

THE FIRST BOOK IN ENGLISH ON THE LAW OF INCORPORATION.

(Continued from March issue.)

It is instructive to group together the many things in charters that in Sheppard's opinion are of indifferent value, some of which he says the corporation has power over, even if not mentioned, others which it may be as well to mention in the charter. These include among those not necessary to be mentioned, clauses giving power to buy and sell, sue and be sued, to have and use a common seal, to restrain alienation or demise of the land of the corporation, that the survivors shall be incorporate, that if the revenues increase they shall be employed to the public use of the corporation, that they shall be visited by the governors, have power to make ordinances, that the ordinary shall not visit it, license to purchase in mortmain.¹

So also "That the corporation shall erect and use a Town-Goal, or use the Gaol there being, to imprison such as are to be imprisoned: And so for a Town-Hall, and a Gallows. And these may be erected and used accordingly; and so perhaps it might be without any such Grant or Authority given."²

So "The Clause of addition that they may not make Ordinances repugnant to the Lawes, etc., is idle, and to no purpose."³

"So "Charters that have Clauses to give power to imprison men's bodies, set great Fines, sell men's goods as forfeit, for breaking any Charge of the Charter, or any Ordinance of the Corporation. All these and such like clauses inserted into Charters of Corporations are held by Law to be void."⁴

Among the things usually granted, but that Sheppard says "have no dependence or are they at all incident to corporations," he mentions "Felon's goods, and of fugitives, and persons outlawed in Civil Actions, The Forfeiture by penal Statutes, Recognizances, Hundreds, Courts and Consuance of pleas, Fairs, Markets, Wayfs,

¹ pp. 41, 42, 52, 53, 54, 55, 56, 57, 58.

² pp. 66, 67.

³ p. 82.

⁴ p. 78.

Estrayes, Treasure Trove, Deodands, Exemptions from serving in Offices, Juries, payment of Tolls, Picage, etc. The Assize of Bread and Beer, Pillory and Tumbrell, the Office of the Justice of the Peace, Coroner, Clerk of the Market, and a great part of the Sheriff's office, and the like."¹

So also "It is usual to have inserted in the Charter, a Power to use a Sword, Maces, Cap of Maintenance, Arms, and such like Ceremonies. And it is best so to express it, that the use thereof may be without dislike, and without Question."²

In addition to unnecessary clauses in charters already mentioned, Sheppard gives many others, *i. e.* a power to walk the circuit of the town in perambulation:³ that if the revenues increase they shall be employed to the publick use of the corporation: that the corporation shall be restrained from alienating or demising its land: that it shall be visited by the governors: that it shall not be visited by the ordinary:⁴ nor is it necessary to insert in the charter that the corporation shall have and enjoy all the powers, franchises, privileges, etc., of L. corporation or of any corporation in the county of G., or that any of their predecessors had at any time within sixty years last past had or used, etc.; nor that the charter be construed "to give power to do any ought, whereby anything given in the place to pious or charitable uses may be wasted or misemployed against the mind of the Founders."⁵

"That none shall use the trade, not having been apprentice for lesse than seven years, nor keep away another's work and customers by sinister means under paine of five pounds."⁶

The frequent confusion by our writer of details relating to municipal corporations with those relating properly to other kinds of corporations, is noticeable. Putting together the things stated by Sheppard as necessary to a corporation, without affirmation thereof in the charter, together with the things that, although often stated in a charter, should not be there, we see that a good conception of municipal incorporation was in the mind of Sheppard; although he had not learned to differentiate a municipal corporation from other kinds of corporations.

"It is usually best to have some Rent or other reserved to the

¹ pp. 42, 43.

² p. 59.

³ p. 73.

⁴ p. 42.

⁵ p. 76.

⁶ p. 76.

Lord Protector. Albeit perhaps the Corporation may be well made without it."¹

Here we trace the gradual disappearance of the old fee-farm rent, without which there was originally no municipal incorporation. This was what we should call the consideration moving from the townsmen to the lord of the manor, or to the King, at first holding the particular manor as of his own demesne, later and especially after *Quo Warranto* became established, as exercising his regal power, in return for the right to continue to enjoy their old customs, thus gradually ripening into the liberties and rights as defined in the charter. Obviously before this time a fee-farm rent was essential to the creation of this kind of a corporation² and Sheppard was not sure that the time had yet gone by when he wrote in 1659. But our New England forefathers, with their practical knowledge of town government, without lords of manors to exact fee-farm rent, and therefore, without fee-farm rent, without external source of authority, incorporated themselves as towns.

