

The Crown as Corporation

Frederic William Maitland

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The greatest of artificial persons, politically speaking, is the State. But it depends on the legal institutions and forms of every commonwealth whether and how far the State or its titular head is officially treated as an artificial person. In England we now say that the Crown is a corporation: it was certainly not so when the king's peace died with him, and "every man that could forthwith robbed another."^(1*)

I quote these words from Sir F. Pollock's First Book of Jurisprudence. They may serve to attract a little interest to that curious freak of English law, the corporation sole. In a previous paper I have written something concerning its history.^(2*) I endeavoured to show that this strange conceit originated in the sixteenth century and within the domain of what we may call "church property law". It held out a hope, which proved to be vain, that it would provide a permanent "subject" in which could be reposed that fee simple of the parochial glebe which had been slowly abstracted from the patron and was not comfortable in those clouds to which Littleton had banished it. Then, following in the steps of Sir William Markby, I ventured to say that this corporation sole has shown itself to be no "juristic person", but is either a natural man or a juristic abortion.

If the corporation sole had never trespassed beyond the ecclesiastical province in which it was native, it would nowadays be very unimportant. Clearly it would have no future before it, and the honour of writing its epitaph would hardly be worth the trouble. Unfortunately, however, the thought occurred to Coke -- or perhaps in the first instance to some other lawyer of Coke's day -- that the King of England ought to be brought into one class with the parson: both were to be artificial persons and both were to be corporations sole.

Whether the State should be personified, or whether the State, being really and naturally a person, can be personified, these may be very interesting questions. What we see in England, at least what we see if we look only at the surface, is, not that the State is personified or that the State's personality is openly acknowledged, but (I must borrow from one of Mr Gilbert's operas) that the king is "personified". Since that feat was performed, we have been, more or less explicitly, trying to persuade ourselves that our law does not recognize the personality or corporate character of the State or Nation or Commonwealth, and has no need to do anything of the sort if only it will admit that the king, or, yet worse, the Crown, is not unlike a parson.

It would be long to tell the whole story of this co-ordination of king and parson, for it would take us deep into the legal and political thoughts of the Middle Ages. Only two or three remarks can here be hazarded.^(3*) The medieval king was every inch a king, but just for this reason he was every inch a man and you did not talk nonsense about him. You did not ascribe

to him immortality or ubiquity or such powers as no mortal can wield. If you said that he was Christ's Vicar, you meant what you said, and you might add that he would become the servant of the devil if he declined towards tyranny. And there was little cause for ascribing to him more than one capacity. Now and then it was necessary to distinguish between lands that he held in right of his crown and lands which had come to him in right of an escheated barony or vacant bishopric. But in the main all his lands were his lands, and we must be careful not to read a trusteeship for the nation into our medieval documents. The oft-repeated demand that the king should "live of his own" implied this view of the situation. I do not mean that this was at any time a complete view. We may, for example, find the lawyers of Edward II's day catching up a notion that the canonists had propagated, declaring that the king's crown is always under age, and so co-ordinating the corona with the ecclesia.(4*) But English lawyers were not good at work of this kind; they liked their persons to be real, and what we have seen of the parochial glebe has shown us that even the church (ecclesia particularis) was not for them a person.(5*) As to the king, in all the Year Books I have seen very little said of him that was not meant to be strictly and literally true of a man, of an Edward or a Henry.

Then, on the other hand, medieval thought conceived the nation as a community and pictured it as a body of which the king was the head. It resembled those smaller bodies which it comprised and of which it was in some sort composed. What we should regard as the contrast between State and Corporation was hardly visible. The "commune of the realm" differed rather in size and power than in essence from the commune of a county or the commune of a borough. And as the comitatus or county took visible form in the comitatus or county court, so the realm took visible form in a parliament. "Every one", said Thorpe C.J. in 1365, "is bound to know at once what is done in Parliament, for Parliament represents the body of the whole realm."(6*) For a time it seems very possible, as we read the Year Books, that so soon as lawyers begin to argue about the nature of corporations or bodies politic and clearly to sever the Borough, for example, from the sum of burgesses, they will definitely grasp and formulate the very sound thought that the realm is "a corporation aggregate of many". In 1522 Fineux C.J. after telling how some corporations are made by the king, others by the pope, others by both king and pope, adds that there are corporations by the common law, for, says he, "the parliament of the king and the lords and the commons are a corporation."(7*) What is still lacking is the admission that the corporate realm, besides being the wielder of public power, may also be the "subject" of private rights, the owner of lands and chattels. And this is the step that we have never yet formally taken.(8*)

The portrait that Henry VIII painted of the body politic of which he was the sovereign head will not be forgotten:(9*)

Where by divers sundry old authentic histories and chronicles it is manifestly declared and expressed that this realm of England is an Empire, and so hath been accepted in the world, governed by one supreme Head and King, having the dignity and royal estate of the Imperial Crown of the same, unto whom a Body Politick, compact of all sorts and degrees of people and by names of Spirituality and Temporality been bounden, and owen to bear, next to God, a natural and humble obedience....

