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The Modern Corporation Sole

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In 1894, Sir Frederick Pollock asked his American friend Oliver Wendell Holmes, "Have you such a thing as a corporation sole still about you?" The future Justice replied, "I don't know of any corporation sole."[1]

I. Introduction

Blackstone begins his treatment of corporations with the following classification:

> The first division of corporations is into *aggregate* and *sole* . . . . Corporations sole consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had.[2]

He then proposes two conspicuous examples of corporations sole, one civil ("the king is a sole corporation"); the other, ecclesiastical ("so is a bishop . . . and so is every parson and vicar").[3]

In the period prior to the rise of the modern business corporation and the legal evolution and development that accompanied it,[4] the corporation sole was a fixture in every tier of English society. The corporation sole was as distant from the ordinary peasant and tradesman as the Crown, but as near as the parish clergy.

A modern Holmes attempting a reply to a modern Pollock might initially be perplexed, since the usual sources of ready reference suggest two contradictory conclusions. On the one hand, the

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1. 1 HOLMES-POLLOCK LETTERS 52-53 (M. Howe ed. 1941).

2. 1 W. BLACKSTONE, COMMENTARIES *469. In the literature, the terms "Corporation Sole" and "Sole Corporation" are interchangeable, but "Corporation Sole" is far more common.

3. *Id.* at *469.

4. The earliest corporations were all civil or ecclesiastical, rather than for business or profit. *See generally* Laski, *The Early History of the Corporation in England*, 30 HARV. L. REV. 561 (1917); Williston, *History of the Law of Business Corporations Before 1800 (pts. I & II)*, 2 HARV. L. REV. 105, 149 (1888).

sources indicate the corporation sole is "not common," "almost obsolete,"[5] or "obsolescent."[6] The standard casebooks and hornbooks of corporation and property law do not usually treat the topic.[7] Cases cited in legal literature are often very old, and the only full-length journal article devoted exclusively to the subject is from the turn of the century.[8] At least one author equates it with the modern "one-person" corporation,[9] although the two have completely distinct origins.[10]

On the other hand, further research reveals functioning corporations sole in at least one-half of the states, with explicit statutory provisions for corporations sole in about a third. In many jurisdictions, this is the manner of incorporating Roman Catholic dioceses, or more accurately, the *bishops* of those dioceses.[11] From this perspective, the corporation sole is a useful, even commonplace, legal reality.

The apparent discrepancy is not real. The old common law corporation sole, which was transported to American shores in colonial days, is indeed almost dead. However, a modern version, which bears the same name, has evolved and is widely used today.[12] The transformation from the old to the new is a fascinating story, well worth the telling.

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5. 18 C.J.S. *Corporations* § 15 (1939).

6. 1 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 52 (rev. perm. ed. 1983).

7. An exception is H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS § 6 (3d ed. 1983).

8. Maitland, *The Corporation Sole*, 16 L.Q. REV. 335 (1900), *reprinted in* F. MAITLAND, SELECTED ESSAYS 73 (1936). There is, however, a biography entitled CORPORATION SOLE, a life of Cardinal Mundelein of Chicago. *See* E. KANTOWICZ, THE CORPORATION SOLE (1983).

9. "For practical purposes, the modern *one-man* corporation . . . is the equivalent of the corporation sole." H. OLECK, NONPROFIT CORPORATIONS, ORGANIZATIONS, AND ASSOCIATIONS 33 (4th ed. 1980). While these two corporate forms do arise from completely different origins, under certain circumstances a modern one-person nonprofit corporation would resemble a corporation sole in practice. Oleck's conclusion, however, is far too broad.

10. The modern "one-person" corporation is increasingly permitted by state law. The MODEL BUSINESS CORP. Act §§ 1.42, 2.01, 8.03 (1984) allow for one shareholder, one incorporator or one director, respectively.

11. "The office of bishop in most dioceses in the U.S. is a corporation sole." 4 NEW CATHOLIC ENCYCLOPEDIA *Corporation* 337 (1967). A current review suggests that approximately one-third of diocesan bishops are corporations sole. The remainder of the dioceses have small boards, usually appointed by the bishop.

12. The distinction between the "old" common law form, and the "new" American form of corporation sole was first proposed by Carl Zollmann, who pioneered the study of church corporations in American law. His trilogy of articles, Zollmann, *Classes of American Religious Corporation*, 13 MICH. L. REV. 566 (1915); Zollmann, *Powers of Americn Religious Corporations*, 13 MICH. L. REV. 646 (1915); Zollmann, *Nature of American Religious Corporations*, 14 MICH. L. REV. 37 (1916), later appeared as chapters in C. ZOLLMANN, AMERICAN CIVIL CHURCH LAW (1917).

The present study proposes: 1) to define the classic common law corporation sole; 2) to trace its development in America; and 3) to describe the present status of the corporation sole in the United States with analysis of its modern forms. The emphasis will be fundamentally American, with English sources serving as points of reference and prologue. Moreover, the English side of the story has already been told.[13]

II. The "Old" Common Law Corporation Sole

"Legal nomenclature is for once its own interpreter. A member of a corporation sole is one of a series of single persons succeeding one another in some official position."[14] The crux of this description is *not* that the corporation sole is composed of a single person. Rather, it is really composed of a number of persons who, *one after another*, hold the same office. The really crucial element of this definition is the series itself and the seriatim succession.