It is noteworthy that just as in New England the right of admission to these municipalities was reserved to the municipality itself to pass upon, so in England in Sheppard's time, was it still so reserved.

"It is held therefore that the Lord Protector cannot by his Charter make a man free of a City that is not free by the Law and Custom of the Place."³

The next section, VIII, treats of "What Ordinances a Corporation may make." Our author says, "This Clause of giving power to make By-laws, is not necessary to be inserted in the Charter; For by the very Act of Incorporating, this power is given."⁴

That is to say, one of the essentials of all corporations is the power to frame its own rules for its own guidance in its own concerns. In the case of a municipal corporation, what is this but the right to local self-government under another name? The name given to these rules is in itself significant, by-laws being the laws of the bir, burg or borough.

The fact that the name of the rules of a town (by-laws) is used as the name of the rules of all kinds of corporations marks the ignoring of the distinction between different kinds of corporations.

¹P. 73.

²See the case of the men of Islington, Dyer, 100 (1553).

³P. 78.

⁴P. 82.

A study of our primal institutions shows us that this right of local self-rule is no gift from a superior to an inferior, but comes to us as a step in evolution. It is therefore fundamental, institutional, even though ignored in the past by bench and bar, ignorant of the facts of our history. It is what Webster meant, building better than he knew, when in his address on "The Landing at Plymouth" delivered December 22, 1843, he spoke of "the government of a great nation over a vastly extended portion of the surface of the earth, by means of local institutions for local purposes, and general institutions for general purposes."¹

An even broader statement of these principles appears in the Declaration of Independence; that governments derive their just powers from the consent of the governed.

More attention to the facts of history and the details of town charters, brought to light since Coke's time, and less deference to his *dicta* and erroneous metaphysical notions, would have saved our text book writers and courts from the mistaken views now prevalent concerning town powers.

"The Clause of addition that they may not make Ordinances repugnant to the Lawes, &c., is idle, and to no purpose. For the law doth understand, and it is included, and such By-laws made by a corporation are void by the very Common-Law.

But for the further clearing of this point these things are to be known:

It is provided by an act of Parliament, 19 H. 7, chap. 7, That no Masters, Wardens and Fellowships of Crafts or mysteries: Or Rulers of Gylde or Fraternities: shall make and put in use any Order or Ordinance by them made in diminution of the King's Prerogative, or against the Common profit of the people, nor confirmed by the *Lord Chancellor, Lord Treasurer, Lords Chief Justices* of the two Benches, or three of them, or by the two Judges of Assize of the County where the same corporation is, under pain of 40*s*. For the understanding whereof these things are to be known:

1. That an Order or By-law made by a Corporation, not against the Prerogative of the *Lord Protector*, or profit of the people, is good without any such Confirmation.

2. That all By-laws by them made against the Liberty and Freedom of the People, as, to forbid or Restraine Trade, Impose Taxes or Burdens of Payment on the people, where the law doth not impose them; to bind a man's Inheritance, to restrain men from suing in what Court they please, or to enhance the prizes of Com-

¹2 Works, Daniel Webster, 207.

modities to the hurt of the publick and private advantage of the place, are void. Nor can they annex to a good Ordinance, a penalty of imprisonment, or Forfeiture of goods bought or sold.

3. No Clause in the Charter to this purpose can help or make such an Ordinance good. Nor will any Confirmation of Lords or Judges make such an Ordinance or By-law good."¹

By its very terms the provisions of this act (19 H. 7 ch. 7) apply only to certain kinds of corporations ("Masters, Wardens and Fellowships of Crafts or Mysteries; or Rulers of Guylds or Fraternities"). Therefore they do not apply to municipal corporations. Obviously also these provisions can only apply to charters granted by the King. If Parliament grant charters giving any such obnoxious powers or creating any such obnoxious restraints, there is no power in the English system of government to set them aside or to declare them void.

By implication it would appear that Sheppard knew the difference. "And therefore Cities which are incorporate within the time of memory cannot have such privileges without Parliament, Co. 8, 125. *Dyer*, 279,"² implying that if Parliament grant unlawful privileges ("against Common Right") they become lawful, but if granted by the King, they do not.

