

## THE DEVELOPMENT OF THE PUBLIC GROUP AS A JURISTIC PERSON

The distinction between public and private "group-persons" which was noted in both the early Roman and German law and which is found to persist in modern German, English, and American law, at least, is founded upon inherent differences in their nature. The function of the Public Group Person primarily is to advance the political or social welfare of the group, but as an agency of government, whereas the function of the Private Group Person, as its name indicates, is to engage wholly in private conduct and enterprise. From an early date, however, it has been found convenient for sub-divisions of the state to be clothed with the powers, functions and the form of a private corporation, and to be governed in its transactions, when in this character, not by its sovereign will but by the laws and customs which govern the transactions of its subjects. Because of the dual personality which apparently results, we find the thorniest of problems in the field before us.<sup>1</sup>

While the development of modern corporate theories would have been impossible without the development of the public corporation, we find that it is with respect to that group that legal theory and political theory must meet, and the line of demarcation is not always clear.

### THE STATE

It will be helpful if, at once, we distinguish between the state and the juristic person. The state is the source, not the

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1. For the confusion in the sphere of public group persons, see MAITLAND'S *INTRODUCTION TO GIERKE'S POLITICAL THEORIES OF THE MIDDLE AGE* (1922), especially page xi, where the "rarified air in which philosophy and law mix" is discussed. See also, LASKI, *FOUNDATIONS OF SOVEREIGNTY* (1935), pp. 209-231, where he discusses the problem from the legal and philosophical standpoints. "Nothing is easier," he says, "than to pass from legal right to moral right, but nothing, at the same time, is more fatal."

recipient, of the rights and liabilities which go to make up the attributes of juristic personality. It is true that from early times down to the present Reconstruction Finance Corporation, the state, and later other public-law bodies, employed the corporation concept to acquire and hold property and transact business under the private law system. However, the state could, if it wished, transact its business under the public law and hence, although upon occasion it might *personae vice fungi*, it was not and is not a juristic person but a sovereign.<sup>2</sup>

It has been said that there is a *genus* of which the state and corporations are species. That may be true, but that *genus* is not the juristic person. The three types of persons—natural, juristic, and sovereign—must be carefully distinguished if we are to treat the present problem from a legal standpoint. For the lawyer, the natural person has no legal significance except to the extent that he has been endowed with rights and liabilities. The sovereign today is considered as a power rather than a person and as the source of the attributes of personality. It is only the juristic person—the subject of legal rights and duties—who may be either an individual person or a group person, it is only this person who is the proper object of legal speculation.<sup>3</sup>

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2. "For the lawyer, all that is immediately necessary is a knowledge of the authorities that are legally competent to deal with the problems that arise. For him, then, the idea of sovereignty has a particular and definite meaning. It does not matter that an act is socially harmful or unpopular, or morally wrong; if it issues from the authority competent to act, and is issued in due form, he has from the legal standpoint, no further problems." LASKI, *op. cit.*, p. 229.

The only view of the juristic person which really concerns us is the state's view, since it is the source of these rights. The juristic person derives its personality, not from itself, but from the sources of the law. Hence, the self-created state cannot be said to be a true juristic person.

3. "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 contents, rights and wrongs to these groups, to these units." MATTLAND'S INTRODUCTION TO GIERKE,

There are many who disagree with the view that the modern state is sovereign, believing that there are other groups within the state totally independent of the state itself. With that question, we are unconcerned. For, whatever may be the true sovereignty, the *legal* attributes of *juristic* personality are determined by the state, and whatever may be the ultimate source of legal sovereignty, that source operates through the state, and its machinery, the Government.<sup>4</sup>

Lawyers, also, have disagreed with this view, and the courts have held that a state is a corporation. The latter view, the prevalent one in this country, however, is a result of the confusion mentioned above. It is here that the state may enter into the field of corporation law and deal with others, but it may also assume the rights of a juristic person while absolving itself of the liabilities—witness the *Gold Clause Cases*—and hence may not be classed as a full juristic person.<sup>5</sup>

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POLITICAL THEORIES OF THE MIDDLE AGE, p. ix. Philosophically, there is much that is true in this view, but it lies outside the sphere of the law, which recognizes the state as the source of the attributes which lend juristic persons their legal personality.

