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"The nature of shareholding and corporate governance"

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*“Pulchra sunt quae
videntur,*

*pulchriora quae
sciuntur,*

*longe pulcherrima
quae ignorantur.”*

*Skøn er det, vi ser
Skønnere er det, vi forstår
Men langt det skønneste er det, vi
ikke fatter*

Niels Stensen, Denmark, 1638 - 1686

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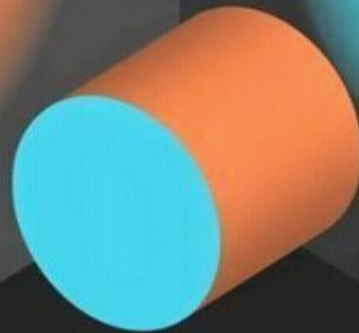
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Part I

Nature of Shares

THIS IS **TRUE**

THIS IS **TRUE**



THIS IS **TRUTH**

please consider this before talking/typing

▣ **Three perspectives of analysis** to understand nature of shares.

(1) Part of share capital

(2) Bundle of rights

(3) Security

1. Definition of share

▣ FARWELL J. in *Borland's Trustee v Steel Brothers and Co Ltd* [1901] 1 Ch. 279 at 288.

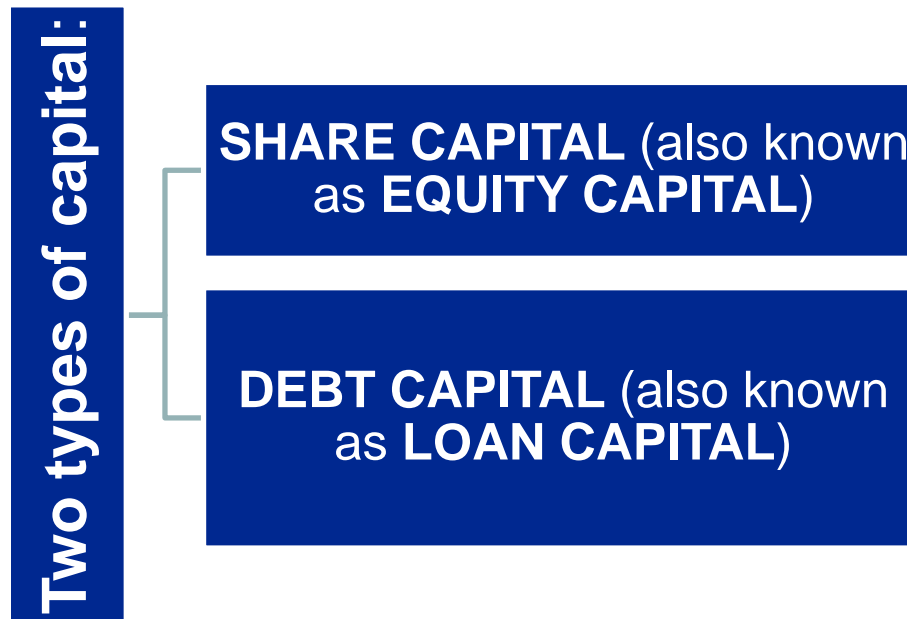
“A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with [s.33]. The contract contained in the **articles of association** is one of the original incidents of the share. A share is not a sum of money ... but **(1) is an interest measured by a sum of money** and made up of **(2) various rights contained in the contract**, including the right to a sum of money of a more or less amount.”

1. Definition of share

“Share is a part of share capital, which confers a number of rights and liabilities upon its holder, who has the legal status of company member or shareholder”.

2. Share as a part of share capital

- There are **two types of capital**:



- Section 540(1) CA 2006 defines a “share” as a “share in the company’s share capital”.

2. Share as a part of share capital

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I. Nominal value → Shares in a limited company have a fixed **nominal value**.

■ Nominal value is the **minimum price** for which the share can be allotted. It is common for shares to be allotted for more than their nominal value and the excess is the “**share premium**”.

■ Nominal value **rarely corresponds with share's actual value** (especially in ***listed companies***, can be ***higher*** or ***lower***).

■ Farewell J.'s definition says that the interest of a shareholder “is measured by a sum of money”. At this respect, nominal value is “**only a reference**” a “**proportional reference**”.

2. Share as a part of share capital

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II. Prohibition on allotting shares at a discount.

❑ Shares cannot be allotted at a discount (for less than their nominal value). That would **break the balance** between:

❑ **company share capital** and

❑ **company assets.**

❑ In such case → the **allottee is liable** to pay the company an amount equal to the discount including interest.

❑ This prohibition is weakened in relation to **private companies**. When shares are paid not in cash but in “money’s worth” (goods, property, transferring rights to the company), the non-cash consideration can be overvalued.

❑ UK courts have stated that they will only interfere where the consideration is manifestly inadequate (**Re Wragg Ltd [1897]**).

