Early American Land Companies. By Shaw Livermore. New York: Commonwealth Fund, 1939. Pp. xxx, 327. $3.50.

Present-day corporation theory with all its modern improvements is often not quite as certain nor as precise as one might expect. These shortcomings are usually ascribed, at least in part, to the curious development of business associations in this country during the formative decades before and after 1800, and to legislative vagaries regulating such early ventures. But if proof of the pervading influence of history were required, reference to Professor Livermore's volume on *Early American Land Companies* should now adequately suffice.

Briefly, the view expressed by Professor Livermore is that there existed for centuries in England a disposition of business groups to organize spontaneously for any common purpose, with or without official approval, and the settlers brought this tendency along with them over to America. In the later colonial period, commercial enterprise grew and changed in character: joint management of capital contributions became necessary in large-scale operations. With a conservative atmosphere of legal traditions, it was only natural for investors to utilize the experience of the past in establishing their new companies. That is not to say they did not experiment freely. Actually these groups drew partially on New England models in town organization[1] and borrowed too from French and Dutch business practices; again, certain ideas of management came from the "numercially insignificant chartered" corporations, though speculative activities generally ignored such a device.[2] Thus the colonists seem to have believed in their inherent right to set up associations of any kind or description according to their own peculiar needs:[3] if governmental sanction might later be requisite, no doubt it would be readily forthcoming in due course. Meantime their indifference as to legitimate charters arose not only out of the very considerable expense entailed, but also out of the common law disadvantages incident to the grant, such as chancery power of visitation,[4] the control over by-laws and an ever-present menace of quo warranto. In short, assuming human actions are based on self-interest, certainly those hybrid types of business units which were slowly and gradually evolved amply furthered colonial financial interests.

In the rude state of pre-Revolutionary society, a legal historian would scarcely

[1] In his introduction (pp. xi–xx), Professor Goebel has indicated also the New England concept of the corporate character of the church. The associative ideas in religious affairs seem to have reached over into secular matters, at least in relation to the New England towns.

[2] Professor Goebel adds: "The reasons for this are several. In the first place, a royal charter or parlimentary incorporation was costly, and the legal status of a colonial charter or act was by no means certain. Furthermore, the extension of the Bubble Act to the Colonies (1741), although it does not appear to have stimulated a policy of repressing colonial companies, remained at least as a warning on the statute books. In the second place, limited liability was not, at least as to business companies, a settled incident of corporations, and hence the motive which later proved so compulsive was absent. Finally, even the increase in formally incorporated companies had not caused any substantial abatement in the popular ideas respecting the effects of free association as respects the exercise of rights or privileges connected with corporateness as the common law understood it." Introduction, xxii–xxiii. Cf. 2 Davis, Essays in the Earlier History of American Corporations 4–8 (1917).

[3] P. 217.

[4] Pound, Visitorial Jurisdiction over Corporations in Equity, 49 Harv. L. Rev. 369 (1936).

expect to find corporate development in the highest perfection. Still its business groups were soon confronted with an opportunity of marketing vast areas of unexplored territory, and the subsequent land companies first truly exemplified their associative genius. The various forms of enterprise invented for land merchandising were immensely important in determining the character and scope of eighteenth-century commercial operations, representing as these did "the indigenous response of American business men" to a problem that imperatively necessitated the company solution.[5] Legal logicians might reason about Bubble Act abstractions: a compelling speculative instinct drove colonial leaders to disregard any limitations in promoting their land syndicates. And therein lies much of the explanation for an eventual break between the law in books, embodying rigid common law rules as to incorporation, and the law in action as utilized by early business organizations.[6] When, two generations later, American legislatures finally recognized the demands of the business community by enacting general incorporation statutes, it was merely an acceptance of the principle of free association typified by the land companies. The law had simply advanced from particular images to general terms.

