THE ORIGIN OF MUNICIPAL INCORPORATION IN ENGLAND AND IN THE UNITED STATES

Published @ 2017 Trieste Publishing Pty Ltd

ISBN 9780649021451

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Edited by Trieste Publishing Pty Ltd.
Cover @ 2017

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"Whoso desireth to discourse in a proper manner concerning corporated towns and communities, must take in a great variety of matter and should be allowed a great deal of time and preparation. The subject is extensive and difficult."[1]

Two opposite views are held in the United States as to the relation of town and state. One is that the state is absolutely paramount; that it created the towns, has absolute power over them and can destroy them—if it pleases; that while it accords to them a certain measure of self-government, it may, whenever the legislature sees fit, take away from them the local self-government it has temporarily allowed. This view has been persistently held in Pennsylvania,[2] and in the Supreme Court of the United States.[3] It has also been maintained in

[1] From the preface to Firma Burgi, or an Historical Essay concerning the Cities, Towns and Boroughs of England, by Thomas Madox, London, 1722 and 1726, born in 1666, died in 1727. He studied law, was admitted to the Middle Temple, but was never called to the bar. He studied history under the patronage of Lord Somers, became a legal antiquary and published "Formulare Anglicanum," or collection of antique charters, in 1702, in folio, pp. 441, with a preliminary dissertation on ancient charters replete with erudition "of unspeakable service to our students in law and antiquities." In 1714 he was sworn in as historiographer royal. In 1722 he published "Firma Burgi" in folio, dedicated to George I. The great value of Madox's labors has been acknowledged by many generations of students of English mediæval history, and his work on the exchequer is frequently quoted by Bishop Stubbs in his "Constitutional History."

[2] Philadelphia v. Fox, 64 Penn. St. 169 at 180 (1870).

[3] United States v. Railroad Co., 17 Wall. 322 (1872); Barnes v. District of Columbia, 91 U. S. 540 (1875); Laramie Co. v. Albany Co., 92 U. S. 307 (1875); Mount Pleasant v. Beckwith, 100 U. S. 514 (1879); Merewether v. Garrett, 102 U. S. 472 (1880); Met. R. Co. v. Dist. of Columbia, 132 U. S. 1 (1889).

other states,[1] and in other cases cited and examined in the series of articles on "The Right to Local Self-Government" in the 13th and 14th *Harvard Law Review*, and there is danger of its general acceptance as correct.

An examination of these cases will show that in most of them the affirmance of such a general doctrine is merely *dictum*, it not being necessary to the decision of the case actually before the court. It is a dangerous doctrine—one, under color of which politicians, legislators ignorant of constitutional law, even if nothing worse be said of them, and judges accepting it without adequate study of the history and the development of our American colonies, are unconsciously coöperating to deprive our towns and cities, or other units of our political system, of their right to self-government in their local affairs.

The other view is that the American system of government consists of:

First.—(Beginning at the top) the union of the people and states, constituting us a nation.

Second.—The several states, subject to the Constitution of the United States, and to the treaties and laws made thereunder, but sovereign in the sense that each state has control over its own internal affairs, free from interference by the United States.

Third.—The towns and cities, or other units of government, also endowed with a certain limited sovereign power in the sense that while subject to general laws passed by the state legislature and to the right of the legislature to mould[2] and

[1] Daniel v. Mayor, &c., of Memphis, 11 Humph. (Tenn.) 582 (1851); Montpelier v. E. Montpelier, 29 Vt. 12, 19 (1850); People v. Draper, 25 Barb. 344 (1857); Mayor, &c. of Baltimore v. State Bd. of Police, 15 Md. 376 (1869); State v. Covington, 29 Ohio St. 102 (1876); Burch v. Hardwicke, 30 Gratt. 24 (1878); Coyle v. McIntyre, 7 Houst. (Del.) 44 (1876); State v. Smith, 44 Ohio St. 348 (1886); State v. Hunter, 38 Kan. 578 (1888).

[2] "The state may mould local institutions according to its views of policy or expediency; but local government is matter of absolute right, and the state cannot take it away." By Cooley, J., in People v. Hurlbut, 24 Mich. 44 (1871) at 108.

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direct their powers, especially upon their own application as occasion may require, that have a constitutional right, express or implied, to manage their own local affairs free from the interference or control of the legislature. In the language of Webster[1] this is the American system of "the government of a great nation over a vastly extended portion of the surface of the earth by means of local institutions for local purposes and general institutions for general purposes." It is the only system under which, when they are fit for it, we can hope to govern successfully the Philippine Islands.

The problem thus presented is too difficult and complicated for solution, unless we go back to the beginning of Municipal Incorporation in England and ascertain the principles on which it rests.

