THE FORMATION OF INSURANCE COMPANIES.*

1. The Distinction Between Incorporation and Licensing.

The formation of a new insurance company involves two steps: First, the incorporation, or official recognition of a new juristic person; and second, the authorization of the company to engage in the business of making insurance contracts. The incorporation endows the group with juristic personality, but the powers of the juristic person are narrowly limited until it obtains the state's privilege to engage in the business for which it was formed. The first step is normally consummated by the issuance of a certificate of incorporation; the second by the issuance of a license or certificate of authority to engage in the insurance business.[1]

The first step stands for state control over group action generally,[2] and is, of course, not peculiar to insurance corporations. It is not surprising, therefore, to find that in a number of states the insurance commissioner is not given official power over the incorporation of insurance companies, which takes place in the same way as the formation of other companies;[3] that is, the certificate of incorporation is issued independently of the insurance commissioner, by the secretary of state or other official who is empowered to issue such certificates for business

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[1] See Jackson v. Mutual Fire Ins. Ass'n. of Ark., 154 Ark. 342, 242 S. W. 567 (1922), holding a mutual company, under the Ark. statutes, not bound by a contract of insurance made after the certificate of incorporation, but before the license, was issued. An express provision to this effect is found in Ala. Civ. Code (1923) Sec. 8422.

[2] Freund, Standards of American Legislation, 39-40.

[3] Ala. Civ. Code (1923) (other than mutual companies); Ark. (Kirby and Castle's Digest, 1915); Conn. Gen. Stat. (1918) (except Fraternal Societies); Fla. Comp. Laws (1914); Ga. (Code, 1910); Mo. Rev. Stats. (1919) Sec. 6439 (as to County Mutual companies); Nev. Rev. Laws (1912) Sec. 1286; N. H. Pub. Stats. (1901) and Supp. (1913); N. J. Comp. Stats. (1910) p. 2840, Secs. 4, 5; N. M. Ann., Stat. (1915) Sec. 2825; Ohio Gen. Code (Page, 1920) Sec. 9512; R. I. Gen. Laws (1909) Ch. 212, Sec. 10 (special act of the legislature in each case); S. C. Code of Laws (1912) Sec. 2834; Tenn. Ann. Code (Shannon, 1917) Sec. 2024 (*cf.* Sec. 2259); Va. Code Ann. (1919) Sec. 4201.

corporations generally. In a second group of states, though the application for incorporation is made directly to the secretary of state, and the certificate of incorporation is issued by him, the enterprise must first be approved by the insurance commissioner in certain particulars.[4]

In a third and somewhat larger group of states, however, it seems that the incorporation of insurance companies is treated as *sui generis;* the application is made directly to the insurance commissioner, who acts independently of the secretary of state (usually, however, subject to the approval of the attorney-general as to the formal legality of the application) and takes both steps: the incorporation and the authorization to do business.[5] It is difficult to generalize, since successive statutes have often provided different modes of incorporation for different kinds of companies.[6]

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[4] Del. Rev. Code (1915) Sec. 575; Ind. Ann. Stat. (Burns, 1914) Sec. 4613 Me. Rev. Stat. (1916) Ch. 53, Sec. 63; Minn Gen. Stat. (1913) Sec. 3256; Mo. Rev. Stat. (1919) Sec. 6106; Mont. Rev. Code (1907) Secs 4043, 4077, 4413; Pa. (Supp. to Purdon's Dig. [1923] vol. 8, "Insurance") Sec. 103 (com'r certifies approval to Governor); S. Dak. Rev. Code (1919) Sec. 9155; Vt. Gen. Laws (1917) Sec. 5518 (com'r must certify that it "will promote the public good of the state"); Wash. Comp. Stat. (Remington, 1922) Sec. 7130; W. Va. Code Ann. (Barnes, 1923). Ch. 23, Sec. 74.

[5] Ala. Civ. Code (1923) Secs. 8419 (mutual, other than life), 8458 (fraternal), 8510; Ariz. Civ. Code (1913) Secs. 3425, 3482; Colo. Laws 1915, p. 269; Idaho Comp. Stat. (1919) Sec. 4942; Ill. Rev. Stat. (Hurd, 1917) Ch. 73, Sec. 56; Iowa Comp. Code (1919) Sec. 5477; Ky. Stat. (Carroll, 1915) Secs. 661, 619; La. Ann. Rev. Stat. (Marr, 1915) Sec. 3567 (here the Secretary of State is *ex officio* insurance commissioner); Mich., Acts 1917, No. 256, II, 1, Sec. 4; Miss. Ann. Code (Hemingway, 1917) Sec. 5043; Neb. Rev. Stat. (1913) Sec. 3218; N. Y. Cons. Laws (1909) Ch. 28, Secs. 10, 70 (life), 110 (fire), Laws 1917, Ch. 155, Sec. 1, Ch. 4, Sec. 1; N. C. Rev. Laws (Pell, 1908) Sec. 4727; N. Dak. Comp. Laws Ann. (1913) Sec. 4839; Okla. Ann. Comp. Stat. (Bunn, 1921) Sec. 6667; Ore. Laws (Olson, 1920) Sec. 6365 (subject to approval of Corporation Commission); Tex. Ann. Civ. Stat. (Vernon, 1914) Secs. 4705, 4707; Wis. Stat. (1921) Sec. 1896; Wyo. Comp. Stat. Ann. (1920) Sec. 5243. In nearly every case the approval of the charter by the Attorney General is required.

