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The Evolution of the Business Corporation

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T H E S I S .

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THE EVOLUTION OF THE BUSINESS CORPORATION.

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James C. Swift.

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Cornell University. School of Law.

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1893.

C O N T E N T S .

Chapter I.

I n t r o d u c t i o n .

"Without corporations America would be a different country and have a different history."

The word corporation, vast as is its meaning and import, creates in the mind of the average layman a mental picture not to be admired.

He sees a large number of organizations starting under most brilliant prospects ending in disastrous failure. He hears and believes, and undoubtedly in many cases has the right to so believe, of judges bribed and legislators corrupted, cities made and unmade; political methods dictated and a general unscrupulous control exercised by these vast aggregations of capital.

He therefore becomes fully convinced that the corporation is hostile to his interest and is a legitimate object of prey. He probably has not heard that the corporation is a being invisible and intangible

without a soul,but he does know that it has a treasury and if there is any one moral dogma upon which the people,as a whole,unite,it is that in defrauding a corporation,no sin is committed.

But the student of social movements,especially the American student,in looking over the field which his own country affords,beholds another picture.

He sees vast stretches of railway crossing and recrossing our states,binding them together by iron bands. He sees barren lands made fertile;vast swamps reclaimed and peoples brought into closer communion.

He notes the absence of famine and protracted wars; the increased happiness and prosperity of the people. And in seeking for the reason of all these remarkable growths and changes,he discovers that the railroad corporation is the secret of them all.

True indeed the history of railroads and corporations in general would not be the most fruitful field of moral ethics,but it is also true that the man who opens up vast stretches of country; who cheapens the price and increases the supply of the necessaries of life is the greatest benefactor: and in judging we must

not only consider the means but the ends.

It is not the intention of this paper to enter into a discussion of the comparative merits of corporate benefits and evils,but to consider the business corporation from a legal point of view,briefly of necessity.

The corporation at present absorbs a large part of the administrative and executive ability which formerly sought political life and herein lies the explanation of the marked change in the attitude of the corporation towards the public.

Chapter II.

The Ancient Business Corporation.

The idea of a corporation as a legal creation is not a modern one, for the paternity of the fiction, if such a thing can be, is credited to the Romans.

Some even trace the organization back to the Greeks, but be that as it may, the corporation has always been regarded as a legal creation.

The reason for this legal fiction is not apparent unless it was that by so regarding corporations a satisfactory solution of many difficulties was arrived at.

We could hardly expect the people of those early times to look forward and anticipate the difficulties into which this view would lead, any more than we could expect them to forecast the marvelous growth of this form of commercial enterprise.

But before proceeding to trace the development of the business corporation, let us classify the subject according to the light of present law and advancement.

Considered from a business stand point, there are but two classes of corporations.

I. Public corporations - a good example of which is the New England Township.

2. Private corporations - which include all corporations not included under the first head.

Private corporations are divided into Membership or non business corporations, not organized for the purpose of profit and having no capital stock, and Business or Stock corporations organized expressly for pecuniary gain.

Many other classifications have been made and are found in the books, but the one here given seems to answer all requirements.

The ancient classification of Sole and Aggregate and their subdivisions answered the purpose of its time, but is not applicable to the present, as is illustrated in the old grouping of business and municipal corporations, so different under the modern law, under the one head of civil corporations.

The business corporation differs widely from the municipal, and is governed, in many instances, by entirely

different principles of law.

The business corporation is a voluntary association of individuals; while in the municipal corporation, there exists no contractual relation. It being merely an institution for the administration of the affairs of a community.

If private interests are provided for, the corporation is a private one.

It is noticable that all classifications are founded upon differences in characteristics rather than in legal treatment.

Among the earliest examples of the business corporation were the organizations of the bakers and boatmen of Rome.

The Romans also carried on business enterprises under the form of legal persons, called societates, some of which obtained the right of becoming corporations.

But these organizations did not prosper to any marked extent because of the restrictions under which they existed.

The assent of the sovereign was necessary, not only for their creation, but also for their dissolution, thus making them creatures of the emperor's will.

On the other hand they possessed many privileges, which are embodied in our law at the present time as the characteristics of the corporation. They could hold and dispose of property; incur obligations for which members were individually liable; and inherit by succession, either testamentary or by patronage. Their capacity to commit a tort was a disputed question.

Early corporations in England.

With the advent of the Romans into Britain came their customs, and among these their features of corporate organization. The earliest of these organizations seem to have been the peace guilds, the members of which were pledged to mutual protection.

At the opening of the seventeenth century, there were only two or three joint stock companies in England, and they were far from organizations for the promotion of individual interest only. They were looked upon as public agencies to which had been confided the due regulation of foreign trade just as domestic trade was regulated by the guilds.

The first work treating of corporations published anonymously in 1702, entitled the Law of Corporations,

says "The general intent and end of all civil corporations is for better government, either special or general."

Law of Corporations, page 2.

This idea can be distinctly observed in the charters granted to subsequent corporations, particularly in the recitals and provisions.

About the close of the seventeenth century, the advantages of corporate organization began to be realized. Previous to this time, a few corporations had existed, the most prominent of which was the East India Company. But we may say that the chartering of the Bank of England in 1694 is the first step in the great commercial change.

