Corporate Personality

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Part 1

From the earliest period of our judicial history, lawyers and judges have reiterated the doctrine that a corporation is an intangible legal entity, without body and without soul. In almost Athanasian terms, the orthodox doctrine of a corporation as a legal person, separate and distinct from the personality of the members who compose it, has been defined and propagated. In these latter days, a sect of heretics has arisen who, rejecting the teachings of the fathers, deny or disparage this great doctrine. But these heretics do not seek to belittle the questions at issue between themselves and the orthodox party. Far from it. They rather strive to exaggerate the importance of those questions, in order to pose as great reformers engaged in a gigantic task of emancipating the legal world from the thraldom of a mediaeval superstition.

In the heated controversy thus engendered, it is difficult indeed for any American lawyer writing upon the subject of corporations to avoid declaring himself. If he endeavors to preserve silence, his failure to speak is attributed to cowardice, or to a lack of clearly defined convictions upon a fundamental question. He is not permitted to treat the whole controversy with indifference. The direct interrogatory is pressed upon him, “Under which king?” He is called upon to vouch for his legal character by formulating his creed, in much the same way that each English sovereign has heretofore been required by his coronation oath to testify his adherence to the principles of the Reformation.

But sharp as the controversy may appear to have been among us, it is mere guerilla warfare, a few desultory skirmishes, in comparison with the pitched battles and protracted campaigns in which Continental jurists have waged war over this doctrine. With us, the literature of the subject, on the orthodox side, consists in a dictum reported by Coke, referred to by Blackstone; and reiterated monotonously by every law student, together with a number of modern decisions which apply, or misapply, the doctrine. The opposing party can point to a few statements in text-books, often contradicted or seemingly contradicted by other passages in the same treatises, and to some modern decisions and dicta in which judges have somewhat ostentatiously repudiated the doctrine as a mere conceit of the schoolmen. On the Continent, on the other hand, whole volumes have been devoted to this one doctrine, and rival theories have been developed whose adherents have formed themselves into parties almost as well-defined as the Epicureans, the Stoics, or any other of the historic philosophic sects. In Germany, in France, in Italy, learned treatises occupied wholly with this doctrine of corporate personality are constantly appearing.

Our complete oblivion to all this wealth of controversial learning strikingly exhibits the insularity of our English law. Are not Coke and Blackstone, sources of the common law, better than all the scholars of Europe? It may be that this patriotic confidence is justified, and that all that foreign learning furnishes no lesson from which we can derive profit; but if so, it would be reassuring to find some defender of our faith who, having imperilled his legal soul by mastering the occult learning of Continental jurists, should be able to state reasons why no Anglo-American lawyer need vex his English soul with that mass of foreign lore. Here, however, it is impossible to do more than make brief mention of some of the leading theories, as an introduction to an examination of the subject on principle.

1. The Roman law gave but little consideration to what we call corporations, and the whole law of the subject consisted in a number of ambiguous and unfortunate phrases which have been the sources of much of the confusion both in English law and in the law of Continental Europe. The canon law, while it devoted more consideration to the subject, did not develop any well defined theory. In spite of the scholastic flavor of the dicta on the subject transmitted to us by Coke, the Canonists cannot fairly be charged with originating the confusion surrounding the subject.

Savigny in Germany, in the first half of the nineteenth century, began the scientific or metaphysical

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1 Sutton’s Hospital Case, 10 Co. 32.

3 A complete bibliography of the subject would be of appalling size. The following are a few of the more recent foreign treatises dealing with this subject: Binder, Das Problem des juristischen Persönlichkeit (Leipzig, 1907); Hölder, Natt ü riche und juristische Personen (Leipzig, 1905); Meurer, Die juristische Personen (Stuttgart, 1901); Mayer, Die juristische Person und ihre Verwertbarkeit im öffentlichen Recht (Tübingen, 1908); Schwabe, Die juristische Person und das Mitgliedschaftsrecht (Basel, 1900); Rechts subject und Nutzbefugnis (Basel, 1901); Die Körperschaft mit und ohne Persönlichkeit (Basel, 1904); De Vareilles-Sommières, Les Personnes Morales (Paris, 1902); Michoud, La Théorie de la Personnalité Morale (two volumes. Paris, 1906 and 1909); Pic, Sochétés Commerciales, vol. I, title II, ch. I (Paris, 1908); Ferrara, Le Persone Giuridiche (Naples, 1907-1910); Barillari, Sul Concetto della Persona Giuridica (Rome, 1910).

4 See historical review in Binder, Das Problem der juristischen Persönlichkeit, 1-34; Michoud, La Théorie de la Personnalité Morale, 16-99; Ferrara, Le Persone Giuridiche, 22 et seq.
consideration of the subject. He observed the fact that property belongs in law to a corporation and not to any individual, and the question which he put to himself was, “Who or what is the real owner of this property?” With this question theoretical writers in Germany and elsewhere have ever since busied themselves. Savigny’s answer was that the corporate property belonged to a fictitious being and not to any real person or entity. He took as his starting-point the proposition that ownership involves the possession of a will by the owner; and he concluded that asmuch as a corporation does not really possess a will, it must as a property-owner be a fictitious person. At the same time, as an acute French writer has demonstrated, Savigny and his followers, paradoxical as it may seem, impute a certain reality to this fictitious person. For instance, they speak of it as created by the state.

Savigny’s doctrine, or some doctrine closely akin thereto, was generally accepted in France from his time until quite recently; and all students of the common law will recognize in this theory the most prominent features of the orthodox doctrine of Anglo-American law—even including its self-contradictions.

In Germany, however, objections began to be raised to this theory almost as soon as it was definitely formulated. Accordingly, a school arose, led by Brinz, which taught that corporate property is not owned by a fictitious being created by the state but by no person at all. It is not the property of a person but of a purpose—“Zweckvermogen.” This theory was primarily intended to explain the ownership of property by charitable foundations. Although Brinz has found few followers, yet his theory undoubtedly contains an element of truth; for the property of every corporation, not merely charitable corporations but also business companies, is in a sense dedicated to an object. But we of the common law recognize in such dedication, not the ownership of the property by an object, but rather the elements of a somewhat peculiar trust. The purpose to which such property is dedicated amounts to a mere restriction on the otherwise more extensive right of disposition enjoyed by those who manage the property.

