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## THE HISTORICAL DEVELOPMENT OF THE COMMON-LAW CONCEPTION OF A CORPORATION.

The topic, What is a corporation?—using the last word in its fullest significance—is one which has exercised the ingenuity of philosophers and jurists for centuries. Varying conceptions of the nature of a corporation—not to mention those which have become obsolete—run at present from the organic one of Gierke, who declares that a corporation is a real, living being, to that of Duguit, who insists that it is but the shadow of a name, having no real existence (*neant.*). Between these two extremes lie almost every conceivable view.

We save ourselves, however, from the embarrassment of choice by thus defining a corporation as discussed in this essay: A corporation is an association of persons which the law treats in many respects as if it were itself a person,<sup>1</sup> having an existence whose duration is determined by the positive law. This statement, we believe, embodies the distinctive features of a corporation as they have always existed

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<sup>1</sup> So far this is the definition of the Anonymous author in the *Encyclopædia Britannica*.

in the law. Other attributes may co-exist, for corporations have been of many sorts, but we think they are all to be known under any disguise by the features mentioned.

Although our discussion will be of the *legal* conception of a corporation, we shall also consider the bearing upon it of the views held by those who have examined the subject in its philosophic aspects. While the reflections of the cabinet may seem too far removed from the contentions of the forum to be of practical importance, their influence upon the living law is great. Since the courts have failed to give us a doctrine of corporation law satisfactory in practice, it remains to be seen if just and sensible rules cannot be somehow formulated. The history of the law upon this topic shows only too clearly the disastrous effects upon the law, as administered, of a perverted analogy. It is our purpose to show that the common law, as far as it exists in spite of an enormous mass of legislation upon the subject, is returning, though with difficulty, to a healthy state.

From the earliest ages man, being a gregarious animal, has found in *association* the greatest opportunity for self-realization. From that far time when the patriarchal idea took form, to the present moment of vast combinations of individual resources, the idea of co-operation has flourished and developed. Since the period when men perceived that a single man, however great his mental or physical strength, can achieve but infinitely small results; and that the united efforts of many men are much more potent than the individual and disassociated efforts of the same number of men, we have had a steady progression in variety and number of forms of societies.

Since pre-historic times men have been actuated more or less by the desire to acquire property. The natural wish to appropriate as one's own whatever was useful or pleasing is as old as man himself.

It is in the synthesis of these two ideas that existed the fallow field for the germination of the concept of a corporation.

Obviously, since an inevitable result of association was the acquisition of common property, the difficulty of disposing of it in a just way upon the death of any or all of

the associates was the earliest factor in the development of the notion of an ownership in the society as distinct from the individual share of each member in the communal goods. Evidently if the natural heirs of a member were to succeed to their ancestor's interest in the common property there might result the admission into the association—if formed for a special purpose—of hostile elements which would in time disrupt it. On the other hand it seems repugnant to one's natural sense of justice that a man's heirs should upon his death lose every right which he might have enjoyed during his lifetime.

These considerations were of course not felt in primitive times when the notion of individual rights was unknown. Then the tribe was all in all and the good of each was the good of the clan.

But when the races left off their nomadic life and settled down to enjoy the fruits of the earth different motives supervened.

The primitive trace of the concept of a corporation appears in the case of religious associations. In those ancient times *land* was the only property which of itself produced revenue. Accordingly pious kings from earliest times donated fertile fields to priesthoods of Isis and of Bel. It was of course most important to the religious community to retain its lands whatever might happen to the constituent members. And so, we are informed,<sup>2</sup> religious corporations existed in Athens as early as the time of Solon. The *collegium* of the Vestal virgins at Rome is also another ancient example.

As nothing exists which has not been evolved from some preceding fact, the common-law conception of a corporation has a direct relationship to the *collegia* and *universitates* of the Roman law. Indeed, in the language of a learned and luminous but anonymous author,<sup>3</sup> "In no department of our law have we borrowed so copiously and so directly from the civil law."

It is important, for a thorough understanding of our subject, to know what was the view of the Roman law

<sup>2</sup> Kent, *Comm.* 14th ed., pp. 268 *et seq.*

<sup>3</sup> *Encyc. Brit.*, Tit. Corporations.

as to corporations at a period not later than the ninth century. According to our learned author corporations then existed much as we know them to-day. Moreover, as he says, they were divided into four classes as follows: "(1) Public governing bodies, or municipalities, *civitates*; (2) religious societies, such as the *collegia* of priests and Vestal virgins; (3) official societies, *e. g.*, the *scribæ*, employed in the administration of the state; (4) trade societies, *e. g.*, *fabri, pictores, navicularii, etc.*"

This it will be observed is in large measure the same division as that prevailing to-day in systematic treatises on the subject. In all these various forms of association, however, there were clearly to be perceived two distinctive features: (1) The corporation as such had an existence separate from that of the associates; (2) this existence was perpetual and in no wise dependent upon that of the associates. The reason for the separate entity was that some one person, real or imaginary, must hold title to the common property. The immense convenience of having an undying titulary gave rise to its existence.

To revert to the division of corporations as made in the civil law, it will be perceived that corporations then, as now, could be divided into two great classes, to-wit: those for profit and those not for profit. In English law the latter appear first.<sup>4</sup> We shall, therefore, be concerned with them for some space hereafter, relegating the former to a place later in the discussion. It must be borne in mind that while there was a ready-made system of Roman jurisprudence in relation to corporations which partook of the nature of guilds or trading companies, there was no space for its application in England until about the fifteenth century.