The wild speculation in shares of companies organized about the time of the South Sea company is well known, and over two hundred of these companies were organized about the year 1720, for all conceivable purposes, even that of making salt water fresh.

Anderson's History of Commerce.

Writs of Scire Facias put a speedy end to all that

were not duly incorporated,and this in turn created such a distrust that only a few of the strongest weathered the storm.

Then followed a long period of corporate stagnation,and in 1776 we find Adam Smith expressing the opinion that the only possible subjects for successful corporate enterprise were those in which the operations were capable of being reduced to a routine,and he mentions as examples of such,the banking,insurance and navigation businesses. While we have in our time demonstrated the fallacy of the idea as to its exclusiveness,yet the subjects enumerated by him are among those which are conducted almost exclusively at present by corporations.

In the time of the early Roman Law,in case of insolvency the persons constituting the corporation were obliged to contribute their private fortunes to the payment of claims of creditors. It is very doubtful whether this doctrine ever obtained in England,all indications pointing to the prevalence of the present common law liability.

The member of a business corporation originally

had the same right to vote as the member of any other corporation,-one vote for each member. This naturally became distastefull to the large holders and restrictions,various in terms,were enacted. A certain amount of stock was made a condition to voting,pooling being allowed,however. Then followed the custom of allowing large holders more than one vote. This led to what was called splitting the stock - that is,placing it in the hands of friends to be voted. This in turn was followed in 1706 by the enactment of a statute requiring that stock to be voted must have been held at least six months previous to the election.

This was a most important matter,and accounts in a large degree for our present progress over that of those earlier times. In these early common law corporations,the large holders did not always determine the policy of the company,as at present.

The Law of England has always been very conservative in matters of form,as is illustrated in the English Companies Act of 1862,whereby it is provided for a sliding scale of votes based upon the shares held.

The courts have construed this act allowing the shares to be distributed in blocks of ten,thus securing

a vote for each share, after a roundabout fashion the act allowing one vote for each of the first ten shares.

Moffat vs. Farquhar: 7 Ch. Div. 591.

Voting by proxy was long denied (1 Paige's Chan. 590) and up to the opening of the present century a by law authorizing such voting would probably have been held invalid. 14 N.J.L. 222.

As the early corporations were institutions, to which in most cases, were delegated powers of government, they were necessarily allowed appropriate means of enforcing and regulating their authority, and this was done by means of by-laws.

Business corporations were therefore naturally so dealt with in the same manner, but with the change in the conception of a corporation from an institution of special government to a simply instrumentality for carrying on trade, the right to pass by-laws was restricted by regulations for the management of corporate business.

Such regulations being void if contrary to law, and their validity being to a great extent dependent upon the discretion of the judges, we see here the commencement of judicial legislation which has been such a po-

tent factor in the development of this branch of the law.

Previous to the year eighteen hundred, the corporation was dissolved in one of the following ways: (1) By act of Parliament. (2) Natural death of all its members. (3) Surrender of its franchises. (4) Forfeiture of charter through negligence or abuse of its franchise.

The second method of dissolution by natural death of all its members is a peculiar feature of these early common law corporations, and as is well known, does not exist at present.

Kyd in his work on corporations, speaking of dissolution says "The effect of the dissolution of a corporation is that all the lands revert to the original donor, its privileges and franchise are extinguished, and the members can neither recover debts due to the corporation, nor be charged with debts contracted by it. What becomes of the personal estate is perhaps not decided but probably it vests in the crown."

While this statement of the law as made by Kyd is true as to the rights and liabilities enforceable in

an action at law, in equity the debts and liabilities could be enforced.

This is a somewhat different view than has heretofore obtained, but the case of Naylor vs. Brown decided in 1 Finch 83 seems authorative upon the question.

The interest of the shareholders in these earlier corporations differed greatly from our idea of the nature of shareholders interest, to wit a fraction of all the rights and duties of the stockholders.

The old idea was that the corporation held all the property strictly as trustee and that theshareholders were, speaking accurately, cestues que trust - being in equity the co-owners of the property.

2 Pierre Williams 207.

Thus if the shareholders had in equity the same interest which the corporation has at law, a share would be real estate or personalty according to the nature of the property of the corporation.

Thus we see that the business corporation is not a spontaneous product, but the result of the development of earlier institutions running back further than we can trace.

As to such points as modern business corporations have in common with the earlier associations, the law antedates any other branch while as to those points which are features of the business corporations exclusively, the law has been developed almost entirely since the beginning of the present century.

Chapter III.

Inadequacy of the Ancient Corporation.

While the early common law corporation possessed the monopolistic privileges and the business partnership sufficed for carrying on the ordinary business affairs, the defects of the corporation were not generally realized, but with the advancement of society and the demand for improvements in modes of life, came the necessity of vast public works requiring immense capital, and capital would not invest in undertakings which were so hampered and repressed by the law. This led to the granting of special charters which extended special favors in consideration of the work to be done.

