CORPORATIONS AND THE NATION

The Nation has no peculiar relation to corporations created by the States.[1] It can deal with them only as it can deal with unincorporated associations, partnerships and individuals. Incorporation gives a privilege. The power which gives it may reserve the right to regulate its enjoyment, that is, the conduct of the association so privileged. In the nature of things, such right can be reserved only in the grant of the privilege and only by the grantor. The fact that an association of men is incorporated by one State cannot be made the basis of regulation by any other power. Incorporation under the laws of one or more States of the Union, gives no basis for control or regulation by the United States. The basis for Federal action must be found outside of the fact of such incorporation, in something which, regardless of incorporation, brings the association within the field of Federal jurisdiction, under the provisions of the Constitution. State incorporation gives neither a ground for, nor a shield against, Federal interference.

If a partnership runs a stage between two villages in Vermont, its business being confined to that State, even the most advanced advocate of centralization will admit that its business cannot be regulated by Congress. If the partnership is changed into a corporation, or, in other words, if the same association of individuals is incorporated by the State of Vermont, the business being limited as before, the corporation, equally with the previous partnership, is beyond the reach of congressional regulation. The power of Congress is unaffected by incorporation.

Substitute for the two villages in Vermont, two villages, one of which is in Vermont, and the other across the Connecticut River, in New Hampshire, so that the business is interstate transportation. Then such business undoubtedly may be regulated by Congress under its power to regulate interstate commerce. And this is equally so while the individuals who carry it on remain a mere partnership and after they have become a corporation. Regulation may be applied to the business because of its char-

[1] Corporations created by Congress are outside of the purview of this article.

acter. The legal character of the association, the fact that it is or is not incorporated, in no way affects the question.

Suppose a further change is made, and the business of the association is both carriage between two villages in Vermont and carriage between two villages, one in Vermont and one in New Hampshire. Business of the former kind is outside of the power of Federal regulation; business of the latter kind is within such power. The one kind of business may and the other may not be regulated by Congress. The association generally is not subject to such regulation, but only the interstate business which it does. The fact that the same body of men carry on both kinds of business cannot extend the power of Congress; and the power is precisely the same, whether they are associated as a partnership or as a State corporation. That part of the business which is within the definition of interstate commerce, is subject to regulation under the powers referred to; the rest of the business is not. The association may be regulated with respect to its interstate business, but only with respect to such business. Whether it is incorporated or not, whatever it does is free from, or subject to, Federal regulation, according as what it does is without or within the field of interstate commerce.

The Interstate Commerce Act in no sense attempts to regulate corporations; it regulates commerce only. It has lately been extended so as to cover express business. Some of the express companies are incorporated; some of the important ones are not.

The Anti-Trust Act of 1890, does not mention corporations, except in declaring that the word "person" as therein used, includes "corporations." It prohibits certain doings—if the word "certain" may be used, though it is still uncertain what the prohibited doings are. It applies whether the doers are corporations or natural persons. It is the character of the business, not the character of those who do it, which gives to Congress the right to regulate it, and is to be considered in any proceeding under the Act.

When individuals are more frequently prosecuted under these acts, it will be more generally realized that they are not based upon any peculiar relation of the Nation to corporations, but upon the power of Congress to regulate interstate and foreign commerce by whomsoever carried on.

In the proposals for Federal regulation of corporations, it is sometimes urged that corporations are peculiarly subject to State

regulations, because of the franchises which they enjoy. The State by which a franchise is granted, may regulate the use of such franchises, if this right is reserved in the grant. But no other sovereignty can base a right of regulation upon such grant or such reservation therein. Whether a corporation enjoys only the franchise of corporate being—as is true of all industrial corporations—or enjoys, in addition to such franchise, a prerogative franchise such as that of maintaining and operating a railroad, the fact that it enjoys such franchise or franchises by grant from one or more of the States, gives no basis whatever for regulation of its business by the Federal Government.

With reference to the Federal Government, then, corporations created by the States stand upon the same footing as natural persons; if their business may be regulated, it is because of the character of the business, because such business—by whomsoever it may be carried on—is of the kind which is subjected to Federal regulation by the Constitution.

All this is quite obvious; but the obvious is often overlooked. Argument is unnecessary. Reference to authorities would be a waste of effort. It needs only to be pointed out. That it is overlooked is shown by much of the talk upon many legislative suggestions which are heard in these days.

The conclusions from what has been pointed out are both restrictive and expansive. Limitations are seen to lie in the way of some legislative measures proposed. But on the other hand, it equally appears that some proposals should be broadened. If there is any reason for any suggested form of regulation as applied to business done by corporations, there must be the same reason for regulation of like business done by individuals, partnerships and unincorporated associations. Since the power of the Nation depends in no way upon incorporation, incorporation neither extends nor limits the power. Since it is the character of the business and not the legal character of the agency by which it is done which gives Congress its right of regulation, the legal character of the agency does not limit the power of Congress in its regulation of the business. Nor does it appear that there can be any difference in expediency, whether the agency is incorporated or not. The regulations which seem wise with respect to the business should not, therefore, be limited in their application to incorporated bodies. They should be general—as are the regulations of the Anti-Trust Act and the Interstate Com-

merce Act—applying to the doings of individuals and unincorporated associations in like manner as to those of corporations. And the propriety of their enactment should be tested by the thought that they must, in reason, be made so to apply.

There are doubtless those who think—without much thinking—that to draw the line in such matters between corporations and agencies unincorporated, is simply to distinguish between things large and small. But this is a mistake. A partnership which becomes incorporate gains nothing in size or power. On the other hand, there are associations unincorporated which are larger and stronger than all but the largest corporations. Several important combinations have been organized lately by mere agreement, and the express companies give examples of association on a large scale without incorporation. If regulations are to be adopted as to any business, there would seem to be no reason why persons doing such business as individuals, or in unincorporated associations, should find themselves outside of their reach. Indeed, it would seem that incorporation cannot properly be made a basis of differentiation or of classification in any enactment by the Nation, unless it would cut free from the rule of equality of burden which is imposed upon the States by the Federal Constitution.

Reference ought, perhaps, to be made to the very interesting case of *Butler Brothers' Shoe Company v. United States Rubber Company,* (U. S. Circuit Court of Appeals, 8th Circuit) 156 Fed. Rep. 1. It was there held that the State of Colorado could not prohibit a foreign corporation, engaged in interstate commerce, from engaging in such commerce within that State; and in effect this was an assertion of the power of Congress to regulate such corporation with respect to such business. But no point was made of the incorporation of the company. The basis of the decision was that the business which the company did was interstate commerce, the regulation of which belonged to Congress exclusively. It mattered not that the association which carried it on was incorporated. It was the character of the business, no matter what the legal character of the agency conducting it, which put it beyond the regulative power of the State. I find nothing in this case, nor in any of the cases cited therein, to throw any doubt upon any of the statements of this article, or of the article on *Corporations and the States,* published in the December, 1907, number of this Journal. *Thomas Thacher.*