointly liable for the refunding of the money received on account of stock subscriptions, as well as for the payment of debts contracted in the name of the corporation, and for damages to third parties arising out of the nonperformance of obligations contracted in the name of the corporation.[95]

guarded in the form deemed proper by the law. Camara Commercial do Tribunal Civil e Criminal, June 7, 1892, *O Direito*, v. 60, pp. 113–121.

[93] Art. 293. [94] Art. 232.

[95] Argentina, 324; Brazil, 5 *ib.;* Costa Rica, 74; Panama, 381; San Salvador, 236; Uruguay, art. 5 of law of May 31, 1893; Venezuela, 231.

The joint liability of the promoters in case of nullity of the incorporation of an association is established in Brazil by art. 89 of decree number 434.

2. The promoters are personally but not jointly liable for all obligations contracted with a view to organizing the corporation; their right to recover from the same whatever they may have paid being reserved.[96]

Different kinds of shares.

The capital of a corporation is divided into shares represented by a document called *acciones* or *títulos de acción*.[97]

These shares may be issued in the name of a certain person (*nominativas*) or to bearer.[98]

In Chile,[99] Colombia,[100] Guatemala [101] and Honduras,[102] the codes provide for *acciones de industria* (industrial shares), which represent the shares of persons who contribute their services only. They confer merely a right to a certain share of the profits of the corporation but not of its capital, unless the shares have not been divided into the two classes of capital shares and industrial shares, or there has been an agreement to the contrary. The industrial shares must be deposited in the treasury of the corporation until the entitled holder has fulfilled his obligations.

Description of shares.

In Spain,[103] Argentina,[104] Mexico,[105] Panama,[106] Peru,[107] San Salvador [108] and Venezuela,[109] some of the essential requirements of certificates or shares of stock are as follows:

[96] Ecuador, 291.

[97] The corporate capital is subject to a stamp tax to the amount of a milreis per one thousand milreis or fraction thereof. Brazil, decree no. 3,564 of Jan., 1900.

In Mexico, the entries made in the books of a commercial association constitute evidence of the payment of the contribution subscribed, except for the directors, who must prove such payment by other means, 110.

[98] Spain, 161; Brazil, 7 *ib.;* Chile, 451; Colombia, 576; Costa Rica, 109; Guatemala, 317; Haiti, 35, 36; Honduras, 300; Mexico, 178; Panama, 384; Peru, 168; San Salvador, 244; Santo Domingo, 35, 36; Uruguay, 412; Venezuela, 281.

[99] Art. 446.
[100] Art. 572.
[101] Art. 313.
[102] Art. 296.
[103] Art. 164.
[104] Art. 328.
[105] Art. 179.
[106] Art. 384.
[107] Art. 171.
[108] Art. 245.
[109] Art. 282.

1. Name of the corporation and date of its organization; [110]

2. Amount of the capital and number of shares into which it is divided; [111]

3. Nominal value or denomination of every share, and portion that has been paid up; [112]

4. Number of every share; [113]

5. Period of duration of the corporation; [114]

6. Rights granted to the shareholders; [115]

7. Manager's signature.[116]

Indivisibility of shares.

When two or more persons are the owners of a share the legal relation between them and the corporation is a matter on which all the codes do not agree; they follow three systems, namely:

1. The shares may be subdivided into scrip of equal value.[117] In Costa Rica the nominal value of a scrip certificate cannot be less than 50 colones ($23.27 U. S.).

2. The shares may be subdivided, but the subdivision has no effect upon the corporation; the owners must appoint a common representative or the judge may make an appointment in case the parties concerned do not agree.[118]

3. The law is silent, and it is inferred that the various owners of a share must appoint a single representative.

Requisites for issuing shares payable to bearer.

Shares of stock can be issued to bearer only when a certain part of their face value has been paid. The amount

[110] Argentina, Mexico, Panama, Santo Domingo, Venezuela.

[111] Mexico, Panama, Santo Domingo, Venezuela.

[112] Spain, Argentina, Panama, Peru, Santo Domingo, Venezuela.

[113] Argentina, Panama.

[114] Mexico, Venezuela.

[115] Mexico.

[116] Mexico, Panama, Venezuela.

[117] Bolivia, 250; Chile, 445; Colombia, 571; Costa Rica, 109; Ecuador, 287; Guatemala, 312; Haiti, 34; Honduras, 295; Santo Domingo, 34.

[118] Argentina, 331; Brazil, 7 *ib.*; Mexico, 182; Panama, 385; Venezuela, 286.

varies in the different codes, which divide into the following classification:

1. The total face value of bearer shares must be paid.[119]

2. One-half of the face value of bearer shares must be paid.[120]

3. The codes of Bolivia, Haiti, Mexico, Nicaragua and Santo Domingo are silent on this matter and we may infer that shares may be issued to bearer irrespective of the amount paid.

Rights and privileges of shareholders.

A share entitles its holder:

1. To receive a proportionate part of the profits of the corporation, called "dividend" (*dividendo*);

2. To receive a proportionate part of the common capital at the time of liquidation of the corporation or while it is being wound up, if the process is gradual, or else when the shares are purchased by the company;

3. To take part in the discussion and determination of the affairs of the corporation at the general meetings of shareholders;

4. To transfer his share to a stranger without the necessity of asking the consent of the other shareholders or of submitting to a claim of preëmption by the latter.

Of these privileges of a shareholder, which are often not availed of nor enjoyed, some may be considered not essential. The first of these is the privilege of taking part in the discussion and determination of corporate affairs, for there are certain kinds of shares that do not include this power among the rights of shareholders, and in some countries, the shareholder is required to have a certain minimum number of shares in order to

[119] Argentina, 326; Brazil, 7 *ib.;* Chile, 449 to 451; Colombia, 574 to 576; Costa Rica, 111; Ecuador, 296; Guatemala, 315 to 317; Honduras, 298, 299; Panama, 385; San Salvador, 244; Uruguay, 412; Venezuela, 283.

[120] Spain, 164; Peru, 171.

be allowed to vote at a general meeting. The second is the right to receive a part of the common capital at the time of liquidation. There are cases in which a share carries no such right, as, for example, the privileged shares of the promoters, or the industrial shares.

Method of transferring shares.

Shares payable to order must be recorded in a book which the corporation must keep for this purpose, called a transfer book, in which subsequent transfers must also be entered. Without such recording the transfer has no effect on the corporation or on third parties.[121]

Shares payable to bearer must be numbered and recorded in stub-books, in Spain [122] and Peru.[123] In all countries they are transferred by mere delivery of the share.

Liability of shareholders.

Until the full value of shares payable to a named person has been paid, the first subscriber or holder of the share, his assignee, and each person succeeding the latter, should the share be transferred, must jointly, and at the option of the directors of the corporation, answer for the payment of the portion not contributed. No agreement to the contrary is valid. In Argentina, Bolivia, Costa Rica, Mexico and Venezuela, the obligation is not joint and several.

After an action to enforce such liability has been instituted against any of the persons above mentioned, no new action against any other holder or assignee of the shares can

[121] Spain, 162; Argentina, 329; Bolivia, 251; Brazil, 7 *ib.;* Chile, law of Sept. 6, 1878; Colombia, 576; Guatemala, 317; Haiti, 36; Honduras, 300; Mexico, 180; Panama, 399; Peru, 169; San Salvador, 246, 257; Santo Domingo, 36; Uruguay, 414; Venezuela, 285.

Shares of stock have to pay a tax of 300 reis for every 100 milreis in Brazil.

Corporations must keep a book for registering shares. Brazil, article 13 of the code of com. Decree, no. 434, article 22 and law no. 3, 150, article 7, paragraph 3.

The way to dispose of shares belonging to shareholders who have not paid for them is governed in Brazil by decree no. 434, article 33.

[122] Art. 163. [123] Art. 170.

be brought until it is shown that the person previously sued is insolvent.[124]

In case bearer shares have not been fully paid, only the person who appears on the books as the holder thereof is liable for their complete payment. Should the name of the bearer not appear, thereby making a personal claim impossible, the corporation may call in the corresponding certificates of the shares not fully paid.

In such cases the corporation has the privilege of issuing duplicate certificates of the same share, in order to again sell them for the account of the defaulting holders of the annulled certificates.[125]

Rights of an assignor of a share against the assignee who fails to pay the balance due on it.

In case the assignor of a share of stock payable to a named person and transferred by endorsement has been compelled to pay in whole or in part the outstanding balance of a share, due to his joint liability with his assignee, the former has a claim to legal contribution against the latter.[126] Panama and San Salvador, however, declare that the assignor becomes in that case a co-owner of the shares.

New issues of shares.

As the capital is the guaranty of third parties who contract with the corporation and as that capital is represented by the shares, the increase of the capital without full pay-

[124] Spain, 164; Argentina, 332; Bolivia, 252; Brazil, 7 *ib.* Chile, 452; Colombia, 577; Costa Rica, 114 *ib.;* Guatemala, 318; Honduras, 301; Mexico, 163, 183; Nicaragua, 152, 153; Panama, 401; Peru, 171; San Salvador, 249; Uruguay, 413, 415; Venezuela, 283.

When in accordance with the by-laws of a corporation a call of further subscriptions on account of shares of stock is provided for by the general meeting of the stockholders, the provision is binding upon all of them and they cannot release themselves of the obligation of paying the amount of the contribution by the transfer of their shares, where such transfer is not in accordance with the provisions of the articles of incorporation. Spain, Trib. Sup., January 8, 1910; *Gaceta* of June 26, 1910, p. 2.

[125] Spain, 164; Mexico, 183; Peru, 171.

[126] Argentina, 332; Panama, 402; San Salvador, 249.

ment of the previous issues of the shares would be deceiving to the public in general. The law, therefore, provides that no new issues of stock can be floated or sold until complete payment of the series previously issued. Any agreement to the contrary, included in the articles of incorporation, in the by-laws or regulations, or in any resolution adopted at a general meeting of stockholders is null and void.[127]

Disabilities of corporations.

Corporations cannot buy their own shares except with earned profits and with a view to reducing the corporate capital.[128]

In Panama [129] and San Salvador,[130] shares issued in the name of a certain person cannot be sold without the consent of the corporation; when, therefore, by judicial order, shares

[127] Spain, 165; Costa Rica, 75; Panama, 406; Peru, 172; San Salvador, 252.

[128] Spain, 166; Argentina, 343; Brazil, 31; Mexico, 184; Panama, 404; Peru, 173.

Shares which have been repurchased by the corporation do not count in the computation of the majority of votes in the general meetings of stockholders. Spain, Trib. Sup., Dec. 15, 1890; *Gaceta* of Jan. 26, 1891.

The legal doctrine that shares of a corporation which have been given up by one of the associates increase the value of the other shares in due proportion, is not applicable when the associate gave them up for the benefit of a certain shareholder. Spain, Trib. Sup., Oct. 20, 1865; *Gaceta*, Oct. 26, 1865.

It is against the law of contracts to declare forfeited shares belonging to a person who did not attend the meeting at which the causes of forfeiture were fixed and who did not sign the deed in which the corporation was organized. Spain, Trib. Sup., Dec. 1, 1880; *Gaceta*, Dec. 13, 1880.

The by-laws of a corporation cannot authorize an increase of the corporate capital establishing successive series of shares, because in that way the capital would not be fixed. Brazil, decree no. 434, article 84, and decree 8821, article 35.

When a corporation binds itself to make a payment either in cash or in shares of its own stock, it entitles the creditor to demand payment in cash, because it is forbidden to corporations to acquire their own shares. This conclusion is valid, even though the corporation is established in a foreign country, if the case refers to acts done or contracts entered into by its representatives in Spain. Trib. Sup., Oct. 19, 1910; *Gacetas* of March 14 and 15, 1911, p. 110.

The disability of corporations buying their own shares is not an obstacle to their deposit as collateral, and their redemption afterwards by paying their value. Spain, Sup. Trib., June 4, 1905; *Gaceta* of Feb. 12 and 15, 1906, p. 40

[129] Arts. 287, 404. [130] Arts. 248, 251.

of that kind are sold at auction, the corporation may buy them.

In Chile,[131] Colombia,[132] Guatemala [133] and Honduras,[134] the capital cannot be reduced; the corporation, therefore, cannot buy its shares in any event.

In Costa Rica [135] a corporation, its managers and directors are prohibited from buying shares of the corporation when their value is below par; when it is at or above par the general meeting of stockholders can authorize the purchase.

Inasmuch as the corporation, in buying its own shares, reduces its capital proportionately, it is evident that in countries which require the authorization of the government for its organization, it also requires such authorization for the purchase of its shares; but when the law does not expressly authorize the reduction of capital neither such reduction nor the purchase of shares is permissible.

Requisites for reducing the capital.

In countries where the reduction of the capital is lawful, it is necessary to have that step decided upon at a general meeting of stockholders by a majority of two-thirds of the total number of stockholders, possessing at least two-thirds of the capital.[136]

In Argentina,[137] Mexico,[138] Uruguay [139] and Venezuela [140] the presence of stockholders representing three-quarters of the capital and the favorable vote of stockholders representing half of the capital is required, unless otherwise provided in the by-laws.

In Costa Rica [141] the presence of stockholders possessing at least two-thirds of the capital and half plus one of the shares is necessary.

Besides these particulars Spain [142] and Peru [143] require:

(*a*) That the capital, after reduction, shall exceed 75% of the amount of the debts;

[131] Art. 442.
[132] Art. 568.
[133] Art. 309.
[134] Art. 292.
[135] Art. 106.
[136] Spain, 168; Peru, 175.
[137] Art. 354.
[138] Art. 206.
[139] Art. 1, law of July 13, 1900
[140] Art. 270.
[141] Art. 105.
[142] Art. 168.
[143] Art. 175.

(*b*) That a balance sheet be presented to the court, appraising the value of securities at the average quotation of the last three months, and appraising real estate by capitalizing its income according to the legal rate of interest on money.

In Costa Rica [144] the reduction cannot be made if the assets of the business are not sufficient to cover the total liabilities and twenty-five per cent in excess thereof.

Disability to take its own shares as security.

As a consequence of the previous prohibition to corporations to buy their own shares, they are also prohibited from taking them as a pledge; for, unless a buyer can be secured to pay a fair price for them at a compulsory sale, the corporation has to buy them or leave the debt unpaid.[145]

Extension of the term of a corporation.

The term of duration of a corporation cannot be extended except in compliance with the formalities provided in the law for their organization.[146]

The provisions of the law in Costa Rica [147] and Panama [148] are of a character requiring special mention, because in dealing with the extension of the term of a corporation, they limit the privilege for the benefit of those personal creditors of the stockholders who have a preferential power, *i. e.*, a *título ejecutivo* or instrument constituting a confession of judgment, to oppose the extension of the life of the corporation.

The code of Costa Rica reads:

"When the period of duration of a commercial association has terminated, it can be extended only by inscribing and publishing the corresponding agreement.

[144] Art. 106.

[145] Spain, 167; Argentina, 343; Brazil, 27 *ib.;* Mexico, 186; Panama, 404; Peru, 174.

[146] Spain, 119; Argentina, 325; Chile, 350, 425, 427; Colombia, 465, 551, 564; Costa Rica, 4, 10; Ecuador, 330; Guatemala, 233, 301, 304; Honduras, 218, 280; Mexico, 94; Peru, 127; Uruguay, 407; Venezuela, 305.

[147] Art. 10. [148] Art. 280.

> Those personal creditors of the stockholders whose claims are proved by means of a document equivalent to a confession of judgment (*título ejecutivo*) have a period of thirty days within which to oppose the extension of the corporate life—this period to be computed from the day of the above mentioned publication. The opposition thereto shall suspend, with regard to all opposing creditors, the effects of the extension."

The law of Panama contains a similar provision, but it requires that the notice of opposition be inscribed in the commercial registry; and, specifying its effects, provides that after the inscription of the notice the claims of the opposing creditors are to be paid in preference to all other obligations created in favor of new creditors.

CHAPTER XII

Commercial Associations (4)

MANAGEMENT

Administrative agencies of a corporation.

The powers of a corporation are vested in:

1. The general meeting of shareholders;
2. The directors, who, as the executive committee, put into operation the resolutions passed by the shareholders.

General meetings.

The general meeting of shareholders may be: 1. Constituent; 2. Ordinary; 3. Extraordinary.

It has been observed that, in its capacity as a constituent assembly the general meeting has full power to frame the articles of incorporation and the by-laws, and to do everything necessary to establish the company, the powers of the assembly being limited only by the provisions of law governing contracts, and the terms of the authorization of the government in countries which require that formality.

As for the ordinary and extraordinary meetings it may be said that they exercise the legislative power of a corporation, sovereign within the limits of the law and the by-laws, and that their decisions constitute the law of the company.[1]

The regular general meetings of stockholders must be held in the different Latin-American countries according to the following systems:

1. At least once a year;[2]

[1] Spain, 151; Argentina, 347; Brazil, 15; Chile, 466, 467; Colombia, 591, 592; Guatemala, 330, 331; Honduras, 313, 314; Mexico, 202; San Salvador, 266; Peru, 159; Panama, 422, 423; Venezuela, 265.

[2] Argentina, 347; Brazil, 15; Costa Rica, 97; Ecuador, 305; Mexico, 202; Panama, 422; Uruguay, 421; Venezuela, 264.

2. At periods fixed in the by-laws; [3]

3. Every six months; [4]

4. In countries without statutory provision, the meetings must be held at the periods fixed in the by-laws.

Functions of regular meetings.

The functions of regular general meetings are:

1. To discuss, approve, or disapprove the balance sheets, trial balance and annual report presented by the directors, as well as the reports of the supervisors in countries where they are required;

2. To appoint the directors and supervisor for the coming year or fixed period;

3. To discuss any other question mentioned in the call for the meeting.[5]

Formalities for calling general meetings.

The power to call a general meeting is vested in the directors, and in the supervisors where the law requires such functionaries; in Ecuador and in Panama, it is vested also in the judges. As the shareholders are in many cases not known, and their residences at a distance, it is always advisable to give a reasonable notice of the meeting by publication, mentioning the matters to be discussed and passed upon at the meeting (*orden de dia*). The law, however, does not always require these formalities.

Argentina,[6] Brazil [7] and San Salvador [8] require that the call for the meeting be published in the newspapers fifteen days in advance, with a list of the matters to be considered. San Salvador requires publication of the list of matters for discussion in the case of extraordinary meetings only.[9]

[3] Chile, 466; Colombia, 591; Guatemala, 330; Honduras, 313.

[4] San Salvador, 266.

[5] Argentina, 347; Brazil, 15; Chile, 466; Colombia, 591; Costa Rica, 97; Ecuador, 305; Guatemala, 330; Honduras, 313; Mexico, 202; Panama, 422; San Salvador, 266; Uruguay, 421; Venezuela, 265.

[6] Art. 349. [7] Art. 15. [8] Art. 268.

[9] Art. 270.

Venezuela [10] prescribes both requisites, but the period of advance notice is five days.

In Ecuador,[11] Mexico [12] and Panama [13] no period of notice is fixed but it is necessary to publish the list of the matters to be considered.

Other codes contain no provisions in the matter.

All decisions reached at the meeting relating to matters not mentioned in the call are null and void.[14]

When the meeting cannot be held because of the insufficiency of the number of shares represented, a new call must be issued and the meeting held at the time thus fixed, regardless of the number of stockholders present.[15]

In Brazil,[16] when a quarter of the shares are not represented after the second call and the purpose of the meeting is to consider some modification of the articles of organization or the by-laws, a third call must be issued. Thereupon, no matter what the number of shares represented, the meeting is nevertheless to be held, and the decisions arrived at by the majority of the present shareholders are binding, provided not less than those representing two-thirds of the capital appeared at a meeting whose purpose is to establish or liquidate the corporation, to increase its capital or to extend its period. The directors and members of the board of supervisors do not count. Resolutions adopted otherwise are void.

Santo Domingo provides that in regular meetings of stockholders the quorum is formed by a number representing at least a quarter of the capital.[17]

Venezuela provides that in case a meeting, called to discuss a modification of the articles of incorporation or the by-laws, cannot take place because the number of shares required by the by-laws is not represented, a new meeting must be called with advance notice of eight days at least,

[10] Art. 267. [11] Art. 312. [12] Art. 203.
[13] Art. 430.
[14] Argentina, 349; Ecuador, 312; Mexico, 203; San Salvador, 270.
[15] Argentina, 351; Ecuador, 305; Mexico, 204; Panama, 433; San Salvador, 268.
[16] Art. 15. [17] Art. 57.

stating that the meeting will convene with any number of shareholders. The decisions reached at that meeting are not final, until their publication and their ratification by a new meeting regularly called, regardless of the number present.[18]

Limitations of the voting privilege.

In Argentina, no shareholder can represent more than one-tenth of the outstanding shares, nor more than two-tenths of the shares represented at a general meeting.[19]

In Costa Rica,[20] each of the first ten shares of a person entitles him to one vote; from that number up to one hundred every five shares entitle him to one vote; and thereafter every ten shares entitle him to one vote. Fractions of five or ten do not count.

The rule in Uruguay [21] is that the same person cannot represent more than six votes if the corporation has one hundred shares or more, and no more than three if there are less than one hundred.

In the constituent stockholders' meeting Argentina [22] and Venezuela [23] provide that every shareholder has only one vote, regardless of the number of shares subscribed for by him.

Extraordinary meetings, and when they must be called.

The directors and supervisors have, as an incident of their functions, the power to call a general meeting at other periods than those established in the by-laws. These meetings must also be called when a certain number of shareholders so demand. This number differs in the various Latin-American countries, as follows:

Sysiem of Argentina. The number must represent at least five per cent of the capital unless otherwise provided in the by-laws.[24]

[18] Art. 271. [19] Art. 350. [20] Art. 103.
[21] Art. 420. [22] Art. 322. [23] Art. 243.
[24] Argentina, 348; San Salvador, 266; Panama, 420.
When in the by-laws of a corporation there is no person invested with the

System of Ecuador. They must represent one-third of the capital.[25]

System of Costa Rica. They must represent one-fifth of the capital.[26]

How decisions are reached at general meetings.

It is necessary to the validity of a decision reached at a general meeting that in the vote more than half the shares represented be cast in its favor, unless otherwise provided for by the law or the by-laws.[27]

Cases which require special formalities.

There are, however, important decisions that can only be reached by the concurrence of more than half plus one of the shares. These decisions involve:

(*a*) the dissolution of the corporation, before the period established in the articles of organization;

(*b*) the extension of the period of its duration;

(*c*) the repayment or increase of the capital;

(*d*) merger with another corporation;

(*e*) the reduction of the corporate capital;

(*f*) a change in the purpose of the corporation;

(*g*) an amendment or alteration of the by-laws.

Spain,[28] Panama[29] and Peru[30] require the attendance of members representing at least three-quarters of the capital and the vote of three-quarters of the number of those present.

In Argentina,[31] Mexico[32] and Venezuela,[33] it is necessary to have the attendance of members who represent three-

power to call the general meeting of stockholders, the judges have such power and must use it at the request of a proper number of stockholders. Buenos Aires, Cam. de Ap. Com. de la Cap., June 12, 1913, *Jur. de los Tribs. Nacs.*, June, 1913, p. 282.

[25] Ecuador, 311; Mexico, 209.

[26] Costa Rica, 100; Venezuela, 268.

[27] Argentina, 350; Costa Rica, 104; Mexico, 205; Panama, 431; San Salvador, 269.

[28] Art. 168. [29] Art. 435. [30] Art. 175.

[31] Art. 354. [32] Art. 206. [33] Art. 270.

quarters of the capital and the favorable votes of a number of shareholders who represent one-half the total capital.

In Brazil [34] the vote of two-thirds of the corporate capital is required.

In Costa Rica [35] they require the attendance of a number of members representing two-thirds of the capital and the vote of half plus one of the total shares of the corporation.

Santo Domingo [36] is an exception to the rule, because in the above mentioned cases the code requires only the vote of a number of shares representing one-half the capital.

Privilege of withdrawing from the corporation.

When the resolution of the meeting is to extend the duration of the corporation, such extension not being authorized by the by-laws, or when it involves merger with another corporation, repayment or increase of the capital or the change of the scope or object of the corporation, all of which matters affect the original agreement substantially, dissenting shareholders may withdraw from the corporation within twenty-four hours, if present, or within a month from the close of the meeting, if absent, and they have the right to demand payment of their shares in proportion to the corporate capital, according to the last approved balance sheet.[37]

In Panama [38] and Venezuela [39] the limit of time for absent members to withdraw is fifteen days. Furthermore, Venezuela does not give the shareholders the right to withdraw in case of the merger of the corporation with another, in case of the extension of its term of duration or when an increase in the capital is to be made by the issue of new shares. The corporation can demand a period of three months, giving sufficient guaranty, however, for the payment of the shares of the withdrawing stockholders.

[34] Art. 15. [35] Art. 97.

[36] The Tribunal Supremo of Cuba, on August 19, 1902, decided that the two-thirds of the corporate capital required by the code in order to modify the by-laws, and, therefore also to reduce the capital of a corporation, relate to the capital issued and not to the nominal or stipulated capital. Betancourt, *Codigo de Comercio*, p. 88.

[37] Argentina, 354. [38] Art. 436. [39] Art. 272.

Case of an unlawful decision reached at a general meeting.

A decision reached at a general meeting in violation of the provisions of law or the by-laws cannot bind shareholders who oppose it, and a remedy must be provided in case such decisions impair the interests of the corporation. This is simply an application of the general principles of the law of contracts, expressly recognized by the codes of Argentina,[40] Costa Rica,[41] Panama [42] and Venezuela,[43] which provide that every shareholder has a right to protest against decisions thus reached *ultra vires*, and may request the competent judge to suspend the execution and to declare the nullity thereof. Such decisions being *ultra vires* render the expressly assenting shareholders unlimitedly liable.

Shareholders may be represented by proxy.

Shareholders may be represented either by other shareholders or by strangers except in Brazil where the proxy needs to be a stockholder, but cannot be represented by the directors or supervisors.[44] The power can be given in a letter or private instrument signed by the principal, but it must be authenticated by the consul of the country when it is issued abroad.

Effect of resolutions passed at the meetings.

Resolutions of the general meetings passed in accordance with the law and the by-laws are binding on all the shareholders even though not present or dissenting, except in cases where the law gives them the privilege to withdraw from the corporation.[45]

Method of Argentina in cases of shareholders residing in foreign countries.

When there are shareholders in a foreign country, who represent at least 25% of the capital, they may meet to

[40] Art. 353. [41] Art. 107. [42] Art. 418.
[43] Art. 280.
[44] Argentina, 355; Costa Rica, 102; Ecuador, 314; Mexico, 210; Panama, 419.
[45] Argentina, 357; Ecuador, 316; Mexico, 201; Panama, 436.

examine the accounts and reports of directors and supervisors as well as to appoint an agent to represent them at the general meetings, in which case they have as many votes as belong to such shareholders according to the by-laws. In such case they may appoint a presiding officer to receive the respective copies of the reports and accounts which the central management must forward to them a reasonable time in advance. The presiding officer thus appointed must call them in conference and must correspond with the main office. This provision does not impair the right of every shareholder to act individually if he does not wish to proceed collectively.[46]

BOARD OF DIRECTORS

Number of directors.

The codes, as a rule, take it for granted that the management of a corporation is entrusted to more than one person, because they always mention the directors (*directores gerentes*, *consejeros* or *administradores*) in the plural; but they make no special mention of this point, except in Mexico, where the law requires a board of directors (*consejo de administración*) and one or more managers (*directores*);[47] as well as in Costa Rica, where a board of not less than five managers is necessary, or one manager and directors;[48] and in Panama, where a board of at least five managers is required.[49]

Character and liability of the directors.

The directors or managers of a corporation are its agents, and therefore, according to the law of agency, they must show diligence, faithfulness and obedience to their instructions. So long as they comply with these obligations they are not liable individually or jointly for the transactions of the corporation.[50]

[46] Art. 358. [47] Art. 188. Art. 84.

[49] Art. 438. The law uses the words *gerentes*, *directores*, *consejeros*, *administradores* interchangeably, as they possess the character and perform the functions of directors and managers.

[50] Spain, 156; Argentina, 337; Bolivia, 249; Brazil, 299; Chile, 458; Colom-

The managers, however, are personally and jointly liable to the shareholders and third parties for violation of the law or by-laws and for misfeasance, malfeasance, negligence or excess of their powers.[51]

The liability is personal, but not joint, in Uruguay,[52] unless the directors pay a dividend without a previous and correct balance of profits, or of an amount greater than the balance would warrant, or when with a view to showing profits and paying dividends, they make a false statement.[53]

bia, 583; Costa Rica, 84; Ecuador, 300, 301; Guatemala, 322; Haiti, 32; Honduras, 305; Mexico, 195; Nicaragua, 150; Panama, 438; Peru, 164; San Salvador, 261; Santo Domingo, 32; Uruguay, 408; Venezuela, 229.

The death of the manager who executed a power of attorney does not annul the power, if it was granted in the name of the corporation. Spain, Sup. Trib., March 10, 1873; *Gaceta* of March 22, 1873.

In every corporation the members of the board of directors must be considered as agents thereof, and in that capacity, as long as they act within the limits of their power, they are not subject to liability if damage has been caused. Spain, Oct. 20, 1893; *Gaceta* of Dec. 12, 1893.

Only persons duly authorized, acting under the rules of the by-laws and regulations of a corporation can bind the corporate capital by their acts and transactions. Spain, Dec. 2, 1859; *Gaceta*, Dec. 6, 1859.

The legal capacity of the managers of a corporation is governed by the law of agency; the by-laws and regulations as well as decisions reached at the general meetings of shareholders must be taken into consideration in order to determine the powers of the managers. Cuba, Trib. Sup. Havana, Nov. 4, 1904, Decision No. 13, *Jurisp. del Trib. Sup.*, v. XXIII, p. 705.

When the manager of an association is authorized to enter into any kind of contract without limitation, it is considered that he is authorized to give a power of attorney to represent the association. Spain, Trib. Sup., March 9, 1904; *Gaceta* of March 18, 1904.

A manager acting within the powers granted to him by the by-laws of a corporation binds the same, so that it is obliged to pay the amount of loans contracted by him even though they never were entered in the books of the corporation. Spain, Trib. Sup., Dec. 2, 1911; *Gaceta* of March 8, 1913, p. 265.

[51] Argentina, 337; Brazil, 299 of the code and 11, 13 of the law of corporations; Costa Rica, 85, 86, 87; San Salvador, 261.

The manager of a corporation is personally liable for the use of containers that, as a trade-mark, belonged to a third party. The circumstance that those containers or the objects contained therein, were not sold, but given as presents to the patrons of the house, does not change the character of the act as an infringement of the law of trade-marks. Buenos Aires, Cam. Fed. de Apel. de la Cap., Oct. 22, 1912, Larroudé *v.* Manuel Pérez y Cía., *Jur de los Tribs. Nacs.*, Oct., 1912, p. 63.

[52] Art. 408. [53] Art. 418.

In Spain,[54] Chile,[55] Colombia,[56] Ecuador,[57] Guatemala,[58] Honduras,[59] Mexico,[60] Nicaragua,[61] Santo Domingo[62] and Venezuela,[63] the liability of the managers or directors in all cases of violation of the law or the by-laws or of their instructions is personal but not joint.[64].

Argentina,[65] and San Salvador [66] exempt from such liability those managers who did not participate in the wrongful resolution, or who protested against the decision of the majority before action brought against them.

Particular obligations of directors.

Besides the obligations naturally incidental to their character as agents of a corporation, the directors must perform certain specific duties that the law has carefully provided for. Of these the most important are:

1. To present at the regular general meeting of stockholders the balance sheet showing the result of the management of the common business during the preceding period. In Argentina, Chile, Colombia, Costa Rica, Ecuador, Guatemala and Honduras, the directors must, in addition to the balance sheet, present a report on the state of the business and a statement showing all assets and liabilities; [67]

[54] Art. 156. [55] Art. 458. [56] Art. 585.
[57] Art. 303. [58] Arts. 322, 324. [59] Art. 305.
[60] Arts. 194, 195. [61] Art. 150. [62] Art. 32.
[63] Art. 229.

[64] A judicial decision which rejects the complaint (*sentencia absolutoria de la demanda*) against the directors of a corporation because the plaintiff did not prove any negligence or fault of the defendants imposing responsibility on the latter, does not infringe the provision of article 156 of the code of commerce. Spain, Trib. Sup., Dec. 7, 1892; *Gaceta* of Jan. 28, 1893.

[65] Art. 337. [66] Art. 261.

[67] Argentina, 347; Brazil, 15; Chile, 461; Colombia, 586; Costa Rica, 116; Ecuador, 308; Guatemala, 325; San Salvador, 266, 272; Venezuela, 265.

The action demanding of the managers or liquidators of a corporation the accounts of their administration cannot be brought by an individual stockholder; only the corporation itself duly represented can do that. Buenos Aires, Cam. de Ap. Com., April 14, 1914, *Jur. de los Tribs. Nacs.*, April, 1914, p. 266.

2. To call the general meetings of stockholders, whether regular or extraordinary;[68]

3. As soon as they know that the corporate capital has suffered a loss of fifty per cent, to declare that fact to the commercial courts, the declaration being signed by all the managers or directors, and when the loss is seventy-five per cent, to proceed to the liquidation of the corporation according to the by-laws, under penalty of personal and joint responsibility for all transactions undertaken after knowledge of such loss.[69]

In Ecuador[70] and Venezuela[71] the directors must call a general meeting when they realize that one-third of the corporate capital has been lost.

Payment of dividends.

Directors are not permitted to declare dividends out of anything but profits, nor before completing the reserve fund established by the law or the by-laws.[72]

Ecuador[73] and Mexico[74] establish an exception to the principle that dividends must be paid out of profits only and in proportion thereto. Ecuador provides that dividends can be taken out of the corporate capital, in those corporations where some time necessarily elapses before the business commences to operate; during that time the customary interest rate on money may be paid out of capital. Mexico in turn prescribes that in the articles of incorporation or in the by-laws it may be stipulated that the face amount represented by the shares may bear interest not greater than six per centum per annum for a period of not more than five years. Such dividends must be considered as expenses in organizing the corporation.

[68] Argentina, 348; Brazil, 15; Chile, 467; Colombia, 592; Costa Rica, 99; Guatemala, 330, 331; Honduras, 313, 314; Mexico, 204; Panama, 420; Venezuela, 267.

[69] Argentina, 369; Chile, 464; Colombia, 589; Guatemala, 328; Honduras, 311; Costa Rica, 93; Panama, 469; Venezuela, 419.

[70] Art. 304. [71] Art. 251.

[72] Brazil, 13; Chile, 463; Colombia, 588; Guatemala, 327; Honduras, 310; San Salvador, 274; Panama, 468; Uruguay, 418.

[73] Art. 303. [74] Art. 213.

Supervision of a corporation.

The directors or managers of a corporation are elected by the majority of stockholders; therefore, the supervision of the action of the directors ought to be entrusted to the representatives of the minority. But no plan has yet been worked out by the law for granting representation to minorities. The supervisors (*comisarios*, *síndicos*, or *consejo de viligancia*, as they are called) are as a rule appointed by the majority of the shareholders, convened at a regular meeting.[75]

In Chile [76] and Colombia [77] the President of the Republic may appoint the supervisor and fix his compensation, which must be paid by the corporation.

In San Salvador also the Government may appoint supervisors of a corporation, when it is operating a concession, a patent, or a franchise granted by the Government.[78]

Functions of supervisors.

The functions of the supervisors who act in the nature of supervising auditors, are:

(*a*) to examine the books and papers of the corporation at least at the times fixed in the by-laws;

(*b*) to call a general extraordinary meeting of shareholders, when they deem it advisable, or a regular meeting when the directors fail to do so;

(*c*) to inspect the management of the corporation, comparing the cash account with the amount of cash in the treasury of the company;

(*d*) to look after the observance of the laws and by-laws;

(*e*) to supervise the liquidation of the corporation;

(*f*) to report to the general meeting concerning the report, inventory and balance sheet presented by the directors.[79]

[75] Argentina, 335; Brazil, 14; Costa Rica, 122; Ecuador, 306; Mexico, 198; Panama, 449; San Salvador, 262; Venezuela, 252.

[76] Art. 436. [77] Art. 562. [78] Art. 263.

[79] Argentina, 340; Brazil, 14; Chile, 436; Colombia, 562; Costa Rica, 119, 123; Honduras, 308; Mexico, 199; Panama, 455.

Publicity as the best method of supervision.

Spain,[80] instead of supervisors, provides that all corporations must publish every month in the "*Gaceta*" a detailed balance sheet setting forth the amount at which the securities and other property of the corporation are appraised. In Cuba, decree No. 1123 of 1909 provides that the monthly balance sheets which must be published in the *Gaceta* are to be previously verified by the *Dirección de Comercio y Industria*, which must, furthermore, supervise the proper management of the corporation both in behalf of the Government Treasury and the associates.

In Chile [81] and Colombia [82] the directors must present at the general meeting a report of the state of the business, a balance sheet, and an inventory of the corporate property, and these documents must be published if the corporation has issued shares to bearer.

The annual balance sheet presented at the general meeting must be published every year, in Mexico [83] and Panama.[84] In San Salvador,[85] the publication of these documents must be made every six months, and after the meeting of stockholders, the balance sheets presented and discussed at the meeting must be published with the report of the directors and the opinion of the supervisor.

Bonds issued by the corporation.

There are cases in which the capital of a corporation is not sufficient for the development of its business, yet at the same time the shareholders do not consider it advisable, by reason of profits expected and the credit enjoyed by the institution, to increase its capital by calling new subscribers to share in the profits. They prefer to draw on the credit of the company by paying a fixed interest charge and to amortize the debt by creating a sinking fund, or by an analogous measure.

In that case the corporation may issue bonds or securities payable to certain persons or to bearer, the law prescribing certain requisites to be fulfilled, namely:

[80] Art. 157. [81] Art. 461. [82] Art. 586.
[83] Art. 157. [84] Art. 460. [85] Art. 264.

1. The amount of the loan covered by the bonds, cannot be greater than the capital paid in and actually existing according to the last approved balance sheet.[86]

In Argentina [87] and Panama,[88] corporations must publish a balance sheet every month, and in the latter country the corporation is subject to the inspection and supervision of the Government.

In Brazil, the bonds issued with all the legal requisites must be paid in preference to any other creditors of the corporation.

In Mexico and Panama, however, the amount of the loan may be greater than the capital; in Mexico, whenever bonds are to be secured by property, the acquisition of which was the motive of the loan, and in Panama, whenever its excess over the capital is guaranteed by commercial paper or instruments of credit of a civil character and payable to certain persons, this commercial paper or instruments of credit must be deposited in the general treasury of the Republic.

[86] Argentina, 365; Brazil, 32; Mexico, art. 5 of law of Nov. 29, 1897.
[87] Argentina, 368. [88] Art. 414.

CHAPTER XIII

Commercial Associations (5)

DISSOLUTION AND LIQUIDATION OF COMMERCIAL ASSOCIATIONS

General causes of dissolution.

The causes of dissolution of commercial associations are of a character either general or special to corporations and partnerships; personal circumstances may have a decisive influence on partnerships which they cannot have in the case of corporations.[1]

The general causes or conditions of dissolution are:

1st. The expiration of the period fixed in the articles of organization, or the accomplishment of the purpose of the enterprise; [2]

[1] When a mercantile association is winding up its business, it cannot prove its insolvency or lack of funds except by the final result of its liquidation. Spain, Sup. Trib., Dec. 22, 1860; *Gaceta* of Dec. 30, 1860.

When a corporation is dissolved the shareholders are obliged to pay only the balance of the face value of their shares up to the amount that the needs of the liquidation may require to pay the corporate liabilities or to equalize the losses among the shareholders. Buenos Aires, Cam. de Apel. Com., Oct. 5, 1912, Bray *v.* Barros, *Jurisp. de los Tribs. Nacs.*, Oct., 1912, p. 375.

Reference to these general causes of dissolution of associations is made by the codes in the following articles: Spain, 221; Argentina, 422; Bolivia, 266, Brazil, 17; Chile, 2098, 2099, 2107 c. c., 464 com. c.; Colombia, 2124, 2125, 2133 c. c., 589 com. c.; Costa Rica, 25, 26; Guatemala, 328; Honduras, 311; Mexico, 216; Nicaragua, 176; Panama, 517, 522, 524; Peru, 214; San Salvador, 281; Uruguay, 484 and article 2 of the law of May 31, 1893; Venezuela, 290.

[2] Spain, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, San Salvador, Uruguay, Venezuela.

A commercial association is not considered as dissolved, when after the period of its duration expired, its life was extended. The liability of the members continues in that case for all the debts of the association. Brazil, 2a Camara da Corte de Apel. of Nov. 30, 1905; confirmed by the Camaras Reunidas, Apr. 28, 1909, *Revista de Direito*, v. 12, pp. 545, 546.

2d. The bankruptcy of the association; [3]

3d. The total loss of the associate capital in Spain, Bolivia and Peru; in Argentina and Uruguay, the loss of three-quarters of the associate capital; in Chile, Colombia, Guatemala, Honduras and Panama, the loss of half of the capital. In Costa Rica also, the loss of half necessitates the dissolution of a commercial association, if it cannot pay its debts with the remaining half. In Nicaragua, the loss must be of such an amount that the remaining capital is not sufficient for the associate business. In San Salvador a loss of two-thirds and in Venezuela a loss of one-third is sufficient for liquidation; [4]

4th. The unanimous consent of the associates; [5]

5th. A decision of the general meeting of stockholders according to the by-laws; [6]

6th. The impossibility of attaining the aims of the association; [7]

7th. Merger with another commercial association; [8]

8th. A judicial decree dissolving a commercial association; this can be made when it is known that its purpose or activities are dishonest or contrary to public policy.[9]

[3] Spain, Argentina, Bolivia, Chile, Colombia, Costa Rica, Mexico, Nicaragua, Panama, Peru, San Salvador, Uruguay, Venezuela.

[4] Art. 18.

[5] Argentina, Brazil, Chile, Colombia, Mexico, Nicaragua, Panama, Uruguay, Venezuela.

[6] Brazil, Mexico, San Salvador.

When a resolution to dissolve a corporation is passed in legal form by the stockholders, and such resolution is proved by the minutes of the corporation, no action can be brought by any of the stockholders against the former managers, demanding the dissolution already agreed upon or demanding the accounts and reports of their administration. Spain, Trib. Sup., June 28, 1907; *Gaceta* of Oct. 16, 1908, p. 521.

[7] Brazil, Costa Rica, Panama, San Salvador, Uruguay.

[8] Costa Rica, Panama, San Salvador, Venezuela.

When a commercial association has not been liquidated but has merged with another, the rules of dissolution and liquidation are not applicable. Spain, Trib. Sup., June 12, 1867; *Gaceta* of June 20, 1867.

[9] Panama, 524.

Special grounds for dissolution of partnerships.

The special grounds for dissolution of partnerships are: [10]

1. The death of one of the general partners, unless the partnership agreement provides expressly that the partnership shall continue with the heirs of the deceased partner, or with the remaining partners; [11]

2. Insanity or any other cause which produces the incapacity of a managing partner to manage his property; [12]

3. Bankruptcy of any of the partners; [13]

4. The decision of one of the partners in firms which have no fixed period or specific object.[14]

In Costa Rica and Panama a partner may ask for the dissolution at the end of a fiscal year, giving notice thereof six months in advance.

[10] The following articles of the codes deal with the matter of grounds for dissolution of partnerships:

Spain, 222; Argentina, 419, 422; Bolivia, 266; Brazil, 335; Chile, 2103, 2106, 2107 c. c.; Colombia, 2129, 2134 c. c.; Costa Rica, 25; Ecuador, 2106; Mexico, 133; Nicaragua, 176; Panama, 506, 517, 518; San Salvador, 281; Uruguay, 484; Venezuela, 290.

[11] Spain, Argentina (only when the name of the deceased partner is included in the firm name); Bolivia, Brazil, Chile, Colombia, Mexico, Nicaragua, Panama, Peru, San Salvador, Uruguay, Venezuela.

The heir of a deceased partner has a right to ask for the partial administration from the managers and the surviving partners. Buenos Aires, Cam. 2a de Apel. Civ., Oct. 15, 1912, Rello de Baggio *v.* Giolitto, *Jurisp. de los Tribs. Nacs.*, Oct., 1912, p. 261.

In the proceedings of liquidation of a commercial association and the division of its capital, the heir of one of its members cannot object to what has been done with the consent of the latter. Spain, Sup. Trib., June 9, 1844; *Gaceta* of June 14, 1864.

The death of one of the partners does not produce *de jure* the dissolution of the partnership; nor does it prevent the subsisting partners from continuing by mutual agreement the business of the partnership. Spain, Trib. Sup., Sept. 21, 1907; *Gaceta* of Oct. 28, 1908, p. 631.

[12] Spain, Bolivia, Brazil, 335, 336; Chile, 2106 c. c.; Colombia, 2132 c. c.; Mexico, Nicaragua, Panama, Peru, Uruguay, Venezuela.

[13] Spain, Bolivia, Brazil, Chile, Ecuador, Costa Rica, Mexico, Nicaragua, Panama, Peru, Uruguay, Venezuela.

[14] Argentina (only when the name of the partner who asks for the dissolution is included in the firm name); Bolivia, Brazil, Chile, Colombia, Nicaragua, Uruguay.

5. The loss of the whole capital; [15]

6. The withdrawal from the partnership of any partner whose name was included in the firm name; [16]

7. The revocation of the power of attorney of a managing partner, if one of the other partners asks for the dissolution.[17]

Special ground for dissolution of corporations.

Besides the general causes of dissolution of commercial associations, there is one specially applicable to corporations. This relates to the minimum number of members to which the corporation may have been reduced, namely:

(*a*) in Brazil the corporation must be dissolved when the number of its members is reduced to less than seven, unless the legal number is again obtained within six months;

(*b*) in San Salvador, when the number is less than five during more than six months; in Santo Domingo, when it is less than seven during one year, and in Panama, whenever it becomes less than ten.

Rescission of partnership agreement.

The law does not grant to one of the partners an action for rescission as a remedy against all breaches of the agreement of partnership, but reserves such action for such breaches as may seriously impair the common interest or create difficulties in the management of the enterprise. Only Spain,[18] Brazil [19] and Peru [20] provide that any breach of the agreement may give rise to the rescission of the partnership, a rule which is merely an application of the general principles of contract but which has many limitations in other countries.

In Argentina,[21] Bolivia,[22] Chile,[23] Colombia,[24] Costa Rica,[25] Mexico,[26] Nicaragua,[27] Panama,[28] Uruguay [29] and

[15] Argentina.
[16] Argentina.
[17] Mexico.
[18] Art. 218.
[19] Art. 336.
[20] Art. 211.
[21] Art. 419.
[22] Art. 263.
[23] Art. 2101 c. c.
[24] Art. 2127 c. c.
[25] Art. 28.
[26] Art. 131.
[27] Art. 177.
[28] Art. 511.
[29] Art. 481.

Venezuela,[30] the grounds for the rescission of a partnership agreement by action against one of the partners are limited to the following:

1. Use of the firm name or the employment of the common funds for his own benefit; [31]

2. Interference in the management by a partner not entrusted with such power under the agreement; [32]

3. Fraud in the administration or bookkeeping of the partnership; [33]

4. Failure to pay his stipulated contribution, after demand; [34]

5. Entering for his own account into transactions forbidden by the law of partnership; [35]

6. Absence of a partner bound to render personal services to the partnership, when, after demand, he fails to return or acceptably explain the temporary cause thereof.[36]

Mexico and Nicaragua cover in this ground all cases in which the partner does not render the services stipulated. In Mexico, his failure to do so is not a ground for rescission if he can show good preventing cause valid for a period that will not injure the common interest.

7. Total destruction of the specific thing that the partner bound himself to contribute to the common fund.[37]

In Venezuela this case is mentioned with reference to limited partners only.

[30] Art. 287.

[31] Spain, Argentina, Bolivia, Brazil, Costa Rica, Mexico, Nicaragua, Panama, Peru, Uruguay, Venezuela.

[32] Spain, Argentina, Bolivia, Brazil, Costa Rica, Mexico, Nicaragua, Panama, Peru, Uruguay, Venezuela.

[33] Spain, Argentina, Bolivia, Brazil, Costa Rica, Mexico, Nicaragua, Panama, Peru, Uruguay, Venezuela.

[34] Spain, Argentina, Bolivia, Brazil, Chile, Colombia, Mexico, Nicaragua, Panama, Peru, Uruguay, Venezuela.

[35] Spain, Argentina, Bolivia, Brazil, Mexico, Nicaragua, Panama, Peru, Uruguay.

[36] Costa Rica, Peru, Uruguay.

[37] Argentina, Panama.

Effects of a partial rescission.

The partial rescission of a contract of commercial association makes the agreement of no effect as to the culpable member, who is ousted from the association and must pay all the losses of the partnership if any; and it is authorized to retain his contribution without payment to him of any part of the profits, in so far as the transactions pending at the time of the rescission are still unliquidated.[38] In Costa Rica he must be paid his contribution in partial payments as and when the pending affairs are concluded.[39]

Voluntary withdrawal of a partner.

In partnerships for which no fixed period was stipulated, should one of the partners request dissolution, the others cannot refuse it, unless the request is made in bad faith, that is, when the partner intends to obtain by the dissolution of the partnership profits that he would not otherwise have obtained.[40]

The partner who voluntarily withdraws from or asks for the dissolution of a partnership cannot prevent the completion of all pending transactions in the form most convenient for the common interest; and so long as those transactions are not completed, the division of the partnership property cannot take place.[41]

Obligation of registering the premature dissolution of a commercial association.

The dissolution of a commercial association due to a cause other than the expiration of the stipulated period does not bind third parties except from the date of its inscription in the commercial registry.[42]

[38] Spain, 219; Argentina, 420; Bolivia, 264; Brazil, 339; Mexico, 132; Nicaragua, 181; Panama, 512; Peru, 212; Uruguay, 482.

[39] Art. 29.

[40] Spain, 224; Argentina, 425; Bolivia, 269; Chile, 2110 c. c.; Colombia, 2134 c. c.; Nicaragua, 179; Peru, 217; Uruguay, 487.

[41] Spain, 225; Argentina, 425; Bolivia, 270; Brazil, 339; Nicaragua, 180; Peru, 218; Uruguay, 489.

[42] Spain, 226; Argentina, 429; Bolivia, 265; Brazil, 338; Mexico, 136; Nicaragua, 178; Panama, 516; Peru, 219; Uruguay, 483, 492; Venezuela, 305.

In Chile [43] and Colombia [44] the dissolution of a commercial association cannot be pleaded against a third party, except in the following cases:

1. When the life of the association has ended by the expiration of the period fixed in the articles of organization;

2. When notice of its dissolution has been given in the official paper of the department or by bills posted in three of the most frequented places of the locality;

3. When it is proved that the third party had through other channels timely knowledge of its dissolution.

Survival of commercial associations.

In all cases of dissolution the legal entity of the commercial association is deemed to survive for the sole purpose of winding up pending transactions and gradually liquidating those that are finished.[45]

Appointment of the liquidators.

As a rule the liquidation is entrusted to the manager of the association, as his experience and detailed knowledge of the corporate business are generally guaranties of an intelligent closing of the common affairs. This presumption in favor of the managers may, however, be rebutted, and for that reason the law provides the shareholders with power to request the call of a general meeting for the appointment of liquidators.[46]

[43] Art. 2114 c. c.

[44] Art. 2140 c. c.

[45] Argentina, 422; Brazil, 335; Costa Rica, 133; Panama, 539; Uruguay, 498. Notwithstanding that the life of a commercial association has expired, such association can appear in court and enforce its rights when it has continued doing business, a circumstance that must be considered as evidence that the association is in liquidation despite the absence of the clause "*en liquidación*" after the firm name, as provided for by law. Buenos Aires, Cam. Fed. de Ap. de la Cap., April 28, 1914, *Jurisp. de los Tribs. Nacs.*, April, 1914, p. 25.

[46] Spain, 228; Argentina, 434; Bolivia, 274; Brazil, 344; Chile, 465; Colombia, 590; Ecuador, 336; Guatemala, 329; Honduras, 312; Nicaragua, 182, 183; Peru, 221; Uruguay, 423, and article 7 of the law of May 31, 1893; Venezuela, 311.

In Costa Rica,[47] Panama [48] and San Salvador,[49] the managers of partnerships are the liquidators, unless otherwise provided in the articles of agreement; whereas in corporations, the general meeting of shareholders makes the appointment.

In Mexico, the liquidators are always specially appointed either by the associates or by the judge, if properly applied to.[50]

Functions of the liquidators.

When the liquidators are not the same persons who previously served the association in their capacity as managers, they have the following obligations:

1. To receive all the corporate property, papers and books from the managers, making a detailed inventory of everything received;
2. To make and present to the associates a periodical balance sheet showing the progress and status of the liquidation;
3. To collect money due to the association by its members or debtors, representing it in the courts wherever necessary;
4. To pay the debts of the association;
5. To sell the property of the association as required, in order to meet its obligations and proceed to the final distribution of the assets;
6. To lay a general and final balance sheet before the members, showing the distribution of the capital among them.[51]

The manager of an association in liquidation has power as liquidator to collect its credits to pay the obligations contracted and to conclude all pending transactions even though he cannot enter into new contracts. Spain, Trib. Sup., Oct. 12, 1888; *Gaceta* of Dec. 3, 1888.

[47] Art. 139. [48] Art. 533. [49] Art. 285.

[50] Art. 217.

[51] Spain, 230, 232; Argentina, 436, 437; Chile, 412; Colombia, 540; Costa Rica, 135, 138; Ecuador, 338; Guatemala, 329; Honduras, 312; Mexico, 221, 222; Nicaragua, 182, 186, 187; Panama, 538, 541; Peru, 223; San Salvador, 287, 288; Uruguay, 499; Venezuela, 313, 314.

A contract entered into by the members of a partnership with the liquidator

A liquidator who was formerly a manager has these same obligations, with the exception of the first.

Functions of the general meeting of stockholders during the liquidation.

The general meeting of stockholders continues its functions during liquidation. It receives, approves or disapproves the balance sheets presented by the liquidators; it must appoint new liquidators to fill vacancies or remove them when deemed advisable; it approves or modifies the basis of the liquidation and decides all questions not within the powers of the liquidators.[52]

The liquidators and the association.

The relations between the liquidators and the association are governed by the rules of agency. The basis of the functions of the liquidators are the articles and by-laws, the agreements made by the members, and the provisions of the law.[53]

thereof, by virtue of which the liquidator takes over all the assets of the partnership and binds himself to pay all its liabilities and a certain amount to each partner, is valid. Spain, Trib. Sup., April 27, 1910; *Gacetas* of Sept. 16, 17, 1910, p. 241.

[52] Spain, 232; Argentina, 436; Bolivia, 278; Brazil, 348; Chile, 466; Colombia, 591; Costa Rica, 133; Ecuador, 338; Guatemala, 330; Honduras, 313; Mexico, 222; Nicaragua, 186; Panama, 539; Peru, 225; San Salvador, 287; Uruguay, 498, 499.

[53] A decision taken by the majority of the members of a partnership to change it into a corporation is valid, and the dissenting members are bound by that decision when, in the contract of partnership, it was stipulated that, at the end of the period of its duration, the majority of the partners could decide whether the association would or would not continue doing business and the form in which one or the other of those two alternatives should be carried into effect. Spain, Trib. Sup., Feb. 11, 1903; *Gaceta* of March 26, 1903, p. 192.

CHAPTER XIV

Commercial Associations (6)

LIMITED PARTNERSHIP AND JOINT ADVENTURE

Firm name of limited partnerships.

A common form of commercial association is that in which one or more of the partners are unlimitedly and jointly liable for common transactions, while the other partner or partners are only liable to the amount of his or their contribution. The firm name of an association of this kind may take either of two forms: one when there is only one unlimited partner, and one or several partners of limited liability, in which case the firm name is formed by the individual name of the unlimited partner with the additional words, "*Sociedad en Comandita*" (abbreviated *S. en C.*); the other, where the firm name is formed by the names of all the unlimited partners or some of them and the words "*y Compañía*" (abbreviated *y Cía.*), always adding the words "*Sociedad en Comandita.*"

These types may be illustrated by the following examples:

First case: Juan Lopez, Sociedad en Comandita or Juan Lopez, S. en C.

Second case: (*a*) Lopez y Hernández, S. en C.
(*b*) Lopez y Cía., S. en C.

In this collective name, the name of the limited partners cannot be included, except under penalty of subjecting the limited partners to the same liability with respect to third persons as the unlimited partners have without greater rights.[1]

[1] Spain, 146, 147; Argentina, 372, 375; Bolivia, 245; Chile, 476, 477; Colombia, 600, 601; Costa Rica, 63; Ecuador, 275; Guatemala, 340, 341; Haiti, 23, 25; Mexico, 155, 157; Nicaragua, 144; Panama, 332; Peru, 154, 155; San Salvador, 308; Santo Domingo, 23, 25; Uruguay, 428; Venezuela, 221.

The fact that a person inherits the interest of another in a limited partner-

The limited partnership is called "*Sociedad en Comandita*"; the unlimited partner is denominated "*Socio comanditado*" or "*gestor*"; and the limited partner, "*socio comanditario*."

Liability of unlimited partners.

All the *comanditados*, whether managers or not, are subject to unlimited and joint liability and have all the obligations and rights of general partners.[2]

Liability of the special partners.

The liability of special or limited partners for the obligations and losses of the partnership is limited to the amount of their actual or agreed contributions to the limited partnership, except when they include or allow their names to be included in the firm name of the partnership.[3]

Prohibitions to limited partners.

Limited partners cannot take any part whatsoever in the management of the partnership, not even in the capacity of special agents of the managing partners.

ship, when the name of such person already forms a part of the firm name of that partnership, does not constitute an alteration which requires a new contract of partnership. Spain, Trib. Sup., Oct. 13, 1891; *Gaceta* of Oct. 29, 1891.

In limited partnerships, the amounts contributed by the limited partners to the common funds of the organization are subject to the common liabilities. Spain, May 12, 1866; *Gaceta* of June 27, 1866.

[2] Spain, 148; Argentina, 374; Bolivia, 245; Brazil, 313; Chile, 483; Colombia, 606; Costa Rica, 58; Ecuador, 275; Guatemala, 347; Haiti, 23; Honduras, 329; Mexico, 154; Nicaragua, 144; Panama, 331; Peru, 156; Santo Domingo, 23; Uruguay, 425, 427; Venezuela, 221.

[3] Spain, 148; Argentina, 376, 377; Bolivia, 246; Brazil, 313; Chile, 480, 485; Colombia, 604, 607; Costa Rica, 60; Ecuador, 277, 279; Guatemala, 344, 349; Haiti, 26, 27, 28; Honduras, 326, 331; Mexico, 154, 157; Panama, 331, 332; Peru, 156; San Salvador, 308, 309; Santo Domingo, 27; Uruguay, 429, 430; Venezuela, 223, 224.

When a limited partner withdraws his contribution before the proper time, the partnership has an action against him for the restitution of the amounts so taken from the common funds; but it has no right to damages on account of such act, when the bankruptcy of the association was not exclusively due to such withdrawal. Buenos Aires, Cam. de Ap. de lo Com. de la Cap., Dec. 16, 1913, *Jurisp. de los Tribs. Nacs.*, Dec., 1914, p. 295.

If the *comanditarios* violate that prohibition they are held responsible according to the following systems:

1. They are jointly liable with the *comanditados* for all the debts of the partnership; [4]

2. They are jointly liable only for those transactions in which they participated; [5]

3. They are jointly liable for all transactions in which they participated, and if they customarily engage in the management of the partnership, they are jointly liable even for transactions in which they did not participate.[6]

Acts which do not constitute management.

The following acts are not regarded as acts of management: to examine the commercial books, to supervise the common business, to verify data given by the *comanditos*, to give opinions or advice at the meetings of the partners; hence, the *comanditarios* may undertake these acts without thereby subjecting themselves to joint liability with the general partners.[7] They are not allowed to use the firm name of the partnership.

Cases and countries in which the comanditarios may use the firm name of the partnership without being unlimitedly liable. In Costa Rica,[8] Panama [9] and Venezuela [10] the *comanditarios* may be attorneys or agents of the limited partnership without incurring unlimited liability, when, acting in that capacity, they expressly and clearly so state.

[4] Argentina, 377; Chile, 485, 486; Colombia, 607, 608; Ecuador, 279; Guatemala, 349, 350; Haiti, 28; Honduras, 331, 332; San Salvador, 309; Santo Domingo, 28; Uruguay, 430; Venezuela, 224.

[5] Costa Rica, 60, 61; Panama, 333.

[6] Mexico, 157.

[7] Argentina, 378; Chile, 481; Colombia, 609; Costa Rica, 62; Guatemala, 345; Honduras, 327, 333; Mexico, 156; Panama, 334; San Salvador, 309; Uruguay, 431; Venezuela, 225.

A limited partner can at the same time be a partner who contributes his services (*socio industrial*) without being considered for that reason a general partner. Spain, Trib. Sup., May 16, 1881; *Gaceta* of July 23, 1881.

[8] Art. 61. [9] Art. 333. [10] Art. 224.

In Chile,[11] Colombia,[12] Guatemala [13] and Honduras,[14] the *comanditarios* may represent the partnership outside its domicil.

Right of the comanditarios to inspect the books.

It has been noted that the inspection of books, which is very important to the *comanditarios* as a method of supervising the course of their business, is not considered as an act of management which would bind them in an unlimited form for the acts and liabilities of the partnership. This right of inspection is limited in Spain, Mexico, Panama and Peru.[15]

In Spain [16] and Peru,[17] the *comanditarios* cannot examine the state of the business except at the period stipulated in the contract, under penalties provided in that instrument; should the contract not contain any stipulation in the matter, the balance sheet must be presented to the *comanditarios* for a period of at least fifteen days at the end of every year, with all papers necessary to verify it and to pass upon the transactions of the year.

Mexico [18] provides that the *comanditarios* cannot inquire into the general state of the common business, except at the time fixed in the contract. Nevertheless, the courts can at any time, at the request of one of the limited partners, order the exhibition of the books and papers of the association.

When the right of inspection lapses.

The *comanditarios* may transfer or assign their rights, but if they do so before the association has terminated its business, the assignees have no right to inspect the books and

[11] Art. 487. [12] Art. 609. [13] Art. 351.
[14] Art. 333.

[15] The production of the accounts of a commercial association is not a mere act of administration in which only the manager is concerned; it is an act of interest to the association, as it may bind its capital and even the individual property of its members. Buenos Aires, Cam. 2a de Apel. Civ., Oct. 15, 1912, Riello de Baggio *v.* Giolilto, *Jurisp. de los Tribs. Nacs.*, Oct., 1912, p. 261.

[16] Art. 150. [17] Art. 158. [18] Art. 159.

the management. This is provided by the law of Chile,[19] Colombia,[20] Guatemala [21] and Honduras.[22]

In Panama [23] the *comanditarios* can transfer their rights with the consent of the other partners and in that case the transferee has a right of inspection, just as the transferor had.

Limited partnership by shares.

In some cases, the contribution of the *comanditarios* is divided into shares. The effect of this division is that the personal factor, which has an influence in the regular "*comandita*" (*comandita simple*) disappears entirely, inasmuch as the shares are transferable whether by endorsement or by mere delivery. We have in these cases, when the general partners are more than one, two principles to govern the association; on the one hand, the rules of general partnership for those members who have joint and unlimited liability, whose personal qualities have been taken into consideration in organizing the business; on the other hand, the rules of corporations applicable to that group of partners whose liability is limited to the amount of their shares, and whose personal qualities are immaterial to the association.

The natural consequence of this arrangement has been set forth by the code of Argentina, which declares that the "*comandita*" can issue shares of stock under individual name or to bearer, transferable in the form provided for in the by-laws; and that, when the shareholders are more than ten and represent a greater capital than that belonging to the general partners or *comanditados*, the law of corporations must be applied and the board of supervisors appointed by the *comanditarios* have, besides the obligations derived from their character as such, also those of directors of a corporation.

[19] Art. 482. [20] Art. 605. [21] Art. 346.
[22] Art. 328. [23] Art. 343.

JOINT ADVENTURE

(ASOCIACION MOMENTÁNEA OR EN PARTICIPACIÓN)

Another form of association.

The codes denominate as a momentary association (*asociación momentánea*) or joint adventure (*cuentas en participación*) those associations of men whose organization is effected by a contract by which one or more persons have an interest in one or several transactions carried through by another under his own name and personal credit, the former contributing a certain part of the capital required and sharing in the result of the enterprise whether profitable or adverse, in the proportion stipulated.[24]

Mexico makes a peculiar distinction between momentary association and joint adventures (*asociaciónes en participación*).[25] The first are those whose object is to carry on without a common firm name one or several commercial transactions specifically determined. The partners are jointly liable in regard to third parties.[26] Associations *en participación* are present when two or more persons have an interest in transactions carried through by one or several persons, provided the latter constitute a single legal entity. No direct action is there between

[24] Spain, 239; Argentina, 395; Bolivia, 288; Brazil, 325; Chile, 507; Colombia, 629; Costa Rica, 301 com. code; Ecuador, 346; Guatemala, 371; Honduras, 353; Nicaragua, 194; Panama, 489; Peru, 232; San Salvador, 331; Uruguay, 444; Venezuela, 321.

An association must be considered a limited partnership in spite of the fact that the parties call it joint adventure, when it is stipulated that the responsibility arising out of the acts of the manager affect the association and not the individuals, limiting thereby the liability to the amount contributed. Spain, Trib. Sup., Dec. 5, 1910; *Gaceta* of April 7, 1911, p. 121.

A momentary association or joint adventure needs, in order to be considered as organized, certain requisites, the most important of which are: that one of the associates transact the business in his own name and with his personal credit, with the obligation to account to his associates and to divide with them the gains or losses in accordance with their agreement. Colombia, Trib. Sup. del Dist. Judic. del Centro de Antioquía, April 3, 1900; *Crónica Judicial de Antioquía*, v. XV, p. 2.

[25] Art. 268.

[26] Art. 269.

the associates who do not contract and the third contracting parties.[27]

The codes follow different systems in regard to the character of the persons concerned in a momentary association, namely:

1st System. All the parties need to be merchants; [28]

2d System. At least the managing partner must be a merchant; [29]

3d System. Non-merchants are not excluded from these associations; [30]

4th System. Non-merchants are expressly empowered to enter into the contract of momentary association.[31]

The characteristic of this kind of commercial association is that no legal entity is formed and no common firm name is adopted.[32]

The owner of the capital.

If there is no legal entity in momentary associations, it is very important that it be known in whom title to the funds contributed to the common enterprise is vested. The

[27] Art. 270.

The object of a momentary association is to undertake one or several commercial transactions, without using a common firm name.

In a momentary association one or more persons have an interest in transactions that one or more persons undertake in their own name, provided the latter, when more than one person, constitute a legal entity.

The difference between these two kinds of association is that in the second, third parties only know the person in whose name the transaction is carried through, the other remaining undisclosed; whereas in the first the transaction can be undertaken in the name of any of the associates. The members of a momentary association are jointly liable in regard to third parties with whom they have dealt, unless they can prove that they did not deal directly with the creditor; in the latter case they are only bound *pro rata* with the other members. Mexico, 2a Sala del Sup. Trib. del Dist. Fed., H. Marquardt y Compañía *v.* Cartellot Hermanos, Nov. 22, 1909, *Diar. de Jur.*, v. XIX, p. 409.

[28] Spain, 239; Chile, 507; Colombia, 629; Guatemala, 371; Honduras, 353; Nicaragua, 194; Peru, 232.

[29] Brazil, 325; Panama, 489; San Salvador, 332; Uruguay, 447.

[30] Argentina, 395; Mexico, 270.

[31] Costa Rica, 146; Ecuador, 346; Venezuela, 321.

[32] Spain, 241; Argentina, 395; Bolivia, 288; Brazil, 325; Chile, 509; Colombia, 631; Costa Rica, 303; Guatemala, 373; Honduras, 355; Nicaragua, 195; Panama, 490; Peru, 234; San Salvador, 333.

natural consequence of the fact that no legal entity is formed would be that the funds are owned in common; but some codes do not support this conclusion.

Ecuador [33] and Venezuela [34] expressly declare that the non-managing partners have no rights of ownership in the things or sums contributed to the association, their rights being limited to an accounting for their contribution and to a share in the profits and losses. Title then is vested in the manager or managers.

In Argentina,[35] Brazil,[36] Costa Rica,[37] and Panama,[38] the provisions of the codes lead practically to a similar result, because the common funds are liable for all debts of the managing partners including those of a personal nature.

Form of the contract of joint adventure.

The making of the contract of momentary association is not in general subject to any legal formality and its existence may be proved by all the means established by the law.[39] Only Bolivia requires a written contract.[40]

Relations with third parties.

Those who deal with the partner who is carrying on the enterprise have an action against him alone, not against the silent partners; and the latter likewise have no action against third parties who have dealt with the manager, unless he has transferred his rights to them.[41]

[33] Art. 348. [34] Art. 323. [35] Art. 400.
[36] Art. 327. [37] Art. 143. [38] Art. 492.

[39] Spain, 240; Argentina, 397; Brazil, 325; Chile, 508; Colombia, 630; Ecuador, 351; Guatemala, 372; Honduras, 354; Mexico, 271; Nicaragua, 194; Peru, 233; San Salvador, 335; Uruguay, 446; Venezuela, 326.

The existence of a contract of momentary association and an agreement upon its premature liquidation cannot be proved by the testimony of witnesses; it is necessary to lay a foundation of evidence in writing. Buenos Aires, Cam. 2a de Apel. Civ., Oct. 29, 1912, Gergara *v.* Scala, *Jurisp. de los Trib. Nacs.*, Oct., 1912, p. 305.

[40] Art. 288.

[41] Spain, 242; Argentina, 398; Bolivia, 288; Brazil, 326; Chile, 510; Colombia, 632; Costa Rica, 147; Ecuador, 347; Guatemala, 374; Honduras, 356; Nicaragua, 196; Panama, 491; Peru, 235; San Salvador, 336; Uruguay, 448; Venezuela, 322.

There are two exceptions to this rule in Argentina [42] and Uruguay,[43] namely:

(*a*) when all the partners have made a contract with a third party without stating the share belonging to each, all are jointly bound;

(*b*) when one or more of the partners, in making the contract, disclosed the names of the others, with their consent, all are jointly liable.

The first of these two exceptions is also established in Costa Rica [44] and in Panama.[45]

The managing partners, supplied with the common funds, enjoy perhaps more credit than their own capital would warrant and they can take advantage of this circumstance by enlarging their independent business; for that reason the codes of Argentina,[46] Brazil,[47] Costa Rica,[48] Ecuador [49] and Venezuela [50] provide that the common funds are liable for all the debts, even personal, of the managing partners. The first three countries and Uruguay, however, condition such liability to third parties on the latter's ignorance of the existence of the momentary association.

Case of bankruptcy of the managing partner.

As a consequence of the above rules, in the five countries mentioned, the creditors of the managing partners can apply to the payment of their claims the balance shown by the different accounts with the debtor, in whatever character they may have opened the accounts in their books.[51]

Relations of the partners among themselves.

The special circumstances which characterize the momentary association affect particularly the relations of the partners with third parties, who have no means of knowing the agreements among the latter, nor of proving them when it may become necessary to safeguard the interests of such

[42] Art. 399. [43] Art. 449. [44] Art. 149.
[45] Art. 493. [46] Art. 400. [47] Art. 327.
[48] Art. 148. [49] Art. 348. [50] Art. 323.
[51] Argentina, 401; Brazil, 328; Costa Rica, 148; Ecuador, 348; Uruguay, 451.

third parties. But in matters involving the relations of the partners with one another, the general principles of partnership are applicable both as to mutual obligations and rights as well as to dissolution and liquidation of the common enterprise.[52]

Liquidation of the momentary association.

The managing partner or partners are bound by the law and rules of agency; hence their functions are not completed until the presentation of the accounts of the enterprise or of that part of the enterprise entrusted to them, and the payment to each of the participants of the balance due according to the agreement.[53]

[52] Brazil, 289; Chile, 511; Colombia, 633; Guatemala, 375; Nicaragua, 197. In a joint adventure the silent partner who agrees to receive in payment of his contribution shares of stock of a corporation formed by the partners of the enterprise into which he entered cannot afterwards demand, instead of the shares, the payment in cash of such contribution. Spain, Trib. Sup., April 1, 1909; *Gaceta* of Nov. 15, 1909, p. 198.

[53] Spain, 243; Argentina, 402; Bolivia, 290; Chile, 507; Colombia, 629; Costa Rica, 150; Guatemala, 371; Honduras, 357; Panama, 500; Peru, 236; Uruguay, 452.

CHAPTER XV

FOREIGN CORPORATIONS AND PARTNERSHIPS

Spain.—Condition juridique des sociétés étrangèrés en Espagne, by Francisco Lastres, 33 Clunet (1906), pp. 273–278.

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Zeballos, E. S.: Partnerships and companies formed abroad for the purpose of trading in the Argentine Republic. International Law notes. New York, Dec., 1919, pp. 5–6.

Same: De la condition dans la Rep. Argentine des sociétés organisé en pays étranger, 33 Clunet, 1906, pp. 618, 1025, 1032.

Calandrelli, A.: Les sociétés commerciales dans le droit international privé; la legislation Argentine. Bul. arg. de droit international privé (1904), pp. 342–349.

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Chile.—Bill regulating foreign insurance companies in Chile. U. S. For. Rel., 1896, pp. 43–45.

Ecuador.—Loi du 21 Octobre, 1909, relative aux sociétés étrangères faisant des operations en Equateur, 37 Clunet (1910), pp. 1386–1388.

Guatemala.—Decree of April 19, 1893, concerning the status of foreign companies, 85 Brit. & Foreign State Papers (1892–1893), pp. 835–836.

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Venezuela.—Laws governing foreign corp. in Venezuela. In Monthly Cons. Rep., 1904, No. 286, p. 66.

Rivâs Cesar—De las sociedades extrangeras en Venezuela. Caracas, 1905.

Same: Les sociétés étrangères en Venezuela, 32 Clunet (1905), pp. 520–529.

General principles.

There are two contrasted doctrines in regard to the admission into a country of a corporation or partnership or-

ganized abroad. According to the first of these theories a stock company or a partnership is an entity created by the law of the place where it was established; and since that law has no extraterritorial force whatever, the stock company or partnership desiring to engage in business in other countries must secure authorization therefor from the government of those countries. The theory is based upon the principle that every country is interested in promoting commercial international relations and in the establishment of enterprises which may serve to develop the resources of the country for the benefit of its own people. The Latin-American countries have not thus far adopted a uniform system in this respect.

Notwithstanding the differences of legal provisions in those countries, the following rules are generally observed: Foreign corporations seeking to engage in business or open branch houses in such countries must file for record in the mercantile registry or other special office copies of their charter, by-laws, and essential organization papers, including a power of attorney to a local manager or agent, duly authenticated by a notary public and certified by a State authority, which vouches for the authenticity of the signature of the notary and for his capacity as such, and countersigned finally by the consular or diplomatic representative of the local country abroad, who must certify that the signature of the State authority is authentic and that the company is legally organized and in operation under the laws of such State. Similar registration of "protocolized" copies must be made also in the registry of the capitals of any State or province where business is contemplated.

The petition for registry would generally include:

(*a*) a statement of the nature of the business proposed;

(*b*) the date on which such business is to begin;

(*c*) the domicil of the corporation;

(*d*) a statement of any issues of stock or bonds, giving series, denomination, numbers, interest, income, amortization, and premiums, as well as any property mortgaged to secure payment of such issues.

The special rules prevailing in each country vary in detail as follows:

Argentina.

The civil code of Argentina, enacted on September 29, 1869, went into effect on January 1, 1871, when the doctrines of Savigny had gained general acceptance among jurists; and one of the evidences of their influence upon the author of the Argentine code is the fact that associations are considered independently of political subdivisions or entities, being divided, therefore, according to their character into "necessary" and merely "possible" associations. The first consequence of this doctrine was to recognize foreign states, their provinces or municipalities, establishments, corporations or associations existing under legal conditions, as legal entities or juristic persons (*personas jurídicas*) in Argentina, enjoying in general the same rights as individuals to acquire property, to retain possession thereof, to receive the usufruct of property belonging to others, to take by will or by acts *inter vivos*, to create obligations, and to institute civil and criminal actions, in the measure of their capacity in law, in so far as the purpose of their creation may warrant.[1]

Another consequence of the same doctrine is that no distinction is made between foreign and national stock companies or partnerships. Such distinction as there is lies in the practical point of their domicil. For that reason the Argentine code of commerce does not refer to foreign companies, but to companies established abroad or domiciled there.

Article 286 of that code provides that associations (including stock companies and partnerships) organized abroad to carry on *their principal business* in the Republic, with most of their capital in Argentina, or which have their main office and regular meetings there, shall be considered as national associations for all purposes, and subject to the provisions of the code.

[1] Arts. 33, 34, 35, 41, 42 c. c.

Corporations or partnerships legally organized abroad, which establish a branch house or any kind of representation in Argentina are subject, like national corporations and partnerships, to the provisions of the Argentine law with reference to the registration and publication of corporate acts, powers of their representatives, and bankruptcy. The representatives of such associations have, as to third parties, the same responsibilities as the representatives of stock companies. All persons contracting in the name of associations not constituted or operating in accordance with the provisions of the Argentine law, become personally, unlimitedly and jointly liable.[2] Only corporations, not partnerships, need appoint a responsible agent.

Corporations and partnerships organized abroad, which have no branches or any other representatives in Argentina, can, nevertheless, undertake therein any commercial acts not contrary to Argentine law.[3]

By law No. 8867 of February 6, 1912, foreign corporations were dispensed (under condition of reciprocity to Argentine corporations in their home countries), from the obligation, imposed on them by article 287 of the Commercial Code, of obtaining a preliminary authorization from the Executive in order to do business in Argentina. They need merely show that they are regularly constituted in their home countries, and register their by-laws.

According to Act I approved on September 19, 1917, stock companies (*sociedades anónimas*) national or foreign, must send quarterly balance sheets, for publication, to the Bureau of General Inspection in the Department of Justice, and all banks and companies embraced in article 368 of the code of commerce [4] must do so monthly according to a form provided by that Bureau. The balance sheet of branches need refer only to the transactions carried on in Argentina.

Failure to comply with this obligation is punishable by a fine of from $200 to $1,000 Argentine currency ($84 to $420 U. S.),[5] but companies which do not keep or manage other

[2] Arts. 287, 288.

[3] Art. 285.

[4] Associations which issue bonds.

[5] Decree of September 19, 1917.

funds than those accruing from the sale of their own shares, must send to the above Bureau, annually, the documents and minutes required by the law. According to article 368 of the code of commerce companies which issue bonds must send in their balance sheets monthly for publication.[6]

Legislation affecting business taxes in Argentina changes from time to time as a result of recommendations to Congress on the part of the national Executive, when submitting for approval the annual budget estimates.

The general business tax which takes the form of licenses (*patentes*) was regulated for the year 1918 by law No. 10,366 applying to the city of Buenos Aires and ten National Territories. The fourteen Argentine provinces have different laws on license fees.

In accordance with law No. 10,366 business industries and professions pay an annual license fee of from 10 to 100,000 Argentine pesos ($4.21 to $42,000 U. S.) depending on the nature of the business and the importance of the particular concern judged by official appraisers. The owners are obliged to state the amount of their capital and of the yearly turnover. The taxpayer has the right to appeal, if not satisfied with the license tax assessed by the appraisers, to a board composed of two of the largest taxpayers, appointed by the national Executive, two high officials of the bureau of licenses and the chief of the bureau.

At the time of entering the papers in the commercial registry all partnerships and companies are obliged to pay a fee of one per thousand on their capital.

According to a practice generally observed stock companies hold their meetings at the place of their legal domicil, and it is believed that the Executive Power would not approve the by-laws of an Argentine corporation providing that such meetings could be held abroad.

Bolivia.

According to a law of November 13, 1886, foreign stock companies, in order to enjoy the privileges of a legal entity

[6] Law of August 21, 1918.

or legal representation in the Republic must obtain an authorization from the Executive Power first proving their legal existence in the country of origin. This is done by means of a petition to the Minister of Gobierno, who refers it to the *Fiscal*. The authorization, when granted, is published in the *Registro Oficial*, according to the law of November 15, 1912. The corporations must establish a second domicil in Bolivia, appointing as their representative either a local director, or one or two managers responsible to the government and to third parties for the acts and obligations of the company. The authority of such managers or directors must be evidenced by notarial powers, granted by the chairman or head of the board of directors, and duly legalized by the Bolivian minister or consul abroad. In the absence of these formalities, branches or agencies of foreign stock companies cannot enjoy the privileges of legal entities; their acts and contracts are considered as the personal acts and obligations of their agents and bind them as well as the company.

Foreign companies besides complying with the provisions referring to commercial registry are obliged to file in one of the notarial offices of the capital (la Paz) and of the respective department, a legalized copy of their articles of incorporation and by-laws, and a list of their stockholders, with a memorandum of the amount paid on account of their shares. The company cannot commence business before proving compliance with this formality by means of a certificate from the recording notary.

The incorporators of a stock company cannot transfer more than one-half of their original stock during the first two years of the organization of the company.

Managers or directors of banks of issue and employees of the judicial, political and administrative departments of the government cannot be members of any board of directors.

Mining stock companies are obliged to publish yearly their general balance sheet.

Every stock company with offices in Bolivia must pay to the State 2% per annum of its total profits. Mortgage banks, issuing banks, discount banks, etc., must pay 8%

of such profits. Foreign banks require a minimum capital of £50,000, and 5% of their deposits must be kept as a reserve.

Brazil.

Under the head of foreign juristic persons of a private character, only stock companies and limited partnerships by shares require for their operation in Brazil an express act of governmental authorization. For all others, whether commercial partnerships with a firm name, or foundations, or civil associations, custom has recognized the legitimacy of the exercise of their legal powers.[7]

According to article 301 of the commercial code, associations having a commercial purpose must register their charter or articles of association before commencing business and have a representative in Brazil provided with full and unlimited powers.

In the case of stock companies, however, of a commercial character, their establishment and operation depend upon an express authorization. Article 47 of the regulations for stock companies, approved by decree No. 434 of July 4, 1891, provides:

"All foreign stock companies, their branches, or agencies require authorization by the government in order to carry on business in the Republic and must observe the following regulations:

"*Section 1.* Their articles of association must declare a term, never exceeding two years from the date of their authorization, within which at least two-thirds of the company's capital must be paid up and transferred to this country.

"*Section 2.* Such companies are subject to the same conditions that control stock companies generally as regards their scope, and the rights and obligations between the company and its creditors, shareholders, and other interrested parties with a domicil in Brazil, even if they are temporarily absent.

"*Section 3.* After obtaining said authorization such

[7] See Bevilaqua, Direito International Privado. Bahia, 1906, sec. 24.

companies must, under penalty of cancellation, file with the Board of Trade (*Junta Commercial*), and where no such exists, with the Registrar of Merchants of the respective district (*comarca*), the charter and by-law of the company, a list of the shareholders, with a note of the number of shares held and amount paid up by each, and a certificate of deposit of one-tenth of the capital. They must, moreover, publish in the *Diario Oficial* and in the newspapers of the district, the notices required by this decree." [8]

These provisions are liberally and not strictly construed. Thus, the declaration mentioned in Section 1 of a period within which two-thirds of the capital shall be transferred to the country is not always required, except for insurance companies, and it is well understood that in many cases, *e. g.*, for large banks or factories which establish branches in the country, the requirement would be impracticable.

The same holds true concerning the deposit of ten per cent of the corporate capital. This requirement answers the necessity of proving that the capital of the company organized is, at least, paid up to the extent of ten per cent. When, therefore, a company regularly organized abroad is under consideration, and the company merely desires permission to operate in Brazil, this requirement may be dispensed with if the company proves immediately that it operates regularly in the country of its establishment. In according to companies, by presidential decree, permission to operate in Brazil, the Government states the conditions on which such operation is authorized. The questions examined by the Executive to whom the petition is addressed, or rather, by the Department of Justice, to which it is referred, are the following: whether the purpose of the company is legal; whether the incorporation applied for is contrary to public policy or interest.

A representative of the company with full power to accept the Government's suggested changes in the by-laws must file the petition and have it witnessed by a notary. The

[8] Law No. 3150 of November 4, 1882, art. 1, sec. 3; Decree No. 8521 of 1882, art. 30, sec. 1; Decree No. 164 of January 17, 1890, art. 1, sec. 2.

conditions imposed by the Government are about as follows, although they may vary from case to case:

(*a*) The company is obliged to have in Brazil a representative provided with unlimited power to take up and settle definitely questions which may arise with the Government or with officials and who may be served with judicial process in the name of the company.

(*b*) All acts of the company in Brazil shall be subject solely to the laws and regulations of the country and the jurisdiction of its judicial or administrative tribunals.

(*c*) Every change in the articles of association is subject to the authorization of the Government. If the company violates this clause, the authorization to operate in Brazil will be withdrawn.

(*d*) It is understood that the authorization granted does not excuse the company from subjection to the provisions of the Brazilian law governing stock companies.

(*e*) Every violation of any clause for which a special penalty is not provided shall be punished by a fine of one conto (about $250 U. S.) to five contos ($1,250 U. S.) and in case of repetition, by the withdrawal of the authorization.

(*f*) After the granting of a decree of authorization and its publication in the *Diario Oficial*, a stamp proportioned to the corporate capital must be paid at the rate of one milreis to each thousand or fraction thereof of the capital and the necessary documents must be filed with the Board of Trade. Only after this, can the company begin business.

Foreign insurance companies are governed by a special regulation approved by decree No. 5072 of December 12, 1903, and are subject to the close supervision of the Government. Their operation in Brazil depends upon express authorization, but the deposit in the Board of Trade of the documents required for stock companies in general is replaced by a permit or license issued by the Government after an examination of the documents necessary to establish the

complete organization of the company and the regularity of its operations. So far as concerns these companies, besides a deposit of bonds of the public debt of Brazil, there is a provision of law requiring the employment of a part of their property in Brazil. For life insurance companies, this part is the entire statutory reserve, and for other insurance companies at least 20 per cent of this reserve. The employment of bonds of Brazil is regarded as equivalent to the employment of funds in Brazil, even though they are deposited abroad, a provision which renders it easy to satisfy the Brazilian legal requirements.

Chile.

Article 468 of the Chilean code of commerce prescribes that foreign stock companies cannot establish agents in Chile without the authorization of the president of the Republic. Agents who act in behalf of those companies without the foregoing requisite are personally liable for the fulfillment of contracts they may enter into, without prejudice to any action the other parties may have against the companies.

Only two cases are known in which the authorization of the Government was requested, and in both cases the companies had to retire because of various circumstances.

Foreign corporations have, consequently, done business through agents who are willing to accept personal liability for the company they represent. Most of them are mining companies.

Insurance companies are also doing business in Chile. They have devised a system whereby the insured signs a policy in which he waives all actions against the agent of the company.

Fortunately and in spite of the rigor of the law, the courts have allowed foreign corporations to appear as plaintiffs.

Article 42 of the law of municipalities of 1891 provides that foreign corporations must petition the President of

Chile for permission to do business in Chile. The petition is referred to the *Consejo de Defensa Fiscal* in the office of the Minister of Justice. The petition must show that the company has been duly organized in the country of origin; and the petitioner must pay a stamp tax of 20 cents Chilean per 100 pesos of capital to be employed in Chile.

The law of December 22, 1916, established a license tax on professions, industries, businesses and banks. For the purpose of levying such tax the centers of population are divided into five classes: the first comprises Santiago, Valparaíso, Viña del Mar, Concepción and Talcahuano; the second comprises cities having more than twenty thousand and less than one hundred thousand inhabitants; the third comprises cities with more than ten thousand and less than twenty thousand; the fourth, other cities not exceeding ten thousand inhabitants; and the fifth, villages, hamlets and other minor centers. The tax is fixed by a board of taxpayers according to a table and tariff which establishes for professions a yearly maximum of $1,000 Chilean pesos (about $200 U. S.) and a minimum of $50; for factories, a yearly maximum of $1,000 and a minimum of $30; and for commerce and banks, a yearly maximum of $20,000 and a minimum of $10. Such are the rates fixed for cities of the first class. The centers of the second, third, fourth and fifth classes pay that rate diminished by twenty, thirty, forty, and fifty per cent respectively.

Colombia.

Partnerships or stock companies domiciled abroad which have or establish an enterprise of permanent character in Colombia must, within a period of six months after commencing business, protocolize a notarial certificate or a certificate issued by the corresponding officer, which shows the legal existence of the partnership or corporation, its by-laws and the person or persons who represent the association. This protocolization must be made in the office of the district notary where the business is established or where the main business is transacted. The period above referred to

was extended to one year for associations already established in the country.[9]

Such partnerships or stock companies must have in Colombia an agent with power to represent them in court, and such power must be protocolized together with the foregoing documents. A copy of the act of protocolization is competent evidence of the legal capacity of the association and of the powers of its representative when they need to appear in court either as plaintiff or defendant. Notaries are obliged to issue as many copies as may be requested by any person with a view to verifying his capacity.

When associations fail to comply with the foregoing requisites the judge appoints an attorney as their representative, in any suit in which they may be defendants, after summoning the partner or stock company to appear in the action by means of a notice or decree published in the hall of the court and in the official newspaper or periodical of the corresponding Department.[10]

Stock companies must, furthermore, register an abstract of the deed of organization certified by the notary public who made the protocolization. This deed must contain:

(*a*) the name, surname and domicil of the associates;

(*b*) the firm name of the company or association;

(*c*) the associates in charge of the management;

(*d*) the capital contributed by each associate in cash, credits, or property of any kind, with the value thereof, or the method in which the valuation is to be made;

(*e*) the time when the association will commence business.

The registration above referred to must be made in the respective circuit court where the association transacts its more important business, wherein also an abstract of the powers given to representatives of partnerships or stock companies must be entered. After the registration of the foregoing abstracts has taken place, the same must be pub-

[9] Decree No. 2 of 1906, art. 1, and Decree No. 40 of 1907, art. 37.

[10] Arts. 38 to 40 of Decree No. 40 of 1907, and 25 and 27 of law 105 of 1890.

lished in the official newspaper or periodical of the corresponding Department.[11]

It is the function of the Executive to declare when a foreign association has fulfilled all the legal requisites for doing business in Colombia.[12]

Documents which must be protocolized must be executed with the formalities required by the law of the place in which they are drawn up, and must, moreover, be authenticated by a diplomatic or consular officer of Colombia residing in such place, or, if there is none such, by the minister or consul of a friendly nation.[13]

Costa Rica.

Foreign corporations and partnerships with agencies or branches established in Costa Rica are obliged:

(*a*) to appoint an agent with full power (*poder generalísimo*) to deal with and handle all the business of the concern;

(*b*) to keep books in the country for all transactions therein carried out;

(*c*) to submit themselves to the jurisdiction of the courts and to the laws of Costa Rica for the decision of all judicial questions arising out of transactions of the agency or branch, and in regard to matters of publicity required by the law of the country;

(*d*) to enter in the commercial registry:

1. All instruments showing the constitution of the association, amendments or rescission thereof;

2. General and full powers of attorney granted by the association, or the substitution or revocation thereof;

3. Instruments or certifications showing the appointment of managers of stock companies;

4. Matrimonial stipulations between any of the unlimited partners and his wife, when a coöwnership of all property of husband and wife is thereby established;

[11] Arts. 4 of Decree No. 2 of 1906, 2 of law 42 of 1898 and 469, 470 of the Code of commerce.

[12] Art. 5, Decree No. 2 of 1906.

[13] Art. 3 *ib.*

5. Instruments or documents in which an unlimited partner acknowledges a debt in favor of his wife, when he is a merchant;

6. Judgments of divorce or separation of spouses which may affect an unlimited merchant partner, as well as instruments establishing the method of liquidating the matrimonial partnership;

7. A certificate issued by the respective consul of Costa Rica, or, in his absence, by the consul of a friendly nation, certifying that the association was constituted and authorized in accordance with the laws of the country in which it has its principal domicil.[14]

The petition for registration must be made on stamped paper, thus involving a tax of about $10 to $15. Aside from this, taxation of foreign corporations, such as it is, is municipal. Corporations operating under a concession require the authorization of the Executive and of Congress. The *Ley de Registro Publico* indicates the cases in which a concession is necessary.

Cuba.

Foreign partnerships and stock companies wishing to establish branches in Cuba must enter in the Commercial Registry, in addition to the various documents required by the law of Cuban associations, a certificate issued by a Cuban consul stating that said associations have been organized and authorized according to the law of their country of origin. Cuban consuls have a special form for this purpose. These documents and certificates must be presented and entered in the Registry of every one of the districts in which the association may establish branches; the inscription made at the time the first branch was established does not suffice.[15]

[14] Art. 151 of Law of November 24, 1909, and 2 and 3 of the law of June 21, 1901.

[15] Arts. 21, com. c., and 2 and 3 of Decree of April 11, 1903, and decision of the Minister of Justice of April 14 of 1914.

The inscription of foreign commercial associations is obligatory when they desire to establish branches in Cuba; but an association which from the place of its residence transacts business with residents in Cuba is not subject to the

By decree No. 1123 of 1909 a General Registry (*Registro General*) was established, divided by provinces, in which all banks, associations, and commercial stock companies, whether domiciled in Cuba or abroad, must, provided they do business in Cuba, enter their documents. This Registry is a branch office of the Bureau of Commerce and Industry of the Secretary of Agriculture, Commerce and Labor. A certified copy of the charter or articles of incorporation, amendments thereof, if any, by-laws, regulations, resolutions and agreements, as well as all important data and information must be presented and sworn to by the authorized representative. The Bureau of Commerce and Industry supervises the company in the keeping of its books in accordance with the code of commerce, and in complying with the resolutions of the general meetings of stockholders or board of directors, in verifying the cash accounts which, in accordance with article 157 of the code, must be published, and in performing all the fiscal duties of the association.[16]

In order that a foreign corporation may establish itself or a branch, it must present the following documents to the Department of Finance so that it may be declared exempt from the payment of fiscal fees, the documents being later presented to the Mercantile Registry for proper inscription:

(*a*) a certified copy of the charter or articles of incorporation, duly authenticated by the proper authority and by the Cuban consul;

(*b*) a certified copy of the by-laws issued by the secretary of the company with the approval of its president, both signatures authenticated by a Cuban consul;

(*c*) the provisions of the by-laws relating to powers of attorney granted by the company, certified under notarial seal, and the resolution of the board of directors conferring such powers, authenticated by a Cuban consul;

aforesaid provision. Cuba, Trib. Sup., June 28, 1915; *Gaceta* of August 16, 1915.

[16] Art. 1, 2 *ib.*

(*d*) a certificate by a Cuban consul that the company has been established in accordance with the law of the respective country;

(*e*) a certified copy of the resolution of the board of directors authorizing the establishment of a branch in Cuba and fixing the capital with which it is to be operated. This capital, upon the profits of which Cuban taxes are collected, may be purely nominal and serves to avoid payment to the Mercantile Registrar of registration fees in proportion to the total capital of the company.

All the foregoing papers must be presented in triplicate.[17]

At the time of inscribing an association a fee must be paid in proportion to the amount of the capital of the enterprise, as follows: Up to $500, a stamp of 5 cents; from $500 to $1,000, 10 cents; from $1,000 to $5,000, 50 cents; from $5,000 to $10,000, $1.00; more than $10,000, $5.00.

A registration fee of ¼% ad valorem must, moreover, be paid at the time of registration, on the amount fixed by the Tax Bureau.

Partnerships or corporations of any kind must pay taxes in the proportion hereinafter established:

I. Eight per centum of their profits must be paid by:

(*a*) all banks of issue and discount must be paid by;

(*b*) all stock companies engaged in lending money or dealing with credit, except the *Cajas de Ahorros* and *Monte de Piedad* sustained by the State;

(*c*) all partnerships or corporations, whether industrial or commercial, organized in Cuba or abroad for the cultivation or exploitation of tobacco or sugar;

II. Six per centum of their profits must be paid by:

(*a*) all mining properties;

(*b*) all other banks and bankers in general, comprising all companies or individuals who devote their attention principally to the making of loans and mortgages, or dealing in discounts, pledges of securities, drafts, loans, deposits, etc.;

[17] Arts. 63 to 69 of Decree No. 1208 of August 28, 1917.

(*c*) railroad enterprises, whether owned by individuals or by partnerships or stock companies;

III. Four and one-half per centum of their profits must be paid by:

Insurance companies, including mutual insurance companies.

When a partnership or corporation or an individual is engaged in various of the businesses above referred to, the quota must be paid separately for each.

Payment of taxes by insurance enterprises is made in proportion to the premiums paid in by insured persons and of the commission paid to agents. Reinsurance or partial insurance do not require payment of taxes if they have been paid on the original policy, except when the reinsurance is made with reference to a policy issued in a foreign country, in which case the reinsurance is considered as a new insurance issued in Cuba.[18]

Domestic corporations pay their incorporation tax to the State; foreign corporations to the city. If the corporation occupies a store, it must pay a municipal tax depending on the nature of the business. Banks and railroads pay their income tax to the State; and the law of municipal taxation prescribes those associations which must pay the income tax to the city. Order 463 of 1900 provides the taxes to be paid the State. In practice, we are informed, the income tax payable by foreign corporations is generally not enforced, except as to banks, railroads, insurance companies and public utility companies.

There is no special banking law, banks being established like any other corporation according to the code of commerce. The *Banco Territorial* has the same privileges as the Credit Foncier of France, being empowered to mortgage the paper and assets of the bank for the issue of mortgage bonds.

Ecuador, Guatemala and Honduras.

The provisions of the law in Ecuador, Guatemala and Honduras relating to foreign associations are confined to

[18] Arts. 59, 67, 99 and 79 *ib.*

stock companies. Before commencing business in those countries, such companies must request authorization from the respective authority; in Ecuador from the judge of the commercial court, and in Guatemala and Honduras from the Executive. Agents acting for such companies without this previous authorization are personally liable on the contracts and obligations they may enter into, without prejudice to any actions that may be instituted against the companies.[19]

As for partnerships of any kind, the silence of the law in the three countries mentioned, can only be construed as extending to such partnerships the provisions applicable to all commercial contracts in the matter of commercial registry.

Mexico.

Associations legally constituted abroad which seek to establish themselves in the Republic of Mexico or have an agency or branch there, may carry on business subject to the provisions of the Mexican code of commerce in all matters relating to the creation of their association within the national territory, or to their mercantile transactions, as well as to the jurisdiction of the national courts.

Such associations must enter in the commercial registry, besides the certified copy (*testimonio*) of the protocolization of their by-laws, articles of incorporation, contracts and other papers relating to their organization, a general statement (*inventario*) or last balance sheet, if they have any, and a certificate showing that they have been established and authorized in accordance with the law of their country of origin issued by the Mexican minister in that country, or, in his absence, by the Mexican consul. Documents drawn in foreign countries for inscription in Mexico must first be protocolized in Mexico.

If the capital of the association is divided into shares it must publish, every year, a balance sheet showing its assets and liabilities, and also state the names of the persons charged with the management and direction.

[19] Ecuador, art. 325; Guatemala, art. 332; Honduras, art. 315.

Failure to comply with the foregoing provisions makes the persons who contract in the name of the association personally and jointly responsible for all obligations contracted in the Republic by such association. This requirement cannot be waived, so that in Mexico the plan devised by foreign stock companies in Chile is not practicable.[20]

The protocolization of charters and papers of a foreign corporation or partnership in Mexico, which are necessary in order to qualify it to establish agencies or branches in that country, requires the payment of a stamp tax in accordance with the provisions of the law of June 1, 1906, section 96, as amended by decree of September 1, 1919, which levies a tax on civil or commercial partnerships or corporations established in the Republic, proportioned to the capital of the association as established in the articles of organization, of one peso for every $1,000 or fraction of said capital. When, due to the nature of the association, the title of the property contributed is not vested in the association, but only the use, rentals and benefits derived therefrom, the tax is only $2.00 per sheet of the *protocolo* in which the articles of organization are drawn.

In the protocolization of papers and by-laws of foreign corporations or partnerships, the tax is paid in the amount and proportion heretofore established for domestic associations; but if the capital exceeds one million pesos, the tax is 10 cents for each 1,000 pesos or fraction thereof.

Besides the payment of stamp duties in proportion to the capital, each sheet of the instrument (*procolo*) in which the note of protocolization is inscribed and each sheet of the *testimonio* or first certified copy delivered by the notary to the interested party bears a one peso stamp.[21]

The fees of a notary, for the protocolization or drafting of the articles of an association, according to the law of September 19, 1901, are also in proportion to the capital, namely:

(*a*) when it is not above $500, the fees are $5.00;

(*b*) when it is more than $500 and less than $2,000, $10.00;

[20] Arts. 15, 24, 265 and 266.

[21] Section 91 of the Tariff, *ib.*

(*c*) when it is more than $2,000 and less than $5,000, $20.00;

(*d*) when it is more than $5,000 and less than $7,000, $30.00;

(*e*) when it is more than $7,000 and less than $10,000, $35.00;

(*f*) when it is more than $10,000 and less than $20,000, $40.00;

(*g*) if more than $20,000 and less than $50,000, in addition to the foregoing fees, the notary is entitled to $2 for each thousand of capital;

(*h*) if more than $50,000, the notary may charge, furthermore, $1 for each thousand in excess, but the total charge cannot exceed $200, whatever the capital may be.[22]

When it is not possible to determine the amount of the transaction the fees are $8 for every sheet of the document.[23]

For the examination of documents of any kind, when they do not exceed ten sheets, the notarial fees are $3, and ten cents in addition per sheet. If the examination is made outside the office of the notary, he may double the amount.[24]

For the authentication of copies or *testimonios*, and for setting their *rúbrica* [25] to a document, the fees are $1 for each document so authenticated or *rubricado*.[26]

Panama.

Foreign associations and partnerships which desire to establish themselves or a branch house in Panama must enter in the commercial registry, besides a *testimonio* of the protocolization of their by-laws, contracts and other papers referring to their organization, the last balance sheet of their accounts and transactions and a certificate showing that they are established in accordance with the laws of their country of origin, issued by the consul of Panama in

[22] Art. 104 *ib.* [23] Art. 105 *ib.* [24] Art. 113 *ib.*

[25] See chapter on Legal Procedure, General Rules.

[26] Art. 115 *ib.*

said country, or, in his absence, by the consul of a friendly nation.[27]

An extract of the certificate of incorporation must be published three times in a local paper and insurance companies must make a deposit of cash or bonds.

The record statement (*escritura*) filed by a foreign or domestic corporation should contain:

(*a*) the name, surname and domicil of the corporation;

(*b*) the firm name or denomination of the association setting forth the character and domicil of the same;

(*c*) the purpose and duration of the association and manner of computing the term;

(*d*) the associate capital specifying the amount subscribed, and whether it has been partially or fully paid by each member and, in the first case, when the balance should be paid and whether the shares are registered or not;

(*e*) the names of the partners charged with the management, the way of supervising stock companies, powers of the general meetings of stockholders and manner of computing votes;

(*f*) the kind of property in which each member has contributed to the capital;

(*g*) the amount to be left as a reserve fund;

(*h*) the method of making inventories and balance sheets as well as the distribution of dividends and the periods in which they must be fixed and paid;

(*i*) the shares which the founders of stock companies and limited partnerships by shares have reserved for themselves or any other preference they may have;

(*j*) the cases in which the association is to be liquidated;

(*k*) the bases for the liquidation of the company and manner of appointing the liquidators;

(*l*) the form in which the association is to publish the papers which the law requires;

[27] Art. 60.

(*m*) any other stipulations which may be appropriate and lawful.[28]

Insurance companies, whether domestic or foreign, cannot do business in Panama without the corresponding authorization of the Executive, who cannot grant a permit unless the following requisites are fulfilled:

(*a*) that the company has been legally registered;

(*b*) that the company has and maintains an agent in the Republic with power registered in the commercial registry to represent the company in and out of court;

(*c*) that an amount no less than 100,000 balboas ($100,000 U. S.) has been invested in real estate in the Republic or deposited in quotable securities to the satisfaction of the Secretary of Finance in the General Treasury or the Bank established by the Executive.

Any person who insures his property against fire outside of the Republic must notify the Superintendent of Insurance of that fact within eight days after the insured has received notice that the insurance has been effected, under penalty of from 100 to 1,000 balboas.

The authorization to do business in Panama should be withdrawn from any insurance company which effects insurance therein through an unauthorized agent. If a non-authorized company writes insurance in Panama, the Executive power may refuse it the authorization to establish agencies in the Republic.[29]

After a commercial asociation has complied with the aforesaid requisites it can exercise all its civil rights according to its articles of organization; for commercial acts within the object and scope of its business it is subject to the provisions of the law of Panama and to the jurisdiction of the national courts.

Domestic branches or agencies of foreign associations are considered as domiciled in the Republic and subject to the courts and laws thereof in all matters concerning local transactions.

[28] Art. 293.

[29] Arts. 563, 564, 570, 571.

Managers of foreign as of domestic associations or branches are responsible to third parties, and must, consequently, be furnished with an adequate power of attorney, duly filed in the registry (*Registrador General*).

Foreign stock associations must publish on a fixed date, at least every six months, a balance sheet showing the transactions carried on in Panama.[30]

Peru.

Foreign associations and partnerships may engage in business in Peru, without other formality than the payment of the corresponding license (*patente*) fee. If they would avoid difficulties, it is advisable to register in the commercial register; for example, they can only secure the privilege of suspending payments without immediate action (*suspension de pagos*) if they have registered. There is no penalty for failure to register.

Their capacity to contract is governed by the law of their country of origin, but for all commercial transactions in Peru, they are subject to the Peruvian law and courts, unless otherwise provided in international treaties.[31]

If, as is advisable, foreign corporations and partnerships seek to register themselves or their branches in Peru, they must enter in the commercial registry, besides their by-laws and documents required for Peruvian corporations and partnerships, a certificate issued by the Peruvian consul in their home country showing that they are constituted in accordance with the laws of that country.[32]

It is necessary to bear in mind that in the international congress of Montevideo in 1888 there were framed various international treaties which are now in operation between Argentina, Paraguay, Peru and Uruguay. The treaty relating to commercial law was approved in Peru on November 4, 1889, and so far as concerns corporations or partnerships of any of the other three republics, parties to those treaties, its provisions are as follows:

[30] Arts. 283 to 286. [31] Art. 15. [32] Art. 21.

The law of the country where an act takes place decides whether that act is civil or commercial.[33]

The law of the place where a person has his principal business decides whether that person is or is not a merchant.[34]

Merchants and auxiliaries of commerce are subject to the commercial law of the place where they carry on their profession.[35]

The contract of corporation or partnership is governed by the law of the place where the association is to have its commercial domicil, in all matters relating to the legal form of said contract or the relations between the associates with one another, or between them and third parties.[36]

Associations and partnerships possessing the character of legal entities are governed by the law of their domicil; they are *ipso jure* recognized in the other States, and are capable of exercising civil rights therein and demanding recognition as entities by the courts. As for the performance of acts within the scope of their powers, they are subject to the law of the country where the acts are performed.[37]

Branches or agencies established in one State by an association or partnership of another are considered as domiciled in the place where they do business, and subject to the jurisdiction of the local authorities in reference to transactions entered into therein.[38]

The judges of the country where an association or partnership has its legal domicil are competent in all controversies arising between the associates, or instituted by third parties against the association. However, if an association domiciled in one State transacts business in another in which a judicial controversy arises the association can be sued before the courts of the latter State.[39]

Registration fees for associations and partnerships in Peru are as follows:

(*a*) if the capital is not above 5,000 soles, 2.00 soles (the sol is equivalent to about 40 cents U. S. currency);

[33] Art. 1 of the Treaty on commercial law.
[34] Art. 2 *ib.* [35] Art. 3 *ib.* [36] Art. 4 *ib.*
[37] Art. 5 *ib.* [38] Art. 6 *ib.* [39] Art. 7 *ib.*

(*b*) if above 5,000 soles, besides the foregoing fees, there must be paid for each thousand soles or fraction thereof greater that 100 soles and up to 500,000 soles, 0.50 soles, and for each thousand soles above that amount 0.25 soles.

The payment is made on the capital actually paid up at the time the association is formed, or which must, according to the articles or agreement, be paid in within a brief period. Future instalments are subject to the same taxes when they are paid in.

Associations, the capital of which is not fully paid up can, however, pay the fees in full on their subscribed capital, in which case the fees are reduced one-half.

Every increase of the associate capital must pay the foregoing fees.

The issuing of obligations (notes or bonds) not above 5,000 soles, carries a tax of 2.00 soles. For more than 5,000 soles up to 500,000 each thousand or fraction thereof greater than 100 is taxed 0.50 soles. Above 500,000 soles, for each thousand or fraction thereof greater than 100 soles, the fees are 0.25 soles.[40]

San Salvador.

Foreign partnerships and stock companies which have no domicil, branch or other representation in San Salvador, can, nevertheless, perform commercial acts which are not contrary to the law of San Salvador.[41]

The following provision of the San Salvador code warrants attention because it differs somewhat from the provisions of law in other countries. It reads: "Partnerships and stock companies which seek to constitute themselves in a foreign country, but desire to have their domicil in San Salvador and carry on their principal business there, must be considered for all legal purposes as domestic associations, subject to all the provisions of this code."[42]

[40] Tariff of October 1, 1902.

[41] Art. 299.

[42] Art. 300. A somewhat similar rule has been adopted by the Italian, Japanese and Portuguese commercial codes.

Foreign stock companies whenever they intend to establish branches or agencies in San Salvador are obliged to enter in the commercial registry the articles of incorporation and by-laws, the appointment of managers or agents, and documents showing that those papers were entered in the commercial court of the country of origin. So long as the foregoing requisites are not complied with the branches or agencies of a foreign stock company have no legal capacity in San Salvador to appear in courts as plaintiffs, and their managers or agents are, furthermore, personally and jointly liable with respect to acts or contracts undertaken by them in the name of the corporation, even though they have stipulated otherwise.[43]

Uruguay.

Foreign partnerships and stock companies in Uruguay are subject to the same provisions as domestic partnerships and companies, and must, therefore, enter in the commercial registry the articles of organization and by-laws, as well as the powers granted to their representatives.[44] It is necessary to bear in mind, as has already been observed, that stock companies must be authorized by the Executive, and in case they enjoy a franchise, they must also have the approval of the General Assembly.[45] Managers and directors of partnerships and companies are personally and jointly responsible toward third contracting parties until the papers have been registered and the authorization is obtained. After the aforesaid requisites have been complied with, they are only liable to the company or partnership for the faithful discharge of their respective duties. They are, however, responsible to third parties in case they infringe the by-laws and regulations.[46]

The law of February 27, 1919, provides that stock companies, whether domestic or foreign, as well as their branches and agencies, must, in order to trade in that country, submit themselves to the supervision and auditing (*fiscalización*) of

[43] Arts. 12 and 16. [44] Art. 47. [45] Art. 405.
[46] Arts. 408 and 424.

the *Inspección General de Bancos y Sociedades Anônimas* (Bureau of General Inspection of Banks and Stock Companies). They are obliged to publish their balance sheet every three months in the *Diario Oficial*, and to have the same supervised and approved by said Bureau. Their directors or managers must, furthermore, present to the Bureau a detailed balance sheet and the plan for distributing the profits, if any.[47]

Failure to comply with the foregoing requirements is penalized by a fine of from two hundred to five hundred pesos (a peso = $1.03 U. S.) imposed by the Executive, after a report of the Bureau of General Inspection, without prejudice to any other legal liability.[48]

The Bureau of General Inspection enforces compliance by companies with the legal formalities and the provisions of the respective by-laws, and by its representatives attends their meetings for that purpose. These representatives are obliged to keep secret their information not intended for publicity. Aside from their functions of supervision, the members of the Bureau are strictly forbidden to interfere in the management of corporations.[49]

According to the same law, registration fees for all contracts of association are 1/8 per thousand of their capital, with a maximum fee of 100 pesos. There is also a tax of 1 peso for each sheet of the Registry book used. For other documents the fees are 1.20 peso invariably.

Venezuela.

Foreign associations may do business in Venezuela and appear in courts as plaintiffs or defendants, but they are subject to the laws applicable to non-residents. They must, therefore, give security for costs, if plaintiffs in a suit arising out of civil matters. As for actions derived from commercial transactions, no one is bound to give such security.[50]

Foreign partnerships desiring to establish agencies,

[47] Arts. 1, 2 and 3 of law of Feb. 27, 1919.
[48] Art. 4 *ib.*
[49] Arts. 5, 6 and 7 *ib.*
[50] Arts. 27 and 293 c. c., and 1076 com. c.

branches or enterprises in Venezuela, must comply with the same requisites as domestic partnerships. As for stock companies, they must enter in the commercial registry of the place where the agency, branch, or enterprise is located their articles of organization, by-laws, and other documents necessary in creating the company, according to the law of the country of origin, and a copy, properly legalized, of the governing provisions of law.[51] The same formalities must be observed in regard to amendments of the contract of association.[52]

The provisions relating to commercial bookkeeping and correspondence, as laid down in the Code of commerce of Venezuela, are applicable to foreign partnerships and associations doing business in that country.[53]

Foreigners, it seems, cannot establish insurance companies and banks as Venezuelan corporations. Most commercial enterprises must pay a municipal *patente* or license tax, depending in amount on the nature of the business. Mining companies pay no *patente*. Merchants pay an industrial *patente* tax. Corporations pay in addition ten per cent thereof to the federal government. Companies which are not required to pay a *patente* tax are required to pay a stamp tax of one per thousand of their annual income.

[51] Art. 294 com. c. [52] Art. 295 com. c.

[53] Arts. 35 and 50 com. c. Angel Cesar Rivas, Les Societés Etrangères en Venezuela, Journal du Droit International Privé, v. 32 (1905), pp. 520–529.

CHAPTER XVI

Mercantile Contracts

GENERAL PRINCIPLES

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Sources of obligations.

Obligations consist in general of legal duties arising out of legal relations between persons. The sources of obligations are: the law, contracts, quasi-contracts and unlawful acts or omissions, usually called torts, which include faults and negligence. According to some writers the law is the only source of obligations; by reason of the fact that merchants perform a function of social interest, the law imposes upon them more obligations than upon non-merchants for the benefit of third parties. This fact will be pointed out in dealing with relevant cases in which it applies, but for the present we propose to confine ourselves to the discussion of

obligations arising out of contracts, which in commercial matters are the most important source of obligations.

Law of commercial contracts.

The independence of commercial from civil law would lead to the conclusion that the codes of commerce which recognize this independence, should contain a complete section covering all the principles of contractual obligations. But the notion that commercial law is entirely independent has not progressed to that point. We therefore find that the commercial codes of Latin-America follow three different systems:

1. *French system.* The codes of this system have no section dealing with the general principles of contract.[1]

2. *German-Italian system.* The codes which follow this system devote a title to the exposition of the general principles of contract, but the matter is not exhausted therein and the courts must refer to other complementary provisions of law in order to have all the required rules.[2]

3. *Uruguayan system.* The general rules of contract are presented in full in the code of Uruguay.

Relations between the civil and the commercial law of contracts.

We have seen that most of the Latin-American codes consider commercial law as a mere complement of civil law for commercial cases, and in this group of codes we find the consistent declaration that the civil law is to be applied when the commercial law fails to provide for a special case.[3] But

[1] Haiti, Santo Domingo.

[2] Spain, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, San Salvador, Venezuela.

[3] Argentina, 207; Bolivia, 213; Brazil, 121; Chile, 96; Costa Rica, 181; Guatemala, 171; Honduras, 83; Mexico, 81; Nicaragua, 130; San Salvador, 73; Uruguay, 191.

In Brazilian commercial law, the laws and customs antedating the enactment of the commercial code are among the sources of law. The Lawyers

such is the force of tradition that even codes which have recognized the independence of the commercial law contain the same provision.[4]

The commercial code of Panama is the only one which is consistent with the principle of the independence of commercial law. It provides in article 194, that mercantile matters not provided for in that code are governed according to the usages of commerce generally observed in the locality, and only in default of such usage must the general principles of contract embodied in civil law be applied.

The codes of Ecuador and Venezuela do not refer to the matter.

Essential requisites of contracts.

Every contract to be legally binding must have the following essential requisites:

(*a*) capacity of the contracting parties;

(*b*) the consent of two or more persons binding themselves in such manner that the rights and obligations produced by the agreement may be enforced judicially;

(*c*) a certain and lawful object of the right and obligation created, which may be a thing, an act or the omission of an act;

(*d*) a "cause" (analogous to, but not quite the same as, "consideration").

Having already discussed the capacity required in order to be a merchant, we need merely note that the capacity to enter into a mercantile transaction is the ordinary civil capacity governed by the civil code. We may, therefore, pass on to the other requisites.

CONSENT

Consent implies the idea of a meeting of the minds of the

Institute of Rio de Janeiro of Sept. 21, 1865, *Revista de Jurispr udencia*,1870, p. 207.

[4] Spain, 50; Colombia, 182; Peru, 50.

offerer and offeree with a view to contracting some obligation.[5]

The defects or vices that may invalidate consent and hence the contract itself are: *a*, mistake; *b*, duress or intimidation; and, *c*, deceit.

Mistake.

A mistake may invalidate a contract only when it is a substantial error concerning:

(*a*) the person of the other party;
(*b*) the subject-matter of the contract;
(*c*) the "cause" of the contract.

Mistake relating to the person of a contracting party nullifies the contract when it was entered into in consideration of that particular person, a case which happens more frequently in commercial than in civil contracts, because personal credit usually plays a very important rôle in commercial transactions.

A mistake concerning things nullifies the contract, when it relates to the essential qualities of the thing. For example, let us assume that X buys a house supposing it to be in one town and finds it is in another. Mistake invalidates the contract whenever it is certain that had the party known the real qualities or characteristics of the thing he would not have entered into the contract.

Mistake concerning the "cause" likewise invalidates a contract, as, for example, when one person intends to purchase and the other offers merely to rent real estate.[6]

[5] When the existence of an offer and its acceptance has been proved, the existence of a contract is thereby proved. Mexico, 4ª Sala del Supremo Tribunal de Justicia del Distrito Federal, Toriello Guerra *v.* Compañía Telefónica, October 16, 1884, *Anuario de Legislación y Jurisprudencia, Sección de Jurisprudencia*, 1884, p. 269.

[6] A mistake as to the facts cannot be pleaded when ignorance of the truth is due to gross negligence. Argentina, Cam. de Apel. en lo commercial de la Captail, June 7, 1913, *Retteo v. Wus*, Jur. de los Tribs. Nacs., June, 1913, p. 273.

A mistake concerning a thing bought in good faith gives the buyer an action for the recovery of earnest money given by him in consideration of the contract. Argentina, Camara 2 de Apel. en lo civil de la Capital, May 23, 1914, Labourdetta *v.* del Rio, *Ib.*, May, 1914, p. 205.

Duress.

Duress exists when irresistible force is used to procure consent.

Intimidation.

Intimidation exists when one of the contracting parties is inspired by a reasonable and well-grounded fear of suffering imminent and serious injury in his person or property or in the person or property of his wife (or her husband, as the case may be), descendants or parents. To estimate the force of the intimidation the age, sex and status of the person must be considered. The fear of displeasing a person to whom obedience and respect are due (*temor reverencial*) cannot annul a contract. Duress or intimidation even if employed by a third person who did not intervene in the contract renders an obligation void.

Deceit.

Deceit is a false representation of facts, made with knowledge of its falsity and with the intention that it should be acted upon by another, which actually induces him to enter into a contract into which otherwise he would not have entered. In order that deceit may render a contract void, it must produce an injury, and it must not have been used by both parties.[7]

Incidental deceit occurs when the party spontaneously entered into a contract, but was deceived concerning non-essential circumstances. In this case the contract is not

Mistake does not necessarily nullify a contract unless it refers to the "cause" or direct object of the contract. Mistake relating to the purposes of the parties does not nullify a stipulation. The simulation of a contract cannot co-exist with the mistake of one of the parties to it. Mexico, Juzgado 3° de lo civil del Distrito Federal, Aug. 10, 1890, Pontones de Best *v.* Rubi, *Anuario de Leg. y Jur.* 1890, p. 343.

[7] The simulation of a contract may be proved by mere conjecture. Brazil, No. 8893, June 14, 1876, *Gazeta Juridica*, vol. 12, page 698.

Transactions made to defraud creditors may be nullified regardless of when they were executed, and of the statute of limitations. Brazil, Decree No. 917, Art. 30.

void; deceit merely renders the party who employed it liable to an action for damages.

OBJECT OF CONTRACTS

The object of commerce may be a thing or an act, and even an omission. The object must be physically possible and legally permissible; *e. g.*, in the contract of transportation, the object of the contract is the act of the carrier; in the purchase of a commercial house the object implies frequently an omission, that is, that the seller shall not establish himself in the same line of business and within a certain district.

Things that cannot be the objects of contract (cosas fuera del comercio.)

There are things which naturally belong to the public in general, like the air and the high seas; they cannot be objects of private property, nor hence, of commerce. There are also things which, although from an economic standpoint possibly the subject of business transactions, are for certain reasons of public welfare, history or religion, absolutely or conditionally not subject to commerce, such as the highways, historic relics, the public archives, objects of worship, and things that may impair the health of a community.

CAUSE

Consent must have a "cause," because otherwise there is no legal volition. "Cause," therefore, is the immediate consideration or motive of the parties in entering into a contract.[8]

[8] There can be no obligation without a real and legal "cause." The promise to give something in payment of a non-existing debt is an obligation without "cause." Ecuador, Corte Suprema de Just., Davalos *v.* Carrión, July 28, 1876, *Gaceta Judicial*, 1913, p. 1254.

The tendering of payment of an obligation is not enough to release the debtor. He is required to put the thing at the disposal of the creditor, who must refuse acceptance. Ecuador, Corte Suprema de Just., Dammer *v.* Almeida, June 11, 1906, *Gaceta Jud.*, 1906–1915, p. 452.

In countries ruled by civil law, "cause" (a rough translation of the Latin word "causa"), is a term of wider meaning than that of "consideration" prevailing in Anglo-American law. In the latter system, consideration, which is also essential in all contracts, consists of some detriment suffered by or forbearance exacted from the promisee, relying upon the promise, or some corresponding benefit accruing to the promisor. Unless such consideration can be shown by the promisee, he cannot enforce the promise against the promisor. Hence gratuitous promises are not legally enforceable.

In civil law countries, *causa*, as an essential requisite of a contract, is a reason or motive for the making of a promise. It need not be a "good consideration" under Anglo-American law; thus, the desire to aid a person will legally support the promise of a gift and render it enforceable.[9]

The definition and character of "cause" as an essential requisite of contracts has given rise to much speculation and criticism. In bilateral contracts the act of or promise made by one of the parties is the "cause" for the other; as, for example, in the contract of purchase and sale the payment of the price is the "cause" of the contract for the seller, and the delivery of the thing is the "cause" for the buyer. In these cases, therefore, "cause" is equivalent to object. In unilateral contracts the "cause" of the obligation for the debtor

Probably the best comparative treatment of the concepts "causa" and "consideration" in the civil and in the common law is to be found in Professor Lorenzen's article "Causa and Consideration in the Law of Contracts" in 28 Yale Law Journal, 621–646 (May, 1919).

[9] One must not confound the "cause" of an obligation with the purpose of the contracting parties. Mistake relating to the cause nullifies the contract, that relating to the purpose does not. Colombia, Trib. Sup. de Distrito Bogota, October 25, 1894, *Registro Jud. de Cundinamarca*, VIII, p. 1391.

A debtor is in default not only when he fails to comply with an obligation of delivering something or doing some act; but also when he does what he was bound not to do. Colombia, Trib. Sup. del Dist. Medellin, March 26, 1898, *Crónica Jud. de Antioquia*, XIV, p. 3304.

When the "cause" of a contract is contrary to law, morals or public welfare, the debtor may refuse to fulfill his obligation. When the debtor denies the existence of any legal "cause" of his obligation, the creditor must prove its existence. Costa Rica, Corte de Casación, Rodriguez *v.* Tinoco, December 2, 1913. *Sentencias de la Corte de Casación*, 1913, 2d sems., p. 621.

is the act done or the thing delivered by the creditor. In these cases "cause" is again the same as the object. In gifts the "cause" is the consent of the donor, expressed with the formalities established by law. In these cases "cause" is not equivalent to object, but to consent. Consequently the essentials of a contract can be reduced to three, namely: capacity of the parties, mutual consent, and legal object. For this reason the civil code of Mexico [10] and that of Brazil [11] do not mention "cause" among the requisites of a contract, as do the codes which follow in this respect the code of Napoleon.

When the cause is not expressed in a contract, it is presumed to exist and to be lawful, unless the debtor proves the contrary.[12]

Argentina [13] provides that in the case of negotiable instruments, the failure to express the "cause" or the statement of a fictitious "cause" cannot be pleaded against a holder in good faith.[14]

Even though, as it has been observed, "cause" is not an essential requisite of civil contracts in Brazil,[15] but in commercial contracts, failure to express a "cause" of the obligation renders them void.[16]

Uruguay,[17] with the same rule as Argentina, adds that failure to express the "cause" only gives the debtor a right of action to prove that the obligation had no valid "cause."

The modern notions concerning negotiable instruments make the statement of a "cause" thereof unnecessary.

[10] Art. 1279 c. c. [11] 145 c. c.

[12] When the "cause" of an obligation is not expressed, it is presumed that said cause is the liberality of the obligor. Colombia, Tribunal Superior del Distrito, Bucaramanga, October 9, 1896, *Revista Judicial de Santander*, VIII, 510.

[13] Art. 212.

[14] A bill of exchange is deemed simulated when it does not correspond to any real transaction, or when it is accepted by mistake, or by an insane or incapacitated person. Brazil, No. 3199, Relatorio da Corte, May 8, 1871, *Gaceta Juridica*, vol. 2, p. 429.

[15] Art. 145 c. c. [16] Art. 129. [17] Art. 197.

LEGAL FORMALITIES

The form of contracts may be essential when the law or the agreement of the parties specifically so provides.

Three systems may be traced in this matter:

1. *Formalistic system.* This is characterized by the fact that the validity of the contract depends upon the use of certain words peculiar to every transaction, as in the old ritualistic system of the Roman law.

2. *System that requires a written instrument.* In this system, the validity of a contract depends upon the execution of a private or public instrument, but the system requires no special words or ritualism, the contract being interpreted in the light of the purposes and intent of the parties rather than by the literal words of the document.

3. *Non-formalistic system.* According to this system, in a mercantile agreement the parties may be bound by the meeting of the minds expressed orally or in any other clear way without specific formality.

These three systems may be found represented in every one of the Latin-American codes. The first is illustrated in the use of certain words, for example, the words "bill of exchange" required in countries like Brazil and Panama as a legal requisite to the validity of such instruments; and the word "*acepto*" for the acceptance of a draft in certain countries. A written instrument is required in the case of certain contracts, no matter what the importance of the transaction; it is also required as a necessary formality in all kinds of contracts the amount of which is over 1,500 pesetas in Spain ($289.50),[18] 200 pesos ($88.00) in Argentina,[19] (Peru (soles), ($97.32),[20] and Uruguay ($206.84); [21] 250 pe-

[18] Art. 51.

In order to establish whether the amount of an obligation is more or less than 1,500 pesetas, the computation must be made in Spanish money. Cuba, Tribunal Supremo, February 11, 1901. Jurisp. del Trib. Supr. in Materia Crim., vol. VI, p. 75.

[19] Art. 209. [20] Art. 51. [21] Art. 193.

sos (bolivianos) in Bolivia ($87.33) [22] and in Nicaragua ($108.75); [23] 400 milreis ($132) in Brazil; [24] 500 pesos $486.60 nominal) in Guatemala; [25] 100 pesos ($46.54); [26] and 150 pesos ($62.50) in Honduras.

Public and private instruments.

A written instrument may be public or private. It is private when written and signed by the parties only or before witnesses. It is public when written by a notary and signed before him. Generally the notary keeps the original instrument in his records and gives the parties a first certified copy; or by judicial decree he may give them a second certified copy. By public instrument is also meant every document issued by a public authority in the performance of his official duties.

Official brokers may also authenticate mercantile instruments and these enjoy a certain evidential force comparable to that of a public instrument, as we have already observed.

FORMATION OF A COMMERCIAL CONTRACT

Offer and acceptance.

Between the moment at which an offer is made and the time at which it becomes a perfect contract by acceptance, there are important legal relations between the parties.

An offer can be made to a person who is present and in that case the acceptance or refusal of said offer must be made at once or some change may be proposed by the offeree

[22] Art. 211. [23] Art. 132. [24] Art. 123.

A paper written by the plaintiff is not considered written evidence which may be supplemented by the testimony of witnesses in order to prove the existence of a debt over 400 milreis, when it does not refer to documents. Brazil, Decision No. 3,200 of the Relatorio da Corte, June 3, 1873, *O Direito*, vol. 3, p. 115.

Even though a commercial action is brought for more than 400 milreis it is admissible and can be proved, when that amount is the result of several transactions, every one of them involving less than that sum. Decision No. 8,342 of Aug. 23, 1873, *Gazeta Juridica*, vol. 1, p. 461; December 3, 1878, Relatorio da Corte, *O Direito*, vol. 18, p. 358. Corte de Apellação, March 31, 1892, *O Direito*, vol. 58, p. 238.

[25] Art. 195. [26] Art. 184 .

which is considered as a new offer; this must be accepted or repudiated without delay. Once the offer is accepted the contract is binding unless the law provides otherwise.[27]

When the offer is made to a person residing in another place, and it is accepted, a doubt arises as to whether the contract is perfected at the moment when and in the place where the offer was accepted or when and where the acceptance was received by the offerer. This is a question of great importance because upon its decision depends the application to the case of the law of one or the other of the two places involved in the case.

There are two systems regarding this point:

1. *Spanish system.* Contracts entered into by means of letters are perfected when the offer or the modifying proposition has been accepted; [28]

2. *Italian system.* Contracts are perfected when the acceptance of the offer is received by the offerer.[29]

The provision of article 203 of the code of Panama deserves special mention; it states that "contracts entered into over the telephone are considered as made between present parties when the said parties or their representatives personally talked over the telephone."

Telegraphic correspondence.

In the matter of telegraphic correspondence the codes of Spain,[30] Mexico [31] and Peru [32] provide that agreements made by that method are binding only when it has been so stipulated in advance and the telegrams have the requisites and conventional marks, if any, which were previously agreed upon by the parties.

In Honduras,[33] San Salvador [34] and Venezuela,[35] tele-

[27] The acceptance of an offer can be express or tacit. Colombia, Tribunal Superior del Distrito de Panama, May 31, 1892, *Registro Jud.* (de Panama), VI, 1694.

[28] Spain, 54; Bolivia, 215; Brazil, 127; Chile, 101; Colombia, 188; Costa Rica, 190; Ecuador, 145; Guatemala, 179; Honduras, 87; Mexico, 80; Peru, 54.

[29] Panama, 210; San Salvador, 75; Uruguay, 204 and Venezuela, 120.

[30] Art. 51. [31] Art. 80. [32] Art. 51.

[33] Art. 84. [34] Art. 74. [35] Art. 130.

graphic correspondence only creates legal effects between the contracting parties after it has been acknowledged by them; Honduras also provides that such correspondence may produce legal effects when it has been authenticated by the corresponding telegraph office. Argentina [36] and Panama [37] provide that telegraphic correspondence is governed by the same rules as govern letters.

Contracts entered into through brokers.

Contracts in which a broker has intervened are deemed complete when the parties to them have accepted his offer.[38]

In Costa Rica [39] the same provision is applicable to contracts made through factors or clerks.

In Mexico the rule is modified by the provision that the aforesaid contracts are binding only when the contracting parties have signed the proper memorandum (*minuta*) in the presence of the broker, according to special rules.[40]

Effects of the offer prior to acceptance.

Before an offer is accepted there is no binding legal tie between the parties; but the relation is one of legal power in the offeree and liability in the offerer to have the offer converted into a contract by exercise of the offeree's power to accept. Inasmuch as the offer may have led the offeree to make certain preparations before communicating his answer and before knowledge of a revocation by the offerer, the legal situation is complex. The solutions given by the codes may be classified as follows:

1. The offerer may withdraw his offer during the time intervening between the sending of the offer and its acceptance.[41]

2. The offerer may withdraw his offer during the

[36] Art. 214. [37] Art. 197.

[38] Spain, 55; Argentina, 213; Bolivia, 214; Chile, 106; Colombia, 193; Honduras, 88; Peru, 55; San Salvador, 76; Uruguay, 201.

[39] Art. 189. [40] Art. 82.

[41] Brazil, 127; Chile, 99; Colombia, 186; Ecuador, 143; Guatemala, 179.

time intervening between the sending of the offer and his receipt of the acceptance.[42]

3. The offerer must wait until the return mail.[43]

4. The offerer is bound to wait for an answer for a reasonable period sufficient for a reply. It is presumed that the offer was received on time, in the absence of proof to the contrary. Should the acceptance be sent on time but be delayed in reaching the offerer, there is no contract, but the offerer must inform the acceptor of this circumstance at once.[44]

Silence of the offeree.

The silence of the offeree cannot be construed as acceptance effecting the conclusion of the contract, unless by special and previous stipulation of the parties, in order to speed the transaction, such interpretation can be deduced therefrom, or when in view of the special character of the business and of the circumstances the offerer need not wait for an answer.[45]

All that has been said as to the formation of a contract must be understood with the limitation that when the law requires a written instrument or any other formality for the perfection of the contract the mere agreement of the parties does not suffice so long as the legal requisite has not been complied with.

EFFECT OF CONTRACTS

Effect of a contract between the parties thereto.

A contract binds the parties thereto only. It also binds their heirs and assignees, unless the obligation arising out of the agreement is unassignable and personal only.

Effect of a contract in regard to third parties.

There are three exceptions to the above mentioned rule:

(*a*) when the creditors demand a declaration of the

[42] Uruguay, 204; Venezuela, 121.

[43] Nicaragua, 134.

[44] Panama, 204.

[45] Panama, 205.

nullity of acts and contracts of their debtor made in fraud of their rights (*acción pauliana*);

(*b*) when a contract is made for the special benefit of third parties, who may in that case accept and claim the benefits conferred; and

(*c*) when creditors prosecute the rights of their debtor, who refuses to do so himself.[46]

By third parties are meant all persons who neither personally nor by means of guardians, agents or any other representative have entered into the contract.

Contracts constitute law for the parties.

Lawful agreements constitute law for the parties and for those who legally represent them. They bind the parties not only to that which has been expressly stipulated but also to all the consequences which equity and legal usage deduce from the obligation, according to its nature.[47]

Obligations of giving (obligatio dandi).

An obligation of giving something implies the duty of preserving it with the diligence required by the nature of the obligation and the circumstances of person, time and place.[48]

Obligations of doing (obligatio faciendi).

When the obligation consists in the doing of something which the debtor fails to perform, the respect for human liberty and the impossibility of finding an adequate means of compulsion, has induced the law to provide that instead of doing the act the debtor must be compelled to pay damages to the creditor. The same rule governs the obligation of not doing some act.[49]

DIFFERENT KINDS OF OBLIGATIONS

Several and joint obligations (obligationes solidarias).

According to the civil law, the fact that two or more

[46] Uruguay, 226 to 229.
[47] Uruguay, 209.
[48] Uruguay, 210, 211.
[49] Uruguay, 215.

creditors and two or more debtors have been parties to an agreement does not imply that each of the creditors may ask that each of the debtors be compelled to deliver the whole thing, the subject-matter of the obligation, although they may so stipulate.

Three systems are followed by the commercial codes of Latin-America as to the joint and several character of commercial obligations.

French system. The codes are silent in the matter and leave it to be governed by the civil code or by commercial custom, according as the independence of the commercial law is or is not accepted in the country.

German system. In mercantile transactions obligations are deemed joint and several.[50]

System of Uruguay. The code expressly provides that a joint and several obligation is not presumed in commercial matters.[51]

Conditional obligations.

An obligation is conditional when the acquisition of rights, or the extinction of those already acquired depends upon some event, which constitutes the condition.

Conditions may be precedent (*suspensivas*) or subsequent (*resolutorias*); the first suspend all effects of an obligation until the happening of the condition, the second leave the contract in full force, but subject to termination by the happening of the condition. As in mercantile matters most contracts relate to personal property, which is easily dealt with and disposed of, it often happens that its return to the former owner proves impossible; if that is the debtor's obligation in the case of the happening of a condition subsequent, delivery of the equivalent of the property in question satisfies the obligation.

The condition subsequent produces a retroactive effect. It is considered that the former owner has never ceased to possess the subject-matter of the obligation; should the thing

[50] Panama, 221; San Salvador, 79; Venezuela, 115.

[51] Art. 263.

be lost or impaired the loss falls on him, unless the loss or impairment is due to the fault or negligence of the other party. Rights conferred to third parties while the condition was pending shall, however, produce all their effects in spite of the retroactive effect oftthe condition, when the subject-matter of the obligation was delivered to them.

A condition subsequent is always implied in bilateral contracts in the event that one of the parties fails to comply with his obligation; but the other party may choose between the rescission of the contract and its performance, and the payment of damages in either event.[52]

Obligations subject to a term.

A term may be: *a*, legal; *b*, conventional; *c*, discretionary. The first is established by the law, the second by the parties, and the third by the court or judge.[53]

Legal term for obligations.

Some of the codes are silent as to the legal term for the fulfillment of commercial obligations; the others may be divided into the following groups:

Obligations in which no term or period is established by the parties or by the law, are enforceable:

(*a*) ten days after the date of the contract if they may be enforced by means of an ordinary action and the next day if they may be enforced by means of summary executive action (*acciôn executiva*); [54]

[52] Uruguay, 230 to 246.

A contract cannot be rescinded when one of the parties fails to comply with it, if a rescissory clause has been stipulated for the benefit of the seller only. Argentina, Camara 2ª de Apelación de lo civil de la Capital, August 12, 1913, *Jur. de lós Tribs. Nacs.*, Aug., 1913, p. 152.

[53] The stipulation that the debtor has the privilege to pay any time he pleases does not imply that the obligation depends on a term. Ecuador, Corte Suprema de Quito, Cuvi *v.* Milá, July 25, 1910, *Gaceta Judicial*, 1911–1912, p. 948.

[54] Spain, 62; Costa Rica, 207; Honduras, 95; Mexico, 83; Peru, 62; San Salvador, 78.

Cf. infra, chapter on legal procedure.

(*b*) ten days after the date of the contract; [55]

(*c*) three days after; [56]

(*d*) any time, unless the nature of the transaction or mercantile usage requires otherwise.[57]

Manner of computing terms.

Terms consisting of a certain number of days are computed without including the day of the contract, but counting the day on which the obligation is due, so that a judicial action can be brought when that day has passed.[58]

Months are reckoned from date to date; should the last month not have the corresponding number of days, the obligation is due the last day of that month. Years are of 365 days.[59]

No terms of grace or courtesy or of any other character which may alter the fulfillment of a mercantile obligation are admitted, except those established by the parties themselves or by the law.[60]

Most of the commercial codes do not state whether the term of an obligation may be deemed to run in favor of both parties, or in favor of the debtor alone as the civil law provides; only the codes of Colombia,[61] Ecuador [62] and Uruguay [63] state that the term is considered to run in favor of both parties, and the creditor cannot be compelled to receive premature payment unless otherwise stipulated.

Panama provides the reverse.[64] A debtor may fulfill his obligation before it is due when, from the clauses of the con-

[55] Brazil, 127; Uruguay, 252.

[56] Bolivia, 221.

[57] Panama, 227.

[58] Bolivia, 220; Brazil, 135; Colombia, 199; Costa Rica, 204; Guatemala, 193; Nicaragua, 137; Panama, 229; Uruguay, 250.

The provision of the codes that in mercantile obligations which have no period stipulated or established by the law, said obligation is exigible ten days after its date, does not refer to bills of exchange and similar instruments. Brazil, No. 7994, March 6, 1872, *Revista Juridica*, 1873, p. 250.

[59] Spain, 60; Chile, 110; Colombia, 198; Mexico, 84; Panama, 229; Uruguay, 251.

[60] Spain, 61; Bolivia, 219; Chile, 112; Colombia, 210; Costa Rica, 206; Ecuador, 153; Mexico, 84; Peru, 61; Nicaragua, 138.

[61] Art. 207.

[62] Art. 158.

[63] Art. 249.

[64] Art. 234.

tract or from the circumstances, a contrary intention of the parties cannot be inferred. The debtor in that case may only deduct a discount when so stipulated or accepted by usage.

Obligations with a penalty clause.

In case of failure to comply with an obligation containing a penalty clause, the creditor may choose between the payment of the penalty or damages, but he cannot exact both, unless expressly so stipulated.[65]

In Brazil [66] and Uruguay,[67] in case of breach of a contract containing a penalty clause, the party can ask only for the payment of the stipulated penalty.

In Panama [68] also the party can ask only for the payment of the penalty, unless otherwise stipulated, or when the debtor has acted in bad faith. Nevertheless, should the penalty be due only in case of failure to perform the contract at the time and place agreed upon, the creditor may request simultaneously the fulfillment of the contract and the payment of the penalty, if this right has not been expressly waived or if performance of the contract has been accepted without protest.

The penalty must be paid even though the creditor has suffered no damage. The creditor who sustained damage greater than the penalty cannot demand a greater indemnity unless he proves the debtor's bad faith. The penalty cannot be demanded when the performance of the contract has become impossible by reason of unforeseen events or the fault of the creditor himself, or when performance of the obligation has been accepted without protest.

[65] Spain, 56; Bolivia, 216; Costa Rica, 192; Guatemala, 180; Honduras, 89; Mexico, 88; Nicaragua, 134; Peru, 56.

A debtor who fails to comply with his obligation at the proper time and place, must pay the stipulated penalty, even though he had good excuse for the failure. Argentina, Camara 1° de Apel de lo civ. de la Capital, July 17, 1914, Sosa Colombo.

Interest due on a sum in the payment of which there has been default, can only be computed from the time of the service of the summons, unless otherwise expressly stipulated. Argentina, Corte Suprema de la Nación, July 1, 1913, Devoto and Rocha *v.* National Government.

[66] Art. 128. [67] Art. 268. [68] Arts. 237 to 239.

CHAPTER XVII

Mercantile Contracts

general principles (continued)

Alternative obligations.

In alternative obligations, the right of election lies with the debtor unless it has been expressly granted to the creditor. When only one alternative is feasible, the debtor loses the privilege to elect.

When the privilege of election has been expressly given to the creditor, an obligation ceases to be alternative from the date on which notice of the election was given to the debtor. Before such notice the liabilities of the debtor are governed by the following rules:

1. When any of the things he is to deliver has been lost by unforeseen events, he must deliver whichever article the creditor may select from among those remaining or the one that remains, if only one.

2. When the loss of one of the things was due to the fault of the debtor, the creditor may ask for any of those remaining or the value of that which has disappeared through the fault of the debtor.

3. When all the things have been lost through the fault of the debtor, the creditor has the privilege of selecting and demanding the value of any one of them. The same rules are applicable to obligations of doing or not doing in case some or all of the acts to be performed have become impossible.

Divisible and indivisible obligations.

Obligations of giving a specified thing, as well as those not susceptible of partial fulfillment are considered indivisible.

In the case of indivisible obligations, if one of the debtors

fails to comply with his duties, he is liable in damages, or what the civilians call "damages and injuries" (*damnum emergens et lucrum cessans*). Joint debtors who were ready to comply with their duties need only contribute to the indemnity in a share proportionate to the value of the thing to be delivered or of the service of which the obligation consists.

Performance of obligations.

Commercial contracts must be performed in good faith, according to their terms, without misconstruing the correct, proper and usual meaning of the words, whether oral or written, and without altering the natural consequences of the language used by the contracting parties in expressing their will and contracting their obligation.[1]

When a difference is found between the two copies of a contract entered into through an agent or broker, the case is controlled by the corresponding memorandum entered in the books of the agent or broker, provided the books are kept according to the legal requisites.[2]

Rules for interpretation of contracts.

If there is any doubt about the meaning and effect of a contract the following rules are to be applied:

1. The intent of the parties prevails over the literal meaning of the words; the words and sentences in the letters of merchants are to be understood not in their academic connotation but according to the meaning attributed to them by merchants.[3]

[1] Spain, 57; Costa Rica, 194; Guatemala, 181; Honduras, 90; Mexico, 78; Panama, 214; Peru, 57; Uruguay, 209.

[2] Spain, 58; Costa Rica, 198; Honduras, 91; Panama, 215; Peru, 58; San Salvador, 77.

[3] When the tenor of a contract is clear, the rules for the interpretation of contracts are useless. Spain, Tribunal Supremo, April 11, 1865; *Gaceta* of April 23, 1865, January 15, 1867, *Ib.* Jan. 19, 1867, June 19, 1865.

The interpretation of a doubtful clause in a contract is a matter left to the discretion of the judge. Mexico, Primera Sala Del Sup. Trib. de Just. del Distrito Fed., May 29, 1893, Garcia *v.* Fuertes, *Anuario de Leg. y Jur. Sec. de Casación*, 1893.

2. The acts of the contracting parties, at the time of and subsequent to the making of the contract must be taken into consideration.[4]

3. Commercial usages and practices generally observed must be applied in appropriate cases.

4. When a word is used which may be applicable to different quantities or moneys it is understood that the quantity or money used in similar contracts is meant. When days, months or years are mentioned, it must be understood that the days are of twenty-fours hours, the months of the number of days indicated in the Gregorian calendar, and the year of three hundred and sixty-five days.

5. When a sentence may be construed in two meanings, one making the contract void and the other valid, the latter is to be accepted. If both interpretations make the contract valid, that more reasonable and fair is to be followed.[5]

6. Those conditions which are natural and usual in every contract are considered implied in it when the parties do not expressly stipulate otherwise.

7. When according to different interpretations a contract may be detrimental to one of the parties that interpretation which produces the least detriment must be accepted.[6]

The rule that when the purpose of the parties to a contract is well known it must govern the case rather than the grammatical meaning of the words of the instrument itself, is applicable in a contest between the parties themselves, but not to a third party, who must abide by the literal contents of the contract. Colombia, Trib. Sup. del Dist. del Centro de Antioquía, May 6, 1897, *Crónica Judicial de Antioquía*, XIV, p. 2085.

[4] Doubts which may arise in the interpretation of a contract must be resolved by taking into consideration principally the acts of the parties, which may show how they understood their rights and obligations as therein contracted. Spain, Trib. Sup., July 5, 1893; *Gaceta* of Nov. 17 and 18, 1893.

[5] It is never presumed that two persons stipulate senseless and useless things in a contract. Colombia, Trib. Sup. del Dist. de Magdalena, Sept. 11, 1897, *Revista Judicial*, XI, p. 938.

[6] A contract must be interpreted in the way least onerous to the debtor. Peru, Amat. *v.* Marzano, Corte Suprema de Just. Lima, October 10, 1908, *Anales Judiciales*, v. III, p. 452.

8. Acts of merchants are not presumed to be gratuitous.

9. When a doubt cannot be resolved by applying the principles of law, commercial usages and practices, it is decided in favor of the debtor.[7]

Contracts made in foreign countries.

In all matters relating to the performance of contracts entered into in foreign countries and to be performed in another country the law of the latter is applicable.[8]

By payment is meant the delivery of the thing or the rendering of the service which was promised. The creditor cannot be compelled to receive a thing different from that stipulated for, even though it is of an equivalent or greater value.[9]

Payment can be made by the debtor, his representative or by another person interested in the performance of the obligation. It can also be made by a third party with the expressed or implied consent of the debtor; and, finally, it can be made by a third party against the will of the debtor.[10] Expenses arising out of or incidental to payment are for the account of the debtor.[11]

Place in which the obligation is to be performed.

The rules of the civil law provide that the object of a contract must be delivered:

[7] Spain, 59, 60; Argentina, 218, 220; Brazil, 130 to 132; Chile, 6, 110; Colombia, 3, 4; Costa Rica, 196, 199, 201; Ecuador, 4, 156; Guatemala, 182, 183, 188, 190; Honduras, 92, 93; Nicaragua, 135, 136; Panama, 216, 220; Uruguay, 295, 296, 298.

[8] Chile, 113; Colombia, 202, 203; Ecuador, 154; Venezuela, 124.

[9] Spain, 1157 c. c.; Argentina, 744 c. c.; Chile, 1568 c. c.; Colombia, 1627 c. c.; Costa Rica, 764 c. c.; Mexico, 1514–1515 c. c.; Panama, 1044 c. c.; Uruguay, 1449 c. c.

[10] Spain, 1158–1159 c. c.; Argentina, 760 to 762 c. c.; Chile, 1572–2574 c. c.; Colombia, 1632 c. c.; Costa Rica, 765 c. c.; Mexico, 1529 to 1535 c. c.; Panama, 1045 c. c.; Uruguay, 1450 c. c.; Venezuela, 1208 c. c.

[11] Spain, 1168 c. c.; Chile, 1571 c. c.; Colombia, 1629 c. c.; Costa Rica, 784 c. c.; Mexico, 1524 c. c.; Panama, 1055 c. c.; Uruguay, 1467 c. c.; Venezuela, 1223 c. c.

(*a*) at the place designated in the contract;

(*b*) if no stipulation is made therefor, delivery is to be made at the place where the thing was when the contract was entered into;

(*c*) in any other case, at the domicil of the debtor.[12]

The commercial codes of Mexico and Panama embody special rules, as follows:

Mexico provides [13] that mercantile obligations must be performed at the place designated in the contract; if the contract is silent, performance must be made at the place deemed most conformable to the intention of the parties according to the character of the transaction, by mutual agreement or at the discretion of the judge.

Panama,[14] reproducing the rule of Mexico, except the clause relating to the mutual agreement of the parties or judicial discretion, provides instead that in other cases the contract must be performed at the place where the commercial house or the domicil or residence of the debtor is located. When the object to be delivered is a specific one located in the place where the contract was entered into, to the knowledge of the parties, delivery must be made in that place. Money debts,[15] except those consisting of negotiable instruments payable to bearer or to order, must be paid at the place where the creditor has his commercial house, or in default thereof at his residence.

Application of payments in case of several debts.

According to the civil law, a person having several debts of the same class owing to a single creditor, can declare at the time of making a payment to which debt it is to be applied. The payment cannot be applied to the capital or principal until the interest has been paid off. Payment must then be applied to the debt most onerous to the debtor. If the debts have all matured and are of the same kind, payment must be applied to all *pro rata*.[16] This system is favorable

[12] Art. 1171 of the Spanish civ. c.

[13] Art. 86. [14] Art. 224. [15] Art. 225.