The present volume accordingly serves the useful purpose of interpreting corporation theory of the past, by an examination of legal doctrine in the light of economic history. Without wandering "too far beyond the strict boundaries of legal research," it describes the evolution of a new framework for American business and explains the interesting conflict with early legislators that hindered or delayed ultimate accomplishment. Professor Livermore observes that few juristic developments have ever had to struggle with more unfavorable circumstances. At the start, there was the notion of the corporation as a quasi-public body, "created legitimately only to advance the public or national welfare and not primarily for private profit." Hence, from political considerations, the state was inclined to distrust these groups as potential rivals for sovereign power.[7] There was much to be said for this approach: the corporate charter was usually sought in order to gain an exclusive privilege[8] (be it a "public utility" franchise, or a monopoly of some sort or even the authority to govern a proprietary area). In any event, since monopolistic advantage was unnecessary to land exploitation, company organizers wisely dispensed with formal recognition in order to experiment with other types of association. Here their innovations encountered the scrutiny of eighteenth-century lawyers, and the bar has never been known for its imagination or sympathy. Thereafter, as the structure of business ventures became more and more definite, the associative impulse had to contend with judicial inertia and, following the turn of the century, with legislatures that sought to cripple the corporate body.[9] The essential fact remained, however, that groups enterprise had eventually achieved most

[5] "For various reasons the land problem was focal. It was the great commodity, bait for the greenhorns abroad, a spur to the restless at home, for its possession was the criterion of political rights, the assurance of social status. Inevitably, it was the first of the great American roads to affluence or ruin." Introduction, xxiv.

[6] Cf. Pound, Law in Books and Law in Action, 44 Amer. L. Rev. 12 (1910).

[7] Pp. 10 and 244. See also, as to other associations, Dicey, Law and Opinion in England 467 (8th ed. 1915).

[8] Pp. 17, 64 and 215.

[9] P. 258 et seq.

of the characteristics of the modern corporation,[10] thanks to the efforts of a long line of early statesmen and financial leaders.[11]

The very extent of the author's undertaking invites critical comment, combining as it does legal history with realist doctrines of corporation law and eighteenth-century finance with schemes for exploiting the old Northwest. That an economist should have produced this work surely speaks well for the unification of the social sciences; on the other hand, such an ambitious effort must unfortunately omit much[12] and neglect even more. One suspects too that the wish is sometimes father to the thought when every sort of instance is cited to prove the main contention.[13] Historians might hold that the political issues involved in checking French settlement of the Ohio Valley, and later in safeguarding the frontier against Indian aggression, played a more important role in the organization of the pre-Revolutionary groups than Professor Livermore allows. Moreover, the legal terminology accompanying the discussion is occasionally subject to the charge of being inexact or misleading. The book's prejudice against Beardian writers[14] hardly jibes with the admission that the early

[10] Any general discussion of the nature of the early commercial ventures would be beyond the scope of this review, yet a short survey of Professor Livermore's treatment might clarify his thesis. With the New England proprietorship and the proprietary colonies as historical background, there is an initial discussion of primitive business organizations that commenced the trend away from simple methods of partnership. The pre-Revolutionary land companies are then treated in natural sequence with interesting comment on each of the larger ones, such as the first Ohio Company, the Transylvania Project, the Illinois-Wabash Companies and the Indiana Company. These all led up to the Vandalia enterprise, "the climactic undertaking of the trans-Allegheny expansionists," which, like its predecessors, came to a dismal end with the adoption of the Quebec Bill and the new British governmental policy for the Western Country. Of course, the first land speculators had to contend with very serious disadvantages; but even when their companies failed, they were entitled to praise for developing such carefully-organized groups. The post-Revolutionary land companies (and there was an astonishing number of them) could build on these foundations, and evince afterwards a clear growth of the corporate concept. Later change in legal theory was partly the cause and partly the effect of a corresponding change in the commerce and industry of the time.

