

SELECT CASES
AND
OTHER AUTHORITIES
ON THE LAW OF
PRIVATE CORPORATIONS

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PREFACE.

THE first edition of Cases on Corporations was published seven years ago. In this second edition there are large changes.

The following subjects are considered at much greater length: Unincorporated Associations; Issues of Stock at a Discount or for Overvalued Property; Offenses Against the Sherman Anti-Trust Act; Reorganizations of Corporations.

The more important cases decided since 1909 are set forth, or cited in the notes.

There are numerous notes by the editor.

E. H. W.

LANGDELL HALL, CAMBRIDGE,
April, 1916.

TABLE OF CASES.

Andrews Bros. Co. v. Youngstown Coke Co.	74	Charlestown Boot Co. v. Duns- more	483
Ashbury Railway Carriage and Iron Co. v. Riche	657	Chestnut Hill Turnpike Co. v. Rutter	500
Athol Music Hall Company v. Carey	173	Chicago City Railway Co. v. Aller- ton	466
Attorney-General for Canada v. Standard Trust Co.	337	Citizens National Bank v. Apple- ton	740
Automatic Self-Cleansing Filter Co. v. Cuninghame	477	Clapp v. Peterson	446
Ayers v. The South Australian Banking Co.	664	Clews v. Friedman	897
Bahia & San Francisco Ry. Co., <i>in re</i>	901	Coffin v. Ransdell	230
Baldwin v. Canfield	488	Coit v. Gold Amalgamating Co.	242
Bank v. Trebein	125	Cole v. Millerton Iron Co.	989
Bank of Topeka v. Eaton	45	Commercial National Bank v. Weinhard	468
Bank of United States v. Deveaux	108	Continental Securities Co. v. Bel- mont	875
Baroness Wenlock v. River Dee Co.	668	Continental Tyre & Rubber Co., Ltd., v. Daimler Co., Ltd.	157
Bartholomew v. Derby Rubber Co.	961	Cook v. Burlington	90
Bates v. Coronado Beach Co.	407	Coppin v. Greenlees & Ransom Co.	442
Bath Gas Light Co. v. Claffy	731	Cottentin v. Meyer	636
Boston & Albany R.R. Co. v. Rich- ardson	902	Cotton v. Imperial Corporation	970
Boyce v. Towsontown Station	600	Crowell v. Jackson	798
Brewer v. Boston Theatre	857	Davenport v. Dows	873
Brewer v. The State	645	Davenport v. Peoria Insurance Co.	487
Brightman v. Bates	921	David Payne & Co., Ltd., <i>in re</i>	666
British South Africa Co. v. De Beers Consolidated Mines, Ltd.	655	Davis v. Las Ovas Co.	346
Broderip v. Salomon	148	Davis v. Stevens	628
Brown v. Winnisimmet Co.	393	Denny Hotel Co. v. Schram	409
Bryant's Pond Steam Mill Co. v. Felt	176	Denver Fire Insurance Co. v. Mc- Clelland	720
Burroughs v. North Carolina R.R. Co.	841	Dodge v. Woolsey	868
Bushnell v. Consolidated Ice Ma- chine Co.	603	Douglass v. Ireland	265
Butler Paper Co. v. Cleveland	25	Downing v. Mount Washington Road Company	380
California Bank v. Kennedy	415	Dunphy v. Traveller Newspaper Association	874
California Bank v. Kennedy	694	Dupee v. Boston Water Power Co.	449
Callender v. Painesville R.R. Co.	598	East Birmingham Land Co. v. Dennis	890
Carmichael's Case	179	East Norway Lake Church v. Froislie	646
Central Railroad Company v. Col- lins	410	Easton National Bank v. Ameri- can Brick Co.	300
Central R.R. Co. v. Smith	682	Eliot v. Freeman	48
Central Transportation Co. v. Pullman's Car Co.	728	Ellis v. Marshall	17
Chambers v. McKee & Bros.	859	Elyton Land Co. v. Birmingham Co.	255

