CORPORATE PERSONALITY*

I. Introduction

The concept of corporate personality has been subjected to acute and searching analysis by jurists during the last century.[1] The debate on whether a group or association of human beings has a "fictitious" or "real" personality has attracted protagonists on both sides, each pressing its view with vigour. The crucial questions which this discussion has thrown up are these: (1) to what extent ought legal theory and practice give recognition to a personality which can be ascribed to a group of individuals *qua* group; (2) to what extent has the law actually given recognition to such groups? In this paper these questions will be examined, first in the light of a brief survey of the development of the theory of corporate personality, secondly in the context of the particular group entities which are known to English law.

II. The Historical Development of the Concept

The concept of personality has given rise to major philosophical problems in the writings of those who have attempted to define its nature and its effects in social life. In literary usage, it originally meant the mask of the dramatic actor through which vocal effects were emitted; from this it came to mean the part played by the actor in a play.[2] In Roman legal usage which was built upon or at least related to this meaning, personality meant the role played by an individual in society as a bearer of rights and duties. But, as Duff points out, the meaning of a "right and duty bearing unit" shaded imperceptibly into that of a human being (even though some human beings such as slaves did not possess legal personality).[3] In the writings of the Neo-Platonic philosophers and Christian theologians the concept of personality received a much more penetrating analysis, and by the sixth century we find Boethius defining it as the "individuality of a rational being".[4] However, the tensions which arose between the two meanings (i.e. human status, and status as a right and duty bearing unit or "entity" status) left their mark on Roman law. In the latter's treatment of groups of human beings,

*This is a slightly revised version of a paper delivered to a meeting of the Australian Society of Legal Philosophy in Sydney in October, 1963. The author wishes to express his gratitude for the comments of those who attended the meeting.

1. See W. Friedmann, *Legal Theory* (4th ed. 1960) Ch. 33; and G. W. Paton, Textbook of Jurisprudence (2nd ed. 1951) Ch. 16.
2. P. W. Duff, *Personality in Roman Private Law* (1938) 3.
3. *Ibid.* 5. Paton, *op. cit.* 314.
4. Cited D. P. Derham, "Theories of Corporate Personality" in L. C. Webb (ed.), *Legal Personality and Political Pluralism* (1958) 13.

the universitas—the thing as a whole—received legal recognition and the way was paved for the legal recognition of entities other than the human person.[5]

In the Middle Ages, the horizon was extended and discussion revolved around the origins of authority in the political community of human beings (the *civitas*) and on the relationship between that body and the *corpus mysticum*, the Church.[6] The early period was marked by disputes between the Caesaro-Papalists who proclaimed the Pope as the supreme ruler of Church and State and the bearer of the "two swords" and the Conciliarists who saw in their Movement a means towards the "democratization" of the Church. At a later stage, however, the Conciliar Movement itself became the base for an attack on the Universal Church, the old Roman Empire gave way to the new nation States, and with Luther, the conception of the Godly civil ruler with authority in both religious and civil matters came to the fore.[7]

As Gierke points out,[8] the theorists of the Middle Ages made little use of the idea of personality in their study of society and the groups of which it was composed. However, the professional lawyers —the Legists and Canonists—did have a theory of group personality. To them the group was a *persona ficta* which consisted of individuals bound together, it was true, by a social purpose but nevertheless which did not have a *voluntas* or *mens* of its own. At a later stage, the doctrine of the social contract which purported to explain the relationship between the holders of power and those subject to it left little room in a philosophy of political life for the plurality of groups or social institutions which composed society.[9] In the words of Gierke, the theory led to the conclusion that one ruler or Assembly must be the subject of Supreme Power and that in the case of conflict the State is incorporate only in this one man or this one Assembly. "For States within the States there was thenceforth no room, and all the smaller groups had been brought under the rubric of Communes or Corporations."[10]

It was true that these groups were regarded by some as having certain privileges including jurisdiction over their members, but such rights were derived from the consent of the ruler. The State was a *societas perfecta*, these groups *societates privatae*. Such were the *collegia*—the unions of two or more persons of like status—and

