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THE HISTORY OF THE DEVELOPMENT OF THE LAW OF CORPORATIONS

By JAMES A. BURKHARDT

- (a) PUBLIC
- (b) PRIVATE
- (c) THE POLICE POWER OF THE STATE

INTRODUCTION

The law of corporations has gradually been added to from time to time until of late years, it has become so voluminous that it would be useless to attempt to state it concisely.

In the beginning it must be pointed out that corporation law came after the formation of corporations, for until they were in existence there was no need for their regulation. It would be well then to consider the development of corporations and see how at every turn the law (at first mainly that of paternal type which later devolved into the monarchical and aristocratic type, often tyrannical and despotic, until it, because of its own abuse of the power to govern, set in motion the power (a) of the people who usually established a republican form which was intended to be for the people, but which is gradually tending toward socialism) has been imposing restraints upon, even attempting to discourage in the early days their establishment.

Let us then inquire into the conception of the corporate idea and see the difficulty it had in developing until it finally convinced beyond all question that it was and is an extremely useful method of carrying on business. The restraint that will be men-

(a) Revolution.

tioned and the privileges granted to them portrays the development of the law of corporations.

Maine¹ in his work on ancient law credits the early founding together of families, clans and tribes as a foreshadowing of what later has become known by the now familiar term corporate entity, and since it seems to have a great ideal of truth thrust behind it, if it is at once admitted that all things to be accepted by the human mind, as a whole, must be gradually brought before it so that after having become more or less accustomed to the facts it then acknowledges the existence of the concept as a concrete fact.

If we had the ability to abolish all our present ideas of a corporation, and then to have one suddenly suggest to us the idea with all its attendant results, they would be so strange and staggering to the mind that we would find a very potent argument toward Maine's² conclusion as a possible, if not altogether probable, origin of the concept of corporate entity.

Other students, due to the lack of broader outlooks, who would give the legal minds the credit for its birth, point to the early Grecian authority for the permission of private corporations to form and operate.³ Some see its origin in more definite Roman Law as given in the "Commentaries of Gaius" on Roman Law and Pandects of Justinian as authority for the assertion that law fathered by the Hellenic jurist permitted the formation of private corporations for certain purposes upon condition that they did not operate in violation of other laws of the State.⁴ But the mere recital of this notion suggests some earlier and less definite formation of the final idea which was gradually given form and substance in these writings; but all of this is of little practical importance, and it will better serve some useful purpose to allow the reader to accept the one most worthy according to his mind. The real good, if any, which may flow from a treatment of this subject is to give a former foundation upon which to predict, whether any given law develops and continues the original purpose in the creation or perhaps better formation of a corporate entity entitled to certain rights and privileges, which

¹ Maine on ancient law.

² Maine on ancient law.

³ Ayliffe Treatises on Civil Law—Page 197.

⁴ I Bl. Com. 468-9.

they are given by the law-makers, through their authority whether it rest in the supposed omnipotence of a parliament⁵, or an assumed God given right of an absolute Monarch⁶, or again in the representative of the people⁷, which if taken from the reasons that make the formation of corporations so popular today is the privilege of having capital⁸ operate to the formation of additional capital or accomplishment of an ideal (in largest sense) freed from the burden, which until this scheme was devised, was capable of greatly restraining many worthy enterprises simple because the idea, that one might be willing to invest a certain amount in an idea and not be absolutely responsible for all the costs which might result due to the inability of anyone to completely estimate them and foresee the myriads of possible resultant responsibilities which would attach themselves to the often seemingly simple plan, was thought impossible in law.

One but needs to reflect for a moment on the vast outlays of capital necessary for any of the colossal undertakings of the day to realize that it is this freedom, within the named limitation⁹ of the law, which allows and gives people the courage to start them.

PUBLIC

In the case of Public Corporations, it is probable that these really preceded the now more important private, or as defined by statute¹⁰, those for profit, and this was probably due to the fact that first¹¹, that like all new things, and often even the best, it is necessary to overcome the antagonism of constituted authority, or in other words the law, by showing the worth of the idea, and that, for the good of so many without any reason for an attempt at wrongful profits, since these Public corporations are not intended for that purpose; that it was worthy to grant them certain rights and privileges which are notably in case of corporations of this type, the freedom from taxes, in fact, the ability on its part of tax its members, and the right of eminent domain, the ability

⁵ Of England.

⁶ None of note now existing.

⁷ U. S. Legislative body.

⁸ Money or equivalent.