Elyton Land Co. <i>v.</i> Dowdell	947	John Foster & Sons, Ltd., <i>v.</i> Commissioners of Inland Revenue	94
Erlanger <i>v.</i> New Sombbrero Phosphate Co.	334	Joint Stock Discount Co. <i>v.</i> Brown	416
Ewing <i>v.</i> Composite Brake Shoe Co.	982	Jourdan <i>v.</i> Long Island R.R. Co.	424
Finley Shoe & Leather Co. <i>v.</i> Kurtz	491	Kelner <i>v.</i> Baxter	187
First National Bank <i>v.</i> National Exchange Bank	423	Kerfoot <i>v.</i> Farmers' Bank	689
Ford <i>v.</i> Easthampton Rubber Thread Co.	837	Kraft <i>v.</i> Griffon Co.	943
Fort Payne Rolling Mill <i>v.</i> Hill	785	Kuser <i>v.</i> Wright	764
Foss <i>v.</i> Harbottle	862	Lake Superior Iron Co. <i>v.</i> Drexel	250
Franklin Bridge Co. <i>v.</i> Wood	9	Lantz <i>v.</i> Moeller	290
Franklin National Bank <i>v.</i> Whitehead	402	Linn Timber Co. <i>v.</i> United States	137
Furnivall <i>v.</i> Coombes	670	Liverpool Insurance Co. <i>v.</i> Massachusetts	51
Gallagher <i>v.</i> Germania Brewing Co.	98	Luthy <i>v.</i> Ream	912
General Rubber Co. <i>v.</i> Benedict	809	Malone <i>v.</i> Lancaster Gas-Light Co.	388
Gilbert <i>v.</i> Finch	779	Marvin <i>v.</i> Anderson	451
Gillett <i>v.</i> Chicago Title & Trust Co.	276	Mason <i>v.</i> Pewabic Mining Co.	955
Goodnow <i>v.</i> American Writing Paper Co.	832	MacGregor <i>v.</i> Dover & Deal Ry. Co.	672
Great Southern Fire Proof Hotel Co. <i>v.</i> Jones	78	McArthur <i>v.</i> Times Printing Co.	184
Groel <i>v.</i> United Electric Company	866	McClure <i>v.</i> Law	818
Guarantee Trust Co. <i>v.</i> Dilworth Coal Co.	222	McDonald <i>v.</i> Dewey	908
Guckert <i>v.</i> Hacke	653	McDonald, Receiver, <i>v.</i> Williams	932
Hall's Safe Co. <i>v.</i> Herring-Hall-Marvin Safe Co.	145	McGraw, Matter of	699
Handley <i>v.</i> Stutz	937	McNab <i>v.</i> McNab & Harlin Mfg. Co.	835
Harris <i>v.</i> Gas Co.	756	McNeil <i>v.</i> Tenth National Bank	894
Heckman's Estate	191	Meyer <i>v.</i> Mining & Milling Co.	303
Henry <i>v.</i> Babcock & Wilson Co.	829	Middlesex Husbandmen <i>v.</i> Davis	20
Herron Co. <i>v.</i> Shaw	270	Minnesota Gas-Light Co. <i>v.</i> Denslow	605
Hibbs <i>v.</i> Brown	63	Mobile & Ohio R.R. Co. <i>v.</i> Nicholas	917
Hill <i>v.</i> Nisbet	429	Mobile Improvement Co. <i>v.</i> Gass	782
Hodges <i>v.</i> New England Screw Co.	777	Mokelumne Co. <i>v.</i> Woodbury	28
Hoisting Machinery Co. <i>v.</i> Goeller Iron Works	492	Monk <i>v.</i> Barnett	237
Hong Kong & China Gas Co., Ltd., <i>v.</i> Glen	216	Monument National Bank <i>v.</i> Globe Works	712
Hospes <i>v.</i> Northwestern Mfg. & Car Co.	292	Moore & Handley Co. <i>v.</i> Towers Hardware Co.	140
Hubbard <i>v.</i> Worcester Art Museum	704	Morgan <i>v.</i> Lewis	456
Hun <i>v.</i> Cary	772	Munson <i>v.</i> Syracuse R.R. Co.	784
Hutchinson <i>v.</i> Green	473	National Bank <i>v.</i> Matthews	686
Imperial Building Co. <i>v.</i> Chicago Open Board of Trade	618	National Home Building Ass'n <i>v.</i> Home Savings Bank	714
Indianapolis Furnace Co. <i>v.</i> Herkimer	649	Natusch <i>v.</i> Irving	850
Irvine <i>v.</i> New York Edison Co.	984	New Bedford Railroad <i>v.</i> Old Colony Railroad	983
Jackson <i>v.</i> Hooper	100	New England Trust Co. <i>v.</i> Abbott	905
Jacobus <i>v.</i> Jamestown Mantel Co.	821	New York Cable Co. <i>v.</i> Mayor, etc., of New York	651
Janney <i>v.</i> Minneapolis Industrial Exposition	793	Nims <i>v.</i> Mount Hermon Boys' School	677
		North Milwaukee Town Site No. 2 <i>v.</i> Bishop	464
		Northern Pacific Railway Co. <i>v.</i> Boyd	995
		Northern Securities Co. <i>v.</i> United States	532

