A. CHAUNCEY NEWLIN COLLECTION OF OCEANS LAW AND POLICY

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PANAMA CANAL TITLE.

OPINION

OF THE

ATTORNEY-GENERAL

THE TITLE PROPOSED TO BE GIVEN BY THE NEW PANAMA CANAL COMPANY TO THE UNITED STATES.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1902.
The President,
Washington, D. C.

Sir: The act of Congress of June 28, 1902, entitled "An act to provide for the construction of a canal connecting the waters of the Atlantic and Pacific oceans." having authorized you to purchase the rights and property of the New Panama Canal Company of France and to construct a canal across the Isthmus of Panama, in case you should find that a satisfactory title can be given to the United States by the company, and certain arrangements made with the Republic of Colombia, with an alternative provision as to what is known as the Nicaragua Canal route, I have, by your direction and to enable you to perform the first part of the duty so imposed upon you, made an examination of the title proposed to be given by the company, and respectfully submit my opinion thereon.

To make this more intelligible, I think it well to premise a brief summary of the history of the company, of its relations with another Panama canal company of France, and of the negotiations and preparations which have been set on foot looking to a sale to the United States.

In 1878 a contract of concession, which has since been renewed from time to time, was entered into between the minister of foreign affairs of the Republic of Colombia and Lieut. Lucien Napoléon Bonaparte Wyse. In the same year it was approved by a law of Colombia. This contract of concession (see Exhibit C) describes Lieutenant Wyse as a member and delegate of the committee of direction of the civil International Interocanean Canal Company, presided over by Gen. Etienne Turr, and the acceptance of Lieutenant Wyse was in the name of that company. The concession was of the exclusive privilege to excavate across the territory of the Republic, and to operate for ninety-nine years from its completion, a maritime canal between the Atlantic and Pacific oceans. The canal was to be completed and opened to public use within twelve years after the date of the "formation of the universal anonymous company which shall be organized to construct it," and the executive power of the Republic was authorized to extend this time six years, in case it should be found impossible to finish the canal within twelve years. The public lands necessary for the excavation of the canal and for the construction of a railroad, if it should be found convenient to construct one, were granted, the lands to return to the Republic,
together with the canal and railroad, at the expiration of the concessionary period. There was also granted a strip of land 200 meters wide on each side of the canal; also 500,000 hectares of public lands, with the mines that might be in them, to be selected by the company. The canal was to be neutral, a maximum of charges was fixed, and the Republic was to receive certain annual payments of money during the life of the concession. The concessionaire was authorized to make an arrangement with the Panama Railroad Company, and there were other details favorable to the concessionaire, Colombia, and the general public which might use the canal.

This contract of concession was by its terms transferable, but was absolutely forbidden to be ceded or mortgaged in any way to a foreign nation or government.

The concession was transferred by the concessionaire on July 5, 1879, to M. Ferdinand de Lesseps, founder of the Universal Company of the Interocceanic Canal of Panama, hereinafter referred to as the "old Panama Canal Company." This company began the work on the canal and continued it until 1888, when, after the expenditure of a vast amount of money, it became involved in financial difficulties and was placed, in February, by the civil tribunal of the department of the Seine in France (see Exhibit H) in charge of a liquidator, who was authorized, among other things, to contribute or turn over the assets to a new company, the organization of which was then contemplated, and which will be referred to hereinafter as the "New Panama Canal Company."

On December 26, 1890, a law of Colombia (Exhibit C) granted to the liquidator of the old Panama Canal Company a prorogation of ten years for the completion of the canal, providing as a condition that he should transfer the whole of the assets of the company in liquidation to a new company, which was to undertake the completion of the work, and that the new company should be organized with a sufficient capital, and should recommence the work of excavation not later than February 28, 1893. This new law confirmed the contract of concession of 1878, and provided for the receipt by the Colombian Government of 10,000,000 francs and 50,000 shares in the proposed new company.

A law of Colombia of 1892, by article 1, authorized the executive authority to modify the contract of December, 1890, between the minister of foreign affairs and the liquidator, concerning the prorogation for the opening of the canal, and by article 2 authorized the executive to extend the time for constituting the proposed new company and recommencing the work, and provided:

If the Government does not make use of the authorization given by article 1 of the present law, it is fully empowered to make a new contract, which will not require to be approved by Congress.
The Executive made a contract in which a greater time, viz, until October 31, 1894, was allowed for constituting the new company and beginning the work, and it was therein declared that the term of ten years mentioned in the prorogation of 1890 should begin upon the organization of the company. The time for the beginning of the ten years had not been specifically mentioned in the law of 1890. No subsequent law of the Colombian Congress on the subject has been found.

The new company was constituted definitively on October 20, 1894. (See Exhibit J.) This would accordingly make the ten years end in October, 1904.

The Executive power of Colombia, in April, 1900, undertook to grant to the New Panama Canal Company a further extension of six years from October, 1904. (See Exhibit C.)

After the judgment of the civil tribunal of the Seine of February 4, 1889, appointing a liquidator of the old Panama Canal Company and authorizing him, among other liquidation proceedings, to contribute to the projected new company the assets of the former, the liquidator continued the work of the canal as liquidator, entering into arrangements for that purpose with the contracting companies which had been engaged in excavating, until the formation of the new company in 1894, when he entered into a contract of contribution with the founders of that company to turn over the assets.

This contract took the form of stipulations in the by-laws of the New Panama Canal Company, articles 5, etc. (Exhibit I.) These articles declared that the liquidator contributed to the new company all the rights which had resulted for the company in liquidation from the laws, decrees, and other acts of the Government of Colombia; all the works, plants, workshops, buildings, hospitals, matériel, etc., belonging to his company; all the plans, drawings, studies, and documents of all kinds concerning the construction or operation of the canal; the benefit of all contracts with third persons; all guarantee funds on deposit; the whole to be the property of the new company. The articles also contributed a large majority of shares of stock in the Panama Railroad Company, a New York corporation, which shares had been purchased by the company in liquidation; but this last contribution was conditional; that is to say, should the canal be duly completed it was to remain good, but should the canal be attempted and partly constructed by the new company, but not completed within the time allowed by the concession, the shares were to return to the liquidator; and should the new company vote not to attempt the construction of the canal, or vote to raise money for that purpose but fail to get it, then an indemnity of 20,000,000 francs was to be paid to the liquidator and the railroad shares to belong to the new company.