It is stately stuff into which old thoughts and new are woven. "The body spiritual" is henceforth to be conceived as "part of the said body politick" which culminates in King Henry. The medieval dualism of Church and State is at length transcended by the majestic lord who broke the bonds of Rome. The frontispiece of the Leviathan is already before our eyes. But, as for Hobbes, so also for King Henry, the personality of the corporate body is concentrated in and absorbed by the personality of its monarchical head. His reign was not the time when the king's lands could be severed from the nation's lands, the king's wealth from the common wealth, or even the king's power from the power of the State. The idea of a corporation sole which was being prepared in the ecclesiastical sphere might do good service here. Were not all Englishmen incorporated in King Henry? Were not his acts and deeds the acts and deeds of that body politic which was both Realm and Church?

A certain amount of disputation there was sure to be over land acquired by the king in divers ways. Edward VI, not being yet of the age of twenty-one years, purported to alienate land which formed part of the duchy of Lancaster. Did this act fall within the doctrine that the king can convey while he is an infant? Land had been conveyed to Henry VII "and the heirs male of his body lawfully begotten". Did this give him an estate tail or a fee simple conditional? Could the head of a body politic beget heirs? A few cases of this kind came before the Court soon after the middle of the sixteenth century. In Plowden's reports of these cases we may find much curious argumentation about the king's two "bodies", and I do not know where to look in the whole series of our law books for so marvellous a display of metaphysical -- or we might say metaphysiological -- nonsense.(10*) Whether this sort of talk was really new about the year 1550, or whether it had gone unreported until Plowden arose, it were not easy to say; but the Year Books have not prepared us for it. Two sentences may be enough to illustrate what I mean:

So that he [the king] has a body natural adorned and invested with the estate and dignity royal, and he has not a body natural distinct and divided by itself from the office and dignity royal, but a body natural and a body politic together indivisible, and these two bodies are incorporated in one person and make one body and not divers, that is, the body corporate in the body natural et e contra the body natural in the body corporate. So that the body natural by the conjunction of the body politic to it (which body politic contains the office, government and majesty royal) is magnified and by the said consolidation hath in it the body politic.(11*)

"Which faith", we are inclined to add, "except every man keep whole and undefiled, without doubt he shall perish everlastingly." However, a gleam of light seems sometimes to penetrate the darkness. The thought that in one of his two capacities the king is only the "head" of a corporation has not been wholly suppressed.

The king has two capacities, for he has two bodies, the one whereof is a body natural... the other is a body politic, and the members thereof are his subjects, and he and his subjects together compose the corporation, as Southcote said, and he is incorporated with them and they with him, and he is the head and they are the members, and he has the sole government of them.(12*)

Again, in that strange debate occasioned by the too sudden death of Sir James Hales, Brown J. says that suicide is an offence not only against God and Nature, but against the King, for "he, being the Head, has lost one of his mystical members".(13*) But, for reasons that lie for the more part outside the history of law, this thought fell into the background. The king was left with "two bodies"; one of them was natural, the other non-natural. Of this last body we can say little; but it is "politic", whatever "politic" may mean.

Meanwhile the concept of a corporation sole was being fashioned in order to explain, if this were possible, the parson's relation to the glebe. Then came Coke and in his masterful fashion classified Persons for the coming ages. They are natural or artificial. Kings and parsons are artificial persons, corporations sole, created not by God but by the policy of man.(14*)

Abortive as I think the attempt to bring the parson into line with corporations aggregate -- abortive, for the freehold of the glebe persists in falling into abeyance whenever a parson dies -- the attempt to play the same trick with the king seems to me still more abortive and infinitely more mischievous. In the first place, the theory is never logically formulated even by those who are its inventors. We are taught that the king is two "persons", only to be taught that though he has "two bodies" and "two capacities" he "hath but one person".(15*) Any real and consistent severance of the two personalities would naturally have led to "the damnable and damned opinion", productive of "execrable and detestable consequences", that allegiance is due to the corporation sole and not to the mortal man.(16*) In the second place, we are plunged into talk about kings who do not die, who are never under age, who are ubiquitous, who do no wrong and (says Blackstone(17*)) think no wrong; and such talk has not been innocuous. Readers of Kinglake's *Crimea* will not have forgotten the instructive and amusing account of "the two kings" who shared between them control of the British army: "the personal king" and "his constitutional rival". But in the third place, the theory of the two kings or two persons stubbornly refuses to do any real work in the case of jurisprudence.

