POLITICAL THEORIES OF THE MIDDLE AGE

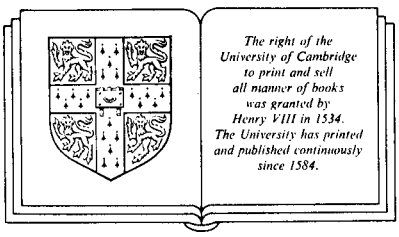
THIS re-issue of F. W. Maitland's translation of a vital section from Otto Gierke's monumental *Das Deutsche Genossenschaftsrecht* makes available once again one of the seminal texts in the historiography of political thought. Famed, *inter alia*, for the elegance and lucidity of Maitland's own expository introduction, *Political Theories of the Middle Age* is concerned in essence with the medieval development of the doctrine of State and Corporation – a concept which, as Maitland indicates, has been prone to misunderstanding by English minds versed in the tradition of the common law.

Gierke identifies the peculiar characteristic of medieval political thought as its vision of the universe as one articulated whole, and every being, whether a joint-being (community) or a single-being – as both a part and a whole: his text examines the potentially revolutionary effect upon this of certain crucial intellectual intrusions, derived in part from Roman Law, described by Gierke as 'ancient-modern'. He highlights the fundamental medieval tendency, familiar to generations of students of European absolutism, towards the concentration of right and power in the highest and widest groups on the one hand, and the individual man on the other, at the expense of all intermediate groups. In Maitland's words 'the ideas that are to possess and divide mankind from the sixteenth until the nineteenth century . . . are the ideas whose early history is to be detected, and they are set before us as thoughts which, under the influence of classical antiquity, necessarily shaped themselves in the course of medieval debate'.

POLITICAL THEORIES OF THE MIDDLE AGE

OTTO GIERKE

TRANSLATED
WITH AN INTRODUCTION
BY
FREDERIC WILLIAM MAITLAND



CAMBRIDGE UNIVERSITY PRESS
CAMBRIDGE
NEW YORK NEW ROCHELLE
MELBOURNE SYDNEY

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780521345347

First published 1900
Reprinted 1987
First paperback edition 1987
Re-issued in this digitally printed version 2008

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data
Gierke, Otto Friedrich von, 1841-1921.
Political theories of the Middle Age.
Translation of: Die publicistischen Lehren des Mittelalters.
Includes index.
1. Political science—History. 2. Civilization, Medieval. I. Title.
JA82.G413 1987 320′.09 87-6590

ISBN 978-0-521-34534-7 hardback
ISBN 978-0-521-34764-8 paperback

CONTENTS.

ERRATUM.

p. 150, note 158. Add to what is said of the opinions of Baldus the following:—

'But in Rubr. C. 10, 1, nr. 12, he holds that the *camera imperii* may in a secondary sense be said to belong to the Roman people; quia princeps repraesentat illum populum et ille populus imperium etiam, mortuo principe.'

INTRODUCTION.

HAD what is here translated, namely, a brief account of the political theories of the Middle Ages, appeared as a whole book, it would hardly have stood in need of that distorting medium, an English translation. Englishmen who were approaching the study of medieval politics, either from the practical or from the theoretical side, would have known that there was a book which they would do well to master, and many who were not professed students or whose interests lay altogether in modern times would have heard of it and have found it profitable. The elaborate notes would have shewn that its writer had read widely and deeply; they would also have guided explorers into a region where sign-posts are too few. As to the text, the last charge which could be made against it would be that of insufficient courage in generalization, unless indeed it were that of aimless medievalism. The outlines are large, the strokes are firm, and medieval appears as an introduction to modern thought. The ideas that are to possess and divide mankind from the sixteenth until the nineteenth century—Sovereignty, the Sovereign Ruler, the Sovereign People, the Representation of the People, the Social Contract, the Natural Rights of Man, the Divine Rights of Kings, the Positive Law that stands below the State, the Natural Law that stands above the State—these are the ideas whose early history is to be detected, and they are set before us as thoughts which, under the influence of Classical Antiquity, necessarily shaped themselves in the course of medieval debate. And if the thoughts are interesting, so too are the thinkers. In Dr Gierke's list of medieval publicists, beside the divines and schoolmen, stand great popes, great lawyers, great reformers, men who were clothing concrete projects in abstract

vesture, men who fashioned the facts as well as the theories of their time.

Moreover, Englishmen should be especially grateful to a guide who is perhaps at his strongest just where they must needs be weak: that is, among the books of the legists and canonists. An educated Englishman may read and enjoy what Dante or Marsiglio has written. An English scholar may face Aquinas or Ockham or even the repellent Wyclif. But Baldus and Bartolus, Innocentius and Johannes Andreae, them he has never been taught to tackle, and they are not to be tackled by the untaught. And yet they are important people, for political philosophy in its youth is apt to look like a sublimated jurisprudence, and, even when it has grown in vigour and stature, is often compelled or content to work with tools—a social contract for example—which have been sharpened, if not forged, in the legal smithy. In that smithy Dr Gierke is at home. With perfect modesty he could say to a learned German public 'It is not probable that for some time to come anyone will tread exactly the same road that I have trodden in long years of fatiguing toil.'

But then what is here translated is only a small, a twentieth, part of a large and as yet unfinished book bearing a title which can hardly attract many readers in this country and for which an English equivalent cannot easily be found, namely *Das deutsche Genossenschaftsrecht*. Of that work the third volume contains a section entitled *Die publicistischen Lehren des Mittelalters*, and that is the section which is here done into English. Now though this section can be detached and still bear a high value, and though the author's permission for its detachment has been graciously given, still it would be untrue to say that this amputating process does no harm. The organism which is a whole with a life of its own, but is also a member of a larger and higher organism whose life it shares, this, so Dr Gierke will teach us, is an idea which we must keep before our minds when we are studying the political thought of the Middle Ages, and it is an idea which we may apply to his and to every good book. The section has a life of its own, but it also shares the life of the whole treatise. Nor only so; it is *membrum de membro*. It is a section in a chapter entitled 'The Medieval Doctrine of State and Corporation,' which stands in a volume entitled 'The Antique and Medieval Doctrine of State and

Corporation and its Reception in Germany'; and this again is part of *Das deutsche Genossenschaftsrecht.* Indeed our section is a member of a highly organized system, and in that section are sentences and paragraphs which will not yield their full meaning except to those who know something of the residue of the book and something also of the controversial atmosphere in which a certain *Genossenschaftstheorie* has been unfolding itself. This being so, the intervention of a translator who has read the whole book, who has read many parts of it many times, who deeply admires it, may be of service. In a short introduction, even if his own steps are none too sure, he may be able to conduct some of his fellow-countrymen towards a point of view which commands a wide prospect of history and human affairs.