Northwestern Transportation Co. <i>v.</i> Beatty	787	Seaton <i>v.</i> Grimm	614
Oakes <i>v.</i> Turquand	930	See <i>v.</i> Heppenheimer	278
O'Connor Mining Co. <i>v.</i> Coosa Fur- nace Co.	791	Seeberger <i>v.</i> McCormick	747
Old Dominion Copper Co. <i>v.</i> Bige- low	349	Seymour <i>v.</i> Spring Forest Ceme- tery Association	796
Old Dominion Copper Co. <i>v.</i> Lewi- sohn	341	Sherman <i>v.</i> Fitch	498
Ooregum Gold Mining Co., Ltd., <i>v.</i> Roper	201	Small <i>v.</i> Minneapolis Electro- Matrix Co.	958
Parker <i>v.</i> Bethel Hotel Co.	84	Smith <i>v.</i> Hurd	805
Parsons <i>v.</i> Joseph	885	Snider's Sons' Co. <i>v.</i> Troy	606
Pell's Case	200	Society Perun <i>v.</i> Cleveland	638
Penfield <i>v.</i> Dawson Town & Gas Co.	244	Southworth <i>v.</i> Morgan	225
Pennell <i>v.</i> Lothrop	183	Spering's Appeal	769
Pennsylvania Transportation Com- pany's Appeal	992	Standard Oil Co. <i>v.</i> United States	552
Penobscot Boom Corporation <i>v.</i> Lamson	14	State <i>v.</i> Atlantic City and Shore R.R. Co.	431
People <i>v.</i> Coleman	59	State <i>v.</i> Bank of Hemingford	726
People <i>ex rel.</i> Manice <i>v.</i> Powell	484	State <i>v.</i> Dawson	15
People <i>v.</i> North River Sugar Refin- ing Co.	128	State <i>v.</i> Eastern Coal Co.	506
People <i>v.</i> Pullman Car Co.	390	State <i>v.</i> Missouri Pacific Ry. Co.	418
People <i>v.</i> Pullman Car Co.	417	Stevens <i>v.</i> Rutland & Burlington R.R. Co.	852
People <i>v.</i> Rochester Railway & Light Co.	510	Stokes <i>v.</i> Continental Trust Co.	843
People <i>v.</i> Stockton R.R. Co.	24	Stoutimore <i>v.</i> Clark	616
People <i>ex rel.</i> Tiffany & Co. <i>v.</i> Campbell	382	Strong <i>v.</i> Repide	800
Phillips <i>v.</i> Blatchford	33	Swift & Co. <i>v.</i> United States	547
Phillips <i>v.</i> Providence Steam En- gine Co.	951	Tappan <i>v.</i> Bailey	31
Pollitz <i>v.</i> Gould	881	Thomas <i>v.</i> Dakin	55
Provident Bank & Trust Co. <i>v.</i> Saxon	631	Timmis, Matter of	966
Reed <i>v.</i> The Richmond Street R.R. Co.	21	Tisdale <i>v.</i> Harris	888
Richards <i>v.</i> Wiener Co.	454	Trevor <i>v.</i> Whitworth	439
Richardson <i>v.</i> Williamson	673	United States <i>v.</i> American Tobacco Co.	574
Richardson Fueling Co. <i>v.</i> Sey- mour	611	United States <i>v.</i> E. C. Knight Co.	516
Riker & Son Co. <i>v.</i> United Drug Co.	963	United States <i>v.</i> Freight Associa- tion	520
Royal British Bank <i>v.</i> Turquand	761	United States <i>v.</i> John Kelso Co.	503
Russell <i>v.</i> Temple	82	United States <i>v.</i> Milwaukee Re- frigerator Transit Co.	116
St. Louis Railroad <i>v.</i> Terre Haute Railroad	753	United States <i>v.</i> Winslow	595
Salomon <i>v.</i> Salomon & Co., Ltd.	148	U.S. Brewing Co. <i>v.</i> Dolese	384
Sanford <i>v.</i> McArthur	743	U.S. Express Co. <i>v.</i> Bedbury	613
Sawyer <i>v.</i> Hoag	925	U.S. Steel Corporation <i>v.</i> Hodge	786
Schwab <i>v.</i> Potter Co.	974	Varney <i>v.</i> Baker	827
Scovill <i>v.</i> Thayer	220	Vent <i>v.</i> Duluth Coffee Co.	462
		Wathen <i>v.</i> Jackson Oil Co.	878
		Weatherford Ry. Co. <i>v.</i> Granger	192
		Whittenton Mills <i>v.</i> Upton	405
		Wilder Mfg. Co. <i>v.</i> Corn Products Co.	622
		Williams <i>v.</i> Johnson	397
		Williams <i>v.</i> Milton	36
		Winget <i>v.</i> Quincy Building Ass'n	615
		Wood <i>v.</i> Whelen	476
		Wragg, Ltd., <i>in re.</i>	213

