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MAITLAND

Selected Essays

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MAITLAND

Selected Essays

EDITED BY
H. D. HAZELTINE
G. LAPSLEY
P. H. WINFIELD



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PREFACE

SOME two years ago the question of bringing out a new edition of Maitland's *Collected Papers* was mooted. A mere reprint would have been the simplest but the least satisfactory solution. Maitland died in 1906 and thus the most recent of the papers was at least nearly forty years old. Hence, for many of them some real editing was necessary if they were to be kept abreast of later research. The Syndics of the Cambridge University Press did not, however, see their way to a new edition of the three volumes on these lines, and a third project was suggested. This was to select certain of the papers likely to be most useful to students in law, history and politics, to edit them and to publish them in one volume; and to include in it Maitland's *Introduction to Memoranda de Parlamento, 1305*, as being of particular interest to historical students and still accessible only in the Rolls Series. This plan was approved by the University Press and this volume represents its execution.

We do not think that any injustice is done to the memory of one whose name will be traditional so long as law and history are taught. The full *Collected Papers* will always be accessible in any first class library. As to those which have been omitted from this selection, the substance of many is incorporated in other works of his and many others are touched by obsolescence. Nothing that he wrote can ever be tarnished by time in the matchless attraction of his style or in the brilliant scholarship and originality of thought which he brought to bear upon every topic that he handled.

That would hardly need saying to any of the generation that came under his direct influence. But it may not be amiss to say it to the later generation for whom principally this selection has been made. We venture to think that they have here all that is of practical use to them and we have put them upon their inquiry as to where they can find the rest.

Mr G. Lapsley has edited the *Introduction to Memoranda de Parlamento, 1305*. Professor H. D. Hazeltine is responsible for *Trust and Corporation* and *Moral Personality and Legal Personality* and Professor P. H. Winfield for *The Corporation Sole, The Crown as Corporation, The Unincorporate Body* and *The Body Politic*. Mr Brand, of the University Press, has prepared the Indices. Our policy has been to leave Maitland's text intact except for mere verbal corrections. Such editing as has been necessary appears in footnotes in square brackets and in Mr Lapsley's preliminary note to the *Introduction to Memoranda de Parlamento, 1305*. As the book is primarily for students, translations of such German quotations as occur in the text have also been included in the footnotes. Having regard to the contexts in which it appears, some difficulty has been encountered in translating the word *Verein*. The lead given by Maitland has been followed in rendering it as "club". Some scholars may no doubt consider that in certain passages "association" would have been preferable.

We wish to express our thanks to Professor Ernest Barker whose criticisms and suggestions have been of the highest value; to Professor H. C. Gutteridge for his counsel on difficult questions of translation; to Professor Sir William Holdsworth, Professor A. L. Goodhart, Professor A. D. McNair and Mrs Tappan Hollond for their suggestions as to the subject-matter of some of the editorial footnotes to

Trust and Corporation and Moral Personality and Legal Personality; to Mrs Shove and Miss Maitland for their ready accession to the scheme of selection of their father's papers; to the Right Hon. H. A. L. Fisher, the editor of the *Collected Papers*, for similar agreement; and to the Controller of H.M. Stationery Office for permission to reprint the text of *Memoranda de Parlamento*, 1305, which was published in the Rolls Series.

August 1936

INTRODUCTION

TO MEMORANDA DE PARLIAMENTO

A.D. 1305

I

EDITORIAL NOTE

WHAT FOLLOWS is slightly less than one-half of the introductory essay which Maitland prefixed to his edition of the parliament roll of 1305.¹ The document had very early become detached from the series in which it belonged and although extracts from it had long been known it was not until the middle of the last century that it was recovered, repaired and described. In 1893 Maitland edited it for the Rolls Series. He devoted the first part of his introduction to establishing the date, character and authority of the roll itself, adding some account of the petitions and writs relevant to it. Valuable as it is, this is now largely superseded by the studies of Mr Richardson and Dr Sayles, and Professor Gray. The introduction concludes with a calendar of the parliament and complete lists of the names of those who took part in it classified according to the office or capacity in virtue of which they were present. Between these two parts occurs the historical study of the king in his council in his parliament which is here reprinted. The

¹ *Records of the Parliament holden at Westminster. .in the thirty-third year of the reign of King Edward the First*, edited by F. W. Maitland, Rolls Series, 1893. [Alternative title, *Memoranda de Parlamento*.]

text is given almost without comment because the work of subsequent years has in fact increased the emphasis which Maitland laid on the council as the core of parliament and the prime duty of the king in his court and council in parliament to give remedy for wrongs which cannot otherwise be redressed.

When Maitland wrote, the orthodox doctrine of Hallam, Gneist and Stubbs still held the field. Edward I had created a parliament of three estates, two of them senatorial in character and the third based on popular representation. At his death, the machinery which was designed to give all alike their share in the common weal was complete and the people were at full growth. Thereafter, the task of the constitutional historian was to examine the struggle between the crown and parliament and in doing so it was generally possible to determine whether any given act or policy was or was not "constitutional" by reference to the institutional work of Edward I and the principles which had animated it. In Germany this teaching had already been challenged by Riess,¹ and Maitland's own study, if not a direct attack, at least disclosed difficulties of which the established doctrine had not taken account. It was some time, no doubt, before scholars grasped completely the bearing and implications of Maitland's essay or realized how strong a solvent of orthodoxy it was destined to be. Accordingly it took its place very rapidly as one of the "standard" works on the history of parliament and in many universities was in the hands of learners as well as teachers and investigators before

¹ *Geschichte des Wahlrechts zum englischen Parlament im Mittelalter*, Leipzig, 1885; "Der Ursprung des englischen Unterhauses", in *Historische Zeitschrift*, vol. LX, pp. 1-33, 1888. Maitland knew Riess' work and possessed a copy of the *Wahlrecht* which is now in the Cambridge University Library.

1910. In that year Professor McIlwain published his *High Court of Parliament*, in which he treated at greater length and with more detail than Maitland the curial character of parliament and the important, perhaps even the predominant part that function had played in its early history. Since then the whole subject has been studied from many points of view and the orthodox teaching, in so far as it assumed a deliberately created parliament speaking the will of the nation, as a normal part of the constitution as early as 1307, quietly abandoned. It is probably too soon to attempt a synthesis of what has been done in the meantime. The results obtained in each field have yet to be co-ordinated and real or apparent contradictions resolved or otherwise dealt with. In particular we must await the forthcoming publication of certain new parliament rolls by Mr Richardson and Dr Sayles.¹ The results of their elaborate and minute studies are likely to be more far-reaching than is at present apparent. They have told us, indeed, that "when we know what we may expect to know of the medieval parliamentary machine it is inevitable that the history of parliament in the thirteenth and fourteenth centuries will be very differently represented".²

Meanwhile it may be useful to take account of the general drift of the study of parliamentary history since Maitland's essay was written. Professor McIlwain's book³ turned everyone's attention to the curial aspect of parliament, the fact that it was a court before it became a legislative and de-

¹ This work has now come to hand and the full title will be found in the bibliography. For obvious reasons it has been impossible to include more than a reference to it in this introduction.

² *Bulletin of the Institute of Historical Research*, vol. VI, pp. 145-146. Cf. *Times Literary Supplement*, 12 Nov. 1928, p. 909; 3 Oct. 1935, p. 612.

³ Full references to this, and other works to be cited, are given in the appended bibliography.

liberative body and continued to be a court after it had developed these new functions. This view was popularized brilliantly, indeed, though not without a certain measure of over-emphasis and inaccuracy in Professor Pollard's *Evolution of Parliament*, in 1920.¹ Three years later Mr H. G. Richardson and Dr Sayles began to publish their minute and skilful study of the early records of parliament, reaching to the end of Edward III's reign. These were immediately followed by three further studies illustrating the working of the institution under the direction, if not the control, of the king's officials. Meanwhile Mr Richardson had contributed to the *Transactions of the Royal Historical Society* a paper on the origin of parliament. It is too soon to estimate the full bearing of these highly important studies, but their drift may be briefly indicated. The parliament developed from the middle of the thirteenth century by way of terminal sessions held by the king in his own court, to give such remedy as was not available in any tribunal of delegated jurisdiction. Its root, therefore, is in that reserve of discretionary authority which was alone competent to solve the doubts of the judges and give the relief which they were not competent to afford. Its terminal sessions continue for this purpose, irrespective of the presence or absence of a representative element, which the king might for his own purposes from time to time add to it. Stubbs' doctrine that the practice of summoning the representatives of the towns and counties arose primarily because the crown recognized the necessity, in theory as well as in practice, of obtaining their consent to taxation was disparaged by Riess. In his view the commons were summoned to inform the crown

¹ In the second edition, 1926, the author has corrected some mistakes and in an additional chapter sought to answer his critics.

about local conditions and help it to influence public opinion. This has found pretty general acceptance. Quite recently, however, Mr Edwards, in an acute and weighty study of the *plena potestas* of the representatives of the commons, has begun a reaction towards the older theory which is the more important from the fact that conclusions similar to his have been reached independently by Professors McIlwain and Stephenson. In the reign of Edward II the presence of this representative element is increasingly frequent and king and magnates alike take advantage of it for political purposes. Throughout the first half of the fourteenth century, in spite of the undeniable growth of the political importance of parliament, in the people's view it still exists *pro justicia omnibus exhibenda*. The commons advance toward a constitutional position largely by the growth of the practice of presenting to the king in parliament petitions for relief or remedy, which, whatever their origin, were held to be in the interest of the community at large. The representative element has been studied in order to determine its origin and the view taken of it, in and out of parliament, particularly in the fourteenth century.¹ The late Dr Pasquet's essay on the *Origin of the House of Commons* (the English version which had the advantage of his revision should be consulted) traces the development of town and county representation up to 1307. It was part of Professor Pollard's thesis to minimize the importance of the commons and this he did on the grounds, among others, that the boroughs sought to evade representation, and in many cases

¹ An interesting attempt to trace a connexion between the development of parliamentary representation in England in the thirteenth century and the organization of the Dominican Order has not proved fruitful; see E. Barker, *The Dominican Order and Convocation*, Oxford, 1913, and H. J. Ford, *Representative Government*, New York, 1924.

succeeded in doing so, and that among the knights and burgesses who did attend there could be no continuing purpose or common mind because of their inexperience of public business and the infrequency with which they were re-elected. These generalizations were not very fortunate and the careful and patient researches of Mr Edwards, Miss McKisack and Miss Wood-Legh have made it pretty clear that the evidence on these points leads to contrary conclusions in each case. There seems to have been no objection to parliamentary service among country gentlemen in the fourteenth century and it was not uncommon for them to serve frequently. The towns in many cases attached importance to what parliament did, instructed their representatives during sessions and received reports from them on their return. Meanwhile the discovery of some new material—in particular the *Anonimale Chronicle*¹—and the re-examination of the whole history of the fourteenth century from the point of view of administration, enabled the late Professor Tout to illustrate the growing political influence of the parliament including the commons. In his view the constitutional crisis of 1341 drew the attention of the “man in the street” to parliament and excited in him an abiding interest in its activities. These results, of course, touch two sides of the same problem. They do not, however, tend to support the orthodox view of a national parliament struggling to assert constitutional principles against the crown. Their effect is rather to redress the balance upset by over-emphasis on the curial and conciliar sides of parliament, and to clear the way for a sounder judgment of its position by disposing of untenable generalizations.

A further step in this direction has quite recently been

¹ Ed. V. H. Galbraith, Manchester University Press, 1927.

taken by Mr Gray in his study of the influence of the commons on legislation.¹ There is a long way to go still, and no doubt the position will have to be reconsidered when we have the new parliament rolls, already referred to, promised by Mr Richardson and Dr Sayles and the book in which it is to be hoped they will bring together the final results of their studies. Important results may also be expected as the work of the Committee on *House of Commons Personnel and Politics* advances.

But it is not from the side of the commons alone that new light has come. In 1894 the late L. O. Pike's *Constitutional History of the House of Lords* made it clear that that part of the orthodox teaching which described the growth of the peerage, the organization of the senatorial estates, would have to be abandoned. Stubbs had taken over the lawyer's doctrine as formulated by Blackstone, and Pike showed that it would have to be restudied and corrected from historical evidence, and himself did much to advance that study. This line of attack had already been begun by the late J. H. Round in an article on the origin of the House of Lords which attracted little attention when it was first published but became famous when reprinted in his *Peerage and Pedigree* in 1910. Professor Pollard dealt with the subject in two spirited and provocative chapters entitled respectively "The Myth of the Three Estates" and "The Fiction of the

¹ Mr Gray's work is of marked but unequal value. His attempt to rehabilitate Stubbs' view of the Lancastrian parliaments has not met with general acceptance. In particular the argument suffers from an unlucky confusion between petitions originating with the commons and such as were of general or common interest. A valuable and detailed criticism of the book will be found in Dr S. B. Chrimes' forthcoming work on *Constitutional Ideas in the Fifteenth Century*. Meanwhile the reader is referred to *History*, vol. xviii, p. 262; *E.H.R.* xlviii, p. 656; and *The Times Literary Supplement*, 19 Sept. 1935, p. 580.

Peerage". His positive teaching on the question of the peerage has been subjected to very damaging criticism by the late Professor Tout in the third volume of his *Chapters* and, in so far as the lords spiritual are concerned, by Miss Chew in her remarkable study of *Ecclesiastical Tenants in Chief*. Professor Tout offers a constructive doctrine of peerage (from a constitutional point of view) which is a cautious and reasonable interpretation of the evidence. The problem of how far, and in what sense, the English parliament can be regarded as an assembly of estates still awaits a satisfactory discussion.¹ We must know more about the date and authority of the *Modus Tenendi Parliamentum*,² and of the different senses in which the word "estate" is used particularly in parliamentary records, before a solution can be expected.

Finally, an attempt has been made to distinguish between the council in its various aspects and the parliament in the fourteenth century. Professor Baldwin's book on the *King's Council* furnished a good deal of material and showed a number of sides of the problem. Many of these have been treated directly and indirectly in Professor Tout's *Chapters*, in the work of Mr Richardson and Dr Sayles, and in Professor Wilkinson's article which is not, however, wholly convincing.

I have tried to indicate the more important points at which Maitland's work has been developed or modified by subsequent investigation. For this reason I have refrained,

¹ Dr Chrimes in his forthcoming work already referred to has made an important contribution to this discussion.

² A work on this subject by the late Miss M. V. Clarke is announced for immediate publication. Meanwhile the reader may be referred to Professor Morris' study, cited below, for a review of the present state of the question and a new theory of the provenance of the puzzling tract.

except in a few special cases, from adding foot-notes to the text of the essay. The selected bibliography which follows is intended to serve as a guide for those who wish to study all or part of the subject.

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II

INTRODUCTION TO
MEMORANDA DE PARLIAMENTO

On the 12th of November, 1304, King Edward issued from Burstwick writs for a parliament to be holden at Westminster on the 16th of February, 1305.¹ He was on his way back from Scotland. He kept Christmas at Lincoln and was there as late as the 12th of January. On the 22nd he was at Spalding and thence he issued a second set of writs. Events, he said, had happened which made it impossible for him to be at Westminster on the appointed day, so the parliament was postponed to the 28th of February.² Slowly and by a circuitous route he travelled southward, for we hear of him at Walsingham, Swaffham, Thetford, Bury St Edmunds, Exning, Wilbraham, Royston, Braughing, Standon, Wades Hill, Ware, Waltham. On the 26th of January he addressed a letter under his privy seal to the chancellor, which may perhaps explain the postponement. He expected that in the ensuing parliament the clergy would call him in question and he directed that a search should be made in the chancery for any documents which might bear upon the matters in dispute.³ By other letters under the privy seal dated on the 5th of February, of which we must speak at greater length hereafter, he directed the appointment of receivers and auditors of petitions; he desired that the petitions should, so far as was possible, be disposed of before his arrival at

The lenten
parliament
of 1305

¹ *Parliamentary Writs*, vol. I, p. 136.

² *Parl Writs*, vol I, p 138.

³ A privy seal in File 53, No. 5225: "por ce qe nous entendons qe le dit Ercevesqe e autres du clergez nous voudront paraventure aresoner a nostre prochein pallement (*sic*) sur aucunes choses touchantz lour estat."

Westminster. Meanwhile the sheriffs of Kent, Surrey and Sussex had been bidden to send up great quantities of corn and ale to Westminster for the maintenance of the king's household.¹ On the 27th he entered London and stayed at the Hospital of St Katharine near the Tower. On the 28th the parliament was opened at Westminster.²

Composition of the parliament It was a full parliament in our sense of that term.³ The three estates of the realm met the king and his council. The great precedent of 1295 had been followed and, if the writs of summons were punctually obeyed, the assembly was a large one. By rights there should have been present some ninety-five prelates, about a hundred and forty-five representatives of the inferior clergy, nine earls (if we include the Prince of Wales and the Earl of Angus), ninety-four barons, seventy-four knights of the shires, and about two hundred citizens and burgesses; altogether some six hundred men. Besides these we must take account of thirty-three members of the king's council to whom writs were sent, and, as we shall see hereafter, there were yet other men present and performing important duties, men who had a special knowledge of Scotland and Gascony.

Duration of the parliament This assembly was kept together for just three weeks. On the 21st of March a proclamation was made telling the

¹ *Parl Writs*, vol 1, p. 407.

² *Annales Londomenses*, p. 134. According to a MS itinerary of Edward I preserved in the search room at the Record Office, he did not arrive in London until the 27th. In looking through the rolls I have not come upon the proof of this, but he was still at Waltham on the 24th. The itinerary in question is, I suppose, that made or began by Mr Joseph Stephenson; see Select Committee of Commons on Record Commission (*Parl. Papers*, 1836, vol. xvi), p. 883.

³ [In medieval usage the term 'full' applied to a court appears to have meant 'open'. Thus a full parliament like a full county court was one that was transacting its business in public. See Pollard, *Evolution of Parliament*, 2nd ed. p. 431; Richardson and Sayles, *Rotuli Parliamentorum*, p. xi.]

archbishops, bishops and other prelates, earls, barons, knights, citizens and burgesses in general that they might go home, but must be ready to appear again if the king summoned them. Those bishops, earls, barons, justices and others who were members of the council were to remain behind and so were all those who had still any business to transact. But the "parliament" was not at an end. Many of its doings that are recorded on our roll were done after the estates had been sent home. The king remained at Westminster, surrounded by his councillors, and his parliament was still in session as a "full" and "general" parliament as late as the 5th and 6th of April.¹ Easter day fell on the 18th of that month, and its approach seems to have put an end to the prolonged session. Early in May the king began a tour through the home counties. He proposed to hold another "parliament", which however, so far as we know, was not to be an assembly of the estates, on the 15th of July, but this he postponed first to the 15th of August and then to the 15th of September.²

Now if we are to frame any exact conception of the body or various bodies of men by whom the business that is recorded on our roll was transacted, and of the mode in which they dealt with that business, it seems necessary that we should understand the composition of the king's council. Unfortunately, as is well known, the council of Edward I is still for us an ill-defined group of men.³ Writs of summons and writs for wages will often teach us the names of all the barons who were called to a parliament and enable us to

The King's
council

¹ *Memoranda de Parlamento*, pp. 4, 293, 297. See also *Parl. Writs*, vol. 1, p. 158. On the 6th of April the king releases one of his councillors, Master Robert Pickering, from further attendance.

² *Parl. Writs*, vol. 1, pp. 158-160.

³ Stubbs, *Const. Hist.* § 230.

know who it was that represented the petty boroughs, and yet we cannot enumerate with any certainty the members of the council. We can indeed make a list of those of its members who, not being prelates or barons, were summoned by name to be present at a given parliament. On the present occasion no less than thirty-three men were thus summoned. The list included Phillip Willoughby the chancellor of the exchequer, the justices of the two benches and the barons of the exchequer, several men who were being employed as justices in eyre and thirteen masters of the chancery or clerks of the council. The title "masters in chancery" is one which may lead us astray by suggesting that those who bear it are, like their successors in later days, principally engaged in performing certain subordinate functions in a great court of law and equity. But this is not so. If, with Dr Stubbs, we say that at this time the chancellor is "the principal secretary of state for all departments", we may call these masters the "under-secretaries of state". Though already a keeper of the privy seal is beginning to intervene between the king and his chancellor, though already the king, at least at times, seems to have one yet more intimate clerk who is known as his secretary, the chancery is still the great secretarial department; it does nearly all the king's writing for him, whether such writing concerns foreign affairs or the government of England.¹ If for a moment we may use such modern terms,

¹ In 1299 John Banstead is described as "secretarius regis"; *Foedera*, vol. i, p. 916. In 1306 the same title is given to Philip Martel, doctor of civil law; *Prymme Records*, vol. iii, p. 1095. In each case, however, this occurs in a document relating to foreign affairs, and we cannot be sure that in addressing foreign powers the king did not sometimes give to his clerks titles that had no very definite signification in England. As to the title "clericus Regis", this may be borne at one and the same time by a large number of persons. [When Kilsby was in Flanders with Edward III in 1338 he was sole director of secretarial work and keeper

we may say that the chancery is Home Office, Foreign Office, Board of Trade, Local Government Board all in one; in short it is a general secretarial bureau, which exercises a certain control even over the only other great official "department" that there is, namely the exchequer. Thus when the king is surrounded by the masters or principal clerks of the chancery, he has at his side the men who know most about the way in which England is governed and foreign affairs are managed, "permanent" or fairly permanent, "under-secretaries of state", and yet men who are on their promotion, for some of them may well look to being chancellors or treasurers before they die. It is among them also that the king finds his diplomatists. The thirty-three names therefore upon our list represent almost all that England has to show in the way of legal learning, official experience and administrative ability.

But then of course it is certain that there are members of the council who are not upon this list. They have been otherwise summoned. In the first place there are the two great ministers. The treasurer, Walter Langton, has been summoned as bishop of Lichfield; he is king Edward's right-hand man. The chancellor, William Hamilton, who, when compared with Langton, seems an insignificant person, can appear as dean of York.¹ But there must be other prelates

Composition
of the
council

of the great seal. He was "called 'king's secretary' in a sense more particular than that in which the description was generally used . . . [and] sometimes . . . actually the king's chancellor . . . in disregard of the rightful chancellor in England", Tout, *Chapters*, III, 86-87. As to Benstead (which appears to be the correct form of the name), he was keeper of the privy seal and "far in the front rank among Edward's confidential agents" at a time when secretary "meant little more than confidant". *Ibid.* II, 18-19, cf. Richardson and Sayles, *E.H.R.* XLVI, p. 547.]

¹ The chancellor seems to have had no summons, except as dean of York.

and there must be lay nobles who are members of the council. On the other hand it is difficult, if not impossible, to believe that every prelate or baron is a member of the council. We see this from that proclamation of the 21st of March which has already been mentioned. On that day the mass of prelates and nobles is sent home; but the members of the council are to remain behind. Now it would be a hard task were we to seek to recover the names of all those who in any given year were king Edward's sworn councillors. Still certain materials exist, by a circumspect use of which we might arrive at some tentative but serviceable conclusions. We will fix our attention on the months of March and April in the year 1305 and see by whom it is that the king is surrounded. Our parliament roll will give us some help, while some help may be derived from the contemporary charter roll. It is well known that a royal charter—and herein lies the chief formal difference between a charter and a mere patent—purports to have been delivered by the king in the presence of several witnesses whose names are given. We must not for one instant suggest that by merely collecting the names of such witnesses we could frame a list of those men of high station who were sworn members of the council. In the first place a man may be a member of the council and yet for many months together may never be in the king's presence. Sickness, old age, a mission to foreign parts, may keep him away; or again he may be in opposition or disgrace. No law obliges the king to consult all his councillors. For example, during the year in question we hardly ever see the Archbishop of Canterbury in the king's presence. In all likelihood he is still a member of the council; but he is in opposition and disgrace. And then on the other hand we may not infer that a man is a member of the council merely

because he witnesses the grant of a charter. Not only may he be a casual visitor to the royal court, but even if his name appears habitually, this may be because he holds some not very important office about the king's person, and we can not be certain that the occupants of all such offices were usually sworn of the council. Still we may reasonably ask what great men were constantly in the king's presence during these two months, and the answer that we get to this question may be of some value.

The parliament, we have said, met on the 28th of February. Between that date and the 21st of March, when the assembly of the estates was dissolved, the king's charters were thus witnessed: The king's
charter
witnesses
in 1305

5th March. Earls of Lincoln, Gloucester, Hereford, and Warwick, Aymer de Valence, Hugh le Despenser, Robert Fitz Roger, Robert de la Warde (steward of the household).

7th March. Earls of Lincoln, Gloucester, Hereford, and Warwick, Aymer de Valence, Hugh le Despenser, Robert de la Warde.

8th March. Archbishop of Canterbury, Bishop of Lichfield (Treasurer), Bishops of Lincoln, Salisbury, and Carlisle, Earls of Lincoln, Lancaster, Gloucester, Hereford, and Warwick, John of Brittany, Hugh le Despenser, John de Segrave, Roger le Brabazon (C.J.B.R.), Robert de la Warde.

10th March. Earls of Lincoln, Gloucester, Hereford, and Warwick, Aymer de Valence, Hugh le Despenser, Robert Fitz Roger, Robert de la Warde.

10th March. The same with John of Hastings.

14th March. The Treasurer, the Bishop of Durham, the Earls of Lincoln, Lancaster, and Hereford, John of Brittany, Aymer de Valence, Robert Fitz Roger, Robert de la Warde.

20th March. The Treasurer, the Bishops of Durham, Carlisle, and Glasgow, the Earls of Lincoln, Gloucester, Hereford, Warwick, and Carrick, John of Brittany, Aymer de Valence, Robert Fitz Roger, Robert de la Warde. [A Scottish charter.]

20th March. The Treasurer, the Bishops of Durham and Carlisle, the Earls of Lincoln, Lancaster, Hereford, and Warwick, Aymer de Valence, Hugh le Despenser, Robert Fitz Roger, Robert de la Warde.

On the next day the assembly of the estates was dissolved. We shall see, however, that the king retains all or most of those who have been witnessing his acts.

28th March. The Treasurer, the Bishops of Durham, Carlisle, and Glasgow, the Earls of Lincoln, Gloucester, Hereford, Warwick, and Carrick, John of Brittany, Aymer de Valence, Robert de la Warde.

29th March. The Treasurer, the Bishops of Durham, Salisbury and Carlisle, Earls of Lincoln, Hereford and Warwick, Henry de Percy, Hugh le Despenser, Robert de Clifford, John de Segrave.

30th March. The Treasurer, the Bishops of Durham and Carlisle, the Earls of Lincoln, Hereford, and Warwick, John of Brittany, Aymer de Valence, Hugh le Despenser, John de Segrave, Robert de la Warde.

5th April. The Treasurer, the Bishops of Durham and Carlisle, the Earls of Lincoln, Gloucester, and Warwick, Henry de Percy, Robert de Clifford, Robert de la Warde.

5th April. The Treasurer, the Bishops of Durham and Carlisle, the Earls of Lincoln, Gloucester, and Hereford, Aymer de Valence, Henry de Percy, John de Hastings, Robert de Clifford, Robert de la Warde.

5th April. The Treasurer, the Bishops of Durham and Carlisle, the Earls of Lincoln, Gloucester, Hereford, and Warwick, John of Brittany, Henry de Percy, Hugh le Despenser, Robert de la Warde.

8th April. The Treasurer, the Earls of Lincoln and Hereford, John of Brittany, Aymer de Valence, Hugh le Despenser, Robert de la Warde.

10th April. The Treasurer, the Bishops of Salisbury and Carlisle, the Earls of Lincoln, Gloucester, and Hereford, Aymer de Valence, Hugh le Despenser and John de Hastings.

15th April. The Treasurer, the Bishop of Durham, the Earls of Lincoln and Hereford, John of Brittany, Aymer de Valence, Henry de Percy, Hugh le Despenser, Robert de la Warde.

The Easter holiday now intervenes. In May and June, as in January and February, we may see the king travelling about the country, and when this is the case his charters have fewer witnesses—perhaps the treasurer, perhaps the Bishop of Durham, with an earl or two earls and three or four barons, or some men, it may be officers of his household, who are not of baronial rank. The most regular of all the witnesses to a royal charter is the steward of the household; at this moment he is Robert de la Warde.

We may now turn to the parliament roll and make further pursuit for the names of councillors. Nicholas Segrave has to answer for his offences “in full parliament, in the presence of the king himself, the Archbishop of Canterbury, and many bishops, earls, barons, and others of the king’s council”.¹ Then on Monday, the 29th of March, certain persons presented themselves “before the king himself and his council”

Councillors
on the
parliament
roll

¹ *Memoranda de Parlamento*, No. 449.

as willing to go bail for Segrave, and on the following Wednesday their bond was witnessed by the treasurer, the Bishops of Durham and Carlisle, the Earls of Lincoln and Warwick, and the two chief justices.¹ On the 13th of March Almaric de St Amand is bailed before the treasurer, the chief justice of the king's bench, "and others of the king's council", by six great men, all of whom may themselves be members of the council, the Earl of Lincoln, John of Brittany, Hugh le Despenser, Hugh de Vere, Thomas of Berkeley, and Adam of Welles.² Another case was heard by the treasurer, the chief justice of the king's bench, John of Berwick, "and others of the king's council".³ But by far the longest list of councillors that we get is contained in an elaborate notarial instrument which describes how on the 5th of April the titular bishop of Byblos appeared "before the bishops and other prelates, earls, barons, justices, and divers other noble clerks and laymen, councillors of the magnificent prince, the lord Edward, the illustrious king of England", proffered a papal bull, and received a short answer to the effect that this bull was of no avail in England. Then the notary tells us how these things were done in the presence of the treasurer, the Bishops of Durham and Carlisle, the Earls of Lincoln, Hereford, and Warwick, twenty-four persons who are described as knights, three who are "discreet men", and three who are clerks. The list is worthy of some further analysis. Of the twenty-four "knights", ten have received the baronial summons to this parliament (Valence, Percy, Clifford, Vere, Teye, Welles, William de Grandison, Rither, Deyncourt, Burghersh), eight have received the councillor's summons and are justices or barons of the ex-

¹ *Memoranda de Parlamento*, No. 449.

² *Ibid.* No. 452.

³ *Ibid.* No. 420.

chequer (Brabazon, de L'Isle, Bereford, Howard, Hengham, Spigurnel, Malorie and Inge). The others are John of Brittany, who apparently was not summoned, but who is the king's nephew and one of his trustiest captains and advisers;¹ John de Botetourte, who is warden of the western parts of the Scottish march;² John Wogan, who is justiciar of Ireland; John of Havering, who may be of baronial rank and who at any rate is just being appointed to be seneschal of Gascony;³ Ralph of Sandwich, who is constable of the Tower; and Nicholas Fermbaud, who is constable of Bristol. The three "clerks" (Reginald Brandon, Robert Pickering, and William of Kilkenny) have all had the councillors' summons. As to the three "discreet men", they have none of them been summoned. They are, we may guess, too "discreet", that is, too intimately connected with the king's person, to need any writ. They are John of Drokenesford, the keeper of the wardrobe, the head, that is, of a department which has a great deal to do with military and other expenditure; John of Banstead, who is or has been the king's secretary, and who before the year is out will be chancellor of the exchequer,⁴ and John of Berwick, another clerk, who has long been in the service of the king and queen; possibly he holds the privy seal.⁵ Then three notaries of the apostolic

¹ His father, John Duke of Brittany, is living, but dies in this year. He is subsequently summoned as Earl of Richmond.

² Bain, *Calendar*, vol. II, No. 1659.

³ *Memoranda de Parlamento*, App. II.

⁴ In a notarial instrument of 1299 he is described as "domini Regis secretarius"; *Foedera*, vol. II, p. 916. In October of this year he was chancellor of the exchequer; *Ibid.* p. 974. His predecessor in that office, Philip Willoughby, died in September; Hardy's *Le Neve*, vol. II, p. 31. Just at this time Banstead is constantly employed in carrying the king's oral instructions to the chancellor.

⁵ Already in 1292 he is "discretus vir", "clericus Regis"; *Foedera*, vol. II, p. 766. He has lately been negotiating the peace with France. He

sec, two of whom, John Bush and John of Caen, are also clerks of the English chancery, perfect the instrument with all due solemnity.

A committee of the council Then we may see a committee of the council appointed. It consists of the treasurer, the Bishop of Durham, the Earl of Lincoln, Aymer de Valence, John Drokenesford, and John Banstead. They are to discuss the affairs concerning which a certain "Dominus de Cuk" has come to the king from foreign parts.¹ He, we take it, is Jehan lord of Cuijk in Brabant. He was over here in 1297 as an envoy of the Count of Flanders,² and on the present occasion he has apparently come to negotiate about certain debts that are due from the king to the Duke of Brabant.³

The council at the autumn parliament In the autumn of this year the king held another "parliament". So far as we know he did not call in the prelates or barons in mass, nor did he summon any representatives of the shires or the towns. The names of those whom he ordered to appear are for the more part names with which we are by this time growing familiar. The treasurer was summoned and the Bishop of Worcester, the Earls of Lincoln and Hereford, Hugh le Despenser, Henry Percy, John of Hastings, John Botetourte, and William Martin; three justices, two barons of the exchequer; Philip Martel and another master of the chancery; John of Banstead, and John of Sandale, the chamberlain of Scotland; and besides these the Abbots of Westminster and Waverl[e]y and Friar Hugh of
 was dean of Wimborne and a canon of York. He was one of Queen Eleanor's executors; Foss, *Judges*, vol. III, p. 237. [Tout has pointed out that the importance of these three men in the king's counsels reflects the growing influence of the wardrobe in the administrative system, *Chapters*, II, pp. 82-83.]

¹ *Memoranda de Parlamento*, No. 454.

² *Foedera*, vol. I, pp. 853, 856; *Annales de Wigornia*, p. 529.

³ *Memoranda de Parlamento*, App. III.

Manchester.¹ It was by these twenty men (for John of Hastings was too ill to come), in conjunction with ten representatives of the various estates of Scotland, that the great Ordinance for the affairs of Scotland was drawn up.² Almost immediately after this, six out of these twenty men were commissioned as ambassadors to the pope, namely, the treasurer, the Bishop of Worcester, the Earl of Lincoln, Despenser, Banstead and Martel.³

Now the constitution of the body which was to treat with the Scottish commissioners may give us a valuable warning; for it is somewhat artificial; the representatives of Scotland are to be outnumbered by just two to one; there are to be just two English bishops, two English abbots, two English earls. The two abbots are probably not sworn members of the council, but every great interest is to be represented and there are two Scottish abbots to be balanced. We may well believe that according to the notions of this age the king has a clear right to call upon any one of his subjects to give him counsel; and bold would have been the man who either refused to come, or who refused to sit beside any one whom he found at the council board. This makes it exceedingly hard for us to say that one man is while another man is not a permanent councillor.

Difficulties
as to the
composition
of the
council

The difficulty may be illustrated by the case of one of the most famous of the English nobles. Seven earls were summoned to the parliament, besides the Prince of Wales and

The earls
and the
council

¹ The "parliament" was postponed from time to time, and some men who were summoned in the first instance were not (so far as we know) summoned after the postponement, namely, the Bishops of Durham, Salisbury, and Carlisle, the Prince of Wales, the Earls of Lancaster, Gloucester, and Warwick, Aymer of Valence, John of Brittany, Clifford, Burghersh, Thomas of Berkeley, Roger la Warre, and certain justices and clerks; *Parl. Writs*, vol. I, pp. 159-161

² *Parl. Writs*, vol. I, p. 161.

³ *Foedera*, vol. II, p. 974.

Gilbert of Umfraville, who was Earl of Angus in Scotland. Five of these we have seen about the king's court, the Earls of Lincoln, Gloucester, Hereford, Lancaster, and Warwick; and, by the way, it must not escape us that the king is surrounded by his kinsfolk: Thomas of Lancaster and John of Brittany are his nephews, Hereford and Gloucester are his sons-in-law, Aymer de Valence is his cousin. Then the Warenne earldoms of Surrey and Sussex we may perhaps describe as being in suspense. The heir to them, the young John of Warenne, has not been summoned to the parliament; probably he is under age and not yet belted; but we happen to know that he is present, for on the 15th of March the king "in his own chamber at Westminster in his parliament" offers the hand of his grand-daughter, Joan of Bar, to the young earl, who gratefully accepts the offer.¹ Edmund, the heir of Arundel, is another infant. The two earls whom we have not mentioned are those of Oxford and Norfolk. We can hardly doubt that the marshal of England is at least a titular councillor; but he is not being consulted; we do not know that he came to this parliament. He has been in disgrace. Three years ago he had to surrender his estate and office to the king, and take them back on terms which will make him the last of his great race.² There is no quarrel now. On the 14th of March the king "because of his great affection"—so runs the chancery formula—forgives him the debts that he owes.³ He may well be an old, disappointed, broken man; death is at hand and the days of the Bigods are over; but for all this he is probably entitled to call himself one of the king's councillors.

¹ Rot. Cl. 33 Edw. I, m. 18d

² The surrender was made in April, the regrant in July 1302; *Foedera*, vol. 1, pp. 940-941.

³ Rot. Pat. 33 Edw. I, pt. 1, m. 16: "ob grandem affectionem".

When, however, all due allowance has been made for all our doubts and mistakes, we have to picture to ourselves the council as being in the main a body of officers, of ministers, of men who in one capacity or another are doing the king's work and receiving the king's pay. Even those prelates and barons who remain at Westminster, when their fellows have gone home, are hardly mere prelates and barons. The Bishops of Durham and Carlisle are not just two bishops; the magnificent Anthony Beck, the strenuous John Halton, we might almost call provincial governors, the military governors of districts which are exposed to invasion. Clifford and Despenser are not just two powerful barons; they are the two forest justices, and as such they are at this moment two very important ministers. Valence and Brittany are the king's best generals. The Earl of Lincoln, the faithful Henry Lacy, is as near to being a prime minister as a layman can be. And then the council embraces all the great courts and all the great boards. A full meeting of the council is a full meeting of the king's bench, of the common bench, of the chancery, of the exchequer: it is this and more than this.¹

Conclusion
as to the
composition
of the
council

So much as to men; one word as to places. The parliament was held at Westminster, and the proclamation that invited petitions was made in "the great hall". Nevertheless, it is not in the royal palace that we can lay the one scene of which we have a full account; it was not there that the Bishop of Byblos came before the council. The king, we are told, was dwelling and the council was assembled in the house of the

Place of
session

¹ I have not come upon any contemporary and official authority which shows that the king has more than one council, or which qualifies the term *consilium* with any such adjectives as *ordinarium*, *privatum*, or the like. [This view (expressed more fully below, p 71, n 1) is now generally accepted although Mr Richardson and Dr Sayles regard the term 'great council' as one marking a distinction of practical importance. Baldwin, *King's Council*, pp. 105-114, Pickthorn, *Early*

Archbishop of York.¹ Another document tells us that on the 22nd of February a sum of 6*l.* 12*s.* was paid from the wardrobe to Walter, the chaplain of the palace, in order that the archbishop's house might be prepared for the reception of the king and queen.² The temporalities of the archiepiscopal see were in the king's hands; William of Greenfield, the elect archbishop—he had lately resigned the chancellorship—had gone to the Pope for confirmation. Already in 1293 the king had held a parliament at the same place,³ and thus early had York House, standing where the White Hall was to stand in later days, become the scene of royal councils.

The work of a parliament And now we may ask the question, what does our record tell us of the part played in this parliament by the king's council, and by those who constituted or represented the three estates of the realm? We may bring the business of a medieval parliament under five heads, namely—(1) the discussion of affairs of state, more especially foreign affairs; (2) legislation; (3) taxation or supply; (4) the audience of petitions; (5) judicial business, the determination of causes criminal and civil

General discussion (1) The king had summoned the estates in order that he might treat "of certain matters specially touching our realm of England and the establishment of our land of Scotland", and no doubt the state of Scotland was one of the main matters which required his attention and the advice of his councillors. Let us remember that just at this moment Edward was at the full height of his power. All looked well; it seemed as if the evening of his reign was to be peaceful

Tudor Government, vol. i, pp. 32-33; Richardson and Sayles, *B.I.H.R.*, viii, pp. 72-73; *E.H.R.*, xlvii, pp. 199-201.]

¹ *Memoranda de Parlamento*, No. 464.

² Q. R. Wardrobe 1*g*⁴.

³ *Rolls of Parliament*, vol. i, p. 91.

and glorious. He had lately traversed Scotland from end to end hardly finding an enemy, save in the garrison of Stirling Castle, and now even Stirling was his. Wallace, it is true, was in all probability still at large when our parliament was sitting at Westminster; but he was a hunted outlaw and his capture, when it took place soon afterwards, cannot have been an unlooked-for event. As for the young Earl of Carrick, Edward had no reason for suspecting him of a grand ambition; we see him taking part in the parliament as one whom the king trusts. The task in hand was to provide for Scotland a settled form of government, a task that might demand prolonged debates, but not, it would seem, a hopeless task. What Edward did at this parliament was to call upon the Bishop of Glasgow, the Earl of Carrick, and John Mowbray to say how Scotland should be represented at another parliament to be holden later in the year. They reported that two bishops, two abbots, two earls, two barons, and two men elected by the community of Scotland would be representatives enough. As to the place at which the parliament should meet, they left that to the king; as to the time, the Scots could hardly be ready before Midsummer. Thereupon the king fixed London and the 15th of July as the place and date for the assembly.¹ Afterwards he postponed that date until the 15th of September, and then at Westminster the ten Scottish representatives and twenty members of the English council drew up the important "*Ordinatio super stabilitate terræ Scotiæ*". However, at the moment what should interest us most is this, that in our lenten parliament the three Scottish spokesmen did not answer the question that had been put to them until after the assembly of the English estates had been dissolved. Those who were not members of the

¹ *Memoranda de Parlamento*, Nos. 13, 458.

council had been sent home on the 21st of March; not until the 26th did the Bishop of Glasgow, Robert Bruce, and John Mowbray bring in their report.

Gascon
affairs

Whether Edward had sought advice in this matter from the mass of the clergy, baronage, and commoners, we cannot say; nor do we know that the affairs of Gascony afforded material for a general debate, though there was an enormous mass of Gascon business to be transacted. Edward had lately recovered his French provinces, and was just sending out a new set of representatives. John of Havering, who had been justiciar of Wales, was to be in supreme command as seneschal of the duchy; Richard of Havering, lately the escheator north of Trent, was to be constable of Bordeaux; William Dene, seneschal of the Agenais; Frisot de Montclar, treasurer of Agen. Vast quantities of writs had to be issued for the payment of arrears of many kinds.¹

spite with
the arch-
bishop

To come nearer home, we have seen how the king expected that the clergy would make an attack upon him. He was now quite strong enough to meet, to forestall, such an attack. He had not forgotten the humiliation that he had suffered at the hands of Archbishop Winchelsea. With his very good will, as we may well suppose, a petition was presented by the barons and commons complaining that the monks, more especially the Cistercians, sent large sums of money out of the country to alien mother houses.² Of this matter we must speak under another head, but it may have been discussed in many meetings by the assembled laity. The treatment of the offending archbishop, who had lately been giving a fresh cause of complaint by "visiting" the king's free

¹ This information is derived from the Vascon Roll. *Memoranda de Parlamento*, App. II.

² *Ibid.* No. 486.

chapel in Hastings Castle,¹ was a subject to be debated rather at the council board than before the estates of the realm.

(2) In the way of legislation this parliament did little. No Legislation statute was passed which at once found a place upon the statute roll; but there are several acts of a more or less legislative character which should be briefly mentioned.

In answer to the petition of the laity touching the revenues De asportis of the religious houses the following reply was given: "The religiosorum king in his full parliament, by the consent of the prelates, earls, barons, and others of the realm, has ordained and established a certain statute about this matter."² Our roll, as will now be seen for the first time, goes on to add—"in the form that follows". But nothing follows; a blank space is left; the statute, if drawn up, was kept in abeyance. Two years afterwards it was formally enacted or re-enacted at another parliament and became the well-known Statute of Carlisle, "De asportis religiosorum".³ The reasons for this delay are not obvious; but we have to remember that at the date of our parliament the papacy was vacant, and that Edward may have had several reasons for keeping in suspense over the future pope a statute which might prevent the flow of money from England to Rome or Avignon.⁴

¹ *Ibid* No. 204.

² *Memoranda de Parlamento*, No. 486.

³ *Statutes of the Realm*, vol 1, p. 150

⁴ Dr Stubbs, *Const. Hist.* § 181, writes thus: "In the February parliament of 1305 the consent of the barons had been given to a statute forbidding the payment of tallages on monastic property and other imposts by which money was raised to be sent out of the country. Not being fortified by the assent of the clergy or commons this Act was not published until 1307, when in the parliament of Carlisle held in January it was formally passed" This may be so, and certainly the recitals in the Statute of Carlisle seem to point this way. But our roll very distinctly claims for the statute made in our parliament the consent of the prelates, earls, barons, and others of the realm. Benedict XI died on the 7th of July, 1304; Clement V was not elected until the 5th of June, 1305.