From which it is evident that a charter of incorporation granted by Parliament is more valuable than one granted by the King, because the courts have no power to find anything in the former to be void, however it may trench on well established principles of constitutional law, but they may declare that powers, &c., given or restraints contained in charters granted by the King are illegal and void.³

"But a corporation may make such By-laws and Orders as any Town, Parish or Neighborhood of men by the very Common-law may make, by a general consent for the better government of themselves, and if it be for the publique good, not onely of the place, but of the country."⁴

Here we find grouped together town, parish and neighborhood of men as having the same right as a corporation to enact by-laws. Therefore incorporation is not necessary in order to gain power to make by-laws. And at the present time, a voluntary association

¹Pp. 82, 83, 84.

²P. 86. From this it appears that Sheppard thought the statute applied also to municipal corporations.

³See *Dr. Bonham's case*, Co. 8, 115.

⁴P. 85.

may make by-laws that are valid and binding upon the members of the association. But the collocation of corporation, town, parish and neighborhood of men strikes us now as discordant.

This section concludes with brief statements of the principles laid down in Austin's Case¹; the Case of the Tailors of Ipswich, Co. 11-53²; the case of Monopolies, Co. 11, 84³; Goodyer vs. Shaw, Stiles Rep. 298⁴; Co. 5, 64—Clarke's Case⁵; the case of the Chamberlain of London, Co. 5, 62b⁶; Norris vs. Stapes⁷; Dogrell vs. Powks, &c.;⁸ concerning which much might be said did not lack of space forbid. They are cited and briefly explained, to show how Sheppard mixed up all kinds of cases relating to corporations, failing to distinguish between the different kinds.

Sect. IX and the last one, inconsistently with the statement made in the table of contents, treats of:

"Some other general Rules, needfull to be known about a corporation." As throughout the book, the influence of Coke and his report of the case of Sutton's Hospital is predominant. Thus a corporation "cannot commit Treason, be Out-Law'd, Ex-communicate, appear in person in a Court, be Sworn, Dye, and other such like Acts which a natural body may do."⁹

If the corporation by a majority of its members, ratify the treasonable acts of the directors, why is it not just as much the treason of the corporation as, in like circumstances, it would be the

¹P. 89. Hen. 6 granted power to the corporation of dyers to search, &c.—and to declare forfeit any cloth found dyed with logwood. It was adjudged that no charter could make forfeit the goods of a corporation.

²P. 90. An ordinance was declared illegal prohibiting the exercising of a certain trade until proof was made before the Society of having served seven years as apprentice.

³P. 92. An ordinance of the Company Taylors in London preferring the brothers of the Society in the dressing of cloth was declared illegal, "for one may put his Cloath to dress where he will."

⁴P. 94. An ordinance authorizing the taking of bad locks by the warden of the Locksmiths of Durham held void, because no order was made by the Corporation to take away the locks and also because "it will be very hard to maintain the Locksmiths to be a Corporation."

⁵P. 96. The corporation of St. Albans rated the inhabitants and burgesses to build courts and it was adjudged to be nought.

⁶P. 97. An ordinance prohibiting the sale of broadcloth until inspected at Blackwell-Hall, &c., was upheld.

⁷P. 98. Prohibiting the art of weaving unless he had been an apprentice within the borough for seven years, &c., was held invalid.

⁸P. 104. An ordinance of the City of London that none of such a trade should take to his apprentice the son of an alien was declared void.

⁹P. 109, citing Co. 10, Sutton's Hospital Case.

trespass of the corporation? The only logical course is frankly to adopt the proposition that a corporation acts through its members or agents, duly authorized, or in consequence of the ratification by the corporation of the acts of its agents.

The case between the King and Lord Dacres for the College of Graystocke is cited by Sheppard¹ as authority for the proposition that there cannot be a corporation without a lawful commencement.

A statute, 1 Ed. 6, ch. 14, gave all colleges to the King. It was decided that the college was not the King's by the act because the master was presented and not elected, because it had no common seal, and because it had no legal commencement. Its defects saved it. But admitting the case as authority for the proposition in the case of a college, it is obviously straining it too far to admit it as an authority for the proposition that all corporations are illegal unless they can show a lawful commencement, for it would at once make void all the municipalities of England claiming to be corporations by prescription. Moreover, it would be incompatible with the evolutionary process under which English towns, boroughs and cities have gradually become corporations. It is impossible to determine exactly when London was formally incorporated. See "The Origin of Mun. Incorp." Amasa M. Eaton, already cited.

