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Joseph M. Cormack  
*William & Mary Law School*

Frederick F. Barker

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THE MERCANTILE ACT:
A STUDY IN MEXICAN LEGAL APPROACH†
FREDERICK F. BARKER* AND JOSEPH M. CORMACK**

INTRODUCTION

In the Latin American republics and in most of the countries of Europe we find a commercial code distinct from the civil code. The first governs mercantile acts, the second civil acts. With the civilian, therefore, the distinction to be drawn between these two classes of activities is fundamental.

In Mexico, the severance of the law of commerce from the main body of private civil law is accentuated by constitutional provisions vesting in the central or federal authority the regulation of all commerce, in the broadest sense of the term. Consequently, a single federal Code of Commerce prevails throughout the Republic. It governs all mercantile activities, both inter- and intra-state. Non-mercantile acts, on the other hand, are governed by the corresponding state civil code, or by the Civil Code of the Federal District and Territories.*

The principal matters which are controlled by provisions of the respective civil code, to the exclusion of the Code of Commerce, are marriage, filiation and the family relations in general, professional services, real estate titles, gifts and inheritance. The more important matters falling within the scope of the mercantile code, to the substantial exclusion of the civil codes, are transportation by land and sea, drafts and bills of exchange, banking and bankruptcy. The character, as either mercantile or civil, of companies and of sales and other contracts not embraced in the above enumerations is determined by the nature of the act in question, as evidenced chiefly by whether the object of the parties is, or is not, pecuniary profit, in the technical sense to be explained later. An

†[This is the first of a series of articles on Mexican law by these authors. A second article, entitled “The Mexican Law of Business Organizations,” will appear in the March issue of the Review.—Ed.]

* [Member of the Los Angeles Bar; specializing in Mexican and international law.]

** [Professor of Law, University of Southern California.]

* A new civil code was promulgated Aug. 30, 1928, but did not go into effect until Oct. 1, 1932, some four years after promulgation. Its provisions govern civil acts in the Federal District and territories and are supplementary to all federal legislation. (Art. 1 of the new Civil Code.)
act may be civil in respect of one of the parties thereto and commercial in respect of the other. Agriculture and cattle-raising are deemed civil activities; whereas the mining and the petroleum industries, as a result of recent legislation, are now viewed by the law as mercantile. In general, not only the substantive law governing mercantile acts differs from that governing civil acts, but so also does the law of procedure, including the rules of evidence and of jurisdiction.

To the common law practitioner many of the above outlined principles of Mexican legislation will appear anomalous and difficult of application. They will be treated in greater detail in the latter part of this paper. In this country, the study of any legal topic involves the examination and analysis of a vast array of cases and an attempt to synthesize the material so obtained. But the Spanish-American jurist proceeds in an entirely different manner. His first concern is with the historical antecedents of his subject and the commentaries of leading jurists, both of his own country and continent and of Europe—principally the French, Spanish and Italian. In the light of this background, he examines the provisions of the existing and earlier codes of his own jurisdiction and then lays down his conclusions. Many legal treatises published in Mexico are absolutely devoid of case references. Even in the courts, the text of the law, interpreted in the higher tribunals in the light of the doctrines enunciated by national and foreign jurists, is the chief criterion of the court. Cases are cited sparingly, for reasons which will appear later. In this study we shall adopt the approach of the civilian, confining ourselves mainly, however, to the Mexican text-writers and to the provisions of the Mexican law.

HISTORY

THE ROMAN LAW

The leading Mexican commentators on the Code of Commerce devote much space to an examination of historical antecedents, going back to the Roman law and even to earlier legal systems. They hold with Montesquieu: "Il faut éclairer l'histoire par les lois, et les lois par l'histoire" (history must be elucidated by the laws, and the laws by history). The structure and underlying principles of modern civil law, as distinguished from the Anglo-Saxon common law, are traceable in great measure to the Roman legislation, as compiled by the Emperor Justinian in the sixth century. Howe, in his Studies in the Civil Law, finds the origin of the

1 An interesting account of the different methods of interpretive approach which have prevailed in Europe during recent centuries will be found, under the chapter on philosophy of law, in Borchard & Stumberg, Guide to the Law and Legal Literature of France, 1931, published by the Library of Congress. The methods are there classified (following Dean Pound) as the metaphysical or a priori method, the analytical method, the historical method and the comparative method—reference being made, also, to a rising and still formative school which may be styled the sociological school. In recent years the Mexican courts and some of the jurists have shown a marked tendency toward a sociological interpretation of the law, patterned on the ideals of the Mexican revolution of 1911 and subsequent years.

2 Quoted by Gustavus Schmidt in his Historical Introduction to the Civil Law of Spain and Mexico, New Orleans, 1951.

mercantile law of Rome in the Praetorian jurisdiction and particularly in the
*Jus Gentium* as administered by the *Praetor Peregrinus*. The rules of the
*Jus Civile* and of the *Jus Gentium* were harmonized in the later Roman juris-
prudence and embraced in a single codified system in the Justinian Pandects.
As a consequence of this incorporation of the general customs of merchants
into the local *Jus Civile*, the Roman jurisprudence became "a law available
for the world in general."

The strictly mercantile provisions of the Pandects are meager, however—
and this despite the commercial development which took place under the Roman
Empire. Manuel Cervantes, a prominent Mexican jurist and text-writer of the
present century, attributes this fact to the comprehensiveness and flexibility of
the Roman civil law:

"Rome had a great industry and a great commerce—without doubt the
most vast and the most active of her time; but, in spite of this, she
never felt the need for dividing her private law into civil and mercan-
tile . . . for the very simple reason that as new juridic relations arose,
they found a place easily in the domains of the civil law. So long as
Rome lived, her law could evolve, could be transformed and moulded
to the new conditions of actual life; could incorporate into itself the
new institutions which sprang up as the result of commercial progress;
and this vitality, this amplitude, this flexibility of the great body of the
Roman civil law, made a secession of the mercantile law completely
unnecessary."

Felipe de la Tena, who ranks among the foremost of the Mexican commen-
tators, adds a temperamental cause for the meager treatment of the commercial
law by the Roman codifiers:

"The proud rulers of the world always held in low esteem the pursuit
of commerce, which they abandoned to their slaves and conquered
peoples."

He quotes Cicero in support of this view:

"Commerce, if in a small way, should be regarded as sordid; if in a
large way, bringing in many things from all parts, it should, to that
extent, not be so villified."

Jacinto Pallares, who flourished in the closing decades of the last century,
was for some time director of the National School of Law of Mexico and is
generally revered as the greatest of all Mexican jurists and commentators, takes
the view that Rome was too militaristic to promote commerce in the spirit of

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4Howe, *Studies in the Civil Law*, 93, quoting Sohn.
5Here, as throughout this paper, the excerpts from the Mexican text-writers are, with
one exception, translated from the Spanish. An endeavor has been made to reproduce the
individual flavor of the author’s style—le style c’est l’homme. The references are by page
and not by section.
7Tena, *Derecho Mercantil Mexicano*, Morelia, Mexico, 1922, 14. (No subsequent
volumes have appeared.)
8Tena, *Derecho Mercantil Mexicano*, 14n.
universal altruism and, therefore, neglected the development of the mercantile law:

“Rome ... developed no protective system of commerce, no high plans in favor of traffic or industry ...; the temper of that conquering people, far from understanding the benefits of commerce, knew enough only to inspire the promulgation of the Flaminian (or Claudian) decree, which forbade patricians to engage in commerce, thereby laying the foundation for that species of infamy which weighed upon commerce in the customs of Rome, was voiced with approval by her leading orator, and is reproduced even in the latest [modern] codes, through the authority of tradition and the influence of the Roman law.”

The closing words of the excerpt merit reflection. Pallares strikes here the keynote of the difference in ethnical temper between the Latin and the Anglo-Saxon. We shall revert to this point presently. Further on in his historical sketch he continues in the same vein:

“This [the Roman] system of the amassing of wealth by taxation is sufficient alone to reveal how impossible it was to awaken among the Romans habits of mercantile enterprise and perseverance, of peaceable labor and foresight, of industrial economy and discipline; ... The little industry which still subsisted [under the later Roman Empire] was not the result of any wise laws, nor of governmental stimulus or protection, but of the prodigality, dissoluteness, and inordinate luxury of those opulent lords of the world.”

Whether or not we sympathize with Pallares' arraignment of Roman militarism, there can be no doubt that her conquests opened up avenues of commerce, just as did the crusades in the eleventh, twelfth and thirteenth centuries and, later, the Spanish invasions in Latin America and the British military expeditions in other parts of the world.

THE MIDDLE AGES

At the fall of the Roman Empire, the commercial life of Europe was arrested temporarily. Aside from the frequent devastating wars and the resultant poverty of the people, the feudal lords on land and the pirates on the seas paralyzed traffic. The times were not propitious to the development of a mercantile law.

