Suggested Reforms in the Law of Formation of the Corporation

By

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The Philippine Commission on April 1, 1906, introduced in the Philippines the corporation as known then in American law. Before that time we only had the *sociedades anonimas* of the Spanish Code of Commerce, corresponding to the joint stock companies of English law.[1] And since that time Philippine students of law have come to speak of the corporation in familiar terms. Our intimacy with this valuable institution, however, hardly dates farther than the year 1906 and we are on the whole unaware that it had to fight the great battles that faced all novel ideas at their birth. The idea of a fictitious legal person is, of course, not new to us for we find recognition of it in our Codes[2] and in Supreme Court decisions in relation, especially, with the Catholic Church.[3] The source is traced to the ancient Romans[4] and Greeks[5] and even farther back to times history does not record.[6] The corporation, however, such as we know it today, although known in English history in an early time[7] was not popular and indeed

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[1] Harden v. Benguet Consolidated Mining Co., 58 Phil. 141, 145-147.

[2] Arts. 35 and 1665, Civil Code; Art. 116, Code of Commerce. See also art. 1768 of the new Civil Code of the Philippines.

[3] In Barlin v. Ramirez, 7 Phil. 41, 57-58, the Supreme Court said: "It is suggested by the appellant that the Roman Catholic Church has no legal personality in the Philippine Islands. This suggestion, made with reference to an institution which antedates by almost a thousand years any other personality in Europe, and which existed 'when Grecian eloquence still flourished in Antioch, and when idols were still worshipped in the temple of Mecca,' does not require serious consideration." This opinion was reiterated and approved in Roman Catholic Church v. Municipality of Placer, 11 Phil. 315. See also Capellania de Tambobong v. Cruz et al., 9 Phil. 145, 146-147; Government of the Philippine Islands v. Avila, 38 Phil. 383, 388-389; and The San Juan de Dios Hospital v. Government of the Philippine Islands, 40 O. G., No. 3, First Supp., 5, 8-9, where the Supreme Court recognized the capellanias, cofradias and the San Juan de Dios Hospital as fictitious persons.

[4] Blackstone, *Commentaries*, p. 468; 2 Savigny, *System des Heutigen Romischen Rechts*, Sec. 86 et seq.

[5] Angell and Ames think the Romans borrowed the idea from the Greeks. *Corporations*, 11th ed., p. 38. See also Williston, "History of the Law of Business Corporations Before 1800," 2 *Harvard Law Review*, 103, 106.

[6] Maine, *Ancient Law*, 4th ed., p. 183; 8 *The Americana*, pp. 3 et seq. The idea, it is claimed, antedates the individual and is lost in antiquity.

[7] "* * * as early as the fifteenth century it was clear that an individual corporator was not personally liable for the debts of the corporation; and after some hesitation, this conclusion was ultimately accepted in the latter part of the seventeenth century." 8 Holdsworth, *History of English Law*, p. 208. But commercial men did not firmly grasp the distinction between a large partnership and a chartered company till after the passing of the Bubble Act in 1720." 8 Holdsworth, *supra*, p. 192. The royal prerogative to establish corporations was frequently exercised at the time of Elizabeth and her successors followed

met with prejudice.[8] Its monopolistic and speculative aspects were so condemned by statesmen[9] and scholars,[10] no less than by the

suit. 1 Dodd and Baker, *Cases on Business Associations*, 1940, pp. 3-4. The idea of a stock exchange started in England in 1692. 8 Holdsworth, *supra*, p. 214. See also Hunt, *The Development of the Business Corporation in England, 1800-1867*, 1936, pp. 4-5. Since, however, non-liability of shareholders for corporate debts became common only in 1855, it is said that the modern idea of a corporation could not have been formed until then. Pollock and Maitland, *The History of English Law*, 2nd ed., p. 493.

[8] See Hunt, *op. cit.*, pp. 6-9, 15-55, 59-60, 86-87. His Majesty's Commissioners for Trade and Plantations, in 1696, attacked "the pernicious art of stock-jobbing (which had) so wholly perverted the end and design of companies and corporations—erected for the introducing or carrying on of manufactures—to the private profit of the first projectors, that the privileges granted to them have commonly been made no other use of by the first procurers and subscribers, but to sell again with advantage to ignorant men drawn in by the reputation, falsely raised and artfully spread, concerning the thriving state of their stock." 11 *House of Commons Journals* (1696) 595. The prejudice was specially bitter in 1719 when the stock market crashed and ruined the South Sea Company. A panic-stricken Parliament passed the Bubble Act in 1720 "which even now when we read it," said Maitland, "seems to scream at us from the statute book." 3 *Collected Papers*, "Trust and Corporation," 390. The House of Commons resolved: "That for some time past several large subscriptions having been made by great numbers of persons in the City of London to carry on public undertakings, upon which the subscribers have paid in small proportions of their respective subscriptions, though amounting on the whole to great sums of money; and that the subscribers having acted as corporate bodies without any legal authority for their so doing, and thereby drawn in several unwary persons with unwarrantable undertakings, the said practices manifestly tend to the prejudices of the public trade and commerce of the kingdom." 19 *House of Commons Journals* (1720), 351. See also 8 Holdsworth, *op. cit.*, note 7, pp. 209, 219-220; Palmer, *Company Law*, 8th ed., pp. 5-6; 5 Halsbury, *Laws of England*, p. 481, note (f); 1 Lindley, *Companies*, 1902, p. 3; Scott, *Joint Stock Companies to 1720*, 1912, pp. 108, 436-438. Scott points out that the real "proximate cause of the evil had been the veniality of the ministry and of the House of Commons." At page 437. "The speculation in shares had been too great and the expectation of profit too extravagant not to cause a correspondingly great distrust in corporate enterprises when the bubble bursts, and the profits realized were found to be small and extremely variable." Williston, *op. cit.*, note 5, p. 112. See also Horrwitz, "Historical Development of Company Law," 62 *Law Quarterly Review*, 375.

[9] "* * * Walpole and Archibald Hutcheson maintained stoutly that credit was good, but that it had been somewhat impaired by the canker of stock-jobbing." Scott, *supra*, p. 437. In 1807 the Attorney-General sought a criminal information on the basis of the Bubble Act. Rex v. Dodd, 9 East 516-517. See also Rex v. Buck and Rex v. Stratton (1808) 1 Campbell, 547, 549. Lord Ellenborough "condemned the feature of alleged limited liability as a 'mischievous delusion calculated to ensnare the unwary public.'" Hunt, *op. cit.*, note 7, p. 19. Joseph Marryat opposed incorporation as destructive of private enterprise. See *Speech by Joseph Marryat, M.P., on Marine Insurance*, reprinted by Lloyd's (2d ed. 1810); Hansard, *Parliamentary Debates*, 15 (1810) pp. 494-495. Wiberforce was of like opinion. Hansard, *supra*, 14 (1809), pp. 860-861.

[10] Adam Smith: "* * * the only trades which it seems possible for a joint-stock company to carry on successfully without an exclusive privilege, are those of which all the operations are capable of being reduced to what is called routine, or to such a uniformity of method as admits of little or no variation. Of this kind is first, the banking trade; secondly, the trade of insurance from fire, and from risk and capture in time of war; thirdly, the trade of making and maintaining a navigable cut or canal; and, fourthly, the similar trade of bringing water for the supply of a great city." *Wealth of Nations*, book v. ch. 1, art. 5. On attack against monopolies during Elizabeth's time, see Scott, *op. cit.*, note 8, pp. 107-108. See also Hunt, *op. cit.*, note 7, pp. 15-17 and chapter VI on "Limited Liability."

common people,[11] that obstacles were placed towards their formation, if they could not be completely exercised. It was not until the middle of the nineteenth century[12] that corporations could be organized under a general law in England, but yet limited liability for shareholders was not extended as a rule. Although we are told that limited liability was known as far back as the fifteenth century,[13] it was not until 1855 that its blessing was generally bestowed upon corporations.[14] "The economic historian of the future," said the *The Economist*, "may assign to the nameless inventor of the principle of limited liability, as applied to trading corporations, a place of honor with Watt and Stephenson, and other pioneers of the Industrial Revolution. The genius of these men produced the means by which man's command of natural resources was multiplied many times over; the limited liability company the means by which huge aggregations of capital required to give effect to their discoveries were collected, organized and efficiently administered."[15] The idea now seems so naturally associated with corporations that we seldom realize that it had had its heroic battles in which it nearly lost scarcely a century ago.[16] "Indeed" says Hunt, "freedom of incorporation was achieved only after a protracted and bitter struggle against deeply-rooted prejudices, widespread misconception and even fear."[17]

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[11] Thomas Mortimer defined a company as a "number of merchants uniting and applying to the Government for an exclusive charter, to prevent others from engaging in the same commerce, and for a power to raise money by an open subscription in order to form their stock or capital * * *" *Every Man His Own Broker Or a Guide to the Stock Exchange*, 13th ed. (1801). See also Hunt, *op. cit.*, note 7, pp. 15-17 and chapter VI on "Limited Liability."