"One Corporation cannot make another."²

But as our author has stated³ that the King is a corporation, how, then, can the King create a corporation? And how could any American Colony, a corporation under a charter from the King, create either a municipal corporation or any other corporation? If we accept this doctrine, all the American colonies were not corporations, or if they were, then all the corporations they created were illegal, and all their recognitions of towns as valid corporations, were illegal and void acts. It was probably this erroneous doctrine together with the other erroneous doctrine that only the King can incorporate that led our colonial legislatures to hesitate when they incorporated Harvard, Yale and Brown. When Yale College applied to the legislature of Connecticut for a charter, in 1701, the act of incorporation was purposely so drawn, at the suggestion of Judge Sewall, as to conceal as much as possible, its real meaning. He may have known that one of the grounds on which the charter of Massachusetts had been declared forfeited in 1688 under *Quo*

¹P. 111.

²P. 112, citing Broo. Corps. 45, 46.

³P. 6.

Varranto, was that the colonial legislature had granted a charter of incorporation to Harvard College.¹

It is time such crude erroneous doctrines were utterly discarded. The Congress of the United States sets apart a new territorial subdivision of the country as a corporation, calling it a Territory or District. This new corporation, through its legislature, creates numerous other corporations, public and private. Are their charters void and illegal? Has the validity of their incorporation ever been questioned? It seems then that one corporation can create another. It seems also that it does not need the King, nor the sovereign power, or incorporate, for a temporary territorial legislature is not sovereign, nor has it any sovereign people or state behind it. What is still more remarkable, although the validity of all the charters granted by such a territorial legislature is denied by no one, yet if Congress were to grant the same charters the common voice of the bar of the country would question the validity of such grants. So here is a case where the created can do what the creator cannot do, where the created is greater than the creator.

Incorporation not calling necessarily for the exercise of any sovereign power, since if it did, a territorial legislature could not incorporate, the question naturally arises whether Congress has not power to incorporate and to pass a general incorporation act? It certainly has power to incorporate any corporation engaged in interstate commerce, and to pass a general incorporation act under which such corporations may be formed, through the power expressly conferred in the Constitution, Art. 1, sec. 8.²

¹Modern Pol. Insts. Baldwin, 184, citing 3 N. H. Hist. Soc. Collec. 413, as to Yale.

²See the case of the United States v. Maurice, 2 Brock. 96, at 109 (1823), Marshall, C. J.

"The United States is a government, and, consequently, a body capable of attaining the objects for which it was created, by the means which are necessary for their attainment. This great corporation was ordained and established by the American people, and endowed by them with powers for important purposes. Its powers are unquestionably limited; but while within the limits, it is as perfect a government as any other, having all the faculties and properties belonging to a government, with a perfect right to use them freely, in order to accomplish the objects of its institutions, it will certainly require no argument to prove that one of the means by which some of these objects are to be accomplished, is contract; the government, therefore, is capable of contracting, and its contracts may be made in the name of the United States." Cited in *Van Brocklin v. State of Tennessee*, 117 U. S. 151 (1885) at 154 by Gray, J.

See also the language used by Marshall, C. J., in *Cohens v. Bank of Virginia*, 6 Wheat. 414: "America has chosen to be, in many respects and to many purposes, a nation, and for all these purposes her government is complete; for all these objects it is supreme * * * " Cited in *Legal Tender Cases*, 12 Wall. 457.

Our author says there must be unanimous consent in the disposal of the revenues of a corporation, especially if there be any prejudice therein to the corporation.¹

"But the persons corporate in Colledges or Halls in either of the Universities, or elsewhere, the Masters or Guardians of Hospitalls, cannot make any lease for longer time than for three lives, or 21 years."²

"And if the Colledge have 20 acres of Land that hath been usually letten, and make a Lease of these 20 acres, and one acre more never let, and adde so much Rent as this acre comes to, it is void. So if it have two Farms at two Rents, one £20, the other £30, and lease them both at £50 Rent; this is not a good lease."³

"And it is a general Rule, That nothing may be done by a Corporation that doth concern the whole Corporation, but it must be done by a Deed under the Common-Seal."⁴

The mere statement of the old rule:

"A Corporation cannot be seised of land to other uses, Coo, 10-24"⁵ is enough, to point out the radical changes made since 1659 when Sheppard wrote.

