

1893

# Status of Joint-Stock Companies

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STATUS OF JOINT-STOCK COMPANIES.

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## STATUS OF JOINT STOCK COMPANIES.

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On the borderland between partnerships and corporations, the line of demarcation being apparently invisible, lie voluntary associations; by some writers of great authority considered as partnerships usurping the privileges of corporations and by others of equal authority treated as associations of persons approaching very near and perhaps encroaching a little upon the domain of corporations; possessing many of their attributes, and scarcely distinguishable from them, but still not stepping sufficiently into their territory to be deemed and treated as corporations, at any rate causing much confusion, interesting questions, differing opinions, and argument among judges and text-book writers, not only in this country but also in England and wherever they exist; Lord Eldon himself saying in *Lloyd vs. Loaring*, 6 Ves. 773, "I am alarmed at the notion that these voluntary

societies are to be permitted to state all their laws, forms, and constitutions upon the record, and then tell the court they are individuals." And the learned judge was much perplexed as to how they acted as individuals, and what sort of partnerships they were. But of late years, voluntary unincorporated associations have been growing more frequent, particularly in the United States, owing to the number of benevolent organizations etc., and the courts are becoming clearer as regards their status and liabilities.

Says Stephens in the introduction to his work on Joint-Stock Companies: "The principle of association for mutual profit is of very ancient origin. Indeed, if detaching the term profit from the narrow idea it conveys when used in a merchant's ledger, we expand it so as to mean, protection, support, or advantage of any kind, we will find the principle coeval with mankind itself. Commencing within that limited circle we call the family, it has spread like a circle on a pool until it has embraced almost all the relations of life, and has given rise to countless associations formed either for pleasure or for profit."

Voluntary unincor-

porated associations are divided into two great classes: viz., clubs and joint-stock companies, the latter of which, formed for the purpose of profit will be treated in the following pages. Associations in the nature of joint-stock companies were early formed among the Romans for the purpose of carrying on all kinds of commercial operations both by land and sea. These associations had their ramifications throughout the country, and like joint-stock companies of the present day, were not dissolved by the death of a member. Each member had an interest in the concern in proportion to the amount contributed by him, and the company was managed by directors called *magistri*. Thus we see in these associations most of the essential features of joint-stock companies.

Many definitions of joint-stock companies have been attempted, some very satisfactory and others quite the contrary. It is generally quite difficult to frame a definition which will always fit the situation, and ✕ "definitions differ in their character according to the nature of the thing defined and the word is made intelligible only by description, by the enumeration of

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the attributes or circumstances in which it agrees or differs with other things of qualities somewhat similar. Thus, a name conveying an idea generalized from many individuals is defined and explained by describing the qualities ordinarily found in such individuals: "therefore, we will first give a few commonly accepted definitions, and describe the powers, privileges, and attributes of joint-stock companies, and then the definition may be inferred. Boone defines a joint-stock company to be "a quasi-partnership, invested by statute in England and in many of the states of the Union, with some of the privileges of a corporation," and he says that no greater formalities for the formation of such companies or associations are required, as respects membership, than for the formation of ordinary partnerships.

The definition generally accepted and which to me seems the best is: "A joint-stock company is an association of individuals for the purpose of profit, possessing a common capital, being divided into shares, of which each member possesses one or more, and which are transferable by the owner." Morawitz goes so far as to say that

their organization and character must in each case be determined by reference to the laws and articles of agreement under which they are formed; whether they are called co-partnerships, or joint-stock companies or corporations, is solely a question of definition.