4. Foremost among those who deny the unitary sovereignty of the state were the Pluralists, such as the Webb, Krabbe, Duquit, Figgis, and Maitland. For the modern view see LASKI, *THE STATE IN THEORY AND PRACTICE* (1935), where it is insisted that the state is not the voice of the people, but is, in fact, the coercive expression of those who control the means or instruments of production. However, he later defines the state as a "society \* \* \* integrated by possessing a coercive authority supreme over any individual or group, which a part of the society." Thus, the statement still holds that, regardless of who controls the state, the latter, operating through its machinery, the government, determines the legal capacity of its members—the juristic persons. For other statements of the opposite view, see MUIR, *HOW BRITAIN IS GOVERNED*; LASKI, *FOUNDATIONS OF SOVEREIGNTY*, pp. 103-138; KRABBE, *MODERN IDEA OF THE STATE*.

5. "The American state is considered very like a corporation, it has a distinct name, indefinite succession, private rights, power to sue, and the like." MAITLAND, *CROWN AS CORPORATION*, 3 *COLLECTED PAPERS* (1911), p. 266.

Some courts have classified the state as a corporation. See *Delafield v. Illinois*, 2 Hill (N.Y.) 159, 162 (1841); *Indiana v. Woram*, 6 Hill (N.Y.) 33 (1843); *State v. Delesdenier*, 7 Texas 76 (1903). However, it is well established

The objection may be made that if we deny personality to the state, we are ignoring a "*fait accompli*"—Fascism. The words "corporate state" are thrown at us as the result of the theory of group personality. Mussolini has called his state "a living organism" and "an embodied will to power and government". By personifying the group, the fascists have made the state the ultimate groups, the absolute, in comparison with which all individuals or groups are relative.<sup>6</sup>

But the Fascist State is a sovereign person, not a *juristic* person—it is not merely a subject of rights and duties on a legal par with other juristic persons, national or group. According to Mussolini,

"It is itself conscious, and has itself a will and a personality—thus it may be called the 'ethic' state . . . The state is a spiritual and moral fact . . . and represents the immanent spirit of the nation."

True, it operates through '*corporazioni*,' to express the will of

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that a state cannot be sued against its will, and may at any time relieve itself of liabilities while retaining rights as a unit. In *Perry v. U. S.*, 294 U. S. 340, 55 Sup. Ct. 432, 79 L. Ed. 912 (1935), Mr. Chief Justice Hughes declared that "when the United States with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments, save that the United States cannot be sued thereon without its consent."

6. The quoted passages on Fascism are all from MUSSOLINI, *THE POLITICAL AND SOCIAL DOCTRINE OF FASCISM*, International Conciliation Pamphlet (1935). The workings of the state through the *corporazioni* are explained in the same pamphlet in an article entitled, *Aims and Policies of the Fascist Regime In Italy*, by Beniamino de Retes: "These corporations—twenty-two of them—are being set up to insure the direct participation of the people \* \* \* in the management and the direction of the Italian economic and social life" (p. 23). Thus, the corporations in Italy may be said to be mere creatures of the state and the means by which it reaches the people, but nevertheless they are juristic persons with their purposes fixed by the state. The state, although it controls them completely, is still not a juristic person, but a sovereign power.

their respective interests, but these are mere "guilds," which are endowed with juristic personality by the state. Perhaps here more than anywhere else we find exemplified our definition of the juristic person, endowed by the state with juristic attributes. The state, more sovereign than elsewhere, allows the groups this personality, but maintains a strict control over them in the interests of the collective body of citizens. The fascist corporation may be more powerful than any other, but it is below the state itself. The state is not the juristic person, but the source of the attributes of juristic personality.

### THE COUNTY

In the county, however, we do find juristic personality, even if only to a limited degree. From an early period, the county was regarded as a community, and approached the King as a "corporate" body. It was, likewise, an organic entity for purposes of taxation and the conservation of the peace and was responsible for the acts of the county court. In the thirteenth century, the county secured representation in Parliament by the elective knights, which representation was greatly enlarged by subsequent acts of the governing body.<sup>7</sup>

A decline in the corporateness of the county resulted from the inauguration in the fourteenth century of justices of the peace. These officers strengthened the royal control over the county, and the county became for the most part a royal administrative unit rather than a manifestation of group entity. Today, in England, the county is not a corporation, but has certain attributes of juristic personality, chiefly liabilities.