Upon the resurgence of commerce, in the latter part of the Middle Ages, new conditions demanded new laws. Cervantes graphically describes the situation:

“When commerce revived and acquired momentum in the medieval Italian republics, in the south of France, in Catalonia, in Germany, not only was she without adequate laws for her regulation, but she had to

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91 Jacinto Pallares, Derecho Mercantil Mexicano, Mexico City, 1891, 44. (No subsequent volumes have been published.)
921 Jacinto Pallares, Derecho Mercantil Mexicano, 45-46.
10 Cervantes, Sociedades Mercantiles y Civiles, 10.
do battle against existing systems of law—the Roman, the German and the Canonical—which frequently opposed her purposes and shackled her aspirations. In effect, with Rome dead, Roman law could not be transformed, its evolution had ceased, it stood inert, petrified in the works of the jurisconsults, in the sentences of the judges, in the novels of the emperors; and in that condition, when the generations of the feudal times exhumed them, they could not then be utilized by commerce. . . . The Roman law was not only mute in the presence of the new and varied juridic relations created by the advance of navigation and of commerce, but often, not to say always, its rigid and inflexible texts were found to be in open opposition to the nature and tendencies of such relations."

THE MEDIEVAL GUILDS

It was at this period of history that the European guilds or corporations made their appearance. Cervantes' picturesque description continues:

"All men engaged in the same calling, in the same industry, in the same profession, grouped themselves into associations known as guilds, and each guild had its chief, its banner, its common treasury, its saint, and its own regulations. These regulations were at first merely usages, which rapidly became juridic customs, and in the end special laws of the community. The merchants also formed guilds, also joined together in large associations, and also aspired to have their own regulations and special laws, adequate to the exercise of the mercantile profession. And thus in fact it came about; but by reason of their wealth and power, they secured something more: the right to maintain an exclusive jurisdiction similar to the jurisdictions of the most privileged corporations, such as the church and the army. In a word, commerce obtained by these means not only a law of her own, distinct from the Roman, the local and the ecclesiastical, but at the same time the privilege of recourse to special judges (called consuls), appointed by the guild and vested with authority to hear and decide mercantile suits, to the exclusion of the municipal and feudal courts."

Concurrently with the development of the merchant guilds, bodies of mercantile law were formulated, more or less independently, in different parts of Europe. Among the more famous may be mentioned: the Rolls of Oleron, said to be the chief code of maritime law of the Middle Ages; the Consolato del Mare, treating almost exclusively of maritime law and claimed, by the Spaniards, to have originated at Barcelona, and, by the French, at Marseilles; the ordinances of the Hanseatic League, of the north German towns; the Laws of Wisby on the Baltic Sea; the Statutes of the cities of Amalfi, Pisa, Genoa and Venice, on the Italian coast. Of these, the civilians regard the statutes of the Italian corporations as the most fruitful source of modern commercial law. Bolaffio, the Italian jurist, writes:

"This statutory legislation [of the Italian guilds] governed the mercantile activities of Italy from the twelfth century down to the"
beginning of the nineteenth century, and from this source are derived, in a direct manner, the contents of the [mercantile] codes, in their essence uniform, which are operative in the different parts of the world.\footnote{14} There is much divergence of opinion among jurists in writing of the law merchant of the Middle Ages, but they appear to agree on several points of interest to us here. The statutes of the guilds marked the first appearance in Europe of an autonomous mercantile jurisprudence and are the original source of the greater portion of the modern law of commerce. They owe little directly to the Corpus Juris of Justinian. Their provisions, at least prior to the Italian Renaissance, relate almost exclusively to maritime law, were based on the customs of merchants, without legal sanction of any constituted political authority and were in the main concrete, empirical and of summary administration, with a minimum of formal or dilatory proceedings. Their application was restricted to the merchants themselves and largely to members of the individual guild or corporation which administered them.

**CODIFICATION OF THE MERCANTILE LAW**

The first true codifications of the mercantile law, as such, are to be found in the two Colbert Ordinances of Louis XIV. The first, issued in 1673 and known as the Code Savary, treats of commerce on land; the second, issued in 1681, of maritime commerce. These codes are the principal source of the Napoleonic Commercial Code of 1807, and so of modern mercantile codes. Since the French Revolution, the law merchant, in the Latin- and English-speaking countries at least, has ceased to be a class legislation and now governs all commercial activities, largely regardless of the persons involved. From being subjective in character, it has become objective.\footnote{15}

Outside the English-speaking nations, there are very few who do not have parallel mercantile and civil codes. Switzerland is one of the exceptions. Her federal Code of Obligations, enacted in 1911 and regarded by civilians as a notable achievement, draws no line of demarcation between civil and mercantile acts, but embraces in a single code all the forms of contract. With few exceptions, too, the commercial codes of the world mark off the mercantile law from the civil objectively and not subjectively; they govern acts of commerce as distinguished from civil acts, and not merchants as distinguished from nonmerchants. Germany is an outstanding exception, her present commercial code being subjective in its application.\footnote{16}

**MEXICAN MERCANTILE CODES**

The Spanish Ordinances of Bilbao, made applicable to Mexico by the royal decrees of 1792 and 1801, constituted the first mercantile code of that Spanish colony. During the first decades following Mexico’s declaration of independence

\footnote{14} Bolaffio, I Fattori della Legislazione Commerciale, title 1, introduction, quoted in 1 Tena, Derecho Mercantil Mexicano, 21. Tena points out that, whereas France was the leader in codification of the mercantile law, she was not the first in its formation—the leadership in this respect must be accorded to Italy. 1 Derecho Mercantil Mexicano, 26n.

\footnote{15} Condensed from 1 Jacinto Pallares, Derecho Mercantil Mexicano, 249-255, and from 1 Tena, Derecho Mercantil Mexicano, 25-33.

\footnote{16} 1 Tena, Derecho Mercantil Mexicano, 408.
from Spain, a compilation known as *Curia Filipica Mexicana*, based on the
Ordinances of Bilbao, largely supplied the lack of a national mercantile code.
Mexico's first national code of commerce was promulgated by President Antonio
Lopez de Santa-Ana in 1854 and is known as the Lares Code, from the name of
its drafter. It was modeled upon the French and the Spanish codes in force at
the time. In 1855, the Lares Code was abrogated and the Ordinances of Bilbao
were restored. In 1884, by virtue of a constitutional amendment adopted in
1883, Mexico's second commercial code was promulgated, during the presidency
of Manuel Gonzalez. This was replaced by the existing code of 1889, enacted
by President Porfirio Diaz. 17

The Mexican writers lay great stress on the divergence, both in origin and
in substance, between their mercantile and their civil law. Unquestionably the
divergence is great. But the dissimilarities—in substance, form, terminology,
manner of interpretation and of administration—to be found between the legal
system of the English-speaking countries and that which prevails in the Latin
American republics are immeasurably greater. 18 Few Mexican commentators
appreciate sufficiently, in our estimation, the debt their mercantile jurisprudence
owes to the Justinian compilations. S. Moreno Cora, a native of Veracruz,
Mexico, whose legal works are held in high esteem because of their
conservatism and lucidity of style, contends that the Justinian treatment of the civil law
under the tri-partite division of Persons, Things and Actions (confounded by
some later jurists with Acts) is inherent in every legal concept and never has
been improved upon. 19 It is striking evidence of the enduring influence of the
Roman law that the first three books of the officially issued project of a new
Mexican code of commerce 20 are entitled respectively “Of Persons,” “Of Mer­
cantile Things” and “Of Mercantile Acts, Obligations and Contracts.”

THE LAW MERCHANT IN COMMON LAW JURISDICTIONS

Down to the time of Coke (circa 1600) the English law merchant was in
general that of the Continent. It was distinct from the common law, parallel
and proceeding from a different source. It was custom, recognized and ad­
ministered in special tribunals, where the disputes of a special class were
settled in view of peculiar duties and peculiar rights. Not until the eighteenth
century under the judicial leadership of Lord Mansfield, did it become part of
the general law of England. 21 Because of what Jacinto Pallares terms “a pre-

17Further details regarding the history of Mexican commercial codification will be
found in 1 Jacinto Pallares, Derecho Mercantil Mexicano, 265-268, and in 1 Tena, Derecho
Mercantil Mexicano, 41-46.
18To the reader with human insight, the extracts given in this paper from the Mexican
text-writers and their Code of Commerce will be more illuminating than any psychoanalysis
done after the manner of Jerome Frank in his recent outstanding work, Law and the
Modern Mind. To such a reader the gulf that divides the common law system from the
civil law system will be startlingly evident. As a lawyer thinks, so is his law.
19Cora, Derecho Mercantil Mexicano, Mexico City, 1905, 18-19.
20This project was published in two volumes in 1929-1930. As yet it has not received
legislative sanction and probably will be modified before final enactment. Some of its pro­
visions are discussed later in this paper.
21Howe, Studies in the Civil Law, 96. In this connection the work of Leone Levi may
be consulted: Commercial Law, Its Principles and Administration, or the Mercantile Law
of Great Britain Compared with the Codes of Commerce of the Modern World, and with
the Institutes of Justinian, London, 1850-1852.
judice difficult to eradicate," the English have not codified the commercial law, although some of its principal departments, such as bills of exchange, shipping, companies and bankruptcy, are contained in special acts of Parliament. In Lower Canada, a civil code was issued in 1866. It consists of four books. The fourth relates to commerce but treats only of bills, notes and checks, merchant-shipping, carriers, insurance, bottomry and respondentia. 22 This book does not treat of obligations in general and draws no line of demarcation between civil and commercial acts as such. In the United States no distinctively commercial code ever has been promulgated—not even in Louisiana, which has adopted in several other respects the legal molds of the civilian. 23

BIPARTITE CODIFICATION OF PRIVATE LAW
REASON AND JUSTIFICATION

Why do the civilians have a commercial code distinct from their civil code? What justification is there for this practice? To some of us a discussion of questions such as these may seem fruitless. But both Jacinto Pallares and Tena devote many pages to an attempt to answer these two questions satisfactorily; and since one of the aims of this study is to inspire a sympathetic understanding of the methods of legal approach and interpretation of the Mexican jurist, we give them attentive hearing.