This contract of contribution stipulated in favor of the liquidation of the old company 60 per cent of the net profits of the enterprise,
and this was to be reduced to 50 per cent if the canal should not be attempted and if the unconditional title to the railroad shares should be acquired by the new company in the manner that has just been explained. (See Exhibits L and I.)

The rights as to the railroad shares were to remain inalienable by the New Panama Canal Company until payment of the 20,000,000 francs or the complete construction of the canal within the time allowed by the concession. There was also reserved to the liquidator the right to a commission of inspection to examine the proceedings of the new company.

In the interval between the appointment of the liquidator in 1889 and this contract of contribution of October, 1894, divers suits were brought against the liquidator, which were the more embarrassing because of the legal character of the old Panama Canal Company. He accordingly applied to the French Parliament for a special law to regulate the liquidation of the company, and such a law was passed on July 1, 1893. (Exhibit B.) This law will be frequently referred to hereinafter.

In the course of raising funds the old Panama Canal Company had issued a great number of bonds of different kinds. (See Exhibit 13.) The last issue before the company went into liquidation was an issue of what have come to be known as "lottery bonds"—that is to say, bonds which were also in a sense lottery tickets. These were authorized by another special law of France of June 8, 1888. (Exhibit F.)

Of the money received from the subscribers of these bonds, namely, 360 francs each, the old Panama Canal Company took 300 francs and 60 francs were turned over to another company, to be invested and to provide both a sinking fund to reimburse the bonds from time to time, and in the meantime to furnish funds to pay the prizes of the lottery. This company is still in operation. Its members are the subscribers to the lottery bonds themselves. (Exhibit 13.)

Another special law of France after the dissolution of the old Panama Canal Company authorized the liquidator to issue some of the same lottery bonds.

The bonds in his hands unissued were not among the rights contributed by him to the New Panama Canal Company.

The latter company resumed the work on the canal immediately upon organizing itself, having taken in a cash capital of 60,000,000 francs, subscribed by divers persons, including some of the old contractors, some of the bondholders and stockholders of the old company and some outside persons; and has continued the work until the present time.

The liquidation of the old Panama Canal Company has likewise continued under the special law of July 1, 1893, concerning it.

In 1901 the question of a purchase of the rights and property of the New Panama Canal Company by the United States was much discussed
in France and the United States, and on January 9, 1902, an official offer (see Exhibit T) was made by the officers of that company to sell to the Government of the United States all the property and rights of the company on the Isthmus of Panama and its archives in Paris, for $40,000,000.

This offer had been authorized by vote of the general meeting of stockholders of the company (see Exhibit T), and the liquidator and the official representative (called the "mandataire") of the bondholders of the old Panama Canal Company whose appointment had been provided for by the special law of July 1, 1893, announced their consent to the sale in formal proceedings in the civil tribunal of the Seine, by which that law required all acts of the liquidator tending to alienate the assets of the old company to be approved.

The civil tribunal of the Seine approved such consent of the liquidator by a judgment of March 19, 1902. (Exhibit 4.)

A division of the $40,000,000 between the new company and the liquidator was settled by arbitration, and the submission by the liquidator of this matter to arbitration was approved by another judgment of the civil tribunal of the Seine, dated August 2, 1901. (Exhibit O.)

One of the bondholders of the old Panama Company, a M. Donna- dieu, went into court and asked the civil tribunal of the Seine to set aside and annul its own judgment approving the consent of the liquidator to the sale to the United States and questioning the new company's right to sell; but the tribunal, by judgment of July 3, 1902 (Exhibit 5), decided that he had no right of action, because, under the special law of 1893, he was represented for such purposes by the mandataire of the bondholders, and that he had no right to question the power of the New Panama Canal Company to sell, having no legal relations with that company.

This judgment was confirmed upon the same reasons given below, by judgment of the court of appeals of Paris of August 5, 1902. (Exhibit 6.)

For convenience in pursuing the investigation, all objections known to have been stated in Congressional debates and elsewhere to the satisfactory character of the title proposed to be given by the new Panama Canal Company to the United States were formulated. (Exhibit 1.) These were in the same terms communicated to the officers and lawyers of the company, in order that, while the investigation was pursued and the conclusions herein stated reached independently of them, they might draw up and submit whatever they saw fit by way of comment upon those objections. They have recently handed me a legal opinion or brief, a translation of which is among the papers hereto annexed. (Exhibit 2.)

In addition to taking that step we have obtained, independently of them, a special stenographic report of the oral arguments made in a
recently decided case in the court of appeals of Paris, in which the sale of the canal property was opposed by one Donnadieu, as already mentioned. (Exhibit 6.)

The objections referred to, except the last, which is that Congress authorized a purchase only from the new company and not from the old, whereas it is alleged that the property has become again that of the old company, resolve themselves into reasons in support of the following propositions:

1. That the new company has not power to sell the canal and railway property.

2. That the liquidator has not power to consent to such sale.

3. That the French courts have not power to authorize the liquidator and new company, or either of them, to enter into the sale.

4. That, at all events, the United States would take the property as a trust fund subject to the total obligations to the stockholders, bondholders, and the other creditors of both companies.

It will be convenient to examine the law bearing upon these four propositions in their order:

1. The first is: That the new company has not power to sell the canal and railway property.

   This requires a brief statement of the history and nature of such a company, in view of the law of France.

   Our conceptions of charters and corporations and privileges enjoyed by corporations, as well as the notion of their being unable to act beyond the ability infused into them by their charters, are here very misleading, but, notwithstanding this, there are abundant conceptions belonging to our system which can enable us to understand these French associations.