For example, Queen Elizabeth II, as a corporation sole, is identical to Victoria; the present Archbishop of Canterbury in his corporate form is one with his predecessors, Laud, Benson or Lang.[15] The corporation sole, unlike its business counterpart, is only vertical in time.

"There are very few points of corporation law applicable to a corporation sole," according to Kent.[16] There are, however, four legal characteristics unique to it:

> 1. All corporations sole are "either public officers or dignitaries of the established church."[17] In short, the corporation sole is the incorporation of an office.
>
> 2. At common law, the corporation sole can claim title to real property only.[18]
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> 3. Property and powers of a corporation sole are transferred on the death of an incumbent to successors in the office, not to heirs or through executors.[19]

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13. Maitland, *supra* note 8.

14. C. CARR, THE LAW OF CORPORATIONS 14 (1905 & photo. reprint 1984).

15. William Laud (1573-1645) was Archbishop from 1633 to 1645; Edward White Benson (1829-1896) from 1883 to 1896; Cosmo Gordon Lang (1864-1945) from 1928 to 1942.

16. 2 J. KENT, COMMENTARIES *273.

17. Recent Cases, *Corporations Sole*, 12 MINN. L. REV. 295 (1928) [hereinafter Recent Cases].

18. 1 S. KYD, THE LAW OF CORPORATIONS 77 (1793 & photo. reprint 1978); 2 J. KENT, COMMENTARIES *273; Overseers of the Poor v. Sears, 39 Mass. (22 Pick.) 122, 127 (1839).

19. Common law authorities held a gift to a corporation sole without the word "successors" to be legally insufficient. 1 KYD, *supra* note 18, at 105. *But see* McCloskey v. Doherty, 97 Ky. 300, 30 S.W. 649 (1895). During a vacancy, the fee was "in abeyance." Terrett v.

4. The corporation sole lacks the usual trappings of a corporation. It does not have a board of directors, officers, stock, bylaws, official minutes, seal, or corporate name.[20] The older corporations sole are also devoid of a royal charter or other formal authorization, characteristics that are required in later corporations.[21]

Historically, both the king and a variety of clergy qualified as corporations in their official capacities. However, the ecclesiastical form is older, dating to the mid-fifteenth century.[22] Initially, the corporation sole grew out of the efforts of judges to solve title problems that arose from the passage of real property to a church. Although the early common law of property was elaborate and intricate, it sometimes lacked the sophistication to deal with these problems. At that time, legal forms did not exist that allowed the devise of real property to a church in fee simple absolute.

The law struggled with this problem in amusing ways. For example, property was sometimes devised to the saint after whom a parish was named, or to the four walls of a church building. Under these circumstances, the local bishop or priest was the agent or administrator. Therefore, it was only a short leap in logic to incorporate the agent.[23]

The hierarchical polity of the English church was well suited to this type of corporate structure. However, it was still another one hundred fifty years before a civil corporation sole appeared when Lord Coke ascribed corporateness to the crown.[24] Blackstone confidently called this development uniquely English.[25] In one sense, he is correct, but modern scholarship also finds a powerful Roman Catholic Canon Law influence on the process.[26]

Taylor, 13 U.S. (9 Cranch) 43, 47 (1815); Town of Pawlet v. Clark, 13 U.S. (9 Cranch) 292, 329 (1815).

20. Overseers of the Poor v. Sears, 39 Mass. (22 Pick.) 122, 128 (1839).

21. Since state authorization later became a requirement, a theory had to be developed to justify the corporate existence of the ancient churches. One such theory was based on the fiction that some earlier king had issued a charter subsequently lost, or at least that the Crown had no objection to continuing corporate existence. *See* Williston, *supra* note 4, at 113-14.

22. The earliest mention of an incorporated cleric dates to 1448. Maitland, *supra* note 8, at 337.

23. For a concise summary of this problem and imaginative efforts to solve it, see 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 486-511 (2d ed. 1898).

24. Maitland, *The Crown as Corporation* 17 L.Q. REV. 131 (1901), *reprinted in* F. MAITLAND, SELECTED ESSAYS 104 (1936).

25. 2 W. BLACKSTONE, COMMENTARIES *469.

26. C. CARR, *supra* note 14, at 16. For more specific background on the complex relationship between English law and the Roman Canon law, see generally F. MAITLAND, ROMAN CANON LAW IN THE CHURCH OF ENGLAND (1898); Re, *The Roman Contribution to the Common Law*, 29 FORDHAM L. REV. 447, 458-62 (1961).

For all its singularity, the sole corporation had many detractors. In fact, Maitland and Pollock particularly thought it was an anomaly, a "strange conceit," a "juristic abortion,"[27] an "unhappy freak of English law,"[28] and a "useless figment of shreds and patches."[29]

Some of the criticism came from theorists who objected to the philosophical underpinnings of the fictitious personality of the corporation sole.[30] But practical problems were also evident. The courts accepted some officers as corporations, yet resisted the corporate claims of others similarly situated.[31] This inconsistency may explain why the corporation sole was not widely extended to other civil officers.

Other practical questions were also raised. What claims on corporate property might arise from the heirs of a deceased incumbent? What limits on fraudulent transfer by a dishonest incumbent? Is a separate accounting required for the incumbent as a corporation and as a private person? Is there a quasi-fiduciary relationship between the corporation sole and his successors?