This “Zweckvermogen” theory, like that of Savigny, regarded the personality of corporations as fictitious; but in the meantime a rival school arose, which teaches that corporations are real persons. This personality is neither fictitious, nor artificial, nor created by the state, but both real and natural, recognized but not created by the law. When a company is formed by the union of natural persons, a new real person, a real corporate “organism,” is brought into being. Of this school, which in some form or other has long been dominant in Germany, Gierke is the leading exponent. In the hands of some writers, this doctrine is carried to grotesque lengths. The corporate organism is an animal: it possesses organs like a human being. It is endowed with a will and with senses. It even possesses sex: some corporate organisms, like the church, are feminine, while others, such as the state, are masculine. One opponent of this doctrine ironically propounds the question whether a marriage with a legal person is valid. Of course, in the hands of most writers, this reality theory of corporate personality is much more refined. For instance, Gierke himself has a much less anthropomorphic conception of the corporate organism. Some writers make the real corporate organism a mere colorless, lifeless “subject of rights.” Some, with Zitelmann, hold that the corporate organism possesses a will, and is for that reason a real person. Others assert that a corporation has no will, but that a will is not essential to personality.

Some writers, notably Thering in Germany, M. de Vareilles-Sommières in France, and Schwabe in Switzerland, have rejected all the foregoing views. They teach that the “subject of rights” in cases of corporate ownership of property is simply the natural persons who compose the entity. They concur with the advocates of the fiction theory in maintaining that the personality of a corporation, or even its existence as an entity, is a pure fiction or metaphor; but they maintain that the fictitious personality is not “created” by the state, because it does not exist. To them, a corporation is merely an abbreviated way of writing the names of the several members.

When we turn homeward from these foreign theories, we find that no English or American lawyer has philosophized about the question, although the orthodox doctrine in this country is similar to Savigny’s and is, like his, full of self-contradictions. The orthodox American lawyer would be apt to say, “A corporation is a fictitious, artificial person, composed of natural persons, created by the state, existing only in contemplation of law, invisible, soulless, immortal.” Now, such a definition is a congeries of self-contradictory terms. For example, a corporation cannot possibly be both an artificial person and an imaginary or fictitious person. That which is artificial is real, and not imaginary: an artificial lake is not an imaginary lake, nor is an artificial waterfall a fictitious waterfall. So a corporation cannot be at the same time “created by the state” and fictitious. If a corporation is “created,” it is real, and therefore cannot be a purely fictitious body having no existence except in the legal imagination. Moreover, a corporation cannot possibly be imaginary or fictitious and also composed of natural persons. Neither in mathematics nor in philosophy nor in law can the sum of several actual, rational quantities produce an imaginary quantity. As, therefore, the orthodox doctrine contains so many mutually contradictory propositions, it behooves us to study the question on principle.

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3 De Vareilles-Sommières, Les Personnes Morales, ch. II.

6 De Vareilles-Sommières, Les Personnes Morales, pp. 77-78.
2. What, then, is the corporate entity? Is it real or imaginary? Is it natural or artificial? Is it "created by the state," or does it spring into existence spontaneously? Is it a person or is it not?

The difficulties of the inquiry are manifold; for the most abstruse questions of philosophy become pertinent. At the very outset, we are confronted by Pilate's question, "What is truth?" or by the cognate question, "What is reality?" For certainly we cannot well determine whether the corporate entity is real, unless we first decide what reality is. For instance, an idealist, who believes that chairs and tables have no existence save in his own mind, is very apt to impute to the ideal corporate entity the same degree of reality as his self.

Now, in respect to the nature of a corporation, there are two basic propositions, (1) that a corporation is an entity distinct from the sum of the members that compose it, and (2) that this entity is a person. These propositions are often confused; but they are properly quite distinct from one another. For example, one who denies that a corporation is really a person, or who accepts that proposition merely as a figurative statement or fiction of law, is not at all bound by logical consistency to deny the reality of the corporation as an entity distinct from the sum of the members.7

3. Let us, therefore, address ourselves first of all to the question whether, or in what sense, a corporation is an entity distinct from the sum of the members.

Now, consider for a moment any composite whole. Is a house merely the sum of the bricks that compose it? This question cannot well be answered in the affirmative; for you may change many of the bricks without changing the identity of the house. Or take such a common word as "bundle." Every child recognizes that the "bundle" is something distinct from the bunches of sticks, or what not, which compose it. When you have the separate bunches, you do not have the bundle; and you may change the bunches, or many of them, without destroying the identity of the bundle.

To come still closer to the subject, take such a simple idea as "school" or "church." Was there ever a schoolboy who had any difficulty in understanding that his school is something distinct from the boys that constitute it? He does not need to be told that the school may preserve its identity after a new generation of boys have grown up, so that not a single pupil remains the same, and though every teacher may have changed and though the school building may have been moved to a different location. He finds nothing strange or mystical in the conception of the school as an entity. Similarly, he needs no theological instruction, still less any metaphysical disquisition about the nature of an imaginary entity, to inform him that the Church is the same church to-day as in the days of our Lord. Was there ever a pupil in a Sunday School who asked for an explanation of the doctrine of "One Catholic and Apostolic Church" on the ground that every time there is a change in membership there must be a new church? On the contrary, much instruction would be required to make a healthy boy believe that the school or the Church is a short-hand expression for the several members of the school or of the Church, so that every time a new boy joins the school or a new member joins the Church, there is a new school or a new Church.