   There once existed in France concerns similar to our corporations, taking their character from royal and feudal institutions, but it is to be remembered that France passed, more than a century ago, through a revolution in which almost everything of that kind was destroyed as though by fire.

   It was one of the acts of the French Revolutionary Convention to declare "the liberty of industry."

The New Panama Canal Company is an anonymous partnership or association, composed of shareholders (Société Anonyme par Actions), which, in view of its object, is of a noncommercial or nontrafficking kind, but subjected by a law of August 1, 1893, to an act concerning commercial associations passed in 1867, and to the Commercial Code and the customs of commerce. All anonymous associations formed since August 1, 1893, are subject to the same, and are, legally speaking, commercial, though in fact not so.

The old company is an anonymous partnership which voluntarily took the form of an anonymous association of shareholders, but is not ruled, and never was ruled, by the law of 1867 or the code and customs
of commerce, but only by the Civil Code, having been formed before August 1, 1893, and not being commercial in its object or business.

Anonymous associations or partnerships have not the names of the partners, but a name merely descriptive of their object or business.

The essential or fundamental nature of both companies is that of voluntary partnership, as we understand that. The powers, accordingly, are those which an individual Frenchman has under the general rules of law—an individual merchant corresponding to the new company, and an individual who is not a merchant to the old company. As an individual can sell what belongs to him to whomsoever he pleases (unless some third person has a claim such as properly warrants him in opposing the sale in order to subject the property to a debt owing to him, or the like), so one of these associations, of either kind, can ordinarily dispose of its property.

In the case of commercial associations proper, to which the new company, the one we are now considering, has been assimilated and added by the general law already referred to of August 1, 1893, the legislature of France, in view of the usually large capital and the great number of stockholders, bondholders, and other creditors, has imposed a few restrictive rules (act of 1867 and amendment of August 1, 1893, Exhibit 3) for the greater security of the partners and of third persons, requiring publication of the by-laws, a certain amount of stock to be represented at certain stockholders' meetings, the paying up of subscriptions, etc.; but these do not change the essential character of the concerns as partnerships; do not establish any tie between them and the Government, or any obligations from them to the Government, and do not forbid the exercise of the liberty to dispose of the property of the concerns as freely as an individual is able to dispose of his, if no special law forbids and if he is solvent and not under some particular contractual or other like obligation to retain the property. This new Panama Company is quite solvent.

The act of 1867 already referred to provides, in section 21, the first section under the title of "Anonymous associations," as follows:

21. In the future, anonymous associations may be formed without authorization by the Government. They can, whatever may be the number of the associates, be formed by a document of a private character ("sous seing privé") made in duplicate. They are subject to the provisions of articles 29, 30, 32, 33, 34, 36 of the Code of Commerce and to all provisions contained in this title.

Lyon-Caen and Renault, Treatise on Commercial Law, say that—

The law of 23d of May, 1863, modified the Code's requirement of the authorization by administration to the extent of exempting from the requirement associations having a capital exceeding 20,000,000 francs * * * the law of 1867, which has repealed the law of 1863, has not set anonymous associations free to constitute themselves and to perform their functions as they may see fit. In the interest of stockholders and third persons it has imposed some rules (articles 41, 42, 47) which, from the nature of things, are much the same as those that same law has established for
associations of commandite par action. The legal regulation of the two kinds of societies par actions (that is to say, having stock) has thus become the same in this, that since then neither of them is submitted to a previous authorization or to the surveillance of the administration, but they enjoy only a liberty regulated by the law.

In a judgment of July 19, 1899, the civil tribunal of the Seine, in deciding a controversy between the liquidator of the old Panama Company and the company formed in 1888 to take care of the so-called lottery bonds, discussed the different situation of a civil association formed before 1893, such as was the old Panama Company, and that of a more recent association, and held that the civil association for taking care of the bonds did not "come under the control of the law of July 24, 1867, which applies only to commercial associations.

* * * That it is the Civil Code alone which rules the civil associations to determine the rights and suits of those interested, whatever form those civil associations may have taken in order to constitute themselves; that the agreement shown by the by-laws, accepted by all and by the company of Panama itself, is, therefore, the law of the parties; that it has been observed in the calling and in the composition of the extraordinary general meeting of July 25, 1898, which, consequently, can not be criticised from this point of view."

But we are at present discussing the power of the new company to sell, and it would seem to follow from what has been said that it has the power, just as an individual would have power to sell his property, unless some special statute has forbidden this or made it unlawful, since it is a solvent company without bondholders, as appears from its annual reports hereto appended. (Exhibit N.) It is essentially a partnership, subject to a few statutory regulations about entirely different matters.

It has been suggested, however, that its contractual obligation to the old company to pay 60 per cent of the earnings of the canal restrains it. And this may well be true; but this contractual obligation of a partnership is the same as though an individual had agreed to complete the canal and to pay the 60 per cent, and is therefore such an obligation as can be released by the other contracting party. If so effectually waived by the other contracting party, no one else could complain or question.

Being a merely contractual obligation of a private partnership for the benefit of another private concern, there is no principle of law which would make the new company unable, with the consent of the other contracting party, to make use of its liberty to dispose of what belongs to it. There is no lack of power, or vires.

Whether from the point of view of the bondholders and other creditors of the old company, and the power of the liquidator, it is just and lawful for him to set free the new company is a question to be separately discussed hereinafter.
It has also been suggested that the so-called lottery bond law of 1888, providing—

Art. 3. All machinery necessary for the accomplishment of the work shall be made in France. The raw materials shall be of French origin—

is a special law containing, by some implication, a prohibition to the new company to sell to one who could not be expected to be subject to such provisions of law, or else subjecting any purchaser of the property of the new company to those provisions, so that he would be bound to proceed accordingly.

It has, besides, been supposed (but enough has been said to indicate the error of that) that this law of 1888 is proof that the Government of France is represented by or bound up with companies generally in such a way that the express consent of that Government is necessary to authorize any sale of the whole of its property by the new company.

