Corporate Financing under Latin American Law: A Comparative Study

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Available at: http://scholarship.law.cornell.edu/clr/vol22/iss4/3
Corporation laws of Latin American countries are coming to have increasing significance for the American lawyer, business man, and investor. This is due to the increasing activity and investments in Latin American countries; to increasing advantages in incorporating in the country where a foreign business or enterprise is to be conducted (as opposed to organizing an American corporation and qualifying it in the foreign country); and to the greater interchange of thought and experience in seeking to meet the problems arising under modern corporate financing.

For purely subsidiary operations of American corporations financed in this country, the relative advantages of the foreign or American corporation depend upon varied factors. Taxes are always important. Suitability of the corporation laws for financing is seldom a controlling factor. It is for the individual investor in an enterprise wholly conducted abroad, however, that the foreign corporation formed in the country where operations are conducted often presents great advantages. Consequently, for such enterprises the corporation laws of the particular country are of the utmost importance.

The trend towards incorporation in foreign countries for American operations to be conducted there is fostered by developments in this country. From the viewpoint of the corporation itself, the taxes upon an American corporation are generally not only higher, but also more restrictive, than those upon the foreign corporation. Several of the Latin American countries have no income tax and others, to encourage economic development, impose the tax at rates considerably less than the normal corporate income tax in the United States. But in addition to the normal tax, the American corporation is subject to the capital stock tax and the excess profits tax and is restricted by the undistributed profits tax and Section 102 of the Revenue Act of 1936, relating to accumulation of surplus. These taxes are not designed to encourage new enterprises. Regardless of their appropriateness in this country (as to which opinions differ considerably), these taxes severely affect the ability of an American corporation to build up new enterprises abroad and to compete with capital from other nations. In Brazil, for instance, the tax philosophy has been quite the reverse and deductions have been allowed for earnings reinvested in plant and equipment. Aside from the con-

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conflict in underlying principle, the net result is that income of the Latin American corporation is by and large subject to less tax and its operations subject to less restrictions than in the case of an American corporation doing business in the same Latin American country or countries, with resultant advantage to the stockholders of the former. Where all stockholders are residents or citizens of the United States, the repeal of exemption of dividends of domestic corporations from the normal personal income tax has removed what was formerly sometimes an advantage to stockholders of an American corporation as compared with a foreign corporation. But where for the supposed advantage of greater facility in financing in American markets corporations were formerly organized under our laws by persons some or all of whom are foreigners, the foreign stockholders naturally suffer from the payment of the higher United States income taxes and are less inclined to favor the American corporation.

These factors have made for increasing use of the foreign corporation as a vehicle for investment in foreign countries. This tendency and the offering in this country of securities of foreign corporations, not necessarily controlled here, have made the American investor more familiar with corporate procedure and financing under foreign laws. Of course, registration of securities of a foreign corporation under the Federal Securities Act of 1933, as amended, is often more difficult than registration of securities of an American corporation, because of the different and more complicated formalities of their corporate procedure, the greater time required to take corporate action, and the time and expense of communication. Nevertheless, greater familiarity with procedure under foreign laws and with the advantages of the foreign corporation as a vehicle for financing may be expected to bring more registrations by foreign corporations, where the laws of the country of incorporation are found to be reasonably workable.

Increasing comparative law research into the corporation laws of other countries may be attributed to a recognition that abuses have grown up here and to a readiness to experiment with corrective measures adopted in other countries. The danger faced is in attempting to implant foreign institutions here without fully considering their adaptability and fitness or the difference in character and degree of abuse which the provisions of the foreign law were designed to prevent. Comparison must be made not only of the purpose but also of the results of such laws; for experience has shown that a measure designed to accomplish a particular result may often in the long run produce a result contrary to that intended. Open-minded consideration of legal institutions under different systems of law cannot but prove beneficial if the underlying differences of the two systems be borne in mind and the benefits derived under one system be carefully considered in the light of the existing practices and legal institutions in the other country.
This article is subdivided into four main topics: First, corporate procedure and practice under Latin American laws; second, the difficulties in financing thereunder; third, the possible influence of the civil law upon corporation laws in this country; and fourth, the possible effect of our common law doctrines upon Latin American corporation laws and financing.

I. Latin American Corporate Procedure and Practice

Preliminarily, it should be noted that the corporation is not in nearly so common use in Latin American countries as it is in the United States. Large businesses and enterprises in which more than one individual or a small group are interested are not as common as in this country. The laws of most Latin American countries offer as many as five or six types of organizations for purposes characterized as "commercial" as distinguished from "civil." In addition to the general partnerships, there are limited partnerships, limited partnerships with shares, limited liability companies, and cooperative companies and corporations. Usually, only corporations and limited partnerships with shares are authorized to issue stock or formal share certificates. The limited liability company is really a form of partnership with only special partners; the interest of each partner may consist of one or more equal parts of the capital which may not be represented by transferable certificates, their transfer being subject to various formal requisites and consents.

These special forms of organization other than the corporation are admirably adapted to the conduct of the small or closely-held enterprise. They have been so extensively utilized that there has not been the demand for liberalization of the corporation laws experienced in this country. In some countries, for instance, specific governmental authorization is still required for the organization of corporations. Others have adopted a regime frequently referred to as "regulated freedom" of incorporation. Some of

ARGENTINA COM. CODE art. 318.
BOLIVIA COM. CODE art. 247; Decree March 8, 1860, art. 1.
CHILE COM. CODE art. 427.
ECUADOR COM. CODE arts. 288, 289.
GUATEMALA COM. CODE art. 303, Executive Order of July 7, 1903.
HAITI COM. CODE art. 37.
HONDURAS COM. CODE art. 286.
PARAGUAY COM. CODE art. 318.
URUGUAY COM. CODE arts. 405, 407.
BRAZIL: Decree No. 434 of July 4, 1891, art. 4.
COLOMBIA: Law No. 27 of 1887, amending COM. CODE art. 17.
COSTA RICA: Law No. 6 of Nov. 24, 1909, art. 4.
CUBA COM. CODE arts 117, 119.
DOMINICAN REPUBLIC COM. CODE art. 37.
EL SALVADOR COM. CODE art. 236.
MEXICO: General Law of Commercial Companies of July 28, 1934, art. 2.
the latter require governmental authorization for organization of corporations for specified purposes.  

Generally speaking, procedure for organization of corporations is cumbersome and complicated in comparison with American proceedings. If familiarity with the system is acquired, the difficulties may be resolved into a matter of the time element involved. Two methods typify the procedure for the organization of a corporation: (1) An agreement in the form of a public instrument, setting forth the corporate statutes (corresponding to our articles of incorporation and by-laws) and signed by all the initial subscribers of capital stock; and (2) public subscription.