⁹ Certain statutory liability in cases of.

¹⁰ General Code of Ohio.

¹¹ Taylor civil aw, 567-70, Kents Com. 217.

to regulate and govern with a view too good of the whole, rather than the rights and privileges of any individual.

The success of these undertakings and the convenience which they brought about in trade by setting to rest that old and ever unanswered question of the perforce, narrow minds of the common law judges of England as to where the title rested¹² was one of the chief advantages of the practice of incorporating villages.

The mind is a peculiar thing: when it can not solve the problem, it invents some sort of fiction or fairy tale to tide it over, and it is amazing to find how often a simple thing like this will set the mind at rest.

This will explain how corporations began as well as any. It is almost certain that it was not the entirely original idea of any one man. It developed as most ideas, inventions, and fictions do, being added to gradually from the store of human ingenuity as necessity demanded it.

For those of the present day whose ideas are so restricted and tamed by the lash of statutory regulations it may seem necessary to find when first some one with a God given right, or a body of people ostensibly the representatives of the whole (nation) first solemnly declared what a corporation was and defined its rights and privileges under the law, it is sufficient to say, since for these people no law binds but ours, as found in the Code, that corporation in this state began in 1802 with the adoption of the constitution of Ohio.

But this according to A. A. Berle, Jr. in his short work in the interest of the new General Corporation act for Ohio, "origin of American Corporation Law", is wholly inaccurate historically as well as logically.¹³ That the idea was probably given its inception during the time of James I of England, when he, during the trying times seized this means of giving the crown control over these ever increasing, incorporating boroughs. He¹⁴ suggests that the religion of James I may have inspired the ideas upon which it is based, borrowed from the church's doctrine that a fiat was necessary to create a church today.

¹² Of considerable importance at that time.

¹³ A. A. Berle, Jr.

The doctrine gave the Royal heads, the law of the time, so great an advantage that they were unwilling to admit the fallacy upon which this usurpation was predicated. The crown was very jealous at that time to centralize all authority in itself, and this afforded a means of doing so. The Boroughs submitted to this because of the state of mind of the people (that where the king acts it must be right. Somewhat like the condition we have today, for those without minds of their own where charity is mentioned, or in political circles, the words of one in power is deemed omnipotent) and also due to fact that they (corporations) wished governmental powers and it was desirable to have the sanction of the king, as force was freely used in these days, and it must be admitted it is often effective, though wrong.

A. A. Berle, Jr. believes that the revolution in England of 1688 was at least partially brought about by this doctrine of the Stuart Kings that corporation was a creature of the Sovereign and subject to his pleasure for it made the Guilds and Boroughs subject to him in a new way, they believed that their ancient right and liberties were no longer safe. But the idea did not die with the Stuarts, and has been continued down to our day.

Kent says a corporation is a franchise but, Berle points out that corporations could and did exist without one, as a matter of history, they did for several centuries before any franchises were granted. In reality, it was this: when they wished to exercise governmental powers they then asked for a franchise.

The English lawyers and writers in an attempt to reconcile this with their ideas of the law claimed that for those corporations which existed without any royalty granted, that they (the corporations) existed by prescription which is this, that the original charter has been given so long ago that it is lost in antiquity. Or as Blackstone puts it, it runs beyond the memory of man when it was otherwise, but these explanations are at best child's play and verbosity.

But all our theorizing or research is met with the decision of this country's courts, that a corporation exists with and by the consent of the sovereignty.¹⁵ This State, (Ohio) has so declared as far back as 1851 in *Meyers, et al v. Manhattan Bank*, 20 O. S. 283, the same doctrine which in the word of Chief Justice Mar-

¹⁵ Clark on Corporations—35.

shall,¹⁶ "A corporation is an artificial being invisible, intangible, and existing only in contemplation of law. Being the mere creature of law it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidentally to its very existence. These are such as are supposed best calculated to affect the object for which it was created. Among the most important are immortality, and if the expression may be allowed individuality, properties by which perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities that corporations were invented, and are in use. By these means a perpetual succession of individualities are capable of acting for the promotion of a particular object, like one immortal being," shows clearly the illogical and fallacious result even a Chief Justice¹⁷ can arrive at if he blindly follows what is told him without examining the premise upon which the deduction is based.

