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Edited by

L. RADZINOWICZ

and J. W. C. TURNER

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EDITORIAL NOTE

THE present publication arises out of a venture initiated by the Cambridge Department of Criminal Science some six years ago. It was then that in collaboration with the *Canadian Bar Review* the Department sponsored a series of short reports on problems of immediate interest in criminal science. Twelve reports appeared in the *Canadian Bar Review* and afterwards in pamphlet form. The welcome extended to this series—almost all the pamphlets are out of print—encouraged us to embark on a somewhat more ambitious scheme.

The *Journal of Criminal Science*—the first volume of which we now present—will appear from time to time. Its aim is to present material which will be of use both to those who take part in the administration of criminal justice and to all who are interested in the impact of crime on modern society.

The enterprise has been well supported and we take this opportunity of expressing to the authors whose contributions constitute this present number of the *Journal* our gratitude for their valued help.

We are happy to announce that arrangements have been made to include in our next number articles by Professor P. Logoz, Judge of the Federal Tribunal of Switzerland, by Professor Magnol, Dean of the Faculty of the University of Toulouse, and by Dr H. Edelston, Director of the Bradford Child Guidance Clinic.

We also record our acknowledgments to Messrs Macmillan and Co., the publishers of our *English Studies in Criminal Science*, who despite present difficulties, have made it possible for this *Journal* to appear.

LEON RADZINOWICZ. J. W. C. TURNER.

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THE RESPONSIBILITY OF CORPORATIONS UNDER CRIMINAL LAW

By SIR ROLAND BURROWS, K.C.

Recorder of Cambridge

A CORPORATION is a mere legal institution, having no real existence, and has been devised for reasons of convenience as having rights and being subject to duties on the analogy of a human being. If a corporation has members, its personality is quite distinct from theirs.

Corporations are classed as corporations sole and as corporations aggregate. The former are really personified offices; the latter are composed of members who may or may not have a voice in the management of affairs. There is really no compelling reason why a corporation should have members at all, but one thing is essential, viz. that there should be some individual or group of individuals who are entrusted with the exercise of its functions, because no corporation can operate without human aid. All its activities, whether lawful or not, must be effected through the agency of human beings.

As the law does not countenance the formation of corporations for unlawful purposes, and their acts and omissions are necessarily those of some individual or individuals, it would be a simple and logical deduction to say that no corporation can do or authorise an unlawful act, and individuals who may commit such an act in relation to the corporation's affairs are alone the offenders. It is true that no such individuals can escape the consequences of their acts by alleging that they did them on the authority and on behalf of a corporation (or indeed anyone else), but it has never been true that a corporation is not considered to be liable in some form or another for such acts.

During the whole course of the history of English law there have been corporations, but until the nineteenth century their number was comparatively small and their importance relatively slight. In medieval times there was rarely any need to examine their essential characteristics in any detail. It was, of course,

perceived that a corporation aggregate could not do homage or swear fealty, and if a corporation sole, such as a bishop, could, it was probably because such an office was not conceived of as an entity apart from the actual holder until Tudor developments. A bishop who committed treason against a Plantagenet king found that his person and his lands were seized without regard to the fact that the office of Bishop had done no wrong although the actual holder had. With regard to corporations aggregate, misconduct might lead to forfeiture, either of their status as such or of franchises vested in them, and the members who were guilty of the misconduct were answerable in their own persons. This probably was a sufficient sanction. The management of a corporation aggregate almost necessarily calls for the co-operation of two or more individuals, but this circumstance does not appear to have played any great part in developing the law of conspiracy.

The matter of procedure has been an obstacle in the development of doctrine on the subject of the criminal liability of corporations. An accused person, speaking generally, could only be tried on indictment and in case of treason and felony the appropriate penalty was usually death. A corporation could only appear by attorney in the Court of King's Bench, and consequently could not be tried at assizes or quarter-sessions, and if charged with treason or felony could not if convicted undergo the prescribed punishment. *Lex non cogit ad impossibilia.* For practical purposes there is no difference between being incapable of crime and not being punishable for crime. It is not surprising therefore that it has been stated over and over again that a corporation is incapable of committing treason or felony.