Staats- und Korporationslehre—the Doctrine of State and Corporation. Such a title may be to some a stumbling-block set before the threshold. A theory of the State, so it might be said, may be very interesting to the philosophic few and fairly interesting to the intelligent many, but a doctrine of Corporations, which probably speaks of fictitious personality and similar artifices, can only concern some juristic speculators, of whom there are none or next to none in this country. On second thoughts, however, we may be persuaded to see here no rock of offence but rather a stepping-stone which our thoughts should sometimes traverse. For, when all is said, there seems to be a genus of which State and Corporation are species. They seem to be permanently organized groups of men; they seem to be group-units; we seem to attribute acts and intents, rights and wrongs to these groups, to these units. Let it be allowed that the State is a highly peculiar group-unit; still it may be asked whether we ourselves are not the slaves of a jurist's theory and a little behind the age of Darwin if between the State and all other groups we fix an immeasurable gulf and ask ourselves no questions about the origin of species. Certain it is that our medieval history will go astray, our history of Italy and Germany will go far astray, unless we can suffer communities to acquire and lose the character of States somewhat easily, somewhat insensibly, or rather unless we both know and feel that we must not thrust our modern 'State-concept,' as a German would call it, upon the reluctant material.

Englishmen in particular should sometimes give themselves

this warning, and not only for the sake of the Middle Ages. Fortunate in littleness and insularity, England could soon exhibit as a difference in kind what elsewhere was a difference in degree, namely, to use medieval terms, the difference between a community or corporation (*universitas*) which does and one which does not 'recognize a superior.' There was no likelihood that the England which the Norman duke had subdued and surveyed would be either *Staatenbund* or *Bundesstaat*, and the aspiration of Londoners to have 'no king but the mayor' was fleeting. This, if it diminished our expenditure of blood and treasure—an expenditure that impoverishes—diminished also our expenditure of thought—an expenditure that enriches—and facilitated (might this not be said?) a certain thoughtlessness or poverty of ideas. The State that Englishmen knew was a singularly unicellular State, and at a critical time they were not too well equipped with tried and traditional thoughts which would meet the case of Ireland or of some communities, commonwealths, corporations in America which seemed to have wills—and hardly fictitious wills—of their own, and which became States and United States[1]. The medieval Empire laboured under the weight of an incongruously simple theory so soon as lawyers were teaching that the Kaiser was the Princeps of Justinian's law-books. The modern and multicellular British State—often and perhaps harmlessly called an Empire—may prosper without a theory, but does not suggest and, were we serious in our talk of sovereignty, would hardly tolerate, a theory that is simple enough and insular enough, and yet withal imperially Roman enough, to deny an essentially state-like character to those 'self-governing colonies,' communities, commonwealths, which are knit and welded into a larger sovereign whole. The adventures of an English joint-stock company which happed into a rulership of the Indies, the adventures of another English company which while its charter was still very new had become the puritan commonwealth of Massachusett's Bay should

[1] See the remarks of Sir C. Ilbert, The Government of India, p. 55: 'Both the theory and the experience were lacking which are requisite for adapting English institutions to new and foreign circumstances. For want of such experience England was destined to lose her colonies in the Western hemisphere. For want of it mistakes were committed which imperilled the empire she was building up in the East.' The want of a theory about Ireland which would have mediated between absolute dependence and absolute independence was the origin of many evils.

be enough to shew that our popular English *Staatslehre* if, instead of analyzing the contents of a speculative jurist's mind, it seriously grasped the facts of English history, would shew some inclination to become a *Korporationslehre* also.

Even as it is, such a tendency is plainly to be seen in many zones. Standing on the solid ground of positive law and legal orthodoxy we confess the king of this country to be a 'corporation sole,' and, if we have any curiosity, ought to wonder why in the sixteenth century the old idea that the king is the head of a 'corporation aggregate of many[1]' gave way before a thought which classed him along with the parish parson of decadent ecclesiastical law under one uncomfortable rubric. Deeply convinced though our lawyers may be that individual men are the only 'real' and 'natural' persons, they are compelled to find some phrase which places State and Man upon one level. 'The greatest of artificial persons, politically speaking, is the State': so we may read in an excellent First Book of Jurisprudence[2]. Ascending from the legal plain, we are in a middle region where a sociology emulous of the physical sciences discourses of organs and organisms and social tissue, and cannot sever by sharp lines the natural history of the state-group from the natural history of other groups. Finally, we are among the summits of philosophy and observe how a doctrine, which makes some way in England, ascribes to the State, or, more vaguely, the Community, not only a real will, but even 'the' real will, and it must occur to us to ask whether what is thus affirmed in the case of the State can be denied in the case of other organized groups: for example, that considerable group the Roman Catholic Church. It seems possible to one who can only guess, that even now-a-days a Jesuit may think that the will of the Company to which he belongs is no less real than the will of any State, and, if the reality of this will be granted by the philosopher, can he pause until even the so-called one-man-company has a real will really distinct from the several wills of the one man and his six humble associates? If we pursue that thought, not only will our philosophic *Staatslehre* be merging itself in a wider doctrine, but we shall already be deep in the *Genossenschaftstheorie*. In any case, however, the law's old habit of co-ordinating men and 'bodies

[1] A late instance of this old concept occurs in Plowden's Commentaries, 234.
[2] Pollock, First Book of Jurisprudence, 113.

politic' as two kinds of Persons seems to deserve the close attention of the modern philosopher, for, though it be an old habit, it has become vastly more important in these last years than it ever was before. In the second half of the nineteenth century corporate groups of the most various sorts have been multiplying all the world over at a rate that far outstrips the increase of 'natural persons,' and a large share of all our newest law is law concerning corporations[1]. Something not unworthy of philosophic discussion would seem to lie in this quarter: either some deep-set truth which is always bearing fresh fruit, or else a surprisingly stable product of mankind's propensity to feign.—Howbeit, this rare atmosphere we do not easily breathe and therefore will for a while follow a lower road.

I.