In countries where incorporation requires governmental authorization, the agreement of association must be submitted for approval, sometimes requiring weeks or months in certain countries. In some countries, the incorporation papers must be published in the official gazette, diario, or newspaper, as well as recorded in some public office. Organization procedure may require from four or five days to several weeks, depending upon the length of documents, arrangements with the notary, frequency of publications, and frequency of action by the governmental department in accepting the publications for filing. One reason why it is impracticable in some countries to take preparatory steps in advance and have corporate proceedings started, whenever there is any possibility that a corporation may have to be organized, is the requirement that the entire capital be subscribed at the time of incorporation. If the corporation be formed with merely a nominal capital, substantially the same procedure is required for an increase; and little advantage is to be derived from organizing initially a corporation with nominal capital.

Incorporation by public subscription frequently takes longer and is not often resorted to. Under this procedure, the promoters prepare and publish a prospectus, proposed articles of incorporation, and by-laws. When the subscriptions of the capital stock have been obtained, a meeting is held at

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NíCARAGUA Com. Code arts. 19, 204, 209.
Panama: Law No. 32 of 1927, arts. 2, 4, 6.
PERU Com. Code arts. 124, 126.
VENEZUELA Com. Code art. 224.

Brazil, for certain banking, insurance, savings, and social service corporations, including those engaged in producing food products. Decree No. 434 of July 4, 1891, art. 46.

El Salvador, for corporations enjoying governmental concession or privilege. Com. Code art. 240.


Brazil: Decree No. 434 of July 4, 1891, art. 80.

VENEZUELA Com. Code arts. 220, 221.

Publication of mere extracts is required in:
Costa Rica: Law No. 6 of Nov. 24, 1909, arts. 4, 8.
DOMINICAN REPUBLIC Com. Code art. 42.
NíCARAGUA Com. Code art. 204.
which the incorporation papers are presented and approved, whereupon the papers are either submitted for governmental approval or protocolized with a notary public, as may be required, and registered. The purpose and effect of these requirements are generally similar to those of the Federal Securities Act and the Blue Sky laws in this country. Corporation laws in all Latin American countries are national laws rather than laws of a State, Province, or Department; and it is, therefore, not unnatural to find the "public offering" requirements embodied in the corporation law itself. Generally speaking, these requirements are not as severe as those of the Federal Securities Act here; for the corporation under Latin American laws has not, in general, attained the same growth or development as in this country; and the expense of registration under the Federal Securities Act here would be a formidable bar to any public offerings of the size and nature now found in most of the Latin American countries. The "public subscription" method is not described at length in all of the codes and corporation laws. Only a few countries provide for it in any detail.6 It is developed most fully in the legislation of Argentina and Mexico.

The formalities for corporate meetings are impressive. Naturally, publication of notice of meeting is required if bearer shares are outstanding. Brazil requires such publication even though all shares are registered and irrespective of any waiver of notice.7 Governmental supervision of the meetings is provided for under the laws of Argentina.8 In Chile, it is optional for the Government's supervisor to be present at meetings of stockholders.9 Minutes are customarily entered in longhand on the minute book and in some countries are signed by all attending stockholders. In certain countries they must be published in the official diario or newspaper.

It is through control of the voting power that the civil law makes its greatest attempt to "regulate" the corporation and protect the interests of stockholders. Refinements of this control mechanism, such as have recently been urged in France and which will be later discussed, have apparently not yet gained much favor in Latin American countries. The "regulation" with respect to voting power, so far employed, is in the form of a prohibition in some nations of the so-called "plural vote," and the requirement, where there is more than one class of stock, that the par value of the different classes be the same and all shares be entitled to the same vote. The "plural

6Argentina Com. Code art. 320 et seq.
   Brazil: Decree No. 434 of 1891, arts. 71 et seq.
   Costa Rica: Law No. 6 of 1909, arts. 71 et seq.
   Mexico: General Law of Commercial Companies of 1934, arts. 90, 92 et seq.
7Decrees No. 23 and 324 of Nov. 6, 1933, art. 2.
8Decree of April 27, 1923, art. 23.
9Decree No. 251 of May 20, 1931, art. 83, subdiv. e.
vote" is an institution which has been utilized extensively in Europe to assure control of a corporation to a small group, but it has not been greatly resorted to in Latin America even where permitted. Specific provision authorizing cumulative voting for directors is found in the law of Mexico.\(^{10}\) The voting trust is apparently not specifically provided for. The trust, as here known, is not generally recognized under the civil law. In some instances, however, voting trusts have been created under the laws of states in this country, limited to a term of years and for lives of specified persons.

The management of the corporation under Latin American laws differs considerably in practice from that in this country and England. The directors or administrators are elected by stockholders in accordance with the corporate statutes and the corporation laws. Directors are considered mandataries or agents of the stockholders, rather than trustees. Liability of directors is generally determined by the corporation law, and sometimes by applicable provisions of the commercial code or civil code. In most Latin American countries, directors are subject to dismissal \textit{ad nutum} by majority vote at a special stockholders' meeting. This is a consequence of the underlying theory of mandate and the power of the stockholders, as principal, to terminate the agency at will. It carries out the legalistic approach of the civil law. In Mexico, where cumulative voting is provided for by law, the minority directors are subject to dismissal only when all the other directors are to be dismissed.\(^{11}\)

The difference in practice lies in the fact that directors of Latin American corporations are generally fewer in number, and each generally has active duties of administration of the corporation. They usually perform important administrative duties instead of merely acting as a board to determine policies and appoint executive officers. Thus, a typical directorate of a Latin American corporation might be a director-president, a technical director, a commercial director, and one or two additional directors, whose tasks might correspond to those of treasurer and secretary in an American corporation. The corporate statutes may specify segregation of duties or may merely stipulate the total number of directors and the number thereof, if more than one, whose act is necessary to bind the corporation. Almost without exception, the Latin American laws provide for election by the stockholders of a fiscal council or one or more fiscal supervisors (generally called \textit{comisarios} or \textit{sindicos}) whose function varies from mere verification of the annual balance sheet and profit and loss statement to a wide range of duties and prerogatives including the duty to pass upon proposed increases of capital and the right to propose dismissal of any of the directors.

\(^{10}\)General Law of Commercial Companies of July 28, 1934, art. 144.
\(^{11}\)General Law of Commercial Companies of July 28, 1934, art. 144.
Control by majority vote of the stockholders is established in principle in all of the Latin American countries to an extent far beyond that known here. This feature of practically absolute control by the majority has been the subject of increasing adverse criticism in recent years. It is coming to be recognized as responsible for the reluctance of small investors to participate in corporate enterprises, for attempts to increase artificial safeguards thrown around the corporate structure, and for the consequent reluctance of legislators to permit greater freedom in the capital structure.