Any group of men, at any rate any group whose membership is changing, is necessarily an entity separate and distinct from the constituent members.8 The naturalness and indeed inevitableness of the conception of a corporation as an entity was pointed out by Mr. Morawetz:

"The conception of a number of individuals as a corporate or collective entity occurs in the earliest stages of human development, and is essential to many of the most ordinary processes of thought. Thus, the existence of tribes, village communities, families, clans, and nations implies a conception of these several bodies of individuals as entities having corporate rights and attributes. An ordinary copartnership or firm is constantly treated as a united or corporate body in the actual transaction of business, though it is not recognized in that light in the procedure of the courts of law. So, in numberless other instances, associations which are not legally incorporated are considered as personified entities, acting as a unit and in one name; 

7 See De Vareilles-Sommieres, Les Personnes Morales, sec. 232, where the author says: "Remarquons tout d'abord que, s'il était vrai que l'association fût quelque chose d'autre que ses membres, s'il était vrai que le tout fût quelque chose de plus que les associés, il ne s'en suivrait nullement que cette chose, ce tout, fût une personne. Où est le lien entre ses deux idées: les associés forment un tout; ce tout est une personne? Il y a un abîme entre elles. ... Pour le combler, il faudrait y jeter cette majeure avec ses preuves: un tout compose de différents individus d'un certain ordre est toujours lui-même un individu du même ordre."

8 This may be demonstrated mathematically. Suppose a corporation composed of two members, a and b. Let c = the corporate entity. Now, if the corporate entity is merely the equivalent of the sum of the members, then c = a + b. Now, suppose b to assign his shares to d, then c = a + d. But this cannot be unless b is the same as d, which is absurd. Therefore, c, the corporate entity, is not equivalent to the sum of the members.
for example, political parties, societies, committees, courts.\textsuperscript{9}

All that the law can do is to recognize, or refuse to recognize, the existence of this entity. The law can no more create such an entity than it can create a house out of a collection of loose bricks. If the bricks are put together so as to form a house, the law can refuse to recognize the existence of that house—can act as if it did not exist; but the law has nothing whatever to do with putting the bricks together in such a way that, if the law is not to shut its eyes to facts, it must recognize that a house exists and not merely a number of bricks.

Hence, it follows that in recognizing the existence of a corporation as an entity, the law is merely recognizing an objective fact, while in refusing to recognize fully the existence of a partnership or voluntary association as an entity the law is shutting its eyes to facts. Therefore, what needs explanation in the common law is not the doctrine that a corporation is an entity, but the doctrine that a partnership or other voluntary association is not an entity. It is all but impossible for those unlearned in the law to think of a partnership otherwise than as an entity. It is hard to convince a sensible business man that when a senior partner gives his son on attaining majority a small interest in the firm, an entirely new firm is thereby created. The ordinary layman has the conception of the firm as an entity; and confusion and litigation arise because the Anglo-American law will not recognize, or will not fully recognize, that simple conception.

Hence, the oft repeated statement of lawyers and judges that a corporation exists only in contemplation or intendment of law\textsuperscript{10} is untrue. A corporation exists as an objectively real entity, which any well-developed child or normal man must perceive: the law merely recognizes and gives legal effect to the existence of this entity. To confound legal recognition of existing facts with creation of facts is an error, — none the less serious because the law some times, ostrich-like, closes its eyes to facts and assumes that they have no existence. For instance, the common law refused to recognize the paternity of an illegitimate child and declared him to be filius nullius; but it did not follow that the parentage of children born in wedlock existed only in contemplation of law. In that case, the law recognized facts; in the other it refused to do so. Similarly, although the law stubbornly blinks at the facts when it will not ac knowledge the existence of a partnership or voluntary association as an entity, it does not follow that a corporation as an entity exists only in intendment of law. Because Nelson at Copenhagen would not see the signal to retreat, it did not follow that

everything that he did see—the enemy’s vessels and his own—existed only in his own mind.

We need not waste words in discussing the nature of the existence of this corporate entity. Its existence is precisely as real as the existence of any other composite unit. As Kyd, a writer who deserves a greater reputation than he enjoys, dearly stated, “A corporation is as visible a body as an army; for though the commission or authority be not seen by every one, yet the body, united by that authority, is seen by all but the blind.”\textsuperscript{11} If a corporation is fictitious, the only reality being the individuals who compose it, then by the same token a river is fictitious, the only reality being the individual atoms of oxygen and hydrogen. The only difference is that one of the essential elements of an army, or of a river, consists in juxtaposition in space of the members, or of the molecules of water, whereas the bond of union in the case of a corporation is less material. But this difference is not at all fundamental; and the existence of a corporation is quite as real as the existence of the Church, of the Republican Party, or of any other aggregation of men for good or evil. Whether this existence be ideal or material, it is certainly real.

In these days, it has become rather fashionable to inveigh against the doctrine that a corporation is an entity, as a mere technicality and a relic of the Middle Ages; but nothing could be further from the truth. A corporation is an entity—not imaginary or fictitious, but real, not artificial but natural. Its existence is as real as that of an army or of the Church. This is the element of truth in the reality theory of corporate personality which, originating in Germany, has commanded wide acceptance not only in that country but also in France and Italy.

4. Having thus established that a corporation is a real and natural entity, recognized but not created by the law, we next encounter the question whether this entity is a person. The answer to this question is, of course, vitally affected by our definition of “person.” If we use the word in the signification which it conveys to the ordinary English-speaking layman, undoubtedly the corporate entity is not, in truth and reality, a person. For the corporate entity is not a human being; it is not even a rational creature capable of feeling and willing. But the word may be used in some very different sense. “When I use a word,” said Lewis Carroll’s Humpty Dumpty, “it means just what I choose it to mean—neither more nor less”; and when Alice objected, “The question is whether you can make words mean so many different things,” Humpty Dumpty replied, “The question is which is to be master—that’s all.” Many a German scholar has resolved, like Humpty Dumpty, that words shall not master him, and having thus impressed upon the word “person” its own meaning he demonstrates with absolute finality that

\textsuperscript{9} Morawetz, Private Corporations, 2 ed., § 3.

