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HISTORY OF THE LAW OF BUSINESS CORPORATIONS BEFORE 1800.

I.

THE most striking peculiarity found on first examination of the history of the law of business corporations is the fact that different kinds of corporations are treated without distinction, and, with few exceptions, as if the same rules were applicable to all alike. Subdivisions into special kinds are indeed made, but the classification is based on differences of fact rather than on differences in legal treatment. Thus, corporations are divided into sole and aggregate. Again, they are divided into ecclesiastical and lay, and lay corporations are again divided into eleemosynary and civil. But the division having been made, the older authors [1] proceed to treat them all together, now and then recording some minor peculiarity of a corporation sole or of an ecclesiastical corporation with one member capable.

Municipal and business corporations, so unlike according to modern ideas, are classed together as civil corporations, and treated together along with the rest. Yet the East India Company was chartered in 1600, and other trading companies had been chartered even earlier, and between 1600 and 1800 numer-

[1] *E. g.*, Coke, in Sutton's Hospital Case, 10 Rep. 1, The Law of Corporations, 1 Blacks. Com. ch. xviii., Kyd on Corporations.

ous corporations were chartered, having for their objects, trade, fishing, mining, insurance, and other business purposes. To understand how it was that the law of business corporations was so connected with that of other corporations, and how it gradually became distinguished, it is necessary to understand how such corporations grew up, and in what way they were regarded when first they came into existence.

The general idea of a corporation, a fictitious legal person, distinct from the actual persons who compose it, is very old. Blackstone ascribes to Numa Pompilius the honor of originating the idea.[1] Angell and Ames are of the opinion that it was known to the Greeks, and that the Romans borrowed it from them.[2] Sir Henry Maine, however, shows that primitive society was regarded by its members as made up of corporate bodies, that the units "were not individuals but groups of men united by the reality or the fiction of blood relationship," and that the family, clan, tribe, were recognized as distinct entities of society before individuals were.[3] It is not surprising, therefore, to find in the Roman law the conception of corporate unity early developed. Savigny, in whose treatise[4] may be found the best connected account of corporations in the Roman law, states that villages, towns, and colonies were the earliest. "But once established definitely for dependent towns, the institution of the legal person was extended little by little to cases for which one would hardly have thought of introducing it. Thus, it was applied to the old brotherhoods of priests and of artisans; then, by way of abstraction, to the State, which, under the name of *fiscus*, was treated as a person and placed within the jurisdiction of the court. Finally, to subjects of a purely ideal nature, such as gods and temples." Savigny then enumerates the different kinds of corporations among the Romans. The present subject is concerned with but one of these, — the business associations. "To this class belong the old corporations of artisans who always continued to exist, and of whom some, the blacksmiths, for example, had particular privileges; also new corporations, such as the bakers of Rome, and the boatmen at Rome and in the provinces. Their interests were of the

[1] 1 Blacks. Com. 468.
[2] Angell and Ames on Corp. (1st ed.).
[3] Ancient Law (4th ed.), 183.
[4] System des Heutigen Römischen Rechts, vol. ii. § 86 *et seq.*

same nature, and this served as the basis of their association, but each one worked, as to-day, on his own account."

"There were also business enterprises carried on in common and under the form of legal persons. They were ordinarily called *societates*. Their nature was, in general, purely contractual; they incurred obligations, and they were dissolved by the will as well as by the death of a single member. Some of them obtained the right of being a corporation, keeping always, however, the name of *societates*. Such were the associations for working mines, salt-works, and for collecting taxes."[1]

This latter kind of corporation seems never to have become sufficiently numerous or important to exert a definite influence on the law. Perhaps the Romans were not a sufficiently commercial people to develop the uses of business corporations. In common with other associations the authorization of the supreme power of the State was needed to constitute them legal persons, though this might be given by tacit recognition;[2] and the assent of the sovereign was equally necessary for dissolution. Three members were requisite for the formation of a corporation, though not for its continued existence. The rights and duties of the fictitious person corresponded closely to those of an actual person, so far as the nature of the case admitted. It could hold and deal with property, enjoy *usufructus*, incur obligations, and compel its members to contribute to the payment of its debts, inherit by succession either testamentary or by patronage, and take a legacy. Whether it could commit a tort was a disputed question.

After the introduction of Christianity the church found numerous applications in its own organization for the doctrines which had been developed in regard to corporations, and through the church and its officials these doctrines strongly influenced the law of England, where they were applied to the existing associations.

The earliest corporate associations in England seem to have

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[1] Savigny, System etc., § 88.