The uncertainty of the nature of a share and the character of the interest it represented, as said before, was a great hindrance to corporate growth. The courts recognized this evil and after deliberation and long consideration decided that such shares were personalty -

would pass by assignment; and represented a proportionate interest in the profits and net assets of the company.

But the corporation was still tied up by the ancient doctrine that corporations could only act by deed under their common seal. Blackstone assigns as a reason that a corporation being an invisible body, cannot manifest its intention by any personal act or declaration and therefore speaks only by its common seal. But the corporation has no hand whereby to annex the seal and if this can be done by an agent, why cannot the agent do any other act ?

Even the early law dispensed with the seal in the execution of the most unimportant acts and our present rule of dispensing with the seal is only a development dictated by business necessity.

However, until after the commencement of the present century, the departure was not extensively allowed.

The recognizing of the share as a substantial interest created the doctrine of succession and this feature of joint stock is the distinguishing characteristic of the modern corporation.

The old idea of the extinguishment of debts to and from the corporation by its dissolution was detri-

mental to all interests because of the uncertainty of any dealing with such organizations. This led to the development of the modern doctrine that the capital stock was a trust fund for the benefit of creditors.

But the method of granting special charters was dangerous and inadequate. The discovery of steam and the immense capital demanded in its application and employment led to the enactment of statutes by which individuals who comply with a few simple regulations may secure a charter authorizing them to engage in some designated business.

This general freedom in the incorporation gave a great impulse to corporations.

But the greatest inadequacy in the early law of corporations was in the legal conception of it.

"The present tendency of the courts to look at the substance and not the form has wrought vast changes in the law and is along the line of progress. As is well said by Taylor, the common law conception of a metaphysical entity separate from the individuals who composed it, arose at a time when corporations were all created by special charters; when very few of them were

stock corporations and when the legal status was wholly swallowed up in the legal person of the corporation and when corporations were as a necessary result of their creation and position,monopolies."

Am.Law Rev.XIX.114.

In the United States nearly all corporations are formed under business laws,which limit in duration, completely control the corporation and which make the stockholders liable personally to some specified extent and manner.

Except in the features that they can sue and be sued;make contracts,acquire rights and incur liabilities in their corporate name;and that a change in membership does not work their dissolution,these associations differ very little in their essential attributes from a partnership.

They are in fact a combination of the old common law corporation and the partnership.

The courts in numerous cases do not seem to recognize the changes which have taken place and we find judges applying the same rules and using the same language with reference to these modern corporations as

were applied and used in the case of the purely common law corporations.

We might pattern with profit in this respect, after the English courts. These courts in construing acts of Parliament similar to our general incorporation laws, have been careful to distinguish between companies formed under these acts and common law corporations.

Chapter IV.

Development of the Modern Corporation.

Incorporation under general laws.

During the last fifty years the practice of organizing under special laws has been largely superseded by general laws permitting corporations to be formed by the voluntary association of at least a specified number of persons for the purposes and in the manner stated in the acts, and when organized conferring upon organizations certain corporate powers which are restricted to those named in the act.

The charter of the corporation is part of the public law and the power of granting such charters is one appertaining to sovereignty, being in this country reposed in Congress and in the legislatures of the States.

The constitutions of the different States make different and various provisions for the organization

and regulation of these associations. Thus in the Constitutions of California (Art.1238)Colorado (Art.15 sect.8) Georgia (Art.4 sect.2) Louisiana (Art.235) Missouri (Art.12 sect.8) and Penna.(Art.16 sect.3) we find provisions that the exercise of the police power of the State should never be so construed or abridged as to permit corporations to conduct their business in such a manner as to infringe the equal rights of individuals and the general well being of the public.

In discussing the power of Congress to create corporations,Marshall,C.J. said: "The power of creating a corporation although appertaining to sovereignty is not like the power of making war and levying taxes or regulating commerce - a great substantive and independent power which cannot be implied as incidental to other powers,or used as a means of executing them. It is never the end for which other powers are exercised but a means by which other objects are accomplished."

According to the holding of numerous courts,the charter and not the organization under it creates the subscribers a corporation,at least so as to render contracts in favor of the corporation valid.

Ver.Cent.R.R.vs.Clay:21 Vt.30.

Contra,see

Gent vs.Mut.Ins.Co.:107 Ill.652.

The custom of granting special charters,which is now prohibited by the constitutions of most of the States,creating as it did certain privileged organizations,gave rise to the term franchise,and in incorporating under these special charters or franchises,no express words were necessary; any words describing the purposes of the legislature were sufficient. 73 Ala.325. And in cases where the requirements of an act necessitated incorporation,the right could be gathered from the purpose. Comm.vs.W.C.R.R.3 Grant (Pa.)200.

Except where organized under general laws,the legislative recognition of a corporation as existing dispenses with further proof of incorporation.

Peo.vs.Farnham:35 Ill.562.

But in cases of organization to be perfected under general laws,legislative recognition cannot confer validity.

R.R.Co.vs.Supervisors:37 Cal.354.

The era of special charters has passed as to their granting, but we still observe their operation and remark on the prodigality of legislatures in granting away the people's rights.

In discussing the right of a railroad corporation to exercise certain powers, M Cay J. says "There is in this country reasons for strictly construing charters, and for confining corporations to their powers, which does not exist in any other.