[16] Art. 1172 to 1174 of the Spanish civil code.

to the debtor and in the absence of a contrary provision in the commercial law or usages it must be applied.

Chile [17] has adopted an intermediate system which leaves the application of a payment to the discretion of the creditor, provided the debtor has not designated any special debt at the time of making the payment.

Colombia [18] and Panama [19] follow a system entirely favorable to the creditor; the former provides that the creditor of various matured credits against the same debtor may apply a payment to the claim which is least secured and the latter leaves the application of the payment entirely to the discretion of the creditor.

The receipt and its legal effects.

A debtor who pays has a right to demand a receipt and need not be satisfied merely with the return of the document which serves to prove his debt. The receipt is the evidence of his payment. This consequence attaches to the character of an obligation and its performance, and it is expressly provided for by the codes of Chile,[20] Colombia,[21] Ecuador [22] and Venezuela.[23]

A receipt for a debt carries a presumption of the payment of all other debts due previously, when it is customary for the merchant who gives the receipt to collect his debts at fixed periods.[24]

In paying an account or in giving a receipt a merchant preserves his right to rectify mistakes, omissions, double entries or any other errors.[25]

Tender of payment and judicial deposit.

It would not be fair to allow the creditor to prolong the

[17] Art. 121. [18] Art. 213. [19] Art. 222.

[20] Art. 119. [21] Arts. 209, 210.

Article 9 of law No. 110 of 1888 prohibits the judges and public officials from admitting in evidence receipts which are not written on stamped paper. Colombia, Tribunal Supremo del Dist. de Cundinamarca, September 24, 1894, *Registro Jud. de Cundinamarca*, VI, p. 2571.

[22] Arts. 160, 161, 162. [23] Arts. 125, 127, 128.

[24] Chile, 120; Colombia, 211; Ecuador, 161; Venezuela, 127.

[25] Chile, 122; Colombia, 214; Ecuador, 162; Venezuela, 128.

obligations of the debtor for an indefinite period, particularly in mercantile affairs which require quick disposition. The commercial codes have no general provisions tending to release the debtor on tender of payment; they imply such rules, however, in cases such as the delivery of the thing sold, when the buyer does not accept it, or in cases of transportation and freight. The procedure followed, therefore, is that established by the civil law, which, substantially, is as follows:

When the creditor refuses to accept payment, when he is absent or is an incompetent or incapacitated person, when different persons claim to be the legal creditor, or when the document in which the obligation was evidenced has been lost, the debtor may release himself from the obligation by depositing the object or amount of the debt in the place designated by the court. Before the court will order the deposit, the debtor is required to prove that the payment was tendered and the intention to deposit advertised. Notice must also be given to the interested persons after the deposit has been made. The judicial deposit puts an end to the obligation of the debtor; the creditor can at any time withdraw the deposit, but if he authorizes the debtor to withdraw it the creditor loses all his special privileges with respect to the money or article deposited. The debtor and sureties are thereby discharged.[26]

Loss of the thing due.

The obligation of giving a specified thing is extinguished when the thing is lost or destroyed without fault on the part of the debtor, provided he is not in default. In the

[26] Spain, 1176 c. c.; Argentina, 790 c. c.; Chile, 1598 c. c.; Colombia, 1656 c. c.; Costa Rica, 797 c. c.; Mexico, 1556 c. c.; Panama, 1063 c. c.; Uruguay, 1481 c. c.; Venezuela, 1232 c. c.

The judicial deposit of a debt does not exonerate a debtor from his obligation as long as said deposit has not been approved by the court in a proper judicial decision; therefore the debtor may be adjudged in default in complying with the corresponding contract while the proceedings relating to the judicial deposit are pending. Mexico, Tribunal Sup. del Dist. Fed., August 28, 1899, Arevalo *v.* Diputación de Minería de Pachuca, *An. de Leg. y Jur. Sec. de Casación*, 1894, p. 361.

absence of proof to the contrary, it is presumed that the loss occurred through the fault of the debtor when the thing was lost while in his possession.

When the obligation is extinguished by loss of the thing, all rights of action which the debtor might have had with respect thereto against third persons pass to the creditor.

Release from a debt.

Release from a debt is governed by the law with respect to gifts, but the release may be tacit.

When a private instrument evidencing a debt appears in possession of the debtor, it is presumed, in the absence of proof to the contrary, that the creditor intentionally delivered the instrument to and thereby discharged the debtor.

Merging rights of creditor and debtor.

Merging of the rights of creditor and debtor does not extinguish debts due in severalty, except with respect to the part in which the character of creditor and debtor are merged.

Set-off.

A set-off takes place when two persons are reciprocally creditors and debtors of each other. In order that set-off may take place it is necessary:

1. That each of the persons indebted be a principal debtor;
2. That the reciprocal debt consists of a liquidated sum of money or if the things due are perishable, that they be of the same kind and quality;
3. That both debts be due;
4. That no lien or suit instituted by a third party, of which due notice has been given to the debtor, affects either creditor or debtor.

Nevertheless, sureties may offset against the claim of the creditor whatever the latter owes to the principal debtor.

A debtor who has consented to an assignment of rights by his creditor to a third party, cannot set off against the

assignee a claim against the assignor. In the United States generally, notice of the assignment suffices to effect this disability. If the debtor, after notice by the creditor of the assignment, does not consent to it, he may set off against the assignee his claims against the assignor existing prior to the assignment, but not those contracted subsequently. When the assignment is made without the knowledge of the debtor, he can offset against the assignee credits existing both prior to and subsequent to the assignment, but without knowledge thereof.

Set-off can not take place when any of the debts is derived from a deposit or thing deposited with the debtor, nor can it take place against an obligor whose promise was gratuitous and without consideration.

Novation (novación).

Substitution of a new obligation for an old one, which is thereby extinguished, may occur in one of the following ways:

1. By a change in the subject-matter of the debt or its principal elements or conditions.
2. By a substitution in the person of the debtor. This novation may be made without the privity of the old debtor, or by the debtor's transmission of his debt to another, who accepts the obligation and is himself accepted by the creditor.
3. By a substitution in the person of the creditor. All three parties must assent to the new bargain. It is not presumed; it must always be expressly declared.[27]

Nevertheless, the substitution of a new creditor in the rights of a former one is presumed:

1. When an ordinary creditor pays a preferred creditor, *e. g.*, in cases of claims against bankrupts.
2. When a third party who has no interest in the debt pays it with the express or tacit consent of the debtor.

[27] The substitution of one obligation for another is not presumed and is not proved by a copy of a contract in which no mention is made of the obligation supposed to be substituted. Mexico, Secunda Sala del Sup. Trib. del Dist. Fed., Aug. 8, 1911, Gallopin *v.* Lejarza, *Diario de Jur.*, 1912, p. 386.

3. When a person who has an interest in the performance of the obligation pays it, in which case a partial or total merging of the primary obligation may take place.[28]

In such case, the partly paid creditor may enforce his rights with respect to the balance with a preference over the subrogated creditor.

Prescription (statute of limitations).

In legal matters the word "prescription" (*prescripción*) has two meanings:

(*a*) it is a method of acquiring ownership; and,

(*b*) it is a method of releasing a person from an obligation by lapse of time.

Requisites of prescription.

For acquisitive prescription it is necessary to possess things:

a, in good faith; *b*, under a claim of right or valid title; *c*, during a certain time specified by law; *d*, publicly; *e*, peacefully; and *f*, without interruption.

Good faith consists in the belief that the person from whom the thing was received was its owner and could transfer ownership therein.

By claim of right or valid title is understood a title which legally suffices to transfer ownership in the thing claimed. A claim of valid title must be proved; it is never presumed.

The prescriptive period established by the law varies in different cases and countries. It will be referred to in its appropriate place in this work.

Possession is said to be public or notorious when the possessor does nothing to prevent the fact of his possession from becoming known.

It is said to be peaceful, when it was not acquired by a violent act.

[28] The substitution of a new creditor for an old one transfers to that new creditor all actions, privileges, mortgages and pledges against the principal debtor and his co-debtors. Ecuador, Corte Suprema de Justicia, April 22, 1915, Dillon *v.* Barba, *Gaceta Judicial*, July 24, 1915.

Possession is interrupted: *a*, naturally, when for any cause it ceases for one year or more; *b*, civilly, when a judicial summons has been served on the possessor, even though it is made by order of an incompetent judge, provided:

1. It is not void because lacking legal formalities;
2. The plaintiff has not withdrawn his complaint or has not failed to prosecute it in time;
3. The complaint is not dismissed.

Mercantile transactions relate, as a rule, to personal property; hence the requisite of a claim of right or valid title is not necessary, because the mere possession of personal property in good faith is in most cases equivalent to a *prima facie* valid title.

Negative prescription or the limitation of actions against obligors takes place by the mere lapse of the period of time fixed by law.

Non-performance of obligations.

Failure to perform an obligation may be voluntary or involuntary.

Voluntary failure. Default (Mora).

An obligor is "in default" when he fails to perform his obligation at the time specified by agreement or fixed by law.[29]

An obligation may be due on a certain day or may have no period established for its fulfillment. In the latter case the creditor is required to demand payment from the debtor (*hacer interpelación*) before a judge, a notary or any other official authorized thereunto.[30]

[29] A contracting party is not in default when he does not fulfill an obligation, if the other party fails to comply with his duties. Mexico, Tercera Sala del Sup. Trib. del Dist. Fed., Dec. 27, 1911, Elsasser y Cia *v.* The Jersey Dairy Association, S. A. *Diario de Jur.*, 1912, p. 249.

[30] In obligations of giving certain sums of money having no fixed term for their fulfillment, the obligation to pay legal interest begins when the proper demand for payment is made. Mexico, Juzgado Primero de lo Civil del Distrito Federal, November 15, 1911, Zaccagua *v.* Compañía Italiana de Construcciones, S. A. *Diario de Jurisp.*, 1912, p. 705.

In the other case, namely, when the obligation is due on a certain day, there are two systems governing the determination when the debtor is in default:

System of the Spanish code of 1885.

A debtor is in default in mercantile matters, from the day following that on which the obligation becomes due. In Guatemala since the obligation is due.[31]

System of the Spanish code of 1829.

A debtor is in default in mercantile matters, when, after the obligation has become due, a demand is made upon him judicially or before a notary or other official to comply with the obligation.[32]

Negligence (culpa).

By negligence is meant the omission, causing injury to another, of that care required by the nature of the obligation and the circumstances of persons, things and places.

Fraud (dolo).

Fraud likewise causes injury, but differs from negligence because in case of fraud the injury is intentionally induced.[33]

The obligation to pay damages arising from future negligence can be lawfully waived in a contract, but the waiving of that obligation for injuries arising from fraud is unlawful and void.

Damages.

The failure to perform a contract gives the other contract-

A demand is necessary in the case of obligations of doing some act in order that the debtor be in default. *Ib.*

[31] Spain, 63; Guatemala, 194; Honduras, 96; Mexico, 85; Panama, 232; Peru, 63.

The debtor when obliged to pay the price of something bought on credit, is in default and must pay interest on the debt from the day the debt is due, without a previous demand. Mexico, Primera Sala del Sup. Trib. de Just. del Dist. Fed., March 16, 1893, Camacho *v.* Grande Guerrero, *Anuario de Leg. y Jur. Secc. de Casación*, 1893.

[32] Bolivia, 222; Brazil, 138; Costa Rica, 208; Nicaragua, 139; Uruguay, 213.

[33] Spain, Tribunal Supremo, March 11, 1904; *Gaceta* of May 9–11, 1904. The graduation of a fault or negligence is a matter left to the discretion of the courts.

ing party who has performed, the right to ask for the rescission of the contract, and subjects the party in default to the secondary duty of paying damages. The civilians use for the concept "damages" the phrase "damages and injuries."

By damage (*daño*) is meant any loss directly sustained (*damnum emergens*) and by "injury" (*perjuicio*) every profit that one is prevented from obtaining (*lucrum cessans*). "Damages," therefore, includes both elements, physical losses sustained and loss of prospective profits. But, as in American law generally, the lost profits must be directly ascertainable and proximate, and not merely indirect, remote or speculative.

The code of Uruguay [34] provides that, except in cases of special provision of the code or of fraud, the debtor is only responsible for damages which the parties have foreseen, or which might have been in contemplation at the time of the contract.[35]

Payment of interest.

In obligations involving the payment of a certain amount of money, penalty for default comprises merely the payment of interest, except in the case of exchange or contrary agreement. Such interest is due without the necessity of the creditor's proving any loss and even when the debtor acts in good faith.[36]

Panama [37] provides that a debtor in default must pay damages thereby arising and must answer for unforeseen events; and that when a certain rate of interest has been stipulated in case of default and the injury sustained by the

[34] Art. 223.

[35] This is not unlike the rule of the United States Supreme Court in Howard *v.* Stillwell Tool Mfg. Co. (1895), 139 U. S. 199, that profits which may reasonably be presumed to have been within the contemplation of the parties were an element of the measure of damages.

[36] By the words *interés corriente* is meant interest generally accepted in commercial matters at a certain locality where the special transaction takes place. Colombia, Trib. Sup. del Dist. Jud. de Medellin, Dec. 17, 1895, *Crónica Judicial de Antioquía*, IV, p. 634.

[37] Art. 235.

creditor exceeds the amount of interest, the debtor must pay the whole damage.

Article 240 of the code of Panama affords an exceptional protection to the merchant creditor. It reads as follows:

"With respect to matured credits of a mercantile character, the creditor has a lien on money, chattels and any other property of his debtor of which he may be in actual possession or which he may have at his disposal by the debtor's consent."

This lien cannot be enforced if when the things came into the possession of the creditor as bailee, the debtor himself or a third person had indicated a special destination for them. Merchants can also enforce this lien among themselves with respect to their outstanding credits arising out of bilateral mercantile contracts, in two cases:

(*a*) when the debtor went into bankruptcy or suspended payments;

(*b*) when the creditor suing out a writ of attachment could not find sufficient unburdened property belonging to the debtor.[38]

Involuntary failure of performance.

Involuntary failure to perform an obligation arises from an unforeseen event or by *force-majeure.*

PROOF OF OBLIGATIONS

A commercial contract can be proved:

1. By public instruments.[39]
2. By the memoranda of brokers and the certified copies of their books.

[38] A *comissionista* (commercial agent) is not obliged to pay damages when he refused to hand over merchandise belonging to his principal so long as the latter does not pay his compensation. Peru, Dalma *v.* Petti, January 7, 1907. *Anales Judiciales*, v. II, p. 542.

[39] When the existence of a contract is proved by means of a public document, and at the same time other documents equally trustworthy and other means of evidence contradict said public document, the judge may use his discretion in evaluating the evidence. Spain, Trib. Sup., November 15, 1890; *Gaceta*, December 10, 1890.

3. By private documents signed by the parties or by some person at their request and in their behalf.

4. By epistolary or telegraphic correspondence.

5. By commercial books and accepted invoices.

6. By the admission and sworn statement of the parties.

7. By the testimony of witnesses.

8. By presumptions and other legal means.[40]

This matter is more fully discussed in the chapter on legal procedure. Attention may, however, be here called to certain peculiarities of the commercial law.

Admissibility of the testimony of witnesses.

The testimony of witnesses is not admissible to evidence contracts over 1,500 pesetas ($300 U. S.) in Spain,[41] $200 ($84 U. S.) in Argentina,[42] 400 milreis ($128 U. S.) in Brazil,[43] $100 ($43 U. S.) in Costa Rica,[44] $500 in Guatemala,[45] $150 ($58 U. S.) in Honduras,[46] 200 ($192 U. S.) soles in Peru.[47]

In other countries the testimony of witnesses is generally accepted regardless of the amount of the contract, unless otherwise expressly provided by the law.

Notwithstanding the limitation as to oral testimony in Guatemala the testimony is admissible when intended not to enforce the performance of a contract but to compel the party to execute it in writing.

Furthermore, it must be borne in mind that the limitation with respect to the admissibility of the testimony of witnesses is applicable only to the proof of contracts, not to the proof of commercial acts of any other nature.

In Chile [48] and Panama,[49] the courts may in their discretion accept parol evidence even against the tenor of public documents.

We have already discussed the probative force of the

[40] Argentina, 208; Bolivia, 122; Costa Rica, 209; Ecuador, 164; Panama, 244; Mexico, 1205; Venezuela, 130.

[41] Art. 51. [42] Art. 209. [43] Art. 123.

[44] Art. 184. [45] Art. 195. [46] Art. 84.

[47] Art. 51. [48] Arts. 128, 129. [49] Art. 246.

commercial books, and in the chapter on legal procedure we shall deal with the other forms of evidence. Invoices in which merchants customarily state the amount, character and quality of merchandise sold cannot produce any effect in favor of the issuing merchant, until after they have been accepted or acknowledged by the purchaser. This fact may be proved by all forms of evidence; therefore invoices are included within the rules applicable to private instruments.

NULLITY OF CONTRACTS

Contracts in which one of the essential requirements is missing are void.

Effects of the nullity of a contract.

When the nullity of an obligation has been declared, the contracting parties must restore to each other the subject-matter of the contract with its fruits or proceeds or the value thereof with interest. But this rule is subject to the following limitations:

1. When the nullity is caused by incompetency of one of the contracting parties, the incompetent party is under no duty to make restitution, except to the extent that he has profited by the thing or by the value received by him.

2. When the nullity arises from the illegality of the consideration or the object of the contract, provided it constitutes a crime or misdemeanor common to both contracting parties, they have no right of action against each other and criminal proceedings may be instituted against them. Things which may have been the subject-matter of the contract are restored or applied as is provided by the penal code with respect to the subject-matter of crimes or misdemeanors.[50]

This rule is applicable to cases in which there has been a crime or misdemeanor on the part of only one of the

[50] Only the contracting parties and their successors may demand the nullity of a contract. Spain, Trib. Sup., April 1, 1897; *Gaceta* of April 18, 1897.

contracting parties; the innocent party is then entitled to recover what he has given, but is not bound to comply with what he has promised.

3. If the illegal consideration or object constitutes neither a crime nor a misdemeanor the following rules are observed:

(*a*) when both parties are culpable, neither can recover what he has parted with by virtue of the contract, nor claim the fulfillment of what the other party has promised;

(*b*) when only one of the contracting parties is culpable, the latter cannot recover what he has parted with or demand the fulfillment of what has been promised him. The innocent party may demand the restoration of what he has parted with, while under no duty to perform his own promise.

4. Whenever a person who, by a declaration of nullity, is under a duty to return a thing is unable to return it because of its loss, he must return the fruits or proceeds gathered or accumulated and its value at the time of loss, with interest from that date.

So long as one of the contracting parties fails to return that which he is obliged to deliver by virtue of a declaration of nullity, the other party cannot be compelled to carry out his own duties in the premises.

The action for a declaration of nullity is extinguished by the confirmation of the contract by the party entitled to institute that action.

CHAPTER XVIII

COMMERCIAL AGENCY

SPAIN.—Benito y Endara, Lorenzo: El mandato mercantil. Barcelona, 1904.

Estasén, Pedro. El viajante y el representante de comercio según el derecho español. Barcelona, 1904.

BRAZIL.—Gama, Alfonse Dionysio: Das procuraçoes, 2d ed., cor. e muito augm. Rio de Janeiro, 1913.

Gonçalves, Maia: Theoria e pratica das procuraçoes. Amazonas, 1910.

CUBA.—Biblioteca jurídica de la República de Cuba. Procuradores y mandatarios judiciales. Disposiciones vigentes para el desempeño de procurador y mandatario judicial en la República de Cuba. Habana, 1910.

MEXICO.—O'Reilly, Francisco: ¿El comisionista que anticipa fondos puede vender los efectos contra las instrucciones expresas del comitente? *El Derecho*, México, 1897, p. 273.

Definition.

Agency, in general, is a contract by which one person, the principal, gives another, the agent, a power which the latter accepts, to represent the former, in order to undertake in his name and for his account some act or a series of acts.[1]

The contract of agency is called *mandato;* the principal is the *mandante*, or *comitente* in commercial affairs, and the agent or representative the *mandatario* or *comisionista*. The document containing the power of attorney is called *poder*. The greater part of the law of agency is governed by the civil code.

Legal capacity to be an agent.

In stating the general principles which govern the capacity

[1] Power given by a merchant to a bank to cash bills of exchange which represent the price of merchandise is a contract of agency and not one of purchase and sale. Cuba, Trib. Sup., Oct. 13, 1905; *Gaceta* of May 16, 1906.

A contract by which one party contributes his services to resell goods which the other is to send him, the parties dividing the profits derived therefrom, is a partnership, not an agency. Cuba, Trib. Sup., Aug. 6, 1902; *Gaceta* of Aug. 30, 1902.

of a party to bind himself contractually, requiring a certain age and other conditions, the law takes into consideration the usual cases. But a person, without reaching that age or fulfilling those conditions, may be deemed by a given principal better qualified or more reliable than other persons of legal age and full capacity; that is a matter which concerns the grantor of the power, and the law in some countries recognizes the privilege of a principal to appoint a minor his agent, according to the following systems:

1st System. An emancipated minor may be an agent, but any actions that the principal may bring against him are subject to the rules governing the obligations of minors.[2]

2d System. A power of attorney can validly be granted to a person incapable of binding himself, and the principal is bound by the execution of the agency, both as to the agent and as to third persons with whom the latter has contracted. An incompetent person who accepts a power can set up the nullity of the agency when he is sued by the principal for not performing the obligations of the contract, without prejudice to the right of action of the principal for conversion of the principal's property to the agent's use.[3]

3d System. Non-emancipated minors can be granted powers, but the principal has no right of action against them except in accordance with the rules applicable to obligations of minors.[4]

4th System. Those who have no capacity to bind themselves cannot as a rule be agents. Minors, however, can be grantees of powers, except for judicial purposes; but the principal's rights of action against a minor are limited according to the principles of the obligations of minors.[5]

[2] Spain, 1716 c. c.; Haiti, 1754 c. c.; Panama, 1407 c. c.

[3] Argentina, 1931, 1932 c. c.; Chile, 2128 c. c.; Colombia, 2154 c. c.; Uruguay, 2062 c. c.

[4] Brazil, 1298 c. c.; Honduras, 1895 c. c.; Nicaragua, 2128 c. c.; San Salvador, 2036 c. c.; Venezuela, 1656 c. c.

[5] Costa Rica, 1260 c. c.

5th System. Minors cannot be agents.[6]

6th System. Married women and minors over eighteen years old can accept a power, if authorized respectively by the husband or parent to do so.[7]

In Spain [8] married women also need their husband's authorization to accept a power, while in Haiti [9] such authorization is not necessary.

Forms of power.

The power of attorney is the instrument by which the agency is created or the agent's powers defined. The Anglo-American lawyer and business man in their dealings with Latin-American countries find it occasionally difficult to determine whether a certain authority must or must not be specifically mentioned in a power of attorney. They are inclined to believe that powers of attorney are complicated and formalistic instruments. This idea has probably been produced by the powers executed by notaries in foreign countries. Notaries and lawyers very frequently indulge in legal verbosity and surplusage. As a matter of fact a power of attorney may be at the same time brief yet comprehensive; it is merely necessary to be careful to mention those faculties of the agent which the law does not consider implied in a general power, even though words like "ample," "liberal," or any other emphatic adjectives might have been used.

Law which governs the form of a power to be exercised in a foreign country.

The form of power of attorney depends upon the law of the place where such power is given and executed, by application of the principle, generally accepted in private international law, of *locus regit actum.* If the law of New York, for instance, validates a power given in a mere letter signed by the principal, that letter suffices to prove the power in other countries, notwithstanding that the law there requires a document executed before a notary public.

[6] Guatemala, 2194 c. c. [7] Mexico, 2357 c. c. [8] Art. 1716 c. c.
[9] Art. 1754 c. c.

It is necessary, however, to observe that in most of the Latin-American countries a public instrument is required not as a matter of form, but as an essential condition for the existence of the agent's power. In that case the requisite of a public instrument affects the validity of the act itself; hence it is governed, in that respect, by the law of the place where the agent is to exercise his powers. If that law requires a public instrument, the power must be embodied in such an instrument; but otherwise the method of its execution is left to the law of the place where it is drawn.[10]

In this matter, however, what in Latin-American countries is called a "public instrument" is practically unknown in the United States; at least in those states, in which the law is based on Anglo-Saxon traditions. By reason of this circumstance, and inasmuch as a power can always be executed in a public instrument even though this formality is not necessary for certain transactions, the most advisable practice is to draw the power in the form used in the United States, adopting the language of Latin-America as far as possible, and have the signature of the grantor and witnesses acknowledged before a notary public. This would approximate most nearly a Latin-American "public instrument"; the signature of the notary must then be authenticated by the county clerk or secretary of state of the state, and the latter's signature finally authenticated by the consul of the country where the power is to be exercised.

Express and implied power.

A power may be either express or implied.[11] A power is implied when the principal, knowing that a person is acting in his behalf, does nothing to prevent such act of intervention in his business, and thus tacitly acquiesces in the acts done. But evidence of such acquiescence cannot be adduced except

[10] Laurent, Principes de Droit Civil, vol. I, p. 155. For a general idea of what is meant by a public instrument, see chapter on Procedure, Contentious Jurisdiction, *infra*.

[11] Spain, 1700 c. c.; Argentina, 1907 c. c.; Ecuador, 2110 c. c.; Honduras, 1889 c. c.; Nicaragua, 2133 c. c.; Panama, 1401 c. c.; San Salvador, 2031 c. c.; Uruguay, 2053 c. c.; Venezuela, 1651.

in accordance with the general rules of evidence, which limit the admission of the testimony of witnesses in certain cases.[12]

A power can never be implied in Costa Rica,[13] Guatemala,[14] Haiti,[15] Mexico,[16] Peru [17] and Santo Domingo.[18] However, under the name of *gestor oficioso*, a person can act in behalf of another who is absent or cannot attend to his business, the latter not being bound by the acts of the *gestor*, unless the principal ratifies or avails himself of the benefits of the acts done by the *gestor*.[19]

An express power can be given by means of a public or a private instrument, or even verbally. An oral power is only valid when the law does not require a written document and the amount of the transaction is not over the maximum fixed by the law for the admissibility of oral testimony.[20]

When a public instrument is necessary.

In the matter of requiring a public instrument, the following systems may be noted:

System of Spain. A power must be executed in a public instrument when it embraces an authorization to contract marriage in the name of the principal, when it is to cover general representation in judicial cases or in a special case; and when it gives authority to manage property, or to execute a document which must itself be drawn in a public instrument or may prejudice a third party.[21]

System of Argentina. A power produces the same

[12] Acts undertaken by a person who claims to be the representative of another, bind the principal, even though the latter gave him no power, provided he accepts the contract entered into by such person. Argentina, Cam. Fed. de Apel. de la Cap., June 27, 1914, *Jur. de los Tribs. Nacs.*, June, 1914, p. 71.

[13] Art. 1251 c. c. [14] Art. 2187 c. c. [15] Art. 1749 c. c.

[16] Art. 2345 c. c. [17] Art. 1244 c. c. [18] Art. 1987 c. c.

[19] Mexico, 2416, 2419, 2428 c. c.

[20] A commercial agency or commission can be granted orally or by means of letters. Colombia, Corte Sup. de Just., Oct. 27, 1904; *Gaceta Jud.*, vol. XVII, p. 152.

[21] Spain, 1280 c. c.; Panama, 1131 c. c.

effects whether expressed in a public or in a private instrument.[22]

System of Chile. This system is similar to that of Spain, but its wording is simpler, providing merely that a power must be granted in a public instrument when the donee of the power must execute an instrument of that kind.[23]

System of Costa Rica. Powers are divided into three classes, namely: special, general, and most general (*generalísimo*). Powers of the last two classes require incorporation in a public instrument and inscription in the corresponding section of the Registry of Property.[24]

System of Colombia. Powers may be either express or implied without any limitation.[25]

System of Mexico. A power must be expressed in a public instrument:

(*a*) when it is general;

(*b*) when the amount of the transaction for which it is granted exceeds one thousand pesos;

(*c*) when, by virtue thereof, the agent must execute in the name of the principal a document which must be expressed in a public instrument, according to law;

(*d*) when it is granted for a judicial matter, provided the amount claimed is one thousand pesos or more.[26]

[22] Argentina, 1873 c. c.; Haiti, 1749 c. c.; Santo Domingo, 1985 c. c.

A power of attorney to undertake business, the amount of which is over 400 milreis can only be proved by means of a written instrument. Brazil, Trib. de Just. de S. Paulo, Oct. 21, 1903, *Sao Paulo Judiciario*, vol. III, p. 303.

A power of attorney can be given orally, in a private or in a public instrument, by means of a letter, under the form of a commission, a request or even an indirect petition. In order to give a power by means of a letter it is enough to show in the same the purpose of the principal to entrust the addressee with certain business, no matter in what form the letter is drafted. Brazil, Trib. de S. Paulo, Nov. 10, 1905, *Sao Paulo Judiciario*, vol. IX, p. 311.

A power the purpose of which is other than appearance in court can be given orally. Brazil, Trib. de Just. de S. Paulo, Dec. 17, 1903, *Ib.*, vol. II, p. 290.

[23] Chile, 2123 c. c.; Ecuador, 2110 c. c.; Nicaragua, 2123 c. c.; San Salvador, 2031 c. c.; Uruguay, 2053 c. c.

[24] Costa Rica, 1251 c. c.

[25] Colombia, 2149 c. c.; Honduras, 1889 c. c.; Venezuela, 1651 c. c.

[26] Mexico, 2352, 2353 c. c.

System of Peru. A power must be incorporated in a public instrument when the grantee must execute a public instrument on behalf of the principal or when the amount claimed in a law suit exceeds fifty pounds sterling.[27]

Authorization contained in a general power.

The power of an agent being construed according to the law of the place where the power is to be exercised, it may well happen that the extent of such power is greater there than in the country where the principal originally executed the power. A general power implies only acts of management or administration.[28]

Planiol, the present professor of civil law in the Paris School of Law, distinguishing acts of disposition from acts of management or administration says: "In a general way we can say that under acts of disposition besides all alienations properly so called (sales, barters, gifts, contributions to associations, etc.), a certain number of acts are included which affect definitively the property of a person for the future; a mortgage and the constitution of an easement or servitude being among the principal acts of this kind. The characteristic feature of acts of management is that they do not tie up the property for more than a very short period and therefore they can be frequently renewed." [29] The code of

A power executed in a private instrument is proper in order to present a judicial demand of not more than one thousand pesos, but not to answer counterclaims exceeding that amount. Mexico, Trib. Sup. del Dist. Fed. 2a Sala, Aug. 28, 1911, *Diar. de Jur.*, vol. XXV, p. 695.

An agent does not exceed his powers when he makes a contract on more advantageous conditions than directed by his principal. Mexico, Trib. Sup. del Dist. Fed., 3a Sala, Oct. 9, 1912, *Diar. de Jur.*, v. XXVIII, p. 294.

A power of attorney executed before a notary public constitutes full evidence. (See chapter on Procedure.) Mexico, Trib. Sup. del Dist. Fed., Nov. 1, 1910, *Diar. de Jur.*, v. 24, p. 473.

[27] Peru, 1297 c. c.

[28] Spain, 1713 c. c.; Argentina, 1914 c. c.; Bolivia, 1337 c. c.; Brazil, 1295 c. c.; Chile, 2132 c. c.; Colombia, 2158 c. c.; Haiti, 1752 c. c.; Honduras, 1892 c. c.; Mexico, 2350 c. c.; Nicaragua, 2132 c. c.; Panama, 1404 c. c.; Peru, 1926 c. c.; San Salvador, 2040 c. c.; Santo Domingo, 1988 c. c.; Uruguay, 2056 c. c.; Venezuela, 1654 c. c.

[29] Traité Élémentaire de droit civil, v. I, p. 966.

Chile makes an enumeration that can be applied generally. It provides that a power does not, as a rule, authorize the agent to do more than undertake acts of administration, for example, to pay the debts and collect the credits of the principal, both being incidental to his regular business, to institute or prosecute judicial actions against debtors; to begin possessory actions and interrupt the running of prescriptive periods or statutes of limitation in connection with matters arising out of the principal's business; to make contracts for the repair of things entrusted to his management; and to purchase the necessary materials for the cultivation of lands and the operation of mines, factories or industries placed in his charge.

To undertake acts which cannot be classified as those of administration or management a special power is required; thus it is necessary to draw a special power or insert a special clause in a general power in order to authorize an agent:

(*a*) to compromise a claim;

(*b*) to sell or in any other way dispose of property;

(*c*) to mortgage property;

(*d*) to submit cases of the principal to arbitration;

(*e*) to do any other act which may affect the ownership of property of the principal.[30]

In Colombia,[31] Ecuador,[32] Guatemala,[33] Haiti,[34] Honduras,[35] Mexico,[36] Nicaragua,[37] Peru,[38] San Salvador,[39] Santo Domingo [40] and Venezuela,[41] a special power is also necessary in order to receive money due the principal.

In Costa Rica [42] a most general (*generalísimo*) power

[30] Spain, 1713, 1714 c. c.; Argentina, 1915 c. c.; Bolivia, 1337, 1338 c. c.; Brazil, 1295 c. c.; Colombia, 2158, 2167 c. c.; Ecuador, 2119, 2128, 2130 c. c.; Guatemala, 2192 c. c.; Haiti, 1752, 1853 c. c.; Honduras, 1892 c. c.; Mexico, 2350, 2387 c. c.; Nicaragua, 2141, 2142, 2143 c. c.; Panama, 1404 c. c.; Peru, 1927 c. c.; San Salvador, 2049, 2050 c. c.; Santo Domingo, 1988 c. c.; Uruguay, 2056 c. c.; Venezuela, 1654, 1655 c. c.

[31] Art. 1640 c. c. [32] Art. 2130 c. c. [33] Art. 2192 c. c.
[34] Art. 1752 c. c. [35] Art. 1892 c. c. [36] Art. 2387 c. c.
[37] Art. 2143 c. c. [38] Art. 1927 c. c. [39] Art. 2051 c. c.
[40] Art. 1988 c. c. [41] Art. 1654 c. c. [42] Art. 1253 c. c.

entitles the agent to sell, mortgage or in any other way dispose of or burden the estate of the principal, to accept or reject inheritances, to represent the principal in court, to enter into any kind of contracts, and to perform any other legal act which the principal himself might undertake, except certain acts involving family relations and the making of gifts.

The code of Argentina enumerates so elaborately the cases in which a special power, or special mention of such authority in a general power is required, that it seems advisable to transcribe the provision in full, for it may serve as a guide in drawing powers for countries of the civil law, notwithstanding the fact that in some of them various of these acts require no special power.

According to the Argentine code special powers are necessary:

1st. to make payments which are not the usual payments of the business;

2d. to effect novations which may extinguish obligations already existing at the time the power was granted;

3d. to compromise, submit cases to arbitration, submit to the jurisdiction of judges not normally competent in the case, waive the right of appeal or the operation of statutes of limitation already run;

4th. to make any gratuitous waiver, or remission or composition of debts, except in the event of the bankruptcy of the debtor;

5th. to contract marriage in the name of the principal;

6th. to acknowledge natural children;

7th. to enter into any contract the object of which is to convey or acquire ownership in real estate with or without consideration.

8th. to make gifts, other than presents of small sums to the employees or persons in the service of the business;

9th. to lend or borrow money, unless the business of

the principal consists in lending and borrowing at interest, or when loans are a consequence of the management, or if it is absolutely necessary to borrow money to preserve the property or things managed;

10th. to lease for more than six years the real property in his charge;

11th. to accept deposits in the name of the principal, unless the business consists in receiving deposits and consignments, or the deposit is incidental to the management;

12th. to obligate the principal to render some service, to be a bailee or to do something gratuitously;

13th. to form an association;

14th. to obligate the principal as a surety;

15th. to create or assign real rights in immovables;

16th. to accept inheritances;

17th. to acknowledge obligations antedating the power.[43]

A special power to compromise does not include the power to submit to arbitration.[44]

A special power to sell does not include the power to mortgage, nor to receive the price of the sale when time for payment has been granted; nor does a power to mortgage include the power to sell.[45]

A special power to do certain acts of a specified nature must be limited to the acts for which it was granted, and cannot be extended to other analogous acts, even though the latter could be considered as a natural consequence of those which the principal has empowered the agent to perform.[46]

A special power to mortgage real estate of the principal does not include the power to mortgage it for debts antedating the power.[47]

The power to contract an obligation includes the power to perform it, provided the principal delivers to the agent the money or the thing which must be given in payment.[48]

[43] Art. 1915 c. c. [44] Art. 1916 c. c. [45] Art. 1917 c. c.
[46] Art. 1918 c. c. [47] Art. 1919 c. c. [48] Art. 1920 c. c.

A power to sell the property of an inheritance does not include the power to assign it before having received it.[49]

A power to collect debts does not include the power to sue the debtors, or to receive one thing in lieu of another, or to make novations, or grant total or partial releases.[50]

Powers executed by corporations, partnerships or an agent.

Powers of attorney executed by corporations, partnerships, or persons who act as agents of another, as attorneys, guardians, receivers in bankruptcy, executors of a last will, etc., must bear evidence that the person executing them for the corporation or partnership or in behalf of another had authority to bind the association or person for which or for whom he is acting.

In the case of a corporation it is necessary to transcribe: *a*, that part of the charter which shows that the corporation was properly organized, where and when it was organized, and the scope of the association; *b*, that part of the articles of incorporation or by-laws which authorizes the directors or other officers to execute the power, or, in lieu thereof, the corresponding part of the minutes of the general meeting of stockholders, in which a particular officer or person was authorized to execute the power; *c*, when the person was not directly designated by the stockholders' meeting, a copy of the minutes showing the election of directors must be included; *d*, the corresponding part of the directors' meeting to prove that they decided to grant the power or in which they authorized any of their members to execute it, in case the granting of the power is within the authority of the directors.

In powers granted by partnerships it is necessary to transcribe that part of the articles of agreement which mentions the date and place of organization, its line of business and the names of the managers thereof as well as their power to appoint a representative for the partnership; or in lieu thereof, a copy of the minutes of the partners' meeting

[49] Art. 1921 c. c.

[50] Art. 1922 c. c.

in which they decided to appoint an attorney and execute the power, must be inserted.

In case the power is executed by an attorney properly authorized thereto, the part of the power granted to the attorney by the principal, showing the place and date of its execution, the name of the notary who authenticated the same, and the clause in which the authorization to execute a power is given, should be inserted.

When a guardian or receiver or executor of a last will or any other person who derives his authority from a judicial or extrajudicial aet is to exccute a power, everything proper to show the authority derived therefrom should be included.

Legalization of powers.

Besides the formal requisites mentioned above, it is necessary to legalize the power, and for that purpose the signature of the notary who authenticated that of the grantor must in turn be authenticated by the county clerk, and the consul of the country where the power is to be exercised must attest that the corporation or partnership, as the case may be, is legally established, and that the signature of the county clerk is genuine. If the power is signed in a county where there is no consul of the country in which the power is to be exercised the signature of the county clerk must be authenticated by the secretary of the State, and that of the latter by the consul.

When an agency is commercial.

The word "agency" (*mandato*) can be applied in every case in which one person acts for another, regardless of the character of the business and of the persons concerned. When an agency is commercial it is governed by the code of commerce.

The codes of Latin-America are not uniform in their criteria for classifying an agency as commercial. They follow two systems, namely:

1. *The Subjective System.* An agency is commercial

when the purpose of the parties is to perform commercial acts.[51]

2. *The Compound System.* An agency is commercial when, besides covering commercial transactions, both parties are, or at least one of them is, a merchant, in the following manner:

(*a*) both parties, in Bolivia; [52]

(*b*) either of the parties, in Spain,[53] Brazil,[54] Honduras [55] and Panama; [56]

(*c*) the agent in Nicaragua [57].

In Costa Rica [58] and Guatemala [59] the agent at least must be capable of trading.

[51] Argentina, 223; Chile, 233; Colombia, 331; Ecuador, 352; Mexico, 273; Panama, 3 and 580; San Salvador, 122, 155; Uruguay, 335; Venezuela, 327.

The nature of the business for which a power is given, and not the character of the parties, makes an agency commercial. Colombia, Corte Sup. de Just., Casación, Aug. 23, 1912; *Gaceta Jud.*, vol. 21, p. 370.

The power given by one merchant to another to sell chattels with a view to speculating is commercial. Cuba, Trib. Sup., February 3, 1903; *Gaceta*, Sept. 11, 1903.

[52] Bolivia, 107. [53] Art. 244. [54] Art. 165.
[55] Art. 157. [56] Art. 237. [57] Art. 57.
[58] Art. 63.
[59] Art. 61.

The contract of commission does not change its character by reason of the circumstance that the commissionaire advances funds, which must be paid back to him out of the price of the thing to be sold. Spain, Trib. Sup., July 17, 1886; *Gaceta* of Aug. 28, 1886.

The commission given by one merchant to another to sell movable property, with a view to making profits, is commercial. Cuba, Trib. Sup. Habana, Feb. 3, 1903; *Gaceta* of Sept. 11, 1903.

An essential element of the contract of commission is that it relates to commercial acts and that the *comisionista* acts in his own name. Brazil, Revista, No. 8379, Sept. 27, 1872; *Gaceta Jur.*, v. I, p. 315.

The fact that a person sends merchandise to a commercial house to be sold in another place constitutes a commission. Brazil, Trib. do Comm. da Corte, Nov. 11 and 28, 1873; *Gaceta Juridica*, v. I, p. 396.

By the nature of the contract of *comisiôn* the factor (*comisionista*) has the right to be compensated for his services. Mexico, 3a Sala Trib. Sup. del Dist. Fed. Mexico, May 20, 1907, Delgado *v.* W. Herrmann y Compañía, *Diario de Jurisp.*, v. 12, p. 329.

A *comisiôn* is a contract of agency applied to commercial acts; it consists in entrusting some one with one or more mercantile acts in behalf of the principal; the fact that a price was previously fixed for merchandise that the *comisionista* was bound to deal with, does not change the character of the

Criteria for distinguishing a commercial agency from a commission business (comisión).

The criteria adopted by the codes in classifying the different ways in which a person may be represented in commercial transactions, are as follows:

First System. Commission differs from a commercial agency in that the latter requires that the agent invariably deal in the name of the principal, while the commission merchant may transact business in his own name or in that of his principal.[60]

Second System. Commercial agency consists in empowering another to perform some commercial act in behalf and in the name of the principal; commission consists in empowering another to perform such act in his own name, but for the account of the principal.[61]

Third System. Commission is an agency applied to specific acts of commerce. The commissionaire may deal in his own name or in that of his principal.[62]

Completion of the contract.

The contract is completed when the *comisionista* has accepted the agency entrusted to him.

Formerly when merchants were the only class that could trade, the acceptance of a commission was compulsory, an obligation correlative to the commercial privileges conferred; but now the person entrusted with a commercial

contract. Mexico, 3a Sala Trib. Sup. del Dist. Fed., Jan. 20, 1908, The National Supply and Construction Co. S. A. *v.* Moenen Gerardo, *Diario de Jur.*, v. 15, p. 421.

[60] Spain, 245, 246; Bolivia, 107, 123; Brazil, 165; Guatemala, 61, 63; Honduras, 158, 159; Nicaragua, 57; Panama, 637; Peru, 238, 239.

The difference between an agent (*comisionista*) and a factor does not lie in the fact that the former is charged with a single commercial transaction, as he may be charged with several in the name of the principal; but in the circumstance that the factor is provided with general powers. Both the *comisionista* and the factor are accountable to the principal. Spain, Trib. Sup., June 28, 1910; *Gaceta* of Oct. 7, 1910, p. 417.

[61] Argentina, 222; Ecuador, 352; Haiti, 90; San Salvador, 155; Santo Domingo, 94; Uruguay, 300; Venezuela, 327.

[62] Chile, 235; Colombia, 333; Costa Rica, 64, 65; Mexico, 273.

agency can either accept or refuse. The acceptance may be express or implied. Acceptance is express when the *comisionista* answers, accepting the agency; it is implied when he performs some of the acts entrusted to him.[63]

Obligations in case of refusal.

In case the person entrusted with the performance of some commercial business refuses to accept the charge, he has, nevertheless, two obligations:

(*a*) to advise the principal of his refusal by the quickest method, confirming such refusal in writing and mailing it immediately after receiving the commission.

(*b*) to carefully preserve the goods sent by the *comitente* until the latter names another agent, or until a court takes charge of the goods on the agent's petition.

Failure to comply with either of these two obligations renders the *comisionista* liable for any damage thereby caused the principal.[64]

In Mexico [65] the *comisionista* may in the following cases sell the goods sent by the principal through brokers or two merchants, who must first certify the amount and price thereof:

(*a*) when the apparent value of the consigned goods

[63] Spain, 249; Argentina, 238; Bolivia, 114; Brazil, 141; Chile, 245; Colombia, 346; Costa Rica, 70; Ecuador, 358; Guatemala, 68; Honduras, 162; Mexico, 276; Peru, 242; Uruguay, 342; Venezuela, 333.

In the contract of *comisión*, acceptance is shown by the fact that the *comisionista* performs the same. Mexico, 2a Sala del Trib. Sup. del Dist. Fed., Feb. 26, 1907, Sanchez Ramos *v.* Fundación de Sinaloa, *Diario de Jurisp.*, v. 12, p. 257.

[64] Spain, 248; Argentina, 235, 236; Chile, 243; Colombia, 344; Costa Rica, 67, 68; Ecuador, 356; Guatemala, 66; Honduras, 161; Nicaragua, 60; Panama, 584, 635; Peru, 241; San Salvador, 125; Uruguay, 339, 340; Venezuela, 331.

According to articles 2070 and 2071 of the code of civil procedure of Cuba the judge to whom the application referred to in article 248 of the code of commerce must be made is the judge of first instance, when the goods are located in the capital of a judicial district; to the municipal judge in other cases, and to the Cuban consul in foreign countries. Betancourt, *Codigo de Comercio vigente de la Republica de Cuba*, p. 115.

[65] Art. 279.

cannot cover the expenses of their transportation and receipt;

(*b*) when, after the *comisionista* has advised the principal of his refusal of the agency, the latter fails to appoint a new agent to receive the goods. The net proceeds of the sale of the goods must be deposited at the disposal of the principal in a credit institution; and should there be none, then with a person designated by the court.

Relations between the parties when the comisionista deals in his own name.

When the *comisionista* transacts business in his own name, without disclosing that of his principal, he is directly liable as if the business were for his own account, to the person with whom he transacts the same; such person has no right of action against the principal, nor the latter against the former. The reciprocal liability of the principal and of the *comisionista* to each other is always reserved.[66]

[66] Spain, 246; Argentina, 233; Brazil, 150; Chile, 255; Colombia, 357; Costa Rica, 66; Ecuador, 353, 354; Guatemala, 63, 64; Honduras, 159; Mexico, 284; Nicaragua, 59; Panama, 638; Peru, 239; Uruguay, 337; Venezuela, 328.

An obligation contracted by a *comisionista* of an insurance corporation in its name binds the latter directly; the functions of the *comisionista* cease as soon as he receives the premium from the insured, and delivers the policy to him. Spain, Supremo Trib., Feb. 16, 1863; *Gaceta* of Feb. 19, 1863.

When a *comisionista* acts in his own name the principal has no action against third parties who contracted with the former in regard to the object of the commission, unless the *comisionista* assigns his rights to the principal, according to law. The third party has no action against the principal in such case. *Ibid.*, June 30, 1883; *Gaceta* of Sept. 23, 1883.

When the plaintiff in a suit against an industrial association for payment of professional services rendered at the request of a person who was the manager of the association, has not proved that there was any legal relation between the plaintiff himself and the defendant association, nor that the latter authorized its agent to demand the services, the plaintiff cannot recover judgment. *Ibid.*, Oct. 26, 1898; *Gaceta* of Nov. 15, 1898.

Even though the *comisionista* has contracted in the name and for the account of the principal, and notwithstanding that the latter has ratified the transaction, the *comisionista* can institute actions derived therefrom, when he has been given power therefor, and also when, though in the beginning he had not the power he afterwards acquired all rights belonging to the principal. *Ibid.*, Dec. 29, 1903; *Gacetas* of Jan. 26 and 30, 1904.

In Chile [67] and Colombia [68] the *comisionista* may reserve for himself the privilege subsequently to disclose the name of his principal; when afterwards he discloses the name, the *comisionista* is relieved of any obligation, and the principal is substituted, with retroactive effect, in all the rights and obligations derived from the contract.

The code of Panama provides that the *comisionista* who deals in his own name is personally and exclusively liable to the third person dealing with him, even though the principal is present at the time the contract is entered into and discloses himself as the person interested in the business, or if it is common knowledge that the transaction is made for his account.

That code provides,[69] furthermore, that the principal has no direct right of action against third parties with whom the *comisionista* dealt in his own name. He can, however, compel the latter to transfer to the principal any rights he may have against such third parties.

Relations between the parties when the comisionista deals in the principal's name.

If the *comisionista* transacts business in the name of the principal he must announce that fact; and if the contract is in writing, he must state the fact therein or in the subscribing clause, giving the name, surname, and domicil of his principal. In this case the contract and any actions arising therefrom bind the principal and the person or persons who contracted with the *comisionista*, but the latter is bound with respect to such person or persons as long as he does not prove the existence of the power, should the principal deny it, without prejudice to the mutual rights and obligations between the principal and the *comisionista*.[70]

In Chile,[71] Colombia [72] and Panama,[73] the principal can declare to third parties who have dealt with the *comisionista*

[67] Art. 256. [68] Art. 359. [69] Art. 640.

[70] Spain, 247; Chile, 260; Colombia, 360, 362; Ecuador, 355; Guatemala, 64; Honduras, 160; Peru, 240.

[71] Art. 258. [72] Art. 361. [73] Art. 642.

that the contract was made in behalf of the principal himself, thus assuming the obligations of the contract. This declaration leaves subsisting the relations already created between the *comisionista* and the third parties, and its effect is to make the principal the surety of the *comisionista* in all contracts executed by him in the name of his principal.

Effects in regard to third parties.

When a contract is entered into by the *comisionista* in the name of the principal with all legal formalities, the latter must accept all the consequences thereof, his rights against the *comisionista* for negligence or fault being reserved.[74]

A *comisionista* who, without express authorization of the principal arranges a transaction under conditions more onerous than is customary, is liable to the principal for any loss he may thus cause him; the fact that he transacted business at the same time for his own account under similar circumstances not being admissible as an excuse.[75]

[74] Spain, 253; Brazil, 149; Chile, 260; Colombia, 362; Costa Rica, 90; Ecuador, 384; Guatemala, 87; Honduras, 166; Mexico, 285; Panama, 639; Peru, 247; Uruguay, 336; Venezuela, 357.

According to articles 247 of the code of commerce and 1727 of the civil code, the principal must abide by the consequences of the contract entered into according to his direction. Articles 260 of the commercial code and 1902 of the civil code are not applicable to a case in which the responsibility of the principal is not derived from faults or omissions of the agent in fulfilling his obligations. Spain, Sup. Trib., June 16, 1903; *Gaceta* of Aug. 21, 1903.

The agent who receives bills of exchange to his order, payable at certain periods after sight, covering the price of merchandise received by the agent and drawn upon the buyer thereof, cannot refuse to surrender the merchandise when the buyer accepts the bills of exchange, upon the ground that he has not yet paid the amount of the bills, inasmuch as the sale is in that case made on credit and vests the title to the goods in the buyer. Cuba, Trib. Sup., Oct. 13, 1905; *Gaceta* of May 16, 1906.

A contract made by an agent in the name of his principal can be nullified when it is notoriously detrimental to the latter. Costa Rica, Corte de Casación, Feb. 8, 1812, *Sentencias de la Corte de Casación*, 1912, 1st semester, p. 52.

[75] Spain, 258; Argentina, 272; Bolivia, 121; Brazil, 183; Chile, 296; Colombia, 400; Costa Rica, 79; Guatemala, 76, 79; Honduras, 171; Nicaragua, 69; Peru, 251; Uruguay, 377.

In case the agent has not obeyed the instruction of the principal the agent must pay damages, if it is proved that there were any, but the transaction is

Obligations of comisionista.

After accepting the commission (comisión) a *comisionista* is obliged:

(*a*) *To carry out the commission.* A *comisionista* who, without legal cause, fails to execute a commission which he has accepted or begun to perform, is liable for all damages the principal may suffer by reason thereof.[76]

Cases in which the execution of an accepted commission is not compulsory.

The execution of commissions requiring the disbursement of funds is not compulsory, even though accepted, until the principal places the sum necessary for the purpose at the disposal of the *comisionista*.

The *comisionista* may also suspend the taking of further action with regard to the commission entrusted to him when, after having disbursed the sum received, the principal refuses to remit additional funds requested by the *comisionista*.[77]

If an agreement has been concluded to the effect that the *comisionista* shall advance the funds necessary for the execution of the commission, he is obliged to supply them, except in the case of suspension of payments or bankruptcy of the principal.[78]

In Argentina,[79] Chile,[80] and Colombia,[81] the *comisionista* may renounce the *comisión* any time, but he must advise the principal thereof. Nevertheless, he must pay any damages the principal may sustain thereby.

not considered as having been undertaken for the account of the agent. Spain, Sup. Trib., Oct. 13, 1902; *Gaceta* of Dec. 9, 1902.

[76] Spain, 252; Argentina, 239; Bolivia, 114; Brazil, 143; Chile, 245; Colombia, 346; Costa Rica, 73; Ecuador, 358; Guatemala, 68; Honduras, 165; Mexico, 276; Nicaragua, 64; Uruguay, 343; Venezuela, 333.

[77] Spain, 250; Argentina, 224; Bolivia, 117; Chile, 272; Colombia, 376; Costa Rica, 71; Ecuador, 359; Guatemala, 69; Honduras, 163; Mexico, 281; Nicaragua, 63; Panama, 593; Peru, 243; Uruguay, 345; Venezuela, 333.

[78] Spain, 251; Argentina, 241; Bolivia, 118; Guatemala, 70; Honduras, 164; Mexico, 282; Panama, 593; Peru, 244; Uruguay, 345.

[79] Art. 224. [80] Art. 243. [81] Arts. 342, 344.

The power cannot be delegated.

The *comisionista* must personally execute the commission, and cannot delegate it without the prior consent of the principal; but he may under his own responsibility employ his own subordinates in those routine duties which, according to general commercial customs, are usually entrusted to them.[82]

In Argentina,[83] Panama,[84] and Uruguay,[85] there is an exception to the rule above mentioned, in that the *comisionista* may employ a substitute in the agency, although an express power therefor has not been given, when the character of the transaction requires it or when it becomes necessary because of some unfore seen event.

The delegation can be made in the name of the *comisionista* or in that of the principal. In the first case, the *comisión* subsists through the delegating *comisionista*. In the second case, the original *comisión* is extinguished and a new one arises between the principal and the delegate. If the agent makes a delegation with the authorization of the principal, the delegate being selected personally by the *comisionista*, the latter is liable for the acts of the former; if not so selected, he is released from liability.[86]

(*b*) *To obey the instructions of the principal.* In no case can the *comisionista* disobey an express direction of the principal, without becoming liable for all damage he may occasion by reason thereof. Similar liability is incurred by a *comisionista* in case of malice or abandonment.[87]

[82] Spain, 261; Bolivia, 115; Brazil, 146; Chile, 261; Colombia, 363; Costa Rica, 83; Ecuador, 365; Guatemala, 80; Honduras, 174; Mexico, 280; Nicaragua, 72; Peru, 255; Venezuela, 338.

An agency can be delegated when the law of the place where the power was given allows the agent to do so. Mexico, Trib. Sup. del Dist. Fed., 2a Sala., Sept. 11, 1911, *Diario de Jur.*, vol. 29, p. 156.

[83] Art. 251. [84] Art. 646. [85] Art. 355.

[86] Spain, 262; Argentina, 252; Chile, 263, 265; Colombia, 364, 366; Ecuador, 365; Honduras, 174; Panama, 648; Peru, 256; Uruguay, 355; Venezuela, 338.

[87] Spain, 256; Argentina, 225, 238; Bolivia, 116; Brazil, 168, 169; Chile, 268;

(*c*) *To consult the principal in unforeseen circumstances.* In matters not expressly foreseen and provided for by the principal, the *comisionista* must consult him, provided the nature of the business permits. But when the *comisionista* is authorized to act at his discretion, or when consultation is not possible, he must proceed with prudence and in accordance with commercial customs, acting in the business as if it were his own. If in the judgment of the *comisionista* an unforeseen accident makes the execution of the instructions received hazardous or prejudicial, he may suspend performance of the commission, notifying the principal of the reasons therefor by the speediest means of communication.[88]

(*d*) *To use proper diligence in the discharge of his commission.* A *comisionista* must observe the laws and regulations with regard to the transaction entrusted to him, and is liable for the results of violations or omissions. If he acted under express orders of the principal, any liabilities which may arise are incurred by both.[89]

The *comisionista* must frequently communicate to the principal any information which may be of importance in securing the successful outcome of the transaction, sending by mail any contracts he may

Colombia, 370; Costa Rica, 74; Ecuador, 363; Guatemala, 72; Honduras, 169; Mexico, 286; Peru, 249; Uruguay, 346; Venezuela, 336.

[88] Spain, 255; Argentina, 245; Bolivia, 119; Chile, 269; Colombia, 371; Costa Rica, 75; Ecuador, 363, 364; Guatemala, 73; Honduras, 168; Mexico, 287; Nicaragua, 65, 66; Peru, 249.

[89] Spain, 259; Argentina, 244; Colombia, 352; Costa Rica, 80; Guatemala, 77; Honduras, 172; Mexico, 291; Nicaragua, 68; Panama, 596; Peru, 252; Uruguay, 348.

A commercial agent is bound to perform his obligations in accordance with his contract and with the provisions of the commercial and civil code. Spain, Trib. Sup., July 7, 1871; *Gaceta* of Aug. 15, 1871.

The fact that an agency is commercial does not prevent the application of the pertinent provisions of the civil code, as, for instance, article 2155, according to which the agent is liable even for slight negligence. Colombia, Corte Sup. de Just. Casación, Aug. 22, 1912; *Gaceta Jud.*, vol. 21, p. 370.

have executed, on the same day or the day after they were concluded.[90]

Comisionistas cannot handle goods of the same kind belonging to different parties, bearing the same mark, without distinguishing them by a countermark, in order to avoid confusion and for the purpose of designating the respective property of each principal.[91]

(*e*) *To execute the commission in good faith.* No *comisionista* can purchase for himself or for another what he has been commissioned to sell, nor can he sell what he has been commissioned to purchase, without leave of the principal. Furthermore, he may not alter the trade-marks on goods which he has purchased or sold for the account of another.[92]

(*f*) *To account to his principal.* The *comisionista* is obliged to render a specific and proper account of the amounts received for the account of the principal, paying over any balance in his favor at the time and in the manner prescribed by the principal. This account must be drawn from his books. In case of tardiness, he must pay the legal rate of interest.[93]

[90] Spain, 260; Argentina, 245; Bolivia, 131; Chile, 250; Colombia, 351; Costa Rica, 81; Ecuador, 364; Guatemala, 78; Honduras, 173; Mexico, 290; Panama, 589; Peru, 253; San Salvador, 130; Uruguay, 349; Venezuela, 237.

Failure to give the notice provided for in articles 248 and 253 of the code of commerce, does not excuse the principal who failed to send a consular invoice from repaying to the agent the fine he was compelled to pay. Peru, Corte Suprema de Just., Nov. 24, 1908, Mirgenhi *v.* Maggioncalda, *Anales Judiciales*, v. IV, p. 594.

[91] Spain, 268; Argentina, 265, 266; Chile, 314, 315; Colombia, 419, 420; Costa Rica, 111; Ecuador, 382; Guatemala, 106; Honduras, 181; Nicaragua, 84; Peru, 262; Venezuela, 355.

[92] Spain, 267; Argentina, 262, 263; Bolivia, 125; Costa Rica, 108; Guatemala, 105; Honduras, 180; Mexico, 299; Nicaragua, 82; Panama, 650; Peru, 261; Uruguay, 367.

[93] Spain, 263; Argentina, 277; Bolivia, 133; Chile, 279, 280; Colombia, 383–384; Costa Rica, 86; Ecuador, 369; Honduras, 176; Mexico, 298; Nicaragua, 74; Panama, 610; Peru, 257; Uruguay, 382; Venezuela, 342.

An agent is bound to surrender to his principal all amounts received for the account of the latter; the circumstance that the agent is a partner of the principal cannot be invoked against this rule, so long as the partnership is not

Special liabilities of a comisionista.

In the performance of his commission a *comisionista* may incur certain liabilities, some of which are as follows:

For the goods he receives. The *comisionista* is liable for the goods he may receive, under the terms, the conditions and according to the description stated in the consignment, unless he proves, on receiving them, that they had sustained damage and deterioration on comparing their condition with that stated in the bill of lading, or the instructions received from the principal.[94]

For sales on credit. A *comisionista* cannot without authorization from the principal, lend or sell on credit. If he does, the principal may demand cash payment from the *comisionista* leaving him any interest, profits, or advantages that may arise from the transaction. If a *comisionista* with due authorization sells on credit, he must inform the principal, giving him the names of the purchaser. Should he not do so, the sale will be considered as made for cash, in so far as the principal is concerned.[95]

In Argentina,[96] Brazil,[97] Chile,[98] Colombia,[99] Costa Rica,[100] Nicaragua,[101] Panama,[102] Uruguay [103] and Venezuela,[104] the *comisionista* is presumed to be auth-

liquidated and a balance found due by the principal to his agent. Colombia, Sup. Corte de Justicia, Casación, Sept. 17, 1910; *Gaceta Jud.*, vol. 29, p. 86.

[94] Spain, 265; Argentina, 247, 249; Bolivia, 120; Brazil, 170, 172; Chile, 248, 250, 302; Colombia, 347, 408, 409; Costa Rica, 96; Ecuador, 360; Guatemala, 90, 93; Honduras, 178; Mexico, 294; Nicaragua, 78; Panama, 585; Peru, 259; San Salvador, 126, 128; Uruguay, 250, 253; Venezuela, 334.

[95] Spain, 270, 271; Bolivia, 128; Guatemala, 98; Honduras, 193, 194; Mexico, 301; Peru, 264, 265.

The *comisionista* who sells on credit is obliged to give notice thereof to his principal; otherwise it is understood that the transaction was made for cash, notwithstanding that the custom of the place was to sell such goods on credit. He is obliged also to give notice to the principal when a bill of exchange has not been paid, and of cases in which it is suspected that the debtor is bankrupt. Brazil, Rev. No. 4560, Jan. 13, 1852, *Jurisprudencia Com.*, p. 58.

[96] Art. 257. [97] Art. 176. [98] Art. 253.
[99] Art. 355. [100] Arts. 101, 104. [101] Art. 80.
[102] Arts. 656, 657, 658. [103] Art. 362. [104] Art. 350.

orized to sell on credit when it is the custom of the place, in the absence of orders to the contrary.

For delay in collecting claims. The *comisionista* is responsible for damage caused by his failure to collect credits of the principal when due, unless he proves that he made timely use of the legal means for obtaining payment.[105]

For not insuring merchandise transported. A *comisionista* who has been directed to insure merchandise for transportation is responsible in damages if he fails to do so, provided he has been supplied with sufficient funds to pay the premium of insurance or has bound himself to supply them, and has not given timely notice to the principal of the impossibility of insuring the merchandise.

Should the insurer become a bankrupt during the running of the risk, the *comisionista* is obliged to renew the insurance unless the principal has provided otherwise.

For cash received. All the risks of the cash in possession of the *comisionista* are for his account.[106]

Del credere agent.

If a *comisionista* receives for a sale, besides the ordinary commission, an extra commission called guaranty commission (*del credere*) the risks of collection are borne by him, and he is obliged to pay the principal the proceeds of the sale at the periods agreed upon by the purchaser.[107] The extra

[105] Spain, 273; Argentina, 260; Bolivia, 132; Costa Rica, 106; Ecuador, 380; Honduras, 186; Mexico, 303; Peru, 267; Uruguay, 365; Venezuela, 353.

[106] Argentina, 273; Bolivia, 129; Brazil, 181; Costa Rica, 78; Ecuador, 362; Honduras, 170; Mexico, 292; Panama, 597; Peru, 250; Uruguay, 375; Venezuela, 335.

[107] Spain, 272; Argentina, 256; Bolivia, 142; Brazil, 179; Chile, 317; Colombia, 424; Costa Rica, 105; Ecuador, 381; Guatemala, 102; Honduras, 185; Nicaragua, 81; Panama, 654; Peru, 266; Uruguay, 360; Venezuela, 354.

A person is entitled to be paid a commission even though he is not inscribed in the commercial registry as a broker, if he is inscribed as a commission merchant. Argentina, Cam. de Apel. Com. Buenos Aires, April 18, 1914, J. M. Faro *v.* N. T. Marlo, *Jurisp. de los Tribs. Nacs.*, April, 1914, p. 264.

commission is compensation for insuring the solvency of the buyer and the prompt payment of the debt.

Obligations of the principal.

The obligations of the principal may be summarized in the words, to compensate and to indemnify the *comisionista.*

The principal is obliged to pay the *comisionista* the commission fees, unless there is an agreement to the contrary. Should there be no agreement with regard to the fees, they must be fixed in accordance with the mercantile practices and customs of the place where the commission is executed. The principal is, furthermore, obliged to reimburse the *comisionista* in cash, after receiving a proper account, for all expenses and disbursements, with legal interest from the day they were incurred to the day of payment. The commission, advances and other charges that the *comisionista* may have incurred or earned on account of merchandise sent on consignment, may be deducted from the proceeds of the sale.[108]

Lien of the comisionista.

The *comisionista* has a lien on the goods sent to him on commission for the payment of his compensation and advances. Consequent thereon, the *comisionista* is said to have the following privileges:

(*a*) the merchandise a *comisionista* receives on consignment cannot be taken from him until he is reimbursed for his advances, expenses and commission charges;

(*b*) the *comisionista* must be paid out of the proceeds of the merchandise or must be preferred over the other creditors of the principal, after the transportation

As the commission *del credere,* charged by the *comisionista* to the principal, is natural in the contract of commission, it does not constitute an innovation therein. Brazil, Rev. 9022 of Feb. 17, 1877, and Accordao revisor de Rel. del Maranhao of June 5, 1877, *O Direito,* vol. 12, p. 603 and vol. 13, p. 713.

[108] A demand for payment of a commission is improper after the closing of a current account which fixes the legal relations of the parties. Colombia, Corte Sup. Casación, July 6, 1899; *Gaceta Jud.,* v. 14, p. 307.

charges have been paid. In order to enjoy this preference, the merchandise must be in the possession of the consignee or *comisionista*, or be at his disposal in public stores or warehouses, or be consigned to him, the bill of lading or transportation contract having been received by him, signed by the carrier.[109]

[109] Spain, 276, 277, 278; Argentina, 279; Bolivia, 139, 143, 144; Brazil, 185, 186, 189; Chile, 274, 278, 284; Colombia, 378, 379, 388; Costa Rica, 77, 84, 95, 116; Ecuador, 367, 371, 372; Guatemala, 111; Haiti, 92; Honduras, 189, 190, 191; Mexico, 304, 305, 306; Nicaragua, 73, 89; Peru, 270, 271, 272; San Salvador, 123, 136; Santo Domingo, 95; Uruguay, 359, 380, 381, 384; Venezuela, 345.

The rules which govern the contract of agency are applicable to that of commission; therefore the principal must pay the stipulated compensation at the place where the commission was executed, unless otherwise agreed, according to the constant policy of the Tribunal Supremo in the application of articles 277 of the code of commerce and 1728 of the civil code. Spain, Sup. Trib., Oct. 23, 1906; *Gaceta* of Nov. 11, 1906, and Nov. 18, 1903; *Gaceta* of Dec. 4, 1903.

Article 276 of the code of commerce establishes a guaranty in favor of the *comisionista*, consisting in a lien or privilege for his compensation and expenses incurred in the discharge of the commission, on the price of the merchandise sold, with preference to all other creditors of the principal; but it does not establish a limitation on the freedom of the parties to stipulate the compensation due to the agent. Spain, Trib. Sup., Oct. 13, 1898; *Gaceta* of Oct. 31, 1898.

The natural consequence of a contract of *comisiôn* is that the principal is under obligation to pay the *comisionista* all expenses incurred and proved. Spain, Trib. Sup., June 28, 1887; *Gaceta* of Aug. 18, 1887.

Whether in the case of a *comisiôn* or of a commercial agency, the obligation of the principal, according to articles 244, 277, 278, of the code of commerce, in connection with articles 1728 and 1729 of the civil code, is to pay the *comisionista* or the agent, at the place in which the services were rendered, the amount of expenses incurred by the agent as well as the compensation stipulated. Spain, April 6, 1904, *Colec. Leg. de España, Jur. Civ.*, 1904, vol. II, p. 39.

A *comisionista* has a right to demand compensation from the principal for his services only when there has been an agreement in regard to the amount of the compensation. He has no right to demand indemnity for expenses incurred except to the amount legally proved. Mexico, 2a Sala Sup. Trib. del Dist. Fed., Aug. 2, 1906, Gaudry *v.* Comandón & Cía., *Diario de Jurisp.*, vol. 9, p. 411.

The *comisionista* has the right to demand from the principal payment of the compensation agreed to, as soon as the fact on which such payment depends has occurred; and the principal, on the other hand, is obliged to pay the *comisionista* the stipulated compensation. Mexico, Juzgado 4° de lo Civil, Mexico, Dist. Fed., Sept. 22, 1905, Casino *v.* Fondería del Pignon S. A., *Diario de Jurisp.*, vol. 7, p. 729.

The *comisionista* who, in accordance with the contract, has made advances

In Chile, the *comisionista* has also the privilege of being paid, in preference to any other creditors of the principal, out of the proceeds of the merchandise consigned to him, whatever the form of the proceeds may be at the time of the bankruptcy of the principal.

Termination of the comision.

The *comisión* expires:

(*a*) by revocation. The principal may revoke the commission entrusted to an agent at any stage of the business, by notice to the *comisionista;* but the principal is always bound by the results of the transactions which took place before the agent was informed of the revocation.[110]

In Chile [111] the principal cannot revoke the commission at his will, after it has been accepted, if the *comisionista* or a third party has an interest in its performance.

(*b*) by rescission. A contract of *comisión* is rescinded by the death or incapacity of the *comisionista* but it is not rescinded by the death or incapacity of the principal, although it may be revoked by his representative.[112]

In Colombia,[113] however, when the *comisión* was

for the account of the principal has no right to be paid, in case of bankruptcy of the principal, in preference to the other creditors. Peru, Corte Suprema de Justicia, June 20, 1909, Butrón *v.* Empresa de Gas de Arequipa, *Anales Judiciales*, vol. 5, p. 189.

[110] Spain, 279; Colombia, 341; Costa Rica, 90; Ecuador, 384; Honduras, 192; Mexico, 307; Nicaragua, 77; Peru, 273; Venezuela, 257.

[111] Art. 241.

[112] Spain, 280; Bolivia, 146; Chile, 240; Colombia, 339; Ecuador, 385; Honduras, 193; Mexico, 308; Nicaragua, 77; Peru, 274; Venezuela, 358.

A power of attorney given by a debtor to his creditor to sell realty mortgaged to such creditor, does not terminate by the fact that the debtor becomes a bankrupt. Argentina, Cam. la de Apel. de lo Civ. Buenos Aires, April 16, 1914, *Jur. de los Tribs. Nacs.*, April, 1914, p. 157.

[113] Art. 340.

A power of attorney to institute a judicial action has special rules, one of which is that it is extinguished (art. 354 of the code of civil procedure) by the death of the principal if the complaint has not been answered; otherwise it will survive. The reason for this is that the plaintiff is not bound to carry on the suit as long as the defendant has not answered the complaint; the termination

made less in consideration of the *comisionista* personally than in that of the firm he represented, the death of the *comisionista* does not put an end to the *comisión* if the firm subsists.

In San Salvador,[114] a *comisiôn* is always rescinded by the death either of the principal or of the agent.

Commercial travelers.

The best way of developing business and at the same time obtain fresh and reliable information of the needs of the people in the Latin-American countries, as well as reliable knowledge of the standing of merchants and facts of importance from a business point of view, is usually to send a commercial traveler to those countries. This method, however, is inconvenient and expensive due to the fact that the traveling agent has to submit to regulations which vary from place to place and has to pay fees in every town. To overcome these difficulties the International High Commission in Washington has proposed to each country of Latin-America a uniform treaty. This has already been signed by the representatives of Ecuador, Guatemala, Haiti, Nicaragua, Panama, Paraguay, San Salvador, Uruguay and Venezuela and it has already been ratified by the governments of Guatemala, Panama and Uruguay. According to the provisions of the treaty, traders can act in the territory of any of the other high contracting parties either by themselves or by agents, by paying for a single license which shall be valid in its whole territory.

A certificate issued in the country where the trader resides must be presented showing the character of the commercial traveler. Said certificate shall be issued by the official designated by each county, viséd by the consul of the nation in which the applicant intends to work. Upon presentation of this document, the authorities of the other country will issue

of the power under those circumstances cannot injure the heirs of the principal. Colombia, Corte, Sup. de Justicia, Casación, Sept. 15, 1900; *Gaceta Jud.*, vol. 15, p. 125, and Dec. 15, 1900, *Ib.*, p. 126.

[114] Art. 135.

the national license above referred to. Traveling agents can sell their samples without an importer's special license. All samples without commercial value are held free of duty. By samples without commercial value it is understood those which are marked, sealed or otherwise rendered useless to such a degree that they cannot be applied to other uses. Samples with commercial value are provisionally admitted under bond for the payment of custom duties in case they are not reëxported within a period of six months.

The duties shall be paid on that part of the samples which has not been reëxported.

Persons who travel with a view to studying the market business, although they may initiate commercial relations, but who do not sell any goods; those who transact business through local agencies which pay regular license or other duties to which those agencies may be subject; and travelers who are buyers exclusively, do not need any license.

CHAPTER XIX

MERCANTILE DEPOSIT

MEXICO.—Verdugo, Agustín: Diferencias entre depósito y préstamo. *El Derecho.* México, 1895, p. 34.

When the deposit is mercantile.

There are different systems in Latin-America to determine whether the deposit is mercantile.[1] They are as follows:

1. (*a*) At least the depositary must be a merchant;
   (*b*) the thing must be an object of commerce; and
   (*c*) the deposit in itself an act of commerce or the cause or effect of a commercial act.[2]
2. (*a*) One of the parties must be a merchant;
   (*b*) it must originate in or give rise to a commercial act; and
   (*c*) must not be gratuitous.[3]
3. (*a*) Both parties must be merchants;
   (*b*) the thing deposited must be a commercial object and;
   (*c*) the deposit must be the result of a commercial transaction.[4]
4. (*a*) One of the parties must be a merchant; and
   (*b*) the deposit must arise from a commercial act.[5]

[1] Spain, 303; Argentina, 572, 573; Bolivia, 342; Brazil, 280; Costa Rica, 351; Ecuador, 517; Guatemala, 386; Mexico, 332; Nicaragua, 227; Peru, 297; San Salvador, 470; Uruguay, 721; Venezuela, 487.

[2] Spain, Peru, Venezuela.

[3] Argentina.

[4] Bolivia, Costa Rica, Ecuador, Guatemala.

[5] Brazil.

In order that a deposit be mercantile, the statement made by the debtor that he binds himself according to the law of deposit is not enough; it is necessary that the contract contain all legal requirements. Brazil, Trib. de Just. de S. Paulo, April 28, 1899; *Gaceta Jur. de S. Paulo,* v. 20, p. 477.

Failure to state in a mercantile contract of deposit that it is derived from mercantile transactions creates the presumption that the contract is simulated. Trib. de Justicia de S. Paulo, Sept. 13, 1899, *Rev. de Jurisp.*, v. 14, p. 261.

5. The thing deposited must be commercial or the deposit a consequence of a commercial transaction.[6]

6. The deposit is presumed to be commercial when one of the parties is a merchant, unless by the circumstances of the business it appears otherwise.[7]

7. This is like the third one, but requires in addition that the deposit should not be gratuitous.[8]

Depositary must be compensated.

The depositary is entitled to receive compensation for the deposit, unless otherwise agreed. If the parties did not stipulate for the rate of such compensation, it must be fixed according to the usages of the place in which the deposit was made.[9]

In Bolivia the depositary fee, in the absence of special agreement, is from four to six per cent per annum of the value of the deposited things.[10]

In Argentina [11] and Uruguay,[12] the fact that the depositary does not charge any compensation makes the deposit non-mercantile.

Manner of perfecting the deposit.

According to the Roman traditions the contract of de-

The owner of a public security deposited in a bank makes a request on a certain person by means of a letter, that after the death of such owner the security be given to a third party. The owner dies and the person referred to complies with the charge, but the owner in his will instituted a different person for his heir, and this latter demands the delivery of the security to him. The court assented to his petition on the ground that the last will of the owner was to be observed in preference to a private letter. Spain, Trib. Sup., Oct. 29, 1912; *Gaceta*, Oct. 4, 1913, p. 141.

A depositary is responsible for the surrender of the deposited object to the depositor and for his negligence in not exhausting all means of investigation concerning the title of the person who withdraws the deposit. Spain, Trib. Sup., June 24, 1914; *Gacetas* of Dec. 5 and 7, 1914, p. 466, and Dec. 26, 1906; *Gaceta* of May 26, 1908, p. 97.

[6] Mexico. [7] Nicaragua. [8] Uruguay.

[9] Spain, 304; Brazil, 282; Chile, 809; Colombia, 942; Costa Rica, 352; Ecuador, 518; Guatemala, 389; Honduras, 549; Mexico, 333; Nicaragua, 229; Peru, 298; San Salvador, 472; Uruguay, 722; Venezuela, 488.

[10] Arts. 139, 343. [11] Art. 573. [12] Art. 722.

posit is by its nature a "real" one, that is, a contract which cannot be considered perfect until its subject-matter is delivered to the depositary. This is the system followed by the codes of Spain,[13] Brazil,[14] Mexico [15] and Peru.[16]

In other countries the deposit is a contract perfected by the mere consent of the parties, like agency or commission, and the rules which govern commercial agency are applied to the deposit except when there is a modifying provision in the law.[17]

Obligations of the bailee.

In the Roman law and in those systems derived from it up to the time the new codes came into force, there was a general principle in the matter of deposit that by its nature, the depositary had no right to demand any compensation, and consequently his obligations were limited in such manner that he was not responsible to the bailor except for his own fraud. Ideas have since changed; the depositary is expressly authorized by the law to demand compensation in the absence of agreement to the contrary, and his responsibility has therefore increased.

The codes of Spain,[18] Mexico [19] and Peru [20] provide that the depositary is liable, in the preservation of the deposit, for all injuries, damage and losses which the things suffer by reason of his malice or negligence, as well as for those due to the nature or defects of the things themselves, if he did not make all necessary efforts to avoid them or to remedy them, notifying the bailor thereof as soon as the defects became manifest.[21]

[13] Art. 305. [14] Art. 281. [15] Art. 334.

[16] Art. 299.

[17] Argentina, 574; Bolivia, 343; Chile, 807, 808; Colombia, 940, 941; Costa Rica, 353, 354; Ecuador, 521; Guatemala, 390, 391; Honduras, 547, 548; Nicaragua, 228; Panama, 830, 831; San Salvador, 470, 471; Uruguay, 723; Venezuela, 490.

[18] Art. 306. [19] Art. 335. [20] Art. 300.

[21] A contract in which the buyer of goods agrees to keep them on deposit until he pays the price thereof is governed by the law of mercantile deposit. Mexico, 3a Sala del Triba Sup., del Dist. Fed., Sept. 20, 1912, David Medgley & Sons *v.* L. Garcia Teruel, *Diar. de Jur.*, vol. XXVII, p. 604.

Uruguay [22] provides that the depositary is liable even for unforeseen events:

(*a*) when he is in default in returning the deposit;

(*b*) when the deposit consists of money and he has converted it to his own use;

(*c*) when he binds himself for unforeseen events or they are due to his fault.

Deposit consisting of money.

There may be two cases of bailment of money, viz.:

(*a*) when the coins of which it consists have been specified or the money has been delivered in sealed bags (ear marked); [23]

(*b*) when the coins are not specified nor contained in sealed bags.

In the first case any increase or decrease in the value of the money is for the account of the bailor.[24]

In Spain, Mexico and Peru the risks of the deposit in this case rest on the depositary, unless he proves that the loss was due to unforeseen events or *force majeure.*

When the deposit is made without specifying the coins or without the money being contained in sealed bags, there are various systems, namely:

(*a*) The liability of the depositary is governed by the general rules, with all the rigor provided by the codes of Spain,[25] Mexico,[26] Peru [27] and Panama.[28]

When the debtor of a certain amount of money bearing interest is ordered by a judge to keep that amount in deposit awaiting a judgment in a judicial case, the amount ceases to bear interest from the date of the order until payment is provided for. Peru, Corte. Sup., Aug. 18, 1910, *Anales Judiciales*, vol. VI, p. 330.

[22] Art. 727.

[23] Money can only be the subject-matter of a contract of deposit when it is delivered in such form that it can be identified, as within a closed chest or sealed package, etc. The contract of deposit must be made in writing. Brazil, 2a Cam. da Corte de Apel., Aug. 23, 1908, *Rev. de Direito*, v. 9, p. 530.

[24] Spain, 307; Argentina, 576; Costa Rica, 356; Guatemala, 395; Mexico, 336; Nicaragua, 229; Peru, 301; Panama, 835; Uruguay, 725.

[25] Art. 307. [26] Art. 336. [27] Art. 301.

[28] Art. 835.

When a deposit is made in a general partnership (*sociedad colectiva*) and the

(*b*) The depositary cannot use the bailed money under penalty of paying all damages, even though they are due to unforeseen events, and must furthermore pay interest.[29]

In Argentina and Uruguay the rate of interest is that which is usual in the place; in Costa Rica it is the legal rate, and in Guatemala the maximun of the commercial rate.

(*c*) The depositary who employs the deposit for his own use must pay interest thereon and is furthermore subject to the provisions of the penal code in case of embezzlement.[30]

(*d*) The depositary who uses the deposited money loses all right to receive the stipulated or usual compensation, even in cases in which by law or by agreement he is permitted to demand it.[31]

(*e*) The depositary becomes the owner of the money given to him in deposit; but he must return the amount received as soon as requested to do so, for otherwise he is responsible in damages.[32]

(*f*) The depositary who fails to surrender the deposit within forty-eight hours after judicial request therefor, must be imprisoned until he complies with such obligation or pays the value of the deposit.[33]

Obligations of the bailee in case of deposit of documents.

The depositary of securities or stock which carry interest is

same is not returned to the bailor who demands it, a criminal proceeding may be instituted against the partner responsible for the conversion, but not against the partnership itself, as legal entities cannot be held criminally liable. Colombia, Corte Sup., Oct. 13, 1896; *Gaceta Judicial*, vol. XII, p. 124.

[29] Argentina, 575; Costa Rica, 355; Guatemala, 394; Uruguay, 724.

[30] Bolivia, 344.

[31] Chile, 810; Colombia, 943; Ecuador, 520; Honduras, 550; San Salvador, 473.

[32] Nicaragua, 229; Venezuela, 309, 335.

[33] Brazil, 284.

The period of imprisonment for the depositary who fails to deliver the thing, subject-matter of the deposit, cannot exceed three months. Brazil, Trib. de Rio Grande do Sul, Nov. 25, 1904, *Rev. de Direito*, v. I, p. 439.

bound to collect the interest when due, as well as to take such steps as may be necessary to preserve the corresponding rights in accordance with general rules.[34] Peru [35] makes similar provision, excepting the case of an express stipulation to the contrary.

Change in the nature of the contract.

Whenever, with the consent of the bailor, the bailee disposes of the things, subject-matter of the deposit, whether for his own benefit or in order to carry on the business of the bailor, the rights and obligations of a bailor no longer subsist, and the rules of mercantile loan or agency or those of the new substituted contract must be applied.[36]

Case of violent substitution of the deposit.

The depositary who is dispossessed by force, and receives instead of the thing deposited, money or any other equivalent thing, is bound to give the bailor what he has received in exchange.[37]

Deposits made in credit institutions.

Deposits made in banks, general warehouses, credit institutions or any other corporation, must be governed in the first place by the by-laws of said institution; should there be no provision in this respect in the by-laws, they are controlled by the principles of the commercial code.[38]

[34] Spain, 308; Argentina, 577; Bolivia, 345; Brazil, 286, 277; Chile, 811; Colombia, 944; Costa Rica, 354; Ecuador, 519; Guatemala, 395; Honduras, 551; Mexico, 337; Nicaragua, 231; Panama, 836; San Salvador, 474; Uruguay, 728; Venezuela, 489.

[35] Art. 308.

[36] Spain, 309; Mexico, 338; Peru, 303; Panama, 837.

A deposit of money which bears interest is governed by the law of loans. Colombia, Corte Sup., Oct. 13, 1896; *Gaceta Judicial*, v. XII, p. 124.

[37] Argentina, 578; Uruguay, 729.

[38] Spain, 310; Argentina, 579; Brazil, 304; Panama, 838; San Salvador, 475; Uruguay, 740.

CHAPTER XX

COMMERCIAL LOANS.

A loan is a contract by virtue of which a person delivers a thing of his own to another in order that the latter may use it during the period agreed upon. As the things subject-matter of this contract cannot at times be utilized except by consuming or destroying them, and as at times it is possible to use them without destroying them, the contract is of two types: in the first case the loan is called *mutuo*, and in the second *comodato*.[1]

In mercantile affairs the *mutuo* or loan for consumption is the more important.

Mercantile character of a loan.

There are various systems for distinguishing a mercantile from a civil loan, as follows:

1st System. A loan is commercial when: (*a*) one at least of the contracting parties is a merchant, and, (*b*) the thing lent is destined to mercantile transactions.[2] In Peru it is enough to declare in the document that the things are to be used in trade.

[1] Simulation of a contract of loan the amount of which, it is alleged, was never received by the so-called debtor can be proved by coördinated circumstantial evidence. The fact that it bears no authenticated date is one of those circumstances. Argentina Cam. de Ap. Civil, Buenos Aires, June 17, 1914, *Jurisp de los Trib. Nacs.*, June, 1914, p. 211.

A loan contracted by the manager of a general partnership is void when his powers prohibit him to enter into such a contract. Mexico, Juzgado 2º de lo Civ. de la Capital, Feb. 3, 1913, J. G. Gonzalez *v.* Claudio Pellandini e Hijo, *Diar. de Jur.*, vol. XXVIII, p. 529.

A promise to lend a certain amount of money on condition to have it guaranteed by a mortgage, is a bilateral contract, and therefore the person who offered to lend the money is not in default as long as the other party does not execute the mortgage. Colombia, Casación, Nov. 2, 1907; *Gaceta Judicial*, vol. XVIII, p. 203.

[2] Spain, 311; Nicaragua, 217; Peru, 205.

2d. System. When, (*a*) the thing, subject-matter of the contract is considered a commercial article, or is destined for trade, and (*b*) the debtor, at least, is a merchant.[3]

*3*d *System.* When, (*a*) the debtor at least is a merchant and (*b*) the contract was made with the express condition that the thing, subject-matter of the contract, is intended for commercial transactions.[4]

4th System. When, (*a*) the debtor at least is a merchant, and (*b*) the thing subject-matter of the contract is a commercial article.[5]

5th System. When the contract is made by a merchant in relation to commercial transactions.[6]

6th System. When the contract is made with the understanding and statement that the things, subject-matter thereof are destined for trade, even though none of the parties is a merchant.[7]

7th System. When, (*a*) the contract is made with the understanding and statement that the things, subject-matter thereof are intended for mercantile transactions, or (*b*) when it is made between merchants. In both cases the contract is presumed to be mercantile.[8]

8th System. When the thing, subject-matter of the contract is intended for any commercial transaction.[9]

Interest on mercantile loans.

As the characteristic feature of every commercial transaction is profit, it would seem natural that commercial loans should always draw interest. Nevertheless not all the codes agree on this matter. They may be grouped as follows:

System of Spain. Loans do not draw interest, unless so stipulated in writing.[10]

[3] Argentina, 558.

[4] Bolivia, 335; Costa Rica, 334; Guatemala, 376; Uruguay, 701; Venezuela, 482.

[5] Brazil, 247. [6] Colombia, 21. [7] Ecuador, 507.

[8] Mexico, 358. [9] Panama, 795.

[10] Spain, 314; Costa Rica, 341; Nicaragua, 318; Peru, 309; Uruguay, 711.

System of Argentina. Loans do not draw interest unless so stipulated, whether in writing or otherwise.[11]

System of Brazil. In commercial loans interest is due, even though not so stipulated, when it is permitted by the commercial code or when it is awarded in a judgment.[12]

System of Chile. Mercantile loans bear legal interest unless otherwise stipulated.[13]

Freedom of the parties to stipulate for interest.

Money being considered subject to the law of supply and demand, all the countries of Latin-America grant unlimited freedom to the parties to stipulate any rate of interest they see fit.[14]

The only exception to this rule is Ecuador, where the maximum interest allowed is 12% yearly.[15]

Legal interest.

Except in Ecuador by legal interest is meant not a maximum rate permitted to the parties, but a fixed rate applicable only when interest is due according to law or when the parties have not agreed upon the rate.

There are three systems for the computation of legal interest, namely:

1st System. Legal interest is the rate used by the banks.[16]

[11] Argentina, 560; Uruguay, 707.

An action to nullify a contract upon the ground that the "cause" thereof was a usurious loan is not maintainable. Buenos Aires, Cam. de Apel. Civ. de la Cap., Nov. 25, 1913, *Jurisp. de los Trib. Nacs.*, Nov., 1913, p. 253.

[12] Brazil, 248.

[13] Chile, 798; Colombia, 931; Ecuador, 511; Honduras, 538; Panama, 796; Venezuela, 484.

[14] Spain, 315; Argentina, 565; Bolivia, 341; Brazil, 248; Chile, 798; Colombia, 931; Costa Rica, 345; Guatemala, 383, 384; Honduras, 538; Mexico, 361; Nicaragua, 218; Panama, 796; Peru, 310; Uruguay, 712; Venezuela, 484.

[15] Art. 513.

[16] Argentina, 565; Uruguay, 712.

2d System. It is that usual among the merchants of the place.[17]

3d System. It is 6% per annum.[18]

In Colombia [19] the rate of interest in case of default, is the highest prevailing in the market; in other cases it is the average rate in the market.

Interest in case of default.

If the parties have stipulated a rate of interest should the debtor be in default, the principle of freedom of contract requires the enforcement of said stipulation. In case they have not stipulated for interest, the interest due after default is the legal rate; but there are cases in which the parties have agreed upon a certain interest for the life of the contract without any provision for the event of default. In the latter case there are two systems, viz:

1st System. Interest must be paid at the legal rate.[20]

2d System. The rate of interest stipulated for the life of the contract is the rate due after default.[21]

In Colombia[22] in the absence of stipulation the interest in case of default is the highest rate prevailing during the period of default.

Interest in case of loans of merchandise.

Interest on loans contracted between merchants must

[17] Chile, 801; Guatemala, 384; Honduras, 541; Panama, 796; Venezuela, 484.

[18] In Bolivia, law of Nov. 5, 1840; Costa Rica, 344, and Mexico, 362, the rate is 6%; in Ecuador, 12%, art. 512; in Uruguay, Art. 712, as amended by law of April 26, 1882, is 9%.

[19] Art. 219.

[20] Spain, 316; Costa Rica, 335; Mexico, 362; Peru, 311.

When a judicial demand comprises at the same time liquid and unliquid amounts and no period was stipulated for the payment thereof, interest must be paid on the first from the day the action was instituted. Mex. 3a Sala del Trib. Sup. del Dist. Fed., Sept. 13, 1893, *An de Leg. y Jur.*, Sec. de Jur., vol. XI, p. 8.

The borrower of money is bound to pay the same plus interest at the rate agreed upon, from the day of maturity to the day of payment. Mex., 3a Sala Del Trib. Sup. del Dist. Fed., Sept. 5, 1912, *Diar. de Jur.*, vol. XXVII, p. 483.

[21] Argentina, 560; Bolivia, 336; Chile, 802; Colombia, 935; Guatemala, 383; Honduras, 542; Nicaragua, 218; Panama, 800; Uruguay, 717.

[22] Art. 219.

always be stipulated in money even though the thing subject-matter of the contract consists of commercial goods.[23] In Chile, Colombia, Guatemala and Honduras the price of the goods at the time the payment is made is the basis for the computation, while in Venezuela it is the price of the goods the day of the contract.

Compound interest.

The question whether interest due bears interest is determined according to the following systems:

1st System. Unpaid interest does not bear interest; the parties, however, can capitalize liquid and unpaid interest and in that case this sum bears interest.[24]

2d System. Interest accrued can draw interest in case judicial complaint is brought against the debtor or when there has been a special agreement. In the first case it is necessary that the interest of one year at least be due. The liquid balances of transactions closed at the end of the year also draw interest. After suit is begun, interest cannot draw interest.[25]

3d System. Interest accrued draws interest only by agreement of the parties or by a final judicial decision. Interest accruing after suit brought cannot be capitalized.[26]

4th Ssytem. It is prohibited to charge interest upon interest in the case of annual liquid balances of current accounts. After the debtor is served with a summons the accrual of interest to capital ceases.[27]

[23] Argentina, 563; Chile, 800; Colombia, 933; Costa Rica, 340; Guatemala, 381; Honduras, 540; Nicaragua, 219; Panama, 314; Uruguay, 710; Venezuela, 484.

[24] Spain, 317; Mexico, 363; Peru, 312.

[25] Argentina, 569, 570; Panama, 803.

In order that interest on a sum produce interest it is necessary that the parties agree to it after such interest is already due, or else, that once the sum is liquid and the judge orders its payment the debtor fails to comply with the ruling. Argentina, Cam. Fed. De Ap. Paraná, June 17, 1914, *Jurisp. de los Tribs. Nacs.*, June, 1914, p. 92.

[26] Bolivia, 339, 340; Costa Rica, 348, 349.

[27] Brazil, 253.

5th System. Interest can draw interest after a judicial suit or by mutual agreement, provided the suit or the agreement involve interest accrued for at least one year.[28]

6th System. Interest does not draw interest except when the balance of an account has been fixed by mutual agreement or by judicial decision provided payment be demanded at once.[29]

7th System. Interest draws new interest and its capitalization is effected according to the rules of the civil code.[30]

8th System. Interest accrued draws new interest by special agreement. Interest due over one year or balances of closed transactions or of current accounts annually settled bear interest also.[31]

Kind of money which must be returned.

When loans are made in merchandise with the obligation of returning the merchandise in kind it is clear enough that the price may change between the time of contract and payment. When the loan is made in money the parties do not always realize that although dealing in the same coins they are really dealing with different values, because money is used to denominate prices of commodities, and other commodities are never used to denominate the price of currency. The value of money can change not only as a result of the operation of economic laws, but also as a consequence of alterations in the monetary system of a country. These changes affect transactions in such manner that it not infrequently happens that under the same nominal amount the creditor receives a very different value from that which the parties had in mind at the time of their agreement. In order to make the legal relation more equitable the parties themselves at times provide in these contracts that payment must be made in a certain kind of money

[28] Chile, 804; Colombia, 937.

[29] Ecuador, 514; Guatemala, 385; Nicaragua, 225; Venezuela, 485.

[30] Honduras, 544.

[31] Uruguay, 718, 719.

irrespective of the legal currency, or stipulate for payment in foreign coins which are not subject to the same depreciation or alteration as the national money.

Such a stipulation aims to equalize the condition of the parties, to make certain the amount received and paid and therefore to create confidence between the parties and is generally accepted by the law, which provides that when loans consist of money the obligation of the debtor is to pay according to its legal value, unless otherwise stipulated.[32]

Mexico,[33] on the contrary, provides that payment must be made by delivering an equal amount, according to the monetary law of the Republic at the time payment is made; this provision cannot be waived by the parties, unless they stipulate that payment is to be made in foreign currency. This article sacrifices equity and certainty, so important in commercial transactions, to an impossible stability of the national monetary system, and at the same time creates an advantage in favor of foreign coins.[34]

[32] Spain, 312; Chile, 797; Colombia, 930; Costa Rica, 339; Ecuador, 510; Guatemala, 380; Honduras, 537; Peru, 307; Panama, 805; Uruguay, 702.

[33] Art. 359.

[34] When a loan is made in foreign coins and it is stipulated that the money shall be paid in those same coins the stipulation must be complied with, but if those species are not in the market, payment must be made in national currency at the rate of exchange current on the day payment takes place. Mexico, 3a Sala del Trib. Sup. of the Fed. Dist., May 12, 1894, *Anuario de Leg. y Jur.*, Sec. de Jur., vol. XI, p. 157.

During the revolt of Carranza against the government of Huerta the former, for the first time in the history of Mexico, began to issue paper money which the people of the places occupied by the revolutionists were forced to receive in exchange for their own metallic money. Other rebel chiefs soon followed that example and issued paper money without stint, and without any consideration to the actual amount needed for circulation. In many cases the issue was not even reduced to a certain amount by any decree, and the currency of the country was thus left to the mercy of irresponsible military leaders. Many issues of every description flooded the market, every chief repudiating the paper of his opponents; and Carranza went so far as to nullify his own issues. The people were tired of such a state of affairs, and agreed as by general accord, not to take any more of such worthless paper. The government found itself helpless before the popular and general attitude and the paper was suppressed in fact within the lapse of one day. The legal and economic situation thereby derived was unprecedented; obligations contracted under the régime of the paper money were due and enforceable after that currency had disappeared and

Nicaragua,[35] on the other hand, influenced by equitable considerations, destroys entirely the essential of money, by providing that the debtor must pay back an equal amount

gold was in circulation; associations were formed with shares whose value was computed in paper, some had been totally paid in that currency while the new payments were demanded in gold. The most essential principles of equity called for a settlement of such an incongruous situation. The banks were closed; money had been sent out of the country; industries of every kind were on the verge of ruin, and bankruptcy seemed inevitable if payments could be exacted at once. In order to meet these pressing needs the government on September 15, 1916, issued a law called "Law of payments (Ley de pagos) to regulate the relations between creditors and debtors. Such law failed to satisfy the necessities and a short time after, on December 14, 1916, a new decree provided a *moratorium* on all debts covered by the law of payments. Article 2 of this decree provided that neither the debtor could be compelled to pay nor the creditor to receive payments; that all pending judicial proceedings started by debtors with a view to having a judicial deposit of the money owed to their creditors, and relieving themselves by paying in paper money were to be suspended (Art. 5). Obligations contracted after September 9th of that year, in which special stipulation of payment in metallic specie was made were not covered by the moratorium (Art. 3). Payments of rents were also excluded from the moratorium, but those of rural property not exceeding $50 a month were reduced to 50%; those of more than $50 and not exceeding $100 a month were reduced to 75%, and those exceeding $100 to be paid in full. Rents of houses not exceeding $30 a month were reduced to 40%; those of more than $30 and not exceeding $50 were reduced to a half; and those exceeding $50 a month were reduced to 75% (Art. 7). On December 20 of that same year a decree excepted the insurance companies from the moratorium. All future payments to them were to be made in gold, and past payments in paper were to be liquidated on the basis of a table fixing the price of the paper money at various dates; after the liquidation was made that way the insured was required to pay the balance within sixty days, or otherwise the amount of the policy was to be reduced accordingly. No provision was made for payments by the underwriters to the policy-holders during the régime of paper money. On April 13, 1918, a new law of payments was enacted dividing obligations to pay money into four classes, namely: (*a*) those contracted before April 15, 1913; (*b*) those contracted on or after April 15, 1913, and before November 30, 1916; (*c*) those contracted during the latter period when an express stipulation of paying in specific money was made, and (*d*) those contracted between November 30th and December 14th, 1916. Obligations contracted after December 14, 1916, and those in which banks of issue were involved, are not subjected to the provisions of such law; the first ones could be enforced according to the general principles of law, and the second ones were to be the subject-matter of a special law. Contracts of lease continued to be subject to the law of December 24, 1917. Obligations of class "a" were to be paid in silver; the moratorium being lifted in regard to them up to 25% of the capital and the

[35] Art. 221.

according to the nominal value which money had at the time of the transaction, so that the same intrinsic value be paid.

Time for making payment.

When no period has been provided for making payment, the creditor can demand it according to the following systems:

1st System. Thirty days after a request for payment is made before a notary; or according to law.[36]

total of the interest. In obligations of class "b" the moratorium was also lifted up to 25% of the capital and the whole of the interest due, but both capital and interest were reduced according to the following table:

	1913	1914	1915	1916
January	par	74 c.	28 c.	9 c.
February	par	69 c.	26 c.	8 c.
March	par	63 c.	22 c.	5 c.
April	par	58 c.	18 c.	7 c.
May	par	66 c.	17 c.	20 c.
June	par	65 c.	17 c.	12 c.
July	90 c.	62 c.	10 c.	10 c.
August	79 c.	63 c.	13 c.	7 c.
September	73 c.	40 c.	13 c.	5 c.
October	72 c.	40 c.	14 c.	3 c.
November	71 c.	39 c.	14 c.	1½ c.
December	71 c.	37 c.	12 c.	—

In obligations of class "c" 25% of the capital and the total interest due are exigible; the capital as well as the interest must be paid in national gold coins, at par. Obligations included in class "d" can be enforced in toto as per capital and interest, and shall be paid in the money stipulated in each case. The payment of capital and interest on obligations in which the moratorium is lifted by the aforesaid law must be paid in four bimesters, one-fourth of the exigible amount to be paid in each bimester; the first payment is to be made two months from the date of demand (interpelación), or from the date fixed by the corresponding decision in case of litigation. Finally, on August 16, 1918, the Secretary of Hacienda issued a circular N. 38 in which various amendments were made to the law of payments in reference to contributions to the capital of partnerships or of shares of stock companies, or made on current account, or for price of property sold, and excepting from the law of payments obligations of paying in the special kind of paper called "emisión de Veracruz," fixing as a basis for the liquidation of such obligations 10% invariably.

[36] Spain, 313 n.; Colombia, 928; Costa Rica, 337; Mexico, 360; Peru, 307; Venezuela, 483.

2d System. Ten days after the request for payment.[37]

3d. System. Fifteen days after the request for payment.[38]

4th System. Ten days after the contract.[39] When the period does not seem to be clearly stated, the court must fix a reasonable one taking into consideration the terms of the contract, the nature of the transaction for which the loan was intended and the personal circumstances of the lender and borrower.[40]

Effects of receipts.

A receipt for the capital sum given by the creditor, without expressly reserving to himself the right to interest, stipulated or legally due, extinguishes the obligation of the debtor.[41]

A receipt for interest given without condition or reserve is presumptive evidence of payment of interest previously due.[42]

In Chile,[43] Colombia,[44] Ecuador [45] and Honduras [46] a receipt for interest covering the three last periods of payment is presumptive evidence that the former payments were made, unless the receipt bears a clause preserving the rights of the creditor.

Application of payments.

Payments made on account, when their application is not clearly stated, must be applied first to accrued interest and afterwards to capital.[47]

[37] Argentina, 559; Chile, 795; Ecuador, 508; Guatemala, 378; Honduras, 535.

[38] Nicaragua, 220.

[39] Ecuador, 508; Panama, 804; Uruguay, 705.

[40] Chile, 796; Colombia, 929; Costa Rica, 338; Ecuador, 509; Guatemala, 379; Honduras, 536; Uruguay, 706.

[41] Spain, 318; Bolivia, 338; Brazil, 252; Costa Rica, 350; Ecuador, 516; Guatemala, 387; Mexico, 364; Nicaragua, 226; Panama, 801; Peru, 313; Uruguay, 716.

[42] Argentina, 567; Uruguay, 718; Venezuela, 786.

[43] Art. 803. [44] Art. 936. [45] Art. 515.

[46] Art. 543.

[47] Spain, 318; Mexico, 364; Panama, 313; Peru, 313.

Balances of accounts.

Balances of accounts relating to agencies, or advances in mercantile transactions, are considered as loans and governed by the rules applicable to loans.[48]

[48] Chile, 806; Colombia, 939; Honduras, 546.

CHAPTER XXI

PLEDGE

Character of a pledge.

By the contract of pledge a debtor or a third party in his behalf, delivers to his creditor a chattel as a pledge or guaranty. This contract, consequently, is one of those called *real* because its completion depends not only on the mere consent of the parties, but also on the actual delivery of the thing, subject-matter of the pledge, and such pledge subsists as long as the thing is in the possession of the creditor.[1]

When a contract of pledge is mercantile.

The codes follow different systems in classifying the contract of pledge as mercantile, namely:

1st System. It is commercial when made in order to guarantee a commercial transaction.[2]

2d System. It is commercial when made between merchants, in relation to mercantile transactions, or when it derives from contracts essentially commercial.[3]

3d System. It is commercial when made in order to

[1] Argentina, 580; Brazil, 271; Chile, 817; Colombia, 950; Ecuador, 524; Guatemala, 691; Honduras, 557; Mexico, 606, 608; Panama, 816, 823; Santo Domingo, 92; Uruguay, 741, 752.

A clause in a contract declaring that the thing pledged is considered delivered by the mere fact of the stipulation, cannot substitute the actual surrendering of the thing to the creditor. Brazil, 2a Cam. da Corte de Apel., May 19, 1908, Rio de Janeiro, *Rev. de Direito*, vol. 18, p. 142.

The debtor who gives a pledge by means of the clause *constituti* (*i. e.*, declaring that through the mere stipulation, without actual delivery, he conveys the possession of the pledge to the creditor) as a guaranty for a certain debt, is responsible to the creditor under the law of deposit. Brazil, S. Paulo, Feb. 1, 1899; *Gaceta Jurídica*, vol. 19, 196.

[2] Argentina, 580; Brazil, 271; Guatemala, 687; Peru, 315; Santo Domingo, 91 and Uruguay, 741.

[3] Chile, 1; Colombia, 21.

guarantee a commercial act. When made by a merchant it is presumed to be commercial, except when otherwise expressed in the contract, or when the contrary is proved.[4]

4th System. It is commercial when made in order to guarantee a commercial obligation or when by itself it is a mercantile transaction.[5]

Form of the contract.

The contract of pledge does not need any formality in order to be enforceable, because the only requisite is the actual delivery of the thing pledged. In regard to third parties, however, and in some of the countries it cannot produce any effect unless it is made in writing.[6]

In Brazil [7] and Uruguay [8] the contract of pledge can only be proved, as to the parties thereto or to strangers, by means of a written instrument.

Mexico provides [9] that the contract of pledge must be executed with the same formalities required for the contract it guarantees.

Effects of a pledge.

A pledge confers upon the pledgee a right to be paid with the proceeds of the sale of the thing pledged before other creditors of the pledgor.[10]

The code of Spain covers the matter of pledge of exchange-quoted articles only; and that of Mexico, while dealing with

[4] Mexico, 605. [5] Panama, 2.

[6] Argentina, 581; Chile, 815; Colombia, 948; Ecuador, 522; Guatemala, 689; Honduras, 553, 555; Panama, 814; Venezuela, 491.

The requisites established by article 3217 of the civil code for the validity of the pledge govern also the mercantile pledge. Buenos Aires, Cam. de Apel. Com., November 5, 1912, *Jur. de los Tribs. Nacs.*, Nov., 1912, p. 287.

[7] Arts. 271, 272.

An admission of the defendant as to the existence of a pledge cannot substitute the necessary written document to prove that a contract of pledge was made. Brazil, Trib. de Justicia, S. Paulo, December 6, 1895, *Rev. Mensal*, vol. 2, p. 93.

[8] Art. 742. [9] Art. 607.

[10] Spain, 320; Argentina, 582; Brazil, 275; Chile, 814; Colombia, 947;

commercial pledges in general, adopts in a special chapter most of the provisions of the Spanish code in regard to pledges of such articles. According to these two codes a mercantile loan guaranteed by securities or quoted articles, made in a written policy through an exchange agent, in Spain, or a broker in Mexico, is always presumed to be commercial, and the lender is entitled to collect his credit in preference to the other creditors, unless they pay the obligation guaranteed by the pledge.

Enforcement of rights of pledgees.

In default of payment and of special stipulations for the case, the creditor is entitled to demand the sale of the thing pledged and to have his credit paid with the proceeds thereof. In regard to the way of selling the pledged object there are three systems: one provides for an extrajudicial sale of the thing pledged; the second, for a judicial sale, and the third combines the two.

Argentina,[11] Spain [12] and Santo Domingo [13] follow the first system, Argentina providing that when no special stipulation is made for the sale of the pledge the creditor must proceed to effect it at public auction, duly announced three days in advance. If the pledge consists of securities, shares of stock or other negotiable instruments quoted in the exchange or public market, the sale can be effected through brokers at the current price on the day after the debt became due.

In Spain the creditor must present the paper to the board of exchange agents, which, finding their serial numbers corresponding to those described in the contract of pledge, must sell them in the necessary amount through an exchange

Ecuador, 524; Guatemala, 688; Honduras, 554; Mexico, 609; Panama, 818; Peru, 316; Uruguay, 747; Venezuela, 493.

[11] Art. 585.

The sale made by a creditor of the thing given to him as a pledge, without fulfilling the legal formalities thereof, is not unlawful when the creditor gives notice to the debtor of his purpose of selling the pledge that way, without the debtor objecting. Buenos Aires, Cam. de Apel. Crim., May 2, 1914, *Jur. de los Tribs. Nacs.*, May, 1914, p. 220.

[12] Art. 323. [13] Art. 93.

agent, on the day of their presentation, and if this is not possible, on the day after. This right can only be exercised by creditors at the meeting of the exchange next after the maturity of the loan.

In Santo Domingo sales of pledges of every kind can be made through agents or brokers. The parties, however, may ask the president of the commercial court for the designation of any other public official to sell the pledge; the proceedings and fees must be those provided for sales through brokers.

The second system is adopted by Ecuador [14] and Venezuela.[15] The judge, at the petition of the creditor, establishes the manner in which the sale must be made whether through a broker or at public auction; the petition of the pledgee must be notified to the debtor, and the sale cannot take place until eight days after the notification. The creditor is forbidden to apply the pledge to himself or to sell it in a form different from that above described.

The third system is followed by Brazil,[16] Mexico,[17] Peru [18] and Uruguay.[19]

In Brazil the creditor can ask the courts to order the sale if he does not agree with the debtor upon another method of procedure.

In Mexico the pledge must be appraised and sold by two brokers, one named by each party, and a third one appointed by the brokers themselves in case they do not agree in the appraisal, or by the judge in default of brokers. When there are no brokers in the locality the appraisal and sale are made by two resident merchants.

In Peru the sale must be made according to the rules

[14] Arts. 526, 528. [15] Arts. 495, 498. [16] Art. 275.

There is no simulation of the contract of pledge when, for reasons of safety and prompt liquidation of a debt, in case it was not paid at maturity, the debtor conveys the title to the pledged securities to the creditor. Brazil, Rio de Janeiro, *Cam. da Corte de Apel.*, Dec. 5, 1905, *Rev. de Direito*, vol. 3, p. 165.

The *pacto commissario*, by virtue of which a creditor is authorized to own the pledged property without a previous valuation thereof is void *de jure;* but the contract of pledge is valid. Brazil, Rio de Janeiro, 2a Cam. da Corte de Apel., Dec. 5, 1905, *Ib.*

[17] Art. 611. [18] Art. 319. [19] Art. 753.

established in the contract. Should there not be any, the creditor can ask the judge of first instance for an authorization to sell the pledge. If it consists of quoted articles, the judge, without hearing the debtor, may authorize the sale at auction, without any other requisite than the valuation of the pledge, if the contract fails to indicate its value. The pledge sold in this way cannot be replevied by its lawful owner, in case the pledgor was not such. The only remedy of the true owner is to demand damages from the person responsible for the acts through which he was dispossessed.

In Uruguay, if there is no agreement between the parties, the pledge is sold at auction by judicial decree, ten days after the request of payment upon the debtor. In case the latter agrees to the sale without judicial authorization, it must be made by a public auctioneer, if the pledge consists of chattels, or by an official broker, if it is an article quoted on the exchange.

In other countries in which the code is silent, it must be understood that the sale requires a judicial authorization.

A creditor who disposes of the pledge in a different way than that provided by the law is criminally liable.[20]

Obligations of the pledgee.

As the pledgee is obliged to surrender the pledge when the debtor pays, the pledgee is bound to keep the pledge according to the law of deposit, and when the pledge consists of a document of credit, he must take all necessary steps to collect it when due, as well as to collect interest or instalments on the same, without a power therefor being necessary.[21]

[20] Argentina, 588; Brazil, 279; Ecuador, 528; Uruguay, 764.

[21] Argentina, 587, 588; Brazil, 276, 277; Chile, 818; Colombia, 915; Ecuador, 525; Guatemala, 692; Honduras, 558; Panama, 825, 826; Uruguay, 754, 759; Venezuela, 494.

CHAPTER XXII

PURCHASE AND SALE

MEXICO.—Deffis, Armando: El traspaso de negociaciones mercantiles considerado como sucesión por universalidad. *Rev. de Leg. y Jur.* México, 1898, 2d sems., p. 352.

Perez, E., and Borja Soriano, M.: Reglas que han de formar el criterio del Notario acerca de la eficacia de los títulos para transmitir el dominio o conceder el aprovechamiento de una cosa. México. *Diario de Jurisprudencia.* v. 3, p. 272.

Verdugo, Agustín ¿Exigía la legislación antigua para la compra-venta de inmuebles que se hiciese constar en escritura pública so pena de no existir el contrato? *El Derecho*, 1894, p. 113.

Character of the contract of purchase and sale.

The contract of purchase and sale is, it may be said, the substantial or primary contract of commerce. The others are merely secondary contracts, designed ultimately to facilitate purchases and sales, by which the production of any part of the world is placed at the disposal of consumers in the rest of the world. It is therefore natural that the fundamental principles of the contract of purchase and sale are to be found in the law of all peoples.

There is, however, a difference in the definition of the contract between the system followed by the Roman law, and that instituted by the code Napoleon and adopted by some of the modern codes.

Roman system.

Purchase and sale is a contract by which one of the parties binds himself to deliver something to another who, in turn, binds himself to pay the price agreed upon. According to this definition the obligation of the seller is not to transmit the "ownership" of a thing sold. As a consequence, the sale of a thing not owned by the seller is valid and binding; his principal obligation is to guarantee the buyer a

quiet possession of the thing sold and not the ownership thereof.[1]

French system.

Some codes, adopting the theory initiated by the code Napoleon, consider purchase and sale as a contract by which one of the parties binds himself to transfer the ownership of something to the other party, who, in turn, binds himself to pay the price thereof.[2]

Comparison of the two systems.

The first impression produced by these two systems is in favor of the second one. We cannot help experiencing a certain surprise, considering the great influence exercised by the Stoic philosophy on the Roman law, that the sale of an object not owned by the seller could be valid. How could the Romans accept so immoral a theory concerning the most frequent of all transactions?

After careful study, however, we perceive the reason why even now opinion is divided as to the respective merits of the two systems and why codes as modern as that of Panama prefer the theory of the Roman law to that of the French. The most important effect of the contract of purchase and sale is the warranty of quiet enjoyment, *i. e.*, against eviction, by which the seller covenants to keep the buyer free from disturbance in the possession of the thing sold. The question naturally arises, how can this be one of the effects of the contract, if the contract for the sale of a thing not our own, is void? If the contract were void, it would create no legal rights and duties. The contract of sale of a thing not the seller's imposes on the buyer, however, the duty of notifying the seller, in the proper way and at the proper time, of any action brought by the true owner to recover

[1] Spain, 1445 c. c.; Argentina, 450, 453; Bolivia, 1003 c. c.; Chile, 1793, 1815 c. c.; Colombia, 1849, 1871 c. c.; Ecuador, 169; Honduras, 1605 c. c.; Nicaragua, 1793, 1815 c. c.; San Salvador, 1779, 1801 c. c.; Panama, 740; Uruguay, 513; Venezuela, 139.

[2] Brazil, 1122 c. c.; Haiti, 1367, 1384 c. c.; Guatemala, 1476, 1498 c. c.; Mexico, 2811, 2830; Peru, 1002, 1017 c. c.; Santo Domingo, 1582, 1599 c. c.

the possession of the thing sold. If the buyer fails to comply with this duty originating in the contract he loses all rights against the seller to be indemnified for his loss. All these consequences flow naturally from the theory that the contract is valid, whether or not the thing sold belongs to the seller.

The contract of purchase and sale is consensual.

The contract of purchase and sale is complete and binding by the mere fact of agreement of the parties on the thing to be sold and its price, *i. e.*, the contract is consensual. The natural consequence of this classification of the contract ought to be that, once the parties have arrived at an agreement, title to the thing sold vests in the buyer and the right to recover the price vests in the seller. The risk of the thing sold should also be on the vendee; and that is the case in civil purchases and sales. But in commercial matters the law requires in some cases, as will presently be noted, the actual delivery of the thing sold in order to complete the contract.[3] In this respect and in these cases the mercantile contract of purchase and sale has some similarity to contracts called "real," because of their requirement of the actual delivery of the thing, subject-matter of the contract.

When the contract is completed.

According to the theory accepted by the codes, a contract

[3] The sale or assignment gives to the purchaser or transferee merely a personal right against the vendor or assignor, but it gives him no right of ownership in the thing sold or the credit assigned until after delivery and taking possession thereof. Brazil, Accordão revisor de Trib. do Com. de Bahia, *Jurisp. Comm.*, pp. 68 and 78.

The contract of purchase and sale is essentially consensual, and therefore it is complete and binding by the mere consent of the parties as to the thing and the price. Costa Rica, Corte de Casación, June 1, 1903, Francisco *v.* Vargas, *Sentencias de la Corte de Casación*, 1903, p. 353.

When the subject-matter of the contract of purchase and sale is a thing specifically identified, the title is vested in the buyer by the mere consent of the parties as to the thing sold and the price, without any transfer of the thing itself being necessary. Mexico, Juzgado 3° de lo Civil del Dist. Fed., Feb. 20, 1911, Ortiz Saenz y Cia. *v.* Sebastian B. de Mier, *Diario de Jurisp.*, v. XXIII, p. 601.

of purchase and sale is as a rule perfected between the vendor and vendee from the moment they agree upon the thing, subject-matter of the contract, and upon the price, even though neither has been delivered.[4]

Even a promise to sell and to buy when there has been an agreement as to the thing and the price, gives a reciprocal right to both parties to demand compliance with the contract.

These provisions have been misconstrued by some courts, who have reached the conclusion that by operation of law and by the mere agreement of the parties as to the thing to be sold and the price thereof, property is conveyed by the vendor to the vendee, and title divested from the seller and vested in the buyer, in spite of express stipulations to the contrary; and further that no right of ownership can afterwards be claimed by the seller; he has only a personal action against the buyer for payment of the purchase price. The

[4] A misunderstanding between partners in reference to goods purchased by one of them does not excuse the non-fulfillment of the contract which was perfected by the consent of one of the partners whose name is included in the firm name of the partnership. Argentina, Cam. de Apel. Com. Buenos Aires, Feb. 15, 1913, Chedil Burtio y Cia. *v.* Cambrol Hnos, *Jurisp. de los Tribs. Nacs.*, Feb. 1913, p. 131.

After the contract of purchase and sale is completed by agreement of the parties as to the thing sold and its price, and because a public deed was executed when that formality is required by the law, the buyer has no right of action to compel the seller to receive the price, nor can the latter compel the buyer to receive the thing sold; the law provides the buyer with an action to demand the thing, and the seller with an action to collect the price. Colombia, Trib. Sup. del Dist. de Antioquía, June 10, 1895, *Crónica Judicial de Antioquía*, v. VII, p. 2558.

There is no legal prohibition to stipulate in the contract of purchase and sale that the buyer cannot mortgage the thing sold as long as the price is not paid. Colombia, Dist. Judicial del Centro de Antioquía, April 9, 1897, *Crónica Judicial de Antioquía*, v. XII, p. 1064.

The testimony of a witness is admissible to prove a contract of mercantile sale, as the law does not require any special formality therefor. Colombia, Dist. Jud. de Panama, June 14, 1897, *Registro Jud. de Panama*, v. X, p. 128.

The contract of purchase and sale made by a traveling agent authorized to sell, is complete and binds the principal to deliver the merchandise sold. Mexico, Juzgado Cuarto de 1° Civil del Disto. Fed., Nov. 4, 1912, *Diario de Jurisp.*, v. XXVII, p. 708.

It is an essential requisite in order to make the promise of selling binding that the price be certain. Spain, Trib. Sup., May 18, 1908; *Gaceta* of April 10, 1909, p. 33.

weight of authority, however, is opposed to this interpretation.[5]

When the contract is mercantile.

The purchase and sale of a thing is mercantile when made in order to resell, whether in the original or in a different form, with a view to making a profit by the resale.[6]

[5] A promise to sell a certain thing for a fixed price does not vest title to the same in the buyer and gives the latter only a personal action against the seller for the performance of the promise. Spain, Trib. Sup., June 23, 1915; *Gaceta* of Nov. 29 and 30, p. 503.

A contract of sale is valid notwithstanding that the subject-matter of the same was promised to be sold by the seller to another party. Spain, Trib. Sup., Sept. 21, 1908; *Gaceta* of Nov. 2, 1908.

A promise to sell does not convey title in the thing to the promisee, nor give him any real action, not even a right to demand the thing at once; he has only a personal action against the promisor to perform the contract or to pay damages if in the meantime he has sold the thing to a third party. Spain, Trib. Sup., Dec. 6, 1904; *Gaceta* of Dec. 29, 1904, p. 393.

A promise to sell cannot produce the effect of an actual sale; as the former does not transfer the title in the thing, subject-matter of the contract, it does not give rise to a real action for specific performance; the promisee cannot recover it; he can only bring a personal action against the promisor to compel him to perform the contract which cannot be complied with if the promised thing has passed over to a third person,—the right of the promisee to damages being reserved. Spain, Trib. Sup., Dec. 6, 1904; *Gaceta* of Dec. 29, 1904, p. 393.

The condition precedent in a contract of purchase and sale of personal property that the title in the property shall not pass to the buyer until full payment of the price agreed to is perfectly valid. Mexico, Suprema Corte de Justicia de la Nación, Amparo, Riestra *v.* Juzgado Rimero de Dist. Fed., March 16, 1907, *Diario de Jurisp.*, v. 17, p. 663.

[6] Spain, 325; Argentina, 451; Costa Rica, 306; Honduras, 97; Mexico, 371; Nicaragua, 198; Panama, 2; Peru, 320; Uruguay, 513.

The agreement of resale, authorized by the civil code, may also be included in a commercial contract, because it is not contrary to its character as such and, furthermore, the civil law governs commercial transactions when there is no provision applicable in the code of commerce. Argentina, Cam. de Apel. Com. Buenos Aires, April 19, 1913, Pradere *v.* Colombato, *Jurisp. de los Tribs. Nacs.*, April, 1913, p. 238.

Brazil: The purchase of shares of stock of corporations for the account of another is not in itself a mercantile act; neither is the agency for entering into such transactions mercantile. The purchase of shares is only mercantile when it is made with a view to reselling them wholesale or retail. Brazil, Accordãos de Trib. do Comm. da Corte, of May 27 and July 25, 1867, *Rev. Juridica* of 1868, p. 126.

Brazil requires, furthermore, that the buyer be a merchant.[7]

When the contract is not mercantile, but civil.

In addition to the general rules which serve to classify a contract of purchase and sale as commercial, mentioned in chapter II, the codes of Spain,[8] Argentina,[9] Costa Rica,[10] Honduras,[11] Mexico,[12] Nicaragua,[13] Panama,[14] Peru,[15] San Salvador,[16] Uruguay[17] and Venezuela[18] provide that it is not commercial in the following cases:

(*a*) purchase of articles intended for the domestic consumption of the buyer;[19]

(*b*) sales made by a farmer or cattle-raiser of the products of his crops or cattle, or those of a similar character; [20]

(*c*) sales made by craftsmen in their own shops of the objects they manufacture; [21]

The sale of meat to a hotel is mercantile, Brazil, Acc. da Rel. da Corte, Nov. 21, 1873; *Gaceta Juridica*, v. 1, p. 383.

The purpose of obtaining a profit by the resale, when expressed in the contract of purchase and sale, or shown by other acts, is necessary in order that the contract be regarded as mercantile. Should that purpose not be expressed or shown the commercial judge has no jurisdiction over the case, and the proceedings brought before him are void. Ecuador, Corte Suprema de Justicia, Feb. 27, 1886; *Gaceta Judicial*, n. 125, p. 1015.

Sales made by rural associations of the products of farms controlled by them are not commercial. Spain, Trib. Sup., Oct. 15, 1913; *Gacetas* of Feb. 23 and 26th, 1914, p. 55.

Business consisting in the purchase of raw materials in order to transform them into chemicals or medicines and sell them to pharmacists is considered as a mercantile business governed by the code of commerce. Spain, Trib. Sup., April 21, 1911; *Gacetas* of June 8 and 10th, 1912.

The occupation of buying raw materials and transforming them into chemicals or medical preparations is mercantile, and the person engaged in it must be declared in bankruptcy not in *concurso*. Spain, Trib. Sup., April 21, 1911; *Gacetas* of June 8 and 19th, 1912, p. 360.

[7] Art. 191. [8] Art. 326. [9] Art. 452.
[10] Art. 307. [11] Art. 98. [12] Art. 76.
[13] Art. 199. [14] Art. 3. [15] Art. 321.
[16] Art. 81. [17] Art. 516. [18] Art. 5.

[19] Spain, Argentina, Costa Rica, Nicaragua, Panama, Peru, San Salvador, Uruguay.

[20] Spain, Argentina, Colombia, Costa Rica, Panama, San Salvador, Uruguay.

[21] Spain, Peru, San Salvador.

(*d*) resale by a non-merchant of the surplus stock bought for his own consumption; [22]

(*e*) purchase of real estate and fixtures. The purchases of fixtures necessary for commercial enterprises are, however, commercial; [23]

(*f*) sales made by landlords or any other persons of the fruits, goods or products which they receive as rent, salary or compensation of any kind; [24]

(*g*) purchases made by public officials or employees for the public service.[25]

Mexico is the only country in Latin-America which declares that sales made by farmers of the products of their crops are commercial.[26]

The object of commercial purchase and sale.

Everything not excepted by the law, and subject to individual ownership, may be the subject-matter of the contract of commercial purchase and sale.

In Spain,[27] Argentina,[28] Costa Rica,[29] Honduras,[30] Nicaragua,[31] Peru [32] and Uruguay,[33] the law expressly refers only to the contract of purchase and sale of movables as a mercantile transaction, leaving to the courts the power to decide, as the case may arise, whether or not the contract to sell and purchase real estate is commercial.

The sale of live stock made to a manufacturer of hams, bacon, etc., is not a commercial act, because the buyer does not sell the things he buys in a different form than that in which he acquired them, but makes an entirely different thing which is the product of his industry. Spain, Trib. Sup., Oct. 4, 1904; *Gaceta* of Oct. 26, 1904.

The acquisition of raw materials for an industry and the acceptance of bills of exchange or drafts with a view to making such acquisition, are not commercial acts, *i. e.*, they are not habitual acts of trade and profit which give to the maker of the same the character of a merchant. Spain, Trib. Sup., April 12, 1907; *Gaceta* of Sept. 13, 1908, p. 242.

[22] Spain, Argentina, Costa Rica, Panama, Peru, San Salvador, Uruguay.

[23] Argentina, Costa Rica, Uruguay.

[24] Argentina, Costa Rica, Uruguay.

[25] Panama. [26] 75, sec. XXII. [27] Art. 325.

[28] Art. 451. [29] Art. 306. [30] Art. 97.

[31] Art. 198. [32] Art. 320. [33] Art. 515.

Determination of the price.

Inasmuch as the substantial elements of the contract of purchase and sale are the object and its price, it is very important to determine when these elements have become certain in the minds of the contracting parties, and hence, from what moment the contract exists.

System of Spain. In order that the price may be considered fixed, it is sufficient that it be fixed with reference to another determinate thing, or that the determination thereof be left to the judgment of a specified person. Should such person be unable or unwilling to fix the price, the contract will be void.[34]

System of Chile. In Chile,[35] Colombia,[36] Ecuador,[37] Guatemala [38] and Panama,[39] there is no purchase and sale if the contracting parties do not agree on the price or on a method to fix it; but if the thing sold was delivered, it is presumed that the parties have accepted the market price thereof at the day and place of the contract. Should there be differences of price on that day and at that place, the purchaser must pay the average price. This rule is also applicable where the parties have referred to a price at a different time and place from those of the contract.

If the third party charged with fixing the price does not do so, for any reason whatsoever, and the thing sold has been delivered, the contract is effective at the market price of the thing on the day of the transaction, or at the average price should there be several.

System of Brazil. In Brazil [40] and Uruguay,[41] the fixing of the price may be left to the judgment of a

[34] Spain, c. c., 1447; Argentina, 459; Brazil, 194; Mexico, 2813 c. c.; Uruguay, 524; Venezuela, 140.

The price in a contract of purchase and sale is certain not only when the parties agree upon a fixed sum, but also when they consent to having the price fixed by experts. Spain, Trib. Sup., June 23, 1915; *Gacetas* of Nov. 29 and 30, p. 503.

[35] Arts. 139, 140, 141. [36] Arts. 229, 230, 231. [37] Arts. 183, 184, 185.
[38] Arts. 206, 207, 208. [39] Arts. 749, 750, 751.
[40] Art. 194. [41] Art. 524.

third party; should he be unable or unwilling to fix the price, it must be fixed by experts.

System of Venezuela. In Venezuela a mercantile sale made for an undetermined price is valid, provided the parties afterward agree on the method of determining it. A sale made for "a just price" or "for the current price" is also valid; the price must be fixed in accordance with the books of the brokers and at the exchange of the day and place of the sale. The determination of the price may be left to the judgment of a third party appointed at the time of the contract or afterwards. In both of these two cases, should the person selected be unable or unwilling to accept the charge, and the parties cannot agree upon another third party, the competent judge must appoint him.[42]

Specification of the thing sold.

The determination of the thing sold is another substantial element. Two cases may occur:

(*a*) *Purchase made by sample.* When the purchase is made by sample or with reference to a fixed quality well known in the trade, the purchaser cannot refuse to receive the goods contracted for, if they are in accordance with the sample or the quality stipulated in the contract.

Should the vendee refuse to receive the goods because of their failure to meet these requirements, they must be examined by experts who, taking into consideration the terms of the contract and comparing the goods with the sample displayed, if any, must decide whether the goods should or should not have been received.

(*b*) *Purchase of unspecified things.* In the matter of the purchase of things whose qualities have not been specified, the following systems may be mentioned:

System of Spain. In the purchase of goods which have not been seen or which cannot be characterized by a fixed quality well known in the trade, it is under-

[42] Art. 140.

stood that the purchaser reserves for himself the privilege of examining them and unrestrictedly rescinding the contract if the goods do not suit him. The purchaser may also rescind the contract after examining the goods if the parties so agreed.[43]

System of Chile. In Chile,[44] Colombia,[45] Ecuador [46] and Guatemala,[47] when the purchaser of a thing expressly reserves the privilege of testing or examining it, without fixing a period for so doing, it is understood that the purchase is made under an option and condition precedent operative for a period of three days. This period is counted from the day the vendor requests the purchaser to make the test or examination; should the latter fail to do so within that period, he is deemed to have given up the contract.

In the case of a purchase by order (*por orden*) of a thing not seen, and designated by kind only, it is understood that the vendee on receipt thereof has the privilege of rescinding the contract should the thing not be sound and of average quality. In case the thing is designated at the same time by its kind and quality, the buyer can rescind the contract should the thing not be of the stipulated kind and quality; if the parties disagree on this point, experts must make the decision.[48]

Purchases made with the clause "free of charges."

When a thing is purchased and shipped by order, with the stipulation that it is free of charges (*franco de porte*), it is understood that the purchase is made on condition that the thing reaches its destination. Once this condition is fulfilled the purchaser cannot rescind the contract, except for noncompliance with specifications.[49]

[43] Spain, 328; Argentina, 455; Costa Rica, 308; Honduras, 100; Mexico, 374; Nicaragua, 200; Panama, 742; Peru, 323; San Salvador, 83; Uruguay, 520.
[44] Art. 131. [45] Art. 222. [46] Art. 171.
[47] Art. 198.
[48] Chile, 134; Colombia, 224; Ecuador, 174; Guatemala, 201; Panama, 745.
[49] Panama, 748.

Obligations of the vendor.

The obligations of the vendor are three, namely:

(*a*) to deliver the thing sold;

(*b*) to warrant its title; and

(*c*) to warrant its freedom from defects.

Methods of making delivery.

The delivery of the thing sold may be made either physically, by actually placing it in the hands and possession of the vendee, or symbolically.[50]

The shipment of the goods by the vendor to the domicil of the vendee or to any other place agreed upon, is considered as delivery, unless the shipment is made without the purpose of conveying title to the purchaser, as, for example, when the vendor sends the merchandise to a consignee, with the order not to deliver it until he has been paid the price or received security therefor.[51]

Symbolic delivery (tradicion "simbólica").

Besides actual delivery, the commercial codes of Argen-

When merchandise is sold "free on board" of a railroad car or vessel it is understood that the delivery is made at the place where the car or vessel is located and the judge of that place has jurisdiction of all questions arising out of the contract of purchase and sale. Spain, Trib. Sup., July 8, 1909; *Gaceta* of March 11, 1910, p. 47.

[50] According to article 1462 of the civil code of Spain the delivery of the thing sold is made when the deed of sale is executed; it is, nevertheless, necessary that the vendor, at the time of the execution of the deed, be in actual possession of the thing sold. Spain, Trib. Sup., May 29, 1906; *Gaceta* of May 19, 1907, p. 112, and Trib. Sup. of Cuba, March 30, 1904; *Gaceta* of Aug. 23, 1904.

The mere fact that a contract of purchase and sale was entered into at a certain place does not necessarily imply that the subject-matter of the contract was delivered at that same place, as such delivery is not an essential requisite of the above mentioned contract. Cuba, Trib. Sup., July 8, 1903; *Gaceta* of July 8, 1903.

In sales of merchandise made on credit the place of delivery is the commercial house of the seller even though the merchandise be sent to the domicil of the buyer; the sending of the articles to the address of the buyer is equivalent to delivery, unless otherwise stipulated. Spain, Trib. Sup., Feb. 1 and 8, 1907, and Sept. 4 and 28, 1908; *Gacetas* of Feb., 1907 and Oct. 6, 1908.

[51] Panama, 762; Uruguay, 528; Venezuela, 154.

tina,[52] Brazil,[53] Chile,[54] Colombia,[55] Ecuador,[56] Guatemala,[57] Panama,[58] Uruguay [59] and Venezuela [60] admit of a symbolic or conventional delivery in the following forms:

(*a*) the delivery of the keys of a warehouse, storehouse, or boxes in which the goods sold are located; [61]

(*b*) the act of the vendee in placing his mark on the goods in the presence of the vendor and with his consent; [62]

(*c*) the delivery of the invoice without immediate objection by the vendee; [63]

(*d*) the clause "on account" placed in a bill of lading, if not objected to by the vendee within twenty-four hours or by letter sent by the next mail; [64]

(*e*) the declaration made in books of public record in favor of the buyer, provided both parties agree; [65]

(*f*) the authorization of the vendor to the vendee to take away the goods, the right of the vendor to retain them for non-payment, and of the vendee to examine them being reserved; [66]

(*g*) any other act considered as a symbolic delivery by commercial custom.[67]

[52] Art. 463. [53] Art. 200. [54] Art. 149.
[55] Art. 239. [56] Art. 193. [57] Art. 216.
[58] Art. 763. [59] Art. 529. [60] Art. 154.

[61] Argentina, Brazil, Panama, Uruguay.

[62] Argentina, Brazil, Chile, Colombia, Ecuador, Guatemala, Panama, Uruguay, Venezuela.

[63] Argentina, Brazil, Chile, Colombia, Ecuador, Guatemala, Panama, Uruguay, Venezuela.

[64] Argentina, Brazil, Uruguay.

[65] Argentina, Brazil, Panama, Uruguay.

[66] Uruguay.

[67] Chile, Colombia, Guatemala, Panama.

The vendor is bound to deposit the goods sold as a condition precedent to demanding the payment of their price, only when he has not delivered them in fact or symbolically (*tradición ficta*). A symbolic delivery takes place not only when, according to article 339 of the code of commerce, the goods are placed at the disposal of the vendee with his consent, but also when, at the time of making the contract, he has consented to have the vendor place the thing sold at his disposal; inasmuch as, in the matter of the form in which delivery is to be made, as well as in all other circumstances of a purchase and sale, the parties are free to make any stipulation. Spain, Trib. Sup., May 1, 1903; *Gaceta* of May 20, 1903, p. 334.

In Mexico, from the moment the purchaser acknowledges the fact that the merchandise bought is at his disposal, he is held to have virtually received them and the vendor has the rights and liabilities of a mere depositary.[68]

Place of delivery of the thing sold.

The delivery must be made at the place agreed upon; should there be no agreement in that respect, the thing must be delivered at the place where it was located when sold.[69]

Time of delivery.

If no time is fixed for delivery of the thing sold, it must be at the disposal of the vendee within twenty-four hours after the contract was completed.[70]

Partial delivery.

In contracts in which the delivery of a certain amount of merchandise within a certain time is stipulated, the purchaser cannot be compelled to receive a part thereof even on the promise of delivering the rest; but if he accepts delivery of a part, the sale is deemed consummated with respect to the goods received, reserving the right of the purchaser to demand, as to the rest, the fulfillment of the contract or its rescission.[71]

[68] Art. 378.

The seller is a depositary of the thing sold when he has agreed thereto with the buyer, or when he has consented to keep the merchandise at the disposal of a second buyer who bought it from the original one. Mexico, Juzgado 3° de lo Civil del Dist., Fed., Feb. 20, 1911, "Ortiz Saenz y Cia." *v.* Sebastian B. de Mier, *Diario de Jurisp.*, v. XXIII, p. 601.

[69] Argentina, 461; Brazil, 199; Chile, 144; Colombia, 234; Ecuador, 188; Guatemala, 211; Panama, 758; Uruguay, 527.

[70] Spain, 337; Argentina, 464; Chile, 144; Colombia, 234; Costa Rica, 319; Ecuador, 188; Guatemala, 211; Honduras, 102; Mexico, 379; Nicaragua, 206; Panama, 758; Peru, 332; San Salvador, 86; Uruguay, 530.

[71] Spain, 330; Argentina, 468; Brazil, 203; Chile, 157; Colombia, 249; Costa Rica, 311; Ecuador, 199; Guatemala, 224; Honduras, 102; Mexico, 375; Nicaragua, 203; Panama, 745; Peru, 325; San Salvador, 84; Uruguay, 537.

Failure to deliver.

When the seller fails to deliver the goods he is subject to suit by the buyer, as follows:

System of Spain. If the vendor does not deliver the goods purchased within the stipulated period, the vendee may demand the fulfillment or the rescission of the contract, with damages for the delay in either case.[72]

System of Argentina. If the vendor does not deliver the goods within the period stipulated, or within twenty-four hours, if no period has been stated, the vendee may demand the rescission of the contract or its fulfillment, with damages for the default; or he may ask for authorization to buy in the local market, for the account of the vendor, an equal quantity of the same goods. Nevertheless, when the default in delivery is caused by destruction or injury of the goods through unforeseen events without fault on the part of the vendor, the latter's liability ceases, the contract is rescinded *de jure*, and the price must be refunded to the vendee.[73]

System of Nicaragua. If the vendor fails to deliver the goods within the stipulated period, or delivers them in defective condition, although either of these circumstances be due to unforeseen events, the buyer may rescind the contract, and demand damages if slight negligence be proved. If the goods were destroyed the rescission occurs *de jure;* and damages are due if they became lost through fault other than the vendee's.[74]

Cases in which the vendor disposes of, consumes or damages the goods.

The vendor who, after the sale, disposes of, consumes or injures the thing sold, is obliged to give to the vendee an-

[72] Spain, 329; Brazil, 202; Chile, 156; Colombia, 248; Costa Rica, 310; Ecuador, 198; Guatemala, 223; Honduras, 101; Mexico, 376; Peru, 324; Panama, 754, 774; Uruguay, 534.

[73] Argentina, 467; Venezuela, 147.

[74] Nicaragua, 201.

other of the same kind, quality and quantity, or otherwise to pay him the value thereof according to the appraisal made by expert arbitrators who must take into consideration the use to which the purchaser intended to put it and the benefit he might have derived therefrom, and must discount the price should the purchaser not yet have paid it.[75]

Expenses.

Expenses incurred in a contract of purchase and sale must be defrayed as follows:

System of Spain. The expenses caused by the delivery of the thing sold must be defrayed by the vendor, unless otherwise stipulated, until it is weighed or measured and placed at the disposal of the vendee. The expense of preserving and removing it from the place where it is situated are for the account of the purchaser.[76]

System of Brazil. The expenses caused by the execution of deeds or documents and transportation and delivery of the thing sold must be for the exclusive account of the buyer.[77]

When the obligation of delivering the thing sold terminates.

The obligation of the vendor to deliver the thing sold, before payment of the purchase price, ceases when between the act of sale and the time of delivery, the financial status of the vendee is impaired and he does not give sufficient guaranty for the payment of the price when due.[78]

In Venezuela [79] the provision is of a more general character, because the seller has a vendor's lien on the goods sold, while in his possession, until the full payment of the purchase price and accrued interest.

[75] Brazil, 208; Chile, 152; Colombia, 242; Ecuador, 196; Guatemala, 219.

[76] Spain, 338; Argentina, 460; Costa Rica, 320; Honduras, 110; Mexico, 382; Nicaragua, 204; Uruguay, 525.

[77] Brazil, 196.

[78] Brazil, 198; Chile, 147; Colombia, 237; Ecuador, 192; Guatemala, 214; Panama, 761; Uruguay, 526.

[79] Art. 153.

Warranty of title (garantía de evicción.)

The other obligation of the vendor, as has been stated, is to warrant the title, that is, the legal and peaceful possession of the thing sold; and to warrant that there are no hidden defects therein.[80]

The warranty of title is more frequently used in civil than in commercial sales; for that reason the law-makers do not appear to have perceived any special reason for changing in commercial matters the general principles of the civil law. Hence we believe it proper to explain briefly those principles, as they are established in the civil code of Spain.

The warranty of title becomes effective when there has been an eviction. Eviction takes place when by a final judgment and by virtue of a right antedating the sale, the vendee is deprived of the whole or of a part of the thing purchased.

The vendor is liable for the damages arising from eviction though the contract be silent on the subject. The contracting parties may, however, increase, decrease, or expressly waive the obligation arising out of the warranty.

[80] Spain, 345; Brazil, 215; Chile, 154; Colombia, 246; Costa Rica, 327; Ecuador, 190; Guatemala, 221; Honduras, 117; Mexico, 384; Nicaragua, 212; Panama, 770; Peru, 340; Uruguay, 549.

The heir of the vendor cannot ask for the nullity of a sale, because he is bound to warrant the title thereof. Argentina, Cam. Fed. de Apel. La Plata, May 28, 1913.

Indemnity to a buyer in case of eviction is only proper when he has been deprived of the whole or a part of the thing by a final judicial decision, provided the seller was summoned and notified of the demand. A settlement made by the buyer with the plaintiff in such suit, without the concurrence of the seller, cannot prejudice the latter. Spain, Trib. Sup., June 26, 1913; *Gaceta* of Feb. 14, 1914, p. 537.

The seller after summons is served upon him to appear in a suit brought against the buyer cannot be declared to be in default (*declarado en rebeldía*) because he is not bound to defend the buyer but to indemnify him in case the plaintiff recovers the thing sold. Spain, Trib. Sup., June 15, 1912; *Gaceta* of June 18, 1914, p. 493.

A judicial decision in a case in which the matter of eviction has been one of the issues in litigation, must determine when the defendant is deprived of the possession of the thing disputed; otherwise the decision may be set aside. Spain, Trib. Sup., April 27, 1907; *Gacetas*, Jan. 30 and Feb. 15, 1907, p. 48.

If a vendee has waived the covenant of warranty against eviction and the eviction occurs, the vendor need return only the value of the thing at the time of the eviction, unless the vendee has assumed the risk of eviction; in the latter event, the vendor need make no compensation.

When a warranty has been expressed, or when there has been no mention of the subject, and the eviction takes place, the vendee has the right to demand of the vendor:

1st. The restitution of the value of the thing at the time of eviction, whether it be greater or less than the purchase price;

2d. The fruits or accrued proceeds thereof, in cases where he would have been judicially ordered to deliver them to the person who won the suit;

3d. The costs of the suit which resulted in the eviction, and in a proper case, those of the suit instituted against the vendor on the warranty;

4th. The expenses of the contract, if the vendee paid them;

5th. The damages and voluntary expenses incurred to improve the thing sold, should the sale have been made in bad faith.

Should the vendee be evicted from a part of the thing sold, of such importance in relation to the whole that without it he would not have made the purchase, he may demand the rescission of the contract; but with the obligation to return the thing without encumbrances other than those it had when he acquired it.

The same rules are applicable when two or more things are sold together for a lump sum or at a special price for each, if it clearly appears that the vendee would not have purchased one without the other.

Vindication or making good of the warranty cannot be demanded until a final judgment has been rendered by which the vendee is judicially ordered to return to the true owner the thing acquired or a part thereof.

The vendor is obliged to make good the warranty whenever it is proved that he was given notice by or at the in-

stance of the vendee of the suit for eviction. In the absence of such notice, the vendor is not bound by the warranty.

A defendant vendee must request, within the period fixed by the law of civil procedure, that notice of the complaint be given to the vendor or vendors within the shortest period possible. This notice which has the character of interpleader, must be served in the manner provided for summoning defendants.

The time of the vendee to answer the complaint is suspended until the expiration of the time granted the vendor and prior vendors, covering the period of limitation, to appear and answer the complaint; this period is the same as that granted all defendants by the law of civil procedure, and is counted from the date when the summons was served upon the vendor. Should the vendors not enter a timely or proper appearance, the vendee's period to answer begins to run.

Warranty for hidden defects.

With respect to the warranty for hidden defects in or encumbrances on the thing sold, the general principles of law are in no wise special to the commercial law, but are found in the general civil law of the civil code. A few words will suffice to explain the matter.

The vendor is bound to warrant against any hidden defects in the thing sold, should they render it unfit for the use for which it was intended, or if they should so impair such use that the vendee, had he had knowledge thereof, would not have purchased the thing or would have given a lower price for it; but the vendor is not liable for patent defects, for those which are visible, or for those which are not visible if the vendee is an expert who might easily have discovered them.[81] In these last cases, the rule *caveat emptor* applies.

[81] The seller of goods which are damaged is liable for hidden defects to the purchaser who bought them supposing they were in good condition, even after delivery of said goods. Brazil, Acc. Da Rel. da Corte, No. 5748 of Feb. 9, 1855, Mafra, *Jurisp. das Trib.*, p. 313.

The action for rescission on account of hidden defects which could not be perceived at the time the goods were examined, may be brought against the vendor within a period which varies from country to country. In Spain.[82] Honduras,[83] Mexico,[84] Peru [85] and San Salvador,[86] the period is thirty days; in Argentina it is fixed by the tribunals as the case may require, but it can never be more than six months; in Chile,[87] Colombia,[88] Costa Rica,[89] Guatemala,[90] Nicaragua [91] and Uruguay,[92] it is six months; in Ecuador [93] it is six months in domestic trade and one year in foreign trade; and finally, in Brazil,[94] there is no special term, so that the period presumably is that fixed by the general principles of the statute of limitations.

Period for making claims on account of faults in quantity or quality.

When the goods are delivered in bales or wrapped so that they cannot be examined, the vendee may make claim for any shortage in quantity or defect in quality within three days after delivery. In the first case he must prove that the outside ends of the pieces have remained untouched; and in the second case, that the defects could not have occurred by an unforeseen event or fraudulently while in his possession. The vendor may always require at the time of delivery that a thorough examination of the quantity and quality of the goods be made by the vendee; and in that event there will be no ground for claims after delivery.[95]

In Chile,[96] Colombia [97] and Guatemala,[98] the same rule prevails, but the vendee at the time of receiving the goods baled or covered must expressly reserve his privilege of examining them.

[82] Art. 342. [83] Art. 114. [84] Art. 383.
[85] Art. 337. [86] Art. 88. [87] Art. 154.
[88] Art. 246. [89] Art. 318. [90] Art. 221.
[91] Art. 205. [92] Art. 548. [93] Art. 190.
[94] Art. 210.
[95] Spain, 336; Argentina, 472; Honduras, 108; Panama, 772; Uruguay, 546.
[96] Art. 159. [97] Art. 251. [98] Art. 226.

In Costa Rica [99] and Nicaragua [100] the same rule prevails as in Argentina, but the period for making claims is eight days after delivery. In Brazil [101] the period is ten days.

Ecuador [102] and Venezuela [103] have adopted the above-mentioned rule requiring that the vendee expressly reserve his privilege of examining the goods at the time of delivery, but the period for claims is extended to eight days.

In Mexico [104] the vendee who within five days after receipt of the goods makes no claim against the vendor for defects in the quantity or quality thereof, or who within thirty days from the time of receipt makes no claim for hidden defects loses all rights against the vendor arising out of these causes.

In San Salvador [105] the rule of Argentina is established; but when there has been fraud, the vendee is entitled to ask for the rescission or the fulfillment of the contract without the special limitation incidental to the action on the warranty against defects.

Obligation of giving an invoice.

No seller can refuse the buyer an invoice of the goods sold and delivered, and a receipt for the amount received. If there is no statement as to when payment is to be made, it is presumed that the sale is for cash. When the buyer does not object to the invoice within eight days after delivery (in Argentina, Brazil and Uruguay within ten days) it is presumed that the amount of the invoice is a correct account.[106]

Risk of loss of the thing sold.

Inasmuch as by virtue of a contract of purchase and sale the title to the thing sold is divested from the vendor and vested in the vendee by the mere agreement of the parties,

[99] Art. 317. [100] Art. 205. [101] Art. 211.
[102] Art. 191. [103] Art. 150. [104] Art. 383.
[105] Art. 85.

[106] Argentina, 474; Brazil, 219; Chile, 160; Colombia, 252; Costa Rica, 324; Ecuador, 200; Guatemala, 227; Nicaragua, 209; Panama, 776; Uruguay, 557; Venezuela, 152.

the risk of loss of the thing ought to be thenceforth on the vendee, by application of the rule "risk follows title." That is the rule in civil transactions; but in mercantile purchase and sale when delivery has not been made we find the following systems:

System of Spain. The loss or impairment of the thing sold, due to unforeseen events and without fault of the vendor, gives power to the vendee to rescind the contract, unless the vendor has been entrusted with the deposit thereof, in which case the vendor is liable only according to the law of bailment.[107]

System of Chile. This system is in accord with general principles inasmuch as the risk of loss or impairment of the goods after completion of the contract rests on the buyer, unless otherwise stipulated or unless the loss or impairment are due to fraud or negligence of the vendor or to inherent vices in the thing sold.[108]

The risk of loss and injury to goods, occurring after the contract has been perfected and after the vendor has put them at the disposal of the vendee, in proper time and place, rests on the latter, except in cases of fraud or negligence of the vendor.[109]

Cases in which the vendor assumes the risk.