TABLE OF CONTENTS.

BOOK I.

THE NATURE OF A CORPORATION.

CHAPTER I.

THE FORMATION OF A CORPORATION:

- A. Necessity of Authority from the State 1
- B. Grant of Authority from the State 9

CHAPTER II.

DISTINGUISHING A CORPORATION FROM AN UNINCORPORATED ASSOCIATION:

- A. Where there is no Legislative Enactment 31
- B. Where there is some Legislative Enactment 51

CHAPTER III.

UNDER WHAT, IF ANY, CIRCUMSTANCES THE CORPORATE FICTION SHOULD BE DISREGARDED 82

BOOK II.

THE PROMOTION OF CORPORATIONS.

CHAPTER I.

SUBSCRIPTIONS TO STOCK OF A CORPORATION TO BE FORMED 173

CHAPTER II.

CONVEYANCES TO PROMOTERS, AND CONTRACTS WITH PROMOTERS RELATING TO PROPERTY OR SERVICES . . . 183

CHAPTER III.

ISSUES OF STOCK AT A DISCOUNT OR FOR OVERVALUED PROPERTY 200

CHAPTER IV.

TRANSACTIONS BETWEEN PROMOTERS AND THE CORPORATION PROMOTED 334

BOOK III.

THE POWERS OF CORPORATIONS.

CHAPTER I.

EXTENT OF THE POWERS:

SECTION 1. In General	380
SECTION 2. To enter into a Partnership	405
SECTION 3. To hold Stock in other Corporations	409
SECTION 4. To hold their own Stock	439

CHAPTER II.

THE EXERCISE OF THE POWERS:

SECTION 1. In whom the Powers are vested	464
SECTION 2. Mode of exercising the Powers	487

BOOK IV.

LIABILITY FOR TORTS AND CRIMES.

CHAPTER I.

IN GENERAL	500
----------------------	-----

CHAPTER II.

OFFENSES UNDER THE SHERMAN ANTI-TRUST ACT	514
---	-----

BOOK V.

UNAUTHORIZED CORPORATE ACTION.

CHAPTER I.

COLLATERAL ATTACK UPON THE FORMATION OF A CORPORATION.

HEREIN OF THE EXPRESSION "DE FACTO CORPORATION":

SECTION 1. Where there have been Dealings between the Parties on a Corporate Basis	598
SECTION 2. Where there have been no Dealings between the Parties on a Corporate Basis	638

CHAPTER II.

COLLATERAL ATTACK UPON THE POWERS OF A CORPORATION.

HEREIN OF THE EXPRESSION "ULTRA VIRES":

SECTION 1. The English Authorities	655
--	-----

SECTION 2. United States Authorities:

A. Torts	677
B. Transfers of Property Rights	686
C. Contracts	712
D. Quasi Contracts	740
E. Liability of Human Beings	743
F. Setting aside an <i>Ultra Vires</i> Transaction	753

BOOK VI.

OFFICERS, STOCKHOLDERS, AND CREDITORS.

CHAPTER I.

DIRECTORS AND OTHER OFFICERS:

A. Unauthorized Action by <i>de jure</i> Officers	761
B. <i>De Facto</i> Officers	764
C. Liability of Directors for Action or Inaction	769
D. Contracts with the Corporation	782
E. Purchases of Corporate Property or Obligations	793
F. Relation to Stockholders	798
G. Dealings with Third Persons	818
H. Executive Officers	821

CHAPTER II.

