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THE DEVELOPMENT OF THE CONCEPT OF CORPORATION FROM EARLIEST ROMAN TIMES TO A.D. 476

Abstract: The idea of the "modern" business corporation is usually traced to England during the late fifteenth and early sixteenth centuries. However, many corporate attributes can be found in the Stoic's scientific theory of corpora. This theory permeated both Roman law and science and manifested itself in many of the Roman Empire's business and non-business entities. A historical and geographical linkage is suggested between the concept's development in Rome and its eventual appearance in England.

Introduction

This paper traces the concept of corporation back to its earliest known roots as found in Roman science and jurisprudence. A concise description of the history of the Roman empire and of the development of Roman law is given to provide the historical framework for the concept's development. An assessment is made of the concept's progress and spread up to the year attributed by historians to be the fall of the Western Roman Empire, 476 A.D. The conclusion of this paper, which serves as the starting point of a second paper, illustrates the various manners in which the remnants of Roman law survived the fall of the Western empire and were incorporated into several Germanic and Saxon codifications; a subsequent paper will detail the further development of the corporate concept in England up to the year 1500 A.D.

Periods in the History of Rome

It is common for present-day Roman historians to divide Roman history into three parts corresponding to the forms of government that prevailed at the time. Thus, many authors speak of Roman history as divided into the Monarchy, the Republic, and the Empire (see Appendix).

No precise beginning date for the founding of Rome has yet been determined; Roman historians of the fourth century B.C. invented a

mythical figure called Romulus, as the city's founder. Romulus, son of the god Mars, was credited with establishing the city on the Palatine hill in 573 B.C. From 573 to 509 B.C. Rome was ruled by seven kings (or six if one dismisses Romulus as a fictional character). The monarchy was politically divided into the "kingship, a council, an assembly of the people, and the units into which the citizens were grouped for the better performance of their obligations and the exercise of their rights."¹ The kingship was not hereditary nor was his power absolute. The council, called the Senate, was principally advisory in nature and the Roman people were divided into thirty groups called *curiae*, ten of which constituted a tribe. The kingship was not a stable position and its influence as a political force waned as that of the nobility rose.

The period of the Roman Republic extends from 509 B.C. down to 31 B.C. with the battle of Actium in which C. Julius Caesar Octavianus was the victor. Mommsen has divided the Republic into four smaller periods.² The first of these periods runs from 509 B.C. to 265 B.C. during which time the city of Rome solidified its political and military power and unified the whole Italian peninsula. The second period, from 265 to 168 B.C., sees Rome battling non-Italian powers not only in Italy but abroad. Roman victories during this time lead to the acquisition of Sicily, the greater part of Spain, the Punic possessions in North Africa, and Macedonia. The third period, from 167 B.C. to 79 B.C. witnesses the breakdown of the republican form of government and fierce political upheaval leading, at times, to civil war. The last period, from 78 B.C. to 31 B.C. sees the replacement of the republican form of government with that of a military monarchy.

The third period in Roman history is the Empire itself; this period is often divided into two parts: the first part, from 31 B.C. to 284 A.D. is usually called the Principate, designating the Emperor's power as supreme but masked under republican trappings; the final part, from 284 to 476 A.D., is called the Dominate and sees the Emperor as both supreme and divine and making no pretense towards republican forms of government. It is important to remember that this study is concerned mostly with that part of the Empire referred to as the Western Roman Empire. It is during Diocletian's reign from 284 to 305 A.D. that the Empire is divided into two parts for administrative purposes: the Western Roman Empire was continuously besieged by barbarian invaders and its last Emperor, Romulus Augustus, was deposed in 476 A.D.; the Eastern Empire was to thrive for another thousand years until the Turks captured Constantinople in 1453 A.D.

The Evolution of Roman Law

The antecedents of Roman law are not known with certainty. Some historians conjecture that the antecedents of Roman law may be described as Etruscan imports. More cautious historians such as Wolff attribute the development of Roman legal doctrines as being entirely original to the Romans; Etruscan, Greek, and other alien influences "pertained to detail only and were assimilated without affecting the spirit and structure of the system as a whole."³ Jolowicz refers to the time period from 753 B.C., the founding of the city of Rome, up until 451-450 B.C. as "the period of conjecture."⁴ It is conjectured that the early kings established regal laws during the monarchy period. Roman tradition has it that one Sextus Papirius collected these laws in a book known as the *Ius Papirianum*; however, if such laws ever existed they are presently lost to us.