3. Share as a bundle of rights

▣▣ The **origin of shareholder's rights is contractual**. A contract between a **company** and its **members**, and between the members themselves (Section 33(1) CA 2006). A **company's constitution** consists of **two documents**:

▣▣ **Memorandum of association**

▣▣ **Articles of association**

▣▣ The **company contract** (in UK, specifically the ***articles of association***) defines the **nature of the rights**. All of them are **personal rights**, enforceable ***inter partes***: the shareholder and the company.

3. Share as a bundle of rights

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⚡ Shareholder rights can be divided into **two categories**: rights with an **economic content**, rights with a **political content**:

⚡ **Economic content**

- ⚡ Dividend
- ⚡ Return of capital

⚡ **Political content**

- ⚡ Attendance at meetings
- ⚡ Voting
- ⚡ Information
- ⚡ Challenging corporate agreements

⚡ **Economic/ political content**

- ⚡ Pre-emptive right

➔ **None** of them confers an **ownership right** over the assets of the company

3. Share as a bundle of rights

▣▣ Classes of shares

Attending to the rights that a share confers to the holder, shares can be classified into two categories:

▣▣ Ordinary shares

▣▣ Special classes of shares

3. Share as a bundle of rights

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▣▣ Ordinary shares

They are shares which confer to its holder **all the rights usually attached** to a share.

According to the jurisdiction, **rights attached to ordinary shares can be found at:**

- ▣▣ National **company law** (i.e. Companies Act)
- ▣▣ In some countries, **statutory and case law**
- ▣▣ The **corporate charter and governance documents**

Most companies only have **one class of share** -ordinary shares- and shareholders have the same rights.

3. Share as a bundle of rights

❖ Special classes of shares

❖ Special classes of shares may have **any combination of features** not possessed by ordinary shares.

❖ Companies are **free to issue different classes of share** that confer different rights upon the holder. The rights attached to differing classes of shares are known as “**class rights**”.

3. Share as a bundle of rights

▣ The **following features** are usually associated with **preferred shares**:

- ▣ Preference in dividends
- ▣ Preference in assets, in the event of winding up or liquidation
- ▣ Ability to be redeemed by the company at a stated time
- ▣ Nonvoting
- ▣ Convertibility to ordinary share

▣ **Types** of special classes of shares

- ▣ **Nonvoting shares**
- ▣ **Preference shares**
- ▣ **Redeemable shares**
- ▣ **etc.**

3. Share as a bundle of rights

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- ▣ **Main objective** of special shares → making shares **more attractive for investors** as a **financial product**.
- ▣ They **normally improve** the **rights with an economic content**.
- ▣ A paradigmatic example → **nonvoting shares**: no voting right, but increased dividends (and other economic benefits).

4. Share as a security

■ ■ Certificated and uncertificated shares

■ ■ **Certificated shares**

- ■ The shareholder receives a paper certificate evidencing his or her shareholding.
- ■ When a share is transferred the seller must deliver the share certificate to the buyer.

7 Sep 1666

VV Y ondergeschreven van weghen de Camere der Oost-Indische Compagnie tot Enckhuysen, bekennen by desen ontfanghen te hebben vanden E. *Spelder Herman*

Groot de somme van *twadelf guldens*

en dat voor resten van *des Goudet* *U. A. H. guld*

daer mede de voornoemde *Spelder Herman* *Enck*

inde voorz. Compagnie gheregistrert staet te herideren opt Groot-boeck vande voorz. Camere folio 254 Synde hier mede de voorschreven

Goudet *U. A. H. guldens* daer mede de voornoemde

Spelder Herman inde voorz. Compagnie voorde eerste Thien-Iarighe Rekeninghe participeert, ten vollen opgebracht ende betaelt: Ende voorts gheannulleert ende te niere ghedaen alle de Recipissen,

over de betalinghen opde ghemelde partije ghedaen, voors desen ghegheven.

Aldum den *9. Septemb. 1666* *J. C. C. C.*

Verit

J. C. C. C.

1662 and 6 Nov. 1662. 6000 Oct. deling 17 1/2 ft.
1663 and 20 Oct. 1663. 6000 Oct. deling 17 1/2 ft.
1664 and 21 April 1664. 6000 Oct. deling 17 1/2 ft.
1665 and 20 May 1665. 6000 Oct. deling 17 1/2 ft.