STOCKHOLDERS:

SECTION 1. Rights of a Stockholder even when he is in the Minority:

A. To inspect the Corporate Books and Records	827
B. To Dividends	832
C. To subscribe to New Issues of Stock	843
D. To enjoin any Act which the Corporation is unauthorized to do, or which it was unauthorized to do when Plaintiff became a Stockholder.	850
E. To prevent and redress an Appropriation of Corporate Assets by the Majority	857
F. To compel the Corporation to assert Valid Claims, and to resist Invalid Claims	859
G. Procedure in a Suit by Stockholder to assert a Corporate Right	873
H. Rights of Persons who became Stockholders at a time subsequent to the Commission of the Alleged Wrong	881

SECTION 2. Transfer of Shares	888
---	-----

SECTION 3. Voting Trusts	912
------------------------------------	-----

CHAPTER III.

CREDITORS	925
---------------------	-----

BOOK VII.

THE REORGANIZATION OF CORPORATIONS.

CHAPTER I.

ISSUES OF STOCK BY A CORPORATION WITH IMPAIRED CAPITAL .	937
--	-----

CHAPTER II.

RIGHT OF STOCKHOLDERS TO PREVENT A SALE, OR LEASE, OF CORPORATE ASSETS	947
---	-----

CHAPTER III.

RIGHTS OF CREDITORS AS AFFECTED BY REORGANIZATIONS .	982
--	-----

APPENDIX OF CORPORATE FORMS.

CERTIFICATE OF INCORPORATION OF UNITED STATES STEEL CORPORATION	1007
BY-LAWS	1013
MINUTES OF FIRST MEETING OF INCORPORATORS	1019
MINUTES OF FIRST MEETING OF DIRECTORS	1022
LISTING OF SECURITIES	1026
SYNDICATE AGREEMENT	1030
VOTING TRUST AGREEMENT	1037
CERTIFICATE OF COMMON STOCK	1042
CERTIFICATE OF PREFERRED STOCK	1044
BOND	1046
COUPON	1048
VOTING TRUST CERTIFICATE	1050

CASES ON CORPORATIONS.

BOOK I.

THE NATURE OF A CORPORATION.

CHAPTER I.

THE FORMATION OF A CORPORATION.

A. Necessity of Authority from the State.

BLACKSTONE, COMMENTARIES.

Book I, pp. 468, 469, 470, 472, 473.

THE honor of originally inventing these political constitutions entirely belongs to the Romans. They were introduced, as Plutarch says, by Numa; who finding, upon his accession, the city torn to pieces by the two rival factions of Sabines and Romans, thought it a prudent and politic measure to subdivide these two into many smaller ones, by instituting separate societies of every manual trade and profession. They were afterwards much considered by the civil law, in which they were called *universitates* as forming one whole out of many individuals; or *collegia*, from being gathered together: they were adopted also by the canon law, for the maintenance of ecclesiastical discipline; and from them our spiritual corporations are derived. But our laws have considerably refined and improved upon the invention, according to the usual genius of the English nation: particularly with regard to sole corporations, consisting of one person only, of which the Roman lawyers had no notion; their maxim being that "*tres faciunt collegium.*" Though they held, that if a corporation, originally consisting of three persons, be reduced to one, "*si universitas ad unum redit,*" it may still subsist as a corporation, "*et stet nomen universitatis.*"

Before we proceed to treat of the several incidents of corporations, as regarded by the laws of England, let us first take a view of the several sorts of them; and then we shall be better enabled to apprehend their respective qualities.

The first division of corporations is into aggregate and sole. Corporations aggregate consist of many persons united together into one society, and are kept up by a perpetual succession of members, so

as to continue forever: of which kind are the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church. Corporations sole consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity which in their natural persons they could not have had. In this sense the king is a sole corporation; so is a bishop; so are some deans, and prebendaries, distinct from their several chapters; and so is every parson and vicar. And the necessity, or at least use, of this institution will be very apparent, if we consider the case of a parson of a church. At the original endowment of parish churches, the freehold of the church, the churchyard, the parsonage house, the glebe, and the tithes of the parish, were vested in the then parson by the bounty of the donor, as a temporal recompense to him for his spiritual care of the inhabitants, and with intent that the same emoluments should ever afterwards continue as a recompense for the same care. But how was this to be effected? The freehold was vested in the parson; and, if we suppose it vested in his natural capacity, on his death it might descend to his heir, and would be liable to his debts and encumbrances: or at best, the heir might be compellable, at some trouble and expense, to convey these rights to the succeeding incumbent. The law therefore has wisely ordained, that the parson, *quatenus* parson, shall never die, any more than the king: by making him and his successors a corporation. By which means all the original rights of the parsonage are preserved entire to the successor; for the present incumbent, and his predecessor who lived seven centuries ago, are in law one and the same person; and what was given to the one was given to the other also. . . .