5. Duff, *op. cit.* 35 *et seq.*
6. See Generally O. von Gierke, *Political Theories of the Middle Age* (ed. F. W. Maitland, 1900); *Natural Law and the Theory of Society* (ed. E. Barker, 1950).
7. *Natural Law and the Theory of Society* 88.
8. *Ibid.* 67-69.
9. *Political Theories in the Middle Ages* 88 *et. seq.*
10. *Ibid.* 97.

the more comprehensive *corpus* and *universitas* such as the local community. Although the family had a basis in natural law it was also regarded as a *societas privata*.[11] There were some writers such as Althusius who attributed to these communities a higher status. Althusius recognized within the State associations possessing certain rights of their own—the family, the fellowship, the local community, the province—each having power to resist tyrannical attacks on their rights. But even though the group received some measure of recognition it remained a collection of individuals: the influence of the *persona ficta* of the Legists was still strong.[12]

In the eighteenth century with the consolidation of the doctrine of sovereignty, the status of associations became precarious. This was especially the case in France. In the debates of the French Convention antagonism on the part of those who espoused the doctrine of the sovereignty of the people was directed against any body which stood between the individual and the State. Did not such groups destroy the unity of the nation? Since they existed by concession of the State, the State could abolish them, acquire their property and punish by death or imprisonment those members who resisted.[13]

It is against this background that the issues debated by the jurists in the nineteenth century took shape. Gierke steeped in the Germanist tradition argued that the Romanism of Savigny, which held the *universitas* to be a *persona ficta*, did not take account of the German Fellowship with its real communal life. In Gierke's view, such groups had a status in law which was not derived from State recognition or concession: the act of recognition merely had a declaratory function.[14]

In the twentieth century, the realist theory was enthusiastically adopted in different forms, by Harold Laski in America,[15] and by the institutionalists Hauriou and Renard in France.[16] To Hauriou the social group or institution was "an idea of an undertaking or of an enterprise which is realized and which persists juridically in a social environment; for the realization of this idea an authority is constituted which procures organs to itself; and in addition, among the rulers of the social group interested in the realization

11. *Natural Law and the Theory of Society* 63.
12. *Ibid.* 70-77.
13. *Ibid.* 166-7.
14. Gierke's doctrines are summarized by Maitland in the Introduction to *Political Theories of the Middle Age*, xvii *et seq.*
15. "The Personality of Associations" (1915) 29 *Harvard Law Review* 404. For a recent discussion of Laski's views see L. C. Webb, "Corporate Personality and Political Pluralism" in *id.* (ed.), *op. cit. supra* n. 4, at 62 *et seq.*
16. The works of these writers are exhaustively analyzed by F. Hallis, *Corporate Personality* (1934).

of the idea there are produced manifestations of communion directed by the organs of authority and regulated by procedural rules".[17] The phrase "persists juridically" is ambiguous. It may mean that the social group has received its legal status by an act of the State or that it exists by permission of the State (as distinct from some positive act). If this meaning is accepted the Institutionalist theory would have little practical effect. It may mean that a group exists in the eyes of the law from the very moment of its birth. This is the meaning which Haurion has in mind for he considers that the determination by the State of the status of a group is of a declaratory and not constitutive nature.[18]

The major effect of the teaching of the Institutionalists was to emphasize the plurality and vitality of the groups making up human society—family, church, trade union, State. To the Institutionalists, these groups had a certain life of their own, a life deriving, as it were, from the natural order of things. Within and around this way of life there develop rules of procedure and action which are inextricably tied to the purposes of the particular group. The law of the State must in some way promote these purposes by giving recognition to the above-mentioned rules.

It is when a practical attempt is made to work out a basis on which legal personality ought to be attributed to social groups and to construct a hierarchy of group functions that the Realists and Institutionalists face their greatest difficulty. In Gierke's theory, the State itself while it was the most comprehensive group was not sovereign in the sense that it controlled the activities of the other groups: it had the function of superintending the purposes of the other groups and the legality of their activities.[19] However, as Friedmann suggests, in actual practice the recognition of such a superintending function can lead and often has in fact led to a decline in the corporate autonomy of groups and to the resurrection of the Leviathan.[20]

In England, theoretical discussions of the nature of corporate personality were infrequent until Maitland's discussion of Gierke's theories. The reason, as Maitland pointed out in his famous lecture on "Trust and Corporation" was that the Trust provided a means whereby a social group could effectuate its purposes without the need for direct intervention on the part of the State.[21] It was