1666. 6. October voor verd. deling 20 ft.	30
1667. 12 April 1667 voor verd. deling 17 1/2 ft.	18. 15
1668. 23 February 1668 voor verd. deling 25 ft.	37. 10
1669. 13 Feb. 1669 voor verd. deling 17 1/2 ft.	26. 5
1670. 5 March 1670 voor verd. deling 17 1/2 ft.	18. 15
1671. 13 Feb. 1671 voor verd. deling 20 ft.	30
1672. 15 April 1672 voor verd. deling 20 ft.	30
11. May voor verd. deling 17 1/2 ft.	18. 15
22. Sept. 1672 voor verd. deling 17 1/2 ft.	18. 15
1673. 21 May 1673 voor verd. deling 25 ft.	41. 5
1674. 4. June 1674 voor verd. deling 25 ft.	37. 10
1675. 13. Dec. 1675 voor verd. deling 10 ft.	15
1676. 24. March 1676 voor verd. deling 17 1/2 ft.	22. 10
1677. 2. April 1677 voor verd. deling 25 ft.	37. 10
1678. 26 August 1678 voor verd. deling 25 ft.	37. 10
1679. 26. Sept. 1679 voor verd. deling 25 ft.	22. 10
1680. 26. Sept. 1680 voor verd. deling 25 ft.	37. 10
1681. 20. January 1681 voor verd. deling 25 ft.	25
1682. 29. September 1682 voor verd. deling 15 ft.	22. 10
1683. 1. April 1683 voor verd. deling 25 ft.	67. 10
1684. 3. October 1684 voor verd. deling 25 ft.	33. 15
1685. 15. April 1685 voor verd. deling 25 ft.	37. 10
1686. 18. January 1686 voor verd. deling 25 ft.	25
1687. 1. May 1687 voor verd. deling 25 ft.	22. 10
1688. 1. May 1688 voor verd. deling 25 ft.	30

4. Share as a security

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■ German and Italian law developed a solid doctrine on this issue:

■ **Wertpapiere**, Germany (Wolfgang ZÖLLNER, Wertpapierrecht, 15. Aufl., München, 2006; Alfred HUECK/ Claus Wilhelm CANARIS, Recht der Wertpapiere, 12. Aufl., München, 1986)

■ **Titoli di credito**, Italy (Tullio ASCARELLI, Corso di diritto commerciale, Milano, 1962; Idem, Teoria geral dos títulos de crédito, Campinas, 2013)

The backbone of this theory is the materialisation **Verkörperung** (Germany) or **materializzazione** (Italy) of the holder rights into the paper certificate.

▣▣ Uncertificated shares

▣▣ Shares are represented by an **inscription in a register**, which is ***electronically managed***.

▣▣ *Paper* is replaced by **registered shares** or ***electronic shares***; also known as **book-entry securities**. This process of replacing paper with electronic shares is referred to as **dematerialisation** -***Entkörperung*** or ***Entmaterialisierung*** (Germany) ***dematerializzazione*** (Italy)-.

❖ Chose in action?

❖ Most authors in UK doctrine → share is a ***chose in action***

❖ A **property right** in something intangible (intangible property), or which may be tangible but **are not in one's possession**, but **enforceable through legal or court action**.

❖ “Like patents, trademarks, and goodwill, a chose in action is an intangible asset.” (Justice Martin Reidinger of the United States District Court in the 2013 decision of Flexible Foam Products).

▣ Personal rights

- ▣ A share is **not a property right**
- ▣ A share is a **bundle of personal rights**



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Part II

Nature of Shareholdership







Horace and John Dodge

1. Property conception of the corporation

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■ In 1919 the **Supreme Court of Michigan issued the judgement of *Dodge v. Ford Motor Co.*** (204 Mich. 459, 170 N.W. 668 -1919-), ruling in favour of the **Dodge brothers**, who considered that **Henry Ford** should **not retain in the company 58 million dollars**, but should instead distribute part of it as **dividends**.

■ Some authors consider this judgement as one of the main foundations of the **«property conception of the corporation»**.



1. Property conception of the corporation

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⚡ Although **regulations do not support the consideration of shareholders as** holders of an *in rem* property right over the corporate assets, the use of the term “owner”, as synonym of “shareholder” or “stockholder”, has become widespread among *some* sectors of the doctrine. However, this opinion is not unanimous and different doctrinal sectors, following a variety of arguments, deny that “shareholders” have the status of “owners”.

- ⚡ Ireland, P., «Company Law and the Myth of Shareholder Ownership», The Modern Law Review, 1999, nº 62
- ⚡ Blair, M./Stout, L., «A Team Production Theory of Corporate Law», Journal of Corporate Law, 1999, nº 24.
- ⚡ Blair, M., «Corporate «Ownership»: A Misleading Word Muddies the Corporate Debate», Brookings Review, Winter, 1995

▣ There is an issue which, in my opinion, can **shed much light in the interpretation of corporate governance** regulations. It is to ascertain who is the holder of corporate assets. This is a key issue, since the discussion between **ownership** and **control**, between **shareholders** and **managers**, is permanently open.

▣ *From a point of view that is more economic and business-related than legal*, the doctrine on corporate governance uses the term “owner” when referring to the “shareholder”.

■ ■ The shareholder is not the holder of a “**ownership**” right over the corporate assets. Not even over the proportional part thereof corresponding to his/her shares. He or she is **NOT the holder of A RIGHT “IN REM”**, such as property. The shareholder is the holder of **a set of rights of an OBLIGATIONAL nature**.

■ ■ If, at the time of incorporating a company, the partner subscribing a share ***delivers an asset owned by him/her***, as contribution to the corporate assets, **he/she losses the status of owner** of such asset and acquires a qualified status as **CREDITOR against the company**.