In this country, the county is endowed with corporate attributes and is considered a quasi-corporation by the law. In some

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7. See 1 POLLOCK and MAITLAND, HISTORY OF ENGLISH LAW (1923), pp. 545-535.

states it is classified as a municipal corporation, either by statute or judicial decision. For the most part, however, their limited corporate life and their place in the administrative system of the state have served to distinguish counties from municipal corporations on the law. All the powers with which the county is entrusted are the powers of the state, and all its duties are the duties of the state. Its corporate activities must, therefore, be in pursuance of administrative functions allowed it by the state.<sup>8</sup>

The county has such contractual powers as may be conferred on it by statute for the purpose of discharging its governmental duties. The same rules for *ultra vires* contracts apply as with private corporations. Subject to the control of the state,

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8. The great weight of modern authority in this country holds the county to be a quasi-corporation. *People v. McFadden*, 81 Cal. 489 (1889); *State v. Goldthwaite*, 172 Ind. 210 (1909); *Northern Trust Co. v. Snyder*, 113 Wis. 516 (1902). In some states, however, they are made municipal corporations by statute. *Leavenworth County v. Sellen*, 99 U.S. 624 (1878); or by judicial decision, *Ex parte Selma, etc., R. Co.*, 45 Ala. 696 (1871); *Kelley v. Rhoads*, 7 Wyo. 237 (1869). The complete subjection of the county to the statutes has served to distinguish it from municipal corporations. *Chester County v. Brower*, 117 Pa. St. 647 (1887); *State v. Hart*, 144 Ind. 107 (1896); *Heigel v. Wichita County*, 84 Tex. 392 (1892). All the powers of the county are those of the state and all its duties are those of the state. *Askew v. Hale County*, 54 Ala. 639 (1876). *Harris v. Whitside County*, 105 Ill. 445 (1883). The county has no contractual powers implied from its nature but merely those given to it by statute. *Stevens v. Henry County*, 218 Ill. 468 (1906). The same rules of *ultra vires* apply as for private corporations. *Flowers v. Logan County*, 138 Ky. 59 (1910); *Harris County v. Campbell*, 68 Tex. 22 (1887). Pursuant to its general purposes, a county has power to purchase and hold real and personal property necessary for the use of the county. *Dahnke v. People*, 168 Ill. 102 (1897); *People v. Ingersoll*, 58 N.Y. 1 (1874); or for the benefit of public schools, *Bell County v. Alexander*, 22 Tex. 350 (1886). The county shares the state's immunity from liability without consent. *Markey v. Queens County*, 154 N.Y. 675 (1897). Hence, it needs an express grant from state to bind itself or its residents. *Marshall County v. Cook*, 33 Ill. 44 (1863). The county is never held liable in a private action for neglect to perform a corporate duty. *Askew v. Hale County*, 54 Ala. 639 (1876); or for acts done in performance of such duties. *Hughes v. Monroe*, 147 N.Y. 49 (1895).

the county has power to purchase and hold real and personal property and may, in the absence of a statute forbidding, receive and hold a bequest of land in trust. Mere creature of the state, the county shares the state's immunity from liability without state consent. Thus, it cannot contract debts binding upon the body or individuals residing within its limits, without an express grant of power for that purpose. Moreover, it cannot be held liable in a private action for neglect to perform a corporate duty, or for acts done while engaged in the performance of such duties.

The county, then, in both England and America is today a political and administrative subdivision of the state. In this country, however, it is more than that. In political and governmental matters it is the representative of the sovereignty of the state, and auxiliary to it. But in and of itself, and independent of the rights granted to it by the state, the county does not possess any of the attributes or functions of sovereignty and hence it is not, in the true sense, any part of the state. In matters relating to property rights and pecuniary obligations arising in or incident to the discharge of its governmental functions, it has the attributes of juristic personality analogous to those of the private corporation. Here, more than anywhere else, we find exemplified the confusion between political philosophy and law, characteristic of public corporations.