This law was purely exceptional, intended to give an unusual right to the old company in the matter of issuing bonds, which are in effect lottery tickets also, lotteries having been prohibited in France by a law of 1836.

The Government, as a compensation to the nation in general for permitting this unusual thing, required the company so specially privileged and benefited to use French machinery and materials. But in view of the general relations of the Government to these free partnership associations, it would be going a long distance to see in this an order intended to be addressed to any individual or other purchaser of property from the company which was thus given the benefit of the unusual privilege, and still more to deduce a mortgage or a lien attaching to any property it might sell into whosoever hands it might come.

The French legislature by act of 1889—the company having dissolved and ceased to require to any great extent machinery and raw materials—passed another law authorizing the liquidator to issue some of the unsold bonds; but, of course, as bonds of the old company, which still existed for the purposes of liquidation, and providing that in case the liquidator should transfer or cede its assets to a company organized for finishing the canal, the new company should not issue the bonds which might at that time remain unsold otherwise than on the conditions determined by the law of June, 1888, concerning the minimum of the selling price and the payment of interest.

But the new company has remained a stranger to the lottery-bond scheme. It has not enjoyed the privilege of issuing those bonds; the still unissued bonds have been retained by the liquidator and were not contributed by him to the new company, and they are no part of what it is now proposed to sell to the United States.
The nature of the provisions of law concerning materials and machinery is such that the requirement to obtain these in France was not in any way to benefit the bondholders or any other specific individuals, or even the French Government itself, but the people of France indefinitely.

The expected benefit was a vague and indefinite one, reserved by the Government as compensation for something which the now proposed purchaser would not get, viz, the privilege of issuing lottery tickets as an inducement to a loan the company had already a right to get; and only the Government of France, which is acquiescing in the proposed sale, with a full knowledge that the foreign purchaser would not think of going to France for his materials, could ask that such materials and machinery should be purchased in France. No bondholder or stockholder or creditor can ask, or could possibly desire to ask, that that order burdening the old company should be transferred to a purchaser. It seems to be clear that no request from the French Government will be, or could justly be, made; and further, that if, by the law of 1888, the legislature intended to say that any remote purchaser of property from a free partnership concern must be a person subject to the laws of France, or that no sale to a foreign company or concern could be made, the legislature used no word to express that idea. The United States will not be a French successor of this French company, enjoying French privileges and bound by French law, but a foreign purchaser of property belonging to it in a foreign country.

It may be remarked, in passing, that so far from the canal project and undertaking being those of the Government of France as a Government, it is clear that the concession by Colombia was made, not to France, but to private persons and a private company, and that the concession itself forbids the belief that Colombia was willing, at the time, to make the concession to or for any foreign government. The canal is not in France, but in Colombia. It is not built in pursuance of the governmental obligations of France to provide highways in France for the French people. It is, in short, a canal of great public interest in Colombia, which fact led Colombia to declare it a work of public utility, so as to authorize the private concessionary to make use of what we call the right of eminent domain, or forcible expropriation of private property; but, as far as the nation and Government of France are concerned, it is a canal in a foreign country partially constructed by a private French concern in the nature of a free partnership.

France could have prohibited the French private company from selling to outside persons or concerns, if it desired to retain the benefit of the purchase of materials in France, but France can not make laws directly binding either outside persons or property in Colombia after
it ceases to be owned by Frenchmen. However, France passed no such law, and such companies, as we have shown, are left by her as free to sell what they own either to Frenchmen or foreigners as individual Frenchmen are.

But it is not sufficient to show that there rests in the New Panama Canal Company, or in its associates or stockholders, somewhere, the right to make this sale, or divest themselves of their rights in favor of a new concessionary of Colombia, so far as their powers under the law of France are concerned.

It is still necessary to know that the "general meeting" of stockholders, so called, which has authorized the offer, reserving the right to itself to ratify the sale, has the power to so offer and ratify that sale, and that it is not necessary to have unanimous action by the shareholders.

The "general meeting" of stockholders receives its powers from the by-laws, and the by-laws are made by the original stockholders or founders. It should always be kept in mind, in this connection, that they are partners who have associated upon certain terms, and that a partnership agreement can not be changed by less than all of the partners.

Sometimes the by-laws (statuts) delegate authority to the "general meeting" to alter those by-laws in certain specified particulars. When that is done the general meeting is, as it were, both a constitutional convention and a legislature of the association.

The Government of France, prior to 1867, authorized, through the executive administration, the by-laws of commercial associations, to which the New Panama Company, created in 1894, has been assimilated by the act of August 1, 1893; but, as I have said, from 1867 only certain very general regulations were prescribed by statute, and otherwise the founders were left free to make such by-laws as they saw fit.

There is nothing in the act of 1867 or the amendment of 1893 forbidding the most extensive powers to be conferred by the by-laws of the founders upon the general meeting.

On the contrary, the authors already quoted (same volume, sec. 864) say that the question is much discussed whether, in the absence of any delegation of power by the by-laws—i. e., when they are silent on the subject—the general meeting has not this power of alteration. They say it is pointed out that if "unanimity among the stockholders is required, alterations of the most necessary character to the carrying on and development of the association will be rendered difficult, even impossible." They say that it is also claimed that in the general meetings, which have to deal with questions concerning a collective personality, there should be power to lay down the law, because the persons
composing the association have renounced their individual rights in favor of the collective interest. They add, however:

We think, on the contrary, that, in the absence of a formal clause in the by-laws, alterations in them can not be made except with the unanimous consent of the shareholders.

It happens that the by-laws of the New Panama Canal Company are not silent, but expressly give very extensive powers to the general meeting which proposes to make the sale. Title 9 of those by-laws (Exhibit I), under the heading "Amendments to the by-laws—Liquidation," has the following:

Art. 60. If experience shall show the expediency of modifying or adding to the present by-laws, the general meeting shall proceed to do that in the manner set forth in articles 61 and 62 hereof.