Convenience of not blurring the distinction between rights *in rem* and obligational rights

❖ In **Roman Law**, the distinction between both categories is especially obvious due to the different types of existing actions to defend one or another type of rights: actio in rem, to demand a right over a **thing**, and actio in personam, to require the compliance of an **obligation**.

- ❖ D. 44.7.25 pr (Ulpianus *l. sing. reg.*): «Actionum genera sunt duo in rem, quae dicitur vindicatio, et in personam, quae condictio appellatur. **In rem** actio est, per quam rem nostram, quae ab alio possidetur, petimus; et semper adversus eum est, qui rem possidet. **In personam** actio est, qua cum eo agimus, qui obligatus est nobis ad faciendum aliquid vel dandum; et semper adversus eundem locum habet».
- ❖ D. 44.7.3 pr (Paulus *II institutionum*): «Obligationum substantia non in eo consistit, ut aliquod corpus nostrum aut servitutem nostram faciat, sed ut alium nobis obstringat ad dandum aliquid vel faciendum vel prestandum».

Convenience of not blurring the distinction between rights *in rem* and obligational rights

▣ Both the **rules** which are part of **Private Law**, and the **legal doctrine** are guided by this ***summa divisio: ius in rem, ius in personam***. In this regard, I would like to stress the work carried out by authors such as **SAVIGNY** and **WINDSCHEID** → “**RIGHTS**” –**IUS**-, more than “**actions**”.

▣ **SAVIGNY, F. K. v.**, ***System des heutigen römischen Rechts***, erster (-achter) Band, Berlín, 1840-1849.

▣ **WINDSCHEID, B.**, ***Lehrbuch des Pandektenrechts***, erster Band, 9. Auflage, Literarische Anstalt Rütten & Loening, Frankfurt am Main, 1906, p. 166, «Dingliche und persönliche Rechte»; p. 193, «*Actio in rem* und *actio in personam*».

⚡ Although the **Common Law** developed as a system independently from the influence of the **Corpus Iuris Civilis**—and thus English Law does not belong to the *ius civile* tradition— it, nevertheless, seems to share many of methodological characteristics of classical Roman law.

⚡ There are **major connection points between both legal traditions** → **Common Law** and **Civil Law**.

❖ In particular, the concepts of «*ius in rem*» and «*ius in personam*» are not alien to **common law**, which clearly differentiates between the real right over a property and a right of *obligational* nature.

❖ In the judgement *Manchester Airport plc v. Dutton* ([2000] 1 QB 1333) it is noted that «the *ius* in issue was one that was *in rem* rather than *in personam*» and, consequently, the success of this case comes from establishing clearly the differences between the nature of «a *proprietary right* and *not just one that was obligational* and which did not attach directly to the res».

▣ Both **law** and **social practice** draw **sharp distinctions** between **ownership or property rights** on the one hand, and **contract rights** on the other.

▣ **Why** is it so **widespread** the **term “owner”** in literature, social practice... BUSINESS AND FINANCIAL PRESS...?

■ The contributions made since the decade of the '60s by the **Economic Analysis of Law** (COASE, POSNER) are very useful. Nevertheless, sometimes their **terminology** is **muddled** and **fuzzy**.



MARKETS, FIRMS &
PROPERTY RIGHTS:
A CELEBRATION OF
THE RESEARCH OF
RONALD COASE

CONFERENCE: DEC. 4 - 5, 2009
UNIVERSITY OF CHICAGO
LAW SCHOOL AUDITORIUM



❖ POSNER → the ***strength of the legal dogma*** and the ***academic level*** of the “science of law” in **continental Europe** show a **much stronger resistance** against the invasion of the **Faculties of Law** by the **Economic Analysis** than that shown by the **US Law Schools**, that were *never –until the ‘80s– research centres*, but professional training **schools for lawyers**.

❖ POSNER, ***Overcoming Law*** (1995); “**Legal Scholarship Today**”, *Harvard L. Rev.* 115 (2001-2002)

⚡ **Two basic premises** enable the **Economic Analysis of Law** to fulfil its **instrumental function**:

- 1) **The ultimate purpose in the analysis of a legal decision** consists of determining if such decision identifies or not with **JUSTICE**, instead of evaluating its ***economic efficiency***.
- 2) The second premise is *as important as it is undemanding*. It consists of **not modifying the meaning of the legal terminology** used.

❖ **Economic Analysis of Law? Yes, but of “Law”**. It would not be desirable that the Economic Analysis of Law led to **distorting the meaning of legal concepts** and, for example, to mix up:

❖ ***Invalidity*** of a contract → ***ineffectiveness*** of a contract

❖ ***Prescription*** → ***expiry***

❖ ***Termination*** of a contract → ***rescission*** of a contract

❖ **SHAREHOLDER** → **OWNER**

Can not the shareholder be regarded as owner if his/her shares are acquired by purchase?