Accordingly we shall briefly summarize the conditions existing in England before the Norman invasion.

The early Christian Church had been flourishing for some centuries and many religious houses had acquired large property.

The primitive Christian notion seems to have been that the title to Church property was vested in the religious

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<sup>4</sup> Ecclesiastical corporations first appear Kyd, p. 95.

community.<sup>5</sup> Centuries later, in line with the centralizing tendency of the papacy, the clergy assumed the ownership of the property donated to religious and charitable uses. From being mere fiscal administrators<sup>6</sup> of a common fund, the *episcopi* became dispensers of it. According to the accepted view the prelacy held such possessions as stewards of God. They, being appointed by divine right, were the final arbiters of its dispensation. The lay congregations seem to have had, in the eighth century, no voice in disposing of what would now be charitable trust funds.<sup>7</sup> This arrangement proved highly satisfactory until the introduction of feudalism. How far, under the Saxon domination, the feudal system held sway is a moot question. But at all events it was after its establishment that corporations sole and aggregate appear.

We must believe, then, that the Roman law of corporations was brought from the Continent by the comparatively sure and rapid means of the clergy. As, in those semi-barbaric times, the Church was the only depository of learning, it is so probable as to be certain that knowledge of the civil law was transplanted into England at an early period. Unfortunately our materials for the history of the "dark ages" are extremely scanty. Only monkish chronicles, for the most part diaries of obscure monasteries, survive. It is impossible to predicate, then, at what precise epoch the Roman law of corporations first took lodgment in England.<sup>8</sup> But it was assuredly before the Conquest.<sup>9</sup> Then, as in earlier times, land was the only revenue-creating property. This fact must be borne fully in mind in endeavoring to trace the history of the law under this title. The *raison d'être* of corporations is thus well stated by Blackstone.<sup>10</sup> "So, also, with regard to holding estates or other property, if land be granted for the purposes of religion or learning to twenty individuals not incorporated, there is no legal way of continuing the property to any other persons for the

<sup>5</sup> Organization of the Early Christian Church. E. Hatch. Bampton Lectures, 1800, p. 152.      <sup>6</sup> *Ib.* Ch. VIII, *per tout*.      <sup>7</sup> *Ib.*

<sup>8</sup> In the Constitutions of Clarendon, cap. ii, mention is made of grants of churches "in perpetuum." This was in 1164. St., Sel. Ch., p. 138.

<sup>9</sup> See Kyd, Corporations, pp. 42-43, quoting Millar.

<sup>10</sup> Bk. I, Ch. 18, p. 468.

same purposes but by endless conveyances from one to the other, as often as the hands are changed."<sup>11</sup> It will be remembered that although this was a time when title passed by livery of seisin, the argument is none the less forcible. Another powerful reason is thus stated by the learned commentator.<sup>12</sup> "If this were a mere voluntary assembly, the individuals which composed it might indeed read, pray . . . together, so long as they could agree to do so; but they could neither frame nor receive any laws or rules of their conduct; none, at least, which would have any binding force, for want of a coercive power to create a sufficient obligation."

It is impossible at this point not to mention the condition of the Church at this epoch. The idea of papal supremacy in temporal as well as in spiritual affairs had been born. At that period all men above the condition of serfs were warriors or priests. The great middle class, which was so profoundly to influence European history, had not yet appeared upon the stage. Accordingly it is not to be denied that there were within the pale of the Church men greatly ambitious for themselves and not in the slightest degree concerned with the salvation of souls. Once the notion of world-dominion in papal hands took form it was but a natural means toward the realization of this dream that every effort should be made toward enriching the Church and, consequently, making it more powerful. As the Church at that time had all the learning and almost all the intellect of Christendom, it was inevitable that the ready-made means of holding and transmitting property in perpetuity as accomplished under the Roman law should be used as a powerful means of forwarding the interests of the clergy.<sup>13</sup>

However desirable for the hierarchy the establishment of ecclesiastical corporations was before the advent of William and his mailed retainers, it became imperative afterwards.<sup>14</sup>

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<sup>11</sup> A striking example of this, at a later period, is to be found in the case of Lenche's Trust. See *English Gilds*, pp. 256 and 266.

<sup>12</sup> *Ib.*, pp. 467-468.

<sup>13</sup> *History of the Christian Church*, Vol. II, Middle Ages, Dr. Wilhelm Møller, p. 307.

<sup>14</sup> The earliest mention we have been able to find, of the word "universitas" occurs in the charter of the city of Oxford (1255). Stubbs, *Sel. Ch.*, 377.

Feudalism in its most rigorous form soon became established and flourished for several centuries. It is not our purpose here to enter at length into a discussion of the system. We shall simply indicate how it stimulated the growth of the idea of religious corporations. Briefly the scheme was this: In a time when life and property were at the mercy of him who chose to take and when the castles of robber barons dotted every hill, it was needful that he who valued his possessions should be prepared to maintain them by the strong hand. Accordingly at this period military organization became a necessity. Of trade and commerce, "business," as we know it now, there was practically none. There were the tillers of the soil, rude unlettered creatures, half savage and wholly barbarous. Over and above them at an immeasurable distance in the social scale were the war lords. These men, in many respects no whit better than their serfs, were nevertheless trained to the highest pitch, according to the notions of their age, in the art of war. Military organization as then understood was the pillar of the state.