[2] Blackstone is, therefore, in error in saying (1 Com. 472) that by the civil law the voluntary association of the members was sufficient unless contrary to law — an error probably caused by the fact that penalties were imposed on certain forbidden associations in the nature of clubs for acting without the authorization of the State, and only on these.

been peace-guilds, the members of which were pledged to stand by each other for mutual protection.[1] Such brotherhoods would naturally be formed by neighbors or by those exercising similar occupations. From the tendency to associate on account of proximity of residence were developed municipal corporations; from the tendency to associate on account of similarity of occupation the craft guilds grew. These two classes of corporations were the earliest regularly chartered lay corporations in England. Both of them had their counterparts in the Roman law.[2] At first sight they do not seem to have much in common, but the ancient municipal corporation differed from its modern descendant. It was a real association, and membership could not be acquired simply by residing within the town limits. It exercised a minute supervision over the inhabitants, — among other things regulating trades. The guilds or companies did the same thing, only on a more restricted scale. They made by-laws governing their respective trades, which were not simply such regulations as a modern trade-union might make, since any one carrying on a trade, though not a member of the guild of that trade, was bound by its by-laws, so long as they were not opposed to the law of the land or to public policy as it was then conceived.[3] In short, the guilds exercised a power similar to that exercised by the municipal corporations, and, indeed, so late as the time of Henry VI. guildated and incorporated were synonymous terms.[4] Instead of having for its field all inhabitants of a district and local legislation of every character, the guild was confined to such inhabitants of the district as carried on a certain trade and to regulations suitable for that trade. So far as that trade was concerned the right of government belonged to the guild.

The first trades to become organized in this way were naturally the manual employments necessary to provide the community with the most fundamental necessities of civilized life. The weavers were the earliest. They received a charter from Henry II., " with all the freedom they had in the time of Henry I." The goldsmiths were chartered in 1327, the mercers in 1373, the

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[1] See History of Guilds, Luigi Brentano.

[2] For an account of guilds at Rome see " Les Sociétés Ouvrières à Rome," 96 Rev. des Deux Mondes, 626, by Gaston Boissier.

[3] Butchers' Company *v.* Morey, 1 H. Bl. 370; Kirk *v.* Nowill, 1 T. R. 118.

[4] Madox, Firma Burgi, 29.

haberdashers in 1407, the fishmongers in 1433, the vintners in 1437, the merchant tailors in 1466.[1]

During the sixteenth century the growth of the commercial spirit, fostered by the recent discovery of the New World, the more thorough exploration of the Southern Atlantic and Indian Oceans, and the search for a North-west passage, led to the establishment and incorporation of companies of foreign adventurers, similar in all respects to the earlier guilds, except that their members were foreign instead of domestic traders. Among the earliest of these were the African Company, the Russia Company, and the Turkey Company.[2] The last two were called "regulated companies"; that is, the members had a monopoly of the trade to Russia and to Turkey, but each member traded on his own account.

A more famous company was chartered by Queen Elizabeth in 1600, under the name of the Company of Merchants of London, trading to the East Indies.[3] It had been found that the expense incident to fitting out ships for voyages, often taking several years for their completion, was too great to be borne easily by individual merchants, and it was one of the claims to favorable consideration which the East India Company put forward, that "noblemen, gentlemen, shopkeepers, widows, orphans, and all other subjects may be traders, and employ their capital in a joint stock."[4]

Sums of various amounts were subscribed, and the profits were to be distributed in the same proportions. This joint-stock adventure was not, however, identical with the corporation. Members of the corporation were not necessarily subscribers to the joint stock, and any member could, if he liked, carry on private trade with the Indies, — a privilege belonging exclusively to members. By the charter, apprentices and sons of members were to be admitted to membership in the same way as was customary in the guilds.

The East India Company was, therefore, in its early days, like the other trading companies, — an association of a class of merchants to which was given the monopoly of carrying on a particular trade, and

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[1] 1 And. Hist. of Commerce, 250. [2] Knight's Hist. of England, vol. v. 39.

[3] What follows in regard to the East India Company is based on "The History of European Commerce with India," by David Macpherson, London, 1812, and documents therein quoted.

[4] From the defence of the Company in the Privy Council, 2 And. Hist. Com. 173.

the right to make regulations in regard to it. Till 1614 the joint stock was subscribed for each voyage separately, and at the end of the voyage was redivided. After that, for many years, the joint stock was subscribed for a longer or shorter term of years, and at the end of each term the old stock was usually taken at a valuation by the new subscribers. Membership in the corporation, however, soon became merely a formal matter, — useless, except to those interested in the joint stock, especially as regulations were passed forbidding other members from engaging in private trading ventures to India. After 1692 no private trading of any kind was allowed except to the captains and seamen of the Company's ships. The form, however, was still retained, and every purchaser of stock who was not a member of the Company was obliged to pay a fee of £5 for membership.