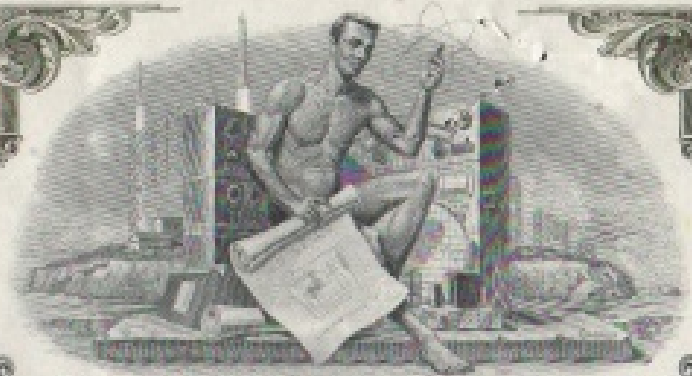
❖ **Shares** are included in the category of **SECURITIES** → they may be represented by means of “**certificates**” (*Wertpapiere*) or “**book-entry securities**” (*Wertrechte* – OPITZ-).

❖ **Denmark** was the **first country** in the world to complete the course of the so-called “**DEMATERIALISATION**” OF **SECURITIES**: the replacement of “certificates” (papers) by “**book-entry securities**” → *Vaerdipapircentralen* (The Danish Securities Center Act nº 165, de 27 de abril de 1983; JACOBSEN, C. B., *Lov om en vaerdipapircentral*, Viborg, 1983).

❖ **France**, second (*SICOVAM*); **Spain**, third (Ley 24/1988, 28 de julio, del Mercado de Valores).

OWNERSHIP OF
**LESS
THAN 100
SHARES**

NO. 603376
DF603376



SHARES
82

OWNERSHIP OF
**LESS
THAN 100
SHARES**

DOMESTIC SHARE CERTIFICATE

COMMON STOCK

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION

THIS CERTIFICATE IS TRANSFERABLE IN THE CITY OF NEW YORK OR IN CHICAGO.

THIS CERTIFICATE IS
TRANSFERABLE IN THE
CITY OF NEW YORK

INCORPORATED UNDER THE
LAWS
OF
NEW YORK

SEE REVERSE FOR
CERTAIN DEFINITIONS

MITCHELL HUTCHINS & CO. INCORPORATED

This Certifies that
82
is the owner of

—EIGHTY-TWO—

FULLY PAID AND NON-ASSESSABLE SHARES, PAR VALUE ONE DOLLAR PER SHARE, OF THE COMMON STOCK OF

International Telephone and Telegraph Corporation, as shown on the back of the certificate by the holder hereof in person or by duly authorized agent, is the owner of the shares of the par value of one dollar and no part of a share and shall be held subject to all the provisions of the Certificate of Incorporation and the regulations and the provisions of the laws of the State of New York in and to which the holder by acceptance hereof, assents. This certificate is not valid unless countersigned by the Transfer Agent and registered by the Registrar.

Witness the signatures of the duly authorized officers.

Dated **MAR 26 1970**

John J. Allen
SECRETARY

Harold J. Green
PRESIDENT

REGISTERED: FIRST NATIONAL CITY BANK, NEW YORK, N.Y.

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION
TRANSFER AGENT

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INT



CONSTITUIDA POR ESCRITURA PÚBLICA
OTORGADA EN 29 DE DICIEMBRE DE 1913 ANTE EL NOTARIO D. GREGORIO RUIZ

CAPITAL 15.120.000 DE PESETAS
REPRESENTADO POR 30.240 ACCIONES DE 500 PESETAS CADA UNA
POR ACUERDO DE LA JUNTA GENERAL EXTRAORDINARIA CELEBRADA EN 14 DE MARZO DE 1929

ACCIÓN AL PORTADOR DE 300 PTAS Nº 23319
LIBERADA POR DESEMBOLO TOTAL DE SU VALOR

Granada 1 Mayo de 1929

EL SECRETARIO

EL PRESIDENTE

EL DIRECTOR GENERAL

[Signatures of the Secretary, President, and General Director]

COMPANIA DE LOS TRANVIAS
ELECTRICOS DE GRANADA
ACCION AL PORTADOR DE 300 PTAS
Nº 23319
Cupon de devolucion por beneficiario

2
CUPON Nº 60

COMPANIA DE LOS TRANVIAS
ELECTRICOS DE GRANADA
ACCION AL PORTADOR DE 300 PTAS
Nº 23319
Cupon de devolucion por beneficiario

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COMPANIA DE LOS TRANVIAS
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ACCION AL PORTADOR DE 300 PTAS
Nº 23319
Cupon de devolucion por beneficiario

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ACCION AL PORTADOR DE 300 PTAS
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Cupon de devolucion por beneficiario

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Cupon de devolucion por beneficiario

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Tip. Lit. S. Berdones. Granada

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ACCION AL PORTADOR DE 300 PTAS
Nº 23319
Cupon de devolucion por beneficiario