It has been said inelegantly but most truly by the greatest general the world has ever seen that "an army moves on its belly." Some one then must supply the sinews of war. These purveyors were the villeins, the farmhands of that time. In return for protection to life and land they rendered to their superiors a portion of the produce of the soil. Nay more, they were bound to render military service to their lords in time of war, or, what was often the same thing, at his whim. This was known as villeinage.<sup>15</sup> The same idea was carried out in the higher strata of society. The smaller barons in return for the protection of a still greater lord were bound to render services under certain conditions and held their lands by knight's service. And so, up to the lord paramount who, in England after the Conquest,<sup>16</sup> was the king. The fundamental idea being that a man possessed all he had by might alone. As women and boys were non-combatants, it was of course due to the exigencies of unsettled times that when the tenant died leaving an heir incapable of bearing arms the feudal su-

<sup>15</sup> Bl. Bk. II, p. 48.

<sup>16</sup> Brac. L. 4, tr. 1, c. 28.

perior should step in during the continuance of such period and assume control of the henchmen of the defunct vassal.<sup>17</sup> In the earlier decades of the feudal régime this right seems not to have been abused. But later the lords paramount acted in most oppressive fashion, often ruining the inheritance during their incumbency. Another "of the greatest grievances of tenure"<sup>18</sup> was that of reliefs. These were compositions made by the heir with the lord for the latter's permission to succeed to the estate. "At the first they were merely arbitrary and at the will of the lord, so that if he pleased to demand an extortionate relief, it was in effect to disinherit the heir."<sup>19</sup> Still another vexatious incident of tenure was that of fines which must be paid by the tenant to the lord whenever the former alienated his land. The reason given for their exaction—the motive being the rapacity of the barons—was that since the new tenant might be *persona non grata* to the lord, some compensation must be made for his wounded feelings. This last requirement, however, seems to have been principally if not entirely applied to the tenants *in capite*, which class included the ecclesiastics of highest rank.<sup>20</sup>

The only remaining incident of feudal tenure important to our discussion was that of escheat. This happened when the tenant's heirs became extinct or, what was legally to the same effect, when they suffered corruption of the blood so as to lose the capacity to inherit. The land then reverted to the lord.<sup>21</sup>

It will thus be easily perceived how great advantages, or rather avoidance of disadvantages, would accrue to associations if some kind of immortal legal persons could be created for the purpose of holding their lands. Stress of circumstances drove the hierarchy to the adoption of the familiar conception of the Roman law.<sup>22</sup>

The embryo thus formed grew with amazing rapidity,

<sup>17</sup> Bl. Bk. II, p. 66.

<sup>18</sup> Bl. Bk. II, p. 65.

<sup>19</sup> *Ib.*

<sup>20</sup> Stubbs, Sel. Ch., pp. 324-5 and 115.

<sup>21</sup> Bl. Bk. II, p. 73.

<sup>22</sup> The study of the Roman Law was revived in the reign of Stephen (1135-1154) and continued under Henry II. Stubbs, Sel. Ch., pp. 124 and 136. John granted his kingdom to the pope (Innocent), and "his successors," in terms used to-day in grants to corporations. *Ib.*, pp. 284 and 285.



displaying traits not seen in its Latin ancestry. The quasi-military organization of the Church demanded that the superiors of the orders should have control of the disposition of religious property. No doubt this was found a most salutary restraint on the tendency of independent and fractious communities to escape from under the papal thumb. So it became the law that certain religious associations could act only with the sanction of their heads.<sup>23</sup> This principle resulted in what was probably an unforeseen and undesired result; that when the superior died, the corporation being unable to act until his successor was chosen, was unable to inherit from the deceased head.<sup>24</sup>

Moreover, there arose in the law of England the corporation *sole*,<sup>25</sup> which, as Blackstone says, "is a refinement of our own." The corporation sole seems to have been an ingenious adaptation of theory on the part of the princes of the Church. They held their lands (after the Conquest) in feudal tenure of the king. On the death of the incumbent the estate reverted to the crown. The successor to the title must pay heavily for confirmation of his rights. Of course by ownership in corporations aggregate this burden could be avoided. But Church polity demanded that bishops and abbots should have entire control of their churches and abbeys. The thus conflicting interests of the Church were ingeniously harmonized in the following way: The notion of a titulary of the property of associated men existing perpetually without reference to the death of any of the associates was thought to permit of the further conception that such titulary might exist without reference to the death of *all* of the associates.<sup>26</sup> So, the transition was easy to the thought that an office might exist forever without incumbents. A grant to a bishop by his corporate title would thus avoid all feudal burdens as he (or it) would never die. In this manner was Church government preserved intact and the overlord deprived of his revenue.

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<sup>23</sup> Bl. Bk. I, p. 478. <sup>24</sup> *Ib.* <sup>25</sup> See Kyd, Corporations, pp. 19-20.

<sup>26</sup> "A dissolution of the corporation was not effected by the death of all its members." Savigny, System, ii, 280, quoted by Taylor: Private Corporations. However this may be, metaphysically speaking, it was not the law as to corporations aggregate. Kyd, pp. 447-448.

