American Legal History – Russell

CURRIE'S ADMIN. V. MUTUAL ASSURANCE SOC., 4 H&M 315 (Va. 1809)

345 *JUDGE ROANE. In the year 1794, the legislature passed an act, at the suggestion of an individual, "for establishing a Mutual Assurance Society against fire, upon buildings in this state." It provided for a subscription to the scheme, by individuals, and declared that the principle of the assurance should be, "that the citizens of this state may insure their buildings against losses and damages occasioned accidentally by fire and that the insured pay the losses and expenses, each his share, according to the sum insured." The act contains a few other provisions, which may, also, be considered as forming a part of the principles of the institution; but none of them are perhaps of so fundamental a cast as this, nor apply so immediately to the case before us. The act further provided, that as soon as three millions of dollars should be subscribed, the subscribers should meet together, examine the system submitted to the legislature, and conclude on such rules and regulations, as to a majority of the subscribers might seem best; and that the said society should be at liberty, from time to time, to alter and amend the said rules and regulations, as they may judge necessary; and in particular, that they should agree upon the premiums to be paid. The act also provided, that as soon as the society should have acted in the premises, and elected their agents and officers, it should be considered as incorporated by virtue of the act.

It is evident, that every thing touching the question before us, is left to the pleasure of the society itself by this act, or at least, every thing that does not invade the principle before mentioned, or some other principle admitted to be fundamental; and that some of the powers expressly recognised by the act, as appertaining to the society itself, (that of fixing and altering the premiums for example,) are equally as important and as liable to be abused as the principle in question; which, it is urged, has been infringed by the act of 1805, effecting a separation between the interests of the towns and those of the **[*346]** country. The power to do right, unwrong; an adequate security to individuals, however, is, that the general will of the society finds no motive for injustice or oppression. The true question, therefore, before us is, whether any fundamental principle exists in the case at bar, interdicting the

separation of the interests in question--and if there be, whether the subsequent legislature had power to invade it?

These questions, and especially the last, involve great and momentous considerations. The near approach of the close of the term, does not allow me time to digest and arrange my ideas upon it, to my satisfaction; but as the interests of the society, and the public, demand a speedy decision, I shall not hesitate to give one.

In order to shew that the act in question is no law, and therefore, it is further urged, is a compact, and as such is beyond the power of a succeeding legislature, Blackstone's definition of municipal law has been relied on. Municipal law is defined by him to be "a rule of civil conduct prescribed by the supreme power of the state, commanding what is right, and prohibiting what is wrong;" and it is argued, that the act in question is no law, under this definition, for want of the generality implied by the term "rule," and because it is said to be not so much in the nature of a command by the legislature, as of a promise or contract proceeding from it. When we consider, that mere private statutes and acts of parliament, are (even by this writer himself) universally classed among the municipal laws of England; nay, even that the particular customs of that kingdom, are admitted to form a part of the municipal code, it is evident, that this definition of municipal law, is by far too limited and narrow. I would rather adopt the definition of Justinian, that civil (or municipal) law, is "quoad quisque sibi populus constituit:" bounded only in this country in relation to legislative acts, by the constitutions of the general and state governments; and limited [*347] also by consideration of justice. It was argued by a respectable member of the bar, that the legislature had a right to pass any law, however just, or unjust, reasonable, or unreasonable. This is a position which even the courtly Judge Blackstone was scarcely hardy enough to contend for, under the doctrine of the boasted omnipotence of parliament. What is this, but to lay prostrate, at the footstool of the legislature, all our rights of person and of property, and abandon those great objects, for the protection of which, alone, all free governments have been instituted?

For my part, I will not outrage the character of any civilized people, by supposing them to have met in legislature, upon any other ground, than that of morality and justice. In this country, in particular, I will never forget, "that no free government, or the blessing of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles." I must add, however that when any legislative act is to be questioned, on the ground of conflicting with the superior acts of the people, or of invading the vested rights of individuals, the case ought to

be palpable and clear: in an equivocal or equiponderant case, it ought not easily to be admitted, that the immediate representatives of the people, representing as well the justice as the wisdom of the nation, have forgotten the great injunctions under which they are called to act. In such case, it ought rather to be believed, that the judging power is mistaken.

With respect to acts of incorporation, they ought never to be passed, but in consideration of services to be rendered to the public. This is the principle on which such charters are granted even in England; (1 B1. Com. 467,) and it holds a fortiori in this country, as our bill of rights interdicts all "exclusive and separate emoluments or privileges from the community, but in consideration of public services." (Art. 4.) It may be often convenient for a set of associated individuals, to have the privileges of a corporation bestowed upon them; **[*348]** but if their object is merely private or selfish; if it is detrimental to, or not promotive of, the public good, they have no adequate claim upon the legislature for the privilege. But as it is possible that the legislature may be imposed upon in the first instance; and as the public good and the interests of the associated body, may, in the progress of time, by the gradual and natural working of events, be thrown entirely asunder, the question presents itself, whether, under such and similar circumstances, the hands of a succeeding legislature are tied up from revoking the privilege. My answer is, that they are not. In the first case, no consideration of public service ever existed, and in the last, none continues to justify the privilege. It is the character of a legislative act to be repealable by a succeeding legislature; nor can a preceding legislature limit the power of its successor, on the mere ground of volition only. That effect can only arise from a state of things involving public utility, which includes the observance of justice and good faith towards all men.