Although associations in the nature of joint-stock companies were known to the Roman law, they did not at least to any great extent, exist in England prior to the seventeenth century. Corporations had existed for many years, having had "their rise in the principle of protection of life and property, from the barons and kings, and particular franchises, inroads upon feudalism, personal and peculiar privileges, were successively won." Then, on account of the rapid increase of trade and commerce; the importance of many undertakings, for which the capital and exertions of a few would be inadequate; and recognition of the fact that combination of such capital and skill would be conducive to better results than individual effort, partnerships were formed. Following these came joint-stock companies, the first of which was the South Sea Company, a short history of which



may not here be amiss. For a long time stories had been coming to England of the boundless wealth of Spanish America and in 1711, Harley, with others, established the South Sea Company, which was to enjoy a monopoly of the trade to Peru and in return a portion of the national debt was thrown into stock to pay six per cent interest at the end of five years. This company became a rival of the Bank of England and in 1719 when the government desired to get rid of unredeemable annuities amounting 800.000 l. per annum, the South Sea Company bid seven and one-half millions, which was accepted by the government. The right was given the company to pay off the annuitants who accepted South Sea stock in lieu of their government stock. In the hope of rapidly becoming rich on account of the inducements held out to them by the company, the remaining stock was rapidly subscribed by the greedy public, and in a short while the £100 stock had risen to £1000. The example set by the South Sea Company was followed by other speculators and numerous other companies, called "bubbles", were started, for almost every conceivable purpose, even to making salt water fresh. People were wild with excitement, so intense

was the desire to speculate. The South Sea Company not having a monopoly on the pocket books of all the speculators, started proceedings against the small concerns, in the hope of annihilating them, and it is thought that the "Bubble Act, passed in 1720, was in the interest of the South Sea Company. This act recites the growth of dangerous and mischievous undertakings and projects, the undertakers and subscribers of which had presumed to act as if they were incorporated, and had pretended to make their shares transferable, and enacts that all such undertakings and attempts before described and others (mentioning them); and "more particularly, the acting or presuming to act as a corporate body or bodies, the raising or pretending to raise transferable stock or stocks, etc., etc., shall (as to all or any such acts, matters and things, as shall be acted, done, attempted, endeavored, or proceeded upon after the said twenty-fourth day of June, 1720) forever be deemed to be illegal and void, and shall not be practiced or in any wise put in execution." All such undertakings were by the act deemed to be nuisances. Even this was wholly power-

less to prevent the forming of the various companies, very few of them being dissolved, but the act was not repealed until 1825. Instead of crushing its adversaries the South Sea Company drew attention toward itself, and the people having been alarmed, demanded an investigation. The stock fell to 150; thousands were reduced to beggary; and the punishment of the directors was demanded. Craggs and Stanhope died during the investigation, Aislacie was sent to the Tower and the property of the company was confiscated and applied to the wants of the starving stockholders.

From this time until after the passage of the Companies Act in 1862, joint-stock companies were very common, because of the expense and difficulty attached to the forming of corporations. After the repeal of the "Bubble Act" and down to 1844 the regulations governing joint-stock enterprise by way of incorporation were under charter or special act of Parliament. In the latter year a bill received the royal assent which specifically provided for the registration, regulation, etc. of joint-stock companies. Between 1844 and 1852, seventeen acts were passed, six relating to joint-stock

companies generally, the most important in 1855, which provided for one registration instead of two, under the former acts and seven or more persons associated for any lawful purpose, were permitted to obtain incorporation with or without limited liability. If there were more than twenty persons in the company and the object gain, it was necessary to register, or the association was unlawful. Many other provisions were also enacted, none of which applied to banking and insurance companies. The law now governing joint-stock companies is laid down in the Companies Act, passed in 1862, and seven amendatory acts, the act of 1855 and acts amendatory thereof, with a few new features, being re-enacted, so that joint-stock companies in England are not illegal, and when filling the requirements of the Companies Acts and acts amendatory thereof, are, with the exception of the fact that the members are individually liable for the debts of the company, although the liability <sup>may be</sup> ~~is~~ limited to a certain extent, corporations.