During the nineteenth century, the problem of the responsibility of corporations for acts done in a particular state of mind was discussed in connection with liability for tort, and as tort and misdemeanours have many resemblances the criminal liability of corporations was at first developed almost as a rider to responsibility for tort, but later, owing to the great increase of modern trading companies and the contemporaneous development of summary jurisdiction following the legislation of 1848, this form of vicarious responsibility has in the majority of cases been discussed in relation to offences which have little or no connection

with indictable crimes. Recently, the responsibility of companies for their servants' misdeeds has been shewn not to be limited to offences which do not require a specific form of *mens rea*, and has been declared to exist with regard to common law misdemeanours. The principle that a person is not criminally liable for a criminal act committed by a servant or agent unless the principal can be shewn to have instigated or connived at that act has not been followed. A company by its nature cannot instigate or connive at an act except by the mind and action of a human being, and "scope of employment" which has played a necessary part in the law of tort has been invoked to justify the imposition of responsibility on both corporations and individuals. In this connection, it does not appear that much, if any, importance has been attached to the function that the corporation was created to fulfil or to the distinction between something which can be called the act of the corporation and something which is an act done on behalf of the corporation. The courts have been concerned with that aspect which deals with the authority given to a servant or agent to act on behalf of the corporation and the scope of that authority. The circumstances that a company may be the instrument used by the real offender to facilitate or cloak his criminal activities was relied on in 1915, but in one or two cases the fact that an offence was part of a fraud on the company has not availed to prevent it being fined for the act of its authorised servant. The reason for this appears to be that the courts have arrived at their conclusions by way of that class of offences that may be said to be breaches of absolute duty and by applying to that class the principle that the act of the servant within the scope of his authority is imputable to the principal in certain classes of crimes as well as in contract and tort. Nevertheless the principle has been applied to acts which are punishable only if done in a particular state of mind or with a particular intention.

No attention has been paid to the point that a corporation created for public purposes may be impeded in carrying out its duties if subjected to that responsibility, or to the point that members who are beneficially interested but not entitled to take part in management may be damnified if the company is responsible for the misconduct of those entrusted with the actual

doing of the company's business. It may be said that the members should choose the managers with more care, even in the case of local government, but there are corporations and companies where in fact or in effect the persons who are financially interested have no say in selecting the management, and in any case cannot effectively control the appointment or conduct of the company's servants or agent. I have found no trace of any distinction drawn between responsibility for the board of directors and that for servants. That there is a distinction between the company and its board of management is well known to the judges, as witness the judgment of Rowlatt J. in *Orpen* v. *Haymarket Capitol* (1931) 145 L.T. 614 at page 617, and consequently it must be assumed that the courts have designedly made no distinction in this respect, either between the company and its board or between the board and others acting on the company's behalf.

It is time to turn to the cases. It must be remembered that at common law the penalty for treason and felony (except petty larceny) was death. It is true that many felonies were clergyable, but this point has no more relevance to the position of corporations than the doctrine of marital compulsion. It being obvious that a corporation could not be punished, no prosecution for treason or felony is to be expected. Dicta to this effect are numerous. Thus, in the *Case of Sutton's Hospital* 10 Rep 1 (which was not an indictment) Lord Coke observed at 32b, "A corporation aggregate . . . rests only in intendment and consideration of the law. . . . They cannot commit treason nor be outlawed nor excommunicate, for they have no souls; neither can they appear in person but by attorney. 33 Hen, 8 Bro. Fealty. A corporation aggregate of many cannot do fealty, for an invisible body can neither be in person nor swear. Plow.Com. 213 and *the Lord Berkeley's Case;* it is not subject to imbecilities, death of the natural body and divers other cases." In the Court of Chancery there was a difficulty in interrogating a corporation made a party to the suit, and in *Wych* v. *Meal* (1734) 3 P. Wms 310 Talbot L. C. said that an official of a company could be ordered to make discovery, since the company could only answer under its common seal, and, however false such an answer might be, there would be no remedy for perjury; and this was adopted in *Dummer* v. *Chippenham Corporation* (1807) 14