Added to these questions are several other crucial problems: What happens to the corporation during the illness or absence of the incumbent; and who manages the property, and with what legal force, during an interregnum? These practical considerations were more difficult than the theoretical questions. Yet for all the inconsistency of application and the eccentricity of the concept, the corporation sole has endured in some form for more than five centuries.

III. Transition from "Old" to "New"

"At a very early period the religious establishment of England seems to have been adopted in the colony of Virginia, and, of course, the common law upon that subject, so far as it was applicable to the circumstances of that colony."[32] Justice Story went on to count the corporation sole as among the "general rights" of the Episcopal Church "growing out of the common law."[33] After the revolution, "the Episcopal Church no longer retained its character as an exclu-

27. Maitland, *supra* note 24, at 131.
28. 1 F. POLLOCK & F. MAITLAND, *supra* note 23, at 488 n.1.
29. F. POLLOCK, THE GENIUS OF THE COMMON LAW 4 (1967).
30. Of the dozens of articles on this subject, John Dewey's classic study is still widely cited. Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926). *See also* Pollock, *Has the Common Law Received the Fiction Theory of Corporations?*, 27 L.Q. REV. 219 (1911).
31. C. CARR, *supra* note 14, at 15.
32. Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 46 (1815).
33. *Id.* at 46.

sive religious establishment,"[34] but the Supreme Court still recognized the rights of the parson as a corporation sole to continue in full force.[35]

After the Declaration of Independence, early case law indicated that the corporation sole lived on. However, sometimes it was found in its pure common law form, other times in a variant form.[36] In New England, title to the real property of territorial parishes was occasionally vested in the resident clergyman.[37] In the South the Episcopal glebe was usually held by the minister-in-charge (whatever his title), just as in England.[38] "The most numerous group of private corporations in the colonies comprises those which were concerned with religious worship."[39]

The corporation sole, however, applied only to the clergy of the churches that were or had been legally and formally established.[40] In another early opinion written by Justice Story, the Supreme Court voided a royal grant of land to the Episcopal Church in New Hampshire. The decision was based on the grounds that no one was legally competent to accept title, since that state had never had an established church, even in colonial days.[41]

The link with church establishment sealed the fate of the common law corporation sole in America. The first amendment technically did not require states to disestablish a church. By implication, however, establishment was doomed by the Bill of Rights and without religious establishment, the rights of establishment were moot.[42]

The civil form of the corporation sole never really took hold in the United States. The king was the most obvious civil corporation sole in colonial days. After the Revolution, however, only a few minor officers in some states were accorded a corporate identity: pro-

34. *Id.* at 48.

35. *Id.* at 54-55.

36. Statutes are occasionally mentioned in the early cases. Weston v. Hunt, 2 Mass. 500, 501 (1807); Inhabitants of the First Parish in Brunswick v. Dunning, 7 Mass. 445, 447 (1811).

37. Inhabitants of Bucksport v. Spofford, 12 Me. 487, 488 (1835). For background material on the legal aspects of the territorial parish, see Kauper & Ellis, *Religious Corporations and the Law*, 71 MICH. L. REV. 1499, 1505-07 (1973).

38. Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 47 (1815); Beckwith v. Rector of St. Philip's Parish, 69 Ga. 564 (1882).

39. 1 J. DAVIS, ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS 75-76 (1917).

40. Recent Cases, *supra* note 17, at 297.

41. Town of Pawlett v. Clark, 13 U.S. (9 Cranch) 292 (1815).

42. Zollmann, *Classes of American Religious Corporation*, 13 MICH. L. REV. 566, 571 (1915).

bate judges,[43] and town supervisors.[44] The governor of a state was regarded as a corporation only in Tennessee.[45] For the most part, the powers and duties of public officers were adequately defined by statute. Incorporation was not necessary to guarantee bonds or contracts,[46] or to continue lawsuits.[47]

Beginning in the first half of the nineteenth century, however, new social and religious forces gave a revived impetus to the sole corporation. The chief thrust came from a most unlikely source. When John Carroll was chosen as the first Roman Catholic bishop in the United States in 1789, gaining secure title to the property of his church in the various states and territories was one of his most pressing tasks. This task was by no means easy.

Roman Catholicism had no legal standing in England, and its position in the new nation was awkward. Although Catholicism shared the fruits of the first amendment, it had a structure that many Americans judged to be autocratic and monarchical. At that time, congregational ownership of church property was natural to many denominations in America, but was contrary to long-established Roman Catholic policy.

Sometimes, for want of a better method, church property was held in fee simple by the local priest or by a pious layman. This system, however, led to endless difficulty. There was a constant fear that church property held in a private name might be claimed by a relative of the holder. Worse yet, the possibility existed that some unworthy claimant with a plausible story could make out a case for ownership. In one lawsuit, an unfrocked priest claimed to be heir to land that a deceased predecessor had purchased to build a church.[48]

Bishop Carroll won that suit, but for the next seventy years the Roman Catholic hierarchy struggled to find a legally sufficient and canonically suitable manner for its church to own property. Vesting title in a board of elected or appointed trustees was one obvious possibility. In fact, that is the way Carroll originally incorporated in Maryland.[49] But "trusteeism" itself became an issue when the trustees in some areas used their property ownership to pressure the bish-