[6] *E. g.,* under Fla. Laws (1915), Ch. 6850, the articles of association of a mutual company are approved by the state treasurer (insurance commissioner) and the legal existence of the corporation dates from his approval and filing of such articles (Sec. 6). See also Mo. Rev. Stat. (1919) Sec. 6439, which provides for the incorporation of county mutual companies by the circuit courts. See Okla. Ann. Comp. Stat. (Bunn, 1921) Sec. 6926 (approval of mutual casualty company by Insurance Board); S. C. Code of Laws (1912) Sec. 2773 (mutual protective associations); S. Dak. Rev. Code (1919) Sec. 9266 (township mutuals formed by county auditor).

The third form of administrative control seems preferable, since the insurance commissioner can do the work (largely perfunctory) of incorporation as well as any other official, and is thereby in a position to stop inimical enterprises at an earlier stage than under the other two methods of control. Moreover, if insurance companies are placed in a class by themselves, the perplexing problems of correlating the insurance statutes with the general incorporation laws will be avoided.[7] Finally, from the standpoint of the incorporators themselves, it is more convenient to have to deal with only one official than with two. The tendency of recent legislation is to adopt this form of control.

While the two steps mentioned above are theoretically distinct, in practice it is often hard to draw the line, and to say when, if ever, the corporation comes into existence (*i. e.*, has the attributes of juristic "personality") before it is finally authorized to engage in the insurance business. The statutes frequently fail to make this clear. Thus, under the New York statute,[8] it was held that the "incorporators become a corporation before subscriptions to the capital stock are invited";[9] while under a very similar statute in Missouri[10] the courts decided "there is no corporation until the amount of the proposed stock has been subscribed."[11] Probably under most statutes of similar wording, the New York view would be preferred.[12]

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[7] Such questions constantly arise in the courts; *e. g.*, Greiger v. Salzer, 63 Colo. 167, 165 Pac. 240 (1917).

[8] Ins. Law of 1892, Sec. 110, which provides that upon filing the declaration of intention to incorporate and a copy of the charter and proof of publication of the intention, "such corporation, if a stock corporation, may open books for subscription to its capital stock. . . ."

[9] Van Schaick v. Mackin, 129 App. Div. 335, 113 N. Y. Supp. 408 (1908). The court held that the general incorporation law therefore applied and invalidated a subscription to stock which was not accompanied by a cash payment of at least ten per cent.

[10] Mo. Rev. Stats. (1909) Sec. 6898 provides that after certain steps are taken. the Secretary of State "shall issue a certificate of incorporation, upon receipt of which they shall be a body politic and corporate and may proceed to organize in the manner set forth in their charter and to open books for subscription to the capital stock . . . but it shall not be lawful for such *company* to issue policies . . . until *they* have fully complied with the provisions of this article." (Italics ours.)

[11] Taylor v. St. Louis Nat'l. L. I. Co., 266 Mo. 283, 181 S. W. 8 (1915); Reynolds v. Whittemore, 190 S. W. 594 (1916); Reynolds v. Title Guaranty Trust Co., 196 Mo. App. 21, 189 S. W. 33, 37 (1916); Reynolds v. Union Station Bank of St. Louis, 198 Mo. App. 323, 200 S. W. 711 (1918). In these cases the courts attained the same objects as in the New York case, namely, protected the enterprise against inimical stock subscription agreements.

[12] King v. Howeth & Co., 42 Okla. 178, 181, 140 Pac. 1182 (1914), *semble*

Some states have provided that the commissioner shall issue, not a certificate of incorporation, but a license to the incorporators to solicit stock subscriptions.[13] Where only this has been done, the incorporators have not yet attained juristic personality,[14] and the two steps (incorporation and authorization) become coincident in point of time. This arrangement seems well adapted to protect the public against unsound insurance enterprises.

2. Discretionary Powers of Commissioner.

The statutes uniformly lay down pretty definite rules for the formation of insurance companies [15] and hence most of the work of the commissioner in this connection is routine or perfunctory. Disputed questions of fact can seldom arise, and the application of the statute to the facts will usually be simple and direct when once the statute has been found and interpreted. For example, an application was made to the commissioner for the incorporation of a company to guarantee payment of mortgage notes and bonds, under the statute relating to the formation of surety companies. The commissioner refused the application on the ground that the casualty insurance statute was the one applicable to this kind of business. The court granted a *mandamus*, saying that the commissioner had no discretion as to which statute was applicable.[16]

In another case, the proposed articles of incorporation submitted to the commissioner did not contain the information called

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(corporation in existence before stock subscribed). But see Blinn v. Riggs, 110 Ill. App. 37, 49 (1903) under a similar statute (corporation in existence when capital stock subscribed though not paid in).