## THE MUNICIPALITY

### 1—*Development*

The development of the municipality was in exact contrast to that of the county. The latter, possessing some of the characteristics of an independent unit, gradually became what it is today—chiefly a political subdivision of the state possessed of some corporate aspects. The former, on the other hand, during the centuries which were required for its gradual evolution

from the vill into the modern city, never once subordinated its social and economic activities to its political or governmental functions. The latter functions, the modern city still possesses but still in subordination to the former. Originally the vill was a convenient, safe meeting place, later a market, with common fields and garrisons for protection, and finally a burgh or borough. Trade and commerce were attracted; crafts to supply the growing needs of the population sprung up; courts were necessarily constituted and laws made and enforced, but ever the prime consideration was that the organism was more commercial than it was governmental, more free than feudal, though, as we shall see, it had to survive a desperate struggle with the king.

Many forces combined from the first to give the borough a peculiar status. It was the function of the arteries of commerce, and hence lacked natural facilities for defense. These reasons, together with its value to the ruler as a source of revenue, caused it to be the object of the King's interest. Every castle needed for its maintenance a large number of skilled artisans, and desired the benefits of a varied commerce. And so, special legal privileges were given to colonists by the King and the lesser lords.

In time, therefore, we find that the crown made a charter of privileges (and liabilities) the *sine qua non* for the boroughs existence. When these privileges were handed to one group but withheld from another, the favored group took on a unitary character. For the rights and privileges involved were not offered to a definite individual, but to the "burgesses and community of a borough". Thus, the borough was a "*communitas*," and as such had its own court, which was endowed at least with the capacity of representing the entire group, and when exercising the powers granted by its charter, acted as a unit.<sup>9</sup> Be-

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9. As a typical charter of the time, demonstrating the extent to which the early kings recognized the unitary character of the borough, we may examine

fore the time of Edward I this unitary character of the borough was not recognized to an extent that the individual was lost to the view. The desire for unity was present, but as yet the borough was an administrative area rather than an *universitas*, as Bracton, apparently inadvertently, termed it. The mayor and bailiffs were merely the representatives of the borough—not the agents of group persons.

Parallel to and instrumental in this development of the borough unit was the recognition by the King and the feudal lords of the true value of the borough to them, and the consequent struggle between them for control. By means of the writ of *quo warranto*, the King was able to secure royal control of the borough, and to pave the way for the time when the borough would be recognized as a person.<sup>10</sup>

So it was that Edward I, needing money very sorely and recognizing the difficulty of raising it by a new tax direct from the crown, called for a meeting of his council with two deputies elected from each borough, who were authorized to represent the entire group. Thus, was begun the admission of the borough to parliamentary representation, and now that their dependence upon the crown was established, to popular elections by the entire borough. At about the same time, the borough, by reason of the rights and liabilities conferred by the charters, assumed the characteristics of a juristic person, possessing land and chattels, under restrictions, but with little revenue or tax rais-

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the following excerpt from Richard I's charter to Colchester (1189): "Know that we have granted and by this our present charter have confirmed to our burgesses of Colchester that they elect from among their number as bailiffs whomsoever they wish, and as judges to hear the pleas of our crown, and indict by the same pleas outside the walls of the same city \* \* \* " MADOX, *FIRMA BURGII* (1726), p. 28.

10. For early juristic attributes of the borough see LASKI, *FOUNDATION OF SOVEREIGNTY* (1921), p. 180; HALLEM, *VIEW OF THE STATE OF EUROPE DURING THE MIDDLE AGES* (1899), Vol. III, Chap. VIII; 1 DILLON, *MUNICIPAL CORPORATIONS* (1873), pp. 76-77; COKE ON LITTLETON (Coventry Ed., 1830).

ing power—its chief possession, indeed its birthright, was that of the merchantile and trade freedom conferred by the charter under which the “Gild Merchant” was beginning to flourish.

By the middle of the fifteenth century, we find the King firmly in the saddle. The old view of the charter as merely bestowing privileges was enlarged to denote an act of incorporation, in order to give the King control over the new craft gilds, which came to displace the merchant gild. At the same time a distinction arose between the chartered and unchartered town.<sup>11</sup> The chartered borough became *un corps* and the canon law view of the corporation as an entity distinct from its members made fast headway. The disturbances in the boroughs over the right to vote lead the king to increase his control by issuing new charters, applying the principles of the corporation concept of the canonists, and narrowing the extent of popular control.