[12] The Act of 1844 was the first general registration act in regard to companies, but it withheld limited liability to shareholders. See Palmer, *op. cit.*, note 9, pp. 6-7. The Companies Act of 1862 is generally known as the Magna Charta of co-operative enterprise.

[13] Pollock and Maitland, *op. cit.*, note 7, say: "And a mere doubt about the general principle of corporate liability occurring at so late a date as 1429 is remarkable." They cite a case in 1437, Fitz. Abr. Execution, pl. 128, in an unprinted Y. B. of Mich. 16, Hen. VI, where it is said that if a man recovers a debt or damages against a commonalty he shall only have execution against the goods that they have in common. At p. 493. Limited liability is said to date back to the ancient Greeks and Romans. Wright and Baughman, "Past and Present Trends in Corporation Law: Is Florida In Step?" 2 *Miami Law Quarterly*, 69, 77.

[14] The "principle of limited liability was first introduced into English law of commercial associations in the sixteenth century when bodies which had started as large partnerships found it expedient to obtain corporate form and to carry on business as an incorporated joint stock company." Horrwitz, *op. cit.*, note 8, p. 875. The limited liability principle, however, became common earlier in the American states. New York provided for it in 1811, Connecticutt in 1817, and Massachusetts in 1830. By 1850 it was rooted in many states. As to Maryland, see Bland, *Maryland Business Corporations, 1783-1852*, 1934. In Ohio shareholders' non-liability did not become uniform until the adoption of a constitutional amendment in 1936, effective July 1, 1937, which eliminated the "double liability" of bank shareholders. The Minnesota Constitution (Art. X, sec. 3), until its amendment in 1933, fixed a double liability on shareholders.

[15] December 18, 1926, quoted in Hunt, *op. cit.*, note 7, p. 116.

[16] For the evolution of limited liability in the United States, see Dodd, "The Evolution of Limited Liability In American Industry: Massachusetts," 61 *Harvard Law Review*, 1349.

[17] *Op. cit.*, note 7, pp. 5-6.

When the corporate idea was transplanted across the Atlantic from England to the United States, prejudice against and fear of the corporation came along with it, if they were not already there. The drafters of the California Constitution of 1879 "had no love for, or at least no immediate knowledge of, the corporate entity as a business medium, and consequently distrusted." [18] Mr. Wyatt, delegate to the Convention, said, "Corporations are not creators of wealth; corporations do not go out and work. A corporation is a seine that runs around the State and seines in the hard-earned money of those who do work. We could live without corporations in the State of California, and, with nineteenths of them wiped from existence we would be much better off than we are now." [19] Mr. Dowling, another delegate, speaking in stronger terms, said: "The corporations of California appear to me to be like an immense boa constrictor, having the whole State gripped within its coils, squeezing faster and faster all the time, until the whole State, trembles with agitation and bleeds from every pore." [20] These ideas carried the day and, if corporations were not prescribed, they were inhibited and discouraged. Thus, among others, was written into the Constitution a provision providing for shareholders' proportional liability for corporate debts, which endured until November 4, 1930, when the constitutional provision was repealed.[21] On the assumption that corporations were generally organized for fraudulent purposes, the governor of Massachusetts, in 1840, in a message to the legislature of that State, admonished that body to take steps to curb corporations. Davies, member of the Ohio Corporation Code Committee, commenting on the Ohio Convention Debates, 1850-1851, stated: "The delegates to the Constitutional Convention were haunted and troubled by the spectre of a fictitious personality identified with monopolies and with the grant of special privileges. The debates of the Convention not only show hostility to corporations but also genuine and serious concern that 'they would usurp every trade and business, intrude themselves into every nook and corner of the State, override all private enterprise, and become as troublesome as the lice of Egypt.'" [22] Mr. Murray, early in the present century, while serving as Chairman of the Constitutional Convention of Oklahoma, opposed permitting the organization of private corporations other than utility companies.[22a] Justice Rutledge, while on the faculty of the Iowa Law School, remarked: "Practically every general incorporation law in force prior to 1890 contained rigid limitations upon the scope and freedom of

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[18] Sterling, "Modernizing California's Corporation Laws," 12 *Wisconsin Law Review*, 451, 455.

[19] *Debates of the Constitutional Convention*, p. 398.

[20] *Ibid.*, p. 402. See also *California State Bar Journal*, November, 1928, p. 3.

[21] See Ballantine, Sterling and Buhler, *California Corporation Laws*, 1949, pp. 1-4. "Their authors did not contemplate the present-day universal use of corporations as instruments of business nor the modern methods of corporate finance and organization." Note 1, p. 2.

[22] "Reflections of the Amateur Draftsmen of the Ohio General Corporation Act," 12 *Wisconsin Law Review*, 487.

[22a] See also Thurman, "Need For Changes in the Constitution and Statutes Emphasized," 17 *The Journal* (Oklahoma Bar Association), 846, 846-847.

corporate activity. These reflected a general and all-pervading attitude of suspicion, if not of fear, towards the corporate institution." [23] Justice Brandeis, in Liggett Co. et al. v. Lee et al.,[24] summarized the general attitude against corporations as follows: "Although the value of this instrumentality in commerce and industry was fully recognized, incorporation for business was commonly denied long after it had been freely granted for religious, educational, and charitable purposes. It was denied because of fear: fear of encroachment upon the liberties and opportunities of the individual; fear of subjection of labor to capital; fear of monopoly; fear of the absorption of capital by corporations; and their perpetual life might bring evils similar to those which attended mortmain. There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations. So, at first, the corporate privilege was granted sparingly; and only when the grant seemed necessary in order to procure for the community some specific benefit otherwise unattainable."

Although we are told that traces of the English Bubble Act of 1720, extended to the United States in 1741, were difficult to find, we note counsel, in 1906, in the case of Spotswood v. Morris,[25] urging in support of its application the views of some nineteenth century American judges.[26] As will hereafter be shown, constitutional and statutory provisions found in some states, prohibiting perpetuities and directed against perpetual corporate existence, are survivals of the historical distrust of corporations.

We find the same prejudice in France at about the time we are discussing. The philosophers of individual liberty who brought about the Revolution had no love for the corporation, for they thought that rights resided only in the individual. Those philosophers who would advance a step farther and would include in the liberty of the individual the right to form corporations were ignored. The corporation was viewed as a state rival for economic and political power. When the Code Napoleon was drawn up in 1804, we found no trace of recognition for the corporation, although it recognized co-ownership, which, of course, bore no resemblance or analogy with the corporation.[27] Liberty was, as it is still today, double-edged and may be used to serve the interests nearest one's heart.[28] This French experience may well account for the absence of the modern corporate idea in the Spanish Code of Commerce which was extended to the Philippines on August 6, 1888.[29]

If we were engaged in a study of the extent to which ancestral fear and prejudice found lodgment in the whole domain of the

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[23] "Significant Trends in Modern Incorporation Statutes," 22 *Washington University Law Quarterly*, 305, 306.

[24] 288 U. S. 517, 548-549, 53 S. Ct. 481, 77 L. ed. 929, 85 A. L. R. 699 (1989).

[25] 12 Idaho 360, 85 Pac. 1094.

[26] 1 Dodd and Baker, *supra*, p. 5, note 4.

[27] Bagchi, *Principles of the Law of Corporations*, 1928, pp. 31-34.

[28] The growth of American corporate enterprise is now ascribed to individual liberty. Wright and Baughman, *op. cit.*, note 13, p. 73.