But the authority cited does not sustain the proposition. The doctrine was advanced as one of the reasons why the case should be differently decided.

"If a summe of money be to be levied upon a corporation, it may be levied upon the Mayor or Chief Magistrate, or upon any member of the Corporation. By Chief Justice Rolls, in *B. R. Hill*, 1652."⁶

To the same effect :

"Anciently a Corporate Town was answerable for the Trespass or Debt of Particular Townsmen, and Particular Townsmen for the Trespass or Debt of the Town or Community."⁷

"If therefore Townsmen did not render their Account, or did not pay their Ferme or other Cleer Debt to the

¹Pp. 112, 113.

²Pp. 114, 115.

³Pp. 119, 120. I leave it to my readers to determine why!

⁴P. 124. Yet already in Sheppard's time, exceptions had sprung up and since then the rule has gone, it being utterly impracticable. Our author at p. 124, expresses his doubt whether the rule can be safely departed from, even in case of a contract for necessary provision for the use of the whole, or the retaining of a necessary servant from year to year, or the demanding of rent.

⁵P. 125.

⁶Pp. 126, 127.

⁷Madox, *Firma Burgi*, 154.

King, it was the usual way to take the Town or Liberty into the King's hand. But That did not hinder the King's Officers from taking remedy against Particular Townsmen, if it was found needful; as will be found in the following part of this Work."¹

We have here an explanation of the apparently unreasonable rule in the United States that the property of any inhabitant may be taken on execution against the town.²

The reason is obvious. Originally each townsman or burgher (villein, the occupant of a villa or town) was liable to his lord for his feudal dues, consisting at first of the stated services that raised him above the position of a serf (servus or slave).³

¹Do. p. 164. See also Chap. X, from p. 181 to p. 232, and Chap. II.

²Bloomfield v. Charter Oak Bank, 121 U. S. 121, 129 (1887). "In Connecticut, as in Massachusetts and Maine, by common law or immemorial usage, the property of any inhabitant may be taken on execution upon a judgment against the town." Atwater v. Woodbridge, 6 Conn. 223-228; McLoud v. Selby, 10 Conn. 390; Beardsley v. Smith, 16 Conn. 368; 5 Dane Abr. 158; Chase v. Merrimack Bank, 19 Pick. 564-569; Gaskill v. Dudley, 6 Met. 546; Adams v. Wiscasset Bank, 1 Gr. 361; Fernald v. Lewis, 6 Greenl. 264.

See also Hopkins v. Elmore, 49 Vt. 176; Rev. Stat. N. H. (1878), c. 239, sec. 8.

³Villein services, in feudal law were base or menial services, performed in consideration of the tenure of land. The serf and his goods belonged to the lord of the soil. "The villein was not a slave, but a freeman minus the very important rights of his lord." 5 Norman Conquest, Freeman, 320. "While the churl sank to the state of villeinage, the slave rose to it." Do. 322.

The first step in municipal incorporation in England was taken when the first serf became the first villein.

"Small things in the beginning of natural or politic bodies, are as remarkable as greater, in bodies full grown." (Dudley's letter to the Countess of Lincoln in 1630, cited in 1 Hist. of New England, Palfrey, 166, n. 1.)

Domesday book recognizes the distinction between *serf* and *villein*, with other distinctions difficult now to understand. Thus the servi are stated to number 25156, and the villeins 108,407. 1 Stubbs Const. Hist. Eng. 463, ed. of 1883.

Slaves continued to be exported from Bristol until the Norman Conquest. (Green, Short History of the English People, Chap. I., sec. VI. Servitude continued centuries later in England. The traditional view of the meeting between the King and the people at Mile End in 1381, under the leadership of Wat Tyler is best given by Green, 1 Hist. of the Eng. People, 473. His source is Froissart, 404-406.