It may be admitted that some knowledge of the Roman system of incorporation lingered with the ecclesiastics after the withdrawal of the Roman power from Britain. This lingering knowledge and the training in canonical law of the ecclesiastics are enough to explain the continued existence in England, throughout the Anglo-Saxon period, of the incorporation of ecclesiastical institutions. It is suspected that a knowledge of ecclesiastical incorporation had an influence upon the quasi incorporation of guilds, whether they partook of a charitable nature (in providing relief to sick and disabled members) or whether they partook of a business nature (in providing pecuniary benefit to those of the particular craft). This lead finally to the incorporation of trading companies, the immediate predecessors of the charters to the American colonies that afterwards became independent states. But municipal incorporation in England originated in a different way.

A corporation is an imaginary, immaterial, legal entity, with certain powers, rights and duties. It is immortal, unless limited in duration, when created by a formal act.

[1] Speech of Dec. 22, 1843, on "The Landing at Plymouth," 2 Works of Daniel Webster, 207.

The conception of a number of human beings acting in concert for a common end, and thus forming a fictitious entity apart from its members and not limited by their lives, although apparently an abstruse one, has long been common. The familiar and very old conception of village communities, clans, tribes, races and nations furnishes us with illustrations of the existence in human thought of the conception of personified fictitious entities. The fixing of this idea upon a legal basis is the essence of the idea of incorporation—the legal recognition of the immaterial entity, composed of individual members that die, but which continues on notwithstanding their death or withdrawal. The charter, *charta*, the paper, is the written legal evidence of the recognition of the existence of such a body—"*un gros*" *or* "*un corps*," whence our word, corporation. It follows that a corporation may exist without a charter. Municipal corporations did long exist in England before they had any charters, and we shall find that the first charters they had, were not grants of original powers, but were confirmations of powers, liberties, franchises and privileges they already had.

Through natural causes population increased in some of the manors of England after the Norman conquest faster than in others, and faster in favored spots in these manors. The feudal service due from each *servus*[1] or serf to the lord of the

[1] "The *servi* or slaves appear to have been the most numerous class, and consisted either of captives taken in war or of persons over whom a property was acquired by other means, and their wretched condition appears from several circumstances. . . . They had no title to property, and receiving nothing but clothes and subsistence. All the profits of their labor accrued to their masters. Nor were they originally allowed to marry, but being encouraged to cohabit together, the children were born to the same base condition as their parents. They were at first sold at pleasure, though afterwards they became *adscripti glebæ* and were conveyed together with the farm to which they belonged.

"*Villani*, or villains, these paid a fixed rent to their master for the land which they cultivated, and enjoyed the fruits of it in property, but were *adscripti glebæ* or *villæ*, from which they derived their name and were transferable with it." (A new history of London, John Noorthouck, Lon-

manor continued as of old. The increased population in these particular spots became a town or borough[1] (for both words

don, 1773, p. 22.) See Pollock and Maitland's History of English Law, p. 396. "A free man may hold in villeinage . . . he is not a serf." P. 397. Serfs are employed in agriculture. The lord does not feed nor clothe him. He may be sold as a chattel, though he generally passes from feoffor to feoffee, from ancestor to heir, as annexed to the soil. The lord can set him at any work he pleases. P. 396. The division in later times into "villeins in gross" and "villeins regrardant" was not known in Bracton's time. P. 399. The lord may beat or imprison his serf. His chattels may be taken at any time by the lord. P. 400. If a serf acquires land by free tenure, his lord may seize it. P. 401. Bracton concludes the lord may contract with his serf, as the greater includes the lesser, and he may free him, but this was not held before his day.(?) Then it was held that a covenant with a serf implies a manumission. P. 402–3. The serf is not a true slave for he is treated as free in relation to wrongs, assaults, etc., at the hands of a third person. P. 403. If a lord be distrained, his villein's chattels are first objects of attack. A contract cannot be enforced against a villein.

[1] "The 'burh' of the Anglo-Saxon period was simply a more strictly organized form of the township. It was probably in a more defensible position; had a ditch and mound instead of the quick set hedge or 'tun' from which the township took its name, and as the 'tun" originally was the fenced homestead of the cultivator, the 'burh' was the fortified house and court yard of the mighty man—the King, the magistrate or the noble." (1 Stubbs. Const. Hist. of Eng., 99.) The oldest general account of English boroughs is by Robert Brady, entitled "An Historical Treatise of Cities and Burghs or Boroughs," 1st ed., London, 1690, fo.; 2d ed., 1722, fo., and a later but inaccurate edition in 1777, 8vo. It has value, through the many Latin charters contained in it, extracts from Domesday Book, etc., but it is written in a partisan spirit to justify the arbitrary proceedings against municipal corporations of Charles II. and James II. "This work gained some credit which its perspicuity and acuteness would deserve if these were not disgraced by a perverse sophistry and suppression of truth . . . written to serve the purposes of James II., though not published till after the Revolution, . . . he endeavored to settle all elective rights on the narrowest and least popular basis." (3 Hallam, Const. Hist. of Eng. 47. See also Hallam, Europe, during the Middle Age. Note, Ed. by Murray); "of little value; displays a partisan spirit." (Gross, Sources and Lit. of Eng. Hist., No. 817, p. 114.) There can be little doubt that Brady wilfully perverted the truth to countenance the pretensions of his royal patrons and to promote their cause. (Gross, Bib. of Mun. Hist. XXIII.) He was regius professor of physic at Cambridge, keeper of the records in the tower, the household physician of Charles II. and James II., and member of Parliament in 1681 and 1685. His book has had a greater influ-