\textsuperscript{10} Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 636; Sutton’s Hospital Case, 10 Co. 32.

\textsuperscript{11} I Kyd, Corporations, 16.
the corporate entity is really a “person”—in his sense of the word.

Certain it is, however, that if the word is thus used in a special, non-popular sense, the proposition that a corporation is a person becomes a mere source of confusion. If by “person” the law means, not a rational, living creature similar to a man but a mere “subject of rights,”—and this is the teaching of the more moderate members of Gierke’s school12—then, in the name of dearness let us adopt some less ambiguous designation for this “subject of rights.” But if we do not lose ourselves in metaphysical discussions of the nature of juristic personality but take common sense as our guide, we shall apprehend clearly that when a jurist first said, “A corporation is a person,” he was using a metaphor to express the truth that a corporation bears some analogy or resemblance to a person, and is to be treated in law in certain respects as if it were a person, or a rational being capable of feeling and volition.

That the dictum, “A corporation is a person” really means what we have just stated and not that a corporation is a “subject of rights” can easily be demonstrated. For true it is that there are or may be subjects of rights which are not beings capable of feeling and volition, but they are not persons in any proper sense of the word. For instance, laws for the prevention of cruelty to animals recognize the lower animals as possessing a somewhat vague right to exemption from needless suffering. The law might go further: it might, for instance, recognize a trust for the maintenance and support of the testator’s dogs or horses, and might permit of the enforcement of this right of those animals by a judicial proceeding in their names by prochein ami, in precisely the same way that the right of an infant cestui que trust would be enforceable; but the horses and dogs would not on that account be persons. Anything that is capable of enjoyment or feeling can be a subject of rights—a “Geniesser” as Bekker would say. Indeed, we may go further; for even a purely imaginary being may have legal rights. For example, our law recognizes and enforces trusts for the benefit of unborn children. So, a heathen code might recognize a right of Jupiter or Apollo to enjoy the sweet savour of a hecatomb or a burnt offering, and might enforce this right by judicial proceedings instituted in the name or on behalf of the divinities in question; and yet those deities, although “subjects of rights,” would not be real persons.

The truth is that the essence of juristic personality does not lie in the possession of rights but in subjection to liabilities. Those beings are “persons” in law to whom the law both can and does address its commands. Now, obviously, legal commands can be addressed to none but rational beings capable of feeling and volition. To all else, the law’s commands, if addressed at all, must remain unintelligible and mere brutum fulmen. It needs no Canute to teach us that the sovereign’s commands when addressed to the waves of the sea, or for that matter to aught but rational beings, are futile.

The essential prerogative of man does not lie in rights, but in duties. Every system of law, from the Decalogue down, is founded upon thou-shalt-not’s, addressed to beings capable of understanding the command, of feeling the penalty, and of exercising a will to act accordingly. It cannot be otherwise. No fiction can supply these essential elements of juristic personality: no law can create them. The only way the law can protect or enforce legal rights is by imposing punishment upon those who violate them—an idle proceeding unless the violator is a moral being capable of being deterred by the threat of punishment.

It will be objected that this conception of personality would exclude idiots and infants. So it would; but what of it? In our ignorance of the nature of the mind or soul, we do not know where the mind of an idiot or an infant is situated, or whether it exists at all; but certain it is that for all legal purposes the mind of an idiot or an infant of tender years is as if it did not exist. We speak of idiots as persons because they have the form of persons; but we recognize that the substance is not there. If society consisted exclusively of idiots or babes, there could be no law. They are persons only in form and in posse.

It will also be objected that the conception of legal personality stated above is too broad in that it would admit the legal personality of slaves. Now, we must concede that the law might refuse to recognize the personality of some classes of rational beings who are really capable of feeling and volition, just as we have seen that the law sometimes refuses to recognize the existence of facts,—for example, in the denial of the paternity of illegitimate children. The law might refuse to recognize certain classes of rational men as subject to legal duties; but few if any systems of law have been so silly. The law finds difficulty enough in securing obedience to its commands without unnecessarily hampering itself by refusing to address them to some beings who by nature are capable of under standing and obeying them. For example, although the law of the Southern States declared with emphasis that slaves were not persons, and deprived them of many of the rights usually enjoyed by persons, nevertheless it left them subject to legal duties. For instance, if a slave committed murder, he could be hanged. When the law declared that a slave was not a person, it meant merely that he was to be treated for some purposes as if he were not a person.

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12 See, Michoud, La Théorie de la Personnalité Morale, 7: “Pour la science de droit, la notion de personne est et doit rester une notion purement juridique. Le mot signifie simplement un sujet de droit, un être capable d’avoir des droits subjectifs lui appartenant en propre, rien de plus,—rien de moins.”
As a corporate entity is not a rational being, is not capable of understanding the law’s commands, and has no will which can be affected by threats of legal punishment, it follows—if demonstration be needed of a self-evident fact—that a corporation is not a real person, if the word “person” be used in its ordinary sense. In addressing commands to a corporation, the law can speak only to the human beings who compose it or who manage and control its destinies. In form, punishment for violation of those commands may be inflicted on the corporate entity, but in so doing the law is using the corporate entity as a mere means of reaching the human beings who act for the corporation. Whether this method of reaching those human beings is the best or most effective need not now be considered. The point here is that in denouncing its penalties upon corporations, the law is using the corporate entity as a mere sight to direct its shots towards the human beings who are behind the entity. This is the truth epigrammatically expressed in American politics by the phrase, “Guilt is personal.”