We might have thought that it would at least have led to a separation of the land that the king held as king from the land that he held as man, and to a legal severance of the money that was in the Exchequer from the money that was in the king's pocket. It did nothing of the sort. All had to be done by statute, and very slowly and clumsily it was done. After the king's lands had been made inalienable, George III had to go to Parliament for permission to hold some land as a man and not as a king, for he had been denied rights that were not denied to "any of His Majesty's subjects".(18*) A deal of legislation, extending into Queen Victoria's reign, has been required in order to secure "private estates" for the king. "Whereas it is doubtful", says an Act of 1862.(19*) "And whereas it may be doubtful", says an Act of 1873.(20*) Many things may be doubtful if we try to make two persons of one man, or to provide one person with two bodies.

The purely natural way in which the king was regarded in the Middle Ages is well illustrated by the terrible consequences of what we now call a demise of the Crown, but what seemed to our ancestors the death of a man who had delegated many of his powers to judges and others. At the delegator's death the delegation ceased. All litigation not only came to a stop but had to be begun over again. We might have thought that the introduction of

phrases which gave the king an immortal as well as a mortal body would have transformed this part of the law. But no. The consequences of the old principle had to be picked off one after another by statute.(21*) At the beginning of Queen Victoria's reign it was discovered that "great inconvenience had arisen on occasion of the demise of the Crown from the necessity of renewing all military commissions under the royal sign manual".(22*) When on a demise of the Crown we see all the wheels of the State stopping or even running backwards, it seems an idle jest to say that the king never dies.

But the worst of it is that we are compelled to introduce into our legal thinking a person whose personality our law does not formally or explicitly recognize. We cannot get on without the State, or the Nation, or the Commonwealth, or the Public, or some similar entity, and yet that is what we are professing to do. In the days when Queen Elizabeth was our Prince -- more often Prince than Princess -- her secretary might write in Latin *De republica Anglorum*, and in English *Of the Commonwealth of England*: Prince and Republic were not yet incompatible. A little later Guy Fawkes and others, so said the Statute Book, had attempted the destruction of His Majesty and "the overthrow of the whole State and Commonwealth".(23*) In 1623 the Exchequer Chamber could speak of the inconvenience that "remote limitations" had introduced "in the republic".(24*) But the great struggle that followed had the effect of depriving us of two useful words. "Republic" and "Commonwealth" implied kinglessness and therefore treason. As to "the State", it was a late comer -- but little known until after 1600 -- and though it might govern political thought, and on rare occasions make its way into the preamble of a statute, it was slow to find a home in English law-books. There is wonderfully little of the State in Blackstone's Commentaries.(25*) It is true that "The people" exists, and "the liberties of the People" must be set over against "the prerogatives of the King"; but just because the King is no part of the People, the People cannot be the State or Commonwealth.

But "the Publick" might be useful. And those who watch the doings of this Publick in the Statute Book of the eighteenth century may feel inclined to say that it has dropped a first syllable. After the rebellion of 1715 an Act of Parliament declared that the estates of certain traitors were to be vested in the king "to the use of the Publick".(26*) Whether this is the first appearance of "the Publick" as *cestui que* trust of a part of those lands of which the king is owner I do not know; but it is an early example. Then we come upon an amusing little story which illustrates the curious qualities of our royal corporation sole. One of the attainted traitors was Lord Derwentwater, and the tenants of his barony of Langley had been accustomed to pay a fine when their lord died: such a custom was, I believe, commoner elsewhere than in England. But, says an Act of 1738, the said premises "being vested in His Majesty, his heirs and successors in his politick capacity, which in consideration of law never dies, it may create a doubt whether the tenants of the said estates ought... to pay such fines... on the death of His present Majesty (whom God long preserve for the benefit of his People) or On the death of any future King or Queen." So the tenants are to pay as they would have paid "in case such King or Queen so dying was considered as a private person only and not in his or her politick capacity".(27*) Thus that artificial person, the king in his politick capacity, who is a trustee for the Publick, must be deemed to die now and then for the benefit of *cestui que* trust.