The courts have said time and again that the common law of England was adopted in this country only in so far as it was not repugnant to our idea of government, therefore what right, have the legislators to grant to certain people exemption from liabilities when these are purely private matters of business, not for the whole of the people, or necessary to government, but wholly, in many cases, for profit alone to a very small percentage of that whole; if it was not the people's will, in other words that by contract they could have done this self same thing without the affixing of the royal seal, or the great seal of the states.

The doctrine of Chief Justice Marshall has done more than any other thing, as far as this country is concerned, to perpetuate this faulty concept of corporations, principally because of the otherwise greatness of the man, and the willingness of the herd to follow the leader, a great deal of it is wholly "obiter dicta" as to the case but has nevertheless been followed to such an extent

¹⁶ In *Dartmouth College Case*, 4 Wheat (U. S.) 660.

¹⁷ Chief Justice Marshall.

that a great portion has become the law of this land.

In the beginning, corporations both Public and private developed out of the need or necessity for a convenient and workable plan to further a certain object or purpose which required, that a great many persons be united in their efforts, and capital, and, because in many instances considerable time was necessary to accomplish the purpose that they have a degree of immortality which would enable them (as a collective body) to continue on in their work regardless of the number of years it might take.

Out of the need or necessity was gradually developed the corporate idea. There need not have been any ideas of mysticism or any thing in the way that Chief Justice Marshall penned it, if it were not for the inability of the people of the time, (yes, even today it is taught in our schools) to grasp the worth of the idea and the great things that might be accomplished by the adoption of such a plan, that caused the then learned to fall back on that ever present remedy, which has been, used throughout the ages, probably first among the ancients in the form of their fakir, magician, seer's, medicine men, and the like, depending on the particular civilization or period of history you choose, myth's and mysticism, somewhat like our answers to children's questions which call for an answer which we are unable to give.

The things that trouble the law, or courts that administer it, most, was the idea of perpetual succession of title, through the ever changing body of owners of the whole, and the limited liability theory. The answer today in the light of present facts and our new freedom of thought, unhampered to a greater extent than ever before, seems so simple as at first to be no answer at all. That of merely contractual relationship. Those dealing with such an organization are made to realize that they must look only to the corporate assets for the payment of their claims.

If it had not been for this partnership would have become as popular as corporations, in fact it would probably have relieved the necessity for the invention of corporations.

No one would be injured by it, for they need not, if they do not care to, deal with the corporation and no injury can follow. The only compulsion which exists, or exerts any influence upon them, being economic conditions, (very powerful by the way), but which are almost entirely beyond our control. We must live

and eat and it drives us on. But we do not need all the luxuries of today, we only want them because of the desires of the mind.

But a mere recital of the ills of our present laws and ideas will not remedy the situation nor change them at once.

To go back to the earliest time when we can find some evidence which would enable us to say, here began corporations may not be impossible, but is as close to it as imaginable, for history of ancient times is very inaccurate at best and always vitiated by the personal errors of deduction from facts gathered.

McQuillin in treating Municipal Corporations starts with the developments of cities. They were probably brought about by the necessity for companionship of other beings, to human contentment, at first, and secondly by the need for the protection afforded by cities to its inhabitants, which is gradually being increased as civilization progresses.

The general accepted authorities are apparently in agreement¹⁸ as to the fact that the seeds of civilization were planted first in the fertile valley of the rivers of the east.

So we find in these suitable spots of the earth, namely, the Nile, the Euphrates, the Tigrus, and the Indus, nations which are amongst the oldest of antiquity which contained the first municipal institutions established by the human race.¹⁹

In the first instances, it must be remembered that cities, or communities existed long before a nation or state, therefore before the law. As far down in history as Roman time, it must be admitted that the great Roman Empire was a system of cities and the idea of a strong, highly centralized unification of government as now exist in this and many other countries, was nowhere, at that time, in existence.

Guizot in his "History of Civilization" says Rome extended her power by conquering or founding towns, It was against towns she fought, with towns that she contracted alliances; it was also into towns that she sent colonies.²⁰

This gives us an idea of why it is so strongly in our minds that cities ought to have the right of self management, for people only need the help of other cities against an enemy which

¹⁸ Rome. Problems of city government, ch. 1 p 6 et seq.

¹⁹ McQuillin on Mun. corporations. Vol. 1 p. 21.

²⁰ Guizot History of Civilization—Vol. 1 Lect. 2.

consists of a "different people",²¹ in this way cities united, either of their own accord, or were subjugated by an aggressive leader who sought further power.