Concerning the legality or illegality of joint-stock companies in England, there has been a diversity

of opinion among text-book writers, especially Collyer and Lindley. Collyer, in his work on Partnership, goes into the subject of joint-stock companies at great length, outlining the origin, history and development of these concerns, and in the course of the discussion gives his views as to their status. The offences which he claims the Bubble Act was enacted to punish are "The presuming to act as a corporate body; the raising transferable stock; the transferring such stock," and the act was passed to declare all such companies public nuisances within the act, their avowed object and general tendency to the contrary notwithstanding. He admits that it is very difficult to define the offence of acting as a corporate body, but that it seems unquestionable that there are particular offences of this nature for which an indictment will lie, not only under the statute, but even under the common law. The learned author then declares that "it seems clear, therefore, that whether we view this subject with reference to the repealed statute or the existing common law, they alone are to be considered as assuming to act as a corporate body who usurp

the "unequivocal indicia and characteristics which form the distinctive and peculiar criterion of a corporation." Again, corporate bodies have the power of binding their members of the acts resolved upon in the manner prescribed by their charters which power they derive from their corporate character, and not from contract and agreement between themselves; on the other hand voluntary associations are governed entirely by the rules that the partners themselves have agreed to. Hence, if the committees or meetings of an unincorporated society were to assume to exercise independently of any contract or agreement for that purpose, a general power of binding their members, it might reasonably be contended that such an act was illegal and indictable. Upon the whole Collyer lays down the rule that generally all trading associations however numerous, and although unsupported by charter or act of Parliament, are legal provided their purposes and mode of dealing are honest, and consistent with the general policy of the company, and provided they usurp none of the exclusive privileges of a corporation, but in order to render the rights of public

companies definite, the majority of them are invested with general or special privileges under various acts of Parliament. Lindley is somewhat opposed to some of the views of Collyer and states what seems to be the modern rule. He says that "the fundamental distinction between partnership and unincorporated company is, that a partnership consists of a few individuals known to each other, bound together by ties of friendship and mutual confidence, and who therefore, are not at liberty without the consent of all to retire from the firm and substitute others persons in their places, whilst a company consists of a large number of individuals, not necessarily nor indeed usually acquainted with each other at all, so that it is a matter of comparative indifference whether changes among them are effected or not. Nearly all the differences which exist between ordinary partnerships and unincorporated companies, will be found traceable to the above distinction. Indeed it may be said that the law of unincorporated companies is composed of little else than the law of partnership modified and adapted to the wants of a large and fluctuating

number of persons. The case of *Blundell vs. Windsor*, 8 Sim. 601, always relied upon as an authority by those who contend that such a company is illegal, has never met with approbation from the bench, nor has it ever been followed.

Upon the whole, therefore, it appears that there is no case deciding that a joint-stock company with transferable shares and not incorporated by charter or act of Parliament, is illegal at common law; that opinions have nevertheless differed upon this question; that the tendency of the courts was formerly to declare such companies illegal; that this tendency exists no longer; and that an unincorporated company with transférable shares will not be held illegal at common law unless it can be shown to be of a mischievous character, tending to the grievance of her Majesty's subjects. The legality of such companies at common law may therefore be considered as finally established." Lindley seems to give a clear, lucid and acceptable statement of the nature of joint-stock companies. The earlier cases declaring that joint-stock companies were illegal were so



decided largely because of the Bubble Act, and it is now too late to contend that partnerships with transferable shares, are illegal. The grounds upon which they were formerly held illegal in England, apart from statute, have been abandoned in modern times, and in the words of the opinion rendered in *19 Wendell, 423*; "These companies, being consonant with the wants of a growing and wealthy community, have forced their way into existence, whether fostered by the law or opposed to it."