"On the morning of the 14th, therefore, Richard rode from the Tower to Mile End, to meet the Essex men. 'I am your king and lord, good people,' the boy began with the fearlessness which marked his bearing

Then feudal services were afterwards commuted for a payment in a fixed sum in money, annually. Another commutation took place when instead of annual payments in severalty, by each villein,¹ now a townsman, burgher or freeman, the town gradually becoming what we call a corporation, undertook to pay a collective or joint sum annually (fee-farm or ferm) in place of the several rents due from its townsmen in return for a charter from the lord of the manor acknowledging the right of the townsmen to the liberties they had already won through custom, and admitting that these liberties should be enjoyed *in futuro*. There thus arose an implied condition that these liberties should continue to be enjoyed so long as the annual fee-farm were paid. It must, however, be borne in mind that for a long time lords of manors entertained no conception of an irrevocable grant. They thought these grants were at will or at best, but for the life of the grantor and hence the necessity of a confirmation of the grant upon the accession of each new lord of a manor. The cases cited of the men of Dale and of the men of Islington fixed the character of the new juristic entity, the *persona ficta*, the corporation, that was being evolved. But even after this new conception was fixed, the lord of the manor retained his remedy against the townsmen severally if the fee-farm rent were not paid, and as his action lay in the manorial court, the result was that if the fee-farm rent was not paid, he had two remedies, the townsmen being in effect liable to him severally as well as jointly.

It is noticeable all through Sheppard's book, how one thing after another was eliminated as not necessary to the creation or existence

throughout the crisis, 'what will you?' 'We will that you free us forever,' shouted the peasants, 'us and our lands, and that we be never named *nor held for serfs*.' 'I grant it,' replied Richard; and he bade them go home, pledging himself at once to issue charters of freedom and amnesty. A shout of joy welcomed the promise. Throughout the day more than thirty clerks were busy writing letters of pardon and emancipation, and with these, the mass of the Essex men and the men of Hertfordshire withdrew quietly to their homes."

(Au. Fr. Chr. 519: "Que nul naif seroit en Engleterre ne nul serviage ne naifte, mes toutz estre free et de vn condicione.")

"During the century and a half after the Peasant Revolt villainage died out so rapidly that it became a rare and antiquated thing."

Green. Short Hist. of the Eng. People, Ch. 5, sec. 5.

I am inclined to think that Green here confounded *villeinage* with *servitude*.

¹*Villein* meant an inhabitant of a villa or farm afterwards a town. In Italian a villa is still a country residence, and we use the word with the same meaning.

of a corporation, until we reach its few indispensable requisites. Thus, p. 6, There must be good and lawful authority to erect the corporation. This we can all accept, but we differ as to the sources of this authority.

P. 10: There must be persons to be incorporated. Even if this be limited to municipal incorporation, it is difficult to accept this statement. For instance, as before stated, the legislature may enact that all the land embraced within certain limits shall constitute a corporation, to be known as the town of A. There may not be a person living within those limits or even owning any land there at the time, and yet who would doubt the validity of such an act of incorporation?

P. 13. The corporation must have a name.

P. 18. "There must be a place certain where to fix and bottom the corporation."

P. 21. "If it be constituted and made by Charter, there must be apt words therein for the making thereof, which are the words commonly used in Charters for this purpose." (Here is an implied admission that a corporation may be constituted and made without charter.)

Summing up at p. 23, Sheppard says: "All these 5 things, every Charter by which any Corporation is well made, must have within it."

But as a charter is not indispensable to incorporation, it is submitted that only these things are necessary to incorporation:

1. Authority and intention to incorporate.
2. Something to be incorporated, lands, persons, &c.

It is further submitted that the authority to incorporate a municipal corporation may come from:

1. The voluntary association of settlers.
2. Lords of manors lay or spiritual, including the King holding a manor as of his own demesne.
3. The sovereign (King, Parliament, legislature, or the people when assembled through a convention).

The first is really the origin of towns and boroughs in England that never had any charters. Instead of recognizing this fact, after this method of incorporating had become superseded by later methods, lawyers and judges invented the fiction of "lost charters."