2
CUPON Nº 39

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CUPON Nº 37

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CUPON Nº 36

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CUPON Nº 35

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CUPON Nº 34

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Nº 23319
Cupon de devolucion por beneficiario

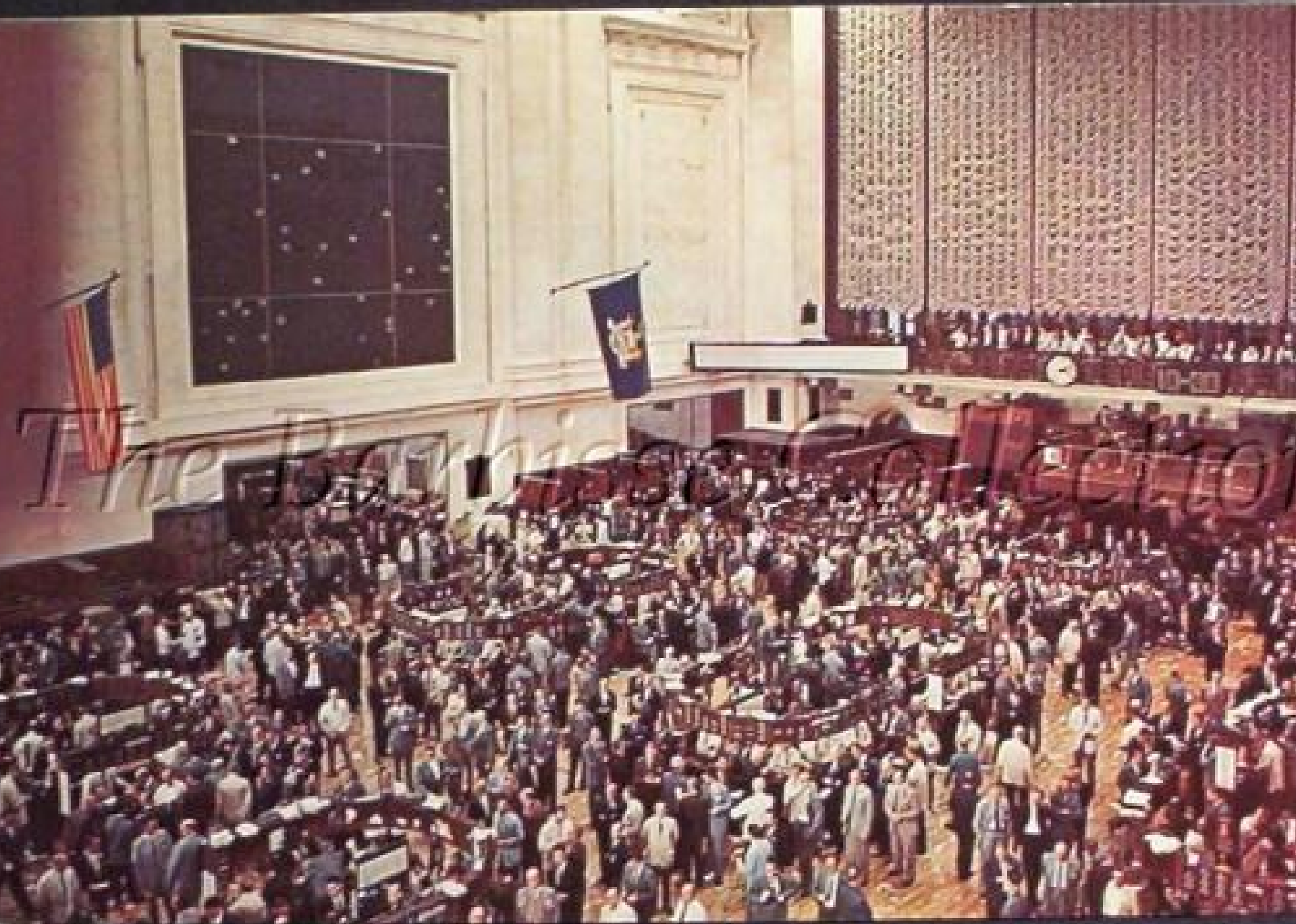
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CUPON Nº 33

COMPANIA DE LOS TRANVIAS
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Cupon de devolucion por beneficiario

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CUPON Nº 32

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ACCION AL PORTADOR DE 300 PTAS
Nº 23319
Cupon de devolucion por beneficiario

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CUPON Nº 31





Can not the shareholder be regarded as owner if his/her shares are acquired by purchase?

■ Either if shares (securities) are represented by means of ***certificates*** or by ***book-entry securities***, they are regarded as “***goods***”. Material goods, in case of ***certificates***; intangible goods, in case of ***book-entry securities***. And therefore, they **may be sold and purchased**.

■ But the shareholder does **NOT** acquire ownership over a portion of the **corporate assets**, but ownership over the **certificate** or over the **book-entry security**. And ownership over them grants him/her, INDIRECTLY, the holdership over the set of obligational rights which the shareholder status consists of.