But it was of "the Publick" that we were speaking, and I believe that "the Publick" first becomes prominent in connexion with the National Debt. Though much might be done for us by a slightly denaturalized king, he could not do all that was requisite. Some proceedings of one of his predecessors, who closed the Exchequer and ruined the goldsmiths, had made our king no good borrower. So the Publick had to take his place. The money might be "advanced to His Majesty", but the Publick had to owe it. This idea could not be kept off the statute book. "Whereas," said an Act of 1786, "the Publick stands indebted to" the East India Company in a sum of four millions and more.(28*)

What is the Publick which owes the National Debt? We try to evade that question. We try to think of that debt not as a debt owed by a person, but as a sum charged upon a pledged or mortgaged thing, upon the Consolidated Fund. This is natural, for we may, if we will, trace the beginnings of a national debt back to days when a king borrows money and charges the repayment of it upon a specific tax; perhaps he will even appoint his creditor to collect that tax, and so enable him to repay himself. Then there was the long transitional stage in which annuities were charged on the Aggregate Fund, the General Fund, the South Sea Fund, and so forth. And now we have the Consolidated Fund; but even the most licentious "objectification" (or, as Dr James Ward says, "reification") can hardly make that Fund "a thing" for jurisprudence. On the one hand, we do not conceive that the holders of Consols would have the slightest right to complain if the present taxes were swept away and new taxes invented, and, on the other hand, we conceive that if the present taxes will not suffice to pay the interest of the debt more taxes must be imposed. Then we speak of "the security of an Act of Parliament", as if the Act were a profit-bearing thing that could be pledged. Or we introduce "the Government" as a debtor. But what, we may ask, is this Government? Surely not the group of Ministers, not the Government which can be contrasted with Parliament. I am happy to think that no words of mine can affect the price of Bank Annuities, but it seems to me that the national debt is not a "secured debt" in any other than that loose sense in which we speak of "personal security", and that the creator has nothing to trust to but the honesty and solvency of that honest and solvent community of which the King is the head and "Government" and Parliament are organs.

One of our subterfuges has been that of making the king a trustee (vel quasi) for unincorporated groups. Another of our subterfuges has been that of slowly substituting "the Crown" for King or Queen. Now the use which has been made in different ages of the crown -- a chattel now lying in the Tower and partaking (so it is said(29*)) of the nature of an heirloom -- might be made the matter of a long essay. I believe, however, that an habitual and perfectly unambiguous personification of the Crown -- in particular, the attribution of acts to the Crown -- is much more modern than most people would believe. It seems to me that in fully half the cases in which Sir William Anson writes "Crown", Blackstone would have written "King". In strictness, however, "the Crown" is not, I take it, among the persons known to our law, unless it is merely another name for the King. The Crown, by that name, never sues, never prosecutes, never issues writs or letters patent. On the face of formal records the King or Queen does it all. I would not, if I could, stop the process which is making "the Crown" one of the names of a certain organized community; but in the meantime that term is being used in three or four different, though closely related, senses. "We

all know that the Crown is an abstraction", said Lord Penzance.(30*) I do not feel quite sure of knowing even this.(31*)

The suggestion that "the Crown" is very often a suppressed or partially recognized corporation aggregate is forced upon us so soon as we begin to attend with care to the language which is used by judges when they are freely reasoning about modern matters and are not feeling the pressure of old theories. Let us listen, for example, to Blackburn J., when in a famous opinion he was explaining why it is that the Postmaster-General or the captain of a man-of-war cannot be made to answer in a civil action for the negligence of his subordinates. "These cases were decided upon the ground that the government was the principal and the defendant merely the servant... All that is decided by this class of cases is that the liability of a servant of the public is no greater than that of the servant of any other principal, though the recourse against the principal, the public, cannot be by an action."(32*) So here the Government and the Public are identified, or else the one is an organ or agent of the other. But the Postmaster-General or the captain of a man-of-war is assuredly a servant of the Crown, and yet he does not serve two masters. A statute of 1887 tells us that "the expressions, permanent civil service of the State", permanent civil service of Her Majesty "and, permanent civil service of the Crown" are hereby declared to have the same meaning".(33*) Now as it is evident that King Edward is not (though Louis XIV may have been) the State, we seem to have statutory authority for holding that the State is "His Majesty". The way out of this mess, for mess it is, lies in a perception of the fact, for fact it is, that our sovereign lord is not a "corporation sole", but is the head of a complex and highly organized "corporation aggregate of many" -- of very many. I see no great harm in calling this corporation a Crown. But a better word has lately returned to the statute book. That word is Commonwealth.