Ordinance
for inquests

There has passed into our collections of statutes out of the *Vetus Codex* an "Ordinance for Inquests" made at this parliament.¹ It is an answer to a petition presented by Simon Parker, and provides in general terms that an inquest to which the king is party, is not to be stayed merely because the king's pleaders assert that some of the jurors are not favourable to the king. This was agreed and ordained "by the king and his whole council".² Such an ordinance was beneath the dignity of the statute roll, and we should have great difficulty in proving that it had the assent of the estates. But it was a concession by the king, and the king's ordaining power would easily cover the making of such a concession.

Forest
ordinance

An *Ordinatio Forestæ* which is on our roll was placed also upon the close roll; it has been received into our printed statute books.³ It is the king's answer to certain petitions and does not purport upon its face to bear the authority of the assembled estates or even the authority of the council.⁴ The king has been compelled to consent to a perambulation (*puralee*) of his forests, and now some of those who have been "put out of the forest by the perambulation" want both to be quit of their old burdens and yet to enjoy their accustomed advantages; they do not want to provide "poture", meat and drink, or money instead of meat and drink, for the foresters as of old, and yet they want to keep their old easements and rights of common within the forest. The king tells them that they must make their choice; they cannot be both inside and outside the forest and the forest law. It was not he who called for the perambulation; the demand for it should not have been made; but he has granted that

¹ *Statutes of the Realm*, vol. I, p. 143.

² *Memoranda de Parlamento*, No. 10.

³ *Statutes*, vol. I, p. 144.

⁴ *Memoranda de Parlamento*, No. 461.

demand and will keep his word. The justices of the forest are to see that effect is given to this answer. We can hardly treat this as an act of legislation; certainly we cannot treat it as an act in which the estates of the realm took part. But no doubt at their meetings there was much talk about the forests, and discussion of those grievances which in the next year were met by an ordinance of sufficient importance to be placed upon the statute roll.¹

Lastly, there is, or rather once was, on our roll what was called in the margin thereof "Ordinatio de trailbastons".² Ordinance of trail baston

The king has appointed justices to inquire of, hear and determine divers felonies and trespasses. Their commissions are upon the patent roll; the earliest is dated on the 6th of April.³ The king now gives them certain instructions as to their proceedings. These will be of some importance in later history, for "a commission of trailbaston" becomes one of the known forms of commission with which justices can be equipped.⁴ But this again we can hardly regard as a legislative act. The king has always enjoyed and still enjoys a very large discretionary power of sending justices when and whither he pleases, and of defining the matters about which they are to inquire. Even were we to examine the new commission minutely, we might find in it little that was very new or to us very striking, nevertheless the issue of it was

¹ The *Ordinatio Forestæ* of 1306; *Statutes*, vol. 1, p. 145. This is dated on the 28th of May, that is to say, two days before the day fixed for the parliament. The enacting words are "concordatum est et statutum", and it calls itself "istud statutum".

² This seems to be the first appearance in an official document of the curious word "trailbaston". [There can be little doubt that it signified a "club-man", a vagabond with a big stick. Miss Cam, *The Hundred and the Hundred Rolls*, 1930, reproduces (p. 180) an early fourteenth-century miniature showing a trailbaston in action.]

³ *Parl. Writs*, vol. 1, p. 408.

⁴ See Pike, *Introduction to Year Book*, 14-15 Edw. III. pp. xxx-xxxvi.

the one thing done in this parliament that all the chroniclers have thought worthy of note; indeed, a certain annalist speaks of this year as the year of trailbaston.¹ This vigorous attempt to free the land of vagabonds takes its place along with the execution of Wallace, the disgrace of the archbishop, and the coronation of a new pope; they are the memorable events of the year, at least so it strikes a contemporary.

No supply
granted or
demanded

(3) As to taxation, we have every reason to believe that on the present occasion no tax of any kind was imposed, and we have no evidence to show that the king asked for money. He seems to have been very poor. The salaries of his justices and his clerks were in arrear, and they had to be told that they must wait for better times.² It is of course possible that some statement of his necessities was laid before the assembled magnates, clergy and commons, but we read nothing of any "supply" or of any demand.

Scutage and
tallage

There are, however, three matters which deserve a brief notice in this context. "The bishops, abbots, earls, barons, and others of the realm" petitioned that, whereas they had done their military service in Scotland in the campaigns of 1300 and 1303, they might take scutages from their tenants.³ The request was granted. "The earls, barons, and others who owe the king military service" also complained that though they had done their service, the officers of the exchequer were charging them with scutages for all their fees. The answer was that the king in the presence of the whole council had ordained that relief should be given to them by a writ directed from the chancery to the exchequer, and that the

¹ *Liber de Antiquis Legibus*, App., p. 250: "L'an de Treyle baton". See also *Flores Historiarum*, vol. III, p. 122; *Annales de Wigornia*, p. 557, Rushanger, *Chronica*, p. 224; *Annales Londonienses*, p. 134; *Trivet*, p. 404.

² *Memoranda de Parlamento*, Nos. 80, 175.

³ *Ibid.* No. 198.

form of the writ was to be settled by the council.¹ Thirdly, "the archbishops, bishops, prelates, earls, barons, and other good men of the land" asked that, as the king had lately tallaged his demesnes, they also might be allowed to tallage those parts of the ancient demesnes of the crown which were in their hands.² To this the response was a simple *Fiat ut petitur*.³ In all these cases the petitioners seem to have been asking for no more than they were entitled to, though the only procedure by which they could obtain it was a petition.

(4) But by far the greater part of our parliament roll is occupied by entries which concern the audience of petitions. Before we discuss any of the many questions which such entries suggest we must remember that many of the original petitions exist, and the external form of a petition should be briefly described.

It will in general be a strip of parchment about five inches long, while its breadth will vary from three inches to a bare inch. On the front of this strip and along its length the

Audience of
petitions

External
aspect of a
petition

¹ *Ibid* No. 203. [The story of Edward's determined but eventually unsuccessful attempt to turn the scutage into a general tax and take a fine by way of composition from the tenants-in-chief who did not serve, has been worked out by Miss Chew in *E.H.R.* xxxvii, pp. 321 ff.]

² *Memoranda de Parlamento*, No. 87.

³ In 1304 Edward had taken a tallage of a sixth from his demesnes; Stubbs, *Const Hist* § 181. It would not be true to say that on the present occasion the king allowed the magnates "to tallage their demesnes". A landlord may always tallage his villains, and it is by his villains that the greater part of his demesnes are occupied. At all events, though he may thereby be breaking manorial custom, no court of law will prevent him doing this. But when one of the manors which are the ancient demesne of the crown has been granted to a mesne lord, he may only tallage the *homines de antiquo dominico coronæ* when their compeers on the manors which have not left the king's hand are being tallaged by the king. And even this, so it would seem, he can only do by the king's permission. See Vinogradoff, *Villainage*, pp. 92-93.

petitioner's grievance and prayer will be written, usually in French, rarely in Latin, and will be addressed "to our lord the king" or "to our lord the king and his council". On the back of this strip and across its breadth there will almost always be written some words, usually in Latin, rarely at this time in French, which either prescribe the relief which the petitioner is to have or send him away empty. Then below this endorsement there will very often occur the syllable *Irr*, while just now and again we find the full *Irrotulatur*.¹ Then, if we are lucky enough to connect this document with an entry on the parliament roll, the relation between the two will be of this kind: By means of the formula, *Ad petitionem A. de B. petentis quod, etc., Ita responsum est quod, etc.*, the roll will first state the substance of the petition, having turned its plaintive French into businesslike Latin and pruned away its immaterial details, and then it will give with absolute accuracy the words of that response which is endorsed on the petition.

Audience
of petitions,
how con-
ducted

And now we may glance at the grave question, How and by whom and when and where was this business, this long and laborious business, transacted? We know that for some time past the multitude of petitions presented at the king's parliaments had been giving trouble and had been met by various expedients. In the eighth year of the reign we hear that "the folk who come to the king's parliament are often delayed and disturbed to the great grievance of them and of the court by the numerous petitions which are presented to the king, many of which might be 'exploited' before the chancellor and the justices". It is, therefore, provided that these petitions are to be sorted. Those which concern the seal are to come before the chancellor, others are to be sent

¹ On several occasions I have seen *Irrotulatur* at full length, and have never noticed an *Irrotuletur*.

according to their nature to the exchequer or to the justices, or to the justices of the Jewry. Only those "which are so great or so much of grace" that they cannot otherwise be dealt with, are to come before the king in order that his pleasure may be taken, and they are to be brought before him and his council by the chancellor and the other chief ministers, so that he and his council may have leisure to attend to the great affairs of his realm and of other lands.¹ Then in the twenty-first year it was ordained that all petitions which thenceforth should be proffered at the parliaments should be handed in to receivers appointed by the king in order that they might be examined. Five bundles were to be made, one for the chancery, another for the exchequer, a third for the justices, a fourth for the king and his council, while the fifth was to contain those which had already been answered.²

On the present occasion we obtain yet fuller information. Already on the 5th of February, three weeks before the day fixed for the parliament, Edward, who was then at Swaffham in Cambridgeshire, wrote to his chancellor about this matter. "We bid you", he said, "along with the treasurer, to whom we have issued a similar command, proclaim that all those who have petitions to deliver to us and our council at our forthcoming parliament, shall deliver them day by day to those who are assigned to receive them between now and the first Sunday of Lent [the 7th of March] at the latest. And do you and the others of our Council in London 'deliver' as many of these petitions as you can before we come, so that no petitions shall come before us in person, save only those which cannot in anywise be 'delivered' without us, and these last you are to have well tried and examined and

Procedure
in 1305

¹ Ryley, *Placita*, p. 442; Stubbs, *Const. Hist.* § 231.

² Ryley, *Placita*, p. 459; Stubbs, *Const. Hist.* § 231.

set in good order. This proclamation should be made in the great hall at Westminster, in the chancery, before the justices of the bench, in the Guildhall, and in Westcheap, and the names of those who are to receive petitions must be declared. You are to let me know without delay in what manner you have fulfilled this command and whom you have appointed to receive the petitions.”¹ From this it would seem that the work of examining and even of answering the petitions—for to “deliver” a petition is to answer it—was to be taken in hand by those members of the council who were in London some days before the date appointed for the parliament.

Auditors of
petitions Whether this order was obeyed or revoked we cannot say for certain. Our roll opens with just such a proclamation as the king had prescribed, and but for his letter we should naturally have supposed that it was not made until the 28th of February, the first day of the parliament. Be this as it may, the persons appointed to receive the petitions were Gilbert Roubury, a justice of the king’s bench, John Kirkby, the remembrancer of the exchequer, and two clerks of the chancery, who were also notaries of the apostolic see, John Bush and John Arthur of Caen. Their duty was, we take it, to receive and to sort the petitions.

The Gascon
committee Then we read that the king has appointed certain men to receive and to answer all those petitions presented by the folk of Gascony that can be answered without the king. These men, we may say, constitute a very strong committee for Gascon affairs. They are the treasurer, the Earl of Lincoln, Aymer de Valence, John of Brittany, John of Havering, Arnaud de Caupenne,² the Prior of le Mas, Master Piers

¹ Privy Seals, File 53, No. 5236.

² On p. 3 of the *Memoranda de Parlamento* this name by a deeply regretted error has been given as Campenne. There is more than one Caupenne (Calva Penna) in the south of France.

Arnaud de Vic, Master Piers Aimery, and John of Sandale. John of Havering is at this parliament appointed seneschal of Gascony; he has some title to be called an English baron, though apparently he has not received the baronial summons on the present occasion. John of Sandale has received no summons; but he is a trusty clerk; he is now chamberlain of Scotland, and will be Bishop of Winchester and Chancellor of England; he has had experience in Gascony.¹ Sir Arnaud de Caupenne, the Prior of le Mas, Piers Arnaud, and Piers Aimery have not received any summons of the ordinary kind and we can in no sense call them Englishmen. Piers Arnaud is provost of Bayonne, he has recently been one of the two royal lieutenants in Gascony and Arnaud de Caupenne has been with him.² Piers Aimery has at times been about the king's person³ and in 1302 he was summoned to a parliament among the king's clerks;⁴ but he is or was a canon of the church of St Severin,⁵ and is at this moment retiring from the office of constable of Bordeaux. Sir Arnaud de Caupenne is seneschal of the Limousin, Périgord, and Quercy. As to the Prior of le Mas, his name is Bernard Pellet of Pelleti, he is a doctor of both laws, and has lately been engaged for our king's service by the Earl of Lincoln at a yearly salary of 250*l.* tournois. We cannot yet treat the auditors of petitions as a committee of the English house of lords.⁶

¹ *Foedera*, vol. II, p. 934.

² In 1294 Master Peter Arnaldi "de Bik" is a king's clerk in Gascony; *Foedera*, vol. II, p. 807. In 1300 and 1301 he was one of the king's "locum tenentes" in his "duchy of Aquitaine", *Ibid* pp. 902, 934. On the Vascon Roll for our year (m. 24) he appears as provost of Bayonne on the 30th of March, 1305. I assume that "de Bik" and "de Vico" have the same meaning. There are several places called Vic in the south of France.

³ *Foedera*, vol. II, p. 876.

⁴ *Parl. Writs*, vol. I, p. 113.

⁵ *Foedera*, vol. II, p. 920.

⁶ As to these Gascon auditors, see *Memoranda de Parlamento*, App. II.

The Irish
committee

To answer those petitions from Ireland and the Channel Islands which can be answered without the king, a less dignified group of men is constituted. It consists of John of Berwick, one of those very "discreet" clerks who have not received writs of summons, Hervey of Stanton, who has not been summoned, but has been employed as an itinerant justice and will soon be a justice of the common bench, William Mortimer, an itinerant justice who has received the councillor's writ, Roger de Beaufou, who has not been summoned but is going to be employed as a justice of trailbaston, and lastly, William de Dene, who is on the eve of being appointed seneschal of the Agenais; if he was in any sense an Irishman, he was the one Irish member of this Irish committee.¹

The Scottish
committee

For Scottish petitions a third set of men is appointed. It includes William Inge and Henry of Guildford, English justices, who have been summoned as councillors (Inge is soon to be a justice north of Forth),² Richard of Havering who has not been summoned (he is one of the king's clerks, has served him in Scotland,³ and is now to go out as constable of Bordeaux),⁴ and two men neither of whom has been summoned but who probably know more than any other men about the king's proprietary interests in Scotland, namely, James of Dalilegh, escheator south of Forth, and John Weston, the king's receiver; they have lately been taking account of all the king's demesnes as far north as Orkney.⁵ We are told that these people are to receive, not that they are to answer, the Scottish petitions, but as it seems

¹ There had been a William de Dene who held land in Ireland, but he was dead, Sweetman, *Calendar*, 1302-1307, p. 157.

² Bain, *Calendar*, vol. II, p. 457.

³ *Ibid.* p. 294.

⁴ *Memoranda de Parlamento*, App. II.

⁵ Bain, *Calendar*, vol. II, p. 438.

plain that in the first instance all petitions are to pass through the hands of Roubury, Caen, Kirkby, and Bush, we may perhaps believe that the committee for Scotland had the same power that was given to the committees for Gascony and for Ireland, that it consisted not merely of receivers and sorters of petitions, but of triers and auditors.

For the English petitions no auditors were, so far as we know, expressly appointed. And here it may be remarked that this roll gives us the first evidence that we have of the appointment of auditors, nor do we get any other evidence for another ten years.¹ In 1315 there were three parties of auditors; one for England, a second for Gascony and the Isles, a third for Wales, Ireland, and Scotland. On that occasion the English committee consisted of three bishops, two barons, a justice, a baron of the exchequer, and a clerk of the chancery.² Perhaps in 1305, without any formal appointment, a small group of councillors was busy over the English petitions, but the constitution of that group may have varied from day to day, as now this man and now that could be spared from other employments. Some of the most important councillors had been told off for the Gascon petitions, the treasurer, the Earl of Lincoln, Aymer de Valence, and John of Brittany. The chancellor may have presided over the English committee and have had with him the Bishops of Durham and Carlisle, the Earls of Hereford, Gloucester and Warwick, some barons, some justices, perhaps the two chief justices, and some clerks. About this matter we cannot be certain; and it is possible that there was more than one committee for England; the endorsements on

English
auditors

¹ At the autumn "parliament" of this year 1305 Roubury, Kirkby, Caen, and Bush were again appointed to receive the petitions, but of auditors we read nothing; *Parl. Writs.* vol. I, p. 160.

² Rot. Parl. vol. I, p. 350.

the various English petitions were not all written by one and the same hand.

Petitions
reserved for
the king or
the whole
council

Then we can see that some of the petitions were reserved for the king's eye or ear, while others were reserved for plenary meetings of the council. We come across a petition which has an endorsement of the usual character, a response defining the relief that the suppliant is to have, but that response is preceded by the words "Coram Rege" or "Coram Consilio", and often we can be sure that those words were not written by the hand that wrote what follows them. Here we seem to have in the first place a statement by the receivers or the auditors that this petition is one which must come before the king himself, or, as the case may be, before a full meeting of the council, followed by the order that was made when the king or when the council had considered the supplication. In one instance the endorsement of a petition which has thus been reserved for the king's audience is followed by an interesting note—"These thirty-two petitions were expedited before the king on the first Sunday of Lent."¹ It is an interesting note, for it shows us that already on the 7th of March, just a week after the opening of parliament and on the very day that had been fixed as the last for the receipt of petitions, considerable progress had been made in the work of "delivering" or "expediting" them; already thirty-two of the reserved petitions had come before the king and they, having been duly "tried" by the auditors, had been answered by him in the course of a single Sunday. Then we find another petition which in effect asks for an original writ of a kind as yet unknown in the chancery.² It bears two endorsements made by two different hands. The first says that at the end of the parliament this petition must

¹ *Memoranda de Parlamento*, No. 77.

² *Ibid.* No. 251.

come before all the justices; the second says that it is agreed by the council that a writ shall be framed to suit the petitioner's case.¹ From this it would seem that towards the end of the parliament, the various committees having done their work, full meetings of the council were held for the discussion of novel and arduous cases. We have seen above how on the 5th of April the Bishop of Byblos found at least thirty-three men assembled in one place to hear his petition.

However, we must not hope that any study of our roll, however careful, will enable us to set in their true chronological order all the acts done in this parliament. We have but too good reason to believe that a parliament roll is not in the very strictest sense of the term a contemporary record, and that it does not always say first what happened first. In one instance this is clear enough. Our roll begins with the proclamation concerning the delivery of petitions. This is immediately followed by the proclamation of the 21st of March, which sends all but the king's councillors back to their homes. From this we must not infer that all the subsequent entries on the roll represent events which occurred after that day. On the contrary we have seen that already on the 7th of March the king had answered a considerable number of petitions. What is more, a glance at the patent or the close roll will show us that long before the 21st the chancery was busily engaged in issuing the writs which carried into execution the responses given to the petitions. Thus, to take one example, we find on the third membrane of our roll an entry telling us how a favourable reply was given to a request by Robert Fitz Walter concerning a chapel in London which had formerly been a synagogue of

The parliament roll and the petitions

¹ This is just such a case as is contemplated by that famous clause, Stat. West. II, c. 24. The clerks of the chancery will not make a new writ, so the matter is brought before "the next parliament", and the writ is provided by the "jurisperiti".

the Jews; and then on the patent roll we find that Robert had got his writ as early as the 8th of March. We may perhaps suppose that the first membrane with its account of the dissolution of the assembly was prefixed by way of frontispiece to a roll that had been already made up; but we have other reasons for suspecting that the larger part of our parliament roll is in a certain sense a secondhand record. We shall probably come to the conclusion that the entries on the roll stand to the endorsed petitions in the relation of copies to original documents.

Already we have said that on the back of the petition we may generally find the word *Irrotulatur* in some abbreviated form. This, we take it, has been put there by the clerk who wrote the parliament roll. It means, "I have enrolled this petition and answer". He did not sit writing his roll in the room in which the petitions were being heard. They were brought to him as they were "expedited", perhaps at the close of each day's session, and his *Irrotulatur* serves as a "tick" to show which of them he has already entered on his roll. Then he sends the originals to the chancery. In the margin of the roll, whenever that margin is still undecayed, we may read opposite almost every entry that concerns a petition, *Lib' in Canc'*, which we may expand into *Liberatur in Cancellariam*. The clerk having done with the petitions sends them off to the chancery, and we may say puts a "tick" on his roll to show that this has been done. Then in the chancery the original endorsed petition will be the warrant for further proceedings. The chancellor will seal some patent writ or some close writ, or, it may be, some charter and vouch his warrant for so doing by the words *per petitionem de consilio*, or *per petitionem retornatam de consilio*. He finds his authority not in the entry on the parliament roll, which perhaps is not in his custody, but in the original endorsed petition.

The endorsement itself is the order that has been made, the entry on the roll is a copy of that order. We are putting no slight upon the parliament roll by saying this and must hasten to add that the roll now before us shows every sign of having been drawn up while the work of hearing petitions was still in progress. To take one example, on the sixth membrane of the roll we read how an addition was made to the response given to a petition of the prior of Biddlington. That petition has been reported on the third membrane, and looking back to the report of it we find that the additional words stated on the sixth membrane have also been introduced by way of postscript into the entry on the third membrane.¹ The third membrane of our roll, therefore, had been written before the addition was made to the response that had been given to the prior. Still it seems that the endorsement itself and not the entry on the roll should be considered as the first-hand and the authoritative document.

This may serve to explain a remarkable fact in the history of the parliament rolls. To all seeming the practice of enrolling such petitions as those which are entered on the roll that is now before us, was abandoned early in the course of the fourteenth century. Such rolls as we have of Edward II's day are very like this roll, that is to say, they are largely occupied by the petitions of private persons who are seeking redress or favours at the hands of the king or at the hands of the king and his council. On later rolls we may find petitions enough; we shall find many petitions presented by one or more of the estates, and also a few petitions which the estates have in effect made their own; but we shall not find, at least not in any number, petitions addressed by private persons to the king or the king and council. We have every reason

The practice
of enrolling
petitions

¹ *Memoranda de Parlamento*, Nos. 49, 170

to believe that such petitions were still presented, for large quantities of them still exist, and some of them have been printed, also that they were presented in parliament, for we find auditors still appointed to hear them; but they are not entered on the parliament roll. If the printed book be a safe guide, there is no parliament roll even of Edward III's day that in this most important respect resembles our roll.¹ The explanation of this we take to be that the enrolment of the petition and its response is all along somewhat of a luxury, for it is not the entry on the roll but the writing on the back of the original petition that serves as a warrant for all subsequent proceedings.²

Have we
lost many
rolls?

We may venture on one other speculation. May it not be that the many sad gaps which occur in the series of parliament rolls are due partly to the fact that at many parliaments, even of the later years of Edward I, no roll was made, and that if a roll was made, it was not treated as being of very high value.³ The suggestion has been offered that many early rolls

¹ If the printed book gives a different impression, this is because its editors have hardly distinguished with sufficient emphasis the matter that they took, at first or second hand, from parliament rolls, from the matter which they took, at first or second hand, from the original petitions. I do not think that they used, at first or second hand, as many as 1600 petitions, while, as already said, the two classes of "Ancient Petitions" and "Ancient Petitions—Exchequer" contain together about 1600 documents.

² See Hale, *Jurisdiction of the House of Lords*, p. 64: "Some [petitions] were delivered over by the receivers of petitions either to the *consilium regis* or the *auditores petitionum* and by them indorsed. And these petitions are not entered on the parliament roll, but were entered [that is, were preserved] in *bundellis petitionum parliamenti* with their answers." This seems to describe correctly the practice which obtained from Edward III's day onwards; but in earlier days the petitions disposed of by the auditors or by the council were not only endorsed but also enrolled, at least so it seems to me.

³ [The problem that Maitland raises here has been carefully discussed by Mr Richardson and Dr Sayles in their articles cited in our

were deliberately destroyed by kings who wished to be quit of uncomfortable precedents. But this hardly accords with the nature of those rolls which have come down to us. By far the greater part of them is filled by what we may call private petitions, and no great store may have been set by them because what they recorded was sufficiently recorded elsewhere. If any dispute arose about a petition, the original could be found upon the chancery file, and possibly the reason why our oldest parliament rolls come from the exchequer and not from the chancery is that they were intended to serve as a check on a chancellor who had got the original documents and was bound to execute the orders endorsed upon them. Then a statute would go on to the statute roll, an ordinance would go on to the patent or the close roll, while as to the *placita*, those heard by the king in parliament were sometimes put upon the 'coram rege' roll, the roll of the king's bench.¹ May it not be then that the first parliament roll was a somewhat superfluous document? At any rate it is a most remarkable fact that we have at this day got most of the membranes that were used by the maker of the *Vetus Codex* and very few membranes that he did not use. Miserably defective though our series may seem, it may be nearly as perfect as it was in the middle of the fourteenth century; it may perhaps be nearly as perfect as it ever was.

The petitions of which our roll speaks are neither petitions by parliament nor yet are they petitions addressed to parliament. We see at once that they are very different from those

bibliography Their results are brought together in their volume, *Rotuli Parliamentorum Anglie Hactenus Inediti*. MCCLXXIX-MCCCLXXIII, R.H.S., Camden Third Series, vol. II, 1935.]

¹ Hale, *Jurisdiction*, p. 53. "And it is observable that most of the great cases, which are recorded *inter placita parlamenti* E. i., which were in their nature cognizable by the king's bench, are likewise entered *inter placita coram rege*, as if transacted and judged in that court"

The petitions are not petitions to parliament but petitions to the king and council

petitions of the commons (*petitions de la commune, petitions des communes*) which will occupy the greater part of almost any parliament roll of Edward III's day. But again they are not addressed to "parliament", or to "the lords of parliament", or to either house of parliament. They are addressed either "to the king" or "to the king and his council". In a certain sense they are parliamentary petitions, they are presented in or at a parliament. But at present "parliament" or "a parliament" is not conceived as a body that can be petitioned. A parliament is rather an act than a body of persons. One cannot present a petition to a colloquy, to a debate. It is but slowly that this word is appropriated to colloquies of a particular kind, namely, those which the king has with the estates of his realm, and still more slowly that it is transferred from the colloquy to the body of men whom the king has summoned. As yet any meeting of the king's council that has been solemnly summoned for general business seems to be a parliament.¹ These petitions are not addressed to parliament, nor are they addressed to the assembled estates, nor are they addressed to the earls, barons, and prelates. They are addressed either simply to the king or to the king and his council. The formal title for them which is in

¹ Stubbs, *Const. Hist.* § 230: "The name of parliament, the king's parliament, belonged to the sessions of each of the three bodies thus distinguished, the terminal session of the select council, the session of the great council, the session of the commune consilium of the three estates." Langlois, *Revue Historique*, vol. XLII, p. 90. "Parlement ce mot vague, synonyme barbare, à l'origine, d'assemblée et de *colloquium*, s'est précisé vers la même époque en Angleterre et en France." The personification of "parliament", which enables us to say that laws are made by, and not merely in, parliament, is a slow and subtle process. The same process is now at work upon other words; we begin to personify the Church Congress and so forth; even our "meetings" pass resolutions. As to the word "council", it is important to remember that in the middle ages no distinction was or could be drawn between "council" and "counsel"; both were *consilium*.

use in the chancery is "petitiones de consilio", "council petitions".

When we examine the character of these petitions we soon see that for the more part they were not fit subjects for discussion in a large assembly. They do not ask for anything that could be called legislation; the responses that are given to them are in no sort "private acts of parliament". Generally the boon that is asked for is one which the king without transcending his legal powers might either grant or deny. Sometimes we may say that, if the facts are truly stated by the petitioner, the king is more or less strictly bound by the rules of common honesty to give him some relief:—The king owes him wages, or his lands have been wrongfully seized by the king's officers. At other times what is asked for is pure grace and favour:—The petitioner owes the king money and asks that he may be allowed to pay it by instalments, or that in consideration of his poverty part of his debt may be forgiven, or perhaps the University of Cambridge asks that the king will found a college. As yet no hard line is drawn between the true petition of right which shall be answered by a *Fiat justitia* and all other petitions. "Right" and "grace" shade off into each other by insensible degrees, and there is a wide field for governmental discretion. Probably there would be an outcry if the religious houses could not pretty easily obtain licenses for the acquisition of a reasonable quantity of land; if the nobleman who is going abroad were not suffered to appoint a general attorney; if the burghers of this or that town could not without much difficulty get leave to tax themselves and their neighbours by way of murage, pontage, or pavage; still, in any particular case the request may be refused and no reason given for the refusal.

Nature of
the petitions

Nature of
the orders
made upon
petitions

Further, we see that the response to the petition seldom gave to the suppliant all that he wanted. He had only, we may say, "made a *prima facie* case" for relief, and he obtained only a preliminary order. He did not get what he wanted, he was merely put in the way of getting it. Hale has stated this matter very well: "But although the council received the petitions from the hands of the receivers, yet they rarely (if at all) exercised any decision or decisive jurisdiction upon them, but only a kind of deliberative power, or rather direction, transmitting them to the proper courts, places, or persons where they were proper to be decided. . . . Hence it is, that most of the answers that the council gave were in the nature of remissions of the petitions to those persons or courts that had properly the cognizance of the causes."¹ That is so; but it does not imply that, had there been no petitions, those persons or courts would have been competent to entertain those causes or to have given relief to the aggrieved. These petitions and responses are not nugatory. Nothing in the age that we are studying is more remarkable than the narrowly limited powers of the courts of law, of the exchequer, of the chancery, more especially in all such matters as concern the king. The courts of law can in general only entertain such causes as are laid before them by a writ issued from the chancery. For ordinary cases the chancery has a store of "writs of course", and no doubt they are issued as a mere matter of routine upon receipt of the proper fees; but if anything that is in the least unusual is required, the chancellor will do nothing without a warrant from the king or council, and this warrant will be carefully noted at the foot of the writ. Some day, when the excellent work of calendaring the patent and close rolls has been completed, we shall know how much and how little a chancellor dared

¹ *Jurisdiction*, pp. 67-68.

to do without an express warrant; apparently he dared do but little. This roll of ours contains a memorandum telling how on the 6th of April "in full parliament" (it was a full parliament though the assembly of the estates had been dissolved a fortnight ago) the king prohibited his chancellor, William Hamilton, from issuing letters of protection for men who were in Ireland.¹ At present the warrant upon which the chancellor proceeds may well be oral instructions given to him immediately by the king, or brought to him by a member of the council, by John of Banstead, Henry Percy, the Bishop of Durham, Aymer de Valence, the Earl of Lincoln, or it may be a writ under the privy seal, or again it may be an endorsed petition.² Hence the need for so many petitions. As to the exchequer, the man who wants any relief there which is not to be had as a mere matter of routine, must petition the king, and if his petition receives a favourable reply, even this will not send him directly to the exchequer; on the contrary it will send him first to the

¹ *Memoranda de Parlamento*, No. 459.

² I understand the note *per ipsum Regem* to mean at this time, 'My warrant is the king's word of mouth heard by me'; *per ipsum Regem nunciante J. de Benstede*, "I act upon an oral message brought to me from the king by John of Banstead"; *per breve de privato sigillo*, "For this I have a writ under the privy seal"; *per consilium*, "I heard the council authorize me to do this", *per petitionem de consilio* or *per petitionem retornatam de consilio*, "I rely upon the endorsement of a petition presented to the council" The "sign manual" does not belong to this age. "The kings of England previous to Richard the Second either could not or never did sign their names in attestation of their royal acts", Hardy, *Introduction to the Charter Rolls*, p. xxiv. [Edward III could write and specimens of his hand have recently been discovered, see *E.H.R.* vol. xxvi, pp. 331-332; cf. Tout, *Charters*, vol. iii, pp. 27-28, 261, n. 2, vol. v, p. 371, n. 5, and Galbraith, V. H., "The Literacy of the Medieval English Kings" in *Proceedings of the British Academy*, vol. xxi. The sign manual also begins in his time, *Ibid* vol. v, p. 61. A comprehensive study of the various warrants by which the chancery could be set in motion will be found in Maxwell-Lyte, H. C., *Historical Notes on the Use of the Great Seal of England*, H.M. Stationery Office, 1926.]

chancery for a writ directed to the treasurer and barons.¹ The king has a very tight and immediate control not only over all purely governmental affairs, but also over all "administrative justice". This control is exercised for him in his "parliaments" by his council or by committees of his council, the greater cases and those which have most of "grace" in them being reserved for his own hearing. The exchequer, the financial department, is controlled by the chancery, the secretarial department, and the chancery is controlled by king and council. Often enough the man who wishes for relief in the exchequer must go first to the council for an endorsement and then to the chancery for a writ. There is already a great deal of what an impatient reader may call circumlocution and red tape. The petition will perhaps in the first instance be endorsed with a *Coram Rege*; it will then be taken before the king and another endorsement will be made upon it; a note of it will then be made upon the parliament roll; then it will be delivered into the chancery; from the chancery a writ will be sent to the exchequer but not until it has been copied on the close roll; when it gets to the exchequer, copies of it will be made by the remembrancers upon their memoranda rolls; and after all this the treasurer and barons will only begin to consider whether justice requires that the suppliant should have any relief. All this formalism is worthy of study; it is the necessary groundwork for ministerial responsibility and government by discussion.

The petitioner's case The petitioner, we have said, had only "to make a *prima facie* case". Occasionally we find him sending in some evidence along with his petition, for example, a copy of

¹ See the learned and triumphant argument of Lord Somers in The Bankers' Case, *State Trials*, vol. XIV, p. 1.

a charter, or of an inquisition. This, however, is rare, and a petition hardly ever ends with a formal offer of proof such as that which every plaintiff makes in the courts of law. Still it seems plain that those who heard the petitions must have had before them more than the suppliant's bare and unsworn word about the facts of his case. True that they were seldom going to give him any final relief; usually they would do no more than set some inquiry going in the courts of law, the chancery or the exchequer. But then the institution of such inquiries cannot possibly have been a mere matter of course; had it been such, a clerk of the chancery might have been set to endorse the petitions with cut and dried formulas. The truth probably is that as regards the king's interests—and it is just because the king has some interest in the matter that most of these petitions are presented—the council is exceedingly well informed; potentially it is almost omniscient. In these parliaments the whole governmental force of England is brought into a focus. Not only are all the great officers there, but most of their principal subordinates are there or within call. A petitioner can hardly make a statement about the king's finances, the king's estates, or even the course of justice, that cannot at once be checked, if not by one of the auditors, then by some judge, clerk, remembrancer or escheator who is close at hand, or by a few recent rolls which are within easy reach. This, we take it, is what is meant by that "trying" of petitions of which we hear. The petitions reserved for the king himself are not to be placed before him until they have been sufficiently "tried", that is to say, he expects that when a petition is brought before him there will be some minister at hand to say whether there is any truth in the petitioner's allegations. We know that the work of hearing petitions was long and

laborious; it had threatened to deprive the king and his chief advisers of any leisure for the great affairs of state; and we may well believe that the four hundred and fifty endorsements recorded by our roll represent the work of many hours.

Appearance
of the
petitioners

When a petition was to be heard, did the petitioner appear either in person or by attorney prepared to supplement or support by oral argument the written statement of his grievance? Probably this was unusual, but still we seem to have evidence that the petitioner's presence might be required and that his petition might be "dismissed for want of prosecution". An entry on our roll tells us how one William of Whitewell presented a petition complaining of the misconduct of John Bacon, a clerk of the court, who was seemingly lying in gaol for his offences, and by way of response we have this: "William of Whitewell being solemnly called has not prosecuted this petition, therefore let the said John go quit thereof for the present".¹ Then the next entry is concerned with another charge against this same John Bacon. Ralph of Cokethorpe accuses him of making fraudulent erasures on the plea rolls and asks for relief. "Roger de Fresnes", we are told, "has presented this petition before the council on Ralph's behalf, but on being asked whether he is Ralph's attorney, he says that he is not; therefore he is told to cause the said Ralph to appear and prosecute the petition should Ralph wish to do so". "Afterwards", says our record, "it was testified by [the chief and another justice of the king's bench] that Ralph came before them and confessed that it was not by his authority that Roger prosecuted the said petition, nor had he any complaint to make. Therefore let the said John go quit thereof for the

¹ *Memoranda de Parlamento*, No. 266.

present.”¹ These two cases stand a little outside the general run of petitions, in that a very definite complaint is brought against a royal officer, but still it is evident that at least in some instances a petitioner was expected to be at Westminster by himself or his attorney, and that his petition might be rejected if he was not there to explain and support it.

Sometimes the petition comes from an individual, sometimes from a community. Of petitions presented by communities we have a considerable number. To say nothing of the religious houses and the two universities, we have petitions by the communities of boroughs and by the communities of counties. And here we may perhaps see one of the duties of the knight who appears on behalf of a shire and of the representative burgess: he brings in and, it may be, urges by oral argument the petitions of that community which has sent him to the parliament. Then, again, we seem to have petitions which must have been drawn up during the parliament. Some instances we have already mentioned. “The bishops, abbots, earls, barons, and others of the realm” ask the king’s aid in collecting their scutages. “The archbishops, bishops, prelates, earls, barons, and other good men of the land” ask that they may tallage such of the ancient demesnes of the crown as are in their hands. Such petitions seem to imply meetings at Westminster of those who were interested in them: they may imply regular sessions of the lords and the commons. By some resolution or another someone must have been authorized to write down these demands on strips of parchment. But so far as we can see these petitions are treated like the other petitions; on the parliament roll they are indiscriminately mixed up with the other petitions. We pass from a

Petitions
by com-
munities

¹ *Memoranda de Parlamento*, No. 267.

petition of the rector of Winchelsea, asking that the king will not take quite all the tithes of his church, to a petition presented by the magnates, and thence to a petition by the Abbot of Osney concerning certain financial operations in which he has taken part on the king's behalf. Then again wedged between a petition of Roland of Okestead and a petition of the citizens of Lincoln we find two petitions which seem to come from the assembled commons and to be the outcome of their deliberations. "The poor men of England" complain that juries are corrupted by the rich, and that ecclesiastical judges meddle with temporal suits.¹ In each case the king civilly refuses to do anything. If juries are corrupt, those who are injured can have a writ of attain; a writ of prohibition will confine the courts christian within their proper bounds. By no sharp line can the petitions of the assembled lords and commoners be marked off from the general mass of those petitions which are to be "expedited" in the parliament by the king and his council. At a somewhat later date the line will be drawn; the petitions of the assembled commons, the petitions of "the community of the land", will be enrolled along with the king's answers to them; petitions addressed to either of the two houses will be enrolled, if they have received the assent of both houses and of the king; but the ordinary petitions presented to the king and council by those who have grievances will not be enrolled, though as of old many of them will be answered in parliament by committees of auditors.

Action of
the com-
moners

As to what was done by the assembled commoners during the three weeks that they spent at Westminster, we shall

¹ *Memoranda de Parlamento*, No. 472. The "pauperes homines terræ Angliæ" seem to be the assembled commons. The original French petition may have run somewhat as follows. "A nostre seigneur le Rei prient les povres gentz de sa terre."

hardly get beyond guesswork. All that we learn from our roll is, first, that they joined in a petition with the magnates about the exportation of the wealth of the monasteries, to which petition the king gave his assent, though he did not at once convert it into a statute; and secondly, that they presented two petitions of their own, which were refused. The king, so far as we know, did not ask them for money, nor did he desire their consent to any new law. The doctrine that in these days the representatives of the shires and towns were called to parliament not in order that they might act in concert on behalf of the commons of England, but in order that each might represent before the king in council the grievances and the interests of the particular community, county or borough, that sent him thither,¹ may easily be pressed too far, but we shall probably think that there is no little truth in it, if we ask what the knights and burgesses were doing while the king and his councillors were slowly disposing of this great mass of petitions, many of which were presented by shires and boroughs. Official testimony the council can easily obtain; but it wants unofficial testimony also; it desires to know what men are saying in remote parts of England about the doings of sheriffs, escheators, and their like, and the possibilities of future taxation have to be considered. Then, again, there are many appointments to be made; for example, it is the fashion at this time to entrust a share in the work of delivering the county gaol to some knight of the county, very often to one of the knights who is representing or has represented that county at a parliament. Without denying that the germ of a "house" of commons already exists, without denying that its members hold

¹ [The doctrine referred to will be found in Riess, *Wahlrecht*, chap. I and more fully in *Historische Zeitschrift*, vol. LX, pp. 1-33.]

meetings, discuss their common affairs and common grievances, without denying that Edward has encouraged them to do this—at the present moment he has a quarrel with the clergy, at least with the archbishop, and no doubt is glad when the assembled commons protest that there are abuses in the church—without denying all this, we may still believe that the council often gives audience, advice, instructions to particular knights and burgesses. After all we have to fall back upon the words of the writ of summons: the commoners have been told to come in order that they may do what shall be ordained.

Judicial
business (5) We pass to judicial business, noticing that the line between this and the hearing of petitions is not very sharp. The *Placita* which came before this parliament were few but miscellaneous.

Segrave's
case In the first place we have the very famous case of Nicholas Segrave.¹ Segrave and Cromwell had been serving with the king in his Scottish campaign; Segrave had brought an accusation against Cromwell and a judicial combat had been waged between them in the king's court.² Then, however, Segrave, perhaps because he knew that the king would stop the duel, challenged his adversary to fight him in the court of the king of France; he withdrew himself from the English host and was endeavouring to make his way to France when he was captured. He confessed this grave offence—it was nothing less than treason. Edward then asked his council what was the punishment meet for such a crime. Their answer was—Death. The king, however, of his special grace was content that Segrave should find seven manucaptors

¹ *Memoranda de Parlamento*, No. 449

² ["Waged" is used here in the technical sense of giving an undertaking to prove your charge by your body or otherwise as the court may determine, at an appointed time.]

who would undertake that he would render himself to prison if ever the king should call upon him to do so.¹

As regards the tribunal before which Segrave stood we can say this much: The sheriff of Northampton was told to bring him before the king in the forthcoming parliament at Westminster, so soon as the king should arrive there: He made his appearance "in full parliament in the presence of the king, the archbishop of Canterbury, and divers earls, barons and others of the king's council": When sentence was to be pronounced the king asked the advice of "the earls, barons" (not, it will be observed, the prelates, for there was like to be a judgment of blood), "and others of his council": It is said by a chronicler that they discussed the matter for three days²: Segrave's manucaptors appeared "before the king and his council" on the 29th of March and executed their bond on the 31st in the presence of the treasurer, three other bishops, the two chief justices, and others. The assembly of the estates had been dissolved on the 21st. It is very possible, however, that the trial took place while all the magnates were still at Westminster; Segrave was a baron and had been summoned as such to the parliament.³

¹ The *Flores Historiarum*, vol. III, pp 121-122, add some picturesque details. The justices consult for three days, find Segrave worthy of death, but add that the king may have mercy upon him. Edward in effect replies, "Of course I may", adding, according to some MSS, "but I should not do it for you any more than I would for a dog" How little trust can be put in such tales is shown by the fact that the chronicler obliges Segrave to find thirty manucaptors, "his peers girt with swords" We know from several rolls that he only had to find seven.

² *Flores Historiarum*, vol III, p 122

³ Nicholas Kingston accused of complicity in Segrave's crime waged his law (*Memoranda de Parlamento*, No. 450). It is said that he made his law on Friday, the 2nd of March The 2nd of April was a Friday; the 2nd of March was a Tuesday and the third day of the parliament. As Segrave had been convicted before Kingston was accused, it seems probable that the 2nd of April is the true date.

The Salis-
bury case.

The citizens of Salisbury had refused to submit to a tallage set upon them by the bishop under the authority of a charter granted to one of his predecessors by Henry III. On the 5th of March a writ went to the sheriff of Wiltshire bidding him summon the mayor, citizens, and the whole community of the city to be "before us and our council" at Westminster on Mid Lent Sunday (the 28th of March). On that day four men appeared bearing full powers from the civic community; two of them were, if we may already use such a phrase, the sitting members for Salisbury, a third had represented the town at a former parliament.¹ They and the bishop plead, and then the matter having been discussed "before the king and his council", a judgment was pronounced. "The king wills and commands" that the citizens do pay the tallage on this occasion, while as to the future they must choose between submitting to tallage and abandoning their franchises. They take the latter course, and on the 6th of April "before the whole council" the mayor surrendered the mayoralty into the king's hand. It is clear that in this case the trial did not take place until the assembly of the estates had been dissolved.²

St Amand's
case

Next we read how on the 13th of March certain great folk, all of whom may themselves have been members of the council, undertook in the presence of the treasurer, the chief justice of the king's bench, "and others of the king's council", to produce Almaric of St Amand and William of Montacute before the king whenever they should be called upon to do so; and then how on the 19th Almaric undertook to produce John of St Amand.³ Almaric was the governor of Oxford castle, and in and about Oxford castle

¹ *Parl Writs*, vol 1, p lxxxv

² *Memoranda de Parlamento*, No. 451.