Under other forms of government, if a charter is found to have privileges which prove dangerous, it is within the power of the State to alter or repeal it.

But getting their grants, as most of our corporations do, from the State, they are held to be contracts, and it is not in the power of the State under the Federal Court to interfere materially with the grant however improvident or unwise it may prove to be .

For these reasons it has in this country as well as in England ever been considered the very highest public policy to keep a strict watch upon corporations and confine them within their apparent bounds."

Ga. Cent. R. R. Co. vs. Collins.

This decision of Judge M Cay is a natural result of the famous Dartmouth College case which might be well designated as the elixir of corporate life.

Previous to the rendering of this now famous decision in 1804, corporations were few and unimportant in this country.

In fact during the entire Provincial period, not one corporation was organized: but this unexpected and far reaching decision gave a value to corporate franchises beyond the possibility of estimate. It placed the creature of the State beyond the control of the State, and it may be justly credited with many of the evils which obtain in this branch of the law.

The incidental concessions which have been since made are insignificant compared with the results of this case. Under the protection of this case, has grown up a system of power compared with which in many cases the States that conferred them are nominal. By the construction put upon the charter the government frequently finds itself stripped by unwise, careless or vicious legislation, of all authority:- all because of the application to charters of private corporations, of a provision of the United States Court which was in-

tended to prevent the repudiation of just debts and contracts.

Although many professional men strenuously maintain that the Dartmouth College case should be reversed; that the principle of a charter of a private corporation as a contract is the result of an unwarrented stretch of a provision of the Constitution,still it has become so well settled in our jurisprudence and such vast interests have grown up in the assurance and belief of its stability,that the principle is now axiomatic in American jurisprudence,or as the court says in Stone vs.Miss.101 U.S.816: "The doctrines announced by this court more than sixty years ago,have become so embedded in the law of this country as to make them to all intents and purposes,a part of the Constitution itself."

"The security of property rests upon it and every successful enterprise is undertaken in the unshaken belief that it will never be forsaken."

The Binghamton Bridge 3 Wall.373.

A brief survey of the leading cases commencing with this case and following along through the Elevator

cases:94 U.S.113,the Granger cases:94 U.S.155 and 164 and 179 and 180,and the R.R.commissioners' cases:116 U.S.307,shows us that while the first decision is upheld,there is ground for the criticism that in the later cases the court has been inconsistent.

Public opinion sooner or later insensibly moulds the law. Judicial tribunals cannot be absolutely beyond its influence,as the law is merely a regulation of rights.

While the decision of the leading case,in the principle,has never been overruled,the tendency is manifested in all the cases to limit the powers by a construction strict in its terms.

As early as the Charles River Bridge case,11 Pet. 420,we find the court holding that all grants are to be construed most strictly against the grantee,thus effectually shutting out corporations,who,while not daring to make their desired power the subject of express provisions,so conceal them in a skillfully drawn charter as to bring them within the principle of contract inviolability of the College case.

In the Warehouse and Granger cases we find another seeming concession to public opinion,in the

exercise of the controlling and restraining powers of the legislatures as denominated by the Supreme Court. They meet public approval,but are not logical or consistent and in every case are accompanied by a vigorous dissent of a strong minority.

These cases proceed upon the theory that where one devotes his property to a public use he must submit to public regulation. Then although the title and possession are protected by the law,the use and income are not,and of what value is the constitutional provision protecting property under these decisions.

In the Granger case the court held that the cases then before them were not governed by the College case,as their charters contained no contracts,making the distinction in the use of private property for a public use makes it of public interest while holding the College a strictly private corporation.

If this doctrine of devotion to a public use is to be the test of an implied right of the legislature to control,the limits are only determined by the courts holding as to the nature of the business. These limits are undefined and the virtual decision of these

cases may be said to rest upon the police power.

Is not the result of these cases to hold private corporations subject to the same control as public corporations by holding them to be public whenever it can be found that their purpose in business affects the community generally.

These later decisions have had the natural effect. They have discouraged corporate investments, and have rendered corporate rights and franchises less valuable. Whether they have proportionately benefited the public is questionable.

The opponents of corporations while applauding these cases, which are deemed by the courts deciding them to be consistent with the early case, believe they see in these later cases principles which will ultimately lead to the reversal of the original doctrine.

Chapter V.

Statutory Aid and Restriction.

The Dartmouth College case produced a corporate boom that became the subject of serious alarm. As is usually the case resort was had to the legislatures and a series of acts followed, varying greatly in their scope and provisions, but all having the same intent - the curbing of the corporation.

As it is impossible within the limits of this thesis to give even a skeleton view of the provisions of the different states, in the consideration of this phase of corporation law, the statutory provisions of New York will be considered almost exclusively.

But these provisions embody almost all those which have been enacted in the other states and in some cases are in advance of the legislation of the country in general.

Vast as they are, the limitations imposed by strict construction of the charters are of secondary importance

compared with these statutory enactments.

By her constitution of 1821, New York required a two thirds vote of each House to grant a charter. This failing to restrict, the constitution of 1826 following the suggestion of Judge Story, incorporated the favorite clause giving the right to alter, amend, or repeal the charter.