It is curious to observe that this *hocus-pocus* operation has given rise to the maxim "the king never dies."<sup>27</sup> As happened so often the courts, reasoning by strained analogies, decided that for purposes of various sorts the king was a corporation sole.<sup>28</sup> So it was said "the king can do no wrong," meaning that the royal corporation sole can perform no unregal act. If this means that he (or it) cannot act *ultra vires*, and if, besides, the corporation sole is created by the sovereign, we find that the lawyers were sadly tangled in the webs of their own spinning. But even to-day we hear about "Crown lands" and "His Majesty's province."

Another aspect of the corporation sole is of practical importance. It has been sought to give it some life in cases of devises, etc., "to the treasurer, etc., of the A. corporation." By deciding that the treasurer, etc., is a corporation sole it would be possible to support meritorious trusts which would otherwise fail. This case, however, must be considered as anomalous, since the creation of a corporation within a corporation is something that the most fine-spun logic of mediæval lawyers would hardly accomplish.<sup>29</sup> The subject is merely mentioned here to be finally dismissed, as corporations sole have no more to do with our general subject than has the mistletoe with the growth of the oak.

Once having established this immortal entity, whether "sole" or "aggregate," the scheme was found to work extremely well, for the Church. As the religious houses grew and flourished they necessarily absorbed in the course of a few centuries a vast amount of land. This state of affairs bore hardly on the lords, who, by reason of the inherent nature of the titular holder of the land, were, as they felt, defrauded of many of their perquisites.<sup>30</sup> Some, however, remained. "Even the monasteries, till the time of their dissolution, contributed to the knighting of their founder's male heir, . . . and the marriage of his female descendants."<sup>31</sup> Though the *aids*, as these obligations were called, survived, yet the diminution of the reve-

<sup>27</sup> Kyd, p. 105, quoting Co. Lit.

<sup>28</sup> Kyd, p. 28.

<sup>29</sup> It was tried, however. See Gierke, *Political Theories of the Middle Ages*, p. 27. Cf. Kyd, p. 33, and esp. p. 35.

<sup>30</sup> Kyd, p. 70.

<sup>31</sup> Bl. Bk. II, p. 64.N.

nue to the nobles was so serious as to lead at an early day<sup>32</sup> to the passage of the so-called statutes of *mortmain*, aimed at restraining or preventing the increase of property in dead hands.<sup>33</sup> No doubt this measure was one of self-preservation, since, barring revolutions, the Church in the course of many centuries would acquire all the land in England. Indeed, in France, in the middle of the eighteenth century, it had acquired one-third of all the land in the kingdom.

While the capacity of *religious* corporations to absorb realty was thus impaired, their ability to aliene property was, in the reign of Elizabeth,<sup>34</sup> curtailed. The reason for this inhibition was to more nearly secure the fulfilment of the intention of the pious founders by compelling the retention by the donee of the very lands, on the once ascertained value of which the charity had been erected. As ecclesiastics were in the habit of making leases for long terms of years without impeachment for waste, receiving therefor large sums of money which they immediately used, the consequence was that their successors took only a bare estate.<sup>35</sup>

The condition of corporations as a title of English law appears in the end of the fourteenth century to have been this: Starting with a ready-made concept of the Roman law that an association might hold property for itself as distinct from the associates,<sup>36</sup> and driven under stress of feudal burdens, the lawyers of the time, who were practically all churchmen, had firmly established the notion of a titulary of property different from anything hitherto known to English law. This creation, by analogy, was endowed

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<sup>32</sup> 1225, Kyd, p. 88.

<sup>33</sup> In 1294, according to the chronicle of W. de Hemingb. ii, 53 (cited in Stubbs, *Select Charters*, p. 438). The bishops "besought [the king] especially that the statute of mortmain which had been enacted to the prejudice of holy mother church, should be nullified." These statutes applied only to gifts *inter vivos*. Lands were not devisable to corporations even after the passage of the Wills act, 32 Hen. VIII, Ch. 1 and 34, & 35 Hen. VIII, Ch. 5.

<sup>34</sup> 1 Eliz. C. 19, forbids alienation by bishops. Later greatly extended.

<sup>35</sup> Kyd, pp. 108 *et seq.*

<sup>36</sup> See Sohm, *Institutes of Roman Law*, pp. 104-106.

with many human attributes. For purposes of convenience we shall hereafter speak of it as the humanesque conception.

The practical advantages ensuing upon the establishment of such a fertile and useful idea caused its extension from the field of ecclesiastical holdings to that of the common interest. Accordingly we find that in the reign of Henry IV (1399-1413) municipal corporations first appear.<sup>37</sup> Chivalry and feudalism were losing their power, and before the rising tide of the people were ere long to go down in ruin. With the increase of population and the tendency toward concentration in towns a new power arose. When collections of individuals were to be found in many places outside of Norman keeps it was realized that the government of such bodies of men could be best accomplished if the cities themselves became responsible as entities. Of course the economic reason was strong also. As there were common rights somebody must be found who could assert them. At all events it is at this time that we first learn of the application of the corporate idea to lay communities in England.<sup>38</sup>

Since the time of Justinian there had existed, especially in Italy, a body of industrious persons known as Scoliaists,<sup>39</sup> who were perennially busy in their studies perfecting and amplifying the *corpus juris*. From a mere mention of "corporation" in the code they had elaborated an entire body of law upon the subject. Chief among these at the beginning of the fifteenth century was the greatly learned but otherwise contemptible Sinibald Fieschi, afterwards Innocent IV. He it was, says Mr. Maitland,<sup>40</sup> "who found the phrase, the thought for which others had sought in vain: The corporation is a person; but it is a person by fiction and only by fiction." He was the creator of the "*Persona Ficta*"—that invisible person acting in a

<sup>37</sup> Kent, *Comm.* and *cf.* Stubbs, *Sel. Ch.*, pp. 252, 265, 313.