17. "La Theorie de l'Institution et de la Fondation" (1925) No. 4 *Cahiers de la Nouvelle Journee*, 10.
18. See G. Gurvitch, "Les Idees Maitresses de Maurice Hauriou" (1931) 1 *Archives de Philosophie de Droit* 155, at 191.
19. Friedmann, *op. cit. supra* n. 1, at 188.
20. *Ibid.* 189-90.
21. "Trust and Corporation" in 3 *Collected Papers* (1911) 321.

through the operation of the trust principle that the life of unincorporated associations received legal recognition, although not legal personality. Furthermore, it might be said, it was the empirical attitude of English law which has saved these associations from the twin dangers of state control and an individualism which recognized only the status of particular human beings.

In the succeeding pages we will examine the various forms of group life which have in some way or other achieved a status (whether corporate or non-corporate) in English law. At the same time we will attempt to ascertain to what extent legal theory has influenced or could profitably influence the rules of English law which apply to such groups.

III. The State

A defined theory of the State is not to be found in English law. The mediaeval conception of the king as a corporation sole has had engrafted upon it a number of rules which specify the relations between the component parts of the governmental structure and rights of the citizen vis-a-vis the government, such rules deriving their force in large part from the common law. The notion of the corporation sole was itself derived from ecclesiastical law and became part of English feudal theory. But the regal corporation sole was not itself a complete juristic person separate from the occupant of the throne: when a monarch died all commissions ended and it was necessary for litigation to be re-commenced.[22]

It may be regarded as unfortunate that, with the demise of the doctrine of the divine right of kings and the establishment in its place of the doctrine of parliamentary supremacy, no attempt was made to create a juristic concept of the English State as a corporation aggregate. As Paton points out, the virtue of this concept is that it emphasizes that the subjects are also members of the State.[23] It might be said that the concept of King-in-Parliament as the ultimate source of legislative power went some way towards closing this gap in English juristic theory, although it remains true that an omnipotent parliament can oppress the rights of the citizens just as much as an omnipotent monarch.

On its foundation, Australia inherited English juristic theory on the nature of the State. Although the Commonwealth Constitution, which was superimposed on the Constitutions of the six Colonies, implicitly introduced a separation of Commonwealth and State legislative and executive powers, there was no grant of a specific personality to the component parts of the Australian federal

22. See Paton, *op. cit. supra* n. 1, at 279 *et seq.*
23. *Ibid.* 282.

structure.[24] Although Griffith C.J. made an attempt to construct a theory of separate Commonwealth-State personality in an early case decided by the High Court,[25] the doctrine of the indivisibility of the Crown was proclaimed in the *Engineers' Case* and the Commonwealth and States were regarded as agents of this indivisible Crown exercising their powers in different localities and in different ways.[26] And yet even the little logic that remained in the doctrine of the indivisibility of the Crown applied to a federal structure was subjected to severe testing when the courts were faced with the task of interpreting statutes which bound one and not the other agent of the Crown. In *Gulson's* Case Latham C.J. pointed out that the principle was of little assistance in a federal system such as Australia where the Commonwealth could sue a State, a State the Commonwealth and the State another State.[27]

If we transfer the discussion to the international arena we have greater difficulty in accommodating the concept of indivisibility of the Crown. The member countries of the Commonwealth are recognized as separate states in international law. The formula devised at the Imperial Conference of 1926 to explain the legal status of membership of the Commonwealth has been strained since the Second World War to encompass republics and a member country with its own monarch (Malaya). The Crown is now the symbol of the association of the member countries, the majority of whose citizens do not owe personal allegiance to the Queen.[28]

What has been said draws attention to the legal inadequacy of the English theory of the State. In actual fact, the practical problems of law and legal organization have been tackled in a pragmatic fashion and the rules which have emerged have, on the whole, provided an effective framework for the solution of the problems of government in a way in which has given due recognition to the rights of the citizens vis-a-vis the government. Thus the principles of ministerial responsibility, separation of powers and judicial review conduce to behaviour of governments which is in accordance with the "rule of law". There have also been faint intimations of criminal responsibility for acts of agents of the Crown, although the doctrine that the king can do no wrong, while modified with regard to civil actions, still stands in the way of the recognition of such responsibility.[29]