[11] Representative leaders were Ethan Allen, Alexander Hamilton, Patrick Henry, Henry Knox, George Mason, Robert Morris, Israel Putnam, George Washington and James Wilson.

[12] For example, Professor Livermore has omitted intentionally any discussion of the Symmes purchase, on the debatable ground that it was "a one-man project." And the failure to discuss an early legislative recognition of the associative impulse, through the enactment of general incorporation statutes covering religious, charitable and literary organizations (e.g., 1 Chase, Statutes of Ohio 204–5 (1833), for the Northwest Territory law of 1798), represents perhaps an effort to limit the material simply to business associations.

[13] Some of the early companies would today be compared with the Massachusetts business trust (cf., e.g., Williams v. Milton, 215 Mass. 1, 102 N.E. 355 (1913)), just as many of the earlier mining ventures resemble the mining partnership of the present time (cf. Childers v. Neely, 47 W.Va. 70, 34 S.E. 828 (1899); and Blackmarr v. Williamson, 57 W.Va. 249, 50 S.E. 254 (1905)). The fact that one might then as now obtain corporate advantages without incorporation scarcely aids in proving the author's thesis. Moreover, the belief of the associates that they were creating something analogous to a tenancy in common (see as to the later Ohio Company, 2 Smith, The St. Clair Papers 64–7 (1882)), would seem to negative the corporate concept.

[14] Pp. 7 n. 8 and 156 n. 47.

land speculator drew "censorious judgment."[15] There are but few minor errors of fact.[16]

On the whole, this interesting work has ably demonstrated in sound and thoughtful fashion the debt of the present to the historical development of business associations in America. The footnotes and references contain valuable quotations as to the various topics considered and have the merit of really clarifying the text. It may be read with profit by any student of corporation law.

There is an excellent bibliography of material, but the index is barely adequate.

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Cases on Future Interests. By Lewis M. Simes. Chicago: Callaghan & Co., 1939. Pp. xii, 866. $6.50.

Anyone familiar with Professor Simes's treatise on the law of future interests would approach this volume expecting to find it to be a well-planned and well-selected collection of cases. He will not be disappointed. It is a compact and meaty casebook.

The first feature that appealed to the reviewer's attention was the arrangement of the material. The book is divided into four parts which are, in order: The Varieties of Future Interests and Expectancies; Powers of Appointments and Related Powers; Problems of Construction; and General Rules of Policy in Creating Future Interests. The placing of powers of appointment before problems of construction is an unusual feature and an excellent idea.

The arrangement of the chapters under the several parts also commends itself to the reviewer, particularly the order of treatment in the chapters on powers, and the chapters on the general rules of policy restricting the creation of future interests. Without going into the arrangement of the chapters on powers, it may be said that it seems the most logical order of treatment that the reviewer has observed. In the chapter on general rules of policy, the plan of treating consecutively illegal conditions and limitations, direct restraints on alienation, and the rule of perpetuities, is in accord with the historical development, and affords opportunities for distinguishing these several rules and contrasting the effect of their operation. This advantage is further enhanced by following those chapters with the chapters on private trusts as perpetuities, and statutes as to the suspension of the power of alienation. The arrangement of all of this part of the book is highly commendable.

Excellent judgment has been used in apportioning the space to the several topics. Each subject seems to receive the proportion which is its due. The space devoted to rules of construction is kept within reasonable bounds. There are, as the editor says, "limits to the utility of a study of such variable and elusive material." In this respect three things are necessary: first, to show the pitfalls; second, the devices by which the courts rescue the unfortunate; and third, and most important, the roads by which the pitfalls may be avoided. The editor seems to place the emphasis where it properly be-

[15] Pp. 131 n. 133.

[16] E.g., "It is even more certain that the leaders of the later Ohio Company . . . . were primarily drawn from the agricultural population." P. 37. Among such leaders were Dr. Cutler, General Parsons, Winthrop Sargent and General Varnum.

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