43. Overseers of the Poor v. Sears, 39 Mass. (22 Pick.) 122, 126 (1839).
44. Jansen v. Ostrander, 1 Cow. 670, 683 (N.Y. Sup. Ct. 1824).
45. Polk v. Plummer, 21 Tenn. (2 Hum.) 500 (1841); Governor v. Allen, 27 Tenn. (8 Hum.) 176 (1847).
46. 1 W. FLETCHER, *supra* note 6, at § 53.
47. The many tax cases involving "The Commissioner" are not unlike the citations of a corporation sole acting as party to a suit.
48. Browers v. Fromm, 1 Add. 362 (Pa. 1798).
49. 1792 Md. Laws 55.

ops in doctrinal or disciplinary disputes.[50]

The internal problems of the Catholic Church were exacerbated and complicated by the rise of a national social and political phenomenon called the "Know-Nothing" movement.[51] In addition to their many other objections to Catholicism, these opponents had particular objections to control of church property by the clergy, and strenuously battled the church on this issue.[52] The bishops battled back, in what they saw as a defense of the doctrine and practice of their religion against bigots on the outside and recalcitrants on the inside. Over time, the corporation sole became a major weapon.[53]

Beginning in 1829, a series of national bishops' meetings was held to address the problems of Catholicism in America. Invariably, property problems were on the agenda.[54] Soon after the first of these gatherings, Archbishop Whitfield of Baltimore sought a charter in the form of a corporation sole from the Maryland General Assembly. In 1832, it was granted.[55]

The link between Roman Catholicism and the legal concept of a corporation sole was surprising for two reasons. First of all, in England, this mode of incorporation was limited to the Anglican Church.[56] In fact, the Roman Catholic hierarchy was not reinstated in England until 1850.[57] Second, Catholic Canon Law did not envision a one-person corporation. The minimum number required to constitute a "collegiate moral person" was three.[58] Even the Pope was not a corporation sole.[59] Even though bishops of dioceses have great autonomy in church law, favorable action by a board of consul-

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50. *See generally* 1 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 808-18 (1950); Guilday, *Trusteeism (1814-1821)*, 18 HIST. REC. & STUD. 7 (1928); McNamara, *Trusteeism in the Atlantic States, 1785-1863*, 30 CATH. HIST. REV. 135 (1944); Stritch, *Trusteeism in the Old Northwest, 1800-1850*, 30 CATH. HIST. REV. 155 (1944).

51. *See generally* R. BILLINGTON, THE PROTESTANT CRUSADE (1938).

52. A. STOKES, *supra* note 50, at 808.

53. P. DIGNAN, HISTORY OF THE LEGAL INCORPORATION OF CATHOLIC CHURCH PROPERTY IN THE UNITED STATES 1784-1932 (1933).

54. P. GUILDAY, A HISTORY OF THE COUNCILS OF BALTIMORE 1791-1884 (1932). The 1829 meeting was attended by Roger B. Taney, a prominent Catholic layman, later Chief Justice of the United States from 1836 to 1864. Taney's role at this meeting of bishops is unclear, but possibly he was serving as legal counsel. *Id.* at 89.

55. 1832 Md. Laws 308.

56. Recent Cases, *supra* note 16, at 295-96.

57. There were a few Roman Catholic bishops ministering to congregations before 1850, but there were no dioceses until the hierarchy was reestablished in that year with the appointment of Cardinal Wiseman as Archbishop of Westminster.

58. This long-standing policy was formally codified in 1917 Code c. 100, § 2. For an exceptionally clear short explanation of the canonical concept of moral personality, see A. MAIDA, OWNERSHIP, CONTROL AND SPONSORSHIP OF CATHOLIC INSTITUTIONS 10-22 (1975).

59. C. CARR, *supra* note 14, at 16 n.1.

tors is still required on major property decisions to this day.[60]

As Roman Catholicism spread geographically and grew in numbers in the last decade of the nineteenth century, new dioceses were created as new areas of the country were settled. Where they could, the bishops incorporated as corporations sole.[61] In some states, this required a private act of special incorporation; in others, a general incorporation statute was utilized.

The effort was not successful everywhere. On at least one occasion, a legislature defeated a bishop's request for sole incorporation on the grounds that Catholicism would thus acquire a legal right not held by other religious denominations.[62] Slowly, Roman Catholics won the battle for their church to be incorporated in a manner consistent with church polity.[63] During this struggle, the old common law corporation sole was gradually transformed. There was no longer any link with an established church. Although legislative action was often the result of activity by one church, the laws passed were usually broad enough for others.

In the courts, judges began to require specific legislative authorization for a corporation sole. The common law was not invoked to create sole corporations in states where the legislature had not acted.[64] Finally, at the beginning of this century, the Supreme Court, in an opinion by Justice Holmes, confirmed what was already an almost universal judicial stance: "Apart from statute the law does not recognize the bishop as a corporation sole . . . ."[65]

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60. B. BROWN, THE CANONICAL JURISTIC PERSONALITY WITH SPECIAL REFERENCE TO ITS STATUS IN THE UNITED STATES OF AMERICA 144 (1927).