24. *Ibid.* 280-81.
25. *Municipal Council of Sydney v. The Commonwealth* (1904) 1 C.L.R. 208, at 231.
26. *Amalgamated Society of Engineers v. Adelaide Steamship Co.* (1920) 28 C.L.R. 129.
27. (1944) 69 C.L.R. 338, at 350.
28. See K. L. Wheare, *Constitutional Structure of the Commonwealth* (1960).
29. See *Cain v. Doyle* (1946) 72 C.L.R. 409.

Perhaps one of the most notable developments, not only in England and Australia but in other countries with different systems of law, which must be recognized in any discussion of the personality of the State, is the establishment of the public corporation as a body to perform functions which are not related *directly* to the ends of government but which are more properly performed by representatives of the "commonweal" than by private enterprise. These bodies occupy an intermediate status between that of the Crown and that of the company. In many cases these bodies are corporations aggregate which are run along semi-business lines but which do not have the shareholding structure of the company.[30] To a large extent dependent on the State, they nevertheless have a degree of autonomy in day to day activities which enables them to achieve goals which the official agents of the State, because of their organizational structure, could not properly achieve. Their role may be seen as constituting a decentralization of the machinery of State and its embodiment in corporate entities which are administered by those whose technical competence enable them to better achieve the purposes and ends falling within the "charter" of the corporation as compared with the members of the Executive (and their staffs) whose rigid procedures are more appropriate to the attainment of direct governmental purposes.

Their existence reflects the development in the twentieth century of the conception of the rule of the State which sees that body as promoting and assisting in the attainment of social purposes which a nineteenth century society would have left to private enterprise.

IV. Private Corporations and Groups

A. Companies

Since the nineteenth century, English law has offered a simple means by which a group of private persons can attain corporate status. This is by the formation of a company under the Companies Acts. The company when formed has a legal personality separate and distinct from the individual persons who compose it although certain inroads into this doctrine have been made by the courts.[31]

The social factors which led to the enactment of the Companies Acts are to be found in the belief that a group of individuals should be allowed to pursue an economic purpose as a single unit and thus reap the benefits bestowed by such status.[32] At a later stage, limited

30. See W. Friedmann (ed.), *The Public Corporation* (1954).
31. See L. C. Gower, *Principles of Modern Company Law* (2 ed. 1957) chs. 2, 3 for an analysis of the historical background.
32. The effects of incorporation are set out *ibid.* ch. 4.

liability was also created by the Acts so that in the event of a liquidation the liability of the participants in the group enterprise was limited to the unpaid value of the shares held by them.[33] While incorporation was open to all groups irrespective of whether they were pursuing a direct economic purpose, the responsibilities enforced by the Act on those who formed and managed companies militated against the use of incorporation by bodies pursuing social, cultural, or sporting ends, although, where a large amount of property was involved, the device of incorporation was often used by such groups.

Although the Companies Acts were designed to facilitate group activity, the decision of the House of Lords in *Salomon v. Salomon*[34] recognizes the validity of the "one man" company where the beneficial ownership of all the shares resides in one person. It was accepted in that case that the court could not "pierce the corporate veil" in order to prevent the interests of creditors from being prejudiced by resort to the device of incorporation. A recent illustration of the Salomon principle is *Lee v. Lee's Air Farming Ltd.*[35] where a wife was held entitled to compensation under Workers' Compensation legislation as against the defendant company for the death of her husband who was the controlling shareholder of the company and sole governing director.[36]

In some fields, however, there has been a tendency on the part of the courts to pierce the corporate veil—to look beyond the formal features of incorporation and to ascertain who are the flesh and blood individuals responsible for the acts performed by the corporation.[37] In cases where some fraudulent or improper conduct on the part of individuals is involved in hiding behind the screen of corporate personality, the courts have intervened and treated the corporate form as a sham. One of the most recent examples is *Jones v. Lipman*[38] where the defendant agreed to sell land and chattels to the plaintiff. In the interval between the signing and completion of the contract, the defendant transferred the land to a company which had been established with a nominal capital of £100 and consisted of Lipman and a clerk from the firm of solicitors who were handling the matter. In an action for specific performance by the plaintiff, the defendant pleaded that he was no longer able to perform the contract for the