II. DIFFICULTIES IN CORPORATE FINANCING UNDER LATIN AMERICAN LAWS

Apart from the time-consuming procedural requirements, the most important obstacles to corporate financing under Latin American laws, in the opinion of the writer, are: First, the practically unfettered control of the majority and lack of equitable remedies; second, the limitation in the amount and types of securities issuable; third, restrictions on consolidations and reorganizations; and, fourth, heavy taxes restrictive of normal financing activities.

The degree of control by the majority of stockholders and the lack of any real and effective protection of minority stockholders made uninviting the purchase of scattered shares of corporations without majority control. To those in control it means a distinct detriment in the raising of funds through public subscription.

The civilists, in their logical approach to the corporate entity have until recent years adhered literally to the theory of the corporate contract—that when an individual subscribes for or purchases stock of a corporation he does so subject to the absolute rule of the majority according to numerical voting rights and subject only to the specific limitations in the corporate statutes and the corporation law; that by the acquisition of voting shares he acquires a given number of votes and has the free right to exercise those votes, either with absolute control if he is in the majority or subject to the absolute control of others if he is in the minority. Selfish interest in voting is subject, not to the broad restraints of equity, but only to those limitations specifically prescribed by law or in the corporate statutes; and consequently, if no specific limitation be transgressed, the majority cannot be restrained from any action taken or contemplated. In short, the civilist may take a given set of facts and legal precepts and work out a course of action within

12An instance is reported in which a prospective purchaser of a large majority of stock of a Latin American corporation cabled to that country and inquired about the rights of minority stockholders. He was advised, in effect, that the only effective right of the minority is to sell their shares.
the specific limitations prescribed without regard to the power of an equity court to consider the facts upon broad principles of equity and, if need be, to create or recognize new principles.

Not only is this concept a present detriment to distribution of stock to small holders, but it tends toward increasing rigor of artificial, as opposed to natural, restrictions, the former being so often ineffective and burdensome. However, as later noted under Point III, the French doctrine has made significant progress toward the application of principles analogous to those of equity based on "good faith" in interpreting the corporate contract governing the rights and duties of corporate stockholders. Development along that line seems the only real safeguard to the small investor and highly preferable to the alternative of increased artificial restrictions. The limitations in amounts and types of securities issuable vary greatly from country to country. Generally speaking, their laws seem designed to fix more rigidly the pattern and mould of the capital structure and, despite their strict contractual theory of the relationship between stockholders, to leave less freedom of contract. For many purposes for which the corporation is utilized in this country, the rigidity of capital structure is not a great obstacle, for in Latin American countries forms of organization other than the corporation may be used. But for the development of a capital market greatly needed for economic development, the rigid limitations often present great obstacles. One of the most striking limitations is the requirement in some countries that all or a substantial percentage of the capital stock be subscribed, not only upon the organization of the corporation but on the occasion of each increase of capital. In Brazil, Costa Rica, Ecuador, El Salvador, Mexico, and Venezuela, 100% of the capital stock must be subscribed; in Guatemala and Honduras, two-thirds; in Nicaragua, 50%; in Bolivia, and Chile, one-third; in Argentina, Paraguay, and Uruguay, 20%; in the Dominican Republic, 10%; in Colombia, Cuba, Haiti, Panama, and Peru, the law is silent on the matter.

23Decree No. 434 of 1891, art. 65.
24Law No. 6 of 1909, art. 69.
27Com. Code art. 332.
28General Law of Commercial Companies of 1934, Art. 89.
30Two-thirds, when incorporated by public instrument, Com. Code art. 305; 100%, when incorporated by public subscription, Com. Code art. 220.
33Decree of March 8, 1860, art. 1.
34Com. Code art. 428.
36Com. Code art. 318.
37Law of June 2, 1893, art. 3.
38Com. Code art. 51 as amended.
The theory behind the requirement that the entire capital be subscribed is again the necessity for state tutelage of the corporation and the investor. The purpose is to assure the stockholder that he will be informed as to the true capital of the corporation. When the corporate capital is stated in the corporate statutes or on the stock certificate, the stockholders, theoretically at least, may assume that capital to that amount has been effectively paid in or subscribed for the corporate venture. It is argued that if the stockholder or investor had to observe the distinction between the issued capital and the authorized capital stock, the latter figure perhaps much larger, there would be greater chance of misunderstanding or deception than if only one figure were stated. Thus, it is thought that, by requiring the entire capital to be subscribed, the state guards the stockholders and investors against one possibility of abuse. The longer the system of complete or substantial subscription of capital is continued, the more the man in the street comes to rely upon it, and the more difficult becomes the task of directing the attention of the investor to the intrinsic worth of a security rather than the extrinsic formalities, and, therefore, increasing safeguards must be thrown about the latter. The greater also will be his distrust of corporate financing when he learns that the capital may be illusory and this intended safeguard a means of deception.

A second limitation is as to the class of securities which may be issued. Preferred stock is authorized only in nine of the Latin American republics. It is expressly prohibited in Uruguay. In others where the law is silent, its issuance would be inadvisable unless strong decisions or established doctrines could be found in its support. The provisions in practically all of the countries relating to value of the shares are such as, in effect, to prohibit shares without par value, with apparently the exceptions of only Chile, Mexico, and Panama.

Only a few countries have detailed provisions regarding corporate bonds
and debentures. Where no special legislation exists, the rules of the Code of Commerce and of the Civil Code apply, the latter supplementing the former. Under existing special laws, bonds and debentures for obtaining funds from the public are subject to tutelage of the State. Consequently, freedom in determining the terms and conditions of the obligation is the exception rather than the rule, and certain requisites of debentures are prescribed by law. In such cases, the corporation is limited to the issuance of debentures within the prescribed terms. The general obligation must be in that form and may or may not be given mortgage or other security, making the debenture, in cases where such security is given, correspond to corporate bonds as here known. Some Latin American debenture laws limit the amount of the issues in relation to the amount of the corporate capital or assets. In Brazil, the aggregate amount of all issues of a given corporation (except certain classes of corporations) may not exceed the corporate capital as stated in the by-laws. In Mexico, the various issues must not exceed the net assets unless the issue is intended to cover the price of purchase or construction of property already contracted for. In Panama, the issues must not be in excess of the paid-in capital.