The Scotch law on the subject differs from the English and holds that joint-stock companies, as to their nature, character and effect, differ from ordinary private partnerships, and confine the responsibility of shareholders in such associations to the extent of three shares. The celebrated case of *the Arran Fishing Company*, which was decided in the middle of the seventeenth century; held that the liability of joint-stock companies differs from that of ordinary partnerships; that the managers are liable for the debts which they contract; that the meaning of limiting the trade to a joint-stock company is that each shall be liable for what he subscribes, and no further, and says Story "In this respect

the Scottish law seems to have followed the general doctrine of the Roman law, that in all partnerships each of the partners should be liable not in solido, but only for his own share. And this is also the general rule of the French law in all cases except of partnerships for commercial purposes, where, upon grounds of public policy, each of the partners is held liable in solido." Thus, it seems that the Roman, Scottish and French law differs in a very material respect from the English and American law, which, in the absence of statute, holds each member to be individually liable for the debts of the company. As has been said, the growth of joint-stock companies in England was, until lately, due to the great expense and difficulty of obtaining incorporation. In the United States, on the contrary, many facilities have been offered for the incorporation of various kinds of associations of individuals, many states having provisions in their statutes for the formation of corporations under general laws, and these have been taken advantage of, thus, to a great extent, lessening the number of joint-stock companies. Nevertheless, the growth of these companies has

been very large in this country, and as they have been treated differently in various states, it will be necessary to consider their status in these states seriatim.

The law in New York as to joint-stock companies has changed from time to time, they having been adjudged to be corporations, partnerships and associations in the nature of partnerships, having some of the privileges of corporations. Cases on this subject were very early adjudicated and the opinions of the courts differed a much. In *Livingstone vs. Lynch* 4 Johns. Chan. 573, a case which was decided in 1820, Chancellor Kent said; "It appears to me most clearly, that the association (in this case it was the North River Steamboat Company) is not, in judgment of law, a partnership with either the rights or responsibilities belonging to that commercial relation. If that were the case, each member would have a joint interest in the whole partnership stock and concern, and could alien or bind the whole interest. One partner may pledge the credit of the others to any amount and each partner commits his entire rights to the discretion of each of his co-partners.

There is no color for the conclusion in this case. The evident character of the members of the company is that of tenants in common, in which each has a distinct, though undivided interest in the establishment, and an entire dominion over his own share or proportion of the property, but without any right or power to bind the interest or regulate the enjoyment of the other members." This case has been much criticized, especially in *Townsend vs. Goewey*, 19 Wend. 424, and Chancellor Kent in his *Commentaries on American law* at p. 27 comes to the conclusion that the ordinary law of partnership according to the established law of the land, applies to large unincorporated associations and that every member is liable for all the debts of the association. He, however, admits that the members of a private association, may limit their personal responsibility, if there be an explicit stipulation to that effect, made with the party with whom they contract, and clearly understood by him at the time.

In 1839, the court, in *Thomas vs. Dakin*, 22 Wend. a case arising under the general banking law, decided that joint-stock companies were corporations, Cowen J. basing

his opinion to a great extent upon the conclusion of Kyd that if an association enjoy the following privileges viz.-1. Perpetual succession under a special denomination and under an artificial form; 2. The right to take and grant property, to contract obligations, and to sue and be sued by its corporate name, in the same manner as an individual; 3. The right to receive grants of privileges and immunities, and to enjoy them in common; the essence of a corporation was sufficient. But in Warner vs. Beers, 23 Wend. 103 very elaborate opinions having been written by Chancellor Walworth and Senator Root on the origin and status of corporations and joint-stock companies, and the differences between them, it was decided that associations organized under the General Banking Law of 1838 and in conformity with its provisions, were not bodies politic and corporate within the spirit and meaning of the constitution. Senator Root, speaking of exemption from personal liability said; "Perhaps, in the general and popular understanding, the most familiar distinction between corporate bodies and common partnerships, or other joint undertakings, is the exemption of the associates from personal liability,