Tena finds the answer to the first question in historical accidents:

"In the light of historical data . . . we may affirm that the mercantile law, at least in so far as it relates to traffic on land, did not live an autonomous life until the second half of the middle ages, when the republic of Italy, at the beginning of the eleventh century, opened that marvelous era of commercial prosperity, of which history offers us so few examples. We may also affirm that this budding of a new branch of law was not due to demands made by the intrinsic nature of the new juridic relations, in any sense that these are essentially incompatible with the contents of the civil law, but to causes of a very different nature, which may be summarized as the need felt by merchants of casting off the cumbersome, complicated and costly formulas of the civil law, formulas that could not be moulded to the free and expeditious contractual forms needed by commerce, nor to the ready and simple procedure demanded by merchants for the settlement of their controversies. Accordingly, if the civil law, instead of having remained mummified when Rome fell, had continued its development with the same wisdom which characterized its growth up to the early middle ages; if, at the rise of the great commercial activity of the Italian cities, the civil law could have satisfied the new juridic-economic needs of the Italian republics (as happened in the case of Genoa); then, the statutory law of the Italian corporations would not have been born, because the general law would have sufficed amply to meet all needs. Therefore, the origin of the autonomy of the commercial law rests wholly on historical bases and such autonomy is explicable only by accidental circumstances." 24

22 Howe, Studies in the Civil Law, 135.
23 Howe, Studies in the Civil Law, 139.
24 Tena, Derecho Mercantil Mexicano, 46-47.
In answer to the second question, as to any inherent justification for this cleavage of the commercial law from the main body of the civil law, Tena quotes extensively from a polemic carried on between the eminent Italian mercantile jurists Vivante and Vidari.25 The briefest summary of the arguments advanced must suffice us here. Vivante maintains that the law of obligations should be a single unit, with no distinction drawn between civil and commercial acts; Vidari contends, on the other hand, that the system of dual codification should be preserved.

Vivante takes the view that the distinctive autonomy of the commercial law is today an anachronism, since everyone performs some acts of commerce; that England, the United States and Switzerland illustrate the practical possibility of governing all contractual obligations by a single general doctrine of contracts; that it never has been possible to draw a precise line of demarcation between civil and commercial acts, either by written law, by doctrine or by court decisions; that in consequence this duality of codification makes for legal uncertainty; and that, finally, a partition of the private law into civil and mercantile exercises a pernicious influence upon its scientific development.

Vidari, Vivante's opponent in this controversy, claims that commercial relations call for a special legislative discipline; that commercial law should apply only to acts of the mercantile profession, the nature of which demands such "discipline"; that the increasing commercialization of life's activities, which has been in progress for many centuries, constitutes no warrant for a fusion of the civil and commercial codes; that, while it is true that the provisions of the civil code of Italy and of other countries do not meet fully the requirements of modern commerce, this is not conclusive on the point at issue, because there always will be need of applying different legal principles to different forms of human activity, as for instance, in regard to civil associations and mercantile companies; that the success of the Swiss General Code of Obligations is due to peculiar national conditions, and particularly to the geographical position of Switzerland; that all the other European countries have both a civil and a mercantile code; and, finally, that a duality of codification has made for a higher development of both the civil and the commercial law.

As Tena points out, the provisions of the Mexican political constitution (which place all "commerce" under federal control and leave the regulation of matters purely civil to the several States) are an insuperable bar to the amalgamation of the mercantile and the non-mercantile law into a single code.26

Jacinto Pallares, while agreeing in the main with Tena, takes a more instructive and comprehensive view of the situation:

"Why have such acts [mercantile acts] demanded a special legislation? The explanation of this phenomenon is very simple [sic]. At the outset it is noteworthy that, with the exception of regulations in regard to certain matters, no special codes of commerce exist in countries governed by customary law [Pallares here refers to our common law], because in such countries, undoubtedly, the same elastic

251 Tena, Derecho Mercantil Mexicano, 47-54.
261 Tena, Derecho Mercantil Mexicano, 54.
movement of constant adaptation which moulded the customary law, with its tendencies and routines, to the fresh needs of civil business, extended likewise its effects to mercantile business; but in countries governed by written law two currents of doctrine, of judicial interpretation, and of legislation were formed: the one, following in the path of the Roman law, created codes or bodies of doctrine inspired by that law, as if in an oracle, and even violating custom in order to make it prevail; while the other, in its paroxysms and expansions of freedom, introduced the mercantile activities, which could not live cramped in the formulas of the Roman law. The first of these currents, as Scherer says, resting upon the Roman law, which concerned itself little or not at all with commerce, instead of producing a constant renovation of the law paralleling the unfoldment of human ideas and activities, became petrified, as did all civil laws drawn from the Pandects [sic]. The second current, that of commerce, slowly became emancipated from the cumbrous formulas and judicial systems of the Roman law, which were merely so many obstacles to the facile and speedy transactions demanded by traffic and by the multiple and novel operations of commerce."27

Among the examples of new fields of law created by the demands of commerce, Pallares lists bills of exchange, companies, paper currency and securities, insurance, mercantile agency and contractual molds freed from the formulas and solemnities of the Roman law. He points out, also, that commerce demands laws that are comprehensive and cosmopolitan, whereas the purely civil law reflects the peculiar genius and customs of a nation, with its innate prejudices and traditions.28 In a footnote, Pallares attributes the persistence of separate codes of commerce mainly to human inertia and distaste for innovation, quoting (with approval) Aguanono. This Italian jurist laments the profound contrasts which exist between the precepts of the civil and those of the mercantile code of his country and characterizes as irrational any dual codification of private law.29

THE MERCANTILE TEMPER

In one of the excerpts given above, Jacinto Pallares speaks of "that species of infamy which weighed upon commerce in the customs of Rome," and finds that this prejudice against trade is reproduced even in the modern codes. In the last analysis, it is this racial unwillingness to accept commerce as the staff of life that best accounts for the bipartite codification of private law prevailing in the non-English-speaking countries.

In England, as in Europe generally, the feudal spirit was hostile to mercantilism. The Norman-French landed aristocracy, once the foundation, but long since only a relic, of feudalism, as a class always has disdained engagement in trade. British commerce was developed by the large Anglo-Saxon urban middle classes, who stood outside the feudal system and whose instinct for trade is indisputable. Had it been otherwise, the later development of English commercial law would have displayed more of the Latin genius.

THE MERCANTILE ACT IN MEXICO

In the United States, settled dominantly by Anglo-Saxon and not by Latin races, and later freed from the traditions of British royalty and feudal nobility, the people easily effaced all stigma from commerce and substituted for the hierarchy of birth and station a hierarchy based upon material wealth. Concurrently their commercial laws were broadened and liberalized.

In Mexico, and generally in the other Latin American republics, the Teutonic strains are negligible; there is no native bourgeois class; commerce is in the hands of foreigners. Under such conditions, a whole-souled national acceptance of mercantilism is impossible. As might be expected, we find in these republics a dispositional detachment from commerce and a strongly entrenched isolation of the mercantile law from the main body of the private law.

A MERCANTILE CODE FOR THE UNITED STATES

It is not likely, for several reasons, that any of the English-speaking nations ever will adopt a distinctively commercial code. In the first place, our preference for a case jurisprudence is too deeply ingrained. Unlike the Latins, we approach our legal problems concretely and pragmatically. Despite our ethical idealism, we are utilitarians in our legal practices, with more concern for facts than for schematic systems of equity. The Englishman, and even more so the North American, lacks that fondness for philosophical unity which is so characteristic of the Central and South American. Our legal reasoning is inductive, rather than deductive. We determine cases by reference to other cases, rather than by recourse to abstract principles of jurisprudence. With us, legal precepts are little more than convenient pegs on which to hang cases and not, as with the civilians, expressions of authoritative doctrine. Our methods of mental approach do not lend themselves readily to legal codification.

Furthermore, commercialism, the commercial spirit, has engulfed us in the United States. In a sense, we are all merchants, selling our goods or our services. We are lacking in that dispassionate detachment with which a Latin is able to view commerce—as merely one of many equally necessary human activities. Material gain is our popular yardstick of success. We do not attain to the broader perspective of life enjoyed by the Latin. It is not easy for us nowadays even to conceive of a system of mercantile law segregated from the main body of private law.

Lastly, in the United States the legal situation created by the constitutional provisions which place in the federal power the regulation of interstate and foreign commerce and leave to the several States the general control of only intrastate commerce, has placed technical difficulties in the way of the adoption by any State of a distinctively mercantile code.