Some Latin American nations have adopted directly or from legislation of European nations the English system of debentures which may be secured by a floating charge and, in some cases, by specific security as well. The debenture without security has in the past been rather rare, issued only by the larger companies of firmly established credit. The more customary form is the debenture secured by a floating charge which, in effect, gives the debenture holders as a group priority over general creditors in case of liquidation and, in Brazil, the right to force dissolution and liquidation. Under this system, the corporate debtor may sell and dispose of properties without obtaining specific releases. The lien securing the debentures is a floating lien and is effective upon the existing property of the corporation on the happening of a given event, dissolution, bankruptcy, or sometimes default. In some cases, for instance in Argentina, the corporation is prohibited from assigning its assets or any part thereof, which might result in making it impossible to

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Argentina: Law No. 8875 of Feb. 23, 1912, art. 32.
Brazil: Decree No. 177-A of Sept. 15, 1893, art. 2.

Panama Code art. 411.
Decree No. 177-A of Sept. 15, 1893, art. 1, 3.
Com. Code art. 409.
Argentina: Law No. 8875 of Feb. 23, 1912, art. 4.
Brazil: Decree No. 177-A of Sept. 15, 1893, art. 1.
Decree No. 22,431 of Feb. 6, 1933, art. 13.
continue in business and from merging with another corporation, unless ex-
pressly permitted by resolution of the debenture
holders. The debenture
with specific security, corresponding to corporate bonds as known here, is
not so customary and is not frequently used, except in the case of senior
financing offered in this country and, occasionally, in England or Europe.

The various limitations as to the period for which mortgage registration is
effective, the necessity for detailed description of the properties, and the
cumbersome procedure for executing and recording mortgages and releases
make the special security somewhat more difficult to obtain. In some countries there have been special restrictions on debentures or
bonds in bearer form. The purpose was, in some cases, to prevent compe-
tition with the Government in the issue of currency and, in others, to pre-
vent the conduct of unauthorized lotteries. For instance, Brazil still retains
the so-called "anti-lottery" provisions which originated in the Belgian law of
May 18, 1873. Under these restrictions, if a debenture is subject to redemp-
tion by lot at a premium, it must bear interest at 3% per annum, the premium
must be the same throughout the period of redemption at a premium, and the
issue must be serviced by a fixed annuity, i.e., the sum of the interest payments
and sinking fund for redemption must be constant during the period the de-

tenures are redeemable at a premium. This means an obligatory cumulative
sinking fund, the initial sinking fund being increased by the amount by
which interest payments are from time to time decreased through redemp-
tion of debentures outstanding. Similar provision is found in Mexico.

Law No. 8875 of Feb. 23, 1912, art. 9.
The original mortgage instrument, containing the detailed description of property,
must be entered in the notary's books, generally in longhand. Certified copies, prepared
and signed by the notary, and extracts containing the description prepared for regis-
tration must be recorded in the registry of mortgages. In the case of a mortgage and
deed of trust for a corporate bond issue which, with the detailed description, might
amount to some 200 printed pages, the procedure for entering, executing, and recording
the mortgage might well require a minimum of ten days or two weeks after the instru-
ment would be ready for execution under our laws. In the case of a certain mortgage,
six notary clerks were engaged in alternate shifts to enter the mortgage in the notarial
books and make the certified copy for registration. A special train was held ready to
take the certified copy and extracts to the various recording offices, but even with such
facilities nine days were required to complete these formalities after the form of the
mortgage was ready for delivery to the notary, i.e., after the time when in this country
it was ready for mere signature and presentation for registration.

Decree No. 177-A of Sept. 15, 1893, art. 6.
In a certain instance, a foreign corporation in Brazil had agreed with bankers here
upon the terms of a bond issue to be offered in New York. The terms which the
bankers had worked out included redemption at premiums graduated downward during
the life of the issue and with the sinking fund not on a cumulative basis. A complete
mortgage and deed of trust in the customary American form had been prepared by
American counsel and cabled to Brazil for execution and recordation. Upon examina-
tion of its terms there it was found not to conform with the requirements of the Brazilian
debenture law and it was necessary not only to revise substantially the mortgage and
deed of trust, but also for the Company and the bankers to reach a completely new agree-
ment regarding the terms of the proposed bond issue, naturally resulting in further delay.

Law of Aug. 26, 1932, art. 211.
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Under existing legislation in most of the Latin American countries, the long term open-end mortgage, or even a closed mortgage providing for serial issue of bonds, presents almost insuperable difficulties. In the first place, the period for which the registration of a mortgage is valid is frequently limited to a fixed period of years. In the legislation of some countries, the right to maintain the existing priority upon re-registering the mortgage while still in force is uncertain and, even where that doubt is not present the continued validity of the long term mortgage is dependent upon a further act of the trustee or the debtor prior to expiration of the fixed period. Difficulty is sometimes encountered in maintaining for any subsequent series or issue of bonds the priority of the mortgage as originally registered, over liens intervening between the original registration and the subsequent issue of bonds. In none of the Latin American countries, so far as the writer has had opportunity to investigate, is the after-acquired property clause as here known effective, since the mortgage registration laws customarily required a minute specification of the properties mortgaged, although, of course, improvements constructed on mortgaged property will automatically become subject to the mortgage under the doctrine of accession. Sometimes the difficulties are such that resort must be had to the issue of bonds under an American form of agreement executed in this country specifically secured by individual and special mortgages of different properties in the foreign country or countries. However, where an attempt is made to provide at the outset mortgage security sufficient to cover subsequent issues of bonds, high taxes or recording fees are frequently encountered.

In Argentina and Mexico, the powers of trustees have been extensively regulated. In Argentina among other powers, they are authorized, for instance, to examine the books of the corporation, attend meetings without vote, in some cases move for dismissal of directors, and take up and manage the business in case of default, heavy losses, or bankruptcy.44 In Mexico, they have these and various other powers, except that of taking up and managing the business of the corporation.45 Brazil has experimented with a law designed to accomplish the same purpose, approached from a strictly civilist viewpoint. Decree No. 22,431 of February 6, 1933, establishes and regulates the community of interest among debenture holders. Unfortunately, this goes to the length of impairing the obligation itself, for it permits action to amend the terms of the issue in material respects by holders of a majority in amount of debentures at a meeting where two-thirds constitutes a quorum. It goes further than merely requiring action by a specific percentage in order to enforce the security given, leaving the individual holder

44Law No. 8875 of Feb. 23, 1912, art. 14 et seq.
45Law of Aug. 26, 1932, art. 216 et seq.
the right to sue on the obligation to pay, as is customary here in order to maintain the negotiability of the instrument. In England and more recently in this country, provision is not uncommon permitting amendment in certain respects of the terms of the indenture affecting the security for debentures or bonds. Generally, a high percentage vote is required and, in all cases, it is a matter for stipulation in the original agreement or indenture and, consequently, a matter of volition as between the debtor corporation and a prospective purchaser of the debentures or bonds. Naturally, a law permitting substantial amendment of the security and even the obligation itself, by a percentage vote (relatively low in the case of the Brazilian decree) would impair the value of debentures generally. It is understood that the law in question has not been favorably received by investors or the Exchanges.