At this time (1692) there were but two other joint-stock companies of any importance in England, — the Royal African Company and the recently chartered [1] Hudson's Bay Company. The outline given above will serve to indicate their general nature and also to show how something like the modern joint-stock corporation grew out of the union of the ideas of association for the government of a particular trade by those who carried it on, and of combination of capital and mutual coöperation, suggested and made necessary by the great expense incident to carrying on trade with distant countries. But the corporation was far from being regarded as simply an organization for the more convenient prosecution of business. It was looked on as a public agency, to which had been confided the due regulation of foreign trade, just as the domestic trades were subject to the government of the guilds. In a little book, entitled "The Law of Corporations," published anonymously in 1702,[2] it is said: "The general intent and end of all civil incorporations is for better government, either general or special. The corporations for general government are those of cities and towns, mayor and citizens, mayor and burgesses, mayor and commonalty, etc. Special government is so called because it is remitted to the managers of particular things, as trade, charity, and the like, for government, whereof several companies and corporations for trade were erected, and several hospitals and houses for charity." [3]

[1] 1670. [2] This is the first English book wholly devoted to the subject of corporations.
[3] Law of Corporations, p. 2.

This idea that the object of a business corporation is the public one of managing and ordering the trade in which it is engaged, as well as the private one of profit for its members, may also be noticed in the charters granted to new corporations, especially in the recitals, and in the provisions usually found that the newly chartered company shall have the exclusive control of the trade intrusted to it.

At the end of the seventeenth century the advantages of corporate enterprises seem to have been realized, and acts of Parliament, authorizing the king to grant charters to various business associations, were more frequent. In 1692 the Company of Merchants of London trading to Greenland was incorporated;[1] the act reciting the great importance of the Greenland trade, how it had fallen into the hands of other nations, and could only be regained by a greater undertaking than would be possible for a private individual, and the consequent necessity of a joint-stock company. In 1694 the Bank of England received its first charter.[2] The act authorizing it was essentially a scheme to raise money for the government. Those who advanced money to the government were to receive a corresponding interest in the bank, the capital of which was to consist of the debt of the government. No other association of more than six persons was allowed to carry on a similar business.[3] Charters were also granted about this time to the National Land Bank,[4] the Royal Lustring Company,[5] the Company of Mine Adventurers,[6] the famous South Sea Company,[7] the Royal Exchange and the London (Marine) Assurance Companies.[8] In these charters also the public interest in having the undertaking prosecuted and the great expense incident thereto are mentioned. The capital of the South Sea Company, like that of the Bank, consisted of a debt due from the government on account of money loaned by private individuals.

The extravagant commercial speculations in joint-stock companies and the stock-jobbing in their shares which characterized the early part of the eighteenth century are well known. Anderson, in his "History of Commerce,"[9] enumerates upwards of

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[1] 4 and 5 Wm. III., c. 17.
[2] 5 and 6 Wm. III., c. 20.
[3] By Stat. 6 Anne, c. 22. § 9.
[4] 7 and 8 Wm. III., c. 31.
[5] 9 and 10 Wm. III., c. 43.
[6] See 9 Anne, c. 24.
[7] 9 Anne, c. 21.
[8] 6 Geo. I., c. 18.
[9] Vol. i. (1st ed.) 291 *et seq.*

two hundred companies formed about the year 1720, for the prosecution of every kind of enterprise, including one for the "Insurance and Improvement of Children's Fortunes," and another for "Making Salt Water Fresh." With very few exceptions, these companies were not incorporated and in 1720 writs of *scire facias* were issued,[1] directing an inquiry as to their right to carry on business, in usurpation of corporate powers. This put a sudden end to many of these unfortunate ventures, and the consequent collapse of the enormously inflated public credit carried down others, so that only four of the long list were still in existence when Anderson wrote, — the York Buildings Company, the two Assurance Companies mentioned above, and the English Copper Company. The speculation in shares had been too great and the expectations of profit too extravagant not to cause a correspondingly great distrust in corporate enterprises when the bubble burst, and the profits realized were found to be small and extremely variable. Adam Smith, writing in 1776, was of opinion,[2] that "the only trades which it seems possible for a joint-stock company to carry on successfully without an exclusive privilege, are those of which all the operations are capable of being reduced to what is called routine, or to such a uniformity of method as admits of little or no variation. Of this kind is, *first*, the banking trade; *secondly*, the trade of insurance from fire, and from sea risk and capture in time of war; *thirdly*, the trade of making and maintaining a navigable cut or canal; and, *fourthly*, the similar trade of bringing water for the supply of a great city." To render the establishment of a joint stock reasonable, however, the author says, two other circumstances should concur: first, "that the undertaking is of greater and more general utility than the greater part of common trades; and, secondly, that it requires a greater capital than can easily be collected into a private copartnery."

But during the latter part of the eighteenth century corporations were gradually increasing in number and importance. The need for them was felt in establishing canals, water-works, and, to some extent, in conducting the growing manufactures of the kingdom. The progress was indeed slow, and was destined to be so until the introduction of gas-lighting into all the larger cities and

[1] And. Hist. Com., Vol. ii. 296.

[2] Wealth of Nations, book v. ch. i. art. 5.

towns early in the present century, and later the laying of railways, created a wide-spread necessity for united capital.