[29] The Code was ordered published in Spain on August 22, 1885.

law, we should do well to turn to the law of corporations. We shall find here numerous examples of exceeding interest. Some of them, in the focus of present enlightened thinking, are gone or nearly so, but others still remain to remind us of the background of their origin. The limited duration of corporate life, to which we have already referred, the prohibition against a corporation having more than one purpose, or against investing in stocks of other corporations,[29a] the entire body of doctrine on ultra vires, the rule that a corporation may not enter into a contract of partnership with another corporation or with individuals, the doctrine that a corporation may not subscribe to shares of another corporation, the niggardliness with which the law vests the corporation with powers, and the strictness with which courts construe this grant, all these rest on no firmer foundations than fear and prejudice. Indeed, we shall find the rules most often justified by the convenient formula that a corporation is a creature of the law and possesses no powers other than those expressly or impliedly granted to it, but the discerning investigator will discover that the motivation is essentially fear and prejudice. Here is a field of study where the jurist can well say that concept formulations are deceitful and that the public good, nebulous though it be, is the better guide. John Dewey, in urging that we bear in mind the policies that lie behind the "fiction" and "realist" theories of corporate personality, has made this sufficiently clear.[30] If then we are at all times aware that, to quote William James,[30a] "our fundamental ways of thinking about things are discoveries of exceedingly remote ancestors, which have been able to preserve themselves throughout the experience of all subsequent time," we shall be set free to innovate as we will.

When the Philippine Commission, therefore, sought in 1906 to enforce in this country a codified American corporation law, it transplanted a system fresh from the battle of prejudice and consequently stunted. Moreover, the system was one designed not for the present state of economic progress or needs. Important changes have in recent years been written into American laws on corporations. Revisions in corporate law have been accomplished in a number of states during the last two decades, especially fol-

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[29a] "Throughout the country, the growing importance and power of corporations intensified the fear of them, which dated from their inception. Some states, in an effort to crush this power, placed prohibitions upon stock ownership, cutting off, as it were, some of the tentacles of this grasping creature, the corporation." Compton, "Early History of Stock Ownership by Corporations," 9 *George Washington Law Review*, 125, 132.

[30] "Discussions and concepts may have been in form intellectual, using a full arsenal of dialectical weapons, they have been in fact, where they have any importance, 'rationalizations' of the positions and claims of some party to a struggle. It is this fact which gives such extraordinary interest to the history of doctrines of juridical personality. Add to this fact that the intellectual and scientific history of western Europe is reflected in the changing fortunes of the meanings of 'person' and 'personality,' a history which has both affected and been affected by the social struggles, and the interest and complexity of the doctrines about juridical personality are sufficiently obvious." "The Historic Background of Corporate Personality," 35 *Yale Law Journal*, 655, 665.

[30a] *Pragmatism*, 1931, p. 170.

lowing the drafting of the Uniform Business Corporation Act by the American Bar Association in 1928.[31] Even Great Britain, which had a general revision only in 1929, enacted a new Company Law in 1947, supplementing the old. Corporate law "can never reach a stage of 'finality'" and "is in need of constant revision."[31a] The London *Times*[32] pointed out that "these changes have in the past demanded recasting of the law not less than about once in fifteen years." While other branches of the law may be left undisturbed and progress left dependent upon judges, corporate law is taken out from the range of the common law.[33] With the exception of a few amendments, which are a mere patchwork not effecting substantial changes, we have left our Corporation Law untouched for more than four decades now. A general revision is long overdue. Without liberal corporation statutes, it is said, the United States would have taken another century to reach its present stage of development.[34] California's unprecedented economic development is cited as a shining example of what a modern corporation law may accomplish.[35] From the old conception of the incorporator being the exception rather than the rule, modern laws make him the rule and not the exception.[36] Facilitating organization, much to be desired under our law, is a keynote of modern legislation on the subject.

In the following pages, we shall point out features of our law which need revision.

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[31] "The year (1947) saw 44 legislatures in session. Well over a thousand bills affecting the corporation laws of the various states were introduced; several hundred survived to repeal, change or add to the existing law. This emphasized anew the expanding, everchanging character of modern corporation law. The new acts ranged from minor technical amendments to complete recodification." *Prentice-Hall Corporation Service*, December 10, 1947, Report Bulletin, No. 7, p. 1. Ohio revised its law in 1927 and again in 1939; Louisiana, in 1928; Idaho, in 1929; Tennessee, in 1929; California, in 1931 and again in 1947; Illinois, in 1933; Minnesota, in 1933; Pennsylvania in 1933; Washington, in 1934; Nebraska, in 1941; Missouri, in 1943; Kentucky, in 1946; and Oklahoma, in 1947. See also Modern Corporation Act prepared by George S. Hills in 1935 in 48 *Harvard Law Review*, 1334. The Section of Corporation, Banking and Mercantile Law of the American Bar Association presented a Model for State Business Corporation Acts in 1946, which is, however, said to be a mere rash-over of the Illinois law.

[31a] Freund, "Company Law Reform," 9 *Modern Law Review*, 235.

[32] July 18, 1945.

[33] Belsheim, "The Need For Revising the Texas Corporation Statutes," 27 *Texas Law Review*, 657. "Court-made law is too uncertain, too slow, too unwieldy, too expensive. Judicial precedents are lacking; customs and unwritten law are scant and uncrystallized. Ancient utterances of Bracton, Littleton, Coke, and Blackstone are of little value as a guide in working satisfactory judicial solutions of modern business problems. Statutes have become the prime medium of development." Wright and Baughman, *op cit.*, note 18, p. 98.

[34] Wright and Baughman, *supra*, p. 98.

[35] *Ibid.*, pp. 124-125.

[36] Sterling, *op cit.*, note 18, p. 451. "* * * it is probably more important today to devise safeguards for the millions of individuals whose savings are invested in corporate securities than to protect general creditors, a class now mainly composed of business corporations which have greater ability to look out for themselves than the average investor has." Dodd, "Statutory Developments in Business Corporation Law," 50 *Harvard Law Review*, 27, 58.

Duration of Corporate Life—

Our law limits the life of a corporation to a period "not exceeding fifty years except as *hereinafter provided.*"[37] As thereafter provided, every "corporation whose charter expires by its own limitation or is annulled by forfeiture or otherwise, or whose corporate existence for other purposes is terminated in any other manner, shall nevertheless be continued as a body corporate for three years after the time when it would have been so dissolved, for the purpose of prosecuting and defending suits by or against it and of enabling it gradually to settle and close its affairs, to dispose of and convey its property and to divide its capital stock, but not for the purpose of continuing the business for which it was established."[38] And while power is granted to amend the articles of incorporation in some particulars, "The life of (the) corporation shall not be extended by said amendment beyond the time fixed in the original articles. . ."[39] As our law now stands, only religious corporations[40] and colleges and institutions of learning[41] may enjoy perpetual existence, and these by implication rather than by express authorization.[42]

We seem to have taken the fifty-year limit from the old law of California.[43] But California recently made it possible to establish perpetual business corporations.[44] Idaho, which formerly fixed the maximum duration for the same time, now allows perpetual existence to its corporations.[45] Mississippi,[46] Oklahoma,[47] Texas,[48] and Wyoming,[49] all providing for initial duration of fifty years, expressly empower their corporations to renew or extend corporate life by means of simple procedures.

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[37] Sec. 6, Act No. 1459. Italics supplied. By constitutional provision, public utility corporations are limited to fifty years. Art. XIII, sec. 8, Constitution of the Philippines.

[38] Sec. 77, Act No. 1459.

[39] Sec. 18, *Ibid.* Prior to 1908, in California, no extension of the period fixed by law was allowed. Boca Mill Co. v. Curry, 154 Cal. 326. This shows the similarity between our law and the old law of California and bears out our statement that our law on this point was patterned after that of California.

[40] Secs. 154 et seq., *Ibid.*

[41] Secs. 165, et seq., *Ibid.*

[42] North Dakota (Sec. 10-1006, Revised Statutes, 1943), Michigan (Sec. 450.12, Public Acts, 1931—No. 327), and Oklahoma (Sec. 1.14, 18 Oklahoma, L. 1947, H. B. 20) all approve perpetual duration for eleemosynary institutions, while denying perpetual existence to business corporations.

[43] Sec. 290(4), Civil Code of California. Hawaii (Sec. 8314, ch. 155, tit. 155, Revised Laws), Mississippi (Sec. 5310, ch. 100, Mississippi Code, 1942), Oklahoma (Sec. 14, L. 1949, H. B. 493), Texas (Art. 1320, tit. 32, Revised Civil Statutes, 1925) and Wyoming (Sec. 44-101, Wyoming Compiled Statutes, 1945) still limit corporate duration to a like period.

[44] See Art. XII, sec. 7 of the California Constitution as amended, effective 1940. Ballantine, Sterling and Buhler, *California Corporation Laws*, 1949, p. 8. Sec. 308, Part 2, ch. 1, General Corporation Law, expressly requires perpetual existence.