beyond the actual amount of their respective proportions of capital. The regarding this very frequent, and important incident of a corporation as an essential characteristic, seems not to be confined to popular opinion." Perhaps the best statement of the status of joint-stock companies in New York is found in *Waterbury vs. Merchants Union Express Company*, 50 Barb. 157, decided at New York Special Term. This was an action brought to obtain a judgment or decree dissolving an express company, organized as a joint - stock company, and for the appointment of a receiver to wind up its affairs. Barnard, J. in the course of the opinion, said; " Joint-stock associations are organized, not as simple partnerships, but with written articles of association, framed under, and with reference to the statute laws on the subject. The first act was passed in the year 1849. It was amended in the year 1851, and again in 1854. A further act, passed at the session of 1867, authorized these companies to hold real estate in perpetual succession. By an examination of all these statutes it will be found that joint-stock associations possess the following qualities, or attri-

butes of corporations: 1. They can, like corporations, sue and be sued in a single or collective name; to wit, the name of their President or Treasurer. 2. Their property or capital is represented in shares and certificates of stock differing in no respect from shares and stock certificates in corporations. 3. The death of a member, his insolvency, or the sale or transfer of his interest, is not a dissolution of the company. 4. They have perpetual succession, or what is sometimes called the immortality of corporations. 5. They can take and hold real and personal estate in a collective capacity and in perpetual succession. These are all attributes of a corporation, and if we look into the books for elementary definitions, we shall find that corporations have no other attributes except the technical one of a common seal to distinguish them from a common law partnership. On the other hand simple partnerships have none of the attributes or qualities here mentioned. Mere names are of but little importance. Looking at the substance and nature of things, it is plain that in respect to the absence of a common seal merely these joint-stock companies are like

partnerships. In the other and vastly more material respects mentioned, they are like corporations, although they are not declared to be such by the legislative acts referred to." Thus, it can be seen, from the statements and arguments set forth in Judge Barnard's opinion, that as early as 1809, joint-stock companies were treated in New York as quasi-corporations, or associations having many of the privileges and attributes of corporations. One attribute which Judge Barnard omitted to mention is the limited liability of members of corporations which is very important in distinguishing corporations from partnerships, and as this is not an incident of joint-stock companies in New York and other states, it is very important in assimilating them to partnerships. But in regard to taxation, a joint-stock company is a corporation within the tax laws and as such taxable on capital. It has been said that with the statutory powers made in regard to these associations, it can scarcely be proper now to consider them as mere partnerships possessing all the rights, and subject to the liabilities of partners. On the contrary, so many corporate powers are conferred by the various statutes relating thereto,



that it might rather be said, that excepting in the liability for the indebtedness of the associations they possessed corporate powers, and such seems to be the general view in this state.

In Illinois and Louisiana, joint-stock companies are not countenanced, either as partnerships or associations with peculiar privileges, but are considered illegal and contrary to the law of the state. In Illinois, the opinion of the courts in *Greene vs. Pavey*, 21 N.E. 605, a leading case in that state on the subject, was not founded upon common law, but upon statutory authority; namely, Rev. St. Ill. 1874, chap. 112, according to which persons professing to act as a joint -stock company are expressly forbidden to act in such capacity. It was held in that case that an association or number of persons, who, in conducting the business of insurance, profess to limit their liability to the amount of money contributed to each, and assume to give perpetuity to the business by making membership certificates transferable by the assignment of the member or his personal representatives, are "acting as a corporation."

Scholfield, J. says; " The fact that these respondents may be legally held individually liable upon any policies they may have issued, does not relieve them of the charge of having acted as corporations. They are, if individually liable, only liable because they have no statutory authority to do what they have assumed to do, because, instead of being a corporation in fact, they have usurped the powers of a corporation."