So too, even in respect to rights attributed to the corporate entity, the object of the law is to carry those rights to the human beings who, collectively, compose the corporation and constitute, according to a foreign expression, its substratum. For although, as we have seen, the law might recognize other beings than men as possessors of rights, yet in fact neither our law, nor any existing system of law, does do so, except to a very limited extent. The law, as already mentioned, does recognize, and punish the infraction of, certain very imperfect rights possessed by the lower animals, and it does recognize and enforce rights of unborn children. But in the broad and large sense, the Declaration of Independence states an undeniable fact when it asserts that governments are instituted “among men”—not among animals or angels, but men—and that it is men whose inalienable rights to life, liberty and the pursuit of happiness the laws attempt to secure. Corporations are created, or allowed to be formed, by the state merely for the purpose of benefiting human beings.\textsuperscript{14}

For the rights of ideal entities, as such, the state has no concern. In the last analysis, it is men and not legal entities whose rights and liabilities the courts must decide. The corporate entity, or personification, which we call a corporation is regarded as having rights and liabilities for the sake of convenience; but it is men of flesh and blood, of like passions with ourselves, who must in one form or another and in varying degrees enjoy the rights and bear the burdens attributed by the law to the corporate entity.

Therefore, the proposition “A corporation is a person” is either a mere metaphor or is a fiction of law. This is the element of truth in the “fiction theory” of the corporate entity which both in England and on the Continent may be regarded as the orthodox doctrine.

But although corporate personality is a fiction, the entity which is personified is no fiction. The union of the members is no fiction. The acting as if they were one person is no mere metaphor. In a word, although corporate personality is a fiction, yet it is a fiction founded upon fact. It is as natural to personify a body of men united in a form like that of the ordinary company as it is to personify a ship. To argue that because the personality of a corporation is a product of the imagination, therefore the corporation itself, as anything different from the separate members, is a fiction would be as reasonable as to argue that because a ship is not really a female, and is personified only by way of metaphor, therefore it has no real existence except as a number of boards and nails.

To appreciate the difference between an imaginary personality, such as that of a corporation, which is a natural and spontaneous expression in figurative language of actual facts, and a purely fictitious person, whose existence is no mere personification of a real but impersonal entity, it is only necessary to refer to some purely fictitious personalities. For there are, or have been, fictitious personalities existing only in contemplation of law; but they are very different from corporations. The fictions in ejectment present the best example. John Doe, the common lessee, and Richard Roe, the casual ejector, exist only in contemplation of law. They are pure legal fictions. They represent no natural idea. They are no mere personification by the law of real entities, but are forthright creations of the legal imagination. They cannot, like corporations, bridge rivers, pierce mountains, unite cities, cross seas, control commerce, and accomplish all manner of other visible and tangible results. Yet, so misleading are the standard definitions of a corporation that they are more justly applicable to such truly fictitious persons as John Doe and Richard Roe than to the very real things which we call corporations. For instance, Chief Justice Marshall’s famous definition of a corporation,\textsuperscript{15} with the substitution of the masculine gender for the

\textsuperscript{13} Note, however, that Zitelmann maintains that a corporation possesses an “emheitlichen Willen,” or “VerbandswiUen.” Binder, Das Problem der juristischen Persönlichkeit, 22-23, criticising Zitelmann’s theory on the ground that this will is of a very different character from the will of a person in the ethical sense. See also passage from Macaulay to be quoted in the continuation of this article.

\textsuperscript{14} Ihering makes this proposition the basis of his conclusion that the real subject of rights is not the corporation but the individual members. “Niemand wird darüber im Zweifel sein, dass die einzelnen Mitglieder es sind, denen die Rechte, mit denen die juristische Person ausgestaltet ist, zugute kommen, und dass diese Wirkung nicht eine zufällige ist, sondern dass sie den Zweck des ganzen Verhältnisses bildet, dass also die einzelnen Mitglieder die wahren Destinatäre der juristischen Person sind.” Ihering, Geist des römischen Rechts, III, 356, quoted by Binder, Das Problem der juristischen Persönlichkeit, 25.

\textsuperscript{15} Dartmouth College v. Woodward, 4 Wheat. (U.S.) 518, 636
neuter gender and of the word “law” for “charter,”
accurately defines John Doe or Richard Roe. The
common lessee, the definition would then read, is “an
artificial being, invisible, intangible, and existing only in
contemplation of law. Being the mere creature of law, he
possesses only those properties which the law of his
creation confers upon him, either expressly or as
incidental to his very existence. Those are such as are
supposed to be best calculated to effect the object for
which he is created.” Are we therefore to conclude that
the only difference between John Doe and a corporation is
one of sex? No conception of the corporate entity which
would define it in terms appropriate to the casual ejector
or the common lessee can be correct.

Part 2

In the former portion of this article, some of the leading
foreign theories as to the nature of corporate personality,
which in recent years have been promulgated by French,
German, and Italian jurists with indefatigable industry and
notable learning and brilliance, were briefly outlined; a
short statement was made of the traditional doctrine of
Anglo-American law upon the subject, and some of the
inconsistencies of that doctrine were mentioned; and
afterwards an examination of the subject on principle was
begun. The result of this examination was the conclusion
that a corporation, or indeed any group or succession of
men—such as the Church, or an army, or a political party
is a real entity—something other than the mere sum of the
members for the time being; but that this entity is actually
impersonal, and is regarded as a person only by way of
metaphor or by a fiction of law. We now proceed to test
this theory that a corporation is a real but impersonal
entity, which is personified by a legal fiction or metaphor,
by applying it to various situations and questions which
arise in corporation law. We shall then consider the use, if
any, of the fiction of corporate personality, and certain
classes of errors in its application. Lastly, the article will
conclude with a practical suggestion as to the best method
of treating and studying the doctrine of corporate
personality.

5. Most of the objections which have been so strongly
urged in France and Germany against the fiction theory of
corporate personality will be found upon examination to
militate against the theory that the corporate entity is a
fiction rather than against the theory that the personality
of that entity is fictitious. For instance, one of those
objections is that the state, the sovereign, the source of
law and fountain of justice, cannot be a fiction; and that
therefore no theory can be tenable which would treat the
existence of all corporations, including the state, as
toxic. But the simple reply is that while the
personality of the state is a fiction, the existence of the
state as an entity is real. The state, like other corporations,
is actually an impersonal entity; by a legal fiction or
metaphor, that impersonal entity is regarded as a person.
Uncle Sam is a fictitious person; but the government of
the United States is a reality.