[13] Colo. Laws 1915, 279; Conn. Gen. Stat. (1918) Sec. 4192 (as to fraternal societies); Ky. Stat. (Carroll, 1915) Sec. 623; Ore. Laws (Olson, 1920) Sec. 6365 (3); Va. Code Ann. (1919) Sec. 4237.

[14] Greiger v. Salzer, 63 Colo. 167, 165 Pac. 240 (1917) construing Colo. Rev. Stat. (1908) Sec. 3117 which is similar to the Colorado Statute cited in the last note.

[15] Except in Rhode Island, where the old practice of incorporating each company by special statute still prevails. See *supra*, note 2.

[16] People *ex rel.* Gosling v. Potts, 264 Ill. 522, 106 N. E. 524 (1914). That is, the court simply disagreed with the commissioner and attached no conclusiveness to his determination.

for by express statutory provision, as to "the time when and the manner in which payment on stock subscribed shall be made"; nor as to "the mode in which the election of directors or managers shall be conducted," nor "the mode of liquidation at the termination of the charter." In a *mandamus* proceeding to compel the commissioner to issue a certificate of authority, it was argued that these were "technical requirements"; but the court refused the writ, pointing out that the non-compliance with the statute was obvious on the face of the document submitted, and adding that "The requirements of the statute cannot be disregarded as mere surplusage." [17] The statute in this case is a typical example of the sharply defined rules governing the commissioner's power to issue certificates of incorporation to newly-formed companies. Generally, the commissioner's duties under such statutes are "ministerial."

Frequently, however, there are standards or principles which the commissioner has to apply, and in the application thereof he should be allowed discretionary power within limits. Thus, he is frequently called upon to determine whether the capital stock has been subscribed, or the assets invested, "in good faith," [18] and the court should uphold his decision unless an abuse of discretion appears,[19] for the indicia of fraud can rarely be reproduced in a judicial record. An exceptional statute is the Vermont provision which requires the commissioner, before approving the formation of a new insurance company, to hold a public hearing to determine whether the establishment of the company "will promote the general good of the state." [20] Cer-

[17] State *ex rel.* Lumberman's Accident Co. v. Michel, 124 La. 558, 50 So. 543 (1909).

[18] *E. g.*, Idaho Comp. Stat. (1919) Sec. 4942; Iowa Comp. Code (1919) Sec. 5478; La. Ann. Rev. Stat. (Marr, 1915) Sec. 3582; Tex. Ann. Civ. Stat. (Vernon, 1914) Sec. 4707; Va. Code Ann. (1919) Sec. 4206; Wyo. Comp. Stat. Ann. (1920) Sec. 5249. So, Ala. Civ. Code (1923) Sec. 8425 ("*bona fide*" applications for incorporation of mutual companies).

[19] American Life Ins. Co. v Ferguson, 66 Ore. 417, 134 Pac. 1029 (1913) (in determining whether a company has the "paid-up unimpaired capital" required by statute the commissioner "is given a wide discretion in safeguarding the interest of the present and prospective stockholders and policyholders of the company.")

[20] Vt. Gen. Laws (1917) Sec. 5518.

tificates of "public convenience," which are frequently required in the formation of new banking enterprises, are not elsewhere found in insurance legislation.

The permissible subjects of insurance are usually set forth in detail in the statutes, and while the language is usually indefinite enough to permit minor innovations, new forms of insurance must await legislative authorization. A Nebraska statute, however, apparently gives the insurance board unregulated discretion to extend indefinitely the legally permissible subjects of insurance.[21]

The commissioner's approval of the company's investments, often provided for, will usually be construed to be governed by the terms of the statutes prescribing the investments for going concerns.[22] Frequently the "approval" of the insurance commissioner generally is required, or he is to approve, etc., if he finds that "the laws of this state have been complied with." In either event, his discretion is regulated by the other statutory provisions.

3. Investigation by the Commissioner.

The methods to be pursued by the commissioner in ascertaining whether or not the statutory requirements as to paid-up stock, investments, etc., have been complied with, vary considerably. One method is for the commissioner to take the affidavit of the incorporators or directors to the effect that this has been done.[23] This method is apparently based on the naive notion that a man who will violate the law will not foreswear himself. However effective the oath may have been in the religious atmosphere of

[21] Neb. Rev. Stat. (1913) Sec. 3218 provides that a company may be formed to transact specified kinds of insurance or for any risk which is a proper subject of insurance, not prohibited by law or contrary to sound public policy, "to be *determined by the insurance board.*" Cf. N. C. Rev. Laws (Gregory, Supp. 1913) Sec. 4726: "or against any other casualty . . . which is a proper subject of insurance."