<sup>38</sup> But see Kyd, p. 63. We deem the associations there mentioned as outside of our definition and share his doubt as to the soundness of Coke's dictum.

<sup>39</sup> Maitland, Introduction to trans. of Dr. Gierke's "Political Theories of the Middle Ages," p. xix.

<sup>40</sup> Maitland, Introduction to Dr. Gierke's "Political Theories of the Middle Ages," p. xxx.

medium of legal thought alone. This result, which so easily symbolizes the more or less coherent mass of law which had been growing up for centuries, may fairly be said to be the fine flower of mediæval jurisprudence. Certainly it has survived to the present time. At this point it is necessary to consider how these corporations were created. It may seem that logically at all events this consideration should have come first, but such was not the historical development. We are told that at the civil law corporations existed simply because three or more persons united themselves for a common purpose.<sup>41</sup> Later, however, when the Roman law was codified it became necessary to determine by what right such societies acquired the power to act as one person, the fact being one which required some explanation. Accordingly the compilers decided that the right to create this anomalous thing—this immortal titulary—was one of the sixty-seven prerogatives of the Princeps. That point being established, his mere fiat was sufficient, and, as it was desirable that some durable evidence of his gracious act should survive, what more natural than that he should grant a *charter*, which in its original signification meant little more than a writing. Further, once the entity was created it was necessary that its field of action should be defined. This as a matter of convenience was also done in the charter,<sup>42</sup> a fact which has since led to some little confusion of thought.<sup>43</sup> As the age was one in which kings and lords held monopolies of everything, there was needed a specific grant of power to act. Hence the modern doctrine<sup>44</sup> which has been evolved from the time when the corporation could do only what it was granted the power to do. It is important to bear in mind that the reason given for the creation of a corporation—a thing then admitted to have no tangible reality—was simply that it pleased the prince; a reason which went very well with ideas of divine right but which has not withstood the shocks of time.

As the prince might of his own will create, so, one would think, he might arbitrarily destroy, a corporation. Clearly

<sup>41</sup> Bl. Bk. I, p. 472.

<sup>42</sup> Kyd, p. 335.

<sup>43</sup> E. g., the learned Chancellor Kent, who defines a corporation as a franchise! See Kyd, Corporations, p. 15.

<sup>44</sup> *Infra*, p. 546.

there is no hardship, as some minds tinctured with the humanesque idea<sup>45</sup> might dream, in putting to death an invisible creature. But—strange result—in England this was not so. Though the king could create a corporation he could not terminate its existence.<sup>46</sup> That execution could be done only by Parliament. The logical reason would seem to be that while the king was sovereign in name and so, as a matter of convenience, could grant charters, in fact Parliament was latterly so powerful that it could restrain the king thus far. It amounted to, in fact, a tacit recognition of the principle that no one should be arbitrarily deprived of his property. It seems to have been well established that upon the legal death of a corporation its realty reverted to the heirs of the donor or in their absence escheated, as did the personal property, to the crown.<sup>47</sup> Mediæval lawyers, who were more concerned with the logical perfection of theories than with any sense of justice in the concrete, allowed the associates under such circumstances nothing at all.<sup>48</sup> Obviously if the king could destroy corporations at will and secure their property by escheat he would have a power capable of great abuse.

We have now arrived, after some digressions, at the state of affairs in England in the fifteenth century.

Within the cities which had already been deemed worthy of incorporation there were coming into existence associations of arts and crafts,<sup>49</sup> known as guilds. These societies, which first appear about the twelfth century,<sup>50</sup> during the

<sup>45</sup> Kyd speaks of a corporation committing suicide, Vol. II, p. 466.

<sup>46</sup> See Chitty's N. to Bl. I, p. 485 and p. 67, Vol. I of Kyd and Vol. II, p. 447.

<sup>47</sup> Kyd, Vol. II, p. 446.

<sup>48</sup> Professor Gray in his splendid monograph on "Perpetuities" has doubted if this reverter was ever the law save where religious corporations held the land in frankalmoign. Indeed the point seems well taken, since if a monastery should be dissolved and the purpose of the donor defeated who is in a better position to demand the return of the land than his representative? The case is obviously different where, as in modern trading corporations, an associate contributes his own money to the common fund.

<sup>49</sup> These are to be clearly distinguished from the religious guilds which had existed for centuries. See English Guilds, Introd., p. xiv.

<sup>50</sup> See Brentano's learned article "Craft Guilds" in "English Guilds," pp. cxiv *et seq.*

next two or three centuries were to affect profoundly the social and economic condition of the kingdom.<sup>51</sup> It is in them that we perceive the first glimmering of anything resembling our modern industrial corporations. They, too, were thought worthy of incorporation soon after the cities had arrived at that dignity,<sup>52</sup> being driven thereto by the same considerations which from the earliest ages have moved men to become associated and to hold property in common.