Corporations, by the civil law, seem to have been created by the mere act, and voluntary association of their members: provided such convention was not contrary to law, for then it was *illicitum collegium*. It does not appear that the prince's consent was necessary to be actually given to the foundation of them; but merely that the original founders of these voluntary and friendly societies, for they were little more than such, should not establish any meetings in opposition to the laws of the state.

But, with us in England, the king's consent is absolutely necessary to the erection of any corporation, either impliedly or expressly given. The king's implied consent is to be found in corporations which exist by force of the common law, to which our former kings are supposed to have given their concurrence; common law being nothing else but custom, arising from the universal agreement of the whole community. Of this sort are the king himself, all bishops, parsons, vicars, churchwardens, and some others; who by common law have ever been held, as far as books can shew us, to have been corporations, *virtute officii*: and this incorporation is so inseparably

annexed to their offices, that we cannot frame a complete legal idea of any of these persons, but we must also have an idea of a corporation, capable to transmit his rights to his successors at the same time. Another method of implication, whereby the king's consent is presumed, is as to all corporations by *prescription*, such as the city of London, and many others, which have existed as corporations, time whereof the memory of man runneth not to the contrary; and therefore are looked upon in law to be well created. For though the members thereof can shew no legal charter of incorporation, yet in cases of such high antiquity the law presumes there once was one; and that by the variety of accidents which a length of time may produce, the charter is lost or destroyed. The methods by which the king's consent is expressly given are either by act of parliament or charter. By act of parliament, of which the royal assent is a necessary ingredient, corporations may undoubtedly be created: but it is observable, that, till of late years, most of these statutes which are usually cited as having created corporations do either confirm such as have been before created by the king, as in the case of the College of Physicians, erected by charter 10 Hen. VIII, which charter was afterwards confirmed in parliament; or they permit the king to erect a corporation *in futuro* with such and such powers, as is the case of the Bank of England, and the society of the British Fishery. So that the immediate creative act was usually performed by the king alone, in virtue of his royal prerogative.

All the other methods, therefore, whereby corporations exist, by common law, by prescription, and by act of parliament, are for the most part reducible to this of the king's letters patent, or charter of incorporation.

NOTE. — From very early times the courts recognized some corporations as existing by force of the common law alone. See Y.B. 11 Hen. IV, 2; Y.B. 37 Hen. VI, 30; Y.B. 8 Edw. IV, 6; Y.B. 20 Edw. IV, 12; Y.B. 14 Hen. VIII, 2; Co. Lit. 3a; Finch's Law, c. xvii; Keilw. 32a; 2 P. Wms. 125; 4 Vin. Abr. 525. There is also evidence tending to show that, in early times, the Court of Exchequer, in revenue matters, allowed unchartered bodies of men to be sued, and even to sue, as a unit. Madox, *Firma Burgi*, 85, 91.

"Anciently a Gild either Religious or Secular could not legally be set-up without the Kings Licence. If any Persons erected a Gild without Warrant, that is, without the Kings leave, it was a Trespass, and they were lyable to be punished for it. For example. In the Twenty-sixth year of K. Henry II (1179), several Gilds in London were amerced to the Crown as Adulterine, that is, as set-up without Warrant from the King." Madox, *Firma Burgi*, 26.

In *De Libertates*, Lib. II, c. 24, fol. 56, Bracton puts the case that the king should grant some liberty "*ut si alicui universitati, sicut*

civibus vel burgensibus vel aliquibus alis q. mercatum habeant." It appears, from the chapter as a whole, that he considered this liberty, or franchise, together with various other liberties, to be under the control of the King ("*in manu sua*") ; and that private persons might enjoy it, "*sed de gratia ipsius Regis speciali.*"