STARE DECISIS IN THE MEXICAN PRACTICE

A Mexican federal law provides, in substance, that interpretations of law of the Supreme Court of the nation shall be authoritative for the other federal courts and for the state courts, if upheld by an unbroken line of five decisions of the Supreme Court itself. Even when a legal rule is so established, the

—“Hardly a rule of law of today but may be matched by its opposite of yesterday, ... These changes or most of them have been wrought by judges.” Judge Cardozo, quoted in Frank, Law and the Modern Mind, 328.
Supreme Court is free to set it aside in any later decision and not infrequently has done so.31 Neither the civil codes nor the Code of Commerce make any mention of case precedents, but prescribe, in effect, that where the written law is silent, the court shall decide the controversy "in accordance with general legal principles."32

General legal principles play an important part in the Mexican practice. They are for the Mexican lawyer what cases are for us—an illumination of the written law. The chief sources of these principles are the French, Spanish and Italian text-writers. In Mexico, however, acceptance of a general principle always has been a gradual process, a consensus growing out of an interplay of views, where the opinions of leaders of the Bar carry as much weight as those of the bench.

The point of special interest here is that neither during the formative period of a general principle, nor after its general acceptance, are the related Mexican cases cited. One may read through a score of Supreme Court decisions without finding therein a single citation of a case. The same is true of briefs and opinions prepared by eminent jurists. In the Mexican textbooks referred to in this paper, there is but one citation of a Mexican case pertinent to our inquiry, and that is on a question of negligible importance.

T. Esquivel Obregón, a leading Mexican jurist, speaking of Latin American countries generally, writes:

"This [the rule that judicial decisions are not binding except with respect to the cases in which they are actually rendered] by no means implies that the decisions of the courts have no authority whatever, but that they have none as a source of positive law. A settled 'practice' has very considerable authority as a doctrine supplying the deficiencies of legislation, whose rules, because of the general way in which they are framed, require adaptation to the varied conditions of the concrete facts of life, provided such adaptation or interpretation does not prove erroneous in the light of legal science. Hence for a Latin-American lawyer the codes and scientific works which comment thereon or which study the principles of law, are of more interest and authority than mere judicial records."33

The well-nigh total absence of case citations in the Mexican practice is not adequately accounted for by the paucity of national case reports or the lack of cumulative digests; but is characteristic of the national legal approach already referred to—a predilection for the general and the abstract, a distaste for the particular and the concrete.

Eduardo Pallares, writing in 1921, recognizes the true reason for the rarity of case citations in his practice, but thinks he observes a tendency in the courts to pay more attention to them than was their custom formerly. This Pallares, son of the illustrious Jacinto, is also a close student of the law and a jurist of national repute, most of whose works have been written since 1917. Among

31Ley de Amparo, Arts. 147-150.
32New Federal Civil Code, Art. 19; Code of Commerce (1889), Art. 1324. Art. 20 of the old Civil Code of 1884 was to the same effect.
33T. Esquivel Obregón, Latin-American Commercial Law, New York, 1921, 7. This work is written in the English language.
them are two volumes of brief legal monographs, consisting mostly of critical case reports.\textsuperscript{34} The excerpt given below is from his work entitled "Jurisprudence of the Supreme Court of Justice":

"... Nowadays it may be more important in a suit to rely upon a decision of the courts than upon a quotation from some renowned text-writer. Our law, like the English, is being transformed into a law of precedents, that is, of legal cases and final judgments. What has previously been decided by a judge or by a court serves as a certain and necessary basis for the decision of the same point or of a similar point. As a consequence, in the United States and in England, the collections of legal cases, of final judgments and decisions of the authorities, have a colossal importance. In such collections resides the true law, the law which the people have lived and have put into practice, and not the law which is only written in the codes. Something similar is occurring among ourselves. Influenced by the current of Americanism which circulates in the national life, and which is despoiling us slowly, but fatefully, of our Latin mode of being, of the tendency to theorize, to live on literature, to wish to determine everything in accordance with abstract principles, to engulf ourselves in Byzantine discussions and to retard business by useless documentation—we are learning to be practical; and nothing can be more expeditious than to base our law upon final judgments or upon rulings of the administrative authorities.\textsuperscript{35}

As an outspoken and independent thinker and acute observer of national traits and tendencies, Eduardo Pallares carries on the work of his distinguished father. But his prophetic statement that the Mexican law "is being transformed into a law of precedents" has not, in the opinion of active practitioners qualified to judge, been justified by the events of the decade elapsed since he made the prediction. Mexico has become Americanized in recent years, it is true; but only in the mechanical sense. Her national and legal cultures show little sign of Americanization.

\textbf{SCIENTIFIC DEFINITIONS OF THE MERCANTILE ACT}

Since the code provisions which define acts of commerce are "largely empirical, arbitrary, and even self-contradictory"\textsuperscript{36} and contain, furthermore, an omnibus clause, both Jacinto Pallares and Tena are at great pains to evolve what in civilian parlance is termed a scientific definition of mercantile acts, in the light of which, supplemented by researches in history and comparative law, they interpret the code enumeration of acts of commerce. The master, Jacinto Pallares, is emphatic on the importance of scientific definitions in Mexican jurisprudence:

"That a scientific definition is contradicted by positive texts of the law can never serve as an argument for declaring the definition un-scientific, and much less for eliminating it from the rank of a funda-

\textsuperscript{34}Eduardo Pallares, Jurisprudencia Mexicana. Two volumes. Mexico City, 1926-1927.
\textsuperscript{35}Eduardo Pallares, Jurisprudencia de la Suprema Corte de Justicia, Mexico City, 1921, preface.
\textsuperscript{36}Tena, Derecho Mercantil Mexicano, 56.
mental principle of interpretation; on the contrary, the law or legal
texts which contradict such a definition should be deemed legal excep-
tions, created by the lawgiver for special reasons and of strict inter-
pretation. . . .”

This jurist holds that “the intention to re-sell in order to make a profit” is the
distinguishing characteristic of commerce. He finds the essence of mercantile
acts “in acquisition for a valuable consideration with the purpose of profiting
by the [subsequent] alienation or use of the thing acquired.” His scientific
definition of an act of commerce is as follows:

“A mercantile act is any civil juridic act by means of which goods or
values are acquired for a valuable consideration with the exclusive ob-
ject or intention of transmitting [re-conveying] the use or ownership
in order to make a profit by the transaction, as also the act in which
the said proposed profit is realized.”

In Tena’s opinion, the two essential elements necessary to constitute an act
of commerce are intermediation and speculation. His scientific definition is:

“An act of commerce is any contract through which a person acquires,
for a valuable consideration, a property of whatsoever character with
the intention of making a profit by its transmission [re-conveyance],
as likewise the contract, if for a valuable consideration, by virtue of
which the said transmission is effected.”

Manuel de la Torre, a Mexican jurist of some note, finds that the “domi-
nant characteristic of mercantile acts is mediation with the intent of profit.”
Writing in 1900 he points out that agriculture and the extractive industries
(mineral and petroleum extraction, for example) “have always been placed by
all legal systems outside the mercantile law,” because, although they may in-
volve speculation, a desire to make a profit, there is no mediation—no buying
from one party to sell to another. As will be seen later, since Manuel de la
Torre penned the above, the Mexican legislators have shifted the mining and
petroleum activities into the category of acts of commerce.

A Spanish commentator defines commerce as “traffic in the products of
nature and of industry with the object of obtaining a profit.” Traffic is here
employed in its broader sense of trade in general.

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371 Jacinto Pallares, Derecho Mercantil Mexicano, 1005.
381 Jacinto Pallares, Derecho Mercantil Mexicano, 995.
391 Jacinto Pallares, Derecho Mercantil Mexicano, 55a.
401 Jacinto Pallares, Derecho Mercantil Mexicano, 1003.
411 Tena, Derecho Mercantil Mexicano, 59.
421 Tena, Derecho Mercantil Mexicano, 62.
431 An essay entitled “Actos Mercantiles,” appearing, with other monographs by Mexi-
can jurists, in a memorial collection styled Comentarios Breves sobre la Legislacion Patrin,
Mexico City, 1900.
441 Cited by Antonio de J. Lorenzo in 1 Annotated C6digo de Comercio de los Estados
Unidos Mexicanos, Mexico City, 1899–1901, 13.
THE MERCANTILE ACT IN MEXICO

The act of an intermediary *cum animo lucri* is the characteristic mercantile act, in the opinion of most civilian writers; but the French jurist Thaller is the leader of a school which regards the intermediation (circulation) as the only element essential to constitute commerce.\(^{45}\)

T. Esquivel Obregón gives a definition of commerce which calls attention to its collectivistic element, a feature in recent years increasingly emphasized by Latin American legislators, including the Mexican:

"We may now define commerce as the *social function* of mediation between producer and consumer, which, exercised habitually and with a view to speculation, serves to promote or increase the *circulation of wealth*."\(^{46}\)

It should be observed, before leaving this subject, that no writer claims that his scientific definition of acts of commerce embraces all the acts enumerated as such in the code of his country. As already stated in another connection, the Italian jurist Vivante declares categorically that neither the law, nor doctrine, nor court decisions have been able, thus far, to draw a precise line of demarcation between civil and commercial acts.\(^{47}\) The same writer finds it impossible to reduce the enumeration of acts of commerce of the Italian code to "a single concept"; and Lyon-Caen and Renault, speaking of the French code, reach the conclusion that it is futile to attempt to find "one single formula" which will embrace all acts of commerce.\(^{48}\)

THE PROBLEM UNDER THE CODES

MERCANTILE ACTS UNDER EARLIER MEXICAN CODES

The first national Code of Commerce of Mexico, promulgated in 1854, provides that "the law regards as mercantile business":

1. The purchase and exchange of fruits for immediate profit;
2. All bills of exchange and commercial drafts and vouchers, if drawn to order; and
3. Any business arising directly out of trade or directly related thereto, such as: transportation by land or sea, insurance, agency, indemnity bonds and pledges.