³ *Ibid.* Nos. 452-3.

there had been a serious riot, in which some clerks of the university had taken their full and accustomed share. The subsequent proceedings assumed the form of an information—and, be it noted, an information of felony—lodged by the king's serjeant in the court of king's bench, and one offender of humble rank went to the gallows. As we read the record which tells this picturesque tale, we shall notice that between the king's council and the king's bench there was still in Edward I's day a very close connexion.

A citizen of Bayonne, a hostage in the king's hand, had been committed to the care of the citizens of Winchester, but had escaped. For his escape the citizens were to answer by their mayor, bailiffs and six other representatives "before us and our council in our forthcoming parliament at Westminster" on the last day of February. At that day nine of the Winchester folk appeared "before the king and his council in the said parliament". Further proceedings took place on the 4th of March, and on a yet later day the citizens made fine with the king "before the king himself and his council".¹

The Winchester case

Such records as these—and many others of a like kind might be cited from other rolls—bring us within sight of an often debated and still debateable question. What in Edward I's day was the jurisdictional competence of the king's council, and in particular what was the relation in matters of judicature between the council and the nascent house of lords?²

Jurisdiction of the council

Perhaps some new light might fall upon this old question were we to view it from what might be called the archivist's

Evolution of the law courts

¹ *Memoranda de Parlamento*, No 456.

² [See *Select Cases before the King's Council*, 1243-1482, ed. J. F. Baldwin and I. S. Leadam, Selden Society, 1918.]

standpoint, were we to say for the moment that every one of the high courts in England must have a separate set of rolls. If we take up this not indefensible position, and leave out of sight the chancery and the exchequer and also the courts of the itinerant justices, we shall then hold that Henry III during the last half of his reign has two, and only two, high courts of law. The one of these is "the bench"; it has a separate set of records, "the *de banco* rolls". The other is professedly held before the king himself; it follows him in his movements; it has a separate set of records, "the *coram rege* rolls". For ordinary purposes this latter court consists of a few professional justices; later in the reign a chief justice is definitely appointed to hold the pleas *coram rege*; but at any moment this court can be afforded by the presence of the king, of his councillors, of numerous barons and prelates. Now and again its roll will bear as a title "Pleas before the King and his Council".¹ It is superior to "the bench", for it can correct the errors of "the bench".² Then early in Edward I's reign a further differentiation takes place. The court held *coram rege* when it assumes its everyday shape—that of a tribunal consisting of a few professional justices—becomes "the king's bench"; what has formerly been "the bench", though it always preserves this title, becomes, in common parlance, "the common bench"; at a later day it will be the court of common pleas. But there is a greater

¹ Hale, *Jurisdiction*, p. 51.

² I may perhaps be allowed to refer to what I have elsewhere written about this matter; Bracton's *Note Book*, vol. 1, p. 56; *Select Pleas of the Crown*, Selden Society, p. xii. Two points seem to be too easily forgotten (1) *The Bench* is the formal title, not of the King's Bench, but of the Court of Common Pleas (2) The two benches were not in all respects courts of co-ordinate jurisdiction; error lay from the Common Pleas to the King's Bench. See Blackstone's *Commentaries*, vol. III, pp. 410-411; Hale, *Jurisdiction*, p. 126.

change than this. A new set, unfortunately a meagre, disjointed set, of plea rolls (which, however, are not pure plea rolls, for they deal also with petitions and other matters) begins to appear. A court which is to stand above the king's bench is being evolved out of the old court held *coram rege*; its rolls are the "parliament rolls". But the process is slow. For a while this highest tribunal is hardly distinct from the king's bench. Every plea in the king's bench is in theory a plea *coram ipso domino rege*, and the rolls of the king's bench never cease to be the *coram rege* rolls. The superior tribunal is rather, if we may so speak, an afforced, an intensified form of the inferior tribunal than a separate court; a plea that is put upon the parliament roll may be put upon the king's bench roll also; the justices of the king's bench are members of the council, and a case heard at a full meeting, a parliament, of the council, is heard by, among others, the justices of the king's bench. A plea may be adjourned from a parliament to the king's bench or from the king's bench to a parliament without breach of continuity.

A new tribunal is evolved, or rather, two tribunals become three. We can see this development taking place in the pages of Bracton and Fleta. Bracton knows but two of those courts of which we are speaking: there are justices resident at the bench; there are yet more exalted justices attending the king's person.¹ Fleta knows three: there are justices resident at the bench; there are other justices who fill the king's own place, but above even them there is another tribunal, "for the king has his court in his council in his parliaments, in the presence of prelates, earls, barons, nobles, and other learned men, where judicial doubts are determined, and new remedies are established for new wrongs, and justice is done to every one

A court
above the
king's
bench

¹ Bracton, f. 108.

according to his deserts".¹ Bracton has to account for two sets of rolls; Fleta for three. Whether we ought to say that the highest of the three tribunals is the new one, whether we ought to describe the process as the deposit of a middle tribunal between the lowest and the highest, whether both of these phrases are not too definite and too modern to describe the real facts—these are grave problems which must be left to others. Our imaginary archivist would perhaps say that he could not decide them until he had made up his mind on the humbler question whether many parliament rolls have been lost. Our present point must be that before the end of Edward's reign there are three courts each with its roll.

Nature of
the highest
tribunal

What is the nature of the highest of these three? Is it council, is it house of lords? Fleta will warn us that we are asking an almost unanswerable question. "*Habet enim Rex curiam suam in consilio suo in parliamentis suis, presentibus prelatibus, comitibus, baronibus, proceribus et aliis viris peritis*", that is all that we can safely say. The highest tribunal of the realm is the king in council; it is the king in his council in his parliaments, in the presence of prelates, barons, and other learned men. To deny that it is the king in council is impossible; to deny that it is the king in parliament, or rather that its sessions are parliaments, is impossible.

Events which were still in the future when the great Edward died, decided that the highest ordinary tribunal of the realm should be "the king in parliament", and that this

¹ Fleta, p. 66. "*Habet enim Rex curiam suam in consilio suo in parliamentis suis, presentibus prelatibus, comitibus, baronibus, proceribus, et aliis viris peritis ubi terminatæ sunt dubitationes judiciorum et novis injuriis emersis nova constituuntur remedia, et unicuique justitia, prout meruit retribuetur ibidem.*" In many handwritings *viris peritis* and *iurisperitis* would be indistinguishable.

term should mean the house of lords; they decided that this tribunal should become for the more part but a court of error, and during the rest of the Middle Ages and far into modern times should have exceedingly little to do;¹ they decided also that the king in council should dispense an extraordinary justice and this on a very large scale. If asked to mark the difference between ordinary and extraordinary justice, we can hardly do better at the present moment than place ourselves once more in the archivist's room, and say that the court of ordinary jurisdiction keeps a proper Latin plea roll and that the council keeps none. This is no insignificant detail. When the time has come for abolishing that court of star chamber which is one of the forms that the council has assumed, this will be charged against it as one of its many irregularities—it has no proper Latin plea roll.² In the eyes of the lawyers of the seventeenth century this want of a roll goes far to prove that the council board is an upstart tribunal. What has been its strength in time gone by when, having no stiff Latin record to draw up, it could modify its procedure to suit every new want, has become its weakness in the age of Coke and Prynne, an age which demands a parchment title for every unpopular institution.

Long ago the parliament roll has passed from the custody of the council. Long ago it has become the record of those meetings of the estates of the realm which have acquired an exclusive right to the name of parliaments, and more particularly it has become the record of the house of lords. Long ago the rule has been that those members of the council

Difficulty
of the
problem

¹ Hale, *Jurisdiction*, chap. xxx; see also Hargrave's Introduction, p. vi.

² Stat. 16 Car. I, c. 10. "And by another statute . . . it is enacted . . . that all pleas . . . shall be entered and enrolled in Latin."

who are not peers of the realm, but yet are summoned to parliament, are to sit in the house of lords as "mere assistants", are not to vote, are not to speak unless their opinions are demanded. This being so, we are apt to approach the parliament rolls of Edward I's reign with a certain prejudice in our minds. They ought, so we think, to be the records of the estates of the realm; in so far as they are judicial records, they ought to be the records of the house of lords. It is hard to think away out of our heads a history which has long lain in a remote past but which once lay in the future; it is hard to be ever remembering that such ancient terms as *house of lords* and *peers of the realm* were once new terms; it is hard to look at the thirteenth century save by looking at it through the distorting medium of the fourteenth. And so we are apt to approach our earliest parliament rolls with a belief that they ought to be rolls of the house of lords and not rolls of the king's council, that the supreme tribunal of England ought to be the house of lords and not the king's council, that, whatever upon our record makes against this belief should be explained away as irregular or anomalous.

The rolls
of Edward I
should not
be judged
by theories
of a later
date

Even if he had settled opinions about debateable questions of constitutional history, it would be wrong for the editor of such a book as this is to thrust them forward. The most that he can legitimately do is to provide materials for the formation of opinions. In so doing, however, it may perhaps be lawful and desirable that he should remind his readers of some facts that are like to be forgotten. And in the present case he may be allowed to say once more that we have very few parliament rolls of Edward I's reign, to remark that his son's reign was filled with momentous events, and to plead that those events may not be suffered to cast their shadow over the past. We must judge the rolls of Edward I's reign

on their own merits, without reference to the parliament rolls of his grandson's, or of any later, reign. As regards the matter that is now before us, the jurisdictional competence of the parliaments, there seem to be some special reasons why this warning should not be neglected.

We are dealing with something that is new. However ancient may be the roots whence the jurisdiction of "the king in his council in his parliaments" draws its nourishment, it is a new thing that men should see three different tribunals rising one above the other; it is a new thing that they should see a yet higher court above that court which is held in theory *coram ipso domino rege*. The competence of this highest court is as yet indefinite. Fleta uses vague words about it. He has a fairly clear view of the competence of the king's bench; it hears criminal causes; it corrects the errors and false judgments of all justices, except when such matters are brought before the king himself and his council or before auditors specially assigned for the purpose. But of the justice that is done by the king "in his council in his parliaments", we must speak loosely:—Judicial doubts are there decided, new remedies are provided for new wrongs, and justice is done to every one according to his merits. We can see, however, that this tribunal is not solely a court of error; it has a far wider power than the house of lords will have in later days. This doctrine is fully borne out by the parliament rolls. The causes which come before the parliaments do not usually come there by writ of error. The jurisdiction that is exercised is more commonly than not a jurisdiction of first instance. If we ask why a case comes before a parliament rather than before the king's bench or the common bench, often we can give no certain answer. We may say perhaps—to take examples from our own roll—

A court
above the
king's bench
a novelty

that Nicholas Segrave is tried in a parliament because he is a baron charged with treason; but why should the citizens of Winchester be haled before a parliament for suffering a prisoner to escape, and why should not the Bishop of Salisbury urge his claim to tallage the men of Salisbury before one of the two benches, or even before the exchequer? Seemingly all that we dare say is that the causes heard in parliament are important causes, important because they concern the king, or because they concern very great men, or because they involve grave questions of public law, or because they are unprecedented. We must not miss the "equitableness" of this tribunal. When Fleta says that it provides new remedies for new wrongs, and that justice is done to every man according to his deserts, he means that this supreme court can look at "the merits of the case" with some disregard for technicalities. We are dealing with a court that has large, indefinite powers.

Under
Edward I
constitutional
problems
are in sus-
pense

And then we are dealing with Edward I, the wise and vigorous king. Under his hand institutions which to our eyes seem to have in them many flaws, flaws which may easily become yawning clefts, are doing their appointed work without much friction. We can hardly look back to his time through the fourteenth century without imagining that there must be some jealous dislike of the council, an aristocratic jealousy on the part of the nobles, a professional jealousy on the part of the judges and common lawyers. But do we really see this? If not, then our problem as to the constitution of the supreme tribunal becomes simpler. It may be further simplified if we try to make it a concrete problem. Indubitably this supreme tribunal is the council. The question whether it is also the house of lords may be divided into two. First, we ought to ask whether every

prelate and baron had a right to sit in the council though he had not been invited to do so. Secondly, we ought to ask whether those members of the council who were neither prelates nor barons were fully competent members of the tribunal.

To neither of these questions must we here give a dogmatic answer, but in connexion with the first it may be right that we should ask a yet further question, namely, whether we are not introducing an inappropriate idea and burdening ourselves with an unnecessary anachronism when we talk of any man having a right to sit in this or any other court of law? We must put duty in the first line, right in the second. We have learnt to do this when discussing the constitution of those county courts which send knights to the house of commons; must we not also do it when we are discussing the constitution of the house of lords and of the council? In 1305 the baron, who had come from Yorkshire or Devonshire, had been compelled to spend three weeks in London at his own cost, for he was paid no wages. Did he very much want to spend another three weeks there hearing dreary petitions concerning the woes of Scots and Gascons? At a later time a desire for political power and for social pre-eminence will make the English baron eager to insist on his right to a writ of summons, eager to take a part, however subordinate, in all that is done by the house of lords. But in Edward I's day the baronage is hardly as yet a well-defined body, and it may be that there are many men who, unable to foresee that their "blood" is being "ennobled" for ever and ever, are not pleased when they receive a writ which tells them that, leaving their homes and affairs, they must journey and labour in the king's service, and all this at their own cost. Thus for many years

Constitution
of the
supreme
court

one great constitutional question can remain in suspense. It is not raised, no one wishes to raise it. So long as the king does not impose taxes or issue statutes without the consent of the baronage, the baron hopes that the king will mind his own business (and it is his business to govern the realm) and allow other folk to mind theirs.

Participation
of councillors
who are
not barons Of the second of our two questions but one word can here be said. If we fix our gaze on the council which remains in constant session and "in full parliament" at Westminster for several weeks after the generality of prelates and barons have departed, we shall have some difficulty in believing that those councillors who are neither prelates nor barons are taking but a subordinate part in the work that is done, for example, that when the council is sitting as a judicial tribunal, the opinions of the two chief justices, Brabazon and Hengham, are of less importance than the opinions of two barons who are no lawyers. Once more let us remember that until very lately the jurisdiction of the king's council has been regarded as being substantially the same thing as the jurisdiction of that court over which Brabazon presides.¹

Conclusion Perhaps more than enough has already been said about these controverted matters; but it seemed necessary to remind readers, who are conversant with the "parliaments" of later days, that about the parliaments of Edward I's time there is still much to be discovered, and that should they come to the opinion that a session of the king's council is the core and essence of every *parliamentum*, that the documents usually called "parliamentary petitions" are petitions

¹ Hale, *Jurisdiction*, pp. 59, 156, holds that the judges were in Edward I's day the most important members of the tribunal which heard pleas in parliament.

to the king and his council, that the auditors of petitions are committees of the council, that the rolls of parliament are the records of the business done by the council—sometimes with, but much more often without, the concurrence of the estates of the realm—that the highest tribunal in England is not a general assembly of barons and prelates, but the king's council, they will not be departing very far from the path marked out by books that are already classical.¹

Those who have done most for the constitutional history of the Middle Ages would probably be the first to admit that much more remains to be done. And much more can and will be done in due course. Only a very small portion of the records that bear on the history of the council of the thirteenth and fourteenth centuries has yet been published. It is true that the parliament rolls are in print, but we have no such rolls for Henry III's reign, very few from the days of the first two Edwards, and even when we have a parliament roll it does not tell us by any means all that we ought to

¹ The one point about which I venture to differ from what seems to be the general opinion of modern historians (and I am uncertain as to whether this difference is real) is that I cannot find in the official language of Edward I's time any warrant for holding that the king has more than one *concilium*, or rather *consilium*, any warrant, that is, for holding that this term is applied to two or three different bodies of persons, which are conceived as permanently existing bodies, or any warrant for holding that the term should be qualified by some adjective, such as *commune*, or *magnum*, or *ordinarium*. We might like to ask the question whether every prelate and every baron is a member of the *magnum consilium*, whether every representative of a shire or a borough is a member of the *commune consilium regni*. The Latin language knows no article definite or indefinite; the language of the time knows no difference between counsel and council. One thing is clear: an order sending to their homes the prelates, earls, barons, knights, burgesses, and other commoners, "sauve les Evesques, Contes et Barouns, Justices et autres, qui sount du Conseil nostre seigneur le Roy" is an intelligible order. [On the point discussed in this note see the references given above, p. 27, n. 1.]

know if we are to know the council. On the other hand there is an inexhaustible supply of rolls of other kinds. The contents of this book, for example, represent but a little part of the writing that was done at Westminster in consequence of one particular session of the council, that which was held in the spring of the year 1305. It would have been easy to have filled another volume with documents occasioned by that session, writs of all sorts and kinds issued *per consilium* or *per petitionem de consilio*, including the very numerous letters that were sent to Gascony, inquisitions of all sorts and kinds that were made under the authority of those writs, proceedings before the king's bench and proceedings in the exchequer which took place because the council had ordered them. I am persuaded that if the charter, patent and close rolls, the privy seals, the memoranda of the exchequer, and the *coram rege* rolls were used skilfully and in combination, our historians would be able to give us an account of many a session or parliament of the council of which we have not yet heard, to tell us who were present and what business was transacted. The task that has to be performed is indeed a gigantic task, that of calendaring mile after mile of closely written parchment, and fitting thousands of undated documents into their proper places; but it can be accomplished by prolonged, sustained, and well-directed efforts, and it ought to be accomplished. He would be a bold man who said that there is any question about the government of England by Edward I which cannot be answered.

I

THE CORPORATION SOLE¹

PERSONS are either natural or artificial. The only natural persons are men. The only artificial persons are corporations. Corporations are either aggregate or sole.

This, I take it, would be an orthodox beginning for a chapter on the English Law of Persons, and such it would have been at any time since the days of Sir Edward Coke.² It makes use, however, of one very odd term which seems to approach self-contradiction, namely, the term "corporation sole", and the question may be raised, and indeed has been raised, whether our corporation sole is a person, and whether we do well in endeavouring to co-ordinate it with the corporation aggregate and the individual man. A courageous paragraph in Sir William Markby's *Elements of Law*³ begins with the words, "There is a curious thing which we meet with in English law called a corporation sole", and Sir William then maintains that we have no better reason for giving this name to a rector or to the king than we have for giving it to an executor. Some little debating of this question will do no harm, and may perhaps do some good, for it is in some sort prejudicial to other and more important questions.

A better statement of what we may regard as the theory of corporations that is prevalent in England could hardly

¹ 16 *Law Quarterly Review* (1900), pp. 335-354.

² Co. Lit. 2a, 250a.

Markby, *Elements of Law*, § 145.

be found than that which occurs in Sir Frederick Pollock's book on *Contract*.¹ He speaks of "the Roman invention, adopted and largely developed in modern systems of law, of constituting the official character of the holders for the time being of the same office, or the common interest of the persons who for the time being are adventurers in the same undertaking, into an artificial person or ideal subject of legal capacities and duties". There follows a comparison which is luminous, even though some would say that it suggests doubts touching the soundness of the theory that is being expounded. "If it is allowable to illustrate one fiction by another, we may say that the artificial person is a fictitious substance conceived as supporting legal attributes."

It will not be news to readers of this journal that there are nowadays many who think that the personality of the corporation aggregate is in no sense and no sort artificial or fictitious, but is every whit as real and natural as is the personality of a man. This opinion, if it was at one time distinctive of a certain school of Germanists, has now been adopted by some learned Romanists, and also has found champions in France and Italy. Hereafter I may be allowed to say a little about it.² Its advocates, if they troubled themselves with our affairs, would claim many rules of English law as evidence that favours their doctrine and as protests against what they call "the Fiction Theory". They would also tell us that a good deal of harm was done when, at the

¹ Pollock, *Contract*, ed 6, p 107 [Ed 10 (1936), p 110, the passage runs "the Roman invention, adopted and largely developed in modern systems of law, of treating the collective persons who from time to time hold such a position—or, in some cases and according to some opinions, the property or office itself—as a single and continuous artificial person or ideal subject of legal capacities and duties" See, too, the learned author's *Essays in the Law* (1922), pp. 151-179.]

² Dr Otto Gierke, of Berlin, has been its principal upholder.

end of the Middle Ages, our common lawyers took over that theory from the canonists and tried, though often in a half-hearted way, to impose it upon the traditional English materials.

In England we are within a measurable distance of the statement that the only persons known to our law are men and certain organized groups of men which are known as corporations aggregate. Could we make that statement, then we might discuss the question whether the organized group of men has not a will of its own—a real, not a fictitious, will of its own—which is really distinct from the several wills of its members. As it is, however, the corporation sole stops, or seems to stop, the way. It prejudices us in favour of the Fiction Theory. We suppose that we personify offices.

Blackstone, having told us that “the honour of inventing” corporations “entirely belongs to the Romans”, complacently adds that “our laws have considerably refined and improved upon the invention, according to the usual genius of the English nation: particularly with regard to sole corporations, consisting of one person only, of which the Roman lawyers had no notion”.¹ If this be so, we might like to pay honour where honour is due, and to name the name of the man who was the first and true inventor of the corporation sole.

Sir Richard Broke died in 1558, and left behind him a *Grand Abridgement*, which was published in 1568.² Now I dare not say that he was the father of “the corporation sole”; indeed I do not know that he ever used precisely that

¹ 1 Comm. 469 [Cf. C. T. Carr, *Corporations* (1905), p. 16 and note 1]

² [Later research makes 1573–1574 a more probable date for the first edition: J. D. Cowley, *Bibliography of Abridgements* (1932), Introd. pp. xlix–l.]

phrase; but more than once he called a parson a "corporation", and, after some little search, I am inclined to believe that this was an unusual statement. Let us look at what he says:

Corporations et Capacities, pl. 41: Vide Trespas in fine ann. 7 E. 4 fo. 12 per Danby: one can give land to a parson and to his successors, and so this is a corporation by the common law, and elsewhere it is agreed that this is mortmain.

Corporations et Capacities, pl. 68: Vide titul' *Encumbent* 14, that a parson of a church is a corporation in succession to prescribe, to take land in fee, and the like, 39 H. 6, 14 and 7 E. 4, 12.

Encumbent et Glebe, pl. 14 [Marginal note: *Corporacion en le person*]: a parson can prescribe in himself and his predecessor, 39 H. 6, fo. 14; and per Danby a man may give land to a parson and his successors, 7 E. 4, fo. 12; and the same per Littleton in his chapter of Frankalmoin.

The books that Broke vouches will warrant his law, but they will not warrant his language. In the case of Henry VI's reign¹ an action for an annuity is maintained against a parson on the ground that he and all his predecessors have paid it; but no word is said of his being a corporation. In the case of Edward IV's reign we may find Danby's dictum.² He says that land may be given to a parson and his successors, and that when the parson dies the donor shall not enter; but there is no talk of the parson's corporateness. So again we may learn from Littleton's chapter on frankalmoin³ that land may be given to a parson and his successors; but again there is no talk of the parson's corporateness.

There is, it is true, another passage in what at first sight looks like Littleton's text which seems to imply that a parson is a body politic, and Coke took occasion of this passage

¹ 39 Hen. VI, f. 13 (Mich. pl. 17).

² Edw. IV, f. 12 (Trin. pl. 2).

³ Lit. sec. 134.

to explain that every corporation is either "sole or aggregate of many", and by so doing drew for future times one of the main outlines of our Law of Persons.¹ However, Butler has duly noted the fact that just the words that are important to us at the present moment are not in the earliest editions of the Tenures, and I believe that we should be very rash if we ascribed them to Littleton.²

Still the most that I should claim for Broke would be that by applying the term "corporation" to a parson, he suggested that a very large number of corporations sole existed in England, and so prepared the way for Coke's dogmatic classification of persons. Apparently for some little time past lawyers had occasionally spoken of the chantry priest as a corporation. So early as 1448 a writ is brought in the name of "John Chaplain of the Chantry of B. Mary of Dale"; objection is taken to the omission of his surname; and to this it is replied that the name in which he sues may be that by which he is corporate.³ Then it would appear that in 1482 Bryan C.J. and Choke J. supposed the existence of a corporation in a case in which an endowment was created for a single chantry priest. Fitzherbert, seemingly on the authority of an unprinted Year Book, represents them as saying that "if the king grants me licence to make a chantry

¹ Lit. sec. 413; Co. Lit. 250a. Other classical passages are Co. Lit. 2a; *Sutton's Hospital Case* (1612), 10 Rep. 29b.

² Littleton is telling us that no dying seised tolls an entry if the lands pass by "succession". He is supposed to add: "Come de prelates, abbates, priours, deans, ou parson desglyse [ou dauter corps politike]." But the words that are here bracketed are not in the Cambridge MS, nor in the edition by Lettou and Machlinia; nor in the Rouen edition; nor in Pynson's. On the other hand they stand in one, at least, of Redman's editions. [They are regarded as spurious in Wambaugh's edition of 1903.]

³ 27 Hen. VI, f. 3 (Mich. pl. 24). "poet estre entende que il est corporate par tiel nosme."

for a priest to sing in a certain place, and to give to him and his successors lands to the value of a certain sum, and I do this, that is a good corporation without further words".¹ Five years later some serjeants, if I understand them rightly, were condemning as void just such licences as those which Bryan and Choke had discussed, and thereby were proposing to provide the lately crowned Henry VII with a rich crop of forfeitures. Keble opines that such a licence does not create a corporation (apparently because the king cannot delegate his corporation-making power), and further opines that the permission to give land to a corporation that does not already exist must be invalid.² Whether more came of this threat—for such it seems to be—I do not know.³ Bullying the chantries was not a new practice in the days of Henry VII's son and grandson. In 1454 Romain's Chantry, which had been confirmed by Edward III and Richard II, stood in need of a private Act of Parliament because a new generation of lawyers was not content with documents which had satisfied their less ingenious predecessors.⁴

Now cases relating to endowed chantry priests were just the cases which might suggest an extension of the idea of corporateness beyond the sphere in which organized groups of men are active. Though in truth it was the law of mortmain, and not any law touching the creation of

¹ Fitz Abr Graunt, pl 30, citing T. 22 Edw IV and M. 21 Edw. IV, 56. The earlier part of the case stands in Y.B. 21 Edw. IV, f 55 (Mich. pl. 28) The case concerned the municipal corporation of Norwich, and the dictum must have been gratuitous.

² 2 Hen VII, f 13 (Hil pl 16).

³ 20 Hen. VII, f 7 (Mich. pl. 17): Rede J seems to say that such a licence would make a corporation.

⁴ Rot. Parl. v 258. It had been supposed for a hundred and twenty years that there had been a chantry sufficiently founded in law and to have stood stable in perpetuity "which for certain diminution of the form of making used in the law at these days is not held sufficient".

fictitious personality, which originally sent the founders of chantries to seek the king's licence, still the king was by this time using somewhat the same language about the single chantry priest that he had slowly learned to use about bodies of burgesses and others. The king, so the phrase went, was enabling the priest to hold land to himself and his successors. An investigation of licences for the formation of chantries might lead to some good results. At present, however, I cannot easily believe that, even when the doom of the chantries was not far distant, English lawyers were agreed that the king could make, and sometimes did make, a corporation out of a single man or out of that man's official character. So late as the year 1522, the year after Richard Broke took his degree at Oxford, Fineux, C.J. B.R., was, if I catch the sense of his words, declaring that a corporation sole would be an absurdity, a nonentity. "It is argued", he said, "that the Master and his Brethren cannot make a gift to the Master, since he is the head of the corporation. Therefore let us see what a corporation is and what kinds of corporations there are. A corporation is an aggregation of head and body: not a head by itself, nor a body by itself; and it must be consonant to reason, for otherwise it is worth nought. For albeit the king desires to make a corporation of J.S., that is not good, for common reason tells us that it is not a permanent thing and cannot have successors."¹ The Chief Justice goes on to speak of the Parliament of King,

¹ 14 Hen. VIII, f. 3 (Mich. pl. 2). "Car coment que le roy voile faire corporacion a J S. ceo n'est bon, pur ceo que comen reason dit que n'est chose permanent et ne poit aver successor" Considering the context, I do not think that I translate this unfairly, though the words "faire corporacion a J.S." may not be exactly rendered or renderable. The king, we may say, cannot make a corporation which shall have J.S. for its basis. ["Grant to J.S. to be a corporation" seems the most plausible version.—ED. *Law Quarterly Review* (1900)]

Lords, and Commons as a corporation by the common law. He seems to find the essence of corporateness in the permanent existence of the organized group, the "body" of "members", which remains the same body though its particles change, and he denies that this phenomenon can exist where only one man is concerned. This is no permanence. The man dies and, if there is office or benefice in the case, he will have no successor until time has elapsed and a successor has been appointed. That is what had made the parson's case a difficult case for English lawyers. Fineux was against feigning corporateness where none really existed. At any rate, a good deal of his judgment seems incompatible with the supposition that "corporation sole" was in 1522 a term in current use.

That term would never have made its fortune had it not been applied to a class much wider and much less exposed to destructive criticism than was the class of permanently endowed chantry priests. That in all the Year Books a parochial rector is never called a corporation I certainly dare not say. Still, as a note at the end of this paper may serve to show, I have unsuccessfully sought the word in a large number of places where it seemed likely to be found if ever it was to be found at all. Such places are by no means rare. Not unfrequently the courts were compelled to consider what a parson could do and could not do, what leases he could grant, what charges he could create, what sort of estate he had in his glebe. Even in Coke's time what we may call the theoretical construction of the parson's relation to the glebe had hardly ceased to be matter of debate. "In whom the fee simple of the glebe is", said the great dogmatist, "is a question in our books."¹ Over the glebe, over the parson's

¹ Co. Lit. 340b, 341 a.

freehold, the parson's fee, the parson's power of burdening his church or his successors with pensions or annuities, there had been a great deal of controversy; but I cannot find that into this controversy the term "corporation" was introduced before the days of Richard Broke.

If now we turn from the phrase to the legal phenomena which it is supposed to describe, we must look for them in the ecclesiastical sphere. Coke knew two corporations sole that were not ecclesiastical, and I cannot find that he knew more. They were a strange pair: the king¹ and the chamberlain of the city of London.² As to the civic officer, a case from 1468 shows us a chamberlain suing on a bond given to a previous chamberlain "and his successors". The lawyers who take part in the argument say nothing of any corporation sole, and seem to think that obligations could be created in favour of the Treasurer of England and his successors or the Chief Justice and his successors.³ As to the king, I strongly suspect that Coke himself was living when men first called the king a corporation sole, though many had called him the head of a corporation. But of this at another time. The centre of sole corporateness, if we may so speak, obviously lies among ecclesiastical institutions. If there are any, there are thousands of corporations sole within the province of church property law.

But further, we must concentrate our attention upon the parish parson. We may find the Elizabethan and Jacobean lawyers applying the new term to bishops, deans, and prebendaries; also retrospectively to abbots and priors. Their cases, however, differed in what had been a most important

¹ *Sutton's Hospital Case* (1612), 10 Rep. 29b.

² *Fulwood's Case* (1591), 4 Rep. 65a.

³ 8 Edw. IV, f. 18 (Mich. pl. 29).

respect from the case of the parochial rector. They were members, in most instances they were heads, of corporations aggregate. As is well known, a disintegrating process had long been at work within the ecclesiastical groups, more especially within the cathedral groups.¹ Already when the Year Books began their tale this process had gone far. The bishop has lands that are severed from the lands of the cathedral chapter or cathedral monastery; the dean has lands, the prebendary has lands or other sources of revenue. These partitions have ceased to be merely matters of internal economy; they have an external validity which the temporal courts recognize.² Still, throughout the Middle Ages it is never forgotten that the bishop who as bishop holds lands severed from the lands of the chapter or the convent holds those lands as head of a corporation of which canons or monks are members. This is of great theoretical importance, for it obviates a difficulty which our lawyers have to meet when they consider the situation of the parochial rector. In the case of the bishop a permanent "body" exists in which the ownership, the full fee simple, of lands can be reposed. "For", as Littleton says, "a bishop may have a writ of right of the tenements of the right of his church, for that the right is in his chapter, and the fee simple abideth in him and his chapter."³ The application of the term "corporation sole" to bishops, deans, and prebendaries marked the end of the long disintegrating process, and did some harm to our

¹ Lib. Ass. f. 117, ann. 25, pl. 8. "All the cathedral churches and their possessions were at one time a gross"

² For instance, *Chapter v Dean of Lincoln*, 9 Edw. III, f. 18 (Trin. pl. 3) and f. 33 (Mich. pl. 33)

³ Lit. sec. 645. 6 Edw. III, f. 10, 11 (Hil. pl. 28), it is said in argument, "The right of the church [of York] abides rather in the dean and chapter than in the archbishop, car ceo ne mourt pas" This case is continued in 6 Edw. III, f. 50 (Mich. pl. 50).

legal theories. If the episcopal lands belong to the bishop as a "corporation sole", why, we may ask, does he require the consent of the chapter if he is to alienate them? The "enabling statute" of Henry VIII and the "disabling statutes" of Elizabeth deprived this question of most of its practical importance. Thenceforward in the way of grants or leases the bishop could do little with, that he could not do without, the chapter's consent.¹ It is also to be remembered that an abbot's powers were exceedingly large; he ruled over a body of men who were dead in the law, and the property of his "house" or "church" was very much like his own property. Even if without the chapter's consent he alienated land, he was regarded, at least by the temporal courts, much rather as one who was attempting to wrong his successors than as one who was wronging that body of "incapables" of which he was the head. It is to be remembered also that in England many of the cathedrals were monastic. This gave our medieval lawyers some thoughts about the heads of corporations aggregate and about the powerlessness of headless bodies which seem strange to us. A man might easily slip from the statement that the abbey is a corporation into the statement that the abbot is a corporation, and I am far from saying that the latter phrase was never used so long as England had abbots in it;² but, so far as I can see, the "corporation sole" makes its entry into the cathedral along with the royal supremacy and other novelties. Our interest lies in the parish church.³

¹ See Coke's exposition, Co. Lit. 44a, ff, and Blackstone's 2 Com. 319.

² Apparently in 1487 (3 Hen. VII, f. 11, Mich. pl. 2), Vavasor J. said "chescun abbe est corps politike, car il ne poet rien prendre forsque al use del meason." [But all the other Justices were against him.]

³ Is the idea of the incapacity of a headless corporation capable of doing harm at the present day? Grant, *Corporations*, 110, note (s), says

Of the parish church there is a long story to be told. Dr Stutz is telling it in a most interesting manner.¹ Our own Selden, however, was on the true track; he knew that the patron had once been more than a patron,² and we need go no further than Blackstone's Commentaries to learn that Alexander III did something memorable in this matter.³ To be brief: in the twelfth century we may regard the patron as one who has been the owner of church and glebe and tithe, but an owner from whom ecclesiastical law has gradually been sucking his ownership. It has been insisting with varying success that he is not to make such profit out of his church as his heathen ancestor would have made out of a god-house. He must demise the church and an appurtenant manse to an ordained clerk approved by the bishop. The ecclesiastical "benefice" is the old Frankish *beneficium*, the old land-loan of which we read in all histories of feudalism.⁴

that "if the master of a college devise lands to the college, they cannot take, because at the moment of his death they are an incomplete body". His latest authority is Dalson, p. 31. In 1863 Dr Whewell or his legal adviser was careful about this matter. A devise was made "unto the Master, Fellows, and Scholars of Trinity College aforesaid and their successors for ever, or, in case that devise would fail of effect in consequence of there being no Master of the said College at my death, then to the persons who shall be the Senior Fellows of the said College at my decease and their heirs until the appointment of a Master of such College, and from and after such appointment (being within twenty-one years after my death) to the Master, Fellows, and Scholars of the said College and their successors for ever". Thus international law was endowed while homage was paid to the law of England. But perhaps I do wrong in attracting attention to a rule that should be, if it is not, obsolete

¹ Ulrich Stutz, *Geschichte des kirchlichen Benefizialwesens* (Berlin, 1895). Only the first part has yet appeared, but Dr Stutz sketched his programme in *Die Eigenkirche* (Berlin, 1895) [For a bibliography of Kirchengeschichte see Dahlmann-Waitz, *Quellenkunde der Deutschen Geschichte*, ed. 9 (1931-1932, Leipzig), 181-205, and for a list of Stutz's Works, *Ibid* Register, 1251.]

² *History of Tithes*, c. 12

³ 2 Bl Com 23.

⁴ Stutz, "Lehen und Pfrunde," *Zeitschrift der Savigny-Stiftung*, Germ. Abt. xx, 213.

In the eleventh century occurred the world-shaking quarrel about investitures. Emperors and princes had been endeavouring to treat even ancient cathedrals as their "owned churches". It was over the investiture of bishops that the main struggle took place; nevertheless, the principle which the Hildebrandine papacy asserted was the broad principle, "No investiture by the lay-hand". Slowly in the twelfth century, when the more famous dispute had been settled, the new rule was made good by constant pressure against the patrons or owners of the ordinary churches. Then a great lawyer, Alexander III (1159-81), succeeded, so we are told, in finding a new "juristic basis" for that right of selecting a clerk which could not be taken away from the patron. That right was to be conceived no longer as an offshoot of ownership, but as an outcome of the Church's gratitude towards a pious founder. Thus was laid the groundwork of the classical law of the Catholic Church about the *ius patronatus*; and, as Dr Stutz says, the Church was left free to show itself less and less grateful as time went on.

One part of Pope Alexander's scheme took no effect in England. Investiture by the lay hand could be suppressed. The parson was to be instituted and inducted by his ecclesiastical superiors. Thus his rights in church and glebe and tithe would no longer appear as rights derived out of the patron's ownership, and the patron's rights, if they were to be conceived—and in England they certainly would be conceived—as rights of a proprietary kind, would be rights in an incorporeal thing, an "objectified" advowson. But with successful tenacity Henry II and his successors asserted on behalf of the temporal forum no merely concurrent, but an absolutely exclusive jurisdiction over all disputes, whether possessory or petitory, that touched the advowson. One

consequence of this most important assertion was that the English law about this matter strayed away from the jurisprudence of the Catholic Church. If we compare what we have learned as to the old English law of advowsons with the *ius commune* of the Catholic Church as it is stated by Dr Hinschius we shall see remarkable differences, and in all cases it is the law of England that is the more favourable to patronage.¹ Also in England we read of survivals which tell us that the old notion of the patron's ownership of the church died hard.²

But here we are speaking of persons. If the patron is not, who then is the owner of the church and glebe? The canonist will "subjectify" the church. The church (subject) owns the church (object). Thus he obtains temporary relief.³ There

¹ *Kirchenrecht*, vol III, pp 1 ff In particular, English law regards patronage as normal. When the ordinary freely chooses the clerk, this is regarded as an exercise of patronage, and so we come by the idea of a "collative advowson". On the other hand, the catholic canonist should, so I understand, look upon patronage as abnormal, should say that when the bishop selects a clerk this is an exercise not of patronage but of "jurisdiction", and should add that the case in which a bishop as bishop is patron of a benefice within his own diocese, though not impossible, is extremely rare (Hinschius, *op cit* pp 35-37). To a king who was going to exercise the "patronage" annexed to vacant bishoprics, but could not claim spiritual jurisdiction, this difference was of high importance.

² See Pike, "Feoffment and Livery of Incorporeal Hereditaments", 5 *Law Quarterly Review* (1889), pp 29, 35 ff 43 Edw III, f 1 (Hil pl 4)· advowson conveyed by feoffment at church door 7 Edw III, f 5 (Hil pl 8) Herle's dictum that not long ago men did not know what an advowson was, but granted churches 11 Hen VI, f 4 (Mich pl 8) per Martin, an advowson will pass by livery, and in a writ of right of advowson the summons must be made upon the glebe 38 Edw III, f. 4 (scire facias) per Finchden, perhaps in old time the law was that patron without parson could charge the glebe. 9 Hen. VI, f 52 (Mich pl. 35) the advowson of a church is assets, for it is an advantage to advance one's blood or one's friend. 5 Hen VII, f 37 (Trin pl 3) per Vavasour and Danvers, an advowson lies in tenure, and one may distrain [for the services] in the churchyard

³ See Gierke, *Genossenschaftsrecht*, vol III, *passim*.

remains the question how this owning church is to be conceived; and a troublesome question it is. What is the relation of the *ecclesia particularis* (church of Ely or of Trumpington) to the universal church? Are we to think of a *persona ficta*, or of a patron saint, or of the Bride of Christ, or of that vast corporation aggregate the *congregatio omnium fidelium*, or of Christ's vicar at Rome, or of Christ's poor throughout the world; or shall we say that walls are capable of retaining possession? Mystical theories break down: persons who can never be in the wrong are useless in a court of law. Much might be and much was written about these matters, and we may observe that the extreme theory which places the ownership of all church property in the pope was taught by at least one English canonist.¹ Within or behind a subjectified church lay problems which English lawyers might well endeavour to avoid.

On the whole it seems to me that a church is no person in the English temporal law of the later Middle Ages. I do not mean that our lawyers maintain one consistent strain of language. That is not so. They occasionally feel the attraction of a system which would make the parson a guardian or curator of an ideal ward. *Ecclesia fungitur vice minoris* is sometimes on their lips.² The thought that the "parson" of a church was or bore the "person" of the church was probably less distant from them than it is from us, for the two words long remained one word for the eye and for the ear. Coke, in a theoretical moment, can teach that in the person of the parson the church may sue for and maintain "her" right.³ Again, it seems that conveyances were some-

¹ J. de Athon (ed 1679), p. 76, gl. ad v. *summorum pontificum*.

² Pollock and Maitland, *History of English Law*, ed 2, vol. 1, 503.

³ Co. Lit. 300b.

times made to a parish church without mention of the parson, and when an action for land is brought against a rector he will sometimes say, "I found my church seised of this land, and therefore pray aid of patron and ordinary."¹

We may, however, remember at this point that in modern judgments and in Acts of Parliament lands are often spoken of as belonging to "a charity". Still, our books do not teach us that charities are persons. Lands that belong to a charity are owned, if not by a corporation, then by some man or men. Now we must not press this analogy between medieval churches and modern charities very far, for medieval lawyers were but slowly elaborating that idea of a trust which bears heavy weights in modern times and enables all religious bodies, except one old-fashioned body, to conduct their affairs conveniently enough without an apparatus of corporations sole. Still, in the main, church and charity seem alike. Neither ever sues, neither is ever sued. The parson holds land "in right of his church". So the king can hold land or claim a wardship or a presentation, sometimes "in right of his crown", but sometimes "in right of" an escheated honour or a vacant bishopric. So too medieval lawyers were learning to say that an executor will own some goods in his own right and others *en autre droit*.

The failure of the church to become a person for English temporal lawyers is best seen in a rule of law which can be traced from Bracton's day to Coke's through the length of the Year Books. A bishop or an abbot can bring a writ of right, a parson cannot. The parson requires a special action, the *iurata utrum*; it is a *singulare beneficium*² provided to suit his peculiar needs. The difficulty that had to be met was this:

¹ 11 Hen. IV, f. 84 (Trin. pl. 34). But see 8 Hen. V, f. 4 (Hil. pl. 15).

² Bracton, f. 286b.

You can conceive ownership, a full fee simple, vested in a man "and his heirs", or in an organized body of men such as a bishop and chapter, or abbot and convent, but you cannot conceive it reposing in the series, the intermittent series, of parsons. True, that the *iurata utrum* will be set to inquire whether a field belongs (*pertinet*) to the plaintiff's "church". But the necessity for a special action shows us that the *pertinet* of the writ is thought of as the *pertinet* of appurtenancy, and not as the *pertinet* of ownership. As a garden belongs to a house, as a stopper belongs to a bottle, not as house and bottle belong to a man, so the glebe belongs to the church.

If we have to think of "subjectification" we have to think of "objectification" also. Some highly complex "things" were made by medieval habit and perceived by medieval law. One such thing was the manor; another such thing was the church. Our pious ancestors talked of their churches much as they talked of their manors. They took esplees of the one and esplees of the other; they exploited the manor and exploited the church. True, that the total sum of right, valuable right, of which the church was the object might generally be split between parson, patron, and ordinary. Usually the claimant of an advowson would have to say that the necessary exploitation of the church had been performed, not by himself, but by his presentee. But let us suppose the church impropriated by a religious house, and listen to the head of that house declaring how to his own proper use he has taken esplees in oblations and obventions, great tithes, small tithes, and other manner of tithes.¹ Or let us see him letting a church to farm for a term of years at an annual rent.² The church was in many contexts a

¹ 5 Edw. III, f. 18 (Pasch. pl. 18). ² 9 Hen. V, f. 8 (Mich. pl. 1).

complex thing, and by no means *extra commercium*. I doubt if it is generally known how much was done in the way of charging "churches" with annuities or pensions in the days of Catholicism. On an average every year seems to produce one law-suit that is worthy to be reported and has its origin in this practice. In the Year Books the church's objectivity as the core of an exploitable and enjoyable mass of wealth is, to say the least, far more prominent than its subjectivity.¹

"If", said Rolfe Serj., in 1421, "a man gives or devises land to God and the church of St Peter of Westminster, his gift is good, for the church is not the house nor the walls, but is to be understood as the *ecclesia spiritualis*, to wit, the abbot and convent, and because the abbot and convent can receive a gift, the gift is good. . . but a parish church can only be understood as a house made of stones and walls and roof which cannot take a gift or feoffment."²

We observe that God and St Peter are impracticable feoffees, and that the learned serjeant's "spiritual church" is a body of men at Westminster. It seems to me that

¹ Sometimes the thing that is let to farm is called, not the church, but the rectory. This, however, does not mean merely the rectory house. 21 Hen VII, f 21 (Pasch pl 11) "The church, the churchyard, and the tithes make the rectory, and under the name of rectory they pass by parol." See *Greenslade v Darby* (1868), L R 3 Q B 421. The lay impropiator's right to the herbage of the churchyard maintained against a perpetual curate: a learned judgment by Blackburn J. See also Lyndwood, *Provinciale*, pp 154ff, as to the practice of letting churches. 30 Edw. III, f 1: Action of account against bailiff of the plaintiff's church, unsuccessful objection that defendant should be called bailiff, not of the church, but of a rectory. "car esglise est a les parrochiens, et nemy le soen [the parson's]". This is the only instance that I have noticed in the Year Books of any phrase which would seem to attribute to the parishioners any sort of proprietary right in the church.