Ves 245. In the King's Bench there was the difficulty that a corporation could not enter into a recognisance. As Coleridge J. pointed out, in *R.* v. *Mayor etc. of Manchester* (1857) 7 E & B 453 at page 458, if the corporation had been the prosecutors seeking to remove an indictment into the Court of King's Bench, "there would have been a difficulty in strictly complying with the statute (which required a recognisance) because they could not enter into a recognisance, although we are aware that in practice this is evaded by one or more members of the body entering into one for them: evaded, we say, rather than overcome". It may be remarked that in 1926 the court saw no difficulty in the way of a corporation entering into a recognisance but held that one entered into by its clerk, not stated to be on its behalf or binding on its property, was not sufficient (*Leyton U.D.C.* v. *Wilkinson* 43 T.L.R. 35). In *Pharmaceutical Society* v. *London & Provincial Supply Association* (1880) 5 App. Cas 857 Lord Blackburn observed, at page 869, "I quite agree that a corporation cannot, in one sense, commit a crime—a corporation cannot be imprisoned, if imprisonment be the sentence for the crime; a corporation cannot be hanged or put to death, if that be the punishment for the crime; and so, in those senses, a corporation cannot commit a crime." Again in *Pearks Gunston and Tee* v. *Ward* (1902), 2 K.B. 1 Channell J. at page 11 said; "By the general principles of the criminal law, if a matter is made a criminal offence, it is essential that there should be something in the nature of *mens rea*, and, therefore, in ordinary cases a corporation cannot be guilty of a criminal offence."

This requirement of *mens rea* or anything involving a state of mind has caused a great deal of hesitation. In *Metropolitan Bank* v. *Pooley* (1885) 10 App. Cas 210 Lord Selborne had, at page 218, expressed the view that a company in liquidation could not be guilty of maintenance. This observation was not supported by any reasoning, but the context suggests that Lord Reading was right in suggesting (in *Neville* v. *London Express* (1917) 1 K.B. 402) that Lord Selborne was really only relying on the very limited authority of a liquidator, who would certainly not have the right to maintain another person's action and did not refer to a company as a going concern. In *Hawke* v. *Hulton* (1909) 2 K.B. 93, a company was held to be not liable under section 41 of

the Lotteries Act, 1823, as the penalty was that offenders should be rogues and vagabonds and punished by imprisonment and whipping.

In *R.* v. *Cory Brothers & Co.* (1927) 1 K.B. 810, Finlay J. quashed an indictment against a company for manslaughter. The point argued was whether section 33 of the Criminal Justice Act, 1925, which made new rules as to indicting a corporation (as a result of the decision in *R.* v. *Daily Mirror Newspapers* (1922) 2 K.B. 530 that a corporation could not be committed for trial, because it had no body to be taken into custody), had merely made changes in procedure or had altered the substantive law. The decision that the section merely made changes in procedure was clearly right. Finlay J. stated that the rule was that an indictment would not lie against a corporation for felony or misdemeanour involving personal violence. Manslaughter may be punished by inflicting a fine, and a company obviously can pay a fine. For this reason the court in *R.* v. *I. R. C. Haulage* (1944) K.B. 551 suggested that, so far as manslaughter is concerned, the decision in *R.* v. *Cory* might be reviewed.

A curious point arose in *D. & L. Caterers* v. *D'Ajou* (1945) K.B. 364. Slander as a rule requires proof of special damage, but one exception is the case where the words impute a criminal offence which is punishable corporally. In spite of the fact that a company cannot be so punished, Stable J. had decided that a company so slandered could recover damages, even in the absence of proof of special damage. The Court of Appeal upheld the judgment without finding it necessary to decide this point. Lord Goddard remarked, at page 366, "If one said of a company 'it is a murderer' or 'it is a forger' I have no doubt that the company could not bring an action, because a company cannot forge and a company cannot murder." In so saying, Lord Goddard had in mind previous decisions. In *Metropolitan Saloon Omnibus Co.* v. *Hawkins* (1859) 4 H. &. N. 87 at page 90, Pollock C. B. had said "It (a company) could not sue in respect of an imputation of murder or incest or adultery, because it could not commit those crimes (*sic*). Nor could it sue in respect of a charge of corruption, for a corporation cannot be guilty of corruption, although the individuals composing it may." This pronouncement had been treated as decisive in *Mayor etc. of*

Manchester v. *Williams* (1891) 1 Q.B. 94, where an action was brought on an imputation of corruption.