The outline sketch just given of the growth of business corporations shows that they are not a spontaneous product, but are rather the result of a gradual development of earlier institutions, running back farther than can be traced. It would be strange if signs of this development were not found in the history of the law relating to them. The natural expectation would be, and such is in fact the case, that as to the points which modern business corporations have in common with the early guilds and municipalities, the law relating to them dates back farther than almost any other branch of the law, while as to the points which belong exclusively to the conception of the business corporation, the law has been formed very largely since 1800. And not only had a body of new law to be thus formed, but old doctrines laid down by early judges as true of all corporations, though in reality suited only to the kinds of corporations then existing, had to be discarded or adapted to changed conditions.

In the first place, then, the endeavor will be to examine the points which belong essentially to every kind of corporation, and afterwards to consider what was settled before the present century in regard to the peculiar relations arising from the nature of a business corporation.

In the case of Sutton's Hospital,[1] decided in 1612, the general law of corporations was considered at some length, and the following things were said to be "of the essence of a corporation:[2] 1st, Lawful authority of incorporation, and that may be by four means, viz., by the common law, as the king himself, etc.; by authority of Parliament; by the king's charter; and by prescription. The 2d, which is of the essence of the incorporation, are persons to be incorporated, and that in two manners; viz., persons natural, or bodies incorporate and political. 3d, A name by which they are incorporated. 4th, Of a place, for without a place no incorporation can be made. 5th, By words sufficient in law, but not restrained to any certain, legal, and prescript form of words."

This, then, was the mould in which every corporation had to be cast, regardless of what might be its nature or its purpose.

The first requirement, due authorization, existed in the Roman

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[1] 10 Rep. 22 b. [2] 10 Rep. 29 b.

law as well as in English.[1] But, since corporate bodies were recognized as facts from the earliest dawn of history, when the rule became recognized that the authority of the supreme power of the State was necessary for their formation, a theory had to be found to support the old associations, which had not been formed in accordance with the rule. This was done both in Roman and in English law by recognizing that a corporation could come into existence by prescription. It is safe to say, however, that prescriptive and common-law corporations, were of the older forms only, and that for the formation of business corporations, from the first, a charter from the king directly or by authority of Parliament was necessary.

Originally the power was exercised exclusively by the king; but his power to grant charters allowing exemptions or monopolies was gradually restricted, like many of his other powers, as little by little the House of Commons assumed the entire effective control of the government. The regulated Russia Company received its charter from the crown in 1555 without the consent of Parliament; so did the East India Company in 1600, the Canary Company in 1665, the Hudson's Bay Company in 1670. All of these companies were given monopolies. The rights of the Russia Company and of the East India Company were afterwards regulated by statute; and the patent of the Canary Company was soon withdrawn, though not before giving rise to a test case[2] on the validity of the monopoly, in which the court decided against it. The Hudson's Bay Company continued to enjoy its charter without interference, but its right to a monopoly held good so long only as nobody cared to dispute it. After the Revolution, no doubt, it was tacitly admitted that for the validity of a charter conferring a monopoly or other special privilege an act of Parliament was necessary, though for granting the simple franchise of acting as a corporation the patent of the king was sufficient.

The last of the requisites enumerated by Coke may be regarded as included within the first. "Lawful authority of incorporation" must necessarily be given "by words sufficient in law." The necessity for persons to compose the corporation results from the nature of things rather than from any rule of law. Perhaps the same may be said of the importance of a name. As an actual

[1] See *supra*, p. 107.

[2] Horne *v.* Ivy, 1 Ventr. 47.

person could hardly transact business or sue and be sued in the courts without a name, so the fictitious person of a corporation rests under a similar necessity. Possibly Coke meant something more, regarding a corporation as an abstraction which would have no existence without a name. "For a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law."[1] But if such was his view, it was not shared by his successors, when the tinge of scholasticism which colored all the law of the period faded away. In the case of the Dutch West India Company *v.* Van Moses,[2] decided in 1724, it was held that the action was well brought, though no certain name had been given the company by the Dutch States, the name being that by which it was usually called; and there are numerous cases to the effect that a technical misnomer of a corporation had even less effect than the misnomer of an individual.[3]

When Coke wrote, it seems to have been necessary that a corporation should be named as of a certain place.[4] This requirement, apparently so fanciful, is explained by the fact that the early corporations were almost all formed for local or special government of some kind, and it was consequently necessary to designate the place where the jurisdiction was to be exercised. The requisite must very early have become merely formal in case of certain classes of corporations, and might be fictitious. Thus, such names may be found as, "The Hospital of St. Lazarus of Jerusalem in England" and "The Prior and Brothers of St. Mary of Mt. Carmel in England."[5] As the purpose for which corporations were instituted became more varied, and the modes of thought of lawyers became more reasonable, less stress was laid on the formality under consideration. It is hardly mentioned in "The Law of Corporations" or in Blackstone's chapter.[6] Kyd merely says, "It is generally denominated of some place;[7] and it may be assumed as true of business corporations, as well as of most others, that before the beginning of the present century there was no

[1] Sutton's Hospital Case, 10 Rep. 32.