33. *Ibid.* 66-68.
34. [1897] A.C. 22.
35. [1961] A.C. 12.
36. See also *Tunstall v. Steigmann* [1962] 2 W.L.R. 1045; *Bank Voor Handel v. Slatford* [1953] 1 Q.B. 248, esp. at 269.
37. See Gower, *op. cit.* ch. 10; E. J. Cohn and C. Simitis, " 'Lifting the Veil' in the Company Laws of the European Continent" (1963) 12 *International* and Comparative Law Quarterly 189, esp. at 215-25.
38. [1962] 1 W.L.R. 832.

sale of the land owing to the fact that it had been transferred to the company. The court, in ordering specific performance by the company, held that it was a mere creation of the defendant, "a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eyes of equity."[39] In the income tax field, too, the courts have on occasions treated one company as an agent for another—the other's *alter ego*—for the purpose of the assessment of taxation on the profits of the company. In *Apthorpe's Case*[40] all of a New York company's shares were held by an English company. The business of the New York company was held by the Court of Appeal to be that of the English company and therefore properly subjected to English income tax.[41] Another example of the penetration of the corporate veil by the courts is found in cases decided on Trading with the Enemy legislation, the most famous being the *Daimler Case*[42] where a company registered in England the shareholding of which was predominantly German was held to be tainted with an enemy character.[43]

It might be said that cases of this kind lend support to the realist theory of corporate personality in that they recognize that the personality conferred by the State on companies can be penetrated in order to discover the real nature of the group life which lies behind it, although they do not support the extreme version of the realist theory which holds that the corporation has a mind of its own. There are cases, however, which are consonant with this extreme version of the realist theory. Mention may be made of a group of cases decided by English courts in the 1940s—*D.P.P. v. Kent and Sussex Contractors Ltd.*,[44] *R. v. I.C.R. Haulage Ltd.*[45] and *Moore v. Bresler Ltd.*[46]—in which criminal responsibility was imposed on companies for offences involving *mens rea* which were committed by directors or senior officers of the companies. The policy which lies behind these decisions is to be found in the belief that the deterrent effect of the criminal law can only be realized by attributing such responsibility to the company itself. Corporations which the courts have found guilty of illegal practices "may not know a

39. *Ibid.* 836.
40. 80 L.T. 395.
41. See Gower, *op. cit.* 195.
42. *Daimler Co. v. Continental Tyre and Rubber Co.* [1916] 2 A.C. 307.
43. In this case the policy lying behind the Trading with the Enemy legislation could only be realized if the corporate veil were pierced. Compare, however, the decision of the High Court of Australia in *Australian Temperance Assurance Society Ltd. v. Howe* (1922) 31 C.L.R. 290 where it was decided by the majority that the word "resident" in section 75(iv) of the Constitution referred to natural persons only and not to companies.
44. [1944] K.B. 146.
45. [1944] K.B. 551.
46. [1944] 2 All E.R. 515. For discussion of this and the previous cases see R. S. Welsh, "The Criminal Liability of Corporations" (1946) 62 *Law Quarterly Review* 345.

prison wall or wear the broad arrow, but their goodwill suffers a very definite depreciation".[47] With the increase in modern statutory law and regulations which impose penalties for the breach of revenue and finance provisions pertaining to transactions the majority of which are probably carried out by commercial entities, it can be said that such extension of criminal liability is justifiable.[48]

Perhaps the most interesting speculations as to the role of a theory of corporations in its wider sense arise from the discussions of the relationship between the private company and the public good and the extent to which control of a public nature ought to be exercised over the activities of the private company. In this respect the realist theory still has a vital role to play, for it throws emphasis on the fact that the corporate form derived from registration under the Companies Act should not be used in a way which would be detrimental to the interests of the shareholders who compose the company or to the wider interests of the community.[49] Provisions in the State Companies Acts show an increasing concern for the interests of the ordinary shareholder in so far as he may be affected by irresponsible action on the part of directors of a company in which he has or takes shares.[50]

All such reforms make for greater internal "democracy" within the company while in the external sphere they point to a certain control of the activities of the company where the interests of the community are involved. In a wide sense such reforms may be said to embody the spirit of the realist doctrine; the corporate structure is viewed against a more comprehensive social background.