As the authorities agree that a corporation cannot commit treason or felony or any misdemeanour involving personal violence, usually giving the reason that such offences were physically impossible, but also relying upon the impossibility of inflicting the only lawful punishment and again also on occasion upon the view that a corporation is incapable of *mens rea*, it is not surprising that there are dicta of wider import. Thus in *Anon* (1702) 12 Mod. 559, Holt C. J. is reported to have said, "A corporation is not indictable, but the particular members are." That is undoubtedly true of some crimes, but, as the words cited constitute the whole report, it is impossible to speculate what limitation, if any, Lord Holt meant to be placed on his words. The series has not the highest reputation and Holt himself once wondered what posterity would think of the judges of his time when reading these "skimble skamble reports". It is probable that he had in mind the decision in the *City of London Case* (1682) 2 Show. 263 where, in proceedings brought to forfeit the City's Charter, Finch S. G. in his argument had cited Y.B. 21 Edw. IV that a corporate body cannot commit a battery or do a personal wrong, but contended that otherwise it could do a corporate act that was illegal, and in fact by presenting a petition had committed sedition. The Charter was forfeited but was restored in the closing stages of James II's reign and the decision was later declared by statute to be erroneous. If Lord Holt really did say what appears in the report, he was not alone, for as late as 1851 Shadwell V. C., in *Two Sicilies* (*King*) v. *Willcox* 1 Sim N.S. 301 at page 335, observed, "the general law of England was that a corporation could not be indicted for crime." It is a pity that the V.C. had not consulted on the point the judge whom he says he had consulted on the construction of the Foreign Enlistment Act then in force (59 Geo. III c. 69 s. 7). It had very recently been decided that a corporation could be indicted, as in 1842 the Court of Queen's Bench had so ruled on demurrer in *R.* v. *Birmingham & Gloucester Rly* 3 Q.B. 223. Referring to the dictum of Lord Holt, Patteson J. who delivered the judgment of the court, said at page 232, "What the nature of the offence was to which the observation was intended to apply does not appear;

and as a general proposition it is opposed to a number of cases which shew that a corporation may be indicted for breach of a duty imposed upon it by law, though not for a felony, or for crimes involving personal violence, as for riots and assaults." These cases must have been rare, as the report shews, for there was great uncertainty as to the proper procedure. The decision was that a railway company, a corporation by statute, was indictable for a nonfeasance which was a breach of a statute. In 1846 it was held that the same applied to an indictment for misfeasance in *R.* v. *Gt. N. of England Rly* 9 Q.B. 315. The jury had returned a verdict of guilty and the defendants had moved the court on the grounds that a corporation could not be criminally liable for such an offence. The court refused the motion. Lord Denman C. J. at page 326 remarked, "Some dicta occur in old cases 'A corporation cannot be guilty of treason or felony'. It might be added 'of perjury or of offences against the person'. The Court of Common Pleas lately held that a corporation might be sued in trespass (*Maund* v. *Monmouthshire Canal Co.* 4 M & G 452); but nobody has sought to fix them with acts of immorality. These plainly derive their character from the corrupted mind of the person committing them and are violations of the social duties that belong to men and subjects. A corporation which, as such, has no such duties cannot be guilty in these cases; but they may be guilty as a body corporate of commanding acts to be done to the nuisance of the community at large." He added another reason, which indicates the change that had taken place in the size of companies and in the importance of their operations, viz. that the persons authorising the acts are not known to the public and the persons actually carrying them out are usually not able to make adequate reparation. It will be observed that Lord Denman was thinking of specific acts specifically authorised, and is not concerned with the scope of the servant's authority or with the question whether the act was done in furtherance of the company's interests or supposed interests. His criterion was apparently whether, having regard to the circumstances, the company could be said to have a duty towards the public which has not been fulfilled. It was not a case where *mens rea* was needed, and one may infer that he would, if need be, have considered the matter afresh on that point.