A large part in the volume that lies before the translator is played by 'the Reception.' When we speak of the Renaissance and the Reformation we need not be at pains to name what was reformed or what was born anew, and even so a German historian will speak of the Reception when he means the Reception of Roman law. Very often Renaissance, Reformation and Reception will be set before us as three intimately connected and almost equally important movements which sever modern from medieval history. Modern Germany has attained such a pre-eminence in the study of Roman law, that we in England may be pardoned for forgetting that of Roman law medieval Germany was innocent and ignorant, decidedly more innocent and more ignorant than was the England of the thirteenth century. It is true that in Germany the theoretical continuity of the Empire was providing a base for the argument that the law of Justinian's books was or ought to be the law of the land; it is also true that the Corpus Iuris was furnishing weapons useful to Emperors who were at strife with Popes; but those weapons were fashioned and wielded chiefly by Italian hands, and the practical law of Germany was as German as it well could be. Also—and here lay the possibility of

[1] In 1857 an American judge went the length of saying 'It is probably true that more corporations were created by the legislature of Illinois at its last session than existed in the whole civilized world at the commencement of the present century.' Dillon, Municipal Corporations, § 37 *a*.

a catastrophe—it was not learned law, it was not taught law, it was far from being *Juristenrecht.* Englishmen are wont to fancy that the law of Germany must needs savour of the school, the lecture room, the professor; but in truth it was just because German law savoured of nothing of the kind, but rather of the open air, oral tradition and thoroughly unacademic doomsmen that the law of Germany ceased to be German and that German law has had to be disinterred by modern professors. Of the geographical and historical causes of the difference we need not speak, but in England we see a very early concentration of justice and then the rapid growth of a legal profession. The Year Books follow and the Inns of Court and lectures on English law and scholastic exercises and that 'call to the bar' of the Inn which is in fact an academically earned degree. Also long before Germany had universities, Roman law was being taught at Oxford and Cambridge, so that it would not come hither with the glamour of the Renaissance. A certain modest place had been assigned to it in the English scheme of life; some knowledge of it was necessary to the students of the lucrative law of the Church, and a few civilians were required for what we should call the diplomatic service of the realm. But already in the fourteenth century Wyclif, the schoolman, had urged that if law was to be taught in the English universities it ought to be English law. In words which seem prophetic of modern 'Germanism' he protested that English was as just, as reasonable, as subtle, as was Roman jurisprudence[1].

Thus when the perilous time came, when the New Learning was in the air and the Modern State was emerging in the shape of the Tudor Monarchy, English law was and had long been lawyers' law, learned law, taught law, *Juristenrecht.* Disgracefully barbarous, so thought one enlightened apostle of the New Learning. Reginald Pole—and his advice was brought to his royal cousin—was for sweeping it away. In so many words he desired that England should 'receive' the civil law of the Romans: a law so civil that Nature's self might have dictated it and a law that was being received in all well governed lands[2]. We must not endeavour to tell

[1] Wyclif, De Officio Regis (ed. Pollard and Sayle, 1887), p. 193: 'Sed non credo quod plus viget in Romana civilitate subtilitas racionis sive iusticia quam in civilitate Anglicana.'

[2] Starkey's England (Early Eng. Text Soc. 1878), 192—5.

the story of the danger that beset English law when the future Cardinal Archbishop was speaking thus: a glance towards Scotland would shew us that the danger was serious enough and would have been far more serious but for the continuous existence of the Inns of Court, and that *indoctissimum genus doctissimorum hominum* which was bred therein. Then late in the sixteenth century began the wonderful resuscitation of medieval learning which attains its completion in the books and acts of Edward Coke. The political side of this movement is the best known. Antiquarian research appears for a while as the guardian and renovator of national liberties, and the men who lead the House of Commons are becoming always more deeply versed in long-forgotten records. However, be it noted that even in England a certain amount of foreign theory was received, and by far the most remarkable instance is the reception of that Italian Theory of the Corporation of which Dr Gierke is the historian, and which centres round the phrase *persona ficta*. It slowly stole from the ecclesiastical courts, which had much to say about the affairs of religious corporations, into our temporal courts, which, though they had long been dealing with English group-units, had no home-made theory to oppose to the subtle and polished invader. This instance may help us to understand what happened in Germany, where the native law had not reached the doctrinal stage of growth, but was still rather 'folk law' than lawyers' law and was dissipating itself in countless local customs.

Italian doctrine swept like a deluge over Germany. The learned doctors from the new universities whom the Princes called to their councils, could explain everything in a Roman or would-be Roman sense. Those Princes were consolidating their powers into a (by Englishmen untranslatable) *Landeshoheit*: something that was less than modern sovereignty, for it still would have the Empire above it, but more than feudal seignory since classical thoughts about 'the State' were coming to its aid. It is noticeable that, except in his hereditary dominions, the Emperor profited little by that dogma of continuity which served as an apology for the Reception. The disintegrating process was so far advanced that not the Kaiser but the Fürst appeared as 'the Prince' of political theory and the Princeps of the Corpus Iuris. The doctors could teach such a prince much that was to his

advantage. Beginning late in the fifteenth century the movement accomplished itself in the sixteenth. It is catastrophic when compared with the slow and silent process whereby the customary law of northern France was partially romanized. No legislator had said that Roman law had been or was to be received in Germany; the work was done not by lawgivers but by lawyers, and from age to age there remained some room for controversy as to the exact position that the Corpus Iuris occupied among the various sources of law actual and potential. Still the broad fact remains that Germany had bowed her neck to the Roman yoke.

In theory what was received was the law of Justinian's books. In practice what was received was the system which the Italian commentators had long been elaborating. Dr Gierke frequently insists that this is an important difference. In Italy the race of glossators who were sincerely endeavouring to discover the meaning of classical texts had given way to a race of commentators whose work was more or less controlled by a desire for practically acceptable results, and who therefore were disposed to accommodate Roman law to medieval life. Our author says that especially in their doctrine of corporations or communities there is much that is not Roman, and much that may be called Germanic. This facilitated the Reception: Roman law had gone half-way to meet the facts that it was to govern. Then again, at a later time the influence of what we may call the 'natural' school of jurists smoothed away some of the contrasts between Roman law and German habit. If in the eyes of an English lawyer systems of Natural Law are apt to look suspiciously Roman, the modern Romanist will complain that when and where such systems were being constructed concrete Rome was evaporating in abstract Reason, and some modern Germanists will teach us that 'Nature Right' often served as the protective disguise of repressible but ineradicable Germanic ideas.