Losses of and injuries to the goods, though due to unforeseen events, are borne by the vendor in certain cases, as follows: [110]

(*a*) if the sale is made by number, weight, or measure, or if the thing sold has not been specified by marks or signs which identify it; [111]

[107] Spain, 331; Costa Rica, 312; Honduras, 103; Mexico, 377; Peru, 326; Uruguay, 541.

[108] Chile, 142; Colombia, 232; Ecuador, 186; Guatemala, 209; Panama, 756.

[109] Spain, 333; Brazil, 206; Costa Rica, 313; Honduras, 105; Peru, 328; Uruguay, 541.

[110] Spain, 334; Brazil, 207; Chile, 143; Colombia, 233; Costa Rica, 314; Ecuador, 187; Guatemala, 210; Honduras, 106; Panama, 757; Peru, 329; Venezuela, 141.

[111] Spain, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Panama, Peru.

(*b*) if, by express stipulation or commercial usage, according to the nature of the thing sold, the purchaser is to have the privilege of examining it before acceptance; [112]

(*c*) if it is stipulated that the thing is to be delivered after certain things are done to it; [113]

(*d*) if the vendor fails to deliver the thing sold after the vendee is ready to receive it.[114] The codes of Chile, Colombia, Ecuador, Guatemala and Panama in referring to this case, provide further that the loss does not fall on the vendor when it would have occurred even had the thing been in the possession of the vendee;

(*e*) if in alternative obligations one of the things to be delivered is lost because of unforeseen events. When both are lost and the loss of one is due to the fault of the vendor, he must pay the price of the last one destroyed, if he had the privilege of choosing. If he did not have that privilege, and one of the things was lost by an unforeseen event, the vendee must be satisfied with the remaining one; but if the loss was due to the fault of the vendor the vendee can demand either the delivery of the remaining or the price of the lost one.[115]

When the loss or injury of the article falls on the vendor, he must refund to the vendee the part of the price he might have received.[116]

Obligations of the vendee.

The obligations of the vendee are two, namely, to receive the goods sold and to pay their price.

Obligation of receiving the goods sold.

As a correlative obligation of the vendor to deliver the thing sold, the vendee must receive it; should he refuse

[112] Spain, Brazil, Chile, Colombia, Costa Rica, Guatemala, Panama, Peru.
[113] Spain, Chile, Colombia, Costa Rica, Ecuador, Peru.
[114] Brazil.
[115] Chile, Colombia, Ecuador, Guatemala, Panama.
[116] Spain, 335; Costa Rica, 315; Honduras, 107; Panama, 769; Peru, 330.

without reasonable cause, the seller can demand the performance or the rescission of the contract, making, in the first case, a judicial deposit of the goods sold. The vendor can also make such deposit when the buyer delays in taking over the goods. The expenses arising out of the deposit must be borne by the party who made it necessary.[117]

In Venezuela,[118] when the buyer does not perform his obligation to receive the goods, the seller has a right either to have the thing sold, or to deposit it with a reliable person; should there be none such, then with a trustworthy commercial house, all the expenses being borne by the buyer. The sale must be made at public auction or at current prices, if the thing, subject-matter of the contract, is quoted in the exchange or market, through an auctioneer or broker, as the case may be; and in default of either, through a person designated by the judge. The vendor has the right to demand from the vendee the difference between the price so obtained and the contract price, as well as payment of damages.

Obligation to pay the price. When it begins.

When the merchandise is placed at the disposal of the buyer and he is satisfied with it, or when it has been deposited by order of a judge after the buyer refused it without good reason, the obligation to pay the price in cash or at the period agreed upon, begins.[119]

[117] Spain, 332; Brazil, 204, 205; Chile, 153; Colombia, 244; Ecuador, 197; Guatemala, 220; Honduras, 104; Mexico, 376; Nicaragua, 202; Panama, 754, 768; Peru, 327; Uruguay, 535, 536.

Articles 332 and 339 of the code of commerce which refer to purchase and sale of merchandise or goods cannot be applied to the sale of a commercial house in bulk. Cuba, Trib. Sup., Aug. 18, 1905; *Gaceta*, March 16, 1906.

[118] Art. 147.

[119] Spain, 339; Argentina, 465; Chile, 155; Colombia, 247; Costa Rica, 321; Guatemala, 222; Honduras, 111; Mexico, 378; Panama, 764, 773; Peru, 334; Uruguay, 531.

The vendor who has not been paid the price of the thing sold, can obtain restitution of the thing or payment of its current price on the day when judgment was rendered. Argentina, Cam. Fed. de Apel., La Plata, July 1, 1914, *Jurisp. de los Trib. Nacs.*, July, 1914, p. 161.

Payment of taxes on the transfer of property must be made by the buyer,

Default in the payment of the price.

Default in the payment of the price of the thing sold, renders the buyer liable for payment of legal interest on the amount due to the vendor, as follows: [120]

System of Spain. If there is a period for payment stipulated, of course, as in all other contracts, that stipulation is binding; but when there is no stipulation, default begins when the vendee fails to pay on receipt of the goods, and from that moment interest begins to run.[121]

System of Argentina. If the contracting parties did not fix any period for the payment of the price the vendee must be allowed a period of ten days for payment; but he cannot demand delivery of the goods without paying the price at the time of delivery.[122]

Earnest money (arras).

When in commercial purchase and sale earnest money has been given, it must always be understood as given on account of the price and as evidence of ratification of the contract, not as a condition precedent to the performance of the contract or as the price of the privilege of recantation or withdrawal, unless otherwise stipulated.[123]

unless otherwise agreed upon, because such taxes are comprised among the expenses after the sale. Cuba, Trib. Sup., Dec. 4, 1906; *Gaceta*, March 3, 1907.

[120] Spain, 341; Costa Rica, 322; Ecuador, 201; Honduras, 113; Nicaragua, 207; Panama, 754; Peru, 336; Uruguay, 532.

[121] Spain, 339; Argentina, 465; Chile, 155; Colombia, 247; Costa Rica, 321; Ecuador, 201; Guatemala, 222; Honduras, 111; Mexico, 380; Nicaragua, 207; Panama, 773; Peru, 334; Uruguay, 531.

[122] Argentina, 464; Uruguay, 530.

[123] Spain, 343; Argentina, 475; Brazil, 218; Costa Rica, 326; Honduras, 115; Mexico, 381; Nicaragua, 211; Panama, 755; Peru, 338; San Salvador, 89; Uruguay, 558.

If the seller can prove that he could convey title to the thing, subject-matter of a contract of purchase and sale, but the buyer, without good reason, refused to accept it, the seller can ask for the recission of the contract and forfeiture of the earnest money given by the buyer. Buenos Aires, Cam. 2° de Apel. civil, July 4, 1914, *Jurisp. de los Tribs. Nacs.*, July, 1914, p. 169.

When the vendor has not fulfilled his obligations in a contract of purchase and sale, he is bound not only to return the earnest money he received but in

Priority of the vendor's credit.

It has been observed that once the parties have agreed upon the thing and its price, the thing belongs to the vendee and the vendor has a personal action against him for payment of the price. Nevertheless, so long as the goods remain in the possession of the vendor (even though he be only a depositary), he has a preferential lien upon them over any other creditor of the vendee, for the purchase price and interest occasioned by the default.[124]

Contract of exchange or barter.

The rules mentioned in dealing with the contract of purchase and sale are applicable to the contract of barter in so far as the circumstances may warrant.[125]

Assignment of non-endorsable credits.

Mercantile credits neither endorsable nor payable to bearer can be transferred by the creditor without the consent of the debtor, merely by serving notice on the latter in the manner provided by law. From the moment that notice is given to the debtor, he is bound to pay to the assignee,

addition an equal amount and also all the expenses caused by the non-fulfillment of the contract. Argentina, Cam. 2ª de Apel. Civ. Buenos Aires, July 7, 1914, J. del Prado *v.* Calegari, *Jurisp. de Los Trib. Nacs.*, July, 1914, p. 175; and Cam. 1ª de Apel. Civ., March 21, 1914, J. Santamaria *v.* A. Aguinariz, *Ib.*, March, 1914, p. 90.

[124] Spain, 340; Argentina, 466; Chile, 151; Colombia, 241; Costa Rica, 323; Ecuador, 195; Guatemala, 218; Honduras, 112; Mexico, 386; Nicaragua, 208; Peru, 335; San Salvador, 87; Uruguay, 533; Venezuela, 153.

When a thing is sold on credit, and it was delivered to the buyer, the seller who afterwards receives it for the purpose of making repairs on it can retain it for payment of the repairs, but not for the balance due on the price thereof. Argentina, Cam. 2ª de Apel. Civ., Buenos Aires, July 4, 1914, *Jurisp. de los Tribs. Nacs.*, July, 1914, p. 169.

The seller can retain the merchandise when the sale was for cash and the buyer did not pay the price, or when the sale was on credit and there is imminent risk that the seller will not be paid. Mexico, Juzgado 3° de lo Civil del Dist. Fed., Feb. 20, 1911, Ortiz Saenz y Cia. *v.* Sebastian B. De Mier, *Diario de Jurisp.*, vol. XXIII, p. 601.

[125] Spain, 346; Brazil, 225; Chile, 161; Colombia, 253; Costa Rica, 333; Ecuador, 202; Honduras, 122; Mexico, 388; Nicaragua, 216; Panama, 783; Peru, 341; San Salvador, 90; Uruguay, 577; Venezuela, 156.

and no payment made to any other person is considered valid.[126]

The assignor is responsible for the lawful existence of the credit and for his own rights in it, but not for the solvency of the debtor.[127]

SALE OF A COMMERCIAL HOUSE

The code of Panama and the law of July 23, 1901, of Costa Rica have paid special attention to this important and frequent transaction among merchants and have provided special rules to safeguard the interests of the seller's creditors, so frequently jeopardized by contracts of this kind. The provisions of both the code of Panama and the law of Costa Rica are the same, namely:

The sale or transfer for any reason whatsoever of a commercial house is of no effect against third parties if it has not been made public by means of a notice inserted three times in the official paper and in another paper of the locality, if there is any, and if not, in a paper of the nearest place.[128]

The provision is applicable whether the commercial house or the greater part thereof is sold as a whole or in two or more parts whenever the parts are larger than those required by normal transactions.[129]

The purchaser of the house cannot legally, *i. e.*, without risk of creditor's claims, pay the price until fifteen days after the publication of the first notice above referred to. In this period the day of publication and that of payment are not computed.[130]

The creditors of the commercial house can enforce their claims against the price within the said period of fifteen

[126] Spain, 347; Chile, 162, 163; Colombia, 254; Costa Rica, 329; Ecuador, 203; Honduras, 123; Mexico, 389; Nicaragua, 213; Panama, 786, 789; Peru, 342; Uruguay, 563; Venezuela, 155.

[127] Spain, 348; Costa Rica, 331; Honduras, 125; Mexico, 391; Nicaragua, 214; Panama, 785; Peru, 343; Uruguay, 567.

[128] Costa Rica, 1; Panama, 777.

[129] Costa Rica, 2; Panama, 778.

[130] Costa Rica, 3; Panama, 779.

days, notwithstanding the fact that their claims are not yet due.

They can also during the said period oppose the sale, if they prove, by means of an appraisal made *groso modo*, that the price agreed upon is ten per cent less than the normal obtainable market price; or if they bind themselves to take over the business at the terms agreed upon.

The appraisal referred to must be made by experts. For that purpose the interested person must apply to a judge of competent jurisdiction, setting forth his demand and naming his expert.[131] The law of Costa Rica adds further that the judge must also choose an expert and request the vendor to choose another within twenty-four hours; should he fail to do so, the judge must *ex officio* designate an umpire.

The privileges thus granted the creditors may be exercised by any of them; it is understood that the acting creditor proceeds in the common interest, and that the advantages obtained accrue to the benefit of all.

The creditor who acts has a right of priority against the sums received, as reimbursement for all expenses incurred; but the allotment of the balance must be made according to the priority established by the law.[132]

The debtor-vendor as well as the vendee of the commercial house can in his turn stop the action of the creditors by paying in full those whose credits are due and by paying with a discount of one-half per cent per month or guaranteeing by mortgage, pledge or bond, the credits not yet due.[133]

[131] Costa Rica, 4; Panama, 780.
[132] Costa Rica, 5; Panama, 781.
[133] Costa Rica, 6; Panama, 782.

CHAPTER XXIII

CONTRACT OF TRANSPORTATION OVERLAND

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Verdegay y Fisconich, Eduardo: Historia del correo . . . con un apendice que comprende la legislación interior de los países que forman la unión postal universal. Madrid, 1894.

Character of the contract.

By the contract of transportation a person or enterprise binds himself or itself to convey from one place to another, things, persons or news for a certain price.

The transportation of news by mail or telegraph is usually a monopoly of the state, and subject, like the telephonic services, to special rules which are not discussed in this chapter.

The transportation of persons and things is divided by the codes into two parts: one comprising carriage from one place to another over land, rivers, lakes or canals; the other including transportation over-seas. The latter is here left out of consideration.

From an economic point of view transportation is one of the most important instruments for the creation of wealth. This is almost a truism. The whole machinery of civilized life is based on the coöperation of all the peoples of the world, made possible through the modern means of transportation.

From a legal viewpoint transportation is considered far more important in commercial than in civil matters. The civil codes deal with it as one of the forms of the more comprehensive contract of hiring of services, while in the commercial codes it is the subject-matter of most elaborate provisions.

Transportation as a commercial act.

In distinguishing commercial from civil transportation we find the same variety of systems already observed in the

classification of other contracts. These may be summarized as follows:

1. The contract of transportation overland or on inland waterways is commercial: (*a*) when merchandise is the object thereof; or (*b*) when, whatever the object, the carrier is a merchant or habitually engages in transportation for the public.[1]

2. It is commercial when carried on by overland or river transportation enterprises.[2]

3. It is commercial when the subject-matter of the contract is merchandise or persons who engage in commerce or travel on commercial pursuits.[3]

Form of the contract.

The usual form in which the contract between the consignor and the carrier is embodied is the bill of lading (*guía* or *carta de porte*). It must contain the following items:[4]

(*a*) the name, surname and address of the consignor (*cargador*).[4a]

No statement of the address of the consignor is required in Brazil;

[1] Spain, 349; Honduras, 126; Mexico, 576; Panama, 2; Peru, 344.

[2] Argentina, 8; Chile, 3; Colombia, 20; Guatemala, 3; San Salvador, 3; Uruguay, 7; Venezuela, 2.

Contracts are only commercial when the parties thereto are merchants; and in the contract of transportation, purchase and sale and certain others it is also necessary that the subject-matter of the contract be merchandise. Colombia, Corte Suprema de Justicia, Sept. 30, 1889; *Gaceta Judicial*, v. IV, p. 146.

[3] Ecuador, 3. A person who hires from an owner a beast of burden and the services of one of the owner's employees for transportation of merchandise does not make any contract of transportation, and is not responsible for wrongs done by the employee. Ecuador, Corte Suprema de Just., May 30, 1885. G. Gomez *v.* A. Flores; *Gaceta Judicial*, No. 113, August 13, 1904.

[4] The articles of the codes which refer to the requisites of bills of lading are: Spain, 350; Argentina, 165, 166; Bolivia, 175; Brazil, 100; Chile, 175, 176; Colombia, 274, 275; Costa Rica, 7 and 8 of law of Nov. 26 and 29, 1909, governing transportation; Ecuador, 211; Guatemala, 139; Haiti, 101; Honduras, 127; Mexico, 581, 582; Nicaragua, 109; Panama, 668, 670; Peru, 345; San Salvador, 92; Santo Domingo, 102; Uruguay, 165; Venezuela, 159.

[4a] Spain, Argentina, Bolivia, Chile, Colombia, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, San Salvador, Venezuela.

(*b*) the name, surname and address of the carrier (*porteador*).[5]

In Brazil the address of the carrier need not be stated;

(*c*) the name, surname and address of the consignee (*consignatario* or *destinatario*) or the person to whose order the cargo is to be delivered, unless the bill of lading runs to bearer.[6]

In Bolivia, Brazil, Guatemala, Haiti, Santo Domingo, Nicaragua and Uruguay there is no provision for bills of lading to bearer. Haiti, Santo Domingo and Uruguay require the name of the consignee only, not his address;

(*d*) a description of the goods, including their generic character, their weight and the external marks or signs of the containers.[7]

(*e*) the transportation fares or freight charges;[8]

(*f*) the date when shipment is to be made;[9]

(*g*) the place of delivery to the carrier;[10]

(*h*) the place and time of delivery to the consignee;[11]

(*i*) the damages the carrier must pay in case of delay, if there is any agreement on this point;[12]

(*j*) the signatures of the consignor and of the carrier.[13]

[5] Spain, Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Peru, San Salvador, Santo Domingo, Venezuela.

[6] Spain, Argentina, Chile, Colombia, Ecuador, Honduras, Mexico, Panama, Peru, San Salvador, Venezuela.

[7] Spain, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Peru, San Salvador, Santo Domingo, Uruguay, Venezuela.

[8] Spain, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Peru, San Salvador, Santo Domingo, Uruguay, Venezuela.

[9] Spain, Colombia, Honduras, Mexico, Nicaragua, Panama, Peru, San Salvador.

[10] Spain, Honduras, Mexico, Peru.

[11] Spain, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, San Salvador, Uruguay, Venezuela.

[12] Spain, Bolivia, Colombia, Ecuador, Haiti, Honduras, Mexico, Nicaragua, Peru, San Salvador, Santo Domingo, Venezuela.

[13] Haiti, Santo Domingo.

Even though the codes of the other countries omit this requisite, this silence is probably due to the fact that the signature of the parties in any contract is considered a matter of course.

In transportation by railway or other public enterprise subject to regulated schedule and tariff, the bill of lading may refer to tariffs, fees, time and other conditions as stated in those schedules and regulations, without further detail.[14]

Legal effects of the bill of lading.

The bill of lading is the legal instrument embodying the contract between the consignor and the carrier. All the disputes which may arise in regard to the fulfillment of their mutual obligations must be decided under that instrument, without extraneous defenses except forgery of the document itself or material error in the drafting thereof.[15]

[14] Spain, 351; Honduras, 128; Mexico, 587; Peru, 346; Panama, 720; San Salvador, 93.

Transportation enterprises enjoy absolute liberty to establish and reduce rates and cannot be compelled to apply such reduced rates to transportation services not exactly comprised within the conditions fixed. Those rates cannot serve as a basis for computing the charges for transportation beyond the limit for which the special tariff was made, or to reckon the fare for a partial trip. Spain, Trib. Sup., June 30, 1913; *Gaceta* of Aug. 10, 1913, p. 248.

[15] Spain, 353; Argentina, 167; Bolivia, 177; Brazil, 105; Chile, 173, 178, 185; Colombia, 272, 276, 277.

The contract of transportation is not considered performed nor the carrier released from his obligation of delivering the merchandise transported, by the fact that the bill of lading was surrendered to him by the consignee in exchange for an order on the warehouse of the carrier to deliver such merchandise. If in the meantime a fire destroys the merchandise, the carrier is liable unless he proves that the fire was not due to his own negligence. Spain, Trib. Sup., April 11, 1913; *Gaceta* of Jan. 1914, p. 309.

The receipt given by the consignee and the payment of the transportation charges extinguish all actions against the carrier, who is furthermore released from any obligation when the time required by the statute of limitations in cases of transportation has elapsed. Spain, Trib. Sup., Nov. 7, 1910; *Gaceta* of Jan. 25, 1911, p. 78.

When the bill of lading stipulates that the forwarding company obligates itself to convey the goods by railway on condition that the railway accepts them, the forwarder is not liable for delay when the goods are transported in a boat because the railway refused to accept them. Argentina, Cam. de Ap. en lo Com. de la Capital, Aug. 12, 1913, p. 305.

The sale of damaged goods by a railway contrary to the provisions of the

Where there is no bill of lading, disputes are decided according to the legal evidence each contracting party may submit in support of his respective claim, in accordance with the general provisions of the law relating to commercial contracts.[16]

After the contract has been performed, the bill of lading must be returned to the carrier. By virtue of the exchange of this document for the goods carried, the reciprocal obligations and actions are cancelled, unless in the act of exchange the power of making a claim is reserved in writing by either of the parties, or unless there is a hidden damage in the goods not detectable without opening the wrappers or packages in which they are contained. If, because of

law governing railways does not imply an obligation to pay the consignee the value of the goods according to the market price of similar commodities in good condition, but only to pay the difference between the price obtained in the sale and that which the damaged goods would have produced, damaged as they were, if the bill of lading stated that the carrier could not be held responsible except for damages caused by his own negligence, properly proved by the shipper. This stipulation in the bill of lading establishes the presumption that any damage sustained by the transported goods is due to their own vices. Argentina, Cam. de Apel. Com. de la Cap., June 21, 1913, Antoniazzo y Brezza *v.* Empresa del F. C. Oeste de Buenos Aires, *Jurisp. de Los Tribs. Nacs.*, June, 1913, p. 305.

Documents which represent valuable goods are transferable by endorsement notwithstanding that they are made in favor of a certain person. Bills of lading are included in this provision.

The contract of transportation is governed by the stipulations contained in the bill of lading, and not by other statements made by the parties. The bill of lading is the legal way to prove the delivery of the goods to the carrier and the delay in the transportation. Spain, Trib. Sup., Nov. 9, 1907; *Gaceta* of Dec. 4, 1908, p. 818.

The responsibility of the carrier ceases when he has surrendered the transported goods at the place nearest to their destination and they are there received by the consignee, if so stipulated in the bill of lading. Cuba, Trib. Sup., May 4, 1903; *Gaceta* of Dec. 21, 1903.

The bill of lading is the only evidence of a contract of transportation; therefore, if not produced by the plaintiff, the questions arising from such a contract cannot be decided. Mexico, Juzgado Sexto Menor de la Capital, April 7, 1890, N. de Lugo Viña *v.* F. C. Central Mexicano, *Anuario de Leg. y Jur. Sección de Jurisp.*, v. 7, p. 489.

[16] Spain, 354; Argentina, 167; Bolivia, 177; Chile, 177, 179, 181; Colombia, 266, 278; Ecuador, 211, 215; Guatemala, 141; Honduras, 131; Mexico, 584, 585; Nicaragua, 110; Panama, 672; Peru, 349; San Salvador, 96; Uruguay, 166; Venezuela, 159, 160.

loss or for any other reason, the consignee cannot, upon receiving the merchandise, return the bill of lading to the carrier, he must give him a receipt for the goods delivered, this having the same effect as the return of the bill of lading.[17]

In Brazil, the issuing of a bill of lading is not optional but imperative, and there is no provision expressly authorizing the use of other evidence in the absence of a bill of lading; on the contrary, it is established that the carrier can be held responsible only for the merchandise enumerated in the bill of lading, evidence that the consignor shipped a greater quantity of goods, or goods of greater value than that declared, being inadmissible.[18]

Legal nature of the contract of transportation.

The contract of transportation of merchandise shares at the same time the character of a contract of hiring of services and of deposit.[19] It is a contract which produces an obligation of doing, notwithstanding the fact that the carrier may, under his personal responsibility, entrust the transportation to a third party. In this case the legal relations of the three or more parties involved are described variously in the sundry Latin-American codes, as follows:

(*a*) A carrier who combines his services with other carriers assumes the obligations of the preceding connecting carriers with respect to the consignee; the right of such carrier to recover from the others and damages he may have paid to the consignor or consignee being reserved, if such damages were not due to his fault. The last carrier who makes the discovery also assumes the rights of action and other rights of his predecessors in the transportation. The shipper and the consignee have a right of action against the carrier who executed the original contract of transportation, or against the other carriers who receive without reserve the goods

[17] Spain, 353; Honduras, 130; Mexico, 583; Nicaragua, 111; Panama, 671; Peru, 348; San Salvador, 95.

[18] Art. 105.

[19] Chile, 167; Colombia, 264.

transported. This reservation, however, does not exempt the carriers from liabilities they may have incurred by their own acts.[20]

(*b*) A carrier can entrust to another carrier the transportation he undertook himself to perform; in that case, the original carrier assumes the character of a carrier with respect to the consignor, and that of a consignor with respect to the delegated carrier.[21]

Special cases in which the contract can be rescinded.

The contract of transportation can be rescinded at the will of the consignor before or after the beginning of the carriage. In the first case he must pay the carrier half the stipulated fees; in the second, the entire freight.[22] Uruguay [23] mentions the first case only.

In case the transportation is prevented or inordinately delayed by reason of some unforeseen event or *force majeure*, rules according to the following systems have been adopted:

1. The carrier must advise the consignor of the obstacle, and the latter may rescind the contract, paying the carrier the expenses incurred and returning the bill of lading. If the obstacle occurs while the carriage is taking place the carrier is furthermore entitled to a part of the freight proportionate to the mileage already covered.[24]

2. The contract can be rescinded without any of the parties having to pay indemnity, where the carriage is not undertaken because of loss of the merchandise, a declaration of war, prohibition of trade, seizure of the goods by enemy forces or other like circumstances.[25] If, after the carriage began, *force majeure* interposes, the

[20] Spain, 373, 379; Argentina, 171; Bolivia, 191; Guatemala, 166; Venezuela, 172.

[21] Chile, 168; Colombia, 265; Ecuador, 205; Nicaragua, 128.

[22] Chile, 169; Colombia, 267; Costa Rica, 5, 6; Ecuador, 206; Mexico, 578; Panama, 664; Venezuela, 163.

[23] Art. 182.

[24] Argentina, 192; Venezuela, 167.

[25] Chile, 170; Colombia, 268; Costa Rica, 13; Ecuador, 207; Mexico, 579; Panama, 666; Venezuela, 164.

carrier can rescind the contract or continue the voyage as soon as the obstacle is removed; should he elect the rescission of the contract he can deposit the cargo at the place nearest to destination or send it back to the point of origin, charging freight in proportion to the mileage covered in both directions, except that the total cannot exceed the agreed freight.[26] In the latter case, in Mexico,[27] the carrier is entitled to *pro rata* freight according to the distance covered; but he is bound to surrender the merchandise to the judicial authority of the place beyond which the trip could not be continued, proving the fact that the goods are handed over in the same state in which they were received by the carrier. The consignor must be advised of these proceedings.

Different kinds of carriers.

Carriers are private and public. The former are private individuals who do not offer their services to the public, but undertake the conveyance of persons or merchandise for a price agreed upon in each case. Public carriers undertake a public service, in the period, at the prices and under the conditions previously announced.[28] In Venezuela [29] a distinction is made between transportation enterprises authorized and not authorized by the Government, the distinction having practically the same consequences as that between public and private carriers.

Obligations of the consignor.

The consignor is bound to deliver the goods to the carrier in good condition at the agreed time and place, as well as to

[26] Chile, 195; Colombia, 294; Ecuador, 231; Guatemala, 164; Venezuela, 171.

[27] Art. 580.

[28] Spain, 351; Argentina, 204; Chile, 172; Colombia, 271; Costa Rica, 4; Ecuador, 209; Honduras, 128; Mexico, 587; Panama, 709; Peru, 346; San Salvador, 93.

[29] Art. 191.

supply him with all necessary documents for their ready transportation.

If the delivery is not made at the time and place stipulated the carrier can demand the rescission of the contract and the payment of half the agreed freight; if he prefers to carry out the contract, the consignor must pay him any additional expense due to the delay.

Confiscations, fines and any other damages suffered by the carrier due to lack of the documents above referred to are at the exclusive account of the shipper.[30]

When the value of the transported merchandise is not sufficient for the payment of freight and the expenses of its preservation, and for that reason the consignee refuses to pay the carrier, the consignor must pay him such freight and expenses.[31]

Privileges of the consignor.

The consignor can, without changing the place where delivery is to be made, change the consignee of the goods, and the carrier must comply with his orders, provided that at the time of change of consignee the original bill of lading, if one was issued, be returned to the carrier in exchange for another containing the new consignee; the expense of the change being charged to the consignor.[32]

Risks of transportation.

Merchandise is transported at the risk of the consignor, unless the contrary is expressly stipulated. The carrier is not an insurer. Therefore all damages and impairment sustained by the goods in transportation by reason of accident, *force majeure*, or by inherent defects of the goods, are for the account and risk of the consignor. The burden of

[30] Chile, 180 to 183; Colombia, 279 to 282; Costa Rica, 11; Mexico, 588; Panama, 673; Venezuela, 161.

[31] Chile, 189; Colombia, 299; Costa Rica, 10; Ecuador, 225.

[32] Spain, 360; Argentina, 191; Bolivia, 183; Brazil, 113; Chile, 187, 188; Colombia, 286, 287; Costa Rica, 16; Ecuador, 223, 224; Guatemala, 158, 159; Honduras, 137; Mexico, 589; Nicaragua, 122; Panama, 667; Peru, 355; San Salvador, 102; Uruguay, 180; Venezuela, 169.

proving these accidents is on the carrier.[33] Articles 97 of the code of Haiti, and 98 of that of Santo Domingo provide, however, that the carrier insures the goods for damage and losses, unless otherwise stipulated in the bill of lading, and not comprising *force majeure.*

In no case is the consignor entitled to demand indemnity for losses or average sustained by merchandise not included in the bill of lading, nor can he claim that the goods were of a quality superior to that indicated in said document, unless the loss or damage is due to fraud of the carrier.[34]

[33] Spain, 361; Argentina, 172; Bolivia, 184; Brazil, 102; Chile, 184; Colombia, 283; Costa Rica, 14; Ecuador, 220; Guatemala, 143; Haiti, 99; Honduras, 138; Mexico, 588, 590; Nicaragua, 112; Panama, 688; Peru, 356; San Salvador, 103; Santo Domingo, 100; Uruguay, 168; Venezuela, 176.

An unlawful order given by the collector of customs to detain goods the transportation of which was contracted to be performed in a certain period of time, is an act of *force majeure* which the carrier can allege in a suit brought against him by the consignee. Spain, Trib. Sup., June 2, 1899; *Gaceta* of August 25, 1899, p. 57.

The carrier who alleges in his favor, in the case of damage or loss of goods entrusted to him for transportation, that the damage or loss was due to unforeseen event, is obliged to prove it. Spain, Trib. Sup., Oct. 7, 1899; *Gaceta* of Nov. 2, 1899, p. 195.

Actions arising out of the contract of transportation are barred by limitation after one year from the day in which they originated; the fact that the plaintiff had within such period appointed an attorney to press his claim in the courts, does not interrupt the running of the period. Spain, Trib. Sup., Jan. 20, 1898; *Gacetas* of Feb. 8 and 10, 1898, p. 99.

See note No. 15, Decision of June 21, 1913, Argentina, Cam. de Apel. Com. de la Capital.

Even though the freight note provides that damages will be presumed to have originated in vices of the things transported the carrier is responsible if the consignor proves that damage was due to the carrier's negligence. Argentina, P. Gorostiaga *v.* F. C. del O. de Buenos Aires, Cam. de Apel. en lo Com. de la Cap., Oct. 14, 1913. *Jurisp. de los Tribs. Nacs.*, Oct. 1913, p. 305, and Oct. 18, 1913, L. M. Fernandez *v.* Expreso Villalonga, *Ib.*, p. 309.

Articles 361 and 366 of the code of commerce are not applicable to damages caused by unforeseen events expressly excluded from the general rule contained in those provisions. Cuba, Trib. Sup., July 24, 1901; *Gaceta* of Nov. 23, 1901.

[34] Spain, 362; Argentina, 173; Bolivia, 185; Brazil, 105; Chile, 185, 186; Colombia, 284, 385; Ecuador, 221; Guatemala, 149; Honduras, 139; Nicaragua, 115; Panama, 689; Peru, 357; San Salvador, 104; Uruguay, 171; Venezuela, 177.

The carrier is liable for damages due to his carelessness. If he is transporting fruit which rots because it was not protected against rain during the voyage,

Duties of the carrier.

The duties of the carrier are as follows:

(*a*) To receive the merchandise at the time and place agreed upon.[35]

Carriers may refuse to accept packages which appear unfit for transportation; if such transportation is to be made over a railroad, and the shipment is insisted on, the company must accept it, but it is exempt from all liability if so stated in the bill of lading.[36]

even though the damage was caused by the fermentation of the sawdust used in packing such fruit moistened by the rain, the carrier is liable. The consignee is not bound to accept the goods. He can leave them for the account of the carrier. The consignee can recover, even though more than one year fixed by the statute of limitations has elapsed, if officers of the carrier have in the meantime accepted the claim and made some proposition for payment. Spain, Trib. Sup., March 18, 1912; *Gacetas* of May 16, 17, 1913, p. 167.

A transportation company cannot take advantage of the maximum period provided for beginning the trip, when it knows that by the nature of the goods they could be damaged by the delay. Spain, Trib. Sup., Feb. 16, 1906; *Gaceta* of Nov. 15, 1906, p. 216.

A railway company is liable for damages suffered in a wreck due to negligence in supervising and repairing its rolling stock. Those damages can be proved and appraised during the procedure in execution of the judgment. The company in that case is responsible even for damages caused to merchandise which it intended to refuse on account of the poor packing of the same and finally accepted, waiving all responsibility. Spain, Trib. Sup., Dec. 22, 1902; *Gacetas* of Jan. 18, 19, 1903, p. 74.

[35] Spain, 355; Chile, 191; Colombia, 290; Ecuador, 227; Mexico, 590; Peru, 350.

[36] Spain, 356; Argentina, 178; Costa Rica, 28; Honduras, 133; Panama, 679; Peru, 351; San Salvador, 98.

The inspection of the transported goods by experts appointed by the parties and an umpire in case of disagreement between the experts is not proper when the goods were received without protest by the consignee, and when, furthermore, the carrier refused to transport the articles on account of the bad state of the containers at the time of the contract, and the consignor insisted on the transportation. Spain, Trib. Sup., Jan. 10, 1906; *Gaceta* of Oct. 21, 1906, p. 218.

At the insistence of the consignor the carrier can be compelled to receive goods not properly packed, without being subject to any liability for damages due to the bad condition in which the goods were delivered, but he is not free from liability due to carelessness in the maintenance of the way or rolling stock. Argentina, Camera de Apel. en lo Com. de la Capital, June 10, 1913, C. V. Moll *v.* Compañía General de F. C. en la Provincia de Buenos Aires. *Jurisp. de los Tribs. Nacs.*, June, 1913, p. 280.

It is presumed that the goods were delivered in good condition to the carrier when no bill of lading was issued.[37]

If the carrier because of a well-grounded suspicion of the false declaration of the contents of a package should determine to examine it, he may do so before witnesses, in the presence of the consignor or of the consignee. Should the consignor or the consignee not appear, the examination must be made before a notary, who must draft a certificate of the result of the examination, for any further use. If the declaration of the consignor prove to be correct, the expenses of the examination must be defrayed by the carrier; otherwise, by the consignor.[38]

(*b*) To make the trip and to finish it by the precise route fixed in the contract, unless compelled to deviate by *force majeure;* if he does so without compulsion he is liable for any damages which may be sustained by the goods transported, whatever the cause, and he must pay the stipulated penalty besides. When on account of *force majeure* the carrier is obliged to take another route, causing an increase in transportation charges, he must be reimbursed for such addition after presenting formal evidence thereof.[39]

(*c*) To transport the goods at once, if no term has been fixed therefor; if engaged in periodical trips, he must forward the goods on the first trip following the contract.[40]

In Nicaragua [41] when no period is stipulated the carrier must start the trip within two days after the

[37] Argentina, 169; Chile, 181; Colombia, 280; Venezuela, 162, 173.

[38] Spain, 357; Costa Rica, 29; Honduras, 134; Panama, 685; Peru, 352; San Salvador, 99.

[39] Spain, 359; Argentina, 186; Bolivia, 182; Brazil, 110; Chile, 194; Colombia, 293; Costa Rica, 36; Ecuador, 230; Guatemala, 163; Honduras, 136; Mexico, 591; Panama, 686; Peru, 354; San Salvador, 101; Uruguay, 177; Venezuela, 168.

[40] See note 34, Decision of February 16, 1906.

[41] Art. 123.

contract and continue it without unnecessary interruption by the straightest and safest route, if the contract has not fixed one.

(*d*) To preserve the goods carefully and diligently, after receipt thereof. He is liable for loss or damage sustained by the merchandise, or for delay in their transportation, unless he proves that the loss or damage is due to unforeseen event, to *force majeure*, to vices of the goods, to their nature or to acts of the consignor or consignee. Even in those cases the carrier is liable: 1st, if an act of his was among the causes of the unforeseen event; 2d, if he has not used all due care and skill to avert or attenuate the damage; 3d, if in the preservation or transportation of the goods he has not exercised the care and diligence usual to intelligent and cautious carriers. The liability of the carrier ceases when the shipper makes a fraudulent declaration in the bill of lading, describing the goods as of a class or quality different from their actual state.[42]

In Argentina,[43] when the goods are fragile or subject to easy injury, or are animals, or when the transportation

[42] Spain, 355, 362; Argentina, 170, 176; Bolivia, 178, 184; Brazil, 99, 101, 104, 105; Chile, 184, 185, 199, 200, 207; Colombia, 283, 284, 298, 299, 306; Costa Rica, 15–24; Ecuador, 220, 221, 235; Guatemala, 147, 148, 149, 152; Haiti, 97, 102; Honduras, 132, 139; Mexico, 590; Nicaragua, 112, 115; Panama, 675, 589; Peru, 350, 357; San Salvador, 97, 104; Santo Domingo, 98, 103; Uruguay, 167, 170; Venezuela, 175, 176.

See note 34,. Decisions of March 18, 1912, and December 22, 1902.

A railway wreck due to a fault of the company or its conductors makes it responsible not only for animals dead but also for those missing, because the liability of the carrier ceases only when the transported things are delivered to the consignee. Argentina, Cam. Fed. de Apel. Paraná, Oct. 22, 1912, M. Acebal *v.* Compañía de los Ferrocarriles de Entre Rios, *Jurisp. de los Tribs. Nacs.*, Oct. 1912, p. 109.

The carrier who is responsible for the safe transportation and delivery of the goods carried, is also responsible for the proceeds of their sale, when they were sold in transitu by mutual agreement. Colombia, Sup. Corte de Just. Casación, Sept. 19, 1907; *Gaceta Judicial*, v. XVIII, p. 198.

A carrier is responsible for carelessness, negligence or malice of his employees, when he did not exercise proper care in their selection. Colombia, Corte Sup. de Just., Oct. 20, 1898; *Gaceta Judicial*, v. XIV, p. 56.

[43] Art. 177.

requires special conditions, the railroad company can stipulate that any losses or injuries to the goods will be presumed to have arisen from their own defects or nature or from acts of the consignor or consignee, unless the liability of the carrier is proved.

Spain,[44] Honduras,[45] Panama,[46] Peru [47] and San Salvador [48] establish a rule which seems to be in accord with the interest of the consignor and the consignee, and at the same time is a natural consequence of the obligation of the carrier diligently to safeguard that interest. If, notwithstanding all the precautions taken by the carrier, the goods transported run the risk of being lost, by reason of their nature or by unavoidable accident, without the owner's being able to dispose thereof, the carrier must proceed to sell them, placing them for this purpose at the disposal of the court or of the officials designated by special provisions of the law.

(*e*) To deliver the goods to the owner of the bill of lading in the same condition as when received, without detriment or impairment. Should he not do so, he is obliged to pay the value of the goods not delivered at the place where and at the time when they should have been delivered to the consignee.[49]

[44] Art. 362.

See note 34, Decisions of March 18, 1912, and December 22, 1902.

[45] Art. 139. [46] Art. 689. [47] Art. 357.

[48] Art. 104.

[49] Spain, 363; Argentina, 175; Brazil, 99; Chile, 200; Colombia, 298; Costa Rica, 23; Ecuador, 235; Guatemala, 144; Honduras, 140; Haiti, 104; Mexico, 590; Nicaragua, 124; Panama, 690; Peru, 358; San Salvador, 105; Santo Domingo, 105; Uruguay, 163, 169; Venezuela, 166.

When the transported merchandise arrives in proper time at its destination but is not delivered to the consignee, due to a mistake in the numbering of the packages imputable to the carrier, the consignee can leave the merchandise for the account of the carrier. Spain, Trib. Sup., April 29, 1910; *Gaceta* of Sept. 14, 1910, p. 225.

In cases of connecting carriers transporting goods, the last one, who must make delivery to the consignee, must comply with the obligations prescribed in article 363 of the code of commerce, and the judge of the place where the last carrier must surrender the goods has proper jurisdiction of differences arising from the delivery. Spain, Trib. Sup., May 26, 1905; *Gaceta* of Aug. 10, 1905, p. 44.

In Bolivia [50] and Nicaragua [51] the appraisal must be made according to the terms embodied in the bill of lading. In Brazil [52] the appraisal must be made by experts, taking into consideration the statements of the bill of lading.

In Costa Rica,[53] when no previous valuation was fixed, the carrier must pay the commercial value of the loss at the date the failure of delivery occurred, in accordance with the market price at that time.

If the effect of damage is depreciation of the value of the goods, the obligation of the carrier is reduced to the payment of the difference of price, fixed by experts.[54]

If the damage renders the goods useless for their accustomed use, the consignee can turn them over to the carrier and demand from him the value thereof, according to the preceding rules.[55]

The carrier has no right to investigate the title of the possessor of the bill of lading to receive the consigned goods.[56]

See note 33, Decision of October 19, 1913.

The delivery of the cargo by the carrier to a person who is not the consignee, makes the former liable to pay the latter the value of the goods, as well as damages. Argentina, Cam. Fed. de Apel. del Paraná, Oct. 22, 1912, A Junes *v.* Desimoni y Nicolini, *Jurisp. de los Tribs. Nacs.*, Oct. 1912, p. 106.

See note 42, Decision of Sept. 10, 1907.

[50] Art. 179. [51] Art. 113. [52] Art. 103.

Railway companies are responsible for damages suffered by the transported merchandise due to their fault. Brazil, Accordao da Rel. de Estado de Rio, Nov. 17, 1903, *O Direito*, v. 102, p. 569.

[53] Art. 27.

[54] Spain, 364; Argentina, 180; Bolivia, 187; Brazil, 106; Chile, 210; Colombia, 309; Costa Rica, 38; Ecuador, 244; Guatemala, 151; Honduras, 141; Mexico, 590; Nicaragua, 117; Panama, 691; Peru, 359; San Salvador, 106; Uruguay, 172; Venezuela, 181.

See note 34, Decision of March 18, 1912.

[55] Spain, 365; Argentina, 181; Bolivia, 186; Chile, 210; Colombia, 309; Costa Rica, 27; Ecuador, 244; Guatemala, 150; Haiti, 142; Mexico, 590; Nicaragua, 116; Panama, 690; Peru, 360; San Salvador, 107; Uruguay, 173; Venezuela, 181.

[56] Spain, 368; Argentina, 195; Bolivia, 178; Chile, 201; Colombia, 300; Ecuador, 236; Guatemala, 156; Honduras, 145; Nicaragua, 121; Panama, 695; Peru, 363; San Salvador, 110; Uruguay, 184.

The carrier must deliver the transported merchandise to the consignee. If

(*f*) To pay the penalty stipulated, if there was an agreement on that point, or otherwise, the damages suffered by the consignor in case of delay. The amount of the penalty or damages can be deducted from the freight.[57]

In Argentina the carrier loses a part of the freight proportioned to the delay, and the whole freight if the delay is double the time stipulated; and he must furthermore make good any excess of damage.

In Bolivia [58] and Nicaragua,[59] when the carrier fails to deliver the goods in the period stipulated, only the indemnity agreed upon can be demanded, but if the delay is double the period of the contract he must pay in addition the damages suffered by the consignor.

Chile,[60] Colombia [61] and Ecuador [62] provide that in case of delay the consignee can enforce the penalty stipulated by deducting its amount from the freight, without proving any damages; the payment of the penalty, however, does not except the carrier from the obligation of paying damages arising from the delay.

The penalty clause stipulated for delay in delivering the goods produces different effects in different countries:

1. In Spain, Honduras, Mexico, Panama, Peru and San Salvador, the consignee can demand the penalty stipulated only, whatever the amount of the damages resulting from the delay.

2. In Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador and Nicaragua the consignee can

by mistake he surrenders the same to another person, he is liable for its value and legal interest upon it from the time of a formal request for payment. Spain, Trib. Sup., June 24, 1904; *Gacetas* of Aug. 3 and 5, 1904, p. 87.

[57] Spain, 370; Brazil, 111, 112; Costa Rica, 36; Honduras, 147; Mexico, 590; Peru, 365; Panama, 677; San Salvador, 112.

In case of delay in the transportation the consignee is entitled to recover damages which cannot be of an amount greater than the price of the goods. Spain, Trib. Sup., Nov. 25, 1902; *Gaceta* of Dec. 30, 1902, p. 306.

[58] Art. 180. [59] Art. 124. [60] Art. 206.

[61] Art. 305. [62] Art. 241.

demand the payment of the penalty stipulated, and furthermore, any damage he may have suffered.

(*g*) To answer for all the consequences which may arise from his failure to comply with the formalities prescribed by the law or with provisions of the administrative authorities in the course of the trip and on his arrival at the place of destination, except when the fault is due to his having being led into error by false statements of the consignor.

If the carrier has failed to comply with those legal requisites by virtue of a formal order of the consignor or of the consignee, the consequences vary in the Latin-American countries, as follows:

1. The carrier and the consignor or consignee are both liable.[63]

2. The carrier is exempt from civil liability but he together with the consignor or consignee must bear any penalty they may have incurred.[64]

3. The carrier is liable, notwithstanding the fact that he was ordered by the consignor or consignee to disregard the legal requirements.[65]

Period within which a claim must be made by the consignee.

There is great variety among the codes with respect to the period in which a claim must be made by the consignee:

1st System. The period is twenty-four hours if the damage cannot be ascertained by viewing the exterior of the packages; otherwise claim must be made at the time of receiving the packages.[66]

[63] Spain, 377; Honduras, 154; Panama, 707; Peru, 372; San Salvador, 119.

[64] Argentina, 199; Chile, 197; Colombia, 296; Ecuador, 232; Guatemala, 155.

[65] Brazil, 115; Costa Rica, 30; Nicaragua, 120; Uruguay, 185.

The responsibility of a railway corporation for damages in transportation is governed by the provisions of the corresponding Ministry, such provision constituting the law for the parties, and establishing the distinction between unforeseen event, negligence and fraud. According to these provisions a railway enterprise is liable for damages due to fraud of its employees. Brazil, Accordao do Sup. Trib. Fed. No. 294 of June 4, 1898, *Direito*, v. 77, p. 17.

[66] Spain, 366; Honduras, 143; Panama, 693; Peru, 361; San Salvador, 108.

2d System. The period is in any case twenty-four hours after delivery of the goods to the consignee.[67]

3rd System. No claim is received after the goods are received without appropriate reservation.[68]

4th System. Three days is the time limit if the damage cannot be ascertained on the receipt of the goods.[69]

5th System. The receipt of the goods without any reservation, the exchange of copies of the bill of lading, and the payment of freight and expenses extinguish as a rule all actions against the carrier.[70]

6th System. The receipt of the goods, and the payment of transportation fees and charges extinguish the action against the carrier. If it is proved that the damage or loss occurred while the goods were under the care of the carrier; the claim can be brought against him even after the payment of fees and transportation charges within five days after the goods were delivered.[71]

Except in Mexico, where the payment of transportation charges by itself does not extinguish the action against the carrier, because such payment must be made before the goods are delivered to the consignee,[72] and in Venezuela

[67] Argentina, 183; Bolivia, 193; Chile, 211; Colombia, 310; Ecuador, 245; Mexico, 595; Nicaragua, 119; Uruguay, 175.

Even though conclusive evidence of damage suffered by the goods is produced, the plaintiff cannot recover any indemnity if his claim has not been made within the period of twenty-four hours after arrival of the goods. Argentina, Cámara Fed. de Apel. del Paraná, May 6, 1914, L. Scappatura *v.* Empresa de los F. C. de Entre-Ríos, *Jurispr. de los Tribs. Nacs.*, May, 1914, p. 61.

The claim for damages (acción de reclamación) referred to in article 183 of the code of commerce is not one of the judicial actions, but merely a claim brought against the carrier or his representative. Buenos Aires. Cam. de Apel. Com. de la Capital, June 14, 1913, J. M. Yañiz *v.* Empresa del F. C. Argentino, *Ib.*, June, 1913, p. 297.

An action for damages to transported goods does not lapse after twenty-four hours from the time of surrendering the goods to the custom-house according to a fiscal law, but from the moment the goods were actually received by the consignee. Argentina, Cam. de Apel. Com. de la Capital. Canevali y Marengo *v.* F. C. de Buenos Aires, June 5, 1913. *Ib.*, July, 1913, p. 220.

[68] Brazil, 109; Haiti, 104; Santo Domingo, 105.

[69] Guatemala, 154.

[70] Costa Rica, 43 to 46.

[71] Venezuela, 188.

[72] Mexico, 591.

where such extinction is not produced if it is proved that the loss or damage sustained by the goods took place while under the care of the carrier, the receipt of the goods without proper reservations and the payment of transportation charges creates the presumption that the carrier complied with the obligations in accordance with the bill of lading, and that the consignee and shipper have no action against the same carrier. The presumption, however, can be rebutted.

Statute of limitations.

In all other cases not covered by the aforesaid limitations, actions against carriers are barred after six months for intranational, and one year for international transportation.[73] Haiti [74] makes no reference to international transportation.

Disputes between the consignee and the carrier.

If a question arises between the consignee and the carrier as to the condition in which the goods are delivered, the goods must be inspected by experts appointed by the parties and an umpire appointed by the jurisdictional judge in case of disagreement between the experts. They must make a written report. If the parties do not abide by the report or come to a compromise, the judge takes the goods into judicial custody, and the parties can bring their actions.[75]

In Argentina,[76] Brazil [77] and Venezuela,[78] the experts are at the same time arbiters and their decision therefore is binding. In Venezuela, furthermore, the consignee can be authorized by the court to receive the goods if he needs them urgently, in advance of the decision of the experts. The court decides whether he should give bond therefor.

[73] Mexico, 592; Santo Domingo, 105, 108; Venezuela, 188.

[74] Art. 106.

[75] Spain, 367; Bolivia, 188; Chile, 208; Colombia, 307; Costa Rica, 37; Guatemala, 153; Honduras, 144; Nicaragua, 118; Panama, 694; Peru, 362; San Salvador, 109; Uruguay, 174.

See note No. 36, decision of January 10, 1906.

[76] Art. 182. [77] Art. 107. [78] Art. 178.

Lien upon the transportation equipment.

Horses, carriages, vehicles, equipment, and other principal or accessory media of transportation are specially destined for the payment of the liabilities of the carrier in favor the consignor.[79]

Rights and privileges of the carrier.

The carrier has the following rights and privileges:

(*a*) To receive half the freight stipulated when by reason of negligence or fault of the consignor, the transportation is not carried out.[80] In the other countries the consignor is liable for damages to the carrier, whether the law expressly so provides, as in Costa Rica,[81] and Panama,[82] or leaves the matter to be decided according to general principles.

(*b*) To receive the full amount of the stipulated freight if the transportation does not take place through the fault or negligence of the consignor, provided the carrier has sent a vacant car to the agreed place for such transportation in accordance with the contract, and it has been impossible for the carrier to find another shipment for the car.[83]

(*c*) To refuse badly packed goods offered for transportation; if the same is to be made by railway and the consignor insists on sending the goods in that condition the carrier must take them without responsibility.[84]

(*d*) To change the route specially stipulated in the contract if after the trip began its continuation is prevented by force *majeure;* if the route was not designated

[79] Spain, 372; Argentina, 185; Bolivia, 190; Brazil, 108; Chile, 190; Colombia, 289; Costa Rica, 18; Ecuador, 226; Guatemala, 146, 165; Honduras, 149; Nicaragua, 144; Panama, 678; Peru, 367; Uruguay, 176.

[80] Chile, 182; Colombia, 281; Mexico, 591; Uruguay, 182.

[81] Art. 11. [82] Art. 673.

[83] Argentina, 193; Chile, 198; Colombia, 297; Costa Rica, 31; Ecuador, 233; Mexico, 591; Panama, 665; Venezuela, 174.

[84] Spain, 356; Argentina, 178; Costa Rica, 28; Honduras, 133; Panama, 679; Peru, 351; San Salvador, 98.

See note 36, Decision of October 21, 1906.

in the contract the carrier may follow that which is more suitable in his opinion, provided it is in the direction of the place of destination of the goods.[85]

(*e*) To examine the contents of the packages in the presence of the consignor, if any suspicion of falsehood arises on their receipt; if the consignor refuses to assent to this request the carrier will be released from any obligation not arising from his own fraud.[86]

(*f*) To compel the consignee to receive out of a damaged shipment those goods which are not injured, whenever their separation from the others is not detrimental.[87]

(*g*) To retain the transported goods until he is paid the transportation charges. This is the law in Mexico only.[88]

(*h*) To deposit the goods in court at the disposal of the consignor or other person who may show a better title, when the consignee cannot be located, or refuses to pay the freight and expenses or to receive the goods.[89]

(*i*) To compel the consignee to open the packages or bundles on their receipt. Should the consignee refuse to do so, the carrier is by that mere fact freed

[85] Spain, 359; Argentina, 186; Bolivia, 182; Brazil, 110; Chile, 193, 194; Colombia, 292, 293; Ecuador, 230; Guatemala, 162, 163; Honduras, 136; Mexico, 591; Nicaragua, 122; Panama, 687; Peru, 354; San Salvador, 101; Uruguay, 177; Venezuela, 168.

[86] Spain, 357; Costa Rica, 29; Honduras, 134; Mexico, 591; Panama, 685; Peru, 352; San Salvador, 99.

[87] Spain, 365; Argentina, 181; Bolivia, 187; Chile, 210; Colombia, 309; Costa Rica, 27; Ecuador, 244; Guatemala, 150; Mexico, 591; Panama, 690; Peru, 360; San Salvador, 107; Uruguay, 173; Venezuela, 181.

When the consignee refuses to receive the transported goods because of their damaged condition and the carrier sells the goods, the latter is assumed to have admitted the damage and the abandonment of the merchandise for his account. Argentina, Cam. de Apel. en lo Com. de la Capital, A. Cricelli *v.* F. C. B. A. al Pacifico, May 23, 1914, *Jurisp. de los Tribs. Nacs.*, May, 1914, p. 246.

[88] Art. 591.

[89] Spain, 369; Argentina, 194, 197; Bolivia, 189; Brazil, 116; Chile, 203, 311; Colombia, 302, 310; Costa Rica, 34; Ecuador, 238; Guatemala, 157; Haiti, 105; Honduras, 146; Mexico, 591; Nicaragua, 121; Panama, 697; Peru, 364; San Salvador, 111; Santo Domingo, 106; Uruguay, 183; Venezuela, 184.

from all responsibility which does not arise from his fraud.[90]

Obligations and rights of subsequent carriers.

The legal provisions as to carriers apply to the intermediaries of transportation, such as freight brokers and agents, as well as to connecting carriers.[91]

Transportation agents and enterprises must keep a registry with all the formalities provided by law, in which they must enter in the order of dates all goods which are entrusted to them for transportation, including all the details required for the bill of lading.[92]

Lien of the carrier.

The carried goods are affected by the privilege of the carrier for the payment of the transportation charges and freight. This privilege expires eight days after delivery of the goods; that period having elapsed, the carrier has only the same rights of action as any other creditor.[93]

In Argentina [94] the privilege of the carrier ceases when the transported goods are surrendered by the consignee to a third party or after one month from their delivery.

[90] Argentina, 198; Chile, 204; Colombia, 303; Costa Rica, 33; Ecuador, 239; Mexico, 595.

[91] Spain, 379; Argentina, 171; Bolivia, 191; Honduras, 156; Nicaragua, 128; Panama, 663; Peru, 374; San Salvador, 121; Uruguay, 185.

When the carriage is made by connecting carriers and the consignee, refusing to receive the merchandise, demands its amount from the first carrier who signed the bill of lading, the proper jurisdiction is the court at the place where the contract was signed or of the domicil of the carrier, but not of the place where the goods were destined. Spain, Trib. Sup., July 29, 1912; *Gaceta* of Sept. 21, 1912, p. 49.

[92] Spain, 378; Argentina, 164; Chile, 222; Colombia, 322; Costa Rica, 52; Ecuador, 254; Honduras, 155; Nicaragua, 129; Peru, 373; San Salvador, 120; Santo Domingo, 102; Uruguay, 164; Venezuela, 158.

[93] Spain, 375; Honduras, 152; Peru, 370; San Salvador, 117.

The privilege granted to the carrier of demanding the judicial sale of the goods and being paid his expenses and freight out of the proceeds of the sale is not a hindrance to the regular action he may bring against the consignee as a non-privileged creditor for the payment of the balance not covered by the proceeds. Spain, Trib. Sup., Dec. 9, 1910; *Gaceta* of July 6, 1911, p. 225.

[94] Art. 200.

In Bolivia,[95] Chile,[96] Colombia,[97] Costa Rica,[98] Ecuador,[99] Guatemala [100] and Nicaragua,[101] the carrier, in order to enforce his privilege, must bring his action within a month after delivery of the goods, and in case they have passed into the possession of a third person, three days after such transfer.

In Brazil [102] the lien subsists as long as the goods are in the possession of the consignee.

In Mexico [103] the lien exists only so long as the goods are in the possession of the carrier, the law thus resembling the Anglo-American rule.

In Panama [104] and Uruguay [105] the lien lasts one month after delivery of the goods, irrespective of the person who possesses them.

In Venezuela [106] the lien ceases: (*a*) if the goods are legally conveyed to another person after delivery; (*b*) if the carrier has not enforced his rights within three days after delivery, even though they have not been transferred to a third party.

Obligations of the consignee.

Besides those obligations which are a consequence of the rights of the carrier above referred to, the consignee has the following obligations:

(*a*) To return to the carrier the bill of lading issued by him at the time he received the goods from the consignor. In case the bill of lading is lost or was not issued or for any other reason whatever cannot be surrendered to the carrier, the consignee must give him a receipt for the goods.[107]

(*b*) To pay the transportation expenses and freight within twenty-four hours at the most after delivery

[95] Arts. 190, 191, 192. [96] Arts. 212, 213. [97] Arts. 311, 312.
[98] Arts. 175, 176. [99] Art. 246. [100] Arts. 166, 167.
[101] Arts. 125, 126. [102] Art. 117. [103] Art. 591.
[104] Art. 704. [105] Art. 186. [106] Art. 186.

[107] Spain, 353; Bolivia, 194; Chile, 214, 216; Colombia, 313, 315; Ecuador, 249; Guatemala, 142; Honduras, 130; Mexico, 595; Nicaragua, 111; Panama, 671; Peru, 348; San Salvador, 95; Venezuela, 183.

of the goods, otherwise the carrier can demand the judicial sale of the goods.[108]

Guatemala [109] extends the period within which the payment of expenses and freight must be made to three days.

In Mexico [110] no delay is granted to the consignee; he must pay when he receives the goods, his right to enter complaint being reserved for twenty-four hours from the receipt thereof.

The codes of Haiti and Santo Domingo are silent; payment therefore must be made at the time the goods are received.

Rights of the consignee.

Besides the rights which are natural consequences of the obligations of the carrier already stated, the consignee is entitled to leave the goods for the account of the carrier, if owing to the fault of the latter the transportation was delayed and the former gave him notice of his decision to abandon the goods before their arrival at destination.[111]

In such case Argentina,[112] Bolivia,[113] Brazil,[114] Chile,[115]

[108] Spain, 374; Argentina, 202; Bolivia, 193; Brazil, 116; Chile, 216; Colombia, 315; Costa Rica, 35; Ecuador, 249; Honduras, 151; Nicaragua, 127; Panama, 702; Peru, 369; Uruguay, 188; Venezuela, 183.

See note No. 95.

[109] Art. 168.

[110] Art. 595.

[111] Spain, 371; Honduras, 148; Panama, 699; Peru, 366; San Salvador, 113.

The fact that the consignee received the merchandise transported without noting his protest for further claims does not deprive him of his right to demand an indemnity when it is proved that the carrier admitted the claim, objecting only to its lack of precision. The consignee who has demanded the payment of damages cannot afterwards change his claim and abandon the goods for the account of the carrier. Spain, Trib. Sup., Nov. 18, 1911; *Gaceta* of March 12, 1912, p. 23.

The abandonment of merchandise by the consignee to the carrier is not proper when it is based on the ground that the transportation was not completed in proper time owing to a delay of the train in which the consignee supposed the goods to be carried, whereas they arrived in another train before the time stipulated. Spain, Trib. Sup., Jan. 22, 1897; *Gaceta* of Feb. 26, p. 130.

[112] Art. 188. [113] Art. 180. [114] Art. 111.

[115] Art. 206.

Colombia,[116] Costa Rica,[117] Ecuador,[118] Mexico [119] and Uruguay [120] provide that the carrier must pay the consignee the damages caused by the delay; but the law of these countries does not authorize the consignee to abandon the goods in case of delay.

On the other hand, in Argentina,[121] Chile,[122] Colombia,[123] Ecuador,[124] Guatemala,[125] Mexico,[126] Nicaragua [127] and Venezuela,[128] the consignee can abandon the goods to the carrier when they are so damaged as to make them unfit for their accustomed use and purpose.

PUBLIC CARRIERS

Besides the rules above mentioned, certain others specially designed for public enterprises require notice.

Unlawful waivers.

Regulations and stipulations made by public carriers, exempting themselves or limiting their liabilities as established by law, are void.[129]

Transportation enterprises cannot enter into agreements with a view to modifying the general tariffs in favor of a certain individual or corporation. Differential tariffs altering the general established rates for special classes are valid when published in advance.[130] Carriers who consent to any secret reduction in their tariffs in whole or in part are bound to make the same reduction for the general public, and

[116] Art. 305. [117] Art. 36. [118] Art. 241.
[119] Art. 590. [120] Art. 178. [121] Art. 181.
[122] Art. 210. [123] Art. 309. [124] Art. 244.
[125] Art. 150. [126] Art. 596. [127] Art. 116.
[128] Art. 181.

[129] Argentina, 204; Chile, 219, 229; Colombia, 318, 329; Costa Rica, 60; Ecuador, 260; Mexico, 597; Panama, 710, 722.

A railway enterprise cannot under penalty of damages, refuse the transportation of merchandise offered nor can it disregard applications for cars made with due notice and in reasonable amount. Argentina, Cam. de Apel. en lo Cam. F. Olivera *v.* F. C. C. Córdoba, Dec. 20, 1913, *Jurisp. de los Tribs. Nacs.*, Dec., 1913, p. 311.

[130] Costa Rica, 50; Panama, 713; Venezuela, 193.

furthermore, must refund the difference in freight between the rate actually charged during the last three months and that established in the secret differential tariff.[131]

Lawful waivers in favor of carriers.

Carriers may stipulate in the bill of lading that they are not responsible for damages sustained during the trip without fault on their part, in the transportation of:

(*a*) live animals;

(*b*) packages which at the request of the shipper are loaded by him or his agents, or travel under the care of persons independent of the carrier;

(*c*) goods which, at the request of the interested person, are carried in open cars or ships, when according to usage and prudence they should be sent in covered vehicles or vessels.[132]

Obligations of a public carrier.

Public carriers are obliged:

(*a*) To exhibit their tariffs and regulations, posting them in a prominent place in their stations.[133] Mexico requires the carrier, furthermore, to publish the regulations in the official paper of the State, Federal District or Territory, to post them in every vehicle, and to print the corresponding articles on the backs of the bills of lading.

(*b*) To keep a registry for detailed entry of everything received for transportation, giving the name of the shipper and consignee, freight charges, and place of destination.[134]

(*c*) To transport between the stations on their routes all persons and goods whenever their regulations are complied with.[135]

[131] Costa Rica, 50; Panama, 714, 193.

[132] Costa Rica, 57, 59; Panama, 717.

[133] Costa Rica, 52; Mexico, 600; Panama, 716.

[134] Chile, 222, 223; Colombia, 322, 323; Costa Rica, 52; Ecuador, 254; Panama, 716; Venezuela, 195.

[135] Argentina, 204; Costa Rica, 49; Mexico, 598; Panama, 711; Venezuela, 191.

(*d*) To deliver a ticket to passengers and a bill of lading to shippers.[136]

(*e*) To keep in their warehouses, with due precautions, all goods entrusted to them for transportation.[137]

(*f*) To start and finish the trip at the day and hour stated in the time-tables.[138]

(*g*) To indemnify passengers for any injuries they or their baggage may suffer, if due to a fault of the carrier or his agents.[139]

Portable packages.

Passengers are not obliged to register their valises or hand baggage which, according to custom or the regulations, are not subject to the payment of freight; but if they deliver such packages to the conductor at the beginning of the trip the carrier is bound to restore them.[140]

Loss of goods delivered to the carrier.

In case of the loss of goods delivered to the carrier, his agents or factors, the passenger or consignor must prove the delivery and value thereof. Should proof of the value be impossible or insufficient, in case the claim is notvoluntarily paid, the judge must take a sworn statement from the passenger or consignor and in view thereof the judge must in his discretion determine the damages to be paid by the carrier, taking into consideration the character and pecuniary position of the passenger and the circumstances of the case.[141] In Mexico [142] and Panama [143] the passenger must prove the

[136] Spain, 352; Chile, 222; Colombia, 322; Costa Rica, 52; Ecuador, 254; Honduras, 129; Mexico, 600; Panama, 716; Peru, 347; San Salvador, 94; Venezuela, 196.

[137] Costa Rica, 52; Panama, 716.

[138] Chile, 222; Colombia, 322; Costa Rica, 52; Ecuador, 254; Mexico, 600; Panama, 716; Venezuela, 196.

See note No. 34, Decision of Feb. 16, 1906.

[139] Costa Rica, 58; Panama, 716.

[140] Chile, 225; Colombia, 325; Ecuador, 257; Mexico, 601; Panama, 721; Venezuela, 198.

[141] Chile, 226, 227; Colombia, 327, 328; Ecuador, 259; Venezuela, 199.

[142] Art. 602. [143] Art. 118.

delivery of the article and its value according to the general rules of evidence.

Objects of great value.

The carrier is not responsible for money, jewelry, documents or articles of great value contained in packages or cases, when, on delivery thereof to the carrier, the passenger or shipper did not declare the contents.[144]

In Colombia [145] the passenger is not obliged to declare specifically the contents of the packages or cases delivered to the carrier, and such passenger, in case of loss, can recover even sums of money contained therein intended for the necessities of the voyage or trip.

In Costa Rica,[146] on the contrary, the passenger is bound to disclose the contents of his packages when requested by the carrier, except in case of valises, packages or suit cases which are kept by the passenger and under his exclusive custody.

Packages and merchandise not called for.

When a certain period has elapsed after the end of a trip or voyage and the passenger or shipper has failed to claim the transported things, they must be deposited in the place designated by and at the disposal of the proper court, which must order their sale and deposit the proceeds to the credit of the person who may show title thereto.

The time for making the judicial deposit of the things is, in Chile [147] and Colombia,[148] at the termination of the voyage or trip. In Costa Rica [149] and Panama,[150] it is thirty days. In Mexico [151] the period is established by the regulations of the carrier. In Venezuela,[152] baggage not claimed by a passenger is deposited in the warehouse of the carrier, and if no one claims it after twelve months, it is sold at auction by the manager of the carrier and the net proceeds applied for the benefit of hospitals.

[144] Chile, 228; Ecuador, 256, 259; Panama, 721.
[145] Arts. 326, 328.
[146] Art. 55.
[147] Arts. 203, 230.
[148] Arts. 302, 330.
[149] Art. 56.
[150] Art. 725.
[151] Art. 603.
[152] Art. 202.

CHAPTER XXIV

Contract of Insurance

GENERAL PRINCIPLES

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Huergo, Enrique L.: El contrato de seguro. Buenos Aires, 1901.

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Origin.

A person who runs a risk likely to cause him serious pecuniary loss may, by associating himself with others in the same case, arrange to have any eventual loss that might happen, divided among all the persons concerned. Thus they guarantee each other against a total loss, each share of loss being small and the benefit mutual. The parties, however, in entering into this contract intend not to make any profit, but merely to avoid serious loss. The nature of the contract is therefore not *ipso jure* commercial.

As commerce grew and experience showed that out of a given number of vessels, but few were lost in the long run, the idea developed of making insurance a matter of profit, the rate being measured on the theory of indemnity plus a profit for the service. The contract in such case is a commercial one.

Insurance can and is actually applied to all kinds of risks—fire, storm, earthquake, frost, hail, shipwreck, rain, drought, burglary, sickness, death, labor and other accidents, etc.

The law makes two great divisions of insurance, namely: maritime and overland insurance. We confine ourselves to the latter, which may be divided into fire, life, overland transportation, etc.

Persons who participate in the contract.

As a rule two persons are involved in the contract: the insurer and underwriter (*asegurador*), who takes the risk, and the insured (*asegurado*) who is paid the loss in case it occurs. The person who contracts with the insurer is not necessarily the one who receives the indemnity; this may be a third party called beneficiary (*beneficiario*).

Elements of the contract.

Three elements enter into the contract of insurance, a thing, or object, a risk (*riesgo*) which is to be guaranteed, and a premium (*prima*) paid to the insurer.

Object of the contract.

Every thing, corporeal and incorporeal, existing at the time the risk arises for the account of the insurer, can be the subject-matter of the contract of insurance, provided it can be evaluated in money, is a lawful object, and is exposed to a danger of loss which the insurer binds himself to pay.[1]

The code of Panama [2] provides that the insurance contract can be made as follows:

1. On a single entire object, individually considered;
2. On a group of things as a whole;
3. On a certain part of every object, jointly or individually considered;
4. On the life of or physical accident to an individual or group of persons;
5. On expected profits.

[1] Spain, 386, 416, 432; Argentina, 493; Chile, 522; Colombia, 646; Ecuador, 538; Guatemala, 411; Honduras, 364, 393, 409; Mexico, 398, 426, 442; Panama, 994; Peru, 381, 411, 433; San Salvador, 341, 360, 376; Uruguay, 635; Venezuela, 507.

[2] Art. 995.

Risk.

By risk is understood any kind of eventual loss to which things and persons are subject when not the result of an illegal enterprise.

Premium.

Premium is the amount paid or the service rendered to the insurer as a consideration for the liability he assumes of paying the damage.

Nature of the contract.

There are five systems to determine when the contract of insurance is commercial:

1st. The contract of insurance to be commercial involves two circumstances:

(*a*) that the insurer is a merchant;

(*b*) that the premium is fixed, that is, that the insured pays a certain amount, singly or in instalments, as a consideration for the insurance. This applies when the insurance is not of the mutual type.[3]

2d. The contract is *ipso facto* commercial irrespective of the character of the parties or the way in which the premium is paid.[4]

3d. The code of Mexico provides that contracts of insurance of any kind are mercantile when they are made by "enterprises;" but as the word "enterprise" is not defined the law is not clear. We believe that it means commercial enterprise, and if this is so the Mexican code requires only one of the circumstances required by the Spanish code.[5]

4th. The code of Venezuela, without any general,

[3] Spain, 380; Honduras, 358; Peru, 375.

[4] Argentina, 527; Chile, 561; Colombia, 685; Ecuador, 534; Guatemala, 449, 450; Panama, 997; Uruguay, 671.

The contract of insurance is a mercantile one and is governed by special provisions. Colombia, Corte Suprema de Justicia, Nov. 30, 1889; *Gaceta Judicial*, IV, p. 148.

[5] Art. 392.

classification as to the commerciality of the contract, declares that the provisions relating to life insurance are not applicable to mutual life insurance contracts and to those requiring the payment of a fixed premium.[6]

5th. The Brazilian code of commerce does not refer to insurance. All the provisions on the subject are found in the civil code; hence the general principles for the classification of a contract as civil or commercial must be applied.

Requisites of the contract.

The contract of insurance must be in writing whether in a public or in a private instrument and subscribed by the parties.[7]

In Argentina the contract of insurance is perfected by mere consent, and the rights and obligations of the parties begin when the agreement has been arrived at, even before the policy is signed. The contract involves the obligation of the insurer to sign the policy at the time agreed upon and to deliver it to the insured.[8] As a rule the contract is proved by means of a written instrument, but other means of evidence are admitted if there is a written foundation of evidence. In case of doubt concerning the clauses or peculiar conditions of the transaction before the delivery of the policy, they can be proved by all means admissible in com-

[6] Art. 545.

[7] Spain, 382; Bolivia, 198, 199, 200; Brazil, 1433 c. c.; Costa Rica, 365; Ecuador, 535; Honduras, 360; Mexico, 394; Nicaragua, 235; Panama, 1013; Peru, 377; San Salvador, 338; Uruguay, 644; Venezuela, 505.

A contract of insurance is proved by means of the corresponding policy. A certified copy of the decision rendered in a criminal case arising out of a fire proves that such fire took place and the destruction caused thereby. The existence of the things or merchandise in the building destroyed by the fire and the value thereof are presumed in accordance with the statement in the policy, provided the destruction was complete; but the insured, in case of partial destruction, must prove, by other means, the value of the remaining objects, and the amount of the loss is the difference between the value stipulated in the policy and that assigned to those objects. Mexico, Juzgado Cuarto de lo Civil de la Cap., March 28, 1907, J. Fernández *v.* Phœnix Assurance Company, Limited, of London, *Diario de Jurisp.*, XIII, p. 241.

[8] Art. 505.

mercial matters. Where, however, the law requires specific mention of facts in the policy, under pain of nullity, they can only be proved by means of a written instrument.[9]

In Chile,[10] Colombia [11] and Guatemala,[12] the contract of insurance is also perfected by subscribing a public or private instrument, but a contract of insurance made orally is valid as a promise of insurance, provided the parties had agreed in respect to the thing, the risk and the premium.

This promise can be proved by all means of evidence admissible in commercial matters, and entitles either of the parties to demand of the other the execution of the policy.[13]

In Brazil and Ecuador [14] the policy can be made payable to a certain person, to his order or to bearer. In Venezuela [15] a life insurance policy cannot be made to order or to bearer.

Contents of a policy.

The policy must state the following facts.[16]

(*a*) Names of the insurer and insured.

(*b*) The kind of risks covered.

In Bolivia when the risk is not specified, the insurer is bound for all kinds.[17]

[9] Art. 506. [10] Arts. 514, 515. [11] Arts. 638, 639.

[12] Arts. 403, 404.

[13] Whenever the contract of insurance, in case of overland transportation, is entered into, the law of the place in which the loss took place governs the rights and obligations arising therefrom. Colombia, Corte Sup. de Just. Casación, Nov. 30, 1889; *Gaceta Jud.*, IV, p. 147.

[14] Brazil, 1447 c. c.; Ecuador, 535.

[15] Art. 505.

[16] Spain, 383; Argentina, 504, 551; Bolivia, 201; Brazil, 1447, 1448 c. c.; Chile, 516; Colombia, 640; Costa Rica, 367; Ecuador, 536; Guatemala, 405; Honduras, 361; Mexico, 395; Nicaragua, 235; Panama, 1016; Peru, 378; San Salvador, 339; Uruguay, 645; Venezuela, 506.

When the insurance was against all risks, the insurer is obliged to pay the indemnity stipulated in case of a loss, even though it was not caused by circumstances previously provided for, or was due to *force majeure*. Only in case of fraud of the insured does this obligation cease. The clauses of a policy written by hand are more efficacious as a means of interpretation of the contract than the printed ones. Brazil, Supremo Trib. Fed., May 26, 1917, Apel. Civil, n. 2969, *Revista do Supremo Trib.*, v. XII, p. 348.

[17] Art. 203.

(*c*) Accurate description and location of the things insured to determine the exact nature of the risk;

(*d*) The value assigned to each insured object, and, in Panama, the place and manner of paying the indemnity. In this respect we find that the method of specifying this valuation is not the same everywhere.

In Spain, Honduras and Peru it is necessary to classify the things and to assign a value to each class.

Brazil [18] provides in this respect only that the policy can be issued in the name of a certain person or to his order or to bearer, except life insurance policies, which cannot be issued to bearer; and it must indicate the beginning and the end of the period covered by the insurance.

In Chile,[19] Colombia,[20] Ecuador,[21] Guatemala [22] and Venezuela,[23] commercial establishments, such as stores, shops, factories, etc., merchandise transported by sea or overland, can be insured with or without specification of the objects contained therein; so with household furniture, except when it has great value such as jewels, paintings, works of art and similar objects, all of which must be specified.

Other countries do not require any specification of things and their value.

In case the value of the insured things is not stated in the policy it is presumed that the contracting parties intend the value of the things at the time the loss occurs, which may be proved by all legal means of evidence.[24]

(*e*) The premium, and the form and time for its payment, and, in Panama, the place and manner in which it must be paid.[25]

(*f*) The day and hour at which the insurance begins to run.

[18] Arts. 1447, 1448 c. c. [19] Art. 524. [20] Art. 648.
[21] Art. 541. [22] Art. 413. [23] Art. 510.

[24] Argentina, 519; Chile, 533, 535; Colombia, 657; Ecuador, 545, 546; Guatemala, 422, 424; Panama, 1107; Uruguay, 660; Venezuela, 511.

[25] The contract of insurance is valid even though in the corresponding policy the amount of the premium stipulated was wrong. Argentina, Cam. de Apel. Com. de la Cap., Feb. 13, 1913. G. González *v.* Banco Vitalicio Argentino., *Jur. de los Tribs. Nacs.*, Feb., 1913, p. 128.

In Chile,[26] Colombia,[27] Ecuador,[28] Guatemala [29] and Venezuela,[30] failure to establish the time when the contract is to be in force, causes the risk to begin to run against the insurer from the moment the parties subscribe the policy, unless otherwise provided by law.

(*g*) In Spain, Honduras, Mexico, Panama [31] and Peru all policies on the same property, if any, must be named. In Chile,[32] Colombia,[33] Ecuador,[34] Guatemala [35] and Venezuela,[36] this statement must be made by the insured at the time of the loss.

(*h*) The place and date of the contract, in Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, Guatemala, San Salvador, Uruguay and Venezuela. Notwithstanding that other countries fail to mention this requisite there can be no doubt that its omission is due to the fact that it is considered a matter of course.

(*i*) Other lawful stipulations which the parties may have agreed upon.

Every alteration or addition in the contract of insurance extending the insurance to new risks or reducing them, or the amount of the insurance, or making any other substantial change must be stated in the policy.[37]

Nullity of the insurance.

The nature of the contract of insurance, which entitles the insured to demand payment of possibly large sums of money by complying with relatively trifling obligations, has induced precautions on the part of the law in order to prevent an institution which may confer such great advantages from falling into discredit. For this reason the law requires the greatest good faith and care in the statements which are the basis for the valuation and assumption of the risk.

We find, consequently, three causes for which a contract

[26] Art. 537. [27] Art. 661. [28] Art. 549.
[29] Art. 426. [30] Art. 510. [31] Art. 1011.
[32] Art. 556. [33] Art. 680. [34] Art. 560.
[35] Art. 445. [36] Art. 524.
[37] Spain, 384; Honduras, 362; Mexico, 396; Peru, 379; San Salvador, 340.

of insurance may be void, besides those which are common to other contracts. These are:

1st. Any act of bad faith on the part of any of the contracting parties at the time of the execution of the contract.

2d. An untruthful declaration, although made in good faith, when it may have influenced the valuation of the risk.

3d. An omission or concealment on the part of the insured of facts or circumstances which may have had an influence in closing the contract.[38]

In Brazil both parties are bound to observe the utmost good faith in their statements; if the insured makes untruthful or incomplete declarations he loses his right to the insurance money and is obliged to pay the premium due.[39]

Chile,[40] Colombia [41] and Guatemala [42] provide that when the value assigned to the insured things has been increased by mistake, the amount of the insurance and of the premium must be reduced proportionately, and the insurer can demand indemnification if he has paid the insurance.

When the difference between the real value of the things and the amount of the insurance is due to fraud of the insured, the latter cannot demand payment of the policy, in case of loss, nor excuse himself from paying the full premium, without prejudice to any criminal actions arising therefrom.

The insurer, however, cannot object to the assigned value when it has been fixed by experts appointed by the parties, unless there has been fraud.

In Nicaragua, the insurance is null in so far as the insured value exceeds the sale value of the article.[43]

Lack of interest as a cause of nullity.

Some of the codes provide, among the rules applicable to

[38] Spain, 381; Argentina, 498; Ecuador, 563, 564; Honduras, 359; Mexico, 393; Panama, 1000; Peru, 376; Uruguay, 640; Venezuela, 527, 528.

[39] Arts. 1443, 1444 c. c. [40] Art. 534. [41] Art. 658.

[42] Art. 423. [43] Art. 237.

all contracts of insurance, that when the insured has no interest in the thing or in the preservation of the life of the person, subject-matter of the insurance, the contract is void.[44]

Ecuador requires that such interest shall exist at the time of the execution of the contract; while Argentina, Panama and Uruguay admit the validity of a contract even though the insured had no interest at the time of the contract, provided he acquires such interest afterwards.

Nullity of a second policy on the same property.

A rule which is, of course, without application to life or accident insurance policies provides that things which are insured for their entire value cannot be insured a second time during the subsistence of the first policy, except when the new insurers guarantee the fulfillment of the contract entered into with the first insurer.[45]

Sale or conveyance of the insured property.

Another rule not applicable to insurance of persons relates to the case of sale or conveyance of the thing insured.

In Spain,[46] Honduras,[47] Mexico,[48] Peru [49] and San Salvador,[50] in case of death, liquidation or bankruptcy of the insured and sale or conveyance of the things covered by insurance, the policy is not nullified when the insured thing is real estate. If personal property, a factory or a store, the insurer can rescind the contract by notifying the insured thereof within a fixed period of fifteen days.[51]

In Argentina [52] and Uruguay [53] the insurance passes to the new owner even though no assignment or delivery of

[44] Argentina, 495; Bolivia, 197; Chile, 518; Colombia, 642; Ecuador, 537; Guatemala, 407; Nicaragua, 236; Panama, 996; Uruguay, 637; Venezuela, 506.

[45] Spain, 399; Argentina, 499; Brazil, 1439, c. c.; Chile, 522, 528; Colombia, 646, 652; Ecuador, 539, 540; Guatemala, 411, 417; Honduras, 377; Mexico, 411; Panama, 1010; Peru, 394; San Salvador, 352; Uruguay, 641; Venezuela, 508.

[46] Art. 401. [47] Art. 379. [48] Art. 413.

[49] Art. 396. [50] Art. 354.

[51] Chile, 530, 531; Colombia, 654, 655; Guatemala, 419, 420.

[52] Arts. 511, 539. [53] Arts. 648, 683.

the policy has been made, unless otherwise stipulated between the insurer and the insured. Should the new owner refuse to accept the insurance at the time the property was conveyed the insurance continues in favor of the former owner, provided he retains some share of the insured thing or in so far as he may have an interest in it, in case of failure to pay the purchase price. This rule is not applicable to fire insurance policies, unless otherwise stipulated.

In Brazil [54] the right to be indemnified by the insurer can be assigned to a third party as an accessory of the insured thing. This conveyance is made *ipso jure* in regard to a thing which was mortgaged or pledged, or when the policy has no contrary stipulation.

In Panama, article 1029, referring only to fire insurance contracts, provides that whenever the insured property, whether realty or personalty, is conveyed to another person, the underwriter may declare the contract without effect, unless otherwise stipulated. The insurer can exercise this privilege within thirty days from the time he learns of the conveyance. In other kinds of insurance the policy passes to the new owner of the insured property without special assignment. Should the new owner refuse to accept the policy, the contract lapses, unless the former owner retains some interest in the property, in which case the insurance subsists in so far as the former owner is concerned.[55]

In Venezuela [56] the rights and obligations of the first owner pass to the new one, in the absence of any contrary stipulation.

Reinsurance.

As already observed, every risk can be covered by insurance; hence the risk which the insurer runs can become the subject-matter of a new contract of insurance. This is only an application of a general rule, but the codes of Argentina,[57] Brazil,[58] Chile,[59] Colombia,[60] Ecuador,[61] Guatemala,[62]

[54] Art. 1463 c. c.
[55] Art. 1006.
[56] Art. 523.
[57] Art. 517.
[58] Art. 1437 c. c.
[59] Art. 523.
[60] Art. 647.
[61] Art. 540.
[62] Art. 412.

Panama,[63] Uruguay [64] and Venezuela [65] expressly so provide.

Loss of the property before the policy becomes effective.

Another simple application of general rules is that which provides that a policy relating to things which at the time of the contract were already free from the risk, subject-matter of the agreement, or were already lost or damaged, is void, because consent was based upon a mistake of fact, namely, the assumption of a certain state of things which was unfounded in fact. The codes of Chile,[66] Colombia,[67] Ecuador,[68] Guatemala [69] and Venezuela [70] declare the contract void in such cases.

The codes of Argentina,[71] Panama [72] and Uruguay [73] provide, however, that the insurance in the case cited is void only when there is a presumption that the insurer knew of the cessation of the risk or the insured knew of the loss or damage of the property.

Brazil prescribes that when the insurer knew that the risk had ceased and nevertheless issues the policy, he must pay twice the stipulated premium.[74]

Obligations of the insured.

The obligations of the insured in every contract of insurance are:

(*a*) To make a faithful statement of all the circumstances necessary to identify the property, subject-matter of the insurance, and to appreciate the risks.[75]

(*b*) To pay the premium at the time and in the form stipulated.

[63] Art. 1008. [64] Art. 658. [65] Art. 509.
[66] Art. 522. [67] Art. 646. [68] Art. 539.
[69] Art. 411. [70] Art. 508. [71] Art. 514.
[72] Art. 1007. [73] Art. 654. [74] Art. 1446 c. c.

[75] The omission on the part of the insured to declare at the time of the contract that he suffered from a previous fire, is not a cause of nullity when that omission does not deprive the insurer of a source of information which would have modified his opinion respecting the risk. Argentina, Cam. de Apel. Com., Oct. 7, 1913, *Jurisp. de los Tribs. Nacs.*, Oct., 1913, p. 289.

(*c*) To notify the insurer of the loss or damage as soon as it takes place. To these obligations the codes of Argentina,[76] Chile,[77] Colombia,[78] Ecuador,[79] Guatemala,[80] Panama,[81] Uruguay [82] and Venezuela [83] add the following:

(*d*) To display all the care and diligence customary in a prudent man to prevent losses.

(*e*) To take the necessary steps in order to save or rescue the insured property or to preserve the part salvaged.[84]

(*f*) To declare at the time payment of the policy is demanded, any other insurance there may be on the same property. We have already observed that in Panama these circumstances must be stated in the new policy.

(*g*) To prove all the circumstances necessary to determine the responsibility of the insurer.

We will see presently that some of these obligations have not obtained general acceptance in the rest of the codes.

Obligation of the insurer.

The nature of all contracts of insurance is to bind the insurer to pay the amount stipulated in case of loss unless the loss is due to acts of the insured, his employees or any person for whose acts he is responsible.[85]

[76] Art. 524. [77] Art. 556. [78] Art. 680.
[79] Art. 560. [80] Art. 445. [81] Art. 1020.
[82] Art. 668. [83] Art. 524.

[84] When the insured has obtained payment of the damages suffered, he cannot again demand said damages from the person responsible for the destruction, because he has no interest, Argentina, Cam. de Apel. Com. de la Cap., Nov. 29, 1913, *Jurisp. de los Tribs. Nacs.*, Nov., 1913, p. 189.

The obligation of the insured to take all necessary steps to rescue or recover the insured thing or to preserve its remains ceases after he abandons the thing to the insurer or receives payment of the policy; since from that moment all rights of action belong to the insurer. Colombia, Corte Sup. de Just. Casación, Nov. 30, 1889; *Gaceta Judicial*, IV, p. 148.

[85] Argentina, 492, 497; Bolivia, 196; Chile, 550, 551; Colombia, 674, 675; Costa Rica, 370; Ecuador, 556, 558; Guatemala, 439, 441; Nicaragua, 234; Uruguay, 634, 639; Venezuela, 519, 521.

Bankruptcy of any of the parties.

In case the insurer becomes bankrupt during the life of the policy, the insured may ask for the rescission of the contract or demand that the receivers guarantee the payment of the insurance if the loss occurs. The insurer enjoys the same privilege in case of failure of the insured before payment of the premium. Should the creditors of the bankrupt or the receivers fail to guarantee the contract, it is rescinded.[86]

Subrogation of the insurer to the rights of the insured.

The insurer who pays the loss covered by the policy is subrogated, by operation of law, to the rights of the insured against third parties responsible for the loss and the insured is liable for any act on his part which may impair these rights of the insurer.[87]

In Chile,[88] Colombia,[89] Ecuador [90] and Guatemala,[91] the provision is somewhat different; the insurer has a right to compel the insured to assign his rights to the insurer. Without such assignment the insurer may demand damages from the responsible third parties, but in that case he cannot avail himself of the personal rights and privileges which the insured may have.[92]

Non-paid and non-balanced policies must be included among the liabilities of a bankrupt underwriter and be considered as balanced policies. Mexico, Juzgado, Tercera de lo Civil del Dist. Fed., Oct. 9, 1912, "La Fraternal" Compañía de Seguros sobre la Vida, *Diario de Jurisp.*, v. XXVII, p. 553.

[86] Argentina, 526; Chile, 559; Colombia, 683; Guatemala, 448; Panama, 1022; Uruguay, 670; Venezuela, 525.

[87] Argentina, 525; Costa Rica, 372; Panama, 1021; Uruguay, 669; Venezuela, 522.

[88] Art. 553. [89] Art. 677. [90] Art. 559.

[91] Art. 442.

[92] Actions designed to recover an indemnity for the loss suffered against the person responsible for it does not belong to the insured but to the insurer. Colombia, Corte Sup. de Just., Nov. 30, 1889, Casación, *Gaceta Judicial*, v. IV, p. 148, and Dec. 2, 1889, *Ib.*, p. 156.

In case of loss of the insured property the insured cannot recover at the same time from the insurer and from the person responsible for the damage, even though the reason for the liability of each is different. Colombia, Corte Sup. de Just., Nov. 30, 1889; *Gaceta Jud.*, v. IV, p. 148.

Statute of limitations.

Actions arising out of contracts of insurance are barred by limitation after one year in Brazil,[93] if the cause of action arose in the country and two years otherwise, after five years in Chile,[94] Ecuador [95] and Guatemala,[96] after ten years in Colombia,[97] and after three years in Venezuela.[98]

[93] Art. 178 c. c. [94] Art. 568. [95] Art. 568.
[96] Art. 457.
[97] Art. 692 of the commercial code and 2536 of the civil code.
[98] Art. 532.

The period of one year fixed by article 953 of the code of commerce for the limitation of actions arising from a contract of insurance, can be shortened in the policy by mutual agreement. Argentina, Cam. de Apel. Com. de la Cap., July 29, 1913, *Jurisp. de los Tribs. Nacs.*, July, 1913, p. 249.

The period established by the law for the prescription of actions derived from a contract of insurance can be reduced in the policy. Such period runs from the day the action arose and not from the day the insurer refused to make payment of the indemnity. The appointment of an appraiser on the part of the underwriter to determine the amount of the loss does not interrupt the running of the period above referred to. Argentina, June 6, 1914, Cam. de Apel. Com. de la Cap., M. Firpo *v.* La Union Mercantil, *Jurisp. de los Tribs. Nacs.*, June, 1914, p. 322.

When the underwriter, in a letter addressed to the insured recognizes the right of the latter to receive an indemnity and objects only to the amount of the same, such underwriter cannot afterwards allege that the action of the insured is barred by limitation. Argentina, Cam. de Apel. Com. de la Cap., July 2, 1914, E. Perera *v.* "La Positiva," *Jurisp. de los Tribs. Nacs.*, July, 1914, p. 246.

CHAPTER XXV

FIRE INSURANCE

Property covered by a fire insurance contract.

All kinds of real estate or personal property which can be destroyed or injured by fire can be the subject-matter of a contract of fire insurance.

Negotiable instruments, securities, bank-notes, shares and bonds of corporations or partnerships, precious stones and metals, whether coined or in bullion, and works of art are not included in a fire insurance policy unless otherwise stipulated, detailing in it the complete description and value of these articles.[1]

Formalities of the policy.

Besides the matters which every kind of insurance policy must enumerate, the fire insurance policy must state: [2]

(*a*) location and boundaries of the insured buildings;

(*b*) their use and purpose;

(*c*) the purpose and use of the neighboring buildings in so far as they can affect the contract.[3]

(*d*) the place where the goods, subject-matter of the insurance, are stored.

In Panama a fire insurance policy covering realty must also contain a full description thereof, taken from the Public Registry of Property. Should the property not be registered,

[1] Spain, 387; Chile, 524; Colombia, 648; Ecuador, 541; Guatemala, 413; Honduras, 365; Mexico, 399; Peru, 382; San Salvador, 342; Venezuela, 510.

[2] Argentina, 529; Chile, 579; Colombia, 703; Ecuador, 579; Guatemala, 466; Panama, 1023; Uruguay, 673; Venezuela, 546.

[3] A fire insurance policy is valid notwithstanding the omission therein of a declaration that the insured building was in direct communication with another building in which constant use of fire was made, when it is proved that the fire which caused the destruction of the insured building did not begin in the dangerous building. Peru, Corte Suprema de Justicia, July 10, 1905, J. Solomón *v.* Compañía a Seguros "La Urbana," *Anales Judiciales*, v. 1, p. 134.

a complete description must be made, and in every case it must state that the insured is in undisturbed possession of the insured property.

Damage covered by the insurance.

The fire insurance policy covers damage and losses due to the direct effect of fire or to the inevitable consequences thereof, and chiefly:

(*a*) expenses incurred by the insured in removing the goods in order to prevent their loss;

(*b*) the injury suffered by the articles salvaged;

(*c*) damage due to measures taken by the authorities with respect to the insured property in order to confine or check the fire.[4]

The law in Argentina [5] and Uruguay [6] is more minutely drawn: all damage due to fire, whatever the cause, is for the account of the insurer unless it is proved that it was due to gross negligence of the insured himself. Loss considered as a consequence of fire is assimilated to that directly caused by the fire, even though it arose from the fire of neighboring buildings, as for example, injury from water or other means used in extinguishing the fire, loss due to looting or other circumstances while the fire was being extinguished or during the consequent turmoil, as well as loss resulting from the partial or total demolition of the insured property ordered by the authorities to check the fire. Losses due to gunpowder or steam boiler explosion, earthquake, thunderbolt, etc., even though no fire resulted, are also assimilated to losses caused by fire.

Panama's law is like Argentina's, the only difference lying in the fact that the policy covers cases of partial or total demolition of the insured property whether ordered by the authorities or not.[7]

[4] Spain, 393; Chile, 582; Colombia, 708; Ecuador, 582; Honduras, 371; Mexico, 405; Peru, 388; San Salvador, 347; Venezuela, 549.

[5] Arts. 541, 542, 543. [6] Arts. 685, 686, 687.

In the United States, on the other hand, loss by fire is strictly construed to cover fire only.

[7] Art. 1024.

The insurer is bound to pay the loss even when it is due to the negligence of the insured.[8]

In Argentina,[9] Chile,[10] Colombia,[11] Ecuador,[12] Guatemala,[13] Panama,[14] Uruguay [15] and Venezuela,[16] the insurer is bound to pay in case the loss is due to slight negligence of the insured, but not to gross negligence.

Losses not comprised in the policy.

In Spain,[17] Honduras,[18] Mexico,[19] Peru [20] and San Salvador,[21] a fire insurance policy does not comprise, unless otherwise stipulated, damage caused to the insured by resulting stoppage of factories, loss of rentals or any other similar losses or damage. In Honduras, no exception is made of the suspension of house rentals. Nor does it cover, in certain countries, either fire caused by military forces in time of war, or fire resulting from riots, volcanic eruptions or earthquakes.[22]

In Chile,[23] Colombia,[24] Ecuador,[25] Guatemala [26] and Venezuela,[27] the insurance taken upon a building does not cover losses sustained by its owner in paying damages to neighbors of the insured building.

Acts of the insured which release the insurer.

The insurer is also released from the obligation of paying the loss on account of certain acts of the insured, according to the following systems:

1st. When the loss is due to a crime of the insured.[28]

2d. When the loss is due to gross negligence or fraud of the insured.[29]

[8] Spain, 396; Honduras, 374; Mexico, 408; Peru, 391; San Salvador, 349.
[9] Art. 541. [10] Art. 552. [11] Art. 676.
[12] Art. 582. [13] Art. 468. [14] Art. 1024.
[15] Art. 685. [16] Art. 549. [17] Art. 395.
[18] Art. 373. [19] Art. 407. [20] Art. 390.
[21] Art. 348.
[22] Spain, 396; Honduras, 374; Mexico, 408; Peru, 391; San Salvador, 349.
[23] Art. 580. [24] Art. 706. [25] Art. 580.
[26] Art. 467. [27] Art. 547.
[28] Spain, 396; Honduras, 374; Mexico, 408; Peru, 391; San Salvador, 349.
[29] Argentina, 541; Panama, 1024; Uruguay, 685.

3d. When the loss is due to an act of the insured or of a person for whom he is civilly liable or to a violation of the law or police regulations on the part of the insured.[30]

Other cases in which indemnity is not due.

The benefit of the insurance covers only the articles which have been insured and while they are in the place declared in the policy. The liability of the insurer cannot be extended beyond the estimated value of the articles insured.[31]

In Venezuela the removal of an insured article without the consent of the insurer releases him from liability to pay for its loss if the court considers the removal to have increased the risk, and provided the insurer continued to receive the premiums after he knew of said removal.[32]

In Argentina,[33] Chile,[34] Colombia,[35] Ecuador,[36] Guatemala,[37] Panama,[38] Uruguay [39] and Venezuela,[40] the liability of the insurer ceases when the insured building is, after the contract, dedicated to a use which increases the risk of fire, in such manner that it is probable that the insurer would not have made the contract or would have done it under different conditions had he been aware of such risk.

Substitution of one thing for another.

The substitution or exchange of one thing for another of a

[30] Chile, 552, 584; Colombia, 676, 710; Ecuador, 558, 584; Guatemala, 441, 470; Venezuela, 521, 551.

[31] Spain, 397; Argentina, 538; Chile, 538, 583; Colombia, 662, 709; Ecuador, 583; Guatemala, 427, 469; Honduras, 375; Mexico, 409; Panama, 1009, 1028; Peru, 392; San Salvador, 350; Uruguay, 682; Venezuela, 515.

[32] The insurer's declaration that a policy has lapsed due to the fact that the insured removed the remains of the house destroyed by fire as well as the salvaged merchandise, without notice to the insurer, is not proper even though the policy stipulated for such notice, when the insured was not actuated in doing so by any unlawful design to conceal the facts. Argentina, Cam. de Apel. Com. de la Cap., Nov. 26, 1912, E. Abente *v.* La Franco Argentina, *Jurisp. de los Tribs. Nacs.*, Nov., 1912, p. 297.

[33] Art. 537. [34] Art. 583. [35] Art. 709.
[36] Art. 583. [37] Art. 469. [38] Art. 1028.
[39] Art. 681. [40] Art. 515.

different kind or species not comprised in the contract of insurance, nullifies it from the moment of substitution.[41]

When an alteration or change is made by an unforeseen event or by the act of a third person, any of the parties may demand the rescission of the contract.[42]

Requisites in order to bind the insurer.

In a fire insurance contract it is necessary, in order that the insurer be bound, to have paid him the single premium or the installments agreed upon as and when agreed upon in the contract. The premium must be paid in advance, and once it is paid it belongs to the insurer, whatever the duration of the insurance.[43]

Duties of the insured.

The duties of the insured or of the persons who represent him are:

(*a*) To declare in good faith all the circumstances necessary to identify the insured property and to appreciate the character of the risk.[44]

(*b*) To pay the premium in advance.[45]

In Panama, when the insured does not pay the premium within the period stipulated in the policy, the contract is void, provided the insurer has notified the insured of the purpose to rescind, and the latter fails

[41] Spain, 391; Chile, 583; Colombia, 662; Ecuador, 550; Guatemala, 427; Honduras, 369; Mexico, 403; Peru, 386; Venezuela, 515.

[42] Spain, 392; Honduras, 370; Mexico, 404; Peru, 387; San Salvador, 346. Additions contructed by the insured on the building, subject-matter of the insurance, after the contract of insurance was executed, are not a cause of rescission, if by the nature of the property and the circumstances of the insured business house, such additions do not increase the risk. Argentina, Cam. de Ap. Com., Oct. 7, 1913, *Jurisp. de los Tribs. Nacs.*, Oct., 1913, p. 289.

[43] Spain, 388; Argentina, 532; Chile, 544; Colombia, 668; Guatemala, 433; Honduras, 366; Mexico, 400; Peru, 383; Uruguay, 674.

[44] Spain, 381; Argentina, 498; Chile, 556; Colombia, 680; Ecuador, 560; Guatemala, 445; Honduras, 359; Mexico, 393; Panama, 1000; Peru, 376; Uruguay, 640, 645; Venezuela, 524.

[45] Spain, 388; Argentina, 530; Bolivia, 196; Chile, 543; Colombia, 667; Ecuador, 560; Guatemala, 445; Honduras, 366; Mexico, 400; Peru, 383; San Salvador, 343; Uruguay, 674; Venezuela, 524.

to pay within fifteen days. If the insurer does not give such notice, the contract is in force, and in case of loss the insured must receive the amount stipulated, less the non-paid premium and interest thereon at the prevailing market rate.[46]

(*c*) In Argentina,[47] Chile,[48] Colombia,[49] Ecuador,[50] Guatemala,[51] Panama,[52] Uruguay [53] and Venezuela,[54] the insured is bound to use all possible care in the preservation of the insured property; he is responsible even for slight negligence. In case he fails to comply with this duty, the insurer is not released from his obligation of paying the insurance, as we have seen, but he is entitled to damages.

In the above mentioned countries the insured is also bound to take all necessary steps in order to save or rescue the insured property or to preserve the salvaged portion.[55]

(*d*) To notify the insurer:

1. Of all other policies taken out before, simultaneously or after the contract.[56]

In Chile,[57] Colombia,[58] Ecuador,[59] Guatemala [60] and

[46] Art. 998. [47] Art. 524. [48] Art. 556.
[49] Art. 680. [50] Art. 560. [51] Art. 445.
[52] Art. 1020. [53] Art. 668. [54] Art. 524.

[55] The obligation of the insured stipulated in the policy, to produce a final judicial decision in the proceedings initiated on account of a fire, is complied with by the presentation of a provisional judicial decision, because the courts in such cases never render a final decision when no one is found guilty. Argentina, Cam. de Apel. Com., April 18, 1914, *Jurisp. de los Tribs. Nacs.*, April, 1914, p. 260, and May 14, 1914, *Ib.*, May, 1914, p. 240.

In a fire insurance policy in which it has been stipulated: (*a*) that the insured must notify the underwriter immediately after the fire takes place; (*b*) that he must present a statement as exact as possible of things existing in the house before the fire, of those which were destroyed or injured by it, and of those which were not lost, with the value thereof; (*c*) that he must prove the existence and value of the insured things, the insured has to comply with those requisites, otherwise the policy lapses. Argentina, Cam. de Apel. Com. de la Cap., May 23, 1914, *Jurisp. de los Tribs. Nacs.*, May, 1914, p. 143.

[56] Spain, 398; Honduras, 376; Mexico, 410; Panama, 1011; Peru, 393; San Salvador, 351.

[57] Art. 556. [58] Art. 680. [59] Art. 560.
[60] Art. 445.

Venezuela,[61] this obligation must be complied with at the time payment of the policy is demanded.

In Argentina [62] and Uruguay [63] the obligation is limited to a declaration of the policies taken out prior to the contract.

2. Of alterations made in the contracts of insurance mentioned in the policy.[64]

3. Of alterations in the character of the insured property which might increase the risk.[65]

4. Of the death, liquidation or bankruptcy of the insured or the sale or conveyance of the insured property within a period of fifteen days, under pain of the nullity of the insurance from the date those events occurred.[66] In Chile,[67] Colombia [68] and Guatemala,[69] the period is three days, and the penalty is that the insurer can demand the rescission of the contract.

In Venezuela [70] the facts must be notified as soon as possible.

5. Of the loss of the insured property immediately after it occurs.[71]

The partial or total loss of the insured property must be notified to the insurer within eight days after its occurrence, under penalty of damages.[72]

(*e*) To prove the loss in the forms to be stated presently.

Default in payment of the premium.

The effects of default in payment of the premium present

[61] Art. 524. [62] Art. 521. [63] Art. 665.

[64] Spain, 398; Chile, 556; Colombia, 680; Ecuador, 560; Guatemala, 445; Honduras, 376; Mexico, 410; Peru, 393; San Salvador, 351; Venezuela, 524.

[65] Spain, 398; Chile, 556; Colombia, 680; Ecuador, 560; Guatemala, 445; Honduras, 376; Mexico, 410; Peru, 393; San Salvador, 351; Venezuela, 524.

[66] Spain, 402; Honduras, 380; Mexico, 414; Peru, 397; San Salvador, 355.

[67] Arts. 556, 557. [68] Arts. 680, 681. [69] Arts. 445, 446.

[70] Arts. 524, 527.

[71] Spain, 404; Argentina, 524; Chile, 556; Colombia, 680; Ecuador, 560; Honduras, 381; Mexico, 416; Peru, 399; San Salvador, 356; Uruguay, 668; Venezuela, 524.

[72] Panama, 1020.

some differences, and we may note the following systems in this respect:

1. When the insured delays the payment of the premium the insurer can rescind the contract by notifying the insured forty-eight hours after the premium was due.

Should he not avail himself of this privilege the contract is outstanding and the insurer can at any time demand payment of the premium.[73]

Chile,[74] Colombia [75] and Guatemala [76] have the same system but the period granted to the insurer for notifying rescission of the contract is three days.

2. If the premium is not paid at the beginning of every year, the risk ceases to rest upon the insurer. If the insured later offers the overdue payment, the insurer can choose between the continuation of the insurance or its annulment from the day the premium became due; and even though the insurer demands payment of the premium judicially or extrajudicially the risks are not for his account so long as the premium remains unpaid.[77]

Duties of the insurer.

The main obligation of the insurer arises when the loss occurs, and consists in paying indemnity for losses caused by the fire, the losses comprising what has already been set forth.[78]

In Spain, Honduras, Mexico and Guatemala the insurer enjoys a period of ten days in which to pay the loss, counting

[73] Spain, 389; Honduras, 367; Mexico, 401; Peru, 384; San Salvador, 344.

[74] Arts. 544, 545. [75] Arts. 668, 669. [76] Arts. 433, 434.

[77] Argentina, 532, 533; Uruguay, 676, 677.

[78] Spain, 409; Argentina, 541; Chile, 550, 582; Colombia, 674, 708; Ecuador, 556, 582; Guatemala, 439, 468; Honduras, 386; Mexico, 419; Peru, 404; Uruguay, 685; Venezuela, 519, 549.

A fire insurance policy gives the insured the right to initiate an "executive" proceeding for the payment of the full amount stipulated when the loss is total, covering all the insured property. Peru, Corte Suprema de Justicia, Lima, April 23, 1909, Clement *v.* Compañía Internacional de Seguros del Peru, *Anales Jud. de la Sup. Corte de Just.*, v. 5, p. 60.

from the day following the agreement of the parties for the valuation of the loss by experts. In case of delay, the insurer must also pay the legal interest on the amount due, counting from the day mentioned.[79]

Different ways to pay the loss.

The insurer, as a rule, must pay in cash as provided for in the policy, but he can also indemnify by other means.

In Spain,[80] Honduras [81] and Mexico,[82] he can choose within the period of ten days above referred to, between paying the indemnity in cash or repairing, rebuilding or replacing according to their kind or species, the insured and destroyed property, provided both parties agree.

In Peru [83] the same rule prevails, and the insurer can make the election without the consent of the insured.

In Argentina,[84] Panama [85] and Uruguay,[86] if it is stipulated that the insurer is bound to rebuild or repair the destroyed building up to the amount of the insurance, the insurer has a right to compel the insured to use the money paid in the reconstruction or repair agreed upon within a period determined by the court, which, at the request of the insurer, can order the insured to give a bond therefor, if deemed necessary. In Argentina and Uruguay, when the reconstruction of the burnt building is agreed upon, stipulation must be made to the effect that the expenses are for the account of the insurer. In such case the insurance cannot exceed three-quarters of the expenses; otherwise it is null in so far as it exceeds that amount, and it raises a presumption of fraud against the insured.

Colombia [87] provides that in fire insurance policies it must

[79] A demurrer based on the ground that the plaintiff consciously exaggerated the amount of the loss is not proper when it is proved by the books of the insured and other circumstantial evidence that the loss was approximately that stated in the complaint. Argentina, Cam. de Apel. Com. de la Cap., Nov. 29, 1912, G. Conde *v.* "La Italiano" and La Unión Mercantil; " *Jurisp. de los Tribs. Nacs.*, Nov., 1912, p. 303.

[80] Art. 411. [81] Art. 388. [82] Art. 421.
[83] Art. 406. [84] Arts. 535, 536. [85] Art. 1027.
[86] Arts. 679, 680. [87] Arts. 704, 705.

be stated whether the insurer is obliged to indemnify the loss by reconstructing the buildings and replacing the movables or merchandise, or by delivering a certain amount of money. Should there be no such stipulation the obligation of paying in cash is understood; if the insurer prefers to reconstruct the buildings or replace the movables or merchandise neither the insured nor his creditors can compel him to pay the indemnity in cash. In these cases the insurer is bound to invest in the reconstruction or replacement the amount the buildings or merchandise were worth at the time of the loss, provided this amount is not greater than the insured sum.[88]

Obligation of the insurer in case of two or more policies.

When two or more policies have been taken out with respect to the same property various systems are followed, namely:

1. When the same article has been insured for an aliquot part of its value, the insurers must contribute *pro rata* to pay the amount of the insurance.[89]

2. If there are several policies of insurance closed in good faith and the first covers the full value of the property, the others are void. If the first policy does not cover the full value of the property, the following ones guarantee the balance only, in the order of their dates. Should several policies be made for the same same period and at the same day and hour, each covering the full value of the property, every insurer is liable in proportion. Insurers whose policies are left without effect must return half the premium received, keeping the other half thereof by way of damages.[90]

[88] When in a fire insurance policy the replacement of lost articles in kind (species) is stipulated and at the same time a certain amount is fixed to cover the destruction of the building, the underwriter cannot discharge his duty by rebuilding the house; the word "species" refers to personal property and this is the only kind he is authorized by the contract to replace. Chile, Corte de Justicia de Concepción, Aug. 5, 1896, R. de La Fuente *v.* Comp. de Seguros La Concepción; *Gaceta de los Tribs.*, 1896, v. 2, p. 389.

[89] Spain, 400; Honduras, 378; Mexico, 412; Peru, 395; San Salvador, 353.

[90] Argentina, 500; Panama, 1011, 1012; Uruguay, 663.

3. When various insurers have insured jointly or separately on the same date for an amount in excess of the value of the insured property, they will not be liable for more than the value and in proportion to the amount of each policy.[91]

When the policy does not cover the full value of the insured property.

If the value of the thing lost exceeds the amount of the policy, the insured is considered his own insurer for the excess, and must bear an aliquot part of the loss and expenses.[92]

When the policy covers more than the value of the insured property.

When the amount of the insurance is greater than the value of the insured property, the policy is only enforceable up to such value.[93]

Rights of the insurer.

The insurer has the following rights and privileges:

(*a*) To collect the premium in advance according to the terms of the contract. He has a preference in being paid the premium on the value of the insured property before any other creditor, if it is personal property; if it is real estate, it stands as a guaranty for the payment of the premiums due the preceding two years, according to the principles of the civil law.[94]

The clause in a policy that the obligations of the insurer cease if the insured takes out another policy upon the same property is valid. Argentina, Cam. de Apel. Com. de la Cap., Dec. 6, 1913, *Jurisp. de los Tribs. Nacs.*, Dec., 1913, p. 285.

[91] Chile, 526; Colombia, 650; Ecuador, 543; Guatemala, 415; Venezuela, 511.

[92] Spain, 408; Argentina, 502; Chile, 532; Colombia, 656; Ecuador, 544; Guatemala, 421; Honduras, 385; Panama, 1000; Peru, 403; Uruguay, 642; Venezuela, 511.

[93] Argentina, 502; Bolivia, 202; Chile, 532; Colombia, 656; Guatemala, 421; Nicaragua, 237; Panama, 1009; Uruguay, 642; Venezuela, 511.

[94] Spain, 403 and 219, 220, 221 of the *Ley hipoteraria;* Mexico, 415; Peru, 398.

In Argentina,[95] Chile,[96] Colombia,[97] Guatemala,[98] Panama [99] and Uruguay,[100] in case of bankruptcy of the insured, the underwriter who has not been paid the premium may demand the rescission of the contract or a guaranty that the premium will be paid. If the receivers or assignees do not guarantee said payment, the underwriter can demand the full assignment of any rights accruing from other policies which the debtor may have contracted.

(*b*) To be subrogated to the rights of the insured against persons responsible for the fire, whatever the basis for such responsibility, after he has paid the insurance.[101]

(*c*) To acquire ownership in the things saved from the fire, if he pays the insured their value as established by experts.[102]

(*d*) To assign his rights partially or totally, in Spain,[103] Honduras,[104] Mexico,[105] Peru [106] and San Salvador,[107] or to reinsure the property for his benefit, in Argentina,[108] Chile,[109] Colombia,[110] Ecuador,[111] Guatemala,[112] Uruguay [113] and Venezuela,[114] but in either case the rights of the insured are not affected.

(*e*) To rescind any other contract or contracts he may have made with the insured after a loss has occurred, so that no future risks will be for his account. To that end he must advise the insured fifteen days in advance, returning to him the proportionate part of the unearned premium.[115]

[95] Art. 526. [93] Art. 559. [97] Art. 683.
[98] Art. 448. [99] Art. 1022. [100] Art. 670.
[101] Spain, 413; Argentina, 525; Bolivia, 205; Honduras, 390; Mexico, 423; Nicaragua, 239; Panama, 1021; Peru, 408; San Salvador, 358; Uruguay, 669; Venezuela, 522.
[102] Spain, 412; Honduras, 389; Mexico, 422; Peru, 417.
[103] Art. 400. [104] Art. 378. [105] Art. 412.
[106] Art. 395. [107] Art. 353. [108] Art. 517.
[109] Art. 523. [110] Art. 647. [111] Art. 540.
[112] Art. 412. [113] Art. 658. [114] Art. 509.
[115] Spain, 414; Honduras, 391; Mexico, 424; Peru, 409; San Salvador, 359.

Proof of loss.

Various systems are followed in the matter of proof of loss, namely:

System of Spain. The insured must prove the loss sustained by proving the existence of the property before the fire.[116]

System of Argentina. The courts may accept the sworn statement of the insured in case of fire of furniture or merchandise in a house or store, when no regular means of evidence can be obtained.[117]

System of Chile. The insured must prove the existence of all the circumstances necessary to establish the amount of indemnity.[118]

System of Mexico. In case of a total loss by fire, the existence of the insured property at the moment and in the place of the fire is proved by the valuation of the property insured, as noted in the policy and by the premiums paid by the insured, unless evidence to the contrary is produced. In case of partial loss the insured, besides the evidence afforded by the policy itself, must supplement it with other evidence, in order to fix the value of the saved property.[119]

System of Panama. When the subject-matter of the insurance is merchandise or household furniture, the obligation to prove the loss and the existence of the things at the time of the fire rests with the insured.[120]

Appraisal of the property lost.

The appraisal of the loss caused by fire must be undertaken by experts in the form established in the policy or by agreement of the parties, or in default thereof, in accordance with the law of procedure. The experts must pass upon:

(*a*) the causes of the fire;

[116] Spain, 405; Honduras, 382; Peru, 400; San Salvador, 357.
[117] Argentina, 519, 540; Uruguay, 661, 684.
[118] Chile, 556; Colombia, 680; Guatemala, 445; Venezuela, 524.
[119] Art. 402.
[120] Art. 1025.

(*b*) the value of the insured property on the day of the fire, before its occurrence;

(*c*) the value of the same property after the fire, and,

(*d*) other questions submitted to them.[121]

In Argentina,[122] Chile,[123] Colombia,[124] Ecuador,[125] Guatemala [126] and Panama,[127] when by reason of its nature, the value of the insured property has not been fixed in the policy, it is understood that the parties intended its value at the time of the fire, which can be proved by all legal means.[128]

In Uruguay the value of the insured property must be stated in the policy, otherwise it can be proved by all means accepted in commercial affairs.[129]

In Argentina,[130] Panama [131] and Uruguay,[132] the valuation of real estate, in case of fire, must be made by comparing the value of the property before and immediately after the fire.

According to article 661 of the code of Uruguay the valuation noted in the policy is not evidence, in case of disagreement, unless it was fixed by experts, and article 662 adds that the clause "whether less or more valuable" does not

[121] Spain, 406, 407; Honduras, 383, 384; Mexico, 417, 418; Peru, 401, 402.

[122] Art. 519. [123] Art. 533. [124] Art. 557.

[125] Art. 546. [126] Art. 422. [127] Art. 1017.

[128] In case the valuation of the insured things cannot be made, due to the total destruction by fire of the house in which they were, or other similar circumstance, the judge may accept the sworn statement of the insured. Argentina, Cam. de Ap. Com., April 18, 1914, *Jurisp. de los Tribs. Nacs.*, April, 1914, p. 260.

In order to fix the amount of the indemnity due by the underwriter in case of fire it is necessary to take into consideration the maximum stipulated, the price paid by the insured for the things destroyed and the valuation made by the insured. Argentina, Cam. de Apel, Com. de la Cap., July 29, 1913, *Jurisp. de los Tribs. Nacs.*, July, 1913, p. 254.

When the insured demands a greater indemnity than the loss warrants he must pay the underwriter an amount equal to double the premium stipulated, but he does not forfeit the correct indemnity therefor. When the policy was not produced by either of the parties, the case will be decided according to the general principles of law. Argentina, Cam. de Apel. Com. de la Cap., April 29, 1913, G. Menthe *v.* La Unión Mercantil, *Jurisp. de los Tribs. Nacs.*, April, 1913, p. 243.

[129] Art. 660. [130] Art. 534. [131] Art. 1026.

[132] Art. 678.

prevent a finding of fraud on the part of the insured if he has participated in it in the declarations of the policy, nor has it any value if it is proved that the insured property was worth 25% less than the amount fixed in the policy.

Appraisal expenses.

In Spain,[133] Honduras,[134] Mexico [135] and Peru,[136] the expenses incidental to the appraisal of the property lost and the liquidation of the indemnity are for the account of both parties, each paying half, unless the insured has made a manifest exaggeration in his estimate, in which case he alone must bear the expenses.

In Chile,[137] Colombia,[138] Ecuador,[139] Guatemala [140] and Venezuela,[141] the expenses are for the account of the insurer.

Conflict of laws.

According to article 703 of the code of Colombia, when the insurers are not residents of the country but have only agents in it, the fire insurance contract is governed by the laws of the country where said insurers have their domicil.

[133] Art. 415. [134] Art. 392. [135] Art. 425.
[136] Art. 410. [137] Art. 556. [138] Art. 680.
[139] Art. 560. [140] Art. 445. [141] Art. 524.

CHAPTER XXVI

LIFE INSURANCE AND OVERLAND TRANSPORTATION INSURANCE

Object of a life insurance contract.

Life insurance contracts may comprise every combination by which a premium or a certain amount of money is paid as a consideration for an annuity for life or up to a certain age, or for a sum of money payable at the death of a certain person, whether in favor of the insured himself or of his successor in interest, or of a third party. This contract may also comprise any other like combination.[1]

Data in a life insurance policy.

Besides the general requisites of an insurance policy a life insurance policy must state the following:

(*a*) the amount of capital or income, subject-matter of the insurance; [2]

(*b*) the increase or decrease of the capital or income, in case the contract so requires, with the date on which those changes are to take place; [3]

(*c*) the age and condition of health of the insured; [4]

(*d*) the date of the insured's birth; [5]

(*e*) the date after which the risks begin to run for the account of the insurer; [6]

(*f*) The beneficiary.[7]

[1] Spain, 416; Brazil, 1471, 1476 c. c.; Chile, 569, 571, 572; Colombia, 693, 695, 696; Guatemala, 458, 459, 460; Honduras, 393; Mexico, 426; Panama, 1046, 1048; Peru, 411; San Salvador, 360; Uruguay, 695; Venezuela, 535, 536.

[2] Spain, Argentina, Honduras, Mexico, Peru, San Salvador and Uruguay.

[3] Spain, Honduras, Mexico, Peru, San Salvador.

[4] Chile, Colombia, Ecuador, Venezuela.

[5] Panama. [6] Panama.

[7] Panama.

The respective articles of the codes above mentioned are as follows: Spain, 417; Argentina, 551; Chile, 573; Colombia, 697; Ecuador, 573;

The insured.

The contract of insurance may be entered into either for the life of an individual or of a group of persons irrespective of age, sex or health.[8]

A life insurance contract may be made in favor of a third party, described in the policy by name and personal status or other identifying data. This contract in favor of a third person may be made without his knowledge.[9]

In Spain,[10] Brazil,[11] Honduras,[12] Mexico,[13] Peru [14] and San Salvador,[15] the code does not state whether the knowledge of the third person is necessary. In Venezuela [16] the contract of life insurance cannot be made in favor of a third person without his consent.

Interest in the preservation of the life of the insured.

The codes of Argentina,[17] Brazil,[18] Chile,[19] Colombia,[20] Ecuador,[21] Guatemala,[22] Panama,[23] Uruguay [24] and Venezuela [25] require that the person who takes out a policy on the life of another shall have an interest in the preservation of such life. Panama requires that interest at least at the time the contract is entered into.

Venezuela provides, in addition, that the insured must be a relative of the person who takes out the policy, whether in a direct line of ascent or descent, or collaterally, within the fourth degree of consanguinity or affinity. The policy cannot be assigned except as a guaranty, and to a person who is related to the insured in the degree above mentioned, and with the consent of the insured. In case of death of

Honduras, 394; Mexico, 427; Panama, 1049; Peru, 412; San Salvador, 361; Venezuela, 537.

[8] Spain, 418; Honduras, 395; Mexico, 428; Panama, 995; Peru, 413; San Salvador, 362.

[9] Argentina, 550; Chile, 570; Colombia, 694; Ecuador, 570; Guatemala, 458; Panama, 1047; Uruguay, 694.

[10] Art. 419.
[11] Art. 1472 c. c.
[12] Art. 396.
[13] Art. 429.
[14] Art. 414.
[15] Art. 363.
[16] Art. 534.
[17] Art. 550.
[18] Art. 1472 c. c.
[19] Art. 569.
[20] Art. 693.
[21] Art. 569.
[22] Art. 458.
[23] Art. 1046.
[24] Art. 693.
[25] Art. 533.

the insured the benefit of the policy cannot be received directly or through an intermediary (*interpósita persona*) by the person who took out the policy, unless the latter is a legal heir of the insured.[26]

Panama also prescribes that a policy cannot be given as security for an obligation without the consent of the insured.[27]

Party bound by the contract.

Only the person who takes out a policy on the life of a third person is bound to comply with the stipulations of the contract; the policy, however, entitles the insured person to demand from the insurance company the performance of the contract.[28]

Risks not covered by a life insurance contract.

In certain countries insurance can never cover death if the insured dies:

(*a*) in a duel or as a consequence thereof;

(*b*) by committing suicide, or,

(*c*) by suffering capital punishment as a penalty for non-political crimes.[29]

In Argentina [30] and Uruguay,[31] the insurance is void if the person who insured his life commits suicide, suffers capital punishment or loses his life in a duel or in any other criminal enterprise. The insurance is also void in case the person who claims its amount is the author or the accomplice of the author of the death insured against.

In Chile,[32] Colombia,[33] Ecuador [34] and Guatemala,[35] the insurance is rescinded:

(*a*) if the person who insured his life commits suicide

[26] Art. 538.

[27] Art. 1054. In the United States there is no such requirement.

[28] Spain, 420, 421; Chile, 569; Colombia, 693; Ecuador, 569; Guatemala, 458; Honduras, 397, 398; Mexico, 430, 431; Peru, 415, 416; San Salvador, 364, 365.

[29] Spain, 423; Honduras, 400; Mexico, 433; San Salvador, 367.

[30] Arts. 554, 555. [31] Arts. 698, 699. [32] Art. 575.

[33] Art. 699. [34] Art. 575. [35] Art. 463.

or dies because of capital punishment, or in a duel or any other criminal enterprise, or is killed by his heirs. This provision is not applicable in case the insurance was taken out by a third person;

(*b*) when the person who claims the amount of the insurance is the author or the accomplice of the author of the insured's death.

In Venezuela,[36] the contract is not rescinded, but the insurer is released from his obligation of paying the policy:

(*a*) when the person who insured his life commits suicide or dies in a criminal enterprise, or is killed by any of his heirs, unless otherwise stipulated, this provision being inapplicable if the insurance was contracted by a third party;

(*b*) when the person who claims the amount of the insurance is the author or the accomplice of the author of the insured's death.

In Spain,[37] Honduras,[38] Mexico [39] and San Salvador,[40] the life insurance policy does not cover, unless otherwise stipulated under payment of an extra premium:

(*a*) death occurring in voyages out of the country; [41]

(*b*) death occurring in military service in time of war, whether in the army or navy;

(*c*) death occurring in any extraordinary undertaking of a reckless character.

In Argentina,[42] Panama [43] and Venezuela,[44] a change of residence, occupation, status or manner of living on the part

[36] Art. 540. [37] Art. 424. [38] Art. 402.
[39] Art. 434. [40] Art. 368.

[41] With reference to this article of the Spanish code, which is in force in Cuba, Dr. Angel C. Betancourt in his book, *Codigo de Comercio*, page 175, says: "The existence of this provision in the code in force in Cuba is evidently due to carelessness. In the Royal Decree which directed the enforcement of the code in this island there was a purpose to modify all provisions which could not be naturally applied in the form they were drawn, and to amend them according to the circumstances of the place; this provision, however, was overlooked. It is absurd to require an extra premium for a resident in America when he travels there, and not require it when he travels in Europe.

[42] Art. 556. [43] Art. 1053. [44] Art. 541.

of the insured does not interfere with the insurance, unless it is of such character that the insurer would not have entered into the contract or would have made it under different conditions had those circumstances existed at the time of the contract.

Failure to pay the premium.

There is a peculiarity in the law of life insurance in the codes of Spain,[45] Mexico,[46] Peru [47] and San Salvador.[48] These codes provide that the insured who delays payment of the premium agreed upon, cannot demand the amount of the insurance if the death happens or the condition occurs during such default, even though the insurer has not demanded the rescission of the contract.[49]

Failure to mention other policies.

As was stated in discussing the general principles of the insurance contract, the law in some countries requires the mention, at the time of entering into a contract of insurance, of other policies previously or simultaneously taken out; and in other countries such mention must be made at the time of demanding the indemnity. In Spain,[50] Honduras,[51] Mexico [52] and San Salvador,[53] this requisite must be satisfied in the policy itself, and failure to do so makes the insured unable to obtain the benefits of the insurance; he can recover only the amount paid on account of the policy.

[45] Art. 425. [46] Art. 435. [47] Art. 418.

[48] Art. 369.

[49] When an insurance policy lapses by failure to pay premiums it can be revalidated by paying such premiums and complying with the other requisites established by the policy itself. Mexico, Trib. Sup. del Dist. Fed., Segunda Sala, Nov. 23, 1912, R. S. Vda, de Perez *v.* "La Nacional," *Diario de Jurisp.*, vol. XXIX, p. 217.

When in a life insurance policy a declaration is made that the premium was paid, the underwriter cannot afterwards claim that he received instead of the premium a promissory note which was not paid at maturity. Argentina, Cam. de Apel. Com. de la Cap., Dec. 6, 1913, *Jurisp. de los Tribs. Nacs.*, Dec., 1913, p. 293.

[50] Art. 427. [51] Art. 404. [52] Art. 437.

[53] Art. 371.

Right of the insured to ask for a liquidation of the policy.

The codes of Spain,[54] Honduras,[55] Mexico [56] and San Salvador [57] provide that when the insured has paid several premiums and cannot continue, he must so advise the insurer, and the amount of the insurance must be reduced in proportion to the premiums paid, according to the insurance tables and taking into consideration the risks already run. It may be otherwise stipulated in Mexico. In Venezuela [58] the insured has also the privilege of liquidating his policy when he cannot pay premiums any longer; in that case he is entitled to recover two-thirds of the premiums paid.

The benefit of the policy is superior to the rights of creditors.

The amount which the insurer must pay the beneficiary in compliance with the policy is a special fund, which is not subject to any claim on the part of the creditors or legal heirs of the insured.[59]

When a life insurance policy can be endorsed.

After all the stipulated premiums have been paid, a life insurance policy may be assigned, by endorsement on the policy itself and notice to the company in authentic form.[60]

Brazil provides that the beneficiary of a policy can be changed at any time, and if the insurance is payable to order the beneficiary can be designated even at the time the insured makes his will. The only limitation on the power to change beneficiaries is established in case the insurance was contracted with a view to guaranteeing an obligation, in which case the beneficiary cannot be changed.[61]

[54] Art. 426. [55] Art. 403. [56] Art. 436.
[57] Art. 370. [58] Art. 543.

[59] Spain, 428; Argentina, law No. 3942 of 1900; Brazil, 1475 c. c.; Costa Rica, decree of July 7, 1905; Honduras, 405; Mexico, 438; Peru, 419; San Salvador, 372; Uruguay, law of July 1, 1896, art. 1; Venezuela, 544.

A policy in favor of a third person is not subject to the liabilities of the insured. Argentina, Dec. 6, 1913. *ib.*

[60] Spain, 430; Honduras, 407; Mexico, 440; Peru, 421; San Salvador, 374.

[61] Art. 1473 c. c.

Presumptive death of the insured.

In case of absence creating a presumption of death of the insured, the insurance cannot be demanded unless otherwise stipulated; but if the presumptive heirs of the person whose death is presumed have obtained definitive possession of his estate they can demand payment of the insurance, by giving a bond guaranteeing restitution of the amount received if the insured reappears. The judicial declaration of presumptive death, giving the heirs definitive possession of the insured's estate, must in this case be made after hearing the insurer, in Argentina,[62] Chile,[63] Colombia,[64] Ecuador,[65] Panama [66] and Venezuela.[67] In other countries this rule is an application of the general principles governing the declaration of presumptive death.

OVERLAND TRANSPORTATION INSURANCE

Subject-matter of this contract.

All things which can be moved by means used in overland locomotion may be the subject-matter of the contract of overland transportation insurance.[68]

Panama [69] provides that the insurance of goods transported overland or by river or canal may cover the actual value of such goods on their arrival at destination or the profit which is expected to be derived therefrom. If said profit is not valued in the policy, it is understood that the policy does not cover it.

Data which the policy must contain.

Not all the countries require the same data, to be stated presently. The items required include:

(*a*) the name of the carrier; [70]

[62] Art. 557. [63] Art. 576. [64] Art. 700.
[65] Art. 576. [66] Art. 1055. [67] Art. 541.
[68] Spain, 432; Costa Rica, 364; Honduras, 409; Mexico, 442; Peru, 433; San Salvador, 376.
[69] Art. 1041.
[70] Spain, Bolivia, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, San Salvador, Venezuela.

(*b*) the specific character of the insured goods, with the number of packages and marks thereof; [71]

(*c*) the places at which the insured goods must be received and delivered by the carrier; [72]

(*d*) the journey for which the insurance is taken out and the route to be followed; [73]

(*e*) the method of carriage; [74]

(*f*) the bill of lading.[75]

Risks covered by the transportation insurance.

The transportation insurance covers every kind of risk except risks arising from inherent vices of the insured article itself or from mere lapse of time, unless otherwise agreed.[76]

In Costa Rica [77] when the policy does not except any risks, the insurer is liable for all risks without limitation.

Losses and place of proof.

When a total or partial loss occurs during the transportation and it is due to causes not covered by the policy, this circumstance must be proved by the insurer before the courts; but the codes do not agree in designating the place where such proof must be made. The provisions in question may be divided into the following systems:

(*a*) the loss must be proved at the place where the goods are to be delivered; [78]

[71] Spain, Bolivia, Costa Rica, Honduras, Mexico, Nicaragua, Panama, Peru, San Salvador.

[72] Spain, Bolivia, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, San Salvador, Venezuela.

[73] Chile, Colombia, Ecuador, Guatemala, Panama, Venezuela.

[74] Chile, Colombia, Costa Rica, Ecuador, Guatemala, Nicaragua, Venezuela.

[75] Panama.

The respective articles of the codes above mentioned are as follows:

Spain, 433; Bolivia, 201; Chile, 591; Colombia, 719; Costa Rica, 367; Ecuador, 591; Guatemala, 477; Honduras, 410; Mexico, 443; Nicaragua, 235; Peru, 424; Panama, 1042; San Salvador, 377; Venezuela, 558.

[76] Spain, 435; Argentina, 497; Bolivia, 203; Chile, 552; Colombia, 676; Ecuador, 558; Guatemala, 441; Honduras, 412; Mexico, 445; Panama, 1044; Peru, 426; San Salvador, 379; Venezuela, 521.

[77] Art. 370.

[78] Spain, 436; Honduras, 413; Mexico, 446; Panama, 1045; Peru, 427.

(*b*) it must be proved before the court of the place nearest to the situs of the loss; [79]

(*c*) the obligation of proof of loss is fixed, but no indication is made of the place where it must be performed.[80]

If such proof is not made, the insurer is not released from the obligation of paying the loss.

Privilege of surrendering the insured goods to the insurer.

The insured has the privilege of surrendering the insured and damaged goods to the insurer, provided he avails himself of this privilege within one month of the date he obtained knowledge of the damage.[81]

[79] Bolivia, 204; Costa Rica, 371; Nicaragua, 238.

[80] Chile, 598; Colombia, 726; Guatemala, 484; Venezuela, 565.

[81] Chile, 600; Colombia, 728; Ecuador, 600; Guatemala, 486; Venezuela, 566.

CHAPTER XXVII

SURETYSHIP

Definition.

Suretyship is a contract by which one person binds himself to pay or to comply with some obligation on behalf of a third party in case the latter fails to do so. In most of the cases, the surety is bound in the original contract, but a guaranty can be given in a separate instrument.[1]

We shall first study the principles of suretyship in general, as embodied in the civil code of Spain and of certain Latin American countries, and shall then pass on to a special consideration of commercial suretyship. We shall first examine:

1. The nature and extent of suretyship.
2. The effects of suretyship between surety and creditor.
3. Its effects between the debtor and the surety.
4. Its effects among the co-sureties.
5. The extinguishment of suretyship.

When the surety binds himself jointly and severally with the principal debtor, the former is not a surety properly so

[1] Spain, 1822 c. c.; Argentina, 2020 c. c.; Brazil, 1418 c. c.; Bolivia, 1358 c. c.; Chile, 2335 c. c.; Colombia, 2361 c. c.; Costa Rica, 1301 c. c.; Mexico, 1700 c. c.; Panama, 1512 c. c.; Peru, 2079 c. c.; Uruguay, 2102 c. c.; Venezuela, 1791 c. c. There is not in the Spanish language any such distinction as there is in English between suretyship and guaranty; the Spanish word *fianza* covers both meanings, and the words suretyship and guaranty are used interchangeably in this chapter.

A surety who binds himself jointly with the principal debtor must pay the amount of the debt when it becomes due, without the creditor having previously to exhaust the property of such debtor. Spain, Trib. Sup., June 25, 1912; *Gacetas* of June 22 and 23, 1913, p. 530.

Even though a guarantor binds himself jointly and severally with the principal debtor, the creditor must carefully take such steps as are customary in order to secure collection from the principal debtor. Buenos Aires, Cam. de Ap. Civil, Dec. 18, 1913, *Jurisp. de los Tribs.*, Dec., 1913, p. 182.

called; his liabilities are then governed by the provisions relating to joint and several debtors and to obligations.[2]

In Argentina [3] the surety can bind himself jointly with the principal debtor and he does so whenever he waives the "benefit of a levy," as will presently be explained. Even though he makes such waiver, his obligation is always a subsidiary one, except that he may be sued without previously exhausting the property of the principal, or without dividing his liability with his co-sureties.

Validity of guaranty.

The guaranty is valid whether made for consideration or not. It may be constituted in behalf of the principal debtor or in behalf of another surety, either with the consent of the principal or with or without his knowledge or even against his will.[4]

Guaranty cannot exist without a valid obligation. Nevertheless, an obligation which is void merely on personal grounds on the part of the debtor, as, *e. g.*, because of his minority, may be the subject of guaranty, except in the case of loans made to minors not emancipated. This exception is not made in Argentina and certain other countries.[5] In Mexico [6] the principle that guaranty cannot be based on a void obligation is absolute and bears no exception.

Future debts, the amount of which is not yet known, may be guaranteed, but no claim can be instituted against the surety until the debt is liquid.[7]

[2] Spain, 1822; Costa Rica, 1316; Panama, 1512; Uruguay, 2102.

[3] Art. 2037 c. c.; 2038 c. c.

[4] Spain, 1823 c. c.; Colombia, 2366, 2367, 2371 c. c.; Mexico, 1701, 1702 c. c.; Panama, 1513 c. c.; Uruguay, 2103, 2104, 2110 c. c.

In Anglo-American law, suretyship or guaranty requires a consideration.

A husband must have special power from his wife in order to bind her as a guarantor. Buenos Aires, Cam. de Ap. Com., Oct. 3, 1912, *Jur. de los Trib. Nacs.*, Oct., 1912, p. 364.

[5] Spain, 1824 c. c.; Argentina, 2028 c. c.; Bolivia, 1359 c. c.; Brazil, 1488 c. c.; Chile, 2338 c. c.; Colombia, 2364 c. c.; Costa Rica, 1302 c. c.; Panama, 1514 c. c.; Uruguay, 2105 c. c.; Venezuela, 1792 c. c.

[6] Art. 1705 c. c.

[7] Spain, 1825 c. c.; Argentina, 2022 c. c.; Brazil, 1485 c. c.; Chile, 2339 c. c.; Colombia, 2365 c. c.; Mexico, 1706 c. c.; Panama, 1515 c. c.; Uruguay, 2106 c. c.

Contents of suretyship.

A surety may bind himself for less, but not for more than the principal debtor, either as to quantity, quality, or other condition. If he binds himself for more, his obligation must be reduced to the same limits as the debtor's.[8]

Guaranty is not to be presumed, but must be expressed and cannot be extended farther than is specified in the contract. When it is simple and unqualified, it comprises not only the principal obligation, but all its accessories, including the expenses of a suit, after demand on the surety for payment.[9]

[8] Spain, 1826 c. c.; Argentina, 2029 c. c.; Bolivia, 1360 c. c.; 1361 c. c;. Brazil, 1487 c. c.; Chile, 2343 c. c.; Colombia, 2369 c. c.; Costa Rica, 1303 c. c.; Mexico, 1707 c. c.; Panama, 1516 c. c.; Peru, 2084, 2085 c. c.; Uruguay, 2108 c. c.; Venezuela, 1793 c. c.

The obligations of a surety cannot be greater than those of the principal debtor; if the principal contract is rescinded the guaranty is also rescinded. If the surety afterwards pays any money on the contract he is entitled to recover what he paid. Brazil, Cam. Reun. da Corte de Apel., July 3, 1900, *Rev. de Direito*, vol. 2, p. 215.

A surety can be bound to pay the judicial costs of the action instituted against the principal debtor, from the day he was notified thereof. Brazil, Trib. de Just. de S. Paulo, July 23, 1894, *Revista Mensal*, vol. 1, p. 167.

[9] Spain, 1827 c. c.; Bolivia, 1363, 1364 c. c.; Brazil, 1483, 1486 c. c.; Chile, 2347 c. c.; Colombia, 2373 c. c.; Costa Rica, 1304 c. c.; Mexico, 1711, 1712 c. c.; Panama, 1517 c. c.; Peru, 2083 c. c.; Uruguay, 2107 c. c.; Venezuela, 1795, 1796 c. c.

A guaranty for the payment of a bill of exchange does not cover interest stipulated between the bearer and the acceptor without the surety's knowledge. Buenos Aires, Cam de Ap. Com., Oct. 3, 1912, *Jur. de los Trib. Nacs.*, Oct., 1912, p. 364.

The testimony of witnesses is not admissible to prove a commercial guaranty; and in order that an agent may bind his principal as a surety the latter must give the former special power. Brazil, Trib. de Just. de S. Paulo, Sept. 22, 1897, *Gaceta Jur.*, vol. 15, p. 303.

If a person binds himself as a surety for the sums due by a commercial house up to a certain date comprising the value of goods already ordered and pending shipment at that time, he cannot be held responsible for the payment of the balance of an account current closed at a later date, even though the copy of that account was acknowledged by the principal debtor. Colombia, Casación, Aug. 3, 1911, *Gaceta Judicial*, v. 10, p. 165.

A suretyship in a private instrument which is not made and signed by the surety before two witnesses whose signatures have been acknowledged, does not produce any legal effect unless the obligor has recognized his obligation in court. Brazil, Trib. da Rel. do E. Rio, May 5, 1905, *Rev. de Direito*, v. 2, p. 215.

Requisites of a surety.

The surety, when the debtor is obliged to furnish one, must be a person having capacity to bind himself and with sufficient property to answer for the obligation which he guarantees. It is understood that the surety submits himself to the jurisdiction of the court where the obligation is to be fulfilled.[10]

When the surety becomes insolvent, the creditor may ask for another with all the qualifications above mentioned, unless the creditor required and stipulated that a specified person be the surety.[11]

Effects of a guaranty as between the surety and the creditor.

With regard to the effects of guaranty as between the surety and the creditor, the obligation of the former to pay or comply with the obligation of the principal debtor is limited by two rights which the law establishes in his behalf, namely, the benefit of levy (*beneficio de excusión*) and the remedy or benefit of contribution (*beneficio de división*) the general character of which must be considered.[12]

[10] Spain, 1828 c. c.; Bolivia, 1366 c. c.; Brazil, 1489 c. c.; Chile, 2350 c. c.; Colombia, 2376, c. c.; Costa Rica, 1305 c. c.; Mexico, 1717, 1722 c. c.; Panama, 1518 c. c.; Peru, 2106 c. c.; Uruguay, 2112 c. c.; Venezuela, 1797 c. c.

The surety that a party to a suit is bound to furnish must possess unburdened real estate in the place where the suit is carried on. A person who possesses such real estate in another place cannot be accepted by the judge. Mexico, Trib. Sup. del Dist. Fed., Dec. 16, 1910, *Diar. de Jur.*, v. 23, p. 25.

In Anglo-American law, the usual rules applicable to other contracts in respect to the capacity of corporations, infants, intoxicated persons, lunatics, and persons under duress to bind themselves by contract, apply to the contract of suretyship and guaranty, except as occasionally varied by statute. The same principle applies to married women, except that general statutes conferring on married women the right to contract have sometimes been construed not to cover suretyship; in some states, like New Jersey, married women are prohibited from binding themselves as sureties.

[11] Spain, 1829 c. c.; Argentina, 2035 c. c.; Bolivia, 1368 c. c.; Brazil, 1490 c. c.; Chile, 2349 c. c.; Venezuela, 1798 c. c.

[12] Spain, 1830, 1831 c. c.; Argentina, 2046, 2047 c. c.; Bolivia, 1369 c. c.; Brazil, 1491 c. c.; Chile, 2357, 2358 c. c.; Colombia, 2383, 2384 c. c.; Costa Rica, 1312, 1313 c. c.; Mexico, 1725 to 1727 c. c.; Panama, 1520, 1521 c. c.; Peru, 2088 c. c.; Uruguay, 2117, 2118 c. c.; Venezuela, 1799, 1800 c. c.

Benefit of levy of execution against the principal debtor (beneficio de excusión.)

A surety cannot be compelled to pay a creditor until an action has been brought against the principal debtor and a levy made on all his property, and such property has been found insufficient to cover the debt.

The surety cannot avail himself of the benefit of such levy:

(*a*) if he has expressly waived it;

(*b*) if he has jointly bound himself with the debtor;

(*c*) if the principal debtor is a bankrupt;

(*d*) if the principal debtor cannot be judicially sued within the territory of the country.[13]

Prerequisites of the benefit of levy.

In order that the surety may avail himself of the benefit of levy against the principal, he must demand it as soon as the creditor sues him for payment, but the surety must indicate

Notwithstanding that the surety waived the benefit of levy, binding himself jointly with the debtor, previous demand on the latter is indispensable. In case the debtor becomes a bankrupt demand must be made on the receiver. Argentina, Cam 1ª de Apel. Civ. Buenos Aires, July 18, 1914, *Jur. de los Tribs. Nacs.*, July, 1914, p. 149, and July 21, 1914, *ib.*, p. 156.

Notwithstanding that the surety renounced the right of compelling the creditor to exhaust the principal debtor's property, before the surety can be asked for payment, the creditor is obliged to demand payment first of the debtor, even though he is a bankrupt. *Ib.*

A surety who does not bind himself jointly with the principal debtor enjoys the benefit of levy, by virtue of which he is entitled to demand that the debtor be first sued and his property exhausted. Colombia, Corte Sup., Feb. 27, 1896, *Gaceta Judicial*, v. 11, p. 271.

If a surety did not waive the benefit of levy, he is not subject to "executive" proceedings. The waiver of that benefit is void if no mention is made in the contract of suretyship of the provisions of the law which grants it. Mexico, 3a Sala del Trib. Sup. del Dist. Fed., Jan. 22, 1892, *An. de Leg. y Jur., Sec. de Jur.*, v. 9, p. 9.

[13] Spain, 1831 c. c.; Argentina, 2047 c. c.; Bolivia, 1370, 1371 c. c.; Brazil, 1491 c. c.; Chile, 2358 c. c.; Colombia, 2384 c. c.; Costa Rica, 1313 c. c.; Mexico, 1727 c. c.; Panama, 1521 c. c.; Uruguay, 2118 c. c.; Venezuela, 1800 c. c.

In Anglo-American law, as a general proposition, it is no defense to an action against a surety or guarantor that the creditor has other security, and the defendant has no right to ask an assignment thereof to himself prior to his payment of the creditor's demand. Grave doubts were for a time entertained

the property of the debtor which can be sold within the territory of the country and which may be sufficient to cover the debt. After the surety has fulfilled these conditions he is released to the extent of the value of the property designated, if the creditor is negligent in levying on it and the debtor afterwards becomes insolvent.[14]

A creditor may summon the surety for payment at the time he begins suit against the principal, the benefit of levy being reserved in favor of the surety, notwithstanding that a judgment is rendered against him and the principal.[15]

In Mexico [16] the creditor may compel the surety to attach and sell property of the debtor for the payment of the debt, the court fixing a period for the surety to do so.

A compromise made by a surety with a creditor has no effect in regard to the principal debtor. Nor has a compromise by the latter any effect in regard to a surety against his will.[17]

In Mexico [18] a compromise effected between the creditor and the principal debtor operates to the benefit of the surety but not to his prejudice; and a compromise between the surety and the creditor benefits but cannot prejudice the principal debtor.

Benefit of contribution.

Should there be several sureties but only one principal

as to the right of a surety, by suit in equity, to require the creditor to prosecute his demand against the principal. Such right is now generally recognized. There are cases where, apart from this power in equity, the surety, in case of the principal's default, is entitled to notify the creditor to proceed against the principal, at the peril of otherwise releasing the surety to the extent of any injury he may sustain by failure to comply. But not all state jurisdictions are in accord in this matter.

[14] Spain, 1832, 1833 c. c.; Argentina, 2048, 2052 c. c.; Chile, 2359, 2365 c. c.; Colombia, 2384, 2390 c. c.; Costa Rica, 1313, 1314 c. c.; Mexico, 1729, 1734 c. c.; Panama, 1522, 1524 c. c.; Uruguay, 2120, 2123, 2124 c. c.; Venezuela, 1802, 1803 c. c.

[15] Spain, 1834 c. c.; Panama, 1525 c. c.

[16] Art. 1731, 1732 c. c.

[17] Spain, 1835 c. c.; Costa Rica, 1315 c. c.; Panama, 1526 c. c.; Uruguay, 2126 c. c.

[18] Art. 1738 c. c.

debtor for the same debt, the liability must be divided among all the sureties. The creditor can only claim from each surety the proportionate amount he may have to pay, unless joint liability has been expressly stipulated. The benefit of contribution among the co-sureties ceases in the same cases and for the same reasons that the benefit of levy against the principal debtor does.[19]

Costa Rica [20] does not establish the remedy of contribution as a privilege which can be invoked by one of the sureties against the creditor, but only against the co-sureties; and in Bolivia,[21] Brazil [22] and Mexico [23] the law expressly provides that each of the co-sureties is responsible for the total amount of the obligation, unless otherwise stipulated. But if one of the sureties is sued, he can demand that a summons be served upon his co-sureties in order that they defend the action jointly or else pay in due proportion the judgment debt.

Effects of a guaranty as between principal and surety.

The following are the effects of a guaranty as between the debtor and the surety:

1. A surety who pays on behalf of a debtor must be indemnified by the latter. The indemnity covers:

(*a*) the total amount of the debt;

(*b*) legal interest on the same from the day the payment was notified to the debtor, even though it carried no interest for the creditor;

(*c*) losses and damages, when proper. These provisions may be enforced even if the guaranty was undertaken without knowledge of the debtor;

2. By virtue of the payment, the surety is subrogated to all the rights of the creditor against the debtor. Should the surety have compromised with the creditor,

[19] Spain, 1837 c. c.; Argentina, 2058 c. c.; Chile, 2367 c. c.; Colombia, 2392 c. c.; Panama, 1528 c. c.; Peru, 2088 c. c.; Uruguay, 2127 c. c.; Venezuela, 1804 c. c.

[20] Art. 1325 c. c. [21] Art. 1373 c. c. [22] Art. 1493 c. c.

[23] Art. 1741 c. c.

he cannot demand of the debtor more than he has actually paid.[24]

If the surety pays without informing the debtor, the latter may set up against him all the defenses he might have set up against the creditor at the time of payment. If the debt ran for a term and the surety paid it before it became due, he cannot require the debtor to reimburse him until the period has expired. If the surety has paid without notifying the debtor, and the latter, having no knowledge of the payment, also pays, the former has no right of action against the debtor, but only against the creditor.[25]

When surety, before paying, may proceed against the principal.