The question whether a corporation is capable of *mens rea* is unarguable. The real point is whether, in cases in which *mens rea* is essential to the offence, the *mens rea* of an agent or servant acting within his authority can be imputed to that corporation under whose authority he is acting. So far as civil liability in tort is concerned the point was dealt with by Lord Lindley in the Privy Council in *Citizens Life Assurance Co.* v. *Brown* (1904) A.C. 423 at page 426, "There is no doubt that Lord Bramwell held strongly to his opinion (*Abrath* v. *N.E.R.* 11 App Cas 247 at page 250) that a corporation was incapable of malice or motive, and that an action for malicious prosecution could not be maintained against a company. Lord Cranworth in *Addie* v. *Western Bank of Scotland* (L.R. 1 H.L.Sc. 145) had expressed a similar opinion as to the liability of companies for frauds. But these opinions have not prevailed. . . . If it is once granted that corporations are for civil purposes to be regarded as persons, i.e. as principles acting by agents and servants, it is difficult to see why the ordinary doctrines of agency and of master and servant are not to be applied to corporations as well as to ordinary individuals. . . . To talk about imputing malice to corporations appears . . . to introduce metaphysical subtleties which are needless and fallacious."

This, however, relates to civil liability. There is a difference where an ordinary individual authorises someone to do acts which can be done perfectly lawfully and the agent or servant in fact does them in such a way as to commit a crime. It does not follow that the principal is, or should be, criminally responsible. The approach to the problem shews that judges did think of the imputation of malice as being in some respect analogous to liability to indictment. Thus in *Whitfield* v. *S.E.R.* (1858) E.B. & E. 115, Campbell L. C. J. at page 121 said, "Considering that an indictment may be preferred against a corporation aggregate, both for commission and omission to be followed by fine, though not imprisonment, there may be great difficulty in saying that under certain circumstances express malice may not be imputed to and proved against a corporation."

In actions or prosecutions for libel, it had been held that the proprietor of a newspaper was responsible for what was printed, whether he knew of it or not, and in such a case a corporation could not logically be distinguished from a principal,

who was a human being. In *Triplex Safety Glass Co.* v. *Lancegaye Safety Glass* (1939) 2 K.B. 395, the Court of Appeal affirmed the criminal responsibility of a company for libel by upholding a contention that a company could successfully object to answering an interrogatory on the ground that the answer might tend to incriminate it. Du Parcq L. J. in delivering the judgment of the court said, at page 408, "It was further contended that a corporation cannot be indicted for libel. It is not in doubt that a limited company is responsible, in a civil action, for a libel published by one of its officers, and that it is capable of malice; see *Citizens Life Assurance Co.* v. *Brown* (1904) A.C. 423. It follows that it is possible to prove against a limited company all the constituent elements of the crime of publishing a defamatory libel: compare *R.* v. *Wicks* 25 Cr. App. R. 168. It seems to us, therefore, to be in accordance with principle to hold that a limited company may be indicted for libel, and this has the strong support of the well known dictum of Lord Blackburn in *Pharmaceutical Society* v. *London and Provincial Supply Association* 5 App. Cas 857, 869, 870." (This last mentioned case will be discussed later.)

Libel is a common law misdemeanour, and consequently, when in 1943 a motion to quash, so far as concerned a company, an indictment for conspiracy was made at the Kent Assizes, I felt bound to refuse it, as conspiracy is another common law misdemeanour. This refusal was upheld by the Court of Criminal Appeal. *R.* v. *I.R.C. Haulage* (1944) K.B. 551. It was there stated that it is a question in each case whether there is evidence to go to the jury "that the criminal act of an agent, including his state of mind, intention, knowledge or belief, is the act of the company".