This provision is almost universal and its application involves in many cases the question of corporate life or death.

From 1840 to 1860 these reserved powers were appropriately modified. As public policy demanded costly works of internal improvement to be undertaken by private corporations, they were given certain privileges absolutely.

This power of repeal and amendment has its limits as decided by the U.S. Supreme Court and such legislative action must be made in good faith - free from oppression; must not divest property rights acquired under the operation of the charter or deprive the corporation of the benefits of contracts lawfully made.

Shields vs. Ohio: 95 U.S. 319.

Sinking Fund Cases: 99 U.S. 700.

In the decision of the case of the Spring Valley Water Works vs. Scholter 110 U.S. 348, the Supreme Court seems to have departed somewhat from the doctrine of the above cases, for in this case they held that under the amendatory clause, such as prevails in every state, the legislature had power to regulate and reduce the rates which the company was authorized in its charter to charge, and upon the faith of which the vast sums had been expended in the construction of the works, and in addition it held that such rates were to be determined by the officials of the city desiring the water.

Now these officials owe their office to the people, and naturally endeavor to placate them at the corporation's expense.

This seems to be open deprivation of property without due process of law and is a most threatening aspect for the corporation.

General Provisions of the Laws.

A certificate or articles of incorporation is prepared which must be signed by a certain number of incorporators, usually setting forth:

1. Name of the corporation.

2. Purpose.

3. Place of Business.

4. Term it is to exist.

5. Names and residences of the subscribers and number of shares taken by each.

6. Number of directors, and names and residences of those chosen for the first year.

7. Amount of capital stock and number of shares into which it is divided at its par value.

8. That the required portion of the capital stock has been paid into the state treasury.

About the only unanimity in these regulatory provisions, aside from the power to repeal and amend which in many cases is a constitutional provision, is in the provision which makes each stockholder liable to the amount equal to his stock in addition to his common law liability for unpaid subscriptions.

This liability continues until all the stock is paid in full, and instead of working as was the intention of the legislatures which passed it, it tends not to the immediate payment of subscriptions, but to a delay in the same-as the liability continues so long as one

stockholder has failed to pay up in full.

It is only a question of time, and probably of a very short time, in New York at least, before the statutory liability will be done away with and the common law liability on unpaid subscriptions alone exist.

The statutory liability is subject to release by agreement of the parties and is not enforceable to pay damages recovered against the corporation in tort.

The courts in some cases do not seem to distinguish between the nature of the common law liability and the statutory liability. The common law liability was, in most cases, a fund which could be only reached by an action prosecuted for the benefit of all parties interested, while the statutory liability is a fund which any creditor may reach and in the latter case, if the stockholder sue as also a creditor of the corporation, he has quite as good if not a better right since he has possession, to the fund pursued, as the pursuer.

The creditor is on the same footing as the stockholder creditor as to legal rights and the stockholders being in possession has a superior equity.

However the stockholder must be an actual creditor

of the company and if the balance after deducting his claim is in the company's favor, he cannot have a setoff.

Wheeler v. Miller 90 N.Y.

These principles are illustrated in the case of Agate v. Sands 73 N.Y. where the stockholder held five thousand dollars worth of stock and was a creditor to the extent of ten thousand dollars. He was therefore allowed a set-off.

There are certain preliminary requisites to entitle a creditor to recover.

He must in most states and courts show:

1. Capital was not paid in.

2. Debt sued upon is a contract debt.

3. Contracted to be paid within a year.

4. Defendent was a stockholder when the debt was made or contracted.

5. Suit is brought within one year after debt became due.

6. Judgment has been recovered.

7. Execution was issued and returned unsatisfied.

8. Recovery of such judgment was rendered impossible by act of the defendent.

Cuykendall vs.Corning 88 N.Y.129.

The Articles of Incorporation are a contract.

First: Between the State and the corporation,the state agreeing not to impair any privileges granted and the corporation agreeing to perform the objects of its corporation. 4 Wheat.518.

Secondly: Between the stockholders. They are bound to acquiesce in the acts of the majority,if legal, and be governed by the laws which the majority may lawfully enact.

Thirdly: The whole agree with each other that they will apply the funds of the company to its legitimate objects and purposes and not otherwise.

Young vs.Harrison:6 Ga.130.

From the nature of these Articles of Incorporation as is said by the court in a Georgia case,the corporations are apt to forget the fundamental law of their being. In the daily habit of transacting business in the name of the corporation as though it was an individual,they are apt to slide into the notion that a corporation is an individual in all respects so far as business matters are concerned.

Under these laws creditors may elect to bring suits in equity against all the stockholders in the name of all the creditors for the accumulation and distribution of the entire assets of the corporation.

Such actions must be brought against all the stockholders of the same class for the benefit of all creditors having a like interest.

When a suit of this character is brought courts of equity will restrain independent suits against stockholders as they interfere with the accounting which is a necessary incident of the equity procedure.

Farnsworth v.Wood:9I N.Y.308.