² 8 Hen V, f. 4 (Hil pl. 15). I omit some words expressing the often recurring theory that the conventual church cannot accept a gift made when there is no abbot. Headless bodies cannot act, but they can retain a right.

throughout the Middle Ages there was far more doubt than we should expect to find as to the validity of a gift made to "the [parish] church of X", or to "the parson of X and his successors", and that Broke was not performing a needless task when he vouched Littleton and Danby to warrant a gift that took the latter of these forms. Not much land was, I take it, being conveyed to parish churches or parish parsons, while for the old glebe the parson could have shown no title deeds. It had been acquired at a remote time by a slow expropriation of the patron.

The patron's claim upon it was never quite forgotten. Unless I have misread the books, a tendency to speak of the church as a person grows much weaker as time goes on. There is more of it in Bracton than in Littleton or Fitzherbert.¹ English lawyers were no longer learning from civilians and canonists, and were constructing their grand scheme of estates in land. It is with their heads full of "estates" that they approach the problem of the glebe, and difficult they find it. At least with the consent of patron and ordinary, the parson can do much that a tenant for life cannot do;² and, on the other hand, he cannot do all that can be done by a tenant in fee simple. It is hard to find a niche for the rector in our system of tenancies. But let us observe that this difficulty only exists for men who are not going to personify churches or offices.

¹ 21 Edw. IV, f. 61 (Mich. pl. 32): per Pigot, fines were formerly received which purported to convey *Deo et ecclesiae*, but the judges of those days were ignorant of the law. 9 Hen. VII, f. 11 (Mich. pl. 6) conveyances to God and the church are still held valid if made in old time; they would not be valid if made at the present day.

² Even without the active concurrence of patron and ordinary, who perhaps would make default when prayed in aid, the parson could do a good deal in the way of diminishing his successor's revenue by suffering collusive actions. See e.g. 4 Hen. VII, f. 2 (Hil. fol. 4), where the justices in Cam. Scac. were divided, four against three.

There is an interesting discussion in 1430.¹ The plaintiff's ancestor had recovered land from a parson, the predecessor of the defendant, by writ of *Cessavit*; he now sues by *Scire facias*, and the defendant prays aid of the patron; the question is whether the aid prayer is to be allowed.

Cottesmore J. says:

I know well that a parson has only an estate for the term of his life; and it may be that the plaintiff after the judgment released to the patron, and such a release would be good enough, for the reversion of the church is in him [the patron], and this release the parson cannot plead unless he has aid. And I put the case that a man holds land of me for the term of his life, the reversion being in me; then if one who has right in the land releases to me who am in reversion, is not that release good? So in this case.

Paston J. takes the contrary view:

I learnt for law that if *Praeceptum quod reddat* is brought against an abbot or a parson, they shall never have aid, for they have a fee simple in the land, for the land is given to them and their successors, so that no reversion is reserved upon the gift... If a writ of right is brought against them they shall join the mise upon the *mere droit*, and that proves that they have a better estate than for term of life. And I have never seen an estate for life with the reversion in no one; for if the parson dies the freehold of the glebe is not in the patron, and no writ for that land is maintainable against any one until there is another parson. So it seems to me that aid should not be granted.

Then speaks Babington C.J., and, having put an ingenious case in which, so he says, there is a life estate without a reversion, he proceeds to distinguish the case of the abbot from that of the parson:

When an abbot dies seised the freehold always remains in the house (*meason*) and the house cannot be void... but if a parson

¹ 8 Hen VI, f. 24 (Hil. pl. 10).

dies, then the church is empty, and the freehold in right is in the patron, notwithstanding that the patron can take no advantage of the land; and if a recovery were good when the patron was not made party, then the patronage would be diminished, which would be against reason. So it seems to me that [the defendant] shall have aid.

Two other judges, Strangways and Martin, are against the aid prayer; Martin rejects the theory that the parson is tenant for life, and brings into the discussion a tenant in tail after possibility of issue extinct. On the whole the case is unfavourable to the theory which would make the parson tenant for life and the patron reversioner, but that this theory was held in 1430 by a Chief Justice of the Common Pleas seems plain and is very remarkable. The weak point in the doctrine is the admission that the patron does not take the profits of the vacant church. These, it seems settled, go to the ordinary,¹ so that the patron's "reversion" (if any) looks like a very nude right. But the Chief Justice's refusal to repose a right in an empty "church", while he will place one in a "house" that has some monks in it, should not escape attention.

Nearly a century later, in 1520, a somewhat similar case came before the court,² and we still see the same diversity of opinion. Broke J. (not Broke of Abridgement) said that the parson had the fee simple of the glebe *in iure ecclesiae*.

It seems to me (said Pollard J.), that the fee simple is in the patron; for [the parson] has no inheritance in the benefice and the fee cannot be in suspense, and it must be in the patron, for

¹ 11 Hen. VI, f. 4 (Mich. pl. 8): per Danby, the ordinary shall have the occupation and all the profit. 9 Hen. V, f. 14 (Mich. pl. 19) accord. See Stat. 28 Hen. VIII, c. 11, which gives the profits to the succeeding parson.

² 12 Hen. VIII, f. 7 (Mich. pl. 1).

the ordinary only has power to admit a clerk. . . . And although all parsons are made by the act of the ordinary, there is nothing in the case that can properly be called succession. For if land be given to a parson and his successor, that is not good, for he [the parson] has no capacity to take this; but if land be given *Priori et Ecclesiae* that is good, because there is a corporation. . . . And if the parson creates a charge, that will be good only so long as he is parson, for if he dies or resigns, his successor shall hold the land discharged; and this proves that the parson has not the fee simple. But if in time of vacation patron and ordinary charge the land, the successor shall hold it charged, for they [patron and ordinary] had at the time the whole interest.¹

Eliot J. then started a muddle opinion:

It seems to me that the parson has the fee *in iure ecclesiae*, and not the patron—as one is seised in fee *in iure uxoris suae*—and yet for some purposes he is only tenant for life. So tenant in tail has a fee tail, and yet he has only for the term of his life, for if he makes a lease or grants a rent charge, that will be only for the term of his life. . . . As to what my brother Pollard says, namely, that in time of vacation patron and ordinary can create a charge, that is not so.

Then Brudenel C.J. was certain that the parson has a fee simple:

He has a fee simple by succession, as an heir [has one] by inheritance, and neither the ordinary nor the patron gives this to the parson.

Pollard's opinion was belated; but we observe that on the eve of the Reformation it was still possible for an English judge to hold that the ownership, the fee simple, of the church is in the patron. And at this point it will not be impertinent

¹ Apparently Belknap J. had said that such a charge would be good: *Fitz. Abr. Annuitie*, pl. 53 (8 Ric. II).

to remember that even at the present day timber felled on the glebe is said to belong to the patron.¹

In the interval between these two cases Littleton had written. He rejected the theory which would place the fee simple in the patron; but he also rejected that which would place it in the parson. Of any theory which would subjectify the church or the parson's office or dignity he said nothing; and nothing of any corporation sole. Let us follow his argument.

He is discussing "discontinuance" and has to start with this, that if a parson or vicar grants land which is of the right of his church and then dies or resigns, his successor may enter.² In other words, there has been no discontinuance. "And", he says, "I take the cause to be for that the parson or vicar that is seised as in right of his church hath no right of the fee simple in the tenements, and the right of the fee simple doth not³ abide in another person." That, he explains, is the difference between the case of the parson and the case of a bishop, abbot, dean, or master of a hospital; their alienations may be discontinuances, his cannot; "for a bishop may have a writ of right of the tenements of the right of the church, for that the right is in his chapter, and the fee simple abideth in him and his chapter. . . . And a master of a hospital may have a writ of right because the right remaineth in him and in his *confreres*, &c.; and so in other like cases. But a parson or vicar cannot have a writ of right, &c". A dis-

¹ *Sowerby v. Fryer* (1869), L.R. 8 Eq. 417, 423 James V C: "I never could understand why a vicar who has wrongfully cut timber should not be called to account for the proceeds after he has turned it into money, in order that they may be invested for the benefit of the advowson, *it being conceded that the patron is entitled to the specific timber*"

² Lit. sec. 643.

³ There are various readings, but the argument seems plainly to require this "not".

continuance, if I rightly understand the matter, involves the alienation of that in which the alienor has some right, but some right is vested in another person. In the one case the bishop alienates what belongs to him and his chapter; in the other case the parson alienates what belongs to no one else.

Then we are told¹ that the highest writ that a parson or vicar can have is the *Utrum*, and that this "is a great proof that the right of fee is not in them, nor in others. But the right of the fee simple is in abeyance; that is to say, that it is only in the remembrance, intendment, and consideration of law, for it seemeth to me that such a thing and such a right which is said in divers books to be in abeyance is as much as to say in Latin, *Talis res, vel tale rectum, quae vel quod non est in homine adtunc superstite, sed tantummodo est et consistit in consideratione et intelligentia legis, et, quod alii dixerunt, talem rem aut tale rectum fore in nubibus*". Yes, rather than have any dealings with fictitious persons, subjectified churches, personified dignities, corporations that are not bodies, we will have a subjectless right, a fee simple in the clouds.²

Then in a very curious section Littleton³ has to face the fact that the parson with the assent of patron and ordinary can charge the glebe of the parsonage perpetually. Thence, so he says, some will argue that these three persons, or two or one of them, must have a fee simple. Littleton must answer this argument. Now this is one of those points at which a little fiction might give us temporary relief. We might place the fee simple in a fictitious person, whose lawfully appointed guardians give a charge on the property

¹ Lit sec 646

² Apparently the talk about a fee simple *in nubibus* began in debates over contingent remainders: 11 Hen IV, f. 74 (Trin pl. 14).

³ Lit. sec. 648.

of their imaginary ward. We might refer to the case of a town council which sets the common seal to a conveyance of land which belongs to the town. But, rather than do anything of the kind, Littleton has recourse to a wholly different principle.

The charge has been granted by parson, patron, and ordinary, and then the parson dies. His successor cannot come to the church but by the presentment of the patron and institution of the ordinary, "and for this cause he ought to hold himself content and agree to that which his patron and the ordinary have lawfully done before". In other words, the parson is debarred by decency and gratitude from examining the mouth of the gift horse. No one compelled him to accept the benefice. Perhaps we might say that by his own act he is estopped from quarrelling with the past acts of his benefactors. Such a piece of reasoning would surely be impossible to any one who thought of the church or the rector's office as a person capable of sustaining proprietary rights.

Before Littleton's Tenures came to Coke's hands, Broke or some one else had started the suggestion that a parson was a corporation, or might be likened to a corporation. Apparently that suggestion was first offered by way of explaining how it came about that a gift could be made to a parson and his successors. Now it seems to me that a speculative jurist might have taken advantage of this phrase in order to reconstruct the theory of the parson's relation to the glebe. He might have said that in this case, as in the case of the corporation aggregate, we have a *persona ficta*, an ideal subject of rights, in which a fee simple may repose; that the affairs of this person are administered by a single man, in the same way in which the affairs of certain other fictitious

persons are administered by groups of men; and that the rector therefore must be conceived not as a proprietor but as a guardian, though his powers of administration are large, and may often be used for his own advantage. And Coke, in his more speculative moments, showed some inclination to tread this path. Especially is this the case when he contrasts "persons natural created of God, as J.S., J.N., &c., and persons incorporate or politic created by the policy of man", and then adds that the latter are "of two sorts, viz. either sole or aggregate".¹ But to carry that theory through would have necessitated a breach with traditional ideas of the parson's estate and a distinct declaration that Littleton's way of thinking had become antiquated.² As it is, when the critical point is reached and we are perhaps hoping that the new-found corporation sole will be of some real use, we see that it gives and can give Coke no help at all, for, after all, Coke's corporation sole is a man: a man who fills an office and can hold land "to himself and his successors", but a mortal man.

When that man dies the freehold is in abeyance. Littleton had said that this happened "if a parson of a church dieth". Coke adds:³ "So it is of a bishop, abbot, dean, archdeacon, prebend, vicar, and of every other sole corporation or body politic, presentative, elective, or donative, which inheritances put in abeyance are by some called *haereditates iacentes*." So here we catch our corporation sole *in articulo mortis*. If God did not create him, then neither the inferior nor yet the superior clergy are God's creatures.

¹ Co. Lit. 2a.

² In *Wythers v. Iseham* (1552), Dyer, f. 70 (pl. 43), the case of the parson had been noticed as the only exception to the rule that the freehold could not be in abeyance.

³ Co. Lit. 342b.

So much as to the state of affairs when there is no parson: the freehold is in abeyance, and "the fee simple and right is in abeyance". On the other hand, when there is a parson, then, says Coke,¹ "for the benefit of the church and of his successor he is in some cases esteemed in law to have a fee simple qualified; but, to do anything to the prejudice of his successor, in many cases the law adjudgeth him to have in effect but an estate for life". And again, "It is evident that to many purposes a parson hath but in effect an estate for life, and to many a qualified fee simple, but the entire fee and right is not in him."²

This account of the matter seems to have been accepted as final. Just at this time the Elizabethan statutes were giving a new complexion to the practical law. The parson, even with the consent of patron and ordinary, could no longer alienate or charge the glebe, and had only a modest power of granting leases. Moreover, as the old real actions gave place to the action of ejectment, a great deal of the old learning fell into oblivion. Lawyers had no longer to discuss the parson's aid prayer or his ability or inability to join the mise on the *mere droit*, and it was around such topics as these that the old indecisive battles had been fought. Coke's theory, though it might not be neat, was flexible: for some purposes the parson had an estate for life, for others a qualified fee. And is not this the orthodoxy of the present day? The abeyance of the freehold during the vacancy of the benefice had the approval of Mr Challis;³ the "fee simple qualified" appears in Sir H. Elphinstone's edition of Mr Goodeve's book.⁴

¹ Co. Lit 341a.

² *Ibid* 341b

³ Challis, *Real Property*, ed. 2, p. 91; ed. 3, p. 101.

⁴ Goodeve, *Real Property*, ed. 4, pp. 85, 133. See the remarks of Jessel M.R. in *Mulliner v. Midland Railway Co.* (1879), 11 Ch D. 611, 622.

Thus, so it seems to me, our corporation sole refuses to perform just the first service that we should require at the hands of any reasonably useful *persona ficta*. He or it refuses to act as the bearer of a right which threatens to fall into abeyance or dissipate itself among the clouds for want of a "natural" custodian. I say "he or it"; but which ought we to say? Is a beneficed clergyman—for instance, the Rev. John Styles—a corporation sole, or is he merely the administrator or representative of a corporation sole? Our Statute Book is not very consistent. When it was decreeing the Disestablishment of the Irish Church it declared that on 1st January, 1871, every ecclesiastical corporation in Ireland, whether sole or aggregate, should be dissolved,¹ and it were needless to say that this edict did not contemplate a summary dissolution of worthy divines. But turn to a carefully worded Statute of Limitations. "It shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make an entry or distress, or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which *the right of such corporation sole or of his predecessor* . . . shall first have accrued."² Unquestionably for the draftsman of this section the corporation sole was, as he was for Coke, a man, a mortal man.

If our corporation sole really were an artificial person created by the policy of man we ought to marvel at its incompetence. Unless custom or statute aids it, it cannot (so we are told) own a chattel, not even a chattel real.³

¹ 32 & 33 Vict. c. 42, s. 13.

² 3 & 4 Will IV, c. 27, s. 29.

³ *Fulwood's Case* (1590), 4 Rep. 65a, *Arundel's Case* (no date), Hob. 64.

A different and an equally inelegant device was adopted to provide an owning "subject" for the ornaments of the church and the minister thereof—adopted at the end of the Middle Ages by lawyers who held themselves debarred by the theory of corporations from frankly saying that the body of parishioners is a corporation aggregate. And then we are also told that in all probability a corporation sole "cannot enter into a contract except with statutory authority or as incidental to an interest in land".¹ What then can this miserable being do? It cannot even hold its glebe tenaciously enough to prevent the freehold falling into abeyance whenever a parson dies.

When we turn from this mere ghost of a fiction to a true corporation, a corporation aggregate, surely the main phenomenon that requires explanation, that sets us talking of personality and, it may be, of fictitious personality, is this, that we can conceive and do conceive that legal transactions, or acts in the law, can take place and do often take place between the corporation of the one part and some or all of the corporators of the other part. A beautiful modern example² shows us eight men conveying a colliery to a company of which they are the only members; and the Court of Appeal construes this as a "sale" by eight persons to a ninth person, though the price consists not in cash, but in the whole share capital of the newly formed corporation.

¹ Pollock, *Contract*, ed. 6, p. 109. [In ed. 10 (1936), p. 114, the passage reads "corporations sole in England can do very little in their corporate capacity, and in particular cannot bind or even benefit their official successors by contract, except in one or two peculiar cases."] The principal modern authority is *Howley v. Knight* (1849), 14 Q.B. 240 [Cf. *Power v. Banks* [1901] 2 Ch. 487].

² *Foster & Sons, Ltd. v. Com. of Inland Rev.* [1894] 1 Q.B. 516 [For many later examples, see cases cited in Buckley, *Companies Acts*, ed. 11, (1930), pp. 22-23.]

But to all appearance there can be no legal transaction, no act in the law, between the corporation sole and the natural man who is the one and only corporator. We are told, for example, that "a sole corporation, as a bishop or a parson, could not make a lease to himself, because he cannot be both lessor and lessee".¹ We are told that "if a bishop hath lands in both capacities he cannot give or take to or from himself".² Those who use such phrases as these show plainly enough that in their opinion there is no second "person" involved in the cases of which they speak: "he" is "himself", and there is an end of the matter.³ I can find no case in which the natural man has sued the corporation sole or the corporation sole has sued the natural man.

When a man is executor, administrator, trustee, bailee, or agent, we do not feel it necessary to speak of corporateness or artificial personality, and I fail to see why we should do this when a man is a beneficed clerk. Whatever the Romans may have done—and about this there have been disputes enough⁴—we have made no person of the *hereditas iacens*. On an intestate's death we stopped the gap with no figment, but with a real live bishop, and in later days with the Judge of the Probate Court: English law has liked its persons to be real. Our only excuse for making a fuss over the parson is that, owing to the slow expropriation of the patron, the parson has an estate in church and glebe which refuses to fit into any of the ordinary categories of our real property law; but, as we have already seen, our talk of cor-

¹ *Salter v. Grosvenor* (1724), 8 Mod 303, 304.

² *Wood v. Mayor, &c., of London* (1701), Salk 397, 398. See also Grant, *Corporations*, p. 635.

³ The matter was well stated by Broke J. in 14 Hen. VIII, f. 30 (Pasch. pl. 8): a parson cannot grant unto or enfeoff himself, "car comment il ad deus respects uncoure il est mesme le person".

⁴ [W. W. Buckland, *Text-book of Roman Law*, ed. 2, s. cvii.]

porations sole has failed to solve or even to evade the difficulty. No one at the present day would dream of introducing for the first time the scheme of church property law that has come down to us, and I think it not rash to predict that, whether the Church of England remains established or no, churches and glebes will some day find their owners in a corporation aggregate or in many corporations aggregate.¹ Be that as it may, the ecclesiastical corporation sole is no "juristic person"; he or it is either natural man or juristic abortion.

The worst of his or its doings we have not yet considered. He or it has persuaded us to think clumsy thoughts or to speak clumsy words about King and Commonwealth.²

¹ See *Eccl. Com. v. Pinney* [1899] 1 Ch 99, a case prophetic of the ultimate fate of the glebe

² In looking through the Year Books for the corporation sole, I took note of a large number of cases in which this term is not used, but might well have been used had it been current. I thought at one time of printing a list of these cases, but forbear, as it would fill valuable space and only points to a negative result. The discussion of the parson's rights in F N B. 109-112 is one of the places to which we naturally turn, but turn in vain

II

THE CROWN AS CORPORATION¹

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".²

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.³ 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.

¹ 17 *Law Quarterly Review* (1901), pp. 131-146.

² Pollock, *First Book of Jurisprudence*, p. 113 [In ed. 6 (1929), pp. 121-122, the last sentence of this quotation runs. "In England we now say that the Crown is a corporation, though this is an innovation made in an age of pedantry, and seems to be of no real use. The conception of this or any other permanent representation of the State had not been formed at all in the earlier Middle Ages, when the king's peace died with him and 'every man that could forthwith robbed another'."]

³ 16 *Law Quarterly Review* (1900), pp. 335-354.

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 "parsonified". 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.¹

The mediæval king was every inch a king, but just for this reason he was every inch a man and you did not talk

¹ 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 Age* (Cambridge, 1900).

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*.¹ 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.² 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

¹ *Placit Abbrev* p. 339 (15 Edw. II, Northampton).

² 16 *Law Quarterly Review* (1900), p. 344.

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."¹ 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".² 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.³

The portrait that Henry VIII painted of the body politic of which he was the sovereign head will not be forgotten:⁴

Where by divers sundry old authentic histories and chronicles it is manifestly declared and expressed that this realm of England

¹ Y.B. 39 Edw. III, f. 7a. ² Y.B. 14 Hen. VIII, f. 3 (Mich. pl. 2).

³ 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

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

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.¹ 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 politic²

"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

¹ *Case of the Duchy of Lancaster* (1561), Plowden, 212; *Willion v. Berkley* (1559), *Ibid* 223, *Sir Thomas Wroth's Case* (1573), *Ibid* 452

² Plowden, p 213.

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 ¹

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".² 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.³

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".⁴ Any real and consistent severance of the

¹ Plowden, p. 234.

² *Ibid.* 261.

³ Co. Lit. 2a, 250a, *Sutton's Hospital Case* (1612), 10 Rep. 26b.

⁴ *Calvin's Case* (1608), 7 Rep. 10a.

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.¹ 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 Blackstone²) 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".³ 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 1862.⁴ "And whereas it may be doubtful", says an Act of 1873.⁵ Many things may be doubtful if we try to make two persons of one man, or to provide one person with two bodies.

¹ *Calvin's Case* (1608), 7 Rep. 11a, b.

² 1 Comm. 246.

³ 39 & 40 Geo. III, c. 88

⁴ 25 & 26 Vict. c. 37.

⁵ 36 & 37 Vict. c. 61.

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.¹ 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".² 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

¹ 1 Edw VI, begins the process.

² 7 Will. IV & 1 Vict c. 31.

Common wealth".¹ In 1623 the Exchequer Chamber could speak of the inconvenience that "remote limitations" had introduced "in the republic".² 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.³ 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".⁴ 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

¹ 3 Jac. I, c. 2, pr.

² *Child v. Baylie*, Palm. 335, 336.

³ Such phrases as "when the danger of the state is great" (I, 135) are occasionally used

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

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".¹ 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.²

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

¹ 11 Geo. II, c. 30, pr. and s. 1.

² 26 Geo. III, c. 62.

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 creditor 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 said¹) 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.² I do not feel quite sure of knowing even this.³

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

¹ Co Lit 18b.

² *Dixon v. London Small Arms Co.* (1876), L.R. 1 App. Cas. 632, at 652.

³ 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.

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."¹ 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".² 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

¹ *Mersey Docks Trustees v Gibbs* (1866), LR 1 HL 93, 111. The italics, it need hardly be said, are mine

² Pensions (Colonial Service) Act, 1887, 50 & 51 Vict c 13, s. 8.

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.¹

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

¹ Act of 12th Nov. 1709 (8 Anne).

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.¹ 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".² 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

¹ Act of 1714 (13 Anne).

² 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.

Assembly".¹ 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 functions of the executive" (as some modern Americans call it) is no new thing in an English colony.²

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.³ 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

¹ Act of 29th Sept. 1693

² 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

³ *Sloman v Government of New Zealand* (1876), 1 C.P.D. 563, 565-566.

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.¹ But it is a wholesome sight to see "the Crown" sued² and answering for its torts.³ 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.⁴ "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

¹ *Farnell v. Bowman* (1887), 12 App. Cas 643 (N S Wales)

² *Hettihewage Suman Appu v The Queen's Advocate* (1884), 9 App. Cas. 571 (Ceylon).

³ *A-G. of the Straits Settlement v Wemyss* (1888), 13 App Cas 192 (Penang).

⁴ 30 Vict. c. 3, ss 110-125

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.”¹ 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.

¹ *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. As -G. of Ontario, Quebec, Nova Scotia* [1898] A C. 700.

"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."¹ 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.²

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.³

¹ Ilbert, *Government of India* (3rd ed 1915), p 196.

² In *Kinlock v. Secretary of State for India in Council* (1880), 15 Ch D 1, 8, James LJ 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.]

³ Dillon, *Municipal Corporations*, ed. 4, § 31.

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."¹

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.² 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.³ But the class of corporations sole was slow

¹ *Willion v Berkley* (1559), Plowden, p. 234

² 63 & 64 Vict. c. 12

³ *Fulwood's Case* (1591), 4 Rep. 64b.

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,¹ 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 arc" 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.² 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 1853.³ Then in 1855 the Secretary of State intrusted with the seals of the War Department was enabled to hold land as a corporation sole.⁴ Perhaps if there were a Lord High Admiral he would be a corporation sole *vel quasi*.⁵ 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".⁶ 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

¹ 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)

² 3 & 4 Vict. c. 96, s. 67 [now 8 Ed. VII, c. 48, s. 45]

³ 16 & 17 Vict. c. 137, s. 47.

⁴ 18 & 19 Vict. c. 117, s. 2

⁵ 27 & 28 Vict. c. 57, s. 9.

⁶ 39 & 40 Vict. c. 18, s. 1.

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.¹

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.² 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,³ 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.⁴

I am aware of only one instance in which a general law, as distinguished from *privilegia* for this or that officer of the

¹ See 16 *Law Quarterly Review* (1900), p. 352.

² 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].

³ [The Indictments Act, 1915 (5 & 6 Geo. V, c. 90) Sched. 1, s. 6, probably does not solve the difficulty.]

⁴ See 16 *Law Quarterly Review* (1900), p. 355.

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.¹ 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.²

¹ 21 & 22 Vict. c. 92 [repealed by Statute Law Revision Act, 1892]. But this Act does not use the term *corporation sole*

² 51 & 52 Vict. c. 41, s. 64 We do not find it necessary to use mysterious language about the corporateness 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.

III

THE UNINCORPORATE BODY¹

OF the Taff Vale Case² we are likely to hear a good deal for some time to come. The trade unions are not content; there will be agitation; perhaps there will be legislation.³

To one reader of English history and of English law it seems that certain broad principles of justice and jurisprudence are involved in and may be evolved from the debate: certain broad principles which extend far beyond the special interests of masters and workmen. Will he be able to persuade others that this is so? Can he assign to this Taff Vale Case its place in a long story?

Of late years under American teaching we have learned to couple together the two terms "corporations" and "trusts". In the light of history we may see this as a most instructive conjunction. And yet an apprentice of English law might well ask what the law of trusts has to do with the law of corporations. Could two topics stand farther apart from each other in an hypothetical code? Could two law-books have less in common than Grant on Corporations and Lewin on Trusts?

¹ [The date of this paper is probably between 1901 and 1903. Maitland's note on the MS. is "Read to the Eranus Club". It may be noted here that Professor Edward Warren of the Harvard University Law School has published a monograph on *Corporate Advantages without Incorporation* (1929), New York. See, too, H A Smith, *Law of Associations* (1914), Oxford.]

² *Taff Vale R Co v Amalgamated Society of Railway Servants* [1901], A.C. 426.

³ [There was. Trade Disputes Act, 1906 (6 Edw. VII, c. 47); Trade Disputes and Trade Unions Act, 1927 (17 & 18 Geo. V, c. 22) See Slessor and Baker, *Trade Union Law*, ed 3 (1931).]

To such questions English history replies that, none the less, a branch of the law of trusts became a supplement for the law of corporations, and some day when English history is adequately written, one of the most interesting and curious tales that it will have to tell will be that which brings trust and corporation into intimate connexion with each other.¹

A few words about the general law of trusts may not be impertinent even though they say nothing that is new. The idea of a trust is so familiar to us all that we never wonder at it. And yet surely we ought to wonder. If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we should have any better answer to give than this, namely, the development from century to century of the trust idea.

"I do not understand your trust". These words have been seen in a letter written by a very learned German historian familiar with law of all sorts and kinds.

Where lies the difficulty? In the terms of a so-called "general jurisprudence" it seems to lie here: A right which in ultimate analysis appears to be *ius in personam* (the benefit of an obligation) has been so treated that for practical purposes it has become equivalent to *ius in rem* and is habitually thought of as a kind of ownership, "equitable ownership". Or put it thus: If we are to arrange English law as German law is arranged in the new code we must present to our law of trust a dilemma: it must place itself under one of two rubrics; it must belong to the Law of Obligations or to the Law of Things. In sight of this dilemma it reluctates and recalcitrates. It was made by men who had no Roman

¹ [See Sir W. S. Holdsworth, *History of English Law*, vol. iv, pp. 477-480; vol. ix, pp. 47-48.]

law as explained by medieval commentators in the innermost fibres of their minds.

To say much of the old feoffment to uses would be needless. Only we will note that for a long time the only, and for a longer time the typical, subject-matter of a trust is a piece of land or some incorporeal thing, such as an advowson, which is likened to a piece of land. For trusts of movable goods there was no great need. The common law about bailments was sufficient. We may indeed see these two legal concepts deriving from one source: the source that is indicated in Latin by *ad opus*, in old French by *al oes*, in English by "to the use". In the one case however a channel is cut by the Courts of Common Law and the somewhat vague *al oes* explicates itself in a law of bailments and agency, while in the other the destined channel must be cut, if at all, by a new court since the law of rights in land has already attained a relatively high stage of development and finds its expression in an elaborate scheme of writs and formal actions. For the purposes of comparative jurisprudence it is of some importance to observe that though for a long time past our trust idea—the idea of a trust strictly and technically so called—has been extended to things of all sorts and kinds, still were it not for trusts of land we should hardly have come by trusts of other things. The ideas of bailment, agency, guardianship, might have shown themselves capable of performing all that was reasonably necessary. Foreigners manage to live without trusts. They must.

In the fourteenth century when feoffments to uses were becoming common, the most common of all instances seems to have been the feoffment to the feoffor's own use. The landowner enfeoffed some of his friends as joint tenants hoping for one thing that by keeping the legal ownership

in joint tenants and placing new feoffees in vacant gaps no demand could ever be made by the feudal lord for wardship or marriage, relief or escheat, and hoping for another thing that the feoffees would observe his last will and that so in effect he might acquire that testamentary power which the law denied him and which the eternal interest of his sinful soul made an object of keen desire.

Now between feoffor and feoffee in such a case there is agreement. We have only to say that there is contract and then the highly peculiar character of our trust will soon display itself. For let us suppose that we treat this relationship as a contract and ask what will follow.

Well (1) as between feoffor and feoffee how shall we enforce that contract? Shall we just give damages if and when the contract is broken or shall we decree specific performance on pain of imprisonment? Perhaps this difficulty was hardly felt, for it can, so I think, be amply shown that the idea of compelling a man specifically to perform a contract relating to land was old, and that what was new was the effectual pressure of threatened imprisonment. But (2) think of the relationship as contractual and how are we to conceive the right of the feoffor? It is the benefit of a contract. It is a chose in action at a time when a chose in action is inalienable. Also if we held tight by this conception there would be much to be said for holding that the use or trust is in all cases personal property. Then (3) there is great difficulty in holding that a contract can give rights to a third person. We in England feel that difficulty now-a-days. Foreign lawyers and legislatures are surmounting it. We should have had to surmount it, had it not been for our trust. But from an early time, we find that the action, or rather the suit, is given to the destinator, the beneficiary, the *cestui que use*

as we call him, and indeed if the trustor can enforce the trust this will only be so because in the particular case he is the destinatory. And then (4) arises the all important question as to the validity of the beneficiary's right against purchasers from the trustee and against the trustee's creditors. Think steadily of that right as the benefit of a contract and you will find it hard to say why it should be enforced against one who was no party to the contract.

We know what happened. No sooner has the Chancellor got to work than he seems bent on making these "equitable" rights as unlike mere *iura in personam* and as like *iura in rem* as he can possibly make them. The ideas that he employs for this purpose are not many; they are English; certainly they are not derived from any knowledge of Roman law with which we may think fit to equip him. On the one hand as regards what we might call the internal character of these rights, the analogies of the common law are to be strictly pursued. A few concessions may be made in favour of greater "flexibility" but on the whole there is to be a law of equitable estates in land which is a mere replica of the law of legal estates. There are to be estates in fee simple, estates in fee tail, terms of years, remainders, reversions and the rest of it: the equitable estate tail (this is a good example) is to be barred by an equitable recovery. Then as regards the external side of the matter, "good conscience" becomes the active principle; a conscience that can be opposed to strict law. The trust is to be enforced against all whose conscience is to be "affected" by it. Class after class of persons is brought within the range of this idea. The purchaser who for value obtains ownership from the trustee must himself become a trustee if at the time of the purchase he knew of the trust, for it is unconscionable to buy what

you know to be another's "in equity". Then the purchaser who did not know of the trust must be bound by it if he ought to have known of it: that is to say, if he would have known of it had he made such investigation of his vendor's title as a prudent purchaser makes in his own interest. It remains to screw up this standard of diligence higher and higher, until the purchaser who has obtained a legal estate *bona fide* for value and without notice, express or implied, of the equitable right, is an extremely rare and extremely lucky person. And apparently he is now the only person who can hold the land and yet ignore the trust. It was not so always. The lord who came to the land by escheat came to it with a clear conscience. Also we read in our old books that a use cannot be enforced against a corporation because a corporation has no conscience. But in the one case a statute has come to the rescue and in the other we have rejected the logical consequence of a certain speculative theory of corporations to which we still do lip-service. The broad result is that we habitually think of the beneficiary's right as practically equivalent to full ownership, and the instances of rare occurrence in which a purchaser can ignore it seem almost anomalous. And in passing it may be noticed that such danger as there is falls to absolute zero in a class of cases of which we are to speak hereafter. No one will ever be heard to say that he has purchased without notice of a trust a building that was vested in trustees but was fitted up as a club-house, a Jewish synagogue, a Roman catholic cathedral.

Even that is not quite all. Even when the Court of Equity could not give the *cestui que trust* the very thing that was the original subject-matter of the trust it has struggled hard to prevent its darling from falling into the ruck of unsecured creditors of a defaulting trustee. It has allowed him to pursue

a "reified" trust-fund from investment to investment: in other words, to try to find some thing for which the original thing has been exchanged by means of a longer or shorter series of exchanges. That idea of the trust-fund which is dressed up (invested) now as land and now as current coin, now as shares and now as debentures seems to me one of the most remarkable ideas developed by modern English jurisprudence. How we have worked that metaphor! May not one have a vested interest in a fund that is vested in trustees who have invested it in railway shares? Even a Philosophy of Clothes stands aghast. However, the main point is that *cestui que trust* is magnificently protected.

Now I cannot but think that there is one large part of this long story of the trust that ordinarily goes untold. The student is expected to learn something about feoffments to uses and the objects that were gained thereby, something about the Chancellor's interposition, something about the ambitious statute that added three words to a conveyance; but no sooner is King Henry outwitted, no sooner is the Chancellor enforcing the secondary use, than the law of uses and trusts becomes a highly technical matter having for its focus the family settlement with its trustees to preserve contingent remainders, its name and arms clauses, its attendant terms and so forth. Very curious and excellent learning it all is, and in some sort still necessary to be known at least in outline; still we are free to say that some of the exploits that the trust performed in this quarter are not admirable in modern eyes, and at any rate it seems to me a misfortune that certain other and much less questionable exploits pass unnoticed by those books whence beginners obtain their first and their most permanent notions of legal history.

First and last the trust has been a most powerful instrument

of social experimentation. To name some well-known instances: It (in effect) enabled the landowner to devise his land by will until at length the legislature had to give way, though not until a rebellion had been caused and crushed. It (in effect) enabled a married woman to have property that was all her own until at length the legislature had to give way. It (in effect) enabled men to form joint-stock companies with limited liability, until at length the legislature had to give way. The case of the married woman is specially instructive. We see a prolonged experiment. It is deemed a great success. And at last it becomes impossible to maintain (in effect) one law for the poor and another for the rich, since, at least in general estimation, the tried and well-known "separate use" has been working well. Then on the other hand let us observe how impossible it would have been for the most courageous Court of Common Law to make or to suffer any experimentation in this quarter.

Just to illustrate the potency of the trust in unexpected quarters we might mention an employment of it which at one time threatened radically to change the character of the national church. Why should not an advowson be vested in trustees upon trust to present such clerk as the parishioners shall choose? As a matter of fact this was done in a not inconsiderable number of cases and we may even see Queen Elizabeth herself taking part in such a transaction.¹ Had a desire for ministers elected by their congregations become general among conformists, the law was perfectly ready to carry out their wishes. The fact that parishioners are no corporation raised no difficulty.

But there are two achievements of the trust which in social importance and juristic interest seem to eclipse all the

¹ *In re St Stephen, Coleman Street* (1888), 39 Ch.Div. 492.

rest. The trust has given us a liberal substitute for a law about personified institutions. The trust has given us a liberal supplement for a necessarily meagre law of corporations. The social importance of these movements will appear by and by. The juristic interest might perhaps escape us if we could not look abroad.

We in England say that persons are natural or artificial, and that artificial persons are corporations aggregate or corporations sole. A foreign lawyer would probably tell us that such a classification of persons will hardly cover the whole ground that in these days has to be covered: at all events he would tell us this if he knew how little good we get out of our corporation sole—a queer creature that is always turning out to be a mere mortal man just when we have need of an immortal person. We should be asked by a German friend where we kept our *Anstalt* or *Stiftung*, our Institution or Foundation. And then we should be told that, though in particular cases it may be difficult to draw the line between the corporation and the institute, we certainly in modern times require some second class of juristic persons. This necessity we should see if, abolishing in thought our law of trusts, we asked what was to become of our countless “charities”. Unless some feat of personification can be performed they must perish. Let the “charitable” purpose of Mr Styles be, for example, the distribution of annual doles among the deserving poor of Pedlington, an incorporation of the deserving poor is obviously out of the question, and therefore we must either tell Mr Styles that he cannot do what he wants to do or else we must definitely admit “Styles’s Charity” into the circle of “persons known to the law”. In the latter case what will follow? What is likely to follow among men who have been taught the orthodox and

cosmopolitan lore of the fictitious person? Surely this, that without the cooperation of the State no charitable institution can be created. And this doctrine is likely to endure even in days when the State is relaxing its hold over the making of corporations and learned men are doubting the fictitiousness of the corporations personality. Hear the new German Code: "Zur Entstehung einer rechtsfähigen Stiftung ist ausser dem Stiftungsgeschäfte die Genehmigung des Bundesstaats erforderlich, in dessen Gebiete die Stiftung ihren Sitz haben soll" (B.G.B. § 80).¹ Translate that into English and suppose it to have been always law in England. How the face of England is changed!

Our way of escape was the trust. Vest the lands, vest the goods in some man or men. The demand for personality is satisfied. The lands, the goods, have an owner: an owner to defend them and recover them: an owner behind whom a Court of Common Law will never look. All else is mere equity.

Apparently we slid quite easily into our doctrine of charitable trusts. We may represent the process as gradual; we might call it the evanescence of *cetui que trust*. Observe the following series of directions given to trustees of land: (1) to sell and divide the proceeds among the twelve poorest women of the parish: (2) to sell and divide the proceeds among the twelve women of the parish who in the opinion of my trustees shall be the most deserving: (3) annually to divide the rents and profits among the twelve poorest for the time being: (4) annually to divide the rents and profits

¹ [Translation: An endowed institution, having legal status, is created by the act of endowment together with its confirmation by that state of the confederation, within which the endowed institution is to be located. *The Civil Code of the German Empire*. Trs. Walter Loewy (1909)]

among the twelve who are most deserving in the opinion of the trustees. The bodily "owners in equity" who are apparent enough in the first of these cases seem to fade out of sight as small changes are made in the wording of the trust. When they disappear from view, what, let us ask, do they leave behind them?

Well, they leave "a charity" and perhaps no more need be said. If we must have a theory I do not think that any good will come of introducing the Crown or the Attorney-General, the State or the Public, for, although it be established in course of time that the Attorney-General is a necessary party to suits concerning the administration of the trust, still we do not think of Crown or Attorney-General, State or Public as "beneficial owner" of the lands that are vested in the trustees of Nokes's charity, and trustees are not to be multiplied *praeter necessitatem*. Nor do I think that we personify the "charity": it cannot sue or be sued. Apparently our thought would be best expressed by saying that in these cases there is no "equitable owner" and that the accomplishment of a purpose has taken the place of *cestui que trust*. Our rule that the place of *cestui que trust* cannot be taken by a "non-charitable" purpose—a rule that has not been always rigorously observed¹—has not acted as a very serious restraint upon the desires of reasonable persons, so exceedingly wide from first to last has been our idea of "charity".

Now no doubt our free foundation of charitable institutions has had its dark side, and no doubt we discovered that some supervision by the State of the administration of

¹ See *In re Dean* (1889), 41 Ch Div 552, 559: a trust for the comfortable maintenance of specific dogs and horses adjudged valid, though not charitable and not enforceable by any one. See however an article by J. C. Gray, 15 *Harvard Law Review*, p. 509 on "Gifts for a non-charitable purpose".

charitable trust-funds had become necessary, but let us observe that Englishmen in one generation after another have had open to them a field of social experimentation such as could not possibly have been theirs, had not the trustee met the law's imperious demand for a definite owner. Even if we held the extreme opinion that endowed charities have done more harm than good, it might well be said of us that we have learned this lesson in the only way it could be learnt.

And so we came by our English *Anstalt* or *Stiftung* without troubling the State to concede or deny the mysterious boon of personality. That was not an inconsiderable feat of jurisprudence. But a greater than that was performed. In truth and in deed we made corporations without troubling king or parliament though perhaps we said that we were doing nothing of the kind.

Probably as far back as we can trace in England any distinct theory of the corporation's personality or any assertion that this personality must needs have its origin in some act of sovereign power we might trace also the existence of an unincorporated group to whose use land is held by feoffees. At any rate a memorable and misunderstood statute tells us that this was a common case in 1532. "Where by reason of feoffments . . . and assurances made of trusts of manors . . . and hereditaments to the use of parish churches, chapels, church-wardens, guilds, fraternities, comminalties, companies or brotherhoods erected or made of devotion or by common assent of the people without any corporation . . . there groweth and issueth to the King our Sovereign Lord, and to other lords and subjects of this realm the same like losses and inconveniences, and is [*sic*] as much prejudicial to them as doth and is in case where lands be

aliened into mortmain." Upon this recital follows a declaration that "all and every such uses, intents and purposes" that shall be declared or ordained after the 1st of March in 28 Henry VIII shall be utterly void in law if they extend beyond a term of twenty years. We know how Elizabethan lawyers construed this statute. They said that it struck at uses that were superstitious and not at such as were good and godly. We are better able than they are to trace the evolution of King Henry's abhorrence of superstition. In 1532 he was beginning to threaten the pope with a retention of annates, but he was no heretic and not even a schismatic; and indeed this very statute clearly contemplates the continued creation of obits provided that the trust does not exceed the limit of twenty years. The voice that speaks to us is not that of the Supreme Head upon earth of a purified church but that of a supreme landlord who is being done out of escheats and other commodities. I will not say but that there were some words in the Act which in the eyes of good and godly lawyers might confine its effect within narrow limits, but I also think that good and godly lawyers belonging as they did to certain already ancient and honourable societies for which lands were held in trust must have felt that this statute had whistled very near their ears.

IV

TRUST AND CORPORATION¹

NOT very long ago, in the pages of this Review, Dr Redlich, whose book on English Local Government we in England are admiring, did me the honour of referring to some words that I had written concerning our English Corporations and our English Trusts.² I have obtained permission to say with his assistance a few more words upon the same matter, in the hope that I may thereby invite attention to a part of our English legal history which, so far as my knowledge goes, has not attracted all the notice that it deserves.