This theory of the nature of corporate existence and
personality—the one being real, the other imaginary or
metaphorical—will be found to remove many of the
historic difficulties which the courts have encountered in
corporation law.

For example, if the corporate personality is imaginary,
there is no limit to the characteristics and capacities which
may be attributed to that personality. Thus, the old
difficulty, which so long troubled our courts, that a
corporation has no mind and is therefore incapable of
entertaining malice, of contriving a fraud, or of doing any
other act involving a mental state, vanishes. If you can
imagine that a corporate entity is a person, you can also
imagine that this person has a mind. Consequently,
corporations can be guilty of fraud, of malice, or of
crimes involving a particular mental state. To take the
opposite view would be like arguing that Hamlet must
have been insane, because he was a fictitious person and
therefore could have no mind.

Similarly, the famous dictum of Sir Edward Coke that
corporations cannot be excommunicated because they
have no souls, is seen to be illogical. This is illustrated by
the history of the canon law, from which Coke derived his
statement. Thus, Innocent IV held that corporations, or
universitates, could not take an oath, or be baptized or
excommunicated, because “universitas non habet corpus
nec animam, est res inanimata”, but later it was
reasoned, “licet non habeant veram personam, tamen
habent personam fictam, habent personam fictam juris, et sic
edad fictione animam habent et delinquere possunt et puniri.”

To this power of the legal imagination the only limit—if
limit it can be called—is set by the futility of extending to
an absurdity the conception of corporate personality. For
instance, it is often said that a corporation cannot be
imprisoned, because it has no body. Now, this statement
is not logical. For if we can imagine a corporation to be a
person, we can also imagine that this person possesses a
body capable of being imprisoned. The law is, therefore,
able to impute to a corporation a body and to imagine this
body as imprisoned. But cui bono? A threat of imaginary

16 Michoud, La Théorie de la Personnalité Morale, secs. 9-12.

17 Hence it is not true, as stated by M. Michoud, in La Théorie
de la Personnalité Morale, sec. ii, that only the conception of the
state as a person can save its unity.

18 Ferrara, Le Persone Giuridiche, 77; Binder, Das Problem der
juristischen Persönlichkeit, 4.

19 Binder, Das Problem der juristischen Persönlichkeit, 6.

20 I Bl. Comm. 476.
punishment would not deter any rational being from wrongdoing; and we have seen above that only rational beings can be subject to the law’s commands. To be sure, if the imaginary imprisonment of the corporate person involved the actual imprisonment of some of its members, the latter might be deterred from illegal action on behalf of the corporation by the fear of such punishment. The law refrains from the conception of imprisonment of the corporate person not because the legal imagination cannot go to that length, but because to carry the metaphor so far would provoke a smile, and would serve no good purpose.

It follows, also, that in rerum naturæ there is no distinction between a personified entity and an entity not personified. All such distinctions depend on positive law. For instance, one state may personify a body of men which the law of their domicile and of their organization expressly declares shall not be personified.21 The legal imagination can personify a body of men however loosely bound together; and on the other hand it may refrain from personifying a body of men whose organization is of a character ordinarily and naturally regarded as corporate. There is, therefore, no régime personifiant, as a brilliant French writer has contended.22 There are some associations which it is more natural to personify than others; there are none that it is impossible to personify.

For example, the human mind is so constituted that it is difficult not to personify a compact hierarchy like the Roman Catholic Church. We instinctively speak and think of that organization as a person; and the law finds it difficult or impossible to refrain from doing the same.23 But the power of imagination is not strained to its utmost by regarding such a close organization as a person. On the contrary, the most extreme Protestant, whose conception of the Catholic Church is that of a disorganized, incoherent, scattered body of believers, nevertheless personifies that disconnected number of men, who are bound together by no organic tie; and he uses in reference to them the same personal pronouns, adjectives, and appellations that are applied to the Roman Catholic Church. Even a purely inanimate object may be personified.24 For instance, in admiralty law a ship is to some extent personified.

Consequently, the distinction between a personified company, or corporation, and an unincorporated company, or company not personified, depending as it does upon positive law rather than upon any natural differences between the two classes of companies, is of the haziest character. When the matter is considered in this light we see the reason for the difficulty, not to say impossibility, which has been encountered in attempting to draw the line between an incorporated or personified body and an unincorporated body. What is the criterion? Is it limited liability? Surely not; for there are corporations the liability of whose members is unlimited, and unincorporated companies whose members enjoy limited liability. Is it continuous succession, or the capacity for transfer or transmission of shares? That cannot be; for membership in some corporations is not transferable, while shares in many unincorporated companies may be freely aliened. We might go on through the whole list of usual distinctions between incorporated and unincorporated associations, and demonstrate that no one of them is controlling. The case becomes still clearer when we note that in French law one of the most strongly emphasized distinctions between a personified company and a company not personified is that in the former case the joint creditors enjoy a preference in respect to the joint assets over the separate creditors of the several members, while in the case of a company not personified the joint creditors rank pari passu.25 Yet we of the common law are quite familiar with the fact that with us, even in the case of a mere partnership, which is not personified, the joint creditors are entitled to a preference. The truth is that there is no characteristic, and no group of characteristics, which can be possessed by no companies except such as must be regarded as incorporated or personified. The law can personify any group or succession of men whatsoever, and yet may provide that it shall not possess any one of the usual characteristics of a corporation; and conversely it may declare that an association which possesses none of those characteristics shall nevertheless be personified.