“Sublease”: is it coherent to designate shareholders as ‘owners’?

❖ The contribution of an asset to the company’s equity, by way of subletting, is an **example case** of the **incorrect conception** of the *shareholder* as *owner*.

1) “A” is the *owner* of a **building** and *rents* it to “B”. “B” is entitled to *sublease* the building.

2) “B” transfers the building to the **company “C”** as sublessee for a period of **one year**. The company “C” pays “B” with shares of “C”.

3) “B” is now a *shareholder* of “C”.

4) “C” is *not the owner* of the building. “B” is *not the owner* of the building. However, **some authors call him/her ‘owner’** for having provided in sublease an asset *whose owner is “A”*.

■ It is not correct to designate the **shareholder** as ‘**owner**’.

■ But it is **NOT ALWAYS CORRECT** to designate the company as owner of **ALL its corporate assets**. The company may have rights of different nature, over the different “*elements*” which make up its **assets**:

■ *Owner*

■ *Lessee*

■ *Usufructuary*

■ *Borrower*

■ *Etc.*

8.

Is the corporate legal person “owner” of the corporate assets?

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■ Therefore, when talking of the corporate legal person’s relation with its assets as a whole, the most accurate is to say that it is the “holder” of its assets, but not always, and not in an all-inclusive way, the “owner”.



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Part III

A more balanced corporate governance terminology

ALFONSO MARTÍNEZ-ECHEVARRÍA Y GARCÍA DE DUEÑAS
(DIRECTOR)

Gobierno Corporativo: la Estructura del Órgano de Gobierno y la Responsabilidad de los Administradores

Adaptado a la Ley 31/2014, de 3 diciembre

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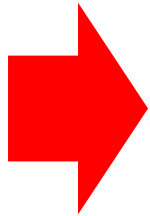
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Reconsidering the relation between managers and shareholders

■ The corporate legal person is the holder of the corporate assets. This statement makes us focus on managers and not on *shareholders*.

■ Managers are those representing the rights and obligations of the corporate legal person: they are *its voice* to negotiate contracts, *its hands* to sign them, and they are the ones to “*sit in the dock*” if the company is taken to Court.



Does this mean that managers are the owners of corporate assets? → NO, but they are the “representatives” of the “owner”, which is the CORPORATE LEGAL PERSON.

■ Does this mean that the **shareholders' position** becomes **weaker than the managers' position**? (Roe, M. J., *Strong Managers, Weak Owners: the Political Roots of American Corporate Finance*, Princeton, New Jersey, 1994)
→ No, in order to **STRENGTHEN** the position of **shareholders**, in the last few years a new regulation has developed, that is more stringent as regards the **"duties"** and the **"responsibility"** of **managers**.



▣▣ If “*shareholders are not owners*” and “*managers are subject to the supervision of shareholders*”, the strengths and relevance of both parties are more balanced within the corporation’s governance.

▣▣ In this context, the **SOCIAL INTEREST** is confirmed as the **BEST CRITERION** to:

- ▣▣ guide the **government** of a corporation, and
- ▣▣ solve any **CONFLICTS** between *managers* and *shareholders*

2.

Managerial theory, shareholder theory, stakeholder theory? → SOCIAL INTEREST

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❖ Besides, the **SOCIAL INTEREST** turns into an argument to consider that the “Stakeholder theory” is the ***most suitable approach in the field of corporate governance***, as opposed to the other two doctrines inspiring the principles of corporate governance (the “managerial theory” and the “shareholder theory”) → the “stakeholder theory” is **the most integrative**, since it gives to all the groups involved (employees, suppliers and relevant creditors) the option to participate in the government of the company.

❖ **Managers** and **shareholders** are **also stakeholders**, and it is fair to recognise that they have a **broader importance and participation** than other groups related to the corporation → the **stakeholders’ interests** can be **arranged hierarchically**.

▣ This idea may be illustrated by an **analogical image**:

▣ *Democratic government* of a *country* ↔ *government* of a *corporation*

▣ COMMON GOOD ↔ SOCIAL INTEREST

▣ A *particular good* (of a citizen or a social group or institution) → *particular interest* of *shareholders*; retribution of *managers*; interest of a *stakeholder*.



DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN

Décretée par l'Assemblée Nationale dans les séances des 20, 21
23, 24 et 26 août 1789, et acceptée par le Roi

PRÉAMBULE

LES représentants du peuple français, constitués en assemblée nationale, considérant que l'ignorance, l'oubli ou le mépris des droits de l'homme ont été les seules causes des malheurs publics et de la corruption des gouvernements, ont résolu d'exposer dans une déclaration solennelle, les droits naturels, inaliénables et sacrés de l'homme, afin que cette déclaration, constamment présente à tous les membres du corps social, leur rappelle sans cesse leurs droits et leurs devoirs, afin que les actes du pouvoir législatif et ceux du pouvoir exécutif, pouvant être à chaque instant comparés avec le but de toute institution politique, en soient plus respectés; afin que les réclamations des citoyens, fondées désormais sur des principes simples et incontestables, tournent toujours au maintien de la constitution et du bonheur de tous.