[45] Sec. 30-114, tit. 30, Idaho Code.

[46] Sec. 5323, ch. 100, Mississippi Code, 1942.

[47] Sec. 14, *op. cit.* note 43.

[48] Art. 1315, tit. 32, Revised Civil Statutes, 1925.

[49] Sec. 44-102, Compiled Statutes, 1945.

North Dakota limits business corporations to a life tenure of twenty years, with the right of renewal for a like period, and grants perpetual existence to non-profit corporations.[50] Arizona fixes the term at twenty-five years but allows successive renewals for a like period within five years *after the expiration of corporate life.*[51] Michigan fixes a period of thirty years for all corporations, except those organized for municipal, railroad, insurance, canal or cemetery purposes, or corporations organized without any capital stock for religious, benevolent, social or fraternal purposes, all of which may enjoy perpetual existence; but it allows successive renewals for a like term.[52] Georgia provides for thirty-five years, allowing successive renewals.[53] Montana fixes a limit of forty years, with the right of renewal, provided the original period and the extension do not exceed forty years and sixty days.[54] Kansas, which originally fixed a period of fifty years, now extends it to one hundred, with the right, presumably, of successive renewals.[55] New Mexico provides for one hundred years but apparently recognizes successive renewals within five years *after the expiration of corporate existence.*[56] Utah, perhaps the most curious, fixes the limit at not less than three nor more than one hundred years.[57] Massachusetts limits corporations formed for the purpose of acquiring, holding, managing, improving, leasing, buying and selling real estate, except those formed for the purpose of owning forest lands, to a term not exceeding fifty years; all other corporations may enjoy perpetual existence, if they so desire.[58] Louisiana fixes no time limit, but prohibits, by constitutional provision, perpetual existence.[59]

It will be seen from above review that, with the exceptions of Hawaii,[60] North Dakota, and Montana, the Philippines has the strictest provision on the duration of corporate life.

It has been said that corporations from their inception down through the ages have been associated with perpetual existence. Unless expressly limited in their charters, they enjoyed perpetual succession.[61] The concentration of lands in these perpetual bodies, however, resulted in the enactment of mortmain legislation in England. Present day legislation and constitutional inhibitions against perpetual existence are largely to be explained in relation to mort-

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[50] Secs. 10-0106 and 10-0214, Revised Statutes, 1943. The law in terms does not clearly authorize successive renewals.

[51] Sec. 53-304, Code Annotated, 1939, ch. 53.

[52] Art. XII, sec. 3, Constitution; Secs. 450.12, 450.64, 450.60, General Corporation Law, Public Acts, 1931—No. 327.

[53] Secs. 22-1802(e) and 22-1827(a), Georgia Code, 1933.

[54] Secs. 5905 and 5926, Revised Codes, 1935.

[55] Secs. 17-2802, art. 28, and 17-4301, art. 48, General Statutes, 1939 Supp.

[56] Secs. 54-208 and 54-222, Statutes Annotated, 1941.

[57] Secs. 18-2-5, tit. 18, Code Annotated, 1943.

[58] Secs. 4(a) and 7, ch. 156, General Laws, Tercentenary edition.

[59] Art. XIII, sec. 7, Constitution; secs. 1082, I, (b) and 1092(b), General Statutes, 1939.

[60] Sec. 8814, ch. 155, tit. 155, Revised Laws. In respect to stock corporations, the law allows extension, but the original period and the extension should not exceed fifty years.

[61] Wright and Baughman, *op cit.*, note 13, 80. This is the rule of the common law. See note 110, *infra*.

main statutes.[62] Mortmain means dead hand or *manus mortua* in French and *morte meyn* in German. The term originally referred to the Catholic Church, a vast organization which could acquire lands but could not dispose of them. This inability of disposal originated with Pope Symmachus [63] and earned for the Church the term *manus mortua*. Later development saw the shifting of the use of the term from the Church itself to the lands conveyed to it. Throughout Europe, both during medieval and modern times, laws were enacted to restrict church ownership of landed property. These laws were inspired by the struggle for power between Church and State, and more particularly because lands conveyed to the Church were permanently withdrawn from lay society and resulted, as one of the consequences, in depriving the State of taxes. The first mortmain enactment in England was contained in the reissue of Magna Charta by Henry III in 1217, directed primarily against gifts in fee simple to ecclesiastical corporations aggregate. This was followed in 1279 by the *De viris religiosis* of Edward I, extending the prohibition to gifts, leases, and sales to ecclesiastical corporations aggregate or sole, without license of the lords. This was later extended to cover lay corporate bodies by a statute of Richard II.[64] The primary objective of these laws was to prevent corporations from depriving the feudal lords of landed property. They were never intended to restrict perpetual existence of lay and ecclesiastical bodies.[65] Corporations in England to this day enjoy perpetual life.

Although in the United States today mortmain laws like those of England may still be found, the general revulsion against perpetuities resulted in prohibitions against perpetual duration of corporations. Oklahoma is an example which furnishes the clue of the general attitude. Article II, section 32 of the Constitution of this State says that "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed..." The Court of Appeals of the State said of this provision: "We do not doubt that the word 'perpetuities'... was not intended to mean or be equivalent to perpetual franchises, but was intended to limit the power to pass titles that would vest *in futuro*." [66] This interpretation was historically correct in view of the foregoing review of mortmain legislation. The Supreme Court of the State held, however, that the provision prohibited perpetual franchises and included in this class franchises of indefinite duration though terminable at the pleasure of the legislature.[67] The Supreme Court of the United States, guided by the opinion of the State Supreme

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[62] Brandeis, J. in Ligget Co. et al. v. Lee et al., *supra*, note 24.

[63] 498-514, A.D.

[64] For other mortmain laws in England, see Mitcheson, "Codification of the Laws of Mortmain," 5 *Law Quarterly Review*, 387.

[65] See 11 *Encyclopedia of the Social Sciences*, pp. 40-49; 15 *Encyclopedia Britannica*, p. 881; Perin v. Carey, 65 U. S. (24 How.) 465, 495. Subsequent Mortmain enactments in England were based on social and economic reasons.

[66] Quoted in Hawks v. Hmaill, 288 U. S. 52, 55.

[67] Okmulgee v. Okmulgee Gas Co., 140 Okla. 88, 282 Pac. 640; In re Okmulgee Gas Co., 141 Okla. 98, 284 Pac. 70; In re Oklahoma Power Co., 141 Okla. 100, 284 Pac. 12.

Court, construed the provision as prohibiting perpetual franchises.[68] This idea of "perpetuities" is written into the law of the various jurisdictions we have reviewed above and finds no sanction in history except from the general prejudice and fear pervading corporate law in its evolution. The only historical tradition that remains is the recognition of perpetual existence of religious, benevolent, and charitable corporations.

It has also been suggested that the reaction against the Dartmouth College case [69] had much to do with influencing the policy against perpetual franchises.[70] The holding that the Royal Charter granted by King George III in 1769 to the College was inviolable half a century later gave much apprehension should the same privilege be extended to purely business corporations.

It is now, however, generally recognized that constitutional and statutory provisions subjecting franchises to legislative authority are sufficient guarantees against monopolies or corporate abuses. Such provisions are found in our law.[71] The inconvenience of new incorporation or extension of corporate life and the many legal problems raised as to corporate status after the termination of the duration of corporate existence have resulted in the grant of perpetual existence.[72] The objectives of mortmain laws are accomplished by statutory provisions limiting the size of landholdings and the duration of their possession.[73] It has, moreover, been recognized that renewal of corporate life opens the door to fraud. Minority shareholders may block renewal with the intention of acquiring the corporate assets at a very much reduced price. So strongly did Professor Ballantine feel against limited duration of corporate life that, in a letter to the draftsman of the Oklahoma Act, he expressed himself thus: "Why should you permit the term of duration to be limited in the articles of incorporation? This is bad and dangerous practice and not allowed under the California Act." [74]

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[68] Hawks v. Hamill, *supra*.

[69] Dartmouth College v. Woodward, 4 Wheat. 518 (1819). See also Horton, "The Dartmouth College Case," 6 *Lawyer*, 16. A similar and even earlier case is that of Wales v. Stetson, 2 Mass. 146 (1806).

[70] Wright and Baughman, *op cit.*, note 13, p. 81.

[71] "* * * any or all corporations created by virtue of this Act may be dissolved by legislative enactment." Sec. 76, Act 1459. "No franchise or right shall be granted to any individual, firm, or corporation, except under the condition that it shall be subject to amendment, alteration, or repeal by the National Assembly when the public interest so requires." (Art. XIII, sec. 8, Constitution of the Philippines.