The early cities such as Enoch²² which, according to the bible was built by Cain and named after his son Enoch, were founded mainly for the protection of the inhabitants. But the constant association of minds leads to the highest development of intellectual side of man. For one acts as the necessary stimulant to the other and the natural desire to do greater things leads ever on.

So cities gradually became the "Mecca" of the people, they were the Shrine and places of worship to the intellectual Spirit of man.

Where man at first was only concerned with his animal nature he now became more deeply interested in the other side of life: to consider the right of his neighbor, which had developed from time to time, only to be set back by the decadence of the artificial structure of the many so called civilizations man has passed, such as, after the fall of Babylonia, Rome, and what must have happened in the early cities of Africa and Mexico.²³

In these ancient cities we find large areas, (estimated as high as 196 square miles)²⁴ populations only exceeded by the largest of our present cities (such as London, New York and Paris). They had fine gardens and parks, they were often walled in, and the streets in many cases paved. They had water systems, a police administrative body,—indeed, we find that in some, such as Babylon they had already used what we called zoning ordinances for to each section of the city certain branches of industry were assigned.²⁵

In the early cities of Greece it is said that each had their own king or chief, who was not an absolute ruler however, as a council of elders existed and participated in the contract of public affairs. As time went on the citizens gradually acquired the right to enter into the management of their own government, bringing about the development of municipal corporations.

²¹ Websters definition of people.

²² Genesis—Chap. 14-17.

²³ Now being excavated.

²⁴ Herodotus estimate of Babylon.

²⁵ McCurdy; history prophecy and monuments—Vol. 3 p. 159—Sec. 1064.

The Greeks seem to have had a great public spirit and their temples and public buildings are monuments to this. They were exclusively for public purposes, private citizens being strictly forbidden to interfere with this use.

In ancient Rome we find that the population was estimated in some as high as two million, but generally under one million. The streets were crowded, as at first they were very narrow and it was found necessary to strictly enforce traffic regulations, during certain hours, for the public thoroughfares. The city because of the marshes in and about Rome found it necessary to drain them and these drains served as sewers. The public baths of Rome, (the warm climate made them almost necessary), are of common knowledge.

The water system was a very elaborate one, consisting of fourteen aqueducts, a total of three hundred and fifty-nine miles of which three hundred and four were underground.

The police and fire department was also a feature of Rome, but as Mommsen²⁶ says it was very strange but evidently a fact that no means was taken for lighting the city at night and Rome had a bad name for the safety and security it offered its inhabitants after nightfall.

These things show us that as far as man is able to trace the early cities they had already developed certain municipal characteristics and regulations, which gradually were developed into what are now considered as essentials of a municipal corporation, for while at first the people were not the rulers they from time to time acquire more and more of this power either by grant from those who had usurped it, (or held by accident of birth and form it in their hands), or by force, they, the citizens took it. They were ever anxious to, more and more, be heard in the affairs of government, their government!

It is said that during the troublesome time of the middle ages when this struggle became discernable as a real conflict, the third estate of power was created, that of popular power.²⁷

But it must be remembered, at that time, their ideas of law as we know it today did not exist. It was only the concern of the ruler as to whether or not a new power was being claimed, and

²⁶ Mommsen—History of Rome.
²⁷ Masson Mediaval Times—Ch. 4.

the influence which was exerted was often gradually and presumably, to those upon whom it was applied, it was not evident just what it was leading to, and we find that this third estate was being built up so that at last it could assert itself as it did later.

It must not be supposed that only in England and English Provinces that this spirit of self-control was manifesting its power. Indeed we are told that Spanish towns were given certain right of self government at a very early date due to the fact that it served the country's aim to have barriers against the enemy, which cities along the frontiers supplied.

Hallam²⁸ believes that the legal incorporation of cities was probably first in the Spanish peninsula, and thus while the inhabitants of the other part of Europe were languishing in feudal servitude, the members of the Castilian corporations, living under the protection of their own law and magistrates in time of peace, and commanded by their own officers in war, were in full enjoyment of all the essential rights and privileges of freedom.²⁹

Municipal government in England from which, to a great extent, ours are copied, have passed through many stages of development and been influenced by many political and natural causes. Kent says that inasmuch as the power and capacities of corporations under English law very much resemble those under the civil law, "it is evident that the principles of law applicable to corporations under the former were borrowed chiefly from the Roman Law, and the policy, of municipal corporations established in Britian and other Roman colonies, after the countries had been conquered by the Roman Arms".³⁰ But most authors seem to favor the view that their policy was more of the Spirit of the people of early Saxony, (as the English nation is undoubtedly of Teutonic or German origin), whose dominating trait was to give liberty and security to the individual.