[22] The permissible investments are usually defined by the statute relating to the particular type of company; *e. g.*, fire, life, etc.

[23] Iowa Comp. Code (1919) Sec. 5479 (evidence in affidavit or otherwise satisfactory); Md. Code (Bagby, 1911) I. 180 (officers of company certify under oath); Minn. Gen. Stat. (1913) Sec. 3313 (directors certify under oath); Ohio Gen. Code (Page, 1920) Sec. 9522; Tex. Ann. Civ. Stat. (Vernon, 1914) Sec. 4708; Va. Code Ann. (1919) Secs. 4205, 4206; Wyo. Comp. Stat. Ann. (1920) Sec. 5249.

the Middle Ages, it is but a feeble substitute for direct official supervision. A second method is for the commissioner to have an examination made by one or more distinterested persons, competency or knowledge of the insurance business and of the wiles of promoters not specified.[24] This method apparently contemplates a sort of layman's examination, which is obviously inadequate. The third method is to have an examination made by the commissioner himself or by one of his deputies or regular examiners. This is the commonest method.[25] A few states leave the method unspecified.[26] Every insurance department should be adequately equipped at least to examine the affairs of new companies and nip unsound enterprises in the bud. It is believed that many of them are not.

4. License to Sell Stock in Insurance Company.

Coincident in time with the spread of the so-called "Blue Sky" laws, there has been an increasing tendency to invest the commissioner with drastic powers of supervision over the sale

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[24] Ill. Rev. Stat. (Hurd, 1917) Ch. 73, Sec. 56 (by commissioner in person or by three disinterested persons who certify under oath); Nev. Rev. Laws (1912) Sec. 1290 (three disinterested residents). *Cf.* N. Y. Cons. Laws (1909), Ch. 28, Sec. 11 (examination by the commissioner or by one or more competent and disinterested persons); Ohio Gen. Code (Page, 1920) Sec. 9522 (alternative methods); Tex. Ann. Civ. Stat. (Vernon, 1914) Sec. 4707 (same); Wash. Comp. Stat. (Remington, 1922) Sec. 7038 (same); Wyo. Comp. Stat. Ann. (1920) Sec. 5249 (same).

[25] Idaho Comp. Stat. (1909) Sec. 4942; Ind. Ann. Stat. (Burns, 1914) Secs. 4651, 4651a; Me. Rev. Stat. (1916) Ch. 53, Sec. 85; Md. Code (Bagby, 1911) I, 180 (in addition to the affidavit of the officers); Kan. Gen. Stat. Ann. (Mackintosh, 1915) Sec. 5191; Ky. Stat. (Carroll, 1915) Sec. 621; Miss. Ann. Code (Hemingway, 1917) Sec. 5037; Mo. Rev. Stat. (1919) Sec. 6107; Mont. Rev. Code (Supp. 1915) Sec. 178c; Ohio Gen. Code (Page, 1920) Sec. 5922 (alternative methods); Ore. Laws (Olson, 1920) Sec. 6365 (8); Pa. (Supp. to Purdon's Dig. [1923] Vol. 8, "Insurance"), Sec. 107; Tex. Ann. Civ. Stat. (Vernon, 1914) Sec. 4707 (alternative methods); Va. Code Ann. (1919) Sec. 4206; Wash. Comp. Stat. (Remington, 1922) Sec. 7038; Wis. Stat. (1921) Sec. 1897t; Wyo. Comp. Stat. Ann. (1920) Sec. 5249 (alternative method). See also Vt. Gen. Laws (1917) Sec. 5518 (public hearing).

[26] Ala. Civ. Code (1923) Sec. 8333; Iowa Comp. Code (1919) Sec. 5479; Colo. Laws 1915, p. 279 ("shall by investigation satisfy himself"); La. Ann. Rev. Stat. (Marr, 1915) Sec. 3582 ("satisfactory evidence"); N. H. Laws (1913) Ch. 42, Secs. 1, 2 (same); N. Dak. Comp. Laws Ann. (1913) Secs. 4839, 4921; Okla. Ann. Comp. Stat. (Bunn, 1921) Sec. 6674; Ore. Laws (Olson, 1920) Sec. 6326 (1); S. C. Code of Laws (1912) Sec. 2699; S. Dak. Rev. Code (1919) Sec. 9116; Tenn. Ann. Code (Shannon, 1917) Sec. 3277; Utah Comp. Laws (1917) Sec. 1140; Vt. Gen. Laws (1917) Sec. 5521; W. Va. Code Ann. (Barnes, 1923) Secs. 15e, 74.