[2] 1 Stra. 612; and see the Law of Corporations, 13. Also, if the name of a corporation be changed, it retains its possessions, debts, etc. Bishop of Rochester's Case, Owen, 73; s. c. 2 And. 107; Luttrel's Case, 4 Rep. 87 b; Mayor of S. *v.* Butler, 3 Lev. 237; Haddock's Case, 1 Ventr. 355.

[3] Kyd, 236 *et seq.*

[4] Button *v.* Wrightman, Cro. Eliz. 338.

[5] Rol. 512.

[6] Blacks. Com. ch. xviii.

[7] 1 Kyd, 228.

force in Coke's fifth essential for the existence of a corporation other than as a matter of convenience.[1]

Grant, now, that a corporation was legally called into being, what abilities and disabilities was it considered to have? Coke says:[2] "When a corporation is duly created all other incidents are tacitly annexed — . . . and therefore divers clauses subsequent in the charters are not of necessity, but only declaratory and might well be left out; as —

"1st. By the same to have authority, ability, and capacity to purchase, but no clause is added that they may alien, etc., and it need not, for it is an incident.

"2d. To sue and be sued, implead and be impleaded.

"3d. To have a seal; that is also declaratory, for when they are incorporated they may make or use what seal they will.

"4th. To restrain them from aliening or devising but in certain form; that is an ordinance testifying the king's desire, but it is but a precept and does not bind in law.

"5th. That the survivors shall be a corporation; that is a good clause to oust doubts and questions which might arise, the number being certain.

"6th. If the revenues increase, that they shall be used to increase the number of the poor, etc.; that is also explanatory.

"8th. To make ordinances; that is requisite for the good order and government of the poor, etc., but not to the essence of the incorporation.

"10th. The license to purchase in mortmain is necessary for the maintenance and support of the poor, for without revenues they cannot live, and without a license in mortmain they cannot lawfully purchase revenues, and yet that is not of the essence of the corporation, for the corporation is perfect without it."

This list of attributes laid down by Coke as necessarily belonging to all corporations is quoted with approval in "The Law of Corporations."[3] It is given by Blackstone in substance, though altered to the following form:[4]

The incidents which are tacitly annexed to every corporation as soon as it is duly erected are —

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[1] See Mayor of Stafford *v.* Bolton, 1 B. & P. 40.

[2] Sutton's Hospital Case, 10 Rep. 30, citing as authority 22 Edw. IV., Grants, 30.

[3] p. 16.

[4] 1 Blackst. Com. 475; also in Wood's Inst. of the Laws of Eng., bk. i. ch. viii.

"1st. To have perpetual succession. This is the very end of its incorporation, for there cannot be a succession forever without an incorporation, and therefore all aggregate corporations have a power necessarily implied of electing members in the room of such as go off.

"2d. To sue or be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may.

"3d. To purchase lands and hold them for the benefit of themselves and their successors, which two are consequential of the former.

"4th. To have a common seal. . . .

"5th. To make by-laws or private statutes for the better government of the corporation, which are binding on themselves, unless contrary to the law of the realm, and then they are void."

The enumeration of Blackstone is given without substantial alteration by Kyd,[1] though he adds that the last two powers are unnecessary for a corporation sole, and that the right to make by-laws is not inseparably incident to all kinds of corporations aggregate, for there are some to which rules may be prescribed; and, further, that the list is not exhaustive. The first three capacities are reducible to this, that the fictitious person of the corporation shall have, in general, the capacity of acting as an actual person, so far as the nature of the case admits. Such must have been the recognized law ever since corporations, as we understand the word, existed; for the conception of a corporation as a legal person, a conception going back farther than can be definitely traced, involves necessarily the consequence that before the law the corporation shall be treated like any other person. To this consequence there is a necessary exception in regard to such rights and duties as require an actual person for their subject.

The right and the necessity of having a corporate seal was probably in its origin simply the result of treating a corporation in the same way as an individual. The great antiquity of the custom of using seals is well known. It prevailed among the Jews and Persians,[2] as well as among the Romans. It was spread over all the countries whose systems of law were borrowed from the Romans, and it was introduced into England by the Normans.[3]

[1] Vol. i. p. 69.

[2] 2 Blackst. Com. 305; Genesis, xxxviii. 18; Esther, viii. 8; Jeremiah, xxxii. 10.

[3] 2 Blackst. Com. 306.