[72] Townsend, *Ohio Corporation Law Practice Forms*, Perpetual Revised Edition, 1940, p. 17, sec. 14; Hurt, "Corporate Organization: A Revised Manual of Colorado Procedure," 20 *The Rocky Mountain Law Review*, 329, 341. The difficulties are pointed out in a Comment in 28 *California Law Review*, 195.

[73] See Guthmann and Dougall, *Corporate Financial Policy*, 1948, p. 35; Government of the Philippine Islands v. El Hogar Filipino, 50 Phil. 399, 411.

[74] Oklahoma did not heed the advice in the revision of 1947 nor in the amendment of 1949. Speaking of the California law before 1929, which limited corporate life to fifty years, Ballantine says: "At the day set the corporation fell dead automatically by the wayside, its affairs must be wound up and a new corporation would then have to be created if those concerned wished to continue the business. There was no sense or policy in such an arbitrary limitation." Ballantine on Corporations, 1946, p. 46.

Thirty-five American jurisdictions now permit perpetual corporate existence. They may be classified as follows: (a) Those in which the corporation endures perpetually, the incorporators not being allowed to fix a limit in the articles. Dissolution is consequently according to law or dependent upon the shareholders or members. (b) Those in which perpetual existence is presumed unless limited in the articles of incorporation, it not being necessary to fix the period. (c) Those requiring incorporators to fix a limit in the articles of incorporation, without expressly authorizing perpetual duration. (d) Those which require and empower incorporators to fix the time in the articles of incorporation, which may be limited or perpetual. (e) And those which do not provide at all in the law for corporate existence.

California belongs to the first class.[75] It seems that Ohio falls under the same classification.[76]

Alabama,[77] Colorado,[78] Connecticutt,[79] Delaware,[80] Idaho,[81] Illinois,[82] Indiana,[83] Maryland,[84] Massachusetts,[85] Missouri,[86] Nebraska,[87] Nevada,[88] New Hampshire.[89] New Jersey,[90] New York,[91] Rhode Island,[92] South Carolina,[93] South Dakota,[94] Tennessee,[95] Washington,[96] West Virginia,[97] Vermont,[98] and Virginia[99] belong to the second group.

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[75] Sec. 308, ch. 1, part 2, General Corporation Law. "There is no provision which gives authority to limit the life of the corporation to a definite number of years. The secretary of state will no doubt refuse to file articles which provide for a definite period of existence at the end of which the corporation must be wound up unless its existence is extended." Ballantine, Sterling and Buhler, *California Corporation Laws*, 1949, p. 56.

[76] Sec. 8623-7, General Corporation Act. The law attributes corporate existence from the filing of the articles and the corporation shall thereafter have perpetual succession.

[77] Sec. 70, tit. 10, General Corporation Law.

[78] Sec. 16, art. 1, ch. 41, Statutes Annotated.

[79] Sec. 5136, ch. 250, part 1, General Corporation Law.

[80] Sec. 2034, ch. 65, Revised Code.

[81] Sec. 30-114, tit. 30, Idaho Code.

[82] Sec. 5(a), Business Corporation Act.

[83] Sec. 25-202(b)(1), Burns Annotated Statutes, 1933.

[84] Secs. 8 and 128, art. 23, Annotated Code of the General Laws of Maryland, 1939.

[85] Sec. 4(a), ch. 156, General Laws of Massachusetts, Tercentenary Edition, 1932.

[86] Sec. 4(a), General and Business Corporation Act.

[87] Sec. 21-103, ch. 21 Revised Statutes, 1943.

[88] Sec. 1607, Compiled Laws, 1929.

[89] Sec. 4, I, ch. 274, tit. XXIV, Revised Laws, 1942.

[90] Sec. 14:2-3, ch. 2, Revised Statutes, 1937. The law requires the articles to contain the "period, if any, limited for the duration of the company." "Formerly the maximum period of duration was fifty years, but by the Revision of 1896 this limitation was stricken out and the existence, if not limited in the certificate of incorporation, is perpetual." Dill on Corporations, 1902, p. 28.

[91] Sec. 14, ch. 650, Laws of 1929.

[92] Secs. 5 and 7, tit. XV, General Laws, 1938.

[93] Sec. 7685, ch. 153, Code of Laws of South Carolina, 1942.

[94] Sec. 11.0104, tit. 11, South Dakota Code, 1939.

[95] Sec. 3714, ch. 5, tit. 9, Annotated Code, 1934.

[96] Sec. 3803-11, Remington's Revised Statutes, 1931.

[97] Sec. 3015, ch. 31, West Virginia Code, 1943.

[98] Sec. 5762, Vermont Statutes, Revision of 1947.

[99] Sec. 3777, General Corporation Law.

Florida falls under the third class with a legal provision requiring a statement in the articles of the "term for which (the corporation) is to exist." [100] A similar provision in the Illinois law of 1919 was construed in practice as allowing perpetual duration.[101] North Carolina [102] may also belong to the class. Its law, however, provides that when no limit is fixed in the articles, it shall be considered as for sixty-five years.

Arkansas,[103] the District of Columbia,[104] Iowa,[105] Kentucky,[106] Minnesota,[107] and Pennsylvania [108] belong to the fourth class.

Wisconsin, which neither prohibits nor expressly authorizes perpetual duration, belongs to the last group. Section 181.03, however, provides that "whenever the articles of organization shall provide a term to the duration of a corporation it shall cease to exist at the time so fixed." [109] On the authority of the common law as permitting perpetual existence, Maine likewise comes within this class.[110]

Puerto Rico, Alaska, and England all provide for perpetual corporate life. There exists no reason why we should not amend our law to conform to the general trend. There is, perhaps, no compelling reason at present to amend our law so as to provide for perpetual existence of business corporations. Since the Corporation Law was enacted in April, 1906, the term of existence of some of our business corporations may not end until some time in April, 1956. That this termination may be easily overlooked by management is too obvious to require comment. Beginning April, 1956, then, and the subsequent periods thereafter, our corporations should be vigilant lest the law announces their death without their knowing. They must be ready to reincorporate before their terms expire, since renewal is impossible under the statute. Is not this requirement altogether unreasonable? Consider, especially, the advantageous position which we give to foreign corporations doing business in our country and the unreasonableness of our law becomes clearer. Some or most of them do not even have to renew their existence or to reincorporate. We should at least put corporations formed under our law on an equal basis with foreign ones.

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[100] Sec. 611.02(4), ch. 611, General Corporation Law.

[101] The Chicago Bar Association, *Illinois Business Corporation Act Annotated*, 1934, pp. 16-17.

[102] Secs. 55-2 and 55-26, ch. 55, North Carolina Code, 1943.

[103] Sec. 64-101, ch. 1, tit. 64, General Corporation Law.

[104] Sec. 29-202, tit. 29, District of Columbia Code, 1940.

[105] Sec. 491.24, tit. XIX, Iowa Code, 1946.

[106] Sec. 271.035, ch. 271, Revised Statutes, 1948.

[107] Sec. 301.04, ch. 300, Business Corporation Act, 1933.

[108] Sec. 204, Business Corporation Law of Pennsylvania, Act No. 106, Law of 1933.

[109] Ch. 180, Wisconsin Statutes, 1933. "It is generally concluded by practitioners that a Wisconsin corporation may have perpetual existence." Since the provision of the law is far from clear as to preclude doubt, it is recommended that an amendment be enacted patterned after the law of other states. Levin, "Blind Spots in the Present Wisconsin General Corporation Statutes," 1939 *Wisconsin Law Review*, 173, 174-175.

[110] See pamphlet on Business Corporations issued by the office of the secretary of state, Augusta, Maine.