Even if the king would have served as a satisfactory debtor for the national debt, some new questions would have been raised in the course of that process which has been called the expansion of England; for colonies came into being which had public debts of their own. At this point it is well for us to remember that three colonies which were exceptionally important on account of their antiquity and activity, namely Massachusetts, Rhode Island, and Connecticut, were corporations duly created by charter with a sufficiency of operative and inoperative words. Also we may notice, that the king was no more a corporator of Rhode Island than he was a corporator of the city of Norwich or of the East India Company, and that the Governor of Connecticut was as little a deputy of the king as was the Governor of the Bank of England. But even where there was a royal governor, and where there was no solemnly created corporation, there was a "subject" capable of borrowing money and contracting debts. At least as early as 1709, and I know not how much earlier, bills of credit were being emitted which ran in this form:

This indented bill of shillings due from the Colony of New York to the possessor thereof shall be in value equal to money and shall be accepted accordingly by the Treasurer of this Colony for the time being in all public payments and for any fund at any time in the Treasury. Dated, New York the first of November, 1709, by order of the Lieutenant Governor, Council and General Assembly of the said Colony.(34*)

In 1714 the Governor, Council and General Assembly of New York passed a long Act "for the paying and discharging the several debts and sums of money claimed as debts of this Colony". A preamble stated that some of the debts of the Colony had not been paid because the Governors had misapplied and extravagantly expended "the revenue given by the loyal subjects aforesaid to Her Majesty and Her Royal Predecessors, Kings and Queens of England, sufficient for the honourable as well as necessary support of their Government here." "This Colony", the preamble added, "in strict justice is in no manner of way obliged to pay many of the said claims"; however, in order "to restore the Publick Credit", they were to be paid.(35*) Here we have a Colony which can be bound even in strict justice to pay money. What the great colonies did the small colonies did also. In 1697 an Act was passed at Montserrat "for raising a Levy or Tax for defraying the Publick Debts of this His Majesty's Island".

The Colonial Assemblies imitated the Parliament of England. They voted supplies to "His Majesty"; but they also appropriated those supplies. In Colonial Acts coming from what we may call an ancient date and from places which still form parts of the British Empire, we may see a good deal of care taken that whatever is given to the king shall be marked with a trust. For instance, in the Bermudas, when in 1698 a penalty is imposed, half of it is given to the informer, "and the remainder to His Majesty, His Heirs and Successors, to be employed for and towards the support of the Government of these Islands and the contingent charges thereof".(36*) If "the old house and kitchen belonging to their Majesties [William and Mary] and formerly inhabited by the Governors of these Islands" is to be sold, then the price is to be paid "into the Publick Stock or Revenue for the Publick Uses of these Islands and the same to be paid out by Order of the Governor, Council and a Committee of Assembly".(37*) It would, I believe, be found that in some colonies in which there was no ancestral tradition of republicanism, the Assemblies were not far behind the House of Commons in controlling the expenditure of whatever money was voted to the king. In 1753 the Assembly of Jamaica resolved "that it is the inherent and undoubted right of the Representatives of the People to raise and apply monies for the services and exigencies of government and to appoint such person or persons for the receiving and issuing thereof as they shall think proper, which right this House hath exerted and will always exert in such manner as they shall judge most conducive to the service of His Majesty and the interest of his People." In many or most of the colonies the treasurer was appointed, not by the Governor but by an Act of Assembly; sometimes he was appointed by a mere resolution of the House of Representatives. In the matter of finance, "responsible government" (as we now call it) or "a tendency of the legislature to encroach upon the proper actions of the executive" (as some modern Americans call it) is no new thing in an English colony.(38*)

We deny nowadays that a Colony is a corporation. The three unquestionably incorporated colonies have gone their own way and are forgotten of lawyers. James L.J. once said that it seemed to him an abuse of language to speak of the Governor and Government of New Zealand as a corporation.(39*) So be it, and I should not wish to see a "Governor" or a "Government" incorporated. But can we -- do we really and not merely in words -- avoid an admission that the Colony of New Zealand is a person? In the case that was before the Court a contract for the conveyance of emigrants had professedly been made between "Her Majesty the Queen for and on behalf of the Colony of New Zealand" of the first part, Mr

Featherston, "the agent-general in England for the Government of New Zealand", of the second part, and Sloman & Co. of the third part. Now when in a legal document we see those words "for and on behalf of" we generally expect that they will be followed by the name of a person; and I cannot help thinking that they were so followed in this case. I gather that some of the colonies have abandoned the policy of compelling those who have aught against them to pursue the ancient, if royal, road of a petition of right. Perhaps we may not think wholly satisfactory the Australian device of a "nominal defendant" appointed to resist an action in which a claim is made "against the Colonial Government", for there is no need for "nominal parties to actions where real parties (such, for example, as a Colony or State) are forthcoming.(40*) But it is a wholesome sight to see "the Crown" sued(41*) and answering for its torts.(42*) If the field that sends cases to the Judicial Committee is not narrowed, a good many old superstitions will be put upon their trial.