B. Unincorporated Associations

A question which has troubled both legislatures and the courts is the extent to which the activities of unincorporated associations ought to be subjected to judicial review. It is these associations which the Realists (in particular, the French Institutionalists) had in mind when they claimed that social groups had a legal status independent of State recognition. It is no answer to their arguments to say that the law knows nothing of those groups which have not taken advantage of securing corporate status by registration under the Companies Acts or Associations Incorporation Acts.[51] Such

47. Cited in Welsh, *op. cit.* 361.
48. See P. C. Heery, "Corporate Criminal Liability—A Re-appraisal" (1962) 1 *Tasmanian University Law Review* 677, at 683-84.
49. This latter interest is the basis of the proposed Restrictive Practices Legislation of the Commonwealth.
50. See, for instance, section 126 (disclosure of directors' shareholdings).
51. Under the Associations Act of South Australia (No. 56 of 1956) and the Association Incorporation Act of Western Australia (No. 20 of 1895) social and cultural associations may be incorporated. For an interpretation of the South Australian Act see *In Re Proprietary Articles Trade Association of South Australian Incorporated* [1949] S.A.S.R. 88.

clearly is not the case in view of actions entertained by the courts in which a member claims some type of relief against the association to which he belongs. However, the general rule is that, in the absence of statutory authorization, the courts will not entertain a suit by an individual against the representatives of an association unless some civil or proprietary right is involved. But even if this interest is possessed by the plaintiff he will usually be unable to sue the association itself: the remedy will be by way of a representative action.[52] In this section we will examine the legal status of two types of associations—trade unions and churches—which raise special problems.

1. *Trade Unions*

The original hostility of English law to organizations of workmen which were regarded as combinations in restraint of trade was mollified in 1871 with the enactment of the Trade Union Act.[53] Although it was initially considered that the Act had a limited effect on the personality of the trade union, *viz.*, that it empowered the union to hold property and to sue in its own name, the decision in the *Taff Vale Case*[54] showed that its effects were wider. In this case the House of Lords held that non-members could sue a union in tort in its registered name and recover damages against the common fund. Although the effect of this decision was weakened by legislative intervention soon afterwards,[55] the wider implications of the Trade Union Act became apparent in 1910 in the *Osborne Case*[56] when the House of Lords held that a registered trade union could not validly impose a levy on its members to be used for the support of a political party. The basis of the reasoning of the Lords was that the Trade Union Act in conferring a quasi-personality on registered unions had by implication defined the purposes to which their funds could be devoted and the application of such funds to secure parliamentary representation was considered *ultra vires* the proper purposes of a union.[57] More recently in *Bonsor's Case*[58] the House of Lords has upheld the right of a member of a registered trade union to bring an action for damages for expulsion against the union itself and to recover damages from the common fund. The

52. See D. Lloyd, *The Law relating to Unincorporated Associations* (1938); H. A. J. Ford, *Unincorporated Non-Profit Associations* (1959); Webb, article *cited supra* n. 15.
53. For a discussion of the growth of the trade union in England see R. M. Martin, "Legal Personality and the Trade Union" in Webb (ed.) *op. cit. supra*. n. 4, at 93.
54. [1901] A.C. 426.
55. Trade Disputes Act 1906.
56. [1910] A.C. 87.
57. The effect of the decision was neutralized by the Trade Union Act of 1913.
58. [1956] A.C. 104.

judgments of the individual members of the House are characterized by different methods of approach, but at least two of them considered that a registered trade union was a legal entity.[59] In Australia, State statutes similar to the English Trade Union Act of 1871 operate.[60] But Australia has also a system of industrial arbitration both in the Commonwealth and State spheres which has the effect of making a trade-union registered under these Acts much less of a "voluntary" association than an English union and subjects the internal affairs of such a union to a greater degree of scrutiny and control. In the compulsory arbitration system, the trade union has achieved a semi-public status.[61]

It can be seen therefore that by a process of legislative intervention and judicial interpretation the registered trade union has become a legal entity. Does the status which it has attained demonstrate the influence of corporate theory whether fictionist or realist? Both schools could in this respect assert the influence of their theories. The fictionists might say that this status has resulted from State intervention (either directly by legislation or indirectly through judicial interpretation) and that behind the corporate form there is merely a collection of individuals. The realists might reply that such State recognition is merely declaratory, that social history has thrown up the trade union as a real group person, and the intervention by the State is merely a stage in the development of the group life of such a body.