The text of the law is somewhat condensed in the foregoing enumeration.\(^{49}\) It will be noted that this Code excludes from commerce agriculture, the extractive industries (mining and the like) and manufacturing. The Code expressly provides that any person, even though not a merchant, who performs an act of commerce is subject to the mercantile law in respect to such act.\(^{50}\)

\(^{45}\)Cited in 1 Tena, Derecho Mercantil Mexicano, 60.
\(^{46}\)T. Esquivel Obregón, Latin-American Commercial Law, 34 (italics added).
\(^{47}\)Quoted in 1 Tena, Derecho Mercantil Mexicano, 49.
\(^{48}\)Quoted in 1 Tena, Derecho Mercantil Mexicano, 56.
\(^{49}\)Art. 218.
\(^{50}\)Art. 5.
Special tribunals of commerce, then operating in many cities of the Republic, are accorded by this Code exclusive jurisdiction in mercantile matters and rules of procedure for such tribunals are laid down. This Code was abrogated in the year following its promulgation and the authority of the old Spanish Ordinances of Bilbao restored. The latter compilation had no direct effect upon the subsequent course of development of the distinction under examination.

No new national code of commerce was enacted until the year 1884. The Code of 1884 opens with an interesting definition of commerce:

"Commerce is the collection of acts whose exclusive object is profit, by means of the purchase, sale or exchange of the products of nature, industry, or art; of their insurance or transportation, or of other conventions [related thereto], authorized by law or permitted by usage."

The Code defines as "mercantile acts" those which constitute an act of commerce (see the definition of "commerce," above) and then proceeds to enumerate various classes. These classes are substantially the same as those contained in the present Code of 1889, although the phrasing and the order of enumeration are different. In general, the desire to make a profit, plus intermediation, is the controlling element in the determination of what constitutes an act of commerce under this Code, the character of the parties as merchant or non-merchant being immaterial. Suits arising under this Code were tried in the common courts and not in special commercial tribunals.

**SCOPE OF THE PRESENT CODE**

The Code of Commerce now in force was issued September 15, 1889, to become effective January 1 of the following year. It was promulgated by President Porfirio Diaz, by virtue of a general authorization of Congress granted June 4, 1887, under constitutional amendments adopted December 14, 1883, and May 29, 1884. The provisions of the Code were not discussed in Congress at the time of its passage and, strange as it may seem, the minutes of the drafting commission never have been made public. It appears from internal evidence that the greater portion of the articles was transcribed, often literally, from the Spanish Code of Commerce of 1885; but Article 76, which enumerates the acts of commerce, follows closely the provisions of Article 3 of the Italian Code, which in turn are based upon those of Article 632 of the French Code. Consequently, the Spanish, French and Italian commentators frequently are appealed to by the Mexican writers on mercantile law.

Below is a condensed table of contents of the Code of Commerce now in force. As will be seen, this table displays not only the order of arrangement of the matter, but the topics embraced and the relative space given to each:

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51 Arts. 925-1091.
52 Art. 1.
53 Art. 19.
54 Arts. 3 & 15.
55 Jacinto Pallares, Derecho Mercantil Mexicano, 731-732.
56 See introduction to Lozano, Código de Comercio de los Estados Unidos Mexicanos.
57 Tena, Derecho Mercantil Mexicano, 45, and footnote on 464.
### THE MERCANTILE ACT IN MEXICO

The table below summarizes the topics covered by the Mercantile Act in Mexico, along with the corresponding articles:

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Banks, railroads, warehouses and some other commercial institutions are regulated by special legislation, thus accounting for the limited space accorded to their regulation by the Code. The relatively large space devoted to maritime commerce is an inheritance traceable to the maritime development of the countries upon whose codes the Mexican Code is based. The Mexican commentators have written very little on this department of the law.

It will be noted from the foregoing tabulation that, while the topics of the rights and obligations of merchants regarded as a class, of mercantile companies, insurance, bills and notes, maritime commerce, bankruptcy and commercial suits, all receive full treatment, the important matter of mercantile sales and other common forms of mercantile contract on land is covered but scantily, occupying approximately only one-third of the whole. A partial explanation of this is to be found in Article 2 of the Code, which prescribes that "in the absence of provisions of this code, those of the common [civil] law shall apply." However, one of the chief sources of difficulty in interpreting the rules of the Code of Commerce is this supplemental authority of the Civil Code of the Federal District, which now supplants the state Civil Codes in their former supplemental authority in this connection.572 The interpretive interrelation between the civil law and the mercantile law is stated by Jacinto Pallares in the following terms:

> "The first is the genus, the second the species; the first regulates all the civil acts of human life, the second the mercantile civil acts; the first lays down the fundamental and primitive precepts, the second the secondary precepts for certain acts. In consequence, the Mercantile Code must be applied to mercantile acts, and has preference over the civil law; but in the absence of precepts of the Mercantile Code, those precepts of the Civil Code subsist by reason of their absolute and general character. Accordingly, articles 1, 2, 5, 81 and 82 of the New Federal Civil Code, Art. 1."
1051 of our Code provide that its precepts are applicable solely to acts of commerce, and that only in the absence of precepts of the said Code, shall those of the common [civil] law be applicable.\textsuperscript{58}

Tena dissents from the views expressed above by Jacinto Pallares, principally on the ground that, with the rapid expansion of commerce in recent times, the commercial law has become of broader scope than the civil law and therefore should not be regarded as of exceptional application.\textsuperscript{60}

Jorge Vera Estañol, for several years professor of mercantile law at the National School of Jurisprudence, author of several legal works and for the past quarter of a century a leader at the Mexican Bar, has summarized the relation of the mercantile to the civil law in the following terms:

"Two situations may arise: the one where the precepts of the civil law contradict the system developed in the mercantile law; and the other where one must have recourse to the civil law, and the precepts there found do not contradict the mercantile law. In the first situation the civil law, to the extent that it contradicts the mercantile law, is not applicable. In the second situation, the civil law is applicable."\textsuperscript{60}

\textbf{ARTICLES 75 AND 76}

The Code of Commerce contains no definition, in the logical sense, of mercantile acts. Article 75 contains an enumeration of such acts, with an appended omnibus clause; and Article 76 declares certain acts to be non-mercantile.

The purist in terminology will be irked by finding "enterprises," "bookstores," "checks" and "obligations" all listed in the Code as "acts." The codes of most of the Latin countries are guilty of this linguistic impropriety. It is avoided, however, in the German and Austrian codes, as also in the officially published project of a new Mexican code of commerce already referred to. We should point out, perhaps, that the term "speculation," as used in the Mexican law and text books, denotes economic gain and does not carry our connotation of great risk. The term "enterprise" as employed in the Code has a technical meaning, which will be discussed presently. The articles under examination, closely translated, read as follows:

\begin{quote}
\textquoteleft\textquoteleft Art. 75. The law regards as acts of commerce:

\textquoteleft\textquoteleft I. All acquisitions, alienations and rentals, effected with the object of commercial speculation, of supplies, articles, moveables or merchandise, whether in a natural state or after being worked or wrought;

\textquoteleft\textquoteleft II. Purchases and sales of immovables, when effected with the said object of commercial speculation;

\textquoteleft\textquoteleft III. Purchases and sales of interests and shares in, and of obligations of, mercantile companies;
\end{quote}

\textsuperscript{58} Jacinto Pallares, Derecho Mercantil Mexicano, 754.
\textsuperscript{60} Tena, Derecho Mercantil Mexicano, 68-72.
\textsuperscript{60} From an unpublished course of lectures on the Mexican Mercantile Law, delivered at Mexico City in 1908. (Italics added.)
"IV. Contracts relative to obligations of the State or other documents of credit current in commerce;

"V. Enterprises of provisions and supplies;

"VI. Enterprises of construction, and public and private works;

"VII. Enterprises of fabrication and manufacture;

"VIII. Enterprises of transportation of persons or things, by land or by water;

"IX. Book stores and editorial and typographical enterprises;

"X. Enterprises of commissions, of agencies, of commercial business offices, and establishments of sales at public auction;

"XI. Enterprises of public spectacles;

"XII. Operations of mercantile commission;

"XIII. Operations of mediation in mercantile business;

"XIV. Operations of banks;

"XV. All contracts relative to maritime commerce, and to interior and exterior navigation;

"XVI. Contracts of insurance of every kind, provided that they are entered into by enterprises;

"XVII. Deposits by reason of commerce;

"XVIII. Deposits in general warehouses and all operations made upon certificates of deposit, and pledge bonds issued by general warehouses;

"XIX. Checks, bills of exchange or remittances of money from one place to another, among all classes of persons;

"XX. Vouchers or other documents to order or to bearer, and obligations of merchants, unless it be proved that they originated from a non-commercial transaction;

"XXI. Obligations between merchants and bankers, if not of a nature essentially civil;

"XXII. Contracts and obligations of the employees of merchants concerning the business of the merchant in whose employ they are;

"XXIII. The alienation that an owner or a husbandman makes of the products of his land or of his husbandry;

"XXIV. Any other acts of a nature analogous to those stated in this Code.