The surety, even before paying, may proceed against the principal debtor:

(*a*) when the surety is sued for payment;

(*b*) when the principal is a bankrupt or insolvent;

(*c*) when the debtor bound himself to relieve the surety from the guaranty within a specified term, and this term has expired;

(*d*) when the debt is due;

(*e*) if the principal obligation has no fixed term, at the end of ten years, unless it is of such nature that it cannot be extinguished except in a period greater than ten years.[26]

[24] Spain, 1838, 1839 c. c.; Argentina, 2063, 2064 c. c.; Bolivia, 1375, 1376 c. c.; Brazil, 1495 to 1497 c. c.; Chile, 2370 c. c.; Colombia, 2395 c. c. ; Costa Rica, 1318 c. c.; Mexico, 1746 c. c.; Panama, 1529, 1530 c. c.; Uruguay, 2131, 2132 c. c.; Venezuela, 1806, 1807 c. c.

[25] Spain, 1840 c. c.; Argentina, 2067 to 2070 c. c.; Bolivia, 1378 c. c.; Chile, 2376 c. c.; 2377 c. c.; Colombia, 2401, 2402 c. c.; Costa Rica, 1321, 1322 c. c.; Mexico, 1750, 1751 c. c.; Panama, 1531 to 1533 c. c.; Uruguay, 2134 to 2137 c. c.; Venezuela, 1809 c. c.

[26] Spain, 1843 c. c.; Argentina, 2060 c. c.; Bolivia, 1379 c. c.; Brazil, 1499 c. c.; Chile, 2369 c. c.; Colombia, 2394 c. c.; Costa Rica, 1324 c. c.; Mexico, 1754 c. c.; Panama, 1534 c. c.; Peru, 2096, 2097 c. c.; Uruguay, 2128 c. c.; Venezuela, 1810 c. c.

A surety who guarantees payment of a definite amount of money for a

In Brazil [27] a surety can relieve himself from the suretyship at any time he may see fit, if the guaranty was given without limitation of time, but he remains bound on such guaranty prior to his notification of withdrawal or to a judgment or release.

Effects of guaranty among co-sureties.

As for the effects of the guaranty among the co-sureties, the one who has paid the debt is entitled to contribution from the others. If any one of them is insolvent, his part must be paid by all the others in equal proportion. In order that these provisions be applicable, the payment must have been made by virtue of a judicial decree, or when the principal debtor has made an assignment of his property or is a bankrupt.[28]

In Peru,[29] when one of the co-sureties is insolvent, the liability of the others increases proportionately, provided they are joint; otherwise their obligation is unchanged and the disadvantage falls on the creditor.

The co-sureties may set up against the one who paid the same defenses which the principal debtor might have set up

certain consideration, without limiting the period of such guaranty, is released from his obligation after the debtor has paid an amount equal to that stipulated, unless the guaranty was renewed by paying a new consideration. Argentina, Cam. de Ap. Com. Buenos Aires, March 4, 1913, *Jur. de los Trib. Nacs.*, March, 1913, p. 175.

A surety is entitled to demand of the principal debtor his release or the deposit of a sufficient amount of money to pay the debt, when the debtor dissipates or recklessly ventures his property in hazardous business. Chile, Corte de Apel. Santiago, Chile, June 2, 1896; *Gaceta de los Tribs.*, 1896, v. 1, p. 878.

In Anglo-American law, inasmuch as the surety has no interest in the contract of his principal, he may, in a proper case, proceed in a court of equity against the principal to compel him to pay the debt. If, after the debt has become due, the surety has any apprehension of loss or injury from the delay of the debtor, he may proceed in equity to compel the debtor to discharge the debt guaranteed.

[27] Art. 1500 c. c.

[28] Spain, 1844 c. c.; Argentina, 2071 c. c.; Bolivia, 1380 c. c.; Chile, 2378 c. c.; Colombia, 2403 c. c.; Costa Rica, 1325, 1326 c. c.; Mexico, 1757 c. c.; Panama, 1535 c. c.; Peru, 2101 c. c.; Uruguay, 2139 c. c.; Venezuela, 1811 c. c.

[29] Art. 2102, 2095 c. c.

against the creditor, provided they are not purely personal to the debtor.[30]

A sub-surety, in case of insolvency of the surety for whom he bound himself, is liable to the co-sureties in the same terms as the surety was.[31]

Discharge of a surety.

The obligations of a surety expire at the same time as those of the debtor, and for the same causes as terminate obligations in general.[32]

A merger in the person of the debtor and of the surety when one of them inherits from the other, does not extinguish the obligation of the sub-sureties.[33]

A surety is released when the creditor voluntarily accepts, in payment of the debt, real estate or any other goods different from what was owed to him, even though he afterwards loses them by eviction or replevin.[34]

Release by a creditor of one of the sureties without the consent of the others, releases the others from liability for the share of the released surety.[35]

The extension of the period of the debt granted by the creditor without the consent of the surety discharges the latter.[36] In Venezuela, however, such extension does not

[30] Spain, 1845 c. c.; Argentina, 2073 c. c.; Chile, 2379 c. c.; Colombia, 2404 c. c.; Costa Rica, 1327 c. c.; Mexico, 1760 c. c.; Panama, 1536 c. c.; Uruguay, 2140 c. c.

[31] Spain, 1846 c. c.; Argentina, 2075 c. c.; Chile, 2380 c. c.; Colombia, 3405 c. c.; Mexico, 1761 c. c.; Panama, 1537 c. c.; Uruguay, 2141 c. c.

[32] Spain, 1847 c. c.; Argentina, 2076 c. c.; Chile, 2381 c. c.; Colombia, 2406 c. c.; Costa Rica, 1330 c. c.; Mexico, 1762 c. c.; Panama, 1538 c. c.; Peru, 2103 c. c.; Uruguay, 2142 c. c.; Venezuela, 1815 c. c.

[33] Spain, 1848 c. c.; Argentina, 2082 c. c.; Chile, 2383 c. c.; Colombia, 2408 c. c.; Mexico, 1763 c. c.; Panama, 1539 c. c.; Uruguay, 2143 c. c.; Venezuela, 1816 c. c.

[34] Spain, 1849 c. c.; Argentina, 2084 c. c.; Brazil, 1503 c. c.; Chile, 2382 c. c.; Colombia, 2407 c. c.; Costa Rica, 1331; Mexico, 1764 c. c.; Panama, 1540 c. c.; Uruguay, 2145 c. c.; Venezuela, 1819 c. c.

[35] Spain, 1850 c. c.

[36] Spain, 1851 c. c.; Argentina, 2080 c. c.; Brazil, 1503 c. c.; Panama, 1542 c. c.; Uruguay, 2146 c. c.; Venezuela, 1820 c. c.

discharge the surety but entitles him to proceed at once against the debtor, compelling him to pay.

The sureties, even when joint, are released from their obligation whenever, by act of the creditor, they cannot be subrogated to the rights, securities and privileges of the creditor.[37]

The surety may set up against the creditor all the defenses which the principal debtor could, provided they are inherent in the debt; but not those which are purely personal to the debtor.[38]

When a guaranty is commercial.

A guaranty is commercial in character when it is made in order to guarantee a mercantile transaction, independently of the character of the parties, in Spain,[39] Argentina,[40] Ecuador,[41] Peru,[42] Uruguay[43] and Venezuela.[44]

In Bolivia,[45] Costa Rica [46] and Guatemala,[47] the transaction must be mercantile and the parties to it merchants.

In Brazil [48] a guaranty is commercial if the contract to be guaranteed is commercial and at least the principal debtor is a merchant.

In Panama [49] a guaranty is commercial when it guarantees a commercial obligation, or when it constitutes of itself a commercial transaction.

Guaranty must be effected in writing, whatever the amount of the debt, in Spain,[50] Bolivia,[51] Brazil,[52] Chile,[53] Colombia,[54] Costa Rica,[55] Ecuador,[56] Guatemala,[57] Honduras,[58] Nicaragua,[59] Panama [60] and Peru.[61]

[37] Spain, 1852 c. c.; Argentina, 2077, 2078 c. c.; Brazil, 1503 c. c.; Costa Rica, 1332 c. c.; Mexico, 1766 c. c.; Peru, 1543 c. c.; Uruguay, 2144 c. c.; Venezuela, 1818 c. c.

[38] Spain, 1853 c. c.; Brazil, 1502 c. c.

[39] Art. 439. [40] Art. 470. [41] Art. 530.

[42] Art. 430. [43] Art. 603. [44] Art. 500.

[45] Art. 346. [46] Art. 359. [47] Art. 396.

[48] Art. 256. [49] Art. 3. [50] Art. 440.

[51] Art. 347. [52] Art. 257. [53] Art. 820.

[54] Art. 953. [55] Art. 36. [56] Art. 531.

[57] Art. 397. [58] Art. 560. [59] Art. 232.

[60] Art. 807. [61] Art. 431.

In Argentina [62] guaranty may be contracted orally or in writing, but if the surety denies having guaranteed the obligation it must be proved by means of a written instrument.

The surety, in commercial matters, is jointly liable with the principal debtor, in Argentina,[63] Brazil,[64] Colombia,[65] Ecuador,[66] Uruguay [67] and Venezuela,[68] although a previous demand on the latter is necessary to enable the creditor to sue the surety.

In Panama [69] if the surety is sued and payment is requested of him, he may designate property of the principal debtor for attachment, provided such property is unburdened; in case it is insufficient, the attachment may be extended to the surety's property.

Notwithstanding that the surety bound himself jointly with the principal, the surety is entitled to a demand for payment immediately after the principal is in default; the creditor cannot ask interest from the surety until he makes such demand.

The surety can demand of the principal debtor a release from his guaranty, not limited by time, if five years have elapsed since it was given. If, however, the surety was compensated for his guaranty he is not entitled to such release.

The codes of Haiti, Mexico, San Salvador and Santo Domingo make no provision for commercial suretyship.

[62] Art. 2040 c. c.
[63] Art. 605.
[64] Art. 258.
[65] Art. 956.
[66] Art. 553.
[67] Art. 611.
[68] Art. 503.
[69] Arts. 809, 810, 812, 813.

CHAPTER XXVIII

BILLS OF EXCHANGE

GENERAL.—Meyer, Felix: Weltwechselrecht. Leipzig, 1909. 2 v.

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The contract of exchange.

Next in commercial importance to the contract of purchase and sale is that of exchange of money, the mechanism of which is very simple: "C" of Rio de Janeiro owes money to "A" in New York and wishes to send it to the latter city; at the same time "B" of New York wishes to take money with him to Rio de Janeiro to make purchases therein. Instead of this double transportation of money, "A" sells to "B," an order for "C" to pay the money to "B," who delivers to "A" the amount agreed upon as the price of the order.

This contract of exchange renders to commerce a great service, saving time, transportation expenses, abraisement of the money and the risks of the voyage.

Usual terms.

In the example above, the order given by "A" to "C" to pay money to "B" is the bill of exchange (*Letra de cambio*). "A" is the drawer (*girador*), "C" is the drawee (*girado*) and "B" the payee (*tomador*).

The price paid by "B" for the order depends upon the law of supply and demand; when the demand for orders on Rio de Janeiro is greater than the demand for orders from Rio de Janeiro on New York, "B" pays for his order on Rio de Janeiro a certain premium over the par value of the money; this means that the New York merchants owe to the merchants of Rio de Janeiro more money than the latter owe to the former. When the supply of orders is greater than the demand, the balance of accounts

is against Rio de Janeiro, and the price of the order is less than its par value. This variation in the price of an order of payment on another place is also called exchange (*cambio*).

Evolution of the bill of exchange.

In its original character, therefore, a bill of exchange was merely a means of transferring money from place to place without a physical transportation of coins. The addition of the clause "to order" (*a la orden*) was the first step in a far-reaching evolution; it indicated that the bill was payable not only to the payee himself, but to any other person appointed by him thereto. By that addition the document was no longer confined to the function of exchange, but became an instrument of credit. The payee writes on the back (*dorsum*) of the bill of exchange an order of payment to a third person, and this fact, called endorsement (*endoso*) makes the payee-endorser jointly and severally liable with the drawer for the amount of the draft, and the endorsee, who may not know the drawer, can rely upon the credit of the endorser (*endosante*) himself. Thus, the more a bill of exchange passes from hand to hand the more confidence or credit it deserves from the holder (*tenedor*) and the public in general, inasmuch as every endorser is a joint and several obligor for its payment. The bill of exchange thus serves as a circulating medium to pay several obligations during the period of its life, and is a substitute for money among merchants.

In England, the law merchant developed independently of the common law. In its origin, the law of commercial paper was merely the practice of merchants in dealing with bills of exchange and promissory notes, and it was from mercantile law, not the common law, that they obtained their distinguishing characteristics, transferability by endorsement and by mere delivery or change of posesssion. After Mansfield became Chief Justice in 1756, he began to build up a mercantile law administered in the King's Courts. The law of commercial paper was one of the first to which

codification in England (1883) and in America (1896) was applied.

In 1848 the German general law of exchange adopted the theory of the German jurist Einert, who, in a book published in 1839, considered the bill of exchange, contrary to the theories of such prominent jurists as Casaregis, Domat and Savary, from the point of view of its economic functions, as a document of social utility, a kind of paper money.

As a consequence of this new theory the bill of exchange becomes an instrument implying a unilateral obligation, independent of the transaction or act from which it emanates. It is a promise to pay placed in circulation and based upon personal credit. Endorsement or any other negotiation of a bill of exchange made by virtue of a former obligation does not, therefore, constitute the substitution of a new obligation for an old one because the *animus novandi* is not present; the presumptive will of the parties, according to the nature of the bill of exchange, is not to substitute (*novar*) a new obligation for an old one but to place in circulation the value arising therefrom.[1]

What makes the bill of exchange a substitute for money, is the obligation of paying a certain sum of money. This obligation may assume two forms: one an *order* to pay; the other a *promise* to pay. The first is a bill of exchange properly so called; the second is a promissory note (*pagaré*), largely now identified in many respects with the former.

As a substitute for money, the bill of exchange must be:

(*a*) *Formal.* That is, made in writing and in complete accordance with the forms prescribed by the law.

(*b*) *Complete.* That is, all rights and obligations derived from it must be stated therein, or be the legal consequence of the statements contained in it, without being altered or supplemented in any way by extraneous act.[2]

[1] Lacerda, Paulo. A cambial no direito Brasileiro, 2d ed., Rio de Janeiro, 1913.

[2] Conditions not expressed in the bill of exchange or at the time of making an endorsement have no effect against the endorsee. Colombia, Trib. Sup. del Dist. de Boyaca, *La Ley*, v. XII, p. 85.

The fact that the endorsee has not an account in the books of the endorser,

(c) *Autonomous and independent.* That is, without any dependency upon the legal relations from which it originated, or upon those of the persons among whom it has circulated.[3]

With the more frequent commercial intercourse among nations the bill of exchange drawn from one country upon another, is now an instrument of international importance, and the necessity has been felt everywhere for the acceptance of common principles concerning the capacity of the parties to a bill of exchange, the form of the document, the rights and obligations of the persons concerned and the proceedings to collect the money in case it is necessary to have recourse to the courts.

To satisfy these necessities an international conference was held at The Hague during the years 1910 and 1912, in which, taking as a model the German law of bills of exchange, a Uniform Regulation was drawn as well as articles of a Convention, in which important suggestions were made as to the method by which the Regulations could be adopted in every country.

During the spring of 1916, an international conference of the republics of America was held at Buenos Aires, in

does not prove the nullity of the endorsement if in the minute book of the latter there is evidence that an order was given to make the endorsement. Mexico, Tercera Sala del Trib. Sup. del Dist. Fed., July 31, 1912, F. Puga *v.* G. Alcorta, *Diario de Jurisp.*, v. XXVII, p. 113.

[3] An action based on an instrument payable to order is absolutely independent of the legal relation by virtue of which the document was issued, and the person who binds himself in such form accepts beforehand as creditors not only the original payee of the instrument, but every one of those who become owners thereof as endorsees. Buenos Aires, Corte Suprema, September 30, 1913, Province of Cordoba *v.* Griet, *Jurisprudencia de los Trib. Nacs.*, 1913, September, 1913.

The liability of the drawer and endorsers of a bill of exchange is not altered because the origin of the bill of exchange was the result of an agreement to pay the debts of a third party, who does not appear involved in the obligations derived from the instrument. Spain, Trib. Sup., March 4, 1910, Credito Ibero Americano *v.* P. Barbe; *Gaceta* of July 18 and 19, 1910, p. 121.

In Anglo-American law, the negotiability of a bill of exchange depends on this circumstance of independence. See the important case of Guaranty Trust Co. *v.* Hannay (1918), 1 K. B. 43, discussed at length in 27 Yale Law Journal, 1046 (June, 1918).

which the adoption of the Uniform Regulation of The Hague was discussed. The greatest objections were made to articles 74 of the Regulation and 18 and 20 of the Convention in which the principle of nationality was established to govern the capacity of the parties concerned in a bill of exchange, while the countries which entered into the Montevideo treaties of 1889 [4] had recognized the principle of domicil. Finally, the conference drafted a recommendation to the governments represented therein, to adopt the Hague Uniform Regulation, with certain suggested changes as provided by the terms of the Hague Convention and postponing the discussion of articles 74 of the Regulation and 18 and 20 of the Convention.

The Uniform Regulation was adopted by Panama in its commercial code of August, 22, 1916, without the amendments suggested in Buenos Aires.

Guatemala adopted the Uniform Regulation on May 30, 1913, and Nicaragua, at the end of 1916.

In citing the articles of the Uniform Regulation it must be understood that implicit reference is also made to the law of those three countries as well.

Brazil in its law No. 2,044 of December 31, 1908, accepted the principles of the German law of bills of exchange. Numbered references to articles of the law of Brazil refer to that law, as in Costa Rica they refer to the articles of the law on bills of exchange of November 25, 1902.

Systems followed with respect to the nature of bills of exchange.

Not all the codes of Latin-America have acknowledged the modern ideas concerning the nature of a bill of exchange; they include the following systems:

(*a*) Codes which consider bills of exchange as a result and as evidence of a previous contract of exchange of money from one place to another.[5]

[4] *Infra*, chapter on Conflict of Laws.

[5] Bolivia, 394; Chile, 620, 637; Colombia, 746, 763; Ecuador, 388; Haiti, 108; Mexico, 449; Santo Domingo, 110.

(*b*) Codes which give bills of exchange the full character of instruments of credit irrespective of the nature of the transaction in which they originated.[6]

Commercial character of bills of exchange.

There are in Latin-America various systems in regard to the character of bills of exchange, namely:

(*a*) That of the codes which consider bills of exchange as commercial instruments, whatever the character of the persons concerned and the nature of the transaction from which they derive.[7]

(*b*) That of the code of Bolivia which provides that the rights and obligations of the drawer, holder, endorsers and drawee are governed by the commercial or civil law, according to the character of each of those persons; so that a bill of exchange may produce one effect with respect to one of the endorsers and a different one with respect to another. The bill of exchange cannot serve as an instrument of credit with clear and precise obligations for all persons concerned.

(*c*) That of Brazil, Costa Rica and the countries which have adopted the Uniform Regulation, which makes no declaration of the commercial or civil charac-

A bill of exchange presupposes a contract of exchange of money from one place to another. This requisite is fulfilled when the instrument is drawn in one place upon another no matter how close they are and even though it is accepted in the place where the draft was issued. Mexico, Tercera Sala del Trib. Sup. del Dist. Fed., June 25, 1913, A Bonzanelli *v.* A. Diaz Sanchez, *Diar. de Jurisp.*, v. XXX, p. 419.

Bills of exchange always presuppose the previous existence of a contract of exchange, by which the drawer binds himself to deliver to the drawee a certain amount of money in a certain place in consideration of money or valuables received in another place. Consequently when it is proved that no contract of exchange was made, the document though having all the appearances of a bill of exchange has not such a character. Mexico, Tercera Sala del Trib. Sup. del Dist. Fed., July 6, 1912, F. Rueda *v.* F. Colsa, *Diar. de Jur.*, XXVIII, p. 129.

[6] Spain, 446; Argentina, 598; Brazil, 1; Costa Rica, 1; Honduras, 437; Peru, 437; San Salvador, 392; Uruguay, 788, 802; Uniform Regulation, 1; Venezuela, 361.

[7] Spain, 443; Argentina, 8; Chile, 3; Colombia, 20; Ecuador, 3; Honduras, 434; Mexico, 450; Peru, 435; San Salvador, 3; Uruguay, 7; Venezuela, 2.

ter of bills of exchange, inasmuch as a special law covers the entire matter; and whenever a classification is needed for purposes different than the direct effects of bills of exchange, the general rules are applied. (See Chapter II)

(*d*) That of the codes of Haiti and Santo Domingo, which, lacking a special provision, leaves the rights and obligations derived from bills of exchange to be governed by the commercial or civil code as the general principles may require.

Capacity of persons to bind themselves by a bill of exchange.

Some few codes refer to the matter of the capacity of the parties to draw a bill of exchange, and even among these, most require only a general capacity, that is, a capacity governed by the general principles referred to in the chapter on Merchants in General. Such is the case in Chile [8] and Colombia.[9]

Argentina [10] provides that non-merchant women can only guarantee a bill of exchange in the form provided for by the civil law.

Costa Rica has a provision which may, in the same way, affect the capacity of the parties in the matter of bills of exchange. It states that all persons, whether merchants or not, who enjoy civil capacity, can issue negotiable instruments to bearer.[11]

In Brazil [12] a person who has commercial or civil capacity can bind himself by means of a bill of exchange.

In Haiti [13] and Santo Domingo [14] the signature of a married woman or of a single woman who is not a merchant, to a bill of exchange, is only valid as a mere promise, or what the French law calls a *simple promesse*.

As a rule the capacity of a person to engage in commerce

[8] Art. 622. [9] Art. 748. [10] Art. 684.
[11] Art. 200. [12] Art. 42. [13] Arts. 111, 112.
[14] Arts. 113, 114.

also makes him capable of binding himself in a bill of exchange.

Essential requisites of form.

Everything relating to the form of a bill of exchange is essential, since the lack of any of the legal requirements in this particular, changes the nature of the document, and therefore the rights and obligations of the parties.[15]

The essential requisites of form for a bill of exchange differ somewhat in the Latin-American codes, as appears from the appended list of these requisites.[16] The bill must contain:

(*a*) The words "bill of exchange" or their equivalent in the corresponding language.[17]

(*b*) The place where the bill of exchange is drawn.[18]

(*c*) The date.[19]

(*d*) Date or term in which payment must be made.[20]

(*e*) Name of the person, partnership, or corporation to whom or to whose order payment must be made.[21]

[15] Spain, 450; Argentina, 599; Bolivia, 365; Brazil, 2; Chile, 641; Colombia, 767; Costa Rica, 16; Ecuador, 398; Haiti, 108; Honduras, 441; Mexico, 451, 468; Peru, 441; San Salvador, 396; Santo Domingo, 110; Uruguay, 789; Uniform Regulation, 2; Venezuela, 365.

A faulty bill of exchange does not deprive its bearer of his right to recover in accordance with the contract therein contained, but the action must be carried through in a regular way, not by summary proceedings in execution. *Infra*, p. 792. Mexico, 2a Sala del Trib. Sup. del Dist. Fed., Nov. 8, 1909, N. O. Nelson Manufacturing Co. *v.* The Mexico Plumbing Supply Co., *Diar. de Jur.*, v. XIX, p. 745.

[16] Spain, 444; Argentina, 599; Bolivia, 362; Brazil, 1; Chile, 633; Colombia, 759; Costa Rica, 2, 21; Ecuador, 393; Haiti, 108; Honduras, 435; Mexico, 451, 452, 463; Peru, 436; San Salvador, 393, 397; Santo Domingo, 110; Uruguay, 789; Uniform Regulation, 1; Venezuela, 362 .

[17] Brazil, Peru and Venezuela. According to the Uniform Regulation the words "*letra commercial*" can also be used.

[18] Spain, Argentina, Bolivia, Chile, Colombia, Ecuador, Haiti, Honduras, Peru, Santo Domingo, Uruguay and Venezuela.

[19] Spain, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador Haiti, Honduras, Mexico, Peru, San Salvador, Santo Domingo, Uruguay, Uniform Regulation, Venezuela.

[20] Spain, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Haiti, Honduras, Mexico, Peru, San Salvador, Santo Domingo, Uruguay, Uniform Regulation, Venezuela.

[21] Spain, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica (unless

(*f*) Amount to be paid.[22]

(*g*) The form in which the price of the draft was received by the drawer or the indication that the price is charged to the account of the payee or is pending settlement.[23]

(*h*) Name of the person by whose order the bill of exchange was drawn.[24]

(*i*) Name of the drawee.[25]

(*j*) Domicil of the drawee.[26]

(*k*) Signature of the drawer.[27]

(*l*) The indication whether one, two or more copies of the bill of exchange have been issued.[28]

(*m*) Place in which the draft must be paid.[29]

Various provisions regarding these requisites. The date.

In Argentina [30] and Uruguay [31] the failure to state the date on which a bill of exchange is drawn does not bring about the nullity of the obligation contracted between the drawer and the payee. In Brazil,[32] in such a case, it is presumed that the holder has power to fill in the date. In

payable to bearer), Ecuador, Haiti, Honduras, Mexico, Peru, San Salvador, Santo Domingo, Uniform Regulation, Uruguay, Venezuela.

The omission of the name of the payee in a bill of exchange makes it void. Mexico, Juzgado 1°. de lo Civil del. D. F., June 14, 1884, M. Quintana *v.* A. Lopez Ortigosa, *An. de Leg. y Jurisp. Seccion. de Jurisp.*, v. I, p. 121.

[22] Spain, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Haiti, Honduras, Mexico, Peru, San Salvador, Santo Domingo, Uniform Regulation, Uruguay, Venezuela.

[23] Spain, Bolivia, Chile, Colombia, Ecuador, Haiti, Honduras, Mexico, Santo Domingo.

[24] Spain, Bolivia, Chile, Colombia, Honduras.

[25] Spain, Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, Haiti, Honduras, Mexico, Peru, San Salvador, Santo Domingo, Uniform Regulation, Uruguay, Venezuela.

[26] Spain, Bolivia, Ecuador, Honduras, Venezuela.

[27] Spain, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Haiti, Honduras, Mexico, Peru, San Salvador, Santo Domingo, Uruguay, Venezuela, Uniform Regulation.

[28] Argentina, Costa Rica, Haiti, Peru, Santo Domingo, Uruguay.

[29] Haiti, Mexico, Peru, San Salvador, Santo Domingo, Uniform Regulation, Venezuela.

[30] Art. 599. [31] Art. 789. [32] Art. 4.

Costa Rica [33] the date of the original draft, of its endorsement and of its acceptance are presumed truthful until proof to the contrary is produced. The use of a date prior or subsequent to the actual date does not invalidate the instrument, but this does not relieve from liability those persons who used or consented to the wrong date if damage has resulted.

Name of the payee.

In Argentina [34] and in Uruguay [35] if the name of the payee has been left blank, a holder in due course and good faith may fill in his own name. In Costa Rica,[36] when the name of the payee is that of a non-existent person the bill of exchange is considered drawn to bearer.

Number of copies issued.

In Argentina [37] and Uruguay [38] when no statement is made as to the number of copies issued and there are several, each is considered a different bill of exchange.

Signature.

In Argentina [39] and Uruguay [40] the lack of signature in a bill of exchange payable to the order of the drawer himself is supplied by the signature of his endorsement. In Costa Rica [41] if the drawer is unable to sign his own name, he must present the bill of exchange to a notary, to whom he must declare that he has asked the person who signed in his name, to do so; the notary inserts this statement in his notary's book (*protocol*) and writes in the bill of exchange the following declaration: "This bill of exchange is authentic," or some similar statement, signing it without witnesses. In Bolivia [42] in such case a notary must authenticate the declaration of the drawer giving his consent to the issuance of the bill of exchange. In Mexico [43] such a bill of exchange must be executed in a public instrument. The Hague

[33] Art. 13.
[34] Art. 599.
[35] Art. 789.
[36] Art. 8.
[37] Art. 599.
[38] Art. 789.
[39] Art. 599.
[40] Art. 789.
[41] Art. 2.
[42] Art. 361.
[43] Art. 463.

Convention [44] suggests that every country provide a way to supply the signature of a drawer in some manner indicating by declaration that the drawer has consented to subscribe the bill.

In Brazil [45] Costa Rica [46] and according to the Uniform Regulation, when the bill of exchange is drawn or endorsed by an incompetent person, the validity of the obligations contracted by other subscribers is not impaired, because of the independence of every obligation created by the instrument. In other countries which are silent on this point, the application of general principles warrants the conclusion that if an incompetent person is the drawer or endorser the bill of exchange or the endorsement, as the case may be, is void; and title to the instrument is not vested in the endorsee, any person sustaining injury thereby reserving a right to recover damages.

All persons who place their signatures on a bill of exchange in the name of another as drawers, endorsers, or acceptors, must, in Argentina,[47] Bolivia,[48] Costa Rica,[49] Mexico [50] and Uruguay [51] have previous authorization therefor, with special power of attorney, and must express the capacity in which they sign; the payees and the endorsees have a right to demand from the person who signs the production of his

[44] Art. 3. [45] Art. 43.

[46] Art. 19. By the United States Uniform Negotiable Instruments Law, on the other hand, endorsement or assignment of the instrument by an infant passes property therein, notwithstanding that from want of capacity the infant may incur no liability thereon. Moreover, if the holder had no notice of any infirmity in the instrument or defect in the title of the person negotiating it he is a holder in due course.

[47] Art. 608. [48] Art. 369. [49] Art. 20.

[50] Art. 465.

[51] Art. 804.

A citation for the acknowledgment of the signature placed on a document by a person as the attorney in fact of another must be made to the attorney, not to the principal, and the request of payment made to the former is not a cause for a declaration of nullity. Buenos Aires, Cam. de Apel., Sept. 27, 1913. Ludke Sajonx y Cia *v.* R. Sanserino, *Jurisp. de los Tribs. Nacs., Ib.*

When a merchant's wife accepts in his name a bill of exchange because in his absence she is in charge of his business, the acceptance is binding upon the husband inasmuch as he ratified that acceptance. Spain, Trib. Sup., Oct. 12, 1908; *Gaceta* of May 11, 1909, p. 144.

power. In Chile [52] and Colombia,[53] when the person in whose name another signed a bill of exchange denies that he has given the latter power to do so, the signer is personally liable for the payment, until he proves in due form the existence of such power. The provisions of the law in Brazil [54] and in Ecuador [55] are more radical; they make the signer always responsible for the payment of the instrument. According to the Uniform Regulation [56] the person who signs a bill of exchange without power or in excess of his power is personally liable for the payment thereof.

Clauses inconsistent with the character of a bill of exchange. In Brazil,[57] certain clauses in a bill of exchange which might destroy its legal effect as such are considered void, namely: (*a*) that relating to interest; (*b*) that prohibiting endorsement or protest, or releasing parties from responsibility for expenses or dispensing otherwise with the observance of terms or formalities prescribed by law; (*c*) that prohibiting the presentation of the bill of exchange to the drawee; (*d*) that excluding or limiting liability whether in benefit of the debtor or the creditor beyond the limits set by the law.[58]

In Costa Rica [59] the parties cannot by special stipulation modify the legal effects of a bill of exchange, unless otherwise provided by the law. The drawer, however, can insert in the instrument a clause denying or limiting his responsibility in regard to the bearer.

In Chile [60] and Colombia,[61] the drawer and the payee can agree to the clause "*devuelta sin gastos*" (return without expenses) "*sin mas aviso*" (without further notice) and other like clauses expressing accessory agreements which do not alter the essence of the instrument.

[52] Art. 626. [53] Art. 752. [54] Art. 43.
[55] Art. 397. [56] Art. 8. [57] Art. 44.
[58] The endorsement of an instrument to order made with the declaration that the endorsement shall not produce any effect until after the death of the endorser is void. Spain, Trib. Sup., April 24, 1909; *Gaceta* of Dec. 1, 1909.
[59] Arts. 17, 18. [60] Art. 640. [61] Art. 766.

In Venezuela [62] a clause relating to interest is considered as of no effect.

Effects of clauses "value on account," "value understood."

The clauses "value on account" or "value understood" inserted in a bill of exchange make the payee responsible for its value to the drawer, who may set off or demand it in the form and at the time agreed on. They establish in favor of the drawer the presumption that he has not received the price of the bill of exchange until the payee settles his accounts with him. This presumption is of no validity against third parties and may be overcome by proof to the contrary.[63]

Terms of bills of exchange.

There are various systems relating to the terms of bills of exchange, namely:

First system. A bill of exchange can be drawn (*a*) at sight; (*b*) at days or months after sight; (*c*) at days or months after date; (*d*) at one or more "*usances*"; (*e*) at a fixed date; (*f*) or at a fair.[64]

[62] Art. 365.

[63] Argentina, 603; Chile, 635; Colombia, 761; Mexico, 462; Uruguay, 793.

The statement that the value of a bill of exchange was received or charged to account in the endorsement of the same is necessary only for determining the obligations between the endorser and the endorsee. The clause "value understood," "value on account," indicates that the endorser has not been paid the price of the draft. This is also applicable to promissory notes and inland bills of exchange (*libranzas*). Ecuador, Corte Supreme de Justicia, Jan. 20, 1908, Flz. Martinez *v.* D. Capuli; *Gaceta Judicial*, 1908, n. 33, p. 266.

Endorsement with the clause "value on account" is a regular one and transfers the bill of exchange. Mexico, Juzgado 4, de lo Civil de Dist. Fed., July 26, 1904, A Cervantes *v.* W. E. Herman y Compañia, *Diario de Jurisp.*, v. III, p. 633.

An endorsement with the clause "value understood" (*valor entendido*) or "value on account" (*valor en cuenta*) means as a rule that the endorsee has not paid the price thereof, and the effect is that the creditors of the endorser cannot suffer any damage by the endorsement, and the bill of exchange belongs to them, in the absence of proof to the contrary. Mexico, Juzgado 4. de lo Civil de Dist. Fed., July 26, 1904, A Cervantes *v.* W. H. Hermann y Compañia, *Ib.*

[64] Spain, 451; Bolivia, 370; Chile, 642; Colombia, 768; Honduras, 442.

Second system. It can be drawn in the form above stated except at fairs and furthermore, at one or more "*usances*" after sight or date.[65]

Third system. It can be drawn in the same terms as the first system, except at *usances* and at fairs.[66]

According to the Hague Uniform Regulation, which adopted this system, bills of exchange maturing in a different way or at successive periods of maturity are void.

Fourth system. It can be drawn in the same terms as the first system and, in addition, it may become due after an event which, like death, must necessarily occur although the date of its happening is not known.[67]

Fifth system. It must be drawn with indication of the date of payment.[68]

Method of computing terms.

Each of the terms above stated makes the payment of the draft compulsory, as follows: (*a*) the sight draft, on its presentation; (*b*) the days or months "after sight" draft, on the day of expiration of the period, to be counted from the day following acceptance or protest, if not accepted; (*c*) the days or months "after date" draft, as well as that at one or more *usances*, on the day at which the period fixed expires, to be counted from that immediately following the date of the draft; (*d*) the "certain date" draft, on the date set; (*e*) the draft drawn on fairs, on the last day thereof.

Months must be computed from date to date; if in the month the draft falls due, there is no day equivalent to that

[65] Haiti, 127; Santo Domingo, 129.

The circumstance that a bill of exchange is to be paid after several years, which seems to be contrary to the provision of Art. 451 of the code, does not impair the validity of the obligation of the acceptor. The drawer who pays it has a right to recover from such acceptor. Spain, Trib. Sup., March 20, 1909, C. Vildalch *v.* N. Moll; *Gacetas* of 6th and 7th Nov., 1909, p. 159.

[66] Argentina, 609; Brazil, 6; Ecuador, 394; Mexico, 455, 456; Uruguay, 805; Uniform Regulation, 32; Venezuela, 364.

[67] Costa Rica, 29, 30.

[68] San Salvador, 397.

of the month in which the bill of exchange was drawn, it falls due on the last day of the month.[69]

The *usance* of a draft in Spain[70] is sixty days for those drawn in the Peninsula and nearby islands, Portugal, France, England, Holland and Germany, and ninety days for those drawn on other places.[71]

In Bolivia[72] the *usance* for bills of exchange drawn from one place on another within the Republic, or on foreign countries is thirty days; for those drawn from without the Republic on places in Bolivia the *usance* is computed according to the law of the place where drawn.

In Chile, Colombia, Haiti and Honduras, no rule is provided for the computation of *usances*.

In Santo Domingo the *usance* is a period of thirty days.[73]

According to the Uniform Regulation, a bill of exchange at sight is payable at the time of its presentation. It must be presented withing the fixed, legal or conventional periods for the acceptance of bills of exchange payable at a certain period after sight.[74] The maturity of a bill of exchange drawn and payable at a certain period after sight must be determined by the date of its acceptance or by that of protest.[75] When there is no protest, an acceptance without date must be considered in so far as the acceptor is concerned, as having been made the last day of the legal or conventional period fixed for its presentation.[76] When a bill of exchange is drawn at one or several months and a half from date or from sight the whole months must be

[69] Spain, 452, 454; Argentina, 610 to 613; Bolivia, 371, 373, 375; Brazil, 17; Chile, 643 to 645; Colombia, 769 to 771; Costa Rica, 29, 31, 33, 34, 35; Ecuador, 394; Honduras, 443, 445; Mexico, 458; Peru, 469 to 472; Uruguay, 806 to 809; Uniform Regulation, 35; Venezuela, 364.

[70] Art. 453.

[71] Art. 453 of the Spanish code was applied to Cuba in the following form: "Usances" for bills of exchange drawn from one place on another of the island of Cuba and for those drawn on the islands and coasts of the Caribbean Sea or the Gulf of Mexico from the United States, Guatemala, Honduras, Nicaragua, Costa Rica, and Brazil are sixty days; for bills of exchange drawn from other places the "usance" is ninety days.

[72] Art. 374. [73] Art. 132. [74] Art. 33.

[75] Art. 34. [76] Art. 34.

previously computed.[77] If the maturity is fixed at the beginning, at the middle (at the middle of January, at the middle of February, etc.), or at the end of the month, it is understood that this means the first, the fifteenth or the last day of the month respectively. The phrases "eight days" or "fifteen days" are understood not as meaning one or two weeks, but as an actual period of eight or fifteen days respectively. The phrase half a month means fifteen days.

When a bill of exchange is payable at a fixed day in a place where the calendar is different from that at the place where drawn, the date of maturity is fixed by the calendar of the place of payment.[78]

When a bill of exchange is drawn between two places which have different calendars and it is payable at a certain period from date, the date of issuance is referred to the calendar of the place of payment, and the computation of the day of maturity is fixed thereby.

The periods for the presentation of bills of exchange are computed according to the rules of the preceding paragraphs.

These rules are not applicable if any clause of the bill of exchange or the wording of the instrument indicates that the parties intended to adopt different rules.

Maturity on a holiday.

When a bill of exchange is due on a holiday three systems are followed, namely:

First system. The bill of exchange must be paid the day before the holiday.[79]

[77] Art. 35. [78] Art. 36.

According to the custom of English merchants, later adopted in the common law, instruments payable at a certain date or at sight, were entitled to three days of grace. But instruments payable "on demand" were not entitled to grace, but were due in fact without demand the moment they were delivered. This harsh rule, however, is not applied to bank notes which are promissory notes payable on demand. By the American Uniform Negotiable Instruments Law, section 85, days of grace have been abolished, negotiable instruments being payable at the time fixed without grace.

[79] Spain, 455; Argentina, 613; Bolivia, 376; Chile, 646; Colombia, 772; Haiti, 131; Honduras, 445; Mexico, 457; Santo Domingo, 134; Uruguay, 809.

Second system. The bill of exchange must be paid the day after the holiday.[80]

The law of Brazil [81] provides that the bill of exchange must be presented for payment the next business day. Even though a clearer statement would be desirable it seems that Brazil thereby comes within the second system.

Third system. The bill of exchange falls due on the day indicated therein without any exception.[82]

Time for paying a bill of exchange.

Some of the codes enter into details concerning the latest hour of the day at which a bill of exchange can be paid:

Spain,[83] Argentina,[84] Bolivia,[85] Chile,[86] Colombia,[87] Honduras,[88] Mexico [89] and Uruguay [90] fix sunset of the day of maturity as the limit. Costa Rica [91] fixes the limit at 6 p. m.

Different forms of drawing a bill of exchange.

The drawer can draw a bill of exchange in the Latin-American countries in one of the following forms: [92]

1. To his own order.[93]
2. On one person in order that he may make the payment at the domicil of a third.[94]

[80] Costa Rica, 36; Ecuador, 428; Uniform Regulation, 37; Venezuela, 396.

[81] Art. 20.

The Negotiable Instruments Law in the United States, section 85, also makes the instrument payable on the "next succeeding business day."

[82] San Salvador, 425.

[83] Art. 455. [84] Art. 614. [85] Art. 376.
[86] Art. 646. [87] Art. 772. [88] Art. 445.
[89] Art. 457. [90] Art. 810. [91] Art. 36.

[92] Spain, 446; Argentina, 604; Bolivia, 353, 354; Chile, 639; Colombia, 765; Costa Rica, 6, 7; Ecuador, 394; Haiti, 109; Honduras, 437; Mexico, 464; Peru, 438; San Salvador, 400; Santo Domingo, 110, 111; Uruguay, 794; Uniform Regulation, 3, 4; Venezuela, 366.

[93] Spain, Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, Honduras, Peru, San Salvador, Santo Domingo, Uruguay, Uniform Regulation, Venezuela.

[94] Spain, Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, Haiti, Honduras, San Salvador, Uruguay, Uniform Regulation, Venezuela.

3. On himself at a place which is not his domicil.[95]

4. On a person who lives at the place of residence of the drawer.[96]

5. In his own name but by order and for the account of another person, this circumstance being stated in the draft.[97]

In Chile,[98] Colombia [99] and Mexico [100] the bill of exchange cannot be drawn payable to bearer nor in favor of the drawee. When made payable to the drawer it is not perfect until after endorsement at a place different from that designated for payment.

Liability of the drawer who draws the bill of exchange in the name of a third person.

System of Argentina [101] *and Uruguay.*[102] When a bill of exchange is drawn in the name and for the account of a third person, the liability of the drawer with regard to the payee and endorsers is always the same, but he does not guarantee to supply the funds to the drawee, and the holder does not acquire any right against the third person for whose account the bill of exchange was drawn. Nevertheless, in case of a bill of exchange drawn in this way, if the drawer and the drawee become bankrupt, the holder has a right of action against the third person for whose account the payment was to have been made if in the draft itself or in a written order it appears that the drawer drew the bill of exchange as an agent of the third person.

System of Bolivia. When a drawer draws a bill of exchange in his own name for the account of another he is the only one liable to the payee, who has no right

[95] Spain, Honduras, Peru.

[96] Spain, Honduras, Peru.

[97] Spain, Argentina, Bolivia, Chile, Colombia, Haiti, Honduras, Mexico, Peru, San Salvador, Santo Domingo, Uruguay, Uniform Regulation, Venezuela.

[98] Art. 639. [99] Art. 765. [100] Art. 467.

[101] Art. 604. [102] Art. 794.

whatever against the third person by whose order the bill of exchange was drawn.[103]

Contract between the drawer and the payee.

In most cases the contract between the drawer and the payee is one of purchase and sale, in which the former binds himself to deliver to the latter a bill of exchange, that is, an order to pay a certain sum of money. This sale may be in cash or on credit or may be a contract of loan or constitute payment for the price of merchandise, etc.; but without entering into a study of the various origins of a bill of exchange, we must briefly note the relations between the drawer and the payee as independent of the original obligations.

Obligations of the drawer.

The obligations of the drawer are:

1st. To guarantee the acceptance and payment of the bill of exchange.

2d. To give to the payee or holder as many copies of the bill as he may desire. From the second up all the copies must state that they are valid only when payment has not been made upon another.[104] In San Salvador, the issuing of extra copies is not compulsory.[105]

The Uniform Regulation limits this obligation of the drawer to the case in which the bill of exchange itself does not state that it has been issued in a single copy.

3d. To cause payment of the bill to be made to the payee or the holder. For that purpose the drawer is under obligation to supply the drawee with the necessary funds, unless the draft is made for the account of a third person, in which case the obligation rests on the latter, always reserving the direct liability of the drawer with

[103] Bolivia, 354; Ecuador, 397; Mexico, 464; Venezuela, 367.

[104] Spain, 448; Argentina, 592; Brazil, 16; Chile, 627; Colombia, 753; Ecuador, 395; Mexico, 467; Peru, 463; Uniform Regulation, 63; Uruguay, 796; Venezuela, 368.

[105] Art. 401.

respect to the payee or holder of the bill of exchange, and that of the third person for whose account the draft was issued with respect to the drawer.[106]

4th. To answer for the result of the draft to all persons who successively acquire and transfer it.[107] This liability of the drawer ceases when the holder of the draft does not present it or does not protest it in due time and form, provided the drawer proves that when the bill fell due he had supplied the funds for its payment.[108]

In Argentina [109] and Uruguay,[110] when in spite of the fact that the drawer had supplied the necessary funds to the drawee, the latter fails to accept the draft, the holder, whether or not he has protested it, has the power to request from the drawer the assignment of all his rights against the drawee up to the amount necessary to cover the value of the bill of exchange, as well as the delivery, at the cost of the holder, of all documents which may serve to support the rights of the drawer.

In Ecuador,[111] even where presentation or protest

[106] Spain, 456; Argentina, 617, 618; Bolivia, 355; Chile, 648, 652; Colombia, 774, 778; Costa Rica, 37, 38; Ecuador, 399, 400; Haiti, 113; Honduras, 446; Mexico, 469, 472; Santo Domingo, 115; Uruguay, 813, 814; Venezuela, 361, 367.

[107] Spain, 459; Argentina, 621; Bolivia, 435; Brazil, 38, 49; Chile, 647; Colombia, 773; Costa Rica, 45; Ecuador, 454; Honduras, 449; Mexico, 473; Uruguay, 817;Uniform Regulation, 9; Venezuela, 420.

The drawer of a bill of exchange is not, however, bound to pay the amount thereof or interest and expenses when he did not receive any consideration for the draft. Bolivia, Corte Suprema, Oct. 24, 1905; *Gac. Jud.*, No. 784, p. 42.

When the drawee pays the bill of exchange without being supplied with funds he can demand reimbursement from the drawer. Mexico, Tercera Sala del Trib. Sup. del Dist. Fed., April 9, 1913, Garcia Rodriguez *v.* B. Acerbal, *Diario de Jurisp.*, XXX, p. 738.

The liability of the drawer in regard to the payee and endorsees of a bill of exchange and of the latter among themselves can be enforced even though the document has been lost, provided its verbatim contents are shown by the transcription in the memorandum of protest. Spain, Trib. Sup., Feb. 28, 1915, P. Barquero *v.* D. Primo; *Gaceta* of Oct. 4, 1915, p. 169.

[108] Spain, 460; Argentina, 621; Brazil, 32, 48; Chile, 651; Colombia, 777; Costa Rica, 46, 47; Ecuador, 456, 459; Haiti, 115; Honduras, 450; Mexico, 518; Uruguay, 817; Uniform Regulation, 43.

[109] Art. 622. [110] Art. 618. [111] Art. 460.

for lack of payment was not made, or the rights against the guarantors were not enforced according to the law, the holder has a right of action against anyone who transferred the bill to him knowing and concealing the fact that the drawee or some of the guarantors were in bankruptcy.

5th. To pay expenses. The expenses arising from non-acceptance or non-payment of the draft must be paid by the drawer or by the third person on whose account the bill was drawn, unless he proves that he had supplied the funds at the proper time; in that case the drawer may require of the person obligated to accept and to pay, indemnification for the expenses which he may have paid the holder.[112]

When the funds are considered supplied.

The funds must be considered as supplied when at the maturity of the bill of exchange the person on whom it was drawn is a debtor to the drawer or to the third person for whose account the bill was drawn, in a sum equal to or greater than the amount of the bill.[113]

In Costa Rica, it is also considered that the funds were duly supplied when the drawer sent the drawee merchandise for that purpose, whether the drawee bound himself to pay the bill of exchange at once, or whether in his relations with the drawer, he conditioned payment upon

[112] Spain, 458; Argentina, 620; Bolivia, 429, 430; Brazil, 366, 370; Chile, 647; Colombia, 773; Costa Rica, 44; Ecuador, 402; Honduras, 338; Mexico, 473; Uruguay, 816.

[113] Spain, 457; Argentina, 619; Bolivia, 356; Chile, 649; Colombia, 775; Costa Rica, 39; Ecuador, 401; Haiti, 114; Honduras, 447; Mexico, 470 to 472; Santo Domingo, 116; Uruguay, 815.

The fact that the drawee accepts a bill of exchange does not prove that he owes the amount of it to the drawer, even though there exists between the drawer and drawee a current account, the balance of which has not been determined. Spain, Trib. Sup., Jan. 28, 1909, C. Boamonde *v.* A. Hereras; *Gacetas* of Jan. 31, and Feb. 1, 1910, p. 44.

A person who owes another the balance of an account is obliged to accept and pay the bills of exchange drawn by the creditor in order to collect it. Spain, Trib. Sup., Oct. 28, 1914; *Gaceta* of April 16, 1915, p. 157.

the prior sale of the merchandise, where he received them as an agent.[114]

In Ecuador, too, the funds are considered as supplied when the drawee has in his possession enough merchandise for the account of the person bound to supply the funds, provided the bill of exchange has already been accepted.[115]

In Spain,[116] Argentina,[117] Bolivia,[118] Chile,[119] Colombia,[120] Costa Rica,[121] Honduras,[122] Mexico,[123] and Uruguay,[124] funds are also considered as having been supplied when the drawee expressly authorized the drawer to draw on him for the amount of the bill.

[114] Art. 40.
[115] Art. 401.
[116] Art. 458.
[117] Art. 619.
[118] Art. 358.
[119] Art. 649.
[120] Art. 775.
[121] Art. 44.
[122] Art. 448.
[123] Art. 470.
[124] Art. 815.

CHAPTER XXIX

Bills of Exchange (2)

ENDORSEMENT

Definition.

An endorsement is a statement written on the back of a bill of exchange with the legal requirements for transferring ownership in it.[1]

In Costa Rica [2] and San Salvador [3] an endorsement conveys to the endorsee all accessory rights attached to a bill of exchange. If a mortgage secures its payment, he can enforce it even though his name has not been inscribed in the corresponding registry of the property as that of the person entitled to such security.

Formalities of endorsement.

An endorsement may be either formal or in blank. The requisites for the former are not the same in all countries; they may be enumerated as follows:

(*a*) the date of the endorsement; [4]

(*b*) the name of the endorsee; [5]

(*c*) a statement of the amount received for the bill of exchange and whether it was in cash, charged to account or understood; [6]

[1] Spain, 461; Argentina, 634; Bolivia, 380; Brazil, 8; Chile, 655, 656; Colombia, 781, 783; Costa Rica, 48, 49; Ecuador, 405, 408; Haiti, 133; Honduras, 451; Mexico, 477; Peru, 442; San Salvador, 416, 417; Santo Domingo, 136; Uniform Regulation, 10, 12; Uruguay, 820; Venezuela, 370, 372.

[2] Art. 53. [3] Art. 417.

[4] Spain, Argentina, Bolivia, Chile, Colombia, Ecuador, Haiti, Honduras, Mexico, Nicaragua, Peru, San Salvador, Santo Domingo, Uruguay, Venezuela.

[5] Spain, Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Peru, Santo Domingo, Uruguay, Venezuela.

[6] Spain, Argentina, Bolivia, Chile, Colombia, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Santo Domingo, Uruguay.

(*d*) the name of the person from whom the price was received or to whom it is charged, when he is not the endorsee himself; [7]

(*e*) the signature of the endorser.[8]

Notwithstanding the fact that in Haiti, Mexico and Santo Domingo the law does not expressly require the signature of the endorser, it is self-evident that even in those countries his signature is indispensable.[9]

(*f*) Costa Rica requires a statement that ownership in the bill of exchange is transferred, by the use of the word "*pâguese*" (be it paid) or some similar expression.

Blank endorsement.

Blank endorsements containing merely the signature of the endorser are valid as a means of transferring property in a bill of exchange.[10]

In Colombia [11] a blank endorsement is also lawful, but if the date has not been written by the endorser the endorsement is considered with respect to creditors merely as an order for collection.

In Mexico [12] endorsement in blank is recognized, but actions arising therefrom cannot be brought without supplementing it with the requisites of a regular formal endorsement.

The endorsement of a bill of exchange must state in what way the instrument was received by the endorsee and in what form its amount was received by the endorser. Mexico, Tercera Sala del Trib. Sup. del Dist. Fed., August 18, 1913, C. Belina *v.* T. S. Gore, *Diar. de Jurisp.*, vol. XXXI, p. 531.

[7] Spain, Argentina, Bolivia, Chile, Colombia, Guatemala, Honduras, Uruguay.

[8] Spain, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Nicaragua, Peru, Uniform Regulation, Uruguay, Venezuela.

[9] Spain, 462; Argentina, 626; Bolivia, 381; Brazil, 8; Chile, 658; Colombia, 785; Costa Rica, 50; Ecuador, 405; Haiti, 134; Honduras, 452; Mexico, 478; Peru, 444; San Salvador, 416; Santo Domingo, 137; Uniform Regulation, 12; Uruguay, 822; Venezuela, 372.

[10] Spain, 465; Argentina, 627; Brazil, 8; Chile, 661; Colombia, 788; Costa Rica, 63, 64; Honduras, 455; Mexico, 479; Peru, 444; San Salvador, 416; Uniform Regulation, 12; Uruguay, 823; Venezuela, 373.

[11] Art. 788. [12] Art. 479.

Bolivia [13] and Ecuador [14] absolutely prohibit the blank endorsement; the former goes so far as to declare that the endorser in such case cannot demand the price of the bill of exchange so transferred and must pay back any money he may have received.

Effects of endorsement.

Endorsement of a bill of exchange binds every one of the endorsers to guarantee its payment when it is not accepted, or to pay it if it is not honored at maturity by the drawee, just as the drawer must, provided that all the requisites of presentation and protest have been fulfilled in proper time and form.[15]

Clauses modifying these effects.

The liability of the endorser ceases when he uses a clause rejecting liability. Even in that case, however, he guarantees his power to transfer the bill.[16]

In Spain the clause required by the law is "*sin mi responsabilidad*" (without my responsibility); in other countries any clause which connotes the same idea may be used.

The codes of Argentina, Bolivia, Haiti, Mexico, Santo Domingo and Uruguay are silent on this matter.

Brazil [17] prohibits the use of any clause limiting the liability established by law with respect to the persons concerned in a bill of exchange.

[13] Art. 385. [14] Art. 406.

[15] Spain, 467; Argentina, 624, 625; Bolivia, 380; Brazil, 39; Chile, 663; Colombia, 782; Costa Rica, 54; Ecuador, 409; Honduras, 457; Mexico, 482; Peru, 442; San Salvador, 418; Uniform Regulation, 14; Uruguay, 821; Venezuela, 370.

Ownership of bills of exchange is transferred by means of endorsement, the endorsee having thereby the same rights as the payee or original holder. Mexico, Segunda Sala del Trib. Sup. del Dist. Fed., April 26, 1912, G. Rivera *v.* M. Z. Alvarado, *Diar. de Jurisp.*, vol. XXVI, p. 159; and Tercera Sala del Trib. Sup. del Dist. Fed., March 15, 1912, J. Liebes *v.* W. E. Hermann y Cia. y G. S. Gibbon, *Ib.*, p. 57.

[16] Spain, 467; Chile, 665; Colombia, 792; Costa Rica, 56, 57; Ecuador, 409; Peru, 445; San Salvador, 417; Uniform Regulation, 14; Venezuela, 375.

[17] Art. 44.

In general, only the endorser who uses a clause limiting liability may take advantage of it; but San Salvador [18] provides that such clause benefits all endorsers following the original user thereof.

Effects of defective endorsement.

In some countries the endorsement may be either in blank or with all requirements of formal endorsement. The lack of any single requirement, however, makes the endorsement defective. The provision does not seem to be very consistent and the consequences of the omission vary, as follows:

In Spain [19] and Honduras,[20] when the date of the endorsement is omitted property in the bill is not transferred; it merely constitutes an agency for collection. When no consideration for the endorsement is expressed endorsement transfers ownership in the instrument as if the clause "value received" had been written in. In Argentina [21] and Uruguay,[22] when the endorsement is neither in blank nor complete it produces merely the effect of an agency for collection or making protest; if it is made to order, the holder can by means of a new endorsement transfer that power; if the defective endorsement was made in a foreign country, the holder can, furthermore, demand payment judicially. In Bolivia,[23] Chile,[24] and Colombia,[25] the endorsement is void if no mention is made of the name of the endorsee or if it lacks the signature of the endorser. When no statement is made of the value received or the date of the endorsement, its effects are only those of an agency for collection.

Endorsement for collection.

In general, endorsement made with the clause "for collection" (*valor al cobro*) or any other equivalent does not transfer

[18] Art. 417.
[19] Arts. 463, 465.
[20] Arts. 453, 455.
[21] Art. 628.
[22] Art. 824.
[23] Art. 383.
[24] Art. 659.
[25] Art. 786.

ownership in the negotiable instrument; it is only a power to collect and endorse.

But in Argentina,[26] Brazil,[27] Costa Rica,[28] and Uruguay,[29] such clause implies the power to transfer ownership in the bill.

Statement of a date previous to the real one.

The statement in an endorsement of a date anterior to its actual date is prohibited and makes its author liable to punishment for forgery.[30]

Forgery.

The provision of the law in Costa Rica referring to forged endorsement warrants special mention as an illustration of the effects of the independence of the contracts involved in a bill of exchange. When the bearer of a bill of exchange acquired in good faith and without negligence, cannot enforce payment from the drawee by reason of the fact that the bill was forged or obtained through duress, he has a right of action against those who transferred it after the forgery or duress took place just as if the instrument had neither of these vices.

Forgery of an endorsement does not confer any right to compel the holder to surrender the bill thus conveyed if he acquired it in good faith and without negligence.[31]

[26] Art. 623. [27] Art. 8. [28] Art. 60.

[29] Art. 819.

An endorsement made for collection does not transfer ownership in a bill of exchange; it gives the endorsee merely a power to collect the amount of the instrument but not to appear in court in behalf of the endorser. Mexico, Juzgado 1° Menor del Dist. Fed., April 26, 1909, T. Pujol Jr. *v.* M. Del C. Moreno, *Diar. de Jurisp.*, vol. XVIII, p. 187.

[30] Spain, 464; Argentina, 633; Bolivia, 384; Chile, 662; Colombia, 789; Haiti, 136; Honduras, 454; Mexico, 481; Santo Domingo, 139; Uruguay, 829.

[31] Arts. 69, 70.

The holder of a bill of exchange who acquired it by means of an endorsement made by a person who received it in the same manner cannot be compelled to pay back its amount, even though it is proved that one of the former endorsements was forged. Spain, Trib. Sup., Oct. 6, 1904, Compañía General de Tabacos de Filipinas *v.* Crédit Lyonnais; *Gaceta* of Oct. 6, 1904.

Partial endorsement.

The effect of a partial endorsement in Argentina [32] and Uruguay [33] is to extinguish the balance. In Brazil [34] partial endorsement is prohibited and the Uniform Regulation [35] declares it void.

Cases in which a bill of exchange cannot be endorsed.

There are cases in which a bill of exchange cannot be endorsed, namely:

1st. When the bill of exchange is not made to order, except in Brazil,[36] Costa Rica,[37] and according to the Uniform Regulation.[38] In Brazil and Costa Rica the statement that the instrument is not endorseable is considered as not written and void; in Costa Rica when the instrument does not state that it is payable to order, the power to endorse is implied.

The Uniform Regulation contains a like provision, but if there is a prohibition to endorse the bill, it can be transferred by means of assignment according to civil law.

2d. When the bill of exchange has already matured.[39] Costa Rica [40] and Mexico [41] expressly auth-

[32] Art. 634. [33] Art. 830. [34] Art. 8.
[35] Art. 11. [36] Art. 44. [37] Art. 66.
[38] Art. 10.

[39] Spain, 466; Argentina, 635; Brazil, 8; Colombia, 783; Honduras, 456; Peru, 446; San Salvador, 419; Uruguay, 831; Venezuela, 376.

Endorsement in blank made after the maturity of a bill of exchange is void, according to article 635 of the commercial code. Argentina, Camara de Apel. Com. Buenos Aires, March 15, 1913, P. Gartland *v.* J. y C. M. Fernandez, *Jurisp. de los Tribs. Nacs.*, 1913, Marzo.

Endorsement of a bill of exchange is governed by art. 783 of the commercial code even though the parties to it are not merchants. Endorsement of a matured bill of exchange by means of a simple note on the back of the document produces no effect. Colombia, Trib. Sup. del Dist. de Cauca, Feb. 11, 1896; *Gaceta Judic. del Cauca*, v. V, p. 1421; and July 28, 1898, *ib.*, p. 1401.

Endorsement of a bill of exchange can be made even after a suit for its collection has been started. Mexico, Tercera Sala del Trib. Sup. del Dist. Fed., March 15, 1912, J. Liebes *v.* W. E. Hermann y Cia. and G. S. Gibbons, *Diario de Jur.*, vol. XXVI, p. 57.

[40] Art. 58. [41] Art. 480.

orize endorsements after maturity of the instrument, and the Uniform Regulation [42] does the same; but when it is made after protest for non-payment or after the period for making protest has elapsed, the endorsement produces only the effects of an assignment of rights.

3d. When the bill of exchange is impaired by reason of lack of presentation or protest, when proper.[43]

Liability of agents in endorsing a bill of exchange.

In Spain [44] and Honduras [45] the *comisionista* of bills of exchange or endorseable promissory notes is a guarantor of those he acquires or negotiates for another's account, provided he endorses them, and he can only refuse to endorse when there has been an express stipulation dispensing him from that obligation.

[42] Art. 19.

[43] Spain, 466; Chile, 664; Colombia, 791; Ecuador, 410; Honduras, 456; Mexico, 480.

[44] Art. 468. [45] Art. 458.

CHAPTER XXX

Bills of Exchange (3)

PRESENTATION, ACCEPTANCE AND SURETYSHIP

Obligations of the holder.

The holder must fulfill certain obligations in order to preserve his rights against the drawer and the endorsers. These obligations are:

1. to present the bill of exchange for acceptance in case it is payable at a period "after sight";
2. to present it for payment at maturity;
3. to prove in legal form that he complied with these requisites, otherwise the instrument is defective and the rights of the payee or holder are lost; [1]
4. to notify the endorsers and drawer of the failure of the drawee to pay the bill of exchange (notice of dishonor). This obligation is subject to variations in the different countries of Latin-America, as follows:

(*a*) In Spain,[2] Costa Rica [3] and Honduras,[4] the holder must notify every endorser and the drawer of the failure of payment. In Spain and Honduras the notification must be made through a notary. The endorsers who are not notified are released from their obligations; the drawer is also released if he proves that he supplied the drawee with funds.

Mexico makes similar provision, but the notary who makes the protest is obliged to give the notice to the endorsers and drawer.[5]

[1] Spain, 469; Argentina, 661; Bolivia, 453, 454; Brazil, 9, 20, 30; Chile, 686, 688; Colombia, 813, 815, 825; Costa Rica, 72 to 81, 98; Ecuador, 411; Haiti, 165; Honduras, 459; Mexico, 493; Peru, 447; San Salvador, 402; Santo Domingo, 162; Uniform Regulation, 52; Uruguay, 856; Venezuela, 377.

[2] Art. 517. [3] Art. 133. [4] Art. 502.

[5] Arts. 530, 532.

(*b*) In Argentina [6] and Uruguay [7] the holder of a protested bill of exchange is obliged to notify the protest to his endorser, sending him a certified copy of the protest at the first opportunity, under penalty of losing all right of action against the drawer and the endorsers. Every endorser upon receiving such notification, must transmit it to his endorser under penalty of damages. When the person concerned lives in the same town the notification must be made within three days.[8]

(*c*) In Bolivia,[9] when the acceptor of a bill of exchange is sued for payment, the drawer and endorsers must be notified judicially of the protest within a period proportioned to the distance of their residence, counting one day for every three leagues. Omission of this requisite discharges the drawer and endorsers from their liability.

(*d*) In Brazil,[10] Chile,[11] Colombia,[12] Peru,[13] San Salvador,[14] countries governed by the Uniform Regulation [15] and Venezuela,[16] the holder must notify the protest to his endorser and every endorser must notify his transferer under penalty of paying damages.[17]

(*e*) In Ecuador,[18] the holder of a protested bill of exchange must notify his endorser within twenty-four

[6] Arts. 663, 664. [7] Arts. 858, 859.

[8] The lapsing of a bill of exchange due to failure of the holder to give notice of protest can be alleged by the drawer and the last endorser, according to article 664 of the Code of Commerce. Buenos Aires, July 11, 1914, A. Vattuone *v.* Locatelli y Michelena, Cam. de Apel. Com., *Jurisp. de los Tribs. Nacs.*, Julio, 1914, p. 251.

[9] Art. 432. [10] Art. 30. [11] Arts. 698, 701.
[12] Art. 825. [13] Art. 504. [14] Art. 454.
[15] Art. 44. [16] Art. 433.

[17] Under the American Negotiable Instruments Law adopted in nearly all the states, where notice of dishonor is given by the holder or by an endorser entitled to give notice, it inures to the benefit of the holder and of all parties subsequent to the party to whom notice was given; and to the benefit of all prior parties who have a right of recourse against the party to whom it was given.

[18] Art. 451.

hours; should the latter be absent, the notification must be made by the next mail. No specific penalty is provided for a failure to fulfill this requisite.

(*f*) In Haiti [19] and Santo Domingo,[20] if the holder enforces his rights severally against his assignor he must notify the latter of the protest.

Periods for the presentation of a bill of exchange.

There are in Latin-America almost as many ways to compute the period for the presentation of a bill of exchange as there are countries:

In Spain [21] bills of exchange drawn on any place in the Peninsula or Balearic Islands at sight or at a period after sight must be presented for collection or acceptance within forty days from their date. The person, however, who draws a bill of exchange at sight or at a period after sight can fix the time for presentation, and the holder is bound to present it within that time. Bills of exchange drawn between the Peninsula and the Canary Islands must be presented within three months. Those drawn between the Peninsula and the Spanish West Indies on places overseas east of Cape Horn and west of the Cape of Good Hope must be presented at the latest within six months whatever the period indicated in the instrument.[22] For places beyond those capes the maximum period is one year.

In Argentina [23] and Uruguay,[24] the holder of a bill of

[19] Art. 162. [20] Art. 165. [21] Arts. 470 to 472.

[22] The Spanish Royal Decree which put the commercial code of Spain into force in Cuba did not make any change in article 470, in view of the distance between Spain and Cuba. Referring to this circumstance, Dr. Betancourt (*loc. cit.*) says:

"This difficulty is a serious omission which cannot be overcome by interpretation, but only by amendment, and for that purpose it is necessary to proceed analogically. In this respect, according to the opinion of distinguished lawyers, it must be considered that the period is forty days as indicated in article 474, for bills of exchange drawn from abroad. This opinion seems to us acceptable, as the period is the same as that of article 470, which refers to a case very similar, namely, to bills of exchange drawn within the same territory, and as that of article 474.

[23] Arts. 652, 655. [24] Arts. 847, 850.

exchange payable at sight or at a period after sight must send a copy of it for acceptance at the first opportunity, and not later than by the second mail, to the place of residence of the drawee, otherwise prior endorsers are released from their obligations; the rights of the holder against the drawer who has not supplied the drawee with funds, or to compel the drawer to assign his rights against the drawee who has received funds, are reserved.

The person receiving the bill of exchange must present it to the drawee for acceptance within twenty-four hours; if it is not accepted, he must protest it in legal form.

In Bolivia,[25] bills of exchange drawn from one place on another within the Republic, must be presented for payment, if at sight, or for acceptance, if payable at a period after sight or from date, within a term varying according to the distance, counting six leagues for every day. If drawn from a foreign country upon a place in Bolivia, the terms above referred to are reckoned from the date at which the bill of exchange reaches Bolivia.

In Brazil,[26] bills of exchange drawn at a certain period after sight must be presented for acceptance within the period fixed therein; otherwise, within six months from the date of the instrument.

In Chile,[27] bills of exchange drawn from one place on another within the Republic payable at sight or at a certain time after sight, must be presented within three months from their date. Those drawn in the Republic at sight or a period after sight on a place in the American continent or its islands, must be presented within six months from the date thereof; those drawn on a place in Europe, within nine months; and those drawn on any other place, within one year.

In Colombia,[28] bills of exchange drawn at sight or at a period after sight from one state on another in the Republic must be presented within three months, provided the distance between the two places is more than one hundred

[25] Arts. 377, 379. [26] Art. 9. [27] Art. 685.
[28] Art. 812.

myriameters; otherwise within two months. Those drawn on a place in the American continent and its islands, within four months, provided the drawer resides in the maritime littoral of Colombia; otherwise, within six months. Those drawn on a place in Europe, within six months, provided the drawee resides in the maritime littoral of the Republic; otherwise, within eight months. Those drawn on any other place in the world, within eight months, if the drawee resides in the maritime littoral of the Republic; otherwise, within ten months.

Costa Rica [29] provides that when no date is fixed for presentation of the bill of exchange for acceptance, should such presentation not be forbidden, it may or may not be presented, at the option of the holder, who may do so any time within a year from its issuance; provided time enough has elapsed for the drawer to advise the drawee of its issuance.

Article 411 of the code of Ecuador provides that bills of exchange drawn upon a place in the Republic must be presented within three months, if drawn therein; within six months, if drawn from any place on the American continent; within eight months, if drawn in Europe; and within one year, if drawn in any other part of the world.

In Haiti [30] a bill of exchange drawn from any island of the West Indies and payable in Haiti at sight or at a period after sight must be presented within six months from its date; if drawn from any place on the American continent, the Bermudas or Newfoundland, within eight months; and if drawn from Europe, within one year. No mention is made of other parts of the world.

In Honduras [31] bills of exchange drawn from one place upon another in the Republic, or upon a place in the Central-American Republics, must be presented within two months from their dates. Those drawn from other parts of the American continent or its islands, within three months; from Europe, within six months; and from any other place, within nine months.

[29] Arts. 72, 96. [30] Art. 157. [31] Art. 460.

The periods in Mexico [32] are two months for bills of exchange drawn in the territory of the Republic, three months for those drawn from the United States of America or Europe, and four months, for those drawn from any other place upon places in Mexican Territory.

In Peru [33] the period for presentation is one year in every case.

San Salvador [34] allows two months for bills on places within the Republic and Central America, six months for bills drawn from other places of America and Europe, and nine months for those from other parts of the world.

In Santo Domingo [35] bills of exchange drawn from Haiti, West Indies or the United States upon the Republic must be presented within three months; from countries of the American continent south of the Rio Grande del Norte up to the Orinoco on the Atlantic coast, within four months; from other countries of South America, within five months; from any other place, six months.

According to the Uniform Regulation a bill of exchange drawn at a period from sight must be presented for acceptance within six months from its date, although the drawer and endorsers can shorten or extend this period.[36]

Venezuela provides [37] that for bills of exchange payable in the place at which they are drawn the period is three months, and six months for those payable in other places.

The periods above referred to are doubled in case of war which may affect the transmission of the bill.[38]

Case of force majeure.

When the holder of a bill of exchange fails to present it in proper time for acceptance or payment, or to protest it because of *force majeure*, his right to collect the amount is not impaired.[39]

[32] Art. 485. [33] Art. 447. [34] Art. 402.
[35] Art. 160. [36] Art. 22. [37] Art. 377.
[38] Ecuador, 412; Peru, 447; Santo Domingo, 160; Venezuela, 377.
[39] Spain, 483; Argentina, 654; Brazil, 20; Costa Rica, 101; Honduras, 468; Mexico, 494; San Salvador, 409; Uniform Regulation, 53; Uruguay, 849.

Cases in which previous acceptance is not necessary.

When a bill of exchange is payable at or after sight, previous presentation or acceptance thereof is necessary to fix the maturity of the instrument; but when it is payable at a certain date the presentation is optional, as its object then is only to satisfy the holder that the drawee binds himself to pay the bill.[39a] The laws of Spain,[40] Brazil,[41] Chile,[42] Colombia,[43] Honduras,[44] Mexico [45] and San Salvador [46] expressly provide that bills of exchange payable at a certain date do not need to be presented for acceptance.

Bills of exchange not sent in proper time.

Those who send bills of exchange from one place to another after the time allowed for presentation and protest, are responsible for the consequences thereof.[47]

In Argentina,[48] Chile,[49] Colombia,[50] Guatemala [51] and Uruguay,[52] however, the person who takes a bill of exchange in the case above mentioned, must require from the endorser an assumption of the obligation to pay the draft even though presented and protested out of proper time, otherwise he loses his rights against the endorser.

Place in which acceptance must be requested.

Before acceptance no rights and duties exist between the holder and the drawee; the former has the power of requesting of the latter an acceptance of the obligation of paying the draft, and the request must be made at the residence of the drawee even though payment must be made in another

[39a] In the United States, such optional presentation has the further object of enabling the payee, in case of refusal of acceptance by the drawee, to create the drawer's liability, after protest and notice, immediately to pay.

[40] Art. 476. The American Uniform Negotiable Instruments Law contained a similar provision.

[41] Art. 9. [42] Art. 674. [43] Art. 801.

[44] Art. 461. [45] Art. 484. [46] Art. 402.

[47] Spain, 485; Argentina, 657; Chile, 696; Colombia, 823; Honduras, 470; Uruguay, 852.

[48] Art. 658. [49] Art. 697. [50] Art. 824.

[51] Art. 581. [52] Art. 853.

place. So the law provides in Costa Rica.[53] The provision is more detailed in Argentina,[54] Chile,[55] Colombia [56] and Uruguay.[57,58] There the bill of exchange must be presented to the drawee at his house, or at his office or at the building designated in the draft; should his residence or office be unknown, presentation must be made at the place designated by the law for protest.

Period within which acceptance must be made or refused.

There are three systems in reference to the period within which the drawee must grant or refuse acceptance of the bill of exchange:

First system. Acceptance must be given on the day of presentation.[59]

Second system. Acceptance must occur within twenty-four hours after presentment.[60] According to the Uniform Regulation the drawee can ask for a second presentation of the bill on the following day.

Third system. In Brazil and Mexico, no period is fixed, hence it must be made immediately.

Who has to keep the bill of exchange between presentation and acceptance.

The safest way for the holder of a bill of exchange, and the best for the safety of all interests involved is for the holder to retain the instrument while allowing the drawee to note all its details in order to verify the document and the signature of the drawer; he cannot require anything else. There are, however, four systems in this respect:

[53] Art. 74. [54] Art. 659. [55] Art. 691.
[56] Art. 818. [57] Art. 854.

[58] The Uniform Negotiable Instruments Law in the United States provides that the draft must be presented at the domicil of the drawee.

[59] Spain, 478; Argentina, 644; Bolivia, 387; Chile, 667; Colombia, 794; Honduras, 463; Uruguay, 833.

[60] Costa Rica, 75; Ecuador, 417; Haiti, 123; Peru, 451; San Salvador, 403; Santo Domingo, 125; Uniform Regulation, 23; Venezuela, 382.

By the Negotiable Instruments Law the drawer has 24 hours to accept, but "acceptance, if given, dates as of the day of presentation." The holder may give the drawer a longer time if he sees fit.

1. The person from whom acceptance is requested cannot retain the bill of exchange under any pretext whatever.[61]

2. The drawee can keep the bill if the holder allows him to do so.[62]

3. The drawee is supposed to keep the bill.[63]

4. No reference is made to this matter in Ecuador, Guatemala and Mexico; in these countries the holder may keep the bill or not, according to commercial usage.

Effects of the failure to give back the bill of exchange to the holder.

In those countries in which the holder must or may leave the bill of exchange in the hands of the drawee a certain period of time, the failure of the drawee to return it with his acceptance or refusal produces certain effects which vary in different countries. They may be reduced to the following systems:

1. The drawee is liable for payment of the bill of exchange, even though he has not accepted it.[64]

2. The drawee is liable for damages.[65]

The law of Brazil provides that when it is proved that the drawee refuses to surrender the bill received by him for acceptance or payment, he may be imprisoned unless he deposits in court the amount thereof and the expenses.[66] The codes of Ecuador, Peru, Venezuela and the Uniform Regulation are silent on the subject.

[61] Spain, 478.

[62] Argentina, 644; Chile, 667; Colombia, 794; San Salvador, 405; Uruguay, 839; Uniform Regulation, 23.

[63] Bolivia, 387; Brazil, 31; Costa Rica, 75; Haiti, 123; Peru, 451; Santo Domingo, 125; Venezuela, 382.

Under the law in the United States, the bill during the interim for decision as to acceptance, may be in the hands of the payee or of the drawee. If in the former, at the end of the period, he may treat it as dishonored. We shall see presently the legal effects of its retention by the drawee.

[64] Argentina, 644; Bolivia, 387; Chile, 667; Colombia, 794; Uruguay, 839.

[65] Costa Rica, 75; Haiti, 123; San Salvador, 405; Santo Domingo, 125.

[66] Art. 31. By the law in the United States, if the drawer retains the bill *with* the consent of the holder, no legal consequences follow, since an "accept-

Revocations of an acceptance.

Acceptance of a bill of exchange on the part of the drawee is merely a form of consent binding upon the drawee, who cannot afterwards revoke it. This is merely the application of a general principle of the law of contracts. Argentina,[67] Brazil,[68] Chile,[69] Colombia,[70] Ecuador [71] and Uruguay [72] provide consequently that the drawee cannot erase or revoke his acceptance once it is signed, even though the bill has not been returned to the holder.

Peru,[73] San Salvador [74] and Venezuela [75] provide that the acceptance is irrevocable when the bill has been returned to the holder; it is, therefore, permissible to revoke it after it is signed but before its return.

Costa Rica [76] provides that once acceptance is given it cannot be withdrawn except:

1. when it has been obtained through violence;
2. when the signature of the drawer or any other substantial part of the instrument has been forged;
3. when the signature of the drawer was obtained through violence.

In the two latter cases acceptance is irrevocable as to the holder in due course who acquired the bill after acceptance.

The Uniform Regulation [77] provides that when the drawee who has signed his acceptance on the bill of exchange crosses or erases it before delivering the document to the holder, acceptance is considered as refused; such drawee, however, is bound in the terms of his acceptance if he crossed or erased it after he in writing

ance must be in writing and signed by the drawer." If retained *without* the consent of the holder, an action lies to recover damages for the wrongful detention. Some state statutes—although not the Negotiable Instruments Law—provide that if the drawee destroys the bill or refuses to return it within twenty-four hours or on demand, he will be deemed to have accepted it.

[67] Art. 639. [68] Art. 12. [69] Art. 669.
[70] Art. 796. [71] Art. 420. [72] Art. 834.
[73] Art. 451. [74] Art. 403. [75] Art. 382.
[76] Art. 78. [77] Art. 28.

advised the holder or any other of the parties concerned that he accepted it.

Persons qualified to present a bill of exchange for acceptance.

A holder in due course of a bill of exchange is the person entitled to request its acceptance. Nevertheless, the law in some countries gives power to present a draft for acceptance to any person who is in possession of the bill of exchange whatever his title, with a view to preserving the rights of the parties.[78]

Form of acceptance.

With reference to the form in which the acceptance of a bill of exchange must be given there are three systems:

1. That which requires the use of the specific word "*acepto*" (I accept) if the drawee is an individual, or "*aceptamos*" (we accept) if it is a partnership or corporation, otherwise the acceptance is void.[79]

In Haiti [80] and Santo Domingo [81] the unchangeable word is "*aceptada*" (accepted).

2. That which permits the word "acepto" or any other equivalent as essential for accepting.[82]

3. That which admits any word expressive of acceptance or even the mere signature of the drawee as sufficient for its validity.[83]

Brazil prescribes [84] that the mere signature of the drawee,

[78] Argentina, 668; Brazil, 41; Chile, 690; Colombia, 817; Costa Rica, 73; Uniform Regulation, 20; Uruguay, 863.

[79] Spain, 477; Bolivia, 388; Honduras, 462.

[80] Art. 120. [81] Art. 122.

[82] Ecuador, 414; Mexico, 487.

An acceptance is null when it is made without stating the date thereof and the place in which it was made. The *acción ejecutiva* therefore, is to be dismissed, reserving to the plaintiff his right to bring a regular action. Mexico, Juzgado 7° menor, del distrito Fed., July 22, 1892, S. Puron *v.* R. Arguero y Cia. *Anuario de Legislación y Juris. Sección de Jurisp.*, v. IX, p. 149.

[83] Argentina, 639; Chile, 668; Colombia, 795; Costa Rica, 76; Peru, 448; Uruguay, 834; Venezuela, 379.

[84] Art. 11.

written in his own hand or in that of his special representative suffices for the validity of the acceptance; that any declaration which does not indicate a clear refusal or qualification is considered as an unconditional acceptance.[85]

According to the Uniform Regulation the acceptance may be signified by the word "*aceptada*" (accepted) or any other equivalent and must be coupled with the signature of the drawee; the mere signature of the drawee on the face of the instrument amounts to an acceptance.[86]

San Salvador makes no reference to this point.

All the codes agree in the requirement that the acceptance must be in writing and on the bill of exchange itself; that of Ecuador [87] is the only exception in that it prescribes that the acceptance given by means of a letter or a separate document is valid.

In Argentina,[88] Chile,[89] Colombia [90] and Uruguay,[91] an acceptance incorporated in a separate document is only binding in favor of the person to whom it was given, but it cannot be conveyed by means of an endorsement.

The date of acceptance.

In bills of exchange payable at sight or after sight it is necessary for the acceptor to insert the date of his acceptance, since that date fixes the maturity of the bill. If the acceptor fails to comply with that requisite the legal consequences are:

(*a*) in Spain,[92] Bolivia [93] and Honduras,[94] that the period for the maturity of the bill runs from the day the holder might have presented it, assuming no delay in

[85] The United States Negotiable Instruments Law merely provides that the "acceptance must be in writing and signed by the drawee." Any words on the face or back of the instrument signifying the drawee's assent to the order are sufficient, provided they bear the drawer's signature. The signature alone has been held a sufficient acceptance.

[86] Art. 24. [87] Art. 414. [88] Art. 639.

[89] Art. 670. [90] Art. 797. [91] Art. 834.

According to the American Negotiable Instruments Law "where an acceptance is written on a paper other than the bill itself it does not bind the acceptor except in favor of a person who, on the faith thereof, receives the bill for value."

[92] Art. 477. [93] Art. 389. [94] Art. 462.

the mail; if by so computing, the period for presentation has elapsed, the bill is considered due the day after its presentation.

(*b*) in Argentina,[95] Chile,[96] Colombia,[97] Peru,[98] countries governed by the Uniform Regulation,[99] and Uruguay,[100] that the bill must be protested and the period runs from the date of protest;

(*c*) in Brazil [101] and Costa Rica,[102] that the holder can insert in the bill the date of acceptance;

(*d*) in Ecuador,[103] Haiti [104] and Santo Domingo,[105] that the bill is due and enforceable at the time fixed in it, counting from its date;

(*e*) in San Salvador,[106] that it is enforceable without any other requisite;

(*f*) in Venezuela,[107] that the period is reckoned from the day presentation is made in authentic form.

Bills of exchange payable at a place different from the residence of the drawee.

If the bill presented for acceptance must be paid at a place different from the residence of the acceptor, the exact address in which payment is to be made must be indicated therein.[108]

Failure to state the address at which payment must be made results in Costa Rica in the bill having to be protested; and in Peru, in the place of payment being that of the residence of the acceptor.

In Venezuela, if the acceptor fails to indicate the person from whom payment must be requested at the place designated in the bill, it assumed that he himself is the person to pay.

[95] Art. 640. [96] Art. 673. [97] Art. 800.
[98] Art. 449. [99] Art. 24. [100] Art. 835.
[101] Art. 9. [102] Art. 77. [103] Art. 414.
[104] Art. 120. [105] Art. 122. [106] Art. 405.
[107] Art. 380.

[108] Spain, 478; Argentina, 641; Bolivia, 390; Brazil, 20; Chile, 675; Colombia, 802; Costa Rica, 74; Ecuador, 415; Haiti, 121; Honduras, 463; Mexico, 488; Peru, 450; Uniform Regulation, 26; Uruguay, 836; Venezuela, 381.

A person who, receiving a bill for acceptance, if drawn upon him, or for acceptance by another, if drawn upon another person, retains it pending arrival of another copy and states in writing that it has been accepted, is liable to the drawer and endorsers as if acceptance had been noted in the bill itself, notwithstanding there has been no actual acceptance and notwithstanding his refusal to surrender the accepted copy to the person who lawfully demands it.[109]

Conditional and partial acceptances.

Bills of exchange cannot be conditionally accepted. In regard to this matter as well as to cases of an acceptance limited to a sum less than the full amount, there are three systems, namely:

1. The drawee can limit his acceptance to less than the full amount, in which case the holder must protest the bill for the balance.[110]

2. The holder however can refuse an acceptance reduced to an amount smaller than that stated in the bill.[111]

3. Even though the holder is not obliged to receive a conditional acceptance, the drawee is bound by the terms in which he makes it.[112]

[109] Spain, 478; Honduras, 463.

[110] Spain, 479; Argentina, 643; Bolivia, 391; Chile, 671; Colombia, 798; Costa Rica, 79, 80; Haiti, 122; Honduras, 464; Mexico, 490; Peru, 452; San Salvador, 404; Uruguay, 838; Venezuela, 379, 383.

[111] Argentina, 643; Chile, 671; Colombia, 798; Uruguay, 838.

[112] Brazil, 11; Peru, 452; Uniform Regulation, 25; Venezuela, 383.

In the United States the Negotiable Instruments Law admits a qualified acceptance which varies the effect of the bill as drawn. Such a qualified acceptance may be (*a*) conditional, that is, which makes payment by the acceptor dependent on the fulfillment of the condition therein stated; (*b*) partial, that is, an acceptance to pay part only of the amount for which the bill is drawn; (*c*) local, that is, an acceptance to pay only at a particular place; (*d*) qualified as to time; and (*e*) the acceptance of some one or more of the drawees, but not all. The holder is under no duty to take a qualified acceptance. If a general unqualified acceptance is refused, he may treat the bill as dishonored. Where, however, "a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly authorized the holder to take a qualified acceptance, or subsequently

Effect of a promise to accept a bill of exchange.

A promise, whether oral or in writing, to accept a bill of exchange is equivalent to acceptance in favor of the person to whom such promise was made, in Argentina,[113] Chile [114] and Colombia; [115] failure to fulfill the promise obliges the promisor to pay damages to the drawer, and in Uruguay [116] obliges the promisor to pay damages generally, not merely to the drawer.

Effect of acceptance.

The acceptance of a bill of exchange binds the acceptor to pay it when it becomes due.[117] The drawee is not liable on the bill until he accepts.

The acceptor is released from the obligation to pay in certain cases as follows:

(*a*) when the acceptance has been forged; [118]

(*b*) when the bill itself has been forged; [119]

(*c*) when the acceptor has a personal defense against the plaintiff or defenses arising out of a lack of formal requisites of the instrument, or out of a lack of necessary requisites in bringing the action; [120]

(*d*) when the bill or the acceptance has been obtained by duress, or when the signature of the drawer or any other substantial part of the instrument has been forged; [121]

assented thereto." Failure, after notice, to express dissent within a reasonable time, is deemed constructive assent.

[113] Art. 637. [114] Art. 666. [115] Art. 793.

[116] Art. 832. Such a written promise to accept, which must be unconditional, is known in the United States as "virtual acceptance," and is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value. (Neg. Instr. Law, Sec. 134.)

[117] The acceptor of a letter of credit who did not pay it is not obliged to credit its amount to the drawer of the same, unless the latter proves that he had supplied special funds therefor, and the acceptance of such letter does not create any obligation between the acceptor and the drawer. Spain, Trib. Sup., Feb. 8, 1905, A. Herrero *v.* C. Vaamonde; *Gaceta* of March 15, 1905, p. 176.

[118] Spain, 480; Honduras, 465; Uniform Regulation, 27; Venezuela, 385.

[119] Argentina, 647; Bolivia, 392; Chile, 676; Colombia, 803; Mexico, 491; Uruguay, 842.

[120] Brazil, 43, 51. [121] Costa Rica, 78.

(*e*) when the bill has been forged the acceptor is, nevertheless, bound to pay it if it is not in the hands of the payee or of a person responsible for the forgery.[122]

Effect of bankruptcy of the drawer.

After the acceptance of a bill of exchange the acceptor is directly liable for its payment, independently of his rights and duties towards the drawer. The bankruptcy or the insolvency of the latter is no excuse for non-payment, even when the bankruptcy or insolvency occurred prior to the acceptance but unknown to the acceptor.[123]

If the bankruptcy of the drawer was made public before presentation, the drawee must refuse acceptance or payment.[124]

Costa Rica [125] provides that if before the bill is due the drawer fails, the drawee must retain the funds supplied whether or not he has accepted. If a credit not due when the bill matures was designated for its payment, the drawee must retain the credit for such payment, notwithstanding the bankruptcy.

In case of the bankruptcy of the drawer of several bills who has not supplied funds enough for the payment of all, nor made special designation of certain funds for the payment thereof, the bills must be paid in the order of their creation, excepting those which bear a clause forbidding their presentation for acceptance.

Reference.

When the drawer or any of the endorsers of a bill indicates in it other persons from whom acceptance must be requested in case it is refused by the drawee, the holder must, after protest, if the drawee refuses acceptance, ask it from the

[122] Ecuador, 416.

[123] Argentina, 646; Chile, 679; Colombia, 806; Ecuador, 416; Peru, 454; San Salvador, 406; Santo Domingo, 121; Uruguay, 841.

[124] Argentina, 645; Chile, 678; Colombia, 805; Uruguay, 840.

[125] Arts. 42, 43.

persons indicated. Such persons are known as referees in case of need.[126]

In Spain [127] and Honduras,[128] the holder may demand acceptance from the other persons indicated in the bill, even though it was accepted by the drawee, provided other bills accepted by the same drawee have been protested. In that event, the holder must protest the instrument for better security.

In Argentina,[129] Chile [130] and Colombia,[131] a distinction is made: if the persons are jointly designated the holder must request acceptance from every one of them; but if they are designated in the alternative, acceptance or payment must be demanded from the first, and in case of his refusal, then from the others, in the order of their designation.

In Brazil [132] when there are two or more drawees, the holder must present the bill to the first one designated; should he refuse to accept, then to the second, provided he resides in the same place, and so on, in spite of the order mentioned in the bill.

In Costa Rica [133] and Uruguay [134] the holder must first request acceptance and payment from the persons designated by the drawer, and then from the endorsers in their successive order.

SURETYSHIP (*Aval*)

Suretyship is an independent contract by virtue of which a person who is not a party to the bill of exchange guarantees its payment.

The *aval* is always in writing whether in the bill itself or on a separate paper; the former is more frequent, thus facilitating the circulation of the draft.[135]

[126] Spain, 484; Honduras, 469; Mexico, 489; San Salvador, 410.
[127] Art. 481. [128] Art. 466. [129] Art. 655.
[130] Art. 693. [131] Art. 820. [132] Art. 10.
[133] Art. 89. [134] Art. 851.
[135] Spain, 486; Argentina, 679, 680; Bolivia, 410; Brazil, 14; Chile, 680, 681; Colombia, 807, 808; Costa Rica, 155, 156; Ecuador, 424; Haiti, 138; Honduras, 471; Mexico, 496, 497; Peru, 460; Santo Domingo, 141; San Salvador, 420, 421; Uruguay, 872, 873.

Only Venezuela [136] and countries governed by the Uniform Regulation require that the *aval* be written in the bill itself and not on separate paper.

The *aval* may be given in general terms, or limited to a certain person, amount or condition.[137]

Effect of the " aval."

When the *aval* is given for a limited time, case, amount or person, the obligation of the surety is ruled by his own stipulation; but when there is no limitation established at the time he gives his guaranty, various systems are followed, namely:

1st System. The obligation of the surety is the same as that of the person for whom he guaranteed, the law taking no account of the case in which no name is mentioned.[138]

2d System. The surety is jointly and severally liable in the same form as the drawer and endorsers.[139]

[136] Art. 391.

[137] Argentina, 682; Bolivia, 411, 412; Chile, 682, 683; Colombia, 809, 810; Costa Rica, 158; Ecuador, 425, 426; Haiti, 139; Honduras, 472; Mexico, 498; Peru, 461; San Salvador, 423; Santo Domingo, 142; Uruguay, 875, 876; Venezuela, 394.

The following are forms of the *aval* written on the back of the document:

Unlimited *aval*

Por aval
Juan López.

Aval limited to a certain amount.
Por aval mil pesos.
Juan López.

Aval subject to a period of time.
Por aval a quince dias despues del vencimiento de esta letra.
Juan López.

Aval for a specified person.
Por aval a favor únicamente del tomador don Pedro Pérez.
Juan López.

Aval subject to condition.
Por aval después de que se haya hecho excusion en los bienes del aceptante.
Juan López.

[138] Spain, 487; Bolivia, 412; Costa Rica, 158; Honduras, 472; Venezuela, 393.

[139] Argentina, 682; Chile, 683; Colombia, 810; Ecuador, 426; Haiti, 139; Santo Domingo, 142; Uruguay, 875.

3d System. The surety assumes the liability of the person under whose name he places his signature; otherwise he is responsible like the acceptor. Should the bill not be accepted, his liability is still like that of the drawer.[140]

4th System. The surety is liable as an endorser.[141]

5th System. He is liable like the acceptor, but if the bill has not been accepted, his responsibility is like that of the drawer.[142]

6th System. The surety is responsible in the same manner as the drawer.[143]

Peru [144] and Venezuela [145] as well as the Uniform Regulation [146] provide by way of exception to the general principles of contracts, that the *aval* is valid and binding notwithstanding the nullity of the bill. This rule is a consequence of the independent character of every obligation contracted with respect to a bill of exchange.

Capacity of women to sign an "aval."

In Argentina, non-merchant women can sign an *aval* only subject to the rules established by the civil law.[147]

PAYMENT

Time of payment.

The second obligation of the holder of a bill of exchange desiring to safeguard his rights against the drawer and endorsers is to present it for payment the day of its maturity, and the drawee must pay it that very day, even though it was protested for lack of acceptance. Should the day of maturity be a holiday, presentation and payment must be made the day before.[148]

[140] Brazil, 15. [141] Mexico, 498.
[142] Peru, 461; San Salvador, 423.
[143] Uniform Regulation, 30.
[144] Art. 461. [145] Art. 393. [146] Art. 31.
[147] Art. 684.
[148] Spain, 488; Argentina, 662; Chile, 698; Colombia, 825; Honduras, 473; Mexico, 499; San Salvador, 427; Uruguay, 857.

In Brazil,[149] Costa Rica,[150] Ecuador,[151] Venezuela,[152] as well as under the Uniform Regulation,[153] payment must be made the day after.[154]

Costa Rica makes the presentation for payment not necessary:

(*a*) when the drawee is a fictitious person;

(*b*) with reference to the drawer, when the drawee was not obliged to pay the draft, and the drawer had no reason to suppose that the bill would be paid;

(*c*) with reference to the endorser, when the bill was created and accepted for accommodation, and he had no reason to suppose that the draft would be paid;

(*d*) when, in benefit of the holder, he has been released from the obligation to present the bill within the term fixed by the law;

(*e*) with reference to bills payable at the residence of a third person, if the draft itself does not state the address at which payment is to be made and the drawee fails to designate it;

(*f*) when it cannot be made, notwithstanding the exercise of due diligence.[155]

Money in which payment must be made.

Bills of exchange must be paid in the kind of money therein designated. Should such money not be in circulation in the place, payment must be made in the currency of the country, the amount being computed according to the rate of exchange at the day and place of payment.[156]

[149] Art. 20. [150] Art. 36. [151] Art. 428.
[152] Art. 396. [153] Art. 72.

[154] The endorsee of a bill of exchange which was accepted and afterwards impaired because not presented for payment in proper time is a lawful creditor, and therefore can be a party to the proceedings in bankruptcy against the acceptor. Spain, Trib. Sup., Dec. 28, 1908; *Gacetas* of June 14 and 17, 1909, p. 455.

[155] Art. 102.

[156] Spain, 489; Argentina, 685; Bolivia, 394; Brazil, 25; Chile, 712; Colombia, 843; Costz Rica, 112; Ecuador, 429; Haiti, 140; Honduras, 474; Mexico, 509; Peru, 479; San Salvador, 428; Uruguay, 878; Venezuela, 397.

The rate of exchange for paying a foreign bill of exchange is that of the day

The law of Brazil [157] and the Uniform Regulation [158] provide also that when the kind of money stipulated is not in circulation in the place, payment can be made in the legal currency of the country at the current rate of exchange, in the absence of agreement to the contrary.

In Chile, by decree of September 10, 1892, all commercial obligations must be paid in the exact money stipulated, unless otherwise agreed, thus reiterating article 114 of the code of commerce.

In Santo Domingo [159] payment must always be made in the money agreed upon.

Payment before maturity.

The person who pays a bill of exchange before its maturity does not liberate himself from the obligation of paying it again, if the person who received the payment is not the lawful holder of the instrument.[160]

The codes of Argentina,[161] Bolivia,[162] Colombia,[163] Costa Rica [164] and Uruguay,[165] in dealing with the situation of a person who receives payment before the bill is due, provide that when the payer has become bankrupt all payments in anticipation made by him after he ceased to pay creditors, as fixed by the declaration of the court, are null. The holder of the bill must surrender the amount received to the receivers, and obtain the return of the bill for the further exercise of his rights and powers.

it was due. But if by the failure to pay on that date, the bearer suffers any damage, this must be for the account of the debtor. Colombia, Trib. Sup. del Cauca, Nov. 29, 1905; *Gaceta Jud. del Cauca*, Nov. 29, 1905, v. II, p. 66.

When the judge has issued an order to pay a foreign bill of exchange, computing its amount at the rate of exchange on the day of maturity none of the parties to the suit may ask that payment be made at the rate on the day of its performance. Colombia, Trib. Sup. del Distrito del Cauca, Feb. 20, 1906; *Gaceta Judic. del Cauca*, v. II, p. 180, and IV, 1906, *ib.*, p. 182.

[157] Art. 25. [158] Art. 40. [159] Art. 143.

[160] Spain, 490; Argentina, 686; Bolivia, 400; Brazil, 22; Chile, 714; Colombia, 845; Costa Rica, 103; Ecuador, 431; Haiti, 141; Honduras, 475; Mexico, 501; Peru, 480; San Salvador, 429; Santo Domingo, 144; Uniform Regulation, 39; Uruguay, 879; Venezuela, 399.

[161] Art. 686. [162] Art. 401. [163] Art. 846.

[164] Arts. 108, 109. [165] Art. 880.

A holder cannot be compelled to receive payment in advance.

As a correlative to the foregoing rule, the holder of a bill cannot be compelled to receive payment before maturity.[166]

Payment of a matured bill is presumed valid.

Payment made to the holder of a matured bill is presumed valid unless its amount has been attached by judicial decree.[167] The attachment of the amount of a bill can be effected only in case of loss or theft of the instrument or when the holder is a bankrupt.[168] In Brazil,[169] Chile,[170] Colombia [171] and Costa Rica,[172] the attachment can also be made when the holder is legally encompetent.

Identification of the holder.

The holder of a bill who requests payment must identify himself by means of documents or resident persons of his acquaintance who will guarantee his identity.[173]

[166] Spain, 493; Argentina, 687; Bolivia, 402; Brazil, 22; Chile, 713; Colombia, 844; Costa Rica, 97; Ecuador, 431; Honduras, 478; Mexico, 500; Peru, 480; San Salvador, 432; Uniform Regulation, 39; Uruguay, 881.

The acceptor of a bill has a privilege of paying it, and when payment is not accepted by the creditor, he can deposit the amount in court following the proper proceedings. Spain, Trib. Sup., June 13, 1914, V. Perez Ventoso *v.* A. Trujillo; *Gaceta* of 22 and 24 of Nov., 1914, p. 411.

[167] Spain 491; Argentina, 691; Bolivia,, 404; Brazil, 23; Chile, 716; Colombia, 848; Costa Rica, 104; Ecuador, 434; Haiti, 142; Honduras, 476; Mexico, 502; San Salvador, 430; Santo Domingo, 145; Uniform Regulation, 39; Uruguay, 884; Venezuela, 403.

The person who pays a bill at maturity and without any opposition is legally exonerated even though payment is not made to the owner. Good faith on the part of the payer is presumed. Colombia, Trib. Sup. del Distrito de Bogotá, March, 12, 1896, *Registro Judicial de Cundinamarca*, v. XI, p. 1724.

[168] Argentina, 692; Bolivia, 404; Brazil, 23; Chile, 716; Colombia, 848; Costa Rica, 105; Ecuador, 433; Haiti, 146; Peru, 484; Santo Domingo, 149; Uruguay, 885; Venezuela, 402.

[169] Art. 123. [170] Art. 716. [171] Art. 848.

[172] Art. 105.

[173] The drawee must pay the bill, however, when it falls due even though he does not know the bearer; the latter need not identify himself, as such

The lack of such identification is no hindrance to the acceptor or drawee making, or to the holder demanding judicial deposit of the amount thereof on the day of its presentation, at the house or with a person designated by agreement between the holder and the payer, in which case such house or person must retain the amount until lawful payment can be made.[174]

Nicaragua [175] and Peru,[176] favoring the holder, declare that the holder is bound to prove the property of the bill by a non-interrupted series of endorsements only.

Partial payments.

When the drawee or acceptor of a bill pays a part of the total amount opinions are divided as to the question whether or not the holder is obliged to receive such partial payment. According to general principles he is not bound; but considering that his refusal makes more burdensome the condition of the endorsers and drawer whose interests he in some degree represents, it has been held in some countries that he is obliged to receive such partial payment.

There are consequently two systems:

(*a*) the one giving the holder the privilege not to accept less than full payment; [177]

(*b*) the other making it compulsory for the holder to receive a partial payment.[178]

Payment in case the bill was previously acepted.

Bills of exchange which have been accepted must be paid

requisite is contrary to the main advantage of a bill of exchange, namely, the immediate payment of its amount. Colombia, Trib. Sup. del Dist. de Bogotá, March 12, 1896, *Registro Judicial de Cundinamarca*, v. XI, p. 1724. *Cf.* Colombia, art 847.

[174] Spain, 492; Argentina, 694; Bolivia, 393; Chile, 715; Colombia, 847; Costa Rica, 110; Ecuador, 438; Honduras, 477; Mexico, 508; San Salvador, 431; Uruguay, 887.

[175] Art. 275. [176] Art. 473.

[177] Spain, 494; Bolivia, 403; Chile, 713; Colombia, 844; Ecuador, 430n; Honduras, 479; San Salvador, 433. This is the system adopted generally in the United States.

[178] Brazil, 22; Costa Rica, 113; Mexico, 503; Peru, 478; Uniform Regulation, 28; Venezuela, 398.

in exact accordance with the acceptance on the copy presented. Should payment be made on any other copy, the payer remains liable for the amount thereof to any holder in due course of the accepted copy.[179]

The acceptor cannot be compelled to pay in the foregoing case, even though the holder of the unaccepted copy offers to give a bond to the acceptor's satisfaction; but the holder can demand the deposit of the amount and on non-compliance protest according to law.

If the acceptor voluntarily takes the bond and makes payment, the bond will *de jure* be cancelled as soon as the action arising out of the acceptance which gave origin to the bond is barred by limitation.[180]

Brazil [181] provides that the drawee is bound to pay every one of the copies to which he has set his signature, when there is no indication that the bills were merely different copies of the same draft; and that the endorser to different persons of two or more copies of the same bill which have no such indication as well as the successive endorsers or sureties are bound to pay their amount. The person who receives a copy of a bill for the sole purpose of presenting it for acceptance is bound to deliver it to the holder in due course of the duplicate, under penalty of paying damages.

According to the Uniform Regulation [182] payment made upon any of the copies releases the drawer from the obligation of paying the others even in the absence of agreement to that effect. The drawee, however, is bound on every one of the copies he accepts and does not recover. The endorser who transfers the copies to different persons, as well as the subsequent endorsers are bound on every copy bearing their signature.

The person who sends one of the copies for acceptance,

[179] Spain 495; Argentina, 689; Bolivia, 398; Chile, 717, 719; Colombia, 850, 852; Ecuador, 432; Haiti, 145; Honduras, 480; Mexico, 504; San Salvador, 434; Santo Domingo, 148; Uniform Regulation, 69; Uruguay, 883; Venezuela, 401.

[180] Spain, 496; Bolivia, 399; Chile, 718; Colombia, 851; Honduras, 481; San Salvador, 435.

[181] Art. 16. [182] Art. 64.

must indicate in the other copies the name of the person to whom that copy was sent and the latter must surrender it to the holder in due course of the other copy. Should he refuse thus to surrender the copy to the holder, the latter can enforce his rights only after he has evidenced them by means of a protest: (*a*) that he has demanded the copy sent for acceptance and it has not been delivered to him; (*b*) that the acceptance and payment have not been obtained by means of another copy.[183]

Payment in case the bill has not been accepted.

Non-accepted bills of exchange can be paid after they become due but not before, upon the second, third or any other of the copies issued by the drawer, but not upon copies issued by endorsers, unless one of the copies issued by the drawer is attached thereto.[184]

Case of loss of a bill of exchange.

There are various systems with reference to the procedure to be followed by the holder of a bill in case of its loss, namely:

System of Spain. When a person has lost a bill of exchange, whether accepted or not, and has no other copy for requesting payment, he can demand from the payer the deposit of the amount of the draft in the proper public depositary, or with a trustworthy person agreeable to both parties, or one designated by the judge in case of disagreement. Should the person obliged to pay refuse to make the deposit, such refusal must be authenticated by means of a protest, and with this document the holder retains his rights against the person responsible for the payment of the bill.

For obtaining payment after the deposit is made the law distinguishes two cases:

(*a*) where the bill was drawn in a foreign country or

[183] Art. 65.

[184] Spain, 497; Bolivia, 396, 397; Chile, 720; Colombia, 853; Ecuador, 432; Haiti, 147; Honduras, 482; Mexico, 505; San Salvador, 436; Santo Domingo, 150; Uniform Regulation, 64; Uruguay, 882; Venezuela, 401.

from over seas, in which case the holder has a right to demand delivery of the amount of the draft if he proves title to it through his books and correspondence with the person from whom he got it or by means of a certificate of the broker through whom the negotiation was undertaken and, besides, gives a bond sufficient to guarantee the money. This bond will subsist until a copy of the bill issued by the drawer is produced, or until the action arising therefrom has been barred by the statute of limitations;

(*b*) that of an inland bill of exchange, in which case the delivery of the money cannot be demanded until a copy of the bill issued by the drawer is produced.

This copy is obtained by the last holder from his endorser, and so on from one endorser to another up to the drawer. None of them can refuse his name and services for obtaining the new copy, and the expense thereof must be paid by the owner of the bill.[185]

System of Argentina. Whenever a well-known person asks the payer of a bill to withhold payment because of its loss, the latter must delay payment throughout the day of maturity; should legal notice of a formal attachment not be served upon the payer during that term, he must pay to the holder.[186]

System of Brazil. After proving the absence, loss, or partial or total destruction of a bill clearly and accurately described, its owner can demand from a judge of competent jurisdiction at the place of payment an order directed to the drawee, acceptor or co-obligors not to pay the draft, and to summon its unlawful detainer to appear in court within three months. In case the bill went astray or was destroyed he must demand the summoning of the co-debtors in order that within the same period they may bring their action objecting to the

[185] Spain, 498 to 500; Bolivia, 406 to 408; Honduras, 483 to 485; San Salvador, 437 to 439.

[186] Argentina, 693; Costa Rica, 106; Uruguay, 886.

bill for lack of formal or essential requisites. These citations must be made by means of the press, in the *Diario Oficial* of the federal district and in other papers indicated by the judge, and in the customary places and in the exchange of the place of payment. The period of three months is reckoned from maturity; but if the bill is already due, then from the date of the publication of the citation in the official paper. During that period the owner, provided with a certificate of his demand, and of the judicial decree, can take any step necessary for guaranteeing the credit, and at its maturity, ask from the acceptor the deposit of the amount due. When three months have elapsed without a holder in due course having presented himself, and without any objection on the part of the debtor, the judge must declare the nullity of the lost or destroyed bill and order the depositary to deliver the amount deposited to the owner of the bill. This judgment enables the owner to enforce the *acción ejecutiva* against the acceptor and other obligors.

If in the meantime a holder in due course presents the bill or any of the obligors enter an objection, the judge must drop the demand of nullity, reserving to the applicant all his legal remedies. The institution of this action is no obstacle to demanding a duplicate nor does it dispense the holder from the obligation of immediately notifying the loss of the draft in legal form to the obligors.[187]

System of Ecuador. When a bill of exchange is lost, whether accepted or not, and the holder has no other copy or has not time enough to ask the drawer for one, he can obtain payment by judicial decree, proving the ownership of the bill by means of his books and correspondence and giving a bond, which subsists until the original copy is produced or the action arising therefrom is barred by limitation.[188]

System of Mexico. When a bill of exchange, whether

[187] Art. 36.

[188] Bolivia, 436; Venezuela, 405; Haiti, 149; Santo Domingo, 151.

accepted or not, is lost, and there is no other copy, the holder, besides the right to have it replaced by those who must do so, may:

1. Ask, under his responsibility, the payer of the bill of exchange to deposit the amount thereof on the day of its maturity in a credit institution or in a commercial house designated by common agreement or by the judge.

2. Protest the bill for non-payment if the payer refuses to do so.

3. Demand payment of the bill through the decree of a judge, before whom he must prove ownership.

Obligation of the payer to verify the endorsement.

A general rule admitted by commercial customs and expressly recognized by the law in Brazil,[189] Costa Rica,[190] Peru [191] and Venezuela,[192] exempts the payer from the obligation to verify the authenticity of the endorsements, when he pays a bill of exchange at maturity.

In connection with this rule the code of Argentina [193] provides that the acceptor of a bill is bound to pay it even though it was fraudulently endorsed, provided the holder has received it in good faith and due course from a person qualified to convey it.

The code of Colombia [194] provides that the good faith of the holder does not suffice to authorize the payer to pay a bill fraudulently transferred if he has knowledge of the defect.

The rule is more strict in Costa Rica [195] where, if there is reasonable ground for the drawee to suppose that the last endorsement was forged and pays the bill, or if in making payment he has been in some way negligent, he is responsible with respect to the bill. A payment made in good faith to an insolvent or incompetent holder is lawful.[196]

[189] Art. 40. [190] Art. 107. [191] Art. 473.
[192] Art. 395. [193] Art. 690. [194] Art. 849.
[195] Art. 107. [196] Art. 104.

The Uniform Regulation [197] provides that if a person is dispossessed of a bill of exchange in any way, the holder who can show his rights by means of an uninterrupted series of endorsements even though the last one be in blank, need not surrender the instrument, unless he acquired it in bad faith or through gross negligence.

[197] Art. 15.

CHAPTER XXXI

Bills of Exchange (4)

PROTEST

ACCEPTANCE AND PAYMENT FOR HONOR, ACTIONS, ETC.

Protest as a matter of public policy.

The public interest involved in all matters relating to the fulfillment of the obligations created by a bill of exchange, the number of persons whose liability is involved in such obligations, the fact that they may not know one another, that they may reside in different and distant places, and the many consequences produced by the bankruptcy of the drawee before payment of the amount drawn—all these considerations make it necessary to provide some strict method of evidencing the fact that all the legal requisites have been complied with in the presentation of the bill of exchange for acceptance or payment; inasmuch as upon compliance with these formalities depends the liability or the release of the drawer and endorsers, and, in a general way, the confidence of the people in these instruments of circulation, so important for the general welfare. This is the reason why the law of all the countries of America establishes a solemn and strictly formal method of attesting the non-acceptance and non-payment of a bill of exchange, with the necessity of having recourse to a public officer charged with the function of making such attestation.

The special formalities connected with such attestation are called "protest." [1]

No other act or document can supply the want of protest

[1] Spain, 502; Argentina, 655; Bolivia, 413, 417; Brazil, 27; Chile, 722; Colombia, 855; Costa Rica, 81, 118; Ecuador, 441; Haiti, 170; Honduras, 487; Mexico, 510; Peru, 489; San Salvador, 444; Santo Domingo, 173; Uniform Regulation, 43; Uruguay, 850; Venezuela, 409.

for the preservation of the rights of the holder against the persons responsible for the payment of a bill of exchange.[2]

In some countries the law, with a view to emphasizing the public interest involved in the making of a protest, expressly declares that a clause in a bill of exchange dispensing the holder from the obligation of protesting it, must be considered as void.[3]

Exceptions to the rule.

In some countries, however, the rule has certain exceptions:

In Argentina [4] and Uruguay [5] a protest is not necessary to preserve rights against the drawer, when he has not supplied the drawee with funds, or when the latter becomes bankrupt before the maturity of the bill of exchange; against the endorsers, when the acceptor, the drawer and the previous endorsers are bankrupt; against the endorsers and the drawer, when they have received the amount of the bill of exchange, whether in cash, merchandise or valuables, or when they are debtors of the drawee, according to their accounts; and finally, when the laws of the country where the bill must be paid create some obstacle, direct or indirect, to the making of the protest.

[2] Spain, 509; Argentina, 723; Bolivia, 417; Chile, 735; Colombia, 868; Ecuador, 449; Haiti, 172; Honduras, 494; Mexico, 510; Peru, 496; Santo Domingo, 175; Uruguay, 916; Venezuela, 416.

Lack of protest of a bill of exchange cannot bar the action brought by the holder against the acceptor. Ecuador, Corte Suprema de Justicia, May 15, 1912, A. Manque *v.* C. E. Hoeb y Cia.; *Gaceta Judicial*, No. 138, p. 1100.

The endorser who pays a bill of exchange has the same rights of action against prior co-obligors as the holder has, and can avail himself of the *acción ejecutiva* to collect the amount he paid, as the substitution of creditor results in this case by mere operation of law. Mexico, Tercera Sala del Trib. Sup. del Dist. Fed., Oct. 23, 1913, V. Salmean *v.* M. Ponce, *Diario de Jurisp.*, vol. 31, p. 2.

Failure to protest a bill of exchange extinguishes the rights of the holder against the drawer, payee and endorsers, but not against the acceptor nor against the maker of a promissory note. *Ib.*

The bearer of an unprotested bill of exchange preserves his rights against the acceptor. Mexico, 3a Sala del Trib. Sup. del Dist. Fed., May 8, 1909, J. Ballesteros *v.* Emilio Manuel y Cia., *Diar. de Jur.*, vol. 17, p. 419.

[3] Brazil, 44; Mexico, 519; Peru, 497; San Salvador, 448; Venezuela, 418.

[4] Art. 714. [5] Art. 907.

In Costa Rica[6] the protest can be waived and substituted, if agreeable to the holder, by a document from the drawee or acceptor, declaring his refusal to accept or to pay the bill of exchange; but within two days after the date of such document, it must be authenticated by a public notary, who must present it to the drawee before drawing the memorandum of the facts, and ask him if the signature in the document was his. The notary must note the answer given to this question.

The protest or the document above referred to cannot be substituted by any other form of proof, unless the drawer or the endorsers have otherwise stipulated. Furthermore, it is not necessary to protest a bill of exchange for non-acceptance, when the drawee has died, or was declared insolvent or bankrupt, or when he cannot be located after diligent search.

Protest for non-payment is also unnecessary when the holder is dispensed from the obligation of presenting the bill for payment.

The Uniform Regulation provides[7] that the drawer or any of the endorsers can, by means of the clause "*retorno sin gastos*" (return without expenses), "*sin protesto*" (without protest) or any other equivalent, dispense the holder from the obligation of protesting a bill of exchange for want of acceptance or payment. This clause does not exonerate the holder from the obligation of presenting the draft in proper time, nor of giving notice of non-acceptance or non-payment to the last prior endorser and the drawer. The burden of proving non-observance of the periods provided for presentation lies upon the holder's opponent. When the clause is inserted in the bill by the drawer, it is effective as to each and all the parties to the bill; if, in spite of the clause, the holder protests it, the expenses are for his account. If the clause is inserted by one of the endorsers, the expenses of protest, should there be any, may be charged to any of the obligors.

In Venezuela,[8] the protest can also, with the consent of

[6] Arts. 85 to 87, 129, 130. [7] Art. 45. [8] Art. 416.

the holder, be substituted by a statement of the drawee's reasons for refusing acceptance or payment. This statement must be made within the period fixed for the protest, and must be filed within two days after its date in the Commercial Registry. If this statement is made in a separate document, it must contain a verbatim transcription of the bill of exchange.

Time of protest.

With regard to the time within which protest must be made the following systems may be noted:

System of Spain. Protest is to be made before sunset of the day following that on which acceptance or payment was refused. Should such day be a holiday, the protest must be made on the next working day.[9]

System of Brazil. The bill of exchange which is to be protested must be delivered to the proper official the day after the refusal of acceptance, or after the maturity thereof (as the case may be) and the protest must be made within three working days.[10]

System of Argentina. The bill of exchange must be delivered to the notary who is to make the protest within twenty-four hours after the acceptance or payment should have been made. The protest must be made the next working day before 3 P. M.[11]

System of Chile. The protest must be made before three o'clock of the day after the refusal of acceptance or payment, or if that is a holiday, on the following day.[12]

System of Costa Rica. Non-acceptance is proved by means of a protest made any time before the bill is due, unless it must be presented within a certain period. Protest for non-payment must be made not later than the second day after maturity, not counting holidays. The delay is not imputable to the holder if due to rea-

[9] Spain, 504; Bolivia, 415, 426; Honduras, 489; Mexico, 514, 517; Peru, 491.
[10] Art. 28.
[11] Argentina, 713; Uruguay, 906.
[12] Chile, 723, 724, 736; Colombia, 856, 869.

sons not dependent on his will. The protest must be made not before 8 A. M. or after 6 P. M.[13]

System of Ecuador. The protest must take place before three o'clock. There is no indication of the day on which it is to be made. It is assumed, however, that it must be made the day after the refusal of acceptance or payment.[14]

System of San Salvador. Protest for non-acceptance must be made within the period established for the presentation of the bill of exchange, and protest for non-payment, the day after maturity.[15]

System of the Uniform Regulation. Protest for non-payment must be made on the date of maturity or on either of the following two working days. Protest for non-acceptance must be made in the periods provided for the presentation of the bill for acceptance. If the drawee asks for a second presentation, in accordance with article 23, and the first was made on the last day of the period, the protest can be made the following day.[16]

System of Venezuela. No period is established for protest in case of non-acceptance. We may assume it to be the next working day after refusal. In case of non-payment, protest must be made within two working days after maturity.[17]

When protest can be anticipated.

Protest of a bill of exchange can be anticipated when the drawee becomes bankrupt, and after the protest is made, the holder can enforce his rights against the persons obligated therein.[18]

When protest is unnecessary.

The Uniform Regulation provides that a protest is unnecessary:

[13] Arts. 81, 119, 126. [14] Art. 447. [15] Art. 445.
[16] Art. 43. [17] Art. 396.
[18] Spain, 510; Argentina, 725; Chile, 725; Colombia, 857; Ecuador, 453; Honduras, 495; Mexico, 515; Uruguay, 918.

1st. When acceptance is refused, in which case the protest for non-payment is excused;

2d. When the drawee is bankrupt or has suspended payments, although no judicial declaration thereof has been made, or when, in an attachment of his property, insufficient property was found.

3d. When the drawer becomes bankrupt and the bill of exchange is not subject to previous acceptance.[19]

Place where protest must be made.

With reference to the place of protest, the following systems may be noted:

System of Spain. The place where protest must be made is:

1st. That designated in the bill of exchange.

2d. If there is no designation, then at the residence of the drawee.

3d. If there is no designation and the residence is not known, then at the last known residence of the drawee.[20]

System of Brazil. Protest must be made at the place designated in the bill of exchange for acceptance or payment. When the bill is drawn or is accepted for payment at any other place than the residence of the drawee, it must be protested at that place.[21]

System of Haiti. The place for protest is:

1st. The actual residence of the drawee, or

2d. His last known residence.[22]

System of Costa Rica. Protest must be made at the residence of the drawee.[23]

System of San Salvador. Protest must be made:

1st. At the place indicated in the bill;

[19] Arts. 42, 43.

[20] Spain, 505; Argentina, 716; Bolivia, 421; Chile, 733; Colombia, 866, Ecuador, 442; Honduras, 490; Mexico, 511; Peru, 492; Uruguay, 909; Venezuela, 411.

[21] Art. 28.

[22] Haiti, 170; Santo Domingo, 173.

[23] Arts. 74, 121.

2d. If no place is indicated, then at the residence of the drawee.[24]

Official who performs the protest.

The official charged with performing the formalities of protest, and the procedure incidental thereto, vary as follows:

System of Spain. A notary public.[25]

System of Argentina. A notary public and two resident witnesses not employed by the notary.[26]

System of Chile. A notary public and two witnesses or if there is no notary, the *Subdelegado* (first political authority) of the place and two witnesses.[27]

System of Costa Rica. A notary and two witnesses, or two notaries.[28]

System of Ecuador. A licensed broker and two witnesses, or, in default, a municipal judge with an equal number of witnesses.[29]

System of Haiti. Two notaries, a notary and two witnesses, or a judicial clerk and two witnesses.[30]

System of Mexico. A notary, or in default, the mayor of the town and two witnesses.[31]

System of Uruguay. A notary who must enter the protest in a formal public instrument.[32]

System of Venezuela. A broker or a judge without witnesses.[33]

Necessary persons attending at the protest.

The protest must be carried out before the drawee; or if he cannot be located, before his employees, if he has any; and in default of same, before his wife, children or servants.[34]

[24] Art. 244.
[25] Spain, 504; Honduras, 489; Peru, 491.
[26] Argentina, 712; Bolivia, 419.
[27] Chile, 727; Colombia, 859.
[28] Art. 120. [29] Art. 442.
[30] Haiti, 170; Santo Domingo, 173.
[31] Art. 512. [32] Art. 905. [33] Art. 410.
[34] Spain, 504; Argentina, 715; Bolivia, 421, 423; Chile, 728, 729; Colombia,

In case none of the above mentioned persons can be located, the proceedings must be carried out, in Spain, Honduras, Mexico and Peru, before one of the neighbors; in Argentina, Bolivia, Chile, Colombia, Ecuador, Nicaragua, San Salvador and Uruguay, before the municipal authority.

Brazil,[35] Costa Rica [36] and Venezuela [37] provide that the act of protest must be made before the drawee or his representative; or if after proper inquiry the notary is unable to locate either of them, he can draw up the memorandum, stating the futility of his search.

While the codes of Haiti and Santo Domingo are silent on this point, it may be inferred from articles 170 and 173, respectively, that the system is like that of Brazil.

Requisites of the memorandum of protest.

The laws of all Latin-American countries uniformly require the following requisites in a memorandum of protest.[38]

(*a*) a full and verbatim transcription of the bill of exchange; its acceptance, if there was one, and every endorsement and indication therein contained. Costa Rica, instead of a verbatim transcription, requires a description only of the bill of exchange, showing the names of the drawer, payee and drawee;

(*b*) the demand of acceptance or payment made upon the proper person;

(*c*) the answer given to such demand. In Brazil the demand is not necessary in case the drawee or acceptor signs the declaration refusing acceptance or payment, and is unnecessary when protest is due to the bankruptcy of the acceptor.

Besides these requisites, which are provided for in all the

860, 861; Ecuador, 443; Honduras, 489; Mexico, 511; Peru, 491; San Salvador, 444; Uruguay, 908.

[35] Art. 29. [36] Arts. 121, 124. [37] Arts. 411, 412.

[38] Spain, 504; Argentina, 717; Bolivia, 420; Brazil, 29; Chile, 732; Colombia, 865; Costa Rica, 124; Ecuador, 445; Haiti, 171; Honduras, 489; Mexico, 513; Peru, 491; San Salvador, 446; Santo Domingo, 174; Uruguay, 910; Venezuela, 412.

Latin-American countries, there are further individual requirements of the law in various countries, as follows:

(*a*) Admonition by the notary to the drawee that if he does not pay, the expenses and damages caused by his refusal to accept or pay the bill of exchange will be for his account.[39]

(*b*) The signature of the debtor or person in whose presence the protest is carried out, or that of two witnesses, in case he cannot or does not wish to sign.[40]

In Bolivia, the signature of two witnesses is necessary.

In Chile, Colombia, Ecuador, Haiti, Mexico, Santo Domingo and Venezuela, in case the person to whom the protest is made does not wish, cannot or does not know how to sign, the notary attests that fact in the memorandum.

Argentina and Uruguay require the signature of the holder instead of that of the drawee or acceptor.

Brazil only requires the signature of the official who makes the protest.

In Costa Rica the notary must always be in the company of two witnesses or with another notary, and their signatures only are required.

(*c*) The date and hour of the protest.[41]

(*d*) In Brazil and Costa Rica, it must be stated that the drawee could not be located or was unknown. Should that be the case, Brazil requires the official to post the demand of payment in the customary public places and through the press, if possible.

(*e*) Brazil also requires the protest to state acceptance for honor, with indication of the person for whose honor the guaranty was given and finally, the acquiescence of the holder in such acceptance.

[39] Spain, Argentina, Bolivia, Chile, Colombia, Honduras, Peru, San Salvador and Uruguay.

[40] Spain, Honduras, Peru.

[41] Spain, Argentina, Bolivia, Chile, Colombia, Costa Rica, Honduras, Mexico, Peru, Uruguay, Venezuela.

Other requisites of the protest.

Besides these formalities rather generally prescribed, other codes mention special requisites, as follows:

(*a*) *Copy of the memorandum.* The notary must give a copy of the memorandum to the person before whom the proceedings were carried out.[42]

In Argentina,[43] Costa Rica [44] and Uruguay,[45] the copy must be given to any person concerned demanding it.

In Brazil [46] the memorandum must be entered in the registry of protests and thereupon the holder is given a copy.

(*b*) *Unity of the memorandum.* All the proceedings of protest must be set out in a single instrument in the order in which they are performed, and a copy of the document must be given to the holder who presented the bill for protest.[47]

In Venezuela, the original memorandum is given to the holder.[48] In Mexico, also, the original memorandum is given to the holder when the protest was made by the mayor.[49]

(*c*) *Solemnity of the memorandum of protest.* The memorandum must be entered in the *protocolo* (official record book) of the notary, under penalty of nullity.[50]

Time limit for payment.

The law allows the acceptor a certain period of time for payment of a bill of exchange, as follows:

(*a*) In Spain,[51] Argentina,[52] Bolivia,[53] Chile,[54] Colom-

[42] Spain, 504; Chile, 732; Colombia, 862; Ecuador, 446; Honduras, 489; Peru, 491; Venezuela, 413.

[43] Art. 718. [44] Art. 125. [45] Art. 911.

[46] Art. 29.

[47] Spain, 508; Argentina, 722; Bolivia, 425; Brazil, 29; Chile, 731; Colombia, 864; Costa Rica, 125; Haiti, 170, 173; Honduras, 493; Mexico, 516; Peru, 495; Santo Domingo, 173, 176; Uruguay, 915; Venezuela, 411.

[48] Art. 414. [49] Art. 516.

[50] Chile, 732; Ecuador, 448; Haiti, 173; Santo Domingo, 176; Venezuela, 415.

[51] Art. 506. [52] Art. 713. [53] Art. 426.

bia,[55] Honduras,[56] Mexico,[57] Peru,[58] and Uruguay,[59] notaries must keep the protested bill of exchange and the copy belonging to the holder until sunset of the day of protest; if the protest was due to nonpayment and the drawee presents himself in the meantime to pay the draft and the expenses of protest, the notary must accept payment and surrender the bill of exchange to the payer, stating therein that it was paid and that the protest is cancelled.

(*b*) In Ecuador[60] the time fixed for the notary to keep the bill and receive payment is 6 P. M.

Protest for non-payment is required even if there was protest for non-acceptance.

The fact that the drawee fails to accept a bill of exchange does not establish a presumption, according to law, that he will refuse to pay in proper time; therefore both refusals must be proved in the authentic form of a protest, and the protest for non-acceptance is no excuse for not protesting the bill for nonpayment.[61]

Only the Uniform Regulation[62] prescribes that the non-acceptance of a bill of exchange dispenses the holder from the obligation of presenting it for payment and of protesting it for non-payment.

Protest carried out before the persons indicated.

When a protested bill of exchange has indications of further alternative obligors, the demand of acceptance or payment, the answer given thereto, and the acceptance or payment, if made, must be stated in the memorandum.[63]

[54] Art. 736. [55] Art. 869. [56] Art. 491.
[57] Art. 517. [58] Art. 493. [59] Art. 906.
[60] Art. 447.

[61] Spain, 502; Bolivia, 418; Chile, 723; Colombia, 856; Ecuador, 452; Haiti, 160; Honduras, 487; Mexico, 510; Peru, 489; San Salvador, 447; Venezuela, 417.

[62] Art. 43.

[63] Spain, 507; Argentina, 719; Brazil, 29; Chile, 730; Colombia, 863; Costa Rica, 122, 131; Ecuador, 444; Haiti, 170; Honduras, 492; Mexico, 511; Peru, 494; Santo Domingo, 173; Uruguay, 912; Venezuela, 411.

Argentina [64] and Uruguay [65] in this respect provide, however, that the holder of a bill of exchange is not bound to make the protest before the person indicated therein as alternative acceptor or drawee; but in case he omits to do so, the endorser who made the indication and his assignees can refuse payment so long as the holder fails to make demand upon the person indicated, provided the endorser or assignees prove that since the date of protest before the drawee, the person indicated had and continued to have funds of the endorser for the payment of the bill of exchange and of the expenses of protest.

Effect of protest for non-acceptance.

By virtue of the protest for non-acceptance of a bill of exchange the holder can compel the drawer or any of the endorsers to guarantee the amount of the instrument to the holder's satisfaction or to deposit that amount, or else to make reimbursement of the amount and the expenses of protest and re-exchange, deducting legal interest for the whole period to maturity of the draft.[66]

In Colombia [67] the holder of a bill of exchange protested either for non-acceptance or non-payment, has no claim upon the funds supplied by the drawer, but he can ask the latter to assign all his rights of action against the drawee up to the amount of the bill of exchange and expenses. The drawer is obliged to make such assignment and to surrender all documents in proof of his rights at the expense of the holder. This assignment is no bar to any actions of the holder against the obligors for payment of the bill.

Effect of protest for non-payment.

Every protest for non-payment imposes upon the person

[64] Arts. 720, 721. [65] Arts. 913, 914.

[66] Spain, 481; Argentina, 651; Bolivia, 429; Chile, 687; Colombia, 814; Costa Rica, 84; Ecuador, 450; Haiti, 118; Honduras, 466; Mexico, 529; San Salvador, 408; Santo Domingo, 120; Uruguay, 846; Venezuela, 387.

[67] Art. 822.

responsible the obligation to pay the amount of the bill of exchange and the expenses, interest and damages.[68]

ACCEPTANCE OR PAYMENT FOR HONOR

When and how a bill of exchange can be accepted or paid for honor.

After a bill of exchange has been protested for non-acceptance or non-payment a third party can accept or pay it for honor of the drawer or of any endorser, even though he has not received any request to do so. The acceptance or payment must be admitted, the notary making note of it in the continuation of the memorandum of protest, stating the name of the person for whose honor the acceptance or payment is made, and signing the memorandum together with the acceptor or payer for honor.[69]

In Brazil,[70] Costa Rica,[71] and according to the Uniform Regulation,[72] the holder is not obliged to receive the acceptance, but he is bound to receive the payment for honor made by a third party.

Preference in case of several acceptors or payers for honor.

When several persons undertake to accept or pay a bill of exchange for honor, the one who does so for the drawer is to be preferred. If they act for honor of endorsers, the person

[68] Spain, 503; Argentina, 669; Bolivia, 428; Chile, 703, 737; Colombia, 830, 870; Costa Rica, 118; Ecuador, 437, 456; Honduras, 488; Mexico, 518; Peru, 490; San Salvador, 452; Uruguay, 864; Venezuela, 435.

The deed of protest for non-acceptance of a bill of exchange does not imply a confession of judgment; but the deed of protest for non-payment does. Colombia, Trib. Sup. del Dist. de Magdalena, July 10, 1893, *Revista Jud.* vol. 7, p. 597.

The effect of the protest is that all the signatories of a bill of exchange are kept jointly and severally liable for the payment thereof. Mexico, 2a Sala del Trib. Sup. del Dist. Fed., May 13, 1909, N. Cervantes *v.* A. Roiz, *Diar. de Jur.*, vol. 17, p. 601.

[69] Spain, 511; Argentina, 696; Bolivia, 438; Chile, 738; Colombia, 871; Ecuador, 421, 439; Haiti, 124, 155; Honduras, 496; Mexico, 520, 521; Peru, 456, 485; San Salvador, 411, 441; Santo Domingo, 126, 158; Uruguay, 889; Venezuela, 386, 407.

[70] Arts. 34, 35. [71] Arts. 90, 114. [72] Arts. 55, 58.

who acts for the account of the earliest endorser is to be preferred.[73]

Brazil [74] provides that if no indication is given of the person for whose honor the bill of exchange is paid, it must be understood that it was paid for the drawer, but if the drawee accepted, the payment is presumed to be made in his behalf.

If several persons undertake to pay, whether co-obligors concur or not, preference must be given to the person who discharges the greater number of obligors. When several persons undertake to pay for the same obligor, his co-obligor, or in default, the drawee has the preference; otherwise the holder may elect.

According to the Uniform Regulation [75] when several persons undertake to pay for honor, the one who discharges the most persons must be preferred. Should this rule not be observed, the payer who knows it loses his rights against those who would have been discharged had it been observed.

Payment for honor is prohibited to the acceptor and his surety.

Obligations of the acceptor for honor.

Two obligations rest upon the person who accepts a bill of exchange for honor, namely:

(*a*) to pay it just as if the bill had been drawn upon him; and

(*b*) to notify his acceptance to the person for whose honor he accepted.[76]

Brazil [77] simply provides that the liability of the acceptor for honor is equivalent to that of the drawee who accepts.

[73] Spain, 511; Argentina, 703; Bolivia, 439; Chile, 740; Colombia, 873; Costa Rica, 117; Ecuador, 440; Haiti, 156; Honduras, 496; Mexico, 522; Peru, 458; San Salvador, 412; Santo Domingo, 159; Uruguay, 895; Venezuela, 389.

[74] Art. 35.

[75] Art. 62.

[76] Spain, 512; Argentina, 698; Bolivia, 441; Chile, 742; Colombia, 875; Costa Rica, 92; Ecuador, 422; Haiti, 125; Honduras, 497; Mexico, 524; Peru, 459; San Salvador, 415, 442; Santo Domingo, 127, 159; Uniform Regulation, 54; Uruguay, 895, 897; Venezuela, 388, 389.

[77] Art. 34.

Rights of the holder in case of acceptance for honor.

The fact that a person accepts a bill of exchange for honor does not deprive the holder of his right to compel the drawer or endorsers to guarantee payment thereof.[78]

In Brazil,[79] Costa Rica,[80] and the countries which have adopted the Uniform Regulation,[81] the rule is just the reverse, for the holder cannot demand from the drawer or endorsers the guaranty of payment of a bill which has been accepted for honor.

Payment by the drawee who does not accept.

If the drawee who refused to accept a bill of exchange, thereby giving ground for protest, wishes to pay it at maturity, his payment must be accepted in preference to that of the person who accepted or wished to pay for honor, but he must bear the expenses arising from his refusal to accept at the proper time.[82]

In Brazil [83] any co-obligor of a bill of exchange who wishes to pay for honor is given preference over the drawer and the drawer over the holder, who is willing to pay for honor.

Rights of the payer for honor.

A person who pays a bill of exchange for honor is subrogated to the rights and obligations of the holder, with the following limitations:

(*a*) If he pays for honor of the drawer, the latter is only responsible for the payment of the disbursed amount; the endorsers are released.

(*b*) If he pays for one of the endorsers, he has a right of action against the drawer, the endorser for whose

[78] Spain, 513; Argentina, 700; Bolivia, 442; Chile, 744; Colombia, 877; Ecuador, 423; Haiti, 126; Honduras, 498; Mexico, 525; Peru, 456; San Salvador, 413; Santo Domingo, 128; Uruguay, 893; Venezuela, 387.

[79] Art. 34. [80] Art. 94. [81] Art. 55.

[82] Spain, 514; Argentina, 702; Bolivia, 443; Chile, 747; Colombia, 880; Costa Rica, 116; Ecuador, 440; Haiti, 156; Honduras, 499; Mexico, 523; Peru, 456, 488; San Salvador, 412; Santo Domingo, 159; Uruguay, 895; Venezuela, 387.

[83] Art. 35.

honor he paid and the prior endorsers, but not against the subsequent ones.[84]

Rights of the payer for honor of an unprotested bill of exchange.

The person who pays for honor an unprotested bill of exchange has no other action than that possessed by the holder against the drawer who failed to supply the drawee with funds, or against one who kept in his possession the amount of the bill of exchange.[85]

In Argentina,[86] Chile,[87] Colombia [88] and Uruguay,[89] the payer in the case above mentioned has only an action against the drawer who failed to supply the drawee with funds.

Mexico provides that the payer is subrogated to the rights of the holder, whatever they may be.[90]

The Uniform Regulation [91] makes the same provision with the addition that the payer cannot endorse the bill of exchange.

ACTIONS ARISING OUT OF A BILL OF EXCHANGE (ACCIÓN CAMBIARIA)

Actions in case of non-acceptance.

In case a bill of exchange is not accepted, the holder, after protest thereof, has a right to compel the drawer or any endorser to guarantee, to his satisfaction, the payment thereof or to deposit the amount or pay it with the expenses of protest and re-exchange, deducting the legal interest to maturity, as has been already observed in explaining the effects of the protest; and the fact that a third party accepts the bill of exchange for honor, does not bar this action of

[84] Spain, 512; Argentina, 704; Brazil, 35; Bolivia, 444; Chile, 743; Colombia, 876; Costa Rica, 115; Ecuador, 440; Haiti, 156; Honduras, 497; Mexico, 526; Peru, 486; San Salvador, 442, 443; Santo Domingo, 159; Uruguay, 897; Venezuela, 408.

[85] Spain, 515; Honduras, 500.

[86] Art. 706. [87] Art. 746. [88] Art. 879.

[89] Art. 899. [90] Art. 526. [91] Art. 62.

the holder, except, as previously stated, in Brazil, Costa Rica, and according to the Uniform Regulation.

On the other hand, if the bill of exchange was not accepted by the principal drawee but was accepted by one of the persons indicated in the instrument for that purpose, the holder has no right of action against the drawer or endorsers, inasmuch as in taking the bill he accepted its conditions.

The action above mentioned is of the type known as "executive" (*acción ejecutiva*).[92]

The Uniform Regulation [93] provides that the holder of a bill of exchange which is not accepted, can bring his action for payment against the drawer and other obligors without awaiting maturity or a protest for non-payment.

Actions in case of non-payment.

In case a bill of exchange duly presented and protested is not paid, the holder has a right to compel the acceptor, the drawer or any of the endorsers to pay it with the expenses of protest and re-exchange; but once the action is instituted against one of them, the holder cannot proceed against the others, except in case of insolvency of the defendant.[94]

In Chile [95] and Colombia [96] the rule is almost the same, but the holder who has instituted his action against one of the obligors, can drop it and begin suit against any other co-debtor, in three cases, namely:

(*a*) in case of total or partial insolvency of the defendant, legally proved;

(*b*) in case of bankruptcy of the defendant;

(*c*) in case the action is abandoned (*desistimiento*) against the defendant, in which case the cost of the suit is to be borne by the plaintiff.

[92] Spain, 522; Argentina, 673; Brazil, 49; Costa Rica, 150; Honduras, 507; Mexico, 534; Peru, 509; Uruguay, 868; Venezuela, 438. See *infra*, under Procedure.

[93] Arts. 42, 43.

[94] Spain, 516; Argentina, 669; Bolivia, 430, 431; Brazil, 50; Costa Rica, 144, 145, 147; Ecuador, 456; Honduras, 501; Mexico, 528; Uruguay, 864.

[95] Arts. 703, 705. [96] Arts. 830, 832.

In Ecuador,[97] Haiti [98] and Santo Domingo,[99] the holder of an unpaid bill of exchange, without prejudice to his action, can attach personal property of the obligors and obtain a judicial decree of *lis pendens* prohibiting said persons from selling real estate to the amount necessary to guarantee payment.

The rule in Peru [100] and Venezuela [101] is somewhat different: the holder of an unpaid bill of exchange can bring his action against several obligors simultaneously, or against any one of them, without thereby impairing his rights against the others. Article 46 of the Uniform Regulation provides that every person who signed a bill of exchange as drawer, acceptor, endorser or surety is jointly and severally liable to the holder as guarantor. The latter can begin an action against any or all these persons jointly or separately, without being obliged to follow the order in which they became bound. The same right attaches to any of the signatories who pays the bill of exchange. The action against any one of the co-obligors does not bar a proceeding against the others, though they bound themselves subsequently to the person first sued.

Rights of the endorser who pays.

The endorser who pays a protested bill of exchange is subrogated to the rights of the holder.[102]

The drawer as well as any endorser of a protested bill of exchange, as soon as he has knowledge of the protest, can compel the holder to receive payment and thereupon to surrender the instrument with the memorandum of protest and the account for the redraft.[103]

[97] Art. 461. [98] Art. 169. [99] Art. 172.
[100] Art. 505. [101] Art. 434.

[102] Spain, 519; Argentina, 624, 625; Bolivia, 435; Brazil, 24; Chile, 704; Colombia, 831; Costa Rica, 142; Ecuador, 456; Haiti, 161; Honduras, 504; Mexico, 528; Peru, 506; San Salvador, 455; Santo Domingo, 164; Uniform Regulation, 48; Uruguay, 821; Venezuela, 431, 435.

[103] Spain, 520; Bolivia, 437; Ecuador, 472; Honduras, 505; Mexico, 531; Uniform Regulation, 49; Venezuela, 429.

Character of the action.

The action for payment of a bill of exchange is "*ejecutiva*" [104] against the drawer, endorsers or acceptor, that is, a writ of attachment issues by virtue of the mere exhibition of the bill of exchange and the memorandum of protest, without any other requisite than the acknowledgment of his signature by the defendant, if drawer or endorser. Such acknowledgment is not necessary when the action is brought against the acceptor, unless he declared at the time of protest that his signature was forged.[105]

Defenses to a suit arising out of a bill of exchange.

To a suit for the collection of the amount of a bill of exchange, the defendant has the following defenses only:

In Spain, forgery of the bill; set-off consisting in a claim against the plaintiff enforcible by means of an "*acciôn ejecutiva*"; the statute of limitations; partial or total release; and extension of the period for payment.[106]

In Argentina [107] and Uruguay [108] the same defenses are admitted, but it is necessary to produce in support thereof a public or a private instrument; the signature of the private instrument must have been judicially acknowledged.

Brazil [109] admits all defenses based on a personal right of the defendant against the plaintiff, on defects of form in the instrument, and on absence of the necessary requisites to bring an action.

In Colombia [110] all kinds of defenses are valid, provided they arise out of acts or contracts of the owner of the bill of exchange, and not out of acts of the drawer or endorsers, except forgery of the bill itself.

[104] See chapter on Procedure.

[105] Spain, 521; Argentina, 673,675; Bolivia, 430,431; Brazil, 49; Chile 455 c. c. p.; Colombia, 834; Costa Rica, 150, 151; Haiti, 169; Honduras, 506; Mexico, 534; Peru, 509; Santo Domingo, 172; Uruguay, 868, 869; Venezuela, 438.

[106] Arts. 523 and 1465 c. c. p.

[107] Art. 676. [108] Art. 870. [109] Art. 51.

[110] Art. 835.

In Costa Rica [111] only those defenses are admitted which derive from substantial vices of the obligation contracted, and those of a personal character against the plaintiff, even though not derived from the bill itself. These defenses, however, can be advanced only when they can be proved in writing or by admission of the plaintiff, or when there is at least a foundation of evidence in writing.

In Mexico [112] the defenses are the same as in Spain, but the extension of the period for payment of the bill of exchange and total or partial release must be evidenced by means of a public or private instrument judicially acknowledged.

In Venezuela [113] the defenses are: formal defects of the instrument, absence of the necessary requirements for bringing the action, and personal defenses against the plaintiff.

Releases.

Any release by the creditor of a debtor from whom the payment of a bill of exchange is asked, inures to the benefit of the other debtors.[114] This rule is a consequence of the character of the obligations involved in a bill of exchange.

Actions derived from a lapsed bill of exchange.

When the holder of a bill of exchange fails to comply with the legal requisites of presentation and protest, as the law provides, his action is limited to certain persons and depends upon certain conditions. Three systems are followed in this regard, namely:

First system. The holder of a bill of exchange which has become impaired because of failure to present or protest it or to notify the protest in proper time and form, preserves his rights against the drawer or endorsers who, after the expiration of said periods, have

[111] Art. 152. [112] Art. 535. [113] Art. 439.

[114] Spain, 524; Argentina, 677; Costa Rica, 153; Honduras, 509; Mexico, 536; Uruguay, 871.

received from the drawee the amount of the bill or have balanced such amount in their accounts with the debtor.[115]

Second system. The holder loses all his rights against the endorsers, but the drawer is bound to pay up to the amount by which he has been enriched through the transaction.[116]

Third system. The holder who does not make the protest in proper time and legal form loses his right to be reimbursed by the drawer, endorsers and sureties.[117]

The Uniform Regulation establishes, furthermore, that in such case the rights of the holder against the acceptor are reserved; and when the drawer has provided for a fixed period to present the bill for acceptance and the holder fails to present it within that period, he loses his rights of action, whether originating in non-acceptance or in non-payment of the instrument, unless by the terms of the stipulation it is clearly apparent that the drawer desired to be exonerated only of his warrant of acceptance. If the period for presentation of a bill is contained in an endorsement, only the endorser can take advantage of such stipulation.[118]

REDRAFT AND RE-EXCHANGE

Redraft.

The holder of a protested bill of exchange, besides his privilege of bringing an action against the drawer, endorsers or acceptor, can recover the amount of the bill and the expenses of protest and re-exchange by drawing a new bill of exchange against the drawer or any of the endorsers, accompanying the draft by the original bill, a certified copy of the protest and the redraft account.[119] In practically all the

[115] Spain, 525; Argentina, 672; Chile, 702; Colombia, 829; Costa Rica, 137; Ecuador, 459; Mexico, 533; Haiti, 166, 167, 168; San Salvador, 455; Uruguay, 867.

[116] Peru, 511; Venezuela, 441.

[117] Brazil, 32; and Uniform Regulation, 52.

[118] Art. 52.

[119] Spain, 527; Argentina, 726 to 729; Bolivia, 445 to 447; Brazil, 37; Chile,

countries except Brazil, an affidavit of a broker or in default, of two merchants, certifying the rate of exchange between the place of issue of the redraft and of the original bill, must accompany the redraft.

Items of a redraft account.

The redraft account must contain, in such case, the following items:

(*a*) the amount of the original bill of exchange;
(*b*) the expenses of protest;
(*c*) the stamp tax for the redraft;
(*d*) the commission for drawing, according to local usage;
(*e*) broker's fees;
(*f*) postage expenses;
(*g*) exchange for the redraft.

The account must state the name of the person on whom the redraft is drawn. Argentina, Costa Rica and the Uniform Regulation do not mention stamp taxes among the items to be included.

Interest on a bill of exchange.

Although only Chile, Colombia, Costa Rica, Ecuador, Mexico, Peru, San Salvador and Uruguay enumerate, among the items of a redraft account, the interest due on the amount of an unpaid bill of exchange, it is believed that this item can be included even in countries where the law is silent, because they all provide that interest is payable on obligations in case of default. There are, however, two systems in regard to the time from which interest runs:

First system. Interest runs from the date of the protest.[120]

749 to 754; Colombia, 882 to 887; Costa Rica, 138 to 141; Ecuador, 462 to 467; Haiti, 175 to 178; Honduras, 512; Mexico, 537, 539; Peru, 498, 499; San Salvador, 449, 450; Santo Domingo, 181; Uniform Regulation, 51; Uruguay, 919 to 922; Venezuela, 420 to 424.

[120] Spain, 526; Argentina, 737; Bolivia, 428; Ecuador, 471; Haiti, 181; Honduras, 511; Nicaragua, 306; Santo Domingo, 184; Uruguay, 930; Venezuela, 438.

Second system. Interest runs from the date of maturity.[121]

In Mexico, there are two conflicting provisions: article 527 prescribes that interest runs from the first working day available for the protest of the bill, whereas article 539 allows the creditor to demand interest from the day the bill became due. It is believed that the second rule prevails, because it is in accordance with the general rules governing mercantile default.[122]

Interest on expenses.

Regarding the interest due on the expenses of protest, etc., Argentina,[123] Brazil,[124] Costa Rica,[125] and Uruguay [126] provide that it runs from the date on which these expenses were incurred; whereas Ecuador,[127] Haiti,[128] Santo Domingo [129] and Venezuela [130] provide that it runs from the day action is brought.

Number of redraft accounts.

As a rule the codes provide that only one redraft account can be made, and the ultimate debtor, the drawer, is obliged to pay it.[131] Costa Rica,[132] however, authorizes any of the persons who are obliged to pay to draw a new redraft account.

Re-exchange accounts.

What has been said concerning the redraft account also applies to the re-exchange, the amount of which must be graduated by increasing or diminishing the part which affects each purchaser according as the draft was negotiated

[121] Brazil, 38; Costa Rica, 140; Peru, 449; Uniform Regulation, 47.
[122] See chapters on Commercial Contracts.
[123] Art. 737. [124] Art. 38. [125] Art. 140.
[126] Art. 930. [127] Art. 471. [128] Art. 182.
[129] Art. 185. [130] Art. 428.
[131] Spain, 529; Bolivia, 450; Chile, 758; Haiti, 891; Ecuador, 469; Honduras, 514; Mexico, 542; Nicaragua, 309; Santo Domingo, 182.
[132] Arts. 142, 143.

with a premium or at a discount, each obligor being obliged to pay only his own re-exchange account.[133]

Interest on the amount of a redraft.