of stock in insurance companies. Persons selling insurance stock, or the companies themselves, or both, are required to obtain licenses from the commissioner. The statutes in terms commonly confer unregulated discretion upon the commissioner in the granting or revoking of these licenses. For example, he may refuse a license unless he is "satisfied" or "finds" that "its operations would be beneficial to the public," [27] that "the business proposed to be transacted within the state is proper and right," [28] that its "plans and purposes" are "proper," [29] that its "condition is satisfactory," [30] that the amount of securities is "reasonable," [31] that the price at which the securities are to be sold is "adequate," [32] that the commissions and salaries to be paid are "fair." [33] A Minnesota statute goes even further, providing that the license of a stock-selling agent "shall be subject to revocation at any time" by the commissioner "for cause appearing to him sufficient." [34] Literally construed, this gives the commissioner not only unregulated but also (judicially) uncontrolled discretionary power.[35] It should therefore be declared unconstitutional unless the selling of insurance stock is, like liquor-selling and other forms of vice,[36] in the class of activities which may be absolutely

[27] Colo. Laws 1915, p. 279; Mo. Rev. Stats. (1919) Sec. 6370. It seems these provisions are aimed to prevent fraud and are not the same as the "certificate of public convenience" referred to above.

[28] Ala. Civ. Code (1923) Sec. 4613; Miss. Ann. Code (Hemingway, 1917) Sec. 5149.

[29] N. Y. Laws (1913) Ch. 52 (McKinney, Sec. 66); N. C. Rev. Laws (Gregory, Supp., 1913) Sec. 4824a (4).

[30] *Ibid.* In Ga., a new domestic company "shall collect, hold, and disburse its funds under such rules and regulations as insurance commissioner may prescribe"—Park's Anno. Code, (1914) Vol. II, Sec. 2412J.

[31] *Ibid.* See also Va. Code Ann. (1919) Sec. 4237 ("for good cause").

[32] *Ibid.*

[33] *Ibid.* In Colorado and Missouri, the statutes fix the percentage of commissions to be paid.

[34] Minn. Gen. Stat. (1913) Sec. 3283. *Cf.* the N. Y. provision: may refuse or revoke certificate "if, in his judgment, such refusal will best promote the interest of the people of the state."

[35] In Ayers v. Hatch, 175 Mass. 489, 56 N. E. 612 (1900), "for such cause as he shall deem sufficient" was said to repel the idea that removal of a public officer could be "at pleasure," but the court's inquiry into the cause was perfunctory.

[36] Commonwealth v. Kinsley, 133 Mass. 578 (1882); Martin v. State, 23 Neb. 371, 36 N. W. 554. (1888).

prohibited and which hence (by a dubious argument *a fortiori* generally accepted by the courts),[37] may be tolerated on any terms, however arbitrary, which the legislature may see fit to impose.

Such a construction should be avoided. The grant of unregulated discretion in these cases is due to an ardent desire by the lawmakers to put an end to the sale of bogus or watered securities, coupled with the inability to lay down any standards by which to measure the soundness of an enterprise. The statutes are a striking example of legislative abdication in favor of the administrative. There is recent and high authority for the view that these grants of unregulated power will not be declared unconstitutional.[38] The solution therefore lies with the legislatures, which should make a determined effort to substitute standards of business ethics and business efficiency for the loose phrases now employed.

5. Similarity of Corporate Names.

An example of standardized discretionary power is found in the provisions which declare that the name of a new insurance company shall not be similar to the name of an existing insurance corporation.[39] These statutes exhibit considerable diversity in phraseology; *e. g.*: "which is an interference with or too similar to one already appropriated";[40] "so nearly resembling as to

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[37] For examples of this type of judicial reasoning see Commonwealth v. Kinsley, *supra*, note 36, and White, *J.*, in Oceanic Navigation Co. v. Stranahan, 214 U. S. 320, 53 L. Ed. 1013, 1023 (1909).

[38] See Hall v. Geiger-Jones Co., 242 U. S. 539 (1917); Lloyd v. Ramsay, 192 Iowa 103. 183 N. W. 333 (1921).

[39] Cal. Pol. Code (1907) Sec. 453e; Idaho Comp. Stat. (1919) Sec. 4938; Iowa Comp. Code (1919) Secs. 5510, 5601 and 5623; Ky. Stat. (Carroll, 1915) Sec. 722; Me. Rev. Stat. (1916) Ch. 53, Sec. 59; Mich. Acts 1917 No. 256, II, 1, Sec. 18; Mont. Rev. Code (1907) Sec. 4042; Neb. Rev. Stat. (1913) Sec. 3209; Nev. Rev. Laws (1912) Sec. 1311; N. J. Comp. Stats. (1910) p. 2839, Sec. 3; N. M. Ann. Stat. (1915) Sec. 2847; N. Y. Cons. Laws (1909) Ch. 28, Sec. 10; N. Dak. Comp. Laws Ann. (1913) Sec. 4837; Ohio Gen. Code (Page, 1920) Secs. 9512, 9513, 9522, 9607 (23), 9341, 9349 (different wording as to each type of company); Okla. Ann. Comp. Stat. (Bunn, 1921) Sec. 6667; Ore. Laws (Olson, 1920) Sec. 6305 (1); Pa. (Supp. to Purdon's Dig. [1923] Vol. 8, "Insurance"), Sec. 96; Utah Comp. Laws (1917) Sec. 1138; Wash. Comp. Stats. (Remington, 1922) Sec. 7130; Wis. Stat. (1921) Sec. 1897b; Wyo. Comp. Stat. Ann. (1920) Sec. 5243.