With the commercial expansion of the fifteenth century, the gilds took on new importance, and became the chief wearers of juristic personality, surpassing the borough. It is in the gild's that the greatest subsequent development of corporate personality is found.<sup>12</sup>

The history of the borough from the time of Elizabeth to the Municipal Corporations Reform Act of 1835,<sup>13</sup> is a history of the gradual submission of the borough to the crown, and of corruption in its administration. The incorporated town was declared to be a closed corporation, and the king usually decided to whom it was closed. Its officers were controlled by the crown, on threat of deprivation of its charter through *quo warranto* proceedings, and maladministration characterized its every action.

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11. For the extent of the change from the 13th to the 15th century borough see the charter of Henry VI to Southampton in 1445 quoted in GOEBBEL, *LEGAL INSTITUTIONS* (1931), p. 557-8.

12. On the increase of royal control from the 16th century, see 1 DILLON, *MUNICIPAL CORPORATIONS* (1873), pp. 78-80, 110-115.

The Reform Act of 1835, however, annulled all the old special charters and returned to the borough the management of its own affairs. This act, today, with few amendments, constitutes the body of the existing English municipal corporation system.

## 2—Attributes

A brief recapitulation of the extent of this development of the corporate personality of the borough and its modern counterpart, the city, is in order. We find that recognition by the charter is the last phase of this personality to come to light. It was long before the language of the charter conveyed the impression that the borough was a juristic person. But in point of fact, we discover that many of the attributes of legal persons are found in the early borough, and that today, the municipality is a full grown jurisdiction person.

The fundamental aspect of this personality before the law is, of course, the entity. Of this there is much evidence in the law. In the early days the community had its seal to demonstrate that it was at least a somewhat, if not a somebody. Not only was this privilege an evidence of a vague notion of unity but it was likewise an element which furthered the development and clarification of that notion.<sup>14</sup>

Today, in this country we know that the idea of entity has grown, and the "somewhat" has become a "somebody," to such a degree that the seal is no longer requisite to attest to the unity of the municipal corporation, and that its contract may be evidenced just as that of any other juristic person may be.<sup>15</sup>

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13. V and VI Will. IV, c. 76. This act was passed as a result of the findings of an investigating commission of Parliament in 1835. A summary of the act is found in DILLON, *op. cit.*, pp. 115-117, notes

14. For the history and importance of the common seal, see 1 POLLOCK and MAITLAND, *supra*, note 7, pp. 683-4.

15. The essential importance which the common law anciently attached to

In regard to suability, we find that the attainment of the attribute does not appear as early as the seal but is none the less complete today, and a municipal corporation may appear by attorney, and may sue and be sued in the corporate name.<sup>16</sup>

The development of the concepts of community property was not as rapid as in the case of other attributes of juristic personality, because of the importance of the consequence of these concepts in the struggle against subjugation of the municipalities by the king.

In the early medieval period, the borough, although basically an economic community, owned property of such little importance that the need for a real concept of common ownership was not recognized, and only a crude notion of joint ownership made itself known. Later, with the growth of the borough, the community began to enlarge its sphere of action, to raise an income in rents on its accumulating lands, and to speculate as to the true owner of this land, and hence of its revenue.<sup>17</sup>

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seals and the modern relaxation of the rule are well known. For the application of the same general principles respecting seals of private and municipal corporations, see 1 DILLON, *op. cit.*, pp. 253-255.

16. "The doctrine that a community can appear in court only by attorney, that it cannot possibly appear in person, has certainly not been grasped. 'The citizens of X' or 'the burgesses of Y' are said to appear, and they are not said to appear by attorney. Or again, the mayor, or the bailiffs, or the mayor and bailiffs appear to urge the claims and defend the rights of the community \* \* \* we are inclined to say that if there is any group of men having a permanent common interest, and if an unlawful act is done which can be regarded as a lesion of that interest, even though it does actual damage only to some one member of the group, then the members of it may join in an action, or one of them may sue on behalf of himself and all the other members: — as Bracton says, '*Omnes conqueri possunt et unus sub nomine universitates.*'" 1 POLLOCK and MAITLAND, *supra*, note 7, pp. 680-1. The modern rule recognizes the right of the municipal corporation to sue as such. "The right of a municipal corporation \* \* \* to sue and to be sued \* \* \* has been distinctly recognized by a long line of well-considered cases." *State v. Barker*, 116 Iowa 96, 103 (1901). See also 1 DILLON, *op. cit.*, pp. 245-6.