EN conséquence, l'assemblée nationale reconnoît et déclare, en présence et sous les auspices de l'Être suprême, les droits suivants de l'homme et du citoyen.

ARTICLE PREMIER

LES hommes naissent et demeurent libres et égaux en droits; les distinctions sociales ne peuvent être fondées que sur l'utilité commune.

II.

Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme; ces droits sont la liberté, la propriété, la sûreté, et la résistance à l'oppression.

III.

Le principe de toute souveraineté réside essentiellement dans la nation; nul corps, nul individu ne peut exercer d'autorité qui n'en émane expressément.

IV.

La liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui. Ainsi l'exercice des droits naturels de chaque homme n'a de bornes que celles qui assurent aux autres membres de la société la jouissance de ces mêmes droits; ces bornes ne peuvent être déterminées que par la loi.

V.

La loi n'a le droit de défendre que les actions nuisibles à la société. Tout ce qui n'est pas défendu par la loi ne peut être empêché, et nul ne peut être contraint à faire ce qu'elle n'ordonne pas.

VI.

La loi est l'expression de la volonté générale; tous les citoyens ont droit de concourir personnellement, ou par leurs représentants, à sa formation; elle doit être la même pour tous; soit qu'elle protège, soit qu'elle punisse. Tous les citoyens étant égaux à ses yeux, sont également admissibles à toutes dignités, places et emplois publics, selon leur capacité, et sans autres distinctions que celles de leurs

vertus et de leurs talents

VII.

NUL homme ne peut être accusé, arrêté ni détenu que dans les cas déterminés par la loi, et selon les formes qu'elle a prescrites; ceux qui sollicitent, expédient, exécutent en violation des articles constitutionnels, doivent être punis; mais tout citoyen appelé ou saisi en vertu de la loi, doit obéir à l'instant, il se rend coupable par la résistance.

VIII.

La loi ne doit établir que des peines strictement et évidemment nécessaires, et nul ne peut être puni qu'en vertu d'une loi établie et promulguée antérieurement au délit, et légalement appliquée.

IX.

TOUT homme étant présumé innocent jusqu'à ce qu'il ait été déclaré coupable, s'il est jugé indispensable de l'arrêter, toute rigueur qui ne serait pas nécessaire pour s'assurer de sa personne doit être strictement réprimée par la loi.

X.

NUL ne doit être inquiété pour ses opinions, mêmes religieuses pourvu que leur manifestation ne trouble pas l'ordre public établi par la loi.

XI.

La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme; tout citoyen peut donc parler, écrire, imprimer librement; sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi.

XII.

La garantie des droits de l'homme et du citoyen nécessite une force publique; cette force est donc instituée pour l'avantage de tous, et non pour l'utilité particulière de ceux à qui elle est confiée.

XIII.

Pour la levée de la force publique, et pour les dépenses d'administration, une contribution commune est indispensable; elle doit être également répartie entre les citoyens en raison de leurs facultés.

XIV.

LES citoyens ont le droit de constater par eux-mêmes ou par leurs représentants, la nécessité de la contribution publique, de la consentir librement, d'en suivre l'emploi, et d'en déterminer la quotité, l'étendue, le recouvrement et la durée.

XV.

La société a le droit de demander compte à tout agent public de son administration.

XVI.

TOUTE société, dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de constitution.

XVII.

LES propriétés étant un droit inviolable et sacré, nul ne peut en être privé; si ce n'est lorsque la nécessité publique, légalement constatée, l'exige évidemment, et sous la condition d'une juste et préalable indemnité.

❖ ***“Declaration of the RIGHTS of Man and of the Citizen”***, passed by France's National Constituent Assembly in August 1789. Followed by the ***“Declaration of the RIGHTS and DUTIES of Man and of the Citizen”***, passed in 1795.

❖ Since then, the **legal logic binding rights with obligations** is found at a **second level** → it had to be awakened in the **SOCIAL CONSCIENCE** with the sentence *“Ask not what your country can do for you; ask what you can do for your country”*.

▣ There is a **debate** open regarding “**shareholder's duties**” –around the drafting and enactment Directive (EU) 2017/828, 17 May 2017, amending Directive 2007/36/EC as regards the **encouragement of long-term shareholder engagement**-.

▣ Thus, in those cases where the company owns an **asset**, it is quite **obvious** that the **shareholder** does not have the following duties:

▣ The *liability for defects*;

▣ The respect of *access-easements* and *easements of view*,

▣ etc.

▣ It is important to RECOVER THE PRECISION of legal terminology, in order:

▣ **Not** to create **confusion**

▣ **Not** to continue creating a **DOUBLE-SPEAK**:

▣ Duties of the **owner-shareholder**

▣ Duties of the **owner** (*stricto sensu*) → the **corporate legal person**, the corporation

▣ Therefore, let's talk about the “**SHAREHOLDER'S duties**”



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