[40] Cal. Pol. Code (1907) Sec. 609.

be calculated to deceive";[41] "so similar as to be likely to mislead the public or to cause inconvenience";[42] "liable to be mistaken by the public for the names of other corporations or in any way cause confusion."[43] Such phrases as "an interference with" or "too similar" and even "closely resembles"[44] call for a judgment as to degree without indicating the grounds upon which that judgment is to be exercised; and "to cause inconvenience" indicates too trivial a degree of similarity. Such phrases as "likely to mislead the public," or "calculated to deceive,"[45] express the standard about as clearly as may be done. On the other hand, it seems unnecessary to give the commissioner unregulated power in approving the name of a new company.[46]

Fortunately, the common law decisions on unfair competition are aids in giving meaning to such statutory provisions. Thus, it has been held that the statute does not prohibit the adoption by a life insurance company of a name similar to one already adopted by a company engaged only in fire insurance business, it being shown that many such similarities exist and that in the opinion of company officials they do not cause confusion or uncertainty.[47] On the other hand, it should not be necessary to

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[41] Idaho Comp. Stat. (1919) Sec. 4938.

[42] Iowa Comp. Code (1919) Sec. 5623. *Cf.* Ala. Civ. Code (1923) Sec. 8386 ("so similar . . . as in the opinion of the commissioner . . . is calculated to result in confusion or deception"); Me. Rev. Stat. (1916) Ch. 53, Sec. 59 ("likely to mislead the public"); Mont. Rev. Code (1907) Sec. 4042 (same); N. J. Comp. Stat. (1910) p. 2539, Sec. 3 (same); Ohio Gen. Code (Page, 1920) Secs. 9512, 9513.

[43] Ky. Stat. (Carroll, 1915) Sec. 722. See also Ala. Civ. Code (1923) Sec. 8420 ("so similar as to be confusing or misleading"); Ohio Gen. Code (Page, 1920) Sec. 9522.

[44] Mich. Acts 1917 No. 256, II, 1, Sec. 18; Okla. Ann. Comp. Stat. (Bunn, 1921) Sec. 6667.

[45] N. Y. Cons. Laws (1909) Ch. 28, Sec. 10.

[46] As is done, for example, in Mass. Gen. Laws (1921) Ch. 175, Sec. 49: "The name of the corporation shall be subject to approval by the insurance commissioner . . ." (but see Mass. Gen. Laws [1921] Ch. 155, Sec. 9: company shall not "assume a name so similar thereto as to be likely to be mistaken for it.")

[47] Commercial Union Assurance Co. v. Smith, 2 N. Y. Supp. 296 (1888) (N. Y. Sup. Ct.). This decision is in line with such cases as Vassar College v. Loose-Wiles Biscuit Co., 197 Fed. 982 (1912); but it seems too narrow in the light of more recent holdings. See Aunt Jemima Mills Co. v. Rigney & Co., 247 Fed. 407 (1917), and cases therein cited; OLIPHANT, CASES ON TRADE REGULATION, (1922) Ch. iv, Sec. 1.

show, as in an action for damages, that some other company will be directly or substantially injured by the adoption of a similar name, since the object of such regulation is to protect not only the interests of other companies but primarily the interests of the public.[48]

The statutes are usually not broad enough to prevent similarity of the name of a domestic company to one adopted previously by a corporation not as yet admitted to do business in the state.[49] Thus, in 1919, there were three separate companies in the United States doing business under the name of "Liberty Life Insurance Company." [50] Even where the statute prohibits the adoption of a name similar to that of *any* existing corporation,[51] the commissioner, though he may search the published lists of all insurance companies in existence for similar names before approving a proposed name,[52] may not learn of the formation at about the same time of a company with a similar name under the laws of another state. Only a centralized registration bureau or centralized supervision would prevent such conflicts. The statutes are frequently not broad enough to allow the refusal of authorization to a foreign company because its name resembles that of a domestic company, and in the absence of statute the commissioner has no power to make and apply such a regulation by analogy to the statute covering the formation of domestic companies.[53]

The statutes usually confer expressly upon the commissioner the power to reject the name of a domestic company applying

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[48] Both these elements are discussed without discrimination in Commercial Union Assurance Co. v. Smith, *supra*, note 47.

[49] *E. g.*, Idaho Comp. Stat. (1919) Sec. 4938 (same or similar to the name of a company already *authorized* in this state); Mass. Gen. Laws (1921) Ch. 155, Sec. 9 (corporation carrying on business in Mass.); Mich. Acts 1917 No. 216, II, 1, Sec. 18 ("any other corporation doing business in this state"); Ohio Gen. Code (Page, 1920) Sec. 9341 (like Idaho).