The holder of a redraft is subject to the same rules as the holder of a regular bill of exchange, for the redraft is nothing more than that; the interest on such redraft runs in the same manner and time as on the original bill. The rule, however, varies in different systems as follows:

(*a*) Interest runs from the day the holder requests payment in legal form.[134]

(*b*) Interest runs from the day the action is brought.[135]

(*c*) Interest runs from the day of protest.[136]

(*d*) Interest runs from the day the original bill became due and the expenses were incurred.[137]

Period for issuing redraft.

In Argentina [138] and Uruguay [139] the holder of a protested bill of exchange can issue a redraft, also known as a cross bill, only when he does so at the first opportunity and not later than by the second regular mail for the place on which the redraft is drawn.

In Peru [140] the period for redraft is fifteen days from the protest.

CONFLICT OF LAWS

No other mercantile transaction so frequently gives rise to the application of principles of the conflict of laws as bills of exchange, which, by their nature, are created to settle

[133] Spain, 529; Argentina, 731; Bolivia, 451; Brazil, 38; Chile, 757; Colombia, 890; Costa Rica, 142, 143; Ecuador, 469; Haiti, 180; Honduras, 514; Mexico, 543; Peru, 500; San Salvador, 451; Santo Domingo, 183; Uniform Regulation, 51; Uruguay, 924; Venezuela, 452.

[134] Spain, 530; Honduras, 515.

[135] Bolivia, 452; Mexico, 544; Ecuador, 471; Haiti, 181; Santo Domingo, 185; Venezuela, 482.

[136] Chile, 760; Colombia, 893.

[137] Costa Rica, 140.

[138] Art. 733. [139] Art. 926. [140] Art. 510.

obligations between parties often residing in different countries.

Aside from the general rules presented in the chapter on the Conflict of Laws, certain countries make special provision for the adjustment of conflicts arising from bills of exchange.

The codes may be divided into two groups: (1) those which provide for a general system of settling conflicts arising from bills of exchange; (2) those which, abiding by the general rules, provide only for conflicts arising from the presentation of bills of exchange. The first group comprises Argentina, Brazil, Costa Rica, the countries that follow the Uniform Regulation, and Uruguay.

General rules.

In Argentina [141] and Uruguay [142] all questions in regard to the essential requisites of bills of exchange, their presentation, acceptance, payment, protest and notifications must be decided according to the law of the place where those acts are performed; nevertheless, if the statements made in a foreign bill are sufficient according to the laws of Argentina or Uruguay, respectively, the circumstance that they are defective according to foreign laws cannot give rise to defenses against endorsements subsequently added in those countries.

In Brazil [143] the substance, the effects, the extrinsic form and the means of evidence of an obligation arising out of a bill of exchange are regulated by the law of the place where the obligation was created.

Costa Rica [144] provides that in regard to the form of a bill, the law of the place where the instrument was created governs; and in regard to the supervening contracts, such as endorsements, suretyship, and acceptance, the law of the place where each of these was entered into governs. Nevertheless, if one of the contracts contained in a bill of exchange or even the bill itself, is void by reason of defects in

[141] Art. 738. [142] Art. 931. [143] Art. 47.
[144] Arts. 159, 160.

form or for fiscal reasons, according to the law of the place where such contract was entered into, a subsequent contract entered into within the Republic is valid.

Each of the obligations contained in a bill of exchange is governed as to its content by the law of the place where it was contracted. In the matter of the performance of the contract (maturity, method of making or failure to make payment, etc.), the law of the place of performance governs. The limitation of actions is governed by the law of the place where the contract was entered into.

According to the Uniform Regulation [145] the form of a bill of exchange is governed by the law of the country where the bill was created.

The form and periods of protest, as well as of all other acts looking to the enforcement and preservation of rights in matters of bills of exchange are governed by the law of the country where each of these acts takes place.

The second group of countries above mentioned comprises the rest of Latin-America; but as they are not inspired by a common idea, we find the following systems prevailing:

First system. This system provides that the law of the place where a bill payable at sight or at a certain period from sight is to be presented or cashed, must govern.[146]

Bolivia,[147] however, with reference to the "*usance*," provides that it constitutes a period of thirty days, when the bill is drawn from one place on another within the Republic or on another country; whereas the "*usance*" of a draft from abroad drawn on a place in the Republic, must be reckoned in accordance with the law of the place where the draft was created.

Second system. Under this system the law of the country governs bills of exchange payable at sight or at a certain period from sight, whether they are

[145] Arts. 75, 76.
[146] Spain, 474, 475; Bolivia, 377 to 379.
[147] Art. 374.

drawn upon the country, or from it upon a foreign country.[148]

Third system. This refers only to bills of exchange drawn from abroad on places within the national territory, the law of which must be applied.[149]

Fourth system. This provides for the presentation of bills of exchange at sight or at a period after sight, drawn in the Republic on another country; to these the national law applies.[150]

[148] Chile, 685; Colombia, 812; and 508 of the National Code of Commerce of 1870; Ecuador, 411; Peru, 447; San Salvador, 402; Santo Domingo, 160; Venezuela, 377.

[149] Haiti, 157; Mexico, 485.

[150] Honduras, 460.

CHAPTER XXXII

LOCAL BILLS OF EXCHANGE, PROMISSORY NOTES, CHECKS, ETC.

A bill of exchange payable at the place where issued is called a *libranza* or local bill of exchange. When the bill of exchange was the instrument of the contract of exchange, the distinction between drafts payable at home and those payable abroad was very substantial; but with the growth of modern ideas in regard to bills of exchange the importance of the distinction has disappeared, at least in countries which have accepted the new views. The other countries preserve a distinction, often subtle, between local bills of exchange and those payable at a place different from that of issue.

The countries which mention the *libranza* are: Spain,[1] Bolivia,[2] Chile,[3] Colombia,[4] Ecuador,[5] Guatemala,[6] Honduras,[7] Mexico,[8] and Venezuela.[9] Costa Rica also refers to *libranzas*, but only to declare that they are subject to the same rules as other bills of exchange.

[1] Art. 531.

An inland bill of exchange requires that the name "*libranza*" be written upon it, according to article 531 of the code of commerce. Cuba, Sup. Trib., Sept. 12, 1903, F. Aguirregoviria e Ebargiien *v.* C. Baro, *Jurisp. del Trib. Sup. en Mat. Civil*, vol. 19, p. 49.

The difference between a bill of exchange and a *libranza* is that the latter is not drawn from one place upon another, inasmuch as there is no exchange of money. Mexico, Segunda Sala del Trib. Sup. del Dist. Fed., Jan. 6, 1910, L. G. Labastida *v.* W. C. On, *Diar. de Jurisp.* vol. 19, p. 705.

A *libranza* must contain the statement of the place of payment, the manner in which its amount was received and the mercantile transaction from which it originated, when it is not made between merchants. Mexico, Tercera Sala del Trib. Sup., Dec. 13, 1909, A. Carballo *v.* M. Najera Luzuriaga, *Diar. de Jurisp.* vol. 19, p. 497.

A bill of exchange which is not drawn from one place upon another is considered a *libranza*. Mexico, Juzgado 5° de lo Civil del Dist. Fed., Feb. 2, 1904, E. Martinez *v.* J. Berlon, *Diar. de Jurisp.*, vol. 1, No. 48, p. 6.

[2] Art. 460. [3] Art. 765. [4] Art. 898.
[5] Art. 475. [6] Art. 647. [7] Art. 516.
[8] Art. 545. [9] Art. 446.

Among the countries named, Spain, Bolivia, Chile, Colombia and Haiti require that the *libranza* bear that literal designation.

Other requisites of the libranza.

Other requisites of the *libranza* are:

(*a*) the date of issue;
(*b*) the amount drawn;
(*c*) the period for payment;
(*d*) the name of the payee and of the payer;
(*e*) the method in which the amount was received by the drawer; and
(*f*) the signature of the latter.

Spain, Bolivia, Chile, Colombia and Honduras also require the statement of the place at which payment is to be made.[10]

Rules applicable to the libranza.

The rules of bills of exchange apply to the *libranza* payable to order or originating in a mercantile transaction.[11]

In Spain [12] and Honduras [13] an exception is made of matters relating to acceptance, because the *libranza* is not subject to it.

PROMISSORY NOTES

Whether a promissory note is commercial or not is determined according to the following systems:

[10] Spain, 531; Bolivia, 463; Chile, 771; Colombia, 904; Ecuador, 475; Guatemala, 651; Honduras, 516; Mexico, 546; Venezuela, 446.

[11] Chile, 768, 769; Colombia, 901, 902; Ecuador, 476; Mexico, 549; Venezuela, 447.

The clause "value understood," or "value on account" indicates that the endorser has not been paid the price of the draft. This is also applicable to promissory notes and inland bills of exchange (*libranzas*). Ecuador, Corte Suprema de Justicia, Jan. 20, 1908, F. G. Martinez *v.* D. Capuli; *Gaceta Judicial*, 1908, No. 33, p. 266.

Local bills of exchange (*libranzas*) are subject with respect to their acceptance, to the general rules of bills of exchange. Mexico, Juzgado 7° menor del D. F., July 22, 1892, F. de S. Puron *v.* R. Arguero y Cia., *Anuario de Legislación y Jurisp. Sección de Jurisprudencia*, vol. 9, p. 149.

[12] Art. 532. [13] Art. 517.

First system. It is or is not commercial according to the nature of the act out of which it originates.[14]

Second system. It is commercial if made "to order," otherwise it is subject to civil law.[15]

Third system. It is not commercial when not payable to order. The actions arising therefrom depend on the nature of the transactions in which the obligation originated.[16]

Fourth system. Brazil,[17] Costa Rica,[18] and the Uniform Regulation [19] do not attempt to characterize the promissory note as mercantile or not; they merely state the requisites of a promissory note under their special law. Those requisites are: That a promissory note must contain (*a*), a promise to pay. In Costa Rica and according to the Uniform Regulation this promise must be unconditional; (*b*), the amount to be paid; (*c*), the signature of the promisor; (*d*), in Brazil and in countries governed by the Uniform Regulation, the word "*pagare*" or its equivalent in the language of the country; (*e*), Brazil [20] also requires that the date of payment be precise and single for the full amount due; (*f*), the Uniform Regulation requires the name of the person to whom or to whose order payment must be made.

[14] Spain, 532; Chile, 767; Colombia, 900; Honduras, 517; Venezuela, 446.

[15] Argentina, 740; Bolivia, 461; Costa Rica, 177; Haiti, 184; San Salvador, 463; Santo Domingo, 187; Uruguay, 933.

A promissory note need not be executed with the legal formalities required for the contract in which it originated, in order to produce all its legal effects. Colombia, Trib. Sup. del Dist. del Cauca, Oct. 12, 1891; *Gaceta Judic. del Cauca*, vol. 2, p. 683.

The administrator (*curador de bienes*) of a person whose death is presumed (*ausente*) has no power to endorse a promissory note belonging to that person; he must collect it personally. Colombia, Trib. Sup. del Dist, de Cundinamarca, Sept. 15, 1896, *Reg. Jud. de Cundinamarca*, vol. 9, p. 1899.

When a person signs a promissory note, believing in the existence of a "cause" for so doing, but that belief proves to have been erroneous, he cannot be compelled to pay the instrument. Colombia, Sup. Trib. del Dist. del Sur del Tolima, Nov. 25, 1898, *Cronica Judicial*, vol. 10, p. 5144.

[16] Mexico, 547. [17] Art. 54. [18] Art. 177.

[19] Arts. 77, 78. [20] Art. 55.

In the absence of special indication the place of payment in Brazil is deemed to be the domicil of the maker, and according to the Uniform Regulation the place where the note was issued; but if no mention is made of the place where the note was issued, it is presumed to have been issued at the place indicated beside the name of the maker. In Brazil, an alternative indication of the place of payment is allowed, the election lying with the holder.

Maturity of promissory notes without stated term.

Some of the codes provide specially that a promissory note payable to order without indication of the time of payment, shall become due ten days from the day following its date.[21]

Brazil [22] and the Uniform Regulation [23] provide that when no indication is made of the date of payment, the promissory note is payable at sight. In Brazil, furthermore, when the promissory note does not state the date and place of payment, the holder may insert these items.

The maturity of promissory notes in the other countries is governed by the general rules relating to obligations already discussed.

Notes payable to bearer.

Inasmuch as no principle of public policy is involved in drawing a note to bearer, we must assume that such a note is lawful whenever the law does not provide otherwise. Spain,[24] and Uruguay [25] expressly recognize the validity of such notes. Bolivia [26] and Ecuador,[27] on the contrary, provide that such instruments give rise to no judicial action.

Mexico [28] provides that promissory notes cannot be issued at sight or to bearer, except as provided in the law of credit institutions; and, as already observed, promissory notes not

[21] Bolivia, 471; Chile, 778; Colombia, 911; Costa Rica, 180; Guatemala, 661.
[22] Art. 54. [23] Art. 78. [24] Art. 544.
[25] Art. 933. [26] Art. 473. [27] Art. 479.
[28] Art. 551.

made "to order" are not of themselves mercantile instruments.

The Uniform Regulation requires as an essential formality of a promissory note the statement of the name of the person to whom or to whose order payment is to be made, and provides further [29] that the instrument lacking such requisite is not valid as a promissory note.

CHECKS

Many persons, merchants and others, used to deposit in the house of a banker, all money, valuables and securities, in order to save the expenses of a private cashier and to avoid the risks of theft and fire. They used also to dispose of the funds so deposited by means of drafts payable at sight, called checks. This usage has met with very wide acceptance, and the more advanced the commercial methods and the quicker the circulation, the more frequent is the use of checks.

Spain,[30] Brazil,[31] Honduras,[32] Mexico,[33] Peru,[34] San Salvador [35] and Venezuela [36] allow the check to be drawn upon the depositary whether he is a merchant or not.

Argentina [37] prohibits the drawing of checks on any depositaries except banks.

Costa Rica [38] provides for checks drawn on bankers only.

In Brazil, the matter of checks is governed by special law No. 2591, of August 7, 1912, to which reference is made in this respect. Article 1 of that law provides that every person who has funds at his disposal at a bank or at a merchant's can draw checks or orders of payment at sight for all or part of the funds, in his own favor or in favor of someone else. By the words "funds at his disposal" is understood, (*a*), the liquid credit amount in an account current with a bank; (*b*), the demandable balance in contracts of current account;

[29] Art. 78.
[30] Art. 534.
[31] Law No. 2591 of August 7, 1912, Art. 1.
[32] Art. 519.
[33] Art. 552.
[34] Art. 523.
[35] Art. 456.
[36] Art. 450.
[37] Art. 798.
[38] Art. 162.

or (*c*), the amount of an open credit. In the second and third of these cases it is necessary to have the previous consent of the payer.

The Hague Conference for the unification of the law relating to checks also drew a Resolution of thirty articles regulating the matter, hereafter cited under the term Hague Resolution. This resolution seems to have been adopted by Guatemala and Nicaragua, and it has been incorporated in the code of Panama from art. 919 to art. 943. Article 3 authorizes the drawing of a check on any person who has funds at the disposal of the drawer, provided there is between the parties an express or tacit agreement to draw in that form.

Requisites of checks.

The formal requisites of checks are as follows: [39]

(*a*) the name and signature of the drawer;

(*b*) the name of the drawee. Spain, Honduras and San Salvador also require his domicil;

(*c*) the amount drawn and the date, in figures and words. Argentina requires that the amount be written by hand, without using any means of printing or any other mechanical device and also without erasures, and expressing the kind of money to be paid. In Peru the check must also bear a serial number;

(*d*) a statement whether it is payable to a specific person, to order or to bearer. In Mexico, only checks drawn in favor of a specific person and to bearer are mentioned. In the Hague Resolution the order of payment must be unconditional.

In Brazil and in the countries that have adopted the Hague Resolution a check must also contain:

(*e*) the word "check" written in the instrument;

(*f*) an indication of the place where the check was issued;

(*g*) an indication of the place of payment.

[39] Spain, 535; Brazil, art. 2 of law No. 2591; Argentina, 800; Honduras, 520; Mexico, 553; Peru, 524, 525; Hague Resolution, 1, 4; San Salvador, 457; Venezuela, 451.

In Brazil, the amount of the check must be written in words and in figures, and the day and month must also be written out. In case no indication is made of the place of issue, it is assumed that the check was drawn at the place where it must be paid.

The Hague Resolution provides that a document lacking some of the requirements above mentioned is not a check except in the following cases: (*a*) when no indication is made of the place of payment it is understood that the place mentioned beside the name of the drawee is the place of payment and the drawee's domicil as well; (*b*) when there is no indication of the place of payment, it is payable at the place of issue; (*c*) when no mention is made of the place of issue, it is assumed to have been drawn at the place stated beside the name of the drawee.

Places on which checks can be drawn.

Checks may be drawn at the place where they must be paid or at other places.[40]

In Brazil and Peru there is no provision against drawing a check at a place different from that of payment, but from the context of article 526 of Peru we infer that in that country a check can never be drawn at a place so distant that the mail requires more than eight days to bring it to the place of payment. The same is true for Venezuela,[41] except that the period is fifteen days.

Period in which a check must be presented.

The holder of a check must present it for collection within the following mentioned periods after the date of issue:

(*a*) In Spain [42] and Honduras [43] five days, if issued at the place of payment; eight days, if issued at another place within the country, and fifteen days, if issued in a foreign country.

[40] Spain, 536; Brazil, 2; Costa Rica, 167; Honduras, 521; Mexico, 558; San Salvador, 458; Hague Resolution, 1, 2.

[41] Art. 453. [42] Arts. 537, 538. [43] Arts. 522, 523.

(*b*) In Argentina, fifteen days, if drawn at the place of payment and one month if at other places.[44]

(*c*) In Costa Rica, the periods are eight, fifteen and thirty days, respectively, for checks drawn at the place of payment, at other places within the country or in a foreign country.[45] The days when the office of the drawee is closed are not counted.

(*d*) In Mexico, eight days is the period for local checks, and one day for every 100 kilometers of distance in other cases.[46]

(*e*) In Peru, eight days is the invariable period.

(*f*) In Brazil [47] and San Salvador [48] five days is the period for domestic checks and eight days for any other.

The Hague Resolution [49] establishes ten days as the period for collecting a check payable at the place of issue; fifteen days, if drawn at other places in the country, and the period extended according to the distance and the means of communication, if drawn abroad. The presentation of the check to a clearing house is considered a proper presentation.

(*g*) In Venezuela, the periods are eight days if the check is payable at the place of issue and fifteen days otherwise.[50]

Penalty for failure to present check in proper time.

The holder of a check who fails to present it within the periods above mentioned loses his right of action against endorsers, and may also lose it against the drawer if the funds with which the drawee was supplied for making payment are dissipated by reason of his suspension of payments or his bankruptcy.[51]

In Brazil [52] and according to the Hague Resolution [53] the holder who does not present a check for collection within

[44] Arts. 813, 815. [45] Art. 167. [46] Art. 558.
[47] Art. 4. [48] Art. 459. [49] Art. 14.
[50] Art. 454.
[51] Spain, 537; Argentina, 813; Honduras, 522; Mexico, 559; Peru, 526; San Salvador, 459; Venezuela, 454.
[52] Art. 5. [53] Art. 14.

the period provided for by the law, or who fails to protest it in case of non-payment, loses his rights against the endorsers and their sureties, and also against the drawer if funds were supplied by him and they are dissipated without the drawer's fault.

Argentina provides that banks can pay checks presented after the legal period, if no more than double the period has elapsed.[54]

Payment must be at sight.

The payment of a check must be made at sight.[55] Venezuela, however, provides that a check can be drawn at sight or at a period no greater than six days after sight.[56]

Receipt.

As an application of the general rule that the creditor must furnish a document to prove that the obligation has been fulfilled, Spain,[57] the Hague Resolution,[58] Honduras,[59] Mexico [60] and San Salvador [61] provide that the person to whom the check is paid must acknowledge the receipt thereof by signing his name thereon.

Spain, Honduras and San Salvador also require the date of the receipt.

Duplicate checks.

No duplicate of a check can be issued without previously cancelling or nullifying the original, after the lapse of the legal period for presentation and with the consent of the drawee.[62]

Crossed checks.

With a view to avoiding the misuse and false endorsement

[54] Art. 815.

[55] Spain, 539; Argentina, 804; Brazil, 10; Costa Rica, 163; Hague Resolution, 13; Honduras, 524; Mexico, 562; Peru, 525; San Salvador, 460.

[56] Art. 451. [57] Art. 539. [58] Art. 18.

[59] Art. 524. [60] Art. 560. [61] Art. 460.

[62] Spain, 540; Honduras, 525; San Salvador, 461.

of checks a custom has arisen, which has been incorporated in the law of some countries, of crossing the check with the words "and company," in which case the check is said to be crossed in general, or with the specific name of a banker or commercial house, in which case the check is said to be crossed specially. These words can be written in the check either by the drawer or by any of the endorsers. The payment must then be made to some commercial house, in the first case; or to the banker or commercial house individually designated, in the second. Any payment made otherwise does not release the payer.[63]

In Costa Rica the law provides for the use of the word "banco," when the check is said to be crossed in general, and the same word followed by the specific name of some bank when the check is said to be specially crossed.[64]

General provisions.

The rules governing the joint and several guaranty of drawers and endorsers, endorsement, protest and the special actions established for bills of exchange, are equally applicable to checks.[65]

In Argentina, the holder of a check not paid must notify the drawer thereof on the same day, if the latter lives at the same place, or by the second mail, if he lives elsewhere. Payment must be made by the drawer, in that case, within twenty-four hours if at the same place, and by the second mail otherwise. After these periods the holder can protest the check for non-payment.

The Hague Resolution provides [66] that the presentation and lack of payment must be proved:

(*a*) by an authentic act (protest);

(*b*) by a declaration of the drawee, dated and signed on the check itself, indicating the day of presentation;

[63] Spain, 541; Argentina, 819 to 830; Honduras, 526; San Salvador, 532.

[64] Arts. 169, 170.

[65] Spain, 542; Argentina, 836; Hague Resolution, 22, 24, 30; Honduras, 527; San Salvador, 530; Venezuela, 452.

[66] Art. 22.

(*c*) by the declaration of a clearing-house attesting that the check was presented in proper time and not paid.

The protest [67] for non-payment must take place before the end of the period fixed for presentation. Within that period the protest must be made at the latest on the first working day after presentation.

In Mexico a check is not subject to endorsement or protest.[68]

In Venezuela a check can be protested for non-acceptance.[69]

Cases in which payment of checks may be refused.

There are certain cases in which payment of checks may be suspended or refused. Notwithstanding the intention of the law to provide the check with an independent existence entirely detached from the circumstances or transactions in which it arose and the personal qualifications of the holder, there are cases in which it is necessary to suspend or refuse payment of a check in order to avoid palpable frauds and encourage the lawful use of these instruments of circulation. The cases are as follows:

In Spain,[70] Honduras,[71] San Salvador [72] and Venezuela,[73] the payment of checks can be refused only in the same cases as apply to bills of exchange.

In Argentina [74] a bank must refuse payment of checks in the following cases:

(*a*) when it has knowledge of the bankruptcy of the drawer or holder of a check which has been issued to order or to a certain person, unless a judicial decree to the contrary is produced;

(*b*) when it has notice of the death, flight or legally declared incapacity of the drawer;

(*c*) when the check appears to be forged, altered, erased, interlined or scratched in respect to its date, serial number, amount, kind of money, name of the

[67] Art. 23. [68] Arts. 556, 557. [69] Art. 453.
[70] Art. 542. [71] Art. 527. [72] Art. 530.
[73] Art. 452. [74] Arts. 804, 808.

holder, signature of the drawer, or if it lacks any of the essential requisites;

(*d*) when the drawer or holder has requested the bank in writing not to make payment and this request is received before the presentation of the check.

A banker can also retain a check and suspend payment thereon when he notices any errors or suspects fraud or forgery, in which event he must immediately notify the drawer.

According to the Hague Resolution,[75] neither the death nor the legal incapacity of the drawer, occurring after the check was issued, modifies its effects. The revocation of the order to pay contained in a check is effective only after the period for presentation has expired. If there is no revocation the drawee is privileged to pay the check even after the expiration of the period. If the drawer or the holder notifies the drawee that the check has been lost or that a third party acquired it through fraud, the drawee who pays it is exonerated from his obligation only if the holder of the check proves that he is a holder in due course.

In Mexico [76] the payment of a check cannot be suspended except by judicial order or when the check lacks some of the essential requisites of the law.

Peru has no provision of any kind with respect to this matter.

In San Salvador [77] besides the cases mentioned above, the drawee must refuse payment of the check on the drawer's request.

Check books.

The codes of Argentina [78] and Mexico [79] contain certain rules relative to check books as follows:

In Argentina the banks are obliged to have printed stub books with checks attached and corresponding numbers printed in the body of the check and in the stub, and to deliver these books to the depositors under receipt. The

[75] Arts. 16, 17. [76] Arts. 561, 563. [77] Art. 528.
[78] Arts. 801, 802. [79] Art. 555.

receipt must show the number of the book and the individual serial numeration of the blank checks contained therein.

In case a book is lost or stolen, the owner must at once notify the bank; the latter thereupon must refuse to pay any checks issued on the blanks thus lost or stolen.[80]

Mexico prescribes that the only checks valid are those detached from stub books that merchants or banks give to their depositors or creditors in current account in order that they may draw by means of checks.[81]

Liability in case of misuse of checks.

Argentina provides that in case a check is forged, the consequences are to be borne by the bank:

(*a*) when it is apparent that the signature of the drawer is forged;

(*b*) when the check shows any forgery, alterations, erasures in its date, serial number, amount, kind of money, name of the bearer, signature of the drawer, or lacks any of the essential requisites.

(*c*) when the check is not one of those delivered to the drawer in the check book given to him by the drawee.

When the signature of an endorser is forged the bank is not responsible. The drawer is responsible for the consequences of a forgery in the following cases:

(*a*) when his signature is forged in one or more checks of those given him by the bank and the forgery is not manifest and palpable;

(*b*) when it is signed by a clerk or person who signs lawful checks in his name.[82] The comparison between the stub in the check book and the check itself produces full evidence when the purpose is to prove that the form used by the forger corresponds to the check book given to the drawer.[83]

In Mexico, the drawee is not responsible for the misuse of checks given to a creditor, if the check paid is one of those given by the drawee to the drawer.[84]

[80] Arts. 801, 802. [81] Art. 555. [82] Arts. 809, 810, 812.
[83] Art. 811. [84] Art. 561.

PRESCRIPTION OR LIMITATION OF ACTIONS ARISING OUT OF NEGOTIABLE INSTRUMENTS

There are so many different systems in regard to the limitation of actions on or prescription of negotiable instruments, that the only feasible method of discussion is to present the details at length.

In Spain,[85] Honduras [86] and Mexico,[87] actions arising out of negotiable instruments are barred three years after their maturity whether or not they have been protested.

In Argentina [88] and Uruguay [89] the holder of a bill of exchange duly protested for non-payment, who does not demand payment thereof within one year after protest in the case of an inland bill, or within two years otherwise, loses all his rights against the endorsers.

In Argentina actions arising out of any kind of negotiable instrument, except bank-notes, lapse in three years, unless otherwise provided for by the law. The period of limitation runs from the date of maturity; but when four years have elapsed since the issuance, endorsement or acceptance of the instrument, all actions are barred by limitation. This provision, however, does not apply to cases where the debt is acknowledged in a separate document with a view to creating a new evidence of debt. Acts which by law interrupt the running of the prescriptive period against one of the co-obligors do not produce that effect with respect to the others.[90]

In Uruguay [91] actions arising out of bills of exchange or any other endorseable instrument, if no judicial decision has been rendered thereon, nor the debt been acknowledged in a separate document, are barred by limitation after four years. This period runs from the date of protest, or from

[85] Art. 950. [86] Art. 936. [87] Art. 1044.
[88] Art. 667. [89] Art. 862.
[90] Art. 848.
Actions arising out of a bill of exchange are barred by limitation three years after it is due. Argentina, Cam. Fed. de Apel., Parana, April 3, 1914, J. Martinez *v.* H. Salazar, *Jurisp. de los Tribs. Nacs.*, April, 1914.
[91] Art. 1019.

maturity if there was no protest, or from the date of judicial decision if there was one.[92]

In Brazil [93] actions arising out of bills of exchange against the drawer, acceptors, or their sureties are barred after five years; but against the endorsers and their sureties, after one year. These periods run from the day the action might have been brought; and in the case of an endorser who pays, from the day on which he made payment. This rule also applies to promissory notes [94] and to checks.[95]

In Chile [96] and Colombia [97] actions against the principal debtor or his sureties are barred by limitation after three years from the maturity of a bill, without prejudice to the instrument's being impaired for other valid reasons. A judicial complaint against the principal debtors interrupts the four-year period of limitation; but the period begins to run again if the plaintiff stops the proceedings. When the bill of exchange is paid by one of the endorsers the period runs against him from the date of payment.

Actions of the acceptor who paid without being supplied with funds by the drawer or by the person who ordered the issuance of the bill are barred after five years. A like rule governs actions of the drawer against the acceptor supplied by him with funds, or of the payer for honor against the person for whose honor he paid.

The holder of a *libranza* or promissory note, arising from a mercantile transaction, payable to order, which has been protested for non-payment, must demand payment from the maker or endorsers at his discretion, within three months from the date of protest, if the instrument is payable within the Republics of Chile or Colombia, respectively; otherwise the request of payment must be made within the period necessary for the arrival of the mail at the place of residence of the obligor. When the periods have elapsed without any claim being made, the liability of the endorsers ceases,

[92] Art. 1559. [93] Arts. 52, 53. [94] Art. 56.
[95] Art. 15 of law No. 2591 of August 7, 1912.
[96] Arts. 761 to 764, 774, 779.
[97] Arts. 894 to 897, 907, 912.

as does that of the drawer who supplied the drawee with funds.[98]

In Costa Rica [99] actions arising directly from bills of exchange lapse after four years from their maturity or from the act which legally interrupts the period of limitation. In bills of exchange payable at sight or at a period from sight the limitation period runs from the last day for presentation, unless it is proved that the presentation took place prior thereto. These rules also apply to promissory notes payable to order.[100]

In Ecuador [101] and Venezuela [102] actions originating in bills of exchange are barred by limitation five years from the day following their maturity. If, during the running of that period, the debtor makes a partial payment or gets an extension of time, or it appears from his correspondence that he considered the debt outstanding, the period begins to run again from the date of those acts.

A judicial demand interrupts the running of the period of limitation against the defendants only, but the period begins to run again from the day after the proceedings are discontinued. When there has been a judicial decision or the obligation has been changed into a new one, the regular periods of limitation are applicable.

Even though the period of five years has elapsed, the plaintiff can ask and the defendant must render a sworn statement, whether or not he is a debtor of the amount claimed. If the defendant refuses to make such statement or if by it he admits that the debt is outstanding, the right of action of the creditor is re-established.

These rules apply also to promissory notes and *libranzas* payable to order,[103] but a *libranza* to order must be cashed at once if it is at sight, or upon maturity when it runs for a term. If it is not paid, the holder must return it to the person who delivered it to him within three days; otherwise the former loses his rights of action if the latter had supplied funds.

[98] Chile, 769; Colombia, 902. [99] Art. 154. [100] Art. 181.
[101] Arts. 473, 474, 478. [102] Arts. 444, 445, 449. [103] Art. 476.

In Haiti [104] and Santo Domingo [105] when the holder brings his action individually against his transferer he must do so in Haiti, within a period of ten days, and in Santo Domingo, within fifteen days after the date of protest, if he resides in a place no farther distant than ten leagues in Haiti, and three in Santo Domingo, with one additional day for every five leagues, in Haiti, and two and a half leagues in Santo Domingo, if the transferer resides at a greater distance than ten or three leagues respectively.

If bills of exchange drawn from Haiti or Santo Domingo, respectively, are to be paid and have been protested outside the territory of those countries, the drawers and endorsers residing in Haiti must be requested to make payment within the following periods: within six months, if the bills are payable in the West Indies, eight months, if on the American continent, the Bermudas and Newfoundland, and one year if in Europe.

In Santo Domingo the time for demand is three months, if the drawers or indorsers reside in Haiti, the West Indies or the United States; four months, if they reside in the Republics along the coast of the Atlantic from the Rio Grande to the Orinoco; five months, if they reside in any of the other American Republics, and six months, if the bill is payable in Europe or in any other part of the world. These periods are doubled in case of maritime war.

If the holder brings his action jointly against the endorser and the drawer, the periods above stated apply with respect to each of them. Every endorser has the benefit of the same period running from the day of the judicial demand.

After those periods have elapsed the holder loses all his rights against the endorsers as well as against the drawer, if the latter had supplied the drawee with funds when the bill matured; in that case the only action reserved to the holder is against the drawee.

The limitation above referred to is without effect in favor of the drawer or endorser who, after the lapse of those periods, has received the funds destined for the payment of

[104] Arts. 162 to 168. [105] Arts. 164, 171.

the bill whether in account current, in set-off or in any other way.

In Peru [106] the special action arising from a bill of exchange to recover its amount can only be brought within fifteen days from the date of protest, a period which must be extended according to the distance; if the holder brings his action jointly against the endorsers and the drawer the periods above established are applied to each of them. They also apply in favor of the endorsers from the date on which they paid or on which notice of the judicial decree ordering payment was served on them.

After the expiration of these periods the actions of the holder and of the endorser against prior obligors are barred. The judicial demand suspends the running of the periods of limitation even though brought before a judge without proper jurisdiction. Notwithstanding the fact that the action has lapsed, the drawer is still bound in regard to the holder for any amount by which the former enriched himself to the prejudice of the latter. These rules apply to drafts and promissory notes to order.[107] With regard to checks, the holder must present them for payment within eight days from their date; if he does not comply with this rule he loses his right of action against the drawer if, after the expiration of the period the funds disappear through an act of the drawee. He likewise loses his rights of action against the endorsers of checks payable to order.[108]

In all other cases not provided for above, actions arising from bills of exchange are barred after three years from their maturity, whether protest was made or not.[109]

The Uniform Regulation [110] prescribes that actions arising from a bill of exchange against the acceptor thereof are barred after three years from maturity. Actions of the holder against the endorsers or drawer lapse after one year from protest made in proper time or from maturity in case the clause "return without expenses" has been placed in the instrument. Actions of endorsers against prior endorsers or

[106] Art. 507. [107] Art. 521. [108] Art. 526.
[109] Art. 961. [110] Arts. 70, 71.

against the drawer are barred six months from the day on which the endorser paid the bill or from the day on which he is sued by another endorser. Acts which interrupt the running of the period of limitation operate only with respect to the person directly concerned in the act.

With reference to checks, the Hague Resolution [111] provides that actions of the holder against an endorser or drawer are barred six months after the expiration of the period for the presentation of the check, and actions of an endorser against other endorsers or the drawer are barred six months from the date on which the endorser paid or was sued.

[111] Art. 29.

CHAPTER XXXIII

NEGOTIABLE INSTRUMENTS PAYABLE TO BEARER

The law in Latin-America does not make any definition of instruments payable to bearer because it always implies that the words "to bearer" are therein inscribed.

Nature of an instrument payable to bearer.

In instruments payable to bearer the obligor (person or association) assumes the obligation to pay a certain sum to the possessor of the document, whoever he may be. The Costa Rican law of November 25, 1902, on negotiable instruments, states in article 183 that in an instrument to bearer the obligation derives, not from a contract, but from the subscription of the document. The meaning of this is that it overlooks entirely the contract in which the bill of exchange originated, but that any prospective holder of the instrument bases his rights solely on the signature of the subscriber.

Only the commercial codes of Spain, Argentina, Mexico and Peru, decrees No. 149 of July 28, 1893, in Bolivia, and No. 177 of September 15, 1893, in Brazil, as well as the above mentioned law of Costa Rica contain any special regulations governing instruments to bearer.

General characteristics of instruments to bearer.

In each of these countries we find that an instrument to bearer can be transferred by mere delivery.[1]

Another feature of these instruments is that they cannot be replevined (*i. e.*, subjected to *reivindicatio*) after they have been negotiated, even though the seller had no right to dispose of them. In this matter, we may note three systems:

[1] Spain, 545; Costa Rica, 184; Mexico, 617; Peru, 535.

System of Spain. The instrument cannot be replevined if it has been negotiated on the exchange through collegiate brokers or agents, or, in places where there is no exchange, through a notary or commercial broker.[2]

System of Mexico. It cannot be replevined when it has been negotiated on the exchange.[3]

System of Costa Rica. The instrument is valid and effective after it has been subscribed, notwithstanding that it may have been lost or stolen before it has been put in circulation. The obligor must pay the amount thereof without power to demand of the bearer any other evidence of his right than possession. His only defenses are:

(*a*) lack of formal requisites in the instrument, incapacity of the subscriber or duress used in obtaining the signature of the instrument;

(*b*) defenses disclosed by the instrument itself;

(*c*) defenses based on legal relations of a personal character existing between the subscriber and the bearer;

(*d*) the fact that the bearer came into possession of the instrument through a crime of which the obligor has direct and personal knowledge.[4]

Besides these general features of instruments to bearer in the above mentioned laws, there is another feature common to these instruments although it is not specified in the law of

[2] Spain, 545; Peru, 535.

Negotiable instruments to bearer bought through exchange agents cannot be recovered by the lawful owner thereof, unless he proves that the purchaser acted in bad faith in connivance with the agent. Spain, Trib. Sup., April 22, 24, 1912; *Gaceta* of June 3, 1913, p. 358.

The purchase of negotiable instruments to bearer can lawfully be effected without the assistance of an exchange agent, and instruments so acquired cannot be recovered by a previous lawful owner, when such purchaser resells the instrument through an exchange agent. Spain, Trib. Sup., May 11, 1909; *Gaceta* of Jan. 4, 1910, p. 346.

The provisions of the code of commerce specially referring to the loss of instruments to bearer are also applicable to the loss of coupons of public securities, when issued in a different sheet from the principal document. Spain, Trib. Sup., Oct. 9, 1906; *Gaceta* of Oct. 12, 1907.

[3] Art. 617.

[4] Costa Rica, 183, 185.

Costa Rica, namely—that these instruments give the bearer on their maturity and non-payment the power to institute an "executive" action attaching property of the subscriber, without any other requisite than a previous acknowledgment of the signature of the obligor.[5]

Persons who can create an instrument to bearer.

Every instrument which can be made payable to order, can be made payable to bearer and every person who can subscribe an instrument payable to order, or in other words, who enjoys commercial capacity, can issue an instrument to bearer.[6]

Mexico, however, does not favor the creation of instruments of this kind; a bill of exchange, a *libranza*, or a promissory note cannot be issued to bearer; [7] but only checks and the instruments mentioned below.

Costa Rica [8] provides that when instruments to bearer are issued in series it is necessary that the fact of issue be first published in the official government paper and then inscribed in the Commercial Registry. Without these requisites the instrument is void, the liability of the subscriber being reserved.

Instruments covered by the provisions of this section.

In Spain,[9] Mexico [10] and Peru,[11] the following are considered instruments to bearer for the purpose of this section:

[5] Spain, 544; Costa Rica, 150; Mexico, 617; Peru, 534.
The "executive" or "executory" action is discussed, *infra*, p. 000.
[6] Spain, 544; Costa Rica, 200; Peru, 534.
[7] Arts. 461, 546, 549, 556, 619.
[8] Art. 201. [9] Art. 547. [10] Art. 619.
[11] Art. 537.
Under the Uniform Negotiable Instruments Law of the United States, an instrument is payable to bearer:

1. when it is expressed to be so payable;
2. when it is payable to a person named therein or bearer;
3. when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable;
4. when the name of the payee does not purport to be the name of any person;
5. when the only or last endorsement is an endorsement in blank

(*a*) instruments of credit against the state, province or municipality when legally issued;

(*b*) those issued by a foreign nation, the quotation of which is authorized by the Government;

(*c*) instruments of credit to bearer issued by foreign associations organized in accordance with the law of the state of their domicil;

(*d*) instruments of credit to bearer issued by home enterprises or corporations, in accordance with the national law;

(*e*) in Spain and Peru, in addition, instruments issued by individuals, provided they are sufficiently secured by a mortgage.

In Argentina and Costa Rica, the provisions are applicable to every instrument to bearer without limitation. The law in Costa Rica excepts railway tickets and other similar instruments.[12]

Measures to be taken in case of loss of instruments to bearer.

The measures to be taken in case of loss of instruments payable to bearer may be classified in the following systems:

System of Spain. A dispossessed owner of an instrument to bearer may apply to the competent judge or court either to prevent payment to a third person of principal, interest or dividends due or to become due, or to prevent the instrument from being transferred to another, or lastly, to request a duplicate of the instrument.[13]

System of Costa Rica. In Costa Rica it is not neces-

[12] Arts. 199, 203.

[13] Spain, 548; Mexico, 620; Peru, 538.

The owner of an instrument to bearer is entitled to request that the debtor be directed to retain payment of principal and dividends thereof, that its alienation be forbidden and that the person who tries to cash it be arrested. Opposition to this request produces the effect of suspending all the proceedings; but it does not imply that what has been done must be revoked, except when a final judgment has been recovered by the opposing party. Mexico, Trib. Sup. del Dist. Fed., 2a Sala, July 15, 1912, *Diar. de Jur.*, v. XXVI, p. 735.

sary to make special application to prevent transfer of the instrument, because application for relief of one kind or another above mentioned automatically produces the effect of preventing the negotiation of the instrument.

Rules applicable to these two systems.

In the petition or application made to the judge or court, the dispossessed owner must indicate the name, nature, face value, number, if any, and the series of the securities; and, if possible, the time and place at which he became the owner, the mode of acquisition, the time and place at which he received the last dividend or interest, and the circumstances of the dispossession; he must also designate a residence, within the judicial district, where he may be served with notices.[14]

If the purpose of the application is merely to obtain payment of principal, dividends or interest due or to become due, the judge or court, after the lawful acquisition of the security is proved, must order:

(*a*) the immediate publication of the petition in the papers of the general, provincial and local governments;

(*b*) notification to the directing board which has issued the security, or to the issuing corporation or individual, ordering them to withhold payment of principal and interest.

The petition must be substantiated by hearing the public prosecutor in a summary form.[15]

If the purpose of the petition is to prevent the negotiation or transfer of quotable securities, the dispossessed owner may apply to the governing board of the college of brokers or stock exchange, informing them of the theft or loss of the instrument, with an accompanying note stating the series and numbers of the missing securities, the time of their acquisition and the title by which they were acquired. On

[14] Spain, 549; Costa Rica, 190, 191; Mexico, 621; Peru, 539.

[15] Spain, 550, 551; Costa Rica, 191, 192; Mexico, 622, 623; Peru, 540, 541.

the same exchange day or the following, the governing board must post a notice in the proper place; and at the opening of the exchange, must announce the information of loss and advise the other boards over the nation thereof. A similar announcement must be published in the papers of the general, provincial and local governments.[16]

System of Argentina. There are two different proceedings in Argentina: one when the amount claimed is less than one thousand pesos, national currency, and the other when it is one thousand or more.

In the first case the dispossessed owner must present to the appropriate public office or to the issuing body or corporation a written notification of the loss with all necessary details for the identification of the securities. The fact must be also notified to all the exchanges and markets of the country, which shall cause it to be published in their local papers for one month.[17]

In the second case, that is, when the securities or coupons are worth one thousand pesos or more, the interested party must appear before a public notary and draw up a formal statement containing:

(*a*) the name, nature, nominal value, numbers and series of the securities, if they have any, or the distinguishing characteristic in other cases;

(*b*) the mode, and if possible, the date or time of acquisition;

(*c*) the time when he received the last dividend or interest;

(*d*) the manner in which the dispossession took place;

(*e*) the designation of a legal address, if the applicant's is not well known.[18]

Within twenty-four hours after this instrument is signed, notice thereof must be served on the Public Office interested

[16] Spain, 559; Mexico, 631; Peru, 549. Judicial decisions rendered in regard to robbery, theft or loss of instruments of credit, whether payable to a certain person or to bearer as well as public securities, do not constitute *res judicata*, because such decisions are not rendered in a litigated action. Spain, Trib. Sup., Jan. 13, 1913; *Gaceta* of Nov. 14, 1913, p. 41.

[17] Art. 748. [18] Art. 752.

and on the issuing body, and a certified copy there must be given to the applicant on request.[19]

Effects of the publication of the petition.

The effect of the petition, when granted by the judge, court or issuing authority, as the case may be, and after publication, is:

(*a*) to suspend all the regular rights of the new holder of the security, if any; [20]

(*b*) to entitle the dispossessed owner, after the lapse of one year without any opposition to the petition, to ask the judge or court for an authorization not only to collect the interest or dividends due or to become due, in the proper proportion, but likewise the principal, provided two or more dividends have been paid or the principal has become payable.[21]

When said authorization has been granted by the judge or court the dispossessed owner, before collecting the dividends, interest or principal, must give security covering the amount due and double the amount of the last yearly payment. If the applicant does not wish to or cannot give the security, he may require the debtor company or individual to deposit the interest, dividends or principal due; and if two years have elapsed without any opposition to his petition, he may receive the amounts thus deposited; [22]

(*c*) to entitle the claimant to recover the principal due subsequent to the court's authorization, if he gives a bond therefor, or else to request the deposit of said principal. He can also obtain delivery of the amount so deposited five years after the above mentioned authorization or ten years after the principal is due (in Costa Rica two years only in both cases), if no one has opposed his petition; [23]

[19] Art. 753.

[20] Spain, 550; Argentina, 749; Costa Rica, 192; Mexico, 622; Peru, 540.

[21] Spain, 552; Costa Rica, 193; Mexico, 624; Peru, 542.

[22] Spain, 553; Costa Rica, 193, 194; Mexico, 625; Peru, 543.

[23] Spain, 554; Costa Rica, 197; Mexico, 626; Peru, 544.

(*d*) to prevent all negotiation of the stolen or lost securities after the publication of the advertisement by the Board of Exchange Brokers above referred to. The person who may have acquired the securities or negotiable instruments after said publication has not the immunity from disturbance of his possession by judicial decision that a holder in due course enjoys. The rights of such person against the seller and the agent through whom the transaction was effected, are reserved.[24] This effect, however, does not subsist if within the period of nine days the petitioner has not obtained a judicial decree ratifying the injunction to negotiate or sell the lost securities, or if notice of said decree is not given to the Governing Board within that period; [25]

(*e*) to entitle the petitioner to obtain from the corresponding judge or court a decision declaring the nullity of the stolen or lost instrument, and a duplicate of the same after the lapse of five years (two years in Costa Rica) from the publications above referred to, or from the judicial ratification mentioned in the previous paragraph; [26]

(*f*) to recover the amount of the coupons to bearer, detached from the main instrument, three years after the judicial acceptance of the petition, the object of which was to obtain payment of such coupons; [27]

(*g*) to release from any liability the debtor who has paid the dispossessed owner in accordance with the foregoing provisions, the rights of a third party who may suffer damages thereby against an unlawful claimant being reserved.[28]

The issuance of new instruments payable to bearer, to replace those lost by the owner, is proper when five years have elapsed after the fact of the loss was legally published. Spain, Trib. Sup., March 18, 1910; *Gaceta* of June 22, 1910, p. 156.

[24] Spain, 560; Argentina, 760, 761; Mexico, 632; Peru, 550.

[25] Spain, 561; Peru, 551.

[26] Spain, 562; Costa Rica, 197; Mexico, 633; Peru, 552.

[27] Spain, 556; Mexico, 628; Peru, 546.

[28] Spain, 557; Argentina, 758; Costa Rica, 195; Mexico, 629; Peru, 547.

Opposition of a third party.

If before payment is made to the claimant, a third party presents himself with the missing securities, the debtor must retain them and give notice thereof to the judge or court and the claimant, stating the name, residence and other circumstances which may serve to identify the third party holder. The presentation of the security by the latter suspends the effects of the petition until a judicial decision is rendered thereon.[29]

[29] Spain, 558; Argentina, 759; Costa Rica, 196; Mexico, 630; Peru, 548.

CHAPTER XXXIV

LETTERS OF CREDIT

Character of a letter of credit.

The business relations of a merchant make it necessary for him to give letters of introduction and recommendation, and in some cases genuine letters of credit to persons more or less closely connected with his affairs; but it is very important to distinguish those letters the purpose of which is only to satisfy commercial courtesy, to promote acquaintance between men who carry on similar or different lines of business and afford mutual help and assistance, from those intended to create a legal liability. The law, in order to avoid any misunderstanding in this respect, has provided for certain requisites which must be complied with in the latter case, giving rise to a legal action against the person issuing an actual letter of credit. The character of persons connected with a letter of credit and the legal acts associated with it, are not the same in the various codes of Latin America. We find in this respect the following systems:

System of Spain. The letter of credit is sent from one merchant to another, or it must be connected with a mercantile transaction.[1]

System of Argentina. As the letter of credit is a commercial act, the general rules which serve to classify a transaction as mercantile or civil are applicable. The special section of the code dealing with letters of credit omits, therefore, any reference to the character of the parties or to their purpose. This system is also followed by Brazil and Uruguay.

System of Chile. Chile,[2] Colombia,[3] Ecuador,[4] Guate-

[1] Spain, 567; Honduras, 529; Peru, 557.
[2] Art. 782. [3] Art. 915. [4] Art. 480.

mala [5] and Venezuela [6] provide that a letter of credit involves a conditional contract of exchange between the giver and the receiver, the performance of which depends upon the fact that the receiver avails himself of the credit. The legal character of the parties is the same as that of the drawer and the payee of a bill of exchange.

System of Bolivia. The person who gives the letter and the one to whom it is addressed must be merchants, and the transaction which the letter is intended to facilitate must be mercantile.[7]

System of Mexico. The giver of a letter of credit and the person to whom it is addressed must be merchants, regardless of the character of the transaction to be undertaken.[8]

Requisites of a letter of credit.

A letter of credit must satisfy the following requirements:

(*a*) it must be issued in behalf of a named person, not to his order; [9]

In Chile,[10] Colombia [11] and Guatemala,[12] this essential is supplemented by the provision that it is not endorseable even though issued to order.

Ecuador [13] and Venezuela,[14] however, provide that a letter of credit may authorize the beneficiary to draw in favor of another person or to his order up to the amount indicated therein, but the bill of exchange must be attached to the letter of credit;

[5] Art. 666. [6] Art. 456.

[7] Bolivia, 474; Costa Rica, 519.

[8] Mexico, 564; Nicaragua, 318; San Salvador, 464.

[9] Spain, 568; Argentina, 485; Bolivia, 475; Brazil, 264; Costa Rica, 520; Honduras, 530; Mexico, 565; Nicaragua, 319; Peru, 558; San Salvador, 465; Uruguay, 626.

The essential requisites of a letter of credit are: (*a*) the designation of the person in whose favor it is issued; (*b*) the limitation of the amount covered; and (*c*) the mercantile capacity of the parties. Brazil, Cam. Reun. da Corte de Apel., Nov. 24, 1909, *Rev. de Direito*, v. 14, p. 553.

[10] Art. 783. [11] Art. 916. [12] Arts. 667, 668, 669.

[13] Art. 481. [14] Art. 457.

(*b*) it must state a certain amount or may refer to one or more sums of money, provided they are limited within a certain and fixed maximum. Otherwise the document is not a letter of credit but a recommendation only, which does not create any legal liability on the part of the person issuing it; [15]

(*c*) it must state the period within which it can be utilized.[16]

Life of a letter of credit.

In case no period is fixed for the utilization of a letter of credit, two systems are followed:

1. The law fixes a limit, which in Spain [17] is six months, for letters issued on Europe and twelve months for those issued on other places.[18] In Peru [19] the period is twelve months and in San Salvador [20] and Honduras [21] six months, wherever the letter is issued.

2. The tribunal of commerce or the judge of appropriate jurisdiction fixes the period within a reasonable time.[22]

Revocability of letters of credit.

A point respecting which the codes are not uniform relates

[15] Spain, 568; Argentina, 484; Bolivia, 475; Brazil, 264; Chile, 784, 794; Colombia, 917, 927; Costa Rica, 521; Ecuador, 482; Guatemala, 672, 673; Honduras, 530; Mexico, 564; Nicaragua, 318; Peru, 558; San Salvador, 465; Uruguay, 525; Venezuela, 458.

[16] Spain, 572; Argentina, 490; Bolivia, 481; Chile, 784; Colombia, 917; Costa Rica, 526; Guatemala, 670; Honduras, 534; Mexico, 564; Peru, 562; San Salvador, 469; Uruguay, 631; Veneauela, 458.

[17] Art. 572.

[18] No reference is made in the code of Spain to any special way to reckon the period for using a letter of credit issued in Cuba. Betancourt (*loc. cit.*, p. 209), referring to article 572 above, says: "As long as this article subsists the interested parties should make certain to fix the period lest they run the risk of having the rule contained in it applied verbatim, so that letters of credit issued upon America may live one year, while those on Europe may live only six months, notwithstanding that the purpose of the law makers was perhaps otherwise.

[19] Art. 562. [20] Art. 469. [21] Art. 534.

[22] Argentina, 490; Chile, 784; Colombia, 917; Costa Rica, 526; Guatemala, 671; Uruguay, 631.

to the revocability of letters of credit. Some of them, considering that the fundamental element of such letters is commercial courtesy rather than a real purpose to create obligations, grant to the issuing person the privilege of revoking the letter at any time at will, thus avoiding, on the one hand, the necessaity of proving judicially that the beneficiary no longer warrants the credit granted, a matter generally difficult of proof, and on the other hand, immediately terminating the period which the beneficiary might utilize with great detriment to the person issuing the letter.[23]

Other codes, accepting expressly the rule of the Spanish code just mentioned, except from its operation the cases where the beneficiary of the letter leaves in the hands of the subscriber thereof the amount of credit authorized, and where the person issuing the letter revokes it fraudulently. This system may be regarded as practically the same as the former, because both exceptions may be considered as implied in it, the first, because in receiving the amount of the letter as a guaranty of the credit opened a contract has been concluded and an obligation created binding the giver of the letter; and the second, because everyone is responsible for his own fraud. The system referred to is that of Argentina [24] and Mexico.[25]

Other codes, considering that the act of issuing a letter of credit creates an obligation depending upon the will of the beneficiary only, declare that the giver cannot revoke the letter unless something happens which diminishes the credit of the beneficiary; that an untimely revocation not based on a reasonable and well-proven cause makes the subscriber liable in damages.[26]

Lastly, the codes of Bolivia [27] and Costa Rica [28] provide that the beneficiary of a letter of credit has no action whatever against the giver; although if the latter makes an untimely revocation damaging the beneficiary, the giver is

[23] Spain, 570; Honduras, 532; Peru, 560; San Salvador, 467.

[24] Art. 488. [25] Art. 571.

[26] Chile, 786; Colombia, 919; Ecuador, 483; Guatemala, 675, 676; Nicaragua, 319; Uruguay, 629; Venezuela, 459.

[27] Arts. 478, 479. [28] Arts. 523, 524.

liable. In this system the burden of proving the circumstances which create the liability of the giver is upon the beneficiary.

Protest of letters of credit.

As a rule the codes provide that letters of credit are not subject to acceptance and cannot be protested.[29] In making this provision some of the codes are not consistent with the definition they adopt for the letter of credit as an instrument of exchange. This is the case in the code of Chile and those which follow it.

Ecuador [30] and Venezuela [31] provide, on the contrary, that the letter of credit which is not paid must be protested with the formalities required for a bill of exchange.

Obligation of the giver of a letter of credit.

The giver of a letter of credit is bound to refund to the payer the amount paid to the beneficiary within the limits established in the letter.[32]

Obligations of the beneficiary.

The obligations of the beneficiary of a letter of credit are:

(*a*) to pay the giver without delay the amount he received from the payer; [33]

Nicaragua [34] grants a period of ten days from the

[29] Spain, 569; Argentina, 487; Bolivia, 478; Chile, 788; Colombia, 921; Costa Rica, 523; Guatemala, 678, 679; Honduras, 531; Mexico, 567; Peru, 559; San Salvador, 466; Uruguay, 628.

[30] Art. 486. [31] Art. 462.

[32] Spain, 569; Argentina, 486; Bolivia, 476; Brazil, 264; Chile, 787; Colombia, 920; Costa Rica, 522; Ecuador, 484; Guatemala, 677; Honduras, 531; Mexico, 570; Peru, 559; San Salvador, 466; Uruguay, 627; Venezuela, 460.

The liability of the person who issues a letter of credit is joint with that of the beneficiary, when such person did not make clear his purpose of being a mere surety and he states in his letter of credit that "he will answer for the amounts which would be taken until the final liquidation." There is no question in the case of guaranteeing a certain amount given as a loan. It is really a contract of opening a credit. Brazil, Trib. de Just. de S. Paulo, May 18, 1901, and Feb. 11, 1902, *S. Paulo Judiciario*, v. 1, p. 47. *Cf.* art. 246.

[33] Spain, 571; Argentina, 489; Chile, 791; Colombia, 924; Costa Rica, 525; Guatemala, 682; Honduras, 533; Mexico, 572; Peru, 561; San Salvador, 468; Uruguay, 630. [34] Art. 320.

date of payment, for refunding the amount received. The other codes do not provide for a period within which the beneficiary must refund the amount received; therefore the general rules of mercantile obligations are applicable;

(*b*) to identify himself if the payer so requires; [35]

(*c*) to sign the letter or to give a specimen of his signature to the subscriber of the letter, in Chile,[36] Colombia,[37] Ecuador,[38] Guatemala [39] and Venezuela; [40]

(*d*) to state in the letter the amounts received; and in case he receives only part of the credit covered by it, he can, in Ecuador [41] and Venezuela [42] request from the payer an authorized copy of the letter and receipts.

Legal relations between the beneficiary and the payer of a letter of credit.

The person who complies with the request contained in a letter of credit has no action whatever against the beneficiary for the reimbursement of the amount paid, unless it appears in the terms of the letter that the subscriber was only a surety in the transaction.[43]

Letters addressed to different correspondents.

A letter of credit may be addressed to several correspondents residing at different places, requesting their compliance with it up to the maximum of credit designated therein. In such case the correspondent who pays a part of the amount must state that fact in the letter itself, under penalty of damages.[44]

[35] Spain, 569; Argentina, 485; Bolivia, 477; Chile, 789; Colombia, 922; Costa Rica, 520; Ecuador, 488; Guatemala, 680; Honduras, 531; Mexico, 565; Nicaragua, 321; Peru, 559; Uruguay, 626.

[36] Art. 785. [37] Art. 918. [38] Art. 482.

[39] Art. 674. [40] Art. 458. [41] Art. 485.

[42] Art. 461.

[43] Chile, 792; Colombia, 925; Ecuador, 484; Guatemala, 684; Nicaragua, 321; Venezuela, 460.

[44] Chile, 793; Colombia, 926; Ecuador, 487; Guatemala, 685, 636; Venezuela, 463.

Banker's letter of credit.

A letter of credit directed by a banker to his correspondents in favor of a named beneficiary affords the basis for a sight bill of exchange drawn by the beneficiary upon the banker, with the correspondent as payee. The usual rules of bills of exchange are applicable to such instruments in the United States.

CHAPTER XXXV

CURRENT ACCOUNT

SPAIN.—Estasén, Pedro: De las cuentas corrientes y de los contratos de cuentas corrientes según el derecho español. Madrid, 1910.

Vallés y Pujals, José: El contrato de la cuenta corriente. Barcelona, 1906.

BRAZIL.—Lacerda Paulo de: . . . Do contrato de abertura de credito. São Paulo (1904).

Same: Estudos sobre o contrato de conta-corrente. São Paulo, 1901.

Silva Costa, José da: Contrato de conta-corrente. Rio de Janeiro (1883).

MEXICO.—Pallares, Jacinto: Naturaleza del contrato de cuenta corriente. México, *Rev. de Legislación Jurisprudencia*, 1896, 1st sems., p. 201.

Verdugo, Agustín: La cuenta corriente. *El Derecho*. México, 1895, p. 65.

Definition.

Current account is a contract by which the parties agree to send to and to receive from each other money or any other thing of value, the title or ownership of which is transferred automatically to the receiver, without specification or any obligation to keep at the disposal of the sender any equivalent amount; but only to place to his credit the amounts received and make liquidation at stated periods agreed upon, setting off credits and debts and paying the balance.[1]

[1] Argentina, 771; Chile, 602; Colombia, 730; Ecuador, 489; Guatemala, 488; Honduras, 416; Peru, 563; San Salvador, 383; Venezuela, 464.

Current account is a contract between merchants who reciprocally debit and credit their respective accounts. So long as it is not closed there is no creditor or debtor. Its closing does not imply its liquidation. The final balance cannot be taken from the account kept by one of the parties, but only by mutual agreement or judicial decision. Mexico, 3a Sala del Trib. Sup. del Dist. Fed., May 30, 1908, Miguel Haro S. en C. *v.* M. C. Viuda de Maqueo e Hijos, *Diario de Jur.*, v. XV, p. 301.

Remittances of merchandise and money as the price thereof made to each other by two persons residing in different countries constitute between them a current account, the balance of which can be demanded any time when no period for liquidation has been stipulated; interest begins to accrue from the date of the judicial demand. Mexico, Juzgado, 3a de lo Civil del Dist. Fed., Feb. 12, 1903, M. Santeliz *v.* M. Pérez Fernandez, *Diario de Jur.*, v. I, No. 7, p. 5.

There are three elements in a contract of current account, namely: (*a*) that

The subject-matter of a current account.

All transactions between merchants, whether or not residing at the same place, or between a merchant and a non-merchant, and every kind of valuable thing the ownership of which can be conveyed, may be the subject-matter of a current account.[2]

Natural effects of a current account.

The following are deemed natural effects of a current account:[3]

(*a*) that the title to the money or other thing of value received passes from the sender to the receiver;

(*b*) that the entry made in the account of the receiver crediting negotiable paper, is conditional upon its being paid;

(*c*) that between both parties the setting off of the entries on either side of the account is obligatory; consequently every transaction is a novation, so that neither party has a right to demand payment of any remittance, whatever its value, but only the balance of the account at the time stipulated, subject to agreement to the contrary;

(*d*) that the balances draw legal or contractual interest;

(*e*) that the final balance, when acknowledged, is demandable, unless further remittances have been made or it is agreed to bring the balance to a new account.[4]

mutual remittances between the contracting parties be made, so that debit and credit entries are made, with interest thereon; (*b*) that money or valuables are remitted transferring title thereto to the other party; (*c*) that liquidation of the account be made at fixed periods. Colombia, Casación, May 31, 1911; *Gaceta Jud.*, v. XIX, p. 330.

A person who demands payment of the balance of a current account must prove the existence of the special contract of current account. Argentina, Camara de Apel. Fed. La Plata, Dec. 10, 1913, *Jur. de los Tribs. Nacs.*, Dec., 1913, p. 58.

[2] Argentina, 773; Chile, 604; Colombia, 732; Ecuador, 491; Honduras, 418; Peru, 564; San Salvador, 384; Venezuela, 466.

[3] Argentina, 777; Chile, 606; Colombia, 734; Guatemala, 493; Honduras, 420; Peru, 567; San Salvador, 385; Venezuela, 468.

[4] The "Banco Nacional en Liquidación" cannot bring an "executive"

Commission and current account.

The existence of a contract of current account does not prevent the parties from charging a commission fee and asking for the reimbursement of expenses incurred.[5]

Transactions not affected by the current account.

Money and effects sent for specific purposes to be preserved at the disposal of the sender, are not comprised in the current account, and hence are not subject to a mercantile set-off.[6]

Rights of creditors.

Attachment of goods or credits entered in a current account cannot take place; only the balance, if any, in favor of the debtor at the end of the account, is subject to attachment.[7]

action against the debtor for payment of the balance of a current account unless such balance was acknowledged by the debtor, even though he be absent and his domicil unknown. Argentina, Cam. Fed. de Ap. Cordoba, April 8, 1913, *Jur. de los Tribs. Nacs.* April, 1913, p. 91.

Copies of a current account which have not been acknowledged by the debtor, cannot be the basis of an "executive" proceeding. Peru, Corte Sup., Comp. Hipotecaria *v.* L. León, May 29, 1906, *Anales Jud.*, v. II, p. 373.

When a debtor has acknowledged and accepted the balance of a current account, a writ of attachment in "executive" proceedings can be issued. Mexico, Trib. Sup. del Dist. Fed., Aug. 16, 1912, S. Sanchez Gil *v.* S. Najera, *Diar. de Jur.*, vol. XXVIII, p. 265.

In order that the balance of a current account be demandable, it is necessary to have the account closed, and in the absence of agreement on that point any of the parties, at his option, can close the account. Mexico, Terc. Sala del Trib. Sup. Del. Dist. Fed., May 27, 1913, Bemejillo y Cia, S. en C. en liquidación *v.* C. A. Malan, *Diario de Jurisp.*, v. XXXI, p. 225.

[5] Argentina, 778; Chile, 606; Colombia, 734; Ecuador, 493; Guatemala, 491; Honduras, 420; Peru, 569; San Salvador, 386; Venezuela, 468.

[6] Argentina, 780; Chile, 609; Colombia, 737; Ecuador, 496; Guatemala, 494; Honduras, 423; Peru, 570; Venezuela, 471.

[7] Argentina, 781; Chile, 610; Colombia, 738; Ecuador, 497; Guatemala, 495; Honduras, 424; Peru, 571; Venezuela, 472.

When in a contract a bank binds itself to open a current account for a person who grants the bank a preference to buy securities he may subsequently issue, reserving to himself the privilege to pay the balance of the account and cancel it; once he does cancel the account, he is not bound to give the preference above referred to. Spain, Trib. Sup., Jan. 11, 1911; *Gacetas* of Oct. 23, 26, 28, 1911, pp. 39 to 46.

Termination of a current account.

The termination of a current account takes place:

(*a*) by consent of the parties thereto;

(*b*) by the end of the stipulated period;

(*c*) by death, insanity, bankruptcy or any other event which deprives either of the parties of the management of his property.[8]

Effects of the termination of a current account.

The termination of a current account fixes the legal relations between the parties; by operation of law, it produces a set-off between the credit and the debit of the account and thus establishes in a definite way which of the parties is the creditor.[9]

Periodical balances.

The parties can provide for periodical balances of the account, for the rate of interest and commissions and for any other matter of mutual agreement. The balance of the account, whether provisional or definite, is considered as capital and draws interest.[10]

In Argentina the minimum period which the parties can establish for balancing the account is three months. San Salvador does not establish any minimum, and the other above-mentioned countries establish six months.

San Salvador provides [11] that the current account must be

[8] Argentina, 782; Chile, 611; Colombia, 739; Ecuador, 498; Guatemala, 496; Honduras, 425; Peru, 576; San Salvador, 388; Venezuela, 473.

[9] Argentina, 784; Chile, 613; Colombia, 741; Ecuador, 500; Guatemala, 498; Honduras, 427; Peru, 577; San Salvador, 389; Venezuela, 475.

[10] Argentina, 788; Chile, 617; Colombia, 743; Ecuador, 504; Guatemala, 502; Honduras, 431; Peru, 574; Venezuela, 479.

Interest on the balance of a current account is due from the date on which a summons was served upon the defendant. Mexico, Tercera Sala del Trib. Sup. del Dist. Fed., May 27, 1913, *Diario de Jurisp.*, vol. XXXI, p. 223.

From the moment a liquid balance of an account is ordered to be paid by a final judgment and the debtor fails to pay, he is in default and interest upon that balance begins to accrue. Colombia, Corte Sup., Dec. 11, 1895; *Gaceta Jud.*, v. XI, p. 223.

[11] Art. 387.

closed and the balance paid at the end of the period provided for in the contract; should there not be any provision the liquidation must be made in December of every year.

Proof of the contract of current account.

The contract of account current can be proved by all means of evidence, including the testimony of witnesses, in Argentina [12] and Colombia.[13] In Chile,[14] Ecuador,[15] Guatemala,[16] Honduras,[17] Peru,[18] and Venezuela,[19] it can be proved by the means established in the code of commerce, except by the testimony of witnesses.

Statute of limitations.

Actions demanding the settlement of an account current, payment of its balance, the redress of mistakes in computation, omissions, or items wrongly entered in the account, are barred by limitation after the lapse of five years. The same period limits actions for collecting interest on the balance which is due every year or an agreed part thereof.[20]

[12] Art. 789. [13] Art. 744. [14] Art. 618.
[15] Art. 505. [16] Art. 503. [17] Art. 432.
[18] Art. 575. [19] Art. 480.

The contract of current account is proved when the defendant admits that even though no express agreement was made, the account was actually opened. Mexico, Tercera Sala del Trib. Sup. del Dist. Fed., May 27, 1913, Bermejillo y Cia. S. en C. en Liquidación *v.* C. Malan, *Diario de Jurisp.* v. XXXI, p. 225.

The contract of current account is evidenced by letters and by the fact that merchants draw upon each other. Mexico, Tercera Sala del Trib. Sup. del Dist. Fed., April 9, 1913, Rodriguez, *v.* Acibal, *Diar. de Jur.*, v. XXX, p. 738.

The action for payment of the balance of an account current between merchants is governed by the code of commerce; therefore the existence of the contract from which such action may be derived cannot be proved by the testimony of witnesses. Chile, Corte de Apel. de la Serena, April 7, 1896; *Gaceta de los Tribs.*, 1896, v. I, p. 233.

The proof that a current account existed and that a mortgage was given to guarantee the balance thereof, which mortgage was afterwards cancelled, is also evidence that documents and receipts in the hands of the creditor corresponding to the period in which the current account was in force, are also to be cancelled. Argentina, Cam. La de Ap. Civ. Buenos Aires, July 17, 1913, *Jur. de los Tribs. Nacs.*, July, 1913, p. 116.

[20] Argentina, 790; Chile, 619; Colombia, 745; Ecuador, 506; Guatemala, 504; Honduras, 433; Peru, 578; Venezuela, 481.

For current accounts which have not a mercantile character the period of the

In Peru, the period of five years is calculated from the date on which a copy of the account was served on the debtor or on which the balance was acknowledged.

In San Salvador a claim for the rectification of an arithmetical mistake is only admissible within four years from the day on which a copy of the erroneous account was drawn up or received.[21]

statute of limitations is two years according to article 849 of the code of commerce. Argentina, Cam. 2a de Ap. Civil, Buenos Aires, Nov. 19, 1912, *Jur de los Tribs Nacs.*, Nov., 1912, p. 214.

[21] Art. 391.

CHAPTER XXXVI

BANKRUPTCY IN GENERAL AND PREVENTIVE SETTLEMENT WITH CREDITORS

ARGENTINA.—Armengol, Manuel F.: Fundamentos y crítica de la ley de quiebras . . . 2d ed., aumentada notablemente en la parte crítica. Buenos Aires, 1914.

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Rodríguez, Aristóbulo: Quiebras en derecho internacional privado. Buenos Aires, 1907.

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CUBA.—Betancourt, Angel C.: Suspensión de pagos: Ley de 24 de Junio de 1911. (Of Cuba) Habana, 1912.

PERU.—Lama, Miguel Antonio de la: Código de comercio y ley procesal de quiebras y suspensión de pagos, con notas críticas explicativas y de concordancia. Lima, 1902–1905. 2 v.

SPAIN.—Estasén, Pedro: Tratado de la suspensión de pagos y de las quiebras. Estudio teórico-práctico. 2d ed., 1909.

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Redondo, Remigio Antón: Quiebras. Manuel sobre el procedimiento en los juicios universales de quiebras. Madrid, 1896.

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URUGUAY.—Cibilis, Larravide: Comentarios al titulo 8 del libro 4 del co digo de comercio. Montevideo, 1895.

Ferres, B.: Concordato preventivo. Montevideo, 1906.

Guillot, A.: Declaración de quiebras. Montevideo, 1901.

General principles.

The bankruptcy of a merchant is different in character from the failure of a non-merchant to pay his obligations. The latter is not an organ charged with the function of circulating wealth; nor has he secured the social benefit which the former enjoys from many connections and wide intercourse in different parts of the country and abroad. The failure of a non-merchant cannot as a rule affect many other persons, while that of a merchant may involve persons and associations scattered in different places and countries. From a merely economic viewpoint bankruptcy is a process of selection, separating from the important function of commerce those who have proved unfit.

From a legal viewpoint bankruptcy, terminating provisionally the relations of the common debtor with his creditors, creates among the latter a direct relation which calls for an adjustment in accordance with their respective claims and the economic situation of the debtor's estate, and, making the behavior of the debtor the subject-matter of investigation, provides either for his punishment in case he is found guilty of negligence or crime, or for his rehabilitation as a merchant, when proper.

The law of bankruptcy is special to merchants.

A state of bankruptcy in all Latin-American countries is, therefore, special to merchants.[1]

[1] Spain, 874; Argentina, 1379; Bolivia, 502; Brazil, law of bankruptcy of December 17, 1908; Chile, 1325; Colombia, 121; Costa Rica, 3 of law of Octo-

An exception to this general rule is found in Brazil, where article 3 of the law of bankruptcy [2] provides that corporations (*sociedades anónimas*) are subject to bankruptcy even though they are not commercial, when they fail, without good reason, to meet their obligations or when their capital is reduced to one-fourth or less of the original amount.

Articles 1125 to 1215 of the code of civil procedure of Colombia, amended by law No. 40 of 1907, provide for rules applicable to legal procedure in insolvency irrespective of the person's character as a trader, but the classification of bankruptcy refers to merchants only.

On the other hand, Costa Rica [3] and Panama [4] embody in the same proceedings all persons, whether merchants or not, who fail to pay their debts; and in all cases insolvency is classified either as fortuitous, culpable or fraudulent.

Public interest is at stake in bankruptcy proceedings owing to the interruption in the regular fulfillment of obligations which have a bearing on credit and the circulation of wealth. This explains the fact that the public prosecutor is a party to legal proceedings in bankruptcy.

Preventive composition with creditors.

One of the greatest dangers, when a merchant realizes his inability to pay his creditors, is that he may embark upon ruinous ventures in order to conceal his real situation, with

ber 15, 1901; Ecuador, 917; Guatemala, 1196; Haiti, 434; Honduras, 86; Mexico, 945; Panama, 1534; Peru, 886; San Salvador, 770; Santo Domingo, 437; Uruguay, 1546, 1870.

A merchant cannot make an assignment of his whole property (*cesión de bienes*) to his creditors for that is a privilege of non-merchants; he has to apply instead for a declaration of bankruptcy. Lima, Corte Sup. de Just., June 5, 1907, *Anales Jud. de la Corte Sup.*, vol. 3, p. 100.

The law of bankruptcy is applied to merchants whether they are registered in the commercial registry or not. Lima, June 10, 1907, *Corte Sup. de Just. Anales Jud.*, vol. 3, p. 125.

A person who does not possess the character of a merchant is not subject to bankruptcy proceedings. Spain, Trib. Sup., June 21, 1878; *Gaceta* of Aug. 12, 1878.

[2] Law No. 2024 of December 17, 1908, to which reference is hereafter made in citing articles of the Brazilian law.

[3] Art. 870. [4] Art. 858.

the hope that something may develop to allow him to improve his financial position; or else he may yield to the suggestions of some of his creditors by paying them in advance or by giving them guaranties or preferences, thus prejudicing the other creditors; or, even worse, he may try to secrete a part of his assets. In order to prevent these evils and at the same time to afford an unsuccessful debtor in good faith a way to escape bankruptcy and continue doing business, two systems have been adopted: one consists in giving the debtor an opportunity to secure from his creditors a moratorium (*suspensión de pagos*); and the other, more liberal, consists in giving him an opportunity to arrange with his creditors not merely a moratorium but an abatement of their claims, a so-called preventive settlement (*concordato preventivo*).

The first system has been adopted by the codes of Spain,[5] Honduras[6] and Peru.[7]

The second system has been adopted by the laws of Argentina,[8] Brazil,[9] the Republic of Cuba, which by law of June 24, 1911, amended articles 870 to 873 of the Spanish Commercial Code,[10] Uruguay[11] and Venezuela.[11a]

The codes of Bolivia[12] and of Colombia,[12a] though they classify as bankruptcy, the suspension of payments when the debtor has property enough to pay his debts, nevertheless do not deprive the debtor in case of a mere suspension of payments of the management of his property, nor is it divided among the creditors; thus, these codes practically admit the status of suspension of payments.

Prerequisites for obtaining moratorium or preventive composition.

In countries where the debtor's only relief is by moratorium, it is necessary that the debtor possess property enough to pay his liabilities in full.[13] Venezuela also establishes this

[5] Art. 885.
[6] Art. 1384.
[7] Art. 149.
[8] Arts. 1384 to 1411.
[9] Art. 1523.
[10] Art. 855.
[11] Art. 1523.
[11a] Arts. 855, 860.
[12] Arts. 488, 489.
[12a] Arts. 122, 123.
[13] Spain, 870; Honduras, 858; Peru, 883.

requisite, though the debtor may during the moratorium obtain partial releases.[14]

The debtor, according to both systems, can request a moratorium or a preventive composition under two circumstances: (*a*) before the maturity and demand for payment of any obligation; or (*b*) after maturity and non-payment of such obligation, within a period of forty-eight hours in Spain, Honduras and Peru, or three days in Argentina.[15]

In Brazil [16] the application must contain an affidavit that within the last eight days no negotiable instrument has been protested.

In Cuba,[17] furthermore, when the debtor asks for a preventive composition because his assets have decreased owing to circumstances beyond his control, he must guarantee, with a mortgage, pledge, deposit in cash or guaranty of a merchant possessing a commercial house or realty inscribed in the registry, that he will pay at least fifty per cent of his unsecured liabilities.

In Uruguay and Venezuela no period is established; the debtor may demand the privilege any time.

Besides these requisites the debtor must comply with the following obligations, although not all of them are necessary everywhere, as indicated:

[14] Arts. 855, 863.

[15] Spain, 871; Argentina, 1384; Cuba, 871; Honduras, 859; Peru, 884.

[16] Art. 149.

The period of forty-eight hours for a debtor to apply for a declaration of suspension of payments, after an obligation is due and unsatisfied, must be reckoned not from the date of the maturity of the obligation but from the formal demand of payment by the creditor. Spain, Trib. Sup., Feb. 11, 1895; *Gaceta* of May 3, 1895.

The privilege of suspension of payments only requires the application of the debtor, and the law, in order to minimize the danger which such a situation might create for the creditors, has provided for terms and periods which must be strictly observed, not as a matter of mere procedure, but as a necessary and substantial requisite of the law, lest the debtor or the judge might prolong a dangerous situation; for that reason the provisions of articles 871 of the code of commerce and 1131 and 1132 of the code of civil procedure must be strictly applied. Spain, Trib. Sup., May 3, 1897; *Gaceta* of May 18, 1897.

[17] Art. 870.

(*a*) to apply in writing to the judge of proper jurisdiction asking for a declaration of "suspension of payments," in Spain,[18] Cuba,[19] Honduras [20] and Peru,[21] or for a meeting of his creditors, in Argentina,[22] Brazil,[23] Uruguay [24] and Venezuela.[25] In Cuba the application must be countersigned by a lawyer;

(*b*) to state the reasons why he must suspend payments or request a composition; [26]

(*c*) to give a surety bond or guaranty for half the entire amount of his debts; [27]

(*d*) to present an inventory of his property; [28]

(*e*) to present also a detailed statement of his assets and liabilities and a complete list of his creditors, showing their residences, the amount due to each and the date of maturity of each obligation; [29]

(*f*) to prove that his name is inscribed in the commercial registry.[30]

In Peru [31] the certificate of inscription in the Mercantile Registry must state that such inscription was made six months at least before the application;

(*g*) to produce, in case the applicant is a commercial association, a resolution by the plurality of its members, properly cited for that purpose.[32] In Argentina any of the members, unlimitedly liable, of a partnership or any member who can sign the firm name can make the application, and in a corporation the president or manager thereof. In Brazil [33] and Uruguay [34] corporations cannot enjoy the privilege of a composition. In

[18] Arts. 870, 872. [19] Art. 872. [20] Art. 860.
[21] Art. 885. [22] Art. 1384. [23] Art. 149.
[24] Art. 1530. [25] Art. 857.
[26] Argentina, 1386; Cuba, 872; Uruguay, 1524.
[27] Cuba, 872; Brazil, 149.
[28] Cuba, 872; Peru, 885 c. p.; Venezuela, 856.
[29] Argentina, 1386; Brazil, 149; Cuba, 872; Peru, 885; Venezuela, 855.
[30] Argentina, 1384, 1387; Brazil, article 2, code of com.; Cuba, 872.
[31] Art. 900 c. p.
[32] Spain 873; Argentina, 1385; Brazil, 160; Cuba, 873; Honduras, 861; Peru, 885; Uruguay, 1523.
[33] Art. 160. [34] Art. 13, law of June 2, 1893.

Venezuela any debtor can apply for it, including partnerships and corporations;

(*h*) to present a proposition for a moratorium to his creditors, to extend not longer than three years.[35] In Spain, Honduras and Peru no reduction of the amount of the liabilities can be demanded; if it is, the judge must deny the application.

In Argentina [36] the debtor can in writing present his offer of settlement five days at least before the day fixed for the meeting of the creditors.

In Brazil [37] the offer is submitted at the same time as the application, and it cannot amount to less than a 20% payment of the total liabilities not secured by mortgage or pledge.

In Uruguay no time is fixed in which the offer of settlement may be judicially submitted, but the debtor can secure a settlement extrajudicially,[38] in which case he must request judicial authorization of the settlement (*homologaciôn*) arrived at before it is enforcible. It must be accepted and signed by the majority of the creditors representing at least three-fourths of the amount of the liabilities, excluding privileged creditors and those secured by mortgage or pledge.

In Venezuela [39] the merchant debtor can merely request of the judge an authorization to liquidate his commercial house in a friendly way within a period no longer than one year, obligating himself not to undertake any wholesale transaction so long as his application is not passed upon. During the period of one year allowed for liquidation, he may arrange a settlement with his creditors, if they unanimously, or at least a majority representing three-quarters of the liabilities, accept it, provided that they guarantee to satisfy the dissenting creditors in such manner that the latter will obtain what reasonably can be realized through the liquidation.[40]

[35] Spain, 872; Cuba, 872; Honduras, 860; Peru, 885.
[36] Art. 1392. [37] Art. 149. [38] Art. 1524.
[39] Art. 855. [40] Art. 863.

In Peru [41] the debtor must present a certificate of deposit of an amount sufficient to pay the expenses of the proceedings; such amount must be ten per cent or more of the estimated expenses.

(*i*) to produce his commercial books and papers; [42]

(*j*) in Cuba [43] he must appoint a merchant who will represent him at the meeting of the committee of creditors appointed to report on the accuracy of the balance sheet, the correctness of the mercantile books of the bankrupt and on the causes of the bankruptcy, and to deliver to the clerk of the court the sum of money necessary to issue letters rogatory, and publish notices for the citation of creditors, plus 10% of such sum;

(*k*) in Venezuela [44] the debtor must also present an approval of his petition, signed by three of his creditors.

Effects of the petition.

When the application or petition is submitted with all the requisites provided by the law, it has the effect of a moratorium. In Cuba this is the direct result of the presentation of the application to the judge,[45] while in the other countries such result is produced by the judicial decree granting the petition.[46]

Other effects of the petition, when granted by the judge, are:

(*a*) The judge must appoint a supervisor (intervenor) whose functions are to supervise the transactions and conduct of the merchant and to examine his commercial books and papers, while the creditors themselves appoint another person satisfactory to them.[47]

(*b*) The judge orders the publication of the petition and calls the creditors to a meeting to discuss the

[41] Art. 900 c. p.

[42] Argentina, 1386; Brazil, 149; Peru, 900; Venezuela, 856.

[43] Art. 872 and article 8 of the law of June 24, 1911.

[44] Art. 856. [45] Art. 2.

[46] Spain, 870; Argentina, 1388; Brazil, 149; Honduras, 858; Peru, 883; Uruguay, 1525; Venezuela, 860.

[47] Argentina, 1388; Brazil, 149; Uruguay, 1525; Venezuela, 860.

proposition submitted by the debtor.[48] In Peru [49] the petition must be entered in the commercial registry.

(*c*) The debtor's management of his own affairs is not suspended.[50]

(*d*) The debtor is forbidden to enter into arrangements of settlement with any of his creditors separately.[51]

Notwithstanding that Mexico has not adopted the institution of "suspension of payments," article 988 of its Code of Commerce provides that a debtor can enter into an agreement with his creditors before his petition for a declaration of bankruptcy or before such declaration is made; but this privilege cannot be enjoyed by a fraudulent bankrupt. As there is no way of determining whether a bankruptcy is fraudulent or not, except through bankruptcy proceedings, this provision implies of necessity that the bankruptcy proceedings must be carried out, whereupon the character of the bankruptcy will be determined. Only then can it be known whether the settlement of the debtor with his creditors is lawful or not. The debtor, of course, can avoid bankruptcy by entering into a settlement with his creditors, but only extrajudicially, so that the composition requires the unanimous consent of the creditors, who are not obliged to attend the meetings until the extrajudicial settlement has proved unpracticable.

The composition.

On the day appointed by the judge the creditors, the supervisors and the debtor must discuss the propositions of settlement submitted by the latter, taking into consideration the reports of the supervisor in regard to the causes of the insolvency and of the liabilities. The creditors can accept

[48] Argentina, 1388; Brazil, 151; Uruguay, 1529, 1530; Venezuela, 857.

[49] Art. 901 c. p.

[50] Argentina, 1389; Brazil, 157; Cuba, 4; Uruguay, 1540; Venezuela, 855.

[51] Spain, 899; Argentina, 1409; Cuba, 3; Honduras, 887; Peru, 911; Venezuela, 863.

the proposition by majority of two-thirds of the creditors present representing at least three-fourths of the non-privileged claims; or vice versa in Argentina;[52] and in Brazil [53] by creditors who represent three-fifths of the whole liabilities if the debtor proposes to pay over sixty per cent of his debts, and by those representing two-thirds of the liabilities if the promised settlement is not over forty per cent. If an extension of time for payment is asked the period cannot be longer than two years, and the proposition may be accepted by creditors who represent three-fourths of the amount of the liabilities; in Peru [54] by half plus one of the creditors, representing three-fifths of the amount of the non-privileged claims; and in Uruguay [55] by those representing three-quarters of the amount of the liabilities. In Venezuela [56] even though the judge, in granting the debtor the privilege of a settlement with his creditors must take into consideration their opinion and vote, he is not bound by them but may grant the debtor a period not exceeding twelve months during which he may attempt to reach a settlement with his creditors. These creditors cannot judicially sue the debtor in the meantime, except for debts due the State or those guaranteed by pledge or mortgage or those specially privileged.[57] The debtor may obtain from his creditors a longer period for settling his liabilities or reducing them, provided unanimous consent is given to the proposition. A settlement can also be secured from creditors who represent at least three-quarters of the amount of the debts, provided they guarantee to the dissenting creditors such a dividend as they could reasonably obtain in a liquidation of the business.[58] Whenever a concession is made to a debtor to settle amicably with his creditors, the judge can grant the debtor an exten-

[52] Arts. 1398, 1399.

There is no legal remedy against a judicial decision which refused the debtor an extension of a period for paying his debts or an abatement in the amount thereof on the ground that the majority required by the law was not obtained. Spain, Trib. Sup., Dec. 10, 1888. *Col. Leg. de España, Materia Civil*, 1888, p. 916.

[53] Arts. 106, 155. [54] Art. 901 c. p. [55] Art. 1537.

[56] Arts. 859, 860. [57] Art. 862. [58] Art. 863.

sion of the period fixed for that purpose, provided he has paid a considerable amount of his obligation, or any other circumstance has arisen which makes it proper to give such extension, and the creditors who represent at least half the remaining creditors have agreed to it.[59]

Creditors entitled to vote for the acceptance of the propositions of settlement.

Creditors who have no special privilege, lien or mortgage on the debtor's property are called to vote on the question of acceptance; under certain circumstances, even creditors thus privileged may vote, the effect of their participation in the meeting of creditors and in the decision of the creditors on the debtor's offer varying as follows:

(*a*) in Argentina [60] they lose their security or privilege, even though the propositions are not accepted; they can, however, waive merely a part of their privilege, voting with respect to such part as common creditors, without losing their security or privilege as to the rest of their claim;

(*b*) in Brazil [61] mortgage creditors are forbidden to vote;

(*c*) in Peru [62] they are subject to reduction in amount or to extension of time granted by the meeting of creditors, but they do not lose their privilege or mortgage;

(*d*) in Uruguay [63] they cannot vote unless they waive their right to be preferred, but if the settlement is not approved such waiver has no effect;

(*e*) in Venezuela no distinction is made between privileged and ordinary creditors in regard to this matter.

Effect of the settlement on the debtor.

By virtue of a preventive composition the unsecured creditors and the debtor are bound according to the terms

[59] Art. 865. [60] Art. 1398. [61] Art. 107.
[62] Art. 912 c. p. [63] Art. 1541.

thereof, and no action lies by the former against the latter for payment of the balance of their claims.[64]

Effect in regard to third parties.

The composition of a debtor with his creditors does not alter the obligations of co-debtors or sureties.[65] In Argentina [66] creditors who present themselves after the settlement is approved cannot demand from the other creditors dividends which the latter may have received in accordance with the agreement; they are only entitled to share in future dividends, their right being reserved to demand from the debtor payment of past dividends which should have come to them, after the fulfillment of the composition. Creditors of a partnership do not preserve any right of action against the individual partners jointly liable, unless expressly so stipulated in the composition agreement.

When composition void.

Creditors may oppose the approval of the preventive composition in Spain,[67] Argentina,[68] Brazil,[69] Honduras [70] and Peru,[71] on account of non-fulfillment of legal formalities,

[64] Spain, 904; Argentina, 1411; Brazil, 113; Peru, 916; Uruguay, 1544.

A settlement made between the debtor and his creditors is not binding upon a foreigner who has not been notified of such settlement. Spain, Trib. Sup., March 28, 1895; *Gaceta* of Aug. 3, 1895.

The fact that a merchant asked for a judicial suspension of payments cannot be the basis for his creditors to compel him to present a plan of settlement of all his business, if the merchant dropped his application and continued paying his liabilities, inasmuch as the suspension of payments is as to him a privilege and not an obligation. Spain, Trib. Sup., April, 1, 1895; *Gaceta* of Aug. 5, 1895.

[65] Argentina, 1404; Brazil, 114.

[66] Art. 1410. [67] Arts. 902 to 904.

The fact that between the assets and liabilities noted in the balance sheet produced with an application for suspension of payments and in that produced at the meeting of creditors, there is a substantial difference, and that not all the creditors were cited because the corresponding list produced by the debtor was not complete, is sufficient ground for opposing the acceptance of suspension of payments asked by the debtor. Spain, Trib. Sup., March 28, 1899, *Col. Leg. de España, Materia Civil*, 1899, vol. 1, p. 552.

[68] Art. 1401. [69] Art. 108. [70] Arts. 890 to 892.

[71] Arts. 914 to 916 c. p.

fraudulent connivance between the debtor and one or more creditors, inaccuracy in the financial statements and balance sheet of the business, or in the reports of the supervisors in order to secure acceptance of the propositions of the debtor. In Brazil, a further valid ground for opposing the composition is the fact that it involves a greater sacrifice from the creditors than the winding up of the business.

Argentina [72] and Uruguay [73] provide that any creditor, within one year after the approval of the settlement can demand that it be set aside if he proves any fraud on the part of the debtor, whether prior to the settlement or during the proceedings relating to it, or after it was effected, provided the fraud consists in concealing a part of the assets or in exaggerating the liabilities. The declaration of nullity only prejudices the debtor and the creditors favored by the fraud. Acts carried out in good faith according to the agreement, before the fraud is made known, are valid as to good faith creditors. In case the agreement is nullified the creditors who in accepting it renounced their mortgage or security, recover such security.[74]

Rescission of the composition.

The codes of Spain,[75] Argentina,[76] Brazil,[77] Honduras,[78] Peru [79] and Venezuela [80] provide that the agreement can be rescinded when the debtor fails to comply with the obligations therein contracted. This provision is merely an application of the general principles of contract and would be enforced in other countries. Venezuela, furthermore, prescribes that the agreement is rescindable when the amount left in the hands of the debtor does not indicate any hope that at least two-thirds of the debts will be paid.

Taking over the debtor's property. (Adjudicación de bienes.)

The code of Argentina [81] provides that when the creditors

[72] Arts. 1405, 1407.
[73] Art. 1543.
[74] Art. 1408.
[75] Art. 906.
[76] Art. 1400.
[77] Art. 115.
[78] Art. 894.
[79] Art. 918 c. p.
[80] Art. 864.
[81] Arts. 1412 to 1420.

do not accept the settlement proposed by the debtor they may take over his property, thereby accepting also his liabilities. This step can be decided upon by the same plurality of votes necessary to accept the proposition of settlement, subject to the approval of the court. The privileged creditors preserve their security, but the creditors who distribute among themselves the property of the debtor are only responsible up to the amount of such property.

The debtor is released when the creditors accept his property, and if its value is greater than the liabilities, the creditors may agree to allow him to retain a part of it.

CHAPTER XXXVII

Bankruptcy (2)

DECLARATION OF BANKRUPTCY AND ITS EFFECTS

The state of bankruptcy.

A state of bankruptcy is special to merchants, except, as above stated, in Brazil,[1] where a corporation may be a bankrupt even though organized for a non-commercial purpose, and in Colombia, Costa Rica, Panama and Peru which provide for a system of procedure comprising the *concurso de acreedores* or civil insolvency proceedings as well as the bankruptcy of a merchant.

The object of bankruptcy proceedings is to preserve the property of the bankrupt in order to safeguard the interests of the creditors; to administer the property pending the liquidation thereof and to gather all necessary information in order (*a*) to make a proper distribution of the proceeds of the liquidation among creditors, according to their character and importance, and (*b*) to classify the bankruptcy in order to impose upon the debtor the deserved penalty, if any, or to discharge and rehabilitate him when proper.

The proceedings comprise measures of different kinds, namely:

(*a*) the taking over of the assets of the debtor, and the management and liquidation or disposal thereof in order to wind up the business;

(*b*) the admission of creditor's claims, and their classification and payment, in accordance with said classification;

(*c*) the classification of the bankruptcy, with the purpose of determining the consequences of a civil or

[1] Brazil, art. 3 of law of Dec. 17, 1908; Colombia, arts. 1125 to 1215 of the code of c. p., amended by law No. 40 of 1907; Costa Rica, 870; Panama, 858.

criminal nature which the law attaches to such classification, with respect to the debtor; and finally,

(*d*) the rehabilitation of the debtor, when proper.

Incidentally, during the pendency of these proceedings, an agreement may be reached between the creditors and the debtor, and certain rules have been established in such cases with a view to preventing any collusion or illegal preference between the debtor and one or more creditors detrimental to the others, as well as to preventing the debtor, by means of such agreement, to escape a deserved penalty.

When bankruptcy exists.

When a merchant ceases to pay his liquid and demand debts he is said to be in a state of bankruptcy, whatever the origin of said debts.[2]

In Bolivia,[3] Chile,[4] Panama,[5] Santo Domingo[6] and Uruguay,[7] the unpaid debts must be of a commercial character in order to give rise to bankruptcy proceedings.

In Brazil a merchant may become a bankrupt when he does not pay his commercial obligations, and furthermore,

(*a*) when in "executory" proceedings, after being requested to pay, he fails to do so or to deposit the amount of the debt within twenty-four hours after such request;

(*b*) when he refuses to guarantee the payment of an unaccepted bill of exchange, provided he is the drawer or the payee thereof;

(*c*) when he makes a quick liquidation of his business, or has recourse to ruinous transactions in order to make payments;

(*d*) when he summons his creditors and asks them for extensions of time for payment, or for a partial

[2] Spain, 874; Argentina, 1379; Colombia, 121; Costa Rica 3, of law of Oct. 15, 1901; Ecuador, 917; Guatemala, 1196; Haiti, 434; Honduras, 862; Peru, 886; San Salvador, 770.

See note 48, decision 3.

[3] Art. 487. [4] Art. 1325. [5] Art. 1534.

[6] Art. 437. [7] Art. 1546.

release from his obligations, or offers them an assignment of his property;

(*e*) when he disposes of, conveys, assigns or donates all or a part of his property to a third party, whether creditor or not, in order that such party may pay his obligations, or registers property in the name of another, contracts simulated obligations, or in any other way attempts to secrete his property, or delay payments or defraud his creditors;

(*f*) when he burdens his property with a mortgage, *anticresis*,[8] pledge or lien in favor of one creditor without retaining unburdened property sufficient to pay his debts, or attempts to do any of these acts;

(*g*) when he absents himself from his business, without leaving any one to represent him, manage his affairs and make payments, or conceals himself or attempts to do so, abandoning his home surreptitiously.

It is considered that an association is chargeable with the acts above mentioned when its managers commit them.

In Brazil corporations are also considered bankrupt when they fail to pay their liabilities, whether commercial or not, without good reason; when they are chargeable with any of the acts above mentioned, except subhead (*g*), and when three-quarters or more of their capital has been lost.[9]

Persons entitled to ask for a declaration of bankruptcy.

A declaration of bankruptcy may properly be requested:

(*a*) by the bankrupt himself;

(*b*) by a creditor who, having obtained a writ of attachment upon the property of the debtor, does not find property enough to satisfy his claim; or who, producing a valid evidence of indebtedness, proves that

[8] By anticresis is meant a kind of mortgage in which the thing burdened is given to the creditor in order that he may take the rentals or fruits thereof and pay himself the interest and amortization.

[9] The provisions of paragraph "d," article 1, of the law of bankruptcy are special to bankruptcies, and do not constitute rules applicable to other commercial judicial actions. Brazil, Trib. de Just. de Parahyba., Nov. 20, 1905, *Rev. do Para*, n. 1, p. 109.

the merchant has, in fact, ceased to pay his debts in general, or in case of suspension of payments, has failed to present propositions for settlement within the legal period, or that the debtor has fled or concealed himself, or has closed his place of business without leaving anybody to represent him and pay his debts;

(*c*) by the judge of proper jurisdiction acting *ex officio*, who, without waiting for any request on the part of the creditors, must, when the debtor has fled and deserted his home, proceed to take possession of his property and provide for its preservation awaiting the action of the creditors, who may in turn ask for a declaration of bankruptcy.[10]

In Brazil a creditor may demand a declaration of the bankruptcy of his debtor when the latter fails to pay him a commercial and liquid debt. Among the

[10] Spain, 875 to 877; Argentina, 1379; Bolivia, 509 to 513, Chile, 1344, 1351, 1356; Colombia, 136, 147; Ecuador, 929, 935; Guatemala, 1209 to 1218; Haiti, 446; Honduras, 863 to 865; Peru, 887 and 889; Santo Domingo, 440; Uruguay, 1546; Venezuela, 881, 887, 891.

The legal provisions applicable in Cuba to bankruptcy proceedings instituted in the year 1903, are those contained in the Code of Commerce of 1886, with the amendments made by the law of June 10, 1897, according to which article 872 of that code is no longer connected with articles 904 and 906 of the same code. Cuba, Trib. Sup., Feb. 8 and 20, 1904; *Gaceta* of July 28, and *Boletin Leg.*, vol. 7; part one, p. 228.

The creditors who demand the declaration of bankruptcy of their debtor must prove the real existence of their claims; the accounts opened in their books do not constitute evidence for the purpose of such declaration, unless such accounts have been acknowledged by the debtor. Cuba, Trib. Sup., Oct. 15, 1904, *Boletin Leg.*, vol. 7, part two, p. 594.

The fact that a merchant obtained a declaration of suspension of payments, and afterwards withdrew from the proceedings initiated as a consequence of such suspension of payments, is not conclusive evidence that he is a bankrupt. Cuba, Trib. Sup., Jan. 9 and 31, 1908; *Gaceta* of March 23, 1908.

A state of bankruptcy is determined by facts, such as the liabilities exceeding more than twenty-five per centum of the assets of the merchant, or that several drafts and promissory notes were protested, and that property of the debtor was attached for the payment of his debts. Mexico, Juzgado Segundo de lo Civil del Dist. Fed. May 25, 1905, *Diar. de Jur.* vol. 5, p. 601.

The judge of the place where a bankrupt has the main office of his business possesses the proper jurisdiction to take cognizance of the bankruptcy proceedings. Lima, Corte Sup. de Just., June 30, 1906, *Anales Jud.*, vol. 2, p. 180.

debts which the law considers as liquid are the accounts taken from commercial books, whether the debtor's or the creditor's, if judicially verified by two experts appointed by the judge of commerce on the application of the creditor. In case the account is taken from the creditor's books, the books must comply with the external and internal formalities of the law.[11] If comparison is to be made with the books of the debtor, the latter must be cited to produce his books in court, under penalty of being considered a bankrupt by his own confession; if his books are not legally kept they constitute conclusive evidence against him.

In like manner a merchant must be considered a bankrupt, even though he has not suspended payments, when by his conduct he creates a presumption of a state of bankruptcy. Among the acts inducing such a presumption are the failure to pay or to deposit what he has been ordered to pay or deposit by virtue of a final judgment duly served on him; or the refusal to give a guaranty for a bill of exchange, when required to do so as a debtor, drawer or endorser.

[11] See chapter on Bookkeeping.

The lack of the name of the payee in a bill of exchange causes it to be considered as a promissory note, and therefore it entitles its holder to demand the declaration of bankruptcy of the promisor after proper protest is made. Brazil, Trib. de Just. de S. Paulo, 3, 18 and 30 of May, 1903, *S. Paulo Judiciario*, vol. 2, 73 and 143.

The inspection of the books of the creditor is not lawful without the debtor's being heard. Brazil, Camara Civ. da Corte de Apel. do Dist. Fed., Oct. 21, 1897, and April 3, 1899, *Revista de Jur.*, vol. 3, p. 336, vol. 7, p. 78, and vol. 15, p. 56.

When the debtor was cited for the inspection of the books and failed to appear, he cannot demand a new citation for a second inspection. Brazil, Trib. de Just. de S. Paulo, June 25, 1893; *Gaceta Juridica de S. Paulo*, vol. 3, p. 207.

A merchant debtor who produces his books in blank is considered to have made a general admission of the facts stated in the petition for a declaration of bankruptcy. *Ib.*

The liquidator of a commercial firm can demand the declaration of its bankruptcy by virtue of the powers granted him by article 345 *et seq.* of the commercial code, and may appear in court as a plaintiff or defendant for the benefit of the firm. Brazil, Trib. de Just. de S. Paulo, July 12, 1894; *Gaceta Juridica de S. Paulo*, vol. 5, p. 308.

In Chile [12] a declaration of bankruptcy can also be demanded by the public prosecutor.

In Costa Rica [13] Mexico [14] and Nicaragua,[15] a bankruptcy can only be declared at the petition of the debtor himself or of his creditors, but not *ex officio* or at the petition of the public prosecutor.

In Panama [16] the declaration of bankruptcy can be requested: (*a*) by the debtor himself; (*b*) by any of his creditors; (*c*) by the public prosecutor in case of flight or concealment of a debtor who has no representative duly instructed and supplied with funds to meet his obligations. In order that a creditor may apply for a declaration of bankruptcy, it is necessary that his capacity thereto be legally recognized, and that his claim be mercantile, liquid and due. Nevertheless, in case of flight or concealment of the debtor who has no legal representative sufficiently instructed and equipped to pay his commercial debts, a creditor may demand a declaration of bankruptcy, even though his claim is not yet due, provided he proves the above mentioned

[12] Arts. 1344 and 1356.

The fact that there are debts due does not of itself prove the suspension of payments when the creditor has not been requested to pay, because the creditors may extend the period for the maturity of a debt. Chile, Corte de Apel. de Iquique, March 26, 1896; *Gaceta de los Tribs.*, 1896, p. 903.

[13] Law of Oct. 15, 1901, arts. 14 to 17.

[14] Art. 951.

The fact that a debtor requested a judicial liquidation with his creditors and that his liabilities greatly exceed his assets is proof that the debtor is a bankrupt. . Mexico, D. F. Juzgado Tercero de lo Civil, Oct. 8, 1908, *Diario de Jurisp.*, vol. 27, p. 552.

Matured policies of insurance are due and exigible and must be entered among the liabilities of a bankrupt insurance company.

Balanced life insurance policies contain obligations due at an uncertain time, but which no doubt must arrive; therefore they must also be included among the liabilities.

By reason of the fact that an insurer has asked for a declaration of his bankruptcy, he cannot demand further premiums from the insured. *Ibid.*

A declaration of bankruptcy can only be made when the bankrupt himself or one of his creditors demands it. Mexico, Trib. Sup. del Territorio de Tepic, Sept. 20, 1905, *Diar. de Jurisp.*, vol. 7, p. 121.

[15] Arts. 542, 543. [16] Art. 1534.

facts, or shows that the debtor has ceased to pay his obligations or has disposed in a suspicious manner of the whole or a considerable part of his property, or has encumbered or attempted to conceal it.[17] It is not necessary that the documents on which the creditor bases his application be previously acknowledged by the debtor, if the judge, using his discretion, considers the signatures authentic.[18] A mortgagee or a secured creditor cannot demand the declaration of bankruptcy, unless he proves that the mortgaged or pledged property was insufficient to pay his claim.[19]

Effects of the declaration of bankruptcy on the capacity of the debtor.

The effects produced by a declaration of bankruptcy on the capacity of the debtor, vary in different codes. All of them agree, however, in providing that the bankrupt is incapacitated to manage his property and that his acts disposing of or dealing with it subsequent to the date to which the effects of the bankruptcy relate back, are void.[20] In other respects the codes group into the following systems:

1st. The bankrupt may undertake all acts involving his person or intended merely to preserve his property. All acts of agency, however, must cease and his agents terminate their functions on the day they are notified of the bankruptcy. On that date the accounts for mutual remittances are closed. The debtor is not deprived of salaries or pensions paid by the State nor of property given to him on condition that it be not affected by his debts. He also retains the management of his wife's and children's property, but rentals and the fruits thereof can be attached by the receivers on condition of their compliance with the correlative obligations of such rentals. If the bankrupt declines

[17] Art. 1538. [18] Art. 1539. [19] Art. 1540.

[20] Spain, 878; Argentina, 1449 to 1455; Bolivia, 514, 515, 516; Chile, 1362; Colombia, 155, 156; Ecuador, 939; Guatemala, 1227; Haiti, 439; Honduras, 866; Mexico, 962; Nicaragua, 544; Panama, 1552, 1553; Peru, 890; San Salvador, 775; Santo Domingo, 443; Uruguay, 1571; Venezuela, 895.

an inheritance or bequest, the receiver, with judicial authorization, can accept it for the account of the bankrupt estate and in the name and stead of the debtor.[21] In Brazil, furthermore, the bankruptcy does not affect what the debtor earns by his personal labor when it is used for the support of his family.[22]

2d. The bankrupt is not deprived of his civil rights except in cases specially provided for by the law; he can manage property acquired by him after the declaration of bankruptcy, but it may be subjected to supervision and the creditors may have the net profits thereof. He retains the title to his property, the management of such as is not attachable, and that belonging to his children or to his wife, unless the latter has obtained a legal separation from him. Income of the children's or non-separated wife's property which normally goes to him, belong to the creditors, after deducting expenses for the children's and wife's maintenance, etc. The debtor can undertake all acts purely personal or tending to the preservation of his property in case of negligence on the part of the receivers.[23]

3d. The declaration of bankruptcy does not deprive the debtor of the exercise of his civil rights, except when expressly provided for by law.[24]

4th. All contracts made by the debtor in relation to his property are void from the day of the declaration of bankruptcy.[25]

[21] Argentina, 1449 to 1453; Brazil, 45, 46, 48, 52; Uruguay, 1571 to 1575.

[22] A bankrupt can validly contract obligations, even in reference to his former business, whenever that does not impair the property rights and obligations of the bankrupt estate and the other party is aware of his being a bankrupt. The bankrupt can never take advantage of his incapacity as such, as he cannot avail himself of his own fraud. Brazil, 2a Cam. da Corte de Apel., Aug. 20, 1907, *Rev. de Direito*, vol. 5, p. 576.

[23] Chile, 1360, 1362 to 1364; Ecuador, 939, 940.

A declaration of bankruptcy brings about automatically the incapacity of the debtor to dispose of and manage his property but not to dispose of and manage the property of his wife. Chile, Corte de Apel. de Concepción, March 3, 1896; *Gaceta de los Tribs*, 1896, p. 1423.

[24] Guatemala, 125, 127; Panama, 1564, 1565.

[25] Haiti, 439; Santo Domingo, 446.

5th. All actions and rights of the bankrupt are vested in his creditors, except pension for maintenance (alimentos) of any kind and things given to the debtor as a voluntary donation subject to the condition that it be not alienated.[26]

6th. The management of property acquired by the debtor subsequent to the bankruptcy for a substantial consideration can be supervised by the receivers. But the creditors have a right only to the net profits, after deducting what is necessary for the support of the debtor. In regard to the property of the debtor's wife she can exercise whatever rights the civil code may establish in her favor.[27]

Effects of the declaration of bankruptcy on the person of the debtor.

Although bankruptcy in itself is not a crime, it may originate in a culpable or fraudulent management of commercial business, and this circumstance, together with the fact that the presence of the debtor is required while the bankruptcy proceedings are going on, in order to make desired explanations, have made it seem expedient to prevent the debtor from leaving the jurisdiction, so that if the circumstances indicate that he has incurred criminal liability, he cannot escape punishment. The law consequently provides for certain measures in regard to the person of the debtor, in accordance with the following systems:

First system. The bankrupt is arrested in Spain,[28] Bolivia,[29] Chile,[30] Costa Rica,[31] Guatemala,[32] Haiti [33] and Honduras.[34]

[26] Nicaragua, 544, 545.
[27] Venezuela, 895.
[28] Art. 1335 c. c. p.
[29] Art. 521.
[30] Art. 1350.
[31] Art. 21.
[32] Art. 1215.
[33] Art. 452.
[34] Art. 452 c. c. p.

In order that a bankrupt may be released from the provisional arrest provided for by the law, he requires a surety who must guarantee that the bankrupt will present himself any time the judge so requires; but the surety does not guarantee the payment of the liabilities of the bankrupt. Lima, Corte Sup. de Just., Nov. 30, 1905, *Anales Judiciales*, vol. 2, p. 104.

Second system. The bankrupt is subject to a writ of *ne exeat*, that is to say, he cannot leave the jurisdiction of the bankruptcy proceedings, in Argentina,[35] Brazil,[36] Ecuador,[37] Mexico,[38] Panama [39] and Venezuela.[40]

Third system. He is arrested unless he gives a bond, in Nicaragua.[41]

Fourth system. He is arrested, when proper, or is subjected to police supervision in Santo Domingo.[42]

Fifth system. He is arrested when he fails himself to declare his bankruptcy before the judge of proper jurisdiction within five days after the actual cessation of payments, in Uruguay.[43]

The bankrupt, furthermore, is incapacitated to engage in the occupation of a merchant until he is rehabilitated.[44]

In Panama [45] a bankrupt cannot be a broker, an auctioneer, a manager of a warehouse or corporation, a shipping agent, or an expert or arbitrator in commercial matters; and, finally, he is deprived of the exercise of rights inherent in a citizen of the Republic.

Effects of a declaration of bankruptcy in regard to judicial actions.

As the bankruptcy proceedings are designed to liquidate all real property, chattels, and *choses* in action belonging to the debtor in order to pay his debts, up to the full extent of his economic capacity, so all suits in regard to property or rights, instituted against the bankrupt, must be brought before the judge having jurisdiction of the bankruptcy proceedings and are joined thereto. It is for this reason that such proceedings are called "attractive" (*atractivo*) and "universal" because they merge in the hands of the judge of the bankruptcy and call for a general and joint decision

[35] Art. 1431. [36] Art. 37. [37] Art. 950.
[38] Art. 967. [39] Art. 1552. [40] Art. 906.
[41] Art. 537. [42] Art. 455. [43] Art. 1557.

[44] Spain, 13; Argentina, 24; Bolivia, 2; Brazil, 2 c. com.; Colombia, 16; Costa Rica, 9; Ecuador, 941; Mexico, 12; Nicaragua, 5; Panama, 33; Peru, 13; San Salvador, 9; Uruguay, 29; Venezuela, 897.

[45] Arts. 1553, 1554.

of all pending judicial matters relating to the debtor's property.[46]

In Mexico [47] three exceptions are made to the foregoing rule: (*a*), proceedings in which a decision has been rendered and served on the parties, even though it be not final because subject to appeal; (*b*), foreclosure proceedings of a mortgagee or pledgee; (*c*), proceedings to sell certain property at auction in order to pay a bank or credit institution with the proceeds.

A peculiar characteristic of a final decision arrived at in bankruptcy proceedings is that it produces effects in regard to all persons, whether parties to the proceedings or not, a rule in derogation of the general principle that the authority of *res judicata* cannot extend to persons, things or actions not involved in the action itself.[48]

Effect on non-matured obligations.

By virtue of a declaration of bankruptcy all liabilities of the debtor not yet due become immediately due as of the date of the declaration. Should payment be made before the time fixed in the contract, a corresponding discount must be allowed.[49]

[46] Spain, 1173, 1319 c. c. p.; Argentina, 1436; Bolivia, 612; Brazil, 7; Chile, 1366; Ecuador, 942; Guatemala, 1228; Mexico, 983; San Salvador, 772, 776; Uruguay, 1549; Venezuela, 898.

A mortgagee can carry on the proceedings for foreclosure, independently of those in bankruptcy. Argentina, Cam. 1a. de Apel. Civ, Buenos Aires, June 27, 1914, *Jurisp. de los Tribs. Nacs.*, June, 1914, p. 228.

The bankruptcy proceedings, by their very nature attract, without distinction, all actions, whether the bankrupt be a plaintiff or defendant; all of them must be brought to the cognizance of the judge carrying on such proceedings, even though the actions are within the jurisdiction of the federal courts. Argentina, Cam. Fed. de Apel. del Paraná, March 30, 1914, *Jurisp. de los Trib. Nac.*, March, 1914, p. 76.

A judicial suit in which a certain amount of money is demanded from a bankrupt, must be submitted to the bankruptcy judge and the bankruptcy proceedings. Mexico, 2a Sala del Trib. Sup. del Dist. Fed., Hinojosa P. *v.* Receiver of the bankruptcy of L. G. Otero, April 14, 1911, *Diario de Jurisp.*, vol. 23, p. 323.

[47] Art. 983.

[48] Lyon-Caen et Renault, vol. 7, p. 111.

[49] Spain, 883; Argentina, 1459; Bolivia, 514; Brazil, 26; Chile, 1367; Colombia, 163; Ecuador, 943; Guatemala, 1229; Honduras, 871; Mexico, 974; Nicaragua, 552; Panama, 1571; Peru, 895; San Salvador, 777; Santo Domingo, 444; Uruguay, 1581; Venezuela, 899.

In applying the foregoing rule it is necessary to observe that:

(*a*) in Argentina and Uruguay, in case of annual pensions, their amount must be determined by the judge, according to the circumstances of the case; that

(*b*) in Brazil, in case the obligation depends on a condition precedent, it is not due until the condition arises; while in Chile [50] and Nicaragua [51] the creditor can demand the deposit in court or the delivery to him of any amount payable on account of the conditional debt, provided he guarantees to pay it back if the condition should not be performed; and that

(*c*) in Panama, when a mortgagee or pledgee creditor takes advantage of the benefits of the rule, he is subject to the bankruptcy proceedings.

Effects in regard to co-debtors of the bankrupt.

The rules governing the relations between the co-debtors of the bankrupt and his creditors may be inferred from the general principles already explained.[52] Some codes, however, deal especially with the matter as follows:

In Argentina,[53] Panama [54] and Uruguay,[55] the co-debtors of the bankrupt on a commercial debt, not due at the time of the bankruptcy, provided their debt was contracted simultaneously with the bankrupt, must guarantee that they will pay it at maturity, or pay it at once; but if the debt was not simultaneously, but

Obligations to become due at a future date must be considered as due on the date of bankruptcy, and ought to be paid without discount, when the period to maturity is not certain. Mexico, D. F. Juzgado Tercero de lo Civil, Oct. 8, 1908, *Diario de Jur.*, vol. 27, p. 552.

[50] Art. 1370. [51] Art. 552.

[52] See chapter on Obligations in General.

[53] Arts. 1461, 1462, 1463.

Notwithstanding that the surety waived the "benefit of levy" and bound himself jointly with the principal debtor, the previous demand of the debtor is indispensable. In case the debtor is bankrupt, the receiver must be requested to pay. Argentina, Cam. 1a de Apel. Civ., July 18, 1914, *Jur. de la Trib. Nacs.*, July, 1914, p. 149, and July 21, 1914, *ib.*, p. 156.

[54] Art. 1574. [55] Arts. 1583, 1584.

subsequently, contracted, as is the case with endorsements, the bankruptcy of a later endorser does not give rise to any claim against previous endorsers, before the maturity of the negotiable instrument.

In case of suretyship, if the principal debtor fails, the surety has the benefit of any time period stipulated for the payment of the debt; should the surety become bankrupt, the principal debtor must provide for a new surety unless the surety was provided by the creditor's designation.

In Panama [56] if the bankrupt was a surety he enjoys the "benefit of *excusión*," *i. e.*, the right to demand that the principal debtor be sued first, and his property, if he has any, sold for the payment of the debt,[57] even though he waived such benefit. Should the debt not yet be due, the principal debtor must pay it at once or release the creditors from the obligations of suretyship. The co-debtors or sureties of the bankrupt can bring their claims with those of other creditors of the bankruptcy to the amount of what they paid for the account of the bankrupt; but not for what they paid after the failure, unless at the time of making such payment, they subrogated themselves for the paid creditor.

In Brazil [58] the co-debtors are obliged to give a guaranty for the payment of the debt at maturity.

In Chile,[59] Guatemala,[60] and San Salvador,[61] when the drawer of a non-accepted bill of exchange, or its acceptor or the maker of an endorseable promissory note becomes bankrupt, the other obligors must pay immediately or give a guaranty to pay at maturity.

In Mexico [62] all liabilities due to suretyship legally assumed by the bankrupt are suspended with respect to the bankrupt estate, but amounts already due on account of such suretyship, at the time of the declara-

[56] Art. 1573.
[57] See chapter on Suretyship.
[58] Art. 26.
[59] Art. 1369.
[60] Art. 1230.
[61] Art. 779.
[62] Art. 975.

tion of bankruptcy, must be paid in the corresponding grade and preference.

Interest on amounts due.

Interest due on debts of the bankrupt ceases to run as a consequence of the declaration of bankruptcy, except on debts guaranteed by mortgage or pledge up to the value of the property mortgaged or pledged.

This rule varies in its bearing on the debtor in different countries, as follows:

(*a*) In Spain,[63] Honduras,[64] Peru[65] and San Salvador,[66] the rule is unrestricted; it applies to the relations of the creditors with the debtor and with one another.

(*b*) In Argentina,[67] Ecuador,[68] Guatemala,[69] Mexico,[70] Panama,[71] Nicaragua,[72] Santo Domingo,[73] Uruguay[74] and Venezuela,[75] interest does not run as between creditors but only as to the debtor; that is, the bankrupt will not be released until he has paid the principal and the interest of his debts;

(*c*) In Brazil[76] interest runs as between the creditors up to the amount of the assets of the bankruptcy; so, in regard to the debtor, interest continues to run.

Interest on securities of stock companies or limited partnerships when payable to bearer on mortgage bonds issued by realty associations (*sociedades de crédito real*), and on debts guaranteed by mortgage, *anticresis* or pledge, is subject to payment in preference to other interest with the proceeds of the sale of the mortgaged or pledged property.[77]

Retroactive effect of a declaration of bankruptcy.

As a declaration of bankruptcy is made at the petition either of the debtor or of creditors, it is not infrequent that such declaration is made after the insolvency of the debtor

[63] Art. 884. [64] Art. 872. [65] Art. 896.
[66] Art. 778. [67] Art. 1460. [68] Art. 944.
[69] Art. 1229. [70] Art. 977. [71] Art. 1567.
[72] Art. 569. [73] Art. 445. [74] Art. 1582.
[75] Art. 900. [76] Art. 27. [77] Art. 27.

has become an actual fact which, for one reason or another, he may have concealed; therefore, in order to fix the rights of the creditors, it has been considered necessary to make the effects of the declaration of bankruptcy retroactive to the date at which the insolvency really commenced. The judge, in judicially declaring the bankruptcy, fixes a certain date, according to the evidence, to which the legal effects of the bankruptcy relate back; but at the same time he states that such date is fixed only "for the time being, without prejudice to a third party." He can therefore change the date in a proper case when the debtor himself, by reason of the influence that such date may have upon the classification of the bankruptcy, or when any creditor, by reason of the effects such retroactive date may have upon the validity of his or another's claim, may request a change of the designated date of the bankruptcy.

In this respect the codes adopt different systems, namely:

First system. The judge, according to the data disclosed by the papers and books of the bankrupt, or by evidence produced by the creditors, can fix the date to which the effects of a declaration of bankruptcy must relate back, without any limitation.[78]

Second system. The judge fixes the legal date of the bankruptcy; that is, the date at which the bank-

[78] Spain, 878; Argentina, 1454; Bolivia, 509; Colombia, 156; Ecuador, 937; Haiti, 438; Honduras, 866; Mexico, 987; Panama, 1545; Peru, 890; Santo Domingo, 441.

The sale of movable property by the liquidator of a bankrupt association, after the date to which the effects of the declaration of bankruptcy relate back, is void, even though, as a rule, the liquidator has authority to sell the property of the association, and it has not been proved that the sale was made to defraud creditors. The declaration of bankruptcy is supposed to have been made at the date to whichi ts retrocative effects relate, and as the liquidator is only an agent of the association, it is obvious that he cannot do what the association could not. Colombia, Corte Sup. de Just., Aug. 9, 1912; *Gaceta Jud.*, vol. XXI, p. 106.

The novation of a contract in which a person substitutes himself for the original debtor is void when such person becomes a bankrupt and the effects of the bankruptcy relate back to a time previous to the contract, according to judicial decision. Lima, Corte Sup. de Just, April 23, 1909, *Anales Jud.*, vol. 5, p. 52.

ruptcy became a fact. But he cannot relate it back more than a certain period before the protest of the first unpaid negotiable instrument, or the application for a declaration of bankruptcy. That period is forty days in Brazil,[79] one year in Uruguay,[80] and two years in Venezuela.[81]

Third system. The declaration of bankruptcy fixes the date to which its effects shall relate back, and no subsequent change in this respect is possible.[82]

Revocation of acts of the bankrupt prior to the declaration of bankruptcy.

Besides this retroactive effect, the law provides for the nullification of certain acts of the bankrupt undertaken during a period called the "suspected period," according to the following systems:

System of Spain. All acts, whether of mere management or involving a disposal of property, undertaken after the period to which the effects of the declaration of bankruptcy relate back, are void. Payments by the bankrupt, whether in cash, valuables or merchandise, made within fifteen days prior to the declaration of bankruptcy, of debts due subsequent to such declaration, must be paid back to the estate of the bankrupt. The discount by the debtor of his own obligations is considered as an anticipated payment.

The following contracts are considered void and fraudulent when made by the debtor within thirty days prior to his bankruptcy:

(*a*) gratuitous conveyances of immovable property;

(*b*) dowries in favor of the debtor's daughters out of his exclusive property;

(*c*) conveyances of real estate in payment of debts not due at the time of the declaration of bankruptcy;

(*d*) contractual mortgages to guarantee obligations not previously guaranteed in that way for loans of

[79] Art. 16. [80] Art. 1617. [81] Art. 893.

[82] Chile, 1359; Guatemala, 1224; San Salvador, 773.

money or merchandise, the delivery of which was not made at the time of the execution of the mortgage before the notary and the witnesses who authenticated the instrument;

(*e*) gifts *inter vivos* made after the last balance previous to the bankruptcy, if the liabilities exceed the assets, unless such gifts are made for a past consideration.

The following contracts are voidable at the petition of any creditor, if he proves that the purpose of the debtor was to defraud the creditors:

(*a*) alienation of immovable property for a consideration, within a month prior to the declaration of bankruptcy;

(*b*) dowries given to the daughters within the same period, out of property belonging to the matrimonial partnership, or any other conveyance of such property without consideration;

(*c*) dowries or the burdening of property by one of the spouses in favor of the other within six months previous to the declaration of bankruptcy, unless such dowry was made with or the burden imposed upon property which belonged to the ancestors of the beneficiary spouse, or such property was acquired or possessed before by the spouse in whose favor the dowry was made or the burden imposed;

(*d*) any admission by the bankrupt that he received cash or goods as a loan, executed in a public instrument within six months previous to the bankruptcy, if the notary does not testify to the receipt of the money or goods; or if made in a private instrument, if the entries in the books of both parties do not agree;

(*e*) all contracts, obligations and mercantile transactions entered into by the bankrupt within ten days before the declaration of bankruptcy.[83]

[83] Spain, 878 to 881; Bolivia, 515 to 518; Colombia, 158 to 162; Honduras, 866 to 869.

Peru [84] has adopted this system, with the exception of paragraphs *a* and *b* above, which are changed as follows:

(*a*) alienations of movable property for consideration within sixty days prior to the declaration of bankruptcy;

(*b*) dowries given to the daughters within six months prior to the declaration of bankruptcy out of property belonging to the matrimonial partnership, or any other conveyance of such property without consideration.

System of Argentina. Acts undertaken by the bankrupt after he judicially petitioned for a declaration of bankruptcy, and after the date fixed by the judge as the actual date when payments were suspended are, with respect to the bankruptcy, either absolutely or conditionally void.[85]

The following are absolutely void:

(*a*) alienations of realty or chattel rights and *choses* in action, without consideration;

(*b*) payments of debts not due, whether in cash or by means of assignments of credits, set-offs, or conveyances of any kind, even though the creditor or the debtor acted in good faith;

(*c*) payments of debts past due, if made otherwise than with cash or commercial paper.

(*d*) all mortgages, *anticresis* (a mortgage in which the property mortgaged is left in the possession of the creditor who must apply its fruits or proceeds to the payment of interest and amortization) and pledges on the bankrupt's property for past obligations not thus guaranteed.

On the other hand, all payments made by the bankrupt of obligations due, alienations in general, acts done and obligations contracted, even though

[84] Arts. 890 to 893.

[85] The nullity of the acts of the debtor after the bankruptcy was declared, has been established in behalf of the creditors, and, therefore, it cannot be demanded by the debtor himself. Argentina, Cam. de Ap. Com., Buenos Aires, April 10, 1913, *Jur. de los Tribs. Nacs.*, p. 230.

not of a commercial character, when undertaken after the debtor's application for a declaration of bankruptcy or after the cessation of payments, provided that those who have received something from or have dealt with the debtor were acquainted with the fact of such application or cessation of payments. The rights of third parties in good faith claiming sums belonging to them, but which have been incorporated in the bankruptcy, are reserved.[86]

System of Brazil. The following acts are without effect upon the creditors, no matter whether the contracting party knew the economic condition of the seller, or whether or not the debtor intended to defraud his creditors:[87]

(*a*) payments, within the period of the bankruptcy, of non-matured obligations, whatever the means of extinguishing them, even if it be the discount of the debtor's own obligations;

(*b*) payments, within the legal period of the bankruptcy, of obligations due and payable in any other way than by cash or commercial paper;

(*c*) mortgages or any other security on property (*garantías reaes*) including the right of retention of merchandise purchased, when they are created within the legal term of the bankruptcy, and relate to debts contracted before that term. If the mortgaged property was already subject to another mortgage inscribed in the second place, the receivers must recover the amount intended for the owner of the revoked mortgage;

[86] Argentina, 1454 to 1456.

[87] The dissolution of an association, during the legal period to which the effects of the declaration of bankruptcy are extended, is not *ipso jure* void; it is necessary to have a judicial declaration that there has been fraud in order to nullify it. Brazil, Trib. de Just. de S. Paulo, April 14, 1896, *Rev. Mensal das decisões do Trib. de Just. de S. Paulo*, vol. 3, p. 79.

The sale of merchandise by the debtor, made during the bankruptcy, is valid unless it is proved that there was fraud on the part of both parties. Brazil, Trib. de Just. de S. Paulo, Sept. 19, 1903, *S. Paulo Judiciario*, vol. 3, p. 117.

(*d*) all acts without consideration, unless in pursuance of a law, or if they involve less than 300$000, (about $96 U. S.) undertaken within two years prior to the declaration of bankruptcy, whether or not they form part of a contract entered into for a proper consideration;

(*e*) waiver of an inheritance, bequest or trust fund within two years before the declaration of bankruptcy;

(*f*) an anticipated restitution of the dowry or its surrender before the period stipulated in the antenuptial contract;

(*g*) the recording of mortgages, burdens or conveyances *inter vivos*, whether or not for proper consideration, of property susceptible of being mortgaged, when made after a warrant of attachment or the declaration of bankruptcy is issued. The failure to register the mortgage or burden gives the creditor in question the privilege of joining, for the payment of his debt, with the other non-privileged creditors (*chirographarios*), and the failure to record a conveyance *inter vivos* gives the buyer a personal action to recover the price, together with the fruits or income of the realty. The acts referred to under *c* and *d* are not revocable if, when they were executed, the debtor was not a merchant.[88]

System of Chile. The following acts are void with respect to the estate of the bankrupt if undertaken within ten days prior to the date established by the judge as the date when the suspension of payments took place:

(*a*) conveyances of property without consideration. If the conveyance was in favor of an ancestor or a blood relation in direct or collateral line, within the fourth degree of relationship, even though the act is done through an intermediary (*interpôsita persona*) the above period is extended to one hundred and twenty days before the cessation of payments;

[88] Art. 55.

(*b*) all payments made in anticipation, whether of a civil or commercial debt, by any method. The discount of promissory notes or invoices drawn on the debtor, or the waiver of a time period established in his favor, constitutes an anticipation;

(*c*) all payments of matured debts not made in cash or negotiable instruments;

(*d*) all mortgages, pledges or *anticresis* of property of the bankrupt for debts contracted before the ten days above referred to. Payments made in cash of matured obligations, as well as acts and contracts with proper consideration, made in the interval between the cessation of payments and the declaration of bankruptcy, can be rescinded, when the creditors thus paid or the third parties contracting with the debtor were aware of such cessation. If the bankrupt paid a bill of exchange or a promissory note to order after the date fixed as that of the cessation of payments and before the declaration of bankruptcy, the reimbursement of the amount paid can only be demanded from the person for whose account the payment was made, and it is necessary to prove that he knew of the cessation of payments at the time the bill of exchange was drawn or the promissory note endorsed.

Other acts or contracts, antedating the period of ten days before the cessation of payments, may be rescinded as provided by the civil law.[89]

System of Haiti. All acts conveying realty without consideration within ten days prior to the initiation of the bankruptcy proceedings are void with respect to the body of creditors. The same conveyances made for a consideration, if they are fraudulent, can be nullified at the petition of the creditors. All commercial acts entered into by the debtor within ten days of the above mentioned initiation of proceedings are presumed

[89] Chile, 1373 to 1376; Ecuador, 945 to 947; Guatemala, 1232 to 1234. Venezuela, 901 to 903.

fraudulent on the part of the debtor, and can be declared void if any fraud is proved on the part of the other contracting parties. All acts or payments defrauding creditors are void.[90]

System of Mexico. Transactions of the bankrupt defrauding his creditors at any time before the declaration of bankruptcy, are void, whenever the person with whom the transactions were concluded was aware of the fraud.

All contracts without consideration made in favor of relatives in ascending or descending line or in fulfillment of non-matured obligations are void if made within thirty days previous to the date when the debtor failed to pay the obligation which brought about the bankruptcy. A creditor who, within such period, extends the period of his credit with a view to having it secured by mortgage, pledge or otherwise, will only be entitled to such guaranty if it is valid according to law.[91]

System of Nicaragua. Payments made by the bankrupt within three months before the cessation of payments, are void, if the debt was not due, or if several debts were due at the same time and not all were paid.

Conveyances of property without consideration, pledges or mortgages given to secure debts not originally contracted with such guaranty, or the acknowledgment of debts not proved by other means, if made within six months previous to the cessation of payments or at any time after the last balance sheet showing that the liabilities of the bankrupt were greater than the assets, are void.

All contracts made after the cessation of payments, or within fifteen days before the declaration of bankruptcy, provided the cessation did not take place earlier, are

[90] Haiti, 441 to 444.

[91] Mexico, 978 to 980.

A contract made by an insolvent debtor with another party ignorant of the insolvency is not void when it was, in fact, completed more than thirty days before the declaration of bankruptcy of the debtor. Mexico, Trib. Sup. del Dist. Fed. 2a Sala, Aug. 6, 1906, *Diar. de Jur.*, vol. 9, p. 361.

rescindable in so far as the transaction did not augment the assets.

All conveyances of property made at any time by the debtor can be rescinded if it is proved that they were made to defraud creditors, and the action is brought within three years after the declaration of bankruptcy.

Fraud is presumed, in the absence of proof to the contrary, by the acknowledgment at any time by the bankrupt of a dowry or of a debt in favor of the wife or the husband, as the case may be, when it does not burden inherited property; as well as by conveyance of realty for a consideration, within three months previous to the cessation of payments. The right of the buyer in good faith to be indemnified in so far as it is proved that the price benefited the bankrupt estate, is reserved.[92]

System of Panama. Acts of any kind undertaken by a bankrupt after the declaration of bankruptcy, and payments made to him after its publication are void *ipso jure*, except payment of a bill of exchange, the amount of which ought to be reimbursed by the drawer or by the person for whose account it was drawn, and of promissory notes, the amount of which must be reimbursed by the first endorser if the person who made the payment was aware of the suspension of payments at the time of the endorsement.

The following acts and contracts are also void, but only in favor of the body of creditors, when they are undertaken after the declaration of bankruptcy or thirty days prior thereto:

(*a*) acts or contracts without or for a negligible consideration;

(*b*) pledges, mortgages or any other act or stipulation designed to guarantee obligations previously contracted, or to give them any preference over other debts;

(*c*) the payment of non-matured debts, whether made in cash or by means of assignments or endorsements or in any other way by which an obligation is extin-

[92] Nicaragua, 546, 551.

guished, as well as the assignment of a credit already due in payment of a debt;

(*d*) the repudiation of an inheritance bequest or usufruct within two years previous to the date of the legal existence of the bankruptcy.

Acts and contracts without consideration made by the bankrupt within four years previous to the date to which the effects of the bankruptcy ought to relate back, are void when made in favor of the spouse or relatives of the bankrupt in ascending or descending line, or of brothers, sisters, father- or mother-in-law, sons- or daughters-in-law or brothers- or sisters-in-law.

The following acts and contracts, whenever undertaken, are voidable at the petition of the receiver or any of the creditors without any bar by the statute of limitations:

(*a*) simulated or fraudulent contracts. There is a simulation when the parties declare what is not true;

(*b*) conveyances of property made with or without consideration, when the other party knew that the debtor entered into the act or contract with a view to withdrawing the thing or its full or partial value from his creditors.

In like manner judgments that the debtor fraudulently allowed to be obtained against him can be set aside, if detrimental to the creditors.

Acts designed to acquire or preserve rights, for the execution of which the law requires certain formalities that have not been complied with or the fulfillment of which must take place within a certain period, can be rescinded when they were intended to damage the creditors.

Bilateral contracts which at the time of the declaration of bankruptcy were not performed or only partially performed, whether on the part of the bankrupt or of the other contracting party are *ipso jure* rescinded. In this case the other party can demand and be paid damages as a creditor of the bankrupt, unless he has a pledge or a mortgage as security.

In the case of hiring services or things, the contract can

be rescinded after notice is served according to civil law, the other party being entitled to no indemnity.

The foregoing rules concerning the nullity or rescission of acts and contracts of a bankrupt, are also applicable to those made by his heir with property belonging to the decedent bankrupt's estate from the death of the debtor to the declaration of his bankruptcy.

When an action for rescission is admissible against a person who acquires something, it is also admissible against those to whom he conveyed the thing without consideration; or even where there was a consideration if the transferee knew, at the time of the transaction, of the complicity of the original acquirer with the bankrupt.[93]

System of Santo Domingo. The following acts are void, so far as concerns the body of creditors, when they are undertaken by the debtor after or within ten days before the date fixed by the court as that of the suspension of payments: gratuitous conveyances of property of any kind; payments, whatever their nature, for debts, whether due or not; contractual or judicial mortgages and pledges on property of the bankrupt for obligations contracted before the bankruptcy.

Payments and contracts made for a consideration by the debtor, after the cessation of payments and before the declaration of bankruptcy, are voidable when the other party to the transaction knew that the debtor had ceased to meet his obligations.

Up to the date of the declaration of bankruptcy the deeds of mortgages and liens legally acquired can be entered in the registry. Registrations made after the cessation of payments or within ten days prior thereto, can be declared void if more than fifteen days have elapsed between the execution of the deed and its registration. This period is extended one day for every three leagues of distance between the place where the deed was executed and where it is to be registered.

In case a bill of exchange was paid after the date estab-

[93] Panama, 1579 to 1589.

lished for the cessation of payments and before the declaration of bankruptcy, the action to recover the money can be instituted against the person for whose account the bill was drawn. In case of payment of a promissory note the action can only be brought against its first endorser. In either case it must be proved that the person from whom the money has been demanded was aware of the cessation of payments.[94]

System of Uruguay. The following acts are void when undertaken within sixty days before the cessation of payments, according to the judicial decree:

(*a*) gifts *inter vivos* without a past consideration;

(*b*) conveyances of property without consideration;

(*c*) conveyances of realty in payment of obligations not due at the time; mortgages and pledges in support of debts which had no such security before, are also void when contracted within ten days previous to the suspension of payments.

The following acts and contracts are voidable at the petition of the creditors, when it is proved that the debtor intended to defraud them:

(*a*) mercantile transactions entered into by the bankrupt within ten days prior to the declaration of bankruptcy;

(*b*) loans, in cash or goods, made to the bankrupt within six months previous to the cessation of payments when the actual delivery of the money or goods is not proved by legal means independently of the document in which acknowledgment of the debt is made, unless this is done in a public instrument and the notary attests the delivery;

(*c*) conveyances of real property for a consideration within a month prior to the declaration of bankruptcy;

(*d*) all contracts made within two years previous to the cessation of payments when some simulation to defraud creditors was involved.

Payment by the bankrupt in cash, negotiable instru-

[94] Santo Domingo, 446 to 449.

ments, goods or any other personal property, of non-matured debts and discounts of his own obligations, within fifteen days previous to the declaration of bankruptcy, must be reimbursed to the bankrupt estate by the persons who received the money or property.[95]

Revocation of the decree which declared the state of bankruptcy.

A merchant who obtains the revocation of the decree which, at the petition of his creditors, declared his state of bankruptcy, can institute an action for damages against them if they proceeded maliciously or with manifest injustice or falsehood.[96]

[95] Uruguay, 1576 to 1579.

[96] Spain, 885; Argentina, 1429; Brazil, 21; Chile, 1388; Colombia, 154; Guatemala, 1222; Honduras, 873; Panama, 1550; Peru, 897; Uruguay, 1568; Venezuela, 1015.

CHAPTER XXXVIII

Bankruptcy (3)

Receivers and classification of creditors' claims

Starting the bankruptcy proceedings.

In order (*a*), to prevent the debtor from disposing of his property with the prejudice of his creditors; (*b*), to have a complete and dependable information concerning his assets and liabilities, the character and validity of creditors' claims and the nature of the causes which produced the insolvency; (*c*), to provide for the management of the bankrupt's property, and (*d*), to pay the creditors in the order of preference established by the law, the judge, at the time he declares the state of bankruptcy, must:

(*a*) appoint a receiver (called varyingly *síndico, depositario, curador, agente*) who is charged with the duty of taking possession of the bankrupt's property; [1]

In Argentina the creditors themselves, by a majority of votes representing the majority of interest, appoint the receiver.

In Bolivia, Haiti and Santo Domingo the judge must also appoint a delegated judge, (*juez comisario*) who is to decide questions of minor importance and to prepare the case for judicial decision.

[1] Spain, Chile, Colombia, Ecuador, Guatemala, Mexico, Panama, Uruguay and Venezuela.

When the number of votes and the financial interest represented by the voters in the election of an assignee in bankruptcy do not reach the figures mentioned in art. 1412 of the Code of Commerce, namely, half plus one of the number of creditors present, provided they represent at least three-fifths in amount of the total number of the voting claims, the judge must appoint the assignee. Chile, Corte de Apel. de la Serena, Dec. 31, 1895, *Gaceta de los Tribs.*, 1896, p. 1570.

In Brazil, besides the receiver appointed by the judge, the creditors appoint one or more liquidators.[2]

(*b*) order the receiver to take possession of the debtor's property. For that purpose a seal is placed on the doors of stores, warehouses and other places where personal property may be located, until a detailed inventory can be made, comprising merchandise, furniture, machinery, fixtures, negotiable instruments, securities, valuables of every description, commercial books, papers, correspondence of the bankrupt, which, when entered in the inventory, are vouched for by the receiver.[3]

(*c*) order the postmaster to deliver to the receiver any mail addressed to the bankrupt; the receiver must hand over to the bankrupt all letters of a personal or family character;[4]

(*d*) publish by means of placards and in the press, the declaration of bankruptcy, as well as summon the creditors to produce the evidence of their claims;[5]

(*e*) order any person having property of the bankrupt to surrender the same to the receiver;[6]

(*f*) prohibit the making of any payment to the bankrupt, under penalty of again paying the receiver;[7]

(*g*) call the creditors to a meeting for the discussion of

[2] The director of a corporation cannot be appointed the receiver of the same. Brazil, 1[a] Cam. da Corte de Apel., Oct. 24, 1910, *Rev. de Dir.*, vol. XVIII, p. 324.

A receiver is a depositary and the action of deposit is, therefore, proper against him after the accounts have been decided upon, and in case he refuses to surrender the money, books and property of the bankrupt. Brazil, Trib. de Just. de S. Paulo, March 13, 1905, *S. Paulo Judiciario*, vol. 7, p. 253.

[3] Spain, Argentina, Boliiva, Brazil, Chile, Colombia, Ecuador, Guatemala, Haiti, Mexico, Panama, San Salvador, Santo Domingo, Uruguay and Venezuela.

[4] Spain, Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guatemala, Haiti, Mexico, Panama, San Salvador, Uruguay and Venezuela.

[5] Spain, Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guatemala, Haiti, Mexico, Panama, San Salvador, Uruguay, and Venezuela.

[6] Spain, Argentina, Brazil, Chile, Colombia, Ecuador, Guatemala, Haiti, Mexico, Uruguay and Venezuela.

[7] Spain, Argentina, Chile, Ecuador, Guatemala, Mexico, Panama, San Salvador, Uruguay and Venezuela.

their rights and claims and the appointment of the definite assignee in bankruptcy.[8]

In Mexico,[9] the call is not issued until after the creditors have presented their claims and proof thereof, and the receiver has made his report thereon.

Duties of the receiver.

The duties of the receiver are:

(*a*) to take possession of the debtor's property describing it in the inventory;

(*b*) to manage such property as an agent in the common interest of the creditors;

(*c*) to represent the body of creditors in court;

(*d*) to sell the property of the bankrupt at auction or in a way most advantageous to the creditors, and to keep the proceeds for a proper distribution among the latter;

(*e*) to present a plan for the distribution of the liquid assets among the creditors, a plan which must be discussed by the creditors and sanctioned by the judge;

(*f*) to account for his management.[10]

[8] Spain, Bolivia, Brazil, Chile, Ecuador, Haiti, Panama and Venezuela.

[9] Art. 1445.

The code articles with respect to the above countries are as follows:

Spain, 1713, 1193, 1194 c. p.; Argentina, 1421 to 1423, 1433, 1438; Bolivia, 521; Brazil, 17, 18, 64, 65, 80; Chile, 1350, 1396, 1401; Colombia, art. 62 of the law 40 of 1907; Ecuador, 398; Guatemala, 1215, 1223; Haiti, 451, 453, 454, 460, 496; Mexico, 1429, 1473; Panama, 1795 to 1799 c. p.; San Salvador, 689 c. p.; Santo Domingo, 451, 462, 479, 491; Uruguay, 1557, 1558; Venezuela, 894.

[10] Spain, 1218, 1283, 1291 c. p.; Argentina, 1438 to 1444, 1486, 1492, 1495, 1496 to 1511; Bolivia, 598, 665, 674; Brazil, 74, 83; Chile, 1414 to 1433, 1498 to 1508; Colombia, arts. 82 to 93 of the law 40 of 1907; Costa Rica, 604 to 611, 616, 623, 633, 635, 641, 642, 646 c. p.; Ecuador, 976 to 979, 983; Guatemala, 1250, 1254, 493, 504, 553, 556; Mexico, 1418, 1433 to 1436, 1442, 1486 to 1490; Panama, 1816 c. p.; San Salvador, 703 c. p.; Santo Domingo, 484 to 490, 497, 532 to 537, 566, 569; Uruguay, 1595 to 1602, 1613, 1627 to 1629, 1644 to 1648, 1660, 1661, 1735 to 1741; Venezuela, 894, 896, 913, 916, 917 to 922, 924 to 945.

The assignee in bankruptcy cannot start suit in behalf of the body of creditors without their consent. Argentina, Cam. 1ª de Apel. Civ., Dec. 30, 1913, *Jur. de los Tribs. Nacs.*, December, 1913, p. 193.

A judge cannot discharge the assignees in bankruptcy on account of accusations against them; but he must submit the accusations to the meeting of

In Brazil [11] the sale of the property is made not by the receiver but by a liquidator.

The code of Nicaragua differs somewhat in this respect,[12] as it provides that the property of the bankrupt belongs to his creditors *pro indiviso*, so long as it is not distributed among them, and they can provide for its management as they see fit within the rules of general partnership. The bankrupt must be heard in the discussion of the business as a partner in a general partnership. So long as the creditors do not adopt regulations for the management of the property of the bankrupt it is kept in deposit, the bailee being under the obligation of selling any property subject to deterioration. An inventory is necessary only when the bankrupt himself failed to present one at the time he applied for a declaration of bankruptcy.

Compensation of the receiver or assignee.

The receiver's compensation is determined differently in the various countries as follows:

> In Spain [13] joint receivers are jointly entitled to the following compensation, which, in the absence of agreement to the contrary, they must divide equally;

creditors in order that they may consider them with a view to a resolution-Argentina, Cam. de Apel. Com., Buenos Aires, February 3, 1914, *Jur. de los Tribs. Nacs.*, February, 1914, p. 48.

The classification or graduation of the claims made by the assignee in bankruptcy must be approved by the judge when, being in accordance with the law, it has been accepted by the meeting of creditors. Mexico, Juzgado 2° de lo Civ. del Dist. Fed., May 25, 1905, *Diar. de Jur.*, vol. V, p. 601.

A bankrupt estate is exclusively represented by its receiver. Spain, Trib. Sup., Oct. 23, 1884. *Col. Leg. de Esp.*, 1883, 2d sem., p. 497.

Sales of realty belonging to the bankrupt, made by the receiver, produce the same effect as those made by an owner himself. Spain, Trib. Sup., June 5, 1861; *Gaceta* of July 1, 1867.

[11] Art. 67. [12] Arts. 555, 556.

[13] Art. 1219 c. p.

The compensation due to receivers is not a fixed one; it is regulated in proportion to the transactions they undertake in the exercise of their duties. The judicial expenses incurred in connection with the claim of the receiver for a greater compensation than that allowed him are not borne by the bankrupt estate, but by him. Spain, Trib. Sup., May 21, 1883, *Col. Leg. de Esp. Materia Civ.*, 1st sem., p. 854.

(*a*) one-half of the cash value of all public securities sold;

(*b*) two per cent of the liquid proceeds of the sale of jewelry, movables, live stock or fruits not produced during the administration;

(*c*) one per cent of the net proceeds of the sale of realty and the amounts collected on debts due the estate;

(*d*) five per cent of the net income accruing during their administration, as far as not comprised in the foregoing paragraphs. If the receivers must make trips in the performance of their duties, the expenses incurred must be refunded.

In Argentina [14] before the distribution of the assets is made, the creditors must convene in order to fix the compensation of the receivers and other employees of the common estate. The parties concerned may appeal to the judge from the resolution adopted by the creditors.

In Bolivia [15] each receiver is entitled to a compensation of a half per cent of the amounts collected on claims or debts due the estate; two per cent of the proceedings of the sale of merchandise belonging to the estate; and one per cent on sales and dispositions of property of any kind not pertaining to the commercial business of the bankrupt.

In Chile,[16] Ecuador [17] and Venezuela,[18] receivers, whether provisional or definite, are entitled to compensation as fixed by the commercial court after the account of their management has been approved.

In Colombia [19] the receiver is entitled to the same compensation as a depositary, plus a half per cent of the amounts collected from the bankrupt; in addition he must be compensated for his work in the bankruptcy proceedings, according to expert valuation, provided he has not delayed them.

[14] Art. 1512. [15] Art. 604. [16] Art. 1438.
[17] Art. 984. [18] Art. 946. [19] Law 40 of 1907, art. 98.

In Guatemala [20] the depositaries, as well as the receivers, are entitled to a compensation of two per cent of the actual value of the bankrupt's property for the depositary, and three per cent for the receiver. The general meeting of creditors may increase the compensation according to circumstances.

In Mexico [21] the assignees are entitled to a compensation of eight per cent of the proceedings of the bankrupt's property if not in excess of $25,000; four per cent of the excess above that amount up to $200,000. The receiver appointed by the judge (*interventor provisional*) is entitled to the compensation allowed to attorneys in the appropriate tariff of fees.

In Panama [22] the compensation of the receivers is fixed by the creditors; if they fail to agree, it is fixed by the judge under expert opinion.

In San Salvador [23] the compensation is three per cent of the liquid assets. If the receiver asks for a greater compensation the creditors must decide.

In Uruguay [24] the compensation is fixed by the board of superintendents of the bankruptcy, or by the judge in default of such officers; the amount so fixed can be changed at the petition of the receiver or of the creditors. The determination of the compensation takes place when the funds realized out of the bankrupt's property, are ready for distribution. When the judge's appointment of the receiver is not ratified by the creditors, the compensation of the judicial receiver must be paid when he ceases in his functions. If the receiver, before the accomplishment of his duties resigns his position without good reason, he forfeits all right to be compensated. If the resignation is well founded and a new receiver is appointed, the judge, taking into consideration the period during which each receiver rendered services and the importance thereof, fixes the compensation.

[20] Art. 1255. [21] Arts. 1427, 1428. [22] Art. 1824.
[23] Art. 707 c. p. [24] Arts. 1603 to 1605.

CLASSIFICATION OF CREDITOR'S CLAIMS

The claims or rights of the persons concerned in a bankruptcy to the property found at the time of the inventory of the debtor's business may be of different character. Some property may not belong to the bankrupt and the creditors cannot apply it to the payment of the liabilities; other property may be subject to a lien or burden in favor of one or more creditors; other property, finally, must be distributed in equal parts among the creditors, as will presently be explained.