In the development of the law of corporations the sixteenth century was a time mainly of stagnation. The status of the religious associations was pretty well settled and municipal corporations and those of handicrafts were being developed along similar lines, *mutatis mutandis*. Nothing remarkable had happened in legal thought since the advent of the *persona ficta*.

Let us turn our attention for a moment to general conditions prevailing in England during the reign of Elizabeth. It seems upon observation to be the starting point of British greatness. Spain was then the greatest empire and the strongest power of Europe. England under the tutelage of Cecil, ably abetted by Elizabeth, was gathering strength for the inevitable conflict. Hardy mariners sailed the seas in the search for new lands. Finally came the crushing defeat of the Armada, achieved in part by the force of tempests and Spanish mismanagement as well as by the valor of the English themselves. The net result was to leave England mistress of the seas—a position which, with some variation of fortune, she has maintained to the present day. Obviously under such circumstances commerce was greatly stimulated and trade began to flourish. It is about the middle of the seventeenth century then that corporations as we know them began to assume importance. As many schemes made feasible by new conditions required large amounts of capital, it was most natural that men should unite their resources for the exploitation of such plans. It is hard to say whether the notion of limited liability was

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<sup>51</sup> English Gilds, pp. cli and clxii.

<sup>52</sup> In the ordinance of the Tailors of Exeter (1466) the Gild appears as having been previously incorporated. English Gilds, p. 301.

absolutely established at that early period or not. We have Blackstone's authority for it, and it seems to have been the view generally received that the creditors of the corporation should look to the corporate assets alone for satisfaction of their claims. Certainly it seems in line with the previous notions of corporations. Once we admit, as was unquestionably then the law, that there was a separate individuality, it must follow inevitably, as a matter of legal logic, that debts contracted by the corporation were the debts of the corporation and of no one else. We conceive, then, that there existed at that period no liability of the shareholders other than what might attach to their original contribution. That being so, it is evident that corporations must have been favored instruments for the carrying out of speculative schemes where the promoters were unwilling to risk more than a certain amount of capital.

In short, there is every reason to believe that as the advantages of incorporation became generally recognized they were more and more employed, until at the beginning of the nineteenth century we find corporations multiplying with startling rapidity.

In the early part of the sixteenth century the *Persona Ficta* was firmly embedded in the law of England. In the language of Coke, made familiar by the paraphrase of Marshall,<sup>53</sup> "a corporation aggregate is invisible, and existing only in intendment of law."<sup>54</sup> This dogma led to some curious results.

The strictly legal conception of a corporation, unaffected by legislation, seems to have been as follows ever since the time of Coke. A corporation aggregate is a body of men which, by virtue of an act of the sovereign power, is constituted one legal person, whose existence is for a period, the duration of which is pre-determined or determinable by the sovereign.<sup>55</sup> These are the essentials. But in matters of detail there has been much fluctuation of opinion. The earlier decisions, pursuing a convenient analogy, which made the corporation a sort of spirit, and losing sight of the fact that a corporation was originally devised merely for

<sup>53</sup> Dartmouth Col. Case, 4 Wheat. 518, 636 (1819).

<sup>54</sup> 10 Rep. 32.

<sup>55</sup> Cf. Kyd, Corporations, p. 13.



the purpose of holding property to the use of a certain class of persons whose relations were not consanguineous, tried to establish the proposition that whenever this intangible creature could conceivably act like a real person, it was for legal purposes such, and that where it could not conceivably act as a real person, *e. g.*, in the performance of a physical act, it was legally incapable of doing such an act.<sup>56</sup> We find it gayly stated in the early cases that a corporation cannot commit a battery because, forsooth, it has no limbs. Nor can it be guilty of slander, because it has no tongue. It was found, however, that as the agents of corporations while acting for them frequently were overzealous, and committed acts which came within the rule as to *respondere superior*, some check upon this tendency was needed. Accordingly modern decisions are on a more equitable, if less logical, basis.<sup>57</sup>

But, although limitations were thus set, the corporation was for some purposes a "real" person.<sup>58</sup> So it was endowed with a will. This will was legally manifested by a series of categorical statements affirmed by a majority, numerically or in interest,<sup>59</sup> of the constituent members. Difficulties flowed from this view. If, as by hypothesis, the corporation is a real person having an existence of its own and its will is that of the majority of the stockholders, it can, like any other person, give away its property by means of contracts to the highest bidder, thereby rendering worthless the interests of the minority. This was a point, however, at which pure theory balked. On the other hand, in order that business could be transacted, there must be some method of deciding how it should be done without the assent of an obstinate minority. After some oscillation of opinion, the courts decided that such transactions could be impeached for lack of good faith only. This, of course, reduces the corporation, as far as its internal affairs are concerned, to a partnership. The separate entity is thus for some purposes declared non-existent.

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<sup>56</sup> *Cf.* Kyd, pp. 223, 224, 225.

<sup>57</sup> See for an exhaustive philosophical discussion of this view Duguit, *L'Etat*, Vol. II, pp. 25 *et seq.*, esp. pp. 33-34.

<sup>58</sup> *E. g.*, It was an "inhabitant" for purposes of taxation, Kyd, p. 317.