In the British North America Act, 1867, there are courageous words.(43*) "Canada shall be liable for the debts and liabilities of each Province existing at the Union. Ontario and Quebec conjointly shall be liable to Canada...The assets enumerated in the fourth schedule... shall be the property of Ontario and Quebec conjointly. Nova Scotia shall be liable to Canada... New Brunswick shall be liable to Canada... The several Provinces shall retain all their respective public property... New Brunswick shall receive from Canada...The right of New Brunswick to levy the lumber dues... No lands or property belonging to Canada or any Province shall be liable to taxation...." This is the language of statesmanship, of the statute book, and of daily life. But then comes the lawyer with theories in his head, and begins by placing a legal estate in what he calls the Crown or Her Majesty. "In construing these enactments, it must always be kept in view that wherever public land with its incidents is described as 'the property of' or as 'belonging to' the Dominion or a Province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown."(44*) And so we have to distinguish the lands vested in the Crown "for" or "in right of" Canada from the lands vested in the Crown "for" or "in right of" Quebec or Ontario or British Columbia, or between lands "vested in the Crown as represented by the Dominion" and lands "vested in the Crown as represented by a Province." Apparently "Canada" or "Nova Scotia" is person enough to be the Crown's cestui que trust and at the same time the Crown's representative, but is not person enough to hold a legal estate. It is a funny jumble, which becomes funnier still if we insist that the Crown is a legal fiction.

"Although the Secretary of State [for India] is a body corporate, or in the same position as a body corporate, for the purpose of contracts, and of suing and being sued, yet he is not a body corporate for the purpose of holding property. Such property as formerly vested, or would have vested, in the East India Company now vests in the Crown."(45*) So we sue Person No. 1, who has not and cannot have any property, in order that we may get at a certain part of the property that is owned by Person No. 2. It is a strange result; but not perhaps one at which we ought to stand amazed, if we really believe that both these Persons, however august, are fictitious: fictitious like the common vouchee and the casual ejector.(46*)

We are not surprised when we read the following passage in an

American treatise:

Each one of the United States in its organized political capacity, although it is not in the proper use of the term a corporation, yet it has many of the essential faculties of a corporation, a distinct name, indefinite succession, private rights, power to sue, and the like. Corporations, however, as the term is used in our jurisprudence, do not include States, but only derivative creations, owing their existence and powers to the State, acting through its legislative department. Like corporations, however, a State, as it can make contracts and suffer wrongs, so it may, for this reason and without express provision, maintain in its corporate name actions to enforce its rights and redress its injuries.(47*)

There are some phrases in this passage which imply a disputable theory. However, the main point is that the American State is, to say the least, very like a corporation: it has private rights, power to sue and the like. This seems to me the result to which English law would naturally have come, had not that foolish parson led it astray. There is nothing in this idea that is incompatible with hereditary kingship. "The king and his subjects together compose the corporation, and he is incorporated with them and they with him, and he is the head and they are the members."(48*) There is no cause for despair when "the people of New South Wales, Victoria, South Australia, Queensland and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland". We may miss the old words that were used of Connecticut and Rhode Island: "one body corporate and politic in fact and name"; but "united in a Federal Commonwealth under the name of the Commonwealth of Australia" seems amply to fill their place.(49*) And a body politic may be a member of another body politic.

But we must return from an expanding Empire, or rather Commonwealth, to that thin little thought the corporation sole, and we may inquire whether it has struck root, whether it has flourished, whether it is doing us any good.

Were there at the beginning of the nineteenth century more than two corporations sole that were not ecclesiastical? Coke had coupled the Chamberlain of the City of London with the King.(50*) But the class of corporations sole was slow to grow, and this seems to me a sure proof that the idea was sterile and unprofitable. It is but too likely that I have missed some instances,(51*) but provisionally I will claim the third place in the list for the Postmaster-General. In 1840 the Postmaster-General and his successors "is and are" made "a body corporate" for the purpose of holding and taking conveyances and leases of lands and hereditaments for the service of the Post Office. From the Act that effected this incorporation we may learn that the Postmaster as a mere individual had been holding land in trust for the Crown.(52*) One of the main reasons, I take it, for erecting some new corporations sole was that our "Crown", being more or less identifiable with the King, it was difficult to make the Crown a leaseholder or copyholder in a direct and simple fashion. The Treasurer of Public Charities was made a corporation sole in 1853.(53*) Then in 1855 the Secretary of State intrusted with the seals of the War Department was enabled to hold land as a corporation sole.(54*) Perhaps if there were a Lord High Admiral he would be a corporation sole vel quasi.(55*) The Solicitor to the Treasury was made a corporation sole in