Property recoverable from the receivers.

Merchandise, securities and any other kind of property constituting a part of the estate in bankruptcy, the title to which has not been conveyed to or vested in the bankrupt legally and irrevocably, is considered as belonging to another person and must be placed at the disposal of its lawful owners, after acknowledgment of their rights by the general meeting of the creditors or by a final judgment; the bankrupt estate, however, retaining in said property any rights inhering in the bankrupt in whose stead said estate is substitute, provided it performs the duties attaching thereto.[25]

The following items are considered as included within the general description of property of another mentioned in the foregoing paragraph:

(*a*) the unappraised and appraised dowry property which may remain in the control of the husband, if his receipt is established by a notarial instrument, recorded in accordance with the provisions of law;

(*b*) the paraphernalia property which the wife may have acquired by inheritance, legacy, or gift, whether in

[25] Spain, 908; Argentina, 1487 to 1490; Bolivia, 653; Brazil, 138; Chile, 1509; Colombia, 165; Costa Rica, 30; Ecuador, 985 to 988; Guatemala, 1258; Haiti, 570 to 578; Honduras, 896; Mexico, 998; Peru, 920; San Salvador, 803; Santo Domingo, 574 to 578; Uruguay, 1699, 1703, 1709; Venezuela, 947.

Persons entitled to recover from the bankrupt estate property belonging to them, have no right to vote in the meeting of the ordinary creditors, and the decisions adopted therein are not binding on such persons. Spain, Trib. Sup., Jan. 27, 1872; *Gaceta* of Feb. 1st, 1872.

the specific form in which it was received, or in another into which it has been converted, provided the exchange, or new investment was recorded in the Commercial Registry according to law;

(*c*) the property which the bankrupt may have on deposit, control or trust, lease or usufruct;

(*d*) merchandise which the bankrupt may have in his control under a commission or agency to purchase, sell, transport or deliver;

(*e*) bills of exchange or promissory notes which, without endorsement or any statement transferring ownership therein, had been sent to the bankrupt for collection, and those he may have received for the account of another, drawn or endorsed directly in favor of the principal:

(*f*) funds forwarded to the bankrupt outside of current account for delivery to a specified person in the name and for the account of the principal, or to satisfy obligations to be met at the place of residence of the former;

(*g*) sums which are owing the bankrupt for sales effected for the account of another, and the drafts or promissory notes of like origin which are in his possession, although they are not drawn in favor of the owner of the merchandise sold, provided it is proved that the obligation arises therefrom and that they are in the possession of the bankrupt for the account of the owner in order to be cashed, and the amount thereof to be remitted at the proper time, which fact is a legal presumption if the amount has not been entered in a current account between them;

(*h*) goods sold to the bankrupt for cash but not paid for in whole or in part so long as they remain packed in bulk in the warehouse of the bankrupt, or in the shape in which they were at the time of delivery, and are in such state as to be specifically distinguished by the marks or numbers of the packages or bales;

(*i*) merchandise which the bankrupt has purchased on

credit, so long as the actual delivery thereof has not been made to him at his warehouse or in the place agreed upon, and merchandise the bills of lading or shipping receipts whereof have been forwarded to him, after the goods had been shipped, by order and for the account and risk of the purchaser. In such case and in the case referred to in the paragraph *h*, the receivers or assignees may retain the goods purchased or claim them for the bankruptcy estate, on paying the price thereof to the vendor. The amount of circulating bank-notes of banks of issue which are in bankruptcy are also considered as another's property in the bankruptcy of a bank.[26]

The code of commerce of Argentina [27] provides that in no case is the lack of registry a hindrance for the enforcement of the rights of the wife legally proved in *juicio ordinario* (regular suit), without prejudice to the liability of the husband.

In Bolivia [28] the wife of the bankrupt is to be paid as a creditor guaranteed by mortgage for all her dowry and paraphernalia, which, at the time of the declaration of bankruptcy may have been alienated or consumed; as well as for all that is promised her at the time and in consideration of her marriage, provided it is made in a public instrument and in so far as it does not exceed the amount allowed by law.

Classification of creditor's claims.

There are different methods of classifying creditors' claims, and establishing their order of preference in payment out of the assets. The following are the principal methods:

In Spain, Honduras, Mexico and Peru [29] the classi-

[26] Spain, 909, 910; Argentina, 1470, 1471; Bolivia, 653 to 655; Brazil, 138; Chile, 1510 to 1519; Colombia, 165, 166; Costa Rica, 31 to 33; Ecuador, 985 to 988; Guatemala, 1259 to 1266; Haiti, 538 to 551, 570 to 579; Honduras, 897; Mexico, 999; Peru, 921; San Salvador, 804; Santo Domingo, 574 to 579; Uruguay, 1700 to 1705, 1709; Venezuela, 917 to 949.

[27] Art. 1470. [28] Art. 656.

[29] Spain, 911 to 914; Honduras, 899 to 901; Mexico, 1000 to 1003; Peru, 922 to 925.

Lawful credits are those which, having been approved by the general meeting

fication of the debts must be made by dividing them into two sections, namely:

(*a*) debts which must be paid from the proceeds of the personal property of the bankrupt, and

(*b*) those which are to be paid from the proceeds of the real estate.

The preference of the creditors in the first section is established according to the following order:

1. the creditors especially preferred in this order:

(*a*) creditors for burial, funeral and probate expenses;

(*b*) creditors for maintenance (acreedores alimenticios), *i. e.*, those who have advanced the bankrupt and his family necessaries of life;

(*c*) creditors for personal services, including the business employees, for the six months preceding the bankruptcy;

2. the creditors who have a preferential claim according to the commercial code;

3. the creditors preferred according to civil law and creditors having a legal mortgage, in those cases in which, in accordance with the civil law, they have a preferential claim on the personal property;

4. the creditors whose claim is evidenced by a public instrument or by an instrument made through an exchange agent or broker;

of creditors, have not been subsequently legally objected to. Mexico, D. F. Juz. 3º de lo Civ., Oct. 8, 1908, *Diar. de Jur.*, v. XXVII, p. 552.

Claims objected to can be admitted, when the objection proved groundless. They must be paid in due proportion in so far as the assets of the bankruptcy have not been distributed among the creditors. *Ib.*

Shareholders of a corporation are not creditors in the bankruptcy thereof. *Ib.*

Debts arising from judicial expenses and personal services are preferred at the time of making distribution of the assets of a bankruptcy. *Ib.*

In view of the proofs and documents produced by the creditors, the receiver must prepare his report and submit it to the meeting of the creditors, and the latter must decide upon the acceptance or refusal of every claim by plurality of votes. The rights of the excluded creditor to obtain the revocation of such decision are reserved. Spain, Trib. Sup., Feb. 7, 1881; *Gaceta* of March 27, 1881.

5. ordinary creditors by reason of commercial transactions;

6. ordinary creditors according to civil law.

Priority in payment of the creditors of the second section is subject to the following order:

1. creditors with a lien on the reality *in rem* must be paid in the order prescribed by the mortgage law;

2. creditors specially preferred and the others already enumerated in the first section, in the order therein provided.

In Argentina [30] the creditors are divided into five principal classes, according to the nature of their claims:

1. creditors who are the owners of property found among the property of the bankrupt, as previously decsribed in dealing with the property recoverable from the receiver or assignee;

2. creditors with a general preference on the whole property of the bankruptcy, which comprise claims included in the first section of creditors under the Spanish code, as above mentioned, and governmental claims for fiscal duties;

3. creditors with special preference arising from liens and pledges;

4. mortgage creditors;

5. ordinary, simple or general creditors.

In Bolivia [31] besides the rights of those who claim ownership in specific objects, there are three classes of preferences:

1. privileged claims;

2. claims granted by legal, judicial or contractual mortgage,[32] which include those guaranteed by pledge and those of the wife for dowry and paraphernalia, which at the time of the declaration of bankruptcy were already consumed, or gifts promised her by her

[30] Arts. 1469 to 1475, 1495, 1501 and 1502.

[31] Arts. 650, 656.

[32] A mortgage is called legal when it originates in a provision of the law; it is called judicial when it originates in a judicial decision, and is contractual when it arises from an agreement.

husband as a consideration for marriage, in so far as they do not exceed the legal limits;

3. claims evidenced by a public or private instrument without any mortgage.

In Brazil [33] the law of bankruptcy names five different classes of creditors who are to be paid in the following order:

1. creditors with a general preference as to the entire assets, as those originating in judicial expenses, burial of the bankrupt, salaries of employees and others according to law;

2. creditors with a preference as regards the real estate (mortgage and anticresis creditors);

3. creditors with a special preference, as the pledge, on personal property;

4. creditors having the privilege of being paid separately, as creditors of a person whose heir is the bankrupt;

5. ordinary creditors whose claims are evidenced by private instruments;

6. personal creditors of each of the unlimited partners, with their respective classifications.

The right of retention of merchandise sold to the bankrupt can also be exercised in accordance with the provisions of the commercial code.

In Chile [34] and Colombia [35] the creditors are divided into five classes:

1. those having a general preference;

2. those having a special preference with respect to a certain thing;

3. those secured by a mortgage;

4. those in favor of the public treasury or public

[33] Arts. 85, 98.

[34] Arts. 2472 to 2489 c. c. and 1520 com. c.

Lawyers of the bankrupt are not creditors of the bankruptcy but only those appointed by receivers to defend the bankrupt estate itself. Brazil, Trib. de Just. de S. Paulo, Nov. 28, 1897, *Rev. Mens. das Decisões*, v. III, p. 111.

Representatives of the receivers are not creditors of the bankruptcy estate, as the office of receiver is personal and cannot be delegated. *Ib.*

[35] Arts. 2495 to 2510 c. c. and 164, 165 com. c.

welfare or religious institutions against the collectors of their revenues, and those of the wife, children or ward against the husband, father or guardian;

5. ordinary creditors.

In Ecuador [36] only three classes are admitted:

1. preferred debts payable out of proceeds of the movable property;

2. mortgage debts, and

3. ordinary debts.

In Guatemala [37] there are six classes of creditors' claims:

1. mortgage or pledge claims;

2. general preferred claims;

3. specially preferred claims;

4. taxes and wages due at the time of the declaration of bankruptcy, deposits of fungible things, debts due the state and public institutions.

5. the above debts when not fully paid with the proceeds of the things affected to their payment, and

6. ordinary claims.

In Haiti [38] and Santo Domingo [39] there are three kinds of debts:

1. those with special preference with respect to real estate;

2. other preferred claims, and

3. ordinary debts.

Nicaragua [40] enumerates the order in which debts must be paid very similar to that of the code of Spain in regard to creditors who have a preference as to personal property or real estate; mortgage and pledge creditors must be paid after the expenses of the judicial proceedings for the preservation of the assets, or those incurred for obtaining the fruits or benefits thereof have been paid.

Panama [41] distinguishes two classes of claims, namely, those against the bankrupt prior to the bankruptcy, and those against the receiver considered as the representative of

[36] Arts. 1035, 1040, 1043.
[37] Arts. 1268 to 1276.
[38] Arts. 533 to 552.
[39] Arts. 552, 556, 565, 570.
[40] Arts. 559, 560.
[41] Arts. 1591 to 1599.

a legal entity capable of incurring obligations. The first class is divided into two groups:

1. creditors secured by a mortgage, pledge or any other security constituting a property interest *in rem*, and payable as preferred creditors out of the proceeds of the property affected;

2. all other creditors of the bankrupt who must be paid whatever the date of the debt in the order established by the civil code.

The second class creditors are those whose credits originated in:

(*a*) expenses, judicial or other, incurred in the common interest of the creditors, in verifying the credits and liquidating the assets, in preserving and managing the property and distributing it among the creditors;

(*b*) contracts lawfully entered into by the receiver;

(*c*) rescission of contracts entered into by the debtor when, by reason of such rescission, it becomes necessary to return money or property or to indemnify a good faith possessor of property recovered by the bankrupt estate;

(*d*) fiscal or municipal taxes;

The following claims are also considered included in this class, provided they do not exceed 100 balboas ($100 U. S.):

(*e*) expenses arising out of the burial of the debtor or members of his family who lived with him and did not leave any property;

(*f*) expenses incurred in medical assistance and food supplies furnished the debtor for a month prior to the bankruptcy;

(*g*) wages, without limitation of amount, paid to clerks, employees and servants of the debtor during the last three months preceding the bankruptcy.

All these claims against the estate must be paid first and with preference to any other claims not specially secured by property already burdened in favor of the creditor.

In Uruguay [42] the law divides the creditors into four grades, namely:

(*a*) first class of preferred personal claims comprises judicial costs incurred for the common benefit of the creditors, management expenses, expenses for the bankrupt's funeral, if the death took place before the declaration of bankruptcy, or after such declaration, if such expenses were verified by the assignee and authorized by a creditor's committee, medical assistance to the bankrupt, wages of employees, workers and servants of the bankrupt for the six months prior to the bankruptcy, subsistence supplied the bankrupt or his family during the same period, and arrears for taxes;

(*b*) the second class of personal preferred claims includes all those which, according to law, are secured by a lien upon certain personal property, such as the innkeeper's and carrier's lien, the lien of the creditor of a farmer for money lent for the cultivation of land, upon the fruits of the crops of the preceding year, etc., etc.

(*c*) the third class of personal preferred claims includes those of the public treasury against the collector of taxes, etc.; those of national or municipal charitable or educational institutions and churches against the collectors or managers of their funds; those of married women and minor children for their non-specified property managed by the bankrupt husband or father; and those of a ward against his guardian;

(*d*) the fourth and last class comprises those debts having no priority and payable *pro rata*, without consideration of date, out of the surplus remaining after payment of the three preceding classes. The provision of article 1728 warrants mention inasmuch as it prescribes that the bankrupt's wife cannot institute any action arising from benefits or privileges conceded to her in the marriage settlement, and vice versa, the creditors cannot in any case avail themselves of the stipulations of that settlement in favor of the bankrupt.

[42] Arts. 1732 to 1734, 1750 com. c., as amended by law of Jan. 25, 1916.

Venezuela [43] admits three classes of preferred claims:

1. those having a special privilege as to personal property;

2. those having a special privilege as to real estate; and

3. those secured by mortgage either legal, judicial or contractual.

Rules for the payment of debts of the different classes.

Claims must be paid *pro rata* within each class, without distinction as to date, and in accordance with the order established by law. The following are excepted from this rule:

(*a*) mortgage creditors who are entitled to recover their debts in the order of the recording of their mortgages in the public registry.

(*b*) creditors whose claims are evidenced by a public notarial instrument, or by a commercial instrument authenticated by a broker; they likewise are to be paid in the order of the dates of their instruments.

Notwithstanding the foregoing provisions, the preferences or liens upon specific property, as established by law, remain unaffected; if there are several creditors of the same class so preferred the general rule is to be observed. The proceeds of the sale are not to be distributed among the creditors of one grade or order, until all the claims of the previous grade or order are entirely paid according to their priority.[44]

In Chile,[45] Colombia,[46] and Uruguay,[47] the debts of the first class affect the whole property of the bankrupt, and must be paid in the order of preference indicated in their enumeration. If property is affected simultaneously by a

[43] Arts. 1848, 1851, 1854, 1861, 1863, 1864 c. c.

[44] Spain, 916, 917; Argentina, 1499; Bolivia, 651, 665; Guatemala, 1247 to 1278; Haiti, 552; Honduras, 903, 904; Mexico, 1005, 1006; Peru, 927, 928; Santo Domingo, 552; Venezuela, 849 c. c., 997 com. c.

[45] Arts. 2473, 2476, 2478, 2482, 2486, 2489 c. c.

[46] Arts. 2496, 2498, 2500, 2503, 2506, 2509 c. c.

[47] Arts. 1745 to 1750.

debt of the first and second class, the latter must prevail, but if the other property of the bankrupt is insufficient to pay the debts of the first class, they must have priority in respect to the deficit, and must participate with the others of the first class in the order enumerated by the civil code. When the debts of the first class have not been fully satisfied from the proceeds of the personal property the balance is divided among the mortgaged properties and must be paid with the proceeds of mortgaged property after preference to the mortgaged debts. Debts of the third class have a preference among themselves according to the date of their inscription in the registry, and those of the fourth class according to their respective dates. Ordinary debts are to be paid *pro rata*, regardless of date.

In Costa Rica [48] the code provides for a preference in favor of the business employees. With the exception of preferred claims, all others must be paid *pro rata*, regardless of date.

[48] Art. 35 of law of Oct. 15, 1901.

CHAPTER XXXIX

BANKRUPTCY (4)

Kinds of bankruptcies.

With respect to their legal effects, bankruptcies are divided into three classes: (*a*) fortuitous, (*b*) culpable, and (*c*) fraudulent.[1]

The codes of Bolivia,[2] Colombia [3] and Nicaragua [4] establish five classes of bankruptcy, namely: (*a*) suspension of payment; (*b*) fortuitous insolvency; (*c*) culpable insolvency; (*d*) fraudulent insolvency; and (*e*) flight of the debtor (*alzamiento*).

Practically, however, this classification hardly differs from the former, inasmuch as the word insolvency in this case is interchangeable with bankruptcy and the other codes deal separately with suspension of payment, attributing to this peculiar condition of a merchant the same effects in general as those attached thereto by the three codes above mentioned; whereas the flight of the debtor makes him liable as a fraudulent bankrupt in all the Latin-American countries.

Fortuitous bankruptcy.

A bankruptcy is fortuitous when a merchant has suffered misfortunes which ought to be considered as accidental in the regular and prudent conduct of good business administration, yet which reduce his capital to such a point that he is not able in whole or in part to pay his debts.[5]

[1] Spain, 886; Argentina, 1513, 1514, 1526; Chile, 1330; Ecuador, 918; Guatemala, 1200; Haiti, 435, 436; Honduras, 874; Mexico, 953; Panama, 1557, 1558; Peru, 898; San Salvador, 791; Santo Domingo, 584, 591; Uruguay, 1658; Venezuela, 871.

[2] Art. 488. [3] Art. 122. [4] Art. 529.

[5] Spain, 887; Bolivia, 490; Chile, 1331; Colombia, 124; Ecuador, 918; Guatemala, 1201; Honduras, 875; Mexico, 954; Nicaragua, 531; Peru, 899; San Salvador, 792; Uruguay, 1639; Venezuela, 871.

Culpable bankruptcy.

In characterizing a bankruptcy as culpable, there are three systems, as follows:

System of Spain. According to this system there are two cases, one of irrebuttable culpability, the other of presumptive culpability, rebuttable by evidence to the contrary.

(*a*) A bankrupt is conclusively deemed culpable: (1), if his domestic and personal expenses are excessive and out of proportion to his resources and social status; (2), if he has suffered losses in imprudent gambling or other transactions undertaken with a view to postponing his bankruptcy; or (3), if he sold at a loss goods bought on credit and not paid for, or if, according to his balance sheet, he owed double the amount of his assets for direct obligations;

(*b*) A bankrupt is only presumed to be culpable, but may overcome the presumption by proving his innocence: (1), if he has not kept his books with all the legal requisites, or has, by some error in bookkeeping, caused damage to a third party; (2), if he has failed to make a statement of his bankruptcy within the period established by the law; or (3), if, at the time of the declaration of bankruptcy or during the legal proceedings consequent thereon, he has absented himself or has failed without valid excuse to appear personally in the cases in which the law so requires.[6]

System of Argentina. The code does not set out the specific cases in which a bankrupt must necessarily be considered culpable, but merely provides that the circumstances above mentioned must be taken into consideration in determining culpability.[7]

System of Mexico. There is no distinction between

[6] Spain, 888, 889; Bolivia, 491, 492; Chile, 1333; Colombia, 125, 126; Costa Rica, 36; Ecuador, 919, 920; Guatemala, 1202, 1203; Haiti, 580, 581; Honduras, 876, 877; Peru, 900, 901; San Salvador, 793, 794; Santo Domingo, 585, 586; Uruguay, 1635, 1660; Venezuela, 872, 873.

[7] Art. 1515.

the cases in which the presumption of culpability is conclusive and those in which it is rebuttable. On the other hand, the absence of commercial books, or defective bookkeeping, or failure of the bankrupt to record in the Commercial Registry the documents which must legally be entered therein, stamps the bankruptcy as fraudulent.[8]

System of Nicaragua. In all the cases above mentioned there is a conclusive presumption of culpable bankruptcy.[9]

Fraudulent bankruptcy.

A bankruptcy must be considered as fraudulent if the bankrupt has absconded, taking with him all or a part of his property; has simulated contracts disposing of his property, or has entered in his books property not his own; has not made at the proper time and place the appropriate entries of his transactions, to the prejudice of creditors; has failed to keep books or to keep them properly; has anticipated payments to the prejudice of his creditors; has acknowledged fictitious debts, or debts without good consideration; has, after his last balance sheet, drawn upon a person without having supplied him with funds, or previously secured his consent thereto; has negotiated, without the owner's authorization, bills of exchange sent him for collection or for any purpose not authorizing him to dispose thereof, unless he has sent the proceeds to the owner; has bought property of any kind and registered the title in the name of another; has converted to his own use the property of another; or if, after the declaration of bankruptcy, he has applied to his own use or withdrawn from his estate any of his property.[10]

[8] Mexico, 955, 957; Panama, 1557.

The bankruptcy of a commercial house must be considered fraudulent when its liabilities exceed its assets by twenty-five per cent, and its books are not kept in proper form. Mexico, Dist. Fed. Juzgado Tercero de lo Civil, October 8, 1911, *Diario de Jurisprudencia*, vol. XXVII, p. 552.

[9] Nicaragua, 532.

[10] Spain, 890; Argentina, 1516; Bolivia, 493 to 495; Chile, 1334 to 1336;

In Spain,[11] Colombia,[12] Haiti,[13] Honduras,[14] Peru,[15] and San Salvador,[16] the bankruptcy of a merchant whose financial position cannot be ascertained from the entries and statements in his books is presumed to be fraudulent, in the absence of proof to the contrary.

In Argentina,[17] Chile,[18] Mexico,[19] Panama,[20] and Uruguay,[21] the bankruptcy of a broker or exchange agent is always considered fraudulent.

In Panama [22] a bankruptcy is also considered fraudulent when, after making an inventory and general balance sheet, the debtor finds that his liabilities exceed his assets by

Colombia, 127, 129; Costa Rica, 39; Ecuador, 921, 922; Guatemala, 1204; Haiti, 586, 587; Honduras, 878; Mexico, 956; Nicaragua, 533, 534; Panama, 1558; Peru, 902; San Salvador, 795; Santo Domingo, 591; Uruguay, 1686; Venezuela, 874.

The fact that various circumstances of those enunciated in arts. 137, 138, 1515 and 1516 of the code of commerce are present is not enough to declare a bankruptcy fraudulent; there must be a fraudulent intention on the part of the debtor. Argentina, Cam. de Apel. Crim., Buenos Aires, May 8, 1913, *Jur. de los Tribs. Nacs.*, May, 1913, p. 197.

No matter how irregular and unwise the management of a commercial house may be, it does not warrant a declaration of fraudulent bankruptcy unless there is a purpose on the part of the debtor to defraud his creditors. Argentina, Cam. de Apel. Crim. y Correc., Buenos Aires, July 11, 1914, *Jur. de los Tribs. Nacs.*, July, 1914, p. 233.

Fraud can be proved by all the means of evidence accepted in law, and the judge is not bound by the legal rules of evidence in regard thereto. Knowledge of the debtor of the damage caused to his creditors is enough to charge him with fraud, and the knowledge and participation in such fraud characterizes as fraudulent the act of the party contracting with the debtor. Brazil, 1a Cam. da Corte de Apel., October 28, 1907, *Rev. de Direito*, vol. 6, p. 629.

[11] Art. 891.

The provision in art. 890 of the commercial code that a bankruptcy is presumed fraudulent when the debtor did not keep books, is applicable to the case of his failure to keep any one of the books declared necessary by the law, because each of those books is an integral part of the legal bookkeeping system. The entries in the inventory are the basis for those of the journal; the ledger classifies the data of the journal and all the entries must be in accordance with the correspondence; this is a connection which the law has provided as a matter of public interest and for the benefit of commerce. Spain, Trib. Sup., April 24, 1901, Blanco y Constans, *Derecho Mercantil*, vol. 1, p. 834.

[12] Art. 128. [13] Art. 587. [14] Art. 879.
[15] Art. 903. [16] Art. 796. [17] Arts. 112, 1519.
[18] Art. 1335. [19] Art. 956. [20] Art. 1558.
[21] Art. 1666. [22] Art. 1558.

twenty per cent and fails to declare his bankruptcy to the court at once.

Accomplices of the bankrupt.

All persons who aided the bankrupt to abscond with all or part of his property, or those who helped him to defraud his creditors in any way, must be considered as accomplices of the bankrupt. In addition to the penalty provided for in the penal code they incur the loss of all the rights they may have against the assets of the bankruptcy, of which they are declared accomplices; and they must return any property or rights they may have obtained by the transaction thus declared fraudulent.[23]

COMPOSITION WITH CREDITORS DURING THE BANKRUPTCY PROCEEDINGS

Time for proposing the settlement.

After the bankruptcy proceedings have begun the debtor has another opportunity to settle with his creditors. The proper time for making such settlement varies as follows:

System of Spain. The settlement can take place after the debts have been verified and the classification of the bankruptcy made. This privilege is not extended to fraudulent bankrupts or to those who absconded during the bankruptcy proceedings.[24]

System of Argentina. The settlement can be made after the verification of debts, without waiting for the classification of the bankruptcy, provided, however, that there is no accusation of fraud pending against the bankrupt.[25]

[23] Spain, 893, 894; Argentina, 1517, 1518; Bolivia, 499, 500; Chile, 1337, 1340; Colombia, 130, 131; Costa Rica, 40, 42; Guatemala, 1205, 1207; Haiti, 590, 591; Honduras, 881, 882; Mexico, 957, 958, 960; Nicaragua, 535; Panama, 1559; Peru, 902, 903; Santo Domingo, 593, 595; Uruguay, 1665; Venezuela, 877.

[24] Spain, 898; Honduras, 886; Mexico, 988; Peru, 910.

[25] Argentina, 1398; Bolivia, 568, 578; Brazil, 103, 104; Chile, 1454; Ecuador, 1004, 1014; Guatemala, 1288; Uruguay, 1668; Venezuela, 965, 974.

System of Haiti. The settlement can be made any time after the verification of debts, unless the books and papers of the bankrupt present evidence or a presumption of fraud.[26]

Settlement can only be made at a meeting of creditors.

Settlements between the bankrupt and his creditors must be made at a meeting of the latter, duly called and constituted. Separate agreements between the bankrupt and any of his creditors are void; the creditor who makes them loses his rights against the bankrupt estate, and the bankrupt is considered culpable, if he is not thereby qualified as fraudulent.[27]

Creditors who can refrain from sharing in the settlement.

Creditors with a special or general preference and those who have a mortgage or pledge may abstain from voting at the meeting of creditors; and by doing so, their respective rights cannot be impaired. Should they, however, prefer to discuss the proposition of settlement and to vote upon it, they are thereby included in the extension of time for payment and in the reduction of liabilities agreed to at the meeting, without prejudice, however, to the security and preference they possess.[28]

In Argentina,[29] Chile,[30] Ecuador,[31] Nicaragua,[32] Panama,[33] Santo Domingo,[34] Uruguay,[35] and Venezuela,[36] by the mere

[26] Haiti, 513, 515; Nicaragua, 571; Santo Domingo, 507, 510.

[27] Spain, 899; Argentina, 1398, 1409; Bolivia, 569; Brazil, 106, 110; Chile, 1456, 1457; Ecuador, 1008, 1021; Guatemala, 1293, 1294; Haiti, 513; Honduras, 887; Mexico, 989; Nicaragua, 572; Panama, 1604, 1605; Peru, 911; Santo Domingo, 504 to 506; Uruguay, 1695; Venezuela, 967 to 970.

[28] Spain, 900; Bolivia, 572; Guatemala, 1298; Honduras, 888; Mexico, 990; Peru, 912.

Creditors who claim ownership in any part of the property of the estate in bankruptcy are not obliged to participate in the discussion and acceptance of the settlement of the bankrupt with the creditors, and in refraining from attending the meetings of the other creditors they are not bound by the decision reached. Spain, Trib. Sup., January 27, 1872; *Gaceta* of February 1, 1872.

[29] Art. 1398. [30] Art. 1460. [31] Art. 1005.
[32] Arts. 573, 574. [33] Art. 1606. [34] Art. 608.
[35] Art. 1696. [36] Art. 967.

fact that a privileged or mortgage creditor votes at the meeting for or against the acceptance of the settlement, he thereby loses his preference. A creditor may renounce his preference or mortgage for a part of his claim, and with respect to that part and sum he may vote at the meeting of creditors.

In Brazil [37] and Haiti,[38] the privileged and mortgage creditors are absolutely denied the right to participate in the meeting.

Panama provides, in addition, that when the creditor has renounced his privilege or mortgage, he may recover the same if the settlement is not accomplished; whereas in Uruguay the creditor recovers his preference or security if the settlement is rejected.

Votes necessary for acceptance of settlement.

The proposition made by the debtor must be submitted for the discussion and vote of the creditors. It cannot be accepted unless there is in its favor a majority composed of at least half plus one of the creditors attending the meeting, representing an interest of at least three-fifths of the total liabilities, deducting the preferred or mortgage creditors who have not renounced their preference or mortgage by participating in the discussion and acceptance of the proposition of settlement.[39]

In Argentina,[40] Ecuador,[41] Uruguay [42] and Venezuela,[43] the necessary majority must consist of at least two-thirds of the total number of creditors (in Argentina, of the creditors attending the meeting) representing, at least, three-quarters

[37] Art. 106. [38] Art. 514.

[39] Spain, 901; Chile, 1463; Guatemala, 1297, 1298; Haiti, 513, 514; Honduras, 889; Mexico, 991; Peru, 913; Santo Domingo, 507, 508.

In order that a settlement between a bankrupt and his creditors be valid it must be accepted by half plus one of the creditors present at the meeting called therefor, and such plurality must represent three-fifths of the total liabilities of the bankrupt. Mexico, Tribunal Sup. del Dist. Fed., 3a. Sala, May 20, 1911, Parcels R. W. and Buch. Miguel *v.* the Receiver of the United States Banking Co. S. A., *Diario de Jur.*, vol. XXV, p. 193.

[40] Art. 1399. [41] Art. 1008. [42] Art. 1696.

[43] Art. 970.

of the liabilities, or else three-quarters of the creditors (in Argentina, of the attending creditors) representing at least two-thirds of the liabilities.

In Brazil,[44] the majority is constituted as in the case of a preventive composition with creditors.[45]

In Panama [46] the settlement must be accepted by the majority of creditors representing at least three-quarters of the total liabilities, the preferred or mortgage creditors excepted.

Opposition to the approval of the settlement.

Notwithstanding the acceptance of the bankrupt's propositions for a settlement by the necessary majority of his creditors, there are certain legal grounds on which absent or dissenting members may oppose the approval of such settlement by the court. In this matter, the Latin-American codes may be divided into the following systems:

System of Spain. The only grounds of opposition are:

(*a*) defects in the legal formalities prescribed for calling the meeting of creditors and conducting its deliberations;

(*b*) a want of legal or representative capacity on the part of any of the voters, provided his vote decided the majority in number or amount;

(*c*) the existence of a fraudulent understanding between the debtor and one or more of the creditors, or among the creditors themselves for the approval of the propositions of settlement;

(*d*) a fraudulent exaggeration of claims in order to procure a majority in amount;

(*e*) fraudulent error in the balance sheet of the bankrupt, or in the report of the receiver or assignee, in order to facilitate the acceptance of the debtor's proposals.[47]

[44] Art. 106. [45] See Chapter I, *supra*. [46] Art. 1606.

[47] Spain, 902, 903; Honduras, 890, 891; Mexico, 992, 993; Nicaragua, 575; Peru, 914, 915.

System of Argentina. The only grounds of objection are those indicated in *b*, *c*, and *d* above.[48] It is believed, however, that a defective call of the meeting of creditors is sufficient ground for opposition even in Argentina.

System of Bolivia. All the grounds, except *e* above, are recognized.[49]

System of Brazil. In addition to the grounds above mentioned, the settlement may be objected to if its acceptance implies a greater sacrifice for the creditors than the sale of the property of the bankrupt.[50]

System of Chile. No specific grounds are assigned as a basis of opposition to the settlement; the law merely provides that such opposition must be well founded.[51]

System of Panama. The judge, whether at the petition of a creditor or of the receiver or *ex officio*, must refuse his approval to the settlement in the following cases:

(*a*) when it has not obtained the necessary majority of votes in number or amount required by law, or has not been published in the official and another local periodical;

(*b*) when the debtor, in order to obtain the acceptance of the creditors, has concealed property, simulated liabilities or in any other way vitiated the consent of the creditors;

(*c*) if the settlement is contrary to public policy;

The approval of a settlement between the bankrupt and his creditors is subject only to those objections expressed in art. 933 of the code of commerce, among which the fact that no decision has been made on the classification of the bankruptcy is not enumerated. Mexico, Trib. Sup. del Dist. Fed. 3a. Sala, May 20, 1911, Parcels R. W. and Buch. Miguel *v.* the Receiver of the United States Banking Co. S. A., *Diario de Jur.*, vol. XXV, p. 193.

A settlement with the creditors which has been objected to has no binding force until a judicial approval thereof is obtained. Spain, Trib. Sup., October 24, 1871; *Gaceta* of October 29, 1871.

[48] Argentina, 1401.

[49] Bolivia, 580; Guatemala, 1303.

[50] Brazil, 108.

[51] Chile, 1474; Ecuador, 1013; Haiti, 517; Santo Domingo, 512; Uruguay, 1699.

(*d*) when those who by their vote constituted part of the necessary majority lacked proper representative capacity.

Even after the settlement has been approved by the judge the creditors may ask that it be declared void when any of the above mentioned circumstances are disclosed.[52]

System of Venezuela. The settlement must be disapproved even without the petition of any one:

(*a*) when the bankruptcy is culpable or fraudulent;

(*b*) when the majority was obtained by simulating claims;

(*c*) when the legal formalities were not observed.[53]

Time for demanding disapproval of the settlement.

Creditors may oppose the approval of the settlement within a period of eight days from the date of the meeting at which the debtor's proposals were accepted.[54]

In Panama the period is ten days [55] and in Venezuela, six days.[56]

Effects of the settlement in regard to the creditors.

After the settlement has been approved by the unsecured and unpreferred creditors, it is binding upon the bankrupt and the creditors whose claims antedate the declaration of bankruptcy, provided they have been legally summoned or have been served with notice of the approval of such settlement and have not objected, even though their claims are not included in the balance sheet of the bankruptcy and they have not been parties to the proceedings.[57]

[52] Panama, 1609, 1611.

[53] Venezuela, 977.

[54] Spain, 902; Argentina, 1401; Bolivia, 574; Chile, 1473; Ecuador, 1013; Haiti, 517; Honduras, 890; Mexico, 992; Nicaragua, 575; Peru, 914; Santo Domingo, 512 Uruguay, 1699.

[55] Art. 1609.

[56] Art. 975.

[57] Spain, 904; Honduras, 892; Mexico, 994; Peru, 916.

In Argentina,[58] Bolivia,[59] Brazil,[60] Chile,[61] Ecuador,[62] Guatemala,[63] Haiti,[64] Nicaragua,[65] Santo Domingo,[66] Uruguay [67] and Venezuela,[68] the approval of the settlement by the judge makes it binding upon all the ordinary creditors, whether known or unknown at the time of said approval, and whatever the amount of their claims as ultimately determined.

In Panama,[69] after the settlement is approved by the judge it is binding upon all the creditors except the preferred creditors who did not participate in it; and their claim against the debtor is reduced according to the agreement, notwithstanding that the bankrupt improves his financial position, or, after paying the amount agreed upon, a balance remains to his credit.

Effects in regard to the debtor.

By virtue of the settlement, and in the absence of an express stipulation to the contrary, the debts are extinguished to the extent of the part released, even though a surplus may after payment remain to the bankrupt out of the assets of the bankruptcy or he may subsequently improve his financial position. Should there not be an express stipulation as above mentioned, the creditors whose debts

[58] Art. 1410.

A seller cannot sue the person who bought the sold merchandise from the first buyer, when the latter has made a preventive composition with his creditors. Nor can the seller retain the goods bought and consigned to the second buyer who dealt with the first. Argentina, Cam. de Apel. Com., Buenos Aires, October 5, 1912, *Jur. de los Tribs. Nacs.*, October, 1912, p. 377.

When the proportion of the liabilities as agreed upon by the creditors in their settlement with the bankrupt is paid, all actions arising from the original obligation are extinguished, notwithstanding that they originated in an accommodation by the plaintiff in favor of the bankrupt. Argentina, Cam. de Apel. Com., Buenos Aires, September 18, 1913, *Jur. de los Tribs. Nacs.*, September, 1913, p. 397.

[59] Art. 576. [60] Arts. 111, 113.

A settlement between the debtor and his creditors does not release the receiver from the liabilities he may have incurred during his administration. Brazil, Cam. da Corte de Apel., July 6, 1908, *Rev. de Direito*, vol. 9, p. 304.

[61] Art. 1478. [62] Art. 1016. [63] Art. 1306.

[64] Art. 518. [65] Art. 574. [66] Arts. 516, 517.

[67] Arts. 1705, 1708. [68] Art. 978. [69] Arts. 1615, 1618, 1619.

have not been fully paid preserve their right of action for the balance with respect to after-acquired property of the debtor.[70]

The code of Panama provides [71] that, as a consequence of the judicial approval of the settlement, the bankrupt recovers control of all his rights in so far as they have not been restricted by the creditors, and the receiver must surrender all his property to him, accounting for the management thereof. The agreement must be performed under the inspection of a supervisor appointed by the creditors. In case of non-fulfillment, the guaranties are invoked in behalf of the body of creditors.

Effects in regard to co-debtors.

In Argentina,[72] Brazil,[73] Ecuador [74] and Venezuela,[75] the law expressly provides that the sureties and co-debtors of the bankrupt are not discharged from their obligations by virtue of the composition between the bankrupt and his creditors; the latter can, therefore, demand from them the payment of any part of their claims left unpaid by the settlement.

In Chile [76] and in Panama [77] the settlement releases the sureties and joint debtors of the bankrupt, but only with respect to the creditors who voted for the acceptance of the settlement.

[70] Spain, 905, 907; Argentina, 1411, 1522; Bolivia, 577; Brazil, 111; Chile, 1474; Ecuador, 1018; Guatemala, 1306; Haiti, 518; Honduras, 893, 895; Mexico, 995, 997; Nicaragua, 578, 579; Peru, 917, 919; Santo Domingo, 516; Uruguay, 1710; Venezuela, 980.

[71] Arts. 1615, 1616, 1617.

[72] Art. 1410. [73] Art. 114.

A creditor who, in accepting a settlement with his bankrupt debtor, reserves his rights against the co-obligors or sureties, has a right to recover from them the portion of the credit which was not paid by the bankrupt. Brazil, Trib. de Just. de S. Paulo, March 17, and August 26, 1896; *Gaceta Jur. de S. Paulo*, vol. 12, p. 151.

The opposition to the acceptance of a settlement with the debtor implies the reservation of rights against the co-debtors. Brazil, Trib. de Just. de S. Paulo, June 23, 1902, *S. Paulo Judiciario*, vol. 1, p. 250.

[74] Art. 1017. [75] Art. 979. [76] Art. 1481.

[77] Art. 1618.

Other effects of the settlement.

Finally, the effect of a settlement in Chile is that it produces a mortgage upon the whole property of the debtor in favor of the creditors; [78] and in that country [79] as well as in Bolivia,[80] Brazil,[81] Guatemala [82] and Uruguay,[83] after the settlement, the debtor remains subject to the supervision of an inspector appointed by his creditors, unless the latter expressly agree to dispense therewith.

Rescission of the settlement.

Should the debtor breach the stipulation, any of the creditors may demand the rescission of the settlement and the continuation of the bankruptcy proceedings before the judge or court having jurisdiction thereof.[84]

In Brazil,[85] besides the above mentioned cause of rescission two others are admitted, namely, (1), the abandonment on the part of the debtor of his entire property or his selling it at a low price, and (2), his having been declared a culpable or fraudulent bankrupt or guilty of some other similar offense.

Nullity of the settlement.

The settlement of the bankrupt with his creditors can be declared void according to the following systems:

System of Argentina. Settlement between a bankrupt and his creditors can be nullified by petition of any of the creditors in so far as benefits obtained by the debtor are concerned, if, within one year after the agreement any deceit or fraud on his part has been proved, whether occurring before, during, or after the proceedings for settlement.

No action for the nullity of a settlement judicially

[78] Art. 1480. [79] Art. 1464. [80] Art. 585.
[81] Art. 120. [82] Art. 1307. [83] Art. 1709.
[84] Spain, 906; Brazil, 115; Chile, 1486; Ecuador, 1023; Guatemala, 1310; Honduras, 894; Mexico, 996; Nicaragua, 577; Panama, 1617; Peru, 918; Santo Domingo, 520; Uruguay, 1706; Venezuela, 986.
[85] Art. 115.

approved may be brought, except on account of deceit or fraud resulting in a concealment of assets, or exaggeration of liabilities. The nullity of the settlement in this case discharges the sureties *ipso jure*.[86]

System of Chile. No actions for annulling the settlement can be allowed other than those founded on a subsequent conviction of the bankrupt for fraudulent bankruptcy, or on the concealment of the assets or exaggeration of the liabilities discovered after the approval of the agreement. Annulment of the composition disqualifies the bankrupt from making a new settlement, and discharges *ipso jure* any party who guaranteed it.[87]

System of Santo Domingo. The annulment of the settlement may be founded on deceit or on the fact that the bankruptcy was declared fraudulent. In both cases the sureties are discharged.[88]

System of Uruguay. In case of fraud, the settlement is void. The annulling of the settlement releases sureties *ipso jure*. An action for annulment is only proper when based upon deceit, resulting either from concealment of assets or exaggeration of the liabilities.[89]

Cases in which no settlement is made.

When a settlement has not been concluded between the debtor and his creditors, the bankruptcy proceedings must continue until after the complete liquidation of the property of the bankrupt, and a distribution of the proceeds among the creditors in the form already established has been made. The bankrupt, however, is not released from his liabilities; he may be sued by his creditors until he has fully paid his debts.[90]

[86] Argentina, 1405.

[87] Chile, 1485; Ecuador, 1022; Guatemala, 1310; Venezuela, 985.

[88] Santo Domingo, 520.

[89] Uruguay, 1704, 1706.

[90] Spain, 921; Argentina, 1522; Bolivia, 673; Brazil, 144; Chile, 1533; Colombia, 166; Costa Rica, 51 of the law of October 15, 1901; Ecuador, 1050; Guatemala, 1287; Haiti, 598; Honduras, 908; Mexico, 1013; Nicaragua, 580;

In Argentina [91] the creditors, after refusing acceptance of the proposal of settlement made by the debtor, can decide, by the same plurality of votes required for acceptance, to take over the entire property of the bankrupt, including his liabilities. In this way the bankrupt is entirely released from his obligations both as to the preferred and the ordinary creditors, whether assenting to or dissenting from the decision taken by such plurality.

The code of Chile [92] has a provision which may lead to very similar results. If at the first meeting of the creditors the receiver is authorized to continue the business of the bankrupt, the object and duration of such authorization must, at the same time, be determined, as well as the sum which the receiver must keep at his disposal for the needs of the business. The authorization can be given only by unanimous vote of the creditors present. In order to obtain unanimity, the creditors who favor the continuance of the business can exclude the dissentients on paying them the proportion due them, considering the assets of the bankrupt estate.

Venezuela [93] limits the power to continue the business of the bankrupt to bankrupt stock companies.

Discontinuance of bankruptcy proceedings.

In Argentina,[94] Chile,[95] Santo Domingo,[96] Uruguay [97] and Venezuela,[98] whenever the bankruptcy proceedings are

Panama, 1631, 1632; Peru, 932; Santo Domingo, 608; Uruguay, 1769; Venezuela, 1012.

[91] Art. 1412. [92] Art. 1429. [93] Art. 983.

[94] Arts. 1465, 1466.

The closing of the bankruptcy proceedings due to insufficientcy of the assets constitutes a presumption of fraud on the part of the debtor. Argentina, Cam. de Apel. Com., Buenos Aires, August 14, 1913, *Jur. de Los Tribs. Nacs.*, August, 1913, p. 300.

After the bankruptcy proceedings are closed the creditors can individualyl sue the debtor for the payment of their claims, the statute of limitations running from the day the judge declared that the creditors recovered their individual right of action. Argentina, Cam. de Apel. Com., Buenos Aires, November 27, 1913, *Jur. de los Tribs. Nacs.*, November, 1913, p. 320.

[95] Arts. 1495 to 1497. [96] Art. 527. [97] Arts. 1711, 1712.

[98] Art. 991.

stopped because the assets of the bankruptcy do not cover the expenses of the proceedings, the judge *ex officio* or at the request of the receiver or of any creditor, may order the suspension of the proceedings. The effect of the order is that the state of bankruptcy subsists, but every creditor recovers his right to sue the debtor and to attach his property individually and independently of the other creditors. This, naturally, is the worst outcome for the bankrupt. In Argentina the above-mentioned order implies that there is a presumption of fraud or gross negligence on the part of the debtor, and the judge must transfer the proceedings to the appropriate judge of criminal jurisdiction.

REHABILITATION OF THE BANKRUPT

It has already been observed that the declaration of bankruptcy brings about the legal incapacity of the bankrupt to engage in business, and places him in a peculiar legal condition which differs in detail from country to country.

Rehabilitation and discharge are in Latin-America two things entirely different. The object of rehabilitation is to restore to the bankrupt the legal capacity again to become a merchant, with all corresponding civil rights. This can be obtained from the bankruptcy judge through the proceedings hereafter described.

Discharge, on the other hand, refers to the release of the debtor from his obligation to pay his debts. This can only be obtained by actual full payment, by composition with the creditors after paying the portion stipulated, or by the lapse of the period of limitation. So long as none of these forms of discharge has taken place, the debtor is not released, even though he may have been rehabilitated.

In order for the bankrupt to be rehabilitated and to regain his full civil rights, special proceedings and conditions are necessary. These requirements differ somewhat in the various countries, and they differ for the various classes of bankruptcies.

Rehabilitation of fraudulent bankrupts.

There are two systems in regard to the rehabilitation of fraudulent bankrupts, namely:

System of Spain. No rehabilitation is ever possible for a fraudulent bankrupt.[99]

System of Argentina. Rehabilitation may be granted to the fraudulent bankrupt after he has served or paid the penalty imposed upon him, or the criminal action has lapsed by limitation and the full amount of his liabilities has been paid or guaranteed.[100]

Rehabilitation of a culpable bankrupt.

For the rehabilitation of the culpable bankrupt, the following systems may be noted:

System of Spain. A culpable bankrupt may obtain rehabilitation by proving that he has paid the amount agreed upon in the composition with his creditors, or else that he has paid all his debts in full.[101]

System of Argentina. In order to obtain rehabilitation a culpable bankrupt must prove, in addition, that he has paid the penalty imposed upon him.[102]

In Uruguay, he may also be rehabilitated (*a*) on payment in full; (*b*) when he has been discharged or released by his creditors; (*c*) when, five years having elapsed, he has paid at least fifty per cent of his debts, or else when, ten years having elapsed, he has paid twenty-five per cent of his debts, and in both cases, the property of the bankruptcy has been exhausted.[103]

System of Mexico. A culpable bankrupt may be

[99] Spain, 920; Guatemala, 1314; Haiti, 605; Honduras, 907; Nicaragua, 580; Panama, 1633; Peru, 931; Santo Domingo, 612.

[100] Argentina, 1528; Bolivia, 692; Brazil, 144; Chile, 1527; Colombia, 176; Costa Rica, 52; Ecuador, 1062; Mexico, 1014; Uruguay, 1773; Venezuela, 1023.

[101] Spain, 921; Bolivia, 693; Brazil, 144; Colombia, 178; Honduras, 908; Peru, 932.

[102] Argentina, 1527; Chile, 1528; Costa Rica, 51; Ecuador, 1063; Guatemala, 1315; Haiti, 606; Nicaragua, 580; Santo Domingo, 612; Uruguay, 1773; Venezuela, 1024.

[103] Art. 1774.

rehabilitated when he gives to his creditors a satisfactory guaranty that he will pay his debts in full when he can.[104]

System of Panama. The rehabilitation of a culpable bankrupt may be granted when the following conditions have been satisfied:

(*a*) that the bankrupt has paid his liabilities, or the amount agreed in the composition;

(*b*) that he has served or paid the penalty imposed upon him;

(*c*) that five years have elapsed since the declaration of bankruptcy, provided the criminal proceedings in bankruptcy have been dismissed or he has been acquitted by the court.[105]

Rehabilitation of a fortuitous bankrupt.

The rehabilitation of a fortuitous bankrupt may be obtained in Spain,[106] Bolivia,[107] Brazil,[108] Ecuador,[109] Honduras,[110] Guatemala,[111] Panama,[112] Peru [113] and Santo Domingo,[114] under the same conditions provided for a culpable bankrupt.

In Argentina,[115] the rehabilitation must be granted to the fortuitous bankrupt when he has paid his debts, or else when three years have elapsed since the declaration of bankruptcy.

In Brazil,[116] a culpable or a fortuitous bankrupt can be rehabilitated ten years after the declaration of bankruptcy, if he has paid more than 50% of his debts, or twenty years after said declaration, if he has paid 25% of his debts.

In Chile,[117] Costa Rica [118] and Uruguay,[119] rehabilitation is an automatic consequence of the judicial classification of the bankruptcy as fortuitous.

In Colombia,[120] a fortuitous bankrupt may obtain re-

[104] Art. 1011.
[105] Arts. 1631 to 1634.
[106] Art. 921.
[107] Art. 692.
[108] Art. 144.
[109] Art. 1058.
[110] Art. 908.
[111] Art. 1315.
[112] Arts. 1632, 1633.
[113] Art. 932.
[114] Art. 604.
[115] Art. 1526.
[116] Art. 145.
[117] Art. 1533.
[118] Art. 50.
[119] Art. 1773.
[120] Art. 178.

habilitation by proving that he has carried out the composition, if there was one, or else that, with the assets of the estate and further payments, all the liabilities will be paid.

In Mexico,[121] the fortuitous bankrupt may obtain rehabilitation simply by promising in legal form to pay his debts when possible.

In Nicaragua [122] he may obtain it by full payment of his debts or by a settlement with his creditors.

BANKRUPTCY OF PARTNERSHIPS AND CORPORATIONS

Effects of a declaration of bankruptcy upon a commercial association.

The classification of commercial associations according to the liability of their members for the debts of the association shows that in one type of association, the general partnership, the members are unlimitedly liable (*sociedad colectiva*); in another, the stock company, they are liable only up to the amount of their contributions (*sociedad anonima*); and finally, in a third type, the limited partnership, one or more of the associates are unlimitedly liable while the other or others are liable only up to the amount of their contributions (*sociedad en comandita*). These distinctions will explain the difference in effect of the bankruptcy of different types of commercial association with respect to their members and to third parties.

The bankruptcy of a general partnership (*sociedad colectiva*) necessarily involves the bankruptcy of each of its members; but in carrying on the proceedings, the individual property of each must be kept separated from that of the others in order to satisfy the individual liability of each member.[123]

The bankruptcy of one of the associates, on the other hand,

[121] Art. 1010. [122] Art. 580.

[123] Spain, 923; Argentina, 1439; Bolivia, 547; Brazil, 6; Chile, 370; Colombia, 487; Costa Rica, 22; Ecuador, 954; Guatemala, 1199; Haiti, 22, 449; Honduras, 909; Mexico, 948; Nicaragua, 143, 598; Panama, 1621, 1622; Peru, 934; San Salvador, 785; Santo Domingo, 458; Uruguay, 1576; Venezuela, 910.

does not necessarily involve the bankruptcy of the association, of any type.[124]

Limited partners and stockholders of a corporation can only be compelled, in case of the association's bankruptcy, to complete the amount of their stipulated contributions.[125]

According to art. 314 of the Code of Commerce of Brazil a limited partner cannot be declared a bankrupt because of the bankruptcy of the partnership.

Liability of limited partners and stockholders in case of bankruptcy of the association.

It has been already observed that if, at the time of the bankruptcy, the partners of a limited partnership or the stockholders in a stock company have not paid in the full amount of their stipulated contributions, the receiver of the bankrupt estate has a right to call upon them for further payments so far as necessary, within the limit of their respective liabilities.[126]

The special partner of a limited partnership or the stockholder of a corporation who owes the whole or any part of his contribution and is at the same time a creditor of the bankruptcy, can only demand the difference between the amount of his claim and the amount due on his contribution.[127]

Creditors of the association and creditors of the members.

Considering the partnership or the corporation as a separate entity, its capital, property and assets constitute the creditors' guaranty for the payment of their claims. The

[124] Spain, 924; Argentina, 417; Bolivia, 301; Chile, 380; Colombia, 505; Costa Rica, 24; Guatemala, 1199; Honduras, 910; Panama, 1623; Peru, 935; Uruguay, 1576.

[125] Spain, 925, 926; Argentina, 437; Bolivia, 245; Chile, 456, 480; Colombia, 581, 604; Costa Rica, 58; Ecuador, 926, 727, 302; Guatemala, 347; Haiti, 26, 33; Honduras, 911; Mexico, 154, 163; Nicaragua, 145; Peru, 936; Panama, 1627; San Salvador, 787; Santo Domingo, 22, 33; Uruguay, 410, 425; Venezuela, 223.

[126] Spain, 925; Argentina, 437; Brazil, 346; Chile, 378, 379; Honduras, 911; Mexico, 1020; Peru, 936; San Salvador, 787; Uruguay, 500.

[127] Spain, 926; Honduras, 912; Mexico, 1021; Peru, 937; San Salvador, 788.

creditors of the individual partner or stockholder have no right to such property and assets. But in a general partnership every partner is jointly and unlimitedly liable for all the obligations of the partnership, as are the managing members of a limited partnership. A conflict may therefore occur between the creditors of the association and the creditors of the individual partners. This conflict is resolved by the codes according to the following systems:

First system. The private creditors whose claims against a partner antedate the formation of the partnership rank with the creditors of the latter in their proper grade and class according to law. Those whose claims originated after the formation of the partnership can only be paid out of the residue, if any, after the partnership debts have been paid, rights of the mortgage and preferred creditors being reserved.[128]

Second system. The private creditor of a partner can levy only against the stock or share certificates and the liquid funds of the debtor in the partnership, provided the debtor has no other unburdened property, or if such property is not sufficient to pay the debt. When a person is a member of several associations, each with different partners, and one of the associations has fallen into bankruptcy, the creditors thereof can levy only upon the net funds belonging to the common debtor in the solvent partnerships after the creditors of the latter have been paid.[129]

Third system. The private creditors of an associate cannot be paid their claims in case of bankruptcy of the association until after the creditors of the latter have been fully satisfied.[130]

Fourth system. When a partnership becomes bankrupt, the judge must at the same time declare the bankruptcy of the partners, but separate proceedings

[128] Spain, 927; Guatemala, 257; Honduras, 913; Mexico, 1019; Panama, 1624; Peru, 938; San Salvador, 789.

[129] Argentina, 417.

[130] Bolivia, 303; Chile, 380; Colombia, 505; Ecuador, 266; Uruguay, 478.

must be initiated. Only the creditors of the partnership are entitled to share in the bankruptcy proceedings comprising the property of the partnership. In the proceedings for the individual bankruptcy of a partner the partnership creditors can appear and rank with the individual creditors for the full nominal amount of their claims.[131]

Fifth system. The private creditors of a partner in case of bankruptcy of the association will be paid out of the residue of the partnership assets coming to the partner after payment of the partnership creditors; but if the private creditor has any preferential right to the debtor's property, he can claim the preference concurrently with the general body of partnership creditors who lay claim to the same property as assets of the partnership.[132]

Sixth system. The creditors of a partnership cannot bring an action against the partners until after they have brought action against the partnership.[133]

Representatives of commercial associations in bankruptcy. Partnerships or corporations are represented during the bankruptcy proceedings in the manner provided for such cases in the by-laws, and in the absence thereof, by the board of directors; and they may, at any stage thereof, submit to the creditors any proposals of settlement which they may consider proper.[134]

[131] Costa Rica, 23, 25; Nicaragua, 161.

[132] Uruguay, 478.

[133] Venezuela, 214.

[134] Spain, 929; Argentina, 1536; Honduras, 915; Mexico, 1023; Peru, 940.

The fact that the manager of a corporation has been accused of fraud committed in connection with the business of the association does not imply that the corporation itself is a fraudulent bankrupt deprived of the privilege of making settlement with its creditors. Mexico, Trib. Sup. del Dist. Fed. 3a Sala, May 20, 1911, Parcels R. W. and Buch. Miguel *v.* the Receiver of the United States Banking Co. S. A. *Diario de Jur.*, vol. XXV, p. 193.

The bankruptcy of a commercial association is considered fraudulent when the books of the same are so defectively kept that important entries were omitted and erasures or amendments therein were made. Mexico, Juzgado segundo de lo Civil del Dist. Fed., May 25, 1905, *Diar. de Jur.*, vol. V, p. 601.

The penalties established for culpable or fraudulent bankrupts must be applied to managers, directors or liquidators of a commercial association which is declared in bankruptcy, if they have committed the acts considered by the law to constitute culpable or fraudulent bankruptcy.[135]

Public service companies.

Railroad and other companies devoted to works of general, provincial or municipal public service, which find themselves unable to meet their obligations, may request from the appropriate judge or court a declaration of suspension of payments. This can also be requested by any lawful creditor.[136]

The operation of railroads or any other public service cannot be interrupted through any judicial or administrative action.[137]

Requisites of the settlement.

A public service company or undertaking, being in a state of suspension of payments, which appears before the court and applies for a settlement with its creditors, must accompany its application with the balance sheet of its assets and liabilities. For purposes connected with the settlement, the creditors are divided into three groups: the first includes creditors for personal services, and those whose claims originate in lawful expropriations, works and materials; the second, the mortgage bondholders, including the principal, the coupons and amortization due and unpaid, the coupons and amortization being computed at their full value, and the bonds according to the rate of issue, this group being divided into sections according to the different classes of bond holders; and the third, all other credits, whatever their nature and order of preference *inter se* and with relation to the preceding groups.[138]

[135] Argentina, 1537; Costa Rica, 43.

[136] Spain, 930; Honduras, 916; Mexico, 1026; Peru, 941.

[137] Spain, 931; Argentina, 1539; Honduras, 917; Mexico, 1027; Peru, 942; Uruguay, 65; law of May 31, 1893.

[138] Spain, 932, 933; Honduras, 918, 919; Mexico, 1028, 1029; Peru, 943.

In Argentina [139] at any stage of the bankruptcy proceedings against a stock company and whatever responsibility its managers, directors or liquidators may have incurred, the corporation is allowed to make a composition with its creditors.

Effects on public service companies of the declaration of suspension of payments.

The declaration of suspension of payments made by the judge or court produces the following effects:

(*a*) it suspends the levy of any writ of attachment or execution of judgment against property of the company;

(*b*) it obliges the company or enterprise to deposit in a bank, authorized thereto, any surplus of its income after meeting the expenses of the management, operation and construction;

(*c*) it obliges the company or enterprise to submit to the judge or court, within a period of four months, a proposition of settlement with its creditors, previously approved, in the case of a stock company, at an ordinary or extraordinary meeting of stockholders.[140]

Approval of the settlement.

The settlement must be approved if it has been accepted by the creditors who represent three-fifths of the groups or sections above mentioned. It is also to be considered as approved by the creditors, if a sufficient number of them have not attended the first call and if, at a second meeting, it has been accepted by creditors who represent two-fifths of the total of each of the first two groups and of their sections, provided no objection was made by more than two-fifths of any of said groups or sections or of the total liabilities.[141]

[139] Art. 1538.

[140] Spain, 934; Honduras, 920; Mexico, 1030; Peru, 945.

[141] Spain, 935; Honduras, 921; Mexico, 1031; Peru, 946.

Opposition to the approval of the settlement.

Within fifteen days from the publication of the result of the vote, if it has been favorable to the settlement, the dissenting creditors and those who may not have attended, may object to the settlement because of defects in the calling of the creditors and in their acceptance of the settlement or for any other reason provided for by the commercial code.[142]

After the settlement has been approved without objection or if the objection has been overruled by final decree, the settlement is binding on the company and on the creditors whose claims antedate the suspension of payments, provided they have been summoned in legal form, or if, having been notified of the settlement, they did not object thereto within the time prescribed in the code of civil procedure.[143]

Effects of the settlement with respect to partners.

In Argentina [144] the creditors of a partnership who have made a settlement with it, do not preserve their right of action against the partners, unless they have expressly reserved such right at the time of accepting the settlement.

The Chilean,[145] Ecuadorian [146] and Venezuelan [147] codes provide that while the creditors may come to an arrangement with one of the partners, nevertheless the partnership continues subject to the bankruptcy proceedings, and the individual property of the partner who made the arrangement is subject to the terms of his agreement.

Conflict of laws.

As commerce consists in bringing the products of the different countries of the world within the reach of consumers at home as well as abroad, the case of bankruptcy becomes very complex, due to the great variety of laws applicable to persons and things involved in the liquidation of the

[142] Spain, 936; Honduras, 922; Mexico, 1032; Peru, 947.
[143] Spain, 937; Honduras, 923; Mexico, 1033; Peru, 948.
[144] Art. 1410. [145] Art. 1471. [146] Art. 1020.
[147] Art. 982.

business. The effects produced by a declaration of bankruptcy made by the courts of one country upon the branches of an affected commercial house in other countries, or upon the property abroad of the bankrupt, or on the relations created by contracts entered into by him; the law governing the acceptance and classification of creditors' claims and the classification of the bankruptcy; the jurisdiction of the courts; the rehabilitation of the bankrupt—these are a few among the many questions calling for solution on the part of the law. Unfortunately most of the commercial codes of Spanish-America are silent on these matters and the conflicts are left without any other solution than that deducible from general principles. Other codes have such general and vague provisions that they scarcely provide a more definite basis for solution of the conflict. The codes only of Brazil, Costa Rica and Panama indicate by their detailed provisions that their authors realized the importance of these problems.

In Argentina,[148] Uruguay,[149] Costa Rica [150] and Panama,[151] a foreign declaration of bankruptcy cannot be invoked against the domestic creditors of a bankrupt, either to call up for discussion their claims against the domestic property of the debtor, or to nullify transactions of or with the bankrupt. Once the bankruptcy is declared by the courts of the Republic, the creditors participating in the foreign bankruptcy proceedings are not taken into consideration, except when there is a surplus remaining after the domestic creditors have been paid.

In Bolivia the only provision bearing on the matter is that of article 545 of the Commercial Code, prescribing that in order to place the property of the bankrupt under receivership, when it is located outside his residence, the delegated judge (*juez comisario*) must address the necessary letters rogatory to the judge of the places where the property is located.

In Brazil [152] foreign judgments in regard to the bankruptcy

[148] Art. 1383. [149] Art. 1577. [150] Arts. 8 to 12.
[151] Arts. 1638 to 1648. [152] Arts. 161 to 166.

of individuals or corporations residing in Brazil, are effective after such decisions have been authorized (*homologação*) by the federal supreme court. This, however, does not interfere with the rights of mortgagees residing in Brazil or with rights of non-preferred creditors who have already brought their actions in Brazil.

The authorization of the foreign judgment by the supreme court cannot involve branches established in Brazil; the Brazilian creditors can petition for the bankruptcy of those branches and must be paid with its assets in preference to foreign creditors.

The law of the place where the bankruptcy proceedings are conducted determines the classification of creditors' claims.

Compositions of the debtor with his creditors whether preventive or not, made in a foreign country and affecting property in Brazil, also require the authorization (*homologaçao*) of the Brazilian supreme court.

Such authorization cannot be granted to judgments of foreign courts declaring the bankruptcy of Brazilians residing in Brazil, unless in this, as well as in the other cases, international treaties provide otherwise.

In Costa Rica, if a merchant or an association having branches or agencies in the Republic fails in a foreign country, such branches or agencies are put in liquidation if requested, by means of rogatory letters, issued by the authority having cognizance of the bankruptcy of the merchant or association. These branches and agencies may also be declared in bankruptcy when proper according to law.

The term "resident creditor" for the effects of the bankruptcy law includes:

(*a*) a Costa Rican by birth or naturalization, though resident abroad; and,

(*b*) a foreigner residing in Costa Rica at the time the contract from which the debt arises was entered into.

If the bankrupt is an agency or branch established in Costa Rica the rules applicable to the bankruptcy of a

merchant or association residing in Costa Rica are observed.

Mexico provides that if a foreign commercial enterprise becomes bankrupt abroad its branches in Mexico are liquidated, or are also to be declared in bankruptcy, when proper; and such bankruptcy is subject to the provisions of the Mexican law.[153]

In Nicaragua,[154] in case of a foreign declaration of bankruptcy, partial bankruptcy proceedings can be undertaken with respect to the property existing in Nicaragua. If the delivery of such property be demanded by foreign courts, it must not be made until the expiration of thirty days from the publication of such demand; and the delivery is to be confined to that portion of the property that is unclaimed in the Republic, unless otherwise provided by the law.

The code of Panama [155] provides that, unless otherwise stipulated in international treaties, a foreign declaration of bankruptcy is without effect in Panama, except when a judicial *exequatur* has been issued upon it, according to law; preventive measures against the bankrupt's property located within the Republic can, however, be undertaken by virtue of letters rogatory, even before the *exequatur* is obtained.

Within thirty days after the publication in Panama of the last notice of a bankruptcy declared abroad, the creditors residing in Panama can institute local proceedings in bankruptcy, and must be paid in preference to foreign creditors. If there are several bankruptcy proceedings pending as above mentioned, the residue left after paying the domestic creditors must be turned over to the creditors abroad who first sent in letters rogatory requesting preventive measures.

If a bankrupt undertook occasional commercial acts abroad for the account and under the responsibility of the main house, the creditors residing in Panama rank with the non-resident creditors who have enforced their rights before the court in which the proceedings are pending. For the purposes of these provisions, resident or domestic creditors

[153] Art. 949. [154] Art. 595. [155] Arts. 1638 to 1648.

are deemed to be those whose claims must be satisfied within the country, though they reside abroad.

The classification and preference of creditors' claims are governed by the national law.

Preventive or other settlements, as well as objections to the declaration of bankruptcy approved by the judicial authorities of other countries, are only binding upon creditors residing in Panama if they were cited in legal form, and after an *exequatur* has been issued.

In case of plurality of bankruptcies, the bankrupt's incapacities are governed by the law of the country where he has his personal domicil. His rehabilitation in that case can only become effective when it has been decreed in all the places where proceedings were initiated.

Quite different from the provisions of other codes is that of Santo Domingo,[156] which prescribes that no apportionment can be made of the bankrupt's property among the creditors residing in the Republic, until after setting aside in reserve the portion belonging to the foreign creditors listed in the corresponding balance sheet. If these creditors are not accurately described in such balance sheet, the delegated judge can provide for an increase in the funds reserved; the privilege of the receiver to oppose such provision before the commercial courts being reserved.

For the solution of the conflicts of law between Argentina, Uruguay, Paraguay and Peru the treaties signed at the Montevideo International Congress of 1889 must be taken into consideration, because the four countries mentioned ratified these treaties. Among them there is one referring to commercial law; articles 35 to 48 thereof read as follows:

Art. 35. The judges of the commercial domicil of the bankrupt are competent to take cognizance of the bankruptcy proceedings even though he occasionally performs commercial acts in another country, or maintains in it agencies or branches acting for the account and under the responsibility of the main house.

Art. 36. Should the bankrupt have two or more independ-

[156] Art. 567.

ent commercial houses in different states, the judges of the places where such houses are located are competent to take cognizance of the bankruptcy of each of them respectively.

Art. 37. In the case of the article above, when the declaration of bankruptcy occurs in one of the countries, all preventive measures decreed in the proceedings are to be carried out with respect to the property of the bankrupt in other countries, without prejudice to the rights granted to local creditors by the following articles.

Art. 38. After all preventive measures have been carried out by means of letters rogatory, the judge who received such letters must publish notices for sixty days notifying the declaration of bankruptcy and the preventive measures already taken.

Art. 39. The local creditors during the aforesaid period, counting from the day following the publication of the notices, can begin new bankruptcy proceedings against the bankrupt, or proceedings in civil insolvency (*concursarlo civilmente*) if the bankruptcy proceedings are not proper.

In this case the various bankruptcy proceedings must be carried out separately, and the laws of the country in which they take place must be respectively observed.

Art. 40. The term local creditors, in reference to the proceedings begun in any country, includes those whose claims must be paid in that country.

Art. 41. When a plurality of bankruptcy proceedings is proper, according to the provisions of this title, the residue left to the bankrupt in a country shall be placed at the disposal of the creditors in the other country. An agreement between the respective judges is required therefor.

Art. 42. Should the bankruptcy proceedings be carried out only in one country, either because it is proper according to Art. 35, or because the local creditors did not exercise the rights granted them by Art. 39, all the creditors of the bankrupt are bound to present the evidence of their claims and enforce their rights before the judge or court which declared the bankruptcy.

Art. 43. Even though the bankruptcy proceedings are

carried on in a single place, the mortgage creditors, previous to the declaration of bankruptcy, can enforce their rights before the courts of the country where the mortgaged or pledged property is located.

Art. 44. The preferred claims which are to be paid in the country where the bankruptcy proceedings take place, shall be respected, although the property burdened with such preference is taken to another state, and bankruptcy or civil insolvency proceedings have been begun in such state against the bankrupt.

This, however, shall not take place when the property was so taken during the period to which the effects of the declaration of bankruptcy are to relate back.

Art. 45. The powers of the receivers shall be recognized in all the countries, if they are in accordance with the law of the country where the bankruptcy proceedings take place, and they must everywhere be admitted to the functions incumbent upon them according to the terms of the present treaty.

Art. 46. In case of plurality of proceedings in bankruptcy, the court in whose jurisdiction the bankrupt resides is competent to decree all the measures of a civil character which may affect him personally.

Art. 47. The rehabilitation of the bankrupt shall only be proper when it has been effected in all the bankruptcy proceedings.

Art. 48. The provisions of this treaty in the matter of bankruptcy shall be applied to stock companies, whatever the method provided in the contracting states for the liquidation of such companies in case of suspension of payments.

CHAPTER XL

LEGAL PROCEDURE

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Procedure in countries of federal system.

It has already been observed that four of the Latin-American Republics, namely, Argentina, Brazil, Mexico and Venezuela, have adopted the federal system of government in their political constitutions, modelled upon the Constitution of the United States. In those countries, consequently, there are both federal courts and state courts, both the Central Government and the states having power to enact their corresponding codes of procedure. It is well, however, to notice that the powers of the federal Congress in this respect differ somewhat in each of the four countries mentioned.

In Argentina [1] while the federal Congress has power to enact the civil, commercial, penal and mining codes, the provisions of these codes must be enforced either by the federal or provincial courts, according as things or persons may come within their respective jurisdictions. The federal

[1] Constitution, Art. 67, sections 11, 12, 14, 17, 27, 28.

Congress also has power to enact laws on bankruptcy, to provide by special laws for the organization and the administration of the government of the national territories; to establish federal courts inferior to the Supreme Court of justice; and to enact all the laws and regulations which may be deemed necessary to carry into effect the powers and privileges granted by the Constitution.

The Constitution of Brazil [2] gives the federal Congress power to enact the law of federal procedure; to organize the federal courts according to the Constitution; to legislate in regard to the municipal organization of the federal district; to regulate extradition between the states; and to enact such laws and regulations as may be necessary for the exercise of the powers belonging to the Union and necessary for carrying the Constitution into effect.

The powers of the Mexican [3] Congress to legislate in reference to the administration of justice have been derived from the general power to enact all laws necessary to carry into effect the powers vested by the Constitution in the federal branches of the government.

Finally, in Venezuela,[4] also, the powers of the Congress have been derived from the general authorization given by the Constitution to that body to enact laws necessary for the enforcement of the constitution, and to create federal courts to assist the national Supreme Court to administer federal justice.

Constitution of federal courts.

The federal courts are organized somewhat analogously to the state courts.

In Argentina [5] the constitution only prescribes that the federal judicial power shall be vested in a Supreme Court and in such inferior courts as Congress may establish. The justices of the Supreme Court and of the inferior federal

[2] Art. 34, sections 5, 23, 26, 30, 31 to 34.
[3] Art. 72, sections 6, 10, 21, 30.
[4] Art. 58, sections 1, 3, 7, and Art. 92.
[5] Art. 94.

courts are appointed by the president for life during good behavior, with the concurrence of the Senate, and they cannot be removed except after judicial conviction.[6]

The Argentine federal courts were organized by laws 27 of October, 16, 1862, and 48 of August 25, 1863, amended by law 4055 of January, 1902, which divides the federal jurisdiction into three instances or grades. The first instance consists of the district judges (*juezes de seccion*), of whom there is one in each province, except in Buenos Aires and Santa Fé, where there are two. There are twenty-two in all.

The second instance, as a rule, consists of the federa. Courts of Appeal, of which there are now five in the Republicl Each court has three judges and a *fiscal* or attorney general who looks after the interests of the government and the public welfare. These courts have appellate jurisdiction of cases from the district courts, and final jurisdiction in all cases where a special appeal to the Supreme Court is not provided for.

The court of last resort is the federal Supreme Court, which consists of five justices and an attorney general sitting as a judge. The court has original jurisdiction of certain cases, and appellate jurisdiction from the Courts of Appeal.

There are also justices of the peace in federal territories who take cognizance of civil and commercial cases when the amount in dispute does not exceed 100 pesos.

In Brazil, law 3084 of November 5, 1898, governs the organization of the federal courts. It provides for inferior judges of first instance in each state [7] and two in the federal district, called district judges (*Juizes de Secçäo*). They are appointed by the president of the Republic from three candidates proposed by the Supreme Court.[8] There is also a federal Supreme Court with its seat in the federal district, the capital of the country. In the smaller districts of the states, *comarcas*, there are minor substitute district judges.

The federal Supreme Court is composed of fifteen justices appointed for life by the president of the Republic with the

[6] Art. 96. [7] Art. 54. [8] Art. 55.

approval of the Senate, during good behavior, and removable only upon a judicial conviction.[9]

In Mexico federal justice is administered by the Supreme Court of the nation, composed of nine justices, according to the Constitution of 1917 (formerly fifteen) three circuit courts, and a district judge for each state and federal territory, except the state of Tamaulipas and the Federal District, which have two. The administration of federal justice and the procedure before the federal courts are governed by the code of federal procedure of December 26, 1908. The justices of the Supreme Court, according to the Constitution of 1857, are elected by the people for a period of six years.[10] The present justices, according to the Constitution of 1917, are to keep their positions until 1923; thereafter they, as well as the circuit and district justices, are to be elected for life during good behavior.[11]

In Venezuela, the federal judicial power is vested in a Supreme Court called *Corte Federal y de Casación*, and other inferior courts which were to have been established by law; thus far, however, these inferior courts have not been established, the state courts, in the meantime, exercising the powers which would ordinarily vest in the federal courts of first instance. The *Corte Federal y de Casación* is composed of seven justices elected by the Congress for a period of seven years.[12]

The *Fiscal.* Attached to the federal Supreme Courts there is an officer called *Fiscal*, or Attorney General (*Procurador General*), who has agents attached to all other federal courts; a corresponding officer, exercising functions and assisted by subordinate agents in the local courts, is attached to the state courts. The functions of the *Fiscal* or *Procurador* will be discussed hereafter.

Jurisdiction of federal courts.

In Argentina [13] the Supreme Court, as well as the inferior

[9] Arts. 55 to 57. [10] Arts. 91 and 92. [11] Art. 94.
[12] Arts. 92, 94, and law of June 19, 1917.
[13] Arts. 100 and 101.

federal courts, have jurisdiction in all cases, except those of impeachment, involving matters to be governed by the Constitution, the federal laws, or foreign treaties; cases concerning ambassadors, public ministers and foreign consuls, admiralty cases and cases of maritime jurisdiction; cases in which the nation is a party, and those between two or more provinces or between one province and the citizens of another, or between citizens of different provinces, or between a province or its citizens, against a foreign citizen or state.

In all these cases the Supreme Court has appellate jurisdiction, according to rules established by the Congress; but in cases concerning ambassadors, ministers and foreign consuls, and in those to which a province is a party, the jurisdiction of the court is original and exclusive; [14] in other cases, its jurisdiction is appellate. The jurisdiction of the federal Supreme Court is governed by the law of August 25, 1863, and January 8, 1902.

Brazil [15] devoted the third section of its Constitution to the rules governing the federal judiciary, which consists of a federal Supreme Court, sitting in the capital of the Republic, and of as many inferior federal courts and tribunals as the Congress may create.[16]

The federal Supreme Court is composed of fifteen justices, appointed under the provisions of article 48, No. 12, from among the citizens of notable learning and reputation, eligible to the Senate.

The federal justices hold office for life, being removable only after judicial conviction. Their salaries are fixed by law and cannot be diminished. The Senate tries impeach-

[14] Art. 3. [15] Arts. 55, 59.

[16] Art. 60. The federal judiciary was organized by law of November 14, 1890, but so many amendatory and additional decrees were afterward enacted, that on November 20, 1894, the government was authorized to consolidate all these provisions, and it was done by decree 3084 of November 5, 1898. José Tavares Bastos has edited this decree with annotations and an appendix of supplementary acts relating to procedure in federal courts. Tavares Bastos, José: Decreto No. 3084 de 5 de novembro de 1898 Consolidaçao das leis referentes a justica federal. Rio de Janeiro, J. Ribeirodos Santos, 1914–15, 2 v.

ments of the members of the federal Supreme Court and the federal Supreme Court, those of the lower federal courts.

The federal Supreme Court has jurisdiction as follows:

1. Original and exclusive jurisdiction of (*a*), prosecutions against the President of the Republic for common crimes, and the Cabinet Ministers in the cases specified in article 52; (*b*), cases against diplomatic ministers for common crimes and in cases of impeachment; (*c*), questions and conflicts between the Union and the states, or between the states one with another; (*d*), cases and controversies between foreign nations and the Union, or between foreign nations and the states; (*e*), conflicts between the judges of federal courts one with another, or between these and judges of the states, as also conflicts between the judges and courts of one state and the judges and courts of another state.

2. Jurisdiction on appeal of questions passed upon by the lower federal courts and tribunals, as well as those mentioned in section 1 of article 59 and in article 60.

3. On review of criminal decided cases, if to the benefit of the condemned parties.

An appeal [17] to the federal Supreme Court can be taken from final judgments of the state courts:

(*a*) When the validity or application of the federal laws or treaties is called in question and the decision of the state court is against the same.

(*b*) When the validity of state laws or acts alleged to be contrary to the Constitution or the federal laws is contested, and the state court has decided in favor of the validity of the acts or laws in question.

In cases which involve the application of the laws of the states, the federal court must consult the practice of the local tribunals, and, *vice versa* the state court must consider that of the federal courts when the interpretation of the laws of the Union is involved.

The federal judges and courts have original jurisdiction of:

[17] Art. 59.

(*a*) Suits in which any of the parties bases his claim or defense on some provision of the federal Constitution; (*b*) Suits against the Government of the Union or the National Treasury, founded on provisions of the Constitution, laws and regulations of the Executive power, or on contracts entered into with the Government; (*c*), Claims for compensation, recovery of property, indemnification for damages or any other claims presented by the Government of the Union against private individuals or *vice versa;* (*d*), Suits between one state and the citizens of another, or between citizens of different states, when the respective state laws are different; (*e*), Suits between foreign states and Brazilian citizens; (*f*), Actions instituted by foreigners, founded on contracts with the federal Government or on conventions or treaties between the Union and other nations; (*g*), Questions of maritime law or relating to navigation, whether of the ocean, or of the rivers and lakes of the country; (*h*), Questions of international criminal or civil law; (*i*), Political crimes.

Judgments and decrees of the federal judges are enforced by federal officers, and the local police are bound to assist when called upon to do so.

The federal courts in Mexico [18] must take cognizance of: (*a*), controversies arising out of the application and enforcement of the federal laws, excepting when their application affects private rights only, in which case the regular local courts of the state, the federal district and territories must assume jurisdiction respectively; [19] (*b*), cases pertaining to

[18] The Constitution of 1917 in art. 104, amending art. 97 of the Constitution of 1858 provides that when the controversies above referred to affect only private rights, the regular local courts of the states, the federal district and territories shall, at the election of the plaintiff, assume jurisdiction. Appeal may be had from all judgments of first instance to the next higher tribunal of the same courts in which the case was first heard. Appeal may be taken from judgments of second instance to the Supreme Court of justice, which appeal must be prepared, submitted and prosecuted in accordance with the procedure provided by law.

[19] Art. 97 of the Constitution of 1857 and art. 105 of the Constitution of 1917 give the Supreme Court exclusive jurisdiction of all controversies arising

admiralty law; (*c*), cases to which the federal government may be a party; (*d*), cases arising between two or more states; (*e*), cases arising between a state and one or more citizens of another state; (*f*), civil or criminal cases which may arise out of treaties with foreign powers; (*g*), cases concerning diplomatic agents and consuls.

The Supreme Court has original jurisdiction in cases *c* and *d* above.[20]

The Supreme Court [21] also has power to settle questions of conflict of jurisdiction between federal courts, between federal and state courts, and between courts of different states.

The *Corte Federal y de Casaciôn* in Venezuela [22] has jurisdiction of: (*a*), cases instituted against diplomatic officers, when permitted by international law; (*b*), claims against the nation; (*c*), *casaciôn* (annulment of judgment on appeal) in the form and terms established by law; (*d*), maritime prize cases; (*e*), controversies arising out of contracts or negotiations entered into by the president of the Republic; (*f*), petitions for the enforcement of foreign judgments; (*g*), suits to annul titles to mines or national or municipal lands, and controversies arising out of the refusal of the competent authority to grant such titles.

The law of June 19, 1917, governs the jurisdiction and procedure of the federal courts. By article 8 it extends such jurisdiction, among other cases, to the following: (*a*), all controversies arising out of acts of the federal executive, cognizance of which is not assigned to any other authority; (*b*), cases of expropriation based on public utility, when the law so provides; (*c*), cases to which foreign consuls or agents, in the exercise of their functions in the Republic, are a party; (*d*), cases referring to the navigation of interstate or inter-

between two or more states, between the governing powers of any state as to the constitutionality of their acts, between one or more states and the federal government, and in all cases to which the federal government may be a party.

[20] Art. 99, Constitution of 1857, and art. 106, Constitution of 1917.

[21] Art. 98, Constitution of 1857, and art. 105, Constitution of 1917.

[22] Art. 98.

national rivers; (*e*), cases in which the nation is concerned, if cognizance thereof is not assigned to another tribunal by the Constitution or by another law.

There must naturally be other courts than the Supreme Court to take cognizance in first instance of questions of federal jurisdiction; but as the law has failed to provide for the establishment of such courts, the law of June 19, 1917, prescribes that the inferior state judges are empowered to decide such cases, so long as the law does not create the inferior federal courts.

UNCONSTITUTIONALITY OF LEGISLATION

Power to declare a law unconstitutional.

In parliamentary countries without a written constitution, the legislature is supreme and there can be no question as to whether a law is or is not constitutional, as is the case in England; but in countries having a written constitution not enacted by the regular legislature, the latter must be kept within its constitutional sphere in order to preserve the constitution. Yet to confer on another branch of the government the power to declare legislation unconstitutional, would seem to destroy the theory of the separation of powers. The dilemma has been solved in Latin-America by the adoption of different systems, as follows:

First system. The judiciary is called upon to participate in the enactment of laws by passing upon the constitutionality of bills which are objected to by the executive, and passage of which is insisted upon by the legislature. This system has been adopted by Panama and Colombia. Article 105 of the Constitution of Panama and article 90 of the Constitution of Colombia provide that if the executive objects to a bill on the ground of unconstitutionality, and the National Assembly insists upon its passage, the bill must be referred to the Supreme Court, which must render a decision upon its constitutionality within six days. If the action of the assembly is sustained by the court, the

executive must approve and promulgate the bill as a law; if the bill is pronounced unconstitutional, it fails entirely.

Article 92 of the judicial code of Panama of August 22, 1916, provides that if the court allows the period of six days to elapse without making a decision, the constitutionality of the bill is presumed.

With respect to legislation looking to amendments in the civil and procedural codes, in Colombia, and in any of the codes, in Honduras, Nicaragua and San Salvador, it is provided that the Supreme Court shall be heard before its final enactment.[23]

Second system. The judiciary has power to declare generally and for the future that a law is unconstitutional, whenever a special case calls for such declaration.

Bolivia, Brazil, Colombia, Cuba, Santo Domingo, Uruguay and Venezuela have adopted this system.

According to article III of the Constitution of Bolivia the Supreme Court has power to take original cognizance of mere questions of law wherein the contention relies upon the unconstitutionality of any law, decree or regulation.

Brazil [24] has given power to the federal Supreme Court, as has been stated, to review by way of appeal the final judgments of state courts, when the validity or the applicability of federal laws or treaties is called in question, and the decision of the state court has been against such validity or applicability. Brazil provides, furthermore,[25] that the federal judges must assume jurisdiction whenever the validity of laws or acts of a state, alleged to be in conflict with the Constitution of the federal laws, are drawn in question, and the state courts have decided in favor of their validity.

Finally, decree No. 848 of October 11, 1890, provides that the federal Supreme Court has jurisdiction, by way of appeal, from judgments of state courts whenever such judgments deny the validity or the application of laws enacted by the

[23] Colombia, art. 84; Honduras, art. 83; Nicaragua, art. 71; and San Salvador, art. 79.

[24] Art. 59, paragraph III. [25] art. 60.

federal Congress, or deny the validity of acts of any federal authority, acting in behalf of the Union.[26]

The Constitution of Colombia [27] amended by law No. 3 of 1910, empowers the Supreme Court to pass finally upon the validity of every legislative enactment, disapproved by the Executive or objected to by any citizen as unconstitutional, and upon the validity or nullity of any departmental ordinances suspended by the government or challenged before the court by private parties.[28] Colombia, then, has both systems.

In Cuba, article 83, paragraph 4 of the Constitution empowers the Supreme Court to pass upon the constitutionality of a law, decree or regulation whenever the question is raised by a party. Article 6 of the law of March 31, 1913, which regulates this power of the Supreme Court reads:

"The unconstitutionality of a law, decree or regulation may serve as a basis for *Casación*,[29] notwithstanding that such unconstitutionality was not raised in argument." [30]

In Santo Domingo [31] the Court of Justice has jurisdiction to decide, in case of conflicting laws, which of them must be observed; thus the court is empowered to declare that a law which conflicts with the constitution shall not be enforced.

In Uruguay, the high court of justice has original juris-

[26] Brazil, Riveiro *v.* Silva Avila, December 9, 1914, n. 1833, *Revista do Supremo Tribunal*, vol. 3, first part, 1915, p. 334. Crespo de Oliveiro *v.* Compagnie Française du Pont de Rio Grande do Sul, December 30, 1915, *ib.*, vol. 5, September to December, 1915, p. 541.

[27] Art. 151.

[28] See also art. 8 of law No. 81 of 1910.

[29] *Casación* is a remedy intended to establish a uniform construction of the law by the courts, and therefore is a matter of public welfare, more than of private relief sought by a party. This peculiarity is responsible for the general rule that no issues can be raised before the court of *casación* other than those presented by the parties to the lower courts which had cognizance of the case. The provision of the law of Cuba breaks with the tradition of the *casación* by allowing the Supreme Court to pass upon issues of constitutionality not raised below.

[30] Decisions of Aug. 20, 1903; *Gaceta* of Aug. 27; June 1, 1905; *Gaceta* of the 22d; Sept. 14, 1909; *Gaceta* of the 22d; March 22, 1911; *Gaceta* of the 29th; March 28, 1912; *Gaceta* of April 10; March 26, 1912; *Gaceta* of May 4; January 12, 1912; *Gaceta* of April 10; and March 26, 1912; *Gaceta* of May 7th.

[31] Art. 69, paragraph IV, Constitution.

diction to try all cases, without exception, arising out of violations of the Constitution. [32]

The most comprehensive of the constitutional provisions of this second group is that of article 98 of Venezuela.[33] It gives the *Corte Federal y de Casación* jurisdiction to declare the nullity of national or state laws which conflict with the Constitution; to declare which law, decree or resolution is binding in case federal or state enactments are in conflict; to declare the nullity of one or more articles of a law when they are at variance with other articles of the same law, or the nullity of the laws or decrees of the federal government which encroach upon the autonomy of the states, as well as of acts of state, legislative or municipal councils which infringe the fundamental principles of taxation established by the federal Constitution.

Third system. The judiciary is invested with power to enforce the Constitution, by disregarding laws which conflict with it, but without making any general declaration concerning the unconstitutionality of such laws.

This is the system of Argentina, Haiti, Honduras, Mexico, Nicaragua and San Salvador.

Article 31 of the Argentina Constitution provides that the Constitution itself, the national law enacted in accordance with it and treaties with foreign nations are the supreme law of the country, which must be obeyed as against state or local laws.

And article 3 of law No. 27 of October 13, 1862, declares that one of the objects of the national courts is to enforce the federal Constitution, disregarding in its decisions all provisions of any other national power which may conflict with it. The courts [34] never act *ex officio*, but only on the petition of an interested party.[35]

[32] Art. 119, Constitution of December 18, 1917.

[33] Art. 98, paragraphs X, XI, XII.

[34] Art. 2 of the law of October 13, 1862.

[35] The federal courts have jurisdiction of cases in which the constitutionality of a provincial law is drawn in question. September 6, 1913, *Jurisp. de los Trib. Nac.*, September, 1913, p. 13, Oct. 31, 1884, Municipio de la Capital

In Haiti [36] as well as in Honduras [37] the courts must refuse to apply or enforce an unconstitutional law or executive regulation or decree not in accordance with the Constitution.

The powers of the federal judiciary in Mexico have given rise to much discussion, and an abundant legal literature. Custom and legal tradition seek to create a powerful central judiciary, unifying the law and restraining the local, and not always impartial authority of the state judiciary; at the same time local interests seek to carry to an extreme their imitation of the federal system of the United States. Both tendencies have successively prevailed, and the contest has centered around the following articles of the Constitution of 1857.

Article 101: "The federal courts shall take cognizance of:

"(*a*) All controversies arising out of laws or acts of the authorities which violate any personal guaranties;

"(*b*) All controversies arising out of laws or acts of the federal authorities which limit or encroach upon the sovereignty of the states;

"(*c*) All controversies arising out of laws or acts of the state authorities which invade the sphere of the federal authorities."

Article 102: "All cases mentioned in the foregoing article shall be prosecuted by the injured party in accordance with the judicial forms and procedure established by law; the judgment shall always be so drawn as to affect exclusively private individuals, and

v. Elortondo, Fallos de la Sup. Corte de Just. de la Nacion, vol. 33, p. 162, December 3, 1889, Arcelus *v.* Gomez, *ib.*, vol. XLII, p. 274. April 9, 1891. Botti *v.* del Coro. *ib.*, vol. XLIII, p. 224. July 11, 1893, Doldalo *v.* Muñoz Rodriguez y Cia, *ib.*, vol. LII, p. 413. December 5, 1901, Gibs *v.* Provincia de Mendoza, *ib.*, vol. XCIII, p, 219. June 7, 1902, Tarrascón y Cia. *v.* Provincia de Santa Fé, *ib.*, vol. XCV, p. 100. Sept. 11, 1902, Proto *v.* Provincia de Santa Fé, *Ib.* vol. XCVI, p. 86. March 26, 1904, Las Palomas Produce Co., Ltd., *v.* Provincia de Buenos Aires, *ib.*, vol. XCIX, p. 36.

[36] Art. 147, Constitution. [37] Art. 106.

shall confine itself to affording them redress in the special case arising, but it shall not pronounce a general declaration as to the law or the act constituting the basis of the complaint."

These are the rules which have established the jurisdiction of the federal courts in Mexico, but in order to evaluate their importance it is necessary to take into consideration articles 14 and 16 of the Constitution. They provide, among other things, that no person shall be tried or *sentenced* except under laws previously enacted, *exactly* applicable to the case, and that no one shall be molested in his person, family, residence, papers or possessions, except by virtue of an order issued in writing by the *competent* authority, setting forth the legal ground upon which the measure is taken.

Two questions arose early, namely:

(*a*) if no person is to be *sentenced* except under laws *exactly* applicable to the case, could a party to a civil suit apply for redress to the federal courts whenever he considered that the law had not been exactly applied to his case?

(*b*) Is a person who obtained his position through electoral fraud, a *competent* authority who could issue the order referred to in article 16?

Upon the solution of the first question depended the extension of the power of the federal courts. If the answer was affirmative the Supreme Court was the general revisor of the decisions of state courts, and the judicial sovereignty of the states disappeared. Under the influence of Vallarta, who was the Chief Justice of the Supreme Court of Mexico, the court refused thus to extend its jurisdiction; but after Vallarta left office the centralizing forces had their way, the Constitution was amended and the federal Supreme Court was given power to pass upon all final judgments when one of the parties to the suit considered that the law had not been exactly applied.[38]

[38] In reference to this particular matter of *amparo* (the legal term designating the special proceedings by which the federal courts give redress for the violation of a constitutional guaranty) in civil affairs, we may point out as

The other question involves consequences of far-reaching character, because, if the federal courts were to determine the legitimacy of the authorities of the country, drawing into question their creation and conditions of appointment, then the Supreme Court would be the political arbiter of the nation and other constitutional powers would be merely dependents thereof. Vallarta in this case again placed the weight of his authority on the side of the limitation of the powers of the federal judiciary by confining it to its proper functions, and after a contest lasting for many years and filled with exciting episodes, the court was unanimous in following the path laid out by its Chief Justice.[39]

the most noticeable decisions, those of October 18, 1871, May 14, 1874, July 26, 1878 (amparo Rosales) and July 4, 1879 (amparo Larrache).

[39] Article 103 of the Constitution framed by the constitutionalists of Querétaro, in 1917, reproduces the text of article 101 of the Constitution of 1857; but in other articles the tendency to centralize the judiciary is evident and now every commercial suit may be brought before the federal courts. We may quote article 107 of the Constitution of Querétaro corresponding to 102 of the Constitution of 1857. In most cases the provisions, which are taken from the code of civil procedure in federal matters, are raised to the character of constitutional principles:

Article 107. "All controversies mentioned in Article 103 shall be prosecuted by the injured party in accordance with the judicial forms and procedure which the law shall establish, subject to the following conditions:

1. The judgment shall always be so drawn as to affect exclusively private individuals, and shall confine itself to affording them redress in the special case to which the complaint refers; but it shall make no general statement as to the law or the act that may have formed the basis for the complaint.

2. In civil or penal suits, excepting those mentioned in Clause IX hereof, the writ of "amparo" shall issue only against final judgments when no other ordinary recourse is available by which these judgments may be modified or amended, if the violation of the law shall have occurred in the judgment, or if, although committed during the course of the trial, objection was duly noted and protest entered against the denial of reparation, and provided further that, if committed in first instance, it shall have been invoked in second instance as a violation of the law. Notwithstanding the foregoing provision, the Supreme Court may in penal cases waive any defects in the petition when there has been a manifest violation of the law which has left the petitioner without recourse, or when he has been tried by a law not strictly applicable to the case, provided failure to take advantage of this violation has been merely an oversight.

3. In civil or penal suits the writ of "amparo" shall issue only if substantial portions of the rules of procedure have been violated, and provided further that the said violation shall deprive the petitioner of means of defense.

Article 92 of the Nicaraguan Constitution provides that among the powers of the Supreme Court is that of applying the laws to the concrete cases presented to it for decision, interpreting them to that end, according to the spirit of the

4. In addition to the case mentioned in the foregoing paragraph, the writ of "amparo" shall issue only on a final judgment in a civil suit—provided the requirements set forth in Clause II hereof have been complied with—when the judgment shall be contrary to the letter of the law applicable to the case or contrary to its legal interpretation, when it includes persons, actions, defenses or things which have not been the object of the suit, or finally when all these have not been included either through omission or express refusal. When the writ of "amparo" is sought against mesne judgments, in accordance with the provisions of the foregoing clause, these rules shall be observed, as far as applicable.

5. In penal suits, the authorities responsible for the violation shall stay the execution of final judgment against which the writ of "amparo" has been sought; for this purpose the petitioner shall within the period set by law, give notice, under oath, to the said authorities of the interposition of this recourse, accompanying it with two copies of the petition, one of which shall be delivered by the opposing party and the other filed.

6. The execution of a final judgment in civil suits shall only be stayed when the petitioner shall give bond to cover the damages occasioned thereby, unless the other party shall give a counter bond, (1) to guarantee that the normal conditions and relations previously existing be restored, and (2) to pay the corresponding damages, in the event of the granting of the "amparo." In such event the interposition of the recourse of "amparo" shall be communicated as provided in the foregoing clause.

7. If a writ of "amparo" be sought against a final judgment, a certified copy of such portions of the record as the petitioner may desire shall be requested from the authority responsible for the violation; to this there shall be added such portions as the other party may desire and a clear and succinct statement by the said authority of the justification of the act protested; note shall be made of this on the record.

8. When a writ of "amparo" is sought against a final judgment, the petition shall be brought before the Supreme Court; this petition, together with the copy required by Clause VII, shall be either presented to the Supreme Court or sent through the authority responsible for the violation or through the District Court of the corresponding state. The Supreme Court shall render judgment without any other formality or procedure than the petition, the document presented by the other party and that of the Attorney General or the Public Attorney he may name in his stead, and shall comprise no other legal question than that contained in the complaint.

9. When the acts of an authority other than the judicial are involved or the acts of the judiciary exercised outside of the suit or after the termination thereof, or acts committed during the suit whose execution is impossible of reparation, or which affect persons not parties to the suit, the writ of "amparo" shall be sought before the District Court within whose jurisdiction is located

Constitution, and, under its own responsibility, to refuse to apply them when they are contrary to the fundamental law.

San Salvador has established the "*amparo*" or writ of *habeas corpus* as established in Mexico, and the Supreme

the place where the act protested was committed or attempted; the procedure in this case shall be confined to the report of the authority and to a hearing, the call for which shall be issued in the same order as that calling for the report. This hearing shall be held at as early a date as possible, the testimony of both parties offered, arguments heard which shall not exceed one hour for each side, and finally the judgment which shall be pronounced at the same hearing. The judgment of the District Court shall be final, if the interested parties do not appeal to the Supreme Court within the period set by law and in the manner prescribed by Clause VIII.

In case of a violation of the guarantees of articles 16, 19, and 20, recourse shall be had through the appellate court of the court committing the breach or to the corresponding District Court. An appeal against the decision of any of these courts may be taken to the Supreme Court.

If the district judge shall not reside in the same locality as the official guilty of the violation, the judge before whom the petition of "amparo" shall be submitted shall be determined by law; this judge shall be authorized to suspend temporarily the execution of the act protested, in accordance with the terms established by law.

10. Any official failing to suspend the execution of the act protested when in duty bound to do so, or when he accepts an insufficient or improper bond, shall be turned over to the proper authorities; the civil and penal liability of the official shall in these cases be a joint liability with the person offering the bond and his surety.

11. If after the granting of an "amparo" the guilty official shall persist in the act or acts against which the petition of "amparo" was filed, or shall seek to render of no effect the judgment of the federal authority, he shall be forthwith removed from office and turned over for trial to the corresponding District Court.

12. Wardens and jailors who fail to receive a duly certified copy of the formal order of commitment within the seventy-two hours granted by article 19, reckoned from the time the accused is placed at the disposal of the court, shall bring this fact to the attention of the court immediately upon expiration of this period; and if the proper order be not received within the next three hours the accused shall be set at liberty.

Any official who shall violate this provision and the article referred to in the foregoing paragraph shall be immediately turned over to the proper authorities. Any official or agent thereof who, after an arrest has been made, shall fail to place the accused at the disposition of the court within the next twenty-four hours shall himself be turned over to the proper authority.

If the detention be effected outside the locality in which the court is situated, there shall be added to the period mentioned in the preceding sentence the time necessary to travel from the said locality to that where the detention took place.

Court of the nation has jurisdiction thereof.[40] The jurisdiction of the court therefore is limited to cases in which a private individual asserts that a constitutional guaranty has been infringed to his detriment.

Fourth system. This includes those countries which do not expressly invest any authority with the power to pass upon the constitutionality of legislation. These countries are Chile, Costa Rica, Ecuador, Guatemala, Paraguay and Peru.

The Constitution of Chile does not invest its judiciary with the power of deciding the constitutionality of a law, nor has it any clear declaration on this subject. Conflicts of jurisdiction have occurred between the judiciary and the executive.

Costa Rica [41] and Guatemala [42] leave the details of the organization of the national judiciary to secondary laws, and article 8 of the Costa Rican law of March 29, 1887, provides that judges shall not apply laws, decrees or regulations which conflict with the Constitution.

The Constitution of Ecuador by implication invests the Supreme Court with the power to pass upon the constitutionality of laws, for according to article 132 the constitution is the supreme law of the Republic, and no secondary law, decree, rule, order, provision or public treaty whatsoever, which may be found in opposition or at variance with its text, shall have any effect whatever; and, although no special body is invested with the power to declare that a law infringes the Constitution, it must be assumed that the judiciary, by virtue of its natural functions, is the power which must refuse to apply a law found unconstitutional.

Paraguay is silent on the matter of the unconstitutionality of legislation. The only indication of the idea of the framers of the Constitution is found in article 118 which provides that no law shall be applied to any case if not enacted before the date of occurrence of the facts out of which the case arose, and in article 120 which provides that

[40] Articles 37 and 102, paragraph 11.

[41] Art. 119 c. [42] Art. 93 c.

the justices of the Superior Court shall promise under oath, to be administered by the President of the Republic, faithfully to fulfill their duties and administer justice, lawfully and well and "in conformity with the Constitution."

Equally silent is the Constitution of Peru, article 24 of which, referring to acts of an unconstitutional character, provides that the legislature, at the end of each constitutional period, must examine the administrative acts of the Chief Executive, and approve them if they are in conformity with the Constitution and the laws; otherwise the Chamber of Deputies must submit to the Senate appropriate articles of impeachment.

Article 95, paragraph 5, provides that the Council of State has power to take cognizance of conflicts of jurisdiction among the administrative authorities *inter se*, and of the administrative authorities with the courts of justice.

This power together with that of the Council to have the President submit to it all acts passed by the Senate and Chamber of Deputies which are sent to him for approval, is the nearest approach in Peru to the power to declare laws unconstitutional.

CIVIL AND COMMERCIAL COURTS

In dealing with the method of organization of the courts and their jurisdiction in Latin-American countries having a federal system, reference will be made to the courts of the capital of the respective Republics, unless otherwise expressly stated; and it is necessary, moreover, to bear in mind what has already been said in regard to the power of the federal Congress in those countries to enact laws and codes, in order to determine the applicability of those enactments.

Argentina.

The administration of justice in Buenos Aires, the capital of Argentina, is governed by laws No. 1893, of November 12, 1886, No. 2860 of November 16, 1891, as amended by laws No. 2860 of January 3, 1898, No. 3670 of January 1, 1898,

and No. 7055 of August 19, 1910. According to these laws civil and commercial jurisdiction is divided as follows:

(*a*) *Alcaldes* or ward justices, appointed by the municipality; they have jurisdiction of cases involving not over 50 pesos;

(*b*) *Jueces de paz* (justices of the peace), of whom there are sixteen in the capital. They must be lawyers, in contradistinction to the territorial justices of the peace, and their jurisdiction in civil and commercial cases is confined to those involving from 50 pesos up to 500 pesos; in cases of *desalojo* (ejectment of a tenant), when the monthly rent does not exceed 200 pesos or when the lease is not written; and final jurisdiction on appeals from the *alcaldes*.

(*c*) *Camaras de Paz*, of which there are two, with jurisdiction: (*a*) of appeals from decisions of the *jueces de paz* above 100 pesos and (*b*) of questions of jurisdiction below, and of complaints of delay in administering justice by the justices of the peace.

The *jueces de paz* and the members of a *Camara de paz* are appointed by the President of the Republic with the consent of the Senate, the former for three and the latter for nine years, both being re-eligible;

(*d*) *Jueces de Mercado*, or market judges, one for each market place of the capital, and the members of the

(*e*) *Tribunal de Mercado de segunda instancia*, both appointed by the Executive from among merchants of the respective market places. The jurisdiction of these courts is as follows: the *jueces de mercado* take cognizance in first instance of cases, whatever their amount, provided the parties agree upon the existence of a contract and the question involves market dealings concerning the delivery of cattle, grain or fruit, or the weight of freight or measure thereof.

The *Tribunal de Mercado* takes cognizance of appeals from decisions of the *jueces de mercado* in cases above 100 pesos.

(*f*) *Jueces de lo Civil*, who have jurisdiction in first

instance of all cases governed by civil law involving 2,000 pesos, their decisions being subject to appeal;

(*g*) *Jueces de Comercio,* who have jurisdiction in first instance of all cases over 500 pesos governed by the code of commerce or commercial law. Their judgment is subject to appeal.

These two kinds of judges are appointed by the President of the Republic with the concurrence of the Senate, for life, during good behavior;

(*h*) *Camaras de Apelación.* The appellate court is divided into three chambers, one for civil matters, one for commercial matters, and one for criminal cases. In 1910, a second civil chamber was added. They take cognizance of appeals from judgments of the *Jueces de lo civil* and *Jueces de comercio,* and of complaints against the latter for delaying or denying justice.

The *Ministerio Publico* [43] is represented by a *fiscal* in the *Camaras de Apelación* and by fiscal agents before the judges of first instance and the justices of the peace.

Bolivia.

The Bolivian law of December 31, 1857, with subsequent amendments, as compiled by Dr. Samuel Oropeza, and approved by decree of July 16, 1878, and law of December 12, 1914, governs the organization of the courts and their functions.

The courts having jurisdiction in civil and commercial matters are divided as follows:

(*a*) *Alcaldes de Barrio y de Campo* (justices of boroughs and country places), who take cognizance of claims of an amount not greater than 4 pesos or bolivianos in cash or 8 pesos in goods.[44] (A boliviano is $0.3893 U. S. currency.)

(*b*) *Alcaldes parroquiales* (parochial judges). For every center of population not exceeding 500 inhabitants there must be an *alcalde parroquial* appointed by

[43] See *infra,* for the discussion of the functions of the *Ministerio Publico.*

[44] Arts. 250, 254 of law of December 31, 1857.

the municipal council from a list of three names presented by the *jueces instructores*. These *alcaldes* have jurisdiction of claims to the amount of 16 pesos, with an appeal to the superior judges.[45]

(*c*) *Jueces instructores* (delegated judges), appointed by the Supreme Court from a list of three persons proposed by the district courts. These judges take cognizance of claims from 60 to 200 bolivianos in an oral suit, with appeal to the *jueces de partido*, and from 100 to 500 bolivianos, in written form, with like appeal. In both cases their decisions are subject to annulment by the district court.[46]

(*d*) the *jueces de partido*, are also appointed by the Supreme Court in the same manner as the *jueces instructores;* they take cognizance in first instance of all cases not assigned by the law to other courts, and of appeals from decisions of the inferior courts; [47] when the amount of a complaint exceeds $500 the case belongs to the jurisdiction of the *jueces de partido*.

(*e*) *Cortes de distrito* (district courts). The Republic is divided into eight districts, namely: Sucre, La Paz, Cochabamba, Potosí, Oruro, Santa Cruz, Tarija and Cobija. Each district has a *Corte de Distrito* except Cobija and Tarija, where there are only superior judges. The district judges are elected by the Senate from a list of three persons proposed by the Supreme Court. These courts are appellate courts, and have cognizance of alleged conflicts of jurisdiction between the *jueces de partido* or between the delegated judges (*instructores*) of different provinces, or between regular and special judges; [48] and finally

(*f*) the *Corte Suprema*, composed of seven justices, each appointed by the chamber of deputies from a list of three persons proposed by the Senate. The Corte

[45] Arts. 237, 242 *ib.*

[46] Arts. 224, 227, 229, *ib.*

[47] Arts. 203, 207, 209, 215, *ib.*, and 14 and 18 of decree of August 10, 1877.

[48] Arts. 187, 190, 191, *ib.*, and 30 and 31 of law of October 24, 1871.

Suprema has jurisdiction, in civil and commercial matters, of all petitions for the annulment for error in form or in law of judgments rendered by the district courts; of conflicts of jurisdiction between those courts, and of all questions arising out of contracts or concessions entered into by the Executive.[49]

Brazil.

In Brazil the administration of justice in the Federal District is governed by decree No. 1030 of November 14, 1890, according to which civil and commercial jurisdictions are divided as follows:

(*a*) the *pretores* or justices of the peace of which there are 21 in the federal district take cognizance of cases up to 5,000$ (equivalent to about $1,250. U. S. currency), except when the fisc or public treasury is involved.[50]

(*b*) the *tribunal civil e criminal* composed of one president, two vice-presidents and nine judges. The tribunal is divided into three chambers (*camaras*): one criminal, another civil and another commercial. The commercial chamber has jurisdiction in first instance of cases above 5,000$ and in second instance on appeals from the decisions rendered by the *pretores*.[51]

(*c*) the *corte de appellaçäo*, which is divided into two sections, criminal and civil: The civil section takes cognizance in second and last instance of decisions rendered by the *Tribunal civil*.[52]

Chile.

In Chile the courts are governed by the law of October 15, 1875, as amended or supplemented by laws of March 4, 1897, which organized the consular service; of September 16, 1884, on penalties for misdemeanors; of December 21, 1865, containing the tariff of judicial fees; of December 30, 1886, article 9 of which established the sanitary police; of Octo-

[49] Arts. 49, 50, 51, *ib.*

[50] Art. 50 of Decree No. 1030 of Nov. 14, 1890.

[51] Arts. 82, 83 and 102, *ib.*

[52] Art. 135.

ber 25, 1877, on certified copies; of December 22, 1891, which organized the municipalities; of August 9, 1894, which created the special judge of the slaughter house in Santiago; of December 31, 1897, which authorized the municipality of Valparaiso to create a special slaughter-house judge; of January 10, 1884, which made marriage a civil transaction; of January 19, 1889, providing new qualifications for a *juez de letras* and another of the same date providing for the division of the Supreme Court and creating the Appellate Court at Santiago.

There is a district judge in every district of the Republic with jurisdiction of cases not exceeding 50 pesos.[53] In every *subdelegacion* there is a *juez subdelegado*, who has jurisdiction of cases above 50 pesos and not exceeding 200 pesos, subject to appeal and *casación* (annulment for error).[54] In every department of the Republic there is a *juez de letras*,[55] who has cognizance of cases of non-contentious jurisdiction and of all other civil or commercial disputes involving over 200 pesos, of appeals from decisions of the *jueces subdelagados*, and in third instance, jurisdiction in *casación* of judgments of the *jueces subdelegados*.[56]

There are seven courts of appeal, in the cities of Tacna, La Serena, Valparaiso, Santiago, Talco, Concepción and Valdivia.[57]

Judges of the courts of appeal have original jurisdiction of civil or commercial cases in which the President of the Republic, members of the cabinet, intendants of provinces, governors of the departments, Chilean diplomatic agents, diplomatic representatives of other countries before the Chilean government, the archbishop, the bishops or other eccesiastical officials are parties. These courts have appellate jurisdiction in cases decided in first instance by the district judges; and they have exclusive jurisdiction for the

[53] Art. 13, law of October 15, 1875.
[54] Art. 33, *ib.*
[55] Law of January 31, 1888.
[56] Art. 37, law of October 15, 1875.
[57] Art. 55, *ib.*, as amended by laws of October 8, 1898, January 14, 1899, and July 28, 1888.

remedy of annulment of judgment (*casación*) against decisions rendered by the district judges.[58]

Appeals in the above-mentioned cases in which the judges of appeal have original jurisdiction go to the corresponding chamber of the court, excluding the judges who took cognizance in first instance.[59]

The *Corte Suprema*, which is the highest in the judicial hierarchy, is composed of ten judges, one being the chief justice and chairman of the court. It has jurisdiction in *casación* of judgments of the *Cortes de Apelación*.[60]

Colombia.

In Colombia, article 1 of law No. 100 of 1892 provides that the administration of justice is vested in: (*a*) a Supreme Court, (*b*) superior courts, (*c*) superior judges, (*d*) circuit judges, (*e*) "attaching" judges (*jueces ejecutores*), and (*f*) municipal judges. According to articles 17, 20, 35, 36, of law No. 3 of 1910 the Supreme Court is composed of nine justices, four elected by the Senate, and five by the Chamber of Deputies from a list of three presented by the President of the Republic; the justices are appointed for five years and may be reappointed.

The Supreme Court has jurisdiction of controversies concerning diplomatic agents and maritime prize cases, controversies arising out of agreements made by the national executive, unless otherwise stipulated, cases of conflicting jurisdiction or other matters arising among the provinces (*departmentos*) and cases of revision or annulment for error of judgments of other courts.[61]

The territory of the Republic is divided into districts. In each district there is a superior court (*Tribunal Superior*), whose justices are appointed by the Supreme Court from a list of three names presented by the corresponding provincial assembly. The superior courts have original jurisdic-

[58] Art. 67, law of October 15, 1875.

[59] Art. 4 of the c. p.

[60] Arts 102, 107, 117, of law of October 15, 1875, and art. 4 of the law promulgated on August 28, 1902.

[61] Art. 40 of law 81 of 1910.

tion of cases to which the nation is a party, except cases within the original jurisdiction of the Supreme Court, and appellate jurisdiction of all cases of which the district or circuit judges have original jurisdiction, of decisions of the collectors of taxes, and of awards of arbitrators.[62]

The district judges, of which there must be one in the capital of each judicial district, are also appointed by the corresponding superior court and have jurisdiction of civil and commercial cases involving more than 300 pesos.[63]

In every municipal district there are as many municipal judges as the municipal council may appoint. They have jurisdiction of cases of minor importance (*menor cuantía*) that is to say, municipal judges in the capital of a judicial district, cases less than 300 pesos, judges in the capital of a circuit, 200 pesos, and those of other places, 100 pesos.[64]

Costa Rica.

In Costa Rica the administration of justice is governed by law of March 29, 1887, according to which the judiciary has jurisdiction of all cases, whether civil, criminal or *contencioso-administrativo* (cases between individuals and administrative authorities), whatever their nature and the character of persons concerned.

The jurisdiction is divided among: (*a*) *Alcaldes*, (*b*) judges of first instance (*jueces de primera instancia*) and arbitrators, (*c*) military courts and judges, and (*d*) appellate and *casación* divisions (*salas de apelación y salas de casación*) of the *Corte Suprema*, and (*e*) the full bench. The Supreme Court is composed of eleven justices in three chambers: three justices constituting the appellate division in civil cases; three justices in criminal cases; and five justices, acting as the division of *casación*. The justices of the *Corte Suprema* and the judges of first instance are appointed for a period of four years. The *alcaldes* have civil and commercial jurisdiction of claims not exceeding 250 colones ($125. U. S.

[62] Arts. 7 of law No. 169 of 1896 and 74 of the Code of Justice.

[63] Art. 113, Code of Justice, and art. 1 of law No. 40 of 1907.

[64] Art. 116, of the Code of Justice and 1 of law No. 40 of 1907.

currency); and the judges of first instance, of claims involving over 250 colones, as well as of appeals from final judgments of the *alcaldes* and of cases of conflicting jurisdiction between *alcaldes*.

The appellate division of the *Corte Suprema* takes cognizance, (*a*) of conflicts of jurisdiction between judges or between judges and administrative authorities; (*b*) of refusals of the justices of the court to hear a certain case, and of challenges of these justices; (*c*) of cases of criminal or civil liability incurred by judges of first instance, charges against governors, members of the public board of accountants, and municipalities; and (*d*) of appeals from the judges of first instance.[65]

The *casaciôn* division of the court takes cognizance, (*a*) of all cases of annulment and revision of judgments for error, (*b*) of questions of jurisdiction between the appellate division, and (*c*) of the execution of foreign judgments.[66]

The functions of the full *Corte Suprema* are, among others, (*a*) to appoint inferior judges, and (*b*) to take cognizance of the writ of *habeas corpus*.[67]

Cuba.

In Cuba the administration of justice is governed by Arts. 81 to 90 of the Constitution, by royal decree of January 5, 1891, and royal order of July 30, 1892, and by the law of judicial organization of 1909, according to which there is a *Tribunal Supremo*, six *Audiencias*, one each in Havana, Puerto Principe, Santiago de Cuba, Santa Clara, Matanzaz and Pinar del Rio, judges of the first instance, and municipal judges.[68] The municipal judges (*juzgados municipales*) have jurisdiction of cases not exceeding 350 pesos (or U. S. dollars), except in cases of great urgency

[65] Art. 66, law of March 29, 1887.

[66] Art. 48, *ib.* See Beeche, Oct. Estudios de derecho constitutional. San José, 1910.

[67] Arts. 51, 53, *ib.*

[68] Arts. 2 and 4 of royal decree of January 5, 1891.

when they may take the necessary measures and report to the judge of proper jurisdiction, with appeal to the court of first instance; the judges of the first instance (*juzgados de primera instancia*) have original jurisdiction of cases between individuals involving over 350 pesos, with appeal to the *audiencias;* the *audiencias* are courts of appeal in commercial cases and have original jurisdiction of claims against the state and of conflicting jurisdiction between judges of first instance.[69] The Supreme Court, among other powers, has jurisdiction of cases of annulment of judgment (*casación*), of conflicts of jurisdiction between *audiencias* or between courts not having a common superior; of cases to which the state, on the one side, and the provinces or municipalities on the other, are parties; and of cases in which the constitutionality of a law, decree or regulation is questioned by any party.[70]

Ecuador.

In Ecuador, civil and commercial procedure is governed by the code promulgated on June 12, 1907. All cases involving not over 200 sucres (about $96. U. S. currency) are suits of minor importance (*juicios de menor cuantia*), cognizance of which vests in the parochial judges (*jueces parroquiales*) [71] with a right of appeal, unless the amount claimed is less than 30 sucres.[72] Cases above 200 sucres are within the jurisdiction of the *Alcaldes municipales del cantôn* (district judges).[73]

The law provides for five forms of recourse against judgments rendered in first instance, namely: (*a*) appeal, (*b*) third instance, (*c*) nullity, (*d*) as of fact (*de hecho*), and (*e*) of denial of justice (*queja*).[74]

There cannot be a third instance in cases involving 1,000 sucres or less. When recourse to the third instance lies the *Corte Suprema* takes cognizance thereof. Nullity, which must be demanded when the appeal or third instance is

[69] Arts. 183, 185, 186, *ib.*
[70] Art. 83 c.
[71] Art. 478 c. p.
[72] Art. 376 c. p.
[73] Art. 456 c. p.
[74] Art. 371 c. p.

entered, lies for violations of legal formalities in the proceedings.[75] The *de facto* remedy (*recurso de hecho*) lies, when the court to which an appeal or a petition for annulment of a decision has been directed, does not consider the appeal pertinent. It must be exercised within three days after the judge or court has denied an appeal or third instance.[76] The *queja* lies when a judge or court delays or refuses to administer justice in a case; the Congress takes cognizance of this remedy when it is directed against the justices of the *Corte Suprema*.[77]

Guatemala.

In Guatemala the code of civil procedure promulgated March 8, 1877, divides jurisdiction among: (*a*) municipal judges, who take cognizance of cases involving up to 200 pesos; (*b*) the judges of first instance (*jueces de primera instancia*) with jurisdiction of cases over 200 pesos; (*c*) the *Tribunal Supremo de Justicia*, which takes cognizance of appeals, third instance, and extraordinary remedies established by law.[78] Law of July 20, 1877, governs the commercial courts and procedure; commercial cases belong to the jurisdiction of a special judge in the capital of the Republic, and to that of the judges of first instance in the departments.

Honduras.

In Honduras the law of February 8, 1906, organizes the judiciary and provides that in every municipality there shall be: (*a*) a *juez de paz* and a substitute in the capitals of departments; where there are more than four thousand inhabitants there must be two *jueces de paz* and two substitutes, designated by popular election for one year; they do not receive compensation for their services, and have jurisdiction of cases not exceeding 200 pesos. In addition, there are also *alcaldes auxiliares* who have cognizance of

[75] Arts. 398 to 421 c. p.
[76] Art. 422 c. p.
[77] Arts. 430 to 436 c. p.
[78] Arts. 6, 1234, 1832, 1843, 1859, 1878, 1893 c. p.

cases not above 10 pesos;[79] (*b*) *jueces de letras*, or first instance judges in the capital of each department, with jurisdiction of cases above 200 pesos or of cases the amount of which is indefinite. They review or revise the decisions of the *jueces de paz*, and act also as notaries public with all rights and obligations as such.[80] (*c*) four courts of appeal, as follows: two in Tegucigalpa, one in Comayagua and one in Santa Barbara; they are courts of first instance for complaints against the *jueces de letras*, and are courts of appeal from judgments of the *jueces de letras* or arbitrators;[81] (*d*) the *Corte Suprema de Justicia*, which has original jurisdiction of cases of *casación* and is a court of last instance in reviewing the judgments of the lower courts. It has power to dictate *autos acordados* or regulating provisions of a general character binding for the future, and other provisions in aid of the enforcement of the law.[82]

Haiti.

In Haiti the courts are divided into three grades, namely: (*a*) first instance, which corresponds to the French justices of the peace (*juges de paix*). There is a *juge de paix* in each town, and the president can establish others in wards and parishes where he deems it desirable; (*b*) second and last instance, which corresponds to the civil courts (*tribunaux civils*); and (*c*) the courts of *casación* (*tribunal de cassation*).[83]

Mexico.

In Mexico the administration of justice is organized in the Federal District and national territories in accordance with the law of September 9, 1903, and its regulation of November 30, 1903. With respect to civil and commercial procedure jurisdiction is divided among: (*a*) *jueces menores* (minor judges) who take cognizance of cases involving up to 500 pesos ($250. U. S. currency);[84] (*b*) in places where there are

[79] Arts. 16, 21, 26, 34, *ib.*
[80] Arts. 38, 40, 41, 49, *ib.*
[81] Arts. 50, 55, *ib.*
[82] Arts. 74, 80, 83, *ib.*
[83] Law of June 9, 1835, arts. 7, 29, 46.
[84] Art. 25, law of September 9, of 1903.

no *jueces meñores* and the population exceeds two hundred, there is a *juez de paz*, who has jurisdiction of cases above 50 pesos, and must, furthermore, undertake all proceedings entrusted to him by the superior judges;[85] (*c*) *jueces de lo civil* (judges in civil matters) who have jurisdiction of all civil and commercial cases above 500 pesos whether contentious or not[86] as well as those of no pecuniary value; (*d*) the *Tribunal Superior de Justicia*, divided into five salas or chambers, which, acting together, constitute the *Tribunal pleno* or full court, whose functions are principally administrative. The first chamber takes cognizance of conflicts of jurisdiction between judges of the Federal District and Territories, and of cases of *casación* against judgments of local courts of the Federal District and national Territories.[87] The second and third chambers have jurisdiction of appeals from judgments of the civil courts of the cities of Mexico, Tacubaya, Tlalpam, Xochimilco, Partido Norte of Lower California, and the Territory of Quintana Roo.[88] The fourth and fifth chambers take cognizance of appeals from judges of criminal jurisdiction.

Nicaragua.

The code of civil procedure of Nicaragua promulgated May 12, 1871, was so frequently amended, that it became difficult to determine its applicability. For that reason an official arrangement of the code was made and published October 27, 1884, and amended by law of March 9, 1885. According to this code the *jueces de paz* or *alcaldes* have jurisdiction of cases involving not more than 200 pesos; they can also take cognizance, like the judges of first instance, of cases of no definite amount, such as the discharge of guardians and the like, as well as cases of non-contentious jurisdiction, and cases exclusively within the cognizance of judges of first instance, when the matter requires great promptness to prevent irreparable loss.[89] The judges of first instance have original jurisdiction of cases in which the complaint

[85] Arts. 15 and 18, *ib.* [86] Art. 39, *ib.* [87] Art. 79, *ib.*
[88] Art. 80, *ib.* [89] Art. 430 c. p.

exceeds 200 pesos and of cases in which no material thing is demanded; and appellate jurisdiction from decisions of the *jueces de paz*.[90] The *Tribunal Superior* has appellate jurisduction from the courts of first instance, and original cognizance of conflicts of jurisdiction between judges.[91] It also has jurisdiction in third instance or *súplica*, as well as of the *de facto* remedy (*recurso de hecho*) when an appeal has been denied, and of complaint (*queja*) for violations of substantial requisites of procedure.[92]

Panama.

The *Código Judicial* of Panama provides for the organization of the courts and for civil, commercial and criminal procedure. It was adopted by law of August 21, 1916, and is the most modern law of procedure in Latin-America.

At the head of the judiciary is the *Corte Suprema* with five justices appointed by the president of the Republic, for a period of four years. Its jurisdiction in civil or commercial matters is limited to: (*a*) cases in which a diplomatic agent of a foreign country in Panama is a party, and international law permits; (*b*) cases of maritime or river navigation and maritime prizes; (*c*) claims arising out of contracts entered into by the old state of Panama or the former department of Panama, or by the national executive with the municipalities or individuals, provided there is no stipulation in the contract to the contrary; (*d*) petitions for the annulment of decisions rendered in cases in which the court has original jurisdiction; (*e*) petitions for the revision of other judgments. The court takes cognizance on appeal: (*a*) of cases which a *juez superior* or a *juez de circuito* has decided, in which recourse on appeal or in fact, *i. e.*, when an appeal is denied, or a consultation is proper; (*b*) of judgments of the circuit judges in non-contentious matters; (*c*) of appeals from the decrees of the manager of the National Bank or tax collectors invested with power to compel payments in "executive" proceedings in matters of larger amount. The court as a

[90] Arts. 452, 466, *ib.*

[91] Arts. 820 and 1009, *ib.*

[92] Arts. 856, 885, 936, *ib.*

Sala de Acuerdo passes on conflicts of jurisdiction between superior and circuit judges.

For judicial purposes, the Republic of Panama is divided into the following circuits: Bocas del Toro, Coclé, Colón, Chiriquí, Herrera, Los Santos, Veraguas and Panama, in each of which there is a circuit judge, except in Panama where there are four, and in Colón, Bocas del Toro and Chiriquí where there are two. Circuit judges are appointed for four years. They have original jurisdiction of cases above 150 balboas (equivalent to $150. U. S. currency) and in non-contentious jurisdiction, of petitions for annulment of judgment, and of those to which the nation is a party, when they are not within the jurisdiction of the *Corte Suprema;* and of petitions in annulment of provisions and other acts of municipal councils, and conflicts of jurisdiction between municipal judges. They have appellate jurisdiction from the district courts in cases exceeding $10.00 gold.[93]

There is a municipal judge in every district except in Panama, where there are four, and in Colón, where there are two; they have original jurisdiction of cases involving over ten and less than 150 balboas, except in Panama City, where they have jurisdiction up to 250 balboas; they take cognizance of cases where there is no claim of competition with the circuit judges, priority in starting the proceeding determining the preference of the two jurisdictions.[94]

There is in every *corregimiento* (ward) a justice of peace who has cognizance of cases not exceeding ten balboas.[95]

Paraguay.

In Paraguay the organization and functions of the courts are governed by laws of September 28, 1898, and November 10, 1898, the latter referring to the procedure before justices of the peace. There are three grades of judges:

1. Justices of the peace, who have jurisdiction of civil and commercial cases not exceeding 500 pesos, and of lease or hiring of a thing whenever the total amount claimed does

[93] Arts. 45 to 53, 55, 83, 89, 123, 127, 136 to 138, 1137 c. p.

[94] Arts. 155, 1137 c. p.

[95] Arts. 156 to 160 c. p.

not exceed 1,000 pesos and the monthly rental is not above 500 pesos, and of ejectment of tenants or rescission of leases when the rental is not above 500 pesos. Decisions of justices of the peace are subject to appeal to the judge of first instance when the complaint involves over 50 pesos.

2. There are in Paraguay two judges of first instance for commercial cases and six for civil cases. These judges have original jurisdiction of all cases not expressly assigned to the *jueces de paz*, with the understanding that the commercial judges take exclusive cognizance of commercial cases, and appellate jurisdiction as above mentioned.

3. Judgments of the judges of first instance (*Jueces de Primera Instancia*) are reviewed by the higher chamber of appeal, and in commercial cases, by the *Camara de Apelación en lo criminal y comercial.*

Peru.

In Peru the law of December 15, 1911, provides in accordance with article 125 of the Constitution, that the administration of justice is confided to: (*a*) the *Corte Suprema;* (*b*) the *Cortes Superiores;* (*c*) the judges of first instance, and (*d*) the *jueces de paz.*

The *Corte Suprema* has original jurisdiction of petitions for annulment of judgments, and takes cognizance on appeal of cases within the original jurisdiction of the *Cortes Superiores.*[96]

There are *Cortes Superiores* in the departments of Lima, Piura, Loreto, La Libertad, Ancachas, Cajamarca, Arequipa, Cuzco, Puno and Ayacucho. They have original jurisdiction of conflicts of jurisdiction between judges of the same department or between such judges and other authorities of the department. They take cognizance of appeals from decisions of the judges of first instance or of arbitrators.[97]

The judges of first instance have original jurisdiction of cases not assigned by the law to any other judicial authority, and of conflicts of jurisdiction between *jueces de paz* of their

[96] Art. 54 of law of December 15, 1911.

[97] Art. 80, *ib.*

corresponding district, and on appeal, from decisions of the latter.[98]

The *jueces de paz* have jurisdiction of cases not above 20 pounds sterling or when the case concerns a matter not assessable in money;[99] they can substitute for notaries in places where there are none.[100]

San Salvador.

In San Salvador the law of April 21, 1898, governs the courts and their functions. It divides the judicial power in civil and commercial cases among several courts, as follows: (*a*) the *Corte Suprema de Justicia;* (*b*) *Cámara de Tercera Instancia;* (*c*) five *Cámaras de Segunda Instancia;* (*d*) judges of first instance; and (*e*) *Jueces de paz.*[101]

The capital of the Republic is the seat of the *Cámara de Tercera Instancia* and of two *Cámaras de Segunda Instancia.* These three chambers together form the *Corte Suprema de Justicia,* which is the highest court.[102]

The other three chambers of second instance are located in the cities of Cojutepeque, San Miguel and Santa Ana, respectively.

The *Corte Suprema de Justicia,* among other functions, takes cognizance: (*a*) of conflicts of jurisdiction between judges of any class; (*b*) of the writ of *habeas corpus* (amparo), according to the Constitution; (*c*) of applications for the enforcement of foreign judgments.[103]

The chamber of third instance has jurisdiction of the remedy of *suplica* or annulment of decrees of the chambers of second instance and of refusals of members of such chambers to hear a given case.[104]

The chambers of second instance have jurisdiction on appeal from judgments of first instance, and of charges and challenges against those judges.[105]

The judges of first instance have cognizance of cases

[98] Art. 93, *ib.* [99] Arts. 296, 303 and 935 c. p. [100] Art. 400 c. p.
[101] Art. 1 of the law of April 21, 1898.
[102] Art. 2, *ib.* [103] Art. 30, *ib.* [104] Art. 32, *ib.*
[105] Art. 33, *ib.*

above 200 pesos ($79.56 U. S. currency) and of cases not assessable in money, and jurisdiction on appeal from decisions of the *jueces de paz.*[106] The *jueces de paz* have jurisdiction of cases not exceeding 200 pesos.

Santo Domingo.

In Santo Domingo the law now governing the administration of justice was promulgated June 21, 1895. The *alcaldes,* the lowest in rank of the judges, have jurisdiction limited to the amount of 100 pesos gold, with an appeal when the case involves not less than 25 pesos gold, but not otherwise.[107]

The judges of first instance, which are also commercial courts or *consulados,* have original jurisdiction of cases not within the cognizance of the *alcaldes,* and appellate jurisdiction from decisions of the *alcaldes,* as above mentioned.[108]

The *Suprema Corte de Justicia,* composed of a president or chief justice and four associate justices, is a court of appeal from the judges of first instance and possesses original jurisdiction of cases against diplomatic agents when international law permits. It can also, like the Congress, announce general statements on the interpretation of the law.[109]

Uruguay.

The new Constitution of Uruguay provides [110] that the judicial power shall be vested in the high court of justice, the court or courts of appeal, and the courts of first instance in the manner established by law. According to the law of May 3, 1881, the Executive was directed by the Congress to appoint a commission of five lawyers to present a bill fixing the jurisdiction and procedure of such high court, but it has not so far been created, and the administration of justice, therefore, is still governed by article 86 of the code of civil procedure of January 17, 1878, which provides for: (*a*) *Tenientes alcaldes;* (*b*) *jueces de paz;* (*c*)

[106] Arts. 473, 499 c. p.
[107] Art. 54, law of June 21, 1895.
[108] Arts. 48, 70, *ib.*
[109] Arts. 14 and 15, *ib.* and 69 c. p.
[110] Art. 115 of the new constitution of October 15, 1917.

jueces letrados departmentales; (*d*) *jueces letrados de lo civil* and *jueces letrados de comercio;* and (*e*) *tribunales de apelación.* Subsequently, by law of July 5, 1892, a *juzgado de hacienda* (fiscal judge) was created who, besides his own jurisdiction, must in certain cases substitute for *jueces letrados* in Montevideo, the capital.

The *tenientes alcaldes,* also called *jueces de distrito,* take cognizance of complaints not over 20 pesos.[111] (Uruguayan peso = $1.03 U. S. currency.)

The *jueces de paz* of cities, towns or villages where there is no *juez letrado,* have jurisdiction of civil and commercial cases and of probate not exceeding 1,000 pesos, of ejectment of tenants when the rental is not above 100 pesos and of certain minor cases. When the *jueces de paz* reside in cities, towns or villages where there is a *juez letrado,* their jurisdiction is reduced to cases involving 200 pesos or less and 50 pesos rental in case of ejectment of tenants of urban realty. In the capital of the Republic, the *jueces de paz* have no jurisdiction in commercial cases.[112]

In Monetvideo there are a *juez letrado departmental,* three *jeuces letrados de lo civil* and two *jueces letrados de commercio.* In each department of the Republic there is a *juez letrado departmental.* The *juez letrado departmental* in Montevideo has original jurisdiction of civil cases above 200 pesos up to 2,000 pesos, of cases of divorce, nullity of marriage and probate. The *jeuces letrados departmentales* of other places have jurisdiction of civil and commercial cases above the maximum amount fixed for the jurisdiction of the *jueces de paz,* cases of nullity of civil marriage, divorce and probate matters.

The *jueces letrados de lo civil* in Montevideo have jurisdiction of civil cases above 2,000 pesos, and in other places above the maximum fixed for justices of the peace.

The *jueces de comercio* have original jurisdiction of all commercial cases above 20 pesos within the limits of their districts and appellate jurisdiction from the *jueces departmentales* in the districts outside Montevideo.

The *jueces departmentales* and the *jueces letrados de lo civil*

[111] Art. 87 c. p.

[112] Arts. 88 to 90 c. p.

have jurisdiction on appeal from the *jueces de paz* of the respective departments.[113]

The *tribunales de apelación*, of which there are two, have jurisdiction on appeal from judgments of the *jueces departmentales*.[114]

Venezuela.

The judicial hierarchy in Venezuela is arranged as follows: (*a*) *jueces de parroquia;* (*b*) *juez de departmento* or *juez de distrito*, the former title being used in the Federal District; (*c*) *jueces de primera instancia;* (*d*) *Tribunal Superior;* (*e*) *Corte Suprema.*

The parochial judges have jurisdiction of cases up to 400 bolivars (about $100. U. S. currency); the district or departmental judges, from 400 to 4,000 bolivars; the first instance judges have original jurisdiction of cases above 4,000 bolivars, with separate judges in civil and in commercial cases; the *Tribunal Superior* of each state has jurisdiction of appeals from the inferior judges, and the federal *Corte Suprema* has jurisdiction, as already stated, of cases in which the federal law or federal authorities or diplomatic agents are concerned and of *casación* for error in law of judgments in cases commenced in the court of first instance.

A peculiar feature of the law of Venezuela is that in cases of greater amount, that is, above 4,000 bolivars, any of the parties to a suit is entitled to have a court of associated judges throughout the various instances in the case. If the court consists of a single judge the parties can ask, before the hearings begin, that two associated judges be appointed to sit with the regular judge.[115]

Other court officials.

The other officials concerned in a suit, besides the judges and the parties, are the representative of the *Ministerio Publico*, the secretaries, the recording clerks and minor officers, the lawyers and the *procuradores* (at-

[113] Arts. 91 to 100 c. p.

[114] Art. 101 c. p.

[115] Arts, 668, 669 c. p., 95 c. p.

torneys in fact). The *Ministerio Publico* in Latin-America is an institution created with a view to promoting the enforcement of laws concerning the general welfare and has a threefold function, namely: (*a*) as a *fiscal*, it represents and defends in court the interests of the national, state or local treasury in all cases arising out of the collection of customs and duties, and the rights of the state considered as a legal entity subject to civil law; (*b*) as a public prosecutor, it demands the application of the criminal law against persons suspected of crime; (*c*) as attorney general, it represents in court the interests, whether moral or material, of the community, it supervises the measures for the protection of minors and the appointment of guardians for incompetent persons; it must be heard in proceedings for the approval of the yearly accounts rendered by guardians; it is a party to suits for divorce or annulment of marriage and to those designed to safeguard the interests of absentees whose whereabouts are unknown or whose death is presumed. In some countries like Brazil and Cuba the *Procurador General* acts as a legal advisor to the government.

Notwithstanding the importance and public character of the functions of the *Ministerio Publico*, its representatives are not judicial members of the courts; they cannot even advise the judges. They are one of the parties to those suits in which the interests of the public or of the persons above mentioned are involved; they therefore appear in court as plaintiffs or defendants, they can answer complaints, make replication, produce any kind of evidence, present arguments and use against adverse judgments the same methods of recourse which the law grants to the parties.

The secretaries or clerks of the courts are charged substantially with the following functions: (*a*) to state in the documents produced by the parties the day and hour when the papers were filed or presented; (*b*) to make note, in similar manner, of the date on which the parties take and return documents; (*c*) to attend the sessions of the court and to draw the decrees or resolutions issued by the judge in the pending cases; (*d*) to inform the judge or court, without

delay, of any petitions made by the parties or of communications sent by other officials; (*e*) to legalize with their signatures the proceedings, rulings, orders or judgments which pass through their hands; (*f*) to keep in their custody the file of proceedings and documents in each case, being directly liable for their loss or injury; (*g*) to keep in good order all books provided for by law and regulations; (*h*) to keep the seal of the court; (*i*) to draw the memorandum of judicial acts, and declarations of witnesses or parties to a suit; (*j*) to issue certified copies of documents and papers in their custody, when so directed; (*k*) to fulfill any other obligations the law may impose upon them.

The recording clerks (*actuarios* or *escribanos de diligencias*) are charged with: (*a*) serving process on the parties; (*b*) notifying interested parties of the judicial decrees, rulings, and judgments; (*c*) supervising (or executing) attachments or provisional remedies, requests of payment, and ejectment of tenants. Where the law does not provide for a recording clerk his functions devolve, as a rule, upon the secretary.

Lawyers.

Lawyers are learned in the science of jurisprudence, and are authorized by the government to practice law, give legal advice and plead in court.

Contingency fees.

A lawyer before taking a case, must agree with his client on the amount of his compensation. He has entire liberty in fixing fees and there is not, as a rule, any prohibition against accepting contingency fees (*pacto de cuotalitis*). The Spanish traditions are not, however, favorable to such stipulations. Law 14, tit. 6, Part 3, and law 22, tit. 22, lib. 5, of the *Novissima Recopilación* condemn such an agreement and declare it void. This legal tradition may be responsible for the fact that even in countries in which the principle of liberty of transactions is not limited in the case of professional men, there is a preference among lawyers of good

standing not to enter into any agreement for contingency fees.

In case the fees are not stipulated at the beginning, the lawyer must keep them within the legal tariff, if there is any, or within the usual custom or equitable basis, and the client may object to the bill and demand a reduction by the judge, or submit the matter to arbitration.

In *Argentina* lawyers are prohibited to share in any way with the parties in the outcome of the suit, and any stipulation directly or indirectly producing that effect is null.[116]

There does not appear, however, to be any serious objection to an arrangement between client and attorney by which the attorney is to receive one certain sum if he wins, and another certain sum if he loses. It is often the case that attorneys and clients enter into a preliminary contract as to the attorney's fees, but the most reliable attorneys object to a preliminary contract. On the whole it may be said that the better class of attorneys may be relied upon not to overcharge. Fees for litigation are comparatively small, running from 2 to 15 per cent of the amount in dispute in commercial cases, depending upon the amount involved and the difficulties of the litigation.

Moreover, every contract by which a person having a right of action requires the attorney to give him a part of his fees, and every contract by which an attorney and a procurator agree to divide their fees in a given case is null and void. This does not affect an agreement between an American and an Argentine attorney, by which the former receives a part of the fee for sending his case for further action to the Argentine attorney, and *vice versa.*

In Bolivia lawyers are forbidden: (*a*) to receive any share of the thing, subject-matter of the suit; (*b*) to stipulate for a certain amount or thing in consideration of success in the suit; and (*c*) to stipulate to prosecute the case at their own expense. Aside from these prohibitions, lawyers are free to stipulate for their fees, and if they do not, the court must

[116] Law No. 3094 of August 21, 1894, and art. 931 c. p. of the province of Buenos Aires.

make the allowance, in case one of the parties is ordered to pay costs.[117]

In *Brazil*, while contingency fees are apparently strictly prohibited,[118] the matter is not really definitely settled, for lawyers, though not the better class, do occasionally take cases on such a basis, and they can collect their fees. There is a very old tariff of lawyers' fees, but it is hardly observed in any case, lawyers' services being generally a matter of contract. The following basis of contract between client and attorney appears to meet with approval: a specific sum is fixed as a fee if the case is won, and another specific sum if the case is lost, usually arranged by dropping the last of the three payments made by the client to his counsel, namely, at the time of retainer, at the beginning of the suit, and after final judgment. This differs, of course, from a contract for a percentage of the amount won in the litigation, a contract in general disfavor in Brazil.

In *Chile*,[119] *Colombia*,[120] *Cuba*,[121] *Ecuador*, *Uruguay* [122] and *Venezuela*,[123] lawyers can freely enter into agreements for their fees with clients; should there not be such stipulation, the lawyer may present his bill, and if the party objects to the amount, the court or arbitrators (*reguladores*) appointed by the court must pass upon the matter. In Venezuela the objecting party must raise the issue within ten days after the request for payment of the judicial costs.

In *Costa Rica* [124] a tariff of judicial costs permits lawyers and attorneys in fact to receive as fees 10 per centum upon the amount of the claim, when it is not above 1,000 colones; from that sum up to 20,000 colones, 5 per centum, and on any excess 2½ per centum. In cases of smaller amount, they can

[117] Arts. 287, 302 c. p. and circular of the Supreme Court of November 1, 1889; *Gaceta Judicial* No. 593, p. 15, law of December 19, 1905, art. 5.

[118] Art. 468, Consolidação das Leis Civis, by Texeira de Freitas.

[119] Arts. 404 of law of October 15, 1875, and 2158 c. c.

[120] Tribunal Superior del Dist. Jud. de Panama, December 15, 1892. *Registro Jud. de Panama*, vol. VI, p. 90.

[121] Art. 7, order 500 of 1900.

[122] Art. 146 c. p.

[123] Art. 76 c. p. and law of June 25, 1910, arts. 22 and 23.

[124] Arts. 1085 to 1087 c. p.

charge five colones when the claim is for 25 colones or less, and 10 per centum on the excess. Lawyers' fees may be charged by the winner as costs. The contingency fee is permitted.

In *Guatemala*,[125] *Honduras*,[126] *Mexico* [127] and *Panama*,[128] fees can be freely fixed. In the absence of agreement between the lawyer and the client, they are fixed according to tariffs. Article 643 of the code of Panama provides that when an association of lawyers, or the majority of reliable lawyers of a locality, have established a tariff for lawyers' fees, the court must take that tariff as a basis for the computation of lawyers' fees, being permitted to vary it not over 25 per cent.

In *Nicaragua* [129] lawyers are always obliged to confine themselves to the tariffs in the collection of their fees.

[125] Art. 120 c. p. [126] Art. 12 c. p. [127] Art. 2408 c. p.
[128] Art. 642 c. p. [129] Art. 87 c. p.

CHAPTER XLI

Legal Procedure

RULES OF GENERAL APPLICATION

Contentious and non-contentious jurisdiction.

A person may apply to the courts for two different purposes: (1) because he wishes to obtain judicial aid in the determination of a contested difference with another person or in the enforcement of an obligation or duty resting upon such person with respect to the plaintiff. In these cases a litigation is initiated between the two parties, the judge or court determining the merits of the controversy and aiding in the enforcement of the rights of the successful party. The judge or court acts in such case in the exercise of what is known as contentious jurisdiction (*jurisdicción contenciosa*), and the procedure is called *vía declarativa;* or (2) because the applicant wishes the judge or court to authenticate some act and place the seal of judicial authority upon it, as in the adoption of a person as a son, the filing of testamentary memoranda in the notarial protocols, voluntary judicial public sales, etc. The judge or court in these cases acts in the exercise of non-contentious jurisdiction (*jurisdicción voluntaria*) and the procedure is called *vía de autorización.*

A controversy, however, may arise in a non-contentious proceeding; in that event the character of the action automatically changes, and a litigation begins in order preliminarily to determine the rights of the parties.

The rules applying to these two types of jurisdiction will be discussed presently.

Questions of jurisdiction.

The parties to the action must appear before a judge of competent jurisdiction. The following general rules usu-

ally determine the competency of a judge: In real actions concerning realty the judge of competent jurisdiction is the judge of the place where the property, subject-matter of the litigation or proceeding, is situated; in real actions concerning a chattel, it is the judge of the place where it is located or of the domicil of the defendant, at the election of the plaintiff. When the action is personal and arises out of a contract, the judge of the designated place of performance has jurisdiction; if there is no contract or stipulation concerning performance, the judge of the domicil of the defendant has jurisdiction. The judge having jurisdiction of the principal obligation also takes cognizance of the corresponding dependent actions, such as that of guaranty or pledge.

In matters of personal status the domicil of the person concerned fixes the jurisdiction; in probate cases involving a last will or intestacy the judge of the last domicil of the decedent is vested with jurisdiction, unless there is a single heir, in which case the judge of the domicil of such heir prevails.[1]

In Brazil commercial actions must be brought before the judge of the domicil of the defendant.[2]

In Ecuador,[3] Guatemala,[4] Peru [5] and San Salvador,[6] the judge of the domicil of the defendant is to be preferred, but the plaintiff may choose, as a rule, between the judge of the defendant's domicil and the judge of the place where the real action is to be brought or where the obligation is to be performed.

In Mexico [7] the judge of the domicil of the defendant is always preferred, in the absence of any stipulation to the contrary.

[1] Argentina c. c. p.; of the province of Buenos Aires, arts. 1 to 12; Bolivia, arts. 18, 19, 20, law of Dec. 31, 1857; Brazil, decree No. 737 of Nov. 25, 1850, arts. 60 to 64; Chile, arts. 212 to 226 of law of Oct. 15, 1875; Colombia, 158 to 169 c. p.; Cuba, 62, 63 c. p.; Mexico, 185, 186 to 209 c. p.; Nicaragua, 23 to 35 c. p.; Uruguay, 28 to 43, 60 c. p.

[2] *Ib.*, art. 60. [3] Arts. 34 to 37 c. p. [4] Arts. 84 to 94 c. p.

[5] Arts. 40 to 50 c. p. [6] Arts. 33 to 40 c. p.

[7] Arts. 185, 186 to 209 c. p.

Waiver of jurisdiction.

The defendant may waive the privilege of being sued before the judge of proper jurisdiction provided the forum to which the parties submit is of the same or corresponding category and character as the proper judge or court. A case within the jurisdiction of a municipal judge, for example, cannot be submitted to a judge of first instance, or *vice versa;* but if a judge of first instance of a certain place is competent, the case may be submitted to the judge of first instance of another place.

The waiver of jurisdiction can be made in either of two ways: expressly (*sumisión expresa*), or tacitly (*sumisión tácita*). The waiver is tacit on the part of the plaintiff when he institutes the action before the improper judge, and on the part of the defendant when he answers the complaint or enters any dilatory pleading without reserving the privilege of raising the question of jurisdiction in proper time and form.

The question of jurisdiction can be raised in two forms: by a petition *inhibitoria*, requesting the competent judge to ask the judge without jurisdiction to stop all proceedings in the matter and to send the papers to him; or by a petition *declinatoria*, requesting the judge without jurisdiction to transfer all the proceedings to the competent judge.[8]

Challenges.

Judges, whatever their rank or hierarchy, assessors of inferior judges, secretaries, recording clerks, and other judicial officials may be challenged by legitimate parties to actions or by persons having a right to be parties. In no case can the challenge be interposed after the parties have been cited to hear the rendering of judgment in first instance or after the hearing of the case has begun before the courts of higher grade.

[8] Argentina, 428 to 441 c. p.; Chile, 104 to 117 c. p.; Colombia, 771 to 784 c. p.; Cuba, 72 c. p.; Costa Rica, 10 to 16 c. p.; Ecuador, 912 to 918 c. p.; Guatemala, 326 to 350 c. p.; Honduras, 25 to 43 c. p.; Mexico, 162 c. p.; Nicaragua, 1005 to 1015 c. p.; Peru, 56 to 69 c. p.; Uruguay, 754 to 769 c. p.; Venezuela, 105 to 116 c. p.

The challenge can be made in two ways: (*a*) for cause stated and proved; or (*b*) peremptorily, without allegation of cause.

Spain,[9] Bolivia,[10] Chile,[11] Colombia,[12] Costa Rica,[13] Haiti,[14] Honduras,[15] Nicaragua,[16] Panama,[17] Peru,[18] Uruguay [19] and Venezuela,[20] only admit challenges when made for cause stated and proved.

In Argentina [21] inferior judges can be challenged by the plaintiff without allegation of cause, but only at the time of filing the complaint; and by the defendant, only before or at the time of filing his answer. This privilege can only be used once. The justices of the Supreme Court or of the appellate courts can also be challenged peremptorily, within twenty-four hours after the *llamamiento de autos*, that is to say, after the case has been called for hearing. Apart from these cases judges, whatever their rank, can only be challenged for legal cause.