[50] Commissioner Savage of Iowa in Proceedings of the National Convention of Insurance Commissioners (1919) p. 234.

[51] *E. g.*, Ala. Civ. Code (1923) Sec. 8420; Mont. Rev. Code (1907) Sec. 4042; N. J. Comp. Stats. (1910) p. 2839, Sec. 3.

[52] Commissioner Savage suggested this method in his remarks cited in note 50, and said he used it.

[53] People *ex rel.* Traders' Ins. Co. of N. Y. v. Van Cleave, 183 Ill. 330, 55 N. E. 698 (1899).

for authorization for the first time if it is "similar" to the name of an existing company;[54] yet sometimes the statute simply lays down the norm without specifying who is to enforce it or how that is to be done.[55] It would seem clear that if the commissioner has power to disapprove the articles of incorporation, he is impliedly given power to reject the articles of incorporation, or to refuse a certificate of authority, until the misleading similarity of name is removed by a change of name. To leave it to the courts to enforce the provision by injunction or suit for damages after the new company has commenced business is to prefer *ex post facto* justice to preventive justice. The deception should be nipped in the bud. Yet it has been *said* that under such a statute, the commissioner has no power to reject articles of incorporation on this ground,[56] and held that at all events a court may properly enjoin the formation of a competing enterprise which proposes to apply for incorporation under a name similar to plaintiff's.[57] The *dictum* seems clearly unsound.[58] And if the commissioner had power to refuse a certificate of incor-

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[54] *E. g.*, Cal. Pol. Code (1907) Sec. 609; Iowa Comp. Code (1919) Secs. 5510, 5601, 5523; Ky. Stats. (Carroll, 1915) Sec. 722; Mont. Rev. Code (1907) Sec. 4042; N. M. Ann. Stat. (1915) Sec. 2842; N. Dak. Comp. Laws Ann. (1913) Sec. 4837; Ohio Gen. Code (Page, 1920) Sec. 9513 (*cf.* Sec. 9512, conferring same power on attorney-general), Secs. 9522, 9607 (23), (mutual fire companies; Superintendent and Secretary of State shall pass upon similarity of name; if they disagree, attorney-general decides), Sec. 9349 (may withhold license); Okla. Ann. Comp. Stat. (Bunn, 1921) Sec. 6667; Pa. (Supp. to Purdon's Dig. [1923] Vol. 8, "Insurance"), Sec. 96 (Commissioner may prohibit); Wyo. Comp. Stat. Ann. (1920) Sec. 5243.

[55] *E. g.*, Ala. Civ. Code (1923) Sec. 8420; Mich Acts 1917, No. 256, II, 1, Sec. 18: "No company formed under this act shall assume any name which is the same as or closely resembles the name of any other corporation doing business in this state." See also S. Dak. Rev. Code (1919) Sec. 9154. In Utah, R. I. and Tenn., it seems the commissioner has no power over similarity of name. In others (Ala., Ore., Tex., Vt., Wash.) his power must be derived by implication from general powers of disapproval.

[56] Modern Woodmen of America v. Hatfield, 199 Fed. 270, 275 (1912).

[57] *Ibid.*

[58] The Kansas statute required the organizers (of a fraternal society) to file with the Superintendent of Insurance a certificate stating, among other things, "proposed corporate name of the association which shall not too closely resemble the name of any similar association." The Superintendent was to issue a certificate of his approval "in case (he) shall find that its (the organizers' certificates) provisions are in accordance with Section 1 of this Act," which apparently referred to the requirements above mentioned. The problem was therefore the same as that raised by many other statutes where similarity of name is forbidden, but no express power is given the commissioner to reject the articles on that

poration or of authority on the ground of similarity of name, it would seem that the decision, likewise, was wrong, because, conceding that the commissioner's decision would not be conclusive against judicial attack, the plaintiff should have been required to exhaust his administrative remedies before resorting to a judicial proceeding.[59]

Whether or not the action of the commissioner, or other official, in approving a particular name should be conclusive against subsequent judicial attack, is another question. It would be advantageous to have the question of similarity of name settled once and for all by the granting of the certificate of incorporation. The corporation would then be assured that an established business would not be upset by a subsequent judicial decision that its name "resembled" too closely that of an existing corporation. The commissioner, it would seem, is quite as able to decide these questions of degree as is a judge; moreover, he has on file the names of all existing corporations doing business in the commonwealth. On the other hand, such conclusiveness would be disadvantageous to corporations already doing business in the state. How could the procedural safeguards be made adequate to secure a fair and full hearing of all interferences in name? The obvious analogy of patents and trade-marks supports the view that the commissioner's decision on a corporate name should not be conclusive against collateral attack in a suit by a corporation affected.

This problem has had an interesting history in Massachusetts. In a petition for leave to file an information in the nature of *quo warranto* and to restrain the use of a corporate name by defendant corporation, the plaintiff alleged prior user of the name and resulting confusion and injury, actual or pros-

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ground. Unless such power is to be implied, the prohibition is meaningless. See also People *ex rel.* Felter v. Rose, 225 Ill. 496, 80 N. E. 293 (1907), (Mandamus to compel issuance of certificate of incorporation denied on ground of similarity of name).