Actions to enforce the liability of stockholders should not be confused with actions to enforce the liability of directors for failure to comply with the laws. The latter class of actions are actions in the nature of a penalty and cannot be combined with the action against the stockholder.

The action against the stockholder being on contract is not confined to the courts of any one state,but is maintainable in all courts,provided that it shown that all steps required by the statute under which the

corporation was incorporated ,have been taken.

In some of the states very stringent statutes have been enacted as is illustrated in the Act of the Mass.Legislature of 1821,which made the members of all manufacturing corporations personally liable on all the contracts of the corporation,and subjected their property to attachment on mesne process and their persons to arrest and imprisonment,and allowed the sale of their property on execution issued in actions against the corporation.

Naturally this act was fiercely assailed on the ground that it was not due process of law - procedure against a man who by no possibility could be heard.

The Supreme Court sustained the act,however.

Child vs.Coffan:17 Mass.64.

Marcy vs.Clark:17 Mass.330.

Ultra Vires Doctrine.

The old idea of a corporation was an artificial being created by the king either directly or indirectly, and capable of acting only in a well understood manner, but having conformed to the prescribed regulations,en-

dowed with the same rights and liabilities as individuals.

But with the extension of corporations came the necessity of restriction as a means of protection to the public.

The old method of restriction was to pass prohibitory laws expressly designating what was forbidden; but the marvelous increase in numbers and objects rendered this method impracticable and impossible.

Out of necessity sprung our present system of powers either express or implied in the grant or franchise and from the overstepping of these powers arose our modern doctrine of Ultra Vires.

Chief Justice Marshall in the case of Head vs. Insurance Co. in speaking of the powers of the defendent said "It may be said to be precisely what the incorporating act has made it; to derive all its powers from that act, and to be capable of exercising its faculties only in the manner which that act authorizes."

In early times if the form was complied with nothing further was required, but at present not the letter of the law but the intent and spirit are the determining factors.

All powers are not expressed. Such as naturally flow from the conduct of the business; such as are essential to its success or creation,are embraced within its powers the same as the enumerated powers.

What is unauthorized or ultra vires,is void. Parliament formerly forbade by express statute certain acts. Today the courts declare similar acts unauthorized and void - another example of judicial legislation based upon the same grounds which created the original prohibitory statutes,namely public policy.

People vs.Manhatten Co.:9 Wendell 35I.

There is but one course of reasoning by which this position can be sustained,but happily that is sufficient.

Charters are special privileges conferred by a sovereignty,giving advantages to a certain few. The policy of the law is not to grant privileges unless it appears that such grants will be beneficial to the public as a whole; that public policy demands it. Most certainly then the public demands that such privileges shall not be abused and that the beneficiaries keep within the prescribed regulations which must be

taken as the comparative standard of the privilege and public welfare.

Story on St. and Const. Law: 2 Ed. 1292.

The above doctrine obtains in England and is laid down in the leading case in this country.

Bissell vs. Lake Shore R.R. Co. 22 N.Y. 258.

Acts apparently within the powers of the company, but ultra vires because of some fact lying peculiarly within the knowledge of the corporate officers do not admit the defense of ultra vires. Any acquiescense by the corporation is fatal to the setting up of the doctrine of estoppel as mutuality is absolutely essential. Estoppel upon general principles should be reciprocal.

Although a corporation may successfully invoke the defense of ultra vires, it is still subject to a suit for money had and received when it refuses either to return what it has received or to perform.

Mayor vs. Ray: 19 Wall. 468.

Taxation.

Usually of two kinds:

1. The organization tax.

2. The annual franchise tax determined according to statutory provisions.

After prolonged litigation, the franchise tax has been declared constitutional, as not being a tax upon property.

It is levied upon the corporation alone and one of the penalties provided for its non-payment is the forfeiture of its charter. The amount is determined by the earning capacity, which in turn is evidenced by the dividends (as far as taxes are concerned). The payment of this franchise tax or license does not exempt them from local taxation.

People vs. Warren: 109 N.Y. 576.

The general scheme of corporate taxation is based upon the value of the capital stock and surplus of the corporation.

Certain deductions are allowed, such as the value of the real estate which is taxed where is situated.

No exemption is allowed for debts.

People vs. Asten: 100 N.Y. 597.

Mortgageing of Corporations Property.

The courts of some states particularly of New York, have shown a tendency to limit the right to mortgage, as conferred by laws, to certain purposes. Though they have not attempted to lay down any rules they have refused to uphold the mortgages thus made in several instances. In 65 N.Y. 43 the Court of Appeals held that a mortgage could not be made to raise money to carry on a business, but it hardly seems possible that the legislature in giving this power intended to limit it any more than the business of the corporation was limited, and not to allow the company to mortgage for any purpose it was authorized to transact business for.

However the contrary construction has been put upon these statutes by the courts. 99 N.Y. 547.

Consolidation.

Consolidation is freely allowed in almost all the states, upon compliance with the different statutes prescribing the manner, time and purposes of the consolidation.

Full reports of these proceedings must be filed

in the proper offices,and all statutory requirements as to notice etc. complied with.

Another distinguishing characteristic of the modern business corporation is the ability to hold stock of certain other prescribed corporations engaged in enterprises incidental or related.