In Ecuador, judges can only be challenged for legal cause, but each of the parties can challenge peremptorily, within twenty-four hours after the appointment is notified, one assessor, one clerk of court, and in every instance, one expert, one interpreter and one recording clerk; additional officials can be challenged by the parties for cause only.[22]

In Guatemala the parties may only challenge a judge or official assessor for legal cause; but they can challenge without such requisite two non-official assessors, before they are called to assist the judge, and two recording clerks.[23]

In Mexico each party has a right to challenge peremp-

[9] Art. 188 c. p. [10] Art. 1456 c. p. [11] Art. 118 c. p.
[12] Art. 755 c. p.
A litigant who acquiesces by silence in the jurisdiction of a judge who made it known that there existed a ground for challenge, waives thereby the right to challenge him afterwards. Colombia, Corte Sup. de Just., March 27, 1913; *Gaceta Jud.*, vol. XXI, p. 318.
[13] Arts. 19, 20, c. p. [14] Arts. 22, 375 c. p. [15] Art. 62 c. p.
[16] Art. 965 c. p. and law of Aug. 15, 1859.
[17] Art. 994 c. p. [18] Art. 78 c. p. [19] Art. 795 c. p.
[20] Art. 117 c. p. [21] Arts. 396, 397 c. p.
[22] Arts. 919, 924, 925 c. p. [23] Arts. 65, 68, 69 c. p.

torily one judge of first instance, one municipal judge, and one justice of the peace, one clerk and one assessor; a justice of the *Tribunal Supremo* can only be challenged for cause.[24]

In San Salvador,[25] judicial officials without jurisdiction, as, for example, clerks of courts, can be challenged peremptorily, but officials possessed of jurisdiction can only be challenged for cause.

The legal causes for challenge are those which are likely to impair the impartiality of the challenged official, for example, (*a*) to be a relative by affinity or consanguinity within the fourth civil degree of any of the litigants; (*b*) to have like kinship within the second degree to the attorney of any of the parties to the action; (*c*) to be or to have been charged by any of the parties as the principal, accomplice or accessory in a crime, or as principal in a misdeameanor; (*d*) to have been counsel for any of the parties, to have made a report on the case as an attorney or to have been connected with it as a public prosecutor or as an expert or witness; (*e*) to be or to have been the guardian, or to have been under the guardianship of any person who is a party to the action; (*f*) to be or to have been the public or private accuser in a charged offense of the challenging party; (*g*) to have a direct or indirect interest in the action, or in another similar action; (*h*) to be an intimate friend or an avowed enemy of any of the parties.

Consolidation of actions (Acumulación de acciones).

The plaintiff may consolidate in his complaint as many causes of action as he may have against the defendant, although they proceed from different origins, provided that said actions are not incompatible with each other.

They are incompatible:

(*a*) when they are mutually exclusive or antagonistic, to such an extent that the pressing of one prevents the advance of the other or renders it invalid;

(*b*) when the judge who is to take cognizance of the principal action has no authority, by reason of the

[24] Art. 237 c. p.

[25] Arts. 1127, 1128 c. p.

matter or the amount in litigation, to take cognizance of the consolidated actions;

(*c*) when according to law the causes of action must be heard and decided in different actions.[26]

In Mexico the law [27] makes it compulsory to consolidate in a single complaint all causes of action against the same person, provided they are not contradictory. By pressing one or more the others are extinguished.

Consolidation of records of proceedings (Acumulación de autos).

Consolidation of records of proceedings may only be ordered at the request of a party to the action; it is proper in the following cases:

(*a*) when the judgment to be rendered in one of the actions, the consolidation of which is requested, would give rise to a plea of former judgment or *res judicata* in the other;

(*b*) when an action on the same cause is already pending (*litispendencia*) in another court of proper jurisdiction;

(*c*) when bankruptcy or insolvency proceedings are pending and the property of the bankrupt or insolvent person is the subject of the action instituted;

(*d*) when testamentary or intestacy proceedings are pending and the property of the estate is the subject of the action instituted, provided the action is declared to be subject to consolidation with such proceedings;

(*e*) when the unity of the action would be destroyed if the action should be prosecuted separately.[28]

[26] Spain, 153, 154 c. p.; Argentina, 89 c. p.; Bolivia, 123 c. p.; Chile, 18 c. p.; Colombia, 269 c. p.; Costa Rica, 132 c. p.; Ecuador, 101, 102 c. p.; Guatemala, 545 c. p.; Honduras, 45 c. p.; Nicaragua, 159 c. p.; Panama, 309, 310 c. p.; Peru, 247, 249 c. p.; San Salvador, 190 c. p.; Uruguay, 287 c. p.; Venezuela, 244 c. p.

[27] Art. 22 c. p.

[28] Spain, 160 to 162 c. p.; Chile, 95 c. p.; Colombia, 785, 786 c. p.; Costa Rica, 130 c. p.; Ecuador, 131 c. p.; Guatemala, 5109 c. p.; Honduras, 53 c. p.; Mexico, 873, 874 c . p.; Nicaragua, 128 c. p.; Panama, 1007 c. p.; Peru, 250 c. p.; San Salvador, 550 c. p.; Uruguay, 770, 771 c. p.; Venezuela, 229, 230 c. p.

Judicial periods of time.

Judicial acts and proceedings must take place within the periods fixed by law. In the computation of these periods three systems have been adopted, namely:

System of Spain. Judicial periods of time commence to run on the day following the service of summons, citation or notification, and the last day of said period and holidays are not computed.[29]

System of Argentina. Judicial periods commence to run from and on the day of notification. Legal holidays do not count.[30]

System of Mexico. As a rule, judicial periods of time commence to run on the day following the service of summons, citation or notification. Periods which cannot be extended when composed of several days, begin to run from the day of the notification, which is computed as complete no matter what hour the notification was served.[31]

Extension of judicial periods of time.

Periods of time, the extension of which is not expressly forbidden by law, may be extended. In order to obtain an extension it is necessary: (*a*) that it be requested before

An "executory" action against a bankrupt based merely upon real rights, must not be consolidated with the bankruptcy proceedings, when the property burdened is not among the assets of the bankrupt, even though he burdened such property and the debt is listed among his liabilities. Colombia, Corte Sup. de Just., Aug. 11, 1891; *Gaceta Jud.*, vol. VI, p. 262.

The consolidation of "executory" proceedings is proper when the action in both cases emanates from contracts of a real nature, involves the whole property of the debtor and the same things have been attached in the two suits. Cuba, Trib. Sup., Jan. 15, 1903; *Gaceta* of Jan. 27, 1903.

[29] Spain, 303 c. p.

[30] Argentina, 51 c. p.; Chile, 68, 69 c. p.; Colombia, 507 c. p.; Costa Rica, 11 c. p.; Ecuador, 346 c. p.; Guatemala, 388 c. p.; Honduras, 120, 121 c. p.; Nicaragua, 170 c. p.; Peru, 170 c. p.; San Salvador, 204 c. p.; Venezuela, 164 c. p.

Periods consisting of hours run during the night hours. Colombia, Corte Sup. de Just., Oct. 23, 1887; *Gaceta Jud.*, vol. 1, p. 353.

Judicial periods of time are suspended when for any reason whatever the court adjourns. Colombia, Corte Sup. de Just., Jan. 18, 1888; *Gaceta Jud.*, vol. II, p. 36.

[31] Mexico, 1075, 1077.

the expiration of the period; (*b*) that good cause therefor be shown to the satisfaction of the court. Periods of time cannot be extended (*improrrogables*, *perentorios*) when the law expressly declares that after the lapse of a given time, no action, answer, remedy, or claim shall be litigated.[32-33]

According to the codes of Chile [34] and Honduras [35] the periods are established by the law or by the judge; the latter can be extended, but not the former.

In Colombia,[36] Ecuador [37] and Guatemala,[38] all time periods can be extended when there is good reason therefor.

In Peru [39] and Venezuela [40] the periods of time established by law cannot, as a rule, be extended, except when the law expressly grants such extension or are suspended when there is a reason which makes it necessary.

Notices (*notificaciones*), **citations** (*citaciones*) **and summons** (*emplazamientos*).

Notice is the act of making known to a party the decrees, rulings or judgments of the judge or court.

Citation is the order of a judge or court directing a person to appear in court for a certain act or to attend a judicial proceeding.

Summons is the act of a judge or court calling upon a party to state his defense.

A notice must be given by the clerk, secretary or official authorized thereto, who reads the order at length to the person served. Proof of service must be made in the proceedings, and the notice must be signed by the clerk.

In Spain,[41] Bolivia,[42] Brazil,[43] Costa Rica,[44] Ecuador,[45]

[32-33] Spain, 306, 310 c. p.; Argentina, 41, 43, 46 c. p.; Costa Rica, 114, 116 c. p.; Mexico, 1077 c. p.

[34] Arts. 70, 71 c. p.

[35] Art. 123 c. p.

[36] Arts. 506, 507, 508 c. p.

[37] Arts. 356, 357, 359 c. p.

[38] Art. 389 c. p.

[39] Arts. 173 to 176 c. p.

[40] Art. 165 c. p.

[41] Arts. 262 to 269, 279 c. p.

[42] Arts. 46, 47 c. p.

[43] Arts. 39 to 59, *ib.*

[44] Arts. 96 to 106 c. p.

[45] Arts. 103 to 120 c. p.

Guatemala,[46] Haiti,[47] Honduras,[48] Nicaragua,[49] Peru [50] and San Salvador,[51] all notices must be given personally to the parties, whether they appear in the clerk's office or the clerk goes to their residence, except in case of default. When the residence of the person upon whom service is to be made is known, and on the first attempt he is not found, whatever the cause and the time of absence, the service is made by writ (*cédula*) containing: (*a*) a statement of the character and object of the action or matter, and the names and surnames of the litigants; (*b*) a true copy of the order or resolution which is to be served; (*c*) the name of the person upon whom notice is served, with the reasons for making it by writ; (*d*) a statement of the hour at which said person was sought and not found at his residence, and the date and signature of the process-serving clerk. This writ must be delivered to the nearest relative, member of the household or servant over fourteen years of age, who may be found within the dwelling of the person to be served, and if no one be found there, delivery must be made to the nearest neighbor found.

When the residence of the person to be served is unknown, or when his whereabouts are unknown by reason of change of residence, a statement thereof is made, and the judge must provide that service be made by posting the writ at the usual public place, and by publishing it in the official newspapers.

All notices not served in accordance with the provisions of the law are void. Nevertheless, when the person obeys the order the proceeding has the same effect as if the service had been legally made.

The system of serving notices is practically the same in all the Latin-American countries.[52]

[46] Arts. 491, 510 c. p.
[47] Arts. 9, 78 c. p.
[48] Arts. 93 to 110 c. p.
[49] Arts. 164, 183 c. p.
[50] Arts. 136 to 164 c. p.
[51] Arts. 212, 215 c. p.

[52] Spain, 262 to 269, 279 c. p.; Bolivia, 47, 48 c. p.; Brazil, 39 to 59, *ib.*; Costa Rica, 96 to 106 c. p.; Ecuador, 103 to 120 c. p.; Guatemala, 491 to 510 c. p.; Peru, 136 to 164 c. p.; San Salvador, 212 to 215 c. p.

It is not necessary to the validity of a citation to appear in court that a period of 24 hours elapse between the citation and the appearance; what the law prohibits is that the citation be made for appearance within the space

In Argentina,[53] Chile,[54] Colombia,[55] Mexico (Federal District) [56] and Uruguay,[57] notwithstanding that the parties reside in the same place as the court and their residence is known, notices are not always to be made personally by the clerk or officer in charge thereof. As a rule personal notice is only served on persons who attend at the office in which the notice is usually given; if they fail to attend, the notice is given by means of a writ posted in the proper place or by means of an order printed in an official newspaper. An exception to this rule is made in cases of special importance, *e. g.*, a summons to answer a complaint; a citation to appear in order to state whether certain asseverations made by a party to the action and referring to acts of the cited person, are or are not true (*absolver posiciones*); notice of an order giving a party a certain time to produce evidence before the judge (*auto de apertura del término de prueba*); notice of a final judgment or of one having such effect; and other judicial decrees or orders expressly stated to require service of personal notice.

The difference between the method of serving a mere notice and serving a summons or citation is that in the two latter cases the notice includes the order of the judge to appear in court or in any other place at a stated time.

Letters requisitorial (*supplicatorio*), **Letters rogatory** (*exhorto*), **Letters mandatory** (*carta-orden or oficio*).

Judges and courts are obliged to aid each other in the execution of all judicial process.

of time between sunrise and sunset, that is, within the same day. Brazil, Accordão do Trib. de Just. de S. Paulo, of 1893; *Gaceta Jur. de S. Paulo*, vol. 12, p. 142. Accordãos da Rel. de Orro Preto, Dec. 1, 1894, and Feb. 26, 1896, *O Forum*, vol, 1, p. 446.

[53] Arts. 31, 33, 36 to 40 c. p. of the Federal Capital.

When the nation or a minor is concerned in a suit, notice of the final judgment must be served upon the defender of minors or upon the Fiscal Procurator; otherwise all proceedings which take place after such omission are void. Buenos Aires, Cam. la de Apel. Civil, June 23, 1914, *Jurisp. de los Tribs. Nacs.*, June, 1914, p. 227.

[54] Arts. 41 to 61 c. p.

[55] Arts. 31, 32, law 105 of 1890.

[56] Arts. 81 to 85 c. p.

[57] Arts. 162 c. p.

When a judicial order is to be executed at a place other than that of trial of the action, or by a court or judge other than the one making the order, whether it is in the country of the judge or in a foreign country the judge must commit the execution thereof to the proper judge by means of letters requisitorial (*suplicatorio*), letters rogatory (*exhorto*), or letters mandatory (*carta-orden or oficio*). Letters requisitorial are issued when a judge applies to a court or judge of higher rank; letters rogatory when they are addressed to one of equal rank; and letters mandatory when directed to a subordinate judge or courts. The judge or court ordering the execution of judicial process cannot address for this purpose judges or courts of lower rank who are not his subordinates, but must deal directly with their superiors who exercise a jurisdiction equal to his own, and in case the order is to be executed in a foreign country the judge sends his request through the Department of Justice to that of Foreign Relations for proper diplomatic action.

The judge or court to whom letters requisitorial, rogatory or mandatory are addressed in proper form, if his own jurisdiction is not affected thereby, orders the proper steps for the execution of the request made therein, within the period fixed in the letters themselves, or as soon as possible. After the commission is fulfilled the letters are returned to the requesting judge by the same channels through which they were received.

When service of summons or any other judicial proceeding is to be made, effected or performed in a foreign country, the letters rogatory are transmitted through diplomatic channels, or in the manner and method prescribed by treaties, and in the absence of treaties, as prescribed by general provisions of law or administrative practice. In any case, principles of reciprocity are observed.[58]

[58] Spain, 284 to 300 c. p.; Argentina, 78 c. p.; law No. 44 of Aug. 12, 1863, concerning the method of authenticating public documents must be consulted in this respect; Bolivia, 130 c. p.; Chile, 74 to 80 c. p.; Colombia, 196 c. p. (art. 206 c. p. expressly authorizes judges or courts to use the telegraph for requesting the execution of orders or decrees issued by them); art. 40 of law 105 of 1890; Costa Rica, 103, 121 to 129 c. p.; Ecuador, 109 c. p.; Guate-

Default (*rebeldía*).

By default is meant the non-appearance of a plaintiff or defendant in court or the non-user of a right, power or privilege in a suit within the period fixed therefor by the judge or by the law. As to when and how a party may be considered in default, the laws differ according to the following systems:

First system. In Spain,[59] Argentina,[60] Costa Rica [61] and Panama,[62] after the expiration of time periods incapable of extension, rights which could have been exercised within the time limit are forfeited without entry of default (*acusar rebeldía*) being necessary, except when the period was granted for appearance in court, in which case, as well as when the period can be extended, entry of default is necessary.

Second system. In Bolivia,[63] judgment by default occurs: (*a*) when the defendant, after being served with a summons, fails to appear in court within the period allowed therefor; (*b*) when, after notice of the complaint was served upon him, he failed to take the file of the judicial record with him in order to answer; (*c*) when, after having taken the file, he fails to answer or enter any plea. In the first and third cases the defendant is declared in default on petition of the plaintiff. In the

mala, 503, 504 c. p.; Haiti, 79 c. p.; Honduras, 107 c. p.; Mexico, 76 to 80 c. p.; Nicaragua, 26, 27, 1078 c. p.; Panama, 525 c. p. (Panama also provides for the use of the telegraph for the execution of judicial orders outside the territory where the judge or court issuing the orders resides); Peru, 157, 158 c. p.; San Salvador, 1220 c. p.; Uruguay, 72 c. p.; Venezuela, 440, 443, 444 c. p.

Letters rogatory (*exhortos*) addressed by a national court to a provincial court, in which the former asks to have the original proceedings of a suit sent up *ad effectum videndi*, that is to say, for the single purpose of taking note thereof for information, as authorized by art. 13 of the national law No. 48, must be complied with by the requested court, notwithstanding that the provincial law does not give him authority thereto. Buenos Aires, Corte Sup. de Just. de la Nac., July 4, 1914, *Jurisp. de los Tribs. Nacs.*, July, 1914, pp. 3 and 6.

[59] Art. 312 c. p.

[60] Art. 45 c. p. of the Fed. Cap. to which reference will be made hereinafter.

[61] Art. 118 c. p.

[62] Arts. 348, 536 c. p.

[63] Arts. 411 to 417 c. p.

second case an additional period is granted and if not used, the defendant is declared in default at the request of the plaintiff. Should the defendant subsequently enter an appearance before final judgment is rendered, he must pay costs and may continue the proceedings in the status and under the conditions as of the time of his appearance.

Third system. In Chile,[64] when a period has expired without a party having exercised the right for which the period was granted, the right is deemed to have been exercised, at the request of the other party or *ex-officio* when the law permits, and the court must then provide what is proper for the continuation of the suit.

Fourth system. In Costa Rica,[65] Ecuador [66] and Nicaragua,[67] when the defendant does not enter an appearance, after service of summons upon him, he is declared in default, on petition of the plaintiff, and he will not be given consideration in the further proceedings, unless he subsequently appears and pays costs, in which event he can go on with the proceedings from that point.

Fifth system. In Guatemala,[68] a person who disobeys a judicial order must be declared in default (*rebelde*). If the disobedience is reiterated, he is deemed contumacious (*contumaz*). Only at the request of the opposing party can one of the litigants be declared in default or contumacious. Default takes place: (*a*) when the person on whom a citation was served fails to appear within the period prescribed; (*b*) when a summons or a copy of a paper is served upon a party and he fails to take it or returns it without any statement. Contumacy takes place in the two cases above mentioned after a default has been declared. The contumacy, when no good reason for disobedience is shown, produces the following effects: (*a*) a waiver of a right which should have been advanced or availed of during the prescribed

[64] Art. 81 c. p.
[65] Arts. 119, 120 c. p.
[66] Art. 119 c. p.
[67] Arts. 506, 507, 1086, 1087 c. p.
[68] Arts. 416 to 423 c. p.

period is presumed; (*b*) the thing, subject-matter of the suit, or its equivalent, must be deposited through the court, when a party so requests; (*c*) the burden of proof lies on the person in contumacy, in case he appears after a first instance judgment, which is not *res judicata* (*que no ha causado ejecutoria*) has been rendered against him; (*d*) the plaintiff may acquire by prescription the thing which was given to him by virtue of the declaration of contumacy.

Sixth system. In Haiti [69] and Santo Domingo [70] the default is declared at the request of the plaintiff, when the defendant fails to appear in court at the time designated. The effect of default is that the redress asked by the plaintiff is granted at once, if the court considers it proper; the judges, however, may delay such decision until the next session of court (*audiencia*).

Seventh system. In Honduras [71] a party is in default by the mere expiration of the period designated by the law or by the court, without request therefor by his opponent. The right theretofore available becomes forfeited.

Eighth system. In Mexico [72] the request of a party is necessary to declare a default in any case, and the loss of the right available within the period fixed is a necessary consequence.

Ninth system. In Peru [73] the declaration of default must be asked for and the proceedings follow their course without hearing the person in default; the latter may appear at any stage of the case to continue it but he must pay a fine of two soles (about 80 cents U. S.), and two soles in addition for every day of delay in returning copies of papers which require return. In the meantime, judicial periods run and he can advance no claims or applications.

Tenth system. In San Salvador [74] a default is de-

[69] Arts. 152, 153 c. p.
[70] Arts. 149, 150 c. p.
[71] Art. 129 c. p.
[72] Art. 113 c. p.
[73] Arts. 192 to 201 c. p.
[74] Arts. 533 to 536 c. p.

cleared when a party to the suit demands it. Its effects are as follows: The complaint is considered as answered by the defendant, denying all facts and conclusions; the person in default is given notice of such declaration; the proceedings take their course without service of further notices on the person in default; and he may appear at any stage of the suit to continue it.

Eleventh system. In Uruguay [75] a litigant can be declared in default when he fails to appear within the period fixed, if the other party demands it. The effects of such declaration are: (*a*) that subsequent notices are served on him by a mere entry in the records by the recording clerk; (*b*) that the plaintiff cannot change the object of his complaint, if the defendant is in default, nor the defendant his counterclaim, if the plaintiff is in default; (*c*) that the judge in proper time may render his decision on the merits; if the plaintiff is in default, the complaint is dismissed; (*d*) that the one in default is personally served with notice of the judgment; (*e*) that property of the defendant sufficient to cover the amount claimed is attached; (*f*) that the one in default may appear at any time during the proceedings and continue them, from the stage then reached; (*g*) that against a judgment rendered against a person twice declared in default there is no remedy.

Twelfth system. In Venezuela [76] the mere fact that the defendant is not present at the time prescribed for answering a complaint deprives him of the privilege of making any dilatory plea or any answer to the merits, alleging a set-off, demanding that the guarantor of his title be cited to defend the case, or requesting the grant of an extraordinary period for the production of certain kinds of evidence.

Legal working days and hours. (*días y horas hábiles*).

All judicial proceedings must take place on legal working days and legal working hours, under penalty of nullity.

[75] Arts. 844, 862 c. p.

[76] Arts. 251, 252 c. p.

Legal working days include all the days of the year excepting Sundays and legal holidays; and legal working hours are those between sunrise and sunset. Courts and judges may authorize the performance of judicial acts on non-working days or at non-working hours (*habilitar días y horas*) should there be urgent reason therefor. These provisions constitute practically the general rule in all Spanish-America.[77]

Kinds and forms of judicial decisions.

The most general classification of judicial decisions divides them into four kinds, as follows:

(*a*) *Providencias* or *decretos* (judicial orders or rules) relate to matters of mere practice.

(*b*) *Autos* (rulings) decide incidental issues or matters, such as the disputed personal legal capacity or disability of any of the persons involved in the suit, or the competency of the court, the allowance or disallowance of a challenge, the striking out of part of a complaint, the allowance or disallowance of any plea or defense, the refusal to admit evidence, or any ruling of that sort which, without deciding the issues in the case, may be of substantial effect in the outcome of the action.

(*c*) *Sentencias* (judgments) decide questions at issue in an action, or incidental issues which serve to put an end to the main issue, making the continuation thereof impossible; or may allow or refuse a litigant to be heard after he was declared in default.

(*d*) *Sentencias firmes* (final judgments) by their nature, or because the parties have agreed to them, are not subject to any ordinary or extraordinary appeal.

The public and formal instrument in which a final judgment is entered is called *ejecutoria*.

[77] Spain, 256 to 259 c. p.; Argentina, 6 and 7 c. p.; Bolivia, 47 c. p.; Chile, 62, 63 c. p.; Costa Rica, 76 c. p.; Guatemala, 474 c. p.; Honduras, 91, 92 c. p.; Mexico, 51 to 53 c. p., and 1063 to 1065 cod. of com.; Nicaragua, 171, 172 c. p.; Peru, 165, 168 c. p.; San Salvador, 1246 c. p.; Uruguay, 83 c. p.; Venezuela, 160, 161 c. p.

The formula for a *providencia* or *decreto* consists only in the order of the judge or court, the date thereof, and the name of the judge or court, no statement of the legal grounds on which the order was based being necessary.

The formula for *autos* requires the statement of facts from which they arose (*resultandos*), and the legal basis of the decision (*considerandos*),[78] both accurately drawn and confined to the particular question decided, and the name of the judge or court and the place and date of the decision.

A *sentencia* must be carefully drafted in accordance with the following rules:

(*a*) judgments must be clear, precise, and follow the pleadings and other allegations duly advanced in the action and contain the declarations required, deciding for or against the defendant all questions in litigation. If there are several issues, the decisions pertaining to each must be rendered separately. If there is an adjudication of profits, interest, losses or damages, the net amount thereof must be determined or the bases fixed according to which they may be assessed. Only in case it is impossible to do either must the decision reserve the right to fix the amount thereof and its enforcement in the execution of judgment. Judges and courts cannot, under any pretext, postpone, delay, or refuse to decide questions raised in the action;

(*b*) the judgment must state the place, date, and name of the judge or court, the names, residences, professions and status of the litigants, the names of their attorneys and the object of the action;

(*c*) in separate and numbered paragraphs, beginning with the word *resultando* there must be clearly and concisely stated the contentions of the parties and the facts, properly alleged, on which the contentious are based and which are deemed important and operative. The last *resultando* must state whether the provisions of law have been observed in the course of the proceedings, or the defects or omissions disclosed;

[78] See *infra*.

(*d*) in separate paragraphs, also, and beginning with the word *considerando*, the legal arguments advanced by the parties must be stated, with the reasons and legal principles adduced by the court to support its decision, with citation of authority. If, during the course of the action, any defects or omissions have been disclosed which require correction, they must be stated in the last *considerando*, mentioning, in proper case, the correct doctrine to be followed;

(*e*) finally, judgment must be pronounced in accordance with the general rules heretofore stated, deciding in separate paragraphs the various issues raised, and correcting any errors which may have been committed in the proceedings.[79]

Form of authenticating a judicial decision.

An ancient tradition has prevailed up to the present time as to the method of authenticating judicial decisions, namely, with respect to the different parts of the signature. According to a general and ancient usage, the signature of a person

[79] Spain, 358 to 360, 371 c. p.; Argentina, 63, 216, 217 c. p.; Bolivia, 366 to 369, 377, 379, 385, 386 c. p.; Brazil, 232, *ib.;* Chile, 165, 167, 192, 193, 194, 196, 197 c. p.; Colombia, 283 to 287, 834 to 843 c. p., and art. 28 of law No. 169 of 1896; Costa Rica, 82 to 88, 93 c. p.; Ecuador, 311 to 314, 316 to 319, 327 c. p.; Guatemala, 487 to 489, 872 to 875, 877 c. p.; Haiti, 148 c. p.; Honduras, 183 to 188, 190, 191, 193 c. p.; Mexico, 66, 599 to 608, 612 c. p. and 1321 to 1329 of the code of com.; Nicaragua, 371 to 375, 385, 386, 393 c. p.; Panama, 546, 551, 552 c. p.; Peru, 1073 to 1076 c. p.; San Salvador, 415 to 420, 425, 433 c. p.; Santo Domingo, 128, 129, 141, 142 c. p.; Uruguay, 459 to 462, 466, 467, 478, 479 c. p.; Venezuela, 12, 28, 174, 177, 185 c. p.

A judgment which releases the defendant settles by that mere fact all questions pending in a suit. Spain, Trib. Sup., Jan. 19, 1912; *Gacetas* of 15 and 16 of April, 1913, p. 60.

A judgment which releases the defendant on account of defenses not asserted in proper time infringes the fundamental rules of the necessary connection between the complaint and the answer. Spain, Trib. Sup., June 28, 1912; *Gacetas* of June 26 and 27, 1913, p. 565.

Only allegations set forth respectively in the complaint and the answer thereto, can be the subject of an adjudication in a final decision. Argentina, Camara Fed. de Apel., Paraná, Jan. 12, 1914, *Jurisp. de los Tribs. Nacs.*, June, 1914, p. 86.

A judgment cannot be typewritten; it must be handwritten. Brazil, Accordão de Trib. de S. Paulo, Jnue 3, 1909, *Rev. de Direito*, vol. 14, p. 346.

is composed of three parts, namely, the first or Christian name (*nombre*) which, as a rule, is given to a person when he is baptized, the family name or surname (*apellido*) which may consist of the father's family name alone, or of the father's family name followed by the mother's family name; and finally, the *rúbrica* or flourishing line, individual to every person and used instead of a seal or any other additional sign. *Firma entera* signifies the full signature, comprising first name, family name and *rubrica*. *Media firma* consists of the family name and the *rúbrica*.

The law provides that all judicial proceedings must be authenticated by the public official charged with the duty of certifying the act. Judicial decisions must be rendered before the secretary or clerk who must authenticate them: the judge must place his full signature (*firma entera*) on the original order issued in each case or matter, as well as upon rulings and judgments, and his *media firma* on other orders relating to mere practice and on declarations and formal acts in which they may take part. The judgments and decisions of an *audiencia* (superior court) must be signed with the *firma entera* of the justices, and the presiding judge of the chamber must affix his *rúbrica* to all orders. The justice who is to prepare a case for decision and write the opinion (*magistrado potente*), must affix his *media firma* to all proceedings held before him.

The secretaries and recording clerks must authenticate with their *firma entera* any judicial decision and other act in which a judicial authority takes a personal part, and the certificates or copies of papers which they may issue. Notices and similar process must be authenticated with their *media firma*.[80]

Such are the provisions of the code of Spain,[81] the other codes, accepting the distinction between *firma entera*, *media firma* and *rúbrica* combining differently the use of these

[80] A judicial decree which is not authorized by the corresponding secretary is a ruling without authenticity, which cannot serve as a basis for starting "executory," proceedings. Colombia, Corte Suprema de Just., April 17, 1889; *Gaceta Jud.*, vol. 16, p. 135.

[81] Arts. 249, 251, 252 c. p.

methods of authenticating judicial acts, but agreeing substantially with the code of Spain.[82]

Recourse against judicial decisions.

The following forms of recourse are provided, as a rule, against judicial decisions:

(*a*) against order of mere practice (*providencias*) or rulings (*autos*) which are not appealable, the remedy given is that of *reposición* or *revocación*, or *revocación por contrario imperio*, according to the different names given in the various codes. This relief consists in a rehearing before the judge who issued the order objected to. The judge himself may then decide and, as a rule, there is no recourse against his decision;

(*b*) against final judgments (*sentencias*) which are not clear enough for certainty as to their meaning at the time of execution or which have not covered all the issues in litigation, the law grants the parties the right to apply for *aclaración* or *ampliación*, *i. e.*, elucidation or amplification of the judgment. In this case, as in the previous one, the judge or court which rendered the decision must undertake such elucidation or amplification of the judgment;

(*c*) against judgments in all matters of and rulings on dilatory pleas and incidental issues, an appeal to a superior court is proper. The appeal may be allowed for review only (*en el efecto devolutivo*) or for review and a stay of proceedings (*en ambos efectos*). In the first case the execution of the judgment is not suspended, as it is in the second, pending the final decision of the superior court;

(*d*) against rulings or interlocutory decrees of a court of appeal, there is the remedy of *súplica* or review of the matter by the same court; and

(*e*) lastly, against final judgments and rulings ren-

[82] Bolivia, 378 c. p.; Ecuador, 1025 c. p.; Guatemala, 487 c. p.; Mexico, 67 c. p.; Nicaragua, 387 c. p.; Panama, 172 c. p.; Peru, 1075 c. p.; San Salvador, 427 c. p.

dered by courts of appeal there is no remedy but an appeal for annulment of judgment (*casación*). The remedy of *casación* must be based upon one of the following causes:

1st. Violation of law or legal doctrine in the adjudging part of the decision;

2d. Breach of some of the essentials in matters of form;

3d. The rendition of an award by arbitrators outside the scope of or after the period fixed in the *compromis.*[83]

[83] Spain, 362, 375, 381, 382, 383, 401, 402, 1687, 1789 c. p.; Argentina, 47, 48, 223 to 225 c. p.; Bolivia, 375 c. p.; art. 6 of decree of Jan. 7, 1850, 1265, 1268, 1410 c. p.; 3 and 4 of law of Dec. 24, 1851; Brazil, 639, 641, 646, 652, 665, 667, 668, 680, 682, *ib.;* Chile, 209, 937 c. p.; Colombia, art. 4, law No. 4 of 1907, 898 to 913 c. p.; Costa Rica, 91, 92, 897, 898, 905, 911, 917, 959, 992, 993, 1005 c. p.; Ecuador, 322, 323, 330, 331, 373, 380, 442 c. p.; Guatemala, 880, 900, 1818, 1867 c. p.; Haiti, 160 to 163 c. p.; Honduras, 195, 197, 200, 217, 900, 911 c. p.; Mexico, 629, 642, 648, 649, 689, 698, 699 c. p.; and 1331, 1334, 1336, 1338, 1344, 1345 c. com.; Nicaragua, 380, 381, 494, 803, 806, 855 c. p.; Panama, 1035 to 1086 c. p.; Peru, 1078, 1088, 1090 c. p.; San Salvador, 423, 424, 952, 955, 1000 c. p.; Santo Domingo, 443 c. p.; Uruguay, 486, 651, 654, 665 c. p.; Venezuela, 175, 186, 192, 198, 410, 411 c. p.

The remedy of *casación* is given against the adjudging part of a judgment, not against or on account of the legal basis (*considerandos*) set forth in it. Spain, Trib. Sup., June 11, 1912; *Gaceta* of June 18, 1913, p. 485.

The application or petition by means of which a remedy of *casación* is entered must state the legal provisions on which the remedy is founded and the way (*concepto*) in which those legal provisions were infringed by the judgment objected to. Spain, Trib. Sup., Jan. 19, 1912; *Gaceta* of April 15, 1913, p. 59.

An appeal is proper only when it is made from a final decision, that is, a decision which adjudges the main issue in the case, a decision which has the force and practical effect of a final one, when, deciding an incidental issue, it decides impliedly the principal question. Brazil, Cam. da Corte de Apel., Nov. 16, 1906, *Revista de Direito,* vol. 12, p. 137.

During the proceedings in *casación,* evidence different from that adduced below cannot be taken into consideration. Colombia, Corte Sup. de Just., Nov. 29, 1892; *Gaceta Jud.,* vol. 8, p. 99.

The remedy of *denegada apelación* (appeal insisted upon in spite of the refusal of the judge to enter the appeal) is not proper when the judge of first instance declares that the recourse is not to be declared entered; it is only proper when, after having entered it, he declares that it is not proper. Mexico, 2a Sala Trib. Sup. del Dist. Fed., Jan. 18, 1913, *Diario de Jurisp.,* vol. 29, p. 260.

The remedy of *casación* must be declared illegal when entered after the

In Argentina,[84] Brazil,[85] Colombia,[86] Nicaragua,[87] Peru [88] and Uruguay,[89] instead of the remedy of *casación* there is the remedy of "nullity," with great variety of detail and comprehensiveness.

In Brazil [90] the *revista* or revision is a remedy to nullify proceedings or judgments; it is less comprehensive than the remedy of nullity, which covers even nullities arising from defects in contracts and obligations.

In Chile a remedy of *revisión* is given in cases where some supervening facts show that a judgment was groundless or was given in contradiction to another judgment which had the force of *res judicata*.[91]

In Ecuador [92] there is a third instance and a remedy of complaint (*queja*) for denial or delay of justice somewhat similar to that of *casación*.

Guatemala [93] admits a third instance, to come before the same chamber of the court which decided in second instance.

In Haiti [94] and Santo Domingo [95] the *revisión civil* (*requêt civil*) presents a certain similarity to *casación*. In Haiti [96] when a decree in a matter of mere practice is objected to, the objection can be raised by way of appeal at the same time as the appeal from the final judgment.

In Venezuela [97] there can be a third instance against a

expiration of eight days after a notice of the decision in the previous instance was served upon the petitioning party. Mexico, Trib. Sup. del Dist. Fed. 1a. Sala, Feb. 13, 1912, *Diar. de Jurisp.*, vol. 25, p. 435.

[84] Arts. 237, 281 to 284 c. p.

In dealing with extraordinary remedies established by art. 14 of law 48 of Aug. 25, 1863, governing the jurisdiction of the Corte Suprema de la Nación the court cannot take into consideration other provisions of the Constitution, international treaties or federal laws than those invoked below. Buenos Aires, Corte Sup. de la Nac., June 4, 1914, *Jurisp. de los Tribs. Nacs.*, June, 1914, p. 9.

[85] Arts. 672, 680, *ib.*

[86] Arts. 123 to 140, law No. 105 of 1890.

[87] Arts. 946 to 951 c. p.

[88] Art. 1085 c. p.

[89] Arts. 670, 672, 679 c. p.

[90] Arts. 665, 667, *ib.*

[91] Art. 980 c. p.

[92] Arts. 393, 430 c. p.

[93] Art. 1860 c. p.

[94] Art. 416 c. p.

[95] Art. 480 c. p.

[96] Art. 451 c. p.

[97] Art. 406 c. p.

decision rendered in a first appeal, but only in so far as the second decision may differ from that rendered in the first instance.

Taxation of costs.

Judicial costs, as a rule, are divided into two classes, namely: *procesales* and *personales*. In Uruguay, the first are called *costas*, and the second ones *costos*. The *costas procesales* cover judicial fees for service rendered by judges or employees of the court, where the administration of justice is not free, stamps or stamped paper, postage, and compensation to witnesses; *costas personales* cover compensation to lawyers and experts engaged by the party.

If the judgment does not charge costs to either party it is understood that each must pay his own expenses. The cases in which a party is adjudged to pay costs, as well as the extent of such obligation, vary greatly in the Latin-American countries.

The most general rules are the following:

In Argentina,[98] Chile,[99] Honduras [100] and Peru,[101] the losing party must be adjudged to pay all costs unless the court finds some reason to release him from the burden.

In Bolivia,[102] Costa Rica,[103] Nicaragua [104] and San Salvador,[105] a plaintiff who does not show good cause for his complaint, a contumacious litigant or one who shows bad faith, must be adjudged to pay costs, which cover the *costas procesales* only, unless it is expressly decided that he should pay damages. In that case all costs are covered.

[98] Art. 221 c. p.

A first instance decision which does not grant all that the plaintiff demanded, must be confirmed and the defendant released from costs, because the plaintiff did not obtain his whole claim, and he appealed only on the ground that no costs were adjudged to him in the decision. Buenos Aires, Cam. 2a de Apel. Civ., June 23, 1914, *Jurisp. de los Tribs. Nacs.*, June, 1914, p. 301.

[99] Art. 151 c. p.

[100] Arts. 192 c. p., 242 to 244 c. p.

[101] Art. 1077 c. p.

[102] Art. 392 c. p., Corte Suprema decision published in the *Gaceta Jud.*, No. 259, p. 1558.

[103] Art. 1072 c. p.

[104] Arts. 397, 1082 c. p.

[105] Arts. 437, 1225 c. p.

In Cuba,[106] Colombia,[107] Ecuador,[108] Guatemala,[109] Mexico [110] and Venezuela,[111] a litigant who displays manifest bad faith in the proceedings must be adjudged to pay all costs. In Cuba and Colombia the party who in such case has to pay costs is not obliged to pay any compensation to his attorney unless it is proved that the latter did not help the client in his bad faith proceedings. In Mexico the party adjudged to pay costs need not pay the fees of his opponent's attorney if such attorney is not a lawyer.

In Venezuela the party who must pay the fees of his opponent's attorney is not obliged to pay more than half the amount in litigation.[112]

In Haiti [113] and Santo Domingo [114] the party who loses must always pay all costs.

Loss of rights in judicial proceedings (*Caducidad de la instancia*).

Proceedings are considered abandoned and the effects

[106] Arts. 1, 2 of order No. 3 of 1900.

As the assistance of lawyers and solicitors is not necessary in proceedings of non-contentious jurisdiction, no computation of their fees is proper in the judicial decision thereon. Spain, Trib. Sup., May 3, 1912; *Gaceta* of June 5, 1913, p. 379.

[107] Art. 864 c. p. 43, law No. 40, 1907, and 103 to 105 of law No. 105 of 1890.

If the decision rendered in second instance adjudges costs, and the decision in first instance did not, it is understood that the costs referred to by the decision in second instance are those originating in the second instance only. Colombia, Corte Sup. de Just., July 29, 1891; *Gaceta Jud.*, vol. 6, p. 245.

The remedy of *casación* is not proper with respect to judicial costs, because it relates only to the subject-matter of the contention, and not to matters of an accessory character, as costs are. Colombia, Corte Sup. de Just., Casación, March 27, 1897; *Gaceta Jud.*, vol. 12, p. 323.

[108] Art. 325 c. p. [109] Arts. 526, 534, 535, 536.

[110] Arts. 143 c. p. and 1081 to 1084.

Costs must be adjudged against the party who litigated with an evident want of justice, in the opinion of the judge. Mexico, Juzgado 4°. de lo Civil del Dist. Fed., Nov. 13, 1908, *Diario de Jurisp.*, vol. 18, p. 123.

Lawyer's fees for voyages cannot be taken into account by the judge in taxing costs, when said voyages could have been avoided by issuing rogatory letters to the judge of the place where a judicial act has taken place. Mexico, Juzgado 1o. de lº Civil del Dist. Fed., Aug. 24, 1911, *Diar. de Jur.*, vol. 25, p. 597.

[111] Art. 183 c. p. [112] Art. 184 c. p. [113] Art. 137 c. p.

[114] Art. 130 c. p.

thereof extinguished, even in the case of minors or incompetent persons if, after having been instituted they are not prosecuted.

The period for proceedings thus to be deemed abandoned differs widely. In Spain [115] it is four years and in Honduras [116] three years if the proceedings are in first instance; two years in second instance, and one year if in *câsacion*, in both countries.

In Bolivia,[117] Nicaragua [118] and San Salvador,[119] when the plaintiff fails to prosecute the suit after answer to his complaint, the defendant may request him to continue the proceedings under penalty of a declaration of abandonment (*desercîôn*). The judge must acquiesce in such request and give the plaintiff a period of three days (four days in Bolivia) after the expiration of which without any petition from the plaintiff, the proceedings are declared abandoned.

In Chile [120] the proceedings (*instancia*) are considered abandoned when both parties have ceased to prosecute the same for three years. Only the defendant can plead such abandonment, but he can waive it by not pleading it after the plaintiff makes a move in the case. Abandonment cannot be pleaded in proceedings for the liquidation of the estate of an insolvent, in bankruptcies, partition of inheritances or of partnership or corporation assets.

In Colombia [121] an action is deemed abandoned when the plaintiff ceases to prosecute the case for one year. This provision does not apply to the partition of property between co-owners, nor to acts of non-contentious jurisdiction or "executive" actions.

In Costa Rica [122] the *instancia* can be declared abandoned when the plaintiff fails to prosecute it for six months.

[115] Art. 410 c. p.

To make a declaration that proceedings in an action have lapsed and been abandoned is not a power of the courts but a duty. Spain, Trib. Sup., Dec. 14, 1912; *Gaceta* of Oct. 20, 1913, p. 299.

[116] Art. 147 c. p.

[117] Arts. 502, 503 c. p.

[118] Arts. 510, 511 c. p.

[119] Arts. 539, 540 c. p.

[120] Arts. 159 to 163 c. p.

[121] Art. 54 of law No. 105 of 1890, 29 of law No. 100 of 1892.

[122] Art. 417 c. p.

In Ecuador [123] the first instance is deemed abandoned by the lapse of three years without prosecution, provided the last proceeding required that a move should be made.

In Guatemala [124] the first instance is abandoned by the lapse of six months without prosecution; the second and third instance by the lapse of two months.

In Haiti [125] and Santo Domingo [126] a proceeding is abandoned by the lapse of two years in Haiti and three years in Santo Domingo; this period is extended to six months more, when a motion is made to resume the instance or to appoint a new attorney.

In Mexico [127] abandonment of the proceedings has no legal effect so long as the action itself is not barred by limitation; only when a party has appealed from a judgment or ruling, or has entered a petition of *casación*, is the recourse declared abandoned when he fails to appear before the superior court to continue the proceedings.

In Peru [128] the period for abandonment of proceedings is two years for the first instance, one year for the second, and five months for the recourse of nullity. These periods do not apply to minors who are not properly represented in the suit.

The period is three years in Uruguay [129] and four years in Venezuela,[130] but in the latter country the abandonment of the proceedings in the first instance cannot take place without the defendant's consent.

The legal effect of the abandonment of the proceedings is as follows: the plaintiff does not forfeit his action if the abandonment took place in the first instance, and he can renew it; but the abandoned proceedings are without effect on the period for the limitation of the action, which was interrupted by them. If the abandonment occurs during the second or third instance the effect is to make the previous decision enforceable.[131] Only in Guatemala [132] can the proceedings not be renewed.

[123] Arts. 454, 455 c. p. [124] Art. 454 c. p. [125] Art. 394 c. p.
[126] Art. 397 c. p. [127] Arts. 686, 723 c. p. [128] Arts. 269, 276 c. p.
[129] Art. 1316 c. p. [130] Art. 214 c. p.
[131] Spain, 414, 418 c. p.; Bolivia, 504 c. p.; Chile, 163 c. p.; Colombia, 54 *ib.*;

[132] Art. 454 c. p.

Legal aid to the poor.

In Spanish-American countries there is a provision of the law in favor of persons who, lacking the pecuniary resources to prosecute their claims, need to appear in court whether as plaintiffs or defendants. In order to enjoy the benefit of such provision it is necessary to have a judicial declaration that the applicant is poor, by proving, in some countries, that his means of subsistence are not greater than a certain standard (double the wages of a worker), in others, that his income does not exceed a certain amount per year, and in still others, the matter is left to the discretion of the judge who must take all the circumstances into consideration.

The effects of such declaration are also more or less liberal, for, while in some countries a poor litigant is entitled to have a lawyer appointed to assist him and is relieved from paying fees or from the obligation of using stamped paper, and of making judicial deposits when the law so requires, in other countries the benefit is reduced to the use of a less expensive stamped paper for petitions and proceedings and to his release from any obligation of making deposits as security provided by law or of paying the total amount of costs.[133]

Costa Rica, 419 c. p.; Ecuador, 455 c. p.; Haiti, 401 c. p.; Honduras, 153 c. p.; Nicaragua, 427 c. p.; Peru, 277 c. p.; San Salvador, 469 c. p.; Santo Domingo, 401 c. p.; Uruguay, 1330 c. p.; Venezuela, 214, 215 c. p.

[133] Spain, 14, 15 c. p.; Argentina, 593, 601 c. p.; Bolivia, 664 to 674 c. p.; Chile, 142, 143 c. p.; Colombia, 297 of law No. 105 of 1890; Costa Rica, 162 to 168 c. p.; Ecuador, 950 to 955 c. p.; Guatemala, 307 to 323 c. p.; Honduras, 13 to 24 c. p.; Mexico, 290 to 302 c. p.; Nicaragua, 769 to 775 c. p.; Panama, 1911 to 1919 c. p.; Peru, 282, 295 c. p.; San Salvador, 896 to 902 c. p.; Uruguay, 1283 to 1290 c. p.; Venezuela, 38 to 50 c. p.

Foreigners who appear in the Spanish courts asking to be helped as poor persons in order to carry on a judicial action, are entitled to the benefits of the law and must be granted such relief. Spain, Trib. Sup., Feb. 1, 1912; *Gaceta* of April 25, 1913, p. 115.

A declaration that a person is entitled to the benefit of legal aid to the poor is proper when he has applied therefor to the judge of proper jurisdiction in the intended litigation, has precisely stated the object of said litigation, the attorney general has been heard in the application, and the lack of resources of the petitioner has been proved. Mexico, Juzgado 6° de lo Civil del Dist. Fed., July 28, 1908, *Diario de Jurisp.*, vol. 18, p. 606.

CHAPTER XLII

Legal Procedure

CONTENTIOUS AND NON-CONTENTIOUS JURISDICTION

As the nature of this book precludes our entering into the details of legal procedure in the different countries of Latin-America, as has been done with respect to the substantive law of commerce, this chapter will be confined to the presentation of general principles and rules, as established in the code of civil procedure of Spain, which may be considered as a type, with occasional remarks or citations concerning variations in the law of other countries which may warrant special mention.

Forms of actions.

The following forms of actions or proceedings may be noted:

(*a*) the ordinary action (*juicio ordinario* or *declarativo*),[1] which is classified according to the amount claimed; into ordinary action of greater amount (*juicio declarativo de mayor cuantía*) [2] exceeding 5,000 pesetas; and the ordinary action of minor importance (*juicio declarativo de menor cuantía*). The latter is subdivided in turn, into written proceedings (*juicio escrito*) when the amount in dispute exceeds 1,000 pesetas, and oral proceedings (*juicio verbal*), when less than that amount; [3]

(*b*) the summary action (*juicio sumario*),[4] which may be subdivided into various classes, depending on the purpose of the suit;

[1] Spain, article 480 c. p.

[2] Art. 482 c. p. Actions for more than 500 pesetas or those involving the civil status of a person.

[3] Art. 714.

[4] Arts. 1559, 1607, 1616 and 1692 c. p.

(*c*) the "executory" or "executive" action (*juicio ejecutivo*) when the action is based upon documents constituting full evidence, in the nature of a confession of judgment.[5]

(*d*) intestacy proceedings (*juicio de intestado*);[6]

(*e*) testamentary proceedings (*juicio de testamentaria*);[7]

(*f*) insolvency proceedings (*concurso de acreedores*);[8]

(*g*) bankruptcy proceedings (*juicio de quiebra*).[9]

Proceedings before the complaint.

There are two forms of legal steps preceding the complaint, namely, (*a*) those which the law requires, and (*b*) those which the law merely authorizes in order that the plaintiff may safeguard his interests and insure the practical success of the litigation.

Proceedings to avoid litigation (*acto de conciliabiôn*).

Among the first group, the law of Spain prescribes the proceedings to avoid litigation. Judges, in every written action, are forbidden to admit any complaint not accompanied by the certificate of the proceedings designed to effect a conciliation, in all cases not expressly exempt from such formality by law. The proceedings must be carried out before the municipal judge. On the day appointed by him for the purpose of attempting to effect conciliation, each party must appear accompanied by *un hombre bueno*, or persons who assist the judge in bringing about a conciliation between the parties. If no settlement is affected the proceedings are considered closed, a record of the same or a statement that the defendant did not appear, is entered in a special book, and a certificate of such record is given to the person or persons requesting it, in order that he may begin suit, or use it as he sees fit. With the exception of Uruguay the conciliation procedure appears to have been abolished or fallen into disuse in Latin-America, with the possible exception of divorce cases.

[5] Art. 1427 c. p. [6] Art. 958 c. p. [7] Art. 1035 c. p.
[8] Art. 1128 c. p. [9] Arts. 1321 to 1426 c. p.

Preparatory proceedings.

Among the second group of proceedings there are several measures called preparatory (*diligencias preliminares*) which serve to prepare for an action, as follows:

(*a*) a demand by the prospective plaintiff upon the party whom he intends to sue, for a sworn declaration concerning some fact relating to the personal qualifications of the latter, without which information the action cannot be brought;

(*b*) a request for the exhibition of a certain movable which is to be the subject-matter of a real action against the person having the thing in his possession (*actio ad exhibendum*);

(*c*) a demand by the person who believes himself to be an heir, a co-heir, or a legatee for the exhibition of the will, codicil, or testamentary memorandum of the testator;

(*d*) a demand by the buyer on the seller, or by the seller on the buyer, in case of eviction, for the exhibition of the title-deed or other instruments having reference to the thing sold;

(*e*) a demand by a partner or member of an association that the documents and commercial books of the partnership or association be presented by a co-partner or co-owner who may have the same in his possession, in cases where this is legally proper;

(*f*) a demand by the possessor of a private instrument requesting the acknowledgment of the signature of the debtor, in order to lay the foundation for an "executive" action.

With the exception of the cases above mentioned, the person seeking to institute an action cannot request a declaration under oath from the opposing party, or from witnesses, or any other means of evidence, except when, by reason of the advanced age of a witness, imminent danger to his life, his early departure for a place to which communication is difficult or slow, or for other good reason, such plaintiff is in danger of losing his claim for back of evidence.

In that event he may request, and the judge may order, that the witness or witnesses in the exceptional position above mentioned, be examined by deposition in the manner prescribed by law.

In case personal property is exhibited, and the plaintiff states that it is the subject-matter of his action, the clerk must enter a description thereof in the records, the property itself being left in the possession of the person exhibiting the same, with an order to preserve it in the same condition until the termination of the suit. The deposit of the thing may also be demanded by the plaintiff, if the requisites for an attachment by way of security are present. If the person requesting the deposit does not institute his action within thirty days after these proceedings, the attachment is dissolved *de jure*, and he must make compensation for damages caused thereby.[10]

Preventive measures.

Certain measures may be taken before beginning an action or during the proceedings, called *medidas preventivas* or *providencias precautorias*, the purpose of which is to secure the results of an action brought or about to be brought. They are of different kinds, but may be divided, following the code of Spain, into two classes, namely (*a*), preventive seizures or attachment, and (*b*) the security of property in litigation.

Preventive attachment (embargoes preventivos).

Preventive or preliminary attachment may be ordered for debts in money as well as in kind. In the second case the plaintiff must, under his responsibility, fix, for the purpose of the attachment, the cash value of the thing claimed, calculated according to the average market price in town, without prejudice to the later submission of evidence as to the true value.

In order that a preventive attachment may be ordered it is necessary:

[10] Art. 1316 c. p.

(*a*) that documentary evidence of the existence of the debt be presented with the petition;

(*b*) that the attached debtor be either a foreigner not naturalized, or, even though a citizen, that he have no known residence, or own no real property, or any agricultural, industrial or commercial establishment at the place where payment of the debt may be legally demanded, or that he have disappeared from his residence or establishment, without leaving any person in charge thereof, and if he left some one in charge, that such person do not know the debtor's actual residence or that the latter conceal himself, or that there be reasonable ground to believe that he will conceal or undersell his property to the prejudice of his creditors.

If the instrument of title presented should be one by virtue of which an execution can be ordered without further proceedings ("executive" action), the provisional seizure thereof in execution may be at once ordered; otherwise it may be ordered for the account and risk of the person requesting it. Should he not be a person of admitted responsibility, the judge must require him to furnish security sufficient to answer for damages and costs which the defendant may suffer thereby.

The person who has obtained a preventive attachment must request ratification thereof by filing the corresponding complaint within twenty days after the levying of the attachment; otherwise the seizure becomes *de jure* null and void and the plaintiff must be ordered to indemnify the defendant for any damages sustained.

Security of property in litigation.

A person who, presenting documentary evidence of his rights, institutes an action claiming the ownership of mines, or of woodlands, the principal wealth of which consists of timber, or of plantations, or of industrial and manufacturing establishments, may request that judicial intervention be ordered in the management of the property in litigation. The parties to the suit are cited to appear with the sole

purpose of coming to an agreement as to the person to be appointed as *interventor* (supervisor or administrator); should they be unable to reach an agreement, the plaintiff must designate four person of whom the defendant must select one; if he should not do so, the person who pays the highest territorial tax must be appointed.

If any of the documents which may lay a foundation for an "executive" action is presented in an action, and an obligation to do or to abstain from doing something, or to deliver specific things is clearly apparent therein, the judge may, at the instance and under the responsibility of the plaintiff, adopt any measures which, in the circumstances, may be deemed necessary to secure the enforcement of any judgment that may be rendered in the action. If the person requesting the measure is not known to have sufficient financial responsibility, the judge must require him to furnish security sufficient to answer for any resulting damages. The judges can also secure property of a debtor in order to pay an obligation when the debtor absconds himself, or leaves his domicil without leaving any person in charge of his affairs, or when there is a well-founded fear that he may dilapidate or secrete his property.[11]

Action of jactitation (*Acción de jactancia*).

As a rule no person can be compelled to bring an action against another. An exception to such rule arises when a person publicly boasts that another person is his debtor, or that he has rights with respect to a certain thing possessed by another. In such case the alleged debtor or possessor of the thing may petition the court to fix a period within which the boasting person must bring the action he claims to have, or else be enjoined to keep silent, his claim being deemed waived. A person who in a legal instrument or transaction reserves any rights he may have against another, or with respect to a certain thing, is not considered a boasting person (*jactancioso*).[12]

[11] Arts. 459 to 479 c. p.

[12] Spain, 496 to 501, 1395 to 1426 c. p.; Argentina, 67 to 70, 443 to 463 c. p.;

The effects of an action of *jactancia* are not in all countries the loss of the right which the *jactancioso* assumed to have. In Costa Rica he must pay a fine of from one hundred to five hundred colones; in Nicaragua he is not allowed during a certain period to bring the action he refused to begin at the injunction of the court.

The codes of Spain and Peru have no provision in regard to *jactancia*, but the Spanish courts have held that law 46, tit. 2, Part. 3 of the *Siete Partidas* is actually in force, and that the person who boasts of a right and refuses to vindicate it judicially when enjoined thereto by a court, must on a well-founded petition of an interested party, be adjudged to maintain perpetual silence on the matter.[13]

In Venezuela, articles 649 to 654 of the code of civil procedure have substituted the action of injurious delay (*retardo prejudicial*) for the *jactancia*, and it applies to all cases in which the would-be plaintiff delays maliciously in beginning his action, whether he boasts or not of his supposed rights. If he does not start his action within the period provided by the court, it will not be admitted to trial until the defendant is freed from any damages the inaction may cause.

Proceedings in an action.

The essential parts of an action are: (*a*) the complaint; (*b*) the summons; (*c*) the answer; (*d*) the evidence; and (*e*) the judgment.

The summons and the judgment have already been dis-

Bolivia, 178 to 188 c. p.; 351 to 359 *ib.;* Chile, 263 to 300 c. p.; Colombia, 386 to 393 c. p., arts. 8 to 31 of the law 40 of 1907 and art. 41 of law No. 105 of 1890; Costa Rica, 171 to 176, 178 to 191 c. p.; Ecuador, 96 and 97 c. p.; Guatemala, 232, 233, 235 269, 306 c. p.; Honduras, 250 to 260 c. p.; Mexico, 1151 to 1193 c. com.; Nicaragua, 142 to 150 c. p.; Panama, 375 to 407 and 729 c. p.; Peru, 209 to 246 c. p.; San Salvador, 122 to 154 c. p.; Uruguay, 228 to 260 c. p.; Venezuela, 368 to 384 c. p.

[13] Argentina, Buenos Aires, 425 to 432 c. p.; Bolivia, 189, 191, 722 and 723 c. p.; Chile, 259 to 262, 278 c. p.; Colombia, 275 c. p.; Costa Rica, 4 c. p.; Ecuador, 901, 904 c. p.; Guatemala, 1024 c. p.; Mexico, 23 c. p.; Nicaragua, 149 c. p.; Panama, 356 to 360 c. p.; San Salvador, 152 c. p.; Uruguay, 259, 260, 863, 872 c. p.; Spain, Trib. Sup., July 6, 1882; *Gaceta* of July 19, 1882, and September 27, 1912, No. 163, 42 *Jurisp. Civil*, n. 8, 1089.

cussed in a general way, so that we shall now proceed to summarize the rules governing the other parts of an action.

Requisites of a complaint.

The complaint which commences a judicial action must be in writing and must contain: (*a*) the designation of the court or judge, for example, "*Al Juez Primero de lo Civil*" (To the first Judge of Civil Jurisdiction); (*b*) the name and residence of the plaintiff, as well as the capacity, personal or representative, in which he brings the action; (*c*) the name and residence of the defendant; (*d*) the facts on which the claim is based, in numerical order; (*e*) the principles or rules of law governing the action, in like order; (*f*) the particular redress to which the plaintiff considers himself entitled, *i. e.*, the request for judgment.[14]

Documents which must accompany a complaint.

The following documents must accompany every complaint or answer: (*a*) the power of attorney in case the action is brought by proxy; (*b*) the instrument showing the capacity of the party, whenever he appears as the legal representative of any person or association, or if the right he claims was transferred to him by inheritance or otherwise; (*c*) the certificate of the preliminary proceedings to avoid litigation (*acto de conciliaciôn*), when an indispensable requisite for beginning an action; (*d*) the document or documents upon which the party interested bases his right. If not at his disposal, he must indicate the notarial protocol or archives in which the originals are filed. It is understood that the plaintiff has the documents at his disposal, whenever the originals are filed in a protocol or public archive from which he may demand and obtain an authenticated copy thereof. When the documents above referred to are of the

[14] An alternative complaint, in which the plaintiff asks the payment of a certain sum in damages, or, if the defendant does not agree to that sum, to submit to arbitrators the amount due, in accordance with stipulations of the parties in a contract, is not improper. Spain, Trib. Sup., March 24, 1886; *Gaceta* of July 31, 1886.

kind called public instruments, the presentation can be made by means of a simple copy, if the person interested declares that he has no other authentic one; but such copy does not produce any effect whatever if, during the period designated for taking evidence, he does not obtain and include in the record an authentic copy.

After the filing of the complaint and answer, neither the plaintiff nor the defendant is permitted to file any other document, except the following:

(*a*) those bearing a date subsequent to the complaint;

(*b*) those bearing a prior date, provided the party presenting them states on oath that he had no previous knowledge thereof;

(*c*) those which could not be procured before, for reasons for which the party interested cannot be blamed, provided that the designation of the protocol or archive in which the originals are filed was made in proper time.[15]

Copies which must accompany a complaint.

Every instrument presented with a complaint in an ordinary action must be accompanied by as many copies thereof as there are defendants or opponents, unless the document or instrument is composed of more than twenty-five sheets, in which event the presentation of copies is not obligatory.

A complaint which is not accompanied by the above-

[15] Article 503 of the code of civil procedure which prescribes that the complaint or answer must be accompanied by the documents upon which the party interested bases his rights is not violated by a judgment in favor of the plaintiff when, in his complaint, the use of certain easements was involved and the opposing party recognized the ownership in the land enjoying such easements and the existence of the servitudes, even though the defendant requested the plaintiff to present the documents upon which he based his complaint. Spain, Trib. Sup., November 29, 1888; *Gaceta* of March 8, 1889.

After the complaint and the answer thereto have been entered the parties cannot present new issues or disavow the facts they have admitted in their respective pleas. Spain, Trib. Sup., October 17, 1892; *Gaceta* of December 19, 1892.

Spain, 502 to 513 c. p.

mentioned documents and copies cannot be accepted by the court.

These provisions, as a rule, are not applicable to oral proceedings.[16]

Dilatory pleas or grounds of demurrer.

After the complaint, with the necessary copies, has been presented, it must be ordered served on the defendant or defendants together with the copies, who must be summoned to appear or answer within a period of nine days, which cannot be extended. The period for answer varies slightly from country to country.

If the defendant produces any dilatory plea or demurs, he is not obliged to answer the complaint until the same has been disposed of; this must be done before proceeding further in the action.

The following only are admissible as dilatory pleas:

(*a*) lack of jurisdiction;

(*b*) incapacity of the plaintiff, or of the defendant, or of the plaintiff's attorney or legal representative;

(*c*) pendency of another action before another competent court (*litispendencia*);

(*d*) a legal defect in framing the complaint or in bringing the action;

(*e*) any other plea to which the law expressly gives that character.

Dilatory pleas can only be entered within six days, counting from the day following the notification of the order requiring an answer to the complaint. After the expiration of this period, such pleas must be included in the answer, and do not produce the effect of suspending the course of the action. All dilatory pleas must be entered at the same time

[16] Spain, 514 to 522 c. p.; Argentina, 71 to 75 c. p.; Bolivia, 115 to 125 c. p.; Brazil, 65 to 69 *ib.;* Chile, 250 to 253 c. p.; Colombia, 265 to 267 c. p.; Costa Rica, 215 to 220 c. p.; Ecuador, 98 to 102 c. p.; Guatemala, 542 to 550 c. p.; Honduras, 261 and 262 c. p.; Mexico, 922 to 926 c. p.; Nicaragua, 159 to 161, 230 and 467 c. p.; Panama, 299 to 322 c. p.; Peru, 124 to 135, 306 to 308 c. p.; San Salvador, 185 to 195 c. p.; Uruguay, 284 to 289 c. p.; Venezuela, 239 to 243 c. p.

and in one pleading; those not pleaded must be included in the answer.

All dilatory pleas must be referred to the plaintiff for answer within three days, after which the judge passes upon the exceptions in the form of an incidental issue; but if the exception is to the jurisdiction of the court, or the pendency of another action, such pleas must first be passed upon.

After the decision overruling the dilatory plea has been accepted without appeal, or after it has become final, notice must be served upon the defendant at the petition of the plaintiff, requiring him to answer the complaint within ten days following service of the order.[17]

Security for costs.

Among the dilatory pleas provided by the law may be included the petition of the defendant that the plaintiff guarantee the payment of the costs arising out of the action. This request is subject to different conditions in the various countries, as follows:

System of Spain. Such security can only be demanded from the plaintiff when he is a foreigner, and in the cases and conditions in which such security is demanded from citizens of countries which adopt this system, in the plaintiff's country.[18]

System of Argentina. The security can be demanded

[17] Spain, 522 to 588 c. p.; Argentina, 83, 84 c. p.; Bolivia, 167 to 176 c. p., and art. 7 of the law of February 5, 1858; Brazil, 74 to 80 *ib.;* Chile, 293 to 298 c. p.; Colombia, 463 to 468 c. p. and art. 87 of law 100 of 1892, art. 164 of law 40 of 1907, and arts. 50 and 52 of law 105 of 1890; Costa Rica, 228 to 235 c. p.; Ecuador, 121 to 124 c. p.; Guatemala, 569 to 584 c. p.; Haiti, 169, 175 to 188 c. p.; Honduras, 286 to 288 c. p.; Mexico, 28 to 34, 935 to 940 c. p.; Nicaragua, 128 to 132 c. p.; Panama, 963 to 976, 1094 and 1095 c. p.; Peru, 312 to 319 c. p.; San Salvador, 120 to 121 c. p.; Santo Domingo, 168 to 187 c. p.; Uruguay, 246 to 270 c. p.; Venezuela, 253 to 270 c. p.

The dilatory plea based on the pendency of another similar action between the same parties in another jurisdiction is proper only when the defendant in the first of the actions instituted has been already summoned to appear in the court and answered the complaint. Spain, Trib. Sup., July 11, 1890; *Gaceta* of October 28, 1890.

[18] Spain 533 c. p.; Mexico 28, 938 c. p.

from any plaintiff not a resident of the place in which the action is brought whether he is a citizen or not.[19]

System of Bolivia. All foreign plaintiffs are obliged to give security for costs.[20]

System of Colombia. The obligation of giving security for costs is mutual, whether the parties are resident or not, or citizens or foreigners.[21]

System of Nicaragua. A plaintiff must always give security for costs.[22]

Answer and counterclaim (*contestación and reconvención*).

The answer to the complaint must comply with all requirements prescribed for the complaint itself. If it is not filed within the period allowed, the complaint is considered as if answered and the proceedings continue as may be proper.

The answer may be made: (*a*) by admitting the facts and the conclusions set forth in the complaint as correct; (*b*) by a categorical and full denial thereof; (*c*) by advancing peremptory pleas.

The answer may also contain a counterclaim, if the judge has jurisdiction thereof. After the answer to the complaint has been filed a counterclaim cannot be admitted; the defendant can then bring a separate action only.

The answer to the complaint must be referred to the plaintiff for ten days in order that he may reply thereto (*réplica*); and the replication for a like period to the defend-

[19] Argentina, 85 c. p.; Uruguay, 120, 246 c. p.; Brazil, decree 564 of July 10, 1850, extended to commercial cases by art. 736 of Regulation 737 of 1850, included also in art. 12 of Part III of decree 3084 of 1898, consolidating the laws of federal justice. In Brazil, the defendant estimates the amount of security desired and plaintiff may request a reduction. If the judge does not wish to reduce it, but plaintiff insists, the judge appoints two lawyers at a small fee to fix it by arbitration. See Rodrigo Octavio in 40 Clunet (1913), p. 783.

[20] Bolivia, art. 10 c. p.; Guatemala, 577 c. p.; Haiti, 167 and 168 c. p.; Santo Domingo, 167 c. p.

[21] Colombia, arts. 103 to 106 of law 105 of 1890, and arts. 19 and 20 of law 169 of 1891. See arts. 11–12 c. p. Panama, arts. 668 and 669 c. p.; Costa Rica, art. 198 c. p.

[22] Nicaragua, 18 and 19 c. p.

ant, in order that he may rejoin (*dúplica*). In the replication and rejoinder the parties must concisely and in numbered paragraphs state the facts and rules of law which support their respective contentions, adding to or amending those contained in the complaint and answer.[23]

Periods for admission of evidence.

The judge must order that the evidence in the action be taken, whenever the parties request it, or when he deems it proper, unless the litigants agree to submit the case to judgment without the taking of evidence. The judge in that event orders the record to be brought before him by the clerk, and the parties cited to hear judgment.

There are two periods for the taking of evidence: (*a*) the ordinary and, (*b*) the extraordinary period. The former is divided into two parts: the first part, which cannot be extended, is twenty days and during this period the parties must state all the matters upon which they desire evidence to be taken. The second part, which is of thirty days and can be extended in case *force majeure* prevents the taking of evidence within that time, serves for the taking of evidence on matters proposed by the parties during the first part of the period.

There are countries in which the ordinary period has only one *parte* which serves to state the matters upon which the parties want to submit evidence and at the same time taking the evidence. Such period may vary from country to country, but as a rule is forty days.

The extraordinary period is only granted when the evidence must be taken outside of the country, and it varies according to the distance to the place where the evidence is to be taken.[24]

[23] Spain, 539 to 548 c. p.; Argentina, 98 to 103 c. p.; Bolivia, 247 to 256 c. p.; Brazil, 96 to 110, *ib.;* Chile, 299 to 307 c. p.; Colombia, 937 to 955 c. p. and 143 of law 105 of 1890; Costa Rica, 236 to 242 c. p.; Ecuador, 125 to 129 c. p.; Guatemala, 587 to 602 c. p.; Honduras, 289 to 299 c. p.; Mexico, 943 to 946 c. p.; Nicaragua, 184, 195 c. p.; Panama, 1099 to 1104, 1108 c. p.; Peru, 320, 334 c. p.; San Salvador, 216 to 226 c. p.; Uruguay, 313 to 326 c. p.; Venezuela, 215, 252, 271 to 280 c. p.

[24] Spain, 549 to 561 c. p.; Argentina, 104 to 124 c. p.; Bolivia, 262 to 269 c. p.;

General rules for the taking of evidence.

If after the replication and rejoinder some important fact, material to the case, has occurred, or if any like fact of prior date comes to the knowledge of any of the parties, of which they swear that they had no previous knowledge, they may allege such facts in a supplementary pleading during the first period designated for the admission of evidence. A copy of the supplementary pleadings must be given to the opposing party, who, within three days, must admit or deny the new facts, allege other facts, or controvert those set forth.

The evidence must be confined to the allegations contained in the complaint, the answer, replication and rejoinder, and to those of the supplementary pleadings which have not been fully admitted by the party prejudiced thereby.

All proceedings for the taking of evidence are public, except when dangerous to good order, and must take place after at least twenty-four hours' notice to the parties. The parties and their attorneys merely attend at the taking of evidence, and cannot intervene therein in any other manner than that prescribed for each class of evidence. All proceedings for the taking of evidence after the expiration of the corresponding period are void.[25]

Means of evidence.

The means of evidence which can be employed in an action are:

(*a*) admission to the parties during the action (*con-*

Brazil, 127 to 137, *ib.;* Chile, 316 to 329 c. p.; Colombia, 546 to 550 c. p.; Costa Rica, 243 to 251 c. p.; Guatemala, 621 to 632 c. p.; Haiti, 189 to 193, 253 to 255 c. p.; Honduras, 308 to 309 c. p.; Mexico, 377 to 400 c. p.; Nicaragua, 205 to 208 c. p.; Panama, 700 to 710 c. p.; Peru, 348 to 362; San Salvador, 237 to 244 c. p.; Santo Domingo, 188 to 192 c. p.; Uruguay, 334 to 344 c. p.; Venezuela, 284, 288, 289 c. p.

[25] Spain, 563 to 577 c. p.; Argentina, 104 to 124 c. p.; Bolivia, 257 to 262 c. p.; Chile, 308 to 314 c. p.; Colombia, 536 to 545 c. p.; Costa Rica, 255 to 260 c. p.; Ecuador, 137 to 245 c. p.; Guatemala, 603 to 620 c. p.; Honduras, 300 to 307 c. p.; Mexico, 354 to 376, 546 to 568 c. p.; Panama, 687 to 698 c. p.; Peru, 335 to 346 c. p.; San Salvador, 227 to 236 c. p.; Uruguay, 327 to 332, 346 to 349 c. p.; Venezuela, 289 to 306 c. p.

fesion en juicio). In Argentina the extrajudicial confession is also a means of evidence, provided it is proved according to law and provided also that there is a foundation of evidence in writing to support the same.

(*b*) public documents;
(*c*) private documents;
(*d*) commercial books;
(*e*) opinion of experts;
(*f*) judicial inspection;
(*g*) testimony of witnesses.[26]

Admission of the parties during the action.

From the time the case is opened to the submission of evidence until the notice to appear to hear judgment in first instance, each party may request that the other party give evidence under oath concerning a particular question. It must be noted that a party to a civil or commercial suit cannot be questioned on facts in general, but only on facts or acts done or known by himself. The list of those facts as presented by the opposing party is not called an interrogatory or list of questions, but *posiciones* (statements) because they are assertions which the answering party must simply affirm or deny. The *posiciones* must be in writing, enclosed, as a rule, in a sealed envelope which the judge keeps unopened until the party cited appears to answer. The person

[26] Spain, 578 to 595 c. p.; Argentina, 1224 to 1228 c. c. and 138 c. p.; Bolivia, 270 c. p.; Brazil, 138, *ib.*; Chile, 33 c. p.; Colombia, 541 c. p.; Ecuador, 146 c. p.; Honduras, 320 c. p.; Mexico, 375 c. p.; and 1205 com. c.; Panama, 686 c. p.; Peru, 347 c. p.; and San Salvador, 245 c. p.; Uruguay, 349.

Evidence is considered irrelevant and must not be admitted when for any reason whatever such evidence cannot be taken, as, for instance, the taking of excerpts from the memoranda of preliminary proceedings, because this would be equivalent to violating the secrecy of such proceedings. Spain, Trib. Sup., May 6, 1888; *Gaceta* of August 11, 1888.

Evidence can only be taken before the courts and with the formalities prescribed by the law. Spain, Trib. Sup., April 2, 1887; *Gaceta* of August 18, 1887.

The burden of proof of the existence, object, period and condition of a contract, the existence of which is denied by the defendant, lies upon the plaintiff. Spain, Trib. Sup., March 24, 1891; *Gaceta* of May 26, 1891.

to be examined must appear without his attorney. If he fails to appear or to show good cause for non-appearance, he must be again cited for another stated day and hour, with the admonition that if he does not then appear, his absence will be taken as an admission of the facts. At the time of appearance the judge must determine whether the *posiciones* are acceptable or not, rejecting those which are irrelevant or conflict with the provisions of the law. He then proceeds to the examination of the party. Although the answer must be affirmative or negative, the party answering is permitted to add such explanation as he may deem proper, or as the judge may request. If the answer is evasive the judge must admonish the party that the facts concerning which he refuses a categorical answer will be accepted as admitted. The answering party may refuse to affirm or deny a fact when it was not committed by him. If on account of illness or other special circumstance the party cannot appear to answer the *posiciones*, the judge may go to his house, together with the clerk, in order to take the testimony.[27]

Public documents.

The following are included within the category of public documents and constitute proof, the right of the opposing party to demand a comparison with the original being reserved:

(*a*) those issued by public officials in the proper exercise of their functions, according to law, among which the documents drafted by notaries are the most frequent;

(*b*) certificates issued by exchange and commercial

[27] Spain, 578 to 594 c. p.; Argentina, 125 to 138 c. p.; Bolivia, 352 to 359 c. p.; Brazil, 155 to 174, *ib.;* Chile, 375 to 392 c. p.; Colombia, 555 to 577 c. p.; and 72, 73 of law 105 of 1890; Costa Rica, 261 to 278 c. p.; Ecuador, 256 to 293 c. p.; Guatemala, 633 to 667 c. p.; Haiti, 323, 335 c. p.; Honduras, 338 to 351 c. p.; Mexico, 401 to 438 c. p. and 1211 to 1236 com. c.; Nicaragua, 334 to 361 c. p.; Panama, 711 to 762 c. p.; Peru, 363 to 393 c. p.; San Salvador, 369 to 405 c. p.;.Santo Domingo, 324 to 336 c. p.; Uruguay, 434 to 447 c. p.; Venezuela, 307 to 324 c. p.

brokers of entries contained in the record of their respective transactions in the manner and with the formalities prescribed by the code of commerce;

(*c*) record books, by-laws, ordinances, registers, property statistics, and other documents in public archives of state, province, or town, and copies made and authenticated by secretaries and archivists when directed to do so by proper authority;

(*d*) resolutions, by-laws and regulations of partnerships or associations, provided they have been approved by public authority, and the copies have been certified according to law;

(*e*) records or certificates of births, marriages and deaths taken from the registers by the parish priests, or by the person in charge of the civil registry;

(*f*) writs of attachment in execution and all kinds of judicial proceedings.

Documents executed in other countries have the same validity in an action as those executed in the country of the forum, provided they possess the following requisites:

(*a*) that the purpose of the contract be lawful in the latter country;

(*b*) that the contracting parties have legal capacity and power to contract according to the laws of their own country;

(*c*) that in the execution of the contract all formalities and requirements of the law of the country where the contract or act is executed or performed have been observed;

(*d*) that the document be legalized and duly authenticated.[28]

[28] Spain, 596 to 600 c. p.; Argentina, 139 c. p.; 1031 to 1045 c. c.; Bolivia, 177 to 179 c. p.; Brazil, 140 to 154 c. p.; Chile, 331, 334 c. p.; Colombia, 677 to 690 and 36 law 40 of 1907; Costa Rica, 279 to 284, c. p.; Ecuador, 147 to 192 c. p.; Guatemala, 668 to 685, 709 to 722 c. p.; Haiti, 194 to 252 c. p.; Honduras, 321 to 334 c. p.; Mexico, 439 to 444 c. p. and 1237 to 1251 com. c.; Panama, 857 to 879 c. p.; Peru, 400 to 409 c. p.; San Salvador, 246 to 255, 260 to 275 c. p.; Santo Domingo, 214 to 251 c. p.; Uruguay, 350 to 359 c. p.; Venezuela, 325 to 335 c. p.

Notaries and their functions.

As the notarial instruments are the most important among those which may be introduced in evidence in an action, it may not be without interest to give a summary description of the character and functions of a notary public in Latin-America, taking as a guide the provisions of the Spanish law.

A notary is a public official authorized to certify contracts and other extrajudicial instruments according to law. He is bound to certify any public or private instrument or legal act or transaction, when requested, and incurs liability for failure to render such services within the judicial district in which his office is located.

In order to be a notary it is necessary:

(*a*) to be a citizen of legal age;

(*b*) to have good habits;

(*c*) to have pursued the studies and to have complied with the other requisites prescribed by law and regulations, or to be a lawyer;

(*d*) to give security for the faithful discharge of his duties. Such security may consist of a deposit in money, bonds of the public debt, or a mortgage on realty.

The functions of a notary may be divided into three acts, namely:

(*a*) to prepare original instruments;

(*b*) to issue certified copies;

(*c*) to make "protocols."

An original instrument is one which a notary must draft from a contract or document submitted for his authentication. It must be signed by the interested parties, by the attending witnesses, by the witnesses who identify the parties thereto, when proper, and by the notary, who also sets his seal thereon. All instruments must be drafted by the notary in the language of his country and must be clearly written, without abbreviations or blank spaces. In the statements of dates and amounts, figues cannot be used. The notary must certify to having read the instrument in

full to the parties concerned and to the attesting witnesses, or to have permitted them to read it, as they choose, before they sign it, and to the identifying witnesses the part that refers to them. He must, furthermore, inform all these persons of the privilege they have of reading the instrument themselves.

Additions, marginal notes, interlineations, erasures, or blots in the original instrument are of no effect, unless they are mentioned (*salvados*) at the end of the instrument, and expressly approved by the interested persons before they affix their signatures.

Notaries must authenticate all public instruments with their signature, their flourish (*rúbrica*) and the mark they may select for the purpose; the latter cannot be subsequently changed without authority of the government.

In all public instruments the notary must state his name and residence, the names and residences of the witnesses, and the place and date of the execution of the instrument. He must certify that he is acquainted with the parties thereto, or that he has assured himself of their identity by the declaration of the attesting witnesses, or of two other persons acquainted with them, who are, therefore, called witnesses of identification.

Public instruments are void:

(*a*) whe nthey contain any provision in favor of the notary who authenticates them;

(*b*) when the witnesses are relatives of the parties or the notary within the fourth civil degree of consanguinity, or second of affinity, or when they are employees or servants of the notary;

(*c*) when the notary does not certify in legal form that he is acquainted with the persons interested, or when the signatures of such persons and witnesses, when required to sign, do not appear, or when the notary himself has failed to affix his signature, flourish (*rúbrica*) or mark.

Instruments authenticated by a notary are admitted as evidence within the district in which he resides. In order to

have them admitted outside such district, the signature of the notary must be authenticated by two other notaries of the same judicial district, and countersigned by the judge of first instance, who must fix thereto the seal of the court.

Protocol.

By *protocolo* is meant the file or collection in proper order of the official instruments authenticated during one year, from January 1st to December 31st, inclusive. It must be included in one or more volumes, folioed by number, and with the other requisites prescribed by law.

The *protocolos* belong to the state. The notaries must preserve them in accordance with the law, as archivists thereof, under their responsibility.

All original instruments must bear a serial number written in full by order of dates. All the sheets (*pliegos*) of original instruments must be composed of full or double sheets (*dos hojas*) of stamped paper. On the side on which they are to be bound they must have a blank margin of 20 millimeters, besides one of 60 millimeters on each page at the left of the text to which the notary must affix his flourish.

Notaries must keep the protocols under lock and key in the building in which they reside. Protocols, as a rule, are secret. Neither the original instrument nor the protocol may be removed from the building in which it is kept, not even by virtue of a judicial administrative order, except to transfer it to the proper archives, or in case of *force majeure*.

Testimonios.

A *testimonio* is the first copy of an original instrument which each of the parties interested has a right to receive. Second or subsequent copies can not be issued, except by virtue of a judicial order, and after citation of the persons interested, or of the representative of the department of justice (*ministerio público*) when the persons interested are unknown or absent from the town where the notarial office is situated. No previous citation is necessary, however, in

the case of instruments stating unilateral obligations, or when all the interested parties request the copy.

A *testimonio* must contain a precise citation of the protocol and of the serial number of the original instrument from which the copy was made, and it must be signed, *rubricado* and marked by the notary on stamped paper, must state that it is the first copy, and comply with all other legal requisites. In issuing a first copy the notary must make a memorandum on the margin of the original instrument and above his signature, stating the person for whom such copy is issued, the date of issue, and the class of paper on which it is written. He must, moreover, state all these details in the subscribing clause with which the *testimonio* is closed.[29]

Private documents, correspondence and books of merchants.

Original private documents can be introduced in evidence by the litigants and must be attached to the record, unless they form part of a book, proceedings, or package, or belong to a third person who does not wish to part with them, in which event the papers are exhibited in order that a certified copy of the part designated by the interested party may be made. The authenticity of private documents must be acknowledged or denied under oath before the judge by the party to be charged, unless he has acknowledged their authenticity in his answer, replication or rejoiner.[30]

Whenever the authenticity of a signature is denied, a comparison of handwritings may be made; and whenever a doubt is raised as to the authenticity of any private instrument which cannot be verified by the person or official who issued it, such comparison must be made by experts. The person demanding the comparison designates the document or documents with which such comparison is to be made, and as to the authenticity of which there is no doubt. Should no such documents exist, a public document is considered authentic; and with regard to a private document the judge

[29] Law of April 9, 1862, in force in Cuba and Porto Rico.

[30] In regard to commercial books see chapter on Commercial Bookkeeping.

must take its evidential value into consideration in combination with other evidence.[31]

Opinion of experts (*Juicio pericial*).

Whenever the contested issues of fact require special knowledge in a certain science, art, or industry, experts may be named to give their opinions. The party who desires such opinion must state clearly the matter with regard to which he wishes such testimony. The judge decides upon the matter on which expert evidence is to be taken, and whether one or three experts shall serve by agreement of the parties, or designated by lot from among those who have diplomas as such experts in the science or industry in question. If there is not a sufficient number of experts to proceed to choose by lot, the judge must appoint them. The experts must assume their duties under oath, and can be challenged for the same reasons that a judge may be, namely, personal interest, relationship with the parties, etc.

The parties and their counsel may attend the expert examination and make such suggestions to the experts as they may deem proper. The experts may make their reports in writing or orally, according to the importance of the subject, stating their reasons. The parties may through the judge request further explanations. When the experts disagree they make as many reports as there are opinions. The judge or court must consider the expert testimony according to the rules of sound judgment. They are not obliged to accept such opinion as conclusive.[32]

[31] Spain, 602 to 609 c. p.; Argentina, 139 to 160 c. p.; 1046 to 1070 c. c.; Bolivia, 278 to 282 c. p.; Chile, 335 to 344 c. p.; Colombia, 691 to 705 and art. 7, decree 909 of 1906; Costa Rica, 287 to 296 c. p.; Ecuador, 193 to 208 c. p.; Guatemala, 686 to 708, 723 to 935 c. p.; Haiti, 194 to 252 c. p.; Honduras, 335 to 337 c. p.; Mexico, 445 to 467 c. p., and 1241 to 1245 com. c.; Panama, 880 to 915, 956 to 962 c. p.; Peru, 410 to 440 c. p.; San Salvador, 254 to 259, 273 to 279 c. p.; Santo Domingo, 193 to 213 c. p.; Uruguay, 360 to 374 c. p., and 659 of the Rural Code; Venezuela, 325 to 335 c. p.

[32] Spain, 610 to 632 c. p.; Argentina, 161 to 178 c. p.; Bolivia, 335 to 351 c. p.; Chile, 411 to 427 c. p.; Colombia, 651 to 676 c. p., and 77 to 80 of law 105 of 1890, 31 law 100, 1892; Costa Rica, 297 to 314 c. p.; Guatemala, 736, 769 c. p.;

Judicial inspection.

If for the purpose of elucidating and weighing the facts, it seems necessary for the judge personally to examine some place, scene or thing involved in the litigation, a judicial inspection thereof must be made at the instance of any of the parties, who, together with their attorneys, may attend the examination and make such verbal suggestions to the judge as they may deem proper. When it is decided to make a judicial as well as an expert examination of a thing both proceedings must be held simultaneously. Witnesses also may be examined at the place of, and immediately after, the judicial inspection, when it serves to elucidate their testimony. The clerk makes a record of these proceedings, including all pertinent suggestions made by the parties, the statements of the other persons who were present, and the signatures of all.[33]

Evidence of witnesses.

None of the parties to an action is permitted to submit the evidence of witnesses for the purpose of contradicting facts proved by judicial admission of the parties.

To the instrument requesting the admission of the testimony of witnesses there must be attached the interrogatory or list of questions upon which the witnesses are to be examined, with a copy of the petition and of the interroga-

Haiti, 302 to 322 c. p.; Honduras, 356 to 370 c. p.; Mexico, 468 to 497 c. p.; Panama, 845 to 856 c. p.; Peru, 491 to 504 c. p.; San Salvador, 336 to 363 c. p.; Santo Domingo, 302 to 323; Uruguay, 412 to 430 c. p.; Venezuela, 336 to 342 c. p.

There is no breach of law when a petition that handwriting experts give their testimony with regard to the sense, expression, and intention of a document is denied, as those are facts which can and must be considered only by the court. Spain, Trib. Sup., March 22, 1888; *Gaceta* of May 2, 1888.

[33] Spain, 633 to 636 c. p.; Argentina, 210 to 211 c. p.; Chile, 405 to 410 c. p.; Colombia, 727 to 734 c. p., and art. 81, law 105 of 1890; Costa Rica, 315 to 318 c. p.; Ecuador, 294 to 305 c. p.; Guatemala, 770 to 774 c. p.; Haiti, 296 to 310 c. p.; Honduras, 352 to 355 c. p.; Mexico, 498 to 502 c. p. 1259, 1260 com. c.; Panama, 916 to 931 c. p.; Peru, 394 to 399 c. p.; San Salvador, 364 to 368 c. p.; Santo Domingo, 295 to 301 c. p.; Uruguay, 431 to 433 c. p.; Venezuela, 343 to 347 c. p.

tory. The questions must be numbered, stated with clearness and precision, and confined to points at issue.

The judge must examine the questions, approving those which may be pertinent and rejecting those deemed irrelevant.

Within ten days following the notification of the order admitting such evidence, the person interested must present a list of his witnesses, giving the name and surname of each, his trade or profession, his residence and address, if known. This list may be enlarged within said period.

A copy of this list is given to the opposing parties, and no witnesses other than those mentioned therein can be examined.

The litigants may present cross interrogatories (*repreguntas*) before the examination of the witnesses. The judge approves those which are pertinent, and rejects all others. These interrogatories must be opened at the beginning of the proceedings for the examination of the witnesses; if presented unsealed, they must be kept in the custody of the judge, under his personal responsibility.

The witnesses must be examined separately and successively; those who have testified must not communicate with the others, nor may the latter be present when the former are testifying. To this end, the judge must adopt such measures as he may consider proper.

A witness above fourteen years of age must take an oath, and each witness must be asked:

(*a*) his name, age, status, occupation and place of residence;

(*b*) whether he is a relative of any of the litigants by consanguinity or affinity, and in what degree;

(*c*) whether he is an employee or servant of the person for whom he appears, or whether he is a partner or has any other interest or connection with said party;

(*d*) whether he has any direct or indirect interest in the action or in another similar action;

(*e*) whether he is an intimate friend of any of the litigants.

As these questions are always asked of all witnesses, they are called *generales* (general) questions.

The witnesses are then examined upon each of the questions contained in the interrogatory presented by the party for whom they appear, and then upon those contained in the cross interrogatory.

The witness must answer orally without the aid of any memorandum, unless the question refers to accounts, books or papers, in which case he is permitted to consult them. He must give the reason upon which his answer is founded (*la razón de su dicho*).

The parties and their counsel cannot interrupt the witness, nor ask him other questions than those set forth in their respective interrogatories. Only in the event that the witness fails to answer fully any question or cross-question, or contradicts himself, or expresses himself ambiguously, may the parties or their counsel call the attention of the judge to the fact in order that he may require the witness to make the proper explanation. The judge can also, *ex officio*, request from the witness any explanations he may deem proper for the elucidation of the facts upon which he may have testified.

In weighing the probative force of the testimony of witnesses, the judge or court must apply the rules of sound judgment, taking into consideration the reasons upon which the testimony is based and the circumstances connected therewith. Nevertheless, when the law determines the number or the qualifications of the witnesses, as a condition precedent to the admission of their testimony on a particular matter, the provisions of said law must be observed.[34]

Within four days after the testimony of the witnesses of

[34] Spain, 637 to 659 c. p.; Argentina, 179 to 209 c. p.; Bolivia, 283 to 334 c. p.; Brazil, 175 to 203, *ib.;* Chile, 345 to 374 c. p.; Colombia, 595 to 650 c. p., 74 to 76, law 105 of 1890 and law 53 of 1882; Costa Rica, 319 to 344 c. p.; Ecuador, 209 to 255 c. p.; Guatemala, 775 to 835, 854 to 867 c. p.; Haiti, 256 to 295 c. p.; Honduras, 371 to 407 c. p.; Mexico, 503 to 532, 574 to 594 c. p., 1261 to 1273 com. c.; Nicaragua, 254 to 309 c. p.; Panama, 784 to 844 c. p.; Peru, 449 to 490 c. p.; San Salvador, 285 to 335; Santo Domingo, 252 to 294; Uruguay, 375 to 411 c. p.; Venezuela, 348 to 367 c. p.

one party has been taken, the opposing party may challenge any witness by reason of his kinship with the person for whom he appeared, or for any other reason calculated to impair the impartiality and fairness of his testimony. The evidence relating to the cause of challenge must be attached to the record.

Final pleadings.

After the period for the taking of evidence has expired, the records of the evidence are attached to the main record of the proceedings. Either of the parties may ask for a public oral hearing; if they do not, the judge orders the original record to be delivered to each of the parties successively, for the preparation of a written argument (*alegato de bien probado*) within ten days (the period varies from country to country). The judge may extend this period, at the instance of a party, to thirty days, when the volume or the complicated character of the evidence so requires. The pleadings must concisely summarize and discuss in numbered paragraphs the evidence adduced and the principles of law applicable to the case.[35]

Citation for judgment.

After the record has been returned to the court the judge orders a citation of the parties for judgment, assigning, on eight days' notice, the day and hour for a hearing, if demanded. After the hearing or the citation for judgment, the judge must render his decision and announce it within twelve days. This period may be extended to fifteen days if the length of the record exceeds one thousand folios.[36] The period is usually further extended if the pressure of cases requires it.

Other forms of action.

The proceedings that have been summarized are substantially observed in every action, but there are cases which require a simpler and speedier course in the administration

[35] Spain, 667 to 670 c. p.

[36] Spain, 677, 678 c. p.

of justice either on account of the lesser importance of the case, or because of the necessity for a more rapid redress in the public as well as in the private interest, or because a right manifestly proved at the beginning of the action would be hampered in its vindication by unnecessary delay in the proceedings.

By reason of the amount involved, actions, as has already been observed, are divided into actions of greater importance (*juicios de mayor cuantía*), and actions of lesser importance (*juicios de menor cuantía*). The only substantial difference between the two proceedings consists in the periods granted to the parties for putting in the answer or counterclaim, and for presenting their evidence and final pleadings, and for the judge to render his decision.

On account of the quick redress which certain cases require, actions are divided into ordinary actions (*juicios ordinarios*), with all foregoing formalities and lengthy pleadings, and summary actions (*juicios sumarios*). They differ from one another in the kind of redress to which they are directed, for instance, the action for ejectment of a tenant (*juicio de desahucio*), the summary proceedings to acquire possession (*interdicto de adquirir la posesión*), to retain possession (*interdicto de retener la posesión*), or to recover possession (*interdicto de recobrar la posesión*), summary proceedings to prevent a new injurious construction (*interdicto de obra nueva*), or against ruinous construction (*interdicto de obra peligrosa*), etc. The judgment in these cases passes not upon the ultimate rights of the parties, which may require the full period for the taking of evidence and for the arguments of the parties, but upon certain facts which of themselves and for reasons of a general character call for immediate redress. The decision, as a rule, reserves, consequently, the privilege of the parties to argue the basic issues in an ordinary action.

EXECUTORY OR EXECUTIVE ACTIONS

Sometimes the plaintiff possesses a document which, provided with conclusive probative force by the law, creates

in his favor a presumption that he is entitled to the redress he demands, and makes unnecessary the various formalities of an ordinary action. An executory action must, therefore, be based upon an act or document importing a confession of judgment (*título ejecutivo*). The following documents are the only ones having such self-executing effect:

(*a*) a public instrument, provided that it is a first copy, or, if a second copy, that it has been issued by virtue of a judicial order and with a citation of the person to be charged, or his predecessor in interest;

(*b*) any private document which has been acknowledged as geniune under oath before a judge competent to issue the writ of execution;

(*c*) an admission made before a competent judge;

(*d*) bills of exchange, without the necessity of a judicial acknowledgment thereof, against the acceptor who did not qualify his acceptance as spurious at the time of the protest of the bill of exchange for non-payment;

(*e*) any commercial paper payable to order or to bearer, when legally issued, representing obligations past due, and any matured coupons provided they correspond to the bonds, and the latter to the stub-book from which they were detached;

(*f*) the original memoranda or policies of contracts made through exchange agents or public brokers, signed by the contracting parties and by the agent or broker participating therein, provided they are verified by virtue of a judicial order and a citation of the opposing parties, with the register of such agent or broker, and that such register is kept in accordance with the law.

When an executory action is based upon a private document, request must be made that the debtor acknowledge his signature, whereupon the judge must fix a day for that purpose.

If the debtor fails to appear, he must be cited a second time, with a warning that his non-appearance will be considered as an admission of the authenticity of the signature

for the purpose of execution. In case of such non-appearance the execution issues, provided that a protest or demand for payment by notarial instrument or in proceedings to avoid litigation (*acto de conciliación*) has previously been made, and the falsity of the signature has not been alleged. Except for these cases, the creditor must request and the judge must order that the debtor be cited for a third and last time, with a warning that if he should not appear, he will be considered to have acknowledged the document; and if he does not appear or advance good reasons for his non-appearance, he is considered to have confessed judgment for the purpose of the issue of execution.

When the debt is payable in kind, with merchandise or property which can be measured or weighed, the computation in cash is made at the price agreed upon in the contract; and otherwise according to the market price of such property or merchandise, certified by the directors of the college or chamber of brokers, should there be any in the town, or otherwise, by a certificate of two brokers or merchants, or the municipal authority, in certain cases; the right of the debtor being reserved to demand a reduction of said price at the time of his opposition to the execution.

Procedure in executive actions.

When a complaint in an executive action is presented, the judge must examine the accompanying documents; if he finds that they consist of those which warrant an execution, he must issue an order or writ of attachment, which must be delivered to the bailiff of the court, who in the presence of the court clerk demands payment from the debtor. If the debtor does not pay at once, sufficient property is attached to cover the amount claimed and the costs. Even though the debtor pays upon demand, all the costs incurred are taxed against him. If there is property specially mortgaged or pledged to the debt the attachment must first be levied thereon; otherwise, as well as when said property is not enough, sufficient property of any kind must be attached in the following order:

(*a*) money, if any should be found; (*b*) public securities; (*c*) jewelry; (*d*) credits (*choses* in action), which can be realized at once; (*e*) fruits or rents of any kind; (*f*) live-stock; (*g*) personal property; (*h*) real property; (*i*) salaries or pensions; (*j*) credits and rights which cannot be realized at once.

No attachments can be levied upon the bed, in daily use, of the debtor, his wife and children, nor upon their necessary clothing, nor upon the tools of trade of the debtor.

In the case of salaries or pensions, one-fourth thereof only can be attached, if they amount to less than 5,000 pesetas a year, and one-third thereof if in excess of that amount.

After the attachment has been levied the debtor is notified that the sale of the property attached has been ordered, and he must be served at the same time with copies of the complaint and documents which the execution creditor may have presented. Within three days following the service of complaint, the debtor may object to the execution; otherwise he must be declared in default at the instance of the plaintiff, and the proceedings follow their course without the defendant being again cited, except when the law so requires. The judge then orders the record to be brought before him for judgment with a citation of the plaintiff only. If the debtor objects in proper time and manner he must be given a period of four days to plead any of the following defenses he may deem proper. They are the only defenses admissible in executive actions:

(*a*) falsity of the document importing a confession of judgment; (*b*) payment; (*c*) set-off of a net claim appearing in a document importing a confession of judgment; (*d*) the statute of limitations; (*e*) release or respite; (*f*) waiver of the right to demand payment; (*g*) lack of personal capacity on the part of the execution creditor or his solicitor; (*h*) novation; (*i*) compromise; (*j*) agreement to submit the matter for decision to arbitrators, or to amicable adjusters, executed with legal formalities; (*k*) lack of competent jurisdiction.

Any other defense which the debtor may plead is reserved for an ordinary action, but this does not prevent the rendition of a judgment ordering the sale of the attached property (*sentencia de remate*). In executive actions based on bills of exchange, the only defenses admissible are those mentioned in the first five subdivisions of the foregoing enumeration, and the impairment of the bill of exchange for lack of presentation or protest or notification to the parties concerned in proper form and time.

The defendant may demand that the action be stayed and declared void on the following grounds:

(*a*) that the obligation or the instrument by virtue of which the execution was issued is void;

(*b*) that the instrument does not import a confession of judgment (*no tiene fuerza ejecutiva*) either because of external defects or because it is not yet due, or because the amount is not demandable or is not certain;

(*c*) that the debtor has not been served with notice of sale with legal formalities;

(*d*) that the execution debtor lacks the personal or representative capacity in which he is sued.

The plaintiff is given four days to answer these objections. A period of ten days for the taking of evidence, if necessary, is established; the parties are then given a common period of four days to examine the proceedings; a date is fixed, if any of the parties so request, for a hearing, and within three days thereafter, or within five days if there has been no hearing, the judge must render judgment in one of the three senses following:

(*a*) that the execution be confirmed, stating the amount to be paid to the creditor;

(*b*) that the order for the sale is denied;

(*c*) that the entire proceedings or a part thereof, are void, in which case they must be brought back to their status at the time the error was committed.

In the first case the costs are taxed against the debtor; in the second, against the plaintiff, and in the third, each party must pay his own expenses, unless there is reason to

tax them against one of the parties; or, by way of correction, against the official responsible for the nullity of the proceedings.[37]

In Argentina,[38] Bolivia,[39] Chile,[40] Colombia,[41] Honduras,[42] Panama [43] and Venezuela [44] the executive action can be based upon a private instrument when, after the first citation for acknowledgment thereof, the debtor fails to appear, because by that failure the document is deemed acknowledged, without any other citation or formality.

In Panama,[45] furthermore, the executive proceeding is

[37] Spain, 1429 to 1480 c. p.; Argentina, 464 to 528 c. p.; Bolivia, 515 to 620 c. p.; Brazil, 308 to 319, *ib.;* Chile, 455 to 538 c. p.; Colombia, 1008 to 1094 c. p., arts. 46 to 50, 53, 54, 173, 178 of law 40 of 1907, arts. 180 to 183, 189, 190, 197, 199, 200, 205, 207 to 209, 211 of law 105 of 1890; arts. 39 of law 57 of 1887; 22 and 26 of law 100 of 1892 and law 46 of 1876, amendments 30th and 35th; Costa Rica, 453 to 493 c. p.; Ecuador, 499 to 552 c. p.; Guatemala, 909 to 1016 c. p.; Haiti, 469 to 679 c. p.; Mexico, 1015 to 1070 c. c., and 1391 to 1414 com. c.; Panama, 1166 to 1337 c. p.; Peru, 590 to 741 c. p.; San Salvador, 587 to 659 c. p.; Santo Domingo, 806 to 811 c. p.; Uruguay, 873 to 941 c. p.; Venezuela, 508 to 516 c. p.

A request that the "executory" proceedings be declared void is not admissible, whatever the reasons alleged therefor, if the defendant did not object to the "executory" action in proper time. Spain, Trib. Sup., January 13, 1912; *Gaceta* of April 10, 1913.

When the defendant did not know that an "executory" action had been begun, but learned of it later, and might have raised in the proceeding the question of the nullity of the same, without doing so, he cannot claim such nullity in an ordinary action after the "executory" one is closed. Spain, Trib. Sup., January 15, 1912; *Gaceta* of April 11, 1913.

The citation for judicial sale of the attached property in an "executory" action is equivalent to the summons in an ordinary action. Spain, Trib. Sup., December 31, 1912; *Gaceta* of October 26, 1913.

The defects of the instrument upon which the plaintiff based an "executory" action, and the faults committed in the "executory" proceedings cannot be the subject of a complaint in an ordinary action begun afterwards by the defendant on the ground of presumptive errors in the former action. Spain, Trib. Sup., November 24, 1915; *Gacetas* of March 19, 20, and 22, 1916.

The object of the ordinary action reserved to the defendant in an "executory" action is only to try at length the issue whether or not the obligation which was demanded really existed; not to present pleas and defenses which should have been raised in the "executory" proceedings. Spain, Trib. Sup.; *Gaceta* of December 2, 1914.

[38] Art. 468 c. p. [39] Art. 897 c. p. [40] Art. 456 c. p.
[41] Art. 700 c. p. [42] Art. 448 c. p. [43] Art. 892 c. p.
[44] Art. 509 c. p. [45] Art. 881 c. p.

proper when the subscriber of a private document has acknowledged his signature before a notary public.

In Argentina,[46] Bolivia,[47] Chile,[48] Colombia,[49] Costa Rica,[50] Honduras,[51] Mexico,[52] Nicaragua,[53] Panama [54] and Peru,[55] the confession or admission of a debt of definite amount is also a foundation for executive proceedings.

Articles 246 to 267 of decree No. 737 of Nov. 25, 1850, in Brazil provide for an action in commercial matters which is called *assigna çãо de des dias* (designation of ten days) by which the judge gives the defendant a period of ten days to pay or show legal cause for not paying. This action is proper when it is based upon:

(*a*) a public instrument;

(*b*) a bill of exchange or any other document possessing the same force, according to law;

(*c*) a promissory note or any other document relating to commercial transactions;

(*d*) a bill of lading;

(*e*) insurance policies;

(*f*) invoices or accounts of merchandise sold at wholesale, when not objected to within a legal period fixed by the party.

This action does not lie for obligations which are not of liquid amount, or which depend upon a term or condition.

The defendant, within the ten days fixed by the judge, may present his objections, which may differ for each document; but, as a rule, the falsity or nullity of the instrument, payment, or novation of the debt can be pleaded.

If the defendant does not make any legal objection or the objections are irrevelant or not proved during the ten days, he is adjudged to pay and the judgment is executed.

This action can also be founded upon other private documents besides those heretofore mentioned, if such documents

[46] Art. 465 c. p. [47] Art. 518 c. p. [48] Arts. 455, 456 c. p.
[49] 46 law 40 of 1907. [50] Art. 453 c. p. [51] Art. 473 c. p.
[52] Art. 1288 com. c.
[53] Art. 61, law of March 20, 1875. [54] Art. 1166 c. p.
[55] Art. 591 c. p.

are acknowledged before a judge, or are considered as acknowledged after citation of the debtor and default in appearance.

Execution of judgment.

As soon as judgment has become final, the execution thereof must be proceeded with at the instance of the party, by the judge or court which took cognizance of the action in first instance. If the judgment orders the payment of a definite and net sum, an attachment against the property of the judgment debtor is issued, the property attached is appraised and sold, and payment is made to the plaintiff. If the judgment orders something to be done and the party adjudged to do it fails to perform within the period fixed, it must be done at his expense, and, if it be an act which cannot be performed by another, it is understood that he prefers to pay damages. When real estate is to be delivered to the successful litigant he must be put in immediate possession thereof. The same is true of personal property, if it can be found; otherwise the judgment debtor must pay damages.

When the judgment orders the payment of damages without specifying the amount thereof, whether the basis therefor be established in the judgment or not, the judgment creditor must present a statement of the amount calculated according to the basis established, and a decision is made thereon after a brief hearing of the parties; the creditor's calculation is approved, if according to the judgment and in so far as the debtor may not have shown it to be incorrect. When the property is sold and an appeal as to the amount fixed by the judge has been taken by the judgment debtor, the creditor is given the amount agreed upon by the debtor, together with the costs, and the difference between said amount and that fixed by the judge is deposited in court until the appeal is decided, unless the creditor furnishes proper security, in which case the difference is also given to the creditor.[56]

[56] For judgments rendered by foreign courts, see chapter on Conflict of Laws.

Settlement by arbitrators and amicable compounders (*amigables componedores*)

Sometimes the parties agree to have their differences composed by private persons in whose good judgment and fairness they trust; and the law seeks to encourage this method of settling controversies which may better satisfy the parties than the decision of a judge. The law recognizes two kinds of arbitrators: those properly so called and amicable compounders. The first give their decisions strictly according to law, whereas the amicable compounders are bound by no principle of law in reaching their conclusions and render their decisions according to equity (*a verdad sabida y buena fe guardada*).

There must always be an odd number of arbitrators.

The *compromis* or submission must necessarily be contained in a public instrument, and is void if prepared in any other manner. The agreement of *compromis* must contain, under penalty of nullity: (*a*) the names, occupation and domicil of the litigating parties; (*b*) the names, occupation and domicil of the arbitrators; (*c*) the question which must be submitted to them, with its attendant circumstances; (*d*) the period during which they must render a decision; (*e*) the stipulation that a fine shall be paid by the party who fails to comply with such parts of the agreement as are indispensable to the execution of the *compromis;* (*f*) the stipulation that another fine shall be paid by any party who may appeal from the decision, to the party who accepts it,

Spain, 919 to 350 c. p.; Argentina, 535 to 557 c. p.; Bolivia, 395 to 404, 407 c. p.; and decree of December 19, 1863, arts. 16 to 18; Brazil, 476 to 604, *ib.;* Chile, 236 to 238 c. p.; Colombia, 868 to 875 c. p. and arts. 113, 114, 231, law No. 105 of 1890; Costa Rica, 1023 to 1063 c. p.; Ecuador 499 to 552 c. p.; Guatemala, 1523 to 1563 c. p.; Honduras, 233 to 234 c. p.; Mexico, 736 to 768 c. p.; Nicaragua, 400 to 412 c. p.; Panama, 568 to 580 c. p.; Peru, 1145 to 1154 c. p.; San Salvador, 433 to 453 c. p.; Santo Domingo, 517 to 805 c. p.; Uruguay, 489 to 510 c. p.; Venezuela, 435 to 446 c. p.

A judgment determining issues not raised by the parties is incongruous. Spain, Trib. Sup., October 28, 1889; *Gaceta* of January 8, 1890.

When a question is raised with regard to the interpretation of a judgment at the time of its execution, the decision rendered, when it becomes final, is an integral part thereof. Spain, Trib. Sup., February 5, 1887; *Gaceta* of April 24, 1887.

before such appeal can be heard; (*g*) the designation of the place where the proceedings for arbitration must be held; (*h*) the date on which the *compromis* was entered into.

The acceptance by the arbitrator or arbitrators of his or their appointment gives the right to each of the parties to compel them to comply with their duties, under penalty of damages.

Arbitrators may be challenged for the same causes as judges provided the causes arise after the *compromis*, or were unknown to the parties at the time they entered into it.

The *compromis* becomes void: (*a*) by unanimous consent of those who entered into it; (*b*) by the expiration of the period fixed in the *compromis* and of any extension thereof, without a decision having been rendered. The extension of the period for rendering a decision must be affected by unanimous consent and in a public instrument.

The arbitration proceedings must be held before a clerk of a court of first instance selected by the arbitrators, unless the interested parties designate a special clerk by common consent.

The respective contentions and documents in support must be presented to the arbitrators with legal formalities, and the proceeding must be carried on in accordance with the provisions of the law unless otherwise provided by the *compromis*.

The judgment of the arbitrators must also be in accordance with the law, the contentions and the evidence; points on which they disagree must be submitted to the judge of first instance of the judicial district, and his decision thereon shall be deemed the judgment, whether or not it agrees with the vote of any of the arbitrators. The judgment may be appealed from for review and stay of proceedings to the court of second instance; and appeals are prosecuted in conformity with the rules established for appeals from final judgments in actions of greater importance (*mayor cuantía*).

If the arbitrators have the character of amicable compounders the provisions of the law are substantially the same except that the duties of the compounders are less subject

to formalities; they must, however, receive the documents presented by the parties, hear them and render judgment according to their opinion of the merits. The judgment must be rendered before a notary who must give notice thereof to the parties. From the judgment rendered by the compounder there is no other recourse than an appeal for annulment of judgment (*casación*) in the cases and within the period established by the law for regular actions. If the appeal for annulment of judgment is not allowed, or is not interposed in time, the judgment whether rendered by arbitrators or amiable compounders, becomes final, and must be executed by the judge of first instance of the place in which the judgment was rendered.[57]

NON-CONTENTIOUS JURISDICTION

General rules.

All proceedings in which the intervention of a court or judge is requested or is necessary, without any actual litigation, or in which no issue is raised between known and determined parties, are considered acts of voluntary jurisdiction.

If the person instituting the proceedings, or any person having a legitimate interest therein, should request that some other person be heard, or if the judge should consider it proper, a hearing is granted, and for that purpose the record is left for examination in the clerk's office for a short period, according to the circumstances. All documents which may be presented and evidence offered are admitted without request or any other formality.

The moment any person raises an issue of fact or law the proceedings in the form of voluntary jurisdiction are closed and become subject to the formalities of contentious jurisdiction.

The judge in acts of non-contentious jurisdiction may modify his decrees or decisions without the formalities required for contentious jurisdiction. Rulings which have

[57] Spain, 789 to 838 c. p.

the force of final judgments and against which no remedy was interposed, are not included in this rule.

The party who instituted the proceedings may appeal both for a review and a stay of proceedings; the other parties are admitted to appeal for review only. An appeal for annulment of judgment is also proper against the decisions of courts of second instance.

Acts of non-contentious jurisdiction in commercial matters.

Many acts of a merely civil character are subject to judicial intervention, either because the law so requires, or because the interested person demands it. The adoption of a person as a child, the appointment of guardians (*tutores*) and curators (*curadores*) for minors or incapacitated persons; substitution for the consent of parents, grandparents or guardians for minors to contract marriage; the recording in a public instrument of a verbal will or codicil; the opening of a sealed will and the filing in protocols of a testamentary memorandum; the investiture of power in minors or married women to appear in court; the proceedings to perpetuate testimony, when no determined person can be prejudiced; the alienation of property of minors and incapacitated persons and the settlement of their rights out of court; the administration of the property of absent persons whose whereabouts are unknown; voluntary judicial public sales; the judicial delivery of possession of real estate in which summary proceedings to acquire possession do not lie, and the survey and demarcation of lands are some of the cases which pertain to non-contentious jurisdiction in civil matters.

There are also acts in commercial matters in which a judge is requested to intervene. In reference to these acts not only the judges of first instance, and where there is none, the municipal judges of the locality, but even the consuls of the country where certain rights are to be enforced, are competent.

The necessity of making a deposit of commercial securities or goods is a case of frequent occurrence. The contract of

purchase and sale and the contract of transportation often require such deposit; in such cases the object of the proceedings, on the part of the judge, is to have a complete and faithful description of the things deposited, and to be sure of the reliability of the bailee. Should it become necessary for the judge to order the sale of some of the deposited merchandise, in order to meet the expenses of the deposit, the sale must be made at public auction, after an appraisal by an expert appointed by the owner of the merchandise, if present, or otherwise by the representative of the Department of Justice, complying with the other legal requisites prescribed for sales of this kind.

With regard to bills of exchange it has been observed that when a bill is lost, or is in possession of a person not a holder in due course, the interested party can apply to the judge of proper jurisdiction for an order to deposit the amount thereof. The functions of the judge are confined to insuring the appointment of a proper depositary and giving the petitioner a period, according to the circumstances, within which he shall present a duplicate of the bill of exchange, or request in a proper action the definite attachment of the value thereof, with the warning that if the action is not instituted within that period the temporary deposit will be vacated.

Judicial intervention in commercial matters is also requested and granted in connection with the right of co-partners to appoint a co-manager in case the person in charge of the management is making an improper use of his powers; or when the co-partners are refused the right to inspect the books of the partnership; or when, according to the provisions of law or the stipulations of the contract of partnership or articles of organization of a stock corporation (*sociedad anônima*), it is necessary to appoint an arbitrator; or when, in connection with a contract of insurance, the appointment of an arbitrator or expert is required; and finally when, in overland or maritime transportation, merchandise is to be disposed of, or it becomes necessary to state the condition thereof, or the damage suffered by it or the cause thereof.

In all these and similar cases, the proceedings are carried on in a way designed to meet the necessities and in accordance with general rules, leaving at the discretion of the judge the use of his powers in order to safeguard the interests of all persons concerned.

The judge, in cases of non-contentious jurisdiction, exercises a function differing from the usual functions of a court, because, instead of providing for redress, he aims to prevent a wrong or judicially authenticate a legal fact or transaction.

CHAPTER XLIII

CONFLICT OF LAWS IN LATIN-AMERICAN COUNTRIES[1]

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The sources of private international law are: the treaties between nations which create a positive rule binding the nations parties thereto; the rules established in the statutes of every country, which present the local law for the solution of such international conflicts; finally, science, which studies the general principles of law and seeks to create a common ideal for the solution of those conflicts.

I shall confine myself to the rules established in the statutes of the Latin-American countries, and to present the

conclusions arrived at by the South American Congress held in Montevideo in 1888–1889.

The reader must not expect that all the points that may give rise to international conflicts are covered in this study. Perhaps his impression will be that the article is fragmentary, but this deficiency is due to the fact that the statutes do not always cover all the points. In some countries there are rules which are not found in others, and vice versa. He must not be disappointed, therefore, in finding that after the statement of certain rules, we mention only some of the codes of the Latin-American countries, omitting others which do not refer, so far as we have been able to find, to that particular matter. On the other hand, some rules referring to particular contracts or acts are not discussed here because they find their place in the corresponding chapter of this book, whereas in the present article I usually refer to the general principles.

General remarks.

All the rules which are herein set forth are subject to a superior principle, namely, that prohibitory laws concerning persons, their acts or property, and those which relate to public order or good morals, are not overruled by virtue of laws enacted or judgments rendered, or by regulations or agreements made in a foreign country.

The party who invokes rights created by a foreign law has to prove the existence and the applicability of said law to the case.[2]

As a consequence of the principle that contracts and acts are subject to the forms established by the law of the place where they are executed the means of evidence are also governed by that law. Article 12 of the civil code of Brazil expressly so provides.

[2] Argentina, 13 c. c.; Mexico, 19 c. c.—A decision rendered in this respect by the court of Medellin, in Colombia, on Sept. 5, 1906, is very important, as it establishes that when the national law provides for the application of foreign laws, the judge must *ex officio* inquire into the provisions of said laws, if the parties have not done so. 2 Garavito A. Fernando, *Jurisp. de los Tribunales de Colombia*, 725.

I. STATUS AND CAPACITY OF PERSONS

A. In General

System of Spain. Laws relating to family rights and obligations, or to the status, condition and legal capacity of persons, obligate citizens even though they reside in a foreign country.[3]

System of Brazil. The same rule is established by article 8 of the civil code of Brazil; but article 9 providesth at the law of the domicil is subsidiarily applied—

1. When a person has no nationality.
2. When dual citizenship is attributed to a person, namely, that of his birth, and that of his parents, the Brazilian law governs, provided Brazilian citizenship be one of the two ascribed to the person.[4] Decree No. 737 of Nov. 25, 1850, provides that laws and usages of foreign countries are applicable to questions relating to civil status and capacity of foreigners to contract obligations when such foreigner is not matriculated according to the commercial code. Contracts, however, are not void for lack of capacity in a foreigner when it is proved that they are advantageous to him.

System of Chile. The national law governs the status or legal capacity of a native, with respect to acts which must produce their effect in the country, and to the rights and obligations created through family relations

[3] Spain, 9 c. c. See *In re Butler y Harrap Decision* (Dec. 14, 1901, No. 65, Tribunal Supremo, Cuba). Notwithstanding the fact that art. 10 of the civil code declares the rights of foreigners in Cuba, neither that provision nor any other gives jurisdiction to the Cuban Tribunals to pass upon them. 9 *Jurisprudencia del Tribunal Superior en materia civil* (Havana, 1908) 1019, See also decisions of the Tribunal Superior, Spain, Dec. 11, 1893, and Dec. 18. 1894.

See Haiti, 7 c. c.; Honduras, 13 c. c.; Santo Domingo, 3 c. c.; and Venezuela, 7 c. c.

[4] Pascuali *v.* Bicudo (Sept. 25, 1914, Court of Appeals of S. Paulo, Brazil) 8 *Rev. del Sup. Trib. Rio de Janeiro* (1915) pt. 2, p. 40.

only in matters referring to a native wife and children or relative.[5]

System of Mexico. According to article 12 of the civil code of the Federal District concerning the status and capacity of persons, the Mexican law obligates Mexicans with respect to legal acts or contracts which must be performed in Mexico, whatever the law of the country where the act or contract is executed.[6]

System of Costa Rica. The civil code of Costa Rica embodies the same provisions as article 12 of Mexico, but adds that the Costa Rican law also binds aliens respecting acts which take place or contracts which are executed and must be performed in Costa Rica.[7]

The codes of the above-mentioned countries do not all provide for acts done by their citizens abroad, which must produce effect without their territory; this is a matter which has been left for the law of the country in which the act must take place, or to the agreement of the parties, or to the rules of international law, in default of both.

System of Argentina. The civil code of Argentina adopts an entirely different principle; instead of considering the law of the nationality of a person, in order to establish his status and legal capacity, it considers the law of the country in which a person is domiciled, independently of his nationality. This system is contained in the following articles:

Art. 6: "The capacity or incapacity of persons, domiciled in the territory of the republic, whether nationals or foreigners, is governed by the laws of this code, even though acts performed or property situated in a foreign country are involved."

Art. 7: "The capacity or incapacity of persons domiciled outside the territory of the republic is

[5] Chile, 15 c. c.; Colombia, 19 c. c.; Ecuador, 14 c. c.; Nicaragua, 15 c. c.; San Salvador, 15 c. c.; and Uruguay, 4 c. c.

[6] Dorsay *v.* Diaz Barriga (Apr. 12, 1911, Segunda Sala del Supremo Tribunal del Dist. Fed.), 23 *Diario de Jurisprudencia* (Mexico, 1911).

[7] 40 c. c.

governed by the laws of their respective domicils, even though acts performed or property situated in the republic are involved."

Art. 138: "Whoever moves his domicil from a foreign country to the territory of the republic, and is of legal age or has been emancipated according to the rules established in this code, shall be so considered even though he is a minor or not emancipated according to the laws of his former domicil."

B. Citizenship and Domicil of Married Women

With respect to the citizenship of a married woman, or her domicil, as the case may be, the Latin-American law is as divergent as it is in the matter of general status of persons. Therefore, we have to subdivide this point, in accordance with the different systems which prevail.

System of Spain. A married woman follows the status and citizenship of her husband in Spain and certain other countries.[8]

System of Mexico. The principle that a married woman follows the status and citizenship of her husband is true also of Mexico,[9] Costa Rica [10] and Venezuela; [11-12] but matrimony does not denationalize a native woman when the law of the husband's home does not admit her to his citizenship. In the United States, under the act of March 2, 1907, an American woman marrying a foreigner is denationalized whether or not by the law of her husband's country she acquires his nationality.

System of Ecuador. In Ecuador, a foreign woman married to an Ecuadorian acquires the citizenship of her husband, if she establishes a domicil in his country; and an Ecuadorian woman married in Ecuador

[8] Spain, 22 c. c.; Bolivia, 8 c. c.; Colombia, art. 3, law of July 4, 1823; Guatemala, 56 c. c.; Haiti, 5 pol. c. (pol. c. is the abbreviation for political constitution); Honduras, 48 c. c.; Peru, 41 c. c.; and Santo Domingo, 12 and 19 c. c.

[9] Art. 2, par. IV, law of May 28, 1886.

[10] Arts. 3 and 4, law of Dec. 21, 1886.

[11-12] 18 c. c.

to a foreigner does not lose her nationality as long as she remains domiciled in Ecuador.[13]

The laws of other Latin-American countries are silent upon this point, and since in principle it is necessary to have the consent of a person for acquiring, as well as for losing, his nationality, if the law does not provide otherwise, it seems to follow that in these countries marriage does not denationalize a native woman.[14]

System of Argentina. It has been noted that in Argentina the principle of domicil has replaced that of nationality, and the law establishes in regard to the domicil the same rule that Spain has established in regard to the citizenship of married women. The Argentine civil code [15] provides accordingly that a married woman who is separated by competent authority from her husband preserves the domicil of the latter unless she has created another for herself. The widow retains the domicil which her husband had as long as she does not establish herself elsewhere.[16]

II. REAL ESTATE—GENERAL PRINCIPLE

Real property is always governed by the law of the country in which it is situated.[17]

Spain, however, makes an exception to this rule in favor of legal and testamentary successions, as well as in regard to the order of succession, as to the amount of the inherited rights and to the intrinsic validity of the testamentary provisions, which are governed by the nationality of the dece-

[13] Arts. 13 and 14, law of Aug. 28, 1886.

[14] 1 F. Laurent, *Principes de Droit Civil Français*, No. 349.

[15] Art. 90, sec. IX.

[16] A married woman during the existence of marriage takes the domicil and law of her husband: Luzato *v.* Arquato (Nov. 14, 1912, Camara Federal de Apelación) *Jurisprudencia de los Tribunales Nacionales* (Nov., 1912), 93.

[17] Spain, 10 c. c.; Argentina, 10 c. c.; Bolivia, 3 c. c.; Brazil, 10 c. c.; Chile, 16 c. c.; Colombia, 20 c. c.; Costa Rica, 4 c. c.; Ecuador, 15 c. c.; Guatemala, 5 c . c.; Haiti, 6 c. c.; Honduras, 14 c. c.; Mexico, 13 c. c.; Nicaragua, 16 c. c.; Peru, 5 c. c.; San Salvador, 16 c. c.; Santo Domingo, 3 c. c.; Uruguay, 5 c. c.; and Venezuela, 8 c. c.

dent, whatever the nature of the property and the country in which it is located.[18]

The same exception is found in the civil code of Brazil,[19] but it is limited to cases in which the decedent was not married to a Brazilian woman, or has not Brazilian children, because in these cases the succession is subject to the laws of Brazil.

On the other hand, in Haiti the law is so strict that not only does it provide that real property is governed by the *lex rei sitæ*, but also that foreigners cannot acquire or possess it; thus when a Haitian gives up his citizenship he must part with any real property he may have in Haiti.[20]

III. PERSONAL PROPERTY

Traditional system. The tradition in the matter of personal property is that it is governed by the law of its owner. An ancient legal proverb states that *movables adhere to the bones*—meaning that movables are considered a part of the person himself.

Movables were formerly considered of no importance; only real property conveyed honor and consideration to its possessor. The law of each country, therefore, showed little interest in chattels, leaving them to be governed by the law of the person whether citizen or foreigner. An economic revolution later took place, and personal property is now as valuable as real estate; but the law reflects the tradition in Spain, where the civil code [21] provides that personal property is subject to the law of the owner.

In countries such as France, where no provision is found, a doubt may arise and opinion may be divided, but the weight of authority is for the application of the traditional principle.[22]

[18] 10 c. c. [19] Art. 14.

[20] 6 pol. c. For further treatment of the capacity of foreigners to acquire real estate, see my treatise on *Latin-American Commercial Law*, ch. 3.

[21] Art. 10.

[22] Merlin, *Répertoire*, word "Loi," pr. 6, No. 3; F. Laurent, *loc cit.*, vol. 1, no. 120.

Argentine system. In reference to personal property, a distinction is made in Argentina,[23] Brazil [24] and Uruguay; [25] when it has a permanent *situs*, it is governed by the law of the place where it is located; but personal property carried by its owner, or intended for his personal use, whether at his domicil or abroad, as well as personal property to be transported and sold, is governed by the law of the domicil of its owner.

System of Chile. In Chile,[26] Colombia,[27] Costa Rica,[28] Ecuador,[29] Honduras,[30] Nicaragua [31] and Venezuela,[32] personal property as well as real property is governed by the law of the place where it is located.

IV. FORMS OF CONTRACTS AND LEGAL ACTS

The legal formal requisites of contracts, wills and other instruments are governed by the law of the country in which they are executed.[33]

In Costa Rica,[34] Guatemala,[35] Mexico,[36] Panama,[37] and

[23] 11 c. c. [24] 10 c. c. [25] 5 c. c.
[26] 16 c. c. [27] 20 c. c. [28] 4 c. c.
[29] 15 c. c. [30] 14 c. c. [31] 16 c. c.
[32] 8 c. c.

[33] Spain, 11 c. c.; Anglada de Serres *v.* Giro y Manzano (Dec. 8, 1902, no. 54, Tribunal Supremo, Cuba). A last will made by a foreigner in Cuba must fulfill all the formalities of the Cuban laws, no matter what the provisions of the law of the foreigner's country. 14 *Jurisp. del Trib. Sup. en mat. civil*, 664.

Argentina, 12 c. c.; Bolivia, 36 c. c.; Brazil, 11 c. c.; Chile, 17 c. c.; Colombia, 21 c. c.; Ecuador, 16 c. c.; Haiti (Mar. 23, 1829, court of cassation); Honduras, 15 c. c.; Nicaragua, 17 c. c.; and San Salvador, 17 c. c.

[34] 8 c. c.

[35] 13 c. c.

[36] 14 c. c. Dorsay *v.* Diaz Barriga (Apr. 12, 1911, Segunda Sala del Trib. Sup. del Dist. Fed., Mexico). A foreign document written in a foreign language and presented without translation cannot be accepted. *Diario de Jurisp.* (1911).

Vega Perez *v.* Agente del Ministerio Público and Juez del Registro civil (June 26, 1911, Segunda Sala del Trib. Sup. del Dist. Fed., Mexico). A religious marriage entered into in a foreign country in which the same is valid, produces all its effects in Mexico. Documents proceeding from a foreign country when duly authenticated constitute full evidence. *Ibid.* 1911 Convreur y Compañía *v.* Lack (Oct. 30, 1909) 19 *Ibid.* 729.

[37] 7 c. c.

Venezuela,[38] it is not compulsory to draw instruments according to the law of the place in which they are executed; the party may choose between the law of the country in which the instrument is made and that of the country in which it must have effect.

The codes of Spain [39] and Bolivia [40] provide that when the aforesaid instruments are to be authenticated by diplomatic or consular officials of those countries abroad, the formalities required by the respective law of Spain or Bolivia must be observed.

Colombia,[41] Costa Rica,[42] Ecuador,[43] Honduras,[44] Nicaragua,[45] San Salvador,[46] and Venezuela [47] have another limitation upon the above rule concerning the formal requisites of instruments, which provides that in case the codes or laws of said countries require the public instrument as evidence in matters within the jurisdiction of national courts, private instruments are invalid no matter what force they have in the country in which they were executed.

Argentina,[48] Nicaragua [49] and San Salvador [50] also limit the general principle by providing that contracts concluded in a foreign country conveying rights in real estate situated in the Republic have the same force as those made within the state, provided they are executed in a public instrument and are presented legalized. Where the title of real property is sought to be conveyed to them, such conveyance is without effect unless the contract is protocolized by a decree of a judge of competent jurisdiction.

In treating below of wills we shall consider certain provisions referring to legal forms.

V. EFFECTS OF CONTRACTS

Argentina [51] provides that contracts entered into in the republic or out of it, to be performed within its territory,

[38] 9 c. c.
[39] 11 c. c.
[40] 37 c. c.
[41] 22 c. c.
[42] 8 c. c.
[43] 17 c. c.
[44] 16 c. c.
[45] 18 c. c.
[46] 18 c. c.
[47] 9 c. c.
[48] 1245 c. c.
[49] 16 c. c.
[50] 16 c. c.
[51] 1239 c. c.

are governed as to their validity, nature and obligation by laws of the republic whether the contracting parties be nationals or foreigners. Contracts entered into in the republic to be performed outside of it are governed as to their validity, nature and obligation by the laws and usages of the country in which they are to be performed, whether the contracting parties be nationals or foreigners.

In Brazil [52] the obligations are governed as to the substance and effects they produce by the law of the place where they were contracted. But the law of Brazil governs:

1. Contracts entered into a foreign country which must be performed in Brazil.
2. Obligations contracted between Brazilians in foreign countries.
3. Acts relative to real estate situated in Brazil.
4. Acts relative to the Brazilian mortgage system.

In Chile,[53] Colombia,[54] Guatemala,[55] Honduras,[56] Mexico,[57] Peru [58] and San Salvador,[59] the effects of contracts made in a foreign country, to be performed in the aforesaid countries, are governed by the law of those respective countries.

Peru [60] provides that an obligation contracted between foreigners cannot be enforced in that country unless they have submitted themselves to the jurisdiction of the Peruvian courts.

The Costa Rican civil code provides that [61]

> "In interpreting a contract and in determining its immediate and remote effects, the law of the place where it was made shall be taken into consideration; but if the contracting parties have the same citizenship their national law must prevail."

[52] 13 c. c. [53] 16 c. c. [54] 20 c. c.
[55] 14 and 15 c. c. [56] 14 c. c.
[57] 16 c. c. See Dorsay *v.* Diaz Barriga (Apr. 12, 1911, Segunda Sala del Dist. Fed., Mexico). If the obligations created in a foreign country are to be fulfilled in Mexico they must be governed by the Mexican laws: Cutelli de Contri *v.* Contri (Feb. 1, 1909, Segunda Sala del Trib. Sup. del Dist. Fed., Mexico) 23 *Diario de Jurisp.* (1900) 154. Peru, 1156, 1157 c. p.; Uruguay, 512, 513 c. p.; and Venezuela, 722 c. p.
[58] 40 c. c. [59] 16 c. c. [60] 43 c. c.
[61] 7 c. c.

VI. WILLS

We have already seen that in most of the Latin-American countries the legal formal requisites of wills are governed by the law of the country in which they are executed; but this general rule suffers some exceptions which we are going to review.

In Argentina,[62] Chile,[63] Colombia,[64] Honduras,[65] San Salvador,[66] Nicaragua,[67] Panama [68] and Uruguay,[69] it is provided that a *written will* made by a citizen in a foreign country must be executed by a minister plenipotentiary of his government, a chargé d'affaires or a consul and two witnesses domiciled in the place where the will is made, and bearing the seal of the legation or consulate. When it is not executed before a head of legation, it must be viséed by the latter, if there is a head of legation, at the end thereof in an open will, and on the wrapper in a sealed one. An open will must always be *rubricated* by the head of legation, at the beginning and end of each page, or by the consul if there is no legation. If there be neither consulate nor legation of his country, these formalities must be fulfilled by the minister or consul of a friendly nation. The head of legation or the consul must forward a copy of the open will, or of the inscription on the wrapper of the sealed one, to the minister of foreign affairs of the country that he represents, and the minister, after authenticating the signature of the head of legation or consul, must transmit it to the judge of the last domicil of the deceased, in order that the judge may cause it to be incorporated in the protocols of the notary public of the same domicil. When the domicil of the testator in the country is unknown, the minister of foreign relations must forward the will to the judge of first instance of the capital for incorporation in the protocol of said notary as the judge may determine.

[62] 3670–3672 c. c.
[63] 1027–1029 c. c.
[64] 1053, 1084, 1086 c. c.
[65] 1011, 1012, 1015 c. c.
[66] 1058–1060 c. c.
[67] 127–129 c. c.
[68] 767–769 c. c.
[69] 828, 829 c. c.

In Argentina, Chile, Colombia and Honduras, the will of a person who is outside of the respective country produces effect within it only if made with the formalities prescribed by the law of the place in which he resides, or according to those observed in the nation to which he belongs, or according to those which the national law prescribes.

According to the code of Brazil [70] legal or testamentary successions, the order of succeeding, the rights of the heirs and the intrinsic validity of a will are governed by the law of the country of the deceased, whatever the nature of the property and the country in which he is, except as otherwise provided by the Brazilian law in regard to vacant inheritances. If the testator was married to a Brazilian woman or if he left Brazilian children the rights of inheritance are governed by Brazilian law.

The Brazilian consular agents may serve as officers in the execution and approval of wills made by Brazilians in foreign countries, of serving the prescriptions of the Brazilian code.

The Chilean code [71] and the Colombian code [72] provide in the matter of inheritances that foreigners are called to the legal succession in Chile or Colombia, in the same manner and according to the same rules as the citizens of those countries. In the legal succession of a foreigner who dies within or without the territory of those republics, citizens must have as hereditary or conjugal portion or as alimony the same rights which belong to them according to the Chilean and Colombia law in the legal succession of a Chilean or a Colombian. Citizens interested in a succession of that kind may ask for the application of property belonging to the deceased, within the territory of the country, up to the amount that may belong to them in the succession of the foreigner. The same rule is applied to the case of the succession of a citizen of those countries who leaves an estate in a foreign country.

In Guatemala the civil code [73] provides that in regard to

[70] 14 c. c. [71] 997, 998 c. c. [72] 1052, 1053 c. c.
[73] 13–15 c. c.

legal formalities and wills, the laws of the countries in which they are executed must prevail. Natives or foreigners residing outside the territory of the republic may, however, comply with the legal formalities provided for by the law of Guatemala in cases in which the will must be complied with in that republic.

The rights and obligations arising from wills executed in a foreign country by citizens of Guatemala are governed by the law of Guatemala in all that must take effect in the republic.

In regard to the essential requisites of a will, the testator may choose between his national law and that of Guatemala, when the testament must be executed in the territory of the latter and the testament refers to personal property. As to real estate situated in Guatemala the laws of the republic must be observed.

According to the code of Haiti [74] and the code of Santo Domingo,[75] citizens of those republics who are in a foreign country may draw their wills in a private document, written, dated and signed in their own handwriting, or in a public instrument with the formalities established in the country in which they are.

Testaments made in a foreign country cannot be executed so far as they refer to property situated in those republics, except after being filed in the registry at the domicil of the testator, or if that be unknown, in the registry at his last known domicil. In case the testament contains provisions relating to real property situated in those republics, it must also be filed in the office of the place in which it is situated.

The code of Mexico [76] provides that the Mexican law governs real property whether owned by citizens or foreigners, and that foreigners have no capacity to inherit either by will or by legal succession when, according to the laws of their countries, Mexicans are not permitted to receive legal or testamentary inheritances.[77]

The code of Peru [78] prescribes that foreigners residing

[74] 805, 806 c. c. [75] 999, 1000 c. c. [76] 13 c. c.
[77] 3300 c. c. [78] 475 c. c.

in that country can devise to other foreigners the real property that they possess in their own country, or bequeath personal property, jewelry, money or merchandise which they have in the territory of Peru, according to their national law. But in disposing of the real property located in Peru, they are subject to the laws of Peru.

VII. FOREIGN JUDGMENTS

Procedure

It is a general principle that final judgments rendered in foreign countries have in the territory of a nation that force provided for in the respective treaties with those countries.[79]

Some nations, accepting the principle of reciprocity as a basis, prescribe that when there are no special treaties with a foreign nation in which the judgment was rendered, the judgment shall have the same force that is given in that nation to final judgments of the country in which it is to be enforced. If it is rendered in a country under whose laws judgments rendered in the other nation are not executed, the judgment is not enforceable in the latter.[80]

[79] Spain, 951 c. c.; Argentina, 558 c. p.; Bolivia, 7 c. c.; Chile, 239 c. p.; Colombia, 876 c. p.; Cuba and Porto Rico, 950 c. p.; Ecuador, 235 c. p.; Guatemala, 1563 c. p.; Honduras, 235 c. p.; Mexico, 780 c. p.; Peru, 1155 c. p.; San Salvador, 450 c. p.; and Uruguay, 511 c. p.

[80] Spain, 952, 953 c. p. A decision by the courts of Argentina, *In re* Bueno *v.* Royal Insurance Co. (Aug. 5, 1912) stated that judgments of foreign courts have no extraterritorial effect. *Rev. de Leg. y Jurip. de la Rep. Argentina* (1914) 568.

Chile, 240, 241 c. p.; Colombia, 876, 877 c. p. Judgments of foreign courts shall be without force in Colombia, unless a treaty otherwise provides. See Medellin (Aug. 2, 1906) 378; Garavito, *Jurisp. de los Tribs. de Colombia; In re* Echeverria (Jan. 11, 1900, No. 5, Tribunal Superior, Cuba). See also 4 *Jurisp. del Trib. Sup. en materia civil* (1908) 10, and the case of *In re* Anglada de Serres *v.* Giro y Manzano (No. 54).

In this matter of proving foreign laws in Colombia, the provision of article 13, law no. 124, 1890, is also important. It reads as follows:

"Powers of attorney, acts referring to the civil status of persons and other documents executed in foreign countries, which the interested parties may produce before the courts and tribunals of Colombia, in order to prove their claims, shall be considered valid if they have been authenticated according to the Colombia laws. After they have been so authenticated, they are presumed to have been executed in conformity with the law of the place of their origin, unless the adverse party presents proof to the contrary."

The following conditions must be satisfied before a foreign judgment may be enforced:

1. That it is final, and that it was rendered in a personal action.

2. That it is not a judgment by default.

3. That the obligation for the enforcement of which the action was instituted was lawful according to the laws of the country in which the request is made for its execution.

4. That the letter rogatory possesses the formal requisites which are necessary for its validity as evidence in the country in which it was issued and in the country in which its enforcement is requested.[81]

Chile prescribes that when a foreign judgment is to be enforced there by reason of a special treaty or through reciprocity, the judgment shall have in the territory of Chile the same force which the decisions of Chilean courts have in the country in which the judgment was rendered, provided it has the following requisites:

1. That it does not conflict with the laws of the republic.

2. That it does not encroach upon the national jurisdiction.

[81] Spain, 954 c. p.; Argentina, 559 c. p.; Colombia, 878 c. p.; Costa Rica, 1067 c. p.; Cuba and Porto Rico, 953 c. p.; Ecuador, 500 c. p.; Guatemala, 1566 c. p.; Honduras, 238 c. p.; Mexico, 785 c. p. See Cutelli de Contri *v.* Contri, note 60 *supra*. In order to execute a foreign judgment in Mexico it is necessary that the judgment has been rendered in a personal action.

The action of divorce is not a personal action: *Diario Jurisp. loc. cit.* There is no treaty between Mexico and the United States referring to the enforcement of judicial decisions rendered in the courts of any of the two nations in the territory of the other. In the absence of such treaty it is necessary for the party who tries to enforce in Mexico a decision of the courts of the United States, to prove that in the latter country the Mexican decisions are enforced. Even in the case in which such proof was produced a decision rendered in the United States is not enforceable in Mexico when it is rendered in a real acción, because real property being a part of the Mexican soil can only be governed by national laws and courts. Mexico Suprema Corte de Justicia de la Nación *Amparo*, Wehner *v.* Judge of First Instance of Santiago Txcuintta. April 7, 1907; *Diario de Jurisp.*, v. 12 p. 373. San Salvador, 451 c. p.; Uruguay, 514 c. p.

3. That it is not a judgment by default.

4. That it has been declared enforceable by the laws of the country in which it was rendered.

In Peru the code of civil procedure prescribes, in matter of foreign judgment or decrees, as follows:

Art. 1159: "In order that a foreign judgment be declared enforceable by the superior courts of the country it is required: that it shall not pass upon matters pertaining to the jurisdiction of the Peruvian courts, as set forth in the following article; that it is not contrary to good customs or to prohibitory laws of the republic; that it has the character of a final and enforceable judgment in accordance with the laws of the country in which the action was brought; and that the judgment debtor be served with process in the manner prescribed by the laws of the place."

Art. 1160: "Peruvian courts have exclusive jurisdiction in cases relating to the following matters:

"1. Real estate located in the territory of the republic.

"2. Vessels under the Peruvian flag.

"3. Civil actions arising out of crimes, quasi-crimes, or negligence which occurred in Peru.

"4. Inheritances of Peruvians or of foreigners domiciled in Peru, whenever citizens of or foreigners residing in Peru or a Peruvian charitable institution or the state of Peru have an interest in the estate." [82]

[82] In this connection, Colombia has an important provision relating to the manner in which the legality of a judgment must be proved, which is often a difficult matter. Art. 879 c. p. reads:

"The force and legality of a judgment rendered in a foreign country are proved by means of a certificate from the diplomatic or consular agent of Colombia or of a friendly nation residing in the aforesaid country. This certificate must state:

"1. That the judgment was rendered in accordance with the laws of that country.

"2. That according to said laws, the judgment debtor has exhausted his legal remedies.

"Should there be no diplomatic or consular agent of Colombia or of any other friendly nation in the country in which the judgment was rendered, the

VIII. INTERNATIONAL CONGRESS OF MONTEVIDEO

One of the most notable events in the history of Latin-American private international law was the meeting of the South American International Congress in Montevideo during the years 1888 and 1889. At that Congress the following countries were represented: Argentina, Bolivia, Brazil, Chile, Paraguay, Peru and Uruguay.

Eight treaties were drafted on the following matters: International civil law, legal procedure, copyright, international commercial law, international criminal law, the liberal professions, patents and trade-marks, and an additional protocol.[83]

Brazil and Chile did not accept those treaties. The main reason for their refusal was that in their law they follow the rule derived from the principle of nationality for solving the conflicts of law, whereas the treaties accept the principle of domicil.

Dr. Andrade Figueiras, representative of Brazil, in opposing the acceptance of the Montevideo treaties on the ground of their acceptance of the principle of domicil instead of that of nationality, summarized his objection thus:

> "The law of the domicil for governing the relations whether of citizens or foreigners, means a retrogression in the evolutionary progress of our science, and is almost the derogation of the principles which constitute the basis of private international law.
>
> "The economic interest of the new countries in itself makes the adoption of the law of nationality advisable for the solution of questions relating to the status and civil capacity of foreigners, and for their succession."

The same representative considered the principle of domicil, far from protecting new countries, as an obstacle to the attraction of capital and to the settlement of immigrants;

certificate referred to in this article may be obtained from the secretary of state of said country, through the Minister of Foreign Affiairs of Colombia."

[83] These treaties were ratified by the Argentine Congress on December 6, 1894; by the Congress of Peru on October 25, 1889; by that of Paraguay on September 10, 1889, and by that of Bolivia on February 25, 1904.

this principle aims to break the relations of the immigrants with the country of origin.

Among the rules established in the treaty on *international civil law*, the following are worth noticing:

Art. 1. The capacity of persons is governed by the law of their domicil.

Art. 2. A change of domicil cannot alter the capacity already acquired as a result of emancipation, legal majority or judicial declaration of competency.

Art. 5. The law of the place where a person resides determines the conditions necessary to constitute a domicil.

Art. 6. Parents, guardians and curators [84] have their domicil in the territory of the state from whose laws they derive their functions.

Art. 8. The domicil of husband and wife is where the legal partnership of marriage has been established, and in default thereof it is presumed to be that of the husband. A woman judicially separated from her husband retains his domicil so long as she does not establish another.

Art. 9. Persons not having a known domicil are considered as domiciled in the place of their residence.

Art. 13. The law of the matrimonial domicil governs:

(*a*) The separation of husband and wife.

(*b*) Their divorce, provided the reason alleged therefor is admitted by the law of the place in which the marriage took place.

Art. 26. Property, whatever its nature, is governed exclusively by the law of its *situs*, in matters relating to its character, possession, and alienation, absolute or relative, and to all the legal relations, real in character, of which it is capable.

Art. 29. Debts are considered as situated in the place in which the corresponding obligations are to be performed.

Art. 30. A change in the location of property does not affect rights acquired in accordance with the law of the place where it was at the time of the acquisition. The interested persons, however, are bound to fulfill the formal

[84] A curator is a person appointed to supervise the acts of the guardian.

and substantial requisites necessary by the law of the place of the new location in order to acquire or preserve the aforesaid rights.

Art. 31. Rights acquired by third parties in such property according to the law of its new location, after the change has been made, prevail over those of the first owner.

Art. 33. The same law governs their creation, nature, validity, effects, consequences and performance: in short, all matters of whatever nature concerning contracts.

Art. 34. It follows that contracts relating to certain and specific things are governed by the law of the place where such things are at the time of the execution of the contract.

Those relating to things determined only by their class, by the law of the domicil of the obligor at the time of entering into the contract.

Those relating to fungible things, by the law of the domicil of the debtor at the time of the agreement.

Those dealing with the performance of services:

(*a*) If they refer to things, by the law of the place where they were at the time of the execution of the contract.

(*b*) If their efficacy is related to some special place, by that in which they are to produce their effect.

(*c*) In other cases, by that of the domicil of the debtor at the time the agreement was entered into.

Art. 35. A contract for the sale of goods in different places where conflicting laws prevail is governed by the domicil of the contracting parties, should it be common at the time of the agreement; otherwise by the law of the place in which the contract was entered into, should their domicil be different.

Art. 36. Accessory contracts are governed by the law of the principal obligation to which they refer.

Art. 37. The final conclusion of contracts entered into by means of correspondence or agents is governed by the law of the place whence the offer started.

Art. 39. The form of public instruments is governed by the law of the place where they are executed.

Art. 51. Negative prescription of personal actions is controlled by the law to which the obligations out of which they arose are subject.

Art. 52. Negative prescription of real actions is governed by the law of the place where the burdened property is situated.

Art. 53. If the burdened property is chattel and its location has been changed, prescription is governed by the law of the place where the necessary period of prescription has been completed.

Art. 54. Acquisitive prescription of chattels or of realty is governed by the law of the place in which the property is situated.

In the convention relating to *legal procedure* we find the following rules:

Art. 1. Actions at law and their incidents, whatever their character, shall be presented in accordance with the law of the nation in which they are instituted.

Art. 2. Evidence shall be admitted and evaluated or righted according to the law governing the subject-matter of the action. From this rule is expected such evidence as is not authorized by the law of the place in which the action is proceeding.

Art. 3. Judgments of courts and decisions of arbitrators duly confirmed, rendered in civil or commercial cases; public instruments, and those issued by officers of the state, which have been authenticated and letters rogatory or requisitorial shall be given effect by each of the high, contracting parties according to the stipulations of this treaty, provided they are properly legalized.

Art. 4. A legalization is considered properly made when it takes place according to the law of the country where the document originated, provided it has been authenticated by the diplomatic or consular agent of the country in which its enforcement is asked. This consular agent must reside in the place where the document is legalized.

Art. 5. Judgments or decisions by arbitrators and acts of non-contentious jurisdiction issued in civil or commercial

matters in one of the countries which is a party to this agreement, shall have the same force in the territory of the others that they have in the issuing country, provided they possess the following requisites:

(*a*) That the judgment was rendered by a court which is competent in the international acceptance of that word.

(*b*) That it had the character of a final judgment, considered as *res judicata* in the country in which it was rendered.

(*c*) That the party against whom it was rendered was legally summoned and represented in the suit or else that he was declared to be in default in accordance with the laws of the country where the action was instituted.

(*d*) That it is not contrary to the public policy of the country in which it is to be executed.

Art. 6. In requesting the enforcement of a judgment the following documents shall be required:

(*a*) A complete copy of the judgment or arbitrator's decision.

(*b*) A copy of all the papers necessary to prove that the parties were cited.

(*c*) An authenticated copy of the judicial decree in which it is declared that the judgment or arbitrator's decision has the character of a final judgment and has been established as *res judicata*, as well as a copy of the laws upon which said decree is based.

Art. 7. The character of executive or compulsory judgments or arbitrator's decisions and the proceedings which must be followed in order to execute them shall be determined by the law of procedure of the country in which execution is demanded.

Art. 8. Matters falling within non-contentious jurisdiction, such as inventories, opening of last wills, appraisements or other acts of like nature performed in one state shall have in the other contracting states the same force and effect as if they had been performed in their own territory, pro-

vided they have the requisites established in the previous articles.

Art. 9. Letters requisitorial or rogatory whose object it is to serve legal notices, to receive testimony of witnesses or to perform any other judicial act, must be complied with in any of the contracting countries, when such letters have all the requirements exacted by this treaty.

Art. 10. When the letters requisitorial or rogatory refer to attachment of property, appraisements, inventories or provisional remedies, the judges shall do everything necessary respecting the appointment of experts, appraisers, depositories;—*i. e.*, everything that may lead to the best fulfillment of the commission.

Art. 11. Letters requisitorial or rogatory shall be carried out in accordance with the laws of the country in which the execution is requested.