1876, and this corporation sole can hold "real and personal property of every description"(56*) All this -- and there is more to be said of Boards such as the Board of Trade and the Board of Agriculture and so forth -- seems to me to be the outcome of an awkward endeavour to ignore the personality of the greatest body corporate and politic that has ever existed. And after all, we must ask whether this device does its work. The throne, it is true, is never vacant, for the kingship is entailed and inherited. But we have yet to be taught that the Solicitor to the Treasury never dies. When a Postmaster-General dies, what becomes of the freehold of countless post offices? If we pursue the ecclesiastical analogy -- and it is the only analogy -- we must let the freehold fall into abeyance, for, when all is said, our corporation sole is a man who dies.(57*) Suppose that a prisoner is indicted for stealing a letter being the proper goods of "the Postmaster-General", and suppose that he objects that at the time in question there was no Postmaster-General, he can be silenced; but this is so, not because the Postmaster is a corporation sole, but because a statute seems to have said with sufficient clearness that the indictment is good.(58*) So long as the State is not seen to be a person, we must either make an unwarrantably free use of the King's name, or else we must for ever be laboriously stopping holes through which a criminal might glide. A critical question would be whether the man who is Postmaster for the time being could be indicted for stealing the goods of the Postmaster,(59*) or whether the Solicitor to the Treasury could sue the man who happened to be the Treasury's Solicitor. Not until some such questions have been answered in the affirmative have we any reason for saying that the corporation sole is one person and the natural man another.(60*)

I am aware of only one instance in which a general law, as distinguished from privilegia for this or that officer of the central government, has conferred the quality of sole-corporateness or corporate-soleness upon a class of office-holders. The exceptional case is that of the clerks of the peace.(61*) This arrangement, made in 1858, was convenient because we did not and do not regard the justices of the peace as a corporation. But then so soon as the affairs of the counties were placed upon a modern footing by the Act of 1888, a corporation aggregate took the place of the corporation sole, and what had been vested in the clerk of the peace became vested in the county council. Such is the destined fate of all corporations sole.(62*)

NOTES:

1. Pollock, First Book of Jurisprudence, p. 113.
2. 16 Law Quarterly Review (1900), pp. 335-354.
3. The theme of this paper was suggested by Dr Gierke's *Genossenschaftsrecht*, a portion of which I have lately published in English: *Political Theories of the Middle Ages*. (Cambridge, 1900).
4. *Placit. Abbrev.* p. 339 (15 Edw. II, Northampton).
5. 16 Law Quarterly Review (1900), p. 344.
6. Y.B. 39 Edw. III, f. 7a.

7. Y.B. 14 hen. VIII, f. 3 (Mich. pl. 2).

8. The mistake, so I think, of John Allen's memorable treatise on the Royal Prerogative (1830; new ed. 1849) consists in the supposition that already in very old days the Folk could be and was clearly conceived as a person: a single "subject" of ownership and other rights.

9. 24 Hen. VIII, c. 12 (For the Restraint of Appeals).

10. Case of the Duchy of Lancaster (1561), Plowden, 212; Willion v. Berkley (1559), Ibid. 223; Sir Thomas Wroth's Case (1573), Ibid. 452.

11. Plowden, p. 213.

12. Plowden, p. 234.

13. Ibid. 261.

14. Co. Lit. 2a, 250a; Sutton's Hospital Case (1612), 10 Rep. 26b.

15. Calvin's Case (1608), 7 Rep. 10a.

16. Calvin's Case (1608), 7 Rep. 11a, b.

17. 1 Comm. 246.

18. 39 & 40 Geo. III, c. 88.

19. 25 & 26 Vict. 37.

20. 36 & 37 Vict. c. 61.

21. 1 Edw. VI, begins the process.

22. 7 Will. IV & 1 Vict. c. 31.

23. 3 Jac. I, c. 2, pr.

24. Child v. Baylie, Palm. 335, 336.

25. Such phrases as "when the danger of the state is great" (1, 135) are occasionally used.

26. 1 Geo. I, stat. 2, c. 50. We must distinguish this Public from the Public (quilibet de populo) to whom a highway is dedicated.