6. What then, it may be asked, is the advantage of the exercise of the legal imagination by personifying some groups of men? Cannot the state legislate directly? Why

21 Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U.S.) 566.
22 De Vareilles-Sommières, Les Personnes Morales, sec. 847 et seq.
23 Ponce v. Roman Catholic Church, 210 U.S. 296.
24 “In popular language, and in legal language also, when strictness of speech is not called for, the device of personification is extensively used. We speak of the estate of a deceased person as if it were itself a person. We say that it owes debts, or has debts owing to it, or is insolvent. The law, however, recognizes no legal personality in such a case. The rights and liabilities of a dead man devolve upon his heirs, executors, and administrators, not upon any fictitious person known as his estate. Similarly, we speak of a piece of land as

entitled to a servitude, such as a right of way over another piece. So, also, in the case of common interests and actions, we personify as a single person the group of individuals concerned, even though the law recognizes no body corporate. We speak of a firm as a person distinct from the individual partners. We speak of a jury, a bench of judges, a public meeting, the community itself, as being itself a person instead of merely a group or society of persons.” Salmond, Jurisprudence, 2 ed., 283.
does it need the aid of a fiction? asks M. de Vareilles-Sommières. Then that witty writer takes up one by one the supposed results of the personification of the corporate entity, and demonstrates conclusively that each and all of them, as stated in the last paragraph, may be laid down by the law without the aid of any fiction, and without the intervention of any imaginary personality. Nevertheless the personification of the corporate entity serves many a useful purpose. If a code of corporation law could foresee and provide for every possible case to arise in the future, then indeed, as contended by M. de Vareilles-Sommières, it might dispense with personification of the corporate entity, and might legislate directly for every conceivable case. But, unfortunately, it is impossible thus to provide explicitly for every conceivable case. In spite of every precaution, the *casus omissus* will occur; and when it does, then the doctrine of corporate personality comes into play. For the law, recognizing its inability to provide specifically for every case that may arise, after laying down certain rules which make the personification of the corporate entity natural and almost inevitable,—limited liability, continuous succession, unified management, power to sue and be sued, and to take or convey property in the corporate name, goes on to exact, in effect, that in all other cases, not expressly so provided for, the company shall be treated as if it were a person, or in other words shall be conceived of as a person, or shall be an imaginary or fictitious person.

The conception of corporate personality is a simplification of the processes of thought. Its function is similar to that of an algebraic symbol. A mathematician finds it difficult to carry in his head a complicated expression such as \(x^2 + 3ax + b^2\); and in order to simplify his mental processes he says to himself, “Let \(y = x^2 + 3ax + b^2\);” and then he uses \(y\) in his calculations instead of the longer and more cumbersome expression. So it is with the imaginary corporate personality in legal calculations. The lawyer finds himself unable to solve his problems if he thinks of a corporation not as a personified unit but as a shifting body of shareholders, or even as a real but impersonal entity; and he therefore says to himself, in effect, “Let the corporate personality equal the changing body of shareholders in respect to their relations to the joint property.” By substituting the more compact idea for the more elaborate, he is enabled to reach correct results with less mental effort.

The mathematician recognizes that his \(a\)’s and his \(b\)’s, his \(x\)’s and \(y\)’s, have no existence except in his imagination, and that when he attempts to apply his calculations to practical affairs—for example, to determine the stress which a bridge is capable of bearing or the distance which a projectile will carry—he must convert his symbols into figures; but he does not overlook the assistance which those symbols have been to him in obtaining his practical results. So a judge, in order to work out a problem in the law of corporations, often finds it convenient to make use of the imaginary corporate person in his calculations; but he must recognize that ultimately the effect of his decree, although it may be expressed in terms of the corporate personality, must be the determination of the rights and liabilities of actual human beings.

Let us take an illustration of this use of the corporate fiction. The regulations of a certain company provide that the directors may exercise all the powers of the corporation except that no bonds shall be issued or mortgage executed without the prior approval of a shareholders’ meeting. Nevertheless, without such approval, the directors issue bonds, and execute a mortgage to secure them. Are the bonds valid secured obligations of the company? In order to solve this problem, it is convenient to conceive of the corporation as a personality giving commands to the directors as his or its agents. We say, therefore, that we will regard the bonds as issued by the directors as agents of the imaginary corporate personality in violation of restrictions upon their authority; and as third persons, dealing with the agents, could not justly be expected to see to compliance with such restrictions, therefore, applying the law of agency, we reach the conclusion that the bonds are valid in the hands of innocent third persons. We then drop the symbol of the corporate personality which has been useful to us in reaching our conclusion, and we express the net result in terms of the rights of actual persons by adjudging that the bondholders take the assets and the shareholders get nothing.

26 De Vareilles-Sommières, Les Personnes Morales, sec. 382: “Pourquoi, encore une fois, la loi recourrait-elle à la fiction? Pour s’autoriser elle-même à prendre des mesures qui sont justes ou utiles? A-t-elle besoin de ce détour? Ne peut-elle aller droit au but? N’est-elle pas la maîtresse absolue de faire les règles qu’elle croit bonnes, sans avoir à justifier d’autre chose que de leur sagesse? Les lois sont les rapports nécessaires qui découvrent de la nature des choses; c’est dans les entrailles de la réalité et non dans la domaine de l’imagination qu’elles ont leur raison d’être et leur justification. Quel législateur peut avoir l’étrange idée de se croire obligé de créer un fantôme pour donner satisfaction à des intérêts pratiques, et de rattacher à une chimère des mesures réformées par le bien public?”


28 *Cf.* Willmott v. London Road Car Co. [1910], 2 Ch. 525.

7. The application of this doctrine of corporate personality seems to be beset with pitfalls as well for the cautious as the unvary.

On the one hand is the temptation to shrink from a logical application of the doctrine, and to refuse to apply it in cases where it ought to be applied. For, if we are to use this conception of a corporation as a person—and we have seen above that we can escape from reasoning to
some extent in terms of that conception—we must carry it out consistently. We cannot capriciously drop the corporate personality from our legal reasoning at any moment when the inclination strikes us. Imagine a mathematician who, at some stage of an intricate problem, should suddenly say to himself, “The square root of minus one is a mere figment of the imagination. I will simply draw a pen through the square root of minus one in this term of this equation; for surely no harm can result from striking out a fictitious and imaginary quantity.” Such a mathematician would soon find himself in difficulties, and his final result would be tainted with error. So it is with a lawyer who at some stage of a problem in corporation law determines unceremoniously to drop the conception of a corporation as a person, in order, as he thinks, to eliminate from the calculations a complicating factor. He confuses instead of simplifying his reasoning, and he vitiates the soundness of his conclusions.