It may especially decide in regard to a reduction of the capital stock; a reduction of the fixed duration of the association, an extension of it, or an earlier dissolution of the association; its fusion with other associations; it may even affect all and any modifications bearing upon the object of the association without, however, altering its essence.

Art. 63. In case of the dissolution of the company, the general meeting, on the proposal of the council of administration, determines the method to be adopted for liquidating or for the constitution of a new company; it appoints the liquidator or liquidators, and can give them the most extensive powers.

Articles 61 and 62 referred to contain merely details (taken from the regulations of the act of 1867) as to the composition of a general meeting capable of carrying out article 60.

It would be a violation of article 60 to use the funds of the association to build a canal in Spain. That would essentially alter the object or business to be carried on.

The general meeting thus has the power to amend or add to the by-laws in any way not altering the business to be carried on, and therefore to adopt by-laws giving itself or the president or council of administration any powers concerning the sale of the assets that it sees fit to give.

Having all the powers of the shareholders, with the single exception above mentioned, I do not see that a resolution directly authorizing or ratifying the sale, if published in the manner required for amendments of the by-laws, would be contrary to any law, violative of anyone's rights or in excess of the powers given to the general stockholders' meeting by the by-laws above quoted.

This great power was properly conferred by the founding partners because of the impossibility of getting together for unanimous consent the hundreds of thousands of partners.

II. The next of the four propositions is—

2. That the liquidator has not the power to consent to such sale.

This involves somewhat more complex problems, but they do not seem to be difficult of solution.
It might be sufficient to say that the civil tribunal of the Seine, given by the general law and the special act of July, 1893, jurisdiction of the persons and subject-matter, and being what we should call a court of general jurisdiction, *has decided* that the liquidator *has* the power to consent to the sale, and that the court of appeals, upon the appeal of the only person who presented himself or claimed to have presented himself within the time and manner allowed by that special law, has decided against him on appeal.

He has a right (during a period of two months, now running) to ask the Court of Cassation to nullify the judgment on appeal, which held that even he had not presented himself in due time and manner and that he had no right of action, even if he had been in time. But in view of the objections which I have mentioned in the beginning of this paper, it may be well to explain the validity of the judgment or decision that the liquidator has the power to consent to the sale, its conformity with French law, its reasonableness, and its effects with regard to the stockholders, bondholders, and other creditors of the old company.

What is this liquidator and what are the powers of such liquidators?

The Civil Code, which, as we have seen, regulates the affairs of such civil companies, contains very little with regard to their liquidation or winding up, and almost nothing in restraint of the liberty of the partners. (See title 9, "Of the contract of association.") It is almost wholly confined to the general rights and relations of individuals. It contains nothing about corporations or joint-stock companies or other artificial and privileged concerns. Its provisions about the "contract of association" contemplate a mere voluntary partnership instead of a statutory or artificial body in which the stockholders have a limited liability, and apply to any and all free partnerships. They should be read in the light, first, of the freedom of contract; and, secondly, of the principle that third persons can be bound by ample notice of the nature of the freely made partnership with which they may deal. As the authors already quoted say, there is nothing in the Civil Code or elsewhere to forbid (see secs. 1077-1082) a mere partnership from taking the form of a commercial association and letting the world know that its private contract of association or partnership contemplates a limited liability. These authors say:

We believe, on the contrary, that the law of 1867 [which contemplates limited liability of commercial associations] rules noncommercial associations as it does commercial associations having stockholders, though constituted before the law of August 1, 1893.

We have seen, however, that the civil tribunal of the Seine has held that it does not, and those authors themselves say that the greater number of judicial decisions are that way.

But it is recognized by these authors, and in the decisions of the
civil tribunal of the Seine, that the bankruptcy laws and the laws concerning the statutory institution known as "judicial liquidation" have no application to the noncommercial associations constituted before August 1, 1893, and that the question of their liquidation is left altogether to the Civil Code.

The Civil Code, in turn, leaves it to the will of the proper tribunal, and to the general provisions of law applicable to individuals, and especially to individuals in the case of succession after death. About the only express provisions in the Civil Code on the subject are the following articles:

1871. The dissolution of associations having terms [of duration] can not be demanded by one of the associates before the expiration of the terms unless upon just grounds, as where one of the associates has failed to live up to his engagements, or where an habitual infirmity renders him incapable of attending to the affairs of the association, or in other similar cases, the legitimacy and importance of which are left to the determination of the judges. (Civ., 1184–1865.)

The rules concerning partition of successions, the form of such partitions, and the obligations which result therefrom among the coheirs apply to partitions among associates. (Civ., 792, 815 et seq., 826; Code Procedure, 966 et seq.)

The liquidation or ordinary winding up of commercial associations formed after 1867 is equally unregulated by statute, since it is neither settlement by bankruptcy proceedings nor settlement by what is technically "judicial liquidation." The authors quoted say (sec. 412):

It is not only from the syndic [in bankruptcy proceedings] that the liquidator of an association differs, it is also from the judicial liquidator named in virtue of the law of March 4, 1889.

And in section 364 they say:

The Code of Commerce (art. 64) supposes, it is true, an association in liquidation where it speaks of associates who are not liquidators. Article 61 of the law of 24th July, 1867, also expressly mentions liquidation. But no French statute has defined the state of liquidation, nor established the rules to govern it; jurisprudence (that is, judicial decision) has had to supply that omission, drawing inspiration from the general principles of law and the necessities of practice.

It appears that the matter of liquidation or winding up being left thus to the courts, they have, in a general way, followed the same plan for civil or nontrading associations voluntarily constituted in commercial form before 1893, such as the old Panama Company, as in the case of commercial associations or the associations assimilated to them, created since 1893.