In England, owing to the generally prevailing illiteracy, the use of the seal became the ordinary way of indicating the maker of a charter. The practice, apparently, was not the result of a desire for peculiar solemnity, but merely for indentification. The use and object of a corporate seal may be assumed to have been the same as of an individual seal. It is true that Blackstone [1] finds a reason for its use in the fact that "a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse; it therefore acts and speaks only by its common seal." But this reason, besides bearing on its face indications of having been invented after the fact, goes altogether too far. A corporation has no hand with which to affix its seal, and if it may perform that act by an agent, there is no reason in the nature of things why it should not do anything else by the same instrumentality.[2] And in the Roman law the use of a common seal was only a possible, not a necessary, way for a corporation to act.

When writing became a general accomplishment, the use of a seal for private documents was reserved for instruments of a peculiarly formal or solemn character. That a similar transition did not take place in the use of the seal of a corporation may be ascribed to the natural conservatism of a number of men acting in a body, and to the fact that from the character of early corporations the inconvenience of sealing all corporate contracts was not likely to be felt. However this may be, it was a rule of law well settled before business corporations came into existence that a corporation could only act by deed under its common seal. To the rule some slight exceptions were allowed, but only in few cases. Such a restriction could not fail to be extremely embarrassing to corporations, when they afterwards sprang up, the object of which was to carry on trade; and the development of the law on this point in regard to such corporations shows not so much a growth of legal doctrine, as an endeavor to do away with the inconvenient restraint imposed on all aggregate corporations, which had its origin when guilds and municipal and ecclesiastical associations were the only corporate bodies, — an endeavor that met with but indifferent success.[3]

The general rule seems to have been well settled in the fifteenth

[1] 1 Com. 475.
[2] 1 Blackst. Com. (Sharswood's ed.) 475, n. 7.
[3] Taylor on Evidence (8th ed.), § 976 *et seq.*

century, and it also appears that there were some slight exceptions to it.[1] Just what these were, was by no means definitely marked out. In Y. B. 4 Hy. VII. 17 b, one of the judges, Townsend, said: "A body corporate cannot make a feoffment or lease or anything relating to their inheritance without deed, but of offices and things which pertain to servants they can. For they can appoint plowmen and servants of husbandry without deed, and butlers and cooks and things of that kind, and can depute their servants to do anything without deed. They can do this because it is not in disinheritance of the corporation, but only by way of service, and it is the common course to justify by command of the body corporate, and not show anything from it." Brian, however, was of a contrary opinion, saying, "A body corporate can do none of those things without deed." Townsend's opinion undoubtedly made more sweeping exceptions than were afterwards allowed, but his statement that a corporation could appoint a cook or butler without a deed was for centuries cited as indicating the extent of the power of acting without using the corporate seal.[2] In Y. B. 7 Hy. VII. 9, it was held that the defendant in an action of trespass could not justify as acting for a corporation without showing authority by deed. Wood adds: "But of little things the law is otherwise, for it would be infinite if each little act was by deed, as, a command to their servants, to light a candle in church, or to make a fire, or such things." With this the court with one exception agreed. This statement of the law is based on a principle which continued to be decisive in the eighteenth as in the sixteenth century. In transactions which from their nature could be done under seal only with great inconvenience, the formality of sealing was dispensed with. The inconvenience might arise from the pettiness of the act, or from its being of every-day occurrence and necessity, or from the importance of immediate action. The exception was wrested by common sense from the scope of the rule.

Accordingly, when business corporations arose, it must have been tacitly admitted that the daily business need not all be transacted under seal. For instance, the bills of the Bank and of the East India Company were never sealed. The right to make

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[1] Y. Bks. 9 Edw. IV. 39, 4 Hy. VII. 17 b, 7 Hy. VII. 9.

[2] Horne *v.* Ivy, 1 Vent. 47; Dunston *v.* Imp. Gas Co., 3 B. & Ad. 125, 129; Tilson *v.* Warwick Gas Co., 4 B. & C. 962, 964.

such bills was afterward defended and explained as necessarily implied in the powers given them by Parliament. These corporations "could not carry on their business without the making of such instruments, and they would cease to be bills or notes if under seal. It is clear, however, that this indulgence is not allowed by law to be extended beyond cases of absolute necessity."[1]

A more difficult point was raised in 1717, in the case of Rex *v.* Bigg,[2] the leading case before the present century on the extent to which a business corporation could act without the use of its seal. Bigg was charged with felony in altering a bank-note signed by one Adams, an officer of the bank. It was objected that Adams did not have authority under the seal of the bank to affix his name, and that consequently the altered instrument was not a valid obligation, and the prisoner was not guilty of forgery. The argument of Peere Williams for the prisoner is fully given, and the cases which he cites seem to bear him out in his contention that such an agent could not be appointed without deed; but a majority of the court held the prisoner guilty of felony. No opinion is given. It must be admitted that the decision involved some extension of the old rule that a cook or butler or servant for some petty purpose could be retained without a sealed instrument, but after this the law was settled that the regular servants and agents of a business corporation were to be regarded in a similar way.[3]