The law as to joint-stock companies in Louisiana is laid down in State of Louisiana vs. American Cotton Oil Trust, 1 Ry. and Corp. Law Journal, 509. An action was brought in the name of the state against the American Cotton Oil Trust to have it declared an illegal association so far as it should carry on any business in Louisiana, etc., the acts complained of being the issuing of transferable shares of stock; receiving shares of stock in Louisiana corporations in trust for the owners; exchanging its own certificates for Louisiana stocks and putting its shares on the market - all these being acts which the Attorney-General claimed could only be lawfully performed by a corporation. It was held, that where an association of persons

or an unincorporated joint-stock company, assumes to act as a corporation, a suit will lie in the name of the state against such persons or association even though the corporate acts done are declared to be done, not as a corporation, but as a commercial partnership, or as a board of trustees. In the opinion the court said: "The character of acts is determined by their nature as defined by law. If the law defines certain acts as corporate acts, persons will not be heard to say that they understand such acts not to be corporate acts, but simply acts legally to be done by commercial partners, by trustees or by unincorporated associations." The statute providing for a proceeding under which this joint-stock company was declared to be a corporation was partly worded thus: "When any association or number of persons shall act in this state as a corporation without being duly incorporated." It is, therefore, the interpretation by the court of the statute and not the statute itself, as ~~most~~ <sup>was the</sup> cases in Illinois, which declares these companies illegal. This case and the Illinois statute have been severely criticized, and these states seem to be the exception to the general rule. It does not appear

that the Illinois and Louisiana rule was ever the common law; certainly it is not now law in England; and it is not followed by any state in the Union.

In Pennsylvania, Virginia, California, Wisconsin, and other states statutes have been passed giving to joint stock companies many of the privileges of corporations, and they have been treated ~~as~~ partnerships. The privileges which they enjoy are all known to ~~the~~ common law and may be enjoyed by all partnerships. By agreement a partnership may be continued, although in ordinary cases, it would be dissolved. By special clauses in the articles of partnership, transferability of shares may be provided for. In ordinary partnerships, the number of partners is small, while in joint-stock companies it is large, and many unknown to each other, therefore the necessity of non-transferability of shares is not as apparent as in ordinary partnerships, and is allowed to joint-stock companies without restriction.

Collyer himself agrees that these things may be done by partners. The power to bring suits against the President and his right to sue in that capacity

existed at common law. "A body corporate, or corporation, is an artificial person, created by the supreme power of the state, with the like powers and liabilities as a natural person, in so far as they are given or constituted by their creator." "A corporation is an artificial being, invisible, intangible, existing only in contemplation of law." Thus was a corporation defined by Senator Root and Chief Justice Marshall, and herein lies an important distinction. "Created by the supreme power of the state" A corporation owes its very existence to the "supreme power of the state", and unless authority has been given to it by the state, it cannot exist. When existing, it exists "only in contemplation of law"; it is an entity, while a joint-stock company is formed by the agreement of the individuals who compose it; is not an entity; cannot be sued in its association name; members are generally individually liable for the entire association debts; and exists as a society of individuals. Aside from these it has in general all the attributes of a corporation.

Therefore, while joint-stock companies have some of

the privileges of corporations, they are destitute of some of the essential attributes of such bodies ( In New York, exemption from personal liability being the only attribute which they do not possess) and for the reasons supra, it seems that joint-stock companies in England are very closely akin to corporations and may by incorporation become such, and in the United States, with the exception of Louisiana and Illinois, where they are illegal, and New York, where they are associations to which the law of partnership, in a measure modified and restricted, has been applied, they are partnerships, and not in any sense of the word corporations, or usurpers of corporate functions. "The law of joint-stock companies is composed of little else than the law of partnership modified and adapted to the wants of a large and fluctuating company." As Abbott has aptly said in Abbotts' New Cases at p.301: "The true principle is, and upon this view the apparent discordance in the cases may be nearly reconciled, that the law allows associations to imitate the organization and methods of corporation so far as their rights between themselves are in-

involved, and will enforce their articles of agreement (nothing illegal or unconscientious appearing) as between the parties to them. But the public and creditors have a right to invoke the application of the law of partnership to the dealings of any trading association, unless such association has the shield of incorporation."

THE END.