Perhaps I need hardly say that we on this side of the sea are profoundly grateful to those foreign explorers who have been at pains to investigate our insular arrangements. Looking at us from the outside, it has been possible for them to teach us much about ourselves. Still we cannot but know that it is not merely for the sake of England that English law, both ancient and modern, has been examined. Is it not true that England has played a conspicuous, if a passive, part in that development of historical jurisprudence which was one of the most remarkable scientific achievements of the nineteenth century? Over and over again it has happened that our island has been able to supply just that piece of evidence, just that link in the chain of proof, which the Germanist wanted but could not find at home. Should I go too far if I said that no

¹ *Grunhut's Zeitschrift für das Privat- und Öffentliche Recht*, Bd. xxxii [1904].

² *Ibid.* Bd. xxx, S. 167.

Germanistic theory is beyond dispute until it has been tested upon our English material?

Now I know of nothing English that is likely to be more instructive to students of legal history, and in particular to those who are concerned with Germanic law, than that *Rechtsinstitut* of ours which Dr Redlich described in the following well chosen words: "das Rechtsinstitut des Trust, das ursprünglich für gewisse Bedürfnisse des englischen Grundeigentumsrechtes entstanden, nach und nach zu einem allgemeinen Rechtsinstitute ausgebildet worden ist und auf allen Gebieten des Rechtslebens praktische Bedeutung und eine ausserordentlich verfeinerte juristische Ausbildung erlangt hat."¹

It is a big affair our Trust. This must be evident to anyone who knows—and who does not know?—that out in America the mightiest trading corporations that the world has ever seen are known by the name of "Trusts". And this is only the Trust's last exploit.² Dr Redlich is right when he speaks of it as an "allgemeine Rechtsinstitut." It has all the generality, all the elasticity of Contract. Anyone who wishes to know England, even though he has no care for the detail of Private Law, should know a little of our Trust.

We may imagine an English lawyer who was unfamiliar with the outlines of foreign law taking up the new Civil Code of Germany. "This", he would say, "seems a very admirable piece of work, worthy in every way of the high reputation of German jurists. But surely it is not a complete

¹ [Translation The legal institution known as the Trust, which originated out of certain requirements of the English land-law, has gradually developed into a general institution with a far-reaching and practical significance in all aspects of legal life, and, during this process, it has acquired, in a juridical sense, a remarkably refined and even a perfected form.]

² [See pp. 176, n. 1; 213, n. 1; 221, n. 1, *infra*.]

statement of German private law. Surely there is a large gap in it. I have looked for the Trust, but I cannot find it; and to omit the Trust is, I should have thought, almost as bad as to omit Contract." And then he would look at his book-shelves and would see stout volumes entitled "Law of Trusts", and he would open his "Reports" and would see trust everywhere, and he would remember how he was a trustee and how almost every man that he knew was a trustee.

Is it too bold of me to guess the sort of answer that he would receive from some German friend who had not studied England? "Well, before you blame us, you might tell us what sort of thing is this wonderful Trust of yours. You might at least point out the place where the supposed omission occurs. See, here is our general scheme of Private Law. Are we to place this precious *Rechtsinstitut* under the title *Sachenrecht* or should it stand under *Recht der Schuldverhältnisse*, or, to use a term which may be more familiar, *Obligationenrecht*?"

To this elementary question I know of no reply which would be given at once and as a matter of course by every English lawyer. We are told in one of our old books that in the year 1348 a certain English lawyer found himself face to face with the words *contra inhibitionem novi operis*, and therefore said, "en ceux parolx il n'y ad pas d'entendement". I am not at all sure that some men very learned in our law would not be inclined to give a similar answer if they were required to bring our Trust under any one of those rubrics which divide the German Code.

"Das englische Recht", says Dr Redlich, "kennt keine Unterscheidung von öffentlichem und privatem Recht." In the sense in which he wrote that sentence it is, I think, very true. Now-a-days young men who are beginning to study

our law are expected to read books in which there is talk about this distinction: the distinction between Private Law and Public Law. Perhaps I might say that we regard those terms as potential rubrics.¹ We think, or many of us think, that if all our law were put into a Code that pair of terms might conveniently appear in very large letters. But they are not technical terms. If I saw in an English newspaper that Mr A. B. had written a book on "Public Law", my first guess would be that he had been writing about International Law. If an English newspaper called Mr. C. D. a "publicist", I should think that he wrote articles in newspapers and magazines about political questions.

In the same sense it might be said that English Law knows no distinction between *Sachenrecht* and *Obligationenrecht*. It is needless to say that in England as elsewhere there is a great difference between owning a hundred gold coins and being owed a hundred pounds, and of course one of the first lessons that any beginner must learn is the apprehension of this difference. And then he will read in more or less speculative books—books of "General Jurisprudence"—about *iura in rem* and *iura in personam*, and perhaps will be taught that if English law were put into a Code, this distinction would appear very prominently.² But here again we have much rather potential rubrics than technical terms. The technical concepts with which the English lawyer will have to operate, the tools of his trade (if I may so speak), are of a different kind.

I have said this because, so it seems to me, the Trust could hardly have been evolved among a people who had

¹ [See Pollock, *First Book of Jurisprudence*, ed 6 (1929), chap iv; Keeton, *Principles of Jurisprudence* (1930), pp 179-272; Salmond, *Jurisprudence* (ed. 8, Manning), 1930, pp 539-544.]

² [On this point, see Hohfeld, *Fundamental Legal Conceptions* (1923).]

clearly formulated the distinction between a right *in personam* and a right *in rem*, and had made that distinction one of the main outlines of their legal system.¹ I am aware that the question how far this distinction was grasped in medieval Germany has been debated by distinguished Germanists, and I would not even appear to be intervening between Dr Laband and Dr Heusler. Still I cannot doubt who it is that has said the words that will satisfy the student of English legal history. In the thirteenth century Englishmen find a distinction between the *actio in rem* and the *actio in personam* in those Roman books which they regard as the representatives of enlightened jurisprudence. They try to put their own actions—and they have a large number of separate actions, each with its own name, each with its own procedure—under these cosmopolitan rubrics.² And what is the result? Very soon the result is that which Dr Laband has admirably stated:

Die Klage charakterisirt sich nach dem, was der Kläger fordert, wozu ihm der Richter verhelfen soll, nicht nach dem Grunde, aus welchem er es fordert. . . . Dagegen vernimmt man in den Quellen des Mittelalters eine Characterisirung der Klagen nach dem zu Grunde liegenden Rechtsverhältniss und insbesondere der Unterscheidung dinglicher und persönlicher Klagen. Der der römischen Bezeichnung *actio in rem* scheinbar entsprechende Ausdruck *clage up gut* [in England *real action*] hat gar keinen Zusammenhang mit der juristischen Natur des Rechts des Klägers, sondern er bezieht sich nur darauf, dass das bezeichnete Gut vom Kläger in Anspruch genommen wird.³

¹ [See Holdsworth, *History of English Law*, vol. IV, pp. 433-435.]

² [See Pollock and Maitland, *History of English Law*, ed. 2, vol. II, pp. 558-573, Maitland, *Equity: also the Forms of Action at Common Law* (1909), pp. 293-375 (*passim*).]

³ Laband, *Die Vermögensrechtlichen Klagen*, S. 5-7 [Translation. The action possesses the distinctive characteristic that it is based, not on the cause of action asserted by the plaintiff, but on that which he demands in his claim, or, in other words, his objective, and in respect of this the judge can help him. . . . In the medieval sources, on the contrary, there is

To this very day we are incumbered with those terms "real property" and "personal property" which serve us as approximate equivalents for *Liegenschaft* and *Fahrnis*. The reason is that in the Middle Age, and indeed until 1854, the claimant of a movable could only obtain a judgment which gave his adversary a choice between giving up that thing and paying its value. And so, said we, there is no *actio realis* for a horse or a book. Such things are not "realty"; they are not "real property". Whether this use of words is creditable to English lawyers who are living in the twentieth century is not here the question; but it seems to me exceedingly instructive.

For my own part if a foreign friend asked me to tell him in one word whether the right of the English *Destinatär* (the person for whom property is held in trust) is *dinglich* or *obligatorisch*, I should be inclined to say: "No, I cannot do that. If I said *dinglich*, that would be untrue. If I said *obligatorisch*, I should suggest what is false. In ultimate analysis the right may be *obligatorisch*; but for many practical purposes of great importance it has been treated as though it were *dinglich*, and indeed people habitually speak and think of it as a kind of *Eigenthum*."¹

absent any characterization, or classification, of actions in conformity with the legal relationships that lie at the basis of actions, and, more particularly, there is no distinction drawn between proprietary and personal actions, or, in other words, between actions *in rem* and *in personam*. The expression *clage up gut* [in England *real action*], which seems to correspond to the Roman term *actio in rem*, has no connection with the juridical nature of the plaintiff's right: on the contrary, it has reference only to the subject-matter of the plaintiff's claim]

¹ [An elaboration of Maitland's view that the right of the *cestui que trust* and other equitable rights are rights *in personam* will be found in his *Equity* (1909), pp. 111-155. For the view that equities are rights *in rem* see Scott, "The Nature of the Rights of the *Cestui que trust*" (*Columbia Law Review*, vol. xvii, pp. 269-290; and see Mr Justice Stone's reply, *Ibid.* pp. 467-501). On the controversy as to whether equitable rights

This, then, is the first point to which I would ask attention; and I do so because, so far as my knowledge goes, this point is hardly to be seen upon the surface of those books about English law that a foreign student is most likely to read.¹

I

Before going further I should like to transcribe some sentences from an essay in legal history which has interested me deeply: I mean "Die langobardische Treuhand und ihre Umbildung zur Testamentsvollstreckung" by Dr Alfred Schultze². I think that we may see what is at the root the same *Rechtsinstitut* taking two different shapes in different ages and different lands, and perhaps a German observer will find our Trust the easier after a short excursion into Lombardy.

To be brief, the Lombard cannot make a genuine testament. He therefore transfers the whole or some part of his property to a *Treuhand*, who is to carry out his instructions. Such instructions may leave greater or less liberty of action to the *Treuhand*. He may only have to transfer the things to some named person or some particular church, or, at the

are rights *in personam* or *in rem*, see Winfield, *Province of the Law of Tort* (1931), pp. 104-115; Hanbury, *Essays in Equity* (1934) and *Modern Equity* (1935), *passim*, Chafee and Simpson, *Cases in Equity* (1934), *s. v.* Equitable Estates, Equitable Interests, and the authorities cited by these writers. Both Lindley, L.J., in *Lister v. Stubbs* (1890), 45 Ch D. 1, at 15, and Lord Parker, in *Sinclair v. Brougham*, [1914] A.C. 398, at 441-442, regarded equitable rights as essentially real.]

¹ Heymann, in the sketch of English law that is included in the new edition of Holtzendorff's *Encyklopadie [der Rechtswissenschaft]*, ed 6 (1904), Bd. 1, S. 795-848], has declined to place our Trust under "Das Sachenrecht" or under "Forderungsrecht". It seems to me that in this as in many other instances he has shown a true insight into the structure of our system. [See also Heymann, "Trustee und Trustee-Company im deutschen Rechtsverkehr" (*Festschrift Heinrich Brunner zum siebenzigsten Geburtstag* (1910), S. 473-537), in which the juridical nature of the *cestui que trust's* right is considered.]

² Gierke's *Untersuchungen*, 1895.

other extreme, he may have an unlimited choice among the various means by which the soul of a dead man can be benefited. And now we will listen to Dr Schultze:

Das Treuhandverhältnis wird regelmässig begründet durch Vertrag zwischen dem letztwillig Verfügenden und dem von ihm zum Treuhänder Erkreuten. Dieser Vertrag stellt sich da, wo dem Treuhänder eine unmittelbare Gewalt über körperliche Sachen zugewiesen wird, häufig schon durch seine äussere Erscheinung als dinglicher Vertrag dar. Jene Sachen werden ihm *per cartam* zu dem gewollten Zweck übertragen. Dabei ist ausdrücklich von "tradere res" die Rede. . . . Einzelne Urkunden des Regesto di Farfa aus dem 11. Jahrhundert sprechen von der Investitur, die der Schenker dem Treuhänder ertheilt hat. Der Schenker tradirt an den Treuhänder nicht bloss das fragliche Grundstück, sondern auch, wie das nach einer langobardischen Rechtssitte bei Uebertragung dinglicher Rechte zu geschehen pflegt, seine eigene Erwerbsurkunde und diejenigen seiner Vorgänger, soweit sie sich in seinem Besitze befinden. Er wendet, wenn er ein Franke ist, die fränkischen Investitursymbole, *festuca notata*, Messer, Scholle, Zweig und Handschuh, an.¹

That is what I should have expected, an English reader

¹ [Translation. The relationship of *Treuhand* is normally established by contract between the testator and the person whom he has chosen as *Treuhand*. Where a direct control over corporeal things is conferred on the *Treuhand*, this contract frequently assumes the outward form of a contract which has the effect of transferring title, or, in other words, a conveyance. The things in question are transferred to him *per cartam* for the purpose that has been willed by the testator. Accordingly, the transaction is expressly referred to as 'tradere res'. . . . Certain documents of the *Regesto di Farfa*, dating from the eleventh century, speak of the 'investiture' which the donor has conferred upon the *Treuhand*. The donor transfers to the *Treuhand* not only the land, but also, in accordance with Lombard custom in cases where proprietary rights, rights *in rem*, are conveyed, both the document of title by which he had himself acquired the property and also those of his predecessors in title, so far as he has those in his possession. If the donor is a Frank, he uses the Frankish symbols of investiture, namely, *festuca notata*, knife, sod, branch of a tree, and glove.]

would say. The land is conveyed to the trustee. Of course he has *ein dingliches Recht*. He has *Eigenthum*. In the Middle Age he will be *feoffatus, vestitus et seisitus*; *seffé, vestu et seisi*. And naturally *die Erwerbsurkunden*, "the title deeds", are handed over to him. But we must return to Dr Schultze's exposition:

Der Treuhänder hat, wie soeben nachgewiesen ist, kraft Rechtsnachfolge ein eigenes dingliches Recht an den ihm zugewiesenen körperlichen Sachen. Welcher Art ist dieses Recht?

Wir haben zunächst einige Urkunden herauszuheben die keinen Zweifel daran lassen, dass hier der Treuhänder volles Eigenthum hat und in der Nutzniessung und Verfügun^g weder dinglich noch obligatorisch beschränkt ist. Es sind sämtlich Fälle, in denen der Geber die Sachen im Interesse seines Seelenheils nach freier Bestimmung des Treuhänders verwendet wissen will, sodass der letztere die Rolle des Dispensators im eigentlichen Sinne hat.¹

This, however, was not the common case. Generally what the *Treuhänder* has is not

die volle, freie Verfügungsmacht, sondern ein in bestimmten Schranken gebanntes Veräusserungsrecht. "Er nimmt hier im Verhältnis zu der oben geschilderten Rechtsstellung des Dispensators *optimo jure* eine Minderstellung ein. Aber worin besteht die Minderung? Es kann an dieser Stelle noch unerörtert bleiben, ob hier der Treuhänder obligatorisch beschränkt,

¹ [Translation As has just been proved, the *Treuhänder* has, by virtue of the fact that he is the legal successor, his own proprietary right in the corporeal things that have been transferred to him. What is the nature of this right? In the first place, it may be observed that we have certain documents which, judging from their tenor, leave us in no doubt that the *Treuhänder* has full ownership and is not restricted, either by the proprietary or by the contractual rights of other persons, in the free enjoyment and the free alienation of the property. These are all cases in which the donor, for the good of his soul, wills that the things shall be at the free disposition of the *Treuhänder*, who, in the true sense of the term, is to play the rôle of a dispenser.]

dem Geber oder dessen Erben oder sonst jemandem kraft Privatrechts obligatorisch verpflichtet ist. Es handelt sich hier vielmehr um die Frage, ob sein Recht ein dinglich gemindertes ist. Diese Frage ist zu bejahen.”¹

Dr Schultze then proceeds to expound the *Treuhänder's* right as

“Eigenthum, aber Eigenthum unter auflösender Bedingung, resolutiv bedingtes Eigenthum.” “Die Bedingung wurde existent wenn das Vergabungsobject dem gesetzten Zweck entfremdet oder der Zweck aus irgend einem Grunde unerfüllbar wurde. Die Folge war, dass das Eigenthum auf Seiten des Treuhänders erlosch und ohne jede Rücktradition dem Geber oder seinen Erben anfiel, die nun mit der dinglichen Klage (Eigenthumsklage) das Gut wieder in ihren Besitz bringen konnten.”²

Now that is not true of the English trustee. His right is not “resolutiv bedingtes Eigenthum”. I cite it, however, because of what follows. And what follows is highly instructive to those who would study English “equity”:

¹ [Translation the full, free power of disposition, but a right of alienation that is strictly bound within certain definite limits Here, in contrast with the legal position of the aforementioned *Treuhänder* who acts as a dispenser *optimo jure*, he occupies an inferior position. But what is the nature of this inferiority? We may, in the present place, leave unanswered the question whether in these cases the *Treuhänder* is limited from the view-point of obligations, that is, whether he is bound, by the private law of contract and delict, to the donor or his heirs or any other persons. The sole question at the moment is whether his right is restricted from the view-point of the ownership of property; and this question must be answered in the affirmative.]

² [Translation ownership, but yet ownership subject to a condition subsequent, a condition the fulfilment of which extinguishes the ownership. The condition became operative when the subject-matter of the gift, the property, was alienated contrary to the expressed purpose of the gift or when for any reason that purpose became impossible of realization. The result, in such circumstances, was that the ownership of the *Treuhänder* was extinguished; and, without any re-transfer, the subject-matter of the gift became the property of the donor or of his heirs, who could at once bring an action *in rem*, the proprietary action, and thereby obtain once more the possession of the thing.]

indeed some of Dr Schultze's sentences might have been written about the England of the fourteenth or the England of the twentieth century:

Die in der schwebenden Resolutivbedingung liegende dingliche Beschränkung des Eigenthums zu treuer Hand konnte gegen Dritterwerber Wirkung haben.... Diese Wirkung gegen Dritte setzte Offenkundigkeit (Publizität) jener dinglichen Beschränkung voraus, ein solches Mass von Offenkundigkeit, dass jeder Dritterwerber ohne Härte der Beschränkung unterworfen werden konnte, gleichgültig ob er im einzelnen Falle wirklich davon wusste oder nicht. Nun mögen auch die Lango-barden in Bezug auf Grundstücke früher eine volksrechtliche Form der Rechtsveränderung gekannt haben, welche den Act selbst im Augenblick seiner Vornahme den Volksgenossen in genügendem Masse kundthat (Vornahme auf dem Grundstück, in mallo). In der hier interessirenden Zeit war aber bei weitem vorherrschend und wurde jedenfalls bei den ordentlichen Vergabungen auf den Todesfall, auch denjenigen zu treuer Hand, ausschliesslich angewendet die Form der *traditio cartae*. Jede Rechtsveränderung die vermittelt *traditio cartae* stattgefunden hatte, war damit erschöpfend beurkundet.... Wer ein Grundstück in derivativer Weise erwerben wollte, erlangte daher über das Recht seines Auktors dadurch sichere Auskunft, dass er sich die carta vorweisen liess, die seinerzeit für den Auktor von dessen Vorgänger ausgestellt worden war. Es wurde sogar schon frühe üblich diese carta zur dauernden Sicherung der Legitimation sich mit dem Grundstück zusammen übereignen zu lassen. Und—das war nur eine selbstverständliche Folgerung—nicht blos die Erwerbsurkunde des Auktors, sondern auch die in dessen Hand befindlichen sämmtlichen Erwerbsurkunden seiner Vorgänger... Wer also von einem Treuhänder ein Grundstück erwerben wollte, erkannte sofort bei Prüfung der bis zu diesem herabreichenden Urkunden die Treuhänder-Eigenschaft des Gegenparts, die Bedingtheit seines Eigenthums. Kümmerte er sich aber der Rechtssitte zuwider nicht um die Erwerbsurkunden, so lag dann darin, dass die Bedingung, unvorhergesehen, auch gegen ihn

ihre Wirksamkeit entfaltete, keine Härte; der ihm etwa daraus erwachsende Schade traf ihn nicht unverschuldet.¹

But what have we here?—an Englishman might say—why, it is our “doctrine of constructive notice”, the key-stone which holds together the lofty edifice of trusts that we have raised. These Lombards, he would add, seem to have gone a little too far, and with a “resolutiv bedingtes Eigen-

¹ [Translation The limitation of the ownership *zu treuer Hand*, that is, the ownership of a *Treuhand*, by reason of the presence of a condition subsequent, could affect the title of third parties who acquired the property subject to that limitation. This result presupposed the notoriety (publicity) of that limitation of the proprietary right, a publicity of such character that every third party acquiring the property could without hardship be subjected to the limitation whether or not, in the individual case, he actually knew of the limitation. In respect of land it is indeed possible that at an early time the Lombards knew a folk-law form of transfer of rights whereby the act of transfer became sufficiently known to the members of the folk-community at the very moment when the act itself took place, that is, when the transfer was effected on the land itself or in court, *in mallo*. In the period with which we are concerned, however, the form of transfer almost always employed was that of *traditio cartae*, and in any event that was the form used in most cases of gift *mortis causa*, including gift *zu treuer Hand* . . . Every transfer of rights taking place by *traditio cartae* was, therefore, fully documented. . . . Whoever desired to acquire a piece of land by a derivative title obtained, accordingly, reliable information in regard to the rights of his transferor by demanding the production of the *carta* which had been executed for such transferor by his predecessor in title. At an early time it became in fact the usage that the *carta*, as a permanent proof of the legality of the title, was transferred along with the land itself. It was only a natural consequence of this usage that, in addition to the title-deed of the transferor himself, all the title-deeds of his predecessors, so far as in fact he had these in his possession, were also handed over to his successor in title. Whoever, therefore, desired to acquire a piece of land from a *Treuhand* knew at once, by an examination of the title-deeds, the limited nature of the *Treuhand*'s title as being one that was subject to a condition subsequent. In case, however, contrary to the customary procedure, the purchaser did not trouble about the documents of title, there was no hardship in the fact, so far as he was concerned, that the condition, although actually unknown to him, nevertheless affected his own title to the land. The harm which resulted to him was not undeserved.]

thum" we have not to do. But of course the *Eigenthum* of a piece of land is conveyed *per traditionem cartae*. And of course every prudent buyer of land will expect to see the *Erwerbsurkunden* which are in his Auktor's hand and to have them handed over to himself when the sale is completed. "Kümmerte er sich aber der Rechtsitte zuwider nicht um die Erwerbsurkunden", then there is no hardship if he is treated as knowing all that he would have discovered had he behaved as reasonable men behave. He has "constructive notice" of it all. "Der ihm etwa daraus erwachsende Schade trifft ihn nicht unverschuldet."

We must make one other excerpt before we leave Lombardy:

Indessen dies galt nur für Liegenschaften. Dem Fahrnisverkehr fehlten, ebenso wie in den übrigen germanischen Rechten, Vorkehrungen, die einem die Uebereignung beschränkenden Geding Publizität im Verhältniß zu Dritten verschafft hätten . . . Gewiss war der letztwillige Treuhänder auch in Ansehung der Mobilien durch die Zweckbestimmung rechtlich gebunden. Gewiss war er dinglich gebunden und hatte, wie an Grundstücken, nur resolutiv bedingtes Eigenthum. . . Hatte er die Mobilien aber bereits an die falsche Adresse befördert, so konnten die Erben des Donators gegen die dritten Besitzer, selbst wenn sie beim Erwerb die Sachlage überschaut hatten, nichts ausrichten. Der Grund, weswegen bei Liegenschaften alle Dritten der Wirkung des Gedings unterworfen wurden, war hier nicht gegeben . . . Waren die dem Treuhänder anvertrauten Mobilien durch Veruntreuung aus seinem Besitz gelangt und daher mit der dinglichen Rückforderungsklage "*Malo ordine possides*" nicht erreichbar, so trat an die Stelle eine persönliche Schadenersatzklage.¹

¹ [Translation. Thus, however, had validity only in the case of lands. In the case of transactions respecting chattels, as in other Germanic laws, there were no legal provisions that publicity would operate in such a way as to give effect, so far as third parties were concerned, to conditions

That does not go quite far enough, the English critic might say. If it could be proved that *der dritte Besitzer* actually knew of the "trust", it does not seem to me equitable that he should be able to disregard it. Also it does not seem to me clear that if the movables can no longer be pursued, the claim of the *Destinatar* must of necessity be a mere *personliche Schadenersatzklage* against the *Treuhänder*. But it is most remarkable to see our cousins the Lombards in these very ancient days seizing a distinction that is very familiar to us. The doctrine of "constructive notice" is not to be extended from land to movables.¹

restricting alienation. . . It is true that the testamentary *Treuhänder* was legally bound by the purpose expressed in the will in respect of chattels not less than in the case of lands. Certain it is, indeed, that he was himself bound so far as his own proprietary right was concerned; and, as in the case of land, he held the chattels by a right of ownership that was subject to a condition subsequent. . . Had he, however, transferred the chattels to the wrong persons, the heirs of the donor had no redress against such third parties, even when the latter had had notice of the conditional title of the *Treuhänder*. The reason which in the case of land subjected all third parties to the working of the condition was not present in the case of chattels. If the chattels entrusted to the *Treuhänder* reached the hands of third parties owing to a breach of the trust and were therefore not recoverable by the proprietary action '*Malo ordine possides*', then the beneficiaries could only bring a personal action for damages.]

¹ I am aware that Schultze's construction of the right of the Lombard *Treuhänder* as "resolutiv bedingtes Eigenthum" is open to dispute. See, for example, Caillemer, *Exécution Testamentaire* (Lyon, 1901), 351. A great deal of what M. Caillemer says about England in this excellent book seems to be both new and true. [Of the many published studies of the *Salman* or *Treuhänder* in Germanic law, attention may be drawn to Heusler's *Institutionen des Deutschen Privatrechts*, Bd. I (1885), S. 215-223, vol. II (1886), pp. 621-629, 652-654; Holmes, "Early English Equity" (*Collected Legal Papers* (1920), pp. 1-24), Pollock and Maitland, *History of English Law*, ed. 2 (1898), vol. II, p. 336, n. 1; Ames, *Lectures on Legal History* (1913), pp. 235-237; Holdsworth, *History of English Law*, vol. II, ed. 3, p. 97, vol. III, ed. 3, pp. 563-565, vol. IV, pp. 410-417, vol. VIII, p. 222.] [In *Joseph v. Lyons* (1884), 15 Q.B.D. 280, at 286, 287, both Cotton and Lindley, L.JJ., refused to apply the doctrine of constructive notice to moveables.]

II

We may now turn to the England of the fourteenth century, and in the first place I may be suffered to recall a few general traits of the English law of that time, which, though they may be well enough known, should be had in memory.

A deep and wide gulf lies between *Liegenschaft* and *Fahrnis*. It is deeper and wider in England than elsewhere. This is due in part to our rigorous primogeniture, and in part to the successful efforts of the Church to claim as her own an exclusive jurisdiction over the movables of a dead man, whether he has made a last will or whether he has died intestate. One offshoot of the ancient Germanic *Treuhandschaft* is already a well established and flourishing institute. The English last will is a will with executors. If there is no will or no executor, an "administrator" appointed by the bishop fills the vacant place. This will is no longer a *donatio post obitum* of the old kind, but under canonical influence has assumed a truly testamentary character. The process which makes the executor into the "personal representative" of the dead man, his representative as regards all but his *Liegenschaft*, is already far advanced. It is a process which in course of time makes the English executor not unlike a Roman *haeres*. In later days when the Trust, strictly so called, had been developed, these two institutes, which indeed had a common root, began to influence each other. We began to think of the executor as being for many purposes very like a trustee. However, the Trust, properly so called, makes its appearance on the legal stage at a time when the Englishman can already make a true testament of his movables, and at a time when the relationship between the executor

and the legatees is a matter with which the secular courts have no concern.

As to dealings with movables *inter vivos*, we cannot say that there is any great need for a new *Rechtsinstitut*. It is true that in the fourteenth century this part of our law is not highly developed. Still it meets the main wants of a community that knows little of commerce. We will notice in passing that the current language is often using a term which, when used in another context, will indicate the germ of the true Trust: namely the term that in Latin is *ad opus*, and in French *al oes*. Often it is said that one man holds goods or receives money *ad opus alterius*. But the Common Law is gradually acquiring such categories as deposit, mandate and so forth, which will adequately meet these cases. This part of our law is young and it can grow.

On the other hand, the land law is highly developed, and at every point it is stiffened by a complicated system of actions and writs (*brevia*). A wonderful scheme of "estates"—I know not whether that word can be translated—has been elaborated: "estates in fee simple, estates in fee tail, estates for life, estates in remainder, estates in reversion, etc."; and each "estate" is protected by its corresponding writ (*breve*). The judges, even if they were less conservative than they are, would find it difficult to introduce a new figure into this crowded scene. In particular we may notice that a "*resolutiv bedingtes Eigenthum*", which Dr Schultze finds in Lombardy, is very well known and is doing very hard work. All our *Pfandrecht* is governed by this concept. More work than it is doing it could hardly do.

Then in the second half of the fourteenth century we see a new Court struggling for existence. It is that Court of Chancery whose name is to be inseverably connected with

the Trust. The old idea that when ordinary justice fails, there is a reserve of extraordinary justice which the king can exercise is bearing new fruit. In civil (*privatrechtliche*) causes men make their way to the king's Chancellor begging him in piteous terms to intervene "for the love of God and in the way of charity". It is not of any defect in the material law that they complain; but somehow or another they cannot get justice. They are poor and helpless; their adversaries are rich and powerful. Sheriffs are partial; jurors are corrupt. But, whatever may be the case with penal justice, it is by no means clear that in civil suits there can be any room for a formless, extraordinary jurisdiction. Complaints against interference with the ordinary course of law were becoming loud, when something was found for the Chancellor to do, and something that he could do with general approval. I think it might be said that if the Court of Chancery saved the Trust, the Trust saved the Court of Chancery.

And now we come to the origin of the Trust. The Englishman cannot leave his land by will. In the case of land every germ of testamentary power has been ruthlessly stamped out in the twelfth century. But the Englishman would like to leave his land by will. He would like to provide for the weal of his sinful soul, and he would like to provide for his daughters and younger sons. That is the root of the matter.¹ But further, it is to be observed that the law is hard upon him at the hour of death, more especially if he is one of the great. If he leaves an heir of full age, there is a *relevium* to be paid to the lord. If he leaves an heir under age, the lord may take the profits of the land, perhaps for twenty

¹ I do not wish to deny that there were other causes for trusts; but comparatively they were of little importance. [The desire to evade the incidents of tenure seems to have been quite as much a cause for the spread of uses as the desire to make a will.]

years, and may sell the marriage of the heir. And then if there is no heir, the land falls back ("escheats") to the lord for good and all.

Once more recourse is had to the *Treuhänder*. The landowner conveys his land to some friends. They are to hold it "to his use (*a son oes*)". They will let him enjoy it while he lives, and he can tell them what they are to do with it after his death.

I say that he conveys his land, not to a friend, but to some friends. This is a point of some importance. If there were a single owner, a single *feoffatus*, he might die, and then the lord would claim the ordinary rights of a lord; *relevium*, *custodia haeredis*, *maritagium haeredis*, *escaeta*, all would follow as a matter of course. But here the Germanic *Gesamthandschaft*¹ comes to our help. Enfeoff five or perhaps ten friends *zu gesammtter Hand* ("as joint tenants"). When one of them dies there is no inheritance; there is merely accrescence. The lord can claim nothing. If the number of the *feoffati* is running low, then indeed it will be prudent to introduce some new ones, and this can be done by some transferring and retransferring. But, if a little care be taken about this matter, the lord's chance of getting anything is very small.

Here is a principle that has served us well in the past and is serving us well in the present. The "Gesamthandprincip" enables us to erect (if I may so speak) a wall of trustees which will not be always in need of repair. Some of those "charitable" trusts of which I am to speak hereafter will start with numerous trustees, and many years may pass away before any new documents are necessary. Two may die, three may die; but there is no inheritance; there is merely accrescence;

¹ [See Gierke, *Deutsches Privatrecht*, Bd. 1 (1895), S. 663-697.]

what was owned by ten men, is now owned by eight or by seven; that is all.¹

In a land in which Roman law has long been seriously studied it would be needless, I should imagine, for me to say that it is not in Roman books that Englishmen of the fourteenth century have discovered this device; but it may be well to remark that any talk of *fides*, *fiducia*, *fideicommissum* is singularly absent from the earliest documents in which our new *Rechtsinstitut* appears. The same may be said of the English word "trust". All is being done under the cover of *ad opus*. In Old French this becomes *al oes*, *al ues* or the like. In the degraded French of Stratford-atte-Bow we see many varieties of spelling. It is not unusual for learned persons to restore the Latin *p* and to write *oeps* or *eops*. Finally in English mouths (which do not easily pronounce a French *u*) this word becomes entangled with the French *use*. The English for "ad opus meum" is "to my use".

It is always interesting, if we can, to detect the point at which a new institute or new concept enters the field of law. Hitherto the early history of our "feoffments to uses" has been but too little explored: I fear that the credit of thoroughly exploring it is reserved for some French or German scholar. However, there can be little doubt that the new practice first makes its appearance in the highest and noblest circles of society. I will mention one early example. The "feoffor" in this case is John of Gaunt, son of a King of England and himself at one time titular King of Castile. Among the persons who are to profit by the trust is his son Henry who will be our King Henry IV.

¹ Our "joint ownership" is not a very strong form of *Gesamthandschaft*. One of several "joint owners" has a share that he can alienate *inter vivos*; but he has nothing to give by testament.

On the 3rd of February, 1399, "old John of Gaunt, time-honoured Lancaster" makes his testament.¹ Thereby he disposes of his movables and he appoints seventeen executors, among whom are two bishops and three earls. To this instrument he annexes a "Codicillus" (as he calls it) which begins thus:

Item, la ou jco Johan filz du Roy d'Engleterre, Duc de Lancastre, ay purchacez et fait purchacer a mon cops diverses seigneuries, manoirs, terres, tenementz, rentz, services, possessions, reversiones et advoesons des benefices de seint esglises, ove leur appurtenances. . . si ay je fait faire cest cedula annexee a cest mon testament, contenant ma darrein et entier volente touchant les suisdites seigneuries, manoirs, terres, tenementz, rentz, services, possessions, reversiones, avoesons ove leur appurtenances.

He then says what is to be done with these lands. Thus for example:

Item je vueille que mon trescher Batchelor Monsieur Robert Nevyll, William Gascoigne, mes treschers esquiers Thomas de Radecliff et William Ketryng, et mon trescher clerk Thomas de Longley, qⁱ de ma ordennance sont enfeffez en [le] manoir de Bernolswyk en [le] Counte d'Everwyk facent annuelement paier a mes executours. . .

To be brief, certain sums of money are to be paid to the executors, who will apply them for pious purposes, and

adonques soit estat fait du dit manoir a mon trezaimc filz aizne Henry duc de Hereford et a ses heirs de son corps; et par defaute d'issue du ditz Henry, la remeindre² a mez droiz heirs.

¹ *Testamenta Eboracensia* (Surtees Society), vol. 1, p. 223. In the same volume (p. 113) an earlier example will be found, the will of William, Lord Latimer (13th April, 1381). See also the will of the Earl of Pembroke (5th May, 1372), and the will of the Earl of Arundel (4 March, 1392-1393) in J. Nichols, *Royal Wills* (1780), pp. 92, 120.

² This is an *Anwartschaft*.

Then at the end stand these words:

Item je vueille que toutz autres seigneuries, manoirs, terrez. . .
 ove leurs appurtenances, a mon eops purchasez et remaignantz
 uncore es mains des enfeffez par moi a ce ordennez, soient apres
 ma mort (si je ne face autre ordenance en ma vie) donnez a
 l'avantdit Thomas mon filz a avoir a lui et a ses heirs de son corps
 issantz; et par defaute d'issue de son corps, la remeindre a l'avantdit
 Johan son frere et a sez heirs de son corps issantz; et par defaute
 d'issue de dit Johan, la remeindre a la susdite Johanne leur seur
 et a ses heirs de son corps issantz; et par defaute d'issue de la dite
 Johanne, la remeindre a mez drois heirs qui serront heirs del
 heritage de Lancastre: veuillantz toutez voies que toutes icestes
 mes volentes ordenances et devys en ceste cedula compris, soient
 tout accomplez par ceulx q'en averont l'estat et pover, et par
 l'avys ordenance et conseil de gentz de loy, en la plus sure manere
 que en se purra ordenner.

We see what the situation is. The Duke has transferred various lands to various parties of friends and dependants. When he feels that death is approaching, he declares what his wishes are, and they fall under two heads. He desires to increase the funds which his executors are to expend for the good of his soul, and he desires also to make some provision for his younger and (so it happens) illegitimate children.

Apparently the new fashion spread with great rapidity. We have not in print so many collections of wills as we ought to have; but in such as have been published the mention of land held to the testator's "use" begins to appear somewhat suddenly in the last years of the fourteenth century and thenceforward it is common. We are obliged to suppose that the practice had existed for some time before it found legal protection. But that time seems to have been short. Between 1396 and 1403 the Chancellor's intervention had been demanded.¹

¹ *Select Cases in Chancery* (Selden Society), p. 69.

It would have been very difficult for the old Courts, "the Courts of Common Law", to give any aid. As already said, the system of our land law had become prematurely osseous. The introduction without Act of Parliament of a new *dingliches Recht*, some new modification of *Eigenthum*, would have been impossible. In our documents we see no attempt to meet the new case by an adaptation of the terms that are employed when there is to be a "resolutiv bedingtes Eigenthum".¹ And on the other hand we see a remarkable absence of those phrases which are currently used when an *obligatorischer Vertrag* is being made. No care is taken to exact from the *Treuhand* a formal promise that the trust shall be observed. From the first men seem to feel that a contract binding the trustees to the author of the trust, binding the *feoffati* to the *feoffator*, is not what is wanted.

Moreover, it was probably felt, though perhaps but dimly felt, that if once the old Courts began to take notice of these arrangements a great question of policy would have to be faced. The minds of the magnates were in all probability much divided. They wanted to make wills. But they were "lords", and it was not to their advantage that their "tenants" should make wills. And then there was one person in England who had much to gain and little to lose by a total suppression of this novelty. That person was the King, for he was always "lord" and never "tenant". An open debate about this matter would have made it evident that if landowners, and more especially the magnates, were to make wills, the King

¹ This is not quite true. A few attempts were made to attain the end by means of "conditions", and Edward III himself made, so it seems, some attempt of this kind. But the mechanism of a "condition" would have been very awkward. [See Pollock and Maitland, *History of English Law*, ed. 2, vol II, pp 232, 237; Holdsworth, *History of English Law*, vol. III (ed. 3), pp. 102-105, vol IV, pp. 415-417.]

would have a fair claim for compensation. Even medieval Englishmen must have seen that if the King could not "live of his own", he must live by taxes. The State must have a revenue. Perhaps we may say, therefore, that the kindest thing that the old Courts could do for the nascent Trust was to look the other way. Certain it is that from a very early time some of our great lawyers were deeply engaged in the new practice. We have seen a certain William Gascoigne as a *Treuhänder* for John of Gaunt. He was already a distinguished lawyer. He was going to be Chief Justice of England and will be known to all Shakespeare's readers. Thomas Littleton (ob. 1481) when he expounds the English land law in a very famous book will have hardly a word to say about "feoffments to uses"; but when he makes his own will he will say, "Also I wulle that the feoffees to myn use [of certain lands] make a sure estate unto Richard Lyttelton my sonne, and to the heirs of his bodie."

When we consider where the king's interest lay, it is somewhat surprising that the important step should be taken by his first minister, the Chancellor. It seems very possible, however, that the step was taken without any calculation of loss and gain.¹ We may suppose a scandalous case. Certain persons have been guilty of a flagrant act of dishonesty, condemned by all decent people. Here is an opportunity for the intervention of a Court which has been taught that it is not to intervene where the old Courts of Common Law offer a remedy. And as with politics, so with jurisprudence.

¹ It may have been of decisive importance that at some critical moment the King himself wanted to leave some land by will. Edward III had tried ineffectually to do this. In 1417 King Henry V had a great mass of land in the hands of feoffees (including four bishops, a duke and three earls) and made a will in favour of his brothers. See Nichols, *Royal Wills*, 236.

I doubt whether in the first instance our Chancellor troubled his head about the "juristic nature" of the new *Rechtsinstitut* or asked himself whether the new chapter of English law that he was beginning to write would fall under the title *Sachenrecht* or under the title *Obligationenrecht*. In some scandalous case he compelled the trustees to do what honesty required. Men often act first and think afterwards.

For some time we see hesitation at important points. For example, we hear a doubt whether the trust could be enforced against the heir of a sole trustee. As already said, efforts were generally made to prevent this question arising: to prevent the land coming to the hands of one man. So long as the wall was properly repaired, there would be no inheriting. But on the whole our new *Rechtsinstitut* seems soon to find the line of least resistance and to move irresistibly forward towards an appointed goal.

III

We are to speak of the rights of the *Destinatar*, or in our jargon *cestui que trust*.¹ Postponing the question against whom those rights will be valid, we may ask how those rights are treated within the sphere of their validity. And we soon see that within that sphere they are treated as *Eigenthum* or as some of those modalities of *Eigenthum* in which our medieval land law is so rich. The *Destinatar* has an "estate", not in the land, but in "the use". This may be "an estate in fee simple, an estate for life, an estate in remainder", and so forth. We might say that "the use" is turned into an incorporeal thing, an incorporeal piece of land; and in this incorporeal thing you may have all those

¹ At starting the phrase would be *cestui a qui oes le seffement fut fait*. This degenerates into *cestui que use*; and then *cestui que trust* is made.

rights, those "estates", which you could have in a real, tangible piece of land. And then in course of time movable goods and mere *Forderungen* are held in trust, and we get, as it were, a second edition of our whole *Vermögensrecht*: a second and in some respects an amended edition. About all such matters as inheritance and alienation, the Chancellor's Equity, so we say, is to follow the Common Law.

Another point was settled at an early date. The earliest trust is in the first instance a trust for the author of the trust; he is not only the author of the trust but he is the *Destinatär*. But it is as *Destinatar* and not as contracting party that he obtains the Chancellor's assistance. The notion of contract is not that with which the Chancellor works in these cases: perhaps because the old Courts profess to enforce contracts. It is the destinator who has the action, and he may be a person who was unborn when the trust was created. This is of importance for, curiously enough, after some vacillation our Courts of Common Law have adopted the rule that in the case of a "pactum in favorem tertii" the *tertius* has no action.¹

But a true ownership, a truly *dingliches Recht*, the destinator cannot have. In the common case a full and free and unconditioned ownership has been given to the trustees. Were the Chancellor to attempt to give the destinator a truly *dingliches Recht*, the new Court would not be supplementing the work of the old Courts, but undoing it.

This brings us to the vital question, "Against whom can the destinator's right be enforced"? We see it enforced against the original trustees. Then after a little while we see it enforced against the heir of a trustee who has inherited the land; and, to speak more generally, we see it enforced against

¹ [See Corbin, "Contracts for the Benefit of Third Persons" (*Law Quarterly Review*, vol. XLVI, p. 12).]

all those who by succession on death fill the place of a trustee. But what of a person to whom in breach of trust the trustee conveys the land? Such a person, so far as the old Courts can see, acquires ownership: full and free ownership: nothing less. The question is whether, although he be owner, he can be compelled to hold the land in trust for the destinatory. We soon learn that all is to depend upon the state of his "conscience" at the time when he acquired the ownership. It is to be a question of "notice". This we are told already in 1471. "If my trustee conveys the land to a third person who well knows that the trustee holds for my use, I shall have a remedy in the Chancery against both of them: as well against the buyer as against the trustee: for in conscience he buys my land."¹

That is a basis upon which a lofty structure is reared. The concept with which the Chancellor commences his operations is that of a guilty conscience. If any one knowing that the land is held upon trust for me obtains the ownership of it, he does what is unconscientious and must be treated as a trustee for me. In conscience the land is "ma terre".

This being established, no lawyer will be surprised to hear that the words "if he knew" are after a while followed by the words "or ought to have known", or that a certain degree of negligence is coordinated with fraud. By the side of "actual notice" is placed "constructive notice".