61. It is not the purpose of this study to create a state-by-state history of this pattern of incorporation. However, in some of the cases there are occasional references to the history of this pattern. A few examples will suffice: Illinois had created a corporation sole by private act in 1845; South Carolina in 1880; Kentucky in (or before) 1888; Massachusetts in 1898. *See* Chiniquy v. Catholic Bishop of Chicago, 41 Ill. 148 (1866); Decker v. Bishop of Charleston, 247 S.C. 317, 147 S.E.2d 264 (1966); McCloskey v. Doherty, 97 Ky. 300, 30 S.W. 649 (1895); Searle v. Roman Catholic Bishop of Springfield, 203 Mass. 493, 89 N.E. 809 (1909).

62. Union Church v. Sanders, 6 Del. (1 Houst.) 100, 127 (1855).

63. For a summary of the later stages of the trusteeship controversy, see 3 A. STOKES, *supra* note 50, at 408-13. The Vatican gave formal approval to the corporation sole as one of the approved modes of holding title to church property in a private letter sent to the American bishops in 1911. For the text, see 2 T. BOUSCAREN, CANON LAW DIGEST 443 (1966). The corporation sole is still the "preferable civil law instrument for the dioceses to use in holding title to property." *See* A. MAIDA & N. CAFARDI, CHURCH PROPERTY, CHURCH FINANCES, AND CHURCH-RELATED CORPORATIONS 129 (1986).

64. *See* Roman Catholic Archbishop v. Shipman, 79 Cal. 288, 21 P. 830 (1889) (affirming action taken by the legislature of California). For other decisions where a court did not recognize a corporation sole because the legislature had not acted or where a party had not followed a procedure created by state law, see Dwenger v. Geary, 113 Ind. 106, 14 N.E. 902 (1888); Blakeslee v. Hall, 94 Cal. 159, 29 P. 623 (1892); First Nat'l Bank v. Winchester, 119 Ala. 168, 24 So. 351 (1898).

65. Wright v. Morgan, 191 U.S. 55, 59 (1903).

The transformation of the corporation sole from its common law form to a legislative format, however subtle, created something altogether new. Zollmann, writing in 1915, called it "a new form . . . vigorously flourishing"[66] and "American in the true sense of the word."[67] The tide had turned. Momentum to secure the property rights of the Roman Catholic Church a century ago left permanent traces in modern American law. Today at least thirty states have a corporation sole in one form or another.

IV. The Corporation Sole in Statutory Form

Seventeen states explicitly[68] recognize the corporation sole under statutory law, often in a special section for nonprofit corporations or in a section on religious societies.[69] At least eight other jurisdictions have at least one corporation sole created under special or private charter, sometimes dating to a time before the passage of a general incorporation statute.[70]

To understand the corporation sole under both of these categories, a method of analysis will be useful. For states that recognize the corporation sole under general law, California's statutes can serve as a comparative model. For the states with special or private acts of incorporation, Maryland's private charter for the Archbishop of Baltimore is a useful example.

The California legislation dates to 1877,[71] and comprises part 6 of the title division on nonprofit corporations. Some sections are technical, and relate to filing provisions, applicability to corporations

66. Zollmann, *Classes of American Religious Corporations*, 13 MICH. L. REV. 566, 571 (1915).

67. *Id.* at 573.

68. A law is classified as explicit if the words "corporation sole" are used, or if the words "and his successors" are employed in a context clearly designating a corporation sole.

69. ALA. CODE §§ 10-4-1 to -9 (1975); ALASKA STAT. § 10.40.060 (1985); ARIZ. REV. STAT. ANN. §§ 10-421 to -426 (1977); CAL. CORP. CODE §§ 10000-10015 (West 1977); COLO. REV. STAT. §§ 7-52-101 to -104 (1986); HAW. REV. STAT. §§ 419-1 to -9 (1985); IDAHO CODE § 30-304 (1980); MICH. COMP. LAWS ANN. §§ 458.1-.2, 458.271-.273 (West 1983); MONT. CODE ANN. 35-3-101 to -209 (1985); NEV. REV. STAT. §§ 84.010-.080 (1985); N.H. REV. STAT. ANN. §§ 306.6-.8 (1984); N.C. GEN. STAT. § 615 (1982); OR. REV. STAT. § 61.055(1)-(3) (1983); S.C. CODE ANN. § 33-31-140 (Law. Co-op. 1976); UTAH CODE ANN. §§ 16-7-1 to -12 (1973); WASH. REV. CODE ANN. §§ 24.12.010-.040 (1969); WYO. STAT. §§ 17-8-109 to -113 (1977).

70. They are the District of Columbia, Illinois, Kentucky, Maine, Maryland, Massachusetts, Nebraska, and Rhode Island. The author is unaware of any authoritative listing of the states which have sole corporations under private law or special incorporation. This list was drawn from cases citing a corporation sole in a judicial opinion, from examination of sessions laws, and from a listing of corporate names of dioceses in the 1987 Official Catholic Directory.

71. Prior to the enactment of California's statute, the California Supreme Court had found the priest of the Mission Dolores to have a position in law "analogous" to that of a corporation sole in England. Santillan v. Moses, 1 Cal. 92 (1850).

organized prior to the implementation of the law, and procedures for voluntary dissolution.[72] The key sections are those dealing with who may incorporate, the corporate powers, and the questions of vacancy and succession.