2. *Churches*

A church is regarded by the law as a voluntary association of individuals and not as an entity in itself. The trust principle operates here as in the case of other voluntary associations to subject the property of the church to a trust for the corporate purpose.[62]

The English case of *Overtoun v. Free Church of Scotland*[63] and the Australian case of *Wilde v. Attorney-General for N.S.W.*[64] show the unsatisfactory role which the trust principle plays in respect of the doctrines of a living and developing group such as a church. These cases are also held out as examples of the denial of the operation of the realist theory in English law.[65] On the other hand cases

59. See E. I. Sykes, Strike Law in Australia (1960) 231. See also *Hursey v. Williams* (1959) 103 C.L.R. 30, at 52-3. However, in this latter case it was held that the Osborne doctrine was not applicable to a union registered under the Commonwealth Arbitration Act.
60. Sykes, *op. cit.* 234 *et seq.*
61. See generally O. R. de Foenander, *Trade Unionism in Australia* (1962).
62. See Maitland, Introduction to Gierke's *Political Theory of the Middle Age* xxxix. See also Figgis, *Churches in the Modern State.*
63. [1904] A.C. 515.
64. (1948) 78 C.L.R. 224.
65. See Webb, article cited *supra* n. 15, at 48 *et seq.*

such as *Macqueen v. Frackelton*[66] recognize that a member of a church group (or at least a clergyman) has rights vis-a-vis that body, although not going as far as recognizing the church group as an entity.

In Australia the various State legislatures have intervened to prevent the *Overtoun* principle from interfering with the adoption of new constitutions by churches. Recently, the Church of England Constitution agreed upon by the various dioceses of the Church in Australia has been given statutory force in the States so far as the holding of property is concerned, thus allowing the Church to hold property for the purposes described in the Constitution even though these might differ from the original purposes for which some Church of England property was held.

Although legislative intervention in the field of church relations has not conferred any "entity" status on such bodies, it has at least gone some way towards a recognition of corporate status so far as the property of some churches is concerned. But here again the fictionists and realists will both see in this intervention support for their particular theories. For the rest, it may be pointed out that the Associations Acts of South Australia[67] and Western Australia[68] include within the lists of associations capable of registration churches and chapels. It may be argued, however, that incorporation under these acts subjects the associations thus registered to certain control[69] with the consequence that bodies such as churches may consider that even the minor benefits of registration under the Act are outweighed by the freedom of action which they retain as unincorporated bodies.[70]

V. Conclusion

It is clear from an examination of both case law and statute law from which the principles of English corporation law may be derived that no one theory, fictionist or realist, has triumphed although it would be true to say that the former theory has until recently exerted a greater influence. Where the group or association has attained corporate status under statute, the courts will usually decline to go beyond the corporate form except where more paramount principles of justice or public policy require it to do so. Likewise,

66. (1910) 8 C.L.R. 673.
67. Associations Incorporation Act 1956-57.
68. Associations Incorporation Act 1895 (as amended).
69. In respect of changes of name or objects and the forms of transacting business.
70. It may also be pointed out that in Queensland the Religious Educational and Charitable Institutions Act of 1861 provides for the incorporation of the holders of offices in institutions of this nature by Letters Patent issued by the Governor with the advice of the Executive Council.

where such corporate status has not been attained, the group will usually be regarded merely as a collection of individuals. But here again principles of justice and public policy may require that the court recognize that a group has "entity" status under certain circumstances. In the case of the trade union such principles have in recent years overshadowed opposing considerations based on the fictionist theory. In this respect, too, legislative intervention is affecting the legal status of these unincorporated groups with the consequence that the term "voluntary associations" may no longer adequately describe their true nature.

R. D. LUMB*

*LL.M. (Melb.), D.Phil. (Oxon.), Senior Lecturer in Law, University of Queensland.