With the decadence of Nature Right and the advent of 'the historical school' a new chapter began. Savigny's teaching had two sides. We are accustomed to think of him, and rightly, as the herald of evolution, the man who substitutes development for manufacture, organism for mechanism, natural laws for Natural Law, the man who is nervously afraid lest a code should impede the beautiful processes of gradual growth. But then he was also

the great Romanist, the great dogmatist, the expounder of classical texts according to their true—which must be their original—intent and meaning. There was no good, he seemed to say, in playing at being Roman. If the Common Law of Germany was Roman law, it ought to be the law of the Digest, not the law of glossators or commentators or 'natural' speculators. This teaching, so we are told, bore fruit in the practical work of German courts. They began to take the Corpus Iuris very seriously and to withdraw concessions that had been made—some will say to national life and modern fact, others will say to slovenly thought and slipshod practice.

But that famous historical school was not only a school of historically minded Romanists. It was also the cradle of Germanism. Eichhorn and Grimm stood by Savigny's side. Every scrap and fragment of old German law was to be lovingly and scientifically recovered and edited. Whatever was German was to be traced through all its fortunes to its fount. The motive force in this prolonged effort—one of the great efforts of the nineteenth century—was not antiquarian pedantry, nor was it a purely disinterested curiosity. If there was science there was also love. At this point we ought to remember, and yet have some difficulty in remembering, what Germany, burdened with the curse of the translated Imperium, had become in the six centuries of her agony. The last shadow of political unity had vanished and had left behind a 'geographical expression,' a mere collective name for some allied states. Many of them were rather estates than states; most of them were too small to live vigorous lives; all of them were too small to be the Fatherland. Much else besides blood, iron and song went to the remaking of Germany. The idea of a Common Law would not die. A common legislature there might not be, but a Common Law there was, and a hope that the law of Germany might someday be natively German was awakened. Then in historical retrospect the Reception began to look like disgrace and disaster, bound up as cause and effect with the forces that tore a nation into shreds. The people that defied the tyranny of living popes had fallen under the tyranny of dead emperors, unworthily reincarnate in petty princelings. The land that saw Luther burn one 'Welsh' Corpus Iuris had meekly accepted another. It seemed shameful that Germans, not unconscious of

their mastery of jurisprudence, should see, not only in England, but in France and even the France of Napoleon's Code the survival of principles that might certainly be called Germanic, but could not be called German without a sigh. Was not 'a daughter of the Salica,' or a grand-daughter, reigning over the breadth of North America? And then, as might be expected, all manner of causes and parties sought to suck advantage out of a patriotic aspiration. The socialist could denounce the stern and bitter individualism, the consecrated selfishness, of the alien slave-owners' law, and the Catholic zealot could contrast the Christiano-German law of Germany's great days with the Pagano-Roman law in which disruptive Protestantism had found an unholy ally.

In all soberness, however, it was asserted that old German law, blighted and stunted though it had been, might yet be nursed and tended into bearing the fruit of sound doctrine and reformed practice. The great men were neither dreamers nor purists. Jacob Grimm once said that to root out Roman ideas from German law would be as impossible as to banish Romance words from English speech. The technical merits of Roman law were admitted, admired and emulated. Besides Histories of German Law, Systems were produced and 'Institutes.' The Germanist claimed for his science a parity of doctrinal rank with the science of the Romanist. He too had his theory of possession; he too had his theory of corporations; and sometimes he could boast that, willingly or unwillingly, the courts were adopting his conclusions, though they might attain the Germanic result by the troublesome process of playing fast and loose with Ulpian and his fellows.

Happier days came. Germany was to have a Civil Code, or rather, for the title at least would be German, a Bürgerliches Gesetzbuch. Many years of keen debate now lie behind the most carefully considered statement of a nation's law that the world has ever seen. Enthusiastic Germanists are not content, but they have won something and may win more as the work of interpretation proceeds. What, however, concerns us here is that the appearance of 'Germanistic' doctrines led to controversies of a new and radical kind. It became always plainer that what was in the field was not merely a second set of rules but a second and a disparate set of ideas. Between Romanist and Germanist, and again within each school,

the debate took a turn towards what we might call an ideal morphology. The forms of legal thought, the 'concepts' with which the lawyer 'operates,' were to be described, delimited, compared. In this work there was sometimes shewn a delicacy of touch and a subtlety of historical perception, of which in this country we, having no pressing need for comparisons, can know little, especially if our notion of an analytical jurisprudence is gathered from Austin's very 'natural' exploits. Of special interest to Englishmen should be the manner in which out of the rude material of old German law the Germanists will sometimes reconstruct an idea which in England needs no reconstruction since it is in all our heads, but which bears a wholly new value for us when we have seen it laboriously composed and tested.

II.

At an early moment in the development of Germanism a Theory of the Corporation, which gave itself out to be the orthodox Roman Theory and which Savigny had lately defined in severe outline, was assailed by Georg Beseler who lived to be a father among Germanists[1]. You will never, he said in effect, force our German fellowships, our German *Genossenschaften*, into the Roman scheme: we Germans have had and still have other thoughts than yours. Since then the Roman Corporation (*universitas*) has been in the crucible. Romanists of high repute have forsaken the Savignian path; Ihering went one way, Brinz another, and now, though it might be untrue to say that there are as many doctrines as there are doctors, there seems to be no creed that is entitled to give itself the airs of orthodoxy. It is important to remember that the materials which stand at the Romanist's disposal are meagre. The number of texts in the Digest which, even by a stretch of language, could be said to express a theory of Corporations is extremely small, and as to implied theories it is easy for different expositors to hold different opinions, especially if they feel more or less concerned to deduce a result that will be tolerable in modern Germany. The admission must be made that there is no text which directly calls the *universitas* a *persona*, and still less any that calls it *persona ficta*[2].

[1] Beseler, Volksrecht und Juristenrecht, Leipzig, 1843, pp. 158—194.

[2] It does not seem to be proved that the Roman jurists went beyond the 'personae

According to Dr Gierke, the first man who used this famous phrase was Sinibald Fieschi, who in 1243 became Pope Innocent IV.[1] More than one generation of investigators had passed away, indeed the whole school of glossators was passing away, before the Roman texts would yield a theory to men who lived in a Germanic environment, and, when a theory was found, it was found by the canonists, who had before their eyes as the typical corporation, no medieval city, village or gild, but a collegiate or cathedral church. In Dr Gierke's view Innocent, the father of 'the Fiction Theory,' appears as a truly great lawyer. He really understood the texts; the head of an absolute monarchy, such as the catholic Church was tending to become, was the very man to understand them; he found the phrase, the thought, for which others had sought in vain. The corporation is a person; but it is a person by fiction and only by fiction. Thenceforward this was the doctrine professed alike by legists and canonists, but, so our author contends, it never completely subdued some inconsistent thoughts of Germanic origin which found utterance in practical conclusions. In particular, to mention one rule which is a good touchstone for theories, Innocent, being in earnest about the mere fictitiousness of the corporation's personality and having good warrant in the Digest[2], proclaimed that the corporation could commit neither sin nor delict. As pope he might settle the question of sin, and at all events could prohibit the excommunication of an *universitas*[3], but as lawyer he could not convince his fellow lawyers that corporations must never be charged with crime or tort.