Bankruptcy law, to repeat, applies in any event only to commercial companies and individuals; the quasi-bankruptcy proceeding called "judicial liquidation" is equally inapplicable to this Old Panama Company, a noncommercial company created before 1893. We have simply a dissolution and settlement of a partnership by the partners, if they can agree unanimously, and if they can not, then under the power of the courts on general principles of law, ex necessitate.
But what is left to the courts is the resolution of questions which
the laws do not themselves resolve, and the necessities of the case
nevertheless require to be resolved. This is very little, and we are
not to understand that because the partners can not agree and the
courts must be resorted to, the rights of all concerned, even their
rights of action, are ended or subject to the mere caprice of the
judge. It is quite otherwise. The Civil Code and the statutes and
recognized maxims govern as before, so far as it is possible to apply
them. Ordinarily all that the court does is to appoint a liquidator,
and authorize him generally to liquidate as he deems best.

The partnership is dissolved, though in a sense continuing to exist
(same authors, 372). Being resolved into its units, equal and having
rights well determined by the code, they liquidate themselves if they
can unanimously agree, or where their by-laws have provided for the
choice of a liquidator by the general meeting (as they usually do), he
liquidates. In cases in which they are not unanimous or have not pro-
vided for a liquidator, necessity requires the court to name one (same
authors, sections 368–369, where it is remarked that foreign codes
differ in permitting a mere majority to decide, if a majority can agree
upon a liquidator); and he is not an officer representing the court, but
the judicially selected representative or agent of the associates to
settle or wind up their affairs.

The associates could give him all their unlimited powers of liqui-
dating. If they do not meet and agree unanimously—and this is
obviously impracticable among several hundred thousand scattered
stockholders—then the court gives him general powers or determines,
from among the powers of the associates or partners, what ones are to
be given, and these are confined to the requirements of liquidation or
winding up.

This course, as I have said, is regarded as necessary to reach a liqui-
dation and the partition to which the individual associates or partners
are entitled (the code not having provided any method of reaching
those ends) in the absence of the concurrent, unanimous action of the
associates or partners.

If the creditors are dissatisfied they can (but not in the case of this
noncommercial association, constituted before 1893) apply for a de-
claration of bankruptcy.

The authors already quoted say (secs. 377–379):

Foreign laws, which have concerned themselves with the liquidation of associa-
tions, have determined the powers of the liquidators and their obligations; it is not
so with us, for the simple reason that our Code of Commerce [and the same, as I have
said, is true of the Civil Code] has not treated of liquidation. As has been said above,
it belongs to the associates or to the tribunal, in naming a liquidator, to determine
his obligations and his powers. But it is important to inquire what they are, in case
the act of appointment is silent or incomplete on the question. * * * The liqui-
ator is an agent; he is chosen by the associates, or by the court, to represent the dissolved society, to the end of terminating its operations, paying its creditors, recovering the debts owing to it, and thus getting at the net assets which are to be partitioned among the associates. * * * It is necessary to admit, without restriction, that it is only the association (not the creditors) whom the liquidator represents. It is not necessary to argue otherwise from judgments which confer powers the most extensive upon the liquidators for the realization and partition of the assets. The extent of the powers of the liquidator can not take from the functions he performs their essential character. As has been justly remarked, however considerable we suppose the powers of the liquidator, they can not exceed those which belong to the associates themselves. Who, however, can regard the associates as the agents or representatives of their creditors?

By a judgment of 4th February, 1889 (Exhibit H), a liquidator was appointed, in pursuance of article 1871 of the Civil Code (above quoted), for the Old Panama Company, for the reason that it was in difficulties, practically insolvent, that a vain attempt had been made to obtain an extraordinary general meeting, that the by-laws did not intend to, and could not, deprive a shareholder of the right which article 1871 gave him, etc.; and the liquidator’s appointment was “with powers the most extensive, especially to cede or contribute to any new association the whole or part of the association’s assets,” etc.

He was not, however, authorized by the court or by the special act of France of 1893 to reorganize the old company, and has never undertaken to do so. That would not be liquidating.

It seems to have been supposed that the broad power given is something very extraordinary, and of doubtful validity. But the doubt, if there be one, is certainly not as to the power to get rid of all the assets. It is rather, it seems to me, as to the power to do other than that, viz., to contribute to another company, with the result of an indefinite postponement of the end of the liquidation or winding up; not as to the power to turn over, or consent to have turned over, to a purchaser for cash the original or exchanged assets of the company, but rather as to that of beginning and continuing the agreement of contribution with the new company looking to future work on the canal. Certainly, to sell the property and obtain cash with which to pay the creditors and satisfy the demands of the associates for a partition of what remains, if anything, is one of the most ordinary and obvious methods of liquidating in all countries.

However, either course would seem to be within the limits of legitimate liquidation. The one adopted appeared to promise more to the creditors and stockholders than that of selling offhand the remains of a discredited enterprise and some machinery of little or no value for any other uses.

But it seems to be supposed that, having made a contribution which transferred the ownership of the canal property to a new company for the price of 60 per cent of the net earnings of the completed canal, the liquidator can not, under his original powers or under any power
the court can add thereto, sell or dispose of or release for a cash consideration this 60 per cent of expected earnings.

It is difficult to see wherein this property or right is more sacred or inalienable than the canal itself, which was disposed of by the liquidator in 1894 to the new company.

If it is a debt owing to the old company, represented by the liquidator, it is an asset of a very ordinary kind, such as a liquidator collects, compromises, exchanges, or otherwise disposes of as seems best for his principals. That is what it amounts to, so far as all but the railroad property is concerned, for the agreement of contribution, as embodied in the by-laws of the new company, expressly provided that—

The present corporation shall become owner of the property and rights hereby ceded and contributed on and from the day when it shall have been finally constituted, except, however, what is to be stated hereinafter in regard to the Panama Railroad.

Neither is it apparent why, if the tribunal could have originally authorized a sale of all the property or assets of whatever kind, it has any less power to do so now.

If the title to the railroad stock is in any sense still in the old company, all the more clearly it can be sold by the liquidator as an ordinary unexchanged asset, or quitclaimed by him to a purchaser from the new company.