And now we may refer once more to what Dr Schultze has said of the Lombards:

Nun mögen auch die Langobarden in Bezug auf Grundstücke

¹ Year Book, Trin 11 Edw. IV, f. 8. "Si mon feoffee de trust etc. enfeoffa un autre, que conust bien que le feoffor rien ad forsque a mon use, subpoena girra vers ambideux scil auxibien vers le feoffee come vers le feoffor pur ceo que en conscience il purchase ma terre."

früher eine volksrechtliche Form der Rechtsveränderung gekannt haben, welche den Act selbst im Augenblick seiner Vornahme den Volksgenossen in genügender Masse kundthat. In der hier interessirenden Zeit war aber bei weitem vorherrschend und wurde jedenfalls bei den ordentlichen Vergabungen auf den Todesfall, auch denjenigen zu treuer Hand, ausschliesslich angewendet die Form der *traditio cartae*.¹

With some modifications, which it would be long to explain and which for our purpose are not very important, these words are true of the England in which the Trust was born and are yet truer of modern England. The buyer before he pays the price and obtains the land will investigate the seller's title. He will ask for and examine the *Urkunden* ("deeds") which prove that the seller is owner, and unless the contract is specially worded, the seller of land is under a very onerous duty of demonstrating his ownership. This *Rechtssitte*, as Dr Schultze calls it, enabled the Chancery to set up an external and objective standard of diligence for purchasers of land: namely the conduct of a prudent purchaser. The man who took a conveyance of land might be supposed to know (and he had "constructive notice") of all such rights of destinatories as would have come to his knowledge if he had acted as a prudent purchaser would in his own interest have acted. "Kümmerte er sich aber der Rechtssitte zuwider nicht um die Erwerbsurkunden...der ihm etwa daraus erwachsende Schade traf ihn nicht unver-

¹ [Translation In respect of land it is indeed possible that at an early time the Lombards knew a folk-law form of transfer of rights whereby the act of transfer became sufficiently known to the members of the folk-community at the very moment when the act itself took place. In the period with which we are concerned, however, the form of transfer almost always employed was that of *traditio cartae*, and in any event that was the form used in most cases of gift *mortis causa*, including gift *zu treuer Hand*.]

schuldet." Quite so. Such a purchaser himself became a trustee. We might say that he became a trustee *ex delicto vel quasi*. If not guilty of *dolus*, he was guilty of that sort of negligence which is equivalent to *dolus*. He had shut his eyes in order that he might not see.

A truly *dingliches Recht* the Chancellor could not create. The trustee is owner. It had to be admitted that if the purchaser who acquired ownership from the trustee was, not only ignorant, but excusably ignorant of the rights of the destinator, then he must be left to enjoy the ownership that he had obtained. If he had acted as a prudent purchaser, as the reasonable man behaves, then "his conscience was unaffected" and the Chancellor's Equity had no hold upon him. But the Court of Chancery screwed up the standard of diligence ever higher and higher. The judges who sat in that Court were experts in the creation of trusts. We might say that they could smell a trust a long way off, and they were apt to attribute to every reasonable man their own keen scent. They were apt to attribute to him a constructive notice of all those facts which he would have discovered if he had followed up every trail that was suggested by those *Erwerbsurkunden* that he had seen or ought to have seen.

Of late years there has been some reaction in favour of purchasers. The standard, we are told, is not to be raised yet higher and perhaps it is being slightly lowered. Still it is very hard for any man to acquire land in England without acquiring "constructive notice" of every trust that affects that land. I might almost say that this never happens except when some trustee has committed the grave crime of forgery.¹

¹ [Recent property legislation has modified the doctrine of constructive notice.]

It remains to be observed that a strong line was drawn in this as in other respects between the *entgeltliche* and the *unentgeltliche Handlung*. A man who acquired the land from the trustee without giving "value" for it was bound by the trust, even if at the time of acquisition he had no notice of it. It would be "against conscience" for him to retain the gift after he knew that it had been made in breach of trust. It was only the "purchaser for value" who could disregard the claims of the destinatory.

Also we see it established that the creditors of the trustee cannot exact payment of their debts out of the property that he holds in trust. And on the other hand the creditors of the destinatory can regard that property as part of his wealth. If we suppose that there is bankruptcy on both sides, this property will be divided, not among the creditors of the trustee but among the creditors of the destinatory. This, it need hardly be said, is an important point.

To produce all these results took a long time. The *Billigkeitsrecht* of the new Court moved slowly forward from precedent to precedent: but always towards one goal: namely, the strengthening at every point of the right of the destinatory. In our present context it may, for example, be interesting to notice that at one time it was currently said that the right of the destinatory could not be enforced against a corporation which had acquired the land, for a corporation has no conscience, and conscience is the basis of the equitable jurisdiction. But this precious deduction from the foreign *Fiktionstheorie* was long ago ignored, and it is the commonest thing to see a corporation as *Treuhand*.¹

¹ [The elimination of the rule, as applied to the modern trust, that the medieval use cannot be enforced against a corporation, because it has no conscience, illustrates an important difference between the use and the trust. See Holdsworth, *History of English Law*, vol. vii, p. 146.]

But perhaps the evolution of this *Rechtsinstitut* may be best seen in another quarter. To a modern Englishman it would seem plainly unjust and indeed intolerable that, if a sole trustee died intestate and without an heir, the rights of the destinatory should perish. And on the other hand it might seem to him unnatural that if the destinatory, "the owner in equity", of this land died intestate and without an heir, the trustee should thenceforward hold the land for his own benefit. But the Court, working merely with the idea of good conscience, could not attain what we now regard as the right result. In the first case (trustee's death) the land fell back (escheat) to the King or to some other feudal lord. He did not claim any right through the trustee or through the creator of the trust, and equity had no hold upon him, for his conscience was clean.¹ In the second case (destinatory's death), the trust was at an end. The trustee was owner, and there was no more to be said. The King or the feudal lord was not a destinatory. In both respects, however, modern legislation has reversed these old rules.

Thus we come by the idea of an "equitable ownership" or "ownership in equity". Supposing that a man is in equity the owner ("tenant in fee simple") of a piece of land, it makes very little difference to him that he is not also "owner at law" and that, as we say, "the legal ownership is outstanding in trustees". The only serious danger that he is incurring is that this "legal ownership" may come to a person who acquires it *bona fide*, for value, and without actual or constructive notice of his rights. And that is an uncommon event. It is an event of which practical lawyers must often be thinking when they give advice or compose documents;

¹ The law about this matter had become somewhat doubtful before Parliament intervened.

but still it is an uncommon event. I believe that for the ordinary thought of Englishmen "equitable ownership" is just ownership pure and simple, though it is subject to a peculiar, technical and not very intelligible rule in favour of *bona fide* purchasers.¹ A professor of law will tell his pupils that they must not think, or at any rate must not begin by thinking, in this manner. He may tell them that the destinator's rights are in history and in ultimate analysis not *dinglich* but *obligatorisch*: that they are valid only against those who for some special reason are bound to respect them. But let the Herr Professor say what he likes, so many persons are bound to respect these rights that practically they are almost as valuable as if they were *dominium*.²

This is not all. Let us suppose that the thing that is held upon trust passes into the hands of one against whom the trust cannot be enforced. This may happen with land; it may more easily happen in the case of movables, because (for the reason that Dr Schultze has given) the Court could not extend its doctrine of constructive notice to traffic in movables. Now can we do no more for our destinator than give him a mere *Schadenersatzklage* against the dishonest trustee? That will not always be a very effectual remedy. Dishonest people are often impecunious, insolvent people.

The Court of Chancery managed to do something more for its darling. What it did I cannot well describe in abstract

¹ [On the equity of redemption as an equitable estate, see Turner, *The Equity of Redemption* (1931), pp. 65-87.]

² Some writers even in theoretical discussion have allowed themselves to speak of the destinator as "the real owner", and of the trustee's ownership as "nominal" and "fictitious". See Salmond, *Jurisprudence*, p. 278 [ed. 8 (1930), pp. 284-288]. But I think it is better and safer to say with a great American teacher that "Equity could not create rights *in rem* if it would, and would not if it could". See Langdell, *Harvard Law Review*, vol. 1, p. 60. [See the authorities cited p. 146, n. 1, *supra*.]

terms, but perhaps I may say that it converted the "trust fund" into an incorporeal thing, capable of being "invested" in different ways. Observe that metaphor of "investment". We conceive that the "trust fund" can change its dress, but maintain its identity. To-day it appears as a piece of land; tomorrow it may be some gold coins in a purse; then it will be a sum of Consols; then it will be shares in a Railway Company, and then Peruvian Bonds. When all is going well, changes of investment may often be made; the trustees have been given power to make them. All along the "trust fund" retains its identity. "*Pretium succedit in locum rei*," we might say, "*et res succedit in locum pretii*." But the same idea is applied even when all is not going well. Suppose that a trustee sells land meaning to misappropriate the price. The price is paid to him in the shape of a bank-note which is now in his pocket. That bank-note belongs "in equity" to the destinatories. He pays it away as the price of shares in a company; those shares belong "in equity" to the destinatories. He becomes bankrupt; those shares will not be part of the property that is divisible among his creditors; they will belong to the destinatories. And then, again, if the trustee mixes "trust money" with his own money, we are taught to say that, so long as this is possible, we must suppose him to be an honest man and to be spending, not other people's money, but his own. This idea of a "trust fund" that can be traced from investment to investment does not always work very easily, and for my own part I think it does scanty justice to the claims of the trustee's creditors. But it is an important part of our system.¹ The Court of Chancery

¹ [On following trust property, see *Re Hallett's Estate* (1880), 13 Ch.D. 696, and later cases. Consult Hanbury, *Essays in Equity* (1934) and *Modern Equity* (1935), *passim*.]

struggled hard to prevent its darling, the destinatory, from falling to the level of a mere creditor. And it should be understood that he may often have more than one remedy. He may be able both to pursue a piece of land and to attack the trustee who alienated it. It is not for others to say in what order he shall use his rights, so long as he has not got what he lost or an equivalent for it.

To complete the picture we must add that a very high degree not only of honesty but of diligence has been required of trustees. In common opinion it has been too high, and of late our legislature, without definitely lowering it, has given the courts a discretionary power of dealing mercifully with honest men who have made mistakes or acted unwisely. The honest man brought to ruin by the commission of "a technical breach of trust", brought to ruin at the suit of his friend's children, has in the past been only too common a figure in English life. On the other hand, it was not until lately that the dishonest trustee who misappropriated money or other movables could be treated as a criminal. Naturally there was a difficulty here, for "at law" the trustee was owner, and a man cannot be guilty of stealing what he both owns and possesses. But for half a century we have known the criminal breach of trust, and, though we do not call it theft, it can be severely punished.

Altogether it is certainly not of inadequate protection that a foreign jurist would speak if he examined the position of our destinatory. Rather I should suppose that he would say that this lucky being, the spoilt child of English jurisprudence, has been favoured at the expense of principles and distinctions that ought to have been held sacred. At any rate, those who would understand how our "unincorporate bodies" have lived and flourished behind a hedge of trustees

should understand that the right of the destinator, though we must not call it a true *dominium rei*, is something far better than the mere benefit of a promise.

IV

To describe even in outline the various uses to which our Trust has been put would require many pages. As we all know, when once a *Rechtsinstitut* has been established, it does not perish or become atrophied merely because its original function becomes unnecessary. Trusts may be instituted because landowners want to make testaments but cannot make testaments. A statute gives them the power to make testaments; but by this time the trust has found other work to do and does not die. There is a long and very difficult story to be told about the action of Henry VIII. He was losing his feudal revenue and struck a blow which did a good deal of harm, and harm which we feel at the present day. But in such a survey as the present what he did looks like an ineffectual attempt to dam a mighty current. The stream sweeps onward, carrying some rubbish with it.¹

Soon the Trust became very busy. For a while its chief employment was "the family settlement". Of "the family settlement" I must say no word, except this, that the trust thus entered the service of a wealthy and powerful class: the class of great landowners who could command the best legal advice and the highest technical skill. Whether we like the result or not, we must confess that skill of a very high order was applied to the construction of these "settlements" of great landed estates. Everything that foresight could do was done to define the duties of the trustees. Sometimes they

¹ [The Statute of Uses, 27 Hen. VIII, c. 10, was repealed by the Law of Property Act, 1925, 15 Geo. V, c. 20, Sched. 7.]

would be, as in the early cases, the mere depositaries of a nude *dominium*, bound only to keep it until it was asked for. At other times they would have many and complex duties to perform and wide discretionary powers. And then, if I may so speak, the "settlement" descended from above: descended from the landed aristocracy to the rising monied class, until at last it was quite uncommon for any man or woman of any considerable wealth to marry without a "marriage settlement". Trusts of money or of invested funds became as usual as trusts of land. It may be worthy of notice that this was, at least in part, the effect of an extreme degree of testamentary freedom. Our law had got rid of the *Pflichttheil* altogether, and trusts in favour of the children of the projected marriage were a sort of substitute for it. However, in this region, what we have here to notice is that the trust became one of the commonest institutes of English law. Almost every well-to-do man was a trustee; and though the usual trusts might fall under a few great headings, still all the details (which had to be punctually observed) were to be found in lengthy documents; and a large liberty of constructing unusual trusts was both conceded in law and exercised in fact. To classify trusts is like classifying contracts.

I am well aware that all this has its dark side, and I do not claim admiration for it. But it should not escape us that a very wide field was secured for what I may call social experimentation. Let me give one example. In 1882 a revolutionary change was made in our *eheliches Güterrecht*. But this was no leap in the dark. It had been preceded by a prolonged course of experimentation. Our law about this matter had become obscure at an early time, and, especially as regards *Fahrnis*, was extremely unfavourable to the wife. There was no *Gemeinschaft*. The bride's movables became the husband's;

if the wife acquired, she acquired for her husband. Now *eheliches Güterrecht*, when once it has taken a definite shape, will not easily be altered. Legislators are not easily persuaded to touch so vital a point, and we cannot readily conceive that large changes can be gradually made by the practice of the courts. You cannot transfer ownership from the husband to the wife by slow degrees.

But here the Trust comes to our help. We are not now talking of ownership strictly so called. Some trustees are to be owners. We are only going to speak of their duties. What is to prevent us, if we use words enough, from binding them to pay the income of a fund into the very hands of the wife and to take her written receipt for it? But the wedge was in, and it could be driven home. It was a long process; but one successful experiment followed another. At length the time came when four well-tested words ("for her separate use") would give a married woman a *Vermogen* of which she was the complete mistress "in equity"; and if there was no other trustee appointed, her husband had to be trustee. Then, rightly or wrongly we came to the conclusion that all this experimentation had led to satisfactory results. Our law of husband and wife was revolutionized. But great as was the change, it was in fact little more than the extension to all marriages of rules which had long been applied to the marriages of the well-to-do.¹

But the liberty of action and experimentation that has been

¹ [The "protective trusts" of English law and the "spendthrift trusts" in the law of some of the states of the American Union are more recent illustrations of what Maitland has described as "social experimentation". See Keeton, *Law of Trusts* (1934), pp. 112-115, 259; Scott, "Protective Trusts" (*Harvard Legal Essays* (1934), pp. 419-432); Costigan, "Those Protective Trusts which are miscalled 'Spendthrift Trusts' Reexamined" (*Legal Essays in Tribute to Orrin Kip McMurray*, edited by Max Radin and A. M. Kidd (1935), pp. 85-116). See the Trustee Act, 1925, s. 33.]

secured to us by the Trust is best seen in the freedom with which from a remote time until the present day *Anstalten* and *Stiftungen* of all sorts and kinds had been created by Englishmen.

Whether our law knows or ever has known what foreign lawyers would call a *selbststandige Anstalt* might be a vexed question among us, if we had—but we have not—any turn for juristic speculation. For some centuries we have kept among our technical notions that of a “corporation sole”. Applied in the first instance to the parson of a parish church (*rector ecclesiae parochialis*) we have since the Reformation applied it also to bishops and to certain other ecclesiastical dignitaries. We have endeavoured to apply it also—much to our own disadvantage, so I think,—to our King or to the Crown; and in modern times we have been told by *Gesetz* that we ought to apply it to a few officers of the central government, e.g. the Postmaster-General. It seems to me a most unhappy notion: an attempt at personification that has not succeeded. Upon examination, our “corporation sole” turns out to be either a natural man or a juristic abortion: a sort of hybrid between *Anstalt* and *Mensch*. Our medieval lawyers were staunch realists. They would attribute the ownership of land to a man or to a body of men, but they would not attribute it to anything so unsubstantial as a personified *ecclesia* or a personified *dignitas*. Rather they would say that when the rector of a parish church died there was an interval during which the *gleba ecclesiae* was *herrenlos*. The *Eigenthum*, they said, was “in nubibus”, or “in gremio legis”; it existed only “en abéance”; that is “in spe”. And I do not think that an English lawyer is entitled to say that this is not our orthodox theory at the present day. Practically the question is of no importance. For a long time past this

part of our law has ceased to grow, and I hope that we are not destined to see any new "corporations sole".¹

We have had no need to cultivate the idea of a *selbstständige Anstalt*, because with us the *unselbstständige Anstalt* has long been a highly developed and flourishing *Rechtsinstitut*. I believe that the English term which most closely corresponds to the *Anstalt* or the *Stiftung* of German legal literature is "a charity". It is very possible that our concept of "a charity" would not cover every *Anstalt* or *Stiftung* that is known to German lawyers: but it is and from a remote time has been enormously wide. For example, one of our courts had lately to decide that the mere encouragement of sport is not "charity". The annual giving of a prize to be competed for in a yacht-race is not a "charitable" purpose. On the other hand, "the total suppression of vivisection" is a charitable purpose, though it implies the repeal of an Act of Parliament, and though the judge who decides this question may be fully persuaded that this so-called "charity" will do much more harm than good. English judges have carefully refrained from any exact definition of a "charity"; but perhaps we may say that any *Zweck* which any reasonable person could regard as directly beneficial to the public or to some large and indefinite class of men is a "charitable" purpose. Some exception should be made of trusts which would fly in the face of morality or religion; but judges who were themselves stout adherents of the State Church have had to uphold as "charitable", trusts which involved the maintenance of Catholicism, Presbyterianism, Judaism.

¹ [See Maitland, "The Corporation Sole", pp 73-103, *supra*; "The Crown as Corporation", pp 104-127, *supra*. The reason why the theory that the King was a corporation sole failed was that it never had, owing to the constitutional controversies, a fair chance. See Holdsworth, *History of English Law*, vol. ix, p. 7, n. 2; and compare *op. cit.*, vol. iii (ed. 3), pp. 481-482.]

To the enforcement of charitable trusts we came in a very natural way and at an early date. A trust for persons shades off, we might say, into a trust for a *Zweck*. We are not, it will be remembered, speaking of true ownership. Ownership supposes an owner. We cannot put ownership into an indefinite mass of men; and, according to our English ideas, we cannot put ownership into a *Zweck*. I should say that there are vast masses of *Zweckvermögen* in England, but the owner is always man or corporation. As regards the trust, however, transitions are easy. You may start with a trust for the education of my son and for his education in a particular manner. It is easy to pass from this by slow degrees to the education of the boys of the neighbourhood, though in the process of transition the definite destination may disappear and leave only a *Zweck* behind him.¹

At any rate, in 1601 there was already a vast mass of *Zweckvermögen* in the country; a very large number of *unselbstständige Stiftungen* had come into existence. A famous *Gesetz* of that year became the basis of our law of Charitable Trusts, and their creation was directly encouraged. There being no problem about personality to be solved, the courts for a long while showed every favour to the authors of "charitable" trusts. In particular, it was settled that where there was a "charitable" *Zweck* there was to be no trouble about "perpetuity". The exact import of this remark could not be explained in two or three words. But, as might be supposed, even the Englishman, when he is making a trust of the ordinary private kind, finds that the law sets some limits to his power of bestowing benefits upon a long series of unborn destinatories; and these limits are formulated in

¹ In the oldest cases the Court of Chancery seems to enforce the "charitable" trust upon the complaint of anyone who is interested, without requiring the presence of any representatives of the State

what we know as "the rule against perpetuities". Well, it was settled that where there is "charity", there can be no trouble about "perpetuity".¹

It will occur to my readers that it must have been necessary for English lawyers to make or to find some juristic person in whom the benefit of the "charitable" trust would inhere and who would be the destinator. But that is not true. It will be understood that in external litigation—e.g. if there were an adverse claim to a piece of land held by the trustees—the interests of the trust would be fully represented by the trustees. Then if it were necessary to take proceedings against the trustees to compel them to observe the trust, the *Reichsanwalt* (Attorney-General) would appear. We find it said long ago that it is for the King "ut parens patriae" to intervene for this purpose. But we have stopped far short of any theory which would make the State into the true destinator (*cestui que trust*) of all charitable trusts. Catholics, Wesleyans, Jews would certainly be surprised if they were told that their cathedrals, chapels, synagogues were in any sense *Staatsvermogen*. We are not good at making juristic theories, but of the various concepts that seem to be offered to us by German books, it seems to me that *Zweckvermogen* is that which most nearly corresponds to our way of thinking about our "charities".²

That great abuses took place in this matter of charitable trusts is undeniable. Slowly we were convinced by sad

¹ An Englishman might say that § 2109 of the B G B. contains the German "rule against perpetuities" and that it is considerably more severe than is the English. [On the Bürgerliches Gesetzbuch, § 2109, see Dernburg, *Das bürgerliche Recht*, Bd v (1905), S. 27 (n. 10), 160, 347; Schuster, *Principles of German Civil Law* (1907), pp. 597-598.]

² [On *Zweckvermogen*, see Dernburg, *Pandekten*, Bd 1, ed. 6 (1900), S. 135; Gierke, *Deutsches Privatrecht*, Bd. 1 (1895), S. 465.]

experience that in the way of supervision something more was necessary than the mere administration of the law (technically of "equity") at the instance of a *Staatsanwalt* who was casually set in motion by some person who happened to see that the trustees were not doing their duty. Since 1853 such supervision has been supplied by a central *Behörde* (the Charity Commissioners); but it is much rather supervision than control, and, so far from any check being placed on the creation of new *Stiftungen*, we in 1891 repealed a law which since 1736 had prevented men from giving land to "charity" by testament.¹

I understand that in the case of an *unselbstständige Stiftung* German legal doctrine knows a *Treuhand* or *Fiduziar*, who in many respects would resemble our trustee, and I think that I might bring to light an important point by quoting some words that I read in Dr Regelsberger's *Pandekten*:

Es hat ferner die Ansicht gute Gründe für sich, dass das Zweckvermögen dem Zugriff von Gläubigern des Fiduziars entzogen ist, deren Ansprüche nicht aus dem Zweckvermögen erwachsen sind, dass ferner im Konkurs des Fiduziars oder bei Verhängung einer Vermögensseizung für das Zweckvermögen ein Aussonderungsrecht in Anspruch genommen werden kann, da der Empfänger zwar Rechtsträger, aber nur im fremden Interesse ist.²

Now in England these would not be probable opinions they would be obvious and elementary truths. The trustee's

¹ In some cases the land will have to be sold, but the "charity" will get the price.

² *Pandekten*, S 442 [Translation There are good grounds in support of the view that the creditors of the *Fiduziar* cannot touch the *Zweckvermögen* unless their claims arise out of the *Zweckvermögen* itself, moreover, that in the event of the bankruptcy of the *Fiduziar* or of a sequestration, the *Zweckvermögen* can be dealt with on a special footing, because the person who takes the property holds it in his own name, it is true, but only in the interests of third parties.]

creditors have nothing whatever to do with the trust property. Our *unselbstständige Anstalt* lives behind a wall that was erected in the interests of the richest and most powerful class of Englishmen: it is as safe as the duke and the millionaire.

But the wall will need repairs.

Das Rechtssubject, dem bei einer unselbstständigen Gründung das Zweckvermögen zugewendet wird, ist (says Dr Regelsberger) in der Regel eine juristische Person, denn nur sie bietet einen dauernden Stützpunkt.¹

We have not found that to be true. Doubtless a corporation is, because of its permanence, a convenient trustee. But it is a matter of convenience. By means of the Germanic *Gesamthandschaft* and of a power given to the surviving trustees—or perhaps to some destinatories, or perhaps to other people (e.g. the catholic bishop of the diocese for the time being)—of appointing new trustees, a great deal of permanence can be obtained at a cost that is not serious if the property is of any considerable value. Extreme cases, such as that of a sole trustee who is wandering about in Central Africa with the ownership of some English land in his nomadic person, can be met by an order of the Court (“a vesting order”) taking the ownership out of him and putting it in some more accessible receptacle. We have spent a great deal of pains over this matter. I am far from saying that all our devices are elegant. On juristic elegance we do not pride ourselves, but we know how to keep the roof weather-tight.

And here it should be observed that many reformers of

¹ *Pandekten*, S. 341 [*Translation* In the case of a foundation unable to act without direction, the person to whom the *Zweckvermögen* is transferred is usually a legal person, a corporation, for only such a person furnishes a permanent basis for the foundation.]

our "charities" have deliberately preferred that "charitable trusts" should be confided, not to corporations, but to "natural persons". It is said—and appeal is made to long experience—that men are more conscientious when they are doing acts in their own names than when they are using the name of a corporation. In consequence of this prevailing opinion, all sorts of expedients have been devised by Parliament for simplifying and cheapening those transitions of *Eigenthum* which are inevitable where mortal men are the *Stützpunkt* of an *unselbstständige Stiftung*. Some of these would shock a theorist. In the case of certain places of worship, we may see the *dominium* taken out of one set of men and put into another set of men by the mere vote of an assembly—an unincorporated congregation of Non-conformists.¹ Of course no rules of merely private law can explain this; but that does not trouble us.

This brings us to a point at which the Trust performed a signal service. All that we English people mean by "religious liberty" has been intimately connected with the making of trusts. When the time for a little toleration had come, there was the Trust ready to provide all that was needed by the barely tolerated sects. All that they had to ask from the State was that the open preaching of their doctrines should not be unlawful.

By way of contrast I may be allowed to cite a few words written by Dr Hinschius:²

Das frühere Staatskirchentum konnte, als es in Folge der veränderten Verhältnisse neben der herrschenden Kirche noch einzelne andere Religionsgesellschaften zu dulden anfang, diese nicht als reine Privatvereine gelten lassen, da es die Religion

¹ Trustees Appointment Acts, 1850-69-90

² Marquardsen's *Handbuch des Öffentlichen Rechts*, Bd. I, S. 367.

als Staatssache ansah. Vielmehr musste es aus diesem Grunde zu dem Standpunkte gelangen, solche Genossenschaften in gewissem Umfange als Korporationen mit öffentlichen Rechten zu behandeln, sie aber andererseits weitgehenden staatlichen Kontrollen und staatlichen Eingriffen zu unterwerfen.¹

But just what, according to Dr Hinschius, could not be done, was in England the easy and obvious thing to do. If in 1688 the choice had lain between conceding no toleration at all and forming corporations of Nonconformists, and even "Korporationen mit öffentlichen Rechten", there can be little doubt that "das herrschende Staatskirchentum" would have left them untolerated for a long time to come, for in England, as elsewhere, incorporation meant privilege and exceptional favour. And, on the other hand, there were among the Nonconformists many who would have thought that even toleration was dearly purchased if their religious affairs were subjected to State control. But if the State could be persuaded to do the very minimum, to repeal a few persecuting laws, to say "You shall not be punished for not going to the parish church, and you shall not be punished for going to your meeting-house", that was all that was requisite. Trust would do the rest, and the State and *das Staatskirchentum* could not be accused of any active participation in heresy and schism. Trust soon did the rest. I have been told that some of the earliest trust deeds of Nonconformist "meeting-houses" say what is to be done with the

¹ [Translation: As the earlier State-Church, or *Staatskirchentum*, began to tolerate certain other religious societies, owing to changed conditions, it could not permit them to hold the legal position of private clubs, for the reason that it looked upon religion as a matter for the State. Accordingly, it adopted the attitude that these associations should be treated in certain respects as corporations of public law, with corresponding rights: but, on the other hand, it subjected such associations to a far-reaching control and interference on the part of the State.]

buildings if the Toleration Act be repealed. After a little hesitation, the courts enforced these trusts, and even held that they were "charitable".

And now we have in England Jewish synagogues and Catholic cathedrals and the churches and chapels of countless sects. They are owned by natural persons. They are owned by trustees.

Now I know very well that our way of dealing with all the churches, except that which is "by law established" (and in America and the great English colonies even that exception need not be made), looks grotesque to some of those who see it from the outside. They are surprised when they learn that such an "historic organism" as the Church of Rome, "einem Privatverein, einer Ballspielgesellschaft rechtlich gleichsteht".¹ But when they have done laughing at us, the upshot of their complaint or their warning is, not that we have not made this historic organism comfortable enough, but that we have made it too comfortable.

I have spoken of our "charity" as an *Anstalt* or *Stiftung*; but, as might be expected in a land where men have been very free to create such "charitable trusts" as they pleased, *anstaltliche* and *genossenschaftliche* threads have been interwoven in every conceivable fashion. And this has been so from the very first. In dealing with charitable trusts one by one, our Courts have not been compelled to make any severe classification. *Anstalt* or *Genossenschaft* was not a dilemma which every trust had to face, though I suppose that what would be called an *anstaltliches Element* is implicit in our notion of a charity. This seems particularly noticeable in the ecclesiastical region. There is a piece of ground with a building on it which is used as a place of worship. Who or

¹ Hinschius, *op. cit.* S. 222-224

what is it that in this instance stands behind the trustees? Shall we say *Anstalt* or shall we say *Verein*?

No general answer could be given. We must look at the "trust deed". We may find that as a matter of fact the trustees are little better than automata whose springs are controlled by the catholic bishop, or by the central council ("Conference") of the Wesleyans; or we may find that the trustees themselves have wide discretionary powers. A certain amount of *Zweck* there must be, for otherwise the trust would not be "charitable". But this demand is satisfied by the fact that the building is to be used for public worship. If, however, we raise the question who shall preach here, what shall he preach, who shall appoint, who shall dismiss him, then we are face to face with almost every conceivable type of organization from centralized and absolute monarchy to decentralized democracy and the autonomy of the independent congregation. To say nothing of the Catholics, it is well known that our Protestant Nonconformists have differed from each other much rather about Church government than about theological dogma: but all of them have found satisfaction for their various ideals of ecclesiastical polity under the shadow of our trusts.

V

This brings us to our "unincorporated bodies", and by way of a first example I should like to mention the Wesleyans. They have a very elaborate and a highly centralized constitution, the primary outlines of which are to be found in an *Urkunde* to which John Wesley set his seal in 1784. Thereby he declared the trusts upon which he was holding certain lands and buildings that had been conveyed to him in various parts of England. Now-a-days we see Wesleyan

chapels in all our towns and in many of our villages. Generally every chapel has its separate set of trustees, but the trust deeds all follow one model, devised by a famous lawyer in 1832—the printed copy that lies before me fills more than forty pages—and these deeds institute a form of government so centralized that Rome might be proud of it, though the central organ is no pope, but a council.

But we must not dwell any longer on cases in which there is a “charitable trust”, for, as already said, there is in these cases no pressing demand for a personal destinator. We can, if we please, think of the charitable *Zweck* as filling the place that is filled by a person in the ordinary private trust. When, however, we leave behind us the province, the wide province, of “charity”, then—so we might argue *a priori*—a question about personality must arise. There will here be no *Zweck* that is protected as being “beneficial to the public”. There will here be no intervention of a *Staatsanwalt* who represents the “*parens patriae*”. Must there not therefore be some destinator who is either a natural or else a juristic person? Can we have a trust for a *Genossenschaft*, unless it is endowed with personality, or unless it is steadily regarded as being a mere collective name for certain natural persons? I believe that our answer should be that in theory we cannot, but that in practice we can.

If then we ask how there can be this divergence between theory and practice, we come upon what has to my mind been the chief merit of the Trust. It has served to protect the unincorporated *Genossenschaft* against the attacks of inadequate and individualistic theories.

We should all agree that, if an *Anstalt* or a *Genossenschaft* is to live and thrive, it must be efficiently defended by law against external enemies. On the other hand, experience

seems to show that it can live and thrive, although the only theories that lawyers hold about its internal affairs are inadequate. Let me dwell for a moment on both of these truths.

Our *Anstalt*, or our *Genossenschaft*, or whatever it may be, has to live in a wicked world: a world full of thieves and rogues and other bad people. And apart from wickedness, there will be unfounded claims to be resisted: claims made by neighbours, claims made by the State. This sensitive being must have a hard, exterior shell. Now our Trust provides this hard, exterior shell for whatever lies within. If there is theft, the thief will be accused of stealing the goods of Mr A. B. and Mr C. D., and not one word will be said of the trust. If there is a dispute about a boundary, Mr A. B. and Mr C. D. will bring or defend the action. It is here to be remembered that during the age in which the Trust was taking shape all this external litigation went on before courts where nothing could be said about trusts. The judges in those courts, if I may so say, could only see the wall of trustees and could see nothing that lay beyond it. Thus in a conflict with an external foe no question about personality could arise. A great deal of ingenuity had been spent in bringing about this result.

But if there be this hard exterior shell, then there is no longer any pressing demand for juristic theory. Years may pass by, decades, even centuries, before jurisprudence is called upon to decide exactly what it is that lies within the shell. And if what lies within is some *Genossenschaft*, it may slowly and silently change its shape many times before it is compelled to explain its constitution to a public tribunal. Disputes there will be; but the disputants will be very unwilling to call in the policeman. This unwillingness may

reach its highest point in the case of religious bodies. Englishmen are a litigious race, and religious people have always plenty to quarrel about. Still they are very reluctant to seek the judgment seat of Gallio. As is well known, our "Law Reports", beginning in the day of Edward I, are a mountainous mass. Almost every side of English life is revealed in them. But if you search them through in the hope of discovering the organization of our churches and sects (other than the established church) you will find only a few widely scattered hints. And what is true of religious bodies, is hardly less true of many other *Vercine*, such as our "clubs". Even the "kampflustige Engländer", whom Ihering admired, would, as we say, think once, twice, thrice, before he appealed to a court of law against the decision of the committee or the general meeting. I say "appealed", and believe that this is the word that he would use, for the thought of a "jurisdiction" inherent in the *Genossenschaft* is strong in us, and I believe that it is at its strongest where there is no formal corporation. And so, the external wall being kept in good repair, our English legal *Dogmatik* may have no theory or a wholly inadequate and antiquated theory of what goes on behind. And to some of us that seems a desirable state of affairs. Shameful though it may be to say this, we fear the petrifying action of juristic theory.

And now may I name a few typical instances of "unincorporated bodies" that have lived behind the trustee wall?

I imagine a foreign tourist, with Bädcker in hand, visiting one of our "Inns of Court": let us say Lincoln's Inn.¹ He sees the chapel and the library and the dining-hall; he sees the external gates that are shut at night. It is in many respects much like such colleges as he may see at Oxford and Cam-

¹ In Latin documents the word corresponding to our *inn* is *hospitium*.

bridge. On inquiry he hears of an ancient constitution that had taken shape before 1422, and we know not how much earlier. He learns that something in the way of legal education is being done by these Inns of Court, and that for this purpose a federal organ, a Council of Legal Education, has been established. He learns that no man can practise as an advocate in any of the higher courts who is not a member of one of the four Inns and who has not there received the degree of "barrister-at-law". He would learn that these Inns have been very free to dictate the terms upon which this degree is given. He would learn that the Inn has in its hands a terrible, if rarely exercised, power of expelling ("disbarring") a member for dishonourable or unprofessional conduct, of excluding him from the courts in which he has been making his living, of ruining him and disgracing him. He would learn that in such a case there might be an appeal to the judges of our High Court: but not to them as a public tribunal: to them as "visitors" and as constituting, we might say, a second instance of the domestic forum.

Well, he might say, apparently we have some curious hybrid—and we must expect such things in England—between an *Anstalt des öffentlichen Rechtes* and a *privilegierte Korporation*. Nothing of the sort, an English friend would reply; you have here a *Privatverein* which has not even juristic personality. It might—such at least our theory has been—dissolve itself tomorrow, and its members might divide the property that is held for them by trustees. And indeed there was until lately an Inn of a somewhat similar character, the ancient Inn of the "Serjeants at Law", and, as there were to be no more serjeants, its members dissolved the *Verein* and divided their property. Many people thought that this dissolution of an ancient society was to be regretted; there was a little

war in the newspapers about it; but as to the legal right we were told that there was no doubt.

It need hardly be said that the case of these Inns of Court is in a certain sense anomalous. Such powers as they wield could not be acquired at the present day by any *Privatverein*, and it would not be too much to say that we do not exactly know how or when those powers were acquired, for the beginning of these societies of lawyers was very humble and is very dark. But, before we leave them, let us remember that the English judges who received and repeated a great deal of the canonistic learning about corporations, *Fiktionstheorie*, *Concessionstheorie* and so forth, were to a man members of these *Körperschaften* and had never found that the want of juristic personality was a serious misfortune. Our lawyers were rich and influential people. They could easily have obtained incorporation had they desired it. They did not desire it.

But let us come to modern cases. To-day German ships and Austrian ships are carrying into all the seas the name of the keeper of a coffee-house, the name of Edward Lloyd. At the end of the seventeenth century he kept a coffee-house in the City of London, which was frequented by "underwriters" or marine insurers. Now from 1720 onwards these men had to do their business in the most purely individualistic fashion. In order to protect two privileged corporations, which had lent money to the State, even a simple *Gesellschaft* among underwriters was forbidden. Every insurer had to act for himself and for himself only. We might not expect to see such individualistic units coalescing so as to form a compactly organized body—and this too not in the Middle Age but in the eighteenth century. However, these men had common interests: an interest in obtaining information, an

interest in exposing fraud and resisting fraudulent claims. There was a subscription; there was a small "trust fund"; the exclusive use of the "coffee house" was obtained. The *Verein* grew and grew. During the great wars of the Napoleonic age, "the Committee for regulating the affairs of Lloyd's Coffee House" became a great power. But the organization was still very loose until 1811, when a trust deed was executed and bore more than eleven hundred signatures. I must not attempt to tell all that "Lloyd's" has done for England. The story should be the better known in Germany, because the hero of it, J. J. Angerstein, though he came to us from Russia, was of German parentage. But until 1871 Lloyd's was an unincorporated *Verein* without the least trace (at least so we said) of juristic personality about it. And when incorporation came in 1871, the chief reason for the change was to be found in no ordinary event, but in the recovery from the bottom of the Zuyder Zec of a large mass of treasure which had been lying there since 1799, and which belonged—well, owing to the destruction of records by an accidental fire, no one could exactly say to whom it belonged. In the life of such a *Verein* "incorporation" appears as a mere event. We could not even compare it to the attainment of full age. Rather it is as if a "natural person" bought a type-writing machine or took lessons in stenography.¹

Even more instructive is the story of the London Stock Exchange.² Here also we see small beginnings. In the eighteenth century the men who deal in stocks frequent certain coffee-houses: in particular "Jonathan's". They begin to form a club. They pay the owner an annual sum to exclude

¹ F. Martin, *History of Lloyd's*, 1876.

² C. Duguid, *Story of the Stock Exchange*, 1901.

those whom they have not elected into their society. In 1773 they moved to more commodious rooms. Those who used the rooms paid sixpence a day. In 1802 a costly site was bought, a costly building erected, and an elaborate constitution was formulated in a "deed of settlement". There was a capital of £20,000 divided into 400 shares. Behind the trustees stood a body of "proprietors", who had found the money; and behind the "proprietors" stood a much larger body of "members", whose subscriptions formed the income that was divided among the "proprietors". And then there was building and always more building. In 1876 there was a new "deed of settlement"; in 1882 large changes were made in it; there was a capital of £240,000 divided into 20,000 shares.

Into details we must not enter. Suffice it that the organization is of a high type. It might, for example, strike one at first that the shares of the "proprietors" would, by the natural operation of private law, be often passing into the hands of people who were in no wise interested in the sort of business that is done on the Stock Exchange, and that thus the *genossenschaftliche* character of the constitution would be destroyed. But that danger could be obviated. There was nothing to prevent the original subscribers from agreeing that the shares could only be sold to members of the Stock Exchange, and that, if by inheritance a share came to other hands, it must be sold within a twelvemonth. Such regulations have not prevented the shares from being valuable.

In 1877 a Royal Commission was appointed to consider the Stock Exchange. It heard evidence; it issued a report; it made recommendations. A majority of its members recommended that the Stock Exchange should be incorporated by royal charter or Act of Parliament.

And so the Stock Exchange was incorporated? Certainly not. In England you cannot incorporate people who do not want incorporation, and the members of the Stock Exchange did not want it. Something had been said about the submission of the "bye-laws" of the corporation to the approval of a central *Behörde*, the Board of Trade. That was the cloven hoof. *Ex pede diabolium*.¹

Now, unless we have regard to what an Englishman would call "mere technicalities", it would not, I think, be easy to find anything that a corporation could do and that is not being done by this *nicht rechtsfähiger Verein*. It legislates profusely. Its representative among the Royal Commissioners did not scruple to speak of "legislation". And then he told how it did justice and enforced a higher standard of morality than the law can reach. And a terrible justice it is. Expulsion brings with it disgrace and ruin, and minor punishments are inflicted. In current language the committee is said to "pronounce a sentence" of suspension for a year, or two years or five years.

The "quasi-judicial" power of the body over its members—*quasi* is one of the few Latin words that English lawyers really love—is made to look all the more judicial by the manner in which it is treated by our courts of law. A man who is expelled from one of our clubs,—or (to use a delicate phrase) whose name is removed from the list of members—will sometimes complain to a public court. That court will insist on a strict observance of any procedure that is formulated in the written or printed "rules" of the club; but also

¹ London Stock Exchange Commission, *Parliamentary Papers* (1878), vol. xix. [The Stock Exchange, as a voluntary association, was originally constituted under a deed of 1802, but is now governed by a deed of settlement dated 21st December, 1875. See Policy, *Law and Practice of the Stock Exchange*, ed. 5 (1932), p. 30.]

there may be talk of "natural justice". Thereby is meant an observance of those forms which should secure for every accused person a full and fair trial. In particular, a definite accusation should be definitely made, and the accused should have a sufficient opportunity of meeting it. Whatever the printed rules may say, it is not easy to be supposed that a man has placed his rights beyond that protection which should be afforded to all men by "natural justice". Theoretically the "rules", written or unwritten, may only be the terms of a contract, still the thought that this man is complaining that justice has been denied to him by those who were bound to do it, often finds practical expression. The dread of a *Vereins-herrschaft* is hardly represented among us.

I believe that in the eyes of a large number of my fellow-countrymen the most important and august tribunal in England is not the House of Lords but the Jockey Club; and in this case we might see "jurisdiction"—they would use that word—exercised by the *Verein* over those who stand outside it. I must not aspire to tell this story. But the beginning of it seems to be that some gentlemen form a club, buy a race-course, the famous Newmarket Heath, which is conveyed to trustees for them, and then they can say who shall and who shall not be admitted to it. I fancy, however, that some men who have been excluded from this sacred heath ("warned off Newmarket Heath" is our phrase) would have much preferred the major excommunication of that "historic organism" the Church of Rome.

It will have been observed that I have been choosing examples from the eighteenth century: a time when, if I am not mistaken, corporation theory sat heavy upon mankind in other countries. And we had a theory in England too, and it was of a very orthodox pattern; but it did not crush

the spirit of association. So much could be done behind a trust, and the beginnings might be so very humble. All this tended to make our English jurisprudence disorderly, but also gave to it something of the character of an experimental science, and that I hope it will never lose.

But surely, it will be said, you must have some juristic theory about the constitution of the *Privatverein*: some theory, for example, about your clubs and those luxurious club-houses which we see in Pall Mall.

Yes, we have, and it is a purely individualistic theory. This it must necessarily be. As there is no "charity" in the case, the trust must be a trust for persons, and any attempt to make it a trust for unascertained persons (future members) would soon come into collision with that "rule against perpetuities" which keeps the *Familienfideicommiss* within moderate bounds. So really we have no tools to work with except such as are well known to all lawyers. Behind the wall of trustees we have *Miteigenthum* and *Vertrag*. We say that "in equity" the original members were the only destinatories: they were *Miteigenthümer* with *Gesamthandschaft*; but at the same time they contracted to observe certain rules.

I do not think that the result is satisfactory. The "ownership in equity" that the member of the club has in land, buildings, furniture, books, etc. is of a very strange kind. (1) Practically it is inalienable. (2) Practically his creditors cannot touch it by execution. (3) Practically, if he is bankrupt, there is nothing for them.¹ (4) It ceases if he does not pay his annual

¹ In a conceivable case the prospective right to an aliquot part of the property of a club that was going to be dissolved might be valuable to a member's creditors; but this would be a rare case, and I can find nothing written about it. Some clubs endeavour by their rules to extinguish the right of a bankrupt member.

subscription. (5) It ceases if in accordance with the rules he is expelled. (6) His share—if of a share we may speak—is diminished whenever a new member is elected. (7) He cannot demand a partition. And (8) in order to explain all this, we have to suppose numerous tacit contracts which no one knows that he is making, for after every election there must be a fresh contract between the new member and all the old members. But every judge on the bench is a member of at least one club, and we know that, if a thousand tacit contracts have to be discovered, a tolerable result will be attained. We may remember that the State did not fall to pieces when philosophers and jurists declared that it was the outcome of contract.

There are some signs that in course of time we may be driven out of this theory. The State has begun to tax clubs as it taxes corporations.¹ When we have laid down as a very general principle that, when a man gains any property upon the death of another, he must pay something to the State, it becomes plain to us that the property of a club will escape this sort of taxation. It would be ridiculous, and indeed impossible, to hold that, whenever a member of a club dies, some taxable increment of wealth accrues to every one of his fellows. So the property of the "unincorporated body" is to be taxed as if it belonged to a corporation. This is a step forward.

Strange operations with *Miteigenthum* and *Vertrag* must, I should suppose, have been very familiar to German jurists in days when corporateness was not to be had upon easy terms. But what I am concerned to remark is that, owing to the hard exterior shell provided by a trust, the inadequacy of our theories was seldom brought to the light of day. Every

¹ Customs and Inland Revenue Act, 1885, s. 11.

now and again a court of law may have a word to say about a club; but you will find nothing about club-property in our institutional treatises. And yet the value of those houses in London, their sites and their contents, is very great, and almost every English lawyer is interested, personally interested, in one of them.

A comparison between our unincorporated *Verein* and the *nicht rechtsfahiger Verein* of the new German code might be very instructive; but perhaps the first difference that would strike anyone who undertook the task would be this, that, whereas in the German case almost every conceivable question has been forestalled by scientific and controversial discussion, there is in the English case very little to be read. We have a few decisions, dotted about here and there; but they have to be read with caution, for each decision deals only with some one type of *Verein*, and the types are endless. I might perhaps say that no attempt has been made to provide answers for half the questions that have been raised, for example, by Dr Gierke. And yet let me repeat that our *Vereine ohne Rechtsfahigkeit* are very numerous, that some of them are already old, and that some of them are wealthy.¹

One of the points that is clear (and here we differ from the German code) is that our unincorporated *Verein* is not to be likened to a *Gesellschaft* (partnership): at all events this is not to be done when the *Verein* is a "club" of the common type.² Parenthetically I may observe that for the present

¹ I believe that all the decisions given by our Courts in any way affecting our clubs will be found in a small book: J Wertheimer, *Law relating to Clubs*, ed 3, by A W Chaster (1903). [See *Halsbury's Laws of England*, ed. 2 (Hailsham), vol. iv (1932), pp 481-518 (Clubs)]

² It was otherwise with the unincorporated *Actiengesellschaft*, but that is almost a thing of the past. A few formed long ago may still be living in an unincorporated condition, e.g. the London Stock Exchange.

purpose the English for *Gesellschaft* is "Partnership" and the English for *Verein* is "Society". Now in the early days of clubs an attempt was made to treat the club as a *Gesellschaft*. The *Gesellschaft* was an old well-established institute, and an effort was made to bring the new creature under the old rubric. That effort has, however, been definitely abandoned and we are now taught, not only that the club is not a *Gesellschaft*, but that you cannot as a general rule argue from the one to the other. Since 1890 we have a statutory definition of a *Gesellschaft*: "Partnership is the relation which subsists between persons carrying on a business in common with a view of profit."¹ A club would not fall within this definition.

The chief practical interest of this doctrine, that a club is not to be assimilated to a *Gesellschaft*, lies in the fact that the committee of an English club has no general power of contracting on behalf of the members within a sphere marked out by the affairs of the club. A true corporate liability could not be manufactured, and, as I shall remark below, our courts were setting their faces against any attempt to establish a limited liability. The supposition as regards the club is that the members pay their subscriptions in advance, and that the committee has ready money to meet all current expenses. On paper that is not satisfactory. I believe that cases must pretty frequently occur in which a tradesman who has supplied wine or books or other goods for the use of the club would have great difficulty in discovering the other contractor. We have no such rule (and here again we differ from the German code) as that the person who professes

¹ Partnership Act, 1890, s. 1. For the meaning of these words, see F. Pollock, *Digest of the Law of Partnership*, ed. 6 [ed. 12 (1930)], pp. 1-30; and see also Pollock and Mulla, *Indian Partnership Act* (1934), pp. 4-26].

to act on behalf of an unincorporated *Verein* is always personally liable;¹ and I think the tradesman could often be forced to admit that he had not given credit to any man, the truth being that he thought of the club as a person. I can only say that scandals, though not absolutely unknown,² have been very rare; that the members of the club would in all probability treat the case as if it were one of corporate liability; and that London tradesmen are willing enough to supply goods to clubs on a large scale. If there is to be extraordinary expenditure, if, for example, a new wing is to be added to the building, money to a large amount can often be borrowed at a very moderate rate of interest. We know a "mortgage without personal liability"; and that has been useful. Strictly speaking there is no debtor; but the creditor has various ways by which he can obtain payment: in particular he can sell the land.

Deliktsfahigkeit is an interesting and at the present time it is perhaps a burning point. A little while ago English lawyers would probably have denied that anything resembling corporate liability could be established in this quarter. Any liability beyond that of the man who does the unlawful act must be that of a principal for the acts of an agent, or of a master for the acts of a servant, and if there is any liability at all, it must be unlimited. But this is now very doubtful. Our highest court (the House of Lords) has lately held that a trade union is *deliktsfahig*:³ in other words, that the damage done by the organized action of this unincorporated *Verein* must be paid for out of the property held by its trustees.

¹ B.G.B. § 54.

² See Wertheimer, *op. cit.* p. 73.

³ [See *The Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426; the Trade Disputes Acts, 1906 and 1927 (6 Ed. VII, c. 47, and 17 & 18 Geo. V, c. 22), and Salmond, *Law of Torts*, 8th ed. (W. T. S. Stallybrass), 1934, pp. 61-63.]

Now a trade union is an unincorporated *Verein* of a somewhat exceptional sort. It is the subject of special Statutes which have conferred upon it some, but not all, of those legal qualities which we associate with incorporation. Whether this decision, which made a great noise, is attributable to this exceptional element, or whether it is to be based upon a broader ground, is not absolutely plain. The trade unionists are dissatisfied about this and some other matters, and what the results of their agitation will be I cannot say. The one thing that it is safe to predict is that in England *socialpolitische* will take precedence of *rechtswissenschaftliche* considerations. As to the broader question, now that a beginning has once been made, I believe that the situation could be well described in some words that I will borrow from Dr Gierke:

Vielleicht bildet sich ein Gewohnheitsrecht das die nicht rechtsfähigen Vereine in Ansehung der Haftung für widerrechtliche Schadenszufugung dem Körperschaftsrecht unterstellt.¹

The natural inclination of the members of an English club would, so I think, be to treat the case exactly as if it were a case of corporate liability. It has often struck me that morally there is most personality where legally there is none. A man thinks of his club as a living being, honourable as well as honest, while the joint-stock company is only a sort of machine into which he puts money and out of which he draws dividends.

As to the *Deliktsfähigkeit* of corporations it may not be out of place to observe that by this time English corporations have had to pay for almost every kind of wrong that one

¹ Gierke, *Vereine ohne Rechtsfähigkeit*, zweite Auflage, S. 20 [Translation: Possibly there is a customary law to the effect that clubs which do not as such possess legal capacity are to be placed in the category of corporations so far as liability for harm caused by illegal acts is concerned]

man can do to another. Thus recently an incorporated company had to pay for having instituted criminal proceedings against a man "maliciously and without reasonable or probable cause".¹ In our theoretical moments we reconcile this with the *Fiktionstheorie* by saying that it is a case in which a master (*persona ficta*) pays for the act of his servant or a principal for the act of an agent, and, as our rule about the master's liability is very wide, the explanation is not obviously insufficient. I am not sure that this may not help us to attain the desirable result in the case of the unincorporated *Verein*.

Our practical doctrine about the *Vermögen* of our clubs seems to me to be very much that which is stated by Dr Gierke in the following sentence, though (for the reason already given) we should have to omit a few words in which he refers to a *Gesellschaft*:²

Das Vereinsvermögen . . . gehört . . . den jeweiligen Mitgliedern; aber als Gesellschaftsvermögen [Vereinsvermögen] ist es ein für den Gesellschaftszweck [Vereinszweck] aus dem übrigen Vermögen der Theilhaber ausgeschiedenes, den Gesellschaftern [Vereinsmitgliedern] zu ungesonderten Antheilen gemeinsames Sondervermögen, das sich einem Körperschaftsvermögen nähert.³

And then in England the *Sonderung* of this *Vermögen* from all the other *Vermögen* of the *Theilhaber* can be all the plainer, because in legal analysis the owners of this *Vermögen* are

¹ [See *Citizens' Life Assurance Co. v. Brown*, [1904] A.C. 423.]

² *Vereine ohne Rechtsfähigkeit*, S. 14.

³ [Translation The property of a club belongs to the members for the time being, but, as partnership-property [club-property], it is separated from the rest of the property of the members as being property which serves the partnership's purpose [club's purpose]; it is a special or separate property which belongs to the partners [club-members] in undivided shares, and from this point of view it closely resembles the property of a corporation.]

not the *Vereinsmitglieder*, but the trustees. It is true that for practical purposes this *Eigenthum* of the trustees of a club may be hardly better than a *Scheineigenthum*, and the trustees themselves may be hardly better than puppets whose wires are pulled by the committee and the general meeting. And it is to be observed that in the case of this class of trusts the destinatories are peculiarly well protected, for, even if deeds were forged, no man could say that he had bought one of our club-houses or a catholic cathedral without suspecting the existence of a trust: *res ipsa loquitur*. Still the *nudum dominium* of the trustees serves as a sort of external mark which keeps all this *Vermögen* together as a *Sondervermögen*. And when we remember that some great jurists have found it possible to speak of the juristic person as puppet, a not unimportant analogy is established:

Der Verein kann nicht nur unter Lebenden, sondern auch von Todeswegen erwerben. Denn es besteht kein Hinderniss die jeweiligen Mitglieder in ihrer gesellschaftlichen [vereinschaftlichen] Verbundenheit zu Erben einzusetzen oder mit einem Vermächtniss zu bedenken.¹

This is substantially true of our English law, though the words "zu Erben einzusetzen" do not fit into our system. A little care on the part of the testator is requisite in such cases in order that he may not be accused of having endeavoured to create a trust in favour of a long series of unascertained persons (future members) and of having come into collision with our "rule against perpetuities". The less he says the better. Substantially the *Verein* is *vermachtnissfähig*.

¹ Gierke, *op cit.* S. 21 [Translation: The club can acquire property not only by transactions *inter vivos* but also by testate or intestate succession; for there is no legal objection to the appointment of the members for the time being, in their partnership [or club] capacity, as heirs, or to giving them a legacy.]

Dr Gierke's next sentence also is true, though of course the first word is inappropriate:

[Landesgesetzliche] Einschränkungen des Rechtserwerbes juristischer Personen können auf nicht rechtsfähige Vereine nicht erstreckt werden.¹

Since our lawyers explained away a certain statute of Henry VIII, which will be mentioned below, our *nicht rechtsfähiger Verein* has stood outside the scope of those *Gesetze* which forbade corporations to acquire land (Statutes of Mortmain). And this was at one time a great advantage that our *nicht rechtsfähiger Verein* had over the *rechtsfähiger Verein*. The Jockey Club, for example, could acquire Newmarket Heath without asking the King's or the State's permission. Even at the present day certain of our *nicht rechtsfähige Vereine* would lose their power of holding an unlimited quantity of land if they registered themselves under the Companies Acts and so became corporations.²

As regards *Processfähigkeit*, our doctrine regarded the capacity "to sue and be sued" as one of the essential attributes of the corporation. Indeed at times this capacity seems to have appeared as the specific *differentia* of the corporation, though the common seal also was an important mark. And with this doctrine we have not openly broken. It will be understood, however, that in a very large class of disputes the concerns of the *nicht rechtsfähiger Verein* would be completely represented by the trustees. Especially would this be the case in all litigation concerning *Liegenschaft*. Suppose

¹ [Translation The restrictions [laid down in the statutory law of the several German states] in respect to the acquisition of rights on the part of corporations cannot be extended to clubs which do not as such possess legal capacity.]

² Companies Act, 1862, s. 21. [See Companies Act, 1929, ss. 14, 18; Palmer, *Company Law*, ed. 15 (1933), pp. 263-265.]

a dispute with a neighbour about a servitude ("easement") or about a boundary, this can be brought into court and decided as if there were no trust in existence and no *Verein*. And so if the dispute is with some *Pächter* or *Miether* of land or houses that belong "in equity" to the *Verein*. There is a legal relationship between him and the trustees, but none between him and the *Verein*; and in general it will be impossible for him to give trouble by any talk about the constitution of the *Verein*. And then as regards internal controversies, the Court of Chancery developed a highly elastic doctrine about "representative suits". The beginning of this lies far away from the point that we are considering. It must suffice that in dealing with those complicated trusts that Englishmen are allowed to create, the court was driven to hold that a class of persons may be sufficiently represented in litigation by a member of that class. We became familiar with the plaintiff who was sung "on behalf of himself and all other legatees" or "all other cousins of the deceased" or "all other creditors". This practice came to the aid of the *Verein*. Our English tendency would be to argue that if in many cases a mere class (e.g. the testator's nephews) could be represented by a specimen, then *a fortiori* a *Verein* could be represented by its "officers". And we should do this without seeing that we were infringing the corporation's exclusive possession of *Processfähigkeit*.¹

But with all its imperfections the position of the unincorporate *Verein* must be fairly comfortable. There is a simple test that we can apply. For the last forty years and more almost every *Verein* could have obtained the corporate quality

¹ Our law about this matter is now represented by Rules of the Supreme Court of Judicature, Order xvi, Rule 9. [See *The Annual Practice*, 1936, pp. 250-56, for notes on this Rule].

had it wished to do this, and upon easy terms. When we opened the door we opened it wide. Any seven or more persons associated together for any lawful purpose can make a corporation.¹ No approval by any organ of the State is necessary, and there is no exceptional rule touching *politische socialpolitische oder religiöse Vereine*. Many societies of the most various kinds have taken advantage of this offer; but many have not. I will not speak of humble societies which are going to have no property or very little: only some chess-men perhaps. Nor will I speak of those political societies which spring up in England whenever there is agitation: a "Tariff Reform Association" or a "Free Food League" or the like. It was hardly to be expected that bodies which have a temporary aim, and which perhaps are not quite certain what that aim is going to be, would care to appear as corporations. But many other bodies which are not poor, which hope to exist for a long time, and which have a definite purpose have not accepted the offer. It is so, for example, with clubs of what I may call the London type: clubs which have houses in which their members can pass the day. And it is so with many learned societies. In a case which came under my own observation a society had been formed for printing and distributing among its members

¹ Companies Act, 1862, s. 66. [Companies Act, 1929, s. 1 (1): "Any seven or more persons, or, where the company to be formed will be a private company, any two or more persons, associated together for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability." On "private companies", see Companies Act, 1929, ss. 26-28. On the so-called "one-man company", see Palmer, *Company Law*, ed. 15 (1933), pp. 390-400; Goodhart, *Essays in Jurisprudence and the Common Law* (1931), pp. 39-40. Cf. Whittaker, "Land Companies" (*Cambridge Law Journal*, vol. v, No. 3 (1935), pp. 371-386).]

books illustrating the history of English law. The question was raised what to do with the copyright of these books, and it was proposed that the society should make itself into a corporation; but the council of the society—all of them lawyers, and some of them very distinguished lawyers—preferred the old plan: preferred trustees. As an instance of the big affairs which are carried on in the old way I may mention the London Library, with a large house in the middle of London and more than 200,000 books which its members can borrow.

Why all this should be so it would not be easy to say. It is not, I believe, a matter of expense, for expense is involved in the maintenance of the hedge of trustees, and the account of merely pecuniary profit and loss would often, so I fancy, show a balance in favour of incorporation. But apparently there is a widespread, though not very definite belief, that by placing itself under an incorporating *Gesetz*, however liberal and elastic that *Gesetz* may be, a *Verein* would forfeit some of its liberty, some of its autonomy, and would not be so completely the mistress of its own destiny as it is when it has asked nothing and obtained nothing from the State. This belief may wear out in course of time; but I feel sure that any attempt to drive our *Vereine* into corporateness, any *Registerzwang*, would excite opposition. And on the other hand a proposal to allow the courts of law openly to give the name of corporations to *Vereine* which have neither been chartered nor registered would not only arouse the complaint that an intolerable uncertainty was being introduced into the law (we know little of Austria) but also would awake the suspicion that the proposers had some secret aim in view: perhaps nothing worse than what we call "red-tape", but perhaps taxation and "spoliation".

Hitherto (except when the Stock Exchange was mentioned) I have been speaking of societies that do not divide gain among their members. I must not attempt to tell the story of the English *Aktiengesellschaft*. It has often been told in Germany and elsewhere. But there is just one point to which I would ask attention.

In 1862 Parliament placed corporate form and juristic personality within easy reach of "any seven or more persons associated together for any lawful purpose". I think we have cause to rejoice over the width of these words, for we in England are too much accustomed to half-measures, and this was no half-measure. But still we may represent it as an act of capitulation. The enemy was within the citadel.

In England before the end of the seventeenth century men were trying to make joint-stock companies with transferable shares or "actions" (for that was the word then employed), and this process had gone so far that in 1694 a certain John Houghton could issue in his newspaper a price list which included the "actions" of these unincorporated companies side by side with the stock of such chartered corporations as the Bank of England. We know something of the structure of these companies, but little of the manner in which their affairs were regarded by lawyers and courts of law. Then in 1720, as all know, the South Sea Bubble swelled and burst. A panic-stricken Parliament issued a law, which, even when we now read it, seems to scream at us from the statute book.¹ Unquestionably for a time this hindered the formation of joint-stock companies. But to this day there are living among us some insurance companies,

¹ [On the South Sea Bubble and the resulting legislation, see Holdsworth, *History of English Law*, vol. viii, pp. 218-222.]

in particular "the Sun", which were living before 1720 and went on living in an unincorporate condition.¹ And then, later on when the great catastrophe was forgotten, lawyers began coldly to dissect the words of this terrible Act and to discover that after all it was not so terrible. For one thing, it threatened with punishment men who without lawful authority "presumed to act as a corporation". But how could this crime be committed?

From saying that organization is corporateness English lawyers were precluded by a long history. They themselves were members of the Inns of Court. Really it did not seem clear that men could "presume to act as a corporation" unless they said in so many words that they were incorporated, or unless they usurped that sacred symbol, the common seal. English law had been compelled to find the essence of real or spurious corporateness among comparatively superficial phenomena.

Even the more definite prohibitions in the Statute of 1720, such as that against "raising or pretending to raise a transferable stock", were not, so the courts said, so stringent as they might seem to be at first sight. In its panic Parliament had spoken much of mischief to the public, and judges, whose conception of the mischievous was liable to change, were able to declare that where there was no mischievous tendency there was no offence. Before "the Bubble Act" was repealed in 1825 most of its teeth had been drawn.

But the *unbeschränkte Haftbarkeit* of partners was still maintained. That was a thoroughly practical matter which Englishmen could thoroughly understand. Indeed from the first half of the nineteenth century we have Acts of Parliament which strongly suggest that this is the very kernel of the

¹ F. B. Relton, *Fire Insurance Companies* (1893).

whole matter. All else Parliament was by this time very willing to grant: for instance, active and passive *Processfähigkeit*, the capacity of suing and being sued as unit in the name of some secretary or treasurer. And this, I may remark in passing, tended still further to enlarge our notion of what can be done by "unincorporated companies". It was the day of half-measures. In an interesting case an American court once decided that a certain English company was a corporation, though an Act of our Parliament had expressly said that it was not.¹

And if our legislature would not by any general measure grant full corporateness, our courts were equally earnest in maintaining the unlimited liability of the *Gesellschaftsmitglieder*.

But the wedge was introduced. If a man sells goods and says in so many words that he will hold no one personally liable for the price, but will look only to a certain subscribed fund, must we not hold him to his bargain? Our courts were very unwilling to believe that men had done anything so foolish; but they had to admit that personal liability could be excluded by sufficiently explicit words. The wedge was in. If the State had not given way, we should have had in England joint-stock companies, unincorporated, but contracting with limited liability. We know now-a-days that men are not deterred from making contracts by the word

¹ [The English courts have held, however, that if a corporation is dissolved by the law of the country in which it was created the corporation *ipso facto* ceases to exist in England. See *Lazard Brothers and Co. v. Midland Bank Limited*, [1933] A.C. 289. Consult also Mr B. A. Wortley's article on "The Dissolution of Foreign Corporations in Private International Law in the Light of the 'Russian Bank Cases'" (*British Year Book of International Law*, 1933, pp. 1-17). Compare the judgment of the House of Lords in *Russian and English Bank (in Liquidation) v. Baring Brothers and Co., Limited*, [1936] 1 All. E.R. 505.]

"limited". We have no reason to suppose that they would have been deterred if that word were expanded into four or five lines printed at the head of the company's letter-paper. It is needless to say that the directors of a company would have strong reasons for seeing that due notice of limited liability was given to every one who had contractual dealings with the company, for, if such notice were not given, they themselves would probably be the first sufferers.¹

In England the State capitulated gracefully in 1862. And at the same time it prohibited the formation of large unincorporated *Gesellschaften*. No *Verein* or *Gesellschaft* consisting of more than twenty persons was to be formed for the acquisition of gain unless it was registered and so became incorporate. We may say, however, that this prohibitory rule has become well-nigh a *caput mortuum*, and I doubt whether its existence is generally known, for no one desires to infringe it. If the making of gain be the society's object, the corporate form has proved itself to be so much more convenient than the unincorporate that a great deal of ingenuity has been spent in the formation of very small corporations in which the will of a single man is predominant ("one-man companies"). Indeed the simple *Gesellschaft* of

¹ In England development along this line stopped at this point, because *wirtschaftliche Vereine* became corporations under the *Gesetz* of 1862. English law had gone as far as the first, but not, I believe, as far as the second of the two following sentences "Es steht namentlich nichts im Wege, eine rechtsgeschäftliche Verpflichtung der Mitglieder so zu begründen, dass jedes Mitglied nur mit einem Theil seines Vermögens, dass es insbesondere nur mit seinem Antheil am Vereinsvermögen hafter Ist aber eine solche Abrede wirksam, so kann auch von vornherein durch die Satzung die Vertretungsmacht des Vorstandes dahin eingeschränkt werden, dass er die Mitglieder nur unter Beschränkung ihrer Haftung auf ihre Antheile verpflichten kann" (Gierke, *op cit.* S. 39). Then as regards our clubs, there is, as already said, no presumption that the committee or the trustees can incur debts for which the members will be liable even to a limited degree.

English law, though we cannot call it a dying institution, has been rapidly losing ground.¹

In America it has been otherwise. As I understand, the unincorporate *Aktiengesellschaft* with its property reposing in trustees lived on beside the new trading corporations. I am told that any laws prohibiting men from forming large unincorporated partnerships would have been regarded as an unjustifiable interference with freedom of contract, and even that the validity of such a law might not always be beyond question. A large measure of limited liability was secured by carefully worded clauses. I take the following as an example from an American "trust deed":

The trustees shall have no power to bind the shareholders personally. In every written contract they may make, reference shall be made to this declaration of trust. The person or corporation contracting with the trustees shall look to the funds and property of the trust for the payment under such contract. . . and neither the trustees nor the shareholders, present or future, shall be personally liable therefor.

The larger the affairs in which the *Verein* or *Gesellschaft* is engaged, the more securely will such clauses work, for (to say nothing of legal requirements) big affairs will naturally take the shape of written documents.

Then those events occurred which have inseparably con-

¹ A distinction which, roughly speaking, is similar to that drawn by B.G.B. §§ 21, 22 was drawn by our Act of 1862, s. 4. "No company, association or partnership consisting of more than twenty persons [ten persons, if the business is banking] shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof unless it is registered." [Companies Act, 1929, ss. 358, 359.] I believe that in the space of forty years very few cases have arisen in which it was doubtful whether or not a *Verein* fell within these words. [For the meaning of these words, as interpreted by the Courts, see Palmer, *Company Law*, ed. 15 (1933), pp. 411-413.]

nected the two words "trust" and "corporation". I am not qualified to state with any precision the reasons which induced American capitalists to avoid the corporate form when they were engaged in constructing the greatest aggregations of capital that the world had yet seen; but I believe that the American corporation has lived in greater fear of the State than the English corporation has felt for a long time past. A judgment dissolving a corporation at the suit of the *Staatsanwalt* as a penalty for offences that it has committed has been well-known in America. We have hardly heard of anything of the kind in England since the Revolution of 1688. The dissolution of the civic corporation of London for its offences in the days of Charles II served as a *reductio ad absurdum*. At any rate "trust" not "corporation" was the form that the financial and industrial magnates of America chose when they were fashioning their immense designs.

Since then there has been a change. Certain of the States (especially New Jersey) began to relax their corporation laws in order to attract the great combinations. A very modest percentage is worth collecting when the capital of the company is reckoned in millions. So now-a-days the American "trust" (in the sense in which economists and journalists use that term) is almost always if not quite always a corporation.

And so this old word, the "trustis" of the Salica, has acquired a new sense. Any sort of capitalistic combination is popularly called a "trust" if only it is powerful enough, and Englishmen believe that Germany is full of "trusts".¹

¹ [On the nature and function of corporations and "trusts" in industrial and commercial life of the present day, see P. de Rousiers, *Cartels and Trusts and their Development* (Geneva, 1927); C. Lammers, *Review of Legislation on Cartels and Trusts* (Geneva, 1927); R. Liefmann, *International Cartels, Concerns and Trusts* (London, 1932); H. Levy, *Monopolies*,

VI

And now let me once more repeat that the connection between Trust and Corporation is very ancient. It is at least four centuries old. Henry VIII saw it.¹ An Act of Parliament in which we may hear his majestic voice has these words in its preamble:²

Where by reason of feoffments . . . made of trust of . . . lands to the use of . . . guilds, fraternities, comminalties, companies or brotherheads erected . . . by common assent of the people without any corporation . . . there groweth to the King . . . and other lords and subjects of the realm the same like losses and inconveniences . . . as in case where lands be aliened into mortmain.

We see what the mischief is. The hedge of trustees will be kept in such good repair that there will be no *escaeta*, no *relevium*, no *custodia*, for behind will live a *Genossenschaft* keenly interested in the maintenance of the hedge, and a *Genossenschaft* which has made itself without asking the King's permission. Now no one, I think, can read this Act without seeing that it intends utterly to suppress this mischief.³ Happily, however, the Act also set certain limits to

Cartels and Trusts in British Industry (London, 1927); H. Levy, *Industrial Germany* (London, 1934); W. Z. Ripley, *Trusts, Pools and Corporations* (1905); H. R. Seager and C. A. Gulick, *Trust and Corporation Problems*, New York (1929); L. Mayers (editor), *A Handbook of N.R.A.* (New York, 1934); *Handwörterbuch der Staatswissenschaften* (ed. 4, by L. Elster, A. Weber, and R. Wieser; Jena), Bd. VIII (1928), s. v. Treuhänder und Treuhandgesellschaften, Trusts (articles and bibliographies by R. Liefmann); *Encyclopædia of the Social Sciences* (London 1930-), s. v. Corporation, Combinations (Industrial), Holding Companies, Trusts (with bibliographies); P. Lepaulle, *Traité Théorique et Pratique des Trusts en Droit Interne, en Droit Fiscal et en Droit International* (Paris, 1932), pp. 53-114.]

¹ [See Holdsworth, *History of English Law*, vol. III (ed. 3), pp. 469-490, vol. IV, pp. 407-480.]

² Stat. 23 Hen VIII, c. 10.

³ The trust is to be void unless it be one that must come to an end within twenty years.

trusts for obituary masses, and not long after Henry's death Protestant lawyers were able to say that the whole Act was directed against "superstition". Perhaps the members of the Inns of Court were not quite impartial expositors of the King's intentions. But in a classical case it was argued that the Act could not mean what it apparently said, since almost every town in England—and by "town" was meant not *Stadt* but *Dorf*—had land held for it by trustees. Such a statement, it need hardly be said, is not to be taken literally. But the trust for a *Communalverband* or for certain purposes of a *Communalverband* is very ancient and has been very common: it is a "charity". There was a manor (*Rittergut*) near Cambridge which was devoted to paying the wages of the knights who represented the county of Cambridge in Parliament.¹

It is true that in this quarter the creation of trusts, though it was occasionally useful, could not directly repair the harm that was being done by that very sharp attack of the *Concessionstheorie* from which we suffered. All our *Communalverbände*, except the privileged boroughs, remained at a low stage of legal development. They even lost ground, for they underwent, as it were, a *capitis diminutio* when a privileged order of *communitates*, namely the boroughs, was raised above them. The county of the thirteenth century (when in solemn records we find so bold a phrase as "die Grafschaft kommt

¹ *Porter's Case* (1592), 1 *Coke's Reports*, 16b, 24b, "For almost all the lands belonging to the towns or boroughs not incorporate are conveyed to several inhabitants of the parish and their heirs, upon trust and confidence to employ the profits to such good uses, as defraying the tax of the town, repairing the highways. . . and no such uses (although they are common almost in every town) were ever made void by the statute of 23 H. 8." Some of the earliest instances of "representative suits" that are known to me are cases of Elizabeth's day in which a few members of a village or parish "on behalf of themselves and the others" complain against trustees.

und sagt") was nearer to clear and unquestionable personality than was the county of the eighteenth century. But if the English county never descended to the level of a governmental district, and if there was always a certain element of "self-government" in the strange system that Gneist described under that name, that was due in a large measure (so it seems to me) to the work of the Trust. That work taught us to think of the corporate quality which the King kept for sale as a technical advantage. A very useful advantage it might be, enabling men to do in a straightforward fashion what otherwise they could only do by clumsy methods; but still an advantage of a highly technical kind. Much had been done behind the hedge of trustees in the way of constructing *Körper* ("bodies") which to the eye of the plain man looked extremely like *Korporationen*, and no one was prepared to set definite limits to this process.

All this reacted upon our system of local government. Action and reaction between our *Vereine* and our *Communalverbände* was the easier, because we knew no formal severance of Public from Private Law. One of the marks of our *Korporation*, so soon as we have any doctrine about the matter, is its power of making "bye-laws" (or better "by-laws"); but, whatever meaning Englishmen may attach to that word now-a-days, its original meaning, so etymologists tell us, was not *Nebengesetz* but *Dorfgesetz*.¹ And then there comes the age when the very name "corporation" has fallen

¹ Murray, *New English Dictionary*. It will be known to my readers that in English books "Statute" almost always means *Gesetz* (*Statutum Regni*) and rarely *Statut*. Only in the case of universities, colleges, cathedral chapters and the like can we render *Statut* by "Statute". In other cases we must say "by-laws", "memorandum and articles of association" and so forth, varying the phrase according to the nature of the body of which we are speaking.

into deep discredit, and stinks in the nostrils of all reformers. Gierke's account of the decadence of the German towns is in the main true of the English boroughs, though in the English case there is something to be added about parliamentary elections and the strife between Whig and Tory. And there is this also to be added that the Revolution of 1688 had sanctified the "privileges" of the boroughs. Had not an attack upon their "privileges", which were regarded as *wohlerworbene Rechte*, "vested rights", cost a King his crown? The municipal corporations were both corrupt and sacrosanct. And so all sorts of devices were adopted in order that local government might be carried on without the creation of any new corporations. Bodies of "commissioners" or of "trustees" were instituted by *Gesetz*, now in this place, and now in that, now for this purpose, and now for that; but good care was taken not to incorporate them. Such by this time had been the development of private trusts and charitable trusts, that English law had many principles ready to meet these "trusts of a public nature". But no great step forward could be taken until the borough corporations had been radically reformed and the connection between corporateness and privilege had been decisively severed.

A natural result of all this long history is a certain carelessness in the use of terms and phrases which may puzzle a foreign observer. I can well understand that he might be struck by the fact that whereas our borough is (or, to speak with great strictness, the mayor, aldermen, and burgesses are) a corporation, our county, after all our reforms, is still not a corporation, though the County Council is. But though our modern statutes establish some important distinctions between counties and boroughs, I very much doubt whether any practical consequences could be deduced from the differ-

ence that has just been mentioned, and I am sure that it does not correspond to any vital principle.

I must bring to an end this long and disorderly paper, and yet I have said very little of those *Communalverbände* which gave Dr Redlich occasion to refer to what I had written. I thought, however, that the one small service that I could do to those who for many purposes are better able to see us than we are to see ourselves was to point out that an unincorporated *Communalverband* is no isolated phenomenon which can be studied by itself, but is a member of a great genus, with which we have been familiar ever since the days when we began to borrow a theory of corporations from the canonists. The technical machinery which has made the existence of "unincorporated bodies" of many kinds possible and even comfortable deserves the attention of all who desire to study English life or any part of it. What the foreign observer should specially remember (if I may be bold enough to give advice) is that English law does not naturally fall into a number of independent pieces, one of which can be mastered while the others are ignored. It may be a clumsy whole; but it is a whole, and every part is closely connected with every other part. For example, it does not seem to me that a jurist is entitled to argue that the English county, being unincorporate, and having no juristic personality, can only be a "passive" *Verband*, until he has considered whether he would apply the same argument to, let us say, the Church of Rome (as seen by English law), the Wesleyan "Connexion", Lincoln's Inn, the London Stock Exchange, the London Library, the Jockey Club, and a Trade Union. Also it is to be remembered that the making of grand theories is not and never has been our strong point. The theory that lies upon the surface is sometimes a borrowed theory which

has never penetrated far, while the really vital principles must be sought for in out-of-the-way places.

It would be easy therefore to attach too much importance to the fact that since 1889 we have had upon our statute-book the following words: "In this Act and in every Act passed after the commencement of this Act the expression 'person' shall, unless the contrary intention appears, include any body of persons corporate or unincorporate."¹ I can imagine a country in which a proposal to enact such a clause would give rise to vigorous controversy: but I feel safe in saying that there was nothing of the sort in England. For some years past a similar statutory interpretation had been set upon the word "person" in various Acts of Parliament relating to local government.² Some of our organs of local government, for example the "boards of health," had not been definitely incorporated, and it was, I suppose, to meet their case that the word "person" was thus explained. It is not inconceivable that the above cited section of the Act of 1889 may do some work hereafter; but I have not heard of its having done any work as yet; and I fear that it cannot be treated as evidence that we are dissatisfied with such theories of personality as have descended to us in our classical books.³

One more word may be allowed me. I think that a foreign jurist might find a very curious and instructive story to tell in what he would perhaps call the publicistic extension of

¹ Interpretation Act, 1889, s. 19

² Public Health Act, 1872, s. 60 [Public Health Act, 1875, s. 4; Local Government (England and Wales) Act, 1888, s. 100. Public Bodies Corrupt Practices Act, 1889, s. 7].

³ [On these theories of personality, see Gray, *Nature and Sources of the Law*, ed. 2 (1921), chap. II; Pollock, *First Book of Jurisprudence*, ed. 6 (1929), chap. v.]

our Trust *Begriff*.¹ No one, I suppose, would deny that, at all events in the past, ideas whose native home was the system of Private Law have done hard work outside that sphere, though some would perhaps say that the time for this sort of thing has gone by. Now we in England have lived for a long while in an atmosphere of "trust", and the effects that it has had upon us have become so much part of ourselves that we ourselves are not likely to detect them.² The trustee, "der zwar Rechtsträger aber nur in fremdem Interesse ist" is well known to all of us, and he becomes a centre from which analogies radiate. He is not, it will be remembered, a mandatory. It is not *Vertrag* that binds him to the *Destinatär*. He is not, it will be remembered, a guardian. The *Destinatär* may well be a fully competent person. Again, there may be no *Destinatär* at all, his place being filled by some "charitable" *Zweck*. We have here a very elastic form of thought into which all manner of materials can be brought. So when new organs of local government are being developed, at first sporadically and afterwards by general laws, it is natural not only that any property they acquire, lands or money, should be thought of as "trust property", but that their governmental powers should be regarded as being held in trust. Those powers are, we say, "intrusted to them", or they are "intrusted with" those powers. The fiduciary character of the *Rechtsträger* can in such a case be made apparent in legal proceedings, more or less analogous to those which are directed against other trustees. And, since practical questions will find an answer in the elaborate statutes which regulate

¹ [For a recent study of this extension, see Hanbury, *Essays in Equity* (1934), pp. 80-124 ("Equity in Public Law").]

² [See Holdsworth, "The English Trust: Its Origins and Influence in English Law" (*Revue d'Histoire du Droit*, Haarlem, tome iv, 4^e fascicule (1923), pp. 367-383), and *History of English Law*, vol. iv, pp. 476-480.]

the doings of these *Körper*, we have no great need to say whether the trust is for the State, or for the *Gemeinde*, or for a *Zweck*. Some theorists who would like to put our institutions into their categories, may regret that this is so; but so it is.

Not content, however, with permeating this region, the Trust presses forward until it is imposing itself upon all wielders of political power, upon all the organs of the body politic. Open an English newspaper, and you will be unlucky if you do not see the word "trustee" applied to "the Crown" or to some high and mighty body. I have just made the experiment, and my lesson for to-day is, that as the Transvaal has not yet received a representative constitution, the Imperial parliament is "a trustee for the colony". There is metaphor here. Those who speak thus would admit that the trust was not one which any court could enforce, and might say that it was only a "moral" trust. But I fancy that to a student of *Staatswissenschaft* legal metaphors should be of great interest, especially when they have become the common-places of political debate. Nor is it always easy to say where metaphor begins. When a Statute declared that the *Herrschaft* which the East India Company had acquired in India was held "in trust" for the Crown of Great Britain, that was no idle proposition but the settlement of a great dispute. It is only the other day that American judges were saying that the United States acquired the sovereignty of Cuba upon trust for the Cubans.¹

¹ [On the application of the trust-concept to international mandates see Lee, *The Mandate for Mesopotamia and the Principle of Trusteeship in English Law* (1920); Stoyanovsky, *La Théorie Générale des Mandats Internationaux* (1925), pp. 42-48; Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), pp. 191-202; Oppenheim, *International Law*, vol. 1 (ed. 4 (McNair), 1928), pp. 201-215; Bentwich,

But I have said enough and too much.¹

The Mandates System (1930), pp. 1-20. On the interpretation of the Treaty of Versailles, Article 49, with reference to the Saar territory, in terms of the trust principle, see Bisschop, *The Saar Controversy* (1924), pp. 23-28, 40-42. On the English law of trust and its applicability to international matters, see further Dr Wolfgang Friedmann's *Contribution of English Equity to the Idea of an International Equity Tribunal* (London, 1935), pp. 65-82. For a recent case (1928) in which the distinction is drawn between the private property of a monarch and trust property administered by him as head of a royal family, see *Annual Digest of Public International Law Cases*, Years 1927 and 1928, edited by Dr A. D. McNair and Dr H. Lauterpacht (1931), pp. 31-33.

Owing to the influence of the English trust-concept there is now an increasing tendency among Continental jurists to draw attention to the Germanic *Treuhand* and the Roman *Fiducia*, institutions analogous to the trust, and, by a more definite formulation of their legal content, to adapt them to transactions of private law. See, e.g., W. Siebert, *Das Rechtsgeschäftliche Treuhandverhältnis* (Marburg, 1933); P. Lepaulle, "Civil Law Substitutes for Trusts" (*Yale Law Journal*, vol. xxxvi (1926-7), pp. 1126-1147). Cf. L. T. Bates, "Common Law Express Trusts in French Law" (*Yale Law Journal*, vol. xl, (1931-2), pp. 34-52).]

¹ It did not seem expedient to burden this slight sketch with many references to books, but the following are among the best treatises which deal with those matters of which I have spoken: Lewin, *Law of Trusts*, ed. 10 (1898) [ed. 13 (1928)]; Tudor, *Law of Charities and Mortmain*, ed. 3 (1889) [ed. 5 (1929)]; Lindley, *Law of Partnership*, ed. 6 (1893) [ed. 10 (1935)]; Lindley, *Law of Companies*, ed. 6 (1902); Pollock, *Digest of the Law of Partnership*, ed. 6 (1895) [ed. 12 (1930)]; Buckley, *Law and Practice under the Companies Act*, ed. 8 (1902) [ed. 11 (1930)]; Palmer, *Company Law*, ed. 2 (1898) [ed. 15 (1933)]; Wertheimer, *Law relating to Clubs*, ed. 3 (1903); Underhill, *Encyclopædia of Forms*, vol. III (1903), pp. 728-814 (Clubs) [ed. 2, vol. III (1925), pp. 535-628 (Clubs)]. As regards the early history of "uses" or trusts, an epoch was made by O. W. Holmes, "Early English Equity", *Law Quarterly Review*, vol. I, p. 162 [reprinted (as revised by the author) in *Select Essays in Anglo-American Legal History*, Boston, vol. II (1908), pp. 705-721, and in the author's *Collected Legal Papers* (1920), pp. 1-24].

[On the origin and early history of "uses" or trusts, see also Maitland, "Origin of Uses" (*Collected Papers* (1911), vol. II, pp. 403-416, reprinted from *Harvard Law Review*, 1894), vol. VIII, pp. 127-137, *History of English Law*, ed. 2 (1898), vol. II, pp. 228-239, *Equity* (1909) (*passim*); Ames, "Origin of Uses" (*Lectures in Legal History* (1913), pp. 233-242); Holdsworth, *History of English Law*, vol. IV (1924), pp. 409-449.]

V

MORAL PERSONALITY AND LEGAL PERSONALITY¹

THE memory of Henry Sidgwick is not yet in need of revival. It lives a natural life among us, and will live so long as those who saw and heard him draw breath. Still the generations, as generations must be reckoned in this place, succeed each other rapidly, and already I may be informing, rather than reminding, some of you when I say that among his many generous acts was the endowment of a readership in English Law, of which one of his pupils was fortunate enough to be the first holder. If that pupil ventures to speak here this afternoon, it will not be unnatural that he should choose his theme from the borderland where ethical speculation marches with jurisprudence.

Ethics and Jurisprudence. That such a borderland exists all would allow, and, as usually happens in such cases, each of the neighbouring powers is wont to assert, in practice, if not in theory, its right to define the scientific frontier. We, being English, are, so I fancy, best acquainted with the claims of ethical speculation, and in some sort prejudiced in their favour. We are proud of a long line of moralists, which has not ended in Sidgwick and Martineau and Green, in Herbert Spencer and Leslie Stephen, and we conceive that the "jurist", if indeed such an animal exists, plays, and of right ought to play, a subordinate, if not subservient, part in the delimitation of whatever moral sciences there may happen to be. I am not sure, however, that the poor lawyer

¹ The Sidgwick Lecture for 1903, delivered at Newnham College.

with antiquarian tastes might not take his revenge by endeavouring to explain the moral philosopher as a legal phenomenon, and by classing our specifically English addiction to ethics as a by-product of the specifically English history of English law. That statement, if it be more than the mere turning of the downtrodden worm, is obviously too large, as it is too insolent, a text for an hour's lecture. What I shall attempt will be to indicate one problem of a speculative sort, which (so it seems to me) does not get the attention that it deserves from speculative Englishmen, and does not get that attention because it is shrouded from their view by certain peculiarities of the legal system in which they live.

The Natural Person and the Corporation. Texts, however, I will have. My first is taken from Mr Balfour. Lately in the House of Commons the Prime Minister spoke of trade unions as corporations. Perhaps, for he is an accomplished debator, he anticipated an interruption. At any rate, a distinguished lawyer on the Opposition benches interrupted him with "The trade unions are not corporations." "I know that," retorted Mr Balfour, "I am talking English, not law." A long story was packed into that admirable reply.¹

And my second text is taken from Mr Dicey, who delivered the Sidgwick lecture last year. "When", he said, "a body of twenty, or two thousand, or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body, which by no fiction

¹ The *Standard*, 23rd April, 1904. Mr Balfour: "The mere fact that funds can be used, or are principally used, for benefit purposes, is surely not of itself a sufficient reason for saying that trade unions, and trade unions alone, out of all the corporations in the country, commercial——" Sir R. Reid. "The trade unions are not corporations" Mr Balfour: "I know; I am talking English, not law" (*cheers and laughter*).

of law, but the very nature of things, differs from the individuals of whom it is constituted."¹ I have been waiting a long while for an English lawyer of Professor Dicey's eminence to say what he said—to talk so much "English". Let me repeat a few of his words with the stress where I should like it to lie: "they create a body, which *by no fiction of law, but by the very nature of things*, differs from the individuals of whom it is constituted." So says Blackstone's successor. Blackstone himself would, I think, have inverted that phrase, and would have ascribed to a fiction of law that phenomenon—or whatever we are to call it—which Mr Dicey ascribes to the very nature of things.²

Now for a long time past the existence of this phenomenon has been recognized by lawyers, and the orthodox manner of describing it has been somewhat of this kind. Besides men or "natural persons", law knows persons of another kind. In particular it knows the corporation, and for a multitude of purposes it treats the corporation very much as it treats the man. Like the man, the corporation is (forgive this compound adjective) a right-and-duty-bearing unit. Not all the legal propositions that are true of a man will be true of a corporation. For example, it can neither marry nor be given in marriage; but in a vast number of cases you can

¹ Professor Dicey's lecture on the Combination Laws is printed in *Harvard Law Review*, vol. xvii, p. 511. See p. 513.