Then Savigny is set before us as recalling courts and lawyers from unprincipled aberrations to the straight but narrow Roman road. Let us bring to mind a few of the main traits of his renowned doctrine.

vice fungitur' of Dig. 46, 1, 22. Any modern text-book of Pandektenrecht will introduce its reader to the controversy, and give numerous references. Here it may be enough to name Ihering, Brinz, Windscheid, Pernice, Dernburg and Regelsberger as prominent expositors of various versions of the Roman theory. Among recent discussions may be mentioned, Kniep, Societas Publicanorum, 1896; Kuhlenbeck, Von den Pandekten zum bürgerlichen Gesetzbuch (1898), I. 169 ff.

[1] Gierke, Genossenschaftsrecht, III. 279.

[2] Dig. 4, 3, 15 § 1.

[3] Gierke, Genossenschaftsrecht, III. 280.

Besides men or 'natural persons,' the law knows as 'subjects[1]' of proprietary rights certain fictitious, artificial or juristic persons, and as one species of this class it knows the corporation. We must carefully sunder this ideal person from those natural persons who are called its members. It is capable of proprietary rights; but it is incapable of knowing, intending, willing, acting. The relation between it and the corporators may best be compared to that between *pupillus* and *tutor*, or that between a lunatic and the committee of his estate. By the action of its guardians it can acquire property, and, if it is to take the advantage of contracts, it must take the burden also. To allow it possession is difficult, for possession is matter of fact; still after hesitation the Roman lawyers made this concession. An action based upon unjust enrichment may lie against it; but it must not be charged with delict. To attempt to punish it is both absurd and unjust, though the State may dissolve a noxious group in an administrative way. Being but a fiction of the law, its personality must have its commencement in some authoritative act, some declaration of the State's will. Finally, it may continue to exist though it no longer has even one member.

For the last three centuries and more Englishmen have been repeating some of the canonical phrases, but Dr Gierke would probably say that we have never taken them much to heart. We are likely therefore to overlook some points in the Savignian theory which seem serious to those who have not raised convenient inconsequence to the level of an intellectual virtue. In particular, having made 'the corporation itself' a mindless being that can do no act, we must not think of the organized group of corporators as an 'agent' appointed by a somewhat inert 'principal.' Were the corporation 'itself' capable of appointing an agent, there would be no apparent reason why 'itself' should not do many other acts. Savigny is far more skilful. It is not in agency but in guardianship of the Roman kind that he finds the

[1] Germans distinguish between the Subject and the Object of a right. If Styles owns a horse, Styles is the Subject and the horse the Object of the right. Then if we ascribe the ownership of the horse to the Crown, we make the Crown a Subject; and then we can speak of the Crown's Subjectivity. And so in political theory, if we ascribe Sovereignty to the Crown or the Parliament or the People, we make the Crown, Parliament or People the Subject of Sovereignty. The reader of the following pages may be asked to remember this not inconvenient usage.

correct analogy. Those who wish to make fun of the theory say that it fills the legal world with hopeless idiots and their State-appointed curators; but, if we mean logic, we must be careful to see that our 'corporation itself'—that *Ding an sich* which somehow or another lies beyond the phenomenal group of corporators[1]—does no act, speaks no word, thinks no thought, appoints no agent. Also we may observe, and in history this is important, that this theory might play into the hands of a Prince or princeling inclined to paternal despotism. Really and truly the property of a corporation—for example a city or university—belongs to no real person or persons, and over the doings of guardians and curators the State should exercise, no mere jurisdiction, but administrative control. Of 'natural rights' there can here be no talk, for 'artificial persons' can have no natural rights. Furthermore, the strict confinement of the *persona ficta* within the sphere of Private Law may escape notice in a country where (to use foreign terms) 'publicistic' matter has been wont to assume 'private-rightly' form in a fashion that some would call shamefully medieval but others enviably Germanic. The Savignian corporation is no 'subject' for 'liberties and franchises' or 'rights of self-government.' Really and 'publicistically' it can hardly be other than a wheel in the State's machinery, though for the purposes of Property Law a personification of this wheel is found to be convenient. Lastly, some popular thoughts about 'body' and 'members' must needs go overboard. The guardian is no 'member' of his ward; and how even by way of fiction could a figment be composed of real men? We had better leave body and members to the vulgar.

Savigny wrote on the eve of a great upheaval. A movement in which England played a prominent and honourable part was thrusting the joint-stock company to the very forefront of those facts whence a theory of corporations must draw its sustenance. Whatever may be said of municipal and other communes, of universities and colleges and churches, the modern joint-stock company plainly resents any endeavour to 'construe' it as a piece of the State's mechanism, though we may profitably remember that

[1] Pollock, Contract, ed. 6, p. 108: '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.' But this happy phrase is not by itself an adequate expression of Sir F. Pollock's view. See the context.

early and exemplary specimens, notably the Bank of England and the East India Company, were closely related to the State. Moreover, the modern joint-stock company, if it is an *universitas*, is exceedingly like a *societas*, a partnership, a *Gesellschaft*, and this resemblance seemed to threaten one of the securest results of legal science. There were a few phrases in the Digest capable of perplexing the first glossators, but in clear words Innocent IV. had apprehended the distinction: the *universitas* is a person; the *societas* is only another name, a collective name, for the *socii*[1]. Since then jurisprudence had kept or endeavoured to keep the two in very different boxes, in spite of the efforts of Natural Law to break down the partition. In a system of *Pandektenrecht* the *universitas* appeared on an early page under the rubric 'Law of Persons,' while the *societas* was far away, probably in another volume, for a Partnership is a kind of Contract and Contract is a kind of Obligation. Here, however, was a being whose very name of *Aktiengesellschaft* strongly suggested partnership, and yet the German legislators who had designed its mould had almost certainly meant that it should exhibit personality or legal 'subjectivity,' though they had not said this in so many words. Was it *universitas*, or *societas*, or neither, or both? Could a mean term be found between unity and plurality? What was, what could be, the 'juristic nature' of a shareholder's 'share,' as we call it in England? Was it any conceivable form of co-ownership, any 'real' right in the company's lands and goods? Could it, on the other hand, be reduced to the mere benefit of a contract between the shareholder and the artificial person? Ideal walls were rocking and material interests were at stake. Was it, for example, decent of the Prussian government to tax first the income of the company and then the dividends of the shareholders and yet disclaim all thought of double taxation[2]?