In some countries the status of the trustee is in some doubt. Apart from this legislation, numerous problems must be faced—whether a foreign Trust Company may act within Latin American countries and accept a mortgage; whether it must qualify to do business within the country and if so whether it must comply with requirements relating to banks; and whether it would be recognized in court in attempting to foreclose the mortgage as general representative of the bondholders.

The foregoing review of limitations upon the amount and classes of securities issuable is sufficient to indicate difficulties which may be encountered in financing under Latin American laws. When a preferred stock seems appropriate, it may not be issuable. When additional capital may be badly needed, it may not be possible to issue further stock at par or better; the very fiction of the par value makes stockholders reluctant to reduce the capital to permit the corporation to issue further stock for cash, yet property may be taken at excessive valuations, thereby further increasing the deception from the statement of the capital. The first financing by bonds is frequently insufficient for the needs of a growing company. Under closed mortgages, so often necessary, and the restrictions upon the period of validity of the mortgage registration, it is frequently but the precursor of numerous refundings if the corporation is to develop and grow.

The third major obstacle to corporate development and financing is found in the restriction on consolidations and reorganizations. Few countries expressly permit consolidation or merger on less than unanimous vote. In Argentina and Mexico, at least three-quarters of the outstanding capital must be represented at the respective meetings, and the resolution must be adopted by vote of not less than one-half of such outstanding capital; in Argentina, any stockholder voting against the merger has the right to with-

\footnote{Com. Code art. 354.}

\footnote{General Law of Commercial Companies of July 28, 1934, arts. 182, 190.}
draw and receive reimbursement of the book-value of his shares, but book value is of course no indication of their real value. In El Salvador, the merger must be approved by two-thirds of the capital. In Brazil, which lacks a definite and express provision, the law is interpreted as requiring a unanimous vote of the outstanding capital. Many other laws are silent about the matter, and the question would arise as to whether, in the absence of express provision, mergers or consolidations require unanimous vote or ordinary majority. Particularly when the merger or consolidation would result in the creation of a new juridical entity, caution dictates proceeding only on the assumption that a unanimous vote is required. In such countries, dissolution of one or both of the corporations is often the only expedient available. Ironically enough, dissolution and transfer of assets permit treatment of a dissenting minority much less generous than under the laws of those states in this country which permit dissolution upon a specified vote, with provision for valuation of and payment for shares of dissenting stockholders. Valuation on dissolution may well be less than going concern value on consolidation.

In many countries, transfer of assets on dissolution or consolidation is subject to high property transfer taxes. In some cases, these taxes are so high as to block many consolidations otherwise advantageous. Even if consolidation through obtaining the required vote of stockholders be feasible and the property transfer taxes not prohibitive, a further obstacle is sometimes met in the income tax upon individual stockholders. So-called "tax free" reorganizations are seldom recognized, and the individual stockholders are faced with a tax upon the amount by which the value of the shares of the new corporation exceeds the cost to them of the shares of the old corporation. This presents a further difficulty which must be surmounted to effect a satisfactory consolidation or reorganization.

The fourth obstacle is the generally high scale of taxes encountered. The taxes on capital, contracts generally, and transfer of property are frequently so high as to discourage corporate organization and financing and to favor continuance of individual enterprise. Such taxes vary so much from country to country that space does not permit of particularization, but their cumulative effect is clearly a deterrent to corporate enterprise.

III. Possible Influence of the Civil Law upon Corporation Laws in the United States

An indication of the influence which the civil law may exert on corporation law in this country is found in a recent copyrighted article by Henry Paine.

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49a See Decree No. 434 of July 4, 1891, art. 148.
Crawford in the January, 1937, issue of the *District of Columbia Bar Association Journal*. He "submits without hesitation that a selective combination of the Mexican and Argentine laws governing industrial corporations, plus certain modifications relative to shares of stock, would make the almost perfect corporation law." While the present writer has no desire to disparage the corporation laws of the Latin American countries, nor the thought and learning which have contributed to them, he feels that any attempt to engrat upon our common law system the laws of another system which is so fundamentally different as the civil law could but lead to unfortunate results.

We have seen that Argentina requires governmental authorization for the organization of corporations, and that Mexico requires the full subscription of the capital stock, that is, does not permit authorized and unissued capital. The corporation laws of both countries naturally follow the civil law theories rather than the common law, and protections of an equitable nature have not been extensively developed. Consider, for example, one of the features of the Argentine law to which Mr. Crawford points, viz., the requirement that at least 2% of the earned and liquid profits of the corporation be set aside to create a reserve fund until a total is reached equal to at least 10% of the corporate capital. Though the percentage required is low and though the policy may be extremely desirable for some corporations and in certain periods, the requirement is directly opposed to the philosophy of the undistributed profits tax in this country. Again, Mr. Crawford points out that under the Mexican law a merger cannot take place until three months after the merger agreement has been recorded in the public registry of commerce and published in the financial periodical of the domicile of the corporations, unless "payment of all debts of the corporation to be merged is stipulated, or the deposit of such amount is created in a banking institution, or when the consent of all creditors is granted in writing," unmatured debts being considered matured as of the date of the merger. Payment or provision for outstanding indebtedness, including unmatured, would obviously be out of the question, or prohibitively expensive, in the case of the average well-established American industrial or business corporation. The effect of such a law here would be to leave ineffective for a period of three months a merger which, if feasible and advisable, ought to be effected with the least possible delay.

Other features of the civil law sometimes urged for adoption in this coun-

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49b See note 2 supra.
48c See note 17 supra.
49 It is interesting that the Brazilian Income Tax Law, rather than penalizing reinvestment of profits in fixed plant equipment, has allowed deduction from taxable income for amounts so reinvested to encourage economic and industrial development.
try are: (1) The institution of a Fiscal or Supervising Council as representatives of the stockholders or the appointment of government officials to supervise the operations and audit the accounts of the directors; (2) the requirement that the value to be allowed for property tendered to a corporation in payment of capital stock be determined by appraisers appointed by the stockholders; and (3) the dismissability *ad nutum* of directors.