27. 11 Geo. II, c. 30, pr. and s. 1.

28. 26 Geo. III, c. 62.

29. Co. Lit. 18b.

30. Dixon v. London Small Arms Co. (1876), L.R. 1 App. Cas. 632, at 652.

31. The Acts which enable the king to hold "private estates" are

officially indexed under "Crown Private Estates". It is hard to defend this use of the word unless the Crown is to give garden parties.

32. *Mersey Docks Trustees v. Gibbs* (1866), L.R. 1 H.L. 93, 111.

33. Pensions (Colonial Service) Act, 1887, 50 & 51 Vict. c. 13, s. 8.

34. Act of 12th Nov. 1709 (8 Anne).

35. Act of 1714 (13 Anne).

36. Act of 11th Nov. 1698. Acts of the British Parliament (e.g. 6 Geo II, c. 13, s. 3) sometimes give a penalty to the use of the king "to be applied for the support of the government of the colony or plantation where the same shall be recovered." See Palfrey, *New England*, vol. IV, p. 302. Apparently it was over a clause of this kind that James Otis first came to the front in Massachusetts.

37. Act of 29th Sept. 1693.

38. See Mr E.B. Green's very interesting book on the Provincial Governor, *Harvard Historical Series*; especially pp. 177ff. The Jamaican resolution stands on p. 172.

39. *Sloman v. Government of New Zealand* (1876), 1 C.P.D. 563, 565-566.

40. *Farnell v. Bowman* (1887), 12 App. Cas. 643 (N.S. Wales).

41. *Hettihewage Siman Appu v. The Queen's Advocate* (1884), 9 App. Cas. 571 (Ceylon).

42. *A.-G. of the Straits Settlement v. Wemyss* (1888), 13 App. Cas. 192 (Penag).

43. 30 Vict. c. 3, ss. 110-125.

44. *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46. esp. p. 56; *A.-G. of Brit. Columbia v. A.-G. of Canada*, 14 App. Cas. 295; *A.-G. of Ontario v. Mercer* (1883), 8 App. Cas. 767; *A.-G. of Canada v. A.-G. of Ontario, Quebec, Nova Scotia* [1898] A.C. 700.

45. Ilbert, *Government of India* (3rd. ed. 1915), p. 196.

46. In *Kinlock v. Secretary of State for India in Council* (1880), 15 Ch. D. 1, 8 James L.J. said that "there really is in point of law, no such person or body politic whatever as the Secretary of State for India in Council." Apparently in his view this is only a name by which "the Government of India" is to sue and be sued. But this only has the effect of making "the Government of India" a person, real or fictitious. [The report of the final appeal to the House of Lords (1882), 7 App. Cas. 619, adds nothing on this head.]

47. Dillon, *Municipal Corporations*, ed. 4. section 31.

48. *Willion v. Berkley* (1559), Plowden, p. 234.

49. 63 & 64 Vict. c. 12.

50. Fulwood's Case (1591), 4 Rep. 64b.

51. The Master of the Rolls (who, however, as a matter of history, was not quite free from an ecclesiastical taint) must have been not unlike a corporation sole, for he held land in right of his office. 12 Car. II, c. 36; 20 Geo. II, c. 34 (Sir J. Jekyll granted leases to a trustee for himself).

52. 3 & 4 Vict. c. 96, s. 67 [now 8 Ed. VII, c. 48, s. 45].

53. 16 & 17 Vict. c. 137, s. 47.

54. 18 & 19 Vict. c. 117, s. 2.

55. 27 & 28 Vict. C. 57, s. 9.

56. 39 & 40 Vict. c. 18, s. 1.

57. See 16 Law Quarterly Review, (1900), p. 352.

58. 7 Will. IV & 1 Vict. c. 36, s. 40 [now 8 Ed. VII, c. 48, s. 73; 5 & 6 Geo. V. c. 90, s. 9].

59. [The Indictments Act, 1915 (5 & 6 Geo. V, c. 90) Sched. 1, 5, 6, probably does not solve the difficulty.]

60. See 16 Law Quarterly Review (1900), p. 355.

61. 21 & 22 Vict. c. 92 [repealed by Statute Law Revision Act, 1892]. But this Act does not use the term corporation sole.

62. 51 & 52 Vict. c. 41, s. 64. We do not find it necessary to use mysterious language about the coporateness of every public accountant. But when such an accountant dies the balance to his credit at the bank where the public account is kept is not "in any manner subject to the control of his legal representative". See 29 & 30 Vict. c. 39, s. 18.