[59] Plaintiff alleged that defendants were about to apply to the Superintendent for authority to do business under a similar name. The administrative official (Superintendent of Insurance) had thus never been given an opportunity to act. On the general principle that administrative remedies must first be exhausted before resort to judicial proceedings, see Prentis v. Atlantic Coast Line, 211 U. S. 210 (1908); Mellon v. McCafferty, 239 U. S. 134 (1915).

pective. The defendant was incorporated under a statute which merely prohibited the use of a name "in use by any existing corporation." [60] A later section provided that the issuance of a certificate of incorporation "shall . . . be conclusive evidence of the organization and establishment of such corporation." [61] The court denied the petition, chiefly on the ground that the issuance of the certificate of incorporation was conclusive on the question of similarity of name.[62] While the court confined itself to holding that plaintiff could not invoke the remedy, *quo warranto,* the decision was interpreted in a later case as holding that the issuance of the certificate of authority was conclusive in a suit in equity by a previously existing corporation against one organized with a similar name.[63] There the plaintiff, as in the Kansas case,[64] brought suit before the commissioner of insurance had passed upon defendant's application for a certificate of incorporation, and made the commissioner and the Secretary of State parties defendant. Mr. Justice Holmes, who wrote the opinion, saw the analogy of the patent law:

> "Of course, the right of the defendants to use the name might be left subject to revision upon a private suit, notwithstanding the issue of the charter, after the analogy of patents. The question is one of construction, and the language of the statute is not entirely conclusive. But practically the construction is settled by *Boston Rubber Shoe Co. v. Boston Rubber Co.,* 149 Mass. 436." [65]

In support of this construction, he adduced the analogy of a trade-name acquired under a patent, after the patent has expired:

> "It (plaintiff) received its name in the first instance as a corporate name under the statute, subject as such to what-

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[60] Mass. Laws 1870, Ch. 224 Sec. 8; same as Mass. Pub. Stats. (1882), Ch. 106, Sec. 8.

[61] *Ibid.,* Sec. 11.

[62] Boston Rubber Shoe Co. v. Boston Rubber Co., 149 Mass. 436, 21 N. E. 875 (1889).

[63] American Order of Scottish Clans v. Merrill, 151 Mass. 558, 24 N. E. 918 (1890).

[64] *Supra,* note 56.

[65] 151 Mass. at p. 560.

> ever interference by subsequent corporations might be permitted under the statute. The name remained subject to the same degree of interference, whatever importance it might acquire in a business way. The principle is somewhat like that upon which patentees have been denied the exclusive right to the names of their patented articles as trade-marks after their patents have expired. The degree of protection to which the plaintiff is entitled is measured by the rights which the statute confers on it. The limit is marked by the adjudication of the insurance commissioner." [66]

While constitutional questions were not discussed, the reasoning quoted would strongly support the validity of a statute making the issuance of the certificate of incorporation conclusive as to similarity of name, at least against collateral attack, as here.

However, this construction of the statute was overturned in the following year by a statute which declared that the action of any board, commissioner or officer of the commonwealth in approval of a certificate of incorporation should be subject to "revision" by "the Supreme Court or the Superior Court in a suit in equity brought by any corporation affected thereby, to enjoin a corporation organized with a similar name from doing business under such name." [67] This statute has been carried forward without substantial modification into the latest revision.[68] It is expressly made applicable to insurance companies.[69] On the whole balancing of the conflicting interests involved, it is believed these later statutes represent a sounder view than the judicial decisions. The test of similarity of name is empirical: Does or will the similarity actually lead to confusion and cause injury to the business of the prior user? To pass upon this question in advance of actual user, as the commissioner has to do in passing upon the proposed name of a corporation which has not yet done business, is a much more conjectural process

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[66] 151 Mass. at p. 562.
[67] Mass. Laws 1891, Ch. 257, Sec. 1 (relates solely to this point).
[68] Mass. Gen. Laws (1921) Ch. 155, Sec. 9.
[69] Mass. Gen. Laws (1921) Ch. 175, Sec. 49.

than the determination of the same question by a court after the newer corporation has done business a substantial length of time. The interests involved are too weighty for snap judgment. However, the officials having approval powers may prevent litigation by resolving all doubts in favor of the prior appropriator of a somewhat similar name.[70]

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[70] See Weekly Underwriter Rulings, Ill. 11 (1923), a ruling by the Attorney-General, relying upon People v. Rose, *supra*, note 58, that he had implied power to reject the proposed name of an insurance company because of similarity to that of an existing company, and refusing to approve the proposed name, "Illinois National Life Insurance Company," because there were already in existence two domestic companies, one named "National Life Insurance Company of the United States," the other called "Chicago National Life Insurance Company."