Art. 12. Persons interested in the execution of letters requisitorial or rogatory may at their expense appoint attorneys.

GLOSSARY

ABANDERAR. To register (a ship).

ABANDONO. Abandonment.

ABASTO. Supply of provisions. A certain municipal duty. Slaughter house (Mexico).

ABDICAR. To voluntarily renounce dominion of a thing or a right.

ABERTURA OR APERTURA DE TESTAMENTO. To probate a will.

ABIGEATO. Theft of cattle.

AB INTESTATO. Intestate.

ABJURAR. To forswear.

ABOLENGO. Ancestry, lineage.

ABOGADO. Attorney at law, barrister, lawyer.

ABOGADO EN EJERCICIO. Practicing lawyer.

ABOGADO DEL ESTADO. Attorney for the State.

ABOGADO DE POBRES. Attorney paid by the State and charged with the defense of the poor in courts.

ABOGAR. To argue or plead a case.

ABOLIR. To abolish.

ABONAR. To be surety for another. To make an entry on the credit side of an account.

ABORDAJE. Collision.

ABORTIVO. Abortive.

ABORTO. Abortion.

ABREVADERO. Watering place for cattle.

ABROGACIÓN. Abrogation, act of annulling a law.

ABSOLUCIÓN. Acquittal.

ABSOLVER DE LA INSTANCIA. To acquit, reserving the privilege of reopening the case if new evidence is found.

ABSOLVER POSICIONES. The act of one of the parties to a suit denying or admitting the truthfulness of facts placed in evidence by the other party.

ABUELA. Grandmother.

ABUELO. Grandfather.

ABUSO. Misuse of a thing or power.

ABUSO DE AUTORIDAD. Abuse of power, the inflicting of penalties beyond what is legal.

ABUSO DE CONFIANZA. Embezzlement. To convert to one's own benefit that which has been intrusted to him.

ACAPARADOR. One who corners the market.

ACAPARAR. To corner the market.

ACCESIÓN. Means of acquiring property, by which a thing owned produces accruals, or when something is attached to it.

ACCESORIO. Accessory.

ACCIDENTE DE MAR. Maritime average.

ACCIÓN. Legal action; law suit; share of stock.

ACCIÓN AD EXHIBENDUM. Action of a party interested in recovering a movable requesting the possessor thereof to produce it in court.

ACCIÓN AL PORTADOR. Unregistered share of stock payable to bearer.

ACCIÓN CONFESORIA. Action relating to an easement or any other real right, not including ownership, against a person who hinders the use of such right in order that he confess or admit the existence of the same and cease to disturb its possession.

ACCIÓN CRIMINAL. Criminal action.

ACCIÓN DE DESLINDE. Action to delimit contiguous properties.

ACCIÓN DE DESPOJO. Action against the despoiler of realty, his accomplices and heirs.

ACCIÓN DE DIVORCIO. Action of divorce.

ACCIÓN DE DOMINIO. Action claiming ownership in a thing.

ACCIÓN DE FILIACIÓN. Action of a son against his father demanding that the latter acknowledge him.

ACCIÓN DE HURTO. Action vesting in a person who has been dispossessed of personal property.

ACCIÓN DE NULIDAD. Action of nullity of an act or contract.

ACCIÓN DE PARTICIÓN DE HERENCIA. Action of partition of an inheritance.

ACCIÓN DE REDUCCIÓN. Action of an heir demanding that the portion of another be reduced to the limit assigned by the law to the testator as the maximum he is free to dispose of.

ACCIÓN DOLOSA. Act tending to deceive in order to derive a benefit to another's detriment.

ACCIÓN EJECUTIVA. Action which starts by the execution against the debtor's property and is based upon an instrument which implies a confession of judgment.

ACCIÓN HEREDITARIA. Action demanding an inheritance.

ACCIÓN HIPOTECARIA. Action in forclosure of mortgaged property.

ACCIÓN NEGATORIA. Action of the owner of realty denying that his property is subject to an easement in favor of the property of the defendant.

ACCIÓN NO-ENDOSABLE. Share of stock which cannot be negotiated, *e. g.*, the share of an associate who contributes his services only.

ACCIÓN NOMINATIVA. Registered share of stock.

ACCIÓN ORDINARIA. Action subject to regular proceedings.

ACCIÓN PAULIANA. Action of a creditor demanding the nullity of an act or contract of his debtor, made with a view to defrauding the creditor.

ACCIÓN PERSONAL. Action derived from a merely personal right.

ACCIÓN PETITORIA. Action demanding the ownership of a thing.

ACCIÓN POR EVICCIÓN OR DE EVICCIÓN. Action demanding of the transferor of a thing the warranty of the title thereof or the payment of proper indemnity in case the transferee loses possession to the rightful owner.

ACCIÓN POSESORIA. Action to acquire, retain or recover possession of a thing without the question of ownership being raised.

ACCIÓN PIGNORATICIA. Action derived from a contract of pledge.

ACCIÓN PUBLICIANA. Action of a good faith possessor against any detainer except the rightful owner.

Acción pública. Action which can be begun by any person on behalf of the community.

Acción reivindicatoria. Action to recover dominion of a thing.

Acción redhibitoria. Action of the transferee of a thing against its transferor on account of vices therein.

Acción solidaria. Action of any of the various creditors demanding from the obligor the total amount or the total obligation due.

Acción real. Action relating to real rights.

Accionista. Shareholder.

Acensuar. To impose an income on realty.

Aceptación. Acceptance.

Aceptación por intervención. Acceptance for honor.

Aceptante. Acceptor of a bill of exchange.

Acequia. Irrigation canal.

Acerbo. The whole of an undivided estate or property.

Aclaración. Explanation.

Aclaración de sentencia. A judicial remedy to have the judge explain an obscure part of his decision.

Acrecer (derecho de). Right of coheirs or co-owners to have the vacant portion of the common thing accrue to their portion when one of the coheirs or co-owners renounces his right or is incapable of acquiring it.

Acreedor. Creditor.

Acreedor privilegiado. Creditor who has a right to be paid before others in case of bankruptcy, or out of the price of a certain thing.

Acreedor de dominio. Creditor whose claim is based upon his being the owner of a thing in the bankrupt estate.

Acreedor hereditario. Creditor of a debt contracted by a decedent testator or intestate.

Acreedor hipotecario. Creditor secured by a mortgage.

Acreedor quirografario. Creditor whose right is evidenced by a private instrument.

Acreedor refaccionario. Creditor whose credit originates in money lent for the promotion of a business or industry.

Acreedor solidario. Creditor who can demand the whole thing, subject-matter of the obligation, from any of the obligors.

Acreditar. To evidence the truthfulness of a statement. To make an entry in the credit side of an account.

Activo. The assets of a person or association.

Activo y pasivo. Assets and liabilities.

Acta. Memorandum, minute.

Acto. An act.

Actos conservativos. Steps taken by a creditor in order to safeguard his rights.

Actos de administración. Acts of an attorney or representative which do not include disposal of property, except such personal property as the management of the business of the principal may require.

Actos de comercio. Acts or contracts governed by the commercial law, even though they are performed by a non-merchant.

ACTOS DE POSESIÓN. Acts which prove that the person performing them considers himself a rightful possessor of a thing.

ACTOS JURÍDICOS. Voluntary acts tending to establish legal relations.

ACTOR. Plaintiff.

ACTUAR. To perform legal functions, to act in legal matters.

ACTUACIONES. The record of pleadings and evidence in a law suit.

ACTUARIO, or ESCRIBANO DE ACTUACIONES. Judicial officer who authenticates documents in a suit.

ACUERDO. Resolutions adopted by a court, or administrative authority. Agreement.

ACUMULACIÓN DE ACCIONES. Consolidation of actions.

ACUMULACIÓN DE AUTOS. Consolidation of records of proceedings.

ACUSACIÓN. Impeachment, indictment.

ACUSADO. Accused, person who is impeached or indicted.

ACUSADOR. Accuser, prosecutor.

ACUSAR REBELDÍA. Act of a party calling attention of the judge to the non-appearance or lack of answer of the other party, and asking the continuation of the proceedings in default.

AD CORPUS. Sale of a thing as a whole, as compared with sale made by the measure.

ADELANTADO. A Spanish governing officer formerly employed in the American colonies.

ADEUDAR. To owe; to make an entry in the debit side of an account.

ADICIÓN DE SENTENCIA. Judicial remedy in cases where the judge omitted to refer in his decision to one of the issues of the case.

ADICIÓN DE HERENCIA. The express acceptance of an inheritance.

ADITAMENTO. Addition.

ADJUDICACIÓN. Allocation of a thing by a judge or administrative authority in cases of inheritance, judicial sale or auction.

ADJUDICACIÓN EN PAGO. Allocation of a thing to a creditor in payment of his credit.

ADJUDICATARIO. Person to whom a thing was allocated by proper authority.

ADJUNTO. Assistant or associate judge or functionary.

ADMINICULAR. To complement (used in reference to evidence principally).

ADMINISTRACIÓN. Management; government; manager's office.

ADMINISTRACIÓN DE JUSTICIA. Administration of justice; judicial power.

ADMINISTRADOR. Manager.

ADOLECENCIA. Years of adolescence, over fourteen in a boy, and twelve in a girl.

ADOPCIÓN. Adoption of a person as a son or daughter.

ADOPTIVO. Adoptive son.

ADQUISICIÓN. Acquisition.

ADQUIRIR. To acquire.

ADUANA. Custom-house.

ADULTERAR. To commit adultery. To falsify or misrepresent.

ADULTERIO. Adultery.

ADULTERINO. The offspring of adultery.

ADULTO. Adult, one who has ceased to be *impúber*.

ADVENTICIO. Property obtained by one's own industry.

AFIANZAMIENTO. The act of guaranteeing a debt by means of a guarantor or surety.
AFIN. Relative by affinity.
AFINIDAD. Affinity.
AFIRMARSE. To ratify.
AFORADO. Privileged person. Merchandise appraised for the payment of duties.
AFORO. Appraisal of dutiable things.
AFRENTA. Affront, dishonor.
AGENCIA. Agency; agent's bureau.
AGENDA. Note-book.
AGENTE. Agent, attorney.
AGENTE DE NEGOCIOS. Attorney in court, solicitor.
AGENTE FISCAL. Assistant of the public prosecutor.
AGIO. Benefit obtained through the exchange of paper for money; usury.
AGIOTISTA. Stock-jobber; usurer.
AGNACIÓN. Consanguinity among male descendants of the same father.
AGOTADO. Exhausted; out of print.
AGRARIA. Agrarian (referring to law or husbandry).
AGRAVACIÓN, OR AGRAVANTE. Aggravating circumstances of a crime.
AGRAVIO. Offense. Error. Assignment of error on appeal.
AGRESIÓN. Aggression.
AGRESOR. Aggressor.
AGRÍCOLA. Matters referring to agriculture.
AGRICULTOR. Husbandman, farmer.
AGRICULTURA. Agriculture.
AGRIMENSOR. Land surveyor.
AHIJADO. Godchild, protegé.
AHOGADO. Drowned, Suffocated.
AHORCADO. Person hung.
AHORCAR. To kill by hanging.
AHORRAR. To free a slave. To economize.
AHORRO. Saving, thrift.
AJUAR. Household furniture, bridal apparel and furniture.
AJUSTAR. To settle the price of things or the terms of a transaction, to accept the services of a person as a servant.
AJUSTE. Agreement.
AJUSTICIADO. Criminal who has been put to death.
AJUSTICIAR. To execute a criminal.
ALBACEA. Testamentary executor; representative of the estate appointed by the heirs of an intestate. (Mex.).
ALBACEAZGO. Functions of the executor or assignee of an inheritance.
ALCABALA. Duty paid on conveyance of property. Duty paid in local custom-houses within the same country at the time a thing is imported into the town. (Mex.)
ALCAIDE. Governor of a castle; jailer.
ALCAIDÍA. Office of the *alcaide*.
ALCALDE. Municipal officer vested with administrative and judicial functions. Mayor.

ALCALDE MAYOR. In New Spain the representative of the king in towns which were not a capital of a province.

ALEATORIO. Contract in which the loss or gains depend upon an uncertain event, as gambling, insurance, annuity, etc.

ALEGAR. To argue in a law suit.

ALEGATO. Argument or brief in a law suit.

ALEVE. Treacherous, perfidious.

ALEVOSÍA. Perfidy, breach of trust.

ALGUACIL. Bailiff, lowest officer in the scale of officers in the administration of justice.

ALHAJA. Jewel, gem, valuable furniture.

ALIANZA. Alliance.

ALISTAMIENTO. Enlistment, levy, conscription.

ALIMENTOS. Maintenance, alimony.

ALINDAMIENTO. Setting of landmarks or monuments.

ALMACÉN. Warehouse. Store.

ALMIRANTAZGO. Admiralty court.

ALMOJARIFAZGO. Customs duty.

ALMONEDA. Public auction.

ALOJAMIENTO. Lodging, quartering soldiers.

ALQUILAR. To let, to hire.

ALUVIÓN. Alluvion, one of the ways of acquiring property through accretion by river action.

ALZADA. Appeal.

ALZADO. Fraudulent bankrupt.

ALZAMIENTO. Fraudulent bankruptcy.

ALZARSE. To rise in rebellion. To be a bankrupt who defrauded his creditors. To appeal from a judgment.

ALLANAMIENTO. Order given by judicial authority to enter a building to make an arrest or search. Trespass. Acquiescence in judicial decisions or the performance of an obligation.

AMANCEBADOS. Man and woman who live in concubinage.

AMBIGUO. Ambiguous.

AMENAZA. Threat.

AMIGABLE COMPONEDOR. Friendly arbitrator.

AMILLARAMIENTO. Assessment for taxes.

AMNISTÍA. Amnesty.

AMO. Head of a family, owner, boss.

AMOJONAMIENTO. Setting of landmarks or monuments.

AMONESTACIÓN. Admonition, warning.

AMORTIZACIÓN. Render inalienable. Amortization. Payment.

AMOVIBLE. Removable.

AMPARO. In Mexico a constitutional remedy, similar to the writ of *habeas corpus*, in case any of the rights recognized as common to all men by the constitution is violated by any authority.

AMPARO DE POSESIÓN. To replace a person in the possession of something which was taken violently from him, or to maintain him in that possession against any disturber.

ANARQUÍA. Anarchy.

Anónimo. Anonymous.
Anatocismo. Compound interest.
Anexidades. Rights or things united to another or derived from it.
Anticresis. A kind of mortgage in which the creditor becomes possessor of the mortgaged thing and applies its income to the payment of interest and principal of the debt.
Antinomia. Antinomy.
Antidata. Antedating an instrument.
Anual. Annual.
Anualidad. Annuity.
Anulable. Voidable.
Año. Year.
Año bisiesto. Leap year.
Año fiscal. Fiscal year.
Aparcería. Partnership principally in reference to agriculture and cattle raising.
Aparejar ejecución. Character of a document which offers ground for an execution or attachment of property.
Aparejos. Equipment.
Apear. To survey land and set its marks or boundaries.
Apelable. Appealable.
Apelación. Appeal proper.
Apelación en el efecto devolutivo. Appeal for review only.
Apelación en ambos efectos. Appeal for a review and stay of proceedings.
Apelación desierta. Appeal abandoned.
Apellido. Family name.
Apeo y deslinde. Judicial proceedings in which a survey and a demarkation of land takes place.
Apercibimiento. Judicial warning.
Apersonarse. To appear in court as plaintiff or defendant.
Apoderado. Grantee of a power of attorney.
Apoderarse. To take possession of a thing with a view to becoming owner thereof.
Aprehender. To take hold of a thing.
Apremiar. To compel a person by judicial decree to perform an act or obligation.
Apremio judicial. Judicial compulsion.
Aprendizage. Apprenticeship.
Aprobación. Approval, ratification.
Apuesta. Bet, wager.
Apuntamiento. Extract from records.
Arancel. Tariff of duties, fees, etc.
Arancel de aduanas. Custom-house tariff.
Arancel de honorarios. Scale of fees.
Arbitrador. Friendly arbitrator.
Arbitrage. Arbitrament; arbitratorship; arbitration.
Arbitramiento. Decision rendered by arbitrators.

ARBITRARIEDAD. Unlawful procedure; act unsupported by law or honest judgment.

ARBITRIO DEL JUEZ. Power of a judge to use his own discretion in deciding a question.

ARBITRIOS. Municipal duties and incomes.

ARBITRO. Arbitrator, bound to decide according to law.

ARCHIVO. Archives.

ARISTOCRACIA. Aristocracy.

ÁREA. Surface measure equivalent to ten thousand square meters.

AVIADOR. Merchant who hires and equips a boat.

ARQUEO. Verification of papers and money in a safe.

ARRAIGADO. Person who possesses real estate in a given place. Person subject to a writ of *ne exeat*.

ARRAIGAR. To submit a person to a writ of *ne exeat*. To order him to give security for costs.

ARRAIGARSE. To establish oneself permanently in a place.

ARRAIGO. Real property, used only in phrases like *hombre de arraigo, tiene arraigo*. Writ of *ne exeat*.

ARRAS. Earnest money. Bridal gift.

ARRENDADOR. Lessor.

ARRENDAMIENTO. Renting, lease.

ARRENDATARIO. Lessee.

ARRESTAR. To arrest.

ARRIBADA. Putting into port by stress of weather.

ARROGACIÓN. Adoption of a person as a son with governmental authorization.

ARROGARSE. To take another's property, right or power.

ARSENAL. Shipyard.

ARTE. Art, craft.

ARTESANO. Artisan, craftsman.

ARTICULAR. To ask questions of witnesses, or to state facts which must be acknowledged or denied by the opposing party in a law suit.

ARTÍCULO DE PREVIO Y ESPECIAL PRONUNCIAMIENTO. Incidental issue which needs decision by the judge before the main issue.

ARTISTA. Artist.

ASAMBLEA. Assembly.

ASAMBLEA GENERAL DE ACCIONISTAS. General meeting of stockholders.

ASAMBLEA GENERAL. Congress (in Uruguay).

ASAMBLEA DIRECTIVA. Board of directors.

ASCENDENCIA. Ancestry.

ASCENDIENTE. Ancestor.

ASEGURACIÓN. See *Seguro*.

ASEGURADO. Insured.

ASEGURADOR. Underwriter, insurer.

ASEGURAMIENTO. Insurance, security.

ASENTAMIENTO. Possession given by the judge to a plaintiff of defendant's property in case of default of the latter (Law 1, tit. 8, Part. 2).

ASENTISTA. Contractor. Person who contracts with the government or a community to provide food or other articles to an army, town, etc.

ASESINATO. Murder.

Asesino. Assassin, murderer.
Asesor. Lawyer appointed as legal adviser to a lay judge.
Asesorado. Lay judge who is advised by a lawyer.
Asiento. Entry, record; contract for the supply of food or materials.
Asignatura. Curriculum, course of studies.
Asilo. Asylum.
Asistente. Soldier in attendance upon officer as an orderly.
Asociación. The act of associating; association.
Asonada. Tumultuous crowd.
Asueto. School holiday, one day vacation.
Atentado. Criminal attempt.
Atenuante. Attenuating circumstance.
Atenuar. To attenuate.
Atestiguar. To give testimony.
Atestación. Testimony of witness.
Atribuir jurisdicción. To extend the jurisdiction of a judge.
Audiencia. Superior court of a province.
Audiencia verbal. Oral hearing.
Auditor. Judge who, under the supervision of a captain or military commander in chief, takes cognizance of military crimes.
Ausencia. Absence. The technical legal meaning of this word implies the disappearance of a person from a place without leaving any attorney or representative, when the whereabouts of such person are unknown.
Ausente. Absent; see *Ausencia.*
Autenticar. To authenticate.
Autenticidad. Authenticity.
Auténtico. Authentic.
Auto. Decree or decision of a judicial body which is neither a final judgment (*sentencia*) nor one referring only to matters of procedure. A ruling.
Autos y vistos. Formula used by a judge to notify the parties that he is going to decide and that the issues are closed.
Auto para mejor proveer. Order made by a judge *ex officio* calling for some evidence which he considers substantial and which was overlooked by the parties.
Autos. Record, documents in a law suit.
Autocracía. Autocracy.
Autógrafo. Autograph.
Autonomia. Autonomy.
Autonomo. Autonomous.
Autor. Author.
Autoridad de cosa juzgada. The force of a final and irrevocable judgment either where the law does not give any remedy against it, or because the legal remedies have been exhausted, or no appeal has been taken in proper time.
Auxilio. Aid, assistance.
Aval. Guaranty by third person of the payment of a bill of exchange recorded usually in separate instrument. Such instrument itself.
Avalista. Third person guarantor of a bill of exchange.
Avalúo. Valuation, appraisal.

Avería. Damage, impairment.
Avería común o gruesa. General average.
Avería simple. Particular average.
Aviado. In Mexico a person who receives money from another to carry on a mining business in partnership with the giver of the money.
Aviador. In Mexico a person who supplies money to a miner in consideration of a share in the profits of the mine.
Avocarse el conocimiento. To assume cognizance of a case by a court or judge.
Avulsión. Piece of land suddenly detached from a tract of land by the force of a river and attached to other land below stream belonging to different owner.
Ayudante. Assistant, adjutant.
Ayuntamiento. Municipal government assembly; board of aldermen.
Azar. Hazard, chance, gambling.

Balance. Balance sheet.
Baldío. National land, uncultivated land.
Banca. Money exchange and dealing in negotiable instruments.
Banco. A bank.
Banco de emisión. Bank of issue.
Banco hipotecario. Mortgage bank.
Banco refaccionario. Bank of promotion.
Bandera de paz. Flag of truce.
Bandería. Band or faction.
Bandido. Bandit, highwayman.
Bando. Band, faction. Proclamation of a law or decree.
Banquero. Banker.
Baratería. Fraud committed in contracts of purchase and sale, deposit, etc. Crime of a judge who receives money while administering justice. Barratry.
Baratero. Person who defrauds another, who obtains money from winning gamblers.
Baratillero. Seller of second-hand goods.
Baratillo. Second-hand shop.
Barato. Bargain sale, object bought at low price. Money given by winning gamblers.
Barbecho. Ploughed land.
Barca. Boat, barge, bark.
Barcada. Passage in ferry boat.
Barcaje. Ferriage.
Barra. Sand-bank at the mouth of a harbor. Bar. Share in a mining company (Mexico).
Barragana. Concubine.
Barraqueros. Warehousemen (Argentina).
Barrenar. To drill, to blast a rock.
Barreno. Blast-hole.
Barretero. In mining, one who works with a crow or pick.
Barrio. City district where a municipal official called *Alcalde de Barrio* sits.

BASTANTEAR. The act of a lawyer examining the power of a solicitor and declaring it sufficient in order that the solicitor may be admitted to represent his party in a suit.

BASTARDO. Bastard, illegitimate.

BASTIMENTO. Supply of provisions.

BECERRO. Registry of privileges, franchises or property, usually bound with calf-skin.

BELIGERANTE. Belligerent.

BELLACO. Artful, sly, swindler.

BENDICIÓN NUPCIAL. Religious ceremony of marriage.

BENEFICENCIA. Poor laws, charity.

BENEFICIO. Right, privilege.

BENEFICIO DE COMPETENCIA. Right of a debtor not be to compelled to pay his creditor more than the debtor can after separating what is necessary for his maintenance; this privilege is granted on account of kinship or other considerations.

BENEFICIO DE DELIBERACIÓN. The right of an heir to consider for a certain time whether acceptance of the inheritance is advisable.

BENEFICIO DE DIVISIÓN. Right of a cosurety to ask the creditor to demand contribution from the other cosureties.

BENEFICIO DE EXCUSIÓN. Right of a guarantor to demand that the creditor levy on property of the principal debtor for the payment of the obligation before bringing any action against said guarantor.

BENEFICIO DE INVENTARIO. Right of an heir not to be compelled to pay the liabilities of the person he succeeded beyond the value of the property he inherited from the latter.

BENEFICIO DE RESTITUCIÓN. Right of minors and some other persons or institutions specially privileged to recover property or rights alienated by their representatives or by themselves in certain cases.

BIENES. Property; assets; estate.

BIENES AB INTESTATOS. Estate left by a person who died without making any will or when the will is void.

BIENES ADVENTICIOS. Property acquired by a minor while under *patria potestas* through an artcraft, profession or labor.

BIENES CASTRENSES. Property acquired by a minor in military service.

BIENES CUASI CASTRENSES. Property acquired by a minor through practice of a liberal profession, or public employment, or by a gift of the sovereign.

BIENES COMUNES. Things which, belonging to none, can be utilized by everybody, as the air, the ocean, etc.

BIENES DOTALES. Property given to a husband on marriage to support the expenses of the household.

BIENES PARAFERNALES. Property of the wife besides her dowry.

BIENES FUNGIBLES Y NO FUNGIBLES. Fungible and unfungible property.

BIENES GANANCIALES. Property acquired by the husband or the wife during their marriage, while they live together under the régime of legal matrimonial partnership.

BIENES INMUEBLES. Real estate.

BIENES MOSTRENCOS. Lost property whose owner cannot be ascertained; strayed animals or things.

Bienes muebles. Personal property.
Bienes patrimoniales. Property inherited from parents.
Bienes profecticios. Property acquired by a son or daughter under *patria potestas* by dealing with the property of his or her parents.
Bienes públicos. National or communal property.
Bienes realengos. Property belonging to the king.
Bienes reservables. Property which the widower or the widow who remarries is obliged to reserve for the children of the former marriage.
Bienes semovientes. Property consisting of animals.
Bienes vacantes. Unowned property.
Bienes vinculados. Entailed property.
Bigamía. Bigamy.
Billete. Bill, promissory note, ticket.
Billete de banco. Bank-note.
Blanco. Blank.
Blasfemia. Blasphemy.
Blasonar. To boast.
Boda. Marriage, wedding.
Boletín. Newspaper destined to special purposes.
Bolsa. Exchange.
Bolsa de comercio. Commercial exchange.
Bonificación. Act of crediting an account.
Bono de prenda. Certificate issued by a warehouse in the name of the bailor of merchandise, who can use such paper as a token of pledge of the goods deposited.
Boticario. Apothecary, pharmacist.
Boya. Buoy.
Buena fe. Good faith, bona fides.
Bula. Papal bull.
Bufete. Lawyer's office; desk.
Buque. Vessel, ship.

Caballería. Cavalry. Portion of land which after the conquest of a territory was given to cavalry soldiers who served in the war. Measure of land, variable in the different countries.
Cabeza de partido. Capital of a district.
Cabeza de proceso. Judicial decree initiating legal proceedings for the punishment of a crime.
Cabildo. Town government of mayor and aldermen; chapter of a cathedral.
Cabo. Corporal.
Cabotaje. Coastwise trade.
Cacique. Political chief, "boss."
Cadalso. Scaffold.
Cadáver. Corpse.
Caducar. To lapse, to become extinct by lapse of time or other circumstances.
Caducidad de la instancia. Failure of the action for lack of prosecution.
Caduco. Extinct.
Caja. Case, box, safe, cash.

Caja de ahorros. Savings bank.
Cajero. Cashier.
Cajón. Term applied to some acts, made as a matter of course, which do not require study or special attention. Dry-goods store (in Mexico).
Calabozo. Dungeon; cell of a jail.
Calumnia. False imputation of crime, either oral or written, slander.
Cámara de compensación. Clearing house.
Cámara de diputados. House of representatives.
Cámara de senadores. Senate.
Cambiar. To exchange, to barter.
Cambio. Exchange.
Cambista. Exchange trader.
Campo. Country place, field, space.
Canal. Canal.
Cancelar. To cancel.
Canciller. Chancellor.
Candidato. Candidate.
Canon. Pension, rent, Canonic rule.
Capacidad. Capacity.
Capellán. Chaplain.
Capellanía. The capital and interest of a foundation consisting in the obligation of having a certain number of masses celebrated every year in a certain chapel or altar.
Capilla. Chapel.
Capitación. Taxes levied per capita on individuals irrespective of their capital or income.
Capital. Estate, assets, property; sum of money which produces interest.
Capitalista. Capitalist.
Capitalizar. To add the interest to capital in order to have compound interest. To capitalize.
Capitán. Captain.
Capitulación. Capitulation.
Capitulaciones matrimoniales. Articles of marriage.
Capitular. To capitulate, conclude an agreement.
Capítulo. Chapter of a cathedral, meeting of a community, chapter of a book.
Captura. Capture, seizure, arrest of a criminal.
Cárcel. Jail.
Carear. To confront the witnesses with the accused or with one another for the purpose of cross-examining them.
Careo. The confrontation of witnesses with the accused or with one another for cross-examination.
Carga. Burden; tax; cargo.
Cargador. Freighter, shipper.
Cargo. Charge, public function.
Carrera. Road of about four feet wide for the passage of persons, animals and small vehicles. Career. Race.
Carretera. High-road.
Carretero. Cartwright.

Carta. Letter.
Carta-orden de crédito. Letter of credit.
Carta de pago. Receipt.
Carta de porte. Bill of lading.
Carta de fletamento. Charter of a vessel.
Carta de naturaleza. Letter of naturalization.
Carta de recomendación. Letter of introduction.
Carta poder. Power granted in a private instrument, as a mere letter.
Carta requisitoria. Letters requisitorial.
Cartel. Placard; poster; challenge sent in writing.
Cartulario. Notary.
Casa. House, home, household; business concern.
Casa de moneda. Mint.
Casa solariega. Mansion-house of a family.
Casa de comercio. Commercial firm or establishment.
Casación. Annulment or quashing of a judgment.
Casado. Married.
Casamiento. Marriage.
Casar. The act of a parson or public functionary performing a marriage ceremony. To nullify or quash a judgment.
Caso. Case.
Caso fortuito. Unforeseen event.
Castigo. Punishment.
Castillo. Castle.
Castrense. Belonging to the army, only in certain phrases like *vicario castrense*, chaplain of the army; *peculio castrense* property acquired by a minor in the profession of arms.
Casual. Unforeseen.
Catastro. Official assessment and description of real property in any district, made for the purpose of justly apportioning the taxes payable on such property.
Caución. Security.
Causa. Thing which is given or act done by one of the contracting parties, or affection, liberality or consideration which motivates an obligation.
Causa criminal. Criminal case.
Causahabiente. Successor in the right of another (not good Spanish).
Causante. Person from whom the rights of another are derived.
Cedente. Transferor, assignor.
Cédula. Warrant against, or summons of a defendant. Notice affixed to the house of a debtor to summon him or to notify the public of an action against him.
Celada. An ambush.
Celibato. Status of a single person.
Célibe. Unmarried person.
Cementerio. Cemetery.
Cencerrada. A disturbance of the peace in the form of mock serenades with horns and bells upon the marriage of widows or mismated couples.
Censatario. Payer of ground rent, or one who pays an annuity out of his estate to another.

Censo. Census. The contract whereby a burden is created on realty as a guaranty of a right to receive an annual payment in consideration for something given. The right itself of receiving the annuity. Ground rent.

Censo al quitar. Ground rent, the debtor of which can liberate himself by paying the capital guaranteed with his estate.

Censo consignativo. Ground rent originating in the delivery of money or any other consideration, the possession of the thing burdened being left in the hands of the debtor.

Censo de por vida. Ground rent for the life of one or more persons in succession.

Censo enfitéutico. Ground rent originating in a contract in which one party gives another forever or for a long time the use of realty, reserving the title to the first party.

Censo irredimible. Ground rent, the debtor of which cannot liberate himself by paying the capital guaranteed by his estate.

Censor. Censor.

Censualista or censuario. Person to whom a ground rent is paid.

Censura. Censorship.

Certidumbre. Certainty.

Cesante. Dismissed public officer.

Cesantía. Pension received by a dismissed public officer.

Ceder. To assign.

Cedente. Assignor.

Cesión. Cession, transfer, assignment.

Cesionario. Transferee.

Cesión de bienes. Surrender of the estate of an insolvent non-merchant debtor into the hands of his creditors.

Chapopote. Tar (Mexico).

Chapopotera. Oil sieve (Mex.).

Cheque. Check.

Cheque cruzado. Crossed check.

Choque. Collision.

Ciclista. Cyclist.

Ciclón. Cyclone.

Ciego. Blind. Swayed by violent passion.

Cifra. code; cipher.

Cimiento. Ground work.

Circulación. Circulation, currency.

Circular. Circular.

Circunstancia. Circumstance.

Circunstancias agravantes o atenuantes. Aggravating or attenuating circumstances.

Circunstancial. Circumstantial.

Cirujano. Surgeon.

Cita. Summons, citation, quotation.

Citación. Summons, judicial notice.

Citación de remate. Notice to debtor that his property is going to be sold at auction to pay his debts.

CITAR. To serve a summons, to call a meeting; to quote.
CIUDAD. City.
CIUDADANO. Citizen.
CIUDADANÍA. Citizenship.
CIVIL. Civil, as compared with criminal, commercial, constitutional, etc., in matters of law.
CLANDESTINO. Clandestine, secret.
CLÁUSULA. Stipulation which forms a part of a contract or document.
CLÁUSULA CODICILAR. Addition made by a testator to his will providing that in case it is not valid as such will, it be valid as a codicil.
CLÁUSULA DE CONSTITUTO. Acknowledgment made by a person that he possesses some property in the name and on behalf of another.
CLÁUSULA DEROGATORIA. Clause which amends or nullifies a previous stipulation.
CLÁUSULA GUARENTIGIA. Clause containing a confession of judgment.
CLÁUSULA PENAL. Penalty clause.
CLÁUSULA RESOLUTORIA. Stipulation that in case one of the parties fails to comply with a contract it shall be *de jure* rescinded.
CLÉRIGO. Clergyman.
CLIENTE. Client.
CLAUSURA DEL PROCEDIMIENTO DE QUIEBRA. Stopping of the bankruptcy proceedings, when the debtor's estate is not enough to cover the expenses thereof, leaving him subject to suit by every individual creditor.
CLAUSURA DE SESIONES. Adjournment.
CLUB. Social or political association.
COACCIÓN. Violence, compulsion.
COACTIVO. Compulsory.
COARTADA. Alibi.
COARTAR. To restrict.
COAUTOR. Joint author.
COBRAR. To collect cash, recover, obtain.
CODEUDOR. Co-debtor.
CODICILO. Codicil.
CÓDIGO. Code.
CODIFICAR. To codify.
COERCITIVO. Coercive.
COFRADÍA. Fraternity, brotherhood, or sisterhood, sorority.
COGNACIÓN. Cognation; kinship by consanguinity from female line.
COGNADO. Kinsman or kinswoman by female line.
COHABITACIÓN. Cohabitation.
COHECHO. Bribery.
COHEREDERO. Coheir.
COLACIÓN DE BIENES. Computation made of advances or property received by a legitimate heir during the life of the testator in order to proportionately diminish the amount he is entitled to receive in the distribution of the estate.
COLACIONABLE. Property subject to *colación*.
COLATERAL. Collateral relationship in family.

COLEGIO. College, body of persons of the same profession governed by rules, *e. g., Colegio de corredores, colegio de abogados.*

COLITIGANTE. Person who carries on a law suit with another against a third person.

COLONIA. Colony, settlement.

COLORADO. Referring to title based on some appearance of justice and legality; colorable.

COLUSIÓN. Collusion.

COMADRE. Godmother.

COMANDITA. Commercial association in limited partnership.

COMANDITARIO. Limited partner.

COMENTADOR. Commentator.

COMERCIANTE. Merchant.

COMERCIO. Commerce.

COMISARIO. Delegate. Auditor or superintendent in a stock company (Mex.).

COMISIÓN. Trust; charge; commission; commercial agency.

COMISIÓN PERMANENTE. Standing committee.

COMISIONISTA. Commission merchant.

COMISIONISTA-FIADOR. *Del credere* agent.

COMISO. Every description of confiscation; forfeiture. The confiscated property is also styled *comiso.*

COMISORIO. Stipulation to the effect that in case of a certain event occurring or an obligation not being complied with a contract be *ipso jure* rescinded.

COMITENTE. Constituent, principal.

COMODANTE. The lender of a non-fungible thing which should be specifically returned.

COMODATARIO. Borrower of an unfungible thing who is bound to surrender the same specific thing.

COMODATO. Lending of non-fungible things which must be returned specifically.

COMPADRAZGO. Spiritual affinity between the parents of a baptized child and his godparents.

COMPADRE. Godfather.

COMPAÑÍA. Company, corporation or partnership.

COMPAÑÍA ANÓNIMA. Stock company.

COMPAÑÍA COLECTIVA, OR EN NOMBRE COLECTIVO. General partnership.

COMPAÑÍA EN COMANDITA. Limited partnership.

COMPARECENCIA. Appearance before a judge.

COMPARECER. To appear in an action.

COMPARENDO. Summons, citation to appear before a court.

COMPELER. To compel.

COMPENSACIÓN. Set-off, compensation.

COMPETENCIA. Jurisdiction. Privilege of some debtors not to be compelled to pay except in so far as they can after separating what they may need for their maintenance. Competition. Contention between judges or functionaries both of whom claim to have jurisdiction of a certain case.

CÓMPLICE. An accomplice.

COMPLOT. Plot.

COMPRA-VENTA. Purchase and sale.

COMPRADOR. Buyer.
COMPROBACIÓN. Comprobation, proof.
COMPROMETER. To submit a case to the decision of an arbitrator.
COMPROMISO. Agreement to submit an issue to the decision of an arbitrator. The instrument which contains such agreement.
COMPULSA. Copy of an instrument or proceeding compared with its original.
COMPULSAR. To take a copy of an instrument or proceeding.
COMPULSIÓN. Compulsion.
COMPULSIVO. Term applied to a judicial order to one of the parties to a suit to execute an act.
COMÚN. Common, as compared with what is individually and exclusively owned.
COMUNERO. Co-owner.
COMUNIDAD. Community.
COMUNICACIÓN. Communication. Official despatch, notification.
COMUNIÓN. Co-ownership.
CON ARREGLO A. In conformity with.
CONATO. Crime attempted but not executed.
CONCEJIL. Relating to the municipal council, or to what is common to the inhabitants of a town.
CONCEJO. Town council.
CONCESIÓN. Concession.
CONCESIONARIO. Grantee, concessionaire.
CONCILIACIÓN. Conciliation, mediation of or settlement of disputes.
CONCILIO. Council. Assembly of bishops.
CONCLUSIÓN. Conclusion.
CONCORDATO. Covenant made by a government with the Pope. Composition with creditors.
CONCUBINA. Concubine.
CONCUBINARIO. One who keeps a mistress.
CONCUBINATO. Concubinage.
CONCURRENCIA. Equality of rights of several creditors to be paid with their debtor's property.
CONCURSAR. To start a suit for insolvency.
CONCURSO. Suit for insolvency. Meeting of creditors.
CONCUSIÓN. Concussion, extortion, shaking.
CONCUSIONARIO. Concussive.
CONDENA. Sentence of a condemned criminal. Statement extended by the clerk of a court of such sentence.
CONDENACIÓN. Sentence to punishment.
CONDICIÓN. Condition.
CONDICIÓN CASUAL. Condition which does not depend upon the will of man.
CONDICIÓN POTESTATIVA. Condition depending exclusively upon the will of one of the contracting parties.
CONDICIÓN RESOLUTORIA. Condition which on being fulfilled produces the revocation of the contract and places matters in *statu quo*, as they were before the contract was entered into. Condition subsequent.
CONDICIÓN SUSPENSIVA. Condition precedent.
CONDOMINIO. Co-ownership.

CONDONACIÓN. Remitting of a debt; pardoning of an offense.
CONDUCCIÓN. Hiring of services.
CONFESAR. To admit.
CONFESAR DE PLANO. Plain and full admission of facts by an accused criminal.
CONFESIÓN. Admission. Confession.
CONFESIÓN EXTRAJUDICIAL. Extrajudicial admission, made out of the presence of the judge.
CONFESIÓN CALIFICADA. Admission made under circumstances which limit the effect thereof.
CONFESIÓN DIVISIBLE. Admission of acts under circumstances which do not form a unit with the fact, so that the opposite party can avail himself of the evidence of the fact without being obliged to accept the truthfulness of the circumstances.
CONFESIÓN FICTA. Admission arising from certain facts, principally from the default to appear in certain cases.
CONFINACIÓN. Banishment with indication of the place where the exile is to reside.
CONFISCACIÓN. Confiscation.
CONFRONTACIÓN. Confrontation of accused with witnesses, or of witnesses with one another for cross-examination.
CONFUSIÓN. One of the ways to acquire ownership according to civil law. It consists in the mixing of two or more liquids or stocks of grain belonging to different persons, so as to make a separation impossible. The merging in a single person of the characters of creditor and debtor of the same obligation by inheritance or otherwise.
CONGRESO. Congress.
CONGRESO DE LOS DIPUTADOS. Lower body of the Spanish parliament. *Cortes.*
CONJETURA. Conjecture. Circumstantial evidence.
CONJUEZ. Cojudge.
CONJUNTO. Associate judge. Joint with another in a title or right. Allied by kinship or friendship. Spouse.
CONJURACIÓN. Conspiracy.
CONMINACIÓN. Warning.
CONMUTACIÓN DE PENA. Exchange of one penalty for another.
CONNIVENCIA. Connivance.
CONOCIMIENTO. Act of a judge taking cognizance of a case in order to decide it. Bill of lading.
CONSANGUINIDAD. Consanguinity.
CONSEJAL. Member of a council. Alderman.
CONSEJO. Advice, opinion, monition, counsel.
CONSEJO DE GUERRA. Court-martial. Council of war.
CONSIGNACIÓN. Consignment. Deposit made by a debtor of the thing due when the creditor refuses to accept payment, is not known, or his rights are in doubt.
CONSIGNATARIO. Consignee.
CONSOLIDACIÓN. The union in a single person of the *usufruct* and the ownership of a thing.
CONSORTES. Consorts. Husband and wife.
CONSPIRACIÓN. Conspiracy.

CONSTITUCIÓN. Constitution.
CONSUL. Consul.
CONSULADO. Consulate.
CONSULTA. Consultation.
CONSULTIVO (VOTO). Vote which serves only as an advisory opinion, without deciding power.
CONTADO, *al*. With ready money, for cash.
CONTADOR-PARTIDOR. Person designated to divide an inheritance.
CONTADOR. Accountant.
CONTADURÍA. Auditor's office.
CONTENCIOSO. Contentious. Judicial proceedings between plaintiff and defendant.
CONTENCIOSO-ADMINISTRATIVO. Remedy given against acts or decisions of an administrative authority in violation of a statutory right of the claimant.
CONTESTACIÓN. Answer.
CONTESTE. Witness whose testimony agrees entirely with that of another.
CONTINENCIA DE LA CAUSA. Unity which must exist in a law suit, including unity of action, parties and purpose.
CONTRABANDO. Smuggling. Contraband.
CONTRACAMBIO. Re-exchange.
CONTRADICTORIO. Term applied to legal proceedings in which opposing parties must be heard.
CONTRAMAESTRE. Overseer.
CONTRARÉPLICA. Counterclaim advanced by the plaintiff to offset the counterclaim of defendant.
CONTRATA. Contract referring to the undertaking of works for the government.
CONTRATO. Contract.
CONTRATO A LA GRUESA. Bottomry bond.
CONTRATO CONSENSUAL. Contract which becomes effective by the mere agreement of the parties.
CONTRATO LITERAL. Contract which must be in writing to be valid.
CONTRATO REAL. Contract which requires the delivery of the thing, subject-matter of the same, to become binding.
CONTRIBUCIÓN. Tax, contribution.
CONTRIBUYENTE. Taxpayer, contributor.
CONTUMACIA. Contumacy, contempt of court, default.
CONVENCIÓN. Convention, pact.
CONVENIO. Agreement, contract.
CONVICTO. Convict.
CONVOCATORIA. Convocation, calling of a meeting.
CÓNYUGES. Married couple.
COPIA CERTIFICADA. Exemplified copy authenticated by a notary or public functionary.
COPROPIETARIO. Joint owner, coproprietor.
CORONA. Crown, throne.
CORREDOR. Broker.
CORREDOR DE CAMBIO. Exchange broker.

Correduría. Brokerage.
Corregidor. Administrative head of a district vested also with civil and criminal jurisdiction.
Correo. Post, mail.
Correspondencia. Correspondence, mail.
Corretaje. Broker's functions, broker's fees.
Corrupción. Curruption, bribery.
Corsario. Privateer.
Corso. Privateering.
Corte. City where the king resides. Court.
Cortes. Congress; Senate and Chamber of Deputies in Spain.
Cortesía. Term of grace for the payment of a debt.
Cosa. Thing, object.
Cosa fuera del comercio. Things which cannot be the subject-matter of private transactions or bargains, *e. g.*, the executive mansion, historical monuments, animals contaminated with contagious diseases.
Cosa juzgada. *Res judicata.*
Costas. Costs.
Costas judiciales. Costs paid to judicial functionaries or public fees for judicial proceedings.
Costas personales. Costs consisting of lawyer's fees, etc.
Costumbre. Custom.
Cotejo de letra. Comparison of handwritings in order to ascertain whether they were made by the same person.
Cotización. Quotation, price current.
Coto. Landmark.
Credencial. Credential.
Crédito. Credit.
Créditos activos. Assets, credits.
Créditos pasivos. Liabilities.
Crédito quirografario. Credit evidenced by a private document.
Crédito privilegiado. Privileged or preferred claim or credit.
Crimen. Crime.
Criminal. Criminal.
Criminalista. Criminalist.
Críminología. Criminology.
Cuartel. District, ward of a city. Barracks.
Cuartel maestre general. Quartermaster general.
Cuasi contrato. Quasi-contract.
Cuasi delito. Wrong made unintentionally.
Cuenta. Account, calculation.
a Cuenta. On account.
Cuenta corriente. Current account.
Cuenta de resaca y recambio. Memorandum of expenses of redraft and re-exchange when a bill of exchange is not honored.
Cuenta de venta. Sales account.
Cuerpo del derecho. Authentic compilation of laws.
Cuerpo del delito. Corpus delicti.
Cuestión de tormento. Inquiry by torture.

Culpa. Fault, offense committed wilfully but without malice.
Culpable. Guilty, negligent.
Cumplimiento. Performance.
Cupones. Coupons.
Curador. Administrator of property of a minor, insane person or absentee; one appointed to see that the guardian does his duty, and to represent the ward in and out of court when his interest is adverse to that of the guardian.
Curador ad bona. Person appointed by a judge to manage a minor's estate.
Curador ad litem. Person appointed by a judge to defend an incompetent person in a suit.
Curaduría or curatela. The functions of a *curador*.
Curandero. A medical charlatan or quack.
Curia. Ecclesiastical tribunal.
Curial. Minor officer of a court.

Dación. Actual delivery of the thing, subject-matter of an obligation.
Dación en pago. Delivery of a thing certain instead of cash in payment of a debt.
Dádiva. Gift.
Dador. Drawer of a bill of exchange.
Daño. Damage, money detriment sustained.
Daño emergente. Damage caused by having one's money lent, or by one's debtor retaining that money.
Daño marítimo. Average.
Daños y perjuicios. Damages which cover the detriment sustained as well as the benefit or profit lost arising out of a tort.
Dar. To give.
Dar por quito. Discharge a debtor.
Datos. Data, facts.
Deber. Duty, obligation.
Débito. Debit.
Decano. Senior, dean.
Decapitación. Beheading.
Decenio. Ten-year period, decennial.
Decisión. Decision, judgment.
Decisorio. Term applied to the sworn testimony of one of the parties to a suit when the other party agrees to abide by such testimony.
Declaración. Deposition.
Declinar jurisdicción. To deny the jurisdiction of a judge by asking him to send the proceedings to the competent judge.
Declinatoria. Petition to an incompetent judge to send the proceedings in a law suit to the proper judge.
Decretales. Decretals, papal decrees.
Decreto. Decree.
Decreto de cajón. Judicial decree in routine matters.
Defensa. Defence.
Deferir el juramento. To abide by the sworn statement of the opposing party.

DEFICIT. Deficit, shortage.
DEFINICIÓN. Definition, decision of a doubtful point by competent authority.
DEFINITIVO. Conclusive.
DEFRAUDACIÓN. Fraudulent misappropriations.
DEGRADACIÓN. Degradation.
DEHESA. Fenced pasture ground.
DEJACIÓN. Abandonment of things or rights.
DELACIÓN. Information of a crime.
DELATOR. Informer, accusing witness.
DELEGACIÓN. Delegation, power conferred by a judge on a person in order that such person may take cognizance of and decide a case according to instructions given.
DELEGACIÓN DE DEUDA. Substitution of one debtor instead of another with the consent of the creditor.
DELEGADO. Delegated judge, referee.
DELIBERAR. To deliberate.
DELINCUENTE. Offender, criminal.
DELINQUIR. To transgress the law, to commit a crime.
DELITO. Crime.
DELITO CONSUMADO. Consummated crime.
DELITO FRUSTRADO. Crime which was not consummated due to circumstances entirely independent of the will of the actor.
DELITO INTENTADO. Attempted crime not consummated because of impossibility or of the inadequacy of the means employed.
DEMANDA. Claim, complaint, action.
DEMANDADO. Defendant.
DEMANDADOR OR DEMANDANTE. Plaintiff, petitioner.
DEMENCIA. Lunacy.
DEMENTE. Lunatic.
DEMORA. Delay, default.
DENUNCIA. Denunciation.
DENUNCIADOR. Denunciator, informer.
DENUNCIA DE OBRA NUEVA. Action to stop the construction of a new building or a part thereof when detrimental to individual rights or injurious to public welfare.
DENUNCIA DE OBRA VIEJA OR RUINOSA. Action demanding the demolition or proper repair of a building which threatens to fall, thereby injuring a private or public interest.
DEPONENTE. Bailor, testifying witness, deponent.
DEPONER. To testify.
DEPORTACIÓN. Deportation.
DEPOSICIÓN. Testimony, ouster from office or dignity, deposition.
DEPOSITANTE. Bailor, depositor.
DEPOSITAR. To deposit.
DEPOSITARIO. Bailee, depositary.
DEPÓSITO. Deposit.
DEPÓSITO IRREGULAR. A kind of loan bearing interest.
DERECHO. Right, law in general, body of laws.
DERECHO CANÓNICO. Ecclesiastical or canon law.

Derecho civil. Civil law.
Derecho comercial. Commercial law.
Derecho común. Civil law as compared with special laws, such as military, ecclesiastical, commercial, constitutional law.
Derecho de gentes. International law, as compared with Roman law.
Derecho internacional. International law.
Derecho personal. Rights inherent in a person. Right of a creditor who does not possess any real action.
Derecho político. Law relating to political rights and obligations of citizens or to the administrative functions established by the political constitution.
Derecho positivo. Positive or declared law, as compared with the merely scientific conception of the law.
Derecho procesal. Procedural law.
Derecho real. Right in rem.
Derecho de aduana. Custom duty.
Derogación. Repeal.
Desaforar. To deprive a person of a privilege he enjoys as a penalty for having committed a crime, *e. g.*, the privilege of holding public office.
Desafuero. Open violence, downright injustice, infraction of law.
Desagravio. Indemnity, satisfaction for injury.
Desahucio. Ejectment of tenant.
Desamortizar. Disentail, to break an entail.
Desamparo. Abandonment.
Descargo. Discharge of an obligation, defense.
Descendencia. Descent, extraction.
Descendiente. Descendant, offspring.
Descuento. Discount.
Desembargar. To free from a levy.
Deserción. Desertion. Abandonment of an appeal by appellant.
Desglosar. To separate sheets or documents from the proceedings or record in a suit.
Desheredación. Disinheritance.
Desierta. Term applied to an appeal which is abandoned.
Desistimiento. The abandonment of a right or action.
Deslinde. Survey and marking of boundaries of rural property.
Despacho. Despatch. Order issued by a judge. Commission given to an officer. Office.
Despojar. To despoil one of his property.
Despojo. Spoliation.
Destajo. Job or lump work, as distinguished from piece or day work.
Destierro. Exile, banishment.
Detención. Arrest.
Detentación. Possession held in the name of another.
Detentador. Possessor in another's name, *e. g.*, a lessee, a depositary.
Deuda. Debt.
Deudor. Debtor.
Devengar. To gain, to earn salaries, fees, etc.

Devolución. Restitution.

Devolutivo. Term applied to an appeal for review only which does not suspend the execution of the judgment appealed from.

Día feriado. Legal holiday.

Día festivo. Sundays and holidays.

Diario de avisos. Official gazette.

Días útiles. Working days.

Dietas. Daily salary of public officials; per diem.

Dictamen pericial. Opinion of expert witnesses at a trial.

Diezmo. Tithe; duty of a tenth per cent.

Digesto. Digest. Systematic compilation of the Roman law.

Dilación. Period established by law or a judge to answer a complaint or to produce evidence.

Diligencia. Judicial order, execution of a judicial order, or its notification.

Diligencia para mejor proveer. Judicial or court order to produce certain evidence which the parties overlooked and which is material to a proper decision.

Dilucidar. Elucidate.

Dimisión. Resignation of position or action.

Dinero. Money.

Diploma. Diploma, title, credential.

Diplomático. Diplomat.

Diputado. Representative in the lower house of the congress.

Diputación. Deputation, committee.

Dirección general de aduanas. General custom-house bureau.

Dirección general de rentas. General tax bureau.

Dirección de estadística. Bureau of Statisitics.

Dirimente. Term applied to legal impediments to marriage, which make it void, if performed.

Dirimir. To make void; to decide a contested issue.

Discernir. To endow a person with authority.

Discernimiento. Appointment, principally when made by a judge.

Discordia. Disagreement of arbitrators or expert witnesses.

Disfrutar. To reap benefits, to gain advantage.

Disipación. Dissipation, dissolute living.

Disolución del matrimonio. Dissolution of marriage.

Dispensa. Exemption from a prohibition of law.

Disposición. Disposition.

Dispositiva. Term applied to that part of a judgment in which the decision is contained, as compared with the other parts of the decision relating the facts of the case or the legal grounds referred to by the judge or alleged by the parties.

División. Division or partition of inheritance or thing possessed in co-ownership.

Dividendo. Dividend.

Divorcio. Divorce. In most of the Spanish-American countries this word applies to the mere separation of the consorts, without breaking the matrimonial ties.

Documental. Documentary.

Documento. Document.
Documento ejecutivo. Document implying a confession of judgment.
Documento negociable. Negotiable instrument.
Dolo. Deceit.
Dolo bueno. Shrewdness which every one is bound to use in order to defend himself.
Dolo malo. Malicious deceit.
Doméstico. Servant.
Domicilio. Permanent dwelling, place of residence, domicil.
Dominio. Ownership.
Dominio directo. Right of a person to or in a thing which may or may not imply the right to take the products of the same and utilize them in any way, as long as the right of the beneficiary of those products or benefits subsists. Bare legal owner or trustee.
Dominio eminente. Eminent domain.
Dominio útil. Right of person to enjoy the products and benefits of a thing which belongs to the possessor of the *dominio directo*.
Dominio pleno. Fee simple.
Donación. Donation, gift.
Donación inoficiosa. Gifts to an amount greater than a person can dispose of in favor of strangers, overlooking the rights of his legal heirs.
Donativo. Contribution to a fund for public benefit.
Dotar. To endow.
Dote. Dowry; property given to the husband on account of his marriage to sustain the expenses of the household.
Duelo. Duel. Mourning.
Dueño. Proprietor, owner.
Dúplica. Counterclaim by the defendant.

Echazón. Jettison.
Edad. Age, *mayor edad*, majority; *mayor de edad*, of age; *menor de edad*, minor.
Edicto. Public order of a judge or court issued after default of a party or to notify a large number of persons.
Efecto. Effect.
Efecto devolutivo. An appeal for a review only, without suspending the execution of the judgment.
Efecto retroactivo. Retroactive effect.
Efecto suspensivo. An appeal for a review and stay of proceedings.
Efectos. Effects, merchandise, movables, securities.
Efectos en cartera. Bills or securities in hand.
Efectos públicos. Public securities.
Ejercer. To practice (a profession), to enforce or use a right.
Ejecución. Execution. Attachment of property by judicial decree.
Ejecución aparejada. Attachment of property of a debtor on the basis of an instrument which implies a confession of judgment.
Ejecutado. Debtor whose property has been attached for debt.
Ejecutante. Creditor who attaches property of his debtor.
Ejecutivo. Executory; executive power.
Ejecutor. Judicial officer charged with the execution of an attachment.

EJECUTOR TESTAMENTARIO. Executor of a last will.

EJECUTORIA. Document in which a final judgment is transcribed; *causar ejecutoria*, to vest a judgment with the force of *res judicata*.

EJEMPLAR. The original form or model, copy of a book or instrument.

EJIDO. Tract of land at the outskirts of a town which is left for the common benefit of its residents and is used as pasture-ground.

ELECCIÓN. Election.

EMANCIPACIÓN. Emancipation.

EMBAJADOR. Ambassador.

EMBARCACIÓN. Vessel or ship of any size or description.

EMBARGO. Attachment of a debtor's property; embargo.

EMBARGO PROVISIONAL OR PREVENTIVO. Preliminary or preventive attachment.

EMBRIAGUEZ. Drunkenness.

EMERGENTE. Emergent, issuing.

EMIGRACIÓN. Emigration.

EMISIÓN DE OBLIGACIONES. Issue of bonds.

EMPADRONAMIENTO. Census, tax-list.

EMPATE. Tie vote.

EMPEÑAR. To pledge, to pawn.

EMPLAZAMIENTO. Summons, citation.

EMPLAZAR. To summon.

EMPLEADO. Employee.

EMPLEO. Employment, position.

EMPLEOMANÍA. Rage for public office.

EMPRESARIO DE TRANSPORTES. Transportation contractor.

EMPRÉSTITO. Government loan.

ENAJENACIÓN. Alienation.

ENAJENACIÓN FORZOSA. Sale which owner is forced to effect for public utility; forced sale.

ENAJENACIÓN MENTAL. Insanity.

ENAJENAR. To alienate.

ENCABEZAMIENTO. Tax-roll; head-line.

ENCOMENDERO. Grantee of a concession in the Spanish-American colonies, consisting in a certain number of Indians being assigned to him for their Christian education and defense, in exchange for the services or tribute of the Indians *encomendados*.

ENCUBRIDOR. Concealer; one who conceals a criminal or the means or effects of a crime.

ENCUENTRO. Collision, stroke, clash.

ENCUESTA. Inquiry.

ENDOSANTE. Endorser.

ENDOSATARIO. Endorsee.

ENDOSO. Endorsement.

ENDOSO EN BLANCO. Blank endorsement.

ENEMIGO. Enemy, inimical.

ENFITEUSIS. Contract by virtue of which the owner of realty cedes to another the *dominio útil* (see this word) of the property in consideration for a rent called *canon;* the beneficiary of the *enfiteusis* can sell or mortgage his rights

and dispose of them by will. The usual period of the *enfiteusis* is ninety years.

ENFITEUTA. Person who owns the *dominio dir cto* in a contract of *enfiteusis* (see these words).

ENGAÑO. Deceit, falsehood.

ENJAMBRE. Swarm of bees.

ENJUICIAMIENTO. Judicial procedure.

ENMIENDA. Correction of some error; satisfaction of losses sustained.

ENSAYADOR. Essayer.

ENSAYE. Essay (of metals).

ENTRADAS Y SALIDAS. Right of the owner of realty to pass through land nearby; right of way.

ENTREDICHO. Interdiction.

ENTREGA. Delivery.

ENTRONCAR. To prove that a person has the same descent as another.

ENTRONCAMIENTO. Kinship, relation.

ENVENENAMIENTO. Poisoning.

ENVIADO EXTRAORDINARIO. Minister plenipotentiary ranking below ambassador.

EQUIDAD. Equity.

EQUITATIVO. Equitable.

EQUIVALENTE. Equivalent.

EQUIVOCACIÓN. Mistake.

EQUÍVOCO. Equivocal, ambiguous.

ERA. Era.

ERARIO. Exchequer, public treasury.

ERROR. Error, mistake.

ERROR DE DERECHO. Ignorance of law.

ES BASTANTE. "It is sufficient," formula used in certifying to sufficiency of powers of attorney.

ESCALA. In maritime commerce, a sea port where vessels usually arrive.

ESCALA FRANCA. Free port.

ESCALAR. To scale, to climb walls, etc., to get clandestinely in or out of a building.

ESCALO. Breaking of a way into or out of a place.

ESCÁNDALO. Scandal.

ESCLAVITUD. Slavery.

ESCLAVO. Slave.

ESCOPETA. Shot-gun.

ESCRIBANÍA. The office of a notary.

ESCRIBANO. Notary public; professional public officers charged with authenticating judicial proceedings, contracts, last wills, and other acts.

ESCRITO. Judicial application in writing.

ESCRITOR. Writer.

ESCRITURA. Deed, instrument.

ESCRITURA PÚBLICA. Document executed with legal formalities usually before a notary, or issued by a public officer in the exercise of his functions.

ESCRITURA PRIVADA. Instrument executed by private parties without any notary's authentication.

Escriturario. Referring to public instruments, *e. g.*, *acreedor escriturario*, creditor whose right is based on a public instrument.

Escrutador. Teller, inspector of election charged with collecting and computing the votes.

Escrutinio. Scrutiny; election.

Especiero. Grocer.

Especificación. Specification (title by), manner of acquiring property by accession in the case of a combination of things which produce a new species that belongs to the maker of the new species, as the painter becomes the owner of the materials used in painting, or the sculptor of the marble of the statue made by him; he must, however, pay the price of the material.

Especificar. To specify.

Espera. Extension of time in a debt.

Esperanza. Hope; *Venta de esperanzas*, contract by which a person assigns an eventual right to the buyer.

Esponsales. Promise of marriage.

Esposa. Wife.

Esposas. Handcuffs.

Esposo. Husband.

Espurio. Child whose father cannot be ascertained on account of the loose conduct of the mother.

Estado. State, commonwealth, status.

Estado honesto. Status of a single woman.

Estado de sitio. Rule of martial law.

Estafa. Swindle.

Estanco. Monopoly, embargo.

Estanque. Pond, reservoir.

Estar a derecho. To appear in court by oneself or by representative, and to bind oneself to abide by the judicial decision of the case.

Estatua. Statute.

Estatuto. Statute, principally used for regulations of a town, university, clergy, etc. In the plural, it is used for the by-laws of a company.

Estelionato. A kind of fraud in contracts, principally applied to fraud in selling, mortgaging or pledging things which were already the subject-matter of the same transaction by the same seller, mortgagor or pledgor.

Esterilidad. Sterility, barrenness.

Estimación. Estimation, appraisal.

Estipendio. Salary, wage, fee.

Estipulación. Stipulation.

Estipular. To stipulate.

Estirpe. Stock of a family; (relationship) by blood.

Estrados. Court rooms.

Estrago. Ravage, destruction.

Estupro. Violent deflowering.

Evacuar un traslado. To give an answer, the party returning at the same time the records of proceedings given him for his information.

Evasión. Evasion, subterfuge.

Evasivo. Evasive.

EVENTUAL. Eventual, fortuitous.

EVICCIÓN. Eviction. Judicial dispossession of a thing, and also judicial recovery of a thing which was possessed by another. *Garantía de evicción*, warranty of title in sales, inheritance or common property partition, etc. *Salir a la evicción*, the appearance of the seller, etc., in court to defend the title of the thing he sold or transferred. *Cita de evicción*, citation served upon a person bound to guarantee the title of a thing to appear in court in a case in which the title is disputed.

EXAMEN. Examination.

EXCEPCIÓN. Defense, plea, exception.

EXCEPCIÓN DILATORIA. Dilatory pleading; demurrer.

EXCEPCIÓN PERENTORIA. Defense consisting in alleging a fact which destroys the action of the plaintiff.

EXCUSA. Reason given by a judge to excuse himself from the cognizance of a case.

EXCUSIÓN. See *Beneficio de excusión*.

EXENCIÓN. Exemption.

EXHIBITORIA. See *Acción ad exhibendum*.

EXHORTO. Letters requisitorial sent by one judge to another.

EXHUMACIÓN. Exhumation.

EXIGIBLE. Exigible, demandable.

EXPATRIACIÓN. Expatriation.

EXPEDIDOR. Shipper, consignor.

EXPEDIENTE. File of papers bearing on one case; record.

EXPENSAS. Expenses, charges, costs.

EXPERTO. Expert.

EXPORTACIÓN. Exportation.

EXPÓSITO. Foundling.

EXTORSIÓN. Extortion, overcharge.

EXTRACTO. Abstract, summary.

EXTRADICIÓN. Extradition.

EXTRAJUDICIAL. Extrajudicial.

EXTRANJERÍA. Status of a foreigner.

EXTRANJERO. Foreigner (from different country).

EXTRAÑAMIENTO. Banishment, exile, reprimand.

EXTRAVÍO. Deviation.

FACCIÓN DE TESTAMENTO. Capacity of leaving property by will or being a beneficiary of a last will.

FACTOR DE COMERCIO. Factor representative of a merchant, with power to transact business in his name.

FACTORÍA. Place where factors transact business in behalf of their principals, entrepot.

FACTURA. Invoice.

FACULTAD. Faculty; capacity.

FACULTAD ECONÓMICO-COACTIVA. Power given by law to collectors of taxes and revenues to compel payment of duties.

FACULATATIVO. Optional; physician.

FALLIDO. Insolvent, bankrupt.

FALLO. Judicial decision, judgment.
FALSARIO. Forger, counterfeiter, perjurer.
FALSEDAD. Falsehood.
FALSIFICACIÓN. Counterfeiting, forgery.
FALTA. Misdemeanor, fault.
FALTA DE ACEPTACIÓN. Non-acceptance.
FALTA DE PAGO. Non-payment.
FAMA. Reputation.
FAMILIA. Family.
FAMILIAR. Familiar, domestic.
FARMACÉUTICO. Pharmacist.
FAUTOR. Countenancer, abettor, accomplice.
FE. Faith, confidence, credit.
FECHA. Date.
FEHACIENTE. Authentic.
FELONÍA. Felony, treachery.
FERIA. Fair.
FERIADO. Holiday.
FIADO. Bonded debtor.
FIADOR. Guarantor.
FIANZA. Guarantee.
FIANZA DE ADUANA. Custom-house bond.
FIANZA DE LA HAZ. Security for payment of the judgment debt.
FIANZA DE ESTAR A DERECHO. See *Fianza de la haz.*
FIANZA CARCELERA, OR DE CÁRCEL SEGURA. Bail.
FIAR. To guarantee.
FIAT. Consent, fiat.
FICCIÓN. Fiction.
FIDEICOMISARIO. A devisee or legatee who is bound to deliver the devise or legacy at some future time to another; also a legatee beneficially interested in property left to another in trust; also an executor; cestui que trust.
FIDEICOMISO. Feoffment to use.
FIDUCIARIO. The heir of a legatee trustee.
FIEL ALMOTACÉN. Functionary charged with keeping the standard of weights and measures.
FIELDAD. Function of the *fiel almotacén;* custody.
FIESTA. Holiday; feast.
FILIACIÓN. Descent, lineage.
FILOSOFÍA. Philosophy.
FINCA. Real estate.
FINIQUITO. Final release, quittance.
FIRMA. Signature.
FIRMA ENTERA. The complete signature comprising the Christian name, the surname and the *rúbrica* (flourish). *Media firma* comprises only the surname and the *rúbrica.*
FISCAL. State's attorney; prosecutor.
FISCALÍA. Functions or office of a *fiscal.*
FISCALIZACIÓN. Inspection, censorship.

FLAGRANTE DELITO. Flagrant crime in process of commission.
FLETADOR. Charterer, freighter.
FLETAMENTO. Affreightment.
FLETANTE. Shipowner.
FLETAR. To charter a vessel.
FLETE. Freight.
FONDO PIADOSO. Pious fund.
FONDO DE AMORTIZACIÓN. Sinking fund.
FONDO DE RESERVA. Reserve fund.
FONDOS PÚBLICOS. Public funds.
FONDO, ARTÍCULO DE. Editorial article.
FONDO VITALICIO. Life annuity.
FORAGIDO. Outlaw who is fleeing from justice.
FORAL. Pertaining to charters granted or customs recognized by the king of Spain for the government of the provinces.
FORASTERO. Foreigner as between the provinces of the same country.
FORENSE. Referring to the bar or legal profession.
FORMA. Way of proceeding; *Ante usted en debida forma*, usual form included in petitions to courts or public officials.
FORMACIÓN DE CAUSA. Process of law.
FORMALIDADES. Requirements; red tape.
FORMALIZAR. To execute an act or contract with due formalities of law.
FÓRMULA. Formula.
FORMULARIO. Book containing legal forms.
FORNICACIÓN. Fornication.
FORO. Forum; legal profession, bar.
FORTALEZA. Fortress, fortitude.
FORTUITO, CASO. Unforeseen event; act of God.
FORZADO. Subject to or obtained through violence.
FORZOSO. Compulsory.
FRACTURA. Breakage; fracture.
FRAGANTE. See *Flagrante.*
FRAILE. Friar.
FRANQUEO. Postage.
FRANQUICIA. Exemption from duty, privilege.
FRATRICIDA. Fratricide, murder of a brother or sister.
FRAUDE. Fraud.
FRUCTUARIO. Usufructuary, person who receives the products and benefits derived from a thing whose ownership is in another.
FRUTOS. All that a thing can produce.
FRUTOS CIVILES. Rentals produced by a thing, interest on money, etc.
FRUTOS INDUSTRIALES. Products of a thing obtained through labor and industry applied to it.
FRUTOS NATURALES. Spontaneous products of land.
FUENTE. Water spring.
FUENTES DE DERECHO. Sources of law.
FUERO. Ancient compilation of laws, customs and usages of a town or province; charter granted by the king of Spain to towns or provinces. Jurisdiction, *e. g.*, *fuero comercial*, *fuero de guerra*, jurisdiction and law in

commercial and in military matters. Exemption from arrest enjoyed by certain functionaries.

Fuero externo. Court in which cases are decided according to law.

Fuero interno. Settlement of conduct according to conscience.

Fuerza. Force, violence. Act of an ecclesiastical court exceeding its jurisdiction.

Fuerza mayor. Force majeure; act originating in act of man, as compared with *caso fortuito*, or act of God.

Fullería. Fraud committed in gambling.

Fundación. Foundation; endowment established for a particular purpose.

Fundo. Land property.

Fundo legal. Land property assigned to a town by the law in the Spanish-American colonies.

Funcionario. Official, officer, functionary.

Funerales. Funeral service.

Fungible. Fungible.

Furtivo. Clandestine.

Fusilamiento. Execution by musketry.

Gabela. Tax, heavy service.

Gabinete. Cabinet, body of ministers of the administration.

Gaceta. Government paper where laws, government decrees and judicial decisions are published.

Gacetilla. Personal news column in a paper.

Galeras. Punishment of rowing on board of galleys.

Ganancia. Gain, profit.

Ganadería. Cattle-raising, cattle-brand.

Ganado. Live stock.

Gananciales. See *Bienes gananciales*.

Ganancias y pérdidas. Profit and loss.

Ganzúa. Skeleton-key.

Gañán. Day laborer; farm-hand.

Garante. Guarantor.

Garantía. Guaranty.

Garantía de evicción. Warranty of title.

Garantía de saneamiento. Warranty of paying indemnity in case of eviction or of hidden defects.

Garito. Gambling house.

Garrote. The screw or apparatus used in Spain for the execution of criminals.

Gastador. Spendthrift.

Gasto. Expenditure.

Gastos. Expenses, disbursements.

Gemelos. Twins.

Genealogía. Genealogy.

Generación. Generation.

General. General.

Generales de ley. Questions generally asked, by provision of the law,

from witnesses, such as age, status, profession, relationship with the parties, interest in the case, etc.

GENTE. People, folk.

GEODESIA. Geodesia; land surveying.

GEOLOGÍA. Geology.

GEÓLOGO. Geologist.

GEOMETRÍA. Geometry.

GESTACIÓN. Gestation.

GESTIONAR. To procure, to promote, manage.

GESTIÓN DE NEGOCIOS. Quasi-contract in which a person takes under his care the business of another without power, and even without the latter's consent.

GESTOR. Manager.

GESTOR OFICIOSO. Manager who undertakes certain business in behalf of another without his power of attorney or even his knowledge.

GIRADO. Drawee.

GIRADOR. Drawer.

GIRAR. To draw.

GIRAR EN DESCUBIERTO. To overdraw.

GLOSA. Explanation of a text of law; auditing of an account.

GOBERNADOR. Governor.

GOBIERNO. Government.

GOLPE. Blow, stroke.

GOLPE DE ESTADO. Coup d'état.

GOLPE DE GRACIA. Finishing stroke.

GRADO. Degree; different grades or instances of a suit.

GRADO DE PARENTEZCO. Degree of kinship.

GRADUACIÓN DE ACREEDORES. Classification of creditors in a bankruptcy, according to the rank of preference in which they must be paid.

GRANOS. Grains, cereals.

GRAVAMEN. Lien, encumbrance, burden.

GRAVE. Grave, mortal.

GREMIO. Guild, fraternity.

GRUESA VENTURA. Bottomry.

GUANTES. Extra pay in case of sale of commercial enterprise.

GUARDA. Guardianship, custody.

GUARDACOSTAS. Revenue cutter.

GUARDARRAYA. Boundary of a mining claim.

GUARDIA. Guard.

GUERRA. War.

GUERRILLA. Guerrilla.

GUÍA. Custom house permit or certificate of the payment of duties.

GUBERNATIVO. Administrative, governmental.

HABER. Assets, in bookkeeping.

HÁBIL. Capable.

HABILITACIÓN. License, qualification, equipment.

HABILITACIÓN DE EDAD. Conferring legal capacity on a minor by means of a decree.

HABILITAR LAS HORAS. Judicial decree authorizing proceedings in judicial matters before sunrise or after sunset.

HABITACIÓN. Right to lodging in another's house without paying rent therefor.

HABITANTE. Resident, but not necessarily citizen.

HACER FE. To suffice as a means of evidence.

HACIENDA. Landed property, estate, fortune.

HACIENDA PÚBLICA. Exchequer, public treasury.

HACIENDA DE BENEFICIO. Mining reduction works in Mexico.

HALLAZGO. Act of finding what was lost; thing found.

HECHO. Fact, act; done, made.

HECHO JURÍDICO. Any act or event considered as operative of a change in the legal relations of the parties concerned.

HECHOS JUSTIFICATIVOS. Facts which may show the innocence of a person accused of a crime.

HEREDERO. Heir.

HEREDERO INSTITUIDO. Heir designated in a last will.

HEREDERO FORZOSO. Heir to whom the testator is obliged by law to leave a portion of his estate.

HEREDERO EXTRAÑO, or VOLUNTARIO. Heir voluntarily appointed by the testator, as compared with the *heredero forzoso* and *heredero legítimo*.

HEREDERO FIDUCIARIO. Heir-trustee.

HEREDERO FIDEICOMISARIO. Heir to whom the heir-trustee must deliver the inheritance.

HEREDERO UNIVERSAL. Heir who succeeds to the whole property of the deceased, or to an aliquot part thereof.

HEREDERO PARTICULAR. Legatee, or successor to a certain kind of property.

HERENCIA. Inheritance.

HERENCIA VACANTE. Unclaimed inheritance.

HERENCIA YACENTE. Inheritance which has not been received by the heirs or has not been distributed among them.

HERIDA. Wound.

HERIDO. Wounded person.

HERIR. To wound, hurt.

HERMANDAD. Fraternity.

HERMANA. Sister.

HERMANO. Brother; *medio hermano*, stepbrother.

HERMANOS. Brothers or brothers and sisters.

HERMANOS CARNALES. Brothers by the same father and mother.

HERMANOS CONSANGUÍNEOS. Brothers by the same father but not by the same mother.

HERMANOS UTERINOS. Brothers by the same mother but not by the same father.

HERMANO POLÍTICO or CUÑADO. Brother-in-law.

HERRAR EL GANADO. To brand cattle.

HIDALGO. Noble.

HIDALGUÍA. Nobility by lineage.

HIJASTRO. Stepchild.

HIJO. Son.

Hijo legítimo. Legitimate child.
Hijo adoptivo. Adopted child.
Hijo bastardo, or ílegitimo. Bastard.
Hijo legitimado. Child legitimated by the subsequent marriage of the father and mother.
Hijuela. Portion accruing to an heir, and the instrument in which it is described.
Hipnotizar. Hypnotize.
Hipoteca. Mortgage.
Hipoteca legal. Mortgage imposed by law independently of any agreement of the persons concerned.
Hipoteca convencional. Contractual mortgage.
Hipoteca naval. Mortgage of a ship.
Hipoteca, ejecución de. Mortgage foreclosure.
Hipotecario. Referring to a mortgage.
Historia. History.
Hoja de servicios. Certificate setting forth the rank and services of a military officer.
Hoja volante. Fly-sheet; newspaper extra.
Holgazán. Idle, lazy.
Hológrafo. Document, principally a will, fully hand-written and signed by its author; holographic.
Hombre. Man.
Hombre bueno. Arbiter, arbitrator.
Hombre de negocios. Business man.
Homicida. Murderer.
Homicidio. Manslaughter.
Homicidio proditorio. Treacherous murder.
Honesto. Honest.
Honor. Honor, privilege, chastity in women.
Honorario. Fee.
Hora. Hour.
Horadación. Perforation, boring.
Horca. Gallows.
Horda. Horde.
Horro. Freed slave.
Hospicio. Poor-house; orphan asylum.
Hospital. Hospital.
Hostería. Inn.
Hostilidad. Hostility.
Hotel. Hotel.
Huelga. Strike, leisure.
Huella. Track, footprint, tread.
Huérfano. Orphan.
Huesped. Guest.
Hurto. Theft, stealing, thing stolen.

Identificación. Identification.
Iglesia. Church.

IGUALA. Agreement in reference to professional services, or payment of taxes in a certain amount paid annually, monthly, etc.

ILEGÍTIMO. Illegal, unlawful.

IMPEDIMENTO MATRIMONIAL. Legal impediment to contract marriage.

IMPEDIMENTO IMPEDIENTE. Impediment which hinders the performance of the marriage, but does not dissolve it once contracted.

IMPEDIMENTO DIRIMENTE. Impediment which hinders the performance of marriage and dissolves it if contracted.

IMPORTACIÓN. Importation.

IMPOSTOR. Impostor.

IMPOSTURA. False imputation of charge.

IMPOSIBLE. Impossible.

IMPOTENCIA. Impotence in reference to matrimonial duties.

IMPRENTA. Printing, printing office, press.

IMPRESCRIPTIBLE. Property or right which is not subject to the statute of limitations.

IMPRUDENCIA. Negligence.

IMPÚBER. Male under fourteen, and female under twelve.

IMPUESTO. Tax, impost.

IMPUNIDAD. Impunity.

IMPUTACIÓN. Imputation.

IMPUTABILIDAD. Imputableness.

INALIENABLE. Inalienable.

INAMOVIBLE. Immovable, term applied to functionaries appointed for life, during good behavior.

INAPELABLE. Without appeal.

INCAPACIDAD. Incapacity.

INCENDIARIO. Incendiary, guilty of arson.

INCENDIO PREMEDITADO. Arson.

INCERTIDUMBRE. Uncertainty.

INCESTO. Incest.

INCESTUOSOS. Incestuous.

INCIDENCIA. Incidence; event which occurs in the course of another.

INCIDENTE. Question arising between the parties in litigation during the course of the principal action. Incidental issue.

INCITATIVA. Writ from a superior to a lower court urging that justice be administered.

INCLUSA. Foundling asylum.

INCLUSIVE. Inclusive.

INCOMPATIBILIDAD. Incompatibility, discordance.

INCOMPETENCIA. Lack of jurisdiction, incompetence.

INCOMUNICACIÓN. State of prisoner deprived of intercourse with any one.

INCONFESO. Unconfessed.

INCONGRUENCIA. Incongruousness. Disagreeing.

INCONTINENCIA. Incontinence.

INCONTINENTE. Incontinent, unchaste.

INCONTINENTI. Immediately.

INCORPORAL. Incorporeal.

INCULPAR. To accuse.

INCURRIR. To incur, become liable.
INCURSIÓN. Incursion.
INDAGATORIA. First declaration of an accused before the judge immediately after his arrest.
INDEBIDO. Undue.
INDECLINABLE. Term applied to the jurisdiction of a judge when it cannot be waived or declined by the parties.
INDEMNE. Undamaged.
INDEMNIDAD. Guaranty of indemnity.
INDEMNIZACIÓN. Indemnity, reimbursement.
INDICADO. Referee in case of need, for acceptance and payment of a bill of exchange.
INDICIADO. Accused whose responsibility is not fully proved.
INDICIO. Circumstantial evidence.
INDÍGENA. Indigenous, native.
INDIGENTE. Indigent, poor.
INDIGNIDAD. Indignity, unworthiness.
INDIRECTAMENTE. Indirectly, tortuously.
INDISOLUBLE. Bond which cannot be dissolved or broken.
INDIVIDUO. Individual.
INDIVISO. Undivided property.
INDUCIR. To induce, to persuade.
INDULGENCIA. Leniency with criminals.
INDULTO. Pardon.
INDUSTRIA. Industry.
INDUSTRIAL. Manufacturer; person engaged in industry.
INESTIMADO. Not appraised; *dote inestimada*, dowry delivered to the husband unvaluated.
INFAMADOR. Defamer, libeller.
INFAMIA. Infamy.
INFANCIA. Infancy.
INFANTE. Infant under seven years.
INFANTICIDIO. Infanticide.
INFIDENCIA. Unfaithfulness.
INFLIGIR. To inflict, condemn.
INFORMACIÓN. Judicial inquiry.
INFORMACIÓN AD PERPETUAM. Preventive judicial attestation by witnesses when no action or proceeding has begun, made with a view to safeguarding the interest and rights of a person, when it is to be feared that the witnesses who know the facts may die or absent themselves; perpetuating testimony.
INFORMACIÓN TESTIMONIAL. Attestation of witnesses.
INFORME. Report, argument, pleading.
INFORME PERICIAL. Expert report produced as proof.
INFRACCIÓN. Breach, violation.
INFRAGANTE. See *Flagrante delito*.
INGENIERO. Engineer.
INGRESO. Revenue; entrance.
INHÁBIL. Unable; *dia inhábil*, day in which the courts do not sit.

INHIBIR. To inhibit a court from proceeding further.

INHIBITORIA. Inhibitory letter sent by the judge who possesses jurisdiction to another who, in his opinion, has taken cognizance of a case without having jurisdiction.

INHUMACIÓN. Burial.

INICIATIVA. Initiative. Bill introduced in congress.

ININTELIGIBLE. Unintelligible.

INIQUIDAD. Iniquity.

INJURIA. Injury; slander and libel; outrage.

INJUSTICIA NOTORIA. Palpable injustice; unjustifiable wrong in judicial cases.

INMEMORIAL. Ancient beyond memory.

INMISCUIRSE. To interfere in, to intermeddle in another's business.

INMORAL. Immoral.

INMUEBLE. Real estate; immovable property.

INMUNIDAD. Immunity, franchise, privilege.

INMUNE. Exempt, immune.

INOMINADOS. Contracts which lack special name consecrated by law.

INOCENTE. Innocent, guiltless.

INOFICIOSO. Not in accordance with moral duty. Term used in connection with wills in which the testator overlooks legitimate or necessary heirs or fails to provide for the support of persons legally dependent upon him.

INQUILINATO. Leasehold.

INQUILINO. Tenant, lessee.

INQUISICIÓN. Inquest, inquiry.

INSACULACIÓN. Balloting for names.

INSCRIPCIÓN. Record, registration, as public record or registry for mortgages, etc.

INSÓLIDUM. Joint and several obligation or liability.

INSOLVENCIA. Insolvency.

INSOLVENTE. Insolvent.

INSPECCIÓN OCULAR. Personal inspection by a judge of a matter in evidence, or place in which event in litigation occurred.

INSTALACIÓN. Taking possession of an office.

INSTANCIA. Petition. Grade of courts in the hierarchy. *A instancia de parte*, after party petition, as compared with proceedings carried on *ex officio* by the judge; *primera instancia*, first instance; *segunda instancia*, appeal; *tercera instancia*, revision; *absolución de la instancia*. See *Absolver de la instancia*.

INSTITUCIÓN. Institution.

INSTITUCIÓN DE HEREDERO. Appointment of heir.

INSTITUTO. High school, institute.

INSTRUMENTAL. Referring to public instruments; *prueba instrumental*, evidence consisting in public instruments.

INSTRUMENTO. Instrument.

INSTRUMENTO PRIVADO. Instrument signed by private individuals without notary's attestation and authentication.

INSTRUMENTO PÚBLICO. Instrument issued by an authority or authenticated by a notary.

INSTRUMENTO EJECUTIVO. Instrument which implies a confession of judgment.

INSULTAR. To insult.
INSULTO. Insult, affront.
INSURGENTE. Insurgent, rebel.
INSURRECCIÓN. Insurrection, rebellion.
INTENCIÓN. Intention, design, purpose.
INTENDENTE. Intendant, subtreasurer of the government.
INTENTAR. To try, attempt.
INTENTO. Intent.
INTENTONA. Chimerical attempt.
INTERDICCIÓN. Judicial declaration of incapacity of a person to manage his own affairs due to insanity. Interdict.
INTERDICTO. Summary proceeding in claims referring to possession.
INTERDICTO DE ADQUIRIR LA POSESIÓN. Summary proceedings to enter into possession of property that we did not possess before, but is due us by evident title, as in case of inheritance.
INTERDICTO DE RECOBRAR LA POSESIÓN. Summary proceedings to recover possession of realty.
INTERDICTO DE RETENER LA POSESIÓN. Summary proceedings to retain possession which is menaced by another.
INTERDICTO DE OBRA NUEVA. Summary proceedings enjoining another from constructing a new building or a part thereof which may violate our rights.
INTERDICTO DE OBRA RUINOSA. Summary proceedings to have a dilapidated building destroyed or rebuilt when it is a menace to our property or the public in general.
INTERÉS. Interest.
INTERÉS COMPUESTO. Compound interest.
INTERÉS LEGAL. Legal rate of interest, as a rule fixed by the law for cases in which the parties have not fixed any rate.
INTERÉS CONVENCIONAL. Interest fixed by the parties to a contract.
INTERESES MORATORIOS. Interest due on account of default in an obligation.
INTERLINEAL. Interlineal.
INTERLOCUTORIO. Judicial decree which decides an incidental issue.
INTERPELACIÓN. Request of payment or fulfilment of an obligation.
INTERPONER. To petition (principally in reference to the taking of an appeal or any other remedy).
INTERPÓSITA PERSONA. Intermediary person through whom one seeks to do what the law prohibits one from doing directly.
INTERPRETACIÓN. Interpretation.
INTERPRETACIÓN AUTÉNTICA. Interpretation of law made by the legislator.
INTERPRETACIÓN USUAL. Interpretation of law made by courts.
INTERPRETACIÓN DOCTRINAL. Interpretation of law made by authors and jurists.
INTÉRPRETE. Interpreter; *corredor intérprete de brigues*, ship broker interpreter.
INTERROGATORIO. List of questions asked of a witness.
INTERROGATORIO DE REPREGUNTAS. List of questions for cross-examining a witness.

INTERRUPCIÓN. Interruption (refers to the period of the statute of limitations.)

INTERVALOS LÚCIDOS. Periods of time during which an insane person shows good judgment and can make a will. Lucid intervals.

INTERVENCIÓN. Intervention; *aceptación por intervención*, acceptance for honor; *pago por intervención*, payment for honor.

INTER VIVOS. Legal acts consummated during the life of the parties, such as gifts, etc.

INTRUSIÓN. Intrusion, invasion, trespassing.

INTRUSO. Intruder.

INUNDACIÓN. Inundation, flood.

INÚTIL. Useless.

INUTILIZACIÓN. Mutilation.

INVALIDAR. To invalidate, nullify.

INVÁLIDO. Void. Invalid.

INVASIÓN. Invasion.

INVENCIÓN. Finding of a thing which has no owner. Invention.

INVENTARIO. Statement of assets and liabilities.

INVIOLABILIDAD. Privilege of not being subject to arrest. See *Fuero*.

INVOLUNTARIO. Involuntary.

IRA. Ire, anger, fury.

ÍRRITO. Void.

ISLA. Island.

ITEM. Also.

JACTANCIA. Action to quiet title, or against persons who boast of having an action against the plaintiff. If the boasting party does not bring his professed action within a period provided by the judge, he is enjoined to keep silent and forego the action.

JORNAL. Day-work; day-wage.

JORNALERO. Day-worker.

JOYAS. Jewels, valuable things.

JUBILACIÓN. Retirement of an officer or employee of the government on a pension or reduced pay on arrival at a certain age.

JUDICATURA. Judicature; dignity of a judge.

JUDICIAL. Judicial.

JUEGO. Gambling.

JUEZ. Judge.

JUEZ TERCERO EN DISCORDIA. Umpire.

JUEZ DE LETRAS. Judge who, being a trained lawyer, does not have to consult with a legal adviser. Judge of first instance.

JUEZ INSTRUCTOR. Examining magistrate in criminal prosecutions.

JUEZ DE PRIMERA INSTANCIA. Judge of first instance.

JUEZ DE LO CIVIL. Judge who takes cognizance of civil matters only.

JUEZ DE LO CRIMINAL. Judge of criminal cases.

JUEZ MIXTO. Judge with civil and criminal jurisdiction.

JUEZ INFERIOR. Inferior judge.

JUEZ DE PAZ. Justice of the peace.

JUEZ SUPERIOR. Superior judge.

JUEZ A QUO. Judge from whose decision an appeal is taken.

JUEZ AD QUEM. Judge to whom an appeal is taken.

JUICIO. Proceedings; form of action; suit.

JUICIO DE CONCILIACIÓN. Proceedings to avoid litigation.

JUICIO ARBITRAL. Proceedings before an arbiter.

JUICIO ESCRITO. Proceedings in which petitions, as a rule, must be made in writing.

JUICIO VERBAL. Proceedings in which the parties make their petitions orally and a memorandum is taken by the clerk of all the evidence, pleas and judgment.

JUICIO CONTENCIOSO. Proceedings between contesting litigants, as compared with proceedings in voluntary jurisdiction.

JUICIO DECLARATIVO. Litigation in which the judge has to *declare* which of the parties is right in his claim.

JUICIO UNIVERSAL. Proceedings in which the whole estate of a person is involved, *e. g.*, bankruptcy and inheritance proceedings.

JUICIO PETITORIO. Action in which the dominion or ownership of a thing is contested.

JUICIO POSESORIO. Action involving the mere possession, without reference to the ownership of the thing possessed.

JUICIO DE MAYOR CUANTÍA. Action where the complaint demands property value or damages in excess of a certain sum fixed by the law.

JUICIO DE MENOR CUANTÍA. Action claiming something whose value does not exceed such fixed sum.

JUICIO ORDINARIO, or PLENARIO. Proceedings in which all the requisites of law are observed, a longer period of time being given the parties to answer the complaint and counterclaim, to produce evidence and to prepare arguments.

JUICIO SUMARIO. Summary proceedings, as compared with *juicio plenario*.

JUICIO EJECUTIVO. Proceedings based on an instrument which imports a confession of judgment, and in which an attachment of defendant's property is made before summons is served upon him.

JUICIO DE CONCURSO DE ACREEDORES. Proceedings on insolvency of a non-merchant.

JUICIO DE QUIEBRA. Proceedings on bankruptcy of a merchant.

JUICIO DE APEO. See *Apeo y deslinde*.

JUICIO EN REBELDÍA. Proceedings carried on in the absence of the defendant when he fails to appear after summons served upon him.

JUNTA DE ACREEDORES. Meeting of creditors in proceedings on bankruptcy or suspension of payments.

JUNTA DE COMERCIO. Board of trade.

JUNTA DE GOBIERNO. Executive committee.

JUNTA DE SANIDAD. Board of health.

JURADO. Jury.

JURAMENTO. Oath.

JURAMENTO DECISORIO. Oath taken by deponent when the party seeking his deposition admits his testimony as incontrovertible evidence.

JURAMENTO ESTIMATORIO. Oath taken by plaintiff at the request of the judge, declaring the value of the thing he demands when no other evi-

dence can be had; the evidential force of the deposition is left to the discretion of the judge.

Juramento supletorio. Oath taken by a party at the request of the judge when the deposition is to complement the evidence adduced.

Jurídico. Juridical, adjective applied to acts in accordance with the law, or considered as affecting legal relations.

Jurisconsulto. Jurisconsult, lawyer.

Jurisdicción. Jurisdiction.

Jurisdicción contenciosa. Contentious jurisdiction.

Jurisdicción contencioso-administrativa. Jurisdiction in cases of *contencioso administrativo*. See this word.

Jurisdicción voluntaria. Jurisdiction of cases in which there is no contested issue and the functions of the judge are confined to authenticating or clothing with solemnity certain acts.

Jurisprudencia. Jurisprudence. Interpretation of the law made by judges and courts in uniform decisions.

Jurista. Jurist.

Justicia. Justice.

Justiprecio. Expert valuation.

Justo. What is just and according to law.

Juzgado. Court of first instance.

Juzgar. To adjudge.

Labor. Labor, toil.

Laboreo. Work done in mines to discover and extract metals.

Labrador. Farmer, husbandman or woman.

Labranza. Agriculture.

Ladrón. Thief, robber.

Ladronicio. Larceny, theft, robbery.

Lanzamiento. Ejectment by judicial action.

Lapso. Lapse of time.

Lasto. Voucher, receipt.

Lato. Broad, as compared with strict.

Laudo. Decision given by arbitrators.

Laudo omologado. Decision of arbitrators accepted by the parties or against which no appeal is taken.

Legado. Bequest, legacy.

Legado apóstolico. Papal legate.

Legal. Legal, lawful.

Legalizar. To legalize, authenticate a document.

Legar. To bequeath; to depute.

Legatario. Legatee.

Legislator. Legislator, lawmaker.

Legislar. To legislate.

Legislativo. Legislative.

Legislatura. Legislature.

Legista. Lawyer.

Legítima. That part of the paternal or maternal estate of which the testator cannot disinherit his children without legal cause.

LEGITIMACIÓN. Legitimation; act by means of which a son or a daughter born illegitimate is assimilated to legitimate children.
LEGÍTIMO. Legitimate.
LEGO. Layman.
LEGUA. League, measure of land.
LEGULEYO. Petty lawyer.
LESA MAJESTAD. Lèse majesté or high treason.
LESIÓN. Personal injury; hurt; damage caused to one of the parties to a contract, principally in the price of the thing sold.
LETRA ABIERTA. Letter of credit for an unlimited amount.
LETRA DE CAMBIO. Bill of exchange.
LETRA PERJUDICADA. Bill of exchange not protested in proper time and form.
LETRADO. Lawyer.
LEVA. Levy; enrolling of men for military service.
LEVANTAMIENTO. Revolution, revolt. Withdrawal.
LEY. Statute, act, law.
LIBELO. Libel, petition, complaint.
LIBERACIÓN. Discharge.
LIBERALIDAD. Donation, liberality.
LIBERTAD. Liberty.
LIBRADO. Drawee.
LIBRADOR. Drawer.
LIBRANZA. Draft; bill of exchange payable at the place where it was drawn.
LIBROS DE COMERCIO. Commercial books of account.
LIBRO DIARIO. Journal.
LIBRO MAYOR. Ledger.
LIBRO TALONARIO. Stub book.
LIBRO DE CAJA. Cash book.
LIBRO DE INVENTARIOS. Statements book.
LICENCIA. Permission.
LICITACIÓN. Auction sale of a thing which belongs to various owners.
LICITADOR. Bidder at an auction.
LÍCITO. Licit, lawful.
LINAJE. Lineage.
LÍNEA. Lineage.
LIQUIDACIÓN. Liquidation; winding up.
LÍQUIDO. Liquid.
LITIGANTE. Litigant.
LITIGIO. Lawsuit, litigation, contest.
LITIS. Lawsuit, litigation.
LITISCONSORTE. Associate in a lawsuit.
LITISCONTESTACIÓN. Answer to a judicial demand.
LITISPENDENCIA. *Lis pendens*.
LOCACIÓN CONDUCCIÓN. Lease, hiring of thing or services.
LOCAL. Local.
LOCO. Lunatic, insane person.
LOGRO. Interest, usury, gain.
LONJA. Exchange.
LOTE. Lot, plot or allotment of land.

Lotería. Lottery.
Lúcidos, intervalos. See *Intervales lúcidos.*
Lucrativo. Profitable, lucrative.
Lucro. Lucre, profit.
Lugarteniente. Lieutenant, substitute.
Lujo. Luxury.
Lujuria. Lust, lubricity.
Lustro. Lustrum.
Luto. Mourning; mourning dress.

Madrastra. Stepmother.
Madre. Mother.
Madrina. Godmother.
Maestro. Master, teacher.
Maestro de obras. Master mason who supervises the construction of buildings under the direction of an architect and may himself plan minor buildings or houses.
Magistrado. Magistrate, judge.
Magistrado ponente. Justice who prepares the case for decision and drafts it.
Mala fe. Bad faith.
Malévolo. Malevolent.
Malhechor. Criminal.
Malicia. Malice.
Malversación. Malversation, maladministration.
Manantial. Spring water.
Manceba. Mistress.
Mancebo. Shop-boy.
Mancomunadamente. Jointly and severally.
Mancomunidad. Joint and several obligation.
Mancomunidad activa. Joint and several right or credit.
Mancomunidad pasiva. Joint and several obligation.
Manda. Bequest.
Mandamiento. Judicial mandate.
Mandato. Agency.
Manifestación. Declaration, statement.
Mano muerta. Mortmain.
Mantener. To maintain, support, defend.
Manuscrito. Manuscript.
Mar. Sea; *alta mar*, high sea; *baja mar*, ebb-tide.
Marca de comercio. Trade-mark (seller's).
Marca de fábrica. Trade-mark (manufacturer's).
Marido. Husband.
Marina. Marine, nautical art.
Marina mercante. Merchant craft or marine.
Marina de guerra. Navy.
Marinero. Seaman; seaworthy.
Masa. Joint interest of several persons, *e. g.*, in inheritances and bankrupties; the entire estate.

MATERIAL RODANTE. Rolling stock.
MATERIALES. Materials for construction.
MATERIA PRIMA. Raw material.
MATRÍCULA DE COMERCIO. Register of merchants.
MATRIMONIO. Marriage.
MATRIMONIO PUTATIVO. Void marriage on account of an impediment unknown to the consorts.
MATRIZ. The original of an instrument or document in the office of a notary. Stub of a stub book.
MAYOR CUANTÍA. Term applied to actions whose amount exceeds a certain limit fixed by law.
MAYOR DE EDAD. Of full age.
MAYORAZGO. Right of primogeniture, first-born son entitled to an entailed estate. Entailed estate.
MAYORÍA. Majority. Full age.
MEDIA FIRMA. Signature consisting of the surname and flourish only.
MEDIANERÍA. Right of co-owners of a partition wall.
MEDICAMENTO. Medicament.
MEDICINA. Medicine, physic.
MÉDICO. Physician.
MEDIDA. Measure.
MEDIDOR. Measurer, surveyer.
MEDIERO. Copartner in a farm or cattle ranch.
MEDIODÍA. Noon. South.
MEDIO DE PRUEBA. Means of evidence.
MEJORA. Improvements to property. Advantage or portion of the estate of a testator reserved for a child or a descendant besides his *legítima* (see this word).
MEJORA INOFICIOSA. Portion left to an heir to the detriment of other heirs' rights.
MEJORAR LA APELACIÓN. To appear in a superior court ratifying the appeal taken from a decision, and showing the legal grounds for the remedy.
MEJORAR EL EMBARGO. Extension of an attachment to other property of the debtor when the first levy is not sufficient to cover the demand.
MELLIZOS. Twins.
MEMORIAL. Petition.
MENDICIDAD. Mendicity.
MENDIGO. Beggar.
MENOR. Minor.
MENOR CUANTÍA. Term applied to actions for an amount less than a certain limit fixed by law.
MENORIDAD. Minor age; minority.
MENOSCABO. Damage. Lawful gain which was prevented by another's fault.
MENTECATO. Insane person.
MERCADER. Merchant.
MERCADERÍA. Merchandise.
MERCADO. Commercial market, exchange.
MES. Month.

METRO. Meter.
MEZCLA. Mixture.
MIEDO. Fear.
MILICIA. Art of war. Militia.
MILICIANO. Military, soldier.
MINA. Mine.
MINERAL. Mineral; ore. Mining town.
MINERALOGÍA. Mineralogy.
MINERÍA. Mining science.
MÍNIMO. Minimum.
MINISTERIO. Ministry; each department of the government.
MINISTERIO DE FOMENTO. Department of promotion or development.
MINISTERIO DE HACIENDA. Treasury department.
MINISTERIO PÚBLICO. Department of the public prosecutor, and attorney general.
MINISTRO DEL TRIBUNAL. Any of the justices of a high court.
MINUTA. First draft, memorandum, minute.
MINUTARIO. Minute-book.
MISERIA. Misery.
MISIÓN. Mission.
MISIONERO. Missionary.
MODO. Way.
MOJÓN. Landmark.
MOLINO. Mill.
MONEDA. Coins.
MONEDA CORRIENTE. Currency.
MONEDA SONANTE. Hard money.
MONEDERO FALSO. Counterfeiter.
MONICIÓN. Warning.
MONJA. Nun.
MONJE. Monk.
MONOPOLIO. Monopoly.
MONSTRUO. Monster.
MONTE. Mountain.
MONTE PÍO. Gratuity fund for widows and orphans. Pawnshop.
MONTE DE PIEDAD. Pawnshop controlled by the state.
MORA. Delay, default.
MORADA. Dwelling, house.
MORATORIA OR MORATORIO. Extension of the period for paying debts.
MORDAZA. Gag; muzzle.
MORIBUNDO. Dying person.
MOSTRENCO. Masterless; thing which has no known owner.
MOTÍN. Mutiny, rebellion.
MUCHACHO. Boy, lad.
MUDO. Dumb.
MUELLAGE. Wharfage.
MUELLE. Pier, wharf; tender; licentious.
MUERTE. Death.
MUESTRA. Sample.

Mujer. Woman.
Mujer casada. Married woman.
Multa. Fine.
Munición. Ammunition; *de munición*, supplied by the government, said with reference to food, clothing or arms.
Municiones de boca. Provisions, victuals.
Municiones de guerra. War stores.
Municipal. Municipal.
Munícipe. Alderman.
Municipio. Municipality.
Muralla. Rampart, wall.
Muro. Wall.
Muro medianero. See *Medianería*.
Mutilación. Mutilation.
Mutuante. Lender of a fungible thing, *e. g.*, money, grain, etc.
Mutuatario. Borrower of a fungible thing.
Mutuo. Loan of fungible things, giving the borrower the right to dispose thereof.
Mutuo disenso. Mutual dissent; inadequate expression applied to the agreement of the parties to rescind a contract.

Nacimiento. Birth.
Nación. Nation.
Nacionalidad. Nationality.
Nato. Term used to designate a function which is the legal consequence of a position.
Natural. Natural. Native.
Naturalización. Naturalization.
Naufragio. Shipwreck.
Navegación. Navigation.
Naviero. Ship agent, person charged with securing freight, passage, and provisions for a ship and to represent the shipowner in port.
Nave. Ship.
Negar. To deny; to refute an accusation.
Negligencia. Negligence.
Negociar. To negotiate, to trade.
Neutralidad. Neutrality.
Nieto. Grandson.
Niñez. Childhood.
Niño. Child.
Nombre. Name.
Nombramiento. Appointment.
Non bis in idem. Latin phrase expressing the principle that no person can be accused or tried more than once for the same crime.
Norma. Rule, standard.
Nota. Note; annotation.
Notario. Notary.
Notificación. Legal notice.
Notificación en estrados. Legal notice served on a party in default by

reading the judicial order in the court room before witnesses who certify thereto.

Notoriedad. Evidence of a fact by its notoriety.

Novación. Novation.

Novel. Inexpert.

Nulidad. Nullity. Appeal based on the ground that the judgment violates certain principles of law.

Nulo. Invalid, void.

Nunciatura. Office or house of a nuncio.

Nuncio. Papal legate, nuncio.

Nuncupativo. Oral, nuncupative will.

Nupcial. Nuptial.

Nupcias. Nuptials, wedding.

Obediencia. Obedience.

Objeto. Object, purpose, subject-matter.

Obligación. Obligation.

Obligación de dar. Obligation of delivering a thing.

Obligación de hacer. Obligation of rendering a service.

Obligación pura. Unconditional obligation.

Obligación alternativa. Alternative obligation.

Obligación divisible. Obligation which can be performed in successive parts.

Obligación solidaria. Joint and several obligation.

Obligado. Obliged, obligor.

Obrero. Workman.

Occiso. Murdered, killed.

Ociosidad. Idleness.

Ocultación. Concealment.

Ocultar. To conceal, secrete.

Ocupación. Occupation, pursuit.

Ocurrir. To happen, to apply.

Ocurso. Petition (in Mexico).

Oeste. West.

Ofender. To offend, harm, injure.

Ofensa. Offense, grievance.

Ofensor. Offender.

Oferta. Offer, tender.

Oficial. Official, artificer, officer.

Oficial mayor. Chief clerk.

Oficialía. Clerkship in a public office.

Oficina de correos. Post office.

Oficina de patentes. Patent office.

Oficio. Occupation, function; craft; *de oficio*, ex officio. Official letter. Notary's office.

Oidor. Judge of a supreme court.

Ológrafo. Holographic, document wholly written by its author.

Omisión. Omission.

Oneroso. Onerous, as distinguished from gratuitous.

Opción. Option.
Opinión. Opinion.
Oposición. Opposition; conflict. Competition for a professorship.
Opresivo. Oppressive.
Ordenador. Person on whose order a bill of exchange is drawn.
Orden. Order.
Ordenamiento. Orders emanating from the king of Spain, and differing from *cédula* only in form and in mode of promulgation.
Ordenanza. Ordinance; military law. Soldier in attendance on officer.
Ordinaria. Term applied to the ordinary jurisdiction of a judge, as compared with the special jurisdiction for certain cases and persons.
Original. The first copy of an instrument, or the original instrument in the *protocolo* of a notary.
Oro. Gold.
Ostracismo. Ostracism, exile.
Otorgamiento. Execution of an instrument.
Otorgar. To declare, grant, issue.
Otorgante. Grantor; party who signs and executes an instrument.
Otrosí. "Moreover." Technical word used to introduce a paragraph containing matters different from or complementing the principal object of the petition or document.

Pacto. Agreement, pact.
Padrastro. Stepfather.
Padre. Father.
Padrino. Godfather.
Padrón. Census or tax-list.
Paga. Payment.
Pagaré. Promissory note.
Pagaré a la orden. Note to order.
Pago. Payment.
Pago por intervención. Payment for honor.
Pagos en abonos. Payment in installments.
Paniaguado. Protégé; servant.
Papel de comercio. Securities.
Papel moneda. Paper-money, fiat money.
Papel sellado. Stamped paper.
Parafernales (bienes). Paraphernalia. Property which belongs exclusively to the wife.
Parentesco. Relationship.
Parentesco espiritual. Tie contracted through baptism or confirmation between the godfather or godmother and the child, on the one hand, and his parents on the other hand, so that there can be no marriage between them.
Paridad. Parity.
Parricida. Parricide, murderer of his father or mother.
Parricidio. Parricide. Parricide, murder of father or mother.
Parroquia. Parish. Good will.
Parroquiano. Customer.

PÁRROCO. Rector or incumbent of a parish.
PARTE. Part. Share. Party.
PARTERA. Midwife.
PARTERO. Obstetrician.
PARTICIÓN. Partition. Division.
PARTICIÓN DE HERENCIA. Division or distribution of an inheritance.
PARTICIPAR. To give notice. To participate or share.
PARTÍCIPE. Sharing, participant.
PARTIDA. Entry made in the parochial or in the civil register's books in regard to a birth, marriage or death of a person.
PARTO. Childbirth, parturition.
PASAJERO. Passenger.
PASAPORTE. Passport.
PASE. Permit; pass-ticket, free pass.
PASIVO. Passive. Liabilities.
PASQUÍN. Pasquinade, lampoon.
PASTAR. To pasture, to lead cattle to graze.
PASTO. Pasture, grazing.
PASTOR. Shepherd.
PATENTE DE COMERCIO. Trade license.
PATENTE DE INVENCIÓN. Patent.
PATENTE DE CORSO. Letter of marque.
PATERNIDAD. Fatherhood, paternity.
PATÍBULO. Gibbet, gallows.
PATOLOGÍA. Pathology.
PATRIA. Native country.
PATRIA POTESTAD. Parental power.
PATRIMONIO. Patrimony, possessions.
PATRÓN or PATRONO. Master, employer, protector.
PATRONATO. Patronage. Right of presentation to benefice or office.
PAZ. Peace.
PEAJE. Toll.
PECUARIO. Pertaining to cattle.
PECULADO. Peculation, embezzlement of money from the public treasury.
PECULIO. Estate or property possessed by a child, independent from that of his father.
PEDIMENTO. Petition; *a pedimento*, on petition, at the instance.
PEDIR. To ask, petition.
PEGUJAL. Small portion of land or cattle. Small belongings or holdings.
PENA. Punishment, penalty.
PENA CAPITAL. Capital punishment.
PENA CORPORAL. Punishment inflicted in respect to the body of the culprit, as prison, death, etc.
PENA PECUNIARIA. Fine.
PENAL. Penal; *cláusula penal*, penalty clause.
PENDENCIA. Quarrel, contention.
PENITENCIARÍA. Penitentiary, reformatory.
PENSAMIENTO. Thought, mind.
PENSIÓN. Rent imposed on landed estate. Pension.

PENSIONISTA. Person entitled to a pension.
PÉRDIDA. Loss, damage.
PERDÓN. Pardon, forgiveness.
PERENTORIO. Peremptory, decisive.
PERIÓDICO. Periodical; newspaper.
PERIODISMO. Journalism.
PERITO. Expert.
PERJUICIO. Prejudice, injury. Lawful gain which was prevented by another's fault.
PERJUICIO (SIN). Without prejudice.
PERJURIO. Perjury.
PERJURO. Perjurer.
PERMUTA. Exchange, barter.
PERSONA. Person.
PERSONA JURÍDICA, or PERSONA MORAL. Juridical or juristic person; lega entity; partnerships, corporations and institutions of public interest.
PERSONAL. Personal; personnel.
PERSONARSE EN JUICIO. To appear by attorney in court.
PERSONERO. Solicitor, attorney.
PERSONERÍA. Capacity of a person as representative of another or his successor in rights.
PERTENENCIA. Ownership. Appurtenance. In Mexico a unit of mining property which consists in a solid of indefinite depth limited on the ground by four vertical planes corresponding to the projection of a horizontal square measuring 100 meters on each side.
PERTINENTE. Pertinent.
PESCA. Fishing, fishery.
PESO. Weight. Silver coin which is the monetary unit of various Spanish-American republics.
PESQUISA. Inquiry.
PETICIÓN. Petition, application.
PETITORIO. Lawsuit to recover ownership, as compared with *posesorio*, in which the demand is confined to the mere possession of a thing.
PICOTA. Pillory.
PIEZA DE AUTOS. Papers bound together belonging to a certain lawsuit.
PILOTAJE. Pilotage.
PILOTO. Pilot, first mate.
PILOTO PRÁCTICO. Coast pilot.
PIRATA. Pirate.
PIRATERÍA. Piracy.
PLAGIARIO. Plagiarist. Kidnapper.
PLAGIO. Plagiarism. Kidnapping.
PLANO. Plane; plain; *proceder de plano*, to proceed without previous formalities or delay; *confesar de plano*, to make a full admission of facts.
PLANTACIÓN. Plantation, planting.
PLANTÍO. Plantation.
PLATERO. Silversmith, and also goldsmith.
PLAYA. Shore; beach.

PLAZA. Square; market place; private soldier; *sentar plaza*, to enlist as a soldier.

PLAZA DE ARMAS. Parade ground, main square of a town.

PLAZO. Term, day of payment; *a plazo*, on credit.

PLEBISCITO. Plebiscite.

PLEITO. Lawsuit.

PLENARIO. Lawsuit in which the right of the parties to own or possess a thing is fully discussed, as compared with *sumario* or summary action. Second part of a criminal suit in which the evidence for and against the accused is produced.

PLURALIDAD ABSOLUTA. Majority.

PLURALIDAD RELATIVA. Plurality.

PLUSPETICIÓN. Act of plaintiff demanding more than is due.

POBRE. Poor.

PODER. Power of attorney.

PODER EJECUTIVO. Executive power.

PODER JUDICIAL. Judiciary.

PODER LEGISLATIVO. Legislative power.

PODERDANTE. Grantor of a power of attorney.

POLICÍA. Police.

POLICITACIÓN. Offer or promise, policitation.

POLIGAMÍA. Polygamy.

POLÍTICA. The art of government. Politics.

PÓLIZA. Policy.

PÓLIZA DE FLETAMENTO. Charter party.

PORCIÓN. Portion, share.

PORDIOSERO. Beggar.

PORMENOR. Detail; retail.

PORTADOR. Bearer; holder.

PORTAZGO. Toll.

PORTEADOR. Carrier.

PORTE. Postage.

POSADA. Inn.

POSADERO. Inn-keeper.

POSEEDOR. Possessor.

PÓSESIÓN. Possession.

POSESORIO. Referring to possession.

POSICIONES. Propositions set forth by one of the parties to a suit in order that the other party may admit or deny the facts therein mentioned.

PÓSITO. Granary in which the supply of grain for a town is kept in order to help the agriculturists in case of need and to supply the people of the community. It was a credit as well as beneficent institution for the welfare of the people of the town in Spain and the Spanish domains.

POSTAL. Postal; postal card.

POSTOR. Bidder.

POSTULACIÓN. Petition; postulation.

PÓSTUMO. Posthumous.

POSTURA. Offer or bid at an auction.

POTESTAD. Power, jurisdiction.

POTESTAD MARITAL. Power granted by the law to the husband over his wife and her property.

POTESTAD PATERNA. Power granted by the law to a father over his children and their property.

POTESTATIVO. Optional.

POZO. A well.

PRÁCTICA. Practice; usage.

PRÁCTICO. Expert; harbor pilot.

PRECARIO. Loan revocable at the will of the creditor. Possession depending upon the owner's will.

PRÉCEPTO. Precept.

PRECIO. Price; *precio fijo*, set price.

PREDIO. Land or immovable property.

PREDIO DOMINANTE. Dominant tenement or estate in case of an easement.

PREDIO SIRVIENTE. Servient tenement or estate in case of an easement.

PREFECTO. Prefect, kind of mayor of a town or district.

PREFERENCIA. Preference, principally use in speaking of credits in case of a bankruptcy, meaning the right to be paid first.

PREGUNTA. Question; *preguntas generales*, see *Generales de ley*.

PREJUDICIAL. Requiring a previous judicial decision before the final judgment.

PRELACIÓN. See *Preferencia*.

PREMIO. Reward; prize. Amount paid in the exchange of money above the par value.

PRENDA. Pledge.

PRENSA. Press, printing press.

PREÑEZ. Pregnancy.

PREPARAR EJECUCIÓN. To prepare an "executive" action by means of a public instrument or of a private one which imports a confession of judgment.

PRESA. Capture, seizure, spoils or booty. Dike, dam. Animal killed in hunting.

PRESCRIBIR. To prescribe; to acquire property or to liberate oneself from an obligation by the lapse of time provided by the statute of limitations or period prescription.

PRESCRIPCIÓN. Prescription, statute of limitations.

PRESENCIA. Presence.

PRESENTACIÓN. Presentation, presentment. Personal introduction.

PRESIDENTE. President.

PRESIDIO. Imprisonment at hard labor. Garrison of soldiers; fortress.

PRESO. Prisoner.

PRESTACIÓN. Obligation of paying or doing something.

PRESTAMISTA. Lender of money.

PRÉSTAMO. Loan.

PRÉSTAMO COMODATO. Loan of a specific thing which is not to be consumed and must be specifically returned to the lender.

PRÉSTAMO MUTUO. See *Mutuo*.

PRÉSTAMO A LA GRUESA. Bottomry loan.

PRESUNCIÓN. Presumption; circumstantial evidence.

PRESUNCIÓN *juris tantum*. Legal but rebuttable presumption.
PRESUNCIÓN *juris et de jure*. Irrebuttable legal presumption, really a rule of law.
PRESUNTO. Which is presumed.
PRESUPUESTO. Budget.
PRETERICIÓN. Failure or omission to mention an heir in a will and to leave him the portion of the testator's estate to which such heir is entitled.
PREVARICAR. To prevaricate.
PREVARICATO. Betrayal of a trust.
PREVENCIÓN. Cognizance of a case by a judge in advance of another judge of similar jurisdiction, or when the case is within the jurisdiction of different judges.
PRIMA. Female cousin. Premium.
PRIMICIA. Firstlings; tax consisting of the first products of land or cattle during the year.
PRIMOGENITURA. Primogeniture, seniority.
PRINCIPAL. Principal; capital.
PRINCIPIO DE PRUEBA POR ESCRITO. Written foundation of evidence.
PRIORIDAD. Priority.
PRISIÓN. Prison.
PRIVACIÓN. Degradation.
PRISIONERO. Prisoner.
PRIVILEGIO. Privilege.
PROBANZA. Proof, evidence.
PROBATORIO. Probatory; *término probatorio* or *dilación probatoria*. Time allowed for introducing evidence.
PROCEDIMIENTO. Procedure.
PROCESADO. The accused.
PROCESO. Record of proceedings in criminal or civil actions.
PROCLAMA. Proclamation.
PROCURACIÓN. Power of attorney.
PROCURADOR. Attorney, solicitor.
PROCURADOR JUDICIAL. Attorney for judicial matters.
PROCURADOR GENERAL. Solicitor general.
PROCURADOR VOLUNTARIO. See *Gestor oficioso*.
PROCURADURÍA. Attorney's office or functions.
PRÓDIGO. Person who by judicial decree has been deprived of the free administration of his property by reason of his being a spendthrift; he is put on the same footing as a lunatic and is disqualified from undertaking legal acts.
PRODUCIR. To produce; to exhibit or show a thing for inspection.
PRODUCTO. Product, proceeds.
PROFANO. Person outside of a profession; layman.
PROFESIÓN. Profession.
PRÓFUGO. Fugitive from justice.
PROGENIE. Progeny, race.
PROGNATISMO. Heavy jaw.
PROHIBICIÓN. Prohibition.
PROHIBIR. To prohibit.

PROHIJAR. To adopt as one's son.
PRO INDIVISO. Undivided.
PROLETARIADO. Proletarianism, proletariat.
PROMESA. Promise.
PROMETER. To promise.
PROMETIDA. Betrothed.
PROMOTOR FISCAL. General prosecutor.
PROMOVER. To institute or advance an action.
PROMULGACIÓN. Promulgation.
PRONUNCIAMIENTO. Insurrection; issuing of a judicial decision.
PRONUNCIAR SENTENCIA. To pronounce judgment.
PRONUNCIARSE. To rise in insurrection.
PROPALAR. To publish, divulge.
PROPIEDAD. Ownership.
PROPIEDAD INMUEBLE. Real property.
PROPIEDAD LITERARIA. Copyright.
PROPIEDAD MUEBLE. Personal property
PROPIEDAD RAÍZ. Real property.
PROPIOS Y ARBITRIOS. By *propios* is meant all the real estate belonging to a municipality, and by *arbitrios*, taxes levied by the municipality.
PRORRATA. Quota *pro rata*.
PRORRATEO. Apportionment, assignment of quota *pro rata*.
PRÓRROGA. Prorogation or extension of time.
PRÓRROGA DE JURISDICCIÓN. Extension of jurisdiction of judge by the presumptive or express will of the parties.
PROSCRIPCIÓN. Proscription, outlawry.
PROSTITUCIÓN. Prostitution.
PROTESTA. Protestation.
PROTESTAR. To protest.
PROTESTO. Protest of a bill.
PROTOCOLAR OR PROTOCOLIZAR. To file in the *protocolo*.
PROTOCOLO. Book of a notary in which contracts and other records of acts or instruments are entered. Notarial file or archive of original instruments.
PROTUTOR. See *Curador*.
PROVEER. To provide, decide.
PROVEIDO OR PROVIDENCIA. Judicial decision in matter of procedure.
PROVISIÓN. Remittance of funds by drawer.
PROYECTO. Scheme, design, plan.
PROYECTO DE LEY. Bill introduced in a legislative body.
PRUEBA. Evidence, proof.
PRUEBA LITERAL, OR INSTRUMENTAL. Documentary evidence.
PRUEBA TESTIMONIAL. Testimony of witnesses.
PRUEBA CONJETURAL. Circumstantial evidence.
PRUEBA PRIVILEGIADA. Evidence derived from facts which as a rule are not considered as complete proof, but in some cases the law admits as evidence.
PUBERTAD. Puberty.
PUBLICACIÓN DE LEY. Promulgation of a law.
PUBLICACIÓN DE PRUEBAS. Communication to the parties to a lawsuit of

the evidence adduced by them in order that they may prepare their arguments.

PUBLICISTA. A publicist.

PÚBLICA VOZ Y FAMA. General notoriety.

PÚBLICO. Public, notorious.

PUEBLO. Town, village, people.

PUENTE. Bridge.

PUERTA. Door or doorway.

PUERTO. Port, harbor; pass through mountains.

PUJA. Outbidding at a public auction.

PUJADOR. Bidder.

PUPILO. Ward.

PURO. Pure, unconditional.

QUEBRADO. Bankrupt.

QUEBRADO ALZADO. A bankrupt who has fled to avoid creditors.

QUEBRAR. To be declared a bankrupt.

QUEBRANTAMIENTO DE FORMA. Violation of form or rule of procedure.

QUERELLA. Indictment or information in criminal investigation.

QUERELLA NECESARIA. Information by the injured person without which no criminal investigation is legally possible.

QUERELLA VOLUNTARIA. Information by injured party in criminal investigation without the same being necessary for the proceedings.

QUERELLARSE. To produce an accusation.

QUIEBRA. Bankruptcy.

QUINTO DISPONIBLE. Fifth part of estate which the testator can dispose of to strangers.

QUIROGRAFARIO. Creditor whose right is evidenced by a private instrument.

QUITA. Partial release.

RÁBULA. Ignorant, vociferous lawyer.

RADICAL. Radical, fundamental.

RAMA. Branch.

RAMERA. Prostitute.

RAMO. Line of business.

RANCHERÍA. Settlement of rural workers or peons.

RANCHO. Farm (Mexico).

RAPIÑA. Rapine, robbery.

RAPTADA. Abducted woman.

RAPTO. Abduction.

RAPTOR. Abductor.

RASTRO. Slaughter-house.

RATERÍA. Larceny, petty theft.

RATERO. Pickpocket.

RATIFICACIÓN. Ratification.

RATIFICAR. To ratify.

RATIHABICIÓN. Ratification.

RAZA. Race.

Razón. Reason; *tomar razón*, to register or take note of an act or thing; *dar razón*, to account; *dar la razón*, to approve; *tener razón*, to be right.
Razón social. Firm name.
Real. Real, royal.
Real cédula. Royal dispatch signed by the king of Spain and issued by a supreme tribunal, wherein some favor is granted or some interlocutory decree is issued.
Real decreto. Royal decree.
Realengo. Belonging to the royal patrimony; unappropriated land.
Realización. Sale, liquidation.
Rebaja. Abatement, deduction.
Rebalsar. To dam water.
Rebaño. Flock, herd.
Rebasar. To overflow, to trespass.
Rebato. Alarm.
Rebelarse. To rise in rebellion.
Rebelde. Rebel. In contempt of court.
Rebeldía. Non-appearance in court after being summoned. Default.
Rebelión. Rebellion.
Recado. Message.
Recambio. Re-exchange.
Recapitulación. Recapitulation, summary.
Recaudación. Collection. Collector's office.
Recaudar. To collect rents or taxes.
Receptador. Abettor.
Receptar. To abet.
Receptor. Municipal treasurer.
Receptoría. Treasurer's office.
Receso. Recess (Mexico).
Recibir. To receive.
Recibo. Receipt; discharge; *acusar recibo*, to acknowledge receipt.
Reciprocidad. Reciprocity.
Recíproco. Reciprocal.
Recitar. To recite.
Reclamación. Complaint, claim.
Reclamar. To claim.
Recomendación. Recommendation; *carta de recomendación*, letter of introduction.
Recompensa. Reward.
Recompensar. To compensate.
Reconducción. Renewal of a lease.
Reconocer. To acknowledge, recognize; scrutinize.
Reconocimiento de firma. Acknowledgment of signature.
Reconvención. Counterclaim.
Recopilación de leyes. Compilation of laws.
Recriminación. Recrimination.
Rectificación. Rectification.
Rectificar. To rectify, to amend.
Rectitud. Rectitude, uprightness.

RECUENTO. Recount, inventory.
RECUPERACIÓN. Recovery, replevin.
RECURRENTE. Appellant.
RECURRIR. To appeal.
RECURSO. Appeal; remedy.
RECUSACIÓN. Challenge (of judges or judicial officers); exception.
REDACCIÓN. Wording (of a document). Editorial rooms. Editorial staff.
REDACTAR. To draw up; write.
REDHIBITORIO. Redhibitory, which may bring about the rescission of a contract.
REDIMIR. To redeem; liberate; pay off.
RÉDITO. Interest.
REDITUAR. To yield interest.
REDUCCIÓN. Reduction, rebate.
REDUNDANTE. Redundant, superfluous.
REEDIFICAR. To rebuild.
REELECCIÓN. Re-election.
REEMBARCAR. Re-shipment.
REEMPLAZAR. To substitute.
REEMBOLSO. Reimbursement.
REENGANCHAR. To re-enlist.
REFACCIÓN. Financing.
REFACCIONAR. To finance.
REFACCIONARIO. Pertaining to *refacción; Banco refaccionario,* bank of promotion.
REFACCIONISTA. Financial backer.
REFERENCIA. Reference.
REFORMA. Reform; reformation.
REFRENDAR. To countersign.
REFRENDATARIO. One who countersigns.
REFRIGERADOR. Refrigerator.
REFUGIO. Refuge; shelter; asylum.
REGADÍO. Irrigation; *tierra de regadío,* irrigated land.
REGALAR. To present, to favor with a gift.
REGATEAR. To chaffer, bargain, haggle.
REGENTE. Regent; foreman (print).
REGIDOR. Alderman; councilman.
RÉGIMEN. Government, management.
REGIÓN. Region, district.
REGIONALISTA. Partisan of or relating to home rule.
REGISTRADO. Registered.
REGISTRADOR. Registrar; clerk of records.
REGISTRO. Registry. Search.
REGISTRO CIVIL. The civil registry.
REGISTRO DE COMERCIO. Commercial registry.
REGISTRO PÚBLICO. Public register for property, mortgages, judgments and other acts affecting real estate.
REGLA. Rule.
REGLAMENTARIO. Relating to regulations.

Reglamento. Regulations.
Rehabilitación. Rehabilitation of a bankrupt in order that he may become a merchant again.
Rehuir. To evade; shun.
Rehusar. To refuse, decline, deny.
Reincidente. Backsliding.
Reincidir. To relapse into a crime, vice or error.
Reintegrar. To reintegrate; reimburse.
Reintegro. Repayment.
Reiteración. Reiteration, repetition.
Reivindicación. Recovery, replevin.
Reivindicar. To replevy, to recover.
Reivindicatorio. Replevying; *acción reivindicatoria*, action to recover specific property.
Relación. Report, account, brief.
Relacionar. To relate, report.
Relator. Relator.
Relevar. To exonerate, acquit.
Religión. Religion.
Rematar. To auction; to knock down at auction.
Rematador. Auctioneer.
Remate. Auction.
Remediar. To remedy, repair.
Remesa. Shipment, remittance of money.
Remisión. Remitting; release.
Remitir. To send; to release; pardon.
Remolcar. To tow, take in tow.
Remolcador. Tug, tugboat.
Remolque. Towage.
Rendición. Surrendering.
Rendición de cuentas. Rendering accounts.
Renglón. Written or printed line. Line of business.
Renuncia. Resignation. Waiver.
Renunciar. To resign. To waive.
Reñir. To quarrel, scold.
Reo. Offender; culprit. Defendant.
Reorganización. Reorganization.
Reparación. Reparation, indemnity.
Reparar. To indemnify; to expiate; to give heed.
Reparo. Objection.
Repartimiento. Allotment, division.
Repartir. To divide, allot.
Repeler. To repel.
Repertorio. Repertory.
Repetir. To demand from another money unduly received by him.
Repetición. Claim for money unduly paid.
Réplica. Replication in pleading.
Replicar. To reply; to argue.
Reporte. Report, information.

Reportero. New reporter.
Reposición. Restoring a suit to its initial state. To amend a decision; rehearing.
Repreguntas. Cross-examination.
Representación. Memorial, address. Right of a person to represent his predecessor in interest.
Representar. To represent. To petition.
Representante. Representative.
Reprobación. Reprobation.
República. Republic.
Repulsa. Refusal, repulse.
Reputación. Reputation.
Reputar. To repute, estimate.
Requerimiento. A demand.
Requisa. Requisition.
Requisar. To levy horses or other specific property which the government may need besides money.
Resaca. Redraft a bill of exchange.
Resacar. To redraw a bill of exchange.
Resarcimiento. Indemnity, compensation.
Resarcir. To compensate; indemnify.
Rescatar. To redeem.
Rescate. Ransom.
Rescindir. To rescind, cancel.
Resellar. To countermark.
Reseña. Brief description.
Resguardo. A receipt.
Residencia. Residence.
Residenciar. To impeach.
Residente. Resident.
Residuo. Residue.
Resistencia. Resistance; opposition.
Resolución. Resolution, decision, cancellation.
Resolutorio. Pertaining to cancellation of contracts.
Respaldar. To guarantee, to back. To state on the back of a bill of exchange the reasons for dishonoring it.
Respeto. Respect; regard.
Respetuosamente. Respectfully.
Respiro. Respite; extension of time to a debtor.
Responder. To answer, guarantee.
Responsabilidad. Liability. Responsibility.
Restitución. Restitution.
Restituir. To return; restore.
Restitución in íntegrum. Right of minors and other incapacitated or privileged persons to demand, under certain conditions, the restitution of things alienated by their representative.
Restricción. Restriction, limitation.
Retracto. Right of redemption belonging to co-owners or copartners or stipulated in contracts, by which any of the co-owners or copartners or the

grantee of such right may buy the thing, right or share belonging to any of the other co-owners or copartners or the grantor at the same price and under the same conditions that a sale is contemplated to a stranger.

RETRAER. To exercise the right of *retracto*.

RETRASO. Delay.

RESULTANDOS. Paragraphs of a judicial decision in which the judge sets forth the facts forming the basis of such decision. They are followed by the *Considerandos* or statement of the legal foundation of the judgment.

RETROACTIVO. Retroactive.

RETROTRAER. To bring the effects of a law or contract back to a time previous to its enactment or execution.

RETROVENDER. To sell back to the vendor.

RETROVENTA. Sale on reversion.

REUNIÓN. Meeting. Consolidation.

REVALIDACIÓN. Ratification.

REVALIDAR. To confirm, ratify.

REVENDEDOR. Retailer.

REVENDER. To resell.

REVERSIÓN. Reversion.

REVISAR. To review; *revisar las cuentas*, to audit accounts.

REVISIÓN. Review.

REVOCABLE. Revocable.

REVOCACIÓN. Revocation.

REVOCACIÓN POR CONTRARIO IMPERIO. Annulment of a judicial decree by the judge who rendered it.

REVOCAR. To revoke.

REVOLUCIÓN. Revolution.

REVOLUCIONARIO. Revolutionist.

REZAGAR. To leave behind or defer.

RIEGO. Irrigation.

RIEL. Rail, iron bar laid on ground on one side of railway track.

RIESGO. Risk, danger.

RIFA. Lottery.

RIJOSO. Quarrelsome.

RIÑA. Quarrel.

RIVAL. Rival, competitor.

RIVALIDAD. Rivalry, emulation.

ROBAR. To plunder, steal, rob.

ROBO. Robbery, theft. It includes burglary.

RÚBRICA. Flourish added to one's signature.

RUBRICAR. To subscribe a document with one's peculiar flourish with or without signing the name.

RUMOR. Rumor, hearsay.

RUTA. Itinerary, way.

RUTINA. Routine.

SACAR TESTIMONIO. To make a first certified copy of an original document.

SALARIO. Wage, earnings.

SALARIO MEDIO DIARIO. Average daily earnings.

Saldo. Balance.
Salubridad. Healthfulness; *junta de salubridad*, board of health.
Salvaguardia. Safeguard; passport.
Salvamento. Salvage.
Salvavidas. Life-preserver; *bote salvavidas*, lifeboat.
Salvedad. Reservation.
Salvo. Excepting; *quedar a salvo*, without injury.
Salvoconducto. Passport, permission.
Sambenito. Garment worn by penitent convicts of the Inquisition. Note of infamy.
Saneamiento. Indemnification of the vendee by the vendor in case the former is judicially dispossessed of the thing sold. Sanitation.
Sangre. Blood.
Sanguinario. Sanguinary, bloodthirsty.
Sano. Sound.
Satisfacción. Satisfaction, amends, apology.
Satisfacer. To satisfy; to pay.
Secano. Dry, unirrigated; *tierra de secano*, unirrigated land.
Secretaría. Secretary's office.
Secretario. Secretary.
Secuela. Sequel; *la secuela de la causa*, the course of the proceedings.
Secuestrar. To sequestrate, to abduct, to kidnap.
Secuestro. Attachment.
Sedición. Sedition, mutiny.
Sedicioso. Seditious, mutinous.
Seducir. To seduce, corrupt, entice.
Seductor. Corruptor.
Seguro. Insurance.
Seguro de incendio. Fire insurance.
Seguro dotal. Endowment insurance.
Seguro sobre la vida. Life insurance.
Seguro contra accidentes. Accident insurance.
Sello. Seal, stamp.
Sello de correo. Postage stamp.
Semáforo. Semaphore.
Semana. Week.
Semana santa. Passion-week.
Semanero (ministro). One of the judges of a court sitting in turn during a given week to take care of the daily business.
Sembrado. Sown ground.
Sementera. Sown land.
Semestral. Semiannual.
Semiplena prueba. Incomplete or partial evidence.
Semoviente. Cattle.
Senado. Senate.
Senador. Senator.
Senda. Footpath.
Sentencia. Judgment; *pronunciar sentencia*, to pass judgment.
Sentencia absolutoria. Judgment dismissing the complaint. Acquittal.

SENTENCIA ADVERSA. Adverse judgment.
SENTENCIA CONDENATORIA. Sentence of guilty.
SENTENCIA EJECUTORIADA. Judgment against which no appeal can be taken.
SENTENCIA FAVORABLE. Favorable judgment.
SENTENCIA INTERLOCUTORIA. Decision relating to incidental issues.
SENTENCIA FIRME. An irrevocable judgment.
SEÑORAJE OR SEÑOREAJE. Seignorage.
SEÑORÍO. Seignory.
SEPELIO. Burial.
SEPULCRO. Sepulchre, grave.
SEPULTAR. To bury.
SEPULTURERO. Sexton.
SERVIDUMBRE. Easement, both personal and real; servitude.
SERVIDUMBRE APARENTE. Easement which is revealed by merely looking to the things subject to it, as the leaning of a beam of a house on the wall of another, or a window open in the wall which divides one house from another, as distinguished from *servidumbres no aparentes*, which are detected by no apparent state of things, like the right of the owner of a house to forbid the owner of another to build his house higher.
SERVIDUMBRE CONTINUA. Easement which exists independently of the actual act of its beneficiary, such as that arising out of a window or aqueduct, as compared with *servidumbre discontinua*, which requires some positive act, as right of way through another's property.
SERVIDUMBRE DE PASO. Right of way.
SERVIDUMBRE DE LUZ. Right to receive light as a rule through a window opening in a wall dividing two houses; easement of light.
SERVIDUMBRE DE PROSPECTO. Right to have windows overlooking another's property; easement of view.
SERVIDUMBRE LEGAL. Easement created by the law, as compared with *servidumbre voluntaria*, which is established by contract.
SIGILO PROFESIONAL. Professional secrecy.
SIGLO. Century.
SIGNIFICAR. To make known.
SINONIMIA. Synonymy.
SÍNDICO. Trustee, assignee, receiver.
SÍNDICO DEL AYUNTAMIENTO. Official of the town government charged with representing the interests of the community in court.
SINE QUA NON. Essential.
SIN PERJUICIO. Without prejudice.
SINIESTRO. Damage, loss (in matter of insurance).
SIRVIENTE. Servant, menial.
SISA. Excise.
SOBORNAR. To bribe.
SOBORNO. Bribe.
SOBRECARGA. Overload.
SOBRECARGO. Super-cargo.
SOBRESEER. To dismiss. Discontinuance of legal proceedings.
SOBRESEIMIENTO. Dismissal, discontinuance of legal proceedings.
SOCIAL. Social; belonging to partnerships or corporations.

Socialismo. Socialism.
Socialista. Socialist.
Sociedad. Association, partnership.
Sociedad anónima. Stock company.
Sociedad colectiva. Partnership.
Sociedad en comandita. Limited partnership.
Sociedad co-operativa. Co-operative society.
Socio. Partner, member of an association or partnership.
Socorro. Succor, help.
Sofisma. Sophism, fallacy.
Solar. Ground-plot for homestead. Ancestral mansion.
Solariego. Land descending from ancestors; *ley solariega*, homestead.
Solemne. Formal: *contrato solemne*, contract which requires certain formalities to be binding.
Solidario. Jointly and severally liable.
Solidaridad. Joint and several liability; solidarity.
Soltero. Single, unmarried.
Sordomudo. Deaf and dumb.
Sortear. To cast lots.
Sorteo. Casting of lots.
Sospechoso. Suspicious.
Sostener. To support; to defend.
Subalterno. Subordinate, inferior.
Subarrendar. To sublet.
Subasta. Auction.
Subastar. To sell at auction.
Súbdito. Subject of a country.
Subentender. To understand what is tacitly meant.
Sublevación. Insurrection.
Sublevar. To rise in rebellion.
Submarino. Submarine.
Subordinar. To subordinate.
Subrepticio. Surreptitious, fraudulent.
Subrogación. Subrogation, substitution.
Subscribir. To subscribe.
Subscripción. Subscription.
Subsecretario. Assistant secretary.
Subsidiariamente. Subsidiarily.
Subsidio. Subsidy, pecuniary aid.
Subsistir. To subsist.
Substanciar. To try a case.
Substraer. To subtract; to elude by subtraction.
Subsuelo. Subsoil.
Subvención. Subsidy.
Subversivo. Subversive.
Subvertir. To destroy, to ruin.
Sucesión. Succession.
Suceso. Event.
Suceso incierto. Contingency.

Sucesor. Successor, heir.
Sucesor a título particular. Successor in another's right to a thing due to a contract or bequest particularly referring to that thing.
Sucesor a título universal. Successor to another in a general way, as is the case in inheritance, bankruptcy, etc.
Sueldo. Salary.
Suelo. Ground, soil, land.
Suerte. Hazard, lot.
Sufragar. To defray, to make up.
Sufragio. Vote, suffrage.
Sufrir. To suffer, to undergo.
Sugerir. To suggest.
Suicida. Suicide.
Suicidarse. To commit suicide.
Suma. Sum, addition.
Sumario. Preliminary investigation in a criminal suit, similar to the secret investigation of the grand jury in the United States.
Sumariamente. Summarily.
Sumisión. Submission to the jurisdiction of a judge.
Sumisión expresa. Express submission to the jurisdiction of a judge.
Sumisión tácita. Implied or tacit submission to the jurisdiction of a judge, deduced from the fact that the party appears in his court without reserving the right to claim lack of jurisdiction.
Suntuario. Sumptuary.
Superavit. Surplus.
Suplantar. To forge, alter by fraud.
Súplica. Review of the case by the same court which rendered the decision.
Suplicatorio. Letter rogatory sent by a judge to another of equal authority.
Suposición. Supposition.
Suspensión. Temporary removal or suspension from an employment.
Supuesto. Supposition.
Suspensión de pagos. Suspension of payments, insolvency.
Sustracción. Abduction.

Taberna. Tavern.
Tabernero. Tavernkeeper.
Tabernario. Low, vile (refering to language).
Tablado. Stage, scaffold.
Tablón de edictos. Official bulletin board in the court house for advertising notices.
Táctica. Tactics.
Tacha. Objection to witness.
Tachar. To challenge a witness.
Tala. Felling of trees.
Talar. To fell trees; to lay waste a country.
Talón. Any check, note, invoice or voucher detached from a stub book.
Talonario. Stub book.
Tallar. Woodland fit for cutting.
Tanda. Gang of workers working in rotation or turn with others.

TANTEO. Right to buy at the same price at which the seller agrees to sell to another person. Computation.
TAQUIGRAFÍA. Shorthand.
TAQUIGRÁFICAMENTE. In shorthand.
TARA. Tare.
TARDE. Afternoon. Late.
TARDÍO. Late.
TAREA. Task.
TARIFA. Price list; tariff.
TASA. Measure, standard, valuation.
TASACIÓN. Valuation.
TASADOR. Appraiser.
TEATRAL. Theatrical.
TEATRO. Theater.
TEJIDO. Texture; tissue.
TELEFONAR. To telephone.
TELEGRAFIAR. To telegraph.
TELEGRAMA. Telegram.
TEMA. Theme.
TEMERARIO. Rash, imprudent, baseless.
TENEDOR. Bearer, holder.
TENEDOR DE LIBROS. Bookkeeper.
TENENCIA. Tenancy; physical possession of a thing without any idea of being the owner of it.
TENER TACHA. To be objectionable (a witness).
TENTATIVA. Attempt.
TERCERÍA. Intervention by third party in a lawsuit.
TERCERÍA COADYUBANTE. Intervention in which the third party supports the action.
TERCERÍA DE DOMINIO. Intervention in which a third party claims to be the owner of the thing subject-matter of the contention.
TERCERÍA DE PREFERENCIA. Intervention in which a third party claims that he should be paid first with the proceeds of the attached property.
TERCERÍA EXCLUYENTE. Intervention in which a third party claims against the plaintiff as well as the defendant.
TÉRMINO. Term, maturity, end.
TÉRMINO DE PRUEBA. Period granted to the parties in a lawsuit for producing evidence.
TÉRMINO FATAL OR IMPRORROGABLE. Period fixed by law the duration of which cannot be extended by the judge.
TERNA. List of three persons proposed for an office or position, among whom the election must be made. Ternary.
TERRAPLÉN. Embankment.
TERRATENIENTE. Landowner.
TERRENO. Piece of ground.
TERRITORIAL. Territorial.
TERRITORIO. Territory.
TESIS. Thesis.
TESORERÍA. Treasury.

Tesorero. Treasurer.
Testado. Crossed out (word or sentence); *sucesión testada*, succession by will, as compared with *sucesión intestada*, which indicates succession by intestacy.
Testador. Testator.
Testamento. A will.
Testar. To will.
Testificar. To testify, to witness.
Testigo. Witness.
Testigo de oídas. Witness whose testimony is based upon hearsay.
Testigo de vista. Witness whose testimony is based upon his direct knowledge.
Testimonio. Testimony. First certified copy taken by a notary from an original deed entered in the *protocolo*.
Texto. Text, quotation.
Tienda. Shop, store.
Tierra. The earth, land, soil; *tierra de pan llevar*, plough land.
Tildar. To cross out anything written. To brand.
Timón. Helm, rudder.
Tío. Uncle; *tía*, aunt.
Título. Title; title deed; *justo título*, real or presumptive legal title; *título precario*, right of a person who possesses a thing in another's name.
Título colorado. Colorable title.
Títulos. Instruments, bonds, securities.
Tomador. Payee (of a bill of exchange).
Tonelada. Ton.
Tonelada métrica. Metric ton.
Tontina. Tontine.
Tornaguía. Landing certificate.
Torpedero. Torpedo boat.
Torpedo. Torpedo.
Total. Total.
Trabajador. Worker. Laborious.
Tradición. Tradition, physical delivery of possession.
Traducción. Translation.
Traficar. To trade.
Tragaluz. Skylight.
Traición. Treason; *alta traición*, high treason.
Traidor. Traitor; treacherous.
Trajinante. Professional carrier.
Trajinar. To cart goods.
Tramitación. Judicial proceedings.
Tramitar un incidente. To carry the proceedings to an interlocutory issue.
Trámite. Judicial proceeding.
Tramposo. Tricky, cheater.
Transacción. Compromise; contract.
Transcribir. To transcribe.
Transcripción. Transcription, copy.
Transcurrir. To lapse.

TRANSEUNTE. Sojourner, passer-by, person temporarily sojourning in a town or place.
TRANSFERENCIA. Transference.
TRANSFERIBLE. Transferable.
TRANSFERIR. To transfer, convey, make over.
TRANSGREDIR. To infringe.
TRANSIGIR. To compromise.
TRANSITAR. To travel.
TRANSITORIO. Transitory.
TRANSMITIR. To transfer.
TRANSPORTAR. To carry, to transport.
TRANSPORTE. Transportation.
TRAPACERO. Cheating.
TRASHUMANTE. Nomadic.
TRASLACIÓN DE DOMINIO. Conveyance of title.
TRASLADO. Delivery, serving of a copy or proceedings. Certified copy.
TRASPASO. Conveyance; assignment.
TRATA. African slave trade.
TRATADO. Treaty; treatise.
TRATAMIENTO. Treatment. Title of courtesy.
TRATAR. To trade.
TRAUMÁTICO. Traumatic, relating to wounds.
TREN. Train.
TREN EXPRESO. Express train.
TREN DE RECREO. Excursion train.
TRIBUNA. Tribune, rostrum.
TRIBUNAL. Court; *tribunal de cuentas*, exchequer.
TRIBUTACIÓN. System of taxation.
TRIBUTO. Tribute.
TRIMESTRAL. Trimestrial.
TRIUNFAR. To triumph.
TRONCO. Origin of a family. Team of horses.
TROPA. Troop.
TROPEL. Crowd.
TROPELÍA. Vexation, outrage.
TRUEQUE. Barter.
TRUHÁN. Rascal, knave.
TRUHANERÍA. Rascality.
TUMULTO. Uprising, faction, mob, riot.
TURNO. Turn.
TUTELA. Guardianship.
TUTOR. Guardian.

ULTIMAR UN CONTRATO. To close a transaction.
ULTIMATUM. Ultimatum.
ULTRAJE. Outrage, abuse.
UNÁNIME. Unanimous.
UNANIMIDAD. Unanimity.
UNIVERSIDAD. University.

URBANIZAR. To lay out and build a town.
URBANO. Referring to city life and property, as compared with rural; *finca urbana*, house in a town; *finca rústica*, a farm.
URGENCIA. Urgency.
USO. Usage. Type of usufruct.
USUCAPIÓN. Acquisition of ownership through prescription or statute of limitations.
USUFRUCTO. Usufruct.
USURA. Usury.
USURPACIÓN. Usurpation.
UTENSILIO. Utensil.
UTILIDAD. Profit, gain; utility.

VACANTE. Unoccupied.
VAGO. Wandering, vagrant, tramp.
VALE. Draft, voucher, note of hand.
VALETUDINARIO. Infirm.
VALIDEZ. Validity.
VÁLIDO. Valid, firm, binding.
VALIOSO. Valuable.
VALOR. Value.
VALOR NOMINAL. Face value.
VALOR A LA PAR. Par value.
VALOR DE PLAZA. Market or exchange value.
VALORAR OR VALORIZAR. To appraise.
VAPOR. Steamer.
VARÓN. Male (man); man of respectability.
VECINDAD. Residence. Right acquired by residing in a place.
VECINO. Resident. Neighboring.
VEDAR. To prohibit.
VEEDOR. Inspector.
VENAL. Venal, mercenary.
VENCIMIENTO. Maturity (of an obligation). Expiration of a term.
VENDER. To sell.
VENTA. Sale. Roadside inn.
VENTA PÚBLICA. Public auction.
VENTAJA. Advantage; profit.
VENTANA. Window.
VENTERO. Inn-keeper.
VENTURA. Hazard; *a la ventura*, at random, at hazard.
VERBAL. Verbal, oral.
VERDAD. Truth.
VERDUGO. Hangman; executioner.
VERIFICACIÓN. Proof of debts (in bankruptcy).
VERIFICAR. To verify.
VERISÍMIL or VEROSÍMIL. Likely, credible.
VÍA. Way, road. Proceedings.
VÍA DECLARATIVA. Proceedings in contentious jurisdiction.
VÍA DE APREMIO. Proceedings to compel execution of a judicial decision.

VÍA DE AUTORIZACIÓN. Proceedings in which the functions of the judge are confined to giving authenticity and solemnity to an act; voluntary jurisdiction.

VÍA EJECUTIVA. Summary proceedings which begin by an attachment of the debtor's property.

VIAJE. Journey, trip.

VIAJERO. Traveler.

VIÁTICO. Provision for a journey.

VICECÓNSUL. Vice-consul.

VICIO. Defect; vice.

VÍCTIMA. Victim.

VIDA. Life.

VIGENTE. In force, standing.

VIL. Mean.

VINCULACIÓN. Entail; act of entailing; bond.

VINCULAR. To entail an estate.

VÍNCULO. Tie, bond of union.

VINDICACIÓN. Vindication.

VINDICTA PÚBLICA. Public prosecution of criminals.

VIOLACIÓN. Rape.

VIOLENCIA. Violence.

VIRAR. (Naut.) To tack.

VISITA. Inspection.

VÍSPERA. Eve; the day before.

VISTA. Inspector. Hearings in a case.

VISTA DE OJOS. Judicial inspection of places as means of evidence.

VISTO BUENO. The mark or formula "approved," usually abbreviated V°B°; O. K.

VITALICIO. Lasting for life.

VITUPERAR. To vituperate.

VIUDA. Widow.

VIUDEZ. Widowhood.

VIUDO. Widower.

VÍVERES. Provisions. Food supplies.

VOCAL. Member of an assembly provided with the right of voting; judge of a court.

VOLUNTAD. Will, volition.

VOLUNTARIAMENTE. Spontaneously.

VOTO. Vote. Vow.

VOTO DE CALIDAD. Casting vote.

VOTO PASIVO. Qualification to be elected for a function.

VOZ. Power or authority to speak; *tener voz pero no voto*, to be entitled to speak in an assembly but not to cast a vote.

YACENTE. Vacant; *herencia yacente*, vacant inheritance.

YACIMIENTO. Ore bed, ore deposit.

YANQUI. Native of the United States.

YERRO. Mistake.

YUSIÓN. Precept, order.

ZAFARRANCHO. Clearing for action (naut.); ravage, destruction.
ZAFRA. Sugar crop.
ZANJA. Ditch, drain.
ZANJAR. To open ditches. To compromise amicably.
ZONA. Zone.
ZURDO. Left-handed.

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