The California statutory system indicates that a corporation sole may be formed by a "bishop, chief priest, presiding elder, or other presiding officer of any religious denomination, society, or church."[73] The corporate powers specified in the California law are comprehensive. In California, a corporation sole may:

> (a) Sue and be sued, and defend, in all courts, and places, in all matters and proceedings whatever.
>
> (b) Contract in the same manner and to the same extent as a natural person, for the purposes of the trust.
>
> (c) Borrow money, and give promissory notes thereof, and secure the payment thereof by mortgage or other lien upon property, real or personal.
>
> (d) Buy, sell, lease, mortgage, and in every way deal in real and personal property in the same manner that a natural person may, without the order of any court.
>
> (e) Receive bequests and devises for its own use or upon trusts to the same extent as natural persons may, subject, however, to the laws regulating the transfer of property by will.
>
> (f) Appoint attorneys in fact.[74]

The most complex issue regarding the old corporation sole was that of continuing operation during a vacancy in the office. California deals with this issue in two ways: 1) at the time of incorporation, the manner of filling a vacancy is to be specified,[75] and 2) the law makes clear that the corporation has perpetual existence even during a vacancy.[76]

In contrast with the common law corporation sole, the California statute, like almost all its modern counterparts, is far more precise. A comparison will be useful. The common law or "old" corporation sole applied to some unspecified officers, and not to others of

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72. All references to the California code are to CAL. CORP. CODE §§ 10000-10015 (West 1977). Filing procedures: *Id.* at §§ 10003 to 10005; applicability to earlier corporations: *Id.* at §§ 10000 to 10001; dissolution: *Id.* at §§ 10012 to 10015.

73. Every other state with a codified corporation sole reserves it to specified clergy, except Alaska ("any person and a successor in office") and Arizona ("scientific research institutions"). *See* ALASKA STAT. § 10.40.060 (1985); ARIZ. REV. STAT. ANN. §§ 10-421 to -422 (1977).

74. CAL. CORP. CODE § 10007 (West 1977). A few other states add the power to have a corporate seal. *See, e.g.*, NEV. REV. STAT. § 84.050 (1985).

75. CAL. CORP. CODE § 10003(d) (West 1977).

76. *Id.* at 10008.

similar origin. The statutory or "new" corporation sole, in contrast, applies to those who are designated at the time of their incorporation. The old corporation sole was "in abeyance" at the time of a vacancy, whereas the new corporation sole continues through temporary agents. The old corporation sole could hold title to real estate only, and alienation of the property was difficult and legally questionable. The new corporation sole has the same power over its property as any other corporation, and is not limited in the type of property it can own. In short, the new statutory corporation sole removes the vagaries of the old.

Private charters have a parallel history and similar content. The Maryland legislation incorporating the Archbishop of Baltimore dates to 1832. The law permits church property held by trustees to be deeded to the Archbishop and his successors. However, such property is limited to two acres, must be real property, and can only be used for a church, parsonage, or burial ground.[77]

In 1868, the Maryland legislature amended the act. The acreage designation was enlarged to five acres, and "school house" was added to the list of uses.[78] Up to this point, the Maryland law did not mention the alienation of property. A later amendment, in 1874, granted the power "to dispose of, lease, sell and convey from time to time . . . to the same extent, [as] any private person or other corporate body."[79]

Two subsequent amendments completed the law. In 1894, the restriction to real property was removed. The Archbishop, as a corporation sole, was given the power to exercise rights over property "real, personal or mixed."[80] Finally, in 1927, the acreage restriction was completely removed.[81]

This original 1832 legislation, with its four amendments, remains the charter of the Archbishop of Baltimore as a corporation sole. No further change can now be made, because the Maryland code prohibits the General Assembly from amending the charter of a religious corporation even if it was previously incorporated by special act.[82] Furthermore, the code now contains modern provisions for

77. 1832 Md. Laws 308.
78. 1868 Md. Laws 268.
79. 1874 Md. Laws 398.
80. 1894 Md. Laws 50. Strangely enough, on the very day this amendment was passed, the Maryland Court of Appeals upheld the validity of the original 1832 statute. *See* Gump v. Sibley, 79 Md. 165, 29 A. 977 (1894).
81. 1927 Md. Laws 397.
82. MD. CORPS. & ASS'NS CODE ANN. § 5-313 (1985).

subsidiary or separate Roman Catholic corporations.[83]

The contrast between the California and Maryland laws is very apparent. The California legislation consists of more formal and highly structured general statutes, whereas the Maryland private charter is rather informal, the product of patchwork amendment. The California code carefully establishes a process for creating or dissolving a corporation sole, whereas the Maryland law barely goes beyond the simple statement that a corporation is deemed to exist. Clearly, the general statutes represent a later stage in the evolutionary process.

Although differences exist, the corporations sole created under general corporation laws and those established by special acts or private charters have several common features. They both deserve to be classified under the heading of "new" or "modern" corporations sole, because both are more than merely modes of holding title to property. Both are meant to provide a framework for the operation of a continuing concern. They are also both meant to provide a structure for the planning, financing, direction and management necessary for an organization existing and working in a sophisticated business environment.