But, granting this, how far could an agent of such a corporation act in its behalf without a deed? As mentioned above, a corporation, the charter of which authorized it to carry on a business that required for its proper exercise the issue of bills and notes, did not need to affix the common seal to such obligations. Undoubtedly, also, a large amount of routine business was transacted entirely by parol, and there is no case reported where a transaction executed on both sides was set aside because the corporation did not act by deed. But, for the rest, it may at least be said that till after the first quarter of the present century had passed, no unsealed executory contract was binding on either party;[4] and it is probable, also, that in a partially executed transaction no special

[1] East London Waterworks Co. *v.* Bailey, 12 Moore, 532; s. c. 4 Bing. 283; and see Edie *v.* E. I. Co., 2 Burr. 1216 where assumpsit was brought against the Company on a bill of exchange, without objection.

[2] 3 P. Wms. 419.

[3] Bac. Abr., tit. Corporation (E) 3; 1 Kyd on Corp. 26.

[4] East London Waterworks *v.* Bailey, 12 Moore, 532; s. c. 4 Bing. 283.

agreement was valid without seal. On the other hand, if the transaction was such as of itself gave rise to an obligation, it could be enforced; forfeitures and tolls could be recovered in assumpsit; [1] if land were demised without deed, and the lessee occupied the premises, he was liable for rent in an action for use and occupation; and similarly, no doubt, if goods were bought or sold by a corporation and delivery was made, the vendee could have been forced to return or pay for them.[2]

The courts were sometimes able to mitigate the hardships which followed from the necessity of doing everything under seal, by presuming, as a matter of pleading, that when performance by a corporation was averred, performance with all necessary formalities was intended,[3] and partial relief was given in special instances by act of Parliament; [4] but at best it would be hard to find a more striking instance of a rule of law which arose from the customs prevailing in an entirely different state of society still maintaining itself when every reason for its existence had ceased, and its only effect was to produce injustice.

The right to pass by-laws for the regulation of their affairs belonged to corporations in the Roman law [5] from a very early period, and also in the English law. Indeed, the right is a consequence almost necessarily following from the nature of the early corporations. Institutions to which were delegated powers of government, whether ecclesiastical or secular, whether exercised over all within a certain locality or confined to those practising a particular trade, must have been allowed appropriate means of exerting their authority, and the scope of the by-laws must have been proportioned to the jurisdiction. Thus, the by-laws of a corporate town were binding on any one who came within its limits.[6] The by-laws of a guild were binding not on its members only,

[1] The Barber Surgeons *v.* Pelson, 2 Lev. 252; Mayor of London *v.* Hunt, 3 Lev. 37; and see Parbury *v.* Bank of England, 2 Doug. 524, where, at the suggestion of Lord Mansfield, a special action of assumpsit was brought on account of the bank's refusal to transfer stock on the books.

[2] E. I. Co. *v.* Glover, 1 Stra. 612.

[3] Edgar *v.* Sorell, Cro. Car. 169; Tilson *v.* Warwick Gas Co., 4 B. & C. 962; Rex *v.* Bigg, 3 P. Wms. 419.

[4] *E. g.*, 11 Geo. I. c. 30, § 43, which allowed the two insurance companies recently chartered to make use of the freer pleading in vogue in the action of assumpsit when sued on their policies, which were under seal.

[5] Dig. xlvii. 22, lex 4.

[6] Cuddon *v.* Eastwick, 1 Salk. 193, pl. 5.

but on such outsiders as exercised the trade which the guild governed and regulated.[1] The power of making by-laws would be useless without means of enforcing them, and the imposition of penalties for failure to comply with its by-laws was within the power of a corporation, from an indefinite time.[2] The farther back the examination is carried the broader seems to have been the power of punishing the refractory, extending by special charter in many cases to imprisonment as well as fine.[3] By Coke's time, however, it was settled that the power of imprisonment could not be given by letters-patent from the king, but required an act of Parliament; [4] and it was further held that similar authority was needed for a by-law affixing as a penalty the forfeiture of goods; [5] but that such by-laws were formally valid may be inferred from the fact that this mode of enforcement was sometimes supported as being in accordance with an immemorial custom.[6] Further limitations on the power of making by-laws, which were more strictly construed as time went on, were that they must not be contrary, nor even cumulative, to the statutes of Parliament,[7] nor in restraint of trade,[8] nor unreasonable.[9] Business corporations, when they arose, were dealt with according to the same principles. As it was well recognized that such by-laws only could be made as were in harmony with the objects for which the corporation was created,[10] and as the purposes for which business corporations were chartered were as a rule definitely marked out, the scope of the right to make by-laws was correspondingly narrowed. A few of the earlier joint-stock companies were intrusted with the regulation of the trade in which they were engaged, and the by-laws of these were binding on all engaged in the trade, precisely as was the case with guilds.[11] But by the change in the conception of a

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[1] Butchers' Co. *v.* Morey, 1 H. Bl. 370; Kirk *v.* Nowill, 1 T. R. 118.