<sup>59</sup> Kyd, p. 308.

Further difficulties arose in determining at what point the corporation ceased to be a person. For example, the jurisdiction of the ecclesiastical courts, with their control of matters of probate, was dependent, anciently in fact and latterly in theory, on their ability to excommunicate those disobeying its orders. But corporations, having no souls, were not likely to be harmed by purely spiritual means. Therefore a corporation could not act as executor because not amenable to the Courts Christian.<sup>60</sup> Such a decision is in line with that condemning a locomotive as a *deodand*.

Another matter gave considerable trouble in the eighteenth century. This was, how far corporations could act by agents. The ancient English notion was that they could act only through powers under their corporate seal.<sup>61</sup> Gradually, under stress of convenience amounting to necessity, this rule was infringed upon,<sup>62</sup> so that now it may be broadly stated that a corporation, where its acts are directed by its officers, can do whatever a natural person can.

It will be seen that if the doctrine that a corporation is an invisible person be once accepted, the results reached in the old cases are more logical. Unless, then, the modern view can in some way be reconciled with the conception of the *Persona Ficta*, it is evident that we must regard that view as having been repudiated, in part at least. We have suggested above that the reason why a corporation is responsible for the torts of its agents is that it is the policy of the law that one who stands in the position of a principal should take the responsibility for whatever means are employed to further the interests of the principal. But this does not explain the fundamental difficulty. The question is, how is the agency itself established? If the corporation be in fact a separate person which is invisible and whose acts are manifested to the external world only by documents under the corporate seal, how can it ever be said to *act* otherwise? If the acts in question are authorized by an

<sup>60</sup> *I. e.*, it could not take an oath. This is, of course, no longer law I Wms. Exrs., p. 270, Kyd, p. 71, *cf. Ib.* 277. <sup>61</sup> Kyd, p. 260.

<sup>62</sup> Kyd quaintly remarks: "It has long been considered as an established point, that to offices of ordinary service, such as that of cook and butler, a corporation may appoint without a deed," p. 260. This was in 1793.

officer of the corporation, how did this dumb creature give *him* instructions.<sup>63</sup> It may be said that he received authority from the stockholders to act in the premises; but how can the action of a number of individuals ever be the act of one person? In other words, has the corporation a will of its own? It is evident that at this point we touch the whole notion of the *Persona Ficta* to the quick.

The next important step in the development of the law under this heading was the rise and development of the so-called "trust-fund" idea. An example will make this plain. The A. Company is a corporation. The stockholders knowing that the concern has only enough money to pay its creditors, divide up the assets among themselves and leave the creditors to do without their money.<sup>64</sup> In an early case<sup>65</sup> it was held that this could not be done. The grounds of the decision of the chancellor (Finch) are uncertain. Perhaps they are the broad ones of fraud, or even the more vague ones of fair dealing. It is evident that the former is not very satisfactory. The latter manifestly approaches the case of a partnership. The enunciation of a tangible principle governing this point hung in the air for over a hundred years, until the decision of the famous case of *Wood v. Dummer*<sup>66</sup> by Judge Story. He it was who first enunciated the thought that the corporate assets were a "trust fund" for the benefit of creditors. This idea, like the conception of the *Persona Ficta*, was of that plausible variety which works extremely well in certain cases without being at all applicable to every case. It is quite possible that Judge Story did not intend to convey the meaning that such a fund was a technical trust with all the incidents attached to it by law. It seems, however, that such was the common understanding. If the corporate assets are a trust fund, we are at once confronted with the difficulty of an uncertain *res*. Evidently the property of the corporation cannot remain in *specie*; otherwise corporations would soon cease to exist. If we then say that the trust does not attach at all times, but only for the benefit of cred-

<sup>63</sup> Cf. Maitland, *loc cit.* xxxix, xl.

<sup>64</sup> The question of additional liability being out of the case.

<sup>65</sup> *Naylor v. Brown*, Finch, p. 83 (1673). <sup>66</sup> 3 Mason, p. 308 (1824).

itors, when does it begin to run? Is the time to be calculated from actual bankruptcy or from the time when such bankruptcy is discovered? Is the mere diminution of assets below the value of the capital stock bankruptcy in this sense or not? The idea, then, appears not quite such an easy solution to the problems presented after all.

The rock upon which the *Persona Ficta* may be said to have been shipwrecked was the question of *de facto* corporations. It is a very simple matter to say that an association, which purports to be a corporation without ever having been legally incorporated, has no corporate existence. But suppose such association has received and consumed goods for which it has contracted in the putative corporate name to pay. Manifestly the vendor should be reimbursed. But how can this result be legally achieved? The plaintiff has contracted with what he believed to be a legal person, which, however, has no existence even in legal thought. In such a case we have a multitude of conflicting opinions.<sup>67</sup> One sword used to cut the Gordian knot is, that the defendant is estopped to deny its corporate existence. But estoppel is a principle of the law of torts. The action is one of contract. If we consider, then, the doctrine of estoppel to be inapplicable, the vendor is in a sorry plight. He has contracted with—nobody. Therefore there is no contract. A solution has been attempted on the basis of the so-called “quasi-contract.”<sup>68</sup> This is, perhaps, less unsatisfactory than any other.