The fiscal or supervising council sometimes accomplishes the end it is theoretically designed to serve, but only rarely. More often, where the council is not composed of dummies, it consists of a "whitewash" board of prominent citizens sufficiently interested in the activities of the corporation to consent to assume the responsibilities of their office and lend their names to enhance the prestige of the corporation, perhaps unjustifiably. It is an institution designed to check and supervise the directors, but not infrequently it lulls the stockholder into a false sense of security. If, as is normally the case, the members of the fiscal council are appointed by the majority stockholders, it is only natural that they are persons in the full confidence of the majority and without inclination to question the acts or motives of the directors elected by the same majority. If, on the other hand, the fiscal council were to be elected by the minority (a provision which would be repugnant to the general principles of civil law corporations), the fiscal council might, of course, be a more active check, but the power to check might well develop obstructionist tactics and internecine strife to the detriment of the corporation.

In the view of the writer, provision for cumulative voting for directors, permitting the minority an actual voice in the administration and imposing a corresponding responsibility, supplemented as it is in this country by audits made by certified public accountants in the case of larger corporations whose securities are listed, is distinctly preferable and more practical. It neither lulls the innocent stockholder into a false sense of security nor offers the opportunity to obstruct without responsibility for management. Of course, conditions here are by no means universally applicable. In some Latin American countries, where there are no securities exchanges nor well-established certified public accountants (or the equivalent), the Fiscal or Supervising Council may serve a purpose which could not otherwise be served. Even under such circumstances, however, the institution may well result in misleading the investor. Obviously, the Argentine provision for attendance of government representatives at meetings would be a degree of state intervention in the activities of our corporations (as distinguished from regulation) repugnant to fundamental principles in this country. Considering the vast number of corporations in this country, it would be alarming to contemplate the effect of building up a bureaucracy of supervisors of corporate meetings.
Provisions for appointment of appraisers for property tendered in payment for stock, found in the laws of so many Latin American countries, have a like appeal from the purely theoretical viewpoint. In actual operation, however, such appraisals seem to serve more as "window dressing" and as a buffer to relieve the directors from the full responsibility to which they would otherwise be subject. Theoretically, a stockholder who desires to tender property in payment of stock may make an unconditional subscription in cash, binding himself to pay the full amount of any excess of his subscription over the value at which the tendered property may be appraised; in practice, however, the subscriber will not assume an obligation so uncertain without assurance as to the parties to be appointed as appraisers and as to the value to be returned by them on their appraisal. It will be readily seen that, in practice, there would be no payments for stock in property without a simultaneous meeting of the minds between the party tendering the property and the corporation accepting it in payment of the specified amount of stock. In practice, subscriptions will not be made with the idea of paying for the stock in property unless there is in effect an agreement or understanding that the property to be tendered will be valued at the amount of the stock subscription. It is difficult to conceive, for instance, of a total outsider, not a stockholder, subscribing for stock and leaving to unknown appraisers, to be appointed by the existing stockholders of the company (the other party to the agreement), the determination of the value at which the tendered property is to be received. It is idle to say that the subscriber should be willing to pay in cash if the property is appraised at less than his subscription. He places a definite value on his property and will not part with it except for that value. He may have property and no cash or be willing to transfer property but not cash. On analysis, the formalities of appraisal appear as subterfuge. Any weight which the innocent small stockholder or future subscriber may attribute to them is too great, in the average case at least. They are, therefore, to be characterized in the writer's opinion as more misleading than protective, unless it be in the sense of protecting directors from responsibility which they should assume.

The dismissability ad nutum of directors, which prevails under the civil law with few exceptions, is sometimes referred to as an advantageous protection of stockholders. Recent occurrences, however, indicate a preference for the system normally prevailing under the Anglo-Saxon law, i.e., election and tenure of office for a stated period. Financial scandals in France have revealed that the dismissability ad nutum of directors has been used by groups obtaining a dominant undisclosed stock interest as a weapon to compel action by weak directors to the advantage of the group and to the detriment of minority stockholders. In this country, the laws of Nevada have been
severely criticized for permitting removal of directors by action of stockholders without cause.

This situation has given rise to discussion of various reforms, many of them fanciful, to guard against these and other abuses by controlling the voting power of stock. Such proposals include differentiation in voting power of stock according to number of shares held (for instance, limiting the aggregate voting power of any one stockholder to 10% of the stock, regardless of the number of shares held); no vote, or lesser vote, for certain kinds of stock (bearer shares, the floating supply in market trading); length of time the stock has been held (longer holding as representing a more responsible interest in the corporate affairs); and other highly artificial differentiations which would seem impractical and, perhaps, admit of greater abuses than are now current. They are particularly illustrative of the invitation to evasion from artificial attempts at control. For instance, in countries which now place a maximum limitation upon the number of shares which any one shareholder may vote, it is customary practice to have large blocks of stock split up among several stockholders in order to retain the full voting strength. Differentiation in voting power between bearer and registered stock has nowhere been adopted, to the writer's knowledge, but would seem not only to be ineffective but to introduce elements of uncertainty and surprise, with the possibility of converting bearer shares into registered shares on the eve of any vote. It is interesting to note that in this country the possible abuse of voting "streetname" stock has been met by requiring brokers to obtain consent of the customer before voting stock held in streetnames. Premium on the vote of shares longer held would, in cases where the vote is important, attach an unjustified value to the acquisition of such shares by an opposing interest, eliminating a preponderant vote against them, and would even invite arrangements under which shares might continue to be held in the name of the former registered holders, retaining the voting premium even after the beneficial ownership has passed to others. All of these proposed "devices" are suggestive of a cure that is worse than the ailment.

On the whole, a review of the experience in civil law countries and a comparison with the experience under English common law will show:

(1) the civil law has heretofore afforded practically no protection of an equitable nature (as distinguished from that founded upon express provisions of law) to minority stockholders or defrauded investors;

(2) abuses in corporate financing have been greater, relatively at least, under the cloak of artificial restrictions as safeguards of the civil

See Gaillard, La Société Anonyme de Demain.
law than under the greater freedom of corporate procedure and finance permitted under common law, subject to the protection and restraint afforded by the courts of equity;

(3) the dominant principle of control by the majority, based upon the supposed contractual right of the individual stockholder to vote his stock to his own interest, is largely responsible for the abuses which have been found to exist in the civil law;

(4) increased artificial restrictions on the rights of the corporation, its directors and stockholders, have not resulted in the improvements hoped for, have generally impeded normal corporate development, and, in some cases, have resulted in cloaking other and different abuses than those aimed at;

(5) civil law courts and authorities are now tending to develop protective measures of an equitable nature, still far from those afforded under the common law;

(6) the relatively greater growth and development of corporations under common law is due, in some part at least, to reliance upon equitable protection rather than specific restrictions and limitations in the corporation laws;

(7) the lack of other forms of limited liability organizations under common law requires greater flexibility in the corporation laws here than in civil law countries, for the corporation here must be resorted to for many purposes for which partnerships or companies with limited liability of all members may serve under the civil law.