"In case of doubt the commercial nature of the act shall be determined by the judgment of the court."

"Art. 76. Purchases made by a merchant of articles or merchandise for his own use or consumption, or for that of his family, are not acts of commerce; nor are resales made by workmen, when such resales are a natural consequence of the practice of their calling."

As already stated, commentators are agreed that the provisions of Articles 75 and 76 are unscientific in arrangement, arbitrary in character, lacking in explicitness and even self-contradictory.\(^{61}\) For the purpose of obtaining a

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\(^{61}\) Tena, Derecho Mercantil Mexicano, 56, 57 & 74; Cora, Derecho Mercantil Mexicano, 31; 1 Jacinto Pallares, Derecho Mercantil Mexicano, 978-991, passim.
general grasp of this heterogeneous list of acts of commerce, the re-classification by Cora will be found helpful:

"The acts of commerce enumerated by our Code, in Article 75, may be classified in the following manner:

"First. There are acts which are mercantile by reason of the intent of the party who performs them.

"Second. There are other acts which are mercantile by reason of their nature, regardless of the intent of the parties who performed them.

"Third. Lastly, there are still other acts which the law calls 'enterprises' ['empresas'], in which the repetition of acts of the same nature is assumed." 62

Under the first heading, fall the acts covered by Sections I and II of Article 75; 63 under the second, fall the acts enumerated under Sections III, IV, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI and XXII. These call for no special comment here because the act, being mercantile in its nature, is bilaterally commercial; and consequently the mercantile law will govern both contracting parties, regardless of intent. 64 Under the third heading fall the "enterprises."

"In these acts it can not be doubted that the law, in addition to the idea of profit which such acts presuppose, has taken into account the repetition of acts of a like nature, without which it is inconceivable that there could be any enterprise." 65

Such acts, considered as mercantile acts, may be unilaterally commercial—that is, mercantile as to one of the parties and civil as to the other. We shall revert to this point later.

COMMENTARIES ON THE CODE PROVISIONS

Both Tena and Jacinto Pallares freely admit that, of the twenty-four sections contained in Article 75, only the first section accords with the scientific definitions they give of acts of commerce. 66 In their interpretations of the provisions of this and related articles, neither they nor Cora cite any case precedents, but appeal to the opinions of foreign commentators on analogous provisions in their own codes, to legal doctrine, to principles of equity and to juristic and logical consistency. Unfortunately, they often differ among themselves on points of great practical importance. The following discussion of this intricate subject makes no claim to exhaustiveness, but will serve chiefly to throw additional light on the methods of interpretation employed by the Mexican jurists.

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62 Cora, Derecho Mercantil Mexicano, 32.
63 Cora, Derecho Mercantil Mexicano, 32.
64 Cora, Derecho Mercantil Mexicano, 33.
65 Cora, Derecho Mercantil Mexicano, 33.
66 Tena, Derecho Mercantil Mexicano, 87; 1 Jacinto Pallares, Derecho Mercantil Mexicano, 1004.
The civilian’s use of the term “enterprise” (empresa) calls for elucidation. Tena writes:

“Three elements are essential to constitute an enterprise, according to legal doctrine: the organization of the productive factors (nature, capital and labor); the distribution of the product to satisfy the needs of consumers; and the risk which the head of the enterprise assumes in the elaboration and sale of the product. Whenever any person, whether an individual or a company, coordinates the factors of the production, utilizing workmen in tasks in which they are apt, availing himself of the forces of nature, and furnishing the necessary capital (machinery, raw materials, etc.,) provided that this coordination of factors has for its object the satisfaction of a demand by consumers, the head of the enterprise running the technical and economic risks of his industry, there arises an organism called an ‘enterprise.’”

Not all enterprises are mercantile, however, but only those listed in Article 76 and such others as are analogous to those listed.

WHEN AN ACT IS BOTH CIVIL AND MERCANTILE

Article 1050 of the Code of Commerce provides that where an act is mercantile in regard to one of the parties and civil in regard to the other, the procedure applicable in case of litigation is the mercantile where the defendant has performed a mercantile act and the civil where he has performed a civil act. The procedure is made to depend upon the character of the act from the standpoint of the defendant.

Such acts are termed “mixed” by Jacinto Pallares. He points out that not only does the determination of the proper law of procedure applicable to the case turn upon the character of the act in relation to the defendant, but so, likewise, does the determination of the proper substantive law governing his right and obligations. In a word, if the act be mercantile in respect of the defendant, the mercantile law, both substantive and adjective, is necessarily applied; and if it be civil, the civil law. Jacinto Pallares deduces this rule from a collation of Articles 4, 75, 76 and 1050 of the Code of Commerce, interpreted in the light of “tradition and historical antecedents.” In the opinion of the same jurist, the general principle outlined above does not extend, however, to the rules of evidence governing the trial of such mixed cases. On this point he evolves the following rule: Only the evidence permitted by the civil law may be set up against the party whose act was civil; whereas against the party whose act was mercantile, evidence permitted by either the mercantile or the civil law may be introduced. He grounds this conclusion on principles of equity enunciated by a French text-writer.

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671 Tena, Derecho Mercantil Mexicano, 112.
681 Tena, Derecho Mercantil Mexicano, 113.
69This article is borrowed from the Belgian Code of 1876.
70 Jacinto Pallares, Derecho Mercantil Mexicano, 1027–1029.
71 Jacinto Pallares, Derecho Mercantil Mexicano, 1030.
THE RULE OF PRINCIPAL AND ACCESSORY

Do the opening words of Article 75—"The law regards as acts of commerce"—raise an absolute and irrebuttable presumption as to the mercantile character of the acts enunciated? Tena holds that the presumption is absolute, except in regard to acts falling under Sections XX and XXI, where the law itself prescribes that evidence of the civil nature of the act may be offered. Cora, on the other hand, appears to hold that the presumption of mercantility is in general rebuttable by evidence of the civility of the act in question.

One of the doctrinal principles applied by the commentators to determine whether a given act is or is not mercantile is that of principal and accessory. For instance, the owner of a vineyard who purchases barrels for the storing of his wine does not perform an act of commerce, even though the purchase be made with the intent to sell the wine in the barrels, because the sale of the latter is merely accessory to the sale of the wine, a product of agriculture—which is not a commercial activity.

By a similar process of reasoning, the purchase, by the owner of a spring of mineral waters, of bottles to be used in the sale of such water, is a civil act, because the principal act, the sale of mineral water by the owner of the spring, is civil, for reasons which will be indicated later when treating of the extractive industries. The same is true of the purchase by a custom tailor of thread, buttons and lining to be used in the making of a suit for his customer. Such purchases are accessory to the tailoring, which, in itself, is not a mercantile activity. The same principle explains why the sale by an artisan of the product of his labor is not an act of commerce. Such a sale is deemed by the law accessory to the exercise of a calling not itself commercial.

The authorities do not agree, however, upon the scope of application of this principle in the present connection. Tena contends that an act otherwise purely civil may become mercantile if performed by a merchant in connection with his business, giving as an example the renting of a warehouse for the storage of merchandise. In his opinion, such an act, although in its nature civil, becomes mercantile because accessory to a commercial act, namely, the sale of goods for profit. Cora reaches the same conclusion. But Jacinto Pallares is unqualifiedly contra, holding that leases of immovables never are mercantile acts.

ISOLATED ACTS

The authorities differ also as to whether an isolated purchase—for instance by a non-merchant, cum animo lucrī—is an act of commerce. Tena contends that such an isolated act is civil:

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72 Tena, Derecho Mercantil Mexicano, 94.
73 Cora, Derecho Mercantil Mexicano, 55.
74 Jacinto Pallares, Derecho Mercantil Mexicano, 1015.
75 Tena, Derecho Mercantil Mexicano, 93.
76 Tena, Derecho Mercantil Mexicano, 93.
77 Cora, Derecho Mercantil Mexicano, 35; Code of Commerce, Art. 76.
78 Tena, Derecho Mercantil Mexicano, 1005.
79 Cora, Derecho Mercantil Mexicano, 92.
80 Jacinto Pallares, Derecho Mercantil Mexicano, 1080-1081.
"An isolated act of mediation between producer and consumer, although inspired by an intent to make a profit... can not be termed a mercantile act, nor does it fall within the sphere of application of the Code of Commerce."\textsuperscript{81}

He gives as an example the purchase of a ring by a non-merchant from a merchant, the purchase being made with full intent to resell at a profit.\textsuperscript{82} Jacinto Pallares, on the other hand, strongly maintains the opposite view, giving as an illustration the purchase of a horse by a lawyer, not for his personal use, but with intent to resell at a profit. In the opinion of this jurist both the purchase and the resale are acts of commerce.\textsuperscript{83}

**AGRICULTURAL PURSUITS**

Agriculture always has been regarded as an antithesis of commerce. In the Italian, the Napoleonic, the Spanish and other commercial codes, even sales made by the landowner or the farmer of the produce of the land are expressly excluded from the legal realm of commerce.\textsuperscript{84} Legal doctrine supports this conclusion, principally on the ground that there is no mediation or interposition of a third party, the husbandman obtaining the produce directly from the soil and not from another party. His gains are the product of his labor, aided by nature. But for some reason which the commentators are at a loss to explain satisfactorily, Section XXIII of Article 75 lists, among acts of commerce, sales made by the landowner or the husbandman of the produce of the land. Tena hazards the opinion that the drafters of this provision desired to commercialize agriculture, inspired by a wish to favor its development.\textsuperscript{85} The same author points out that an organized agricultural venture might, in a given case, be characterized by a court as a mercantile enterprise, in which event substantially all its activities would be mercantile.\textsuperscript{86} His conjecture, made in 1922, is remarkably prophetic, since the project of Mexico's new Code of Commerce expressly includes the activities of an agricultural enterprise among acts of commerce.