This type of community was well suited to the political genius of the Anglo-Saxon people, and under protection of royal or baronial charters developed rapidly and did much in breaking down the feudal ties and building up of regular government, police and the arts.

²⁸ Hallam Middle Ages—Note 18—p. 335-6.

²⁹ Prescott, Ferdinand and Isabella—p. 20.

³⁰ Kent's Comm. 4th Ed. 269.

They are still the pillars of modern civilization.³¹ So after gradually increasing these rights and privileges of self government, which is in the usual manner, we find that in the fifteenth century the English Borough "claimed large liberties, high dignities and privileges, and was in fact," a state within the state boasting of rights derived from immemorial customs and of later privileges assured by law.³²

The First Charters were given by the Barons, but later the Kings began to grant them, and when in 1215 the Magna Charter was given, it was not novel, but in a more definite way expressly granted or confirmed these rights which for centuries were preserved in the nations' memory. It is said of this Great Charter, that it marks the transition from the age of traditional rights to the age of written legislation.³³ Which at first was considered a boon but today is rapidly, (note the ever widening floor of legislation on every conceivable subject), becoming our chief opponent to personal liberty.

The inflexibility of written law makes for injustice and confusion which arises from attempts to reconcile all things to the command of the puny gods (the legislators) and is ample evidence that we must return to the system which only places certain necessary restraints upon the action of man (natural or corporate) and leaves the details to be worked out as the need and circumstances direct.

A public corporation, (properly speaking), is one organized for political purposes, granted certain governmental power for the purpose of administration of the civil government of the state as to a particular community.

The present status of Public Corporations is that of a creature existing at the pleasure of the legislature, wholly and in every way³⁴, (insofar as it is a public corporation), subject to the will of the general assembly, (they being subject to the constitutional provisions, which in Ohio under our new constitution allows municipalities to adopt a charter, and by properly framing same, may for local purposes exercise any power possessed by the state),³⁵ who may totally disregard the will and desire

³¹ E. Manson in 9 Encyc. of law of England title Municipal Corp.

³² Vol. 1 McQuillin on Municipality Corp. and Note 81—p. 102.

³³ Green Short history of English people ch. 3 Sec. 3.

³⁴ Most are both Public and Private.

³⁵ 19 O. N. P. (n. s.) 315.

of the people of that community³⁶ in its creation, dissolution or alteration, the restrictions of the legislators is almost minute in detail as to how it shall be designated and operated. Those having over five thousand inhabitants or more at the last federal census shall be cities. All those having less shall be villages, and if the population of a city decreases so as to be less than five thousand it shall become a village again. The method of adopting a charter, those for city manager plan, or the commission plan or the Federal Plan to recite in detail what has been legislated upon and prescribed by the general assembly would be to copy the code.

But in each case the municipal corporation must look to the acts of the general assembly for authority to do a given thing. Just the opposite of what would prove a much more simple plan to allow the city to choose its own form and mode of procedure, placing only such restriction upon it as is necessary to a proper control of these agencies of the state in their exercise of governmental functions.

But this country has developed a mania for "law," which grows out of the idea that to justify an act the authority must be found in some written expression of the same. Even in the courts today the word of an author taken from his book has more authority than it would have if orally delivered.

So today it has become, presently at least, a settled rule that authority for the act must be given by the General Assembly, otherwise it does not exist.

Municipal Corporations or Public Corporations then may be said to possess the power to rule and govern itself within its limits while it stays within the bounds set by the constitution and the General Assembly. These powers are to lay and collect taxes and assessments, to make regulations in the nature of police ordinances.

The purposes for which they may levy taxes and assessments are said to be only for public purposes. That is it may use them to provide necessary buildings, streets, lights, schools and markets, it may own its water works, electric light company, but those last mentioned are not within it, public character strictly speaking these it has in its proprietary character.

³⁶ 34 Me. 411, 56 Am. Dec. 666.

The Police Power of the Municipal Corporation is by far the source of its greatest authority to control its inhabitants, indeed the courts in their attempt to follow the wavering fancy of public sentiment have gone so far as in one instance³⁷ to declare that the state had the right, under the guise of an emergency act, to deny the owner of tenements in a city of over one million people, (for a period of two years), the right of the courts in obtaining his property, and forcing him to accept a reasonable rent, (to be determined by the court, finally). The dissenting opinions show that even the supreme court is beginning to see that there must be some limit upon this power, which as yet is unbridled and is ever being invoked under one form or another, to meet the cry of the unthinking public for more and more legislation, the whole of which is entirely socialistic in tendency and absolutely foreign to the principles of government which reward industry and sagacity and which was intended by the forefathers of this country.