The first known Roman legislation is called the Twelve Tables (XII); Roman historians attribute the formulation of these tables to the attempt by Roman nobles to once and for all solve the long-time struggle that existed between Rome's two classes, the patricians and plebians. A group of ten men, called a *decemviri*, and composed of both patricians and plebians was given extraordinary powers to issue a set of written laws setting forth the rights and obligations of the two classes. The original text of the Twelve Tables is lost but enough references in later works have been found to insure that they did exist. The provisions of the Tables "concern procedure in court actions and enforcement, the law of family, of wills, succession, property, contracts, and torts, . . . sacral law, public law, and criminal law. . . ."⁵ For more than a millenium the Twelve Tables remained as Rome's only attempt at codification.

As comprehensive as the Twelve Tables were, they did not contain all that was Roman law at their time. The Tables were void of any legal definitions yet they used many terms, the definition of which were understood. That is to say, even before the issuance of the Twelve Tables, there was an unwritten body of law "rooted in the collective conscience of the Roman people and sanctioned by ancestral usage, common recognition, or legislative fiat of the political community."⁶ In later times, this traditional body of law would be termed the *ius civile*; its influence on daily Roman life was strong up until the Empire's Dominate period. Its influence lessened during this period as more and more legislative powers passed to the Emperor.

During Rome's Empire period a third source of law emerged in response to the growing necessity of affording legal protection to

those aliens absorbed into the state. The Twelve Tables and the *ius civile* were conceived as being inapplicable to persons who were not Roman citizens by birth. As the Empire expanded, the need for a body of law protecting such persons became obvious. This body of law is referred to as the *ius honorarium* and it was both formulated and administered by Rome's provincial magistrates. From Diocletian onward (284-305 A.D.) direct *imperium* legislation came into use. The Dominate Emperors were the masters of both the law and the Empire and consequently many time-honored legal rules were overruled or ignored by their edicts.

It was not until the ascension of Justinian to the throne (527-565 A.D.) that all of the above-mentioned sources of law were codified into one body of law. The codification which bears his name is most complete and probably his greatest and most enduring success. For seven years, from 528 to 534 A.D., compilers worked on the code. It was meant to be an authoritative statement of the whole of Roman law. "It was to replace and did replace all former statements of law."⁷ Justinian's Code, called the *Corpus Iuris*, is the pinnacle of Roman jurisprudence. It is, thus, in the historical and legal context just mentioned that the concept of corporation emerged.

The Corporate Concept

The concept of corporation, as that term is used presently in America and England, is employed in a much narrower sense than it enjoyed in Roman jurisprudence. This constriction in the term's meaning and use seems to have occurred in the mid-to-late eighteenth century; as the corporate form of business became more and more prevalent in both England and America, the juridical development of the term embodied many of the constraints which national governments wished to place on such forms of business organization. Not only was the Roman concept of corporation much broader than today's but it also was an idea originally posited in the absence of those forms of business organization commonly referred to as corporations. In fact the concept of *corpora*, from which corporation developed, is originally one of Roman natural science instead of jurisprudence.

The general theory of *corpora* is rooted in the Stoic philosophy concerning nature. The general theory asserts that all objects which appear as separate things possessed an inner spirit, called a *species* or *spiritus*, which made that object into a separate body, or *corpus*. Although the *spiritus* was that cohesive force which gave the material object its identity, it was also thought capable of being

independent of the material, or substratum, that composed the object. The substratum could change and not alter the individuality of the object "provided the change happens successively and does not transform the object into a thing of another kind."⁸ Thus, new planks added to a ship's deck did not change the species of the ship although the material comprising its deck does so change.