17. See MAITLAND, *TOWNSHIP AND BOROUGH* (1898), pp. 204-5.

However, this speculation was soon cut short, for the crown, recognizing the fact that here was a serious threat to one of its greatest sources of revenue, enacted the statutes of mortmain, which forbade the holding of real property by corporations. The close restriction on this attribute which these acts permitted to the king have limited its development in England.<sup>18</sup>

In America, however, where these statutes do not apply, the municipality has the power, within the scope of its purposes, as with all juristic attributes, to take, hold, and alienate property. Our juristic person has annexed an important attribute.<sup>19</sup>

The attainment by municipalities of the power to contract as an entity was hindered by the fact that the borough's activities, as well as its purse, were quite limited, and until the time of Edward I there was no need for such a right. With the accumulation of more and more property, however, the borough became a municipal corporation, with the ability to contract. In our modern law, this power is held to be inherent in the charter

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18. "The precise result of the legislation (statutes of mortmain) is, that corporations there (in England), with the capacity of acquiring property, must derive their capacity from the sovereign authority, and the practice is to limit that general capacity within narrow limits, or to subject each acquisition to the revival of the sovereign." McDonough Will Case, 15 How. 367, 404, per Campbell, J.

19. "The English statutes of *mortmain* are not in force in this country \* \* \* ; and consequently, a municipal corporation has the common law or implied power, unless restrained by charter or statute, to purchase and hold all such real estate as may be necessary to the proper exercise of any power specifically granted, or essential to those purposes of municipal government for which it was created \* \* \* General authority to purchase and hold property should, doubtless, be construed to mean for purposes authorized by the charter, and not for speculation or profit \* \* \* Not only may municipal corporations take and hold property in their own right by direct gift, conveyance, or devise, but the cases firmly established the principle, also, that such corporations, at least in this country, are capable, unless specially restrained, of taking property, real and personal, in trust for purposes germane to the objects of the corporation, or which will promote, and or assist in carrying out or perfecting those objects." 2 DILLON, MUNICIPAL CORPORATIONS (1873), pp. 530-536.

of the municipal corporation; and within the scope of its corporate activities, the city is liable in the same manner and to the same extent as private corporations or private individuals.<sup>20</sup>

In the realm of torts we likewise find a late assignment of the attribute, and even today there is a great confusion as to the extent of the liability. Until the time of Edward I, the borough did not have sufficient property to cause the king to differentiate between the damages owed by the community and those owed by the burgesses and wealthier members. Moreover, we must remember that actions for civil damages were, until that time, almost unknown, the rubrics of crime and "specific relief" embodying the bulk of the law.

Today, the municipal corporation, by weight of authority in the United States, is liable for torts committed in the exercise of its private or commercial functions, as distinguished from a rule, however, is not recognized in all states, some of them hold-discharge of its duty as a political subdivision of the state. This ing that the fact that the corporation is a political subdivision absolves it from any tort liability.<sup>21</sup>

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20. Under the old common law rule, for centuries, when a community became a public corporation, agreeable to law, one of the first powers with which it became endowed was the power of contract. Indeed, it would not be a corporate entity to any purpose without that power \* \* \* The common law principle of power to contract vested in every municipality with regard to its municipal and proprietary functions as inherent and is the very life of the corporation, except as it may be limited by state or national constitution." *Columbus v. Public Utilities Comm.*, 103 Ohio St. 79, 130 (1921). "The power to contract inheres in every corporation and is co-extensive with its corporate powers." *Portland Lumbering, etc., Co. v. East Portland*, 18 Ore. 21, 34 (1889). See also 2 DILLON, *op. cit.*, pp. 854-857.