The Achilles heel of the "old" corporation sole was that the corporation itself was a person holding an office. When the incumbent died, the common law could only hold the corporate life and activity in suspension, or "abeyance", until the office was filled again. In regard to the "old" corporation sole, Maitland said, "Our corporation sole is a man who dies."[84] Carr added, "That is the difficulty. The artificial personality of the corporation is not strong enough to compel us to ignore the natural personality of the sole incorporator. The office has not been completely personified if the death of the officeholder can cause such a deadlock."[85]

The modern corporation sole, created under legislative auspices, solves the succession problem quite satisfactorily in one of two ways. Either a specified structure of continuing operation is created in statutes, as in California,[86] or the statutes specify some external set of canons, practices or rules to deal with an interregnum, as in Maryland.[87]

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83. *Id.* at §§ 5-314 to -320.
84. Maitland, *supra* note 24, at 145.
85. C. CARR, *supra* note 14, at 32-33.
86. CAL. CORP. CODE § 10008 (West 1977).
87. Maryland uses the phrase "according to the discipline and government of the Roman Catholic Church." 1832 Md. Laws 308.

The fact that the modern American corporation sole works satisfactorily is, perhaps, best illustrated by the relative absence of recent cases carried to the appeal level.[88] Corporate structure is seldom at issue, but the cases tend to run the gamut: torts,[89] contract,[90] civil procedure,[91] piercing the corporate veil,[92] workman's compensation,[93] taxation,[94] eminent domain,[95] estates[96] and simple fraud.[97] Property disputes are relatively rare, perhaps because there would be first amendment implications for most corporations sole.[98]

The corporation sole seems to have a settled existence. There has been no rash of new legislation, nor have there been any repeals of earlier laws.

V. Special Circumstances

Eight additional states have circumstances meriting comment. The constitutions of Virginia and West Virginia specify that no charter of incorporation can be granted to any church or religious denomination.[99] At least one commentator attributes this prohibition to the influence of Thomas Jefferson and James Madison.[100] Although the tradition of church-state separation in Virginia may indeed be traced to the two former presidents, the constitutional provision in Virginia dates to 1851,[101] long after the deaths of both.[102]

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88. The author speculates that most legal disputes involving a corporation sole would be simple torts resolved in insurance settlements or at the trial level. There may also be a certain reluctance for potential plaintiffs to sue an officer of a church or for officers of a church to permit disputes to go to trial.

89. *See, e.g.*, Decker v. Bishop of Charleston, 247 S.C. 317, 147 S.E.2d 264 (1966); Barabasz v. Kabat, 86 Md. 23, 37 A. 720 (1897).

90. *See, e.g.*, Hurley v. Werly, 203 So. 2d 530 (Fla. Dist. Ct. App. 1967).

91. *See, e.g.*, Zani v. Phandor Co., 281 Mass. 139, 183 N.E. 500 (1932).

92. *See, e.g.*, Roman Catholic Archbishop v. Superior Court, 15 Cal. App. 3d 405, 93 Cal. Rptr. 338 (1971). In this rather amusing case, the Archbishop of San Francisco was sued for damages when a California citizen had a dispute with a Swiss monastery about delivery of a dog bred at the monastery. The court held that the Archbishop could not be held responsible as "alter ego" for a monastery he had never heard of. *Id.* at 411, 93 Cal. Rptr. at 341.

93. *See, e.g.*, Roman Catholic Archbishop v. Industrial Accident Comm'n, 194 Cal. 660, 230 P. 1 (1924).

94. *See, e.g.*, People *ex rel.* Pearsall v. Catholic Bishop, 311 Ill. 11, 142 N.E. 520 (1924).

95. *See, e.g.*, City of Little Rock v. Linn, 245 Ark. 260, 432 S.W.2d 455 (1968).

96. *See, e.g.*, *In re* Estate of Zabriskie, 96 Cal. App. 3d 571, 158 Cal. Rptr. 154 (1979).

97. *See, e.g.*, Baldwin v. Commissioner, 309 N.W.2d 750 (Minn. 1981).

98. *See* Note, *Judicial Intervention in Disputes over the Use of Church Property*, 75 HARV. L. REV. 1142 (1962); Note, *Judicial Intervention in Church Property Disputes—Some Constitutional Considerations*, 74 YALE L.J. 1113 (1981); Oaks, *Trust Doctrines in Church Controversies*, 1981 B.Y.U. L. REV. 805.

99. VA. CONST. art. IV, § 14(20); W. VA. CONST. art. 6, § 47.

100. Kauper & Ellis, *supra* note 37, at 1529.

101. 1 A. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 545 (1974).

102. Thomas Jefferson died in 1826; James Madison in 1836.

The West Virginia courts have acknowledged that the provision in that state is descended from Virginia.[103] While these constitutional provisions pose no problems to the titles of church property in either state, they obviously preclude a corporation sole.[104] An article in the Kansas constitution, which required title to property of religious corporations to be vested in elected trustees, was repealed in 1974.[105]

Connecticut has a provision in its corporation code that gives the local archbishop or bishop special powers in trust if a Catholic parish corporation violates or surrenders its charter.[106] The courts have interpreted this provision to mean that, if a charter is surrendered, "all the property vests in the bishop and his successors, as a corporation sole."[107] This section provides emergency powers that are not normally required.