Corpora were divided into three classes. The first class consisted of homogeneous bodies such as a person, stone, tree or statue. The constituent parts of these homogeneous bodies were so inextricably bound together, so unified, that no separate right of ownership could exist concerning the component parts. One example given by Olivecrona, as cited from the Roman jurist Paulus, is that of a statue's arm. "The absorption of the arm affixed to the statue was even so complete that, if the arm had previously belonged to somebody else than the owner of the statue, his right was extinguished through the *ferruminatio* and did not revive if the arm was later on detached from the statue."⁹ Likewise, if a tree, owned by someone, is purposely planted in foreign soil and takes root there, the ownership right of this person is extinguished because the tree's *spiritus* was absorbed by the *spiritus* of the soil to create a new object with a new *spiritus*.¹⁰

The objects contained in the second class of corpora are different from the first class since they are composed of parts that are not so unified as to be inseparable. A building, for instance, is composed of parts such as windows and doors which have not joined or melted together as completely as did the arm to the statue or the tree to the foreign soil. A person could own the building but it would not have its own *spiritus*. Its identity would be the summation of identities and *spirituses* of the component parts. Juridically important was the fact that should any of these parts be detached from the building, the right of ownership of a previous owner is revived since the *spiritus* of the detached part was not changed even when it was bound up in the larger object. "In other words, objects that are made part of a greater whole (a *corpus*) without being joined to it in such a way that they are absorbed into its unity potentially retain their own species."¹¹

Corpora of the third class consist of parts that are physically independent of one another such as sheep in a flock or men in a legion; they are held together by bonds of unity and have names and *spirituses* of their own. "The reason why groups of persons or things were regarded as corpora was, of course, the natural inclination to conceive them as separate entities remaining identical, while

the parts composing them were changing. . . . The peculiarity of corpora of the third class is that the parts retain their own species though forming parts of the whole."¹² Juridically speaking, the third class of corpora implies that, unlike the second class, individual ownership rights can be exercised without having to demolish, disassemble or break down the object into its component parts. The species of the parts is not dormant while the whole exists.

It must be remembered that the general theory of corpora as enumerated above did not originate as a legal theory; it was rooted in Stoic natural science and assumed to be correct. Its proof was objective and did not depend on jurist's arguments. As a theory it was meant to pertain to all corpora. Corpora of the first class were tangible with but one spiritus; corpora of the second class were tangible but had no separate spiritus, their identity being defined by the spirituses of the components. Corpora of the third class were intangible unities composed of tangible objects. Both the intangible and tangible entities possessed separate spirituses.¹³

One final point should be briefly mentioned at this time. An important point, and one which later concerned many eighteenth and nineteenth century jurists, was the relationship between the scientific theory of corpora to the power and authority of the state. To the Roman philosopher all three classes of corpora were primordial. Consequently, the question arises whether or not corpora of the third kind were subject to creation by the state as artificial persons. If all three classes of corpora were inherent in nature, i.e., natural, the state could control but not create them. However, if the state could create such entities, part of the theory would be unnatural, i.e., not found in nature. To Roman philosophers and scientists corpora of the third class were not meant to be fictitious persons or simply entities with state endowed artificial personalities.

The Actual Development of Corpora of the Third Kind

It can be argued that even if the general theory of corpora is a scientific and rational one, its implementation in a Roman world fraught with political uncertainty is but an ideal. Corpora of the third kind can exist naturally and unfettered in a world where the largest associative tendencies of a people are towards clans and families. In the expansionist world of the Roman Empire the ability to tolerate associative tendencies which placed such corpora above the state was limited. Jurists "will admit frankly that in reality associations are not created by the state, but they will refuse to consider this a sufficient objection to the legal view of them as having only a

fictitious personality granted to them by the state.”¹⁴ The author’s research points to the paradox that even though the corpora theory was widely known among Roman philosophers and jurists the actual propensity in Roman law was to intermittently treat corpora of the third kind as unrestricted or restricted entities.

Much fruitful effort could be spent tracing the worldly manifestations of the third kind of corpora; concepts such as family, clan, tribe, town, state, church, etc., are all good examples. The direction of this paper, however, is to ascertain the extent to which such corpora were manifested in what today would be recognized as primarily business entities.