So we find that corporations which arose out of a natural need of the people for some workable plan to carry out the task of setting up a system or plan for the management of governmental affairs with few and limited powers has grown to this day until it seems as though they are absolutely necessary and almost equally permanent, the final way in which government (local) will be carried out throughout the ages to come, vested with great power but subject to the law as we find it in our code, for the decision in *Meyers, et al against Manhattan Bank*, *supra* is still the law of the state.

PRIVATE CORPORATIONS

The colossal giants of industry of today are as far removed from their humble ancestors, as Municipal Corporations of today are from their predecessors, a picture of which was attempted in the preceding pages.

In the early day of man, he was so vitally interested and occupied with obtaining food for his actual existence and shelter and protection from his enemies the elements, animals and alien persons that industry as we know it today had no part in his life.

³⁷ *Marcus Brown Holding Co. Inc. against Feldman, et al.*, 256 U. S.—170.

It was only after the development of the cities and their various interests which gave rise to a need for the products now so important in the average man's life.

The ancient people, as intelligence became more common, saw that it was necessary to do much work in order to provide these external aids to man's natural powers, for example; man wishes to travel more swiftly, his first aid in this line was on the back of some animal; then the development of a cart of some kind. Today the fast trains, automobiles and airplanes, other desires of man have in a similar way, according to the nature of the want, which might be enumerated at length been satisfied.

At first then one man or perhaps a few engaged in the business of supplying these things, or more likely the maker was also the final user. And as the demand became greater those more skilled in a particular line began to follow it as a business. And as the business increased it became desirable to have a great many engaged in the same line, for the outlay of capital and enterprise became too great often for one man to be able to furnish it, and gradually the need for a scheme such as a corporation became evident.

It must be remembered that in those days something new was looked upon with disfavor and those in power sought to limit their growth and development which caused the final arrival of corporations to be delayed for many years.

But it seems that as the saying, "You can not keep a good man down," neither can you finally stifle a meritorious idea; witness the progress of corporations of today. And this all brought about by the benefits, that incorporation of a body of men, gives to that group. Limited liability, perpetual succession and ease of transferring ownership; these features, in the writer's opinion, have been the real reason for the remarkable growth of corporations (private).

True, it is said they existed many centuries ago, but the details of their charters are not available. As is often the case in purely private enterprises, they concern only a small percentage of the whole, and the people who do research work are not usually interested in details of a particular business.

But generally it is conceded that the separation of the body politic from the share holder, the ability to sue and be sued, the

capacity for perpetual succession were among their chief characteristics; it was only later and after the size of the undertaking necessitated it that the idea of the issuance of stock to be subscribed to generally by the public was given birth, which was probably about the year of 1612,³⁸ when the greatest of all the trading companies, the East India Company, was in need of additional funds, it issued £429,000, but even then the idea of permanence had not developed, for in 1617 this was retired. Later, however, the idea had developed and in 1693 the public was offered general joint stock, one vote for each £1,000.

The law was not very favorable to corporations in the beginning for they carried with them the unsavory taint of the early quasi corporation, which had governmental powers and monopoly tendencies which were greatly feared.

It is said in this country that there were only five or six strictly commercial corporations prior to 1789, such as the New York Company of 1685 for "Settling a Fishery," and the "Philadelphia Contributionship for insuring of houses from loss by fire," which is still in existence.

The question as to whether or not the state had the right to incorporate companies was aired at the constitutional convention, and the proposal to delegate the power to the federal government was defeated by a fair majority.³⁹

The law in this country held to the English idea of the mysterious nature of a corporation and it is natural that during the years there have developed many unique decisions attempting to clarify the idea and at the same time follow the early decision.

But the only way the law can remedy this situation is to openly declare the point and disregard the older opinions. In this country corporations because of the aggressiveness of the people in business and the desire on the part of the legislator to create new forms of revenue, have had many regulations forced upon them because a few of them did, and of course, still try to make unreasonable profits by means of the monopoly method. This finally brought about the passage of anti-trust laws, of which the Sherman Act is the present federal law, and in this state the Valentine Act.

³⁸ A. A. Berle, Jr.

³⁹ Balwin. Op. Cit. p. 260.