But it has been suggested that the proposed action of the liquidator is a bad bargain for the associates and with regard to the creditors of the old company; that he would be wiser to take his chances on the 60 per cent profits of the Panama Canal to be (possibly) constructed by the French company, than accept the certainty of a cash payment equal to the present value of the canal, the concession and the other property.

Can the validity of the sale or disposal of every piece of property embraced in the assets of a failing partnership depend upon the wisdom of it, or the validity of the court's authorization of such sale depend upon that? Who, moreover, is to judge of the wisdom of this act?

The liquidator has decided, the court has approved his decision and published its approval, as the special act of July, 1893, required, and but one among the stockholders and creditors attempted to make use of the right to attack the judgment of approval, and that one, a bondholder, was told that his legal representative had appeared in court and expressly approved the act and in so doing represented his interests as one of the bondholders, in pursuance of the special law of France. Not one of the general creditors (if there are any such) objected, and the mandataire or representative of the bondholders has repeatedly and formally approved.

Under these circumstances, it is to be presumed in fact that the course is a wise, or, at least, reasonable one, from the standpoint of
those who are selling, even if it can be imagined that its wisdom or unwisdom has any bearing upon the validity of the sale.

The bondholder, Donnadieu, who attacked the judgment of March 19, 1902 (Exhibit 4), approving the liquidator’s consent to the sale, was decided against on July 3 last (Exhibit 4), and the court of appeals of Paris reheard the case and, adopting the reasons of the lower court, repeated the decision against him on August 5 (Exhibit 6).

The judgment of approval of the consent of the liquidator to the sale was rendered on March 19, 1902 (Exhibit 4), in pursuance of articles 10 and 11 of the special law of July 1, 1893, which are as follows:

**Art. 10.** All acts tending to alienate any assets of the company, all contracts entailing a transfer or contribution of the whole or of a part of the assets of the concern, emanating from the liquidator of the Universal Company of the Interocenic Canal of Panama, shall be subject to the approval of the civil tribunal of the Seine, which shall, on the report of one of the justices, pass upon the question in open court.

**Art. 11.** All decrees of approval or ratification rendered in accordance with the preceding article shall be published, within a term of ten days, in the "Journal Officiel" and in the "Journal Officiel" (Commune edition).

This decree may be attacked by the shareholders, by the mandataire of the bondholders, and by other creditors of the company, within a delay of not exceeding one month from the date of the publication aforesaid. The civil tribunal shall adjudicate the question within the space of one month, as in the case of matters demanding an immediate and summary adjudication. The appeal from such decision must be entered within ten days from the time of notification of said judgment to the party in person or at his domicile.

This did not confer power upon the liquidator. It restrained the practically unlimited power he already had by subjecting some of his specific acts to the judicial approval.

The words briefly translated into the word "attacked" in article 11 are "frappé de tierce-opposition." Donnadieu, the bondholder of the old company, has made this attack upon the judgment of approval, or attempted to do so.

This proceeding called "tierce-opposition" is one by means of which a person who is not party to the suit, but believes his rights violated or injured by the judgment, can have it set aside. It can not, under the general law, be made use of by one who, though not actually a party, has been represented by one of the parties. The special law concerning the liquidation of the Old Panama Company, however, seems to have extended it to the stockholders of the old company, although represented by the liquidator, and to have extended it to any possible general creditors (not bondholders), although apparently represented by the mandataire of the bondholders, as may be inferred from the second paragraph of article 1, taking away, or rather suspending, their rights of action and permitting them to sue only in case the mandataire neglects or refuses to do so. But whether general creditors are represented is obscure and not important in
regard to the present inquiry, since the general creditors were permitted to oppose the judgment of approval and did not resort in any single instance to the "tierce-opposition."

The special law, so far as the judgment of approval is concerned, is in some respects narrower than the general law, because, according to that law, there is no limit of time for the proceeding of "tierce-opposition" by an outsider, and the time for appeals which, under the general law, is two months, is cut down to ten days. In Beauchet's Treatise on Procedure in Civil and Commercial Matters (third edition, 1891) we read:

1045. This extraordinary proceeding ["tierce opposition"] can be employed against any judgment, whatever may be its nature and the jurisdiction of the court pronouncing it. All the decisions in first instance, or final, of justices of the peace, "prud'hommes," tribunals of commerce, civil tribunals and courts [that is, courts of appeal] are subjected to it. The decrees of the court of cassation only are free from it, according to the decisions of that court. As a decree of the supreme court does not affect the basis or foundation [fond] of the litigation, it can not occasion any serious and real harm.

1046. The law has not fixed any limit of time within which the tierce opposition must be instituted. It has left this point to the control of the ordinary rules of prescription. The tierce opposition can be employed as long as the right upon which the third party bases it has not been taken away by the effect of any prescription acquired against him, conformably to the ordinary law.

The ordinary methods of attacking a judgment, according to Beauchet's Treatise on Procedure (secs. 945, 946) are by appeal and opposition. Opposition is a request to the court entering a judgment on default to set it aside. There is no such judgment in the Donnadieu case.

The extraordinary methods are, according to the same authority, the "tierce opposition," the "requête civil," and the "pourvoi en cassation."

The "requête civil" is an attack upon a judgment of a court of appeals only, based upon fraud or improper conduct in connection with the judgment. Nothing of the kind has been suggested, and this may be dismissed from consideration.

An appeal has been taken and decided against Donnadieu. (Exhibits 5 and 6.)

Tierce opposition has been explained—an application to have a judgment set aside by one not a party to its rendition, because it violates some legal right of his. Any judgment of any court can so be attacked, provided a right of the applicant has been violated, except judgments of the court of cassation. No one can, however, pretend that the appellate judgment against Donnadieu violates any right of his, because that affirmation can hardly affect any one but Donnadieu. Especially can not other bondholders or creditors of the old company escape the statutory obligation to file their own tierce oppositions within the month allowed by the special act, by attacking the affirming judgment against Donnadieu.
This leaves nothing to be considered but Donnadieu's proceeding in cassation, if he should institute one.