Pausing here for a moment, we may notice that an Englishman

[1] Gierke, Genossenschaftsrecht, III. 285.

[2] Dernburg, Pandekten, ed. 5, I. 146. The German lawyer has had a good many different types of association to consider, such as the *Gesellschaft des bürgerlichen Rechtes*, the *offene Handelsgesellschaft*, the *Kommanditgesellschaft*, the *Kommanditgesellschaft auf Aktien*, and the *Aktiengesellschaft*; and, so I understand, the legislature had not explicitly told him which, if any, of these types were to display personality. So a large room was left for rival 'constructions.'

will miss a point in the history of political theory unless he knows that in a strictly legal context the Roman *societas*, the French *société*, and the German *Gesellschaft* should be rendered by the English *partnership* and by no other word. Also he should know that, just as the English lawyer maintains that our English 'firm' is a mere collective name for the partners and displays no 'artificial personality,' so also he will be taught in Germany that the Roman *societas* and the German *Gesellschaft* are not 'juristic persons.' Now-a-days it will perhaps be added that the German *Gesellschaft* —and the same would be said of the English partnership—shews a tendency to develop towards corporate organization, from which tendency the extremely 'individualistic' *societas* of the Romans was wholly free[1]. That is a small matter; but it is a great matter that before the end of the Middle Ages the Roman word for partnership was assuming a vastly wide meaning and, under the patronage of Ciceronian comparisons[2], was entering the field of politics. 'Human Society' should be the partnership of mankind; 'Civil Society' should be the partnership of citizens; 'the Origin of Civil Society' should be a Social Contract or contract of partnership. If Rousseau writes of *le Contrat Social* and Pothier of *le Contrat de Société*, there should be, and there is, a link between their dissimilar books, and a German can say that both discussed the *Gesellschaftsvertrag*, the one with passion, the other with erudition. Here then we face one of the historical problems that Dr Gierke raises. How came it about that political theory, which went to the lawyers for most of its ideas, borrowed the contract of partnership rather than the apparently far more appropriate act of incorporation? In brief the answer is that the current doctrine of corporations, the classical and Innocentian doctrine, stood beneath the level of philosophic thought. A merely fictitious personality, created by the State and shut up within the limits of Private Law, was not what the philosopher wanted when he went about to construct the State itself.

And then political philosophy reacted upon legal theory. When the State itself had become a merely collective unit—a sum of presently existing individuals bound together by the operation of their own wills—it was not likely that any other group would seem capable of withstanding similar analysis. Where philosophy and

[1] Dernburg, loc. cit.

[2] See below, p. 187.

jurisprudence met in such systems of Natural Law as were fashionable in the eighteenth century, the *universitas* was lowered to the rank of the *societas*, or (but this was the same process) the *societas* was raised to the rank of the *universitas*[1]. Both alike exhibited a certain unity in plurality; both alike might be called 'moral persons'; but in the one case as in the other this personality was to be thought of as a mere labour-saving device, like stenography or the mathematician's symbols. What we may call the Bracket Theory or Expansible Symbol Theory of the Corporation really stands in sharp contrast with the Fiction Theory as Savigny conceived it, though sometimes English writers seem to be speaking of the one and thinking of the other. The existing corporators, who in the one scheme are mere guardians for a somewhat that the State has instituted, become in the other scheme the real 'subjects' of those rights and duties that are ascribed to the corporation, though legal art usually keeps these 'subjects' enclosed within a bracket. However, despite this tendency of a 'natural' jurisprudence—a tendency which seems to have left an abiding mark in the legal terminology of Scotland—the Romanists of Germany had been holding fast the doctrine that the *universitas* is, while the *societas* is not, a person, when the joint-stock company, a new power in the theoretic as in the economic world, began to give trouble. That the *Aktiengesellschaft* was a corporation was generally admitted; but of all corporations a joint-stock company is that which seems to offer itself most kindly to the individualistic analyst. When all is said and done, and all due praise has been awarded to the inventors of a beautiful logarithm, are not these shareholders, these men of flesh and blood, the real and only sustainers of the company's rights and duties? So great a Romanist as Ihering[2] trod this 'individualistic' or 'collectivistic' path, and in America where law schools flourish, where supreme courts are many and the need for theory is more urgent than it is in England, highly interesting attempts have been made to dispel the Fiction, or rather to open the Bracket and find therein nothing but contract-bound men[3]. Contract, that greediest of legal categories,

[1] Gierke, Johannes Althusius, 103.

[2] See especially Geist des röm. Rechts, vol. III., p. 343.

[3] Dissatisfaction with the Fiction—or, as Americans sometimes say, with 'the Entity'—is expressed in some well-known text-books, e.g., Taylor, Law of Private Corporations, § 60; Morawetz, Law of Private Corporations, ch. I.

which once wanted to devour the State, resents being told that it cannot painlessly digest even a joint-stock company. Maine's famous sentence about Contract and Status might indeed be boldly questioned by anyone who remembered that, at least for the philologian, the Roman Status became that modern State, *État*, *Staat* which refused to be explained by Contract into a mere 'Civil Society.' Few words have had histories more adventurous than that of the word which is the *State* of public and the *estate* of our private law, and which admirably illustrates the interdependence that exists between all parts of a healthily growing body of jurisprudence. Still, though the analytic powers of Contract are by no means what they once seemed to be, many will think them equal to the task of expanding what they might call the Corporation Symbol.