Financial journals and textbooks in civil law countries are replete with instances in which a corporation or a group has acquired control and exercised such control exclusively in its own interest and to the detriment of minority stockholders. To persons familiar with the doctrines of equity applicable in the United States and England, some of the cited abuses of minority stockholders of foreign corporations seem veritable spoliation, meriting without question or hesitation the intervention of a court of equity. The right of the stockholder to vote in his own interest has been deemed a contractual right which he acquires upon purchasing the shares. It has given rise to the conception of the "contractual" theory of corporations under the civil law, in contradistinction to the newly developing "institutional" theory, which Gaillard describes as follows:

"According to the institutional theory the power of each organ is limited by its purpose and cannot be turned against such purpose.

"The purpose of the stockholders' meetings is to control, to require the directors to follow the common good and not to permit them to violate it with impunity.

"The power of the stockholders meeting thus receives a primary

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51 M. GEGOUT, FILIALES ET GROUPEMENTS DE SOCIÉTÉS p. 287 et seq.; GAILLARD, LA SOCIÉTÉ ANONYME DE DEMAIN pp. 32, 34.
limitation of purpose. Whenever it exceeds that limitation, its acts may be referred to the court.” (Translation.)

A quotation such as the foregoing would seem so commonplace as to be unworthy of note but for the fact that it is the statement of a conclusion reached by Dr. Emile Gaillard towards the end of his work on La Société Anonyme de Demain, in which he reviews various abuses, discusses the contractual theory, and leads up to the development of the institutional theory as a protection against such abuses. For instance, as a typical abuse from which only the institutional theory may effectively guard the investor, Dr. Gaillard cites:

“The owner of the majority, having an incontestable individual interest in appropriating to himself the entire assets of the corporation, may do it for instance by means of the following example: He decides in the general meeting that the corporation transfer to him all of its personal property for the sole consideration of his paying its debts; if the excess of the assets over liabilities is considerable, the despoiled minority will not fail to complain. Will their complaints be admitted?

“It would not be possible to annul the contract because of damage, for our law based on volition admits contracts concerning personal property, no matter how damaging. Furthermore, in accordance with the logic of the contractual theory, it would be necessary to hold the decision valid, since the majority does not have the intention of harming the minority but only of enriching itself.” (Translation.)

Dr. Gaillard then shows with evident satisfaction how the court, in order to prevent this obvious spoliation, invoked Article 1134 of the French Civil Code, imposing the general obligation of good faith in all contracts. This he refers to as the basis for the development of the so-called institutional theory, under which a limitation is placed upon the individual right of the stockholder in order that such right may not be invoked to sacrifice the interest of the corporation.

Other abuses which our courts of equity would not for a moment hesitate to restrain, but which he commends the court for having set aside, are illustrated in the following situations. A stockholders’ meeting was called to act upon a proposal to transfer the entire assets to a third party in consideration of his assuming the liabilities. At the meeting, a shareholder proposed to take over the assets under the same conditions and to pay 25 francs per share to the stockholders. The meeting, although there was no danger from delay, decided not to act upon the last-minute offer but to accept immediately the first offer, in spite of its unfavorable nature. In another case, the majority stockholders of the corporation, holding founders’ shares, decided that the reserves required under the by-laws should thereafter be made
up from the amounts taken, not from the entire net profits, but exclusively from the portion thereof attributable to the shareholders after setting aside the portion for the founders' shares without deducting reserves therefrom. The shareholders lost thereby but the founders gained; and since a majority of the shareholders held a large amount of founders' shares, the operation was beneficial to them. Surely a court of equity would not for a moment have hesitated to grant relief from such gross and evident abuse of power by the majority in either of the foregoing situations.

While not overlooking any advantages which might be derived from the seemingly protective provisions existing and proposed in the corporation laws in civil law countries, we must recognize that most of the protective provisions are restrictive in effect and we must consider the causes which have motivated them. We must consider also whether such restrictive provisions really are effective there and, if so, whether similar provisions would add protection to that which already exists here. If these questions be answered affirmatively, we have still to consider whether any such additional protection is worth its cost, i.e., is sufficient to compensate for the resultant restrictions upon corporate financing. In this country, we have a highly developed equity jurisprudence which offers a degree of protection to minority stockholders not found, in the writer's opinion, in any civil law country. We see examples of more flagrant abuses in civil law countries despite the restrictive measures. It is significant that civil law countries and courts, after experimenting with measures of a paternalistic, restrictive nature, are now developing a so-called "institutional" theory of the corporation which, though not so labeled, has been firmly embedded in our equity jurisprudence for many decades.

We see that corporations have reached a stage of development in this country, in number and in the size and importance of the enterprises conducted, far exceeding that of civil law countries. We see that the provisions of the corporation laws of the Latin American nations referred to in this article are much more restrictive than the laws of the various states in this country. While it can hardly be stated with positiveness, it is but a natural assumption that the liberality of our corporation laws has at least contributed to the growth and development of the corporation as an institution, and that to circumscribe the corporation within the restricted limits prescribed in the corporation laws of many Latin American nations would necessarily hamper their growth and development. In recent years, congressional investigations have exposed corporate activities which may be characterized as patent abuses. Of course, not all the revelations were

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GAILLARD, op. cit. supra note 51, pp. 30, 32.
abuses, but the abuses which were so revealed may by and large be charac-
terized as breaches of trust and failure to disclose material facts. Con-
sistently with fundamental traditions in this country, corrective legislation
has aimed at full disclosure and at avoidance of conflicting duties on the part
of directors, rather than attempting paternalistic control of the nature and
kind of securities to be issued.

The corporation serves a highly useful purpose. In this country it fills
many needs for which limited share partnerships (private companies in
effect) are utilized in Latin American countries. The very flexibility of its
capital structure has permitted the corporation to serve as a mechanism for
carrying out complicated contracts dependent upon numerous conditions. The
public interest in such institution arises when it is utilized for obtaining
funds by public subscription or sale of securities. For this further reason
it would seem that corrective and restrictive measures should be directed,
as at present, not at the mechanism of corporations but rather at improper
uses made thereof and should apply particularly to the regulation of the
sale of securities.

IV. POSSIBLE INFLUENCE OF ANGLO-SAXON CORPORATION LAWS UPON
LATIN AMERICAN LEGISLATION

Latin American and Anglo-Saxon corporation laws are the products of
different systems. The corporation laws under each system fit into the re-
maining body of laws. Even if the corporation laws or particular provisions
under one system could be considered preferable to those under another,
such law or provisions, if transplanted from one system to the other,
might be so ill-adapted to the new legal system as to give entirely unsatis-
factory results. It would be presumptuous, therefore, even to suggest the
consideration of particular laws or provisions in this country for possible
adoption in Latin American countries. The most which might be ventured
would be to mention the effect of provisions here which have contributed
to the growth and financing of corporations. If any of these are deemed
helpful or desirable in Latin American countries where their equivalent does
not exist, a change or amendment in their laws should be such as to accom-
plish the desired result in the manner and form best adapted to their system
of laws.