The essence of incorporation is the creation of the new *persona ficta*, the new judicial entity that is to live on apart from the lives of its individual constituents, something different from the sum of all its parts, a being by itself, with all the powers, privileges, rights and duties of a distinct being. The creation of corporations is not

necessarily the exercise of a sovereign power, although the sovereign may create them and has now taken to itself the exclusive right to erect them. The essential idea is that the parties themselves intend that such a new entity shall exist and such intention is sanctioned by the community, made manifest by long continued acquiescence (prescription) or finally by the King, parliament or legislature, or the intention to create a corporation may be made manifest by direct act of the sovereign power or through its agent, the legislature. Even prior to the time of Coke, and still more ever since the incorrect theory has had the sanction of his great name, ignoring the facts, it was assumed that the recognition by the King or parliament of what already had been done, was in itself the creation of that which had already been in existence, for, as already shown, corporations existed in fact before the word "corporation" was invented, just as M. Jourdain spoke prose for forty years without knowing it.

Sheppard's book concludes with

"The Formes and Presidents of Charters concerning Corporations with the chief Matters that are usually contained in them," continuously paged beginning with page 131 and ending with page 187.

A full form for a municipal charter is given, beginning with page 133 and ending with page 172. This includes "Considerations of Inducement," as follows: "Oliver, Lord Protector of, &c. Whereas our City of N. in our County of N. is a very ancient City; and the Citizens of the said City have anciently been a Body Politique and Corporate—," showing plainly that in the opinion of the person whose official business it was to issue charters of municipal incorporation, such a grant only confirmed what already existed, and was not an act of original creation.

Then follow mention of Guild-hall Prison, Courts, Fines, Issue, Amercements, Distresse, Waives, Estrayes, The Bishops Lands, The new Grant ("Know ye therefore, that we, at the humble petition of the now Mayor and Commonalty of our said City of N. and for divers other good causes and Considerations Us hereunto moving and of our Speciall Grace, certaine Knowledge and merre motion, have granted, ratified and confirmed. And by these presents for Us and our Successors do give, grant, ratifie, and confirme, and approve to the said Mayor and Comonalty, &c.; the aforesaid Tenement, &c.; the Prison house, &c:—and all and every the powers and Authorityes herein before mentioned for the holding and keeping of the aforesaid Courts —.") this grant including according to the marginal note "all the Franchises they have had" showing

plainly that in Sheppard's opinion this charter of incorporation was but a charter confirming all existing franchises, &c. Then, again, following the marginal headings, follow grants of Felon's goods, Waiffes, &c., Post Fines, Extent of the Limits (or Boundaries) Rent, That the Officers of the Lord Protector do not disturb them, or that no Officers shall molest the Corporation for anything past, Recitalls of (former) Charters, The Frame of the Corporation, The making of the Corporation, Sue and be Sued, Seale, The Present officers named, The Mayor, The Recorder, The Aldermen, Assistants, Chamberlains, Bayliffs, High Constables, Sub-Constables, Serjeant at Mace, Sword and Cap of Maintenance, Sword-bearer, Common Council, How called, Making of Orders and Ordinance, Election of Officers, Oath of the Maior, Oath of all the Officers, Justices of the Peace, Power to keep Sessions, Other Justices of the county not to intermeddle, Time of Choosing Justices, Goal, Offenders, where to be committed, Gallows, Custos Rotulorum, Power to take Conusance of Statutes, Naming a Clerk of the Statutes, Town Clerk of the Peace, Clerk of the Court of Pleas, The present Town-Clerk, &c., Clerk of the Market, Coroner, Deposing of Officers for Misbehavior, Refusers of Officers to be fined, That they shall not serve in Jewries (meaning that the citizens shall not be compelled to serve in juries outside of the city) ,Conuzance of Deeds (meaning power to establish an office for the record of deeds), to make Freemen, Mortmaine (waiver of the Statute of Mortmain), Power to let land, Return of Writs, Faires, Markets, &c., Court of Py-powder, Court of Record, General Words (confirming all former franchises, "whether through charter, Prescription or any other Right, Custom or Usage by Common Laws or Statute-Law although the same have been forfeit or lost, or have been ill used, or not used, or abused, or discontinued; albeit, they are not particularly named herein" Saving to Strangers, Proviso (that the Incorporation hereunder shall not do anything whereby lands, &c., heretofore settled to pious or charitable uses shall be wasted or misemployed contrary to the trust and intent of the founders), concluding "And lastly, We do for us, &c., grant that this Fine, or present Charter shall pass without Fine or Fee, Fee in the Hamper, In Witness, &c."

The whole charter, forty pages, is worth studying, but the above statement of its contents is all that can be reproduced here.

It shows the carefully prepared views of what the leading expert of his time thought to be essential in a well considered charter of municipal incorporation and what such incorporation was.