It was in a Germany that was full of new ideas and new hopes that a theory was launched which styled itself 'the German *Genossenschaftstheorie*.' Even the hastiest sketch of its environment, if it notices the appearance of the joint-stock company, should give one word to the persistence in Germany of agrarian communities with world-old histories, to the intricate problems that their dissolution presented, and to the current complaint that Roman law had no equitable solution for these questions and had done scant justice to the peasant. Nor should the triumphs of biological science be forgotten. A name was wanted which would unite many groups of men, simple and complex, modern and archaic; and *Genossenschaft* was chosen. The English translator must carefully avoid Partnership; perhaps in our modern usage Company has become too specific and technical; Society also is dangerous; Fellowship with its slight flavour of an old England may be our least inadequate word. Beginning with Beseler's criticism of Savigny, the theory gradually took shape, especially in Dr Gierke's hands, and a great deal of thought, learning and controversy collected round it. Battles had to be fought in many fields. The new theory was to be philosophically true, scientifically sound, morally righteous, legally implicit in codes and decisions, practically convenient, historically destined, genuinely German, and perhaps exclusively Germanistic[1]. No, it seems to say, whatever

[1] However, some Romanists of repute have asserted their right to adopt and have adopted this theory. See in particular Regelsberger, Pandekten, vol. I. p. 289 ff. See also Dernburg, Pandekten, § 59.

the Roman *universitas* may have been—and Dr Gierke is for pinning the Roman jurists to Savignianism—our German Fellowship is no fiction, no symbol, no piece of the State's machinery, no collective name for individuals, but a living organism and a real person, with body and members and a will of its own. Itself can will, itself can act; it wills and acts by the men who are its organs as a man wills and acts by brain, mouth and hand. It is not a fictitious person; it is a *Gesammtperson*, and its will is a *Gesammtwille*; it is a group-person, and its will is a group-will[1].

This theory, which we might call Realism, may seem to carry its head among the clouds, though no higher perhaps than the Fiction Theory; but a serious effort has been made to give it feet that walk upon the earth. In one long book[2] Dr Gierke has in great detail argued his case throughout the whole domain of practicable modern law, contending, not indeed that all German 'authority' (as an English lawyer would say) is on his side, but that he has the support of a highly respectable body of authority, express and implied, and that legislatures and tribunals fall into self-contradiction or plain injustice when they allow themselves to be governed by other theories. Nothing could be more concrete than the argument, and, though it will sometimes shew an affection for 'the German middle age' and a distrust of ancient Rome, it claims distinctively modern virtues: for instance, that of giving of the shareholder's 'share' the only lawyerly explanation that will stand severe strain. Then in another book our author has been telling the history of German Fellowship Law[3].

Let us try to imagine—we are not likely to see—a book with some such title as English Fellowship Law, which in the first place

[1] The works of Dr Gierke which deal with this matter are (1) Das deutsche Genossenschaftsrecht, whereof three volumes were published in 1868, 1873, and 1881; (2) Die Genossenschaftstheorie und die deutsche Rechtsprechung, 1887; (3) The first volume of Deutsches Privatrecht, 1895, which contains a more succinct and more recent statement; (4) The monograph on Johannes Althusius, 1880, which should be well known to all students of political theory. Those who would rather begin their study of the realistic theory in French than in German may be sent to A. Mestre, Les Personnes Morales, 1899. French lawyers have been conservative, and Savignianism was in harmony with the spirit of the Codes; nevertheless the doctrine of the real group-will is finding disciples. The only English statement that I have seen of this theory is by Ernst Freund, The Legal Nature of Corporations, University Press, Chicago, 1897.

[2] This is the Genossenschaftstheorie of 1887.

[3] This is the Genossenschaftsrecht of 1868—73—81.

described the structure of the groups in which men of English race have stood from the days when the revengeful kindred was pursuing the blood feud to the days when the one-man-company is issuing debentures, when parliamentary assemblies stand three deep above Canadian and Australian soil and 'Trusts and Corporations' is the name of a question that vexes the great Republic of the West. Within these bounds lie churches, and even the medieval church, one and catholic, religious houses, mendicant orders, non-conforming bodies, a presbyterian system, universities old and new, the village community which Germanists revealed to us, the manor in its growth and decay, the township, the New England town, the counties and hundreds, the chartered boroughs, the gild in all its manifold varieties, the inns of court, the merchant adventurers, the militant 'companies' of English condottieri who returning home help to make the word 'company' popular among us, the trading companies, the companies that become colonies, the companies that make war, the friendly societies, the trade unions, the clubs, the group that meets at Lloyd's Coffee-house, the group that becomes the Stock Exchange, and so on even to the one-man-company, the Standard Oil Trust and the South Australian statutes for communistic villages. The English historian would have a wealth of group-life to survey richer even than that which has come under Dr Gierke's eye, though he would not have to tell of the peculiarly interesting civic group which hardly knows whether it is a municipal corporation or a sovereign republic. And then we imagine our historian turning to inquire how Englishmen have conceived their groups: by what thoughts they have striven to distinguish and to reconcile the manyness of the members and the oneness of the body. The borough of the later middle ages he might well regard with Dr Gierke as a central node in the long story. Into it and out from it run most of the great threads of development, economic and theoretical. The borough stretches one hand back to the village community and the other forward to freely formed companies of all sorts and kinds. And this Dr Gierke sets before us as the point at which the unity of the group is first abstracted by thought and law from the plurality, so that 'the borough' can stand out in contrast to the sum of existing burgesses as another person, but still as a person in whom they are organized and embodied.

To his medieval Germans Dr Gierke attributes sound and wholesome thoughts, and in particular a deep sense of the organic character of all permanent groups great and small. Not that, according to him, their thoughts were sharply defined: indeed he has incurred the dissent of some of his fellow Germanists by refusing to carry back to the remotest time the distinction between co-ownership and corporate ownership. In deeply interesting chapters he has described the differentiating process which gives us these two ideas. That process was prospering in the German towns when the catastrophe occurred. When German law was called upon to meet the alien intruder, it had reached 'the stage of abstraction,' but not 'the stage of reflection.' It had its *Körperschaftsbegriff*, but no *Korporationstheorie*. It could co-ordinate Man and Community as equally real persons of different kinds; but it had never turned round to ask itself what it was doing. And so down it went before the disciplined enemy: before the theory which Italian legists and decretists had been drilling.

Then in another volume we have the history of this theory. We should misrepresent our author if, without qualification, we spoke of Italian science as the enemy. All technical merits were on its side; it was a model for consequent thinking. Still, if it did good, it did harm. Its sacred texts were the law of an unassociative people. Roman jurisprudence, starting with a strict severance of *ius publicum* from *ius privatum*, had found its highest development in 'an absolutistic public law and an individualistic private law.' Titius and the State, these the Roman lawyers understood, and out of them and a little fiction the legal universe could be constructed. The theory of corporations which derives from this source may run (and this is perhaps its straightest course) into princely absolutism, or it may take a turn towards mere collectivism (which in this context is another name for individualism); but for the thought of the living group it can find no place; it is condemned to be 'atomistic' and 'mechanical.' For the modern German 'Fellowship Theory' remained the task of recovering and revivifying 'the organic idea' and giving to it a scientific form.