The fact that in a particular case the application of the rule that a corporation is to be treated as a person will work hardship is no reason whatever for departing from the theory. For example, if the theory of a corporate entity is to be of any assistance to the courts, actions or suits to redress injuries to the corporation must be brought in the corporate name. Now, if by a blunder of a solicitor, a suit is brought not in the name of the corporation but in the individual names of all the shareholders, hardship may be caused in a particular case by dismissing the bill. Perhaps the statute of limitations would bar a new suit in the name of the corporation. Yet of course that hardship is no reason whatever for permitting the suit by shareholders in their own names to be maintained, in violation of legal theory.

To take another illustration, suppose that one man acquires all the shares of a corporation and then by deed in his own individual name conveys to A a tract of land the title to which is vested in the corporation. The temptation is strong to hold that A gets a good legal title to the land; 29 for why should he suffer loss because the law regards the corporation as a person and does not recognize a deed by the shareholders as equivalent to a deed by the corporation? Nevertheless, to hold that A has a good legal title to the land would be a departure from the theory of a corporation as a person and, while it might avoid hardship in some particular case, would in the long run work more injustice that it avoids. For in stnce, if such a deed conveys a good title at law, a subsequent bona fide purchaser from the corporation would get no title to the land, although the land records would furnish him no information that the title had passed from the corporation; for of course the deed in the name of the shareholder would not be indexed under the name of the corporation, so that a conveyancer examining the records for conveyances by the corporation would be quite unable to find the deed.

When tempted to disregard the doctrine of corporate personality, we may often find it helpful to concentrate attention, not upon that legal dogma, but upon the hard-and-fast rules of law which have been deduced from the dogma or from which that dogma has been deduced. 30 For instance, the rule that actions or suits to enforce corporate rights must be in the corporate name may have been deduced from the legal rule that in all casus omisssi a corporation shall be regarded as if it were a single person, or it may have been one of the rules specifically prescribed for the government of companies, which induced the generalization that such companies shall be regarded as if each were a single person; but, whatever may have been the historical origin of the rule, it is now as well fixed in the law as if some act of the legislature expressly provided that all actions to enforce corporate rights shall be instituted in the name of the corporation. Consequently in enforcing that rule the courts need not now resort to the doctrine of corporate personality to justify their decisions; to do so is rather confusing. When a court is asked to suspend that rule in favor of some particular litigant, as in the case suggested in a former paragraph, the question is not so much whether the court will “go behind the corporate entity” as whether it will suspend an established rule of law, which may or may not have had its origin in the doctrine of corporate personality.

The difficulty comes where no controlling rule has been laid down by statute or by authoritative judicial decision and where the question arises whether, in some case not specifically so governed, a corporation shall be regarded as if it were a person. For instance, a statute is passed applicable to “persons.” Are corporations within that statute? This is a question which, in the absence of any dear indication of legislative intent one way or the other, may properly be decided by applying the legal fiction of corporate personality. In all such cases, however, considerable latitude must be allowed to judicial discretion.

But the temptation to apply the doctrine of corporate personality too sparingly is much less insidious than the temptation to apply it too freely. For notwithstanding the indispensable assistance which is afforded by the conception of a corporation as a person in solving legal problems, yet that idea should not be exalted into a divinity, or a great mysterious dogma, before which as loyal disciples of the common law we must stand in reverent awe, believing where we cannot prove. There is no command to fall down and worship the imaginary


30 As to the divergence of opinion whether certain rules of law are the causes or the consequences of the personification of corporations, see de Vareilles-Sommières, Les Personnes Morales, sec. 482.
corporate personality, like the golden image which Nebuchadnezzar set up. Still less should the doctrine of the corporate fiction be treated as an oracle to be consulted on every question in corporation law. It does not, like Wamba’s “Pax vobiscum,” constitute an answer to every question. To the points at issue in the great majority of cases in corporation law that now come before the courts, the doctrine of the corporate fiction is quite irrelevant, and only harm can come from attempting to apply it.

For example, take a recent case in which the Supreme Court of the United States and the Supreme Court of Massachusetts have differed in opinion. The facts were, in brief, as follows: Certain promoters had organized a corporation for the purpose of buying certain property to which they themselves held the title. The sale was made and consummated at a time when they and their confederates constituted the board of directors and held all the outstanding shares of the corporation, so that all the persons then interested were fully apprised of the facts. The total authorized number of shares had not, however, at that time been issued, but the promoters contemplated offering them for public subscription. Afterwards, they were subscribed and taken by the public. The new subscribers thus obtained control of the corporation and ascertained that the price paid to the promoters for the property was excessive. The question was whether the sale could be impeached by the corporation as constituted after the public subscribers had become members. The Supreme Court held that it could not,31 and the reason assigned was that the corporation after the public subscription of the shares continued to be the same entity as it was at the time the purchase was made with the full and free approval of every person then holding shares. Now, it is submitted that in thus lugging in, if the expression may be pardoned, the doctrine of the corporate entity, the court merely diverted attention from the real issue. Without doubt, a corporation is a legal entity so that if it was irrevocably bound at the time the purchase was made, the fact that other persons who were kept in ignorance of the true circumstances subsequently became shareholders would not confer upon the entity the right to undo a transaction by which it had formerly been bound. But what was the real question before the court? Was not the real question whether or not the corporation in the first days of its organization, when its destinies were in the hands of promoters who contemplated transferring control to future subscribers, was under a disability, in a court of equity, analogous to that of infancy, so that its consent given at that time was no less voidable than the consent of an infant would have been? With that question the doctrine of the corporate personality had nothing whatever to do.

Yet many lawyers find as great difficulty in keeping the doctrine of corporate personality out of their legal reasoning as Mr. Dