ARE SOCIEDADES ANONIMAS CORPORATIONS? THE FRED HARDEN CASE

By GONZALO D. DAVID *

INTRODUCTION

A. THE IMPLANTATION OF AMERICAN SOVEREIGNTY AND ITS EFFECT ON THE CIVIL LAW.

The implantation of American sovereignty in the Philippine Islands marked the genesis of a unique legal system in which the two great streams of the law—the civil, the legacy of Rome to Spain, coming from the West, and the common, the inheritance of the United States from Great Britain, coming from the East—after circumnavigating the world have met on common ground. This consortium of the world's two great legal systems, "originating from different sources, flourishing in different countries, among different peoples, and diverse institutions, surroundings, and conditions", which in this time may form an amalgam to produce a peculiar national system, has wrought a lamentable confusion in the existing substantive law. Considerable modifications have been made in the Spanish Codes either expressly or by implication. The Civil Code has been modified by the Marriage Law (Acts Nos. 3412 and 3612), the Divorce Law (Act No. 2710), the Chattel Mortgage Law (Act No. 1508), and the Land Registration Act (Act No. 496). (A committee has already been created for the revision of the Civil Code). The Spanish Penal Code has been amended by the Libel Law (Act No. 277), the Brigandage Law (Act No. 518), the Counterfeiting Act (Act No. 1754), the Gambling Law (Act No. 1757), the Perjury Law (Act No. 1697), the Boxing Law (Act No. 2984), the Vagrancy Law (Act No. 519), the Opium Law (Act No. 2381), the Treason, Insurrection, and Sedition Law (Act No. 292), and the Recidivism Law (Act No. 3397), all of which have been incorporated in the Revised Penal Code (Act No. 3815). The Indeterminate Sentence Law (Act No. 4103 as amended by Act 4225) and the Probation Law (Act No. 4221) have introduced into the Revised Penal Code the modern concepts of the Correctional Theory of the Penal Law. The Code of Commerce has been repealed in part by the Corporation Law (Act No. 1459), the Bankruptcy and Insolvency Law (Act No. 1956), the Negotiable Instruments Law (Act No.

* LL.B., University of the Philippines.

purpose of engaging in agriculture and mining to be in anywise interested in any other corporation organized for the purpose of engaging in agriculture or in mining to own more than fifteen per centum of the capital stock then outstanding and entitled to vote of each of such corporation; it shall be unlawful for any corporation to own in excess of fifteen per centum of the capital stock then outstanding and entitled to vote of any corporation organized for the purpose of engaging in agriculture or in mining * * *." The violation of par. 5 of Section 13 of the Corporation Law was penalized in the year 1919 by Section 3 of Act 2972 of the Philippine Legislature amending Section 190 of said Act by the addition of Section 190-A. The amendment providing for the penalty was declared null and void by the Supreme Court in the *El Hogar Filipino* case in July, 1927, (50 Phil. 399), but was reenacted by Act 3518 and became effective in so far as Section 190-A is concerned on December 3, 1928.

It is much to be regretted that the Supreme Court of the Philippine Islands did not there and then adjudicate the question of whether a *sociedad anonima* is a corporation or not; it merely decided in favor of the respondents on the ground that plaintiff is estopped from bringing the action, and the proper action, if any, is a *quo warranto* proceeding by the Attorney General for the Government of the Philippine Islands. The Supreme Court said: "Having shown that the plaintiffs in this case have no right of action against the Benguet Company for the infraction of law supposed to have been committed, we forego any discussion of the further question whether a *sociedad anonima* created under the Spanish law, such as the Benguet Company, is a corporation within the meaning of the prohibitory provision already so many times mentioned. That important question should, in our opinion, be left until it is raised in an action brought by the Government." That important question is, therefore, still a moot question.

C. The Fred Harden Case, 32 O. G. 1118.

The Benguet Consolidated Mining Company was organized in June, 1903, as a *sociedad anonima* in conformity with the provisions of the Code of Commerce; while the Balatoc Mining Company was organized in December, 1925, as a corporation in conformity with the provisions of the Corporation Law (Act No. 1459). Both entities were organized for the purpose of

engaging in the mining of gold in the Philippine Islands, and their respective properties are located only a few miles apart in the subprovince of Benguet. The capital stock of the Balatoc Mining Company consists of one million shares of the par value of one peso (₱1.00) each.

When the Balatoc Mining Company was first organized, the properties acquired by it were largely undeveloped; and the original stockholders were unable to supply the means needed for profitable operation. For this reason the board of directors of the corporation ordered a suspension of all work, effective July 31, 1926. In November of the same year a general meeting of the company's stockholders appointed a committee for the purpose of interesting outside capital in the mine. Under the authority of this resolution the committee approached A. W. Beam, then president and general manager of the Benguet Consolidated Mining Company, to secure the capital necessary to the development of the Balatoc property. As a result of the negotiations thus begun, a contract formally authorized by the management of both companies was executed on March 9, 1927, the principal features of which were that the Benguet Company was to proceed with the development and construct a milling plant for the Balatoc mine, of a capacity of 100 tons of ore per day, and with an extraction of at least 85% of the gold content. The Benguet Company also agreed to erect an appropriate power plant, with the aerial tramlines and such other surface buildings as might be needed to operate the mine. In return for this it was agreed that the Benguet Company should receive from the treasurer of the Balatoc Company shares of a par value of ₱600,000, in payment for the first ₱600,000 to be thus advanced to it by the Benguet Company.

The performance of this contract was speedily begun, and by May 31, 1929, the Benguet Company had spent upon the development the sum of ₱1,417,952.15. In compensation for this work, a certificate for 600,000 shares of the stock of the Balatoc Company has been delivered to the Benguet Company and the excess value of the work in the amount of ₱817,952.15 has been returned to the Benguet Company in cash. Meanwhile, dividends of the Balatoc Company have been enriching its stockholders, and at the time of the filing of the complaint the value of its shares had increased in the market from a nominal valuation to more than eleven pesos per share.

While the Benguet Company was pouring its million and a half into the Balatoc property, the arrangements made between the two companies appeared to have been viewed by the plaintiff Harden with complacency, he being the owner of many thousands of the shares of the Balatoc Company. But as soon as the success of the development had become apparent, he began this litigation in which he has been joined by John D. Highsmith and John C. Hart out of the eighty shareholders of the Balatoc Company.

The legal point upon which the action is based is that it is unlawful for the Benguet Company to hold any interest in a mining corporation and that the contract by which the interest here in question was acquired must be annulled with the consequent obliteration of the certificate issued to the Benguet Company and the corresponding enrichment of the shareholders of the Balatoc Company.

The case came for trial on July 14, 1931, and after granting an amended complaint on November 30, 1931, the trial court on December 28, 1931, rendered an exhaustive decision holding:

(1) That the *sociedad anonima* of the Code of Commerce does not fall within the statutory definition of the term "corporation" contained in Section 2 of Act 1459, and hence that the Benguet Consolidated Mining Company is not a corporation;

(2) That the provisions of Act 1459 prohibiting mining corporations from being in anywise interested in other mining corporations are not applicable to *sociedades anonimas* such as the Benguet Consolidated Mining Company;

(3) That, in any case, neither the appellants nor any other stockholders of the Balatoc Mining Co., nor, indeed, that company itself, are in position to question the validity of the contract Exhibit "A", or the share of certificates issued to the Benguet Consolidated Mining Company under the provisions thereof, the state only being entitled to raise that question; and

(4) That, in any case, the appellants are estopped from maintaining this action by their participation in the negotiations leading up to the execution of the contract they are now seeking to repudiate by having stood silently by while the Benguet Co. performed its obligations under that contract, and expended and put a risk a sum in excess of ₱1,400,000.00 in so doing, without disclosing in any way that they proposed to question the validity of the contract, or the right of that company to receive the shares which it was to receive as part com-

pensation pursuant thereto, by their participation in the delivery of the shares upon the completion of the contract, by their acquiescence in the situation thus created by recognizing the rights of the Benguet Co. as a Balatoc shareholder, and by their failure to institute this action until it had become a certainty that the Balatoc Co. was to be a brilliant financial success.

Accordingly, the court dismissed the complaint and dissolved the preliminary injunction with costs against the plaintiffs. The petitioners appealed their case to the Supreme Court of the Philippine Islands where, on March 18, 1933, a unanimous decision was rendered affirming the judgment of the trial court, but as to the question of whether a *sociedad anonima* is a corporation, *quaere*. A motion for a rehearing was filed by the petitioners and was denied on July 27, 1933. Final judgment was entered on July 28, 1933. The petitioners excepted and gave notice of their intention to apply to the Supreme Court of the United States for a writ of certiorari for the review of said decision and judgment, praying at the same time for a stay of the execution. The Supreme Court of the United States refused to grant a writ of certiorari.

PART I

ORIGIN AND NATURE OF THE CORPORATION AND SOCIEDAD ANONIMA.

A. CORPORATIONS.

1. *Definition.* Lord Coke, in defining a corporation, says: "A corporation aggregate of many, is invisible, immortal, and rests only in intendment and consideration of law. They can't commit treason, nor be outlaws, or excommunicate, for they have no souls, neither can they appear in person, but by attorney." Chief Justice Marshall, following Lord Coke, said that a corporation in an artificial being, invisible, intangible, and existing only in contemplation of law; that being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as an incident to its very existence. (Dartmouth College v. Woodward, 4 Wheat. [U. S.] 518, 4 L. Ed. 629.) The common law defined a corporation as "a franchise created by the King, and a body constituted by policy with a capacity to take or to do." (Comyn's Digest, 465). The earlier one among the best law writers on the subject defined it thus: "A corporation is a body, created

by law, composed of individuals united under a common name, the members of which succeed each other, so that the body continues the same, notwithstanding the change of the individuals who compose it, and is for certain purposes, considered as a natural person." (Angell and Ames, Corporation, sec. 1). Examining statutory definitions, we find that the state of Georgia defines a corporation as "an artificial person created by law for specific purposes, the limit of whose existence, powers, and liabilities, is fixed by the act of incorporation, usually called its charter." (Georgia Code, sec. 1670). Our Corporation Law (Act 1459) defines it as "an artificial being created by the operation of law, having the right of succession, and the powers, attributes, and properties expressly authorized by law or incident to its existence."

2. *Origin and History.* It seems that corporations were known to the Greeks as early as in the time of Solon (638-558 B. C.), who permitted such "association, whether for purposes of mere affection, of business, or of devotion," subject only to the condition that their purposes should not be contrary to the general law of the land. But they were recognized by the Romans at an earlier date, for according to Plutarch, they were introduced by Numa Pompilius, the second legendary king of Rome (715-672 B. C.), "who finding upon his accession, the city torn to pieces by the two rival factions of Sabines and Romans, thought it a prudent and politic measure to subdivide these two into many smaller ones, by instituting separate societies of every manual trade and profession." They were afterwards much considered by the civil law, in which they were called *universitates* (universities), as forming one whole out of many individuals; or *collegia* (*colleges*), from being gathered together; and they were also adopted by the canon law, for the maintenance of ecclesiastical discipline. The Romans established corporations in Britain after its conquest, and subsequently such bodies were established and recognized by English law for various purposes—municipal, charitable, and purely private, on principles adopted chiefly from the Roman or civil law. Various corporations, both public and private, were also created in the American colonies by the English kings or parliament, and some of these still exist; and since American independence, under legislative enactments of the states and of the United States, by which alone corporations may now be created or authorized, they have been created in great numbers

and for almost every purpose, both public and private. (14 C. J. 51). With the advent of American sovereignty into the Islands, this branch of the common law was engrafted in our legal system. The Philippine Commission enacted the Corporation Law (Act 1459) which took effect on April 1, 1906.

3. *Essential Characteristics.* By statutory definition a corporation is an "artificial being created by the operation of law." This means that a corporation cannot be created by a mere agreement of the associated, but that it is necessary to obtain sovereign sanction, since corporations today can be created only by or under legislative authority. Chief Justice Marshall in the great case of McCulloch v. Maryland (4 Wheat. 316, 4 U. S. [L. Ed.] 579), in upholding the power of Congress to incorporate the Bank of the United States, said: "The creation of a corporation, it is said, appertains to sovereignty. This is admitted * * *. The power of creating a corporation though appertaining to sovereignty, is not * * * a great, substantive, and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them." In State v. Curtis (35 Conn. 374, 95 Am. Dec. 263) the Court held that the power to create a corporation is an attribute of sovereignty and that a corporation as the creature of that sovereign is amenable to and controllable by it and by none other. From a great number of cases the rule is well established that the power to create a corporation is one of the attributes of sovereignty and that no corporation can exist without the consent of the sovereign. (7 Ruling Case Law 29.) The situation is the same where there is a general law authorizing the organization of private corporations, as in the Philippines; such a law constitutes the consent of the state.

Another well recognized principle of the American law of corporations is that the corporate charter or franchise constitutes a contract between the state and the corporation, between the state and the shareholders of the corporation, and between the corporation and its shareholders. The leading case on this proposition is again the well-known Dartmouth College Case. Scores of cases have reiterated the same principle, among which are thirty decisions of the Supreme Court of the United States. Indeed, this principle is ingrained in American jurisprudence so much so that in Wilmington and Weldon RR. Co. v. Reid, 13 Wall. 264, 20 U. S. (L. Ed.) 568, the court said it would be a work of supererogation to repeat the reasons on which the argu-

ment is founded that a charter of incorporation granted by the state creates a contract between the state and the corporators which the state cannot violate; and in the Delaware Tax case, 18 Wall. 206, 21 U. S. (L. Ed.) 888, that this doctrine is not controverted by anyone, that it is the established law. This principle is supported by authorities in this jurisdiction. The Supreme Court of the Philippine Islands in the case of the Government of the P. I. v. Philippine Sugar Estates Development Co., 38 Phil. 15, in dealing with the respondent which was formerly a *sociedad anonima* but later on incorporated itself under our general corporation law, referred to its charter as a contract saying that "while it is true that the courts are given a wide discretion in ordering the dissolution of corporations for violation of its franchise, yet nevertheless, when such abuses and violation constitute or threaten a substantial injury to the public, or such as to amount to a violation of the fundamental conditions of the *contract* (charter) by which the franchise were granted and thus defeat the purpose of the grant, then the power of the courts should be exercised for the benefit of the people." And in Government of the P. I. v. El Hogar Filipino, 50 Phil. 339, the right of the respondent corporation, which has been organized under our corporation law, to be a corporation, was repeatedly referred to as a franchise.

As a consequence of the contractual nature of the corporate franchise, no corporation may surrender its charter and put an end to its existence without the consent of the state. For just as the state cannot arbitrarily deprive the corporation of its franchises without violating the compact, so can the corporation put an end to its existence without the consent of the state, and not violate that compact. There must be the same agreement of the parties to dissolve that there was to form the compact. Thus in Harris v. Muskingum Mfg. Co. (4 Blackf. [Ind.] 267, 29 Am. Dec. 392) said the court: "A corporation cannot be dissolved by the consent of its members, except it be by the surrender of their franchise to the government, and an acceptance by the government of the surrender."

With respect to the *modus operandi* and the powers and attributes of a corporation, the corporation law provides that it shall have only "the powers, attributes, and properties expressly authorized by law or incident to its existence." The result is that a corporation may not lawfully exercise any powers except those conferred upon it by the instrument of its creation and

such implied powers as are reasonably incidental to, and consequential upon, the exercise of the powers expressly conferred. Any act which is not authorized by its corporate charter, either expressly or by necessary implication, is *ultra vires*, and null and void. In the Pullman's Palace Car Company case (139 U. S. 24, 35 L. Ed. 55) the Supreme Court of the United States made an exhaustive review of its own decisions on the question and concluded that review as follows: "The clear result of those decisions may be summed up thus: The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental." The words giving the power, or from which it is necessarily implied, must be found in the charter, or it does not exist. (National Home Building and Loan Ass'n. v. Home Savings Bank, 181 Ill. 35, 54 N. E. 619, 77 A. S. R. 245, 64 L. R. A. 399.)

And, lastly, a corporation which exceeds its powers breaches its contract with the state which constitutes the source of its being and entitles the state to denounce that contract, in *quo warranto* proceedings, looking to the dissolution of the corporation. The law in this jurisdiction governing *quo warranto* proceedings against corporations (Sec. 198, Code of Civil Procedure) shows plainly that such proceedings are premised upon the forfeiture of the charter or right to be a corporation, because of neglect or abuse of the corporate franchises, that is, the breach of contract between the sovereign and the corporation. This view is borne out by the provisions of our corporation law contained in sections 14 and 190-A, providing that no corporation shall possess or exercise any powers except those conferred by the Act and except such as are necessary to the exercise of the powers so conferred and penalizing the corporation by dissolution in case of violation of any of the provisions of the Act. The object of such action is to protect the public and not to redress private grievances; and the misuser must be such as to work or threaten a substantial injury to the public, or such as to amount to a violation of the fundamental condition of the contract by which the franchise was granted, and thus defeat the purpose of the grant. (State ex rel. Clapp v. Minnesota Thresher Mfg. Co., 40 Min. 213, 41 N. W. 1020, 3 L. R. A. 510.) It has always been the policy to bestow no special or peculiar favor to franchises in the eye of the law though they are entitled by right to strict and equal justice. Questions touching

franchises are therefore to be examined upon principles of reason, policy, and justice, as the settled doctrines of the common law to trusts, covenants, and contracts between individuals. And reason and legal authority unite in pronouncing the only just ground of forfeiture of such a trust once made and vested by full performance of all preliminary conditions, to be, first, a total neglect or non-user of its duties, and secondly, an abuse of them, improvidently, ignorantly, or fraudulently. In other words there must be a non-user or a misurer. (State v. Real Estate Bank, 5 Ark. 595, 41 Am. Dec. 109.)

B. SOCIEDADES ANONIMAS.

1. *Definition.* An examination of the Code of Commerce will show that there is no definition of *sociedades anonimas.* Art. 122 simply provides that commercial associations shall be established by the adoption of any of the three forms, the third of which, the *sociedad anonima,* is described as one in which the members form the common fund by means of specific parts or partners, represented by shares or in any other unquestionable manner, leaving its management to removable managers or administrators, who represent the company under an appropriate denomination according to the purpose or undertaking for which funds are to be employed. A resort to commentators is, therefore, necessary for a working and understandable definition. Some of the noted Spanish commentators of the Commercial Code define the *sociedad anonima* as follows:

(1) "La sociedad anonima, que asi se llama, no tanto por carecer de denominacion sino por no ejercer el comercio con el nombre de sus socios, puede definirse diciendo que es el comerciante colectivo resultado de aquel contrato social en que las otorgantes acuerdan ejercer el comercio con el capital aportado por los socios y sin extender mas allá su responsibilidad, cuyo patrimonio es administrado por mandatarios amovibles." (Dr. José Ma. G. de Echavarri y Vivanco, Codigo de Comercio, Tomo II, 2a ed., p. 129.)

(2) "Puede definirse la compañia anonima diciendo que es aquella en que el fondo social, unico responsable de las gestiones sociales, esta constituidas por partes ó porciones llamadas *acciones,* y en que la denominacion es apropiada al objeto ó empresa a que se consagra la compañia dirigida y representada por mandatarios ó administradores amovibles." (Dr. Rafael Rodriguez Altunaga, Derecho Mercantil, pag. 94.)

(3) "Sociedad anonima es la que se crea con un capital dividido en cierto numero de partes, llamadas acciones, y en la cual cada socio ó accionista responde solo del resultado de las operaciones sociales hasta el valor que representan las acciones que ha tomado." (D. Mariano Carreras y Gonzalez, Elementos de Derecho Mercantil, pag. 185.)

(4) "Las compañias anonimas pueden definirse diciendo: Que son aquellas que bajo una denominacion social apropiada a la indole de las operaciones de comercio a que se dediquen, los socios solamente responden del capital que aporten, representado en acciones ú otros titulos equivalentes, y su administración se halla confiada a mandatarios amovibles." (Dr. Ricardo Espejo de Hinojosa, Curso de Derecho Mercantil, 8a. ed., pag. 143.)

(5) "La sociedad anonima es la que se crea formando el fondo comun los asociados por partes ó porciones ciertas, figuradas por acciones ó de otra manera indubitada, los cuales encargan su manejo a mandatarios ó administradores amovibles que representan a la compañia bajo una denominacion apropiada al objeto ó empresa a que destinen sus fondos, sin que ninguno resa." (D. Ramon Marti de Exala y D. Manuel Duran y Bas, Instituciones del Derecho Mercantil, pag. 252.)

(6) "Sociedad ó compañia anonima es aquella que se crea de los socios responda del resultado de las operaciones sociales más allá del valor que representa las acciones por los que intecon un capital dividido en determinado numero de partes, llamadas acciones, que es administrado por mandatarios amovibles que representan a la compañia bajo una denominacion apropiada al objeto, y sin que ninguno de los socios responda de las operaciones sociales sino por el valor que representan las acciones que respectivamente poseen." (D. Francisco Blanco Constans, Estudios Elementales de Derecho Mercantil, 3a. ed., pag. 433.)

Of the same tenor is the definition given by an American attorney Mr. Perkins, in his glossary of Philippine Business Law, says:

"Sociedad anónima: a corporation formed under the Code of Commerce, prior to the enactment of the Corporation Law (1906), in which the members form a common fund by means of specific parts or portions, represented by shares, or in any other unquestionable manner, leaving its management to removable managers or administrators, who represent the company under an appropriate denomination according to the purpose or undertaking to which the funds are destined."

I believe that the use of the word "corporation" is rather unfortunate and should not be given the meaning intended by the Corporation Law (Act 1459). The addition of the phrases "formed under the Code of Commerce" and "prior to the enactment of the Corporation Law (1906)" shows the absurdity of its being the corporation of the Anglo-American law.

2. *History.* The historical antecedents of the *sociedad anonima* are found in the Roman *societas nectigalium publicorum, vel auri fodinarum, vel argentil fodinarum, vel salinarum* which were created for the collection of taxes in Asia, Cilicia, and Bitinia, and for the exploitation of mines in Spain, since the *societas* as then known was found inadequate to amass vast capital and to give the necessary supervision which could not well be entrusted to slaves. Here the superior management was entrusted to a *magistre societatis* and the real administration was left to partners who reside in a fixed place *stationari.* There were conventions of partners, and those who do not agree categorically with the decisions are allowed to dispose of their participation. We next hear of the *sociedad anonima* during the renaissance of commerce in the middle ages, granted with commercial privileges by the government, like the *Die gesselschaft des Zcym Handols* recognized by George of Saxony, the business of which was managed by directors who made purchases and sales and other commercial activities in the name of the company. There was a roster of partners where are registered the names of partners and their corresponding share, and a book which was (quarterly) examined by the partners. Endemman cites two other companies of the same nature and Troplong describes a privilege granted by Henry IV to a partnership in which "the majority made law for the minority." Mention must also be made of the *Kapitalistenalpen* of Switzerland with a capital divided into shares definite both in number and in value for the pasture of animals in the Alps. (Echavarri, Cod. de Com., Tomo II, 2a ed., pag. 157.)

A majority of authors with Cossack and Endemman attributes the origin of *sociedades anonimas* to a double source: First: The Italian associations, creditors of the state, endowed with juridical personality, with capital formed into quotas administered for the loans divided into parts (loco or luoghi) which receive proportional interests. These associations were called *maonae ó montes* the most famous being the *maona de Chios* of 1346 and the *Banca de Genova* in the fifteenth century. During the incumbency of Paul IV (1555-1559) of the pontifical

office the lease of tax collection of the papal estates were divided into shares. Second: The commercial companies created after the seventeenth century similar to the sociedad anónima, being the first to resort to the use of "shares", exemplified by the famous English East India Company the foundation of which dates back to 1599, and by the equally famous Dutch East India Company, organized on March 20, 1602 and dissolved in 1795. (Blanco Constans, Derecho Mercantil, Tomo II, 2a ed., pag. 398.) These companies were privileged for they were created by royal grants and concessions which later gave way to state regulation not as a matter of *ratio utilitates* but by *ratio juris*, and which latter also gave way to publicity and freedom of association.

The *sociedad anónima* was first provided for in the Code of Commerce of Spain of 1829, for no mention of it is made in the *Consolato del Mare* (about 1266 A.D.) nor in the *Ordenanzas de Bilbao* which become effective in 1737, although this form of association has existed in the eighteenth century prior to the publication of the Code of 1829. There was the Compañia de Honduras established by royal concession in 1714, that of Caracas or Guipúzcoa in 1726, that of Havana in 1740, that of Sto. Domingo in 1757, and that of the Philippines in 1784.

The Code of Commerce of 1829, which according to Lorenzo Benito, was influenced in this respect by the Napoleonic Code of 1807, provided:

"Art. 265. Puede contraerse la compañia mercantil: 3a. Creándose un fondo por acciones determinadas para girarlo sobre uno o muchos objetos que den nombre a la empresa social cuyo manejo se encargue a mandatarios amovibles a voluntad de los socios, y esta compañia es la que lleva el nombre de anonima.

"Art. 293. Es condicón particular de las compañas anónimas que las escrituras de su establecimiento y todos los reglamentos que han de regir para su administración y manejo directivo y economico, se han de sujetas al exámen del tribunal de commercio del territorio en donde es establezca; y sin su aprobación no podrian llevarse a efecto.

"Art. 294. Cuando las compañias anónimas han de gozar de algun privilegio que ó les concedá para su fomento, se someteran sus reglamentos a mi Soberana aprobación."

The Spanish Code of 1829 was extended to the Philippine Islands by Royal Cedula of July 26, 1832, which made provision for the appointment of judges of a "Tribunal de Comercio."

By the middle of 1846, the "Compañias mercantiles por acciones" as they were known came into disrepute as a result of speculations and the loss of vast fortunes; a general clamor was raised against the lax regulations resulting in reforms such as the Royal Order of 1847 which deprived the "tribunales de comercio" of the power to approve articles of association; the Royal Decree of April 15, 1847 which vested this power directly into the government; the law of January 28, 1848, which provided expressly that no such companies could be formed except by special Royal Decree, and that all companies then existing should obtain regular authorization for their continued existence under penalty of dissolution. A royal decree prescribing the regulations for the carrying out of this law was issued on February 17, 1848. This was extended to Ultramar by the Royal Cedula of November 29, 1853. (Escríche, Diccionario Razonado de Legislación y Jurisprudencia, p. 1535; La Serna y Reus, Código de Comercio, pp. 480-492; Boletín de la Revista General de Leg. y Juris., Tomo 31, pag. 478). These restrictions by way of regulation are reflections of the reactionary character of the Constitution of 1845 which continued to exist till the Revolution of 1868.

The liberal Spanish Constitution of 1869 recognized for the first time the right to freedom of association, Article 17 thereof providing that no Spaniard shall be deprived of the right of association in whatever form not contrary to public morals. Even prior to the adoption of this constitution, the provisional government of 1868 concerned itself greatly with the matter of doing away with all restrictions upon or interference with the organization and functioning of the *sociedad anonima*. Thus in a decree dated September 17, 1869, extending the provisions of a prior decree for that purpose to Cuba, Porto Rico, and the Philippines, we find the following language:

"This decree responds to one of the needs of the new order of things, and enunciates, in one of the most important phases of human activity, the broad principle of freedom of association. The State, in justice, has no right to impose definite conditions on mercantile associations, nor can it without denying and ignoring this right, arrogate to itself the power to grant or refuse permission to individuals, to associate, as if it were the repository of this essential attribute of human nature. The only power and even obligation which the state has, refers to the formalities that give the act of association juridical char-

acter and reveal the existence of legal rights that are created by the act or are inferred from the act itself." (Boletin de la Revista General de Legislación y Jurisprudencia, Tomo 31, pag. 477-79.)

On October 19, 1869, a law was enacted which is of great importance to show the tendency of government policy. The first article provided that the establishment of all forms of association, the purpose of which is any industrial or commercial enterprise, shall be unrestricted. It is interesting to note that this article was carried word for word into the Code of Commerce of 1886 in the second paragraph of Article 117, and that the same liberty to organize *sociedades anonimas* without the consent of the government was recognized by a French statute of July 24, 1867, as follows: "A l'avenir, les sociétes anonymes pourront se former sans l'autorisation du government." An additional article to the same law provided for an immediate revision of the Code of Commerce for the purpose of modifying the same to give the most unrestricted freedom to the partners to organize themselves in the manner they see fit, and to harmonize the same with the progress of the age. (Alcubilla, Dictionary of the Spanish Administration, 3rd ed., vol. II, pp. 743-745). A new commission for the revision of the Code of Commerce was accordingly appointed on September 20, 1869. The decree of appointment set down seven bases, the first of which provided that the revision of the Code should include, first, the abolition of all obstacles which prevent or embarrass the exercise of the right which the constitution grants to Spaniards to freedom of contract, to pursue all kinds of occupations, to associate themselves for all purposes not contrary to morals or to law. Alonzo Martinez, a member of the original commission in his "Motives" prefacing the First Title of the Second Book of the Code said that the principle of freedom of association pervades the proposed Code in providing for the different ways and forms of organizing mercantile associations, which principle may be reduced into three propositions: ample freedom of the partners to organize themselves as they see fit; complete absence of government interference in the inner life of those juridical persons; and publicity with regard to those partnership transactions that may affect third persons.

This Code of Commerce became effective in the Philippine Islands on December 1, 1888.

Lorenzo Benito (Enciclopedia Juridica Española, Tomo VII, pag. 375) epitomized the *sociedad anonima* as a marvellous creation whereby the economic forces of industry and commerce multiplied its energy a hundredfold. The accumulations of generations which for lack of security and impossibility of utilization, remained buried in obscure hiding places, were slowly drawn out of their tombs and in turn gave life to mercantile and industrial associations, energizing the powerful financial entities, especially those created for the purpose of railway and maritime expansion, thanks to which world distances have been annihilated and a stop made towards universal fraternity, which, even if unrealized as yet, is not so remote as some pessimistic spirits would have us believe. Without the *sociedad anonima* the Isthmus of Suez would not have been the busy canal that it is today, cutting off the rate, distance, and time between Europe and the Orient; nor would the Isthmus of Panama have been the great time and distance saver that it is, facilitating the access to China, Japan, and the continent of Australia; nor would the oceans be underlaid with submarine cables; nor would the wireless transcend the expanse of distance, its islands, and its continents; nor would the navigation of the air and the seas weld the world into a homogeneous whole more and more. Indeed, it can truly be said with Vidari (Vidari, Corso di diritto commerciale. 3rd ed., Vol. 1, p. 422) that the creation of the bill of exchange (cambial) and the establishment of the *sociedad anonima* are the two highest peaks of human activity in the field of commercial expansion.

PART II

DEVELOPMENT

A. ANALYSIS OF THE FRED HARDEN CASE, 32 O. G. 1118.

The question of whether a *sociedad anonima* organized under the Code of Commerce is a corporation as that term is used in Sec. 13 of Act 1459 of the Philippine Commission was squarely presented to the Supreme Court. The briefs for both the appellant and the appellee treated mainly and primarily of the identity of the *sociedad anonima* and the corporation and of the applicability of the corporation law to the former; and secondarily only of the question of estoppel and laches and proper party plaintiff. But how did the Supreme Court dispose of the question? It decided the questions in the reverse order. The exact words of the Court, through Justice Street,

are: "Upon a survey of the facts sketched above it is obvious that there are two fundamental questions involved in this controversy. The first is whether the plaintiffs can maintain an action based upon the violation of law supposedly committed by the Benguet Company in this case. The second is whether, assuming the first question in the affirmative, the Benguet Company, which was organized as a *sociedad anónima*, is a corporation within the meaning of the language used by the Congress of the United States, and later by the Philippine Legislature, prohibiting a mining corporation from becoming interested in another mining corporation. It is obvious that, if the first question be answered in the negative it will *not* be necessary to consider the second question in the lawsuit." The disposition of the questions thus made by the Supreme Court is, indeed, a fine example of tactical move to evade committing itself into so weighty and perplexing a proposition. The Supreme Court continued to say: "Upon the first point it is at once obvious that the provision referred to was adopted by the lawmakers with a sole view to the public policy that should control in the granting of mining rights. Furthermore, the penalties imposed in what is now section 190 (a) of the Corporation Law for the violation of the prohibition in question are of such nature that they can be enforced only by a criminal prosecution or by an action of *quo warranto*. But then proceedings can be maintained only by the Attorney General in representation of the Government * * *. Having shown that the plaintiffs in this case have no right of action against the Benguet Company for the infraction of law supposed to have been committed, we forego any discussion of the further question whether a *sociedad anonima* created under the Spanish Law, such as the Benguet Company, is a corpoartion within the meaning of the prohibiting provision already so many times mentioned. That important question should, in our opinion, be left until it is raised in an action brought by the Government."

Discussing the question of estoppel the Court found that the defendant Benguet Company has committed no civil wrong against the plaintiffs, and that if a public wrong has been committed, the directors of the Balatoc Company and the plaintiff Harden himself were the active inducers of that wrong. The contract supposing it to be unlawful in fact, has been performed on both sides, by the building of the Balatoc plant by the Benguet Company and by the delivery to the latter of the

certificate of 600,000 shares of the Balatoc Company. There is no possibility of really undoing what has been done. Nobody would suggest the demolition of the mill. The Balatoc Company is secure in the possession of that improvement, and talk about putting the parties in *satus quo ante* by restoring the consideration does not quite meet the case. And to mulct the Benguet Company in many millions of dollars in favor of individuals who have not the slightest equitable right to that money is a proposition to which no court can give a ready assent.

The plaintiffs argued that they are wholly innocent of participation in the violation of the law and involved paragraph two of Art. 1305 of the Civil Code which declares that an innocent party to an illegal contract may recover anything he may have given while he is not bound to fulfil any promise he may have made. But supposing that the first hurdle can be safely vaulted, the general remedy supplied in Art. 1305 of the Civil Code cannot be invoked where an adequate special remedy is supplied in a special law. (*Go Chioco* v. *Martinez*, 45 Phil. 256, 280.) Much more is the idea applicable to the situation before us where the special provisions give ample remedies for the enforcement of the law by action in the name of the Government and when no civil wrong has been done to the party here seeking redress.

A foreign case analogous to the present case and specially emphasized by the Court is Compañia Azucarera de Carolina v. Registrar (19 Porto Rico 143), for the reason that this case arose under a provision of the Facoher Act, a law analogous to our Philippine Bill. It appeared that the Registrar had refused to register two deeds in favor of the Compañia Azucarera on the ground that the land thereby conveyed was in excess of the area permitted by law to the Company. The Porto Rican court reversed the ruling of the registrar and ordered the registration of the deed saying: "* * * It may be seen that a corporation limited by the law or by its charter has, until the State acts, every power and capacity that every other individual capable of acquiring land possesses. The corporation may exercise every act of ownership over such lands; it may sue in ejectment or unlawful detainer and it may demand specific performance. It has an absolute title against all the world except the State after a proper proceeding is begun in a court of law * * *. The Attorney General is the exclusive officer in whom is

confided the right to initiate proceedings for escheat or attack the right of a corporation to hold land."

The case then is decided on the ground that the action is one that may be maintained by the state alone and that the plaintiff by their participation and acquiescence in the acts of which they later complained, and by their laches, have estopped themselves from maintaining the action. The question, therefore; as to whether a *sociedad anonima* is a corporation or not still remains an open question.

B. Is Sociedad Anonima a Corporation?

1. *Literal Examination of the Phraseology.*

Sections 75 and 191 of the Corporation Law which will be the subject of our examination are worded as follows:

> "SEC. 75. Any corporation or *sociedad anonima* formed, organized, and existing under the laws of the Philippine Islands and lawfully transacting business in the Philippine Islands on the date of the passage of this Act, should be subject to the provisions hereof so far as such provisions may be applicable and shall be entitled at its option either to continue business as such corporation or to reform and organize under and by virtue of the provisions of this Act, transferring all corporate interests the new corporation which, if a stock corporation, is authorized to issue the shares of stock at par to the stockholders or members of the old corporations according to their interests.
>
> "SEC. 191. The Code of Commerce, in so far as it relates to corporations or *sociedades anonimas,* and all other Acts or parts of Acts in conflict or inconsistent with this Act, are hereby repealed * * * *and provided further,* that existing corporations or *sociedades anonimas,* lawfully organized as such, which elect to continue their business as such *sociedades anonimas* instead of reforming and reorganizing under and by virtue of the provisions of this Act, shall continue to be governed by the laws that were in force prior to the passage of this Act in relation to their organization and method of transacting business and to the rights of members thereof as between themselves, but their relations to the public and public officials shall be governed by the provisions of this Act."

The pertinent provisions of these sections are the phrase "any corporation or *sociedad anonima*". Did the Philippine Commission intend to conclude that the *sociedad anonima* and the corporation are one or did it refer to them as two distinct forms of mercantile associations? Or may it not have been that the Philippine Commission intended to use the word "corpora-

tion" as the nearest approach to the Spanish *sociedad anonima?* In other words, is the word *or* used to connect two words meaning the same thing or two words meaning different things? Or may it not be that *or* was used to connect two words, one of which was inadvertently used as the synonym of the other? If the word "corporation" is stricken out from Secs. 75 and 191, will not the intention of the Philippine Commission be expressed better? In my opinion the phrase "Any corporation or *sociedad anonima* formed, organized, and existing under the laws of the Philippine Islands * * *" could only mean "Any *sociedad anonima* formed, organized, and existing under the laws of the Philippine Islands * * *"; for the members of the Philippine Commission know better than to conclude that a corporation is already formed when the Corporation Law is yet inexistent. And if the Philippine Commission really believed that a *sociedad anonima* is a corporation, then would not a subsequent corporation law be superfluous? It is more probable that since there is no exact translation of *sociedad anonima* into English, as is affirmed by Mr. Ferguson, whose profound knowledge of the Spanish language and institutions was well known to everyone, saying that "there is no word in the Spanish language that means the same thing as the English word 'corporation' "; and since there are marked resemblances between the corporation and the *sociedad anonima,* the word corporation was conveniently used as a translation of the *sociedad anonima* which for further clarification were always linked together, wedded by the conjunctive *or.* In fact the Supreme Court (32 O. G. 1118) said: "For purposes of general description only, it may be stated that the *sociedad anonima* is something very much like the English joint stock company with features resembling those of both the partnership and the corporation. Its affinity to the partnership is shown in the fact that *sociedad,* the generis component of its name in Spanish, is the same word that is used in that language to designate other forms of partnership, and in its organization it is constructed along the same general lines as the ordinary partnership. It is, therefore, not surprising that for the purposes of loose translation the expression *sociedad anonima* has not infrequently been translated into English by the word partnership. On the other hand, the affinity of this entity to the American corporation has not escaped notice, and the expression *sociedad anonima* is now generally translated by the word corporation. But when the word corporation is used in the sense

of *sociedad anonima* and close discrimination is necessary, it should be associated with the Spanish expression *sociedad anonima* either in parenthesis or connected by the word *"or"*. This latter devise was adopted in sections 75 and 191 of the Corporation Law."

It is worthy of note, however, that this device was not used in the Insolvency Law (Act 1956) in dealing with corporations and *sociedades anonimas*. By section 52 of the Insolvency Law, the provisions of that Act are made applicable "to all corporations *and* sociedades anonimas", except corporations engaged principally in the banking business and those as to which there is any special provision of law for their application. Under the Insolvency Law corporations must be understood to be those organized under Act 1459, and an unincorporated company is not entitled to the privileges of the Insolvency Law as an entity, but proceedings must be made by or against the members as individuals. Two points may, therefore, be deduced: First: That the Insolvency Law which was passed after the Corporation Law uses the word *and* showing that a corporation and a *sociedad anonima* are two distinct and separate entities; and second: That corporations are treated by the Insolvency Law as an entity, and unincorporated companies proceeded against as individuals. Any doubt as to the function of the conjunction *or* in sections 75 and 191 of Act 1459 is thus explained by Sec. 52 of Act 1956.

2. *Argument of Common Characteristics.* It has been said that the *modus operandi* and the powers and attributes of the Benguet, a sociedad anonima, do not in any way differ from those of the Balatoc, a corporation. If a group of citizens associate themselves and act as a corporation, there is no reason why the legislature may not pass a law recognizing them as a corporation; for by acting as a corporation, they consent in advance to be a corporation. It is even said that if the legislature confers upon an association all the essential attribtues of the corporate body, it thereby creates it a corporation and it would deem immaterial that the term "corporation" is not used. (Fletcher, Cyc. of Corporations, Vol. I, p. 31.) The Benguet Consolidated Mining Company has heretofore possessed and exercised the following powers and attributes:

(a) Perpetual succession.—Under this power the Benguet Company has continued to exist notwithstanding that two of its founders, M. A. Clarke and Nelson Peterson, died long ago;

and notwithstanding that the other founder H. C. Clyde has long ago ceased to have any share, interest, or participation in the Company. At the present time it has about 325 members or shareholders, none of whose were parties to the original articles of incorporation. Its members freely transfer their shares to outside persons in exactly the same way as the members or stockholders of a corporation organized under Act 1459 transfer their shares.

(b) Legal entity or juridical personality separate and distinct from that of its members.—It sues and is sued in its name; it contracts in its name; it acquires and holds property in its name; and it deeds, transfers, and conveys the same in its name.

(c) It has a common seal. (Par. II, Estatutos de Fundacion.)

(d) It has the power to make by-laws. (Est. de Fund.)

(e) Its members or shareholders act through a board of directors elected by them, and do not pretend to bind the company by their individual action.

(f) The liability of its members are limited to the capital contributed or invested by them. They are not individually liable for the debts of the firm, joint or severally.

It is clear, therefore, that by its qualities—the capacity of perpetual succession, the power to sue and be sued and to grant and receive in a corporate name, to purchase and hold real and personal property, to have a common seal, to make by-laws, that the members act through a board of directors elected by them, and that the liability of the members are limited to the capital contributed by them—one can say that in its *modus operandi* said company is more of a corporation than a partnership, "with as much certainty with which one can determine that a creature that stands erect on two legs, has two hands, and possesses the faculty of thinking and reasoning, is a man and not an animal."

The powers and attributes enumerated above and incident to a corporation are generally expressly given to it by statute and enumerated in its charter. These powers, however, are not all essential to corporate existence, for, as we shall hereafter see, the period of a corporation's existence may be limited; it need not have the capacity to sue and be sued under the corporate name, if some other mode is prescribed; it may contract and do acts without a seal; it need not necessarily have power to hold lands or chattels; and it need not necessarily be empowered

to make by-laws. (14 C. J. 51.) These powers and attributes, on the contrary, may even be provided for in any partnership agreement. In this jurisdiction Article 1704 of the Civil Code expressly provides that a stipulation that on the death of one of the partners the partnership shall continue among the survivors is valid, in which cases the heir of the deceased partners shall be entitled to have a partition as of the day of the death of his decedent but at the same time subject to subsequent obligations which are a necessary consequence of acts done before such day. It may also be stipulated that the partnership shall continue with the heir. Similar provisions are found in Article 222 of the Code of Commerce.

It is to be adverted to also that the doctrine that a corporation is a legal entity existing separate from the persons composing it, is a mere fiction, introduced for purposes of convenience and to subserve the ends of justice (State vs. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279; 34 A.S.R. 541; 15 L.R.A. 145). This fiction cannot be urged to an extent and purpose not within its purpose and policy (Donovan v. Purtell, 216 Ill. 269, 75 N. E. 334, 1 L. R. A. [N.S.] 176), and it has been held that corporate existence as an entity distinct from its members may be ignored in order to circumvent the fraudulent purpose of the shareholders in its organization. (Franklin Mining Co. v. O'Brien, 22 Colo. 1291, 43 Pac. 1016, 55 A.S.R. 118.) But in this jurisdiction juridical personality is an attribute common to all properly organized partnerships under both the Civil Code and the Code of Commerce. (Art. 35, C. C.; Art. 116 C. Com.; Wahl v. Donaldson et al, 5 Phil. 14; Vargas v. Chan Hang Chiu, 29 Phil. 449; Campos Rueda & Co. v. Commercial Pacific Company, 44 Phil. 918.)

3. *Opinions of Attorneys General.* The question of whether *sociedades anonimas* are corporations or not has also been touched in 11 Op. Atty. Gen. 29 and V Op. Atty. Gen. 442-445. It is therefore our task to examine them to see what mass of legal information could be added to our discussion. In the Oriente Hotel Case, 11 Op. Atty. Gen. 29, Solicitor General Gregorio Araneta, an eminent Filipino lawyer, whose opinion was concurred in by Atty. General Wilfley, held that a *sociedad anonima* organized in August, 1901 was a corporation created under the provisions of the Spanish Code of Commerce. The facts were that on July, 1900, after the cession of the Philippines to the United States by Spain, the Oriente Hotel Co., Ltd.,

was organized as a *sociedad anonima* under the provisions of the Code of Commerce. Subsequently and in March, 1901, Congress passed the Spooner Amendment concerning the Philippine Islands in which, among other things, it was provided "that no franchise shall be granted which is not approved by the President of the United States * * * until the establishment of permanent civil government * * *." The pertinent part of the opinion reads as follows:

> "In view of the principle which the members of the Commission believe to be a principle of American law, that no corporate franchise could be conferred except by the sovereign and that the sovereign of the United States acts only through Congress, my opinion is asked on the following points:
>
> 1. What was the Oriente Hotel Co., Ltd., in August, 1901? * * * Under the Code of Commerce now in force in these Islands, the sovereign power does not grant any franchise or privilege in the creation of a corporation. The will of the interested parties and compliance with the provisions of the Code of Commerce is all that is necessary for the creation of a corporation * * *. The provisions of the Spanish Code of Commerce relative to corporations are of no greater importance than a municipal law regulating the private rights and relations of individuals among themselves. In no wise can such laws be regarded as political, requiring for their continuation in force the will, favor, or discretion of the former sovereign, but in no way do they create any political relation between the individuals forming the corporation and the sovereign other than disobedience to the laws. They confer no political rights, grant no concession or privilege; they only create rights and obligations between the persons forming the corporation and between the corporations and third parties. Neither in the law nor in any law of the United States is there anything that can be said to be in conflict with the Spanish Commercial Code, under which corporations may be organized without the necessity of a special concession from the sovereign power * * *.
>
> "The question now arises whether the Spooner amendment above quoted repeals the provisions of the Commercial Code with respect to corporations. Said amendment provides that 'no franchise shall be granted * * * until the establishment of permanent civil government * * *.'
>
> "The determination of this question depends upon the interpretation given to the word *franchise* used in said amendment. Undoubtedly under the common law, corporations were originally true franchises, since they were created by special concession of the sovereign, and in this sense all authorities have held that a corporation is a fran-

chise that can be granted only by the Legislature. But now that corporations are created under general laws, it may be said that a corporation is not a franchise in the strict sense of the word. It is a franchise in the wider sense * * *. The right of forming a corporation and of acting in a corporate capacity, under the general incorporation laws, can be called a 'franchise' only in the sense in which the right of forming a limited partnership or of executing a conveyance of land by deed as a franchise. (Morawetz on Private Corporations, Vol. 2, Art. 923.)

"Giving this interpretation to the Spooner amendment, it cannot be held that the provisions of the Commercial Code are repealed, and the questions contained in the inquiry may be answered in the following manner.

"First. The Oriente Hotel Company, Ltd., was in August, 1901, a *corporation* created under the provisions of the Spanish Commercial Code."

I think that it is pertinent at this point to ask what a corporation created under the provisions of the Code of Commerce could be. On the premise of the Solicitor General that the sovereign does not grant a franchise under the Code of Commerce and that compliance with the provisions thereof and the will of the interested parties are all that is necessary for its establishment, my conclusion is that it can not be the "corporation" as that term is known in the common law and as it is defined in Sec. 2 of Act 1459. The description given clearly fits a *sociedad anonima.*

And how did the Solicitor General established his first proposition? Simply by the use of hypothetical and alternative propositions the first of which was that "The Oriente Hotel Co., Ltd., was in August 1901, a partnership according to the provisions of the Civil Code", and the second, that "The Oriente Hotel Co., Ltd., was in August, 1901, nothing more than a community of property", and showing their legal impossibility or absurdity. The reasoning advanced does not show that the Oriente Hotel is a corporation. Much less could it be an authority for the proposition that the sociedad anonima of the Spanish law is the corporation of English and American law.

The next case is that of the "Compañia Maritima", reported in V Op. Atty. Gen. 442 which presents the following facts: In 1910 the question arose as to whether or not the Compañia Maritima, a *sociedad anonima* which was organized under the Code of Commerce and which did not elect to reorganize under the Corporation Law is a corporation subject to the visitorial power

of the Government provided in Secs. 54 and 55 of the Corporation Law. In reply to the consultation of the Governor General, the then Attorney General Ignacio Villamor said:

> "The Compañia Maritima is a *sociedad anonima* organized under the Code of Commerce as existing in the Philippine Islands prior to American occupation. The company elected not to reorganize under the Corporation Law (Act 1459) and is, consequently, governed by the provisions of the Code of Commerce, except in so far as these provisions have been amended or repealed by the acts of the Philippine Commission. An examination of the affairs of said company is under way, by direction of the Governor General, under the authority contained in Sec. 54 of Act No. 1459 of the Philippine Commission.
>
> "Is the Compañia Maritima, as such *sociedad anonima*, subject to the examination provided for in Sec. 554 of Act No. 1459?
>
> "The Code of Commerce was by the provisions of Sec. 191 of Act No. 1459 repealed, in so far as it relates to corporations or *sociedad anonimas* providing that existing corporations or *sociedad anonimas* lawfully organized as such which elect to continue their business as such *sociedades anonimas* instead of reforming and reorganizing under and by virtue of the provisions of said Act, shall continue to be governed by the law that were in force prior to the passage of said Act in relation to their organization and their method of transacting business, and to the rights of the members thereof as between themselves, but that their relations with the public and public officials should be governed by the provisions of said Act * * *. If *sociedades anonimas* are corporations, then, in my opinion, they are subject to the examination provided in Sec. 54, and the fact that they do not derive their franchise or powers directly from the Government, but under a general law, will not in any sense relieve them from the liability of the examination as provided by the Corporation Law.
>
> "The Supreme Court in the case of Reyes et al vs. The Compañia Maritima (3 Phil. 519) expressly holds that the Compañia Maritima is a corporation organized under and by virtue of Art. 151 of the Code of Commerce.
>
> "In the dissenting opinion of Chief Justice Arellano in the case of Compañia Maritima v. Muñoz (9 Phil. 326, 329) the following distinctions and definition of the three classes of partnerships, divided by the Code of Commerce, is clearly made:
>
> (1) Collective Partnerships
> (2) Limited Partnerships, and
> (3) Corporations *anónimas*.

> "From the above citations it is clear that sociedades anonimas are corporations and have all the attributes and rights of a corporation. It would be anomalous to hold that having all the rights and purposes of a full-fledged corporation, they would not be subject to any of the obligations devolving upon corporations, but could avoid the investigations to which all other corporations are liable by declaring themselves simply partnerships. (Espiritu, Notes on the Code of Commerce, p. 24.)"

In the critical examination of the foregoing opinion we may deduce that no anomaly may result even if it is held that a *sociedad anonima* is not subject to inspection under the Corporation Law for Commissioner Ide said that whether they come under the new law or not they would be subject to inspection, regulation, and examination for the purpose of protecting the community. The Commission had already enacted similar legislation when it passed the Act requiring banks to accept deposits in United States currency and the Act regulating common carriers. (Public Minutes of the Phil. Com., Vol. IX, p. 219.)

In the second place the Attorney General says that the Supreme Court in the case of Reyes et al v. The Compañia Maritima, 3 Phil. 519, *expressly* holds that the Compañia Maritima is a corporation organized under and by virtue of the provisions of Art. 151 of the Code of Commerce but that question was not involved in that case. The phrase organized under and by virtue of the provisions of Art. 151 of the Code of Commerce is incompatible with the idea of its identity with the Anglo-American corporation. The Spanish original of the decision penned by Justice Mapa shows that no such holding was expressly made nor even impliedly. The Compañia Maritima is referred to throughout the decision as a "sociedad anónima" or "compañia anónima." No attempt was made to define, explain, or provide a synonym for the term. What, then, is this "corporation *anónima*" under our laws? Why was this Anglo-Spanish term coined? The answer is clear; in the English translation, 3 Phil. 519, (the Spanish Original reported in 3 Jr. Fil. 532) there is nothing but an effort on the part of the translator to provide an English equivalent of the Spanish phrases "sociedad anónima" or "compañia anonima." The translation throughout the decision was "anonymous partnership or corporation", "anonymous stock companies", "anonymous societies", and "partnerships." The same is true of the

dissenting opinion of C. J. Arellano in Compañia Maritima v. Muñoz, 9 Phil. 326, 332. At this juncture it would not be out of place to include the remark made by Mr. Ferguson, whose profound knowledge of the Spanish language and institutions was well-known, to the effect that "there is no word in the Spanish language that means the same thing as the English word 'corporation'." It is also admitted that the translation of the Spanish term cannot in any way be regarded as a solemn adjudication that the two terms are equivalent.

In the third place the opinion of an attorney general does not constitute an adjudication of the question. It does not come within the doctrine of *stare decisis*. No one was heard on the question; it would not bind the courts.

The other side of the question, however, is that if a *sociedad anonima* has exercised all the powers enumerated in Sec. 13 of the Corporation Law, there is no reason why the applicability of the proviso in paragraph 5 of Sec. 13 should be denied. The basis of this applicability is found in Sec. 75 of the Corporation Law providing that *Sociedades anonimas* * * * shall be subject to the provisions thereof in so far as such provisions may be applicable—and why not the proviso of Sec. 13 par. 5 especially, when the restriction imposed was obviously made to promote the public weal. Taking into consideration also the fact that the Philippine Commission was composed by a majority of Americans—Governor General W. H. Taft and Commissioners Ide and Smith—it may not be amiss to surmise that the legislative intent was really to supplant the *sociedad anonima* with the Anglo-American corporation. In fact after the passage of the Corporation Law in 1906, we have not heard of any case of the establishment of a partnership in the form of a *sociedad anonima*.

4. *Creation and Dissolution.* We have already said that a corporation is an artificial being created by operation of law, having the right of succession, and the power, attributes, and properties expressly authorized by law or incident to its existence; while a *sociedad anonima* is a judicial person created by the agreement of the parties, from which are derived its powers, attributes and properties. It has been said that the Corporation Law constitutes a standing authority for the formation of a corporation in the Philippine Islands just as the Code of Commerce did before the enactment of the present Corporation Law;

for under the Corporation Law any requisite number of citizens have the right to associate as a corporation by complying with the provisions of the law just as they had the right to form a *sociedad anonima* with all the attributes and prerogatives of such an association by complying with the Code of Commerce. It would also seem that when the state promulgated the provisions of the Code of Commerce relating to *sociedades anonimas* and the organizers of the same executed the articles of association in compliance with said provisions and the state accepted and admitted of record in the Registry said articles of association, it thereby recognized the association as a juridical person, consenting to and permitting its organization in the same manner that it now permits the formation of a corporation under the Corporation Law by the filing of the articles of incorporation in conformity therewith.

To understand the nature of its creation and dissolution it is necessary to distinguish between an enabling act and a merely regulatory act. Our Corporation Law is an *enabling act* while the Code of Commerce is merely a *regulatory act.* This is very clear from the words of Alonzo Martinez, one of the authors of the Code of Commerce, as embodied in his "Motivos" which follows:

> "En iguales principios se ha inspirado el proyecto de Codigo al ordenar todo relativo a las diversas maneras y formas de constituirse las sociedades mercantiles, cuyas principios pueden resumirse en estas tres: libertad amplia en las asociados para constituirse como tengan conveniente; ausencia completa de la intervencion gubernativa en la vida interior de estas personas juridicas; publicidad de los actos sociales que pueden interesar a tercero."

While it is correct to say that the right to form a corporation flows from the Corporation Law without which no such right would exist, it cannot be said correctly that the right to form a *sociedad anonima* flows from the provisions of the Code of Commerce without which no such right exist. Herein lies the fundamental difference between the two situations. The one—the corporation—is organized in virtue of a *privilege* conferred by the sovereign through a legislative act, a privilege that may be withdrawn at any time—a privilege the acceptance of which sets up a contract between the sovereign and the corporation. The other—the sociedad anonima—is organized by virtue of a natural and absolute right—the right to contract and associate freely—a right that is not in the least dependent

upon the sovereign will—and the exercise of which sets up no contract whatever with the sovereign. And if it could be successfully contended that an association becomes a corporation by mere compliance with the police provisions of a regulatory law, do general and limited partnerships of the Spanish law become corporations by compliance therewith? Do adjudicated cases like the Rocha and Co. case support that contention? Does the Code of Commerce create corporations? Comment would seem to be superfluous.

Corporations may not be dissolved without state consent. It is contended that the same is true of *sociedades anonimas*, that Article 226 of the Code of Commerce constitutes the consent of the state which we also find in sections 62 to 67 of the Corporation Law. Article 226 provides: "The dissolution of a commercial association, which proceeds from any other cause but the termination of the period for which it was constituted, shall not cause any prejudice to third parties until it has been recorded in the commercial registry." A plain reading will show that it is merely regulatory in character; it merely prescribe that any dissolution of a commercial association shall not cause prejudice to third parties until it has been recorded in the commercial registry. It does not purport in any way to *authorize* dissolutions which is left entirely to the agreement of the members. On the other hand the Corporation Law contains that permissions of the state for the dissolution of corporations which is an essential requisite for their valid dissolution and without which they could not dissolve.

In resumé a *sociedad anonima* is not a corporation: (1) because its creation was not dependent upon the consent or indulgence of the sovereign power; (2) because it holds no corporate charter or franchise constituting a contract between itself and the state; (3) because it may be dissolved without the consent of the state; and (4) because its powers, attributes, and properties are derived from the agreement of its members and not from the state. Furthermore, it is incontrovertible: (1) that the history of the *sociedad anónima* and the provisions of the Code of Commerce relating thereto show that they stand exactly upon the same footing as other partnerships from the standpoint of legal sanction for their creation and the source of their powers; (2) that they are the product of the agreement of their members; (3) that they derive all their powers from that agreement; and (4) that the right of the members to enter

into such an agreement is absolute under the doctrine of freedom of Association and freedom of contract which are fundamental, constitutional, and natural rights common to all.

5. *Will a Quo Warranto Lie Against a Sociedad Anonima?*

The Supreme Court in the Fred Harden Case said: "Having shown that the plaintiffs in this case can have no right of action against the Benguet Company for the infraction of law supposed to have been committed, we forego any discussion of the further question whether a *sociedad anonima* created under the Spanish law, such as the Benguet Company, is a corporation within the meaning of the prohibitory provision already so many times mentioned. That important question should, in our opinion, be left until it is raised in an action brought by the Government." The proceedings referred to will be made by means of a *Quo Warranto* provided for in Sec. 198 et seq. of the Code of Civil Procedure. The extraordinary legal remedy of *quo warranto* lies where the defendant or respondent acts as a corporation, without having been previously incorporated in the manner and form prescribed by law, or whenever a corporation duly organized has violated the law in such a manner as to forfeit its privileges and franchise, or when it has surrendered its corporate rights, privileges, or franchise (The Government of the P. I. vs. Binangonan et al, 28 Phil. 116). Now, the question is: Will a *Quo Warranto* lie against a sociedad anonima?

One angle of approach is to determine whether a *sociedad anonima* is a corporation, and if it be so found, then the consequent necessarily follows that *quo warranto* proceedings will lie. But a perusal of the essential characteristics of the *sociedad anonima* of the Spanish law and the corporation of the Anglo-American law will show that while they have many common characteristics, the differences are so fundamental in character that we cannot qualify them as essentially the same. *Quo warranto* would not lie against a *sociedad anonima* for exceeding its powers since it is under no contractual relation with the state. In State ex rel Clapp vs. Minnesota Thresher Mfg. Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510, the court said that in order that the state may denounce the contract constituting its charter in *quo warranto* proceedings looking to the dissolution of the corporation, the misuser must be such as to work or threaten a substantial injury to the public, or such as to amount to a violation of the fundamental condition of the contract by which

the franchise was granted, and thus defeat the purpose of the grant. The theory of such proceedings, therefore, is that there has been a breach of the contract between the corporation and the state.

The second angle of approach concedes that even if the *sociedad anonima* is not strictly the corporation of the Anglo-American law, the Philippine Commission by inserting the phrases that "any corporation or sociedad anonima * * * will be subject to the provisions hereof *so far as applicable*" and that "their relations to the public and public officials shall be governed by the Corporation Law", and the Philippine Legislature, by enacting Act 3518, intended that Sec. 190-A penalizing the corporation by dissolution in case of violation of any of the provisions of the Corporation Law should apply to *sociedades anonimas*. This is a controversial legal question. The objection may be interposed that a *sociedad anonima* is not subject to Sec. 190-A for the reason that it cannot violate the Corporation Law since it is organized under the Code of Commerce and is governed by its articles of association. Yet the express provision subjecting the *sociedad anonima* to the provisions of the Corporation Law so far as applicable and in their relations to the public and public officials is so comprehensive as to include almost anything. The scope and extent of its applicability, however, may be gauged in the opinion of the then Atty. Gen. Ignacio Villamor, reported in V Op. Atty. Gen. 442. In 1910 the question arose as to whether or not the Compañia Maritima, a *sociedad anonima* which was organized under the Code of Commerce and which did not elect to reorganize under the Corporation Law, may be subjected to the visitorial power of the government provided in Secs. 54 and 55 of the Corporation Law. The attorney general replied in the affirmative, stating that an examination of the affairs of said company was under way by direction of the Governor General. He concluded: "From the above citations it is clear that *sociedades anonimas* are corporations and have all the attributes and rights of a corporation. It would be anomalous to hold that having all the rights and purposes of a full-fledge corporation they would not be subjected to any of the obligations devolving upon corporations, but could avoid the investigations to which all other corporations are liable by declaring themselves simply copartners."

C. Is Sec. 13 (5) of Act 1459 Applicable to Sociedades Anonimas?

The question is whether paragraph 5 of Sec. 13 defining the powers of corporations created thereunder for the purpose of engaging in mining, which prohibits mining corporations from being in anywise interested in any other mining corporation and declares it to be unlawful for any person owning stock in more than one mining corporation to own more than fifteen per centum of the capital stock then outstanding and entitled to vote in each of such corporations is to be considered as a provision "applicable" to sociedades anonimas or as a provision governing "their relations with the public and public officials."

We have already seen that Sec. 75 of the Corporation Law made the Act applicable to *sociedades anonimas* formed, organized, and existing on the date of the passage of the Act "so far as such provisions may be applicable", at the same time recognizing their right to continue business as *sociedades anónimas* or to reform and organize under and by virtue of the provisions of the Corporation Law and that Sec. 191 repealed the Code of Commerce relating to *Sociedades Anónimas* which will be governed by the laws in force prior to the passage of the Corporation Law "in relation to their organization and method of doing business and to the rights of members thereof as between themselves", but subjected them to the provisions of the Act "in their relations to the public and public officials."

1. *Statutory Construction.* There is no presumption in law that the prohibitions provided for by the Corporation Law, derogatory as they are to natural right, were intended to apply to partnerships such as the *sociedad anónima* which has all the rights of natural persons. Sutherland on Statutory Construction says: "573. Such statutes as take away a common law right, remove or add to common law disabilities or which are in derogation of the common law, are strictly construed. The court cannot properly give force to them beyond what is expressed in their words, or is necessarily implied from what is expressed." The extension of the provisions of the Corporation Law to *sociedades anónimas* already existing may be construed as a deprivation of a pre-existing natural right. The courts can not hold that such was the intent of the Legislature unless that intent is plainly expressed therein.

In the case of Commonwealth v. Adams Express Co. (123 Ky. 720, 97 S. W. 385) a similar question was considered. The

defendant was a joint stock company, the nearest common law counterpart of the *sociedad anónima.* It was indicted for doing business in Kentucky without filing the statement required by the corporation law of that state from foreign corporations, that law providing that the term "corporation" as used therein might be construed to include joint stock companies. The court decided that the requirement was not "applicable" notwithstanding that provision of the statute, and in so doing, analyzed the entire statute for the purpose of determining which of its provisions and prohibitions could be held applicable to such companies. In the course of the analysis the court said: "The first section of the Act, Laws 1813, p. 612 C-171 (See Ky. St. 1903, Sec. 538) provides for what purposes such corporations may be formed. The next section (Sec. 539) provides what the articles of incorporation shall specify. Neither of these sections can have any application to partnerships or unincorporated companies * * *." As to whether the prohibitions are applicable the court said: "An unincorporated company might as the law then stood, engage in the banking business, and it might own real estate not necessary for the carrying on of its business for a long period than five years (Sec. 567). It might issue stock or heads without an equivalent in money or property actually received." The court, therefore, held that joint stock companies might violate all the restrictive provisions of the corporation law relating to the ownership of land the issuance of stock and bonds notwithstanding that such companies were to be governed by all the applicable provisions of that law, simply because such restrictions could not be put upon unincorporated associations.

2. *Relations to Public and Public Officials.* The meaning of the phrase as applied to *sociedades anonimas* electing to continue as such after the passage of the corporation law was forecasted and anticipated by the remarks of Commissioner Ide at the public hearing of the Philippine Commission when he said: "Of course whether they come under the new law or not, they would be subject to inspection, regulation, and examination for the purpose of protecting the community. The Commission has already enacted similar legislation when it passed the Act requiring banks to accept deposits in United States Currency and the Act regulating common carriers." (Vol. IX, Pub. Min., Phil. Com. 219). Especially significant is the holding in State v. U. S. Express Co., 81 Minn. 87, 50 L. R. A. 667, that the defendant was not a corporation but a joint stock company, de-

claring that it had the right to do business in the state without its permission and free from its control and visitorial power, as any other individual or partnership; but that as a common carrier the business of which is affected with a public interest it is subject to public control and regulation, including its charges for its services as such carrier, as to all its states or domestic business. In other words if the *sociedad anonima* is a common carrier or a railroad company, it is to be governed by the provisions of the act governing the relations of corporations of that character to the public and public officials. If it is a banking association, it is to be governed by the provisions of the act governing the relations of corporations of that character to the public and public officials. If it is a trust company, it is to be governed by the provisions of the act governing the relations of corporations of that character to the public and public officials. The meaning, then, is that the provisions applicable are in essence police provisions. Sec. 13 (5) of the Corporation Law is contractual in nature.

The opposite view is that the provision necessarily affects the relations of corporations to the public and public officials, and as such, is applicable to *sociedades anonimas*. To exercise the powers enumerated in paragraph 5 of Sec. 13 a corporation has to deal with the public for it would be absurd to hold that a corporation may only purchase or sell from or to its own members. And in registering a deed of conveyance or mortgage the corporation will have to deal with the public officials particularly the Register of Deeds who has the right to examine and determine whether such document was properly executed. It can be said, therefore, that the power granted to every corporation in Sec. 13 (5), because it involves the relation of corporations to the public and public officials, is applicable to *sociedades anonimas*.

3. Applicability of Sec. 13 (5) to *Sociedades Anonimas*. If *sociedades anonimas* are corporations, the prohibition is clearly applicable; but since a sociedad anonima strictly speaking is not a corporation, the logical conclusion is that the prohibition is not applicable unless it involves a relation to the public or public officials. It is as if the sovereign said, "I will permit the existence of those corporations on the terms defined in this Act, one of which is that none of them shall have the power to be in any wise interested in any others engaged in mining." It is doubtful if such language can be held to have been addressed

to or made applicable to associations which do not derive their existence and powers from the sovereign and hold no charter from the state. Is it because the *sociedad anonima* exercise some of the powers enumerated in Sec. 13 of the Corporation Law? Is it because the *sociedad anonima* has the right to sue and be sued that it is a corporation? Is it because it issues stocks to its members? Or is it because the *sociedad anonima* has a board of directors? It is incontrovertible that the *sociedad anonima* had these rights even before anybody ever thought that a corporation law would be enacted for the Philippine Islands. The provisions that *sociedades anonimas* electing to continue as such after the passage of the Act "shall continue to be governed by the law that were in force prior to the passage of the Act in relation to their organization and method of business" expressly recognize the existence of such powers. A *sociedad anonima* organized for the purpose of engaging in mining and which under its articles of association might develop mining properties can rightfully and legally exercise that power. It had the natural right to acquire stock in mining corporations anywhere in the world. A convenient "method of transacting its business" was to acquire stock in other companies for the development of their properties. The result is that the right of a *sociedad anonima* to acquire stock in other mining companies is expressly recognized and continued by Sec. 191 of the Corporation Law.

On the other hand, Sec. 75 expressly provides that any corporation or *sociedad anonima* organized under the Code of Commerce "shall be subject to the provisions of the Act so far as such provisions may be applicable", and Sec. 191 further provides that the relation to the public and public officials of existing corporations or *sociedades anonimas* "shall be governed by the provisions of this Act." The extent of its applicability which is indeed broad has already been discussed elsewhere. The phrase "method of transacting business" is preceded by the word "organization" and followed by the phrase "to the right of members thereof as between themselves"; and by the rule *Ex Antecedentibus et Consequentibus Fit Optima Interpretatio* (Broom, Legal Maxim, p. 386), an interpretation should be made with reference to the words preceding and following. It is evident, then, that "method of transacting business" refers to form and not to substance, to the manner of keeping

books rather than to the kinds of business in which it may lawfully engage.

4. *Impairment of Obligation of Contracts.* It is obvious from Sec. 75 of the Corporation Law that *sociedades anonimas* were entitled to continue as such if they elect not to reorganize under the Corporation Law. If the Philippine Commission intended to impose the prohibition against being interested in mining corporations upon *sociedades anonimas,* such legislation would have been void as in violation of the provisions of the Philippine Organic law prohibiting the enactment of legislation impairing the obligation of contracts. It would seem that any attempt to curtail the powers agreed upon by the members of such a company and which they might lawfully exercise as individuals would be beyond legislative power. This restriction falls exactly within the principle laid down by Mr. Justice Day in N. P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. Ed. 630. "The legislation which deprives one of the benefit of a contract, or adds new duties or obligations thereto, necessarily impairs the obligation of the contract * * *." In addition to this, our law recognize the right of the individual to be interested in mining corporations as a natural inherent right. The fact that their association takes the form of a *sociedad anonima* should make no difference; a *sociedad anonima* has all the powers of a natural person in its methods of transacting business.

On the other hand the scope of the constitutional prohibition against the impairment of obligation of contracts has never been understood to embrace other contracts than those with respect to property or some object of value, and confers rights which may be asserted in a court of justice. (6 Encyc. of U.S.S.C. Reports, 782). The contracts designed to be protected by the tenth section of the first article of the Federal Constitution are contracts by which perfected rights, certain definite, fixed private rights of property, are vested. (Butler et al. v. The Commonwealth of Pennsylvania, 13 L. Ed. 472, 478). A vested right is defined by Fearne in his work upon Contingent Remainders as "an immediate fixed right of present or future enjoyment"; and Judge Cooley said that "they are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest." (Cooley, Const. Lim., p. 32). If the vested right refers to the contract of the partners in the articles of copartnership, then it comes within the prohibition and may not be im-

paired; but if it refers to a contract executed subsequent to the legislative enactment, it is clear that the constitutional prohibition is not violated.

With respect to the question that a *sociedad anonima* has all the powers of a natural person in its methods of transacting business, it may be said that that power is not absolute. Section 7 of Act 3518 makes it unlawful for any person owning stock in more than one mining corporation to own more than 15% of the capital stock of each of such corporation. And this amendment to the Corporation Law has not been held to constitute an impairment of obligation of contracts.

In connection with this discussion a new phase arises—the police power. The police power predominates over the constitutional prohibition against the impairment of obligation of contracts in all matters involving the promotion of the public welfare, among which the prevention of monopolies and conservation of natural resources of the country are included. The Philippine Commission and the Philippine Legislature as its successor had the right in the exercise of the police power of the state to apply to the *sociedad anonima* the prohibition against becoming interested in a corporation engaged in mining without reference to whether it was a corporation or not. This prohibition was applied to individuals who were members of the corporations engaged in agriculture or mining. In Manigault v. Springs, 199 U. S. 473, 50 L. Ed. 274, 278, the Court said: "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people and is paramount to any rights under contracts between individuals * * * in other words, that parties, by entering into contracts, may not estop the legislature from enacting laws intended for the public good."

5. *The Question of Monopoly.*

The antecedents of the prohibition found in Section 13 (5) of the Corporation Law were first embodied in Section 75 of the Act of Congress of July 1, 1902 which reads as follows:

"It shall be unlawful * * * for *any* corporation organized for any purpose except irrigation to be in anywise interested in any other corporation engaged in * * * mining."

The Philippine Commission in enacting the Corporation Law copied the same language in Sec. 13 (5). This section was amended by Section 7 of Act 3518 of the Philippine Legislature, approved by Congress on March 1, 1929. The Supreme Court observed that the change effected by this amendment was in the direction of liberalization. Under the former law no corporation whatever its character, except irrigation corporation, could be interested in agricultural or mining corporations. Under the amendment any corporation could be interested in agriculture or mining corporations if other than agriculture or mining corporations. The original inhibitions against members of a corporation engaged in agriculture or mining was so modified as merely to prohibit any such member from holding more than 15% of the outstanding capital stock of another such corporation.

It is said that the provision of the Corporation Law under consideration was obviously designed to prevent octopus-like corporations from extending their tentacles to and strangling smaller and weaker corporations; and for this reason should also be extended to powerful associations like a *sociedad anonima*. If this is not made, any *sociedad anonima* may, by appropriate amendment to its articles of association engage in agriculture and own more than 1,024 hectares of land or may monopolize all the mineral resources of the Philippine Islands by acquiring shares in other mining corporations. This is certainly not in harmony with the long established policy of the U. S. Congress as well as of the Philippine Legislature against undue monopoly of the public lands and of the resources of the Philippine Islands.

As against these considerations, it is noted that the statute is addressed to mining corporations alone. There is nothing therein prohibiting any other form of association from being in any wise interested in mining corporation. The restriction is not antimonopoly legislation and does not constitute an exercise of the police power, because of its limited application. In contradistinction the Anti-Trust Law of Montana (Sec. 321 of its Penal Code) reads as follows: "Every *person, corporation, stock company, association of persons* in the state who directly or indirectly, combine or form what is known as a trust, or make

any contract with any person or persons, corporations, or stock companies, foreign or domestic, through their stockholders, directors, officers, or in any manner whatever * * * is punishable by imprisonment in the state prison not exceeding five years, or by fine not exceeding ten thousand dollars, or both. Every corporation violating the provisions of this section, forfeits to the state all its property and franchises, and in case of a foreign corporation it is prohibited from carrying on business in the state."

As to the nature of the restriction Professor Freund says (Sec. 360, Freund Police Power): "But the restrictions placed on corporate action are not generally referred to these grounds (police power), which would apply equally to all associations; but are simply regarded as legislative qualifications of corporate capacity. Corporations as such are not persons having a natural and inalienable right to existence and happiness; but they exist by legislative sufferance subject to legislative conditions." It is an ordinary restriction on corporate power, similar to those prohibiting the ownership of land not required for the corporate business for a period of more than five years, the issuance of stock and bonds except at a given valuation, and other restrictions imposed by the act upon corporations in the exercise of the sovereign will with regard to their powers and the restrictions and limitations thereupon. But the question, of course, remains open as to whether the provision is applicable, or is intended to be applied by the Philippine Commission, to sociedades anonimas.

D. May a Sociedad Anonima be Organized After the Passage of the Corporation Law?

Section 75 of the Corporation Law made the law applicable to *sociedades anónimas* formed, organized, and existing on the date of the passage of the act "so far as such provisions may be applicable", at the same time recognizing their right to continue business as *sociedades anónimas* or to reform and organize under any by virtue of the provisions of the Act. Section 191 of the Corporation Law repealed the provisions of the Code of Commerce relating to *sociedades anónimas* with the proviso that such associations electing so to continue shall be governed by the laws in force prior to the passage of the Act in relation to their organization and method of doing business and to the rights of members thereof as between themselves, but subjected

them to the provisions of the Act in their relation to the public and public officials.

From these two sections we are to probe into the legislative intent as to whether the sociedades anonimas could be organized after the passage of the Corporation Law or not. Will the perpetuation of the existing sociedades anonimas preclude the organization of new *sociedades anónimas*? It is a principle of statutory construction that the legislative intent is to be garnered from the letter of the law itself. It is interesting to note that the Corporation Law does not purport to do away with the sociedad anonima. It confines itself to the repeal of the provisions of the Code of Commerce which are merely regulatory in character. Article 1670 of the Civil Code provides that partnerships, which on account of the purposes to which they are devoted, may adopt any of the forms recognized by the Code of Commerce and that in such cases its provisions shall be applicable in so far as they do not conflict with those of the Civil Code. Inasmuch as a partnership association may be entered into in the form of a *sociedad anonima* in the exercise of the natural right of contract and association, it is clear that the repeal of the Code of Commerce provisions relative to *sociedades anónimas* does not abolish the *sociedad anonima* itself. It is perhaps for this reason that a well-known attorney declared at the public hearing of the Philippine Commission that even if the Commission would repeal the provisions of the Code of Commerce relative to sociedad anónima, he could legally organize one the next day.

The other, and perhaps the better, point of view is that no more *sociedades anónimas* may be organized after the passage of the Corporation Law from the fact that by Sec. 191, all the provisions of the Code of Commerce relating to *sociedades anonimas* were repealed, saving in so far as it may apply to existing *sociedades anonimas* that did not elect to reorganize under the Corporation Law. This state of conditions came to exist as it was necessary to make certain adjustments resulting from the continued coexistence, for a time, of the two forms of commercial entities. This theory is subscribed to by the Supreme Court when it is said in the Fred Harden Case, 32 O. G. 1118: "The purpose of the Commission in repealing this part of the Code of Commerce was to compel commercial entities thereafter organized to incorporate under the Corporation Law, unless they should prefer to adopt some form or other of the partnership."

If in virtue of their natural right to freedom of contract, the residents of the Philippine Islands, nevertheless, organize a *sociedad anonima* regardless of the repeal of the provisions of the Code of Commerce, what will be its legal effect? In this case such an organization would have no legal personality; it would be a mere co-ownership, the members of which would have to sue and be sued in their individual names and would be personally liable for the contracts and obligations. Thus the Supreme Court held in a case that where the articles of partnership signed for the purpose of transacting commercial business in Manila under the name of Hoc Jua Bee and Co. were never recorded in the mercantile registry, the company never became a juridical person and never acquired any personality distinct from the personality of the individuals who composed it (Ang Seng Quen et al. v. Te Chico et al., 7 Phil. 541, 542), although the individual members of such a firm may maintain a suit jointly, and persons dealing with the partnership are estopped from denying the right of the partnership so to do. (Prautch and Scholes v. Jones, 8 Phil. 1; Strachan and MacMurray v. Emaldi, 22 Phil. 295; Lopez v. Yu Sefao, 31 Phil. 319, 321). The case certainly becomes stronger where there is no law under which the association may be organized.

E. Conclusion and Recommendation

In view of the foregoing discussion we have come to the conclusion that *sociedades anónimas* are not corporations as this term is known in Anglo-American law, that the prohibitions against mining corporations provided for in Section 13 paragraph 5 of the Corporation Law are of doubtful applicability to *sociedades anónimas*, and that a *sociedad anónima* may not be organized after the passage of the Corporation Law. A question arises, however, as to the relative utility and benefits that may be derived by the public from the continuance of the *sociedad anónima*. If it may exercise the same powers as those of a corporation, is its existence not a duplicity, a superfluity, an anachronism? If it wields the same powers as a corporation does, will public interest not be better subserved by placing on the *sociedades anónimas* the same regulations and restrictions? If they serve the same purpose, will not a fusion of the two or the elimination of one lead to less confusion and less expensive suits? Should we at this stage of our legal development, therefore, leave the Spanish law for the American law?

or should we develop a composite law wherein each would supply the defects and insufficiencies of the other? The former would be an effective though abrupt solution while the latter would be gradual, well-considered, and at the same time in harmony with the genius and historical development of our people. In this instance however in so far as the *sociedad anónima* is concerned, the corporation would be an excellent substitute and our law suffer no cataclysmic change; the Corporation Law has grown roots deep into our scheme of laws and jurisprudence since 1906. The only remaining question, then, is a feasible solution. Will a forcible reorganization of the sociedad anónima under Act 1459 impair the obligation of contracts? The answer can be found in the case of Trigo v. Banco Territorial (36 Porto Rico 245). The Banco Territorial y Agricola, a *sociedad anónima,* was required to incorporate in order to continue in the Banking business under the proviso of Section 4 of the Porto Rico Banking Law reading as follows:

"Provided, further, That banks doing business in Porto Rico which have not been incorporated shall incorporate pursuant to the provisions of this Act, within a term of six months from and after the date on which this Act takes effect."

This case answers the last question.