Owing to nationalistic and socialistic legislation enacted since the adoption of the new federal Constitution of 1917, the question of the mercantility or the civility of agricultural activities has become one of considerable practical interest to foreigners and to capitalists. As the law is commonly interpreted at present, engagement in agriculture itself, on whatsoever scale, is a civil pursuit. In regard to sales of the produce in its natural state by the landowner or the lessee, the provisions of Section XXIII of Article 75, referred to above, are generally interpreted in the light of Article 4 of the Code, to the effect that such sales are mercantile acts only when made in a store or warehouse established in some town for that purpose.\textsuperscript{87}

\textsuperscript{81} Tena, Derecho Mercantil Mexicano, 63.
\textsuperscript{82} Tena, Derecho Mercantil Mexicano, 64.
\textsuperscript{83} Jacinto Pallares, Derecho Mercantil Mexicano, 1018.
\textsuperscript{84} Tena, Derecho Mercantil Mexicano, 161.
\textsuperscript{85} Tena, Derecho Mercantil Mexicano, 162.
\textsuperscript{86} Tena, Derecho Mercantil Mexicano, 164.
\textsuperscript{87} Jacinto Pallares, Derecho Mercantil Mexicano, 1035–1039.
Certain branches of industry are conveniently termed "extractive." By our economists, agriculture is included, with mining, oil extraction, cutting of lumber, fishing, hunting, quarrying and the like, among the extractive industries. The civilians, however, following the French economists, do not include agriculture among such industries.88 The reason for this appears to be that farm produce is a joint product of nature and man working in co-operation, whereas minerals, oil, timber, fish, game, rock and the like are "extracted" by man alone in their natural state. In the first case man and nature work simultaneously; in the second, successively.

Mining, agriculture and cattle-raising (to which must be added the petroleum industry since 1901) for several centuries have constituted the major part of Mexico's business activities; but up to recent years none of the extractive industries were classified as acts of commerce in the Mexican law. The reason given for this by the doctrinaires was that the products of the extractive industries, in the same manner as agricultural produce, were acquired directly from nature and not through an intermediary.89 As will be seen in a moment, later legislation has ignored this doctrine.

Prior to the enactment of the Mining Law of 1892 all mining operations, as well as mining companies, were purely civil. Article 24 of this law, however, provided that mining companies formed after the passage of the Law should be governed by the precepts of the Code of Commerce; and Article 79 of the same law declared to be mercantile acts all contracts of sale or of exploitation of mines, as likewise all contracts relative to the minerals. Article 79 of the Mining Law of 1909 and Article 98 of the Mining Law of 1930 are to the same effect.90

In regard to petroleum, up to 1910 the exploitation of oil deposits was a civil activity.91 Between 1910 and 1925, the legal status of the petroleum industry was in a phase of transition and uncertainty;92 but Article 19 of the Petroleum Law of 1925 states categorically that all acts of the petroleum industry are to be deemed mercantile. It is noteworthy that this same article provides, in substance, that where both the Petroleum Law and the Code of Commerce are silent, the rules of the Civil Code of the Federal District, and not of the state civil codes, shall govern. Article 394 of the General Banking Law of 1926 is to the same effect. As was pointed out above, the new federal Civil Code is now supplemental to all federal legislation, including, therefore, the Code of Commerce.

881 Tena, Derecho Mercantil Mexicano, 161, footnote.
891 Jacinto Pallares, Derecho Mercantil Mexicano, 1039.
90For other provisions of this law, consult: Barker, Mexican Mining Concessions, (1931) 5 SOUTHERN CALIFORNIA LAW REVIEW, 1.
91Mining Law of 1909, Art. 2.
92For a scholarly historical sketch of Mexico's subsoil juridic evolution, see: Edward Schuster, Laws and Jurisprudence of Mexico Concerning Petroleum, (March 6, 1928, No. 5) Proceedings of American Foreign Law Association, New York City.
THE MERCANTILE ACT IN MEXICO

THE 1929 PROJECT OF A NEW CODE OF COMMERCE

For several years past, the enactment of a new Code of Commerce has been under consideration by the federal administration. The present Code does not accord with many of the revolutionary principles embodied in the Constitution of 1917. In 1929-1930, the federal government published a project for a new Code of Commerce, which, with some modifications, is likely to become law before very long. It is carefully drafted and is much superior technically to the existing Code. As will be seen, in its treatment of acts of commerce and of the relation of the mercantile law to the civil law, it simplifies greatly the existing law and lays to rest many disputed questions of cardinal importance.

The new commercial code, as at present projected, governs the status of all merchants and is applicable to all mercantile things and acts. Where an act is mercantile in respect to any one of the parties thereto, it is subject to the mercantile law in respect of all parties. The so-called “mixed act” is, therefore, abolished. The juridic relations arising out of the representation of a merchant by his employee are governed by the commercial law; but the contract of employment is governed by the federal Code of Labor, which will be discussed later.

The hierarchy established among the sources of commercial law is as follows:

1. Mercantile legislation;
2. Commercial usages as recognized by the proper chamber of commerce;
3. The provisions of the Civil Code of the Federal District and Territories, to the exclusion of the state civil codes; and
4. General principles of law.

The high rank accorded to commercial usages is noteworthy. The provisions of the Civil Code of the Federal District are not applicable where they are repugnant to the nature of the related system established by the commercial law or by commercial usages.

Acts of commerce are classified as follows:

1. All acts relative to mercantile things, which latter are listed as: seagoing vessels, airplanes, patents, trademarks and the like, government concessions, currency except where it is the object of a civil transaction, bills, notes and the like, the assets, considered as an entity, of a commercial or industrial concern (fundo mercantil), the rights and obligations of shareholders in a mercantile company, and the services of the mercantile professions and of bankers;
2. Acts of acquisition of movables effected by one party with the intent to re-convey them to another, as likewise such re-conveyances.

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93Art. 1.
94Art. 2.
95Art. 3.
96Arts. 4 & 5.
97Art. 6.
(3) Acts of organization, functioning and liquidation of enterprises of the following nature: real estate, manufacturing, construction, the extractive and agricultural industries, transportation, insurance, deposits, editing, publicity, “spectacles” and all forms of public service. An enterprise is defined as an organization of the economic factors needed to produce goods or furnish services for trade;

(4) The external operations of such enterprises;

(5) Acts by virtue of which a person obtains or furnishes money or other movable property, to be used in the execution of any of the foregoing acts;

(6) Acts auxiliary to, or connected with, those enumerated, including acts executed to guarantee their performance; and

(7) Any other acts comprised in the Code. 98

The reader will have noted several important modifications of the existing law in this enumeration, among them the inclusion of all acts relative to things which are commonly the subject matter of commerce, the abolition of the animus luci as one of the tests of the mercantility of an act, the adoption of the economic definition of an enterprise as one of the decisive criteria of mercantility and the express inclusion of the agricultural and public service enterprises as commercial concerns. "The acts of merchants are presumed to be mercantile, unless the contrary is proved." 99

UNCERTAINTY OF THE MEXICAN LAW

The uncertainties of the Mexican law give less concern to the national than they do to the foreigner. 100 As Eduardo Pallares points out, “commerce develops outside the law and against its express precepts.” This author was cited in our discussion of the rule of stare decisis in the Mexican practice. He is of the modern school of thought and has no patience with excessive legislation, nor with the classical spirit in legal interpretation:

“We all know that laws are issued to form therewith horribly voluminous collections, whose simple perusal parches and brutalizes the brain of the patient reader, leaving him incapable of comprehending any perspectives than those born of an arid acquaintance with legal texts. One of the greatest errors of juridic classicism is indeed rooted in excessive legislation, in the multiplication without end of legal texts which no one knows (except two or three famous jurists) and which supposedly govern the world. Who is so credulous as to believe that the wearisome compilation of Justinian really governed the

98Arts. 298, 299, 610 & 611. The language of the project has been somewhat condensed in the above enumeration.

99Art. 612.