The fact remains that if we adhere to the notion that a corporation is a creature of the sovereign merely, we run the risk of committing a grave injustice.<sup>69</sup>

We have seen that at Roman law corporations originally needed no fiat to bring them into being. Blackstone reports that the only reason why they were brought under control by Numa was that they had become a menace to the peace of the city of Rome. It is true that these societies were analogous to the mediæval guilds. The thought will not be quelled that all this jargon of invisible beings, kingly

<sup>67</sup> Full citations on these points will be found in Thompson, *Comm. on Law of Corps.*, Vol. I, Ch. XI.

<sup>68</sup> Cf. Kyd, pp. 313-314.

<sup>69</sup> See Maitland, *loc cit.* p. xxxviii.

prerogative, and all the rest of the paraphernalia of antiquated legal lore, is merely the effort of a bygone manner of thinking to account for or to bring about certain desired results. To-day, when men think more clearly and better than ever on scientific subjects, there is perceived a tendency to look through the veil of mediæval mysticism,<sup>70</sup> to see the corporation as it really is—a partnership, with limitations, in respect to its internal affairs; a person, *for certain purposes only*, as to the external world. This we understand to be the view of Morawetz, whose book is the first attempt to put the law upon a scientific basis.<sup>71</sup>

Finally it is to a Frenchman that is due the fame of putting the last sod upon the grave of the *Persona Ficta*. M. Duguit has considered the subject of the state with exhaustive care.<sup>72</sup> He finds this to be the real condition of affairs: That states as entities have no existence, that the conception of a sovereign—man or abstraction—is a myth. That the only thing actually approaching these ideas are small bodies of men who, for various reasons, impose their wills upon the vast majority. Since this is so, ideas of divine right and of popular government go by the board. It follows that the *Persona Ficta* receives its death blow. Because if the existence of the invisible being is dependent upon the will of the prince (or that which takes his place in other forms of government, *e. g.*, Parliament) and the actions of the prince have no juristic value, the fictitious person can have no juristic existence. Behind the concept of a separate individuality as representing any form of association from a partnership to a nation, there is nothing. All the laws of modern legislatures as to corporations amount simply to this: They are rules imposed by the temporary holders of the reins of government for the purpose of safeguarding the interests of the community from the conceived dangers of unrestricted association.

We have endeavored to trace in outline the history of the development of the conception of a corporation in the common law of England. It has been deemed impossible

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<sup>70</sup> *E. g.*, the Northern Securities Case.

<sup>71</sup> Victor Morawetz, *Private Corporations*.

<sup>72</sup> Duguit, *L'Etat, Le Droit Objectif et la Loi Positive*, Paris, 1901.

within reasonable limits to follow every detail of the subject. No doubt there exists and has existed since the time of Coke a well-defined *legal* conception of what a corporation really is. Much of the apparent confusion on the subject is due to two causes: First, the many kinds of corporations<sup>73</sup> which have existed from "time immemorial" in English law; second, the mass of legislation which has during the past seventy years been overlaid upon the subject. We have not followed up the development of minor titles of the law, but have tried to seize the essence of corporations as understood by the common law. We have desired to show that the focal idea was and is that of a single titular of property which is subject to the use of many individuals. That such individuality has no real existence. That this was admitted centuries ago by commentators who, imbued with ideas of divine right, asserted that the prince might create this invisible being out of hand.

Further, we have endeavored to show that this notion has survived even until now. That though the prince was driven from his throne, usurping legislatures might, according to the accepted view, also arbitrarily create intangible persons. Finally, that when the pendulum had swung so far that courts found themselves gravely discussing the point as to whether a corporation, having no soul, could be excommunicated or not,<sup>74</sup> it swung the other way, and that we are now on the upward beat toward common sense.

History is valueless if it teaches us no lessons. When the multitude of corporations is greater than the sands of the sea and their wealth more vast than Croesus ever dreamed, the problem of their control is of transcendent importance. Would we restrict their acquisitions? Then let us consider the barons and their statutes of *mortmain*. Would we be sure that their business is conducted without harm to the public? Then let us observe the "visitors" of charitable corporations.<sup>75</sup> Much may be learned from the treatment and resolution of ancient problems.

In short, though this is an age of codification of law and

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<sup>73</sup> Kyd, p. 320.    <sup>74</sup> *E. g.*, In *Tipling v. Pexall*, 2 Bulst. 233 (1613).

<sup>75</sup> The scheme suggested here has been in practical operation in the case of National Banks for over forty years.

though corporations in England must not be called so but pass under the name of joint stock companies,<sup>76</sup> the study of bygone ideas is of practical and instant value.

One thing we may predicate of the future development of the law of corporations. Having now in many cases and sometimes by virtue of legislative enactment escaped from the subtlety of the legal thought of the Middle Ages, the law is on the way toward perfection in the not far distant future. At some happy day, not yet arrived, the rights of the public and of the minority stockholders will be adjusted with equity to all.

In conclusion, we may say that in following the development of the law from the earliest ages to the present time we must realize that we stand upon the threshold of a new era. Legal problems of vast import concerning corporations must be solved in the near future. Guided by past experience and accumulated wisdom, let us hope that our judicial and other lawmakers will solve them wisely and well.

*Edmund Bayly Seymour, Jr.*

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<sup>76</sup> *Liverpool Ins. Co. v. Mass.*, 10 Wall, 566 (1870).