It is not easy for an Englishman to throw his heart or even his mind into such matters as these, and therefore it may not be easy for some readers of this book at once to catch the point of

all Dr Gierke's remarks about the personality of States and Corporations. If we asked why this is so, the answer would be a long story which has never yet been duly told. However, its main theme can be indicated by one short phrase which is at this moment a focus of American politics: namely, 'Corporations and Trusts.' That puts the tale into three words. For the last four centuries Englishmen have been able to say, 'Allow us our Trusts, and the law and theory of corporations may indeed be important, but it will not prevent us from forming and maintaining permanent groups of the most various kinds: groups that, behind a screen of trustees, will live happily enough, even from century to century, glorying in their unincorporatedness. If Pope Innocent and Roman forces guard the front stairs, we shall walk up the back.' From the age when, among countless other unchartered fellowships, the Inns of Court were taking shape, to the age, when monopolizing trusts set America ablaze, our law of corporations has only been a part of our *Genossenschaftsrecht*, and not perhaps the most important part[1]. We will mention but one example. If we speak the speech of daily life, we shall say that in this country for some time past a large amount of wealth has 'belonged' to religious 'bodies' other than the established church, and we should have thought our religious liberty shamefully imperfect had our law prevented this arrangement. But until very lately our 'corporation concept' has not stood at the disposal of Nonconformity, and even now little use is made of it in this quarter: for our 'trust concept' has been so serviceable. Behind the screen of trustees and concealed from the direct scrutiny of legal theories, all manner of groups can flourish: Lincoln's Inn or Lloyd's[2] or the Stock Exchange or the Jockey Club, a whole presbyterian system, or even the Church of Rome with the Pope at its head. But, if we are to visit a land where Roman law has

[1] See the Stat. of (1531—2) 23 Hen. VIII., c. 10: lands are already being held to the use of unincorporated 'guilds, fraternities, comminalities, companies or brotherheads,' and this on so large a scale that King Henry, as supreme landlord, must interfere. Happily the lawyers of a later time antedated by a few years King Henry's dislike of 'superstition,' and therefore could give to this repressive statute a scope far narrower than that which its royal author assuredly intended. The important case is *Porter's Case*, 1 Coke's Reports, 22 b.

[2] At length incorporated in 1871: see F. Martin, History of Lloyd's, pp. 356—7, a highly interesting book.

been 'received,' we must leave this great loose 'trust concept' at the Custom House, and must not for a moment suppose that a meagre *fideicommissum* will serve in its stead. Then we shall understand how vitally important to a nation—socially, politically, religiously important—its Theory of Corporations might be.

If it be our task legally to construct and maintain comfortable homes wherein organic groups can live and enjoy whatever 'liberty of association' the Prince will concede to them, a little, but only a little, can be done by means of the Romanist's co-ownership (*condominium*, *Miteigentum*) and the Romanist's partnership (*societas*, *Gesellschaft*). They are, so we are taught, intensely individualistic categories: even more individualistic than are the parallel categories of English law, for there is no 'jointness' (*Gesammthandtschaft*) in them. If then our Prince keeps the *universitas*, the corporate form, safe under lock and key, our task is that of building without mortar. But to keep the *universitas* safe under lock and key was just what the received theory enabled the Prince to do. His right to suppress *collegia illicita* was supplemented by the metaphysical doctrine that, from the very nature of the case, 'artificial personality' must needs be the creature of sovereign power. At this point a decisive word was said by Innocent IV. One outspoken legist reckoned as the fifty-ninth of the sixty-seven prerogatives of the Emperor that he, and only he, makes fictions: 'Solus princeps fingit quod in rei veritate non est[1].' Thus 'the Fiction Theory' leads us into what is known to our neighbours as 'the Concession Theory.' The corporation is, and must be, the creature of the State. Into its nostrils the State must breathe the breath of a fictitious life, for otherwise it would be no animated body but individualistic dust.

Long ago English lawyers received the Concession Theory from the canonists. Bred in the free fellowship of unchartered Inns, they were the very men to swallow it whole. Blackstone could even boast that the law of England went beyond 'the civil law' in its strict adhesion to this theory[2]; and he was right, for the civilians of his day generally admitted that, though in principle the State's consent to the erection of a corporation was absolutely necessary, still there were Roman texts which might be deemed

[1] Lucas de Penna, cited by Gierke, Genossenschaftsrecht, III. 371.
[2] Comment. I. 472.

to have given that consent in advance and in general terms for the benefit of corporations of certain innocuous kinds. But then, what for the civilians was a question of life and death was often in England a question of mere convenience and expense, so wide was that blessed back stair. The trust deed might be long; the lawyer's bill might be longer; new trustees would be wanted from time to time; and now and again an awkward obstacle would require ingenious evasion; but the organized group could live and prosper, and be all the more autonomous because it fell under no solemn legal rubric. Lawyers could even say that the common law reckoned it a crime for men 'to presume to act as a corporation'; but as those lawyers were members of the Inns of Court, we should hardly need other proof—there is plenty to be had—that the commission of this crime (if crime it were) was both very difficult and wholly needless[1]. Finally it became apparent that, unless statute law stood in the way, even a large company trading with a joint-stock, with vendible shares and a handsome measure of 'limited liability' could be constructed by means of a trust deed without any incorporation[2].

Nowhere has the Concession Theory been proclaimed more loudly, more frequently, more absolutely, than in America; nowhere has more lip-service been done to the Fieschi. Ignorant men on board the 'Mayflower' may have thought that, in the presence of God and of one another, they could covenant and combine themselves together into 'a civil body politic[3].' Their descendants know better. A classical definition has taught that 'a Corporation is a Franchise,' and a franchise is a portion of the State's power in the hands of a subject[4]. A Sovereign People

[1] Lindley, Company Law, Bk. I., ch. 5, sect. 1. In the curious case of *Lloyd* v. *Loaring*, 6 Ves. 773, Lord Eldon had before him a lodge of Freemasons which had made an imprudent display of what a Realist would call its corporate character. His lordship's indignation was checked by the thought that 'Mr Worseley's silver cup' belonged to 'the Middle Temple.'

[2] The directors are bound to give notice to every one who gives credit that he has nothing to look to beyond the subscribed fund, and that no person will be personally liable to him. As to these 'attempts to limit liability,' see Lindley, Company Law, Bk. II., ch. 6, sec. 2.

[3] The Mayflower Compact can be found, among other places, in Macdonald, Select Charters, p. 33.

[4] Kent, Comment. Lect. 33: 'A corporation is a franchise possessed by one or more individuals, who subsist as a body politic under a special denomination, and are vested,