Subscriptions and payment as conditions precedent to incorporation or doing business—

Incorporators of stock corporations are, by statute, required to state in the articles of incorporation the amount of capital stock and the number of shares, with or without par value, representing it.[111] If it is sought to issue no-par shares, the number of such stocks, together with the number subscribed by each subscriber and the amount paid therefor, shall likewise be stated.[112] Appended to the articles is an affidavit of the treasurer, elected by the subscribers named in the articles, certifying "that at least twenty per centum of the entire number of authorized shares of capital stock has been subscribed and at least twenty-five per centum of the subscription has been actually paid to him" in cash or in property "for the benefit and to the credit of the corporation".[113] The treasurer is thus constituted a trustee for the corporation to be formed. To secure compliance with the subscription and payment requirements, the Securities and Exchange Commissioner is enjoined not to file the articles until satisfaction of the law is shown.[114] Corporate existence commences upon the filing of the articles with the officer mentioned and the issuance by him of a certificate "setting forth that such articles of incorporation have been duly filed in accordance with law".[115] It will thus be seen that subscription and payment are conditions precedent to incorporation. And although the requirements have been met and incorporation is completed, there are authorities in the United States which hold that the corporation may not do business until after the entire capital stock has been subscribed, unless all the present shareholders unanimously give their consent or authority is expressly conferred in the articles of incorporation.[116] The general practice in the Philippines is to the contrary although the threat of a suit by a shareholder to enjoin the transaction of business is admittedly a potent one.

The percentage requirements of subscription and payment likewise appear when a corporation increases its capital stock. A certificate of increase must be filed with the Securities and Exchange Commissioner, who must refuse to file the same "unless accompanied by the sworn statement of the treasurer of the corporation lawfully holding office at the time of the filing of the certificate, showing that at least twenty per centum of such increased capital

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[111] Sec. 6(7), Act No. 1459, as modified by Act No. 3518 and C. A. No. 287.

[112] Sec. 6(8), *Ibid.*

[113] Secs. 7, as amended by Act No. 1834 and Act No. 3518, and 9, as amended by Act No. 3518 and C. A. No. 287.

[114] Sec. 9, *supra.*

[115] Sec. 11, Act No. 1459, as amended by Act No. 2728 and C. A. No. 287.

[116] 1 Machen, *Modern Law of Corporations*, 1908, sec. 177. English practice is said to be to the contrary. "This doctrine is indeed the basis of the all but universal American rule prohibiting any calls upon shareholders before the authorized capital is fully taken. This American rule, requiring that all the shares be subscribed before the company commences business, is not affected by a statutory provision authorizing the company to commence business as soon as the incorporation paper is filed; for such a provision is construed to mean that the company may begin business if otherwise qualified."

stock has been subscribed and that at least twenty-five per centum of the amount subscribed has been either paid" in cash or property.[117] Until the Securities and Exchange Commissioner files the certificate of increase the capital stock stands as originally fixed in the articles.

The first observation that attracts attention is the distinction between the subscription requirement for a corporation coming into existence and that relating to a corporation already established and merely increasing its capital stock. For a corporation to be organized, the required subscription is twenty per centum of the "entire number of authorized shares of capital stock." [117a] In the case of an increase of capital, the required subscription is twenty per centum of "such increased capital stock." [118] The bases of the computation are not the same, in the one case, the shares, and in the other, the increased capital stock. Before the enactment of Act No. 3518, in 1928, the percentage of subscription, as a condition precedent to incorporation, was based on the amount of the authorized capital stock. Act No. 1459, as originally enacted, required subscription of "twenty per centum of the entire capital stock." [118a] Act No. 1834 [119] preserved the requirement, the only change introduced by it being to authorize payment of subscription in money or property.[119a] Act No. 3518, however, changed the requirement to "twenty per centum of the entire number of authorized shares of capital stock." [120] Commonwealth Act No. 287 preserved this last provision. Section 17 of Act No. 1459, as originally enacted, concerning the increase of capital stock, was silent on the subscription requirement. Obviously, the law as originally enacted required no subscription to the increased capital stock. Act No. 3518,[120a] amending section 17 of the original law, made no mention of subscription requirement to the increased capital stock. Commonwealth Act No. 287, for the first time, imposed the requirement of subscription to the extent at least of "twenty per centum of (the) increased capital stock."

It has been suggested that in former days the subscription list was an important feature of incorporation to determine in advance how much financial support the corporation to be formed can muster. This would also serve to commit the subscribers to contribute what they bound themselves to give.[121] Although this system is not required by our law, the subscription requirement in the articles of incorporation closely resembles it. Perhaps, the real reason, as advanced by numerous writers on the subject, is for the purpose of protecting the future creditors of the emerging corporation. It is likely, as indeed it is authorized in many jurisdictions, for a corporation, without any of its stocks being subscribed and paid,

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117 Sec. 17, Act No. 1459, as amended by Act No. 3518 and C.A. No. 287.
117a Secs. 7 and 9, *ibid.*
118 Sec. 17, *ibid.*
118a Secs. 7 and 9.
119 Secs. 1 and 2.
119a Act No. 1459 originally required payment only in money.
120 Secs. 4 and 6.
120a Sec. 10.
121 Conyngton, Bennett and Pinkerton, *Corporation Procedure*, 1922, p. 33.

to transact business and incur indebtedness. The creditors, in the absence of fraud on the part of the directors and officers of the corporation, would then be looking for payment to a corporation devoid of funds. The present requirements of our law are an attempt to solve this problem.

The question may then be asked how well our law meets the two purposes set forth in the preceding paragraph. The requirements of subscription to twenty per centum of the "entire number of authorized shares of capital stock" and payment of twenty-five per centum of the subscription may fail to meet either the objective of raising enough working capital or that of protecting creditors. Since the shares may be so classified as to have varying prices,[121a] and the law does not require proportional subscription to all classes, a million-peso corporation may be floated with less than one hundred pesos paid in capital.[122] The rule, referred to above, requiring subscription to the entire capital stock before commencing business, apart from not being our general practice, is unlikely to be raised: and if raised, unduly restricts corporate activity. Since a new corporation has no past history to commend it to public support, subscriptions or sales of stock may be expected to be unpopular. It is, therefore, clear that the requirement of our law, prior to the enactment of Act No. 3518, was better fitted to meet the objectives above set forth, though restrictive of easy incorporation. It may, of course, be said, in respect at least to the protection of creditors, that the articles of incorporation, being recorded in the office of the Securities and Exchange Commissioner, should enable creditors to make the necessary investigation before extending credit. This, however, is much to be desired for it does not accord with popular practice. The required publication of assets and liabilities once in a newspaper of general circulation in the domicile of the corporation or in the City of Manila is, perhaps, more ceremonial than effectual.[123] If interested parties do not miss the item in the newspaper that would be well. But, perhaps, no corporation will dare make its initial introduction to the public with a few pesos or centavos of paid-in capital and with a sizeable deficit.

Again, supposing that the shares are so classified and the subscriptions proportionally distributed as to effect a compliance with even the requirements of the law prior to 1928, the fact of a fair amount being required as initial paid-in capital restricts the capital structure of the new corporation. The incorporators are likely to fix a conservative capitalization and thus restrict future financing

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121a Sec. 5, Act No. 1459, as amended by Act 3518.

122 See Fisher, *The Philippine Law of Stock Corporations*, 1929, p. 27; and Guevara, *The Philippine Corporation Law*, 1940, pp. 29-30. This latter gives an instance of a corporation with a capital stock of ₱90,005 and a paid-in capital of only ₱.50. This is not possible, however, in the case of a corporation with only no-par value shares. Shares without par value cannot be issued for a consideration less than ₱5.00 per share. Sec. 5, Act. No. 1459, as amended by Act Act No. 3518.

123 Sec. 9, Act No. 1459, as amended by Act No. 3518 and C. A. No. 287.

accomplished by the mere issuance of stocks to the limit originally authorized by the articles.[124] The only remedy in case of need for refinancing, supposing that bond issue is not availed of, is to have the articles amended so as to increase the capital stock. The procedure, however, prescribed by our law for increasing the capital stock by amendment is cumbersome for it is taken out of the general procedure prescribed for other amendments. While, under Section 18 of Act No. 1459, ordinary amendments may be effected by a majority vote of the board of directors or trustees and the vote or *written assent* of two-thirds of the members in the case of a non-stock corporation, or, in the case of a stock corporation, the vote or *written assent* of the stockholders representing at least two-thirds of the subscribed capital stock, an amendment to increase the capital stock must always be effected through a *meeting* regularly called for the purpose, wherein two-thirds of the *entire corporate capital stock subscribed* shall favor the increase.[125] And the capital stock is not considered increased until the formalities of drawing up a certificate and having it filed in the office of the Securities and Exchange Commissioner are complied with. And as we have seen in the beginning of this discussion, subscription and payment at fixed rates must be shown as conditions precedent to filing.[126] These, again, are limitations of corporate financing which may spell death of a corporation in desperate need of working capital. Under the status of our law, therefore, a corporation may not increase its capital stock without being sure beforehand of a definite source of a portion of the increased capital so as to meet the requirements of filing. The legal trick of classification of shares and thus circumventing the substantial amount required by the law may not be availed of, because, in increasing the capital stock, the increased capital stock, and not the number of shares, is taken as the basis for the twenty per centum requirement. Since the procedure of increasing the capital stock is both cumbersome and onerous, the expedient most likely to be adopted is that of fixing the initial capital in the articles of incorporation to the highest convenient amount and then classifying the shares so as to be able to float a corporation with huge capitalization but with nominal paid-in capital.[127] This practice then brings us back to the objections we have already raised at the beginning. The protection sought to be accorded by our law to creditors is illusory. And the obstacles put on the way of easy incorporations and smooth functioning of corporations already established best comport with the attitude of early days when corporations were feared as having no souls to be damned nor bodies to be kicked.[127a] I should say that, in the Philippines, where we have no traditions of apprehension for corporate organizations, where our experience with them is

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[124] II Conyngton, *Financing An Enterprise*, 1923, pp. 300-301.