Y.B. 49 Edw. III, 3 (1375). A devised lands to B for life, remainder "a deux des meliour homes de la Guild de la Fraternity de Whitawyers en Londres" forever. A died without heirs, and on the death of B the king claimed the land by escheat. The court held that the devise (after B's life estate) was void. BELKNAP expressed his opinion that, even if the devise had been to "the Fraternity," it would not have been good, because the commonalty of London cannot by their own act create a community within the community without the charter of the king. A "Fraternity" is not a term known to the law, nor can a community exist without a charter. ("*Le comen de Londres ne poet my d'eux mesme faire comen deins cest comen sans chartr le Roy. . . Fraternity n'est my terme de ley, ne comen ne puit my estre sans chre.*") KNYVET, Chancellor, with greater precision of thought, said that this commonalty of the gild, which is not confirmed by the king, could not be adjudged a body capable of taking an estate by purchase. ("*Il ne poet pas estre p. la ley q. c. cominalty de la Gualde, q. n'est affirme p. chre le Roy, purroit estre adjudgee un corps de purchase estate.*")

Y.B. 20 Edw. IV, 2 (1480). B, alderman of the X gild, brought debt against C, and counted upon an obligation made to A, sometime alderman of the gild, and his successors. Objection that the plaintiff had not shown how the corporation was formed. Littleton took a distinction between a "corporation of common right" and a gild. The judges were all of opinion that, if suit could be maintained, it would be by the executor of A. See also Y.B. 22 Edw. IV, 34.

In Y.B. 14 Hen. VIII, 2 (1522), Fineux remarked: "There is a corporation by the Pope alone, as those mendicant brothers who cannot purchase." But Brooke, writing after the Reformation, laid it down that if the Pope purports to create a corporation, "*ideo ceo est usurpation et voyd a cest jour et fuit imperpetuum.*" 1 Brooke, Abr. Corp. 33. See also Dyer, 81, pl. 64.

In *Terrett v. Taylor*, 9 Cranch, 43, STORY, J., said (p. 46): "At a very early period the religious establishment of England seems to have been adopted in the colony of Virginia; and, of course, the common law upon that subject, so far as it was applicable to the circumstances of that colony. The local division into parishes for ecclesiastical purposes can be very early traced; and the subsequent laws enacted for religious purposes evidently presuppose the existence of the Episcopal church with its general rights and authorities growing out of the common law. What those rights and authorities

are, need not be minutely stated. It is sufficient that, among other things, the church was capable of receiving endowments of land, and that the minister of the parish was, during his incumbency, seized of the freehold of its inheritable property, as emphatically *persona ecclesiae*, and capable, as a sole corporation, of transmitting that inheritance to his successors. The church wardens, also, were a corporate body clothed with authority and guardianship over the repairs of the church and its personal property; and the other temporal concerns of the parish were submitted to a vestry composed of persons selected for that purpose."

In *The Governor v. Allen*, 8 Humph. (Tenn.) 176, the court held that the governor of the State was, by force of the common law, a corporation sole.

In *People v. Mackey*, 255 Ill. 144, Mr. Justice VICKERS said (p. 156): "A private corporation is an organization for the benefit of its members. When brought into being it enjoys certain rights and privileges of great value that are not enjoyed by natural persons. The right to be a corporation is not a natural or a civil right of any person, and such right can only be acquired from the sovereign State. It is a matter exclusively within the power of the legislature to determine whether it will grant or withhold the privilege of forming corporations. If the legislature determines to exercise its discretion and grant the privilege it may prescribe the terms and conditions upon which the right is to be exercised."

This general statement by Mr. Justice VICKERS must, it is submitted, be qualified in so far as, but only in so far as, the ancient doctrine of corporations at the common law still has virility.

ST. 6 GEORGE I.

C. 18, §§ XVIII and XIX (1719).

Revised out

XVIII. And whereas it is notorious, that several undertakings or projects of different kinds have, at some time or times since the four and twentieth day of June one thousand seven hundred and eighteen, been publicly contrived and practised, or attempted to be practised, within the city of London and other parts of this kingdom, as also in Ireland, and other his Majesty's dominions, which manifestly tend to the common grievance, prejudice, and inconvenience of great numbers of your Majesty's subjects in their trade or commerce, and other their affairs; and the persons who contrive or attempt such dangerous and mischievous undertakings or projects, under false pretences of public good, do presume, according to their own devices and schemes, to open books for public subscriptions, and draw in many unwary persons to subscribe therein towards raising great sums of money, whereupon the