21. Tort Liability of the City: *The general rule*: (1) "Municipal corporations exist in a dual capacity and their functions are twofold. In one they exercise the right springing from sovereignty and while in the performance of the duties pertaining thereto, their acts are political and governmental. Their officers and agents in such capacity, though elected or appointed by them, are nevertheless public functionaries performing a public service, and as such they are officers, agents, and servants of the state. In the other capacity, the municipalities exer-

The unity of the borough is nowhere more clearly shown than in regard to its criminal liability, for the early English law felt no difficulty about attributing misdeeds of many sorts to communities. We have seen how the king, by annulling charters, by fines, and by *quo warranto* proceedings, established himself as the source of the municipalities' rights. Needless to say, the punishment of the borough as a unit was not only an example of the concept of the entity of the community, but was likewise another factor which aided in the growth and acceptance of that notion.<sup>22</sup>

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cise a private, proprietary or corporate right, arising from their existence as legal persons and not as public agents. Their officers and agents in the performance of such functions act in behalf of the municipalities in their corporate or individual capacity and not for the state or sovereign power." *Kokomo v. Loy*, 185 Ind. 18, 20 (1916). (2) "Powers of a municipal corporation are public and private, and, as to the first, the municipality represents the state, discharging duties incumbent on the state, and as agent thereof it becomes the representative of sovereignty, and is not answerable for nonfeasance or malfeasance of its public agents, and as to the second, it represents pecuniary and proprietary interests of individuals, and is held to the same responsibility as a private corporation." *Hall v. Shreveport*, 157 La. 589 (1925).

*The contrary rule:* "After much consideration of the authorities \* \* \*, it seems to us the more logical conclusion that the courts should not undertake to say that any functions of a municipal corporation are private and not governmental, but on the contrary should hold that municipal corporations are created solely for public and governmental purposes, and that all powers granted to them \* \* \* are to be exercised as public and governmental functions for the benefit of the municipal corporation." *Irvine v. Greenwood*, 89 So. Car. 511, 518 (1911). By this latter rule, the municipal corporation is not a juristic person, but a sovereign person. Cf. the section *supra* on the state.

22. "Every borough in England, from the city of London downwards, lives in daily peril of forfeiting its charters, of seeing its merchantile privileges annulled, of seeing its elected magistrates displaced, and itself handed over to the mercies of some royal *custos* or *firmarius*. If the Londoners insult the queen or take the wrong side in the Baron's war, the city will have to redeem its privileges with an immense sum \* \* \* The 'liberties' of the borough give the law an opportunity of enforcing here more clearly than elsewhere the thought that if the organized community acting organically breaks the law, it in its unity can be and should be punished \* \* \* The talk about 'fictitious' personality did not prevent the legists nor, with some exceptions, the cannonists from hold-

## SUMMARY

The public group-person, from the aspect of its juristic personality, is the most elusive of all subjects of legal rights and duties—it is too easy to slip from the realm of the law into the field of political theory. In all of our public juristic persons this tendency is present to a greater or less degree—in each it will be fatal to a clear view of the legal personality of the group. In the case of the state, where the pit-fall is deepest, it must be remembered that the state is the source—or at least the machinery of the source—of our legal attributes, and for an adequate legal theory about these attributes, we need not fall into a deep speculation of the true nature of our sovereign. That is the problem of the political theorist, not the lawyer.

With the county, we notice the same strong tendency, and it must be avoided, if possible; for the county is, for the most part, an instrument of the state, representing the state and not the community over which its officers rule. Like the state the majority of its powers are sovereign powers, and although it may come before the law as a person if it so wishes, it can assume the rights without the liabilities of its personality. Hence, it must be classed as a sovereign person, with the power of becoming a juristic person, or as the law terms it, a quasi-corporation.

It is in the municipality that we find the juristic personality of the public group-person dominating its sovereign personality. Here we have a community, with a group-will, with the power of coming before the law as an entity, to contract and to

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ing that an *universitas* can commit a crime and be punished for it. On the contrary, they went to great lengths in the punishment of corporations; some of them were prepared to say that if a *civitas* commits a capital crime, such as treason, *aratio decapitetur.*' 1 POLLOCK and MATTLAND, *supra*, note 7, pp. 678-9. See also 2 DILLON, *op. cit.*, p. 849 and pp. 850-852. For a collection of cases on the criminal liability of a municipality, see 44 CORPUS JURIS, pp. 1495-6.

hold property, and with the liability attendant on a true juristic personality. True, the municipal corporation has governmental functions and powers derived from the state, which limit the exercise of its legal attributes, but certainly in the modern municipality we have an economic unit with a special interest, which is the legal subject of rights and duties derived from the state.

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