² [Blackstone's views will be found in his *Commentaries on the Laws of England*, Book 1, ed. 2 (1766), chap. xviii. Of Corporations. For comments thereon, see Sir Frederick Pollock's essay, "Has the Common Law received the Fiction Theory of Corporations?" (*Festschrift Otto Gierke zum siebenzigsten Geburtstag* (1911), S. 105-123; reprinted in *Law Quarterly Review*, vol. xxvii, p. 219, and in the author's *Essays in the Law*, 1922, pp. 151-179). Sir Frederick Pollock has reached the conclusion that no English Court has ever officially or semi-officially adopted the fiction theory (*loc. cit.*). See also Geldart, "Legal Personality" (*Law Quarterly Review*, vol. xxvii, pp. 90-108).]

make a legal statement about x and y which will hold good whether these symbols stand for two men or for two corporations, or for a corporation and a man. The University can buy land from Downing, or hire the gildhall from the Town, or borrow money from the London Assurance; and we may say that *exceptis excipiendis* a court of law can treat these transactions, these acts in the law, as if they took place between two men, between Styles and Nokes. But further, we have to allow that the corporation is in some sense composed of men, and yet between the corporation and one of its members there may exist many, perhaps most, of those legal relationships which can exist between two human beings. I can contract with the University: the University can contract with me. You can contract with the Great Northern Company as you can with the Great Eastern, though you happen to be a shareholder in the one and not in the other. In either case there stands opposite to you another right-and-duty-bearing unit—might I not say another individual?—a single “not-yourself” that can pay damages or exact them. You expect results of this character, and, if you did not get them, you would think ill of law and lawyers. Indeed, I should say that, the less we know of law, the more confidently we Englishmen expect that the organized group, whether called a corporation or not, will be treated as person: that is, as right-and-duty-bearing unit.

Legal Orthodoxy and the Fictitious Person. Perhaps I can make the point clearer by referring to an old case. We are told that in Edward IV’s day the mayor and commonalty—or, as we might be tempted to say, the municipal corporation—of Newcastle gave a bond to the man who happened to be mayor, he being named by his personal name, and that the bond was held to be void because a man

cannot be bound to himself.¹ The argument that is implicit in those few words seems to us quaint, if not sophistical. But the case does not stand alone; far from it. If our business is with medieval history and our aim is to re-think it before we re-present it, here lies one of our most serious difficulties. Can we allow the group—gild, town, village, nation—to stand over against each and all of its members as a distinct person? To be concrete, look at Midsummer Common. It belongs, and, so far as we know, has always in some sense belonged, to the burgesses of Cambridge. But in what sense? Were they co-proprietors? were they corporators? Neither—both?

I would not trouble you with medievalism. Only this by the way: If once you become interested in the sort of history that tries to unravel these and similar problems, you will think some other sorts of history rather superficial. Perhaps you will go the length of saying that much the most interesting person that you ever knew was *persona ficta*. But my hour flies.

To steer a clear or any course is hard, for controversial rocks abound. Still, with some security we may say that at the end of the Middle Age a great change in men's thoughts about groups of men was taking place, and that the main agent in the transmutation was Roman Law. Now just how the classical jurists of Rome conceived their *corpora* and *universitates* became in the nineteenth century a much debated question. The profane outsider says of the Digest what some one said of another book:

¹ Year Book, Mich. 21 Edw. IV, f 68: "Come fuit adjudgé en le cas del Maior de Newcastle ou le Maior et le Cominalty fist un obligation a mesme le person que fuit Maior par son propre nosme, et pur ceo que il mesme fuit Maior, et ne puit faire obligation a luy mesme, il [= l'obligation] fuit tenus void "

Hic liber est in quo quaerit sua dogmata quisque
Invenit et pariter dogmata quisque sua.

Where people have tried to make antique texts do modern work, the natural result is what Mr Buckland has happily called "Wardour Street Roman Law".¹ Still, of this I suppose there can be no doubt, that there could, without undue pressure, be obtained from the *Corpus Juris* a doctrine of corporations, which, so far as some main outlines are concerned, is the doctrine which has ruled the modern world. Nor would it be disputed that this work was done by the legists and canonists of the Middle Age, the canonists leading the way.² The group can be a person: co-ordinated, equiparated, with the man, with the natural person.

With the "natural" person—for the personality of the *universitas*, of the corporation, is not natural—it is fictitious. This is a very important part of the canonical doctrine, first clearly proclaimed, so we are told, by the greatest lawyer that ever sat upon the chair of St Peter, Pope Innocent IV. You will recall Mr Dicey's words: "not by fiction of law, but by the very nature of things." Invert those words, and you will have a dogma that works like leaven in the transformation of medieval society.

If the personality of the corporation is a legal fiction, it is the gift of the prince. It is not for you and me to feign and to force our fictions upon our neighbours. "Solus princeps fingit quod in rei veritate non est".³ An argument drawn

¹ Buckland, "Wardour Street Roman Law", *Law Quarterly Review*, vol. xvii, p. 179.

² [For the history of medieval theories in regard to the nature of the corporation and the state, see Gierke, *Genossenschaftsrecht*, Bd. III (1881), S. 1-501; for modern theories, see *op. cit.* Bd. IV (1913).]

³ Lucas de Penna, cited in Gierke, *Das deutsche Genossenschaftsrecht*, Bd. III, S. 371.

from the very nature of fictions thus came to the aid of less questionably Roman doctrines about the illicitness of all associations, the existence of which the prince has not authorized. I would not exaggerate the importance of a dogma, theological or legal. A dogma is of no importance unless and until there is some great desire within it. But what was understood to be the Roman doctrine of corporations was an apt lever for those forces which were transforming the medieval nation into the modern State. The federalistic structure of medieval society is threatened. No longer can we see the body politic as *communitas communitatum*, a system of groups, each of which in its turn is a system of groups. All that stands between the State and the individual has but a derivative and precarious existence.

Do not let us at once think of England. English history can never be an elementary subject: we are not logical enough to be elementary. If we must think of England, then let us remember that we are in the presence of a doctrine which in Charles II's day condemns all—yes, all—of the citizens of London to prison for “presuming to act as a corporation”. We may remember also how corporations appear to our absolutist Hobbes as troublesome entozoa. But it is always best to begin with France, and there, I take it, we may see the pulverizing, macadamizing tendency in all its glory, working from century to century, reducing to impotence, and then to nullity, all that intervenes between Man and State.

The State and the Corporation. In this, as in some other instances, the work of the monarchy issues in the work of the revolutionary assemblies. It issues in the famous declaration of 18th August, 1792: “A State that is truly free ought not to suffer within its bosom any corporation, not

even such as, being dedicated to public instruction, have merited well of the country.”¹ That was one of the mottoes of modern absolutism: the absolute State faced the absolute individual. An appreciable part of the interest of the French Revolution seems to me to be open only to those who will be at pains to give a little thought to the theory of corporations. Take, for example, those memorable debates touching ecclesiastical property.² To whom belong these broad lands when you have pushed fictions aside, when you have become a truly philosophical jurist with a craving for the natural? To the nation, which has stepped into the shoes of the prince. That is at least a plausible answer, though an uncomfortable suspicion that the State itself is but a questionably real person may not be easily dispelled. And as with the churches, the universities, the trade-gilds, and the like, so also with the communes, the towns and villages. Village property—there was a great deal of village property in France—was exposed to the dilemma: it belongs to the State, or else it belongs to the now existing villagers. I doubt we Englishmen, who never clean our slates, generally know how clean the French slate was to be.

Associations in France. Was to be, I say.³ Looking back now, French lawyers can regard the nineteenth century as the century of association, and, if there is to be association, if there is to be group-formation, the problem of personality

¹ “Considérant qu’un État vraiment libre ne doit souffrir dans son sein aucune corporation, pas même celles qui, vouées à l’enseignement public, ont bien mérité de la patrie”

² [See Gierke, *Natural Law and the Theory of Society 1500 to 1800* (translated by Ernest Barker, 1934), pp 167, 370–371, where these debates of the French National Assembly are discussed.]

³ [Maitland’s point seems to be that the cleaning of the French slate was not achieved in the Revolution, or even by the legislation of the nineteenth century, but *was to be* effected by the legislation on *congrégations* and *association ultérieures* in the beginning of the twentieth century]

cannot be evaded, at any rate if we are a logical people. Not to mislead, I must in one sentence say, that even the revolutionary legislators spared what we call partnership, and that for a long time past French law has afforded comfortable quarters for various kinds of groups, provided (but notice this) that the group's one and only object was the making of pecuniary gain. Recent writers have noticed it as a paradox that the State saw no harm in the selfish people who wanted dividends, while it had an intense dread of the comparatively unselfish people who would combine with some religious, charitable, literary, scientific, artistic purpose in view. I cannot within my few minutes be precise, but at the beginning of this twentieth century it was still a misdemeanour to belong to any unauthorized *association* having more than twenty members. A licence from the prefect, which might be obtained with some ease, made the *association* non-criminal, made it licit; but personality—"civil personality", as they say in France—was only to be acquired with difficulty as the gift of the central government.

Now I suppose it to be notorious that during the last years of the nineteenth century law so unfavourable to liberty of association was still being maintained, chiefly, if not solely, because prominent, typically prominent, among the *associations* known to Frenchmen stood the *congrégations*—religious houses, religious orders. The question how these were to be treated divided the nation, and at last, in 1901, when a new and very important law was made about "the contract of association", a firm line was drawn between the non-religious sheep and the religious goats.¹ With the step then taken and the

¹ [For the distinction between the law of *syndicats* (Waldeck-Rousseau's law of 1884) and the law of *associations* (Waldeck-Rousseau's law of 1901), see Esmem, *Éléments de droit constitutionnel* (ed. 1927), vol II, chap. VIII, especially pp. 615-617, 642-648.]

subsequent woes of the congregations I have here no concern; but the manner in which religious and other groups had previously been treated by French jurisprudence seems to me exceedingly instructive. It seems to me to prove so clearly that in a country where people take their legal theories seriously, a country where a Prime Minister will often talk law without ceasing to talk agreeable French, the question whether the group is to be, as we say, "a person in the eye of the law" is the question whether the group as group can enjoy more than an uncomfortable and precarious existence. I am not thinking of attacks directed against it by the State. I am thinking of collisions between it and private persons. It lives at the mercy of its neighbours, for a law-suit will dissolve it into its constituent atoms. Nor is that all. Sometimes its neighbours will have cause to complain of its legal impersonality. They will have been thinking of it as a responsible right-and-duty-bearing unit, while at the touch of law it becomes a mere many, and a practically, if not theoretically, irresponsible many.

Group-Personality. During the nineteenth century (so I understand the case) a vast mass of experience, French, German, Belgian, Italian, and Spanish (and I might add, though the atmosphere is hazier, English and American), has been making for a result which might be stated in more than one way. (1) If the law allows men to form permanently organized groups, those groups will be for common opinion right-and-duty-bearing units; and if the law-giver will not openly treat them as such, he will misrepresent, or, as the French say, he will "denature" the facts: in other words, he will make a mess and call it law. (2) Group-personality is no purely legal phenomenon. The law-giver may say that it does not exist, where, as a matter of moral

sentiment, it does exist. When that happens, he incurs the penalty ordained for those who ignorantly or wilfully say the thing that is not. If he wishes to smash a group, let him smash it, send the policeman, raid the rooms, impound the minute-book, fine, and imprison; but if he is going to tolerate the group, he must recognize its personality, for otherwise he will be dealing wild blows which may fall on those who stand outside the group as well as those who stand within it. (3) For the morality of common sense the group is person, is right-and-duty-bearing unit. Let the moral philosopher explain this, let him explain it as illusion, let him explain it away; but he ought not to leave it unexplained, nor, I think, will he be able to say that it is an illusion which is losing power, for, on the contrary, it seems to me to be persistently and progressively triumphing over certain philosophical and theological prejudices.

You know that classical distribution of Private Law under three grand rubrics—Persons, Things, Actions. Half a century ago the first of these three titles seemed to be almost vanishing from civilized jurisprudence. No longer was there much, if anything, to be said of exceptional classes, of nobles, clerics, monks, serfs, slaves, excommunicates or outlaws. Children there might always be, and lunatics; but women had been freed from tutelage. The march of the progressive societies was, as we all know, from status to contract. And now? And now that forlorn old title is wont to introduce us to ever new species and new genera of persons, to vivacious controversy, to teeming life; and there are many to tell us that the line of advance is no longer from status to contract, but through contract to something that contract cannot explain, and for which our best, if an inadequate, name is the personality of the organized group.

Fact or Fiction. Theorizing, of course, there has been.¹ I need not say so, nor that until lately it was almost exclusively German. Our neighbours' conception of the province of jurisprudence has its advantages as well as its disadvantages. On the one hand, ethical speculation (as we might call it) of a very interesting kind was until these last days too often presented in the unattractive guise of Wardour Street Roman Law, or else, raising the Germanistic cry of "Loose from Rome"! it plunged into an exposition of medieval charters. On the other hand, the theorizing is often done by men who have that close grasp of concrete modern fact which comes of a minute and practical study of legal systems. Happily it is no longer necessary to go straight to Germany. That struggle over "the contract of association" to which I have alluded, those woes of the "congregations" of which all have heard, invoked foreign learning across the border, and now we may read in lucid French of the various German theories. Good reading I think it; and what interests me especially is that the French lawyer, with all his orthodoxy (legal orthodoxy) and conservatism, with all his love of clarity and abhorrence of mysticism, is often compelled to admit that the traditional dogmas of the law-school have

¹ [For a short summary and criticism of the several theories of legal personality, with special reference to the group, see Dr Ernest Barker's Introduction to Gierke's *Natural Law and the Theory of Society 1500 to 1800* (1934), vol. 1, pp. lvi-lxxxvii. The two principal theories of the present day are the canonists' theory of the *persona ficta* and Gierke's theory that the group is a real person which itself can will and itself can act by the men who are its organs. For a list of Gierke's works, in many of which he has elaborated his doctrine, see S. Mogi's *Otto von Gierke: His Political Teaching and Jurisprudence* (1932), pp. 268-282. Gierke's theory has been accepted by many legal thinkers in England and elsewhere. Appropriating those features of the older theories which seem to him to be of value, Dr Barker has propounded a new theory which he seeks to apply to all groups, including the State: he maintains that legal personality resides not in the group itself, but in its purpose (*loc. cit.*.)]

broken down. Much disinclined though he may be to allow the group a real will of its own, just as really real as the will of a man, still he has to admit that if n men unite themselves in an organized body, jurisprudence, unless it wishes to pulverize the group, must see $n + 1$ persons. And that for the mere lawyer should I think be enough. "Of heaven and hell he has no power to sing", and he might content himself with a phenomenal reality—such reality, for example, as the lamp-post has for the idealistic ontologist. Still, we do not like to be told that we are dealing in fiction, even if it be added that we needs must feign, and the thought will occur to us that a fiction that we needs must feign is somehow or another very like the simple truth.

Why we English people are not interested in a problem that is being seriously discussed in many other lands, that is a question to which I have tried to provide some sort of answer elsewhere.¹ It is a long, and you would think it a very dreary, story about the most specifically English of all our legal institutes; I mean the trust. All that I can say here is that the device of building a wall of trustees enabled us to construct bodies which were not technically corporations and which yet would be sufficiently protected from the assaults of individualistic theory. The personality of such bodies—so I should put it—though explicitly denied by lawyers, was on the whole pretty well recognized in practice. That something of this sort happened you might learn from one simple fact. For some time past we have had upon our statute book the term "unincorporate body". Suppose that a Frenchman saw it, what would he say? "Unincorporate body: inanimate

¹ Matland, "Trust und Korporation", Wien, 1904 (from *Grunhut's Zeitschrift für das Privat- und Öffentliche-Recht*, vol. xxxii). [See p. 141, *supra*.]

soul! No wonder your Prime Minister, who is a philosopher, finds it hard to talk English and talk law at the same time."

One result of this was, so I fancy, that the speculative Englishman could not readily believe that in this quarter there was anything to be explored except some legal trickery unworthy of exploration. The lawyer assured him that it was so, and he saw around him great and ancient, flourishing and wealthy groups—the Inns of Court at their head—which, so the lawyer said, were not persons. To have cross-examined the lawyer over the bodiliness of his "unincorporate body" might have brought out some curious results; but such a course was hardly open to those who shared our wholesome English contempt for legal technique.

The Ultimate Moral Unit. Well, I must finish; and yet perhaps I have not succeeded in raising just the question that I wanted to ask. Can I do that in two or three last sentences? It is a moral question, and therefore I will choose my hypothetical case from a region in which our moral sentiments are not likely to be perplexed by legal technique. My organized group shall be a sovereign state. Let us call it Nusquamia. Like many other sovereign states, it owes money, and I will suppose that you are one of its creditors. You are not receiving the expected interest and there is talk of repudiation. That being so, I believe that you will be, and indeed I think that you ought to be, indignant, morally, righteously indignant. Now the question that I want to raise is this: Who is it that really owes you money? Nusquamia. Granted, but can you convert the proposition that Nusquamia owes you money into a series of propositions imposing duties on certain human beings that are now in existence? The task will not be easy. Clearly you do not think that every Nusquamian owes you some aliquot share

of the debt. No one thinks in that way. The debt of Venezuela is not owed by Fulano y Zutano and the rest of them. Nor, I think, shall we get much good out of the word "collectively", which is the smudgiest word in the English language, for the largest "collection" of zeros is only zero. I do not wish to say that I have suggested an impossible task, and that the right-and-duty-bearing group must be for the philosopher an ultimate and unanalysable moral unit: as ultimate and unanalysable, I mean, as is the man. Only if that task can be performed, I think that in the interests of jurisprudence and of moral philosophy it is eminently worthy of circumspect performance. As to our national law, it has sound instincts, and muddles along with semi-personality and demi-semi-personality towards convenient conclusions. Still, I cannot think that Parliament's timid treatment of the trade unions has been other than a warning, or that it was a brilliant day in our legal annals when the affairs of the Free Church of Scotland were brought before the House of Lords, and the dead hand fell with a resounding slap upon the living body. As to philosophy, that is no affair of mine. I speak with conscious ignorance and unfeigned humility; only of this I feel moderately sure, that those who are to tell us of the very nature of things and the very nature of persons will not be discharging their duties to the full unless they come to close terms with that triumphant fiction, if fiction it be, of which I have said in your view more than too much, and in my own view less than too little.¹

¹ In the following list will be found the titles of a few French books which (by way of historical retrospect or legal exposition or juristic speculation or political controversy) illustrate competing theories of legal personality and bring them into close relation with a recent and interesting chapter of French history, namely the campaign against the *congrégations*. Some of these works (see especially M. Michoud's articles) will also serve as an introduction to German speculation.

J[can] Brissaud, *Manuel d'histoire du droit français*, pp. 1769-1785: Paris, 1899. [The second of the two volumes of Brissaud's treatise (vol. I Public Law; vol. II: Private Law) has appeared in a new edition, prepared by the author's son, Jacques Brissaud, which bears the title *Manuel d'histoire du droit privé*: Paris, 1935.] M. Planiol, *Traité élémentaire de droit civil*, t. I, pp. 259-290 (*Les personnes fictives*); t. II, pp. 618-623 (*Association*): Paris, 1901. [Op. cit. t. I, 12ème éd. pp. 1046-1065 (*Propriété collective et personnes fictives*), t. II, 11ème éd. pp. 724-735 (*Associations*).] G. Trouillot et F. Chapsal, *Du contrat d'association—Commentaire de la Loi du 1er Juillet 1901*. Paris, 1902. M. Vauthier, *Études sur les personnes morales*: Bruxelles et Paris, 1887. Le Comte de Vareilles-Sommières, *Du contrat d'association, ou, La loi française permet-elle aux associations non reconnues de posséder?* Paris, 1903. Le Marquis de Vareilles-Sommières, *Les personnes morales*: Paris, 1902 [Later ed. 1919] L. Michoud, "La notion de personnalité morale" (*Revue du droit public et de la science politique*, t. XI, pp. 1, 193: Paris, 1899). A. Mestre, *Les personnes morales et le problème de leur responsabilité pénale*: Paris, 1899. M. Hauriou, "De la personnalité comme élément de la réalité sociale" (*Revue générale du droit, de la législation et de la jurisprudence*, t. XXII, pp. 1, 119. Paris, 1898). D. Négulesco, *Le problème juridique de la personnalité morale et son application aux sociétés civiles et commerciales*. Paris, 1900. A. Gouffre de Lapradelle, *Théorie et pratique des fondations perpétuelles*. Paris, 1895. F. Garcin, *La mainmorte—de 1749 à 1901*. Paris et Lyon, 1903. J. Imbart de Latour, *Des biens communaux*: Paris, 1899. P. M. Waldeck-Rousseau, *Associations et congrégations*: Paris, 1901. E. Combes, *Une campagne laïque (1902-1903)*, Préface par Anatole France. Paris, 1904.

[In addition to the works cited by Martland attention may be drawn to the following. M. Félix, *Congrégations religieuses Étude historique et juridique*, 4 tomes: Paris, 1908-1929. H. Hayem, *Domaines respectifs de l'association et de la société*: Paris, 1907. J. Laplace, *De la capacité des Associations contractuelles. Étude de droit civil sur la loi du 1er Juillet 1901*: Paris, 1903. G. Surugue, *Régime légal des congrégations religieuses en France*, éd. 2: Paris, 1898. S. Serbesco, *La dévolution des biens des personnes morales disparues, précédée d'une étude sur la nature de la personnalité morale*. Paris, 1920. P. Kayser, *Société ou Association? L'article 1832 du Code civil et la loi du 1er Juillet 1901*: Paris, 1928. P. Nourrisson, *Histoire légale des congrégations religieuses en France depuis 1789*, 2 tomes. Paris, 1928. P. Nourrisson, *Histoire de la liberté d'association en France depuis 1789*, 2 tomes. Paris, 1920. L. Michoud, "La personnalité et les droits subjectifs de l'État dans la doctrine française contemporaine" (*Festschrift Otto Gierke zum siebzigsten Geburtstag*, S. 493-524. Weimar, 1911). R. Saleilles, *De la personnalité juridique. Histoire et Théories*, 2ème éd. Paris, 1922. L. Michoud, "La théorie de la personnalité morale dans l'œuvre de Raymond Saleilles" (*L'œuvre juridique de Raymond Saleilles*, pp. 299-337: Paris, 1914). L. Michoud, *La Théorie de la Personnalité Morale*, 3ème éd. par L. Troabas, 2 tomes: Paris, 1932. A. Pillet, *Des personnes morales en*

droit international privé: Étude complète de doctrine et de jurisprudence. Paris, 1914. Josserand, *Cours de droit civil positif français*, t. I, pp. 345-352 ("Le Concept de la personnalité morale"): Paris, 1930. Planiol et Ripert, *Traité pratique de Droit Civil Français*, 14 tomes. Paris. 1928-1934 (see t. XIV, index).

On legal personality, see also the following. F. Hallis, *Corporate Personality*: Oxford, 1930. Gierke's *Natural Law and the Theory of Society 1500 to 1800*: Cambridge, 1934 (E. Barker's Introduction, pp. lvii-lxxxvii). P. Vinogradoff, "Juridical Persons" (*Collected Papers*, vol. II, pp. 328-340: 1928). C. T. Carr, *Law of Corporations* 1905. W. J. Brown, "The Personality of the Corporation and the State" (*Law Quarterly Review*, vol. XXI (1905), pp. 365-379). J. Salmond, *Jurisprudence*, 8th ed., by C. A. W. Manning, chap. xv: London, 1930. F. Pollock, *Essays in the Law*, pp. 151-179: 1922. H. A. Smith, *The Law of Associations Corporate and Unincorporate* Oxford, 1914. Duff, "The Personality of an Idol" (*Cambridge Law Journal*, 1927, pp. 42-8). Many of W. M. Geldart's published writings deal with problems in respect to legal personality, e.g. "Legal Personality" (*Law Quarterly Review*, vol. XXVII, pp. 90-108). See also the volume entitled *Papers and Lectures on the Law of Trade Unions and other Legal Topics by W. M. Geldart* (a set of collected but not republished papers which was privately made and deposited in certain libraries), Oxford, 1924.]

VI

THE BODY POLITIC¹

I HOPE that you will forgive me for choosing a subject which lies very near to that which Sidgwick discussed at our last meeting. I had thought of it before I heard his paper, and though to my great delight he said some things which I had long wanted to hear said, his object was not quite that which I have in view. He spoke of the means, the very inadequate means, that we have of foretelling the future of bodies politic, I wish to speak of the means, the very inadequate means as some people seem to think them, that we have of filling up the gaps that at present exist in our knowledge of the past history of these political organisms. The two processes, that of predicting the future and that of reconstructing the past are essentially similar, both are processes of inference and generalization. Of course, when the historian tells us a single fact, for example, gives the date of a battle, inference and generalization are already at work. He has got this supposed fact from (let us say) some chronicler or some tombstone, and he has come to the conclusion that about such a matter this chronicler's or this tombstone's word may be trusted. But when he goes on to represent as usual or rare some habit or custom or mode of thought or of conduct he is very obviously drawing general conclusions from particular instances, and is, if I may so say, predicting the past.

Sidgwick drew a distinction between empirical and scien-

¹ [The date of this paper is probably 1899. Maitland's note on the MS. is "Read to the Eranus Club".]

tific predictions. I will apply this distinction to postdictions. I did not gather from him that he meant to draw a hard and accurate line between the empirical and the scientific. Certainly for my purpose I could not draw it with a firm hand. But still though we have before us a matter of degree the distinction is real and important. The historian of the old-fashioned type who does not talk about scientific method or laws of nature is drawing inferences and making generalizations, but these do not as a general rule go far outside the country and the time that he is studying. We may compare him to the chancellor of the exchequer who is estimating the produce of next year's taxes. Sometimes the two procedures are very strictly comparable, as when the historian who thinks that he has examined enough accounts ventures on a general statement about the revenue of Henry II or George III. Now in a certain sense it is true that the method employed in these cases ought to be a scientific method, that is to say, it ought to be the method best adapted to the purpose in hand. Still it is only scientific in the sense in which the method of a Sherlock Holmes would be scientific. The end of it all is a story, a causally connected story tested and proved at every point. Also it must I think be allowed that history of this old-fashioned kind is successfully standing one of those tests of a science that Sidgwick mentioned last time. No historian dreams of beginning the work all over again. Even if he has a taste for paradox and a quarrelsome temper he accepts what is after all the great bulk of his predecessor's results. Men are disputing now whether the forged decretals were concocted in the east or in the west of France, whether they shall be dated a little after or a little before 850; the man who attributed them to the popes whose names they bear would be in much the same position as that which is assigned

to the man who says that the world is flat; he would be taking up arms against an organized body of knowledge. I should doubt whether books about the most rapidly advancing of the physical sciences become antiquated more rapidly than those books about history which do not belong to the very first class.

Now to this progress I do not think that we can set any narrow limits. During the present century there has been a rapid acceleration. Tracts which were dark are now fairly well lit and neglected and remote pieces of the story are being systematically explored. Of course I am including under the name of history what some people call archaeology; for to my mind an archaeology that is not history is somewhat less than nothing, and a Special Board for History and Archaeology is like a Special Board for Mathematics and the Rule of Three. Whether we fix our eyes on the east or the west, on ancient or modern times, we see that new truths are being brought in and secured, and this in that gradual fashion in which a healthy body of knowledge grows, the new truth generally turning out to be but a quarter-truth and yet one which must modify the whole tale.

But this process, rapid as it seems to me (for I am comparing it with the growth of historical knowledge in the last century), seems far too slow to some who compare it with the exploits of the natural sciences. They want to have a science of history comparable to some of those sciences, and, for choice, to biology. A desire of this kind there has been for a long time past; in our own day it has become very prominent and there are many writers and readers who seem to think that we are within a measurable distance of a sociology or an inductive political science which shall take no shame when set beside the older sciences. Having a science

of the body natural we are at last to have a similar science of the body politic. The comparison of a state or nation to a living body is of course ancient enough. The Herbert Spencer of the twelfth century worked it out with grotesque mediæval detail; the John of Salisbury of our own century teaches us that the comparison is just about to become strictly scientific since we have at last an evolutionary biology. Now the suggestions derived from this comparison have been of inestimable value to mankind at large and to historians in particular. I wish once for all to make a very large admission about this matter. But for this comparison, the vocabulary of the historian and of the political theorist would be exceedingly meagre, and I need not say that a rich, flexible, delicate vocabulary is necessary if there is to be accurate thinking and precise description. For the presentation—nay, for the perception—of unfamiliar truth we have need of all the metaphors that we can command, and any source of new and apt metaphors is a source of new knowledge. The language of any and every science must be in the eyes of the etymologist a mass of metaphors and of very mixed metaphors. I am also very far from denying that every advance of biological science, but more especially any popularization of its results, will supply the historian and the political theorist with new thoughts, and with new phrases which will make old thoughts truer. I can conceive that a century hence political events will be currently described in a language which I could not understand, so full will it be of terms borrowed from biology, or, for this also is possible, from some science of which no one has yet laid the first stone. But I think that at present the man studying history will do well not to hand himself over body and soul to the professor of any one science; that if in one sentence he has spoken of

political germs or embryos or organisms, he will not be ashamed to speak in the next of political machinery and checks and balances. He may write of the decay, death, dissolution of the Roman empire, but at times he will not condemn the classical decline and fall.

But I ought to be speaking not of metaphor but of method. Now were there to be any talk of scientific biology I would at once end this paper with a confession of blank ignorance, but my contention is that we ought not to believe ourselves to be within sight of such talk. To me it seems that if we start with the comparison suggested by such phrases as "body politic" or "social organism" we are not within sight of that sort of knowledge that every old woman in a village has and has long had of the human body. She knows truths about the span of life, about the growth of children, about their teething, about grey hairs, old age and death, the like of which we do not know, and so far as I can see are not going to know about the parallel social phenomena, if any such parallel phenomena there be. In effect she judges from time to time that some child is not in a normal condition, though she does not use the word "normal". She sends for the doctor, or, may be, living in Devonshire, she sends for the seventh son of a seventh son. No matter what she does, no matter how absurd may be the remedies that she tries, she knows that normally a baby's body is not covered with scarlet blotches. Have we brought, are we likely to bring our inductive political science up to this high level?

Take the best known truth about the life of man, the old major premiss, "All men are mortal". Take a generalization which aims at greater precision, "The days of our years are three score years and ten." Now among our sociologists I seem to see a great unwillingness to grapple with this

somewhat elementary question. Are all states or nations mortal? Have you any phenomenon which is parallel to natural, as contrasted with violent death? Sidgwick touched this point last time, mentioning the case of the Roman empire. Now I should agree with him that if in this context we are to speak of death at all, it must be of violent death; "she died in silence biting hard among the dying hounds". But biting and struggling in the strangest fashion so that when the turmoil is over we hardly know which is dead, the Roman wolf or the German wolf-hound. If really we are to apply this metaphor of death to the events of the fifth century, we shall I think have to cke out the vocabulary of biology with that of psychical research. After a while we see, to use Hobbes's splendid phrase, "the ghost of old Rome sitting crowned upon the ruins thereof". But when did the ghost become a ghost? Of course we must not ask the sociologist for anything so unscientific as a precise date. I don't want to pin him to 476 or to 1453 or to 1806; besides the question seems to me a foolish one. That a historian may now and again find it well to speak of the empire perishing or dying in the fifth century I would not deny—though the contemporary history of what has once been even if it is not still the eastern half of a single body politic will warn him that this analogy has difficulties before it—but I am sure that he will not ride his metaphor very far without a fall, and I don't think that biology is going to dictate a peace to the scholars who are quarrelling bitterly as to the revival of Roman organization in Merovingian Gaul.

I suppose that sometimes a political organism of a low kind, some tribe or horde does cease to exist in a fashion that we can with no great strain of language compare to a natural death; but I cannot think of any instance in which

this figure of speech could be consistently elaborated for the purpose of describing the disappearance of a political organism of a high type, and I see no reason whatever for the belief that the bodies politic which we know as France, Germany and so forth must grow feeble and die if they are not destroyed from without.

There are many other questions that I should like to ask. How are we to picture some such historical events as the partition of Poland, the transfer backwards and forwards between France and Germany of lands which in a neutral language are called Alsatia and Lotharingia, the peopling of North America by men of many different races. Poland we say is torn to pieces and devoured. Yes, but for a long time the undigested fragments of it which lie in three separate stomachs are striving to be one again. The Irish in North America have, for us, a most unfortunate habit of regarding themselves as part of the Irish nation. This cross-organization, if I may so call it, is one of the great difficulties. The man who is an Englishman if you please but first a Catholic bids us pause, for surely we are sticking in the very bark of our social science and becoming the slaves of that militancy that Mr Spencer detests if we will have no organisms except such as are defined for us by international lawyers. Of course the history the Catholic church gives us is by far the grandest instance of a super-national or extra-national organization. But we have not seen the last phenomena which in one respect we may call similar. We have not I fear seen the last of a super-national or infra-national organization of anarchists, whose doings are likely to produce remarkable changes in the police organization of various countries. We see too the beginnings of many societies which aim, it may be at the spread of science and learning, it may be at the

encouragement of sport, but which neglect national boundaries. If we have a long peace before us all this may become of great importance. We may be destined to hear "An Englishman if you please but first a professor of sociology in the University of Man".

Now that complication and interdependence of all human affairs of which we find a by no means solitary example in this cross-organization gives as one of the reasons why we are not bringing our generalizations about social organisms up to that standard of precision that the old woman has attained when she speaks to us of life and death and the teeth of babies. It seems to me that those who are talking most hopefully about sociology are constantly forgetting the greatest lesson that Auguste Comte taught, though I cannot say that his practice came up to his preaching. I mean the interdependence of human affairs, for example the interdependence of political, religious and economic phenomena. It seems to me that the people who have learnt that lesson are not the sociologists but the historians. If I may make a guess, it is here that they would find their defence against a criticism which, if I remember rightly, Sidgwick passed upon them, namely that in their keen hunt for new discoveries they neglect what after all are the important matters. They would, I think, say—We do not yet know except in the roughest way what are the important, the causally important matters; only this we know for certain that they were neglected by even the greatest of our predecessors. Even if you only wish to study political organization (giving to political its narrowest sense), you are perforce compelled to study a great many other phenomena in order that you may put the political into their right places in a meshwork of cause and effect. You may for instance write a political or con-

stitutional history which says very little of religion, or of rents and prices. Life is short; history is the longest of all the arts; a minute division of labour is necessary. No one man will ever write of even a short period of that full history which should be written if we are to see in all completeness the play of those many forces which shape the life of man, even of man regarded as a political animal. And therefore I think it is that some of the best because the truest history books are those which are professedly fragmentary, those which by their every page impress upon the reader that he has only got before him a small part of the whole tale. That is the reason why, though history may be an art, it is falling out of the list of fine arts and will not be restored thereto for a long time to come. It must aim at producing not aesthetic satisfaction but intellectual hunger.

All this by the way. The fault, so it seems to me, of the would-be scientific procedure of our sociologists lies in the too frequent attempt to obtain a set of "laws" by the study of only one class of phenomena, the attempt for example encouraged by this University to fashion an inductive political science. Too often it seems to be thought that you can detach one kind of social phenomena from all other kinds and obtain by induction a law for the phenomena of that class. For example it seems to be assumed that *the* history of *the* family can be written and that it will come out in some such form as this: We start with promiscuity, the next stage is "mother right", the next "father right", and so forth. Or again take the history of property—land is owned first by the tribe or horde, then by the house-community, then by the village-community, then by the individual.

Now I will not utterly deny the possibility of some such

science of the very early stages in human progress. I know too little about the materials to do that. But even in this region I think it plain that our scientific people have been far too hasty with their laws. When this evidence about barbarians gets into the hands of men who have been trained in a severe school of history and who have been taught by experience to look upon all the social phenomena as interdependent it begins to prove far less than it used to prove. Each case begins to look very unique and a law which deduces that "mother right" cannot come after "father right", or that "father right" cannot come after "mother right", or which would establish any other similar sequence of "states" begins to look exceedingly improbable. Our cases, all told, are not many and very rarely indeed have we any direct evidence of the passage of a barbarous nation from one state to another. My own belief is that by and by anthropology will have the choice between being history and being nothing.

If we climb a little higher the outlook for science is far more hopeless. If the creator of the universe had chosen to make a world full of compartments divided by walls touching the heavens, had put into each of those cells a savage race—if at some future time the progress of science had enabled men to scale these walls—I won't say but that this would have been an interesting world. We imagine the inquirer passing from cell to cell, examining the present state of its inmates, exploring their past history as recorded by documents which range from the chipped flint to the printed book. After a while he begins to know what he will find in the next box—"Ah! I thought so, promiscuity, group-marriage, exogamy—fetishism, polytheism, monotheism, positivism—picture writing, ideogram, phonogram, ink, block-books,

movable type—the old tale.” After a while he has got a law—What, no evidence of a polytheistic stage in this country! I supply that stage with certainty; the evidence must have been lost. He comes to a more puzzling case where twist the evidence how he will it breaks his law. But by this time he is justified in using such terms as “morbid”, “abnormal”, “retrogression”—here is a diseased community and he will investigate the climate of the cell and so forth in order to get at the cause of the disease. There remain many compartments with walls so high that they are still insurmountable. “Considering my many thousands of observations”, he says, “I feel entitled to make a scientific prediction as to what is behind these barriers—in some cases I shall be wrong and to details I will not commit myself—but in general I shall be right.”

A very interesting world this would be, but exceedingly unlike the world in which we live. In the real world the political organisms have been and are so few and the history of each of them has been so unique that we have no materials apt for an induction of this sort, we have no means of forming the idea of the *normal* life of a body politic. Not to speak of the biologist's materials we are not within sight of materials of that kind where our villagers have drawn their rude laws of life. We do not know, if I may so put it, that Siamese twins are abnormal. A funny comparative anatomy we should have had if the only living things that the men of science had seen were those collected in the booth of a fair—the two-headed nightingale, the pig-faced lady, and the five-legged donkey. Of course I am exaggerating if I take the monstrous assembly as a fair representative of the family of nations. Nations have much in common, but then a very great part, an indeterminately great part of what they have

in common is the outcome of deliberate imitation. Of course I am aware that human beings imitate each other and that within limits they can modify the structure of their bodies by this imitative conduct—but I do not think that those who know about this matter will contradict me if I say that these modifications are trivial when compared with the changes produced in bodies politic by the analogous process. Mr Leslie Stephen has compared the acquisition by a state of a new kind of artillery to the acquisition by an animal of new and stronger teeth. The modern state says, "Go to! I will have strong teeth because another state has got them"—and straightway within a year the teeth are there. A superficial change, we may say, is to be compared with the acquisition of artificial teeth. Yes, but what a series of social changes a new weapon may set up. I read, and I suppose this to be a plausible theory, that one of the most decisive steps in that process which we call the feudalization of Gaul, and therefore of western Europe, was the outcome of an effort to obtain a cavalry able to cope with the Saracen horsemen and is it not trite that the invention of gunpowder has profoundly modified our social and political organization?

I will take an example of imitation. Near the end of the last century England had a criminal procedure that was all her own, trial by jury. I believe that I am right in saying that there was then nothing that resembled it in any country, at all events in any country that was at all likely to be taken as a model by other states. The difference was great; the whole civilized world was against us. Our procedure was public, accusatory, contradictory, theirs was secret, inquisitory and relied on torture—the same procedure in all its main features was common to all states in the western half of Europe. And then country after country deliberately and pro-

fessedly copied us. Now I am very ready to allow that if England had never existed the continental procedure which was stupid and cruel would sooner or later have been destroyed, but I do not see the remotest probability that a jury or anything resembling a jury would have been introduced. I am not praising the constitution of ours; I am not at all certain that foreigners might not have done better if they had not copied it; but copy it they did and at first in minute detail. I am also very ready to admit that deliberately copied institutions rarely produce in their new home all the good that is expected of them and often turn out to be failures. I am quite willing to believe, for example, that this pretty new constitution of Japan will break down—I do not mind saying, though I know little that entitles me to say, that the Japanese have tried to skip too many stages—but of one thing I feel moderately certain, namely that they can never return to the place where they were in 1850, and that the great attempt to be European will for a very long time to come give shape and colour to the whole history of Japan. To what changes in the body natural can we liken these changes?

And this sort of thing has been going on since the remotest past. How pleasant it would be to have a natural history of one of the chief of those instruments which have modelled the body politic. I mean the alphabet. How nice to say you start with pictures, you pass to ideograms, to phonograms, to letters. Have we four instances of the completed process, have we three, have we two? I do not know, but the number of alphabets which were regarded as independent has been decreasing very fast of late—and now I suppose it to be established that the Egyptian alphabet is the mother of a very numerous family. Would the Greeks have evolved

an alphabet if they had not borrowed from borrowers—and what changes must we not introduce in Greek political thought and political practice—and therefore in the political thought and practice of the whole western world in later times—if we deprive Greek thinkers of the alphabet.

For this reason if we are to talk of organisms at all it seems to me expedient that we should very often regard the whole progressive body of mankind as a single organism—I feel inclined to add: and as one infected by that strange, that unique disease called civilization which is running through all its organs, always breaking out in fresh places, and the end whereof no man has seen. And for this reason it is that I have a special dread of those theorists who are trying to fill up the dark ages of medieval history with laws collected from the barbarian tribes that have been observed in modern days. This procedure urges me to ask, If these tribes of which you speak are on the normal high-road of progress why have they not by this time gone further along it? If I see a set of trucks standing on a railway line from week to week, I do not say, This is the main up line to London, I say, This must be a siding. The traveller who has studied the uncorrupted savage can often tell the historian of medieval Europe what to look for, never what to find, for the German or the Slav hardly appears upon the scene before he is tainted by the subtlest of all poisons.

For one last illustration may I return to criminal procedure. Perhaps I exaggerate its importance but on the whole I think that if some fairy gave me the power of seeing a scene of one and the same kind in every age of the history of every race, the kind of scene that I would choose would be a trial for murder, because I think that it would give me so many hints as to a multitude of matters of the first importance.

Well, are we to have some law as to the normal development of judicial organization in its higher stage, and if so which piece of history are you going to treat as typical for that stage of progress which our modern nations covered between let me say 1100 and 1789? Is it to be the English or French? They are radically different. If we regard the mere number of persons or the mere number of nations that stand on the two sides, there can be no doubt that we must decide in favour of the French. I believe that a certain amount of generalization is possible here—that the current of changes in Italy, Spain, Germany and the Low Countries flows in the same direction as the current of changes in France, though France leads the way, and there is a great deal of deliberate imitation of French institutions. A very careful French historian with this problem before him has pointed to a cause of divergence and I have little doubt that he has pointed in the right direction. Of all these countries at the critical time, say between 1150 and 1300, Britain was the only one in which there was no persecution of heretics, in which there were no heretics to persecute.¹ Everywhere else the inquisitory process fashioned by Innocent III for the trial of heretics becomes a model for the temporal courts. I do not think that this is the full answer. If I were to say more I should have to speak of the causes which made the England of the twelfth century the most governable and the most governed of all European countries, for if a Tocqueville had visited us in 1200 he would have gone home to talk to his fellow-countrymen of English civilization and English bureaucracy. However there can I think be no doubt

¹ [Maitland was speaking broadly. See Pollock and Maitland, *History of English Law*, ed 2, vol II, pp. 547–549, and Maitland, *Roman Canon Law in the Church of England* (1898), pp. 158–179.]

that we have laid our finger on one extremely important cause of divergence when we have mentioned the Catharan heresy. Behind that stand Bulgarian monks and so we go back to Manes. Or if we ask why this faith becomes endemic in the south of France we have to explore the political and economic causes which had made Languedoc a fertile seed-bed for any germs of heresy which might be blown thither from any quarter. Now the question that I have proposed seems to me one which cannot be answered and should not be asked. The history of judicial procedure in England seems to me to be exactly as normal as the history of judicial procedure in France or in Germany, or (to put it another way) the idea of normalness is in this context an inappropriate and a delusive idea; it implies a comparison that we cannot make. What I have said about judicial procedure might I think be said also, with the proper variations, about governmental and legislative organization. The history of the parliament of Westminster is neither more nor less normal than the history of the parliament of Paris. But a science of bodies politic which knows nothing of the normal or the abnormal—which cannot apply either of these adjectives to the process which made a Louis XIV the absolute king that he was, or the process which subjected William III to the control of a house of commons—seems to me a science falsely so called and one which must expect to hear from the other sciences—"Well you don't know much and that's a fact."

That is the reason why when I see a good set of examination questions headed by the words "Political Science" I regret not the questions but the title. Each question, if anything more than the loosest, vaguest, baldest answer is expected, is really a question about some specific piece of

history, and I regret the suggestion that names and dates may properly be omitted. For example a question about the causes of feudalism seems to me to be a question about a certain specific piece of Frankish history, though no doubt a full answer would say something about the causes which prepared other nations to receive willingly or unwillingly certain Frankish institutions. The answer would not be the worse for saying a word about Japan—but so far as I can learn from some commended book on Japanese history I think it should say that of the origin of the so-called feudalism of Japan next to nothing is known and that men who profess to know what is known say nothing about that precarious tenure of land by warriors which I had thought to be the very essence of Frankish and therefore of European feudalism in its first stage. I do not regret the questions—on the contrary it seems to me very desirable that under whatever name youths should be taught as much history as possible—but I do regret the suggestion that at the present time the student of history should hope for and aim at ever wider and wider generalizations.

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