Comparision of experience in corporate financing in Latin American coun-
tries and in this country suggests the following respects in which our laws
and practice might influence those of Latin America:

(1) Only benefit could result in the long run, both to majority and minority
interests, from measures restricting the degree of control now exercised by
the majority stockholders in most, if not all, Latin American countries.
Whether that be by formal adoption of the "institutional" theory, by the
development of an equity jurisprudence in matters of corporation law, or by
resort to general provisions requiring good faith in the interpretation of con-
tracts is merely a choice of method.

(2) Greater latitude in the type of securities, stocks, debentures, and bonds
issuable, would undoubtedly facilitate financing for both local and foreign
capital. Objections to the greater latitude are founded upon the duty or
right of the state to prescribe the patterns of and impose limitations upon
securities of corporations for the protection of individual investors. The
focal point in the discussion is the extent of state intervention. Of course,
all restrictions which tend to assure the payment of real value for stock and
to avoid the imposition of false values upon investors (such as is sometimes
the case where par value stock is issued for overvalued property or after
the corporation has suffered losses) should be retained and strengthened
where possible, as should also provisions imposing and enforcing the lia-
bility of directors and requiring them to act in the corporate interest rather
than their individual interest. It is submitted, however, that provisions of
this nature may be retained and strengthened while greater latitude is per-
mitted as to the nature, type, and amounts of securities issuable.

If, for instance, we take a cross-section of American industry, we find it
is financed by a wide variety of securities. In any one industry the needs and
particular situation of one corporation may differ greatly from that of an-
other. Changing market conditions also dictate changes in the type of securi-
ties which may be offered to the best advantage of the corporation. Obviously,
it is helpful to bona fide financing to have all reasonable latitude in deter-
mining the type and conditions of securities best suited to the particular
financing requirements of the corporation and to market conditions at the
time. Where preferred stock is not yet admitted, or its admissability doubt-
ful, provision expressly authorizing it ought beyond question to be helpful.
Reference has been made above to the right to have authorized capital
beyond that actually subscribed and also to the helpfulness of shares without
par value.\footnote{It is interesting to note the forthright statement by Dr. Octavio Monteiro da Silva,
Deputy in the Brazilian Chamber of Deputies, in his report on Bill No. 424 of 1936,
a proposed revision of the present Brazilian corporation law which, with minor amend-
ments, dates from 1882:

"Shares without par value permit an immediate impression of the true status of the
assets of the company, of the confidence which its administration deserves and of the
possibilities of the business conducted by the company. I should adopt the innova-
tion set forth in the bill, as a salutary and moral provision. However, I was outvoted
at the outset of the work of the legislative committee, when it was still engaged on}
CORPORATE FINANCING

may be issued naturally restrict senior financing. Particularly in such case as the debenture law of Brazil, modeled upon a Belgian law of 1873, it would be helpful to review and determine whether existing restrictions still serve a useful purpose.

(3) Authority for consolidations and mergers on less than unanimous vote, where not now permitted, would be helpful. The effectiveness of such provisions would still depend upon the income tax laws, where they exist, and real property transfer taxes. On the assumption that consolidations are usually beneficial in building up industrial and other enterprises where agreed to by a substantial majority of stockholders, avoidance of excessive or prohibitive transfer taxes would seem a laudable encouragement from the governments. If, for instance, the law should permit the merger of one or more corporations into an existing corporation and the continued corporate existence of the latter rather than the creation of a new corporation, at least a portion of the high transfer taxes might be saved.

(4) Revision of procedural requirements is a matter which touches intimately the existing body of laws and customary practice and procedure. Any radical change for the particular benefit of corporations might be more confusing than helpful. However, any simplification of procedure and shortening of time element involved would be quite helpful. In countries which require the publication of all stockholders' proceedings, any great growth in corporate activity would make corporate publications exceedingly voluminous and burdensome. Perhaps a system of filing for public inspection by interested parties or the mere requirement, as here, that the records be open to inspection by any stockholder, would simplify proceedings immensely.

(5) Revision of tax laws to encourage corporate activities and financing not only would be helpful to economic growth, but also might be fairly expected, as a result of such growth, to maintain or even increase tax revenues. For instance, in many countries the tax on capital stock, which corresponds to our organization taxes in different states, is relatively high. As noted above, consolidations and mergers are often prohibited by heavy property transfer taxes. Also, where income tax laws exist, express provisions recognizing tax-free reorganizations are calculated to increase and encourage corporate activities. Generally speaking, mortgage recording taxes are high to a point which discourages financing by secured bonds.

(6) Revision of mortgage recording laws likewise touches closely upon

the commercial code. My associates on the committee feared that this innovation would be wrongly interpreted and applied among us.” (Translation.)

This quotation brings to mind the story of the legislator in a Western State who introduced at numerous sessions a bill to permit corporations to issue stock without par value, the bill making no progress until he changed its title to “A Bill to Prevent Stock Frauds.”
the general body of law in the particular country. The length of time for which registration is valid is important, as is also express provision that upon re-registration within the period the pre-existing priority is maintained. Presumably the limitation upon the period for which registration is valid is designed to facilitate searches for liens. Where compelling reasons exist for restricting a general limitation to a period of thirty years or less, provision might be made for a special register for corporate bond issues.

Assuming, as seems generally admitted, that corporate financing has attained greater growth in this country than in Latin American countries, it would be difficult to attribute that growth to any particular cause. Certainly, reasonable flexibility of the corporation laws of our various states has contributed towards it. Indeed, it is sometimes suggested that the fact that incorporation is governed by the laws of the respective states, rather than by federal law, is responsible for the flexibility permitted and, according to some, the degeneration of liberty into license. The states have vied with one another in enacting attractive corporation laws. We have seen the time when New Jersey was a favorite state for incorporation, then Maine, and later Delaware, Florida, and Maryland, so that now the laws of many states are considered flexible and favorable.

In the Latin American nations, incorporation is by federal or national law, so that in none of those nations is the same internal situation present as in this country. However, considering the Americas as a whole, the relative advantages and defects encountered in the laws of the respective countries constitute definite factors favoring or discouraging both the mobilization of local capital in productive enterprise and the attraction of foreign capital for a like purpose. In that sense, the Latin American nations may also be considered to vie with one another, not merely to attract prospective incorporators to establish a technical domicile and pay taxes in the country, which is the motivating factor as between our states, but rather to mobilize or attract capital for permanent investment within the country.