

# The Corporation Sole

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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.(1\*) 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(2\*) 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 be found than that which occurs in Sir Frederick Pollock's book on Contract.(3\*) 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.(4\*) 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 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

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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".(5\*) 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. 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 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 parson]: 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 reign(6\*) 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.(7\*) 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 frankalmoin(8\*) 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 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.(9\*) 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.(10\*)

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.(11\*) 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 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".(12\*) 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.(13\*) Whether more came of this threat -- for such it seems to be -- I do not know.(14\*) Bullying the chantries was not a new practice in the days of Henry VII's son and grandson. In 1454 Romayn'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.(15\*)

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 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."(16\*) The Chief Justice goes on to speak of the Parliament of King, 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."(17\*) Over the glebe, over the parson's 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 king(18\*) and the chamberlain of the city of London.(19\*) 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.(20\*) 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 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.(21\*) 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.(22\*) 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."(23\*) 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 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.(24\*) 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;(25\*) 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.(26\*)

Of the parish church there is a long story to be told. Dr Stutz is telling it in a most interesting manner.(27\*) Our own Selden, however, was on the true track; he knew that the patron had once been more than a patron,(28\*) and we need go no further than Blackstone's Commentaries to learn that Alexander III did something memorable in this matter.(29\*) 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.(30\*) 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.(31\*) Also in England we read of survivals which tell us that the old notion of the patron's ownership of the church died hard.(32\*)

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.(33\*) There 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.(34\*) 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.(35\*) 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.(36\*) Again, it seems that conveyances were sometimes 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."(37\*) 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 singulara beneficium(38\*) provided to suit his peculiar needs. The difficulty that had to be met was this: 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 pertinent of the writ is thought of as the pertinent of appurtenancy, and not as the pertinent 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.(39\*) Or let us see him letting a church to farm for a term of years at an annual rent.(40\*) The church was in many contexts a 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.(41\*)

"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."(42\*) 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 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.(43\*) 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;(44\*) 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.

There is an interesting discussion in 1430.(45\*) 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 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,(46\*) 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,(47\*) 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 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.(48\*)

Eliot J. then started a middle 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 to remember that even at the present day timber felled on the glebe is said to belong to the patron.(49\*)

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.(50\*) 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 not(51\*) 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 discontinuance, 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 told(52\*) 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 superstita, 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.(53\*)

Then in a very curious section Littleton(54\*) 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 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 altered 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."(55\*) 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.(56\*) 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:(57\*) "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.

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,(58\*) "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."(59\*)

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;(60\*) the "fee simple qualified" appears in Sir H. Elphinstone's edition of Mr Goodeve's book.(61\*)

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,(62\*) 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."(63\*) 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.(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".(65\*) 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 example(66\*) 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.

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".(67\*) We are told that "if a bishop hath lands in both capacities he cannot give or take to or from himself".(68\*) 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.(69\*) 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 enough(70\*) -- 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 corporations 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.(71\*) 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.(72\*)

#### NOTES:

1. Co. Lit 2a, 2502.

2. Markby, Elements of Law, section 145.

3. Pollack, Contract, ed. 6, p. 107.

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

5. 1 Comm. 469.

6. 39 Hen. VI, f. 13 (Mich. pl. 17).

7. Edw. IV, f. 12 (Trin. pl. 2).

8. Lit sec. 134.

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

10. 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, abdates, 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 Letton 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.]

11. 27 Hen. VI, f. 3 (Mich. pl. 24): "poet estre entende que il est corporate par tiel nosme."

12. 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 concerning the municipal corporations of Norwich, and the dictum must have been gratuitous.

13. 2 Hen. VII, f. 13 (Hil. pl. 16).

14. 20 Hen. VII, f. 7 (Mich. pl. 17): Rede J. seems to say that such a licence would make a corporation.

15. 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."

16. 14 Hen. VIII f. 3 (Mich. pl. 2): "Car coment que le roy voile

faire corporation 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 corporation a J.S." may not be exactly rendered or rederable. 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).]

17. Co. Lit. 340b, 341a.

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

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

20. 8 Edw. IV, f. 18 (Mich. pl. 29).

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

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

23. 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).

24. See Coke's exposition, Co. Lit. 442, ff; and Blackstone's 2 Com. 319.

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

26. Is the idea of the incapacity of a headless corporation capable of doing harm at the present day? Grant, Corporations, 110, note (s), says 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 Dalison, 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 attactmg attention to a rule that should be, if it is not, obsolete.

27. Ulrich Smtz, 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.]

28. History of Tithes, c. 12.

29. 2 Bl. Com. 23.

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

31. 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.

32. 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.

33. See Gierke, Genossenschaftsrecht, vol. III, passim.

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

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

36. Co. Lit. 300b.

37. 11 Hen. IV, f. 84 (Trin. pl. 34). But see 8 Hen. V, f. 4 (Hil. pl. 15)

38. Bracton, f. 286b.

39. 5 Edw. III, f. 18, (Pasch. pl. 18).

40. 9 Hen. V, f. 8 (Mich. pl. 1)

41. 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 tithe 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 parochiens, 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.

42. 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.

43. 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. II (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.

44. 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.

45. 8 Hen. VI, f. 24 (Hil. pl. 10).

46. 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. VII, c. 11, which gives the profits to the succeeding parson.

47. 12 Hen. VIII, f. 7 (Mich. pl. 1).

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

49. *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."

50. *Lit. sec.* 643.

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

52. *Lit. sec.* 646.

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

54. Lit. sec. 648.

55. Co. Lit. 2a.

56. 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.

57. Co. Lit. 342b.

58. Co. Lit. 341 a.

59. *Ibid.* 341 b.

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

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

62. 32 & 33 Vict. c. 42, s. 13.

63. 3 & 4 Will. IV, c. 27, S. 29.

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

65. *Pollock, Contract*, ed. 6, p. 109. The principal modern authority is *Howley v. Knight* (1849), 14 Q.B. 240. [Cf. *Power v. Banks* [1901] 2 Ch. 487.]

66. *Foster & Sons, Lim. 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.]

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

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

69. 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 deux respects uncore il est mesme le person."

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

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

72. 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.

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