THE UNIVERSITY OF CHICAGO, STUDIES IN POLITICAL SCIENCE. THE LEGAL NATURE OF CORPORATIONS, PP. 1-81

Published @ 2017 Trieste Publishing Pty Ltd

ISBN 9780649019892

The University of Chicago, studies in political science. The Legal Nature of Corporations, pp. 1-81 by Ernst Freund

Edited by Trieste Publishing Pty Ltd.
Cover @ 2017

www.triestepublishing.com

ERNST FREUND

THE UNIVERSITY OF CHICAGO, STUDIES IN POLITICAL SCIENCE. THE LEGAL NATURE OF CORPORATIONS, PP. 1-81

Trieste

The University of Chicago
FOUNDED BY JOHN D. ROCKEFELLER

STUDIES IN POLITICAL SCIENCE

111

THE LEGAL NATURE
OF
CORPORATIONS

BY
ERNST FREUND, J. U. D.
Assistant Professor of Jurisprudence at The University of Chicago

CHICAGO
The University of Chicago Press
1897

CONTENTS.

PREFACE.

The subject of the following essay belongs to a field of study and investigation that has been comparatively little cultivated in this country: the analysis of the nature of legal conceptions without immediate or exclusive reference to practical questions. Such analysis is apt to lose itself in metaphysical speculations and refined distinctions of little substantial value: it has therefore fallen into some measure of disrepute even in Germany, where legal science and abstract jurisprudence were for a long time almost convertible terms. It is certainly not necessary for practical purposes to carry every legal doctrine back to its ultimate foundations in logic and psychology; but there is always some danger that an error in fundamental conceptions may lead now and then to incorrect practical conclusions, or—a less objectionable alternative—to unsound reasoning in order to support a sound decision. An exhaustive analysis of elementary legal ideas can therefore hardly fail to be of some practical value.

The question of the nature of corporate existence has a peculiar interest and fascination. Few writers on the subject of corporations ignore it altogether, and our courts have repeatedly enunciated their views as to what a corporation really is. The result is that our law has its accepted theory of corporate existence, while it can hardly be said to have such a theory with regard to the nature of contract, obligation, or incorporeal property. If we have an accepted theory, it is worth while to examine it as to its truth.

The problem of corporate existence has a much wider than simply legal bearing. It has an even greater interest to the sociologist than to the jurist. But I have confined myself to

the corporation as a legal institution, ignoring the subject of association as a factor in economic, social, and political life.

I have treated the subject analytically and not historically, because my object was to establish an elementary conception, and not to ascertain an existing legal doctrine. I have not even dealt with the question how incorporation has come to be a conception of property law exclusively, believing that the nature of corporate existence is not affected by this historical limitation. The history of the corporate idea on the Continent of Europe has been most exhaustively treated by Professor Gierke in his great work on *Deutsches Genossenschaftsrecht;* with regard to the history of our law, we have valuable monographs, and a chapter in Pollock and Maitland's History gives an account of the conception of the English law prior to the period of technical incorporation; but the history of the law of corporations, like that of other parts of our law, remains as yet unwritten.

There are other phases of the subject of corporations which might seem to have called for examination in connection with this essay: above all the difference between the several classes of corporations, public and private, stock companies and societies for collective benefit, incorporated associations and incorporated trusts; also the nature and effect of incorporation. I propose to treat these and cognate subjects separately, and have omitted them here, because in my opinion the nature of corporate existence can be demonstrated independently of them, and because it seemed desirable to confine this essay to its primary subject, which is sufficiently abstract and difficult to claim undivided attention.

E. F.

THE UNIVERSITY OF CHICAGO,
November, 1896.

I. Statement of the Problem.

§ 1. **The Term "Corporation."**—The recognition of rights belonging to groups of persons in common is probably as old as the conception of any legal right, for different forms of community property occur in very early stages of civilization. When legal theories begin to be formulated, the instinctive feeling that such rights do not belong to the members of the groups as their individual rights do, finds expression in the recognition of groups of persons as distinctive holders of rights and especially of property rights. The common law designates such a group as a corporation or body corporate. The term dates from about the beginning of the fifteenth century; in 1411 we find the townsmen of Plymouth petitioning that they may be a "*corps corporat.*"[1] Prior to that time the English law had no one comprehensive technical term to cover the various ecclesiastical and lay bodies, chapters and colleges, cities and boroughs, guilds and fraternities, which enjoyed common rights. The word "*communa*" or "*communitas*" came nearest expressing the collective conception and capacity of an aggregate body, but it appears to have been applied chiefly to municipalities and guilds.[2] The Roman jurists and the Mediæval civilians and canonists spoke of *corpus*, *collegium*, or *universitas*. To the present German law the term corporation is familiar. The French codes and statutes have no term corresponding to our "corporation," to express the distinctive capacity of municipalities (*communes*); stock companies (*sociétés anonymes*), and public institutions (*établissements publics*). The word corporation is foreign to the technical language of French jurisprudence as well as of

[1] Gross, the Guild Merchant, I, p. 94.

[2] Gross, II, pp. 34–36.

legislation, except as an equivalent for professional guild or association.[1]

§ 2. **The "Juristic Person."**—The Germans emphasize the distinctiveness of the corporation by calling it a legal or juristic person (*juristische Person*). The French jurists use the analogous term "*personne morale*," and similar expressions are sometimes met with in English and American jurisprudence. The Germans distinguish different kinds of juristic persons: associations (corporations in the narrower sense), funds or endowments legally secured to certain purposes (*Stiftungen*), the state as a holder of property (*Fiskus*), and the estate of a decedent before it becomes vested in the heir (*hereditas jacens*). This may appear to extend the conception of juristic personality somewhat beyond that of the corporate holding of rights. But if we except as of little importance the *hereditas jacens*, an idea of the Roman jurists, unknown to the common law, we find that all other species of juristic persons assume in our law the corporate form. Our terminology indicates that the rights of eleemosynary foundations and of the state are vested in bodies or aggregates of persons, while that of the Germans points to the fact that the element of association is insufficient to explain the peculiar qualities of rights held by some kinds of corporations. The problem of corporate existence is under the two legal systems practically the same, and in both it is complicated with questions regarding the nature of trust rights.

§ 3. **Corporations in Relation to Government and Property.**—We commonly distinguish two principal classes of corporations, public and private. The former includes the state and municipal and other corporations constituting territorial or administrative subdivisions of the state; the latter, all other bodies incorporated for common purposes of the members, for individual profit, and for eleemosynary objects. It might appear that this distinction coincides with that between the two principal classes of rela-

[1] Viollet, Histoire du droit civil français, p. 647.