There follows, pages 173 to 182, both included, "Notes of An-

other President." It is a form for the incorporation of "The Guardians of the Bridge, the Burgesses and Commonalty of the Village of M. in the County of B."

It begins with the Recital of former Patents, Name of the Corporation, To have, take, buy, sell, Number of Burgesses and Officers, Present Burgesses, Ordinances (power to make), Penalties, Election of Officers, Oath of Officers, Removal of an Officer or Member, Court of Record.

There follow, pages 183, 184, "Notes of Another President," (consisting of Recitals (of former Charters and prayer for a new charter).

Then follows a model of brevity, page 85.

"We do grant to J. S., &c., that they, and all men that shall be Elect there Maiores, Bayliffs, or other Head-Officers, &c., in the same City, be in Fact, Deed and Name, one Body, and perpetual Commonalty, or Corporation, and Incorporate by the name of, &c. And that the same Commonalty and Corporation, every year forever, may choose and make of the same Commonalty, to oversee and govern the same Corporation, and all Persons and Affairs thereof during that year, &c. And that the said Maior and Commonalty shall have and enjoy a Common-Seal, to serve forever for the business of the same Corporation, &c."

And finally the book concludes, pages 186 and 187, with notes for a charter of incorporation for drapers, &c., here copied in full to point out that such charters were not of original grant, but only confirmatory of a state of facts that already amounted to incorporation.

"That we at the request of A. B., C. D., honest persons now exercising and occupying the several Trades, Mysteries, Crafts, Faculties, and Occupations of Drapers, Taylors, Mercers, Hardwaremen, Coopers, and Chandlers, within our Borough, the Town of D. in the county of G. And for the better Government and common profit of the same Town, and of all and singular the persons, as well now as hereafter, their Arts, Mysteries, or Occupations there exercising, professing, and practicing; as also, according to the ancient custom within the said Town, where time out of mind hath been a certain Commonalty or Fellowship of the aforesaid honest men, who the several Trades, Arts, Crafts, Mysteries, Sciences, or Occupations of Drapers, Taylors, Mercers, Hardwaremen, Coopers, and Chandlers aforesaid, or any of them within the Borough or Town aforesaid, now do, or hereafter shall or may exercise, trade, or occupy, will, have, instituted, and begun. And therefore we do

by these Presents grant to the aforesaid A. B., C. D., &c. That they, and all the Occupiers of the said Trades, &c., and every or any of them within the Lordship, Borough, and Town of D. aforesaid, shall be in Deed and Name one Body Politike, Commonalty and Fellowship perpetual. And that the same Fellowship and Commonalty, may every year choose out of them three expert men that have lived three years, and been of one of these Trades, to be Wardens for a year, to oversee the Trades, and govern the Society and Tradesmen thereof, and strangers using the Trades there and punish Offenders against their Orders herein mentioned, with the consent of the major part of the Commonalty. And that the said Wardens, Commonalty, or Fellowship, shall and may have a perpetual Succession, and Common-Seal for their Affairs, called the Common-Seal of the Wardens and Commonalty or Fellowship of Drapers, &c. And that they the said Wardens and Commonalty, and their Successors, may lawfully make honest and Lawful Assemblies, Orders, and Ordinances, for the government, oversight, and correction of the said Commonalty or Fellowship; and of all persons trading, practising, using or occupying the Arts, Trades, &c., to the Laws, &c., of this nation agreeable, &c. And that such a day they meet yearly, and choose their Wardens, and one to be Clerk of the Company for that year; and there make such Orders, as the most of them shall agree to for Government, &c."

Here, in conclusion, is a book, the first one in English on the subject of incorporation, written by an expert on the subject, one who was the clerk under Cromwell of the Commission for the issuance of charters of municipal incorporation. It has long ago dropped out of sight but is deserving of study. Like later writers Sheppard failed to make any distinction between corporations essentially distinct in nature. In common with later writers he was also misled by Coke's erroneous *dicta* uttered in the case of Sutton's Hospital, and his work in common with those since written, has contributed to the perpetuation of mistaken views as to municipal incorporation. To correct these erroneous views it is necessary to go back of all the books written in English on the subject of Incorporation and to study the subject afresh through the historical facts, the cases and the charters.

Amasa M. Eaton.

Providence, R. I., March, 1903.