Preferred Stock.

Corporations may at the time of incorporation classify their stock,thus creating preferred stock,or at any time,upon the unanimous consent of all the shareholders,new preferred stock may be issued.

The subject of preferred stock naturally divides itself into two divisions.

1. Power to issue.

Issuance cannot be justified except for the purpose of strengthening the position of the company or enlarging its business.

The right to issue is usually inserted in the charter but if stock has been issued upon a certain basis,any rights which have attached cannot be impaired except for good reasons and by proper authority.

2. Rights of holders.

Rights of holders of preferred stock extends only to priority of dividends. As to the assets or capital they stand upon the same footing as other stockholders.

While the concern is going, if there are any profits, the holders of the preferred stock must be paid. If there are no profits they get nothing as they are not creditors but partners.

On dissolution profits cease, the capital remains, but as the preferred stockholders were prohibited from drawing on it while the corporation was in existence they are denied the privilege when it is defunct.

Dividends in arrears may and probably are entitled to payment when profits are realized, such payments to be made after payment of current dividend.

In addition to the right to issue prefered stock the corporations are frequently granted the right to increase or diminish their capital stock.

With relation to this privilege, it has always been the law and recognized as founded upon public policy that in any proceedings to increase or diminish, the shareholders shoulde have a voice.

Eidman vs. Bowman: 58 Ill. 414.

And the minority have been held to have the right to defeat any action distasteful to them.

This rule has worked much hardship,as a few block any change. Majority rule is a feature of corporate management and should obtain in these cases,provision being made for the purchase of the stock of the dissatisfied stockholders at a fair valuation.

If such course is not taken the inevitable result is the wrecking of the corporation with all its evils, not only to the stockholders but the business community at large .

Another right and interest of the stockholder is that upon the increase of new stock he has the right to a proportionate share of the new stock determined by his holding of the original stock.

The corporation cannot exclude stockholders from this privilege. A share in the stock is a share in the power of increasing it when the corporation determines to do so. The increase of capital is intended for the benefit of the joint owners.

S.P.States vs.Bank:10 Ohio 91.

Power to issue bonds is another statutory grant

and is frequently used to evade the prohibition against the issue of preferred stock.

This power should be done away with as the stockholders and the bondholders have adverse interests in cases where the business is close.

The stockholders control the board of directors and as bonds draw interest regardless of profits while the stock does not, there is an inevitable clash.

Assignments.

At common law corporations could make assignments unless expressly restricted by enactments, but at present in nearly all the states, statutes either prohibitory or restricting such assignments are on the statute books.

Exceptions are made in cases of a few certain classes of corporations as religious corporations and in New York under the present statute, whether intentionally or by an oversight, it certainly seems by a proper construction of the statute that corporations as a whole may make assignments.

This should be the law, guarded by proper restrictions as in the case of an appointment of receivers, persons wholly incompetent, unacquainted with the business

and possibly hostile to the interests of parties involved,are often appointed.

Among some of the other numerous privileges and restrictions created by statute are the right of agents to act and bind the corporation without the corporate seal,or with a seal,where authority has not been conferred by an instrument under seal.

Bank vs.Dandridge:12 Wheat.64.

The only express limitation upon these acts is the same here as in cases of natural persons. They must be acts within the apparent or express scope of the agent's powers or duties.

McCullogh vs.Moss:5 Denio 567.

Corporations may contract with one another even though their boards of directors consist of the same individuals in whole or part,subject to the provision that the acts of these respective board do not involve hostile interests.

Alexander vs.Williams:14 Mo.App.13.

Corporations are liable for frauds of agents act-

ing within the apparent scope of their authority, such as misrepresentation in notice of judicial sale, calculated to destroy competition.

James vs. R. R. Co. 6 Wall. 752.

Procuring donations by threatening a change of location, etc. Union Pac. R. R. 3 Dillion (C. C.) 343.

Corporations are now liable in actions of tort, the same as natural persons, the old doctrine that because of their peculiar character they could not perform any act involving moral qualities being entirely obsolete.

Johnson vs. StLouis Des. Co. 2 Mo. App. 565.

Although the liability to suit and the power to sue existed at common law, they have been made the subject of express provisions in all the states, in some taking the character of statutory provisions while in others they are found in the constitution.

The powers have been extended and we find an almost universal provision that suit may be brought in any county in which the corporation does business.

Watered Stock.

Many states have constitutional provisions declaring watered stock and bonds void, but the courts will not

enforce them because the remedy is so sweeping and disastrous that the protection of innocent holders requires the practical nullification of the law by judicial construction.

The remedy seeks to cure instead of to prevent. If statutes were passed prohibiting the issue of all stock and bonds for labor property or contract work, unless before such issue it shall have been decided by a state board or commission, that the value of the work, labor or property is equal to the par value of the stock or bonds, I think the evil would be effectually remedied.

Consolidation was not allowed at common law but is generally at present by statutes regulating the manner and extent of such consolidations.

Such consolidations being lawful, the new company succeeds to all the rights and becomes subject to all the liabilities of the combining companies.

No difficulty arises where each of the combining companies were created under the same general laws of a state, but in cases of consolidation of corporations organized under special charters, many delicate questions arise.