[125] Sec. 17, Act No. 1459, as amended by Act No. 3518 and C. A. No. 287. It is said that even non-voting shares, a debatable subject, may vote. Fisher, supra, pp. 63-64; Guevara, supra, p. 68.

[126] Sec. 17, *supra*.

[127] Supposing that fees collectible on the basis of the amount of the capital stock will not hamper such action. Sec. 8, Act. 1459, as amended by Act 3518 and C. A. 287.

[127a] Attributed to Wilberforce, *Life of Thurlow*, Vol. III Appendix.

very short, and where we need them with great urgency, our legal provisions on the point discussed are not so much obsolete as ill conceived. Inconveniences are met whichever way one turns.

Above considerations do not cover the prevalent practice of borrowing money from close friends, presenting the same to the Securities and Exchange Commissioner, and then returning it as soon as incorporation is completed. There would here be a formal, though empty, compliance with the law. It is no comfort to say that the corporation must be liable, if execution cannot be satisfied.[128] Seeking to hold responsible the officers and directors, apart from being controversial,[129] is expensive. The only remedy would be to hold responsible the subscriptions appearing on the articles and which are unpaid, which, again, may be a hopeless gamble. But is not this practice what is actually encouraged by our law?

It will be observed that the problem posed before us involves a reconciliation between a desirable policy of facilitating incorporation and allowing utmost freedom of the corporation in determining its capital structure on the one hand and that of an equally commendable policy of protecting creditors on the other. A careful examination of American laws on the subject gives us the following five types of solutions: (a) By requiring no subscription or payment at all either prior to incorporation or doing business; (b) By requiring no subscription before incorporation but requiring a paid-in capital prior to doing business; (c) By requiring subscription before incorporation but requiring a paid-in capital only for doing business; (d) By requiring subscription for incorporation but not requiring a paid-in capital for doing business; and (e) By requiring both subcription and payment before incorporation. We shall discuss these solutions in the order given.

Under the first group may be mentioned Arizona, California, Colorado, Iowa, Maryland, Nevada, New Hampshire, North Dakota, Virginia, and Wyoming. These States do not even require the incorporators to be subscribers to the capital stock. It will be observed that the only policy satisfied by these jurisdictions is that of facilitating incorporation.[130] We may dismiss this solution as altogether one-sided.

Delaware, Connecticutt, Georgia, Kansas, Minnesota, Mississippi, Nebraska, Ohio, Oregon, South Dakota, Tennessee, Vermont,

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[128] "... a de jure corporation cannot be formed without the required payments being made. It is generally held, however, that there may be a de facto corporation although the capital stock, or a certain percentage thereof, was not paid in, as required by the charter or a statute," although there are decisions to the contrary. Fletcher, *Cyclopedia of Corporations*, Permanent edition, sec. 1591.

[129] See National Bank of Salem v. Almy and others, 117 Mass. 476; Chieppo v. Chieppo, 88 Conn. 233; and Seeberger v. McCormick, 178 Ill. 404.

[130] See note 36, *supra*. California, at the instance of Professor Ballantine, even did away with the certificate of incorporation, issued usually by the secretary of state, as a useless document. This is, however, justified in Illinois as preventing formation of de facto corporations. The Chicago Bar Association, *Illinois Business Corporation Act Annotated*, vol. 1, 2d ed., pp. 228-230.

and Wisconsin belong to the second group. Delaware,[131] Connecticutt,[132] Kansas,[133] Minnesota,[134] Oregon,[135] and Tennessee [136] all require a paid-in capital of $1000 before a corporation may commence to do business. Ohio,[137] South Dakota,[138] Vermont,[139] and Wisconsin.[140] require a minimum paid-in capital of $500. Georgia [141] requires as low as $200. Mississippi [142] and Nebraska [143] both leave the amount dependent upon the provision of the articles of incorporation. It is limited that the fixing of the amount in the law, rather than allowing the incorporators to determine it, gives the creditors better protection, since the law, more than the mere registry, satisfies the ends of notice. It is easy to see that incorporation is facilitated, the capital structure of the corporation is not restricted, and the creditors are amply protected. As to how this requirement of paid-in capital is enforced, we shall discuss later on.

Arkansas, Florida, Illinois, Indiana, Kentucky, Louisiana Michigan, Massachusetts, Missouri, New Jersey, New Mexico, North Carolina, Pennsylvania, Washington, and West Virginia comprise the third group. Illinois,[144] Kentucky,[145] Louisiana,[146] Michigan,[147] New Jersey,[148] New Mexico,[149] and West Virginia [150] all require a paid-in capital of $1000 before a corporation may commence business. Florida,[151] Indiana,[152] Missouri,[153] and Washington,[154] require a paid-in capital of not less than $500 in order to do business. Arkansas alone sets a minimum of $300.[155] Massachusets,[156] North Carolina,[157] and Pennsylvania [158] leave the amount dependent upon the provisions of the articles of incorporation. Arkansas, Florida, Kentucky, Louisiana, Michigan, Missouri, New

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[131] Sec. 2037, No. 4, Revised Code, 1935.
[132] Sec. 5152(5), General Statutes of Connecticutt, Revision of 1949.
[133] Sec. 17-2802, G, General Statures, 1939 Supp.
[134] Sec. 301.04(6), Ch. 300, Session Laws of 1933.
[135] Sec. 77-228, Compiled Laws Annotated, 1940.
[136] Sec. 3714(5), Annotated Code, 1934.
[137] Sec. 8623-4, No. 5, Throckmorton's Annotated Code, 1930, and Baldwin's 1936 Certified Revision.
[138] Sec. 11.0401(8), South Dakota Code of 1939.
[139] Sec. 5802, Vermont Statutes, Revision of 1947.
[140] Sec. 180.02(1), Wisconsin Statutes, 1933.
[141] Sec. 22-1802(a), Georgia Code, 1933.
[142] Sec. 5310(8), Mississippi Code, 1942.
[143] Sec. 21-105(7), Revised Statutes, 1943.
[144] Sec. 47(n), Business Corporation Act.
[145] Sec. 271.085, Revised Statutes, 1948.
[146] Sec. 1088, General Statutes, 1939.
[147] Sec. 450.4,d(2), Public Acts, 1931—No. 327.
[148] Sec. 14:2-3,e, Revised Statutes, 1937.
[149] Sec. 54-208, No. 4, Statutes Annotated, 1941 Compilation, ch. 54.
[150] Sec. 3018, West Virginia Code of 1943, ch. 31.
[151] Sec. 612.03(4), General Corporation Law.
[152] Sec. 25-216(8), Burns Annotated Statutes, 1933.
[153] Sec. 50(d), General and Business Corporation Act.
[154] Sec. 3803-7, Remington's Revised Statutes, 1931, as amended and supplemented.
[155] Sec. 64-101(g), General Corporation Act.
[156] Sec. 10(c), General Laws, Tercentenary Edition, 1932.
[157] Sec. 55-2, No. 5, The North Carolina Code of 1943.
[158] Sec. 2852-204(8), Business Corporation Law—Act 106.

Jersey, New Mexico, North Carolina, Pennsylvania, Washington, and West Virginia all require subscription as condition precedent to incorporation only in the sense that the incorporators must subscribe to at least one share. But since the incorporators may be as few as three or even one, as in Michigan, the subscription is really very nominal. Only Indiana requires a subscription, as condition precedent to incorporation, of $1000 [159] although the paid-in capital in order to do business shall not be less than $500. Massachusetts leaves the amount of subscription dependent upon the articles. On the whole these jurisdictions, except Indiana, on account of the nominal subscription required for incorporation, may be considered as somewhat belonging to the preceding group just discussed.