There is evidence of industrial development in Rome as early as the Monarchy period. Boak asserts that eight early guilds, those of the flute players, gold workers, smiths, dyers, shoemakers, leather workers, bronze workers, and potters, were organized during this period (753-510 B.C.).¹⁵ The character of these guilds was purely social even though the bond between each member was due to a common trade or craft. He adds, however, that for approximately two and a half centuries after the establishment of the Republic (510-260 B.C.) “the encouragement given to trade and commerce under the later monarchy was replaced by an indifference”¹⁶ to such development and a marked reversion to agrarian concerns.

The period from 264-133 B.C. was one of great military victories and territorial expansion for the Roman republic. By 133 B.C. lands added to the republic included Sicily, Sardinia, Corsica, Epirus (Albania), northern Italy up to the Alps, Spain, Greece, and Egypt. It was a period of constant struggle which saw among other movements the rise of the business class. “Its rise was stimulated by the Roman practice of depending as much as possible upon individual initiative for the conduct of public business. . . . By the middle of the second century B.C., contracts were let for the construction of public works of various sorts, the operation of the Spanish and reopened Macedonian mines, the collections of rentals from public lands in Italy and of harbor dues in Italy, Sicily, and Spain.”¹⁷ Persons who undertook such contracts were called publicans (publicani). Great financial means were not necessary since publicans were allowed to form joint stock companies with limited liability; there is no evidence to indicate that the Roman use of the term “joint stock” meant anything more than the pooling of the physical resources necessary to fulfill the contract requirements.

Guilds were but one form of corpora that existed at this time. Other organizations, including the guilds, were referred to as col-

leges; they were all social in nature and founded around a common tie such as a common profession or trade, a common worship, or the widespread common desire to receive a decent burial. The colleges were organized along the same lines as the municipalities with their own patrons, president, and treasury. In 64 B.C. all colleges throughout Rome were abolished because of public disorders occasioned by a new form of college, the political club. Six years later complete freedom of association was restored only to be revoked again by Julius Caesar who allowed only professional and religious colleges to remain in existence. Augustus, who followed Caesar, passed a law which required that new colleges must secure a Senate decree in order to form and stated that membership in an unauthorized college was a treasonable offense. Under Marcus Aurelius the colleges were recognized as juristic persons with the power to manumit slaves and receive legacies.

During the second century A.D. the economy of the Empire began to decline. By this time the publicans had extended their range of services to the point where they were provisioning most of the army and constructing many of the public works such as aqueducts, theaters, coliseums, etc. It became one of the government's vested interests to insure that the functioning of the professional colleges was not impaired in any way. "Gradually the idea developed that these services were public duties (munera) to which the several colleges were obligated, and under Severus Alexander the initiative in organizing new professional guilds passed onto the hands of the state. . . . The colleges from this time onward operated under governmental supervision and really formed a part of the machinery of the administration."¹⁸

The Late Empire (285-565 A.D.)

The Empire's dependence on the colleges to perform public duties became even more pronounced during the late empire period. Those colleges that were associations of businessmen, tradesmen, and craftsmen were now called corporations (corpora), and their members were referred to as corporati. "The idea that such duties constituted an obligation had developed gradually during the Late Principate and was accepted as axiomatic under the Autocracy. . . . The first step taken by the state to insure the performance of these services was to make this duty a charge which rested permanently upon the property of the members of the corporations, no matter into whose possession it passed."¹⁹ Despite this limitation, finding a sufficient number of willing corporati became increasingly more

difficult as the Empire continued to deteriorate. Consequently, the state made membership in these associations an hereditary obligation. The professional corporations were the only ones to survive during the late Empire; the religious and funerary associations lapsed with the acceptance and spread of Christianity as the official religion of Rome.

The Decline and its Aftermath

During Diocletian's reign (284-305 A.D.) an administrative division partitioned the Empire into the Western and Eastern halves. How rapid and smooth this division occurred is hard to assess; however, it was not until 395 A.D. that Emperor Constantine moved his residence to Constantinople and established that city as the Eastern Empire's capital. By this time the end of the Western Empire was imminent. Barbarian invasions could no longer be checked and Rome itself was sacked in 455 A.D.