[2] The Law of Corp. 209.

[3] Grant on Corp. 86, especially notes d and f.

[4] Towle's Case, Cro. Car. 582; Chancey's Case, 12 Rep. 83.

[5] 8 Rep. 125 a; Horne *v.* Ivy, 1 Ventr. 47; Clarke *v.* Tuckett, 2 Ventr. 183; Nightingale *v.* Bridges, 1 Show. 135.

[6] Clearywalk *v.* Constable, Cro. Eliz. 110; Sams *v.* Foster, Cro. Eliz. 352; s. c. Dyer, 297 b.

[7] Grant on Corp. 78.

[8] Ibid. 83.

[9] Ibid. 80.

[10] Child *v.* Hudson's Bay Co., 2 P. Wms. 207; 2 Kyd on Corp. 102.

[11] *E.g.*, the East India Company in its early days regulated the right of private trading with the Indies, and soon forbade it altogether. It endeavored to enforce this rule against

corporation from an institution for special government to a simple instrumentality for carrying on a large business, the right to pass by-laws was restricted to regulations for the management of the corporate business.[1] Such regulations, of course, like the by-laws of municipal corporations and guilds, were void if contrary to statutory or common law, or if unreasonable. Whether a certain by-law was held unreasonable or not depended in some measure on the discretion of the court. The decision might be different when judged by the standards of the eighteenth century from what it would be if judged by modern standards. Thus, a by-law of the Hudson's Bay Company giving itself a lien on its members' stock for any indebtedness due from them to the Company was held valid,[2] the court saying, "All by-laws for the benefit and advantage of trade are good unless such by-laws be unreasonable or unjust; that this, in their opinion, was neither." To-day, in a jurisdiction unfettered by authority, the conclusion would probably be otherwise.[3]

In addition to the doctrines which have just been considered, a few others may be mentioned as applicable to all corporations alike. In general, questions of rights and duties towards the outside world are much the same for all kinds of corporations. The law, it is said, makes no personal distinctions, and it is at least true that wherever considered practicable the fictitious legal person of a corporation, whatever its nature, was treated by the law in the same way as an actual person. On the other hand, the law regulating the relations of the members to each other and to the united body must differ according to the nature and objects of the corporation.

It has often been questioned whether a corporation could commit a tort or crime. The better opinion in the Roman law seems to

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a non-member by forfeiture of his vessel. He petitioned the House of Lords, which ordered the Company to put in its answer. The case finally resulted in a quarrel between the Lords and the Commons as to the right of the former to take jurisdiction. The Lords gave judgment for the plaintiff, but it was never executed. Macpherson, Hist. 127. See, also, Horne *v.* Ivy, 1 Ventr. 47.

Further illustrations of by-laws of business corporations binding on the public may be found in the regulations passed by early canal and railway companies in accordance with 6 Geo. IV. c. 71, and 8 and 9 Vict. c. 20, § 109.

[1] Child *v.* Hudson's Bay Co., 2 P. Wms. 207.

[2] Child *v.* Hudson's Bay Co., 2 P. Wms. 207, re-argued *sub nom.* Gibson *v.* Hudson's Bay Co., 1 Stra. 645; s. c. 7 Vin. Abr. 125.

[3] Lowell, Transfer of Stock, § 166.

have been that the question should be answered in the negative, at least whenever *dolus* or *culpa* was necessary to make the act under consideration wrongful.[1] In England, however, it was very early held that corporations might be liable in actions on the case or in trespass,[2] and afterwards in trover.[3] But it is not likely that a corporate body would have been held liable for any tort of which actual malice or *dolus* was an essential part. Similarly it was held that a corporation could not be guilty of a true crime,[4] that is, it could not have a criminal intent, but it could be indicted for a nuisance or for breach of a prescriptive or statutory duty, and, in general, where only the remedy was criminal in its nature.[5]

It was generally laid down that a corporation could not hold in trust.[6] It is not very clear exactly on what reasoning the conclusion was based. There is very little to support it, except in very old cases. The view gradually became obsolete, and though there was no decision before the year 1800 definitely deciding the point, it is probable that it was recognized before that time that a corporation might hold in trust.[7]

Samuel Williston.

CAMBRIDGE, May 31, 1888.

(*To be continued.*)

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[1] Savigny, System, §§ 94, 95.

[2] See Grant on Corp. 277, 278, and notes, in which are cited many cases from the Year Books.

[3] Yarborough *v.* Bank of England, 16 East, 6.

[4] Anon., 12 Mod. 559; that it cannot commit treason see Vin. Abr., Corpor. Z, pl. 2.

[5] Grant on Corp. 283, 284.

[6] The authorities are collected in Gilbert on Uses, 5, 170, and Sugden's note.

[7] See Atty.-Gen. *v.* Stafford, Barnard. Ch. 33.