The proceeding in cassation is not a general appeal, or even a writ of error as we know the latter. The court of cassation annuls judgments and remands cases, where the judgments violate the law, almost wholly statutory.

His case has two parts—one between him and the new company, the other between him and the liquidator.

He alleged that his rights would be violated by the new company's selling the property, and brought suit to restrain it.

He alleged that the judgment approving the liquidator's consent violated his rights, and asked to have the judgment set aside.

Both parts were decided upon exceptions, instead of upon the two questions he thus sought to raise.

It was held that he was not allowed by the special law to file tierce opposition to the judgment of approval, because he was a bondholder and, as such, represented by the mandataire of the bondholders, and because the special law allows tierce opposition only to the stockholders of the old company, the bondholders' mandataire, and the other creditors.

This is the plain reading of that law.

He does not deny that bondholders are unable to have the tierce opposition individually, but asserts that he is not a bondholder, but ceased to be one by getting judgment for the amount of his bonds, and so became one of the "other crédiors."

Certainly an American court, without regard to the question of an alteration of his technical rights by getting a judgment of recovery on his bonds, would say that, within the meaning of the special law, he is a bondholder and that he is not what is meant by that law as an "other creditor." The meaning or "spirit" of the law is as important to French courts as to ours.

The French courts denied that there had been any alteration of his rights, and held that a man does not cease to be a bondholder because he gets a judgment that his bonds shall be paid.

I see no reason to doubt that that sensible view is correct.

Donnadieu will fail to reverse the court of appeals on the branch of the case concerning the liquidator's consent, unless the court of cassation believes that the liquidator has not the power to dispose of the assets in question, with the approval of the lower courts, and concurrence of the mandataire of the bondholders, and further that his doing so violates some law on the subject of liquidation or some law giving rights to Donnadieu.

And even if it should so believe, if it also believes that Donnadieu's individual tierce opposition was inadmissible under the law—the only question decided by the judgment below—it would probably fail
to annul the judgment refusing to admit him as being a judgment violating a law.

With the manner of exercising the liquidator's power of sale (if it exists) the lower courts have, but the court of cassation has not, anything to do.

That the liquidator has that power I have attempted to show, and shall merely add here that the special act of the French Parliament expressly recognizes and sanctions both the power of the liquidator to alienate the assets—a power which liquidators the world over possess—and the authority of the lower courts to approve or disapprove a particular use thereof.

As for the branch of the case alleging that the sale by the new company was beyond the powers of that company, the decision was that Donnadieu, being merely a bondholder or creditor of the old company, had no such legal relations with the new company as to be able to question the power of that company as to the disposition of its property.

A similar judgment (on default) has recently been rendered in the case of one Sautereau, an engineer, who claimed that certain plans of his had been furnished to the liquidator and would be included in the sale, and that the liquidator had not paid him for them. (Exhibit 7.)

It is needless to dwell upon this branch of the Donnadieu case, because, even if he had no such relations with the new company as to be able to raise such a question, there are others who can at least raise it—namely, the stockholders and creditors of the new company itself.

I have already indicated my opinion that they would raise in vain the general question of the power of the company, with the consent of the liquidator and mandataire of the bondholders of the old company, to sell the canal property. It is only necessary to add that a creditor of the new company, a solvent concern able and willing to pay any debts it may owe out of its funds or out of the purchase price, can not prevent a sale of the company's property under any principle of law or reason that has occurred to me, any more than an individual's debtor, if he is solvent, can prevent him from selling a horse or a house.

As for the stockholders of the new company, they, being the company itself, and bound by the acts of their own duly authorized general meetings and officers, could question nothing but the fact that their by-laws did empower the general meeting to make such a sale. I have already shown that, in my judgment, they clearly do.

III. But it is said that—

3. The French courts have not power to authorize the liquidator and the new company, or either of them, to enter into this sale.

It has been shown that they have undertaken to do so as to the liquidator, but the French special law of July, 1893, is itself questioned
as to its validity, and the French judgments as perhaps violations of fundamental rights which are assumed to exist and assumed to be protected and guaranteed by French institutions.

The courts do not undertake to authorize the new company. That company needed no judicial authorization.

It is not perceived that the vested right alleged to exist in the 60 per cent net earnings in favor of the stockholders but, in reality, beneficial to the bondholders and creditors of the old company, is any more of a vested right than the right to the machinery formerly owned by the old company, but transferred to the new. Of course, it is a vested and a valuable right. But the liquidation is still going on, and it is proposed to realize on that asset, to dispose of it for cash to be paid to the creditors and, after that, if sufficient (which it is not), to the stockholders. The stockholders are the debtors of the bondholders and other creditors of the old company, and they will, after the receipt of the price it is proposed to pay, be unable to pay their debts. They are so now; that is the principal reason for the liquidation of their concern.

But the act of July, 1893, does, so the French courts hold, exclude the bondholders from individually objecting to the sale—at least by formal proceedings in court. It has caused a single agent to be appointed for them, however, and if there were any general objection on their part, there is no reason to suppose that he would not act accordingly and voice their sentiments. This would not lead, necessarily, to a different result. The sale might well be approved, because their reasons were unsatisfactory to the court.

It may seem strange that the French special law of 1893, by some oversight, perhaps, permitted all the individual creditors, though possibly represented by the mandataire, and the individual stockholders, though certainly represented by the liquidator, to have a hearing in court, and yet omitted to give one to the bondholders individually.

But in view of the universal acquiescence of those general creditors (if any exist), having identical interests with the bondholders, and of all others concerned, including the legal representative of the bondholders, the probability is that the same end would have been reached by the court.

However, such is the law passed by the Parliament of France, and it remains to inquire whether it is invalid.

Nothing is more familiar to us than an adjudication by one of the courts that a law regularly passed is invalid, null and void. But when this first happened in our country it was regarded as a very extraordinary thing.

In France, as in England, certain maxims have come to be regarded as extremely sacred, and England is said to have an unwritten consti-