Without entering into a discussion of the cases, the general doctrine may be stated that the law existing at the time of the consolidation is the determining measure, except as to rights vested under other laws.

Although consolidation is generally authorized, corporations have no power to enter into partnership unless expressly authorized.

"A partnership and a corporation are incongruous. Such a contract of partnership is inconsistent with the scope and tener of the powers expressly conferred and the duties expressly enjoined upon a corporation either business or public. In a partnership each member binds the firm when acting within the scope of the business. A corporation must act through the directors or authorized agents and no individual members can as a member bind the corporation.

The whole policy of the law creating corporations looks to the exclusive management of the same by officers of the corporation as provided for by its charter.....

Any arrangement by which the control of the offices of corporations should be taken from the stockholders and officers would be hostile to our incorpora-

tion acts and the decided weight of authority is that a corporation has not the power to enter into a partnership." 8 S.W.Rep.396.

Dissolution of a Corporation.

This subject is considered in a very different light at the present time than at the common law,as is seen in a reference to Kyd on Corporations 447-8 where the author holds it "as a proposition so plain that it seems rediculous to mention it,that the corporation was of necessity dissolved by the death of its emebers."

But such a state of affairs cannot exist in a corporation having capital stock,as shares pass by assignment,bequest,or descent,and must of necessity always belong to some person who will thus be constituted a member of the corporation.

Boston Glass Co.vs.Langdon:24 Pick.52.

The only methods of dissolution existing at the present time are as follows:

1.Death by operation of statute.

2.Surrender of franchise,with consent.of the granting power.

3.Forfeiture of franchise.

Much doubt exists as to the power of a majority to dissolve as against the wishes of a minority except in cases of insolvency or unprofitableness.

Tredwell vs.Manf. Co.7 Gray 405.

On the dissolution at common law the realty reverted to the original grantor and the personalty to the crown,but this doctrine does not obtain in the civil law. "On the contrary the property of the corporation belongs to its members and must be divided among them. But at the present time,equity will enforce all contracts and treat all the corporate property as a fund to be divided among the creditors and case of a surplus shared with the stockholders."

Stark vs.Burke:5 La.Annual 740.

In England the crown may create but cannot at present dissolve a corporation or without its consent alter or amend its charter. Of course Parliament in the exercise of its all supreme power may dissolve or amend but it has rarely done so.

Chapter VI.

Conclusion. Present Tendencies.

In the preceeding pages ~~are~~ is given a crude outline of the development and growth of the corporation from an unimportant and almost unobserved phase of commercial activity to the dominating power which it now is.

This wonderful growth has not been without incident and has not failed to excite alarm. The friends and foes of associated capital have carried on a hot battle and the contest is still raging. Many remedies have been suggested, theories and experiments tried and proved useless, but a remedy seems to be coming in the natural course of events despite legislative restrictions.

Consolidation on a colossal scale is the only seeming solution. As long as combinations can be made, competition will exist, and so long must the public pay for the expense of such competition.

As to the quasi-public corporations, especially the railroads, Congress has power to organize and regulate corporations appropriate for the carrying out of the powers of the Federal government.

Such a corporation being designed to aid the government in the administration of the public service cannot be controlled by the state legislation, and herein lies the only seeming remedy to cut off the ever growing tendency of the state legislatures to inflict burdens upon corporations engaged in the public service.

Enact a national corporation law for just as long as the tendencyof man to over-reach his neighbor exists, just so long will states, which are merely collections of individuals, discriminate against one another.

Those are not found wanting who advocate the abolition of corporations entirely, but this would be commercial suicide, and as has been well said, such talk is foolishness.

Because the corporation can be used in a few instances as an instrument of wrong, the vast numbers which are guilty of no wrong should not be abolished. The corporation is coming and not going.

Public opinion however is beginning to exert a powerful influence with reference to corporations.

The great corporations seek to conciliate the public and fear its condemnation. Jay Gould expressed the idea of the successful corporation officer in his terse phrase - "Molasses catches more flies than vinegar."

The Granger legislation - Railroad cases - the withdrawel of the Southern Pacific from California politics - the conciliatory tactics of the Standard Oil Co., are all due to public sentiment.

The successful corporations of today are managed by honest far-seeing men,who recognize that honesty towards the people is the best business policy.

But with reference to the State,the attitude of the corporation is somewhat different.

So long as the business of the private corporation is affected by the government ,so long will they continue to exert their influence in politics.

When the State refused to grant any more special charters the corporations withdrew to a large extent from the legislatures.

With consolidation will come a lessening of conflict with the State.

Let us then grant corporate privileges only where the necessity of the public overbalances the necessity of the individual.

In all such cases make incorporation obligatory.

Make all stock corporations render full reports, furnishing data for efficient regulation.

All other corporations should be subject to investigation but not control.

The only other remedy seems to be State Socialism.

Isaac Bromley struck the key-note of the situation when he said - "The irregularities in the management of corporations are due to the irregularity on the outside of the globe and the inside of man. Things are growing better all the time but the discussion of the corporation problem needs fresh air," and I should add judicial enlightenment.