These ideas are not new; they are entirely sanctioned by the sublime act of our legislature, "for establishing religious freedom." That act, after having declared and asserted certain self-evident principles, touching the rights of religious freedom, concludes in this manner: "And though we well know that this assembly, elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding assemblies, constituted with powers equal to our own, and that, therefore, to declare this act irrevocable, would be of no effect in law, yet we are free to declare, that the rights hereby asserted, are of the natural rights of mankind, and that if any act shall be hereafter passed, to repeal the present, or to narrow its operation, such act will be an infringement of natural right." Conforming to the principles declared in this luminous exposition, I infer, irresistibly, that the power of a succeeding legislature is bounded only, (and that in cases of no equivocal complexion,) by the principles and provisions **[*349]** of the

constitution and bill of rights, and by those great rights and principles, for the preservation of which all just governments are founded. It is not my intention to go into detail on the present subject; but the power of the succeeding legislature is neither to be limited by a state of things, which (as aforesaid) leaves no beneficial result whatsoever, to the community, nor by those petty inequalities and injuries, which arise to some individuals or classes of men, under every general regulation whatsoever. I will not say that the reason of the law ceasing, the law itself ought to continue; nor that we are to expect entire and exact justice, under any system whatsoever.

Under the actual case before us, I might, perhaps, have spared myself the necessity of this discussion. The principle stated in the act of 1794, which is supposed to have interdicted the separation in question, is couched in terms extremely abstract and general. While other principles declared by this act, have clearly and expressly confined the benefits of the institution to citizens of this state, and limited insurances to losses occasioned accidentally by fire; while it is clearly provided that retribution is to be made by the insured, and that according to the sum insured, the principle now immediately in question does not seem to prohibit a division or distribution of the members, or their interests into classes, or districts. There was no motive for a restriction upon the society in this particular, especially in an institution of the first impression; and there is no reasonable fear of abuse by the society, of a power equally useful to all, and liable to produce injustice in one quarter as well as another. It was deemed proper to allow to the society the benefit of experience; and as other powers of a character as important as the one before us, were confessedly granted to the society at large, wherefore should this be withheld? Referring to the contemporaneous and successive construction of the act of 1794, by the society itself, always acquiesced in by every member, it will be seen that the society itself, inter alia, extended assurances to losses occasioned by lightning also; **[*350]** (whereas the original act seems to have contemplated ordinary fires only;) that they excluded from the benefits of the institution certain combustible houses and buildings; and of their own mere authority, and prior to the existence of any legislative provision to that effect, permitted individuals to withdraw from the obligations they had incurred under the original institution. While it is far from my intention to arraign these wholesome and salutary exercise of power, on the part of the society, in general meeting, I contend that these and some other powers are of a character as important, perhaps, as that of effecting a separation.

From these considerations, it would, perhaps, result, that the regulation in question did not require legislative aid to carry it into operation, but might have been

effected by the society itself. That, however, is taking a broader ground than is necessary to be maintained on the present occasion. That aid having been afforded by the legislature, it is enough for our purpose that the act of 1805, if it has produced any injustice at all to any class of subscribers, has fallen short of that crying grade of injustice, which alone can disarm the act of its operation. The society itself, at least, considered this, on the contrary, as a measure essential to the equalization of the risks; and, in this respect, I see no cause to differ from them in opinion.

By referring to the principle of our law respecting corporations, the foregoing results will be fully justified. Those artificial persons are rendered necessary in the law from the inconvenience, if not impracticability of keeping alive the rights of associated bodies, by devolving them on one series of individuals after another. The effect of them is, to consolidate the will of the whole, which is collected from the sense of the majority of those who constitute them. This decision by a majority is a fundamental law of corporations in this country and in England; in which respect our law differs from the civil law; it requiring the concurrence of two thirds of the whole members. It is also a fundamental **[*351]** principle of corporations, that this majority *may establish rules and regulations for the corporation, (which are considered as a sort of municipal law for the body corporate,) subject only to a superior and fundamental law which may have been prescribed by the founder thereof, or by the legislature which grants the privilege--perhaps, also, these petty legislatures ought further to be limited by all those considerations, (including the due observance of justice,) which I have endeavoured to shew, ought to bound the proceedings of all legislatures whatsoever. If, however, there be no such paramount law, or overruling principle, the mere will of the majority is competent to any regulation. I have endeavoured to shew, that no principle exists in the case before us to answer the foregoing character; that the one suggested is entirely abstract and indefinite as to the point in question; and that it does not appear that any injustice has arisen, or can be reasonably expected to arise, from carrying the measure in question into operation. But further, a corporation may be extinguished by the surrender of its rights and franchises; as to which the unanimous assent of every individual is not requisite. The will of the majority must prevail in this, as in other cases. It is not to be expected, that this kind of suicide will he committed for light causes; and where cases of greater exigency require it, the corporation should not hesitate to make the surrender.

EOD