100Jerome Frank’s Law and the Modern Mind is of interest in this connection. The popular belief, said by this writer to exist, in certainty of the law is dubbed by him “The Basic Legal Myth.” (Chap. 1, passim.) This invaluable study of our American legal mind will be read with peculiar delectation by the civilian jurist. In Mexico, and in Latin America generally, no such myth exists. Eduardo Pallares, who is quoted at length above, would probably agree with Frank in one of his conclusions: “Much of the uncertainty of law is not an unfortunate accident: it is of immense social value.” (Page 7 of Frank’s work.)
Roman world? Who actually entertains the belief that the compilation of Dublan and Lozano\(^{101}\) (just for example) is the juridic guide that has ruled the destinies of Mexico? The fact is that laws in the greatest abundance are promulgated, but very few of them are observed, and fewer still are known to the majority of the people of the country. Ninety per cent. of all legal precepts forever remain dead letters, either because there is no occasion to apply them or because they are openly disobeyed. . . . When the classical spirit of the law disappears, giving place to a spirit more simple, more human, more efficient, less metaphysical—then the laws will not be so copious nor so prolix in useless articles. Excessive reglementation will vanish. The eternal disputes of pettifoggers on legal texts, veritable juridic atoms, will have no reason for existence, and the legislator will abandon for all time his sorry mission of producing voluminous codes which entangle the simplest things and weary both the mind and the will. In the meanwhile life develops outside the law; and more particularly commerce tends to realize its autonomy and creates usages contrary to the Mercantile Code.\(^{102}\)

The writer then gives numerous examples of accepted practices in commerce which ignore the code provisions.

This jurist has been quoted at some length, not only because he gives the chief reason why the uncertainties of the Mexican law—outside those of the Stamp and other revenue laws—do not greatly trouble the local merchant, but because he typifies a new school of juridic approach common among Mexican lawyers of the rising generation. This approach is at once effect and cause of a breaking down of the time-honored principles of individualistic justice. Mexico is moving rapidly in a new economic phase, where pro-Mexican and pro-labor ideals are paramount.\(^{103}\)

THE FEDERAL LABOR LAW

The federal Labor Law of August, 1931, in force throughout the Republic,\(^ {104}\) has given birth to a new kind of act, not to be classified as either civil or mercantile, but strictly \textit{sui generis}. The purpose of the Labor Law is to socialize labor by means of collective labor contracts and the non-judicial settlement of disputes. It governs all employment, both manual and intellectual, arising out of any agreement of personal service, excepting only government employees.\(^ {105}\) The provisions of the law are markedly collectivistic in tendency and embrace every aspect of modern labor problems. Where its precepts favor the work-

\(^{101}\) The noted jurists referred to were compilers of the Mexican laws issued from the date of Mexico's Declaration of Independence down to 1904.

\(^{102}\) Eduardo Pallares, \textit{Derecho Comercial Mexicano}, Mexico City, 1922 (a pamphlet), 5-7. The work is unfinished.

\(^{103}\) A practitioner today who would give useful counsel on concrete questions involving Mexican law must gauge primarily: (a) the consensus of opinion, or its absence, among jurists on the correct interpretation of the pertinent written law; (b) the status and trend of the economic and juridic policies of the federal executive administration. The relative weight to be given to these two criteria will vary with the nature of the legal problems involved. As in every jurisdiction, the personal elements in Mexican legal realism are also of prime importance, but these can not be discussed here.

\(^{104}\) Art. 1.

\(^{105}\) Arts. 2 & 3.
man, they are non-waivable.\textsuperscript{106} The distinctive character of this legislation and its detachment from both the Civil and the Mercantile Codes are evidenced by the terms of Article 16:

"Article 16. Cases not provided for in the present Law, or its regulations, shall be determined in accordance with custom or usage, and where these are lacking, by principles derived from this Law, by principles of the civil law where not repugnant to this Law, and by equity."

The law is administered by a hierarchy of special boards, composed of representatives of the employers, the employees and the government.\textsuperscript{107} In general, the law is patterned upon the French labor legislation of the present century.

\textbf{REVIEW AND OUTLOOK}

We have seen that commerce, as an institution, has had to fight for legal recognition. Under Roman militarism it occupied an ancillary place and was held in mild contempt; under feudalism, as it prevailed in Europe during the middle ages, land tenures formed the basis structure of the law, the usages of merchants standing outside the feudal system; up to within recent times Christian doctrine and ecclesiasticism were hostile to the commercial spirit. Only with the advent of the industrial age, which may be said to have opened with the Italian Renaissance, did the legal practices of the merchant receive the serious attention of jurists.

As might be expected, the early struggles for survival of commerce gave rise to an autonomous system of mercantile law. It was the law of merchants, formed and administered by and for themselves alone. With the breaking down of class distinctions and privileges which culminated in the French Revolution, the autonomy of the mercantile law also was broken. In France, and generally in the European countries, it became then a component part of the national law.

In England, a complete blending of the rules of the Law Merchant with common law principles has been accomplished. But in the countries of Europe which were dominated by the French arms or by the Gallic culture\textsuperscript{108} and in their colonies in America, the amalgamation of the mercantile with the civil law never has been perfected. The ancient autonomy of the Law Merchant survives, although in an attenuated form, in the bipartite codification of the private law—a civil code paralleled by a commercial code.

Historical accidents, political cataclysms, alone will not account for differences in legal systems. The genius of the people is always an important, if not the dominant, factor. English pragmatism never has ceased to be adverse to any codification based on philosophical unity. England's comparative iso-

\textsuperscript{106}Art. 15.
\textsuperscript{107}Arts. 334–685.
\textsuperscript{108}"The conquered nations kept the French laws as a benefit—a remarkable thing."
lation in legal development may be traced to either geographical or tempermental insularity—essentially a single conditioning cause. Her instinct for commerce explains largely her readier acceptance of commercial usages as part of the general law of the land.

In the United States, conflicting ethnical and political forces have brought about a compromise between the code and the case system; but, as in England, our relatively early engulfment by commercialism was an insuperable bar to any juridic divorce of the mercantile from the main body of the civil law; instead, we tend to commercialize all law.

The industrial spirit of Germany, developing in a milieu of class militarism, has broken away from the Gallic system which pivots on the mercantility of the act and has reverted to the older system based on the mercantility of the party who performed it—a form of class legislation. No doubt, also, the German's keen sense of philosophical values pointed the way.

In Switzerland, mere geographical position and a desire to encourage foreign investments are not sufficient to account for her adoption of a unified code, freed from the elusive distinction between civil and mercantile acts. That love of a fine adjustment and delicate co-ordination of parts, characteristic of the watchmaker, must also have played its part in the production of the Swiss unified Code of Obligations.

The Mexican civilization, Latin in origin and in development despite her geographical abutment on the United States, never has become imbued with the commercial spirit. The people are artists rather than merchants. During the three decades covered by the régime of President Porfirio Díaz, the heydey of capitalism in Mexico, the commercial development was foreign, not native. The Científicos, who fostered this development, were Mexican statesmen, not foreign capitalists. They controlled "big business" and never were in any sense its servants. Mexico, as a nation, never has been indigenously capitalistic or plutocratic. The Diaz régime exploded in revolution chiefly because it constituted a superimposed digression from the nation's natural growth, an excursus due largely to British and American influences. Since 1911, the national movement in Mexico has been in the direction of some form of socialism, halted often by military revolutions, but none the less certain and well defined when traced through two decades. The long-delayed passage recently of the federal

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1091878-1883 and 1888-1911.

110 Legislation enacted by several of the States of the Mexican Union during the current year, particularly Veracruz, Querétaro and Hidalgo, threatened, for a time, a much broader application of socialist principles than is warranted by the provisions of the national constitution of 1917. This legislation provided for the possibility of a summary and more or less general expropriation of lands and industries on the ground of social welfare or public utility, with nugatory provisions for compensation of the expropriated owners. The movement was fomented by active communist leaders, most of them foreigners. The federal authorities, for some time past, have shown themselves to be strongly adverse to such propaganda. Several hundred communists have been deported or sent to penal colonies during the past few years. The highest federal executive authorities have declared this recent state socialist legislation to be contrary to the best interests of the country at this time, as well as unconstitutional. Those who now control the destinies of the nation appear to have resolved to maintain the status quo of the revolutionary ideals as incorporated in the constitution and related laws—not to recede, but likewise not to attempt further essays in the same field. The principle of private ownership of property is to be maintained, subject only to such limitations in the collective interest as are sanctioned by the constitution.
Labor Law, outlined above, is Mexico's most significant political event since 1917.

We have seen that Mexico, although not temperamentally a commercial nation, has broadened progressively the sphere of application of her Commercial Code. The activities of one industry after another have been catalogued by the legislator as mercantile acts. This has been due partly to the growth everywhere of the commercial spirit and partly to indigenous factors. Since 1911 the slogan that Mexico is for the Mexicans has been popularized. This has made for the nationalization and federalization of industries, of which one outstanding example is the petroleum industry. Another is agriculture. The national agrarian movement is regulated almost exclusively by federal law; and the activities of private agricultural enterprises involving large investments in all likelihood shortly will be declared acts of commerce and so fall under federal jurisdiction. The same is true of the public service enterprises.

Many nationals of Mexico believe that the domestication of all industry will promote its development. Be this as it may, the merchant and the capitalist in general will thereby become more amenable to federal discipline and intervention; the imposition and collection of taxes will be facilitated; and the national ideals of socialism and social solidarity will be instituted more easily. The most striking illustration of this process of socialization through national enactments is the recent issuance of the federal Labor Law.

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111 A review of the socialist features of Mexico's political constitution of 1917 and related laws will be found in a former article by one of the present writers: Barker, New Laws and Nationalism in Mexico, (1927) 5 Foreign Affairs, 589.