Oklahoma allows for trust succession in the name of an ecclesiastical office.[108] Vermont, in contrast, specifically forbids any such succession.[109]

Finally, case law in Arkansas and Florida also deserves attention. The Supreme Court of Arkansas, in dicta, has recognized the Roman Catholic Bishop of Little Rock as a corporation sole without any special act of the legislature.[110] The Florida situation is even more unique. The Supreme Court of Florida has repeatedly held that the common law corporation sole is in full force in Florida.[111] The court relies on the fact that the common law has been adopted in Florida and remains in force unless expressly or impliedly repealed by organic or statutory law. This unique position initially attracted journal comment,[112] perhaps because it seemed contrary to the earlier United States Supreme Court position.[113]

VI. A Federal Corporation Sole

Only rarely has there been mention of a federal charter for a

103. *See* Powell v. Dawson, 45 W. Va. 780, 32 S.E. 214 (1899).
104. Kauper & Ellis, *supra* note 37, at 1530.
105. KAN. CONST. art. 12, § 3 (repealed 1974).
106. CONN. GEN. STAT. ANN. § 33-281 (West 1987).
107. State *ex rel.* Barry v. Getty, 69 Conn. 286, 289, 37 A. 687, 688 (1897).
108. OKLA. STAT. ANN. tit. 18, § 563 (West 1986).
109. VT. STAT. ANN. tit. 27, § 703 (1975).
110. City of Little Rock v. Linn, 245 Ark. 260, 432 S.W.2d 455 (1968).
111. *See* Reid v. Barry, 93 Fla. 849, 112 So. 846 (1927); Willard v. Barry, 113 Fla. 402, 152 So. 411 (1933); Hurley v. Werly, 203 So. 2d 530 (Fla. 1967); 8 FLA. JUR. 2d, *Business Relationships*, § 6 (1978).
112. *See* Note, *The Corporation Sole*, 26 MICH. L. REV. 545 (1928); Recent Cases, *supra* note 17, at 296-97.
113. Wright v. Morgan, 191 U.S. 55, 59 (1903).

religious or quasi-religious organization.[114] When Congress voted, in 1811, to incorporate an Episcopal church in the District of Columbia, President Madison vetoed it.[115] In his veto message, the President implied that a charter of incorporation was in some sense an approval of a religion, in violation of the Constitution.

More than a century later when incorporation was so common, the Congress and the President took another view. In 1948, the Vatican completely severed the Archdiocese of Washington from the Archdiocese of Baltimore. The new Archbishop of Washington, with the help of President Truman, sought to have a corporation sole established as a framework for the new ecclesiastical territory.[116] Congress complied by passing a private law that established the Archbishop of Washington and his successors as a corporation sole.[117]

VII. A Yet More Modern Form?

A number of authorities warn against confusing the corporation sole with the modern one-person corporation.[118] In fact, courts have held that a stock corporation is not automatically transformed into a corporation sole simply because one person has purchased all of the stock.[119]

It is possible, however, to structure a one-person corporation in such a way that it closely resembles a corporation sole in operation. In fact, the Roman Catholic Diocese of Wilmington is so structured under the general corporation laws of Delaware.[120] The Wilmington diocese is not incorporated under the terms of the Delaware Code for Religious Societies and Corporations.[121] Rather, the diocese is incorporated under the General Corporation Law, which already contains provisions for a board of one, for non-stock operation, and for formation of a close corporation.[122] By carefully writing the by-laws, and

114. For a brief history of "The Question of Federal Incorporation," see 3 A. STOKES, *supra* note 50, at 413. Stokes was not aware of the 1948 legislation incorporating the Archdiocese of Washington.

115. *Id.* at 414.

116. Telephone interview with Rev. Godfrey Mosley, Vice Chancellor of the Archdiocese of Washington (Sept. 16, 1987).

117. 62 Stat. 355 (1948).

118. *See* H. HENN & J. ALEXANDER, *supra* note 7, at 697 n.1; 1 W. FLETCHER, *supra* note 6, at § 54.

119. *See, e.g.*, Louisville Banking Co. v. Eisenman, 94 Ky. 83, 21 S.W. 531 (1893).

120. Telephone interviews with Rev. Msgr. Joseph F. Rebman, Chancellor of the Diocese of Wilmington (Nov. 2, 1987) and with Rev. Msgr. Paul J. Schierse, Former Chancellor (Oct. 30, 1987).

121. DEL. CODE ANN. tit. 27, §§ 115-17 (1975).

122. The General Corporation Law of Delaware is found in DEL. CODE ANN. tit. 8, §§ 101-398 (1984 & Supp. 1986). The number of directors is treated in § 141; section 242 deals

by addressing the problems of succession, the Roman Catholic Diocese of Wilmington has fashioned a corporation that contains all the advantages of the corporation sole in a state that has no regular provision for one.[123]

VIII. Summary

From its quaint beginnings in English law, the corporation sole has established a modest, yet solid, foothold in the United States. To churches with a hierarchical structure, and particularly to the Roman Catholic Church, it has been a secure method for both ownership of property and daily operation.[124] In a society characterized by religious and ethnic pluralism, the corporation sole has provided a useful legal option, well adapted to the needs of certain groups. The corporation sole has, arguably, made a greater contribution in the United States than in its native land. The corporation sole is destined to be a continuing part of American law for years to come.

with non-stock corporations; and Subchapter XIV, beginning with § 341, addresses close corporations.

123. The Diocese was so incorporated on December 2, 1972. Telephone interview with James P. Collins, Esq., Legal Counsel of the Diocese of Wilmington (Nov. 3, 1987).

124. Most dioceses today incorporate each parish and institution separately to limit insurance liability. The corporation sole thus becomes a holding company with multiple subsidiaries.