subscribers or claimants under them do pay small proportions thereof, and such proportions in the whole do amount to very large sums; which dangerous and mischievous undertakings or projects do relate to several fisheries, and other affairs, wherein the trade, commerce, and welfare of your Majesty's subjects, or great numbers of them, are concerned or interested: and whereas in many cases the said undertakers or subscribers have, since the said four and twentieth day of June one thousand seven hundred and eighteen, presumed to act as if they were corporate bodies, and have pretended to make their shares in stock transferable or assignable, without any legal authority, either by act of parliament, or by any charter from the crown for so doing; and in some cases the undertakers or subscribers, since the said four and twentieth day of June one thousand seven hundred and eighteen, have acted or pretended to act under some charter or charters formerly granted by the crown for some particular or special purposes therein expressed, but have used or endeavored to use the same charters for raising joint stocks, and for making transfers or assignments, or pretended transfers or assignments for their own private lucre, which were never intended or designed by the same charters respectively; and in some cases the undertakers or subscribers, since the said four and twentieth day of June one thousand seven hundred and eighteen, have acted under some obsolete charter or charters, although the same became void or voidable by non-user or abuser, or for want of making lawful elections, which were necessary for the continuance thereof; and many other unwarrantable practices (too many to enumerate) have been, and daily are and may hereafter be contrived, set on foot, or proceeded upon, to the ruin and destruction of many of your Majesty's good subjects, if a timely remedy be not provided: and whereas it is become absolutely necessary, that all public undertakings and attempts, tending to the common grievance, prejudice, and inconvenience of your Majesty's subjects in general, or great numbers of them, in their trade, commerce, or other lawful affairs, be effectually suppressed and restrained for the future, by suitable and adequate punishments for that purpose to be ascertained and established: now for suppressing such mischievous and dangerous undertakings and attempts, and preventing the like for the future, may it please your most excellent Majesty, at the humble suit of the said lords spiritual and temporal and commons, in this present parliament assembled, that it may be enacted; and be it enacted by authority of this present parliament, that from and after the four and twentieth day of June one thousand seven hundred and twenty, all and every the undertakings and attempts described, as aforesaid, and all other public undertakings and attempts, tending to the common grievance, prejudice, and inconvenience of his Majesty's subjects, or great numbers of them, in their trade, commerce, or other lawful affairs, and all public subscrip-

tions, receipts, payments, assignments, transfers, pretended assignments and transfers, and all other matters and things, whatsoever, for furthering, countenancing or proceeding in any such undertaking or attempt, and more particularly the acting or presuming to act as a corporate body or bodies, the raising or pretending to raise transferable stock or stocks, the transferring or pretending to transfer or assign any share or shares in such stock or stocks, without legal authority, either by act of parliament, or by any charter from the crown, to warrant such acting as a body corporate, or to raise such transferable stock or stocks, or to transfer shares therein, and all acting or pretending to act under any charter, formerly granted from the crown, for particular or special purposes therein expressed, by persons who do or shall use or endeavor to use the same charters, for raising a capital stock, or for making transfers or assignments, or pretended transfers or assignments of such stock, not intended or designed by such charter to be raised or transferred, and all acting or pretending to act under any obsolete charter become void or voidable by non-user or abuser, or for want of making lawful elections, which were necessary to continue the corporation thereby intended, shall (as to all or any such acts, matters, and things, as shall be acted, done, attempted, endeavored, or proceeded upon, after the said four and twentieth day of June one thousand seven hundred and twenty) forever be deemed to be illegal and void, and shall not be practised or in any wise put in execution.

XIX. And be further enacted by the authority aforesaid, that from and after the said four and twentieth day of June one thousand seven hundred and twenty, all such unlawful undertakings and attempts, so tending to the common grievance, prejudice, and inconvenience of his Majesty's subjects, or a great number of them, in their trade, commerce, or other lawful affairs, and the making or taking of any subscriptions for that purpose, the receiving or paying of any money upon such subscriptions, the making or accepting of any assignment or transfer, or pretended assignment or transfer, of any share or shares upon any such subscription, and all and every other matter and thing whatsoever, for furthering, countenancing, or proceeding in any such unlawful undertaking or attempt, and more particularly the presuming or pretending to act as a corporate body, or to raise a transferable stock or stocks, or to make transfers or assignments of any share or shares therein, without such legal authority, as aforesaid, and all acting or pretending to act under any charter formerly granted from the crown for any particular or special purposes therein expressed, by persons making or endeavoring to make use of such charter for any such other purpose not thereby intended, and all acting or pretending to act under any such obsolete charter as is before described, and every of them (as to all or any such acts, matters or things as shall be so acted, done, attempted, en-