Justinian's Code, compiled and published between 528 and 534 A.D., was a product of the eastern empire. The partitioning of the Empire brought about the separate development of legal systems. The tribes and clans that invaded the Western Empire are often times characterized by historians as barbaric in nature. This statement may be true if one is comparing the degree of civilization of these invaders to that of the Romans; however, it cannot be pressed further without misstatement. It must be remembered that many of the Germanic and Saxon tribes responsible for the disintegration of the Empire were members of that Empire. Roman citizenship was extended to most of the people conquered by the Empire. The Germanic kings who took over the Western Empire attempted to restore or continue the Roman law that had existed. The *Lex Romana Visigothorum* (Roman Law of the Visigoths) was issued by the West Gothic King, Alaric II in 506; the *Lex Romana Burgundionum* (Roman Law of the Burgundians) was issued by King Gundobad before 506 A.D.; and the *Edictum Theodorici*, had been fashioned by Theodoric The Great, the leader of the eastern Goths in northern Italy. All three of these works codified Roman law but their subsequent development was influenced almost totally by the traditions and customs and needs of the Germanic and Saxon clans which lived by them.

With the decline of the western Empire came the decay of manufacture. The state factories (corporations) for military clothing and weapons ceased. The corporations lost their place in society and references to them in medieval law are few. As craftsmen reverted

to local attachments they lost much of their freedom of movement and became beholden to landed proprietors or bishops or monasteries. Although alive in the eastern empire the corporate concept, as practiced by Rome, died in the West.

APPENDIX

A Table of Significant Dates
in Roman History*

		Monarchy Period
B.C.	573	Founding of Rome by Romulus.
	509	End of the early monarchy.
		Republic Period
	451	The Decemvirate. Codification of the Law.
	264	First Punic War.
	218	Second Punic War.
	215	First Macedonian War.
	200	Second Macedonian War.
	171	Third Macedonian War.
	149	Third Punic War. Fourth Macedonian War.
	60	Coalition of Pompey, Caesar, and Crassus.
	58	Subjugation of Gaul.
	55	Caesar's invasions of Britain.
	44	Assassination of Caesar.
	31	Battle of Actium.
		The Empire
	27	
	14 to	Reign of Caesar Augustus.
A.D.	43	Invasion and annexation of Southern Britain.
	70	Destruction of Jerusalem.
	117-138	Reign of Hadrian.
	161-180	Reign of Marcus Aurelius.
	193-211	Reign of Septimius Severus.
	284-305	Reign of Diocletian.
	330	Constantinople the imperial residence.
	376	Visigoths cross the Danube.
	395	Division of the Empire.
	406	Barbarian invasion of Gaul. Roman garrison leaves Britain.
	409	Vandals, Alans, and Sueves invade Spain.
	455	Vandals sack Rome.
	476	Last Western Emperor deposed.
	506	Roman Law of the Visigoths.
	534	Franks overthrow the Burgundian Kingdom.
	529-534	Publication of the Corpus Iuris Civilis.
	565	Death of Justinian.

*Adapted from Boak's *A History of Rome to 565 A.D.*, pp. 525-533.

FOOTNOTES

¹Boak, p. 40.

²Jolowicz, p. 1.

³Wolff, p. 49.

⁴Jolowicz, p. 4.

⁵Wolff, p. 59.

⁶Wolff, p. 62.

⁷Wolff, p. 164.

⁸Olivecrona, pp. 18-19.

⁹Olivecrona, p. 22.

¹⁰Olivecrona, pp. 22-23.

¹¹Olivecrona, p. 24.

¹²Olivecrona, pp. 25-27.

¹³If one abstracts to the present day the three kinds of corpora, one can discern how corpora of the first, second, and third classes, respectively, can be compared to our present notions of proprietorship, partnership, and corporation. The comparison is less abstract if one strips away the legal connotations of these terms and reduces them to more basic concepts.

¹⁴Hallis, p. xxx.

¹⁵Boak, p. 42.

¹⁶Boak, p. 91.

¹⁷Boak, p. 158.

¹⁸Boak, pp. 369-370.

¹⁹Boak, p. 465.

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