ence than any other in moulding public opinion and in diffusing erroneous views concerning the development of towns. "To any one who probes beneath the surface of this book, it is plain that the author wrote in a partisan spirit to uphold the royal prerogative, especially to justify the recent measures of the crown against municipal corporations. Charles II. and James II. had nullified the charters of many towns and had remodelled their constitutions to suit the interests of the crown. The town councils, or select aristocratic bodies, were filled with non-resident royalists who controlled the election of the parliamentary representatives of boroughs. Brady strives to show that municipalities originated in grants of the crown for the benefit of trade; that all their privileges and authority came from the bounty of English Kings; that ever since their foundation boroughs had select bodies (with non-resident members) to which was committed exclusive control of municipal government. Hence the King, their creator, had the right to transform these civic governing bodies to suit his inclination and interest. Thus Brady's object was to influence public opinion on one of the most momentous questions of the day, and he succeeded. His specious arguments helped to give a legal title to the existence of select bodies. They now began to prevail more than ever against the burgesses at large in controverted elections of members of Parliament. (Merewether, Sketch of Hist. of Boroughs, 64). Thus Brady, who was keeper of the records at the Tower, in his work on boroughs, written with a particular design, misstated many of the documents he cited. Yet, as they were in his own keeping, he had the ready means of preventing any inaccuracies, had he been desirious of doing it. (Merewether and Stephens on Corps., viii). "Hume, struck with his talents and deceived by his ability, founded his history on Brady's tenets." (Gilbert Stuart, View of Society in Europe, 339.) Yet with every predisposition to attribute everything to the King as the source of power, Brady concedes that boroughs "were *in dominio* either of the King or some other lords or patrons in the time of King Edward." (P. 17, ed. of 1722, fol.) In his preface Brady claims his treatise will show that boroughs "*have nothing of the greatness and authority they boast of, but from the bounty of our ancient Kings and their successors,*" thus showing that his object is not to get at the truth but to maintain a stated doctrine. That burgs or boroughs and towns or tuns are essentially the same appears from the fact that both words originally signified a hedge or enclosure, then that which is thus enclosed. He concedes that in the reigns of Edward the Confessor and of William the Conqueror "we find the *burgesses* or *tradesmen* in great towns had in those times their *patrons* under whose *protection* they *traded*, and paid an *acknowledgment* therefor, or else were in a more servile condition as being in *dominio regis vel aliorum*, altogether under the *power* of the *King* or other *lords*, and it seems to me that they *traded* not as *being* in any *merchant gild, society* and *community*, but merely under the *liberty* and *protection* given them by their *lords* and *patrons* who probably might have

mean the same thing, a collection of habitations enclosed with a hedge or fence).[1] The particular customs and liberties exercised by the inhabitants of a particular town or borough became associated with that particular place. These liberties would naturally differ very much in different places, and this explains the very great differences in these liberties we find in English towns. Through the enjoyment of these liberties the *servus* or serf was raising himself to the condition of the *villanus* or villein, the inhabitants of a villa, afterwards a town. Gradually the feudal service, afterwards the rent, due from each individual tenant in the town, became merged in a sum certain due from the town or borough as a whole, paid to the lord of the manor. This lord might be a layman or an ecclesiastic or even the King himself holding a manor as of his own domain. (His grant through his royal prerogative will be considered separately). To ensure recognition of the right to the continuance of the peculiar customs, liberties, etc., enjoyed by the townsmen, by the lord of the manor, and to ensure the continued payment of the rent due from each town as a whole instead of

power from the *king* to *license* such a number in this or that port or trading town." (P. 16. Note the word "probably" used here). No one claimed, during all the centuries in which municipal corporations were unconsciously coming into existence, that their liberties, acknowledged or granted in charters from lords of manors, were in reality derived from the King; and not one of all the charters granted for centuries makes any such assertion. But Brady's object being the exaltation of the King's power through depreciation of the powers of lords of manors, by appreciation of the royal power, and by skillful use of probabilities in favor of the King, he succeeded in confirming the erroneous dictum of Coke in the case of Sutton's Hospital that only the King can incorporate. The admission made by Brady in the above quotation that formerly burgesses were under other dominion than that of their King is all the more valuable, coming as it does from a professed exalter of the sovereign power. Madox, Firma Burgi, p. 4, is to the same effect: "It is to be remembered that from the time of the *Norman Conquest* downwards, the cities and towns of *England* were vested either in the crown or else in the clergy, or in the baronage or great men of the laity. That is to say, the King was immediate lord of some towns, and particular persons, either of the clergy or laity, were immediate lords of other towns."

[1] Brady on Cities and Boroughs, 2d Ed., London, 1722, p. 2.