At first in this country incorporations were by special act. This was very well when there were only a few, and before the idea of obtaining special privileges by means of influence asserted itself. Then it was found necessary to forbid incorporation except by general laws. This was accomplished by a constitutional provision in this state by the amendment of 1851.

The law granted to stock holders the right of inspecting the books and to make copies of them, and it was an unqualified right in Ohio until the late case of *The American Mortgage Company against Rosenbaum*—114 O. S. Page 231, which held the corporation might refuse when the purpose was not bonafide.

In this state at present we have the single liability, except for banking corporations, to which attaches double liability, but this was not always the case. The law previous to the amendment to the constitution in 1912 was that of double liability and we find most of the corporations, operating in this state at this time, incorporated in other states such as Delaware, New Jersey and Maryland, whose incorporation acts were much more lenient and the cost of obtaining a charter were and still are much less. The states of late are vying with each other for the fees obtainable by this method.

The Blue Sky Laws of this state which were intended to prevent fraudulent issuance of worthless stock to the public have been justly criticised, the words of Mr. Richard Ingles express the general contempt felt for these provisions. "The statute reads like a piece of dictionary gone mad,"⁴⁰ and Mr. William L. Davis says, "in spite of the law and its infirmities, the Honorable Cyrus Locher has so administered the same that it has been possible to fairly carry on the business of the state, but this credit it due to Mr. Locher and not the law."⁴¹

The law with regard to private corporations is generally being modified, for as A. A. Berle, Jr. points out, when economic facts collide with mere fiction of the law the fiction is bound to be destroyed and, and also it must be remembered that the idea of being lenient is gaining ground, because it is becoming recognized that big business makes far greater wealth and in turn, keeps the people better satisfied, (which is of considerable im-

⁴⁰ See 18 Ohio Law Reporter—514.

⁴¹ See 24 Ohio Law Reporter—222.

portance to the law makers, who must and do, consider their own futures).

Generally then, under the new General Corporation Act, Private Corporations may, by filing with the Secretary of the State Articles of Incorporation (with the fee) in which is stated the purpose of the company, the name to be used, the number of shares, the preference to be given, if any incorporate. Then the incorporators open the subscription book and hold first shareholders meeting at which time the by-laws and rules are adopted, and the directors elected. After this the directors hold their meeting and elect the officers. The corporation then is ready to do business provided it has at least five hundred dollars paid in with which to do so.

Under the new Act, corporations have a much wider field in which to work, as the so called double purpose clause allows them to engage in more than one kind of business. This is a very good feature and allows corporations the right, which they should have had at all times, to diversify their interest and keep them from being affected by seasonal, and temporary depression periods.

Big business, that is successful corporations, make for the greatness of the country, and it is well that it is being recognized in this country, for only by aiding them, instead of harassing them at every turn will this country maintain its present greatness.

The law should only be a set of absolutely necessary regulation and not a code by which individuals and corporations must look to for authority to do a given act.

So the less laws the better. There is no reason why we cannot govern with a simple system which is flexible and inherently sensible, by establishing the principle that a person natural or corporate will be deemed to do right until found to act otherwise, and when it is established, then condemn the act by having the court act to correct the wrong.

There is no need, and it is a highly unwise practice to pass a new law for every wrong or supposed wrong.

May we hope then that in the future we will find that the legislators will actually try to help corporations by simplifying the present laws and refraining from new enactment except for some absolutely necessary reason.

POLICE POWER OF STATE—LIMITS THEREOF

To define the police power of the state, so as to be able to discern its limits, would be to be able to define the sovereign power of the state.

It has been defined as the power of the state to regulate concerning the health, safety and morals of the public.⁴² But this definition was given back in the year of 1885 when courts were still inclined to place limits upon the legislators.

Today it is admitted, by those well versed in the field of constitutional law,⁴³ that it is almost impossible to define its limits.

But judging from the decisions of the courts the only limit is what, at the time of the decision, is the popular sentiment upon the question. One court holds that it is not limited to the health safety and morals, but extends to the public convenience, general welfare and public prosperity.⁴⁴ Terms so inclusive as to entirely open the door to any type of legislation.

The usually mentioned restrictions of this power are the constitutional provisions of both the state and the United States, and that it be reasonable, and have some relation to the object for which it was enacted and not be purely arbitrary or discriminatory as to whom it shall affect.

The courts have of late extended, the ever widening field by declaration to the effect that it embraces enactments which are to prevent fraud and oppression, and even in some cases hold that an emergency (so declared by the legislators to exist) was reason enough for the holding valid, during the emergency) a statute which deprived a property owner of the right to say what rent he would charge and also denying him the right to have the parties ejected.⁴⁵ But the decision was a close one by six to three, a dissenting opinion in the case of Block against Hirsh—256 U. S.—135 was made a part of the dissent in the previous mentioned case and is worthy of serious consideration as it is by far the saner view, in the opinion of this writer, and gives one who is sincerely interested in the stability of government a fear for our

⁴² *New Orleans Gas Light Co. v. La. Light and Heat Producing Co.*, 115 U. S.—650.

⁴³ *Black on Constitutional Law* and note 1 on page 366—4th Ed.

⁴⁴ *In state ex rel, Beck v. Waganer*, 77 Minn. 483.

⁴⁵ *Marcus Brown Holding Co. v. Feldman*, 256 C. S.—170.

constitution, in the word of Mr. Justice McKenna, "indeed we ask may not the state have other interests besides the nullification of contracts, and may not its police power be exerted for their consummation? If not, why not? Under the decision just announced, if one provision of the constitution may be subordinated to that power, may not other provisions be? At any rate the case commits the country to controversies, and their decisions, whether for the supremacy of the constitution or the supremacy of the power of the states, will depend upon the uncertainty of judicial judgment.⁴⁶

There are however, some decisions to the contrary, which hold that the police power is limited and wherever invoked must be for the purpose of promoting the health, comfort, morals, welfare or safety of the public.⁴⁷ This decision was rendered in a case which sought to uphold a zoning ordinance which contained many features which might be desirable from an esthetic standpoint, but in a country like ours who can set himself up as the arbiter of art and good taste? The only way to accomplish their ends, is by education of the public.

But admitting that it is impossible to define the police power or set its limits at present there is no question that in many cases it is and has been properly invoked.

The early use of this power by what ever form of constituted authority was then in control, goes back as far as the foundation of the early cities⁴⁸ a notable example was in the case of the traffic regulations in the early City of Rome, and the draining of the marsh about the city; others could be multiplied at great length. But it will not be very useful, as under an aristocratic form of government where no constitution exists, the limits of the police powers are only those necessary because people will not be subject to their burden.

The proper field for this form of legislation is, as stated in Goldman against Crowther *supra*, where it has some definite and tangible relation to the object of the legislation, and that object is to promote the health comfort, morals, welfare or safety of the public. This places a definite bound upon it, for it may be argued that if every one had a certain type of home, clothing,

⁴⁶ *Block v. Hirsh*, *supra* at p. 170.

⁴⁷ *Goldman v. Crowther*, 38 A. L. R. 1455.

⁴⁸ See first part.

and a regulated diet, and all the many conveniences of of the wealthy, that the public would be better off. But it is incapable of proof, and certainly can not be said to have a definite, tangible relation to the purpose for which an enactment of such a nature might be directed, it might be well to add, reasonable, as a further qualification for the first objection to such a statute would be the impossibility of carrying it out.

Generally speaking the police power rests in the state. It is an inherent right of sovereignty and within the bounds of the constitutions it is unlimited. The United States as the federal government has certain police power or perhaps better has the ability to by sanction of its enactment, which it has power to make under the grant of power to congress, but they all depend upon the constitution or some treaty made in conformity to its provision or be necessary to carry out some authority given by the constitution.

Some examples of what has been passed upon as valid police regulations, are those declaring as crimes and providing punishment for their commission such acts as murder, assault and battery, mayhem, arson, rape, burglary, these all are so clearly and admittedly wrong that the recital of them it first seems unnecessary to mention them, but it must be remembered that such regulations are against things, so far removed from the minds of the general public's ideas of righteous conduct that they are unquestioned. But when we attempt to pass upon the conduct of the people, as to matters which at best can only be said to be, not the best things to do, such as gambling, drinking, smoking, traveling at a rate of speed over some arbitrarily adopted measure, we then come to a class of legislation, which although they have been generally held valid, would be better left to the intelligence of the public to eradicate by means of education, and not by legislative attempts to declare such things in and to themselves as crimes, thereby making criminals out of the vast majority of our people.

Black in his work on constitutional law under title police power,⁴⁹ gives a very good enumeration of different laws held valid and attempted laws held invalid under the different objects for which police regulations are admittedly valid, the only ques-

⁴⁹ Black on Constitutional Law, p. 366 et seq.