There the matter rests so far as indictable offences are concerned. It is clear that some offences cannot be imputed to a corporation. These include such offences as are punishable only corporally, and the most general form of the principle suggests the rule that a corporation cannot commit treason or felony or any misdemeanour that involves personal violence or can only be committed by a human being, e.g. perjury. But, as the cases already cited and those shortly to be referred to strongly suggest, there is another principle, that appears to be or about to become

dominant, that crime may be imputed to a corporation if, on the evidence, the act is the act of the corporation. In that case, it is necessary to examine the constitution of the company and the authority conferred on the agent. This does not exonerate the actual perpetrator (*Dellow* v. *Busby* (1942) 2 All E.R. 439, if indeed any authority is needed) but adds another delinquent. Beyond all question, the view that a corporation is incapable of crime has been rejected.

There seems to be no tendency to develop the argument that a corporation in such cases should be regarded rather as an instrument or as a cloak than as an offender. It can be found in *R.* v. *Grubb* (1915) 2 K.B. 683 where a conviction, under what is now the Larceny Act, 1916, section 20(1), was upheld in the case of a man who misappropriated money entrusted to a company which he controlled.

It is in the department of summary offences that the criminal responsibility of corporations has been principally discussed. Since the Summary Jurisdiction Act, 1848, the number of such offences has been immensely increased, and many of them cannot be effectively dealt with if only the actual perpetrator can be dealt with. There are offences of this kind, however, that only a human being can commit, either from their nature or by reason of the prescribed punishment being inapplicable to corporations. In most cases the argument has turned on the interpretation of the section invoked—whether the term "person" used in such a section includes or does not include a corporation. In that regard it is necessary to bear in mind that Lord Brougham's Act in 1850 had not included a definition of "person", but that under the Interpretation Act, 1889, the word "person" prima facie includes a corporation. In view of the fact that the courts did not conceive of a company being indictable save for breaches of statutory requirements, there are many pronouncements that seem to lay down the rule that a company can only be prosecuted for offences where *mens rea* is not essential, the rule was never laid down in such a form as to be binding (i.e. that where *mens rea* is required, a company cannot be prosecuted) and in the latest cases it would appear that, if an act is done for and by authority of a corporation by a person who has the state of mind that the statute or order requires, then the corporation is liable crimin-

ally for such act. The courts have always disclaimed any intention of treating a company which is a principal on any different footing from any other principal. It is certain that many summary offences are created by way of absolute prohibition, but liability has now been fixed upon principals for acts of agents and servants where the state of mind required by the statute or regulations was that of the actual perpetrator alone and in cases where the principal, found guilty, had merely given a general authority.

The judicial pronouncements began with a series of cases where the main point was whether, on construction, a company was liable to prosecution, and this involved an examination not merely of the offence but also of the characteristics of a corporation. In some cases the offence was declared not to involve a corporation and in others that it did. The most important was the decision, already mentioned, of *Pharmaceutical Society* v. *London and Provincial Supply Assn.* (1880) 5 App Cas 857, which was a civil action for a penalty or otherwise it could not have gone beyond the Divisional Court. It turned upon sections of the Pharmacy Act, 1868, which forbade sales of certain drugs except by qualified persons and a company was incapable of becoming qualified. The actual decision amounted to this: that the Act was not violated if the actual transaction were carried out by a qualified person even if he had an unqualified principal. It, therefore, only decides the construction of a particular statute. The Lords, however, dealt with points of principle. Lord Blackburn at page 869, after the words already cited, said, "But a corporation may be fined, and a corporation may pay damages, notwithstanding what Bramwell L. J. said, or is reported to have said, upon the supposition that a body corporate or a corporation that incorporated itself for the purpose of publishing a newspaper could not be tried and fined, or an action for damages brought against it, for a libel; or that a corporation which commits a nuisance could not be convicted of a nuisance or the like. If you could get over the first difficulty of saying that the word 'person' here may be construed to include an artificial person, a corporation, I should not have the least difficulty upon those other grounds which have been suggested." The case is important since all the Lords in their reasons used expressions