To the fourth group belong Idaho, Montana, New York, and Rhode Island. Idaho, New York, and Rhode Island require incorporators to be subscribers so that these are the only subscriptions required for incorporation. Montana, although not requiring the incorporators to be subscribers, requires a statement in the articles of the amount of subscription to the capital stock.[160] The English Company Law of 1929 [161] puts England within this group. But for the nominal amount of subscription required for incorporation, all these jurisdictions may be considered as falling within the first group.

The fifth group includes Alabama, the District of Columbia, Hawaii, Maine, Oklahoma, South Carolina, Texas, and Utah. Alabama,[162] the District of Columbia,[163] Hawaii,[164] South Carolina,[165]

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[159] Secs. 25-214 and 25-215, *supra*.

[160] Sec. 5905, No. 7, Revised Codes, 1935, as amended.

[161] 19820 Geo. 5, C. 23, secs. 1(1) and 2(4) (b).

[162] Sec. 8, Code of Alabama, 1940, tit. 10, requires that a statement under oath be attached to the articles by the person "authorized by the incorporators to receive subscriptions to the capital stock, showing the amount of capital stock which has been paid-in and the amount of stock secured by contracts for stipulated labor or services or transfer of property, which amount so paid-in and secured shall be at least twenty per cent of the stock subscribed for, and in no case less than one thousand dollars..."

[163] Sec. 29-104, District of Columbia Code, 1940, provides: "The recorder of deeds shall not file or record any certificate or organization of any incorporation until it has been proved to his satisfaction that all the capital stock of said company has been subscribed for in good faith, and not less than ten per cent, of the par value of the stock has been actually paid in cash, and the money derived therefrom is then in the possession of the persons named as the first board of trustees." See also sec. 29-209.

[164] Sec. 8308, Revised Laws, 1945, tit. 21, provides: "In case the affidavit shall show that less than three-fourths of the authorized capital stock has been subscribed for, or shall show that less than ten per centum of the authorized capital stock has been paid in by the acquisition of cash or by the acquisition of property of a value equal to ten per centum of such authorized capital stock, then the corporation prior to its commencement of business in the Territory, shall file a supplemental affidavit showing that three-fourths of its authorized capital stock has been subscribed for, and showing also more than ten per centum of its authorized capital stock has been so paid in..."

[165] Sec. 7726, Code of Laws of South Carolina, 1942, provides: "(7) that not less than fifty per cent. of the proposed capital stock has been subscribed by bona fide subscribers; ... that the board of directors, trustees, or managers, have secured the payment of the subscription to the capital stock, either in whole or in such installments as it shall see fit: *Provided*, The said amount shall not be less than twenty per cent. of the amount subscribed by each stockholder..."

Texas,[166] and Utah [167] require subscriptions and payment to a degree as restrictive as our law. Maine, however, by requiring that the amount of paid-in capital be stated in the articles, without prescribing the amount, seems to be the most liberal.[168] Oklahoma comes next, prescribing that an amount not less than $500 be subscribed and paid-in before incorporation may be permitted.[169]

The second and third groups of statutes discussed above best meet our requirements. Subscription may not be required before incorporation provided a paid-in amount is imposed as a condition for doing business. A nominal subscription, required generally to be made by the incorporators, is of little worth. Incorporators are often dummies who go out of the picture by transferring their shares to the real owners as soon as incorporation is effected. The general tendency is to require a fixed amount as paid-in capital in order to do business, not as condition precedent for incorporation.[170] This satisfies all objectives and does not tie up capital before the corporation is ready to transact business. An illustrative type of legal provision is that recommended by the American Bar Association, which is as follows:

> "SECTION 7. *Minimum amount of paid-in capital.*— The amount of paid-in capital with which a corporation may begin business shall not be less than ($————) in cash or other property taken at a fair valuation.
>
> "SECTION 8. *Conditions precedent to beginning business. Penalty for violation of section*—
>
> "I. A corporation formed under this Act shall not incur any debts or begin the transaction of any business, except such as is incidental to its organization or to the

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[166] Art. 1308, Revised Civil Statutes, 1925, provides: "Before the charter of a private corporation created for profit can be filed by the Secretary of State, the full amount of its authorized capital stock must be in good faith subscribed by its stockholders and fifty per cent thereof paid in cash, or its equivalent in other property or labor done, the product of which shall be worth to the company the actual value at which it was taken or at which the property was received."

[167] Sec. 18-2-6, Code Annotated, 1943, requires an affidavit of three or more incorporators showing "that at least ten per cent of the capital stock subscribed by each stockholder and not less than ten per cent of the capital stock of the corporation has been paid in..." This requirement does not apply to non-stock corporations, in which case only five shares need be subscribed and paid in. Sec. 18-2-5(6).

[168] Sec. 10, Revised Statutes, 1944.

[169] Sec. 15(1), Business Corporation Act, 1947.

[170] Commending this feature, see Cowherd, "Missouri Modernizes Her Business Corporation Code," 12 *The University of Kansas City Law Review*, 89, 97-98; 1 The Chicago Bar Association, *Illinois Business Corporation Act Annotated*, 1947, p. 232; Luce and Heikkinen, "Corporation Legislation in Wisconsin," 31 *Marquette Law Review*, 202, 203-204; Levin, "Blind Spots in the Present Wisconsin General Corporation Statutes," 1939 *Wisconsin Law Review*, 173, 179-180; Small, "Business Organizations," 21 *Indiana Law Journal*, 255, 269-270; Bennett, "The Louisiana Business Corporation Act of 1928," 2 *Louisiana Law Review*, 597, 604-605; Bickel, "Ohio's New Corporation Law," 15 *Georgetown Law Journal*, 409, 412-413.

obtaining of subscriptions to or the payment for its shares, until:

"(b) the amount of capital with which it will begin business, as stated in the articles of incorporation, has been fully paid in; and

"(c) there has been filed in the office of the (Recorder of Deeds of the county) in which the corporation has its registered office an affidavit signed by at least a majority of the board of directors and stating that the amount of capital with which it will commence business, as stated in the articles, has been fully paid in.

"II. If a corporation has transacted any business in violation of this Section, the officers who participated therein and the directors, except those who dissented therefrom and caused their dissent to be filed at the time in the registered office of the corporation, or who, being absent, so filed their dissent upon learning of the action, shall be severally liable for the debts or liabilities of the corporation arising therefrom." [171]

Variations may be found in different statutes principally concerning the persons responsible and the extent of their responsibility for a violation of the rule prescribing a minimum paid-in capital before doing business. For instance, Wisconsin extends the responsibility not only to the signers of the articles and the subscribers for stock but also to the stockholders.[172] And while some laws limit the pecuniary liability to the amount that should have been paid in,[173] others provide for unlimited liability or to the full extent of the obligation incurred.[174]

Laws prescribing a minimum paid-in capital for doing business are interpreted as not affecting corporate existence in case of violation, although the State may demand dissolution of the corporation or that it be enjoined from transacting business. The liability imposed upon those responsible for incurring debts without previous compliance with the legal requirement springs from a paternalistic policy of the legislature towards creditors and is independent of fraud or misrepresentation or even reliance upon public records. There is nothing strange about this, however, for the "trust fund" doctrine, as applied to stocks not fully paid, is founded upon the same policy.[175]

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[171] Uniform Business Corporation Act, 1928.

[172] Sec. 180.06(4), Wisconsin Statutes, 1933. See also Luce and Heikkinen, *supra*

[173] Most statutes limit liability to officers and directors only. Minnesota (Sec. 301.13, *supra*), Kansas (Sec. 17-20806, *supra*), Vermont (Sec. 5802, *supra*), Georgia (Sec. 22-1872, *supra*), Washington (Sec. 3803-8, II, *supra*), Pennsylvania (Sec. 2852-208, *supra*), and Florida (Sec. 612.56, *supra*) so confine liability.

[174] Wisconsin (Sec. 180.06(4), *supra*), Kansas (Sec. 17-2806, *supra*), Vermont (Sec. 5802, *supra*), and Washington (Sec. 3803, II, *supra*) so provide.

[175] Velasco v. Poizat, 37 Phil. 802; Sawyer v. Hoag, 17 Wall. (84 U. S.) 610, 21 L. ed. 731; Hospes v. Northwestern Mfg. & Car Co., 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470; Gogebic Investment Company v. Iron Chief Mining Company, 78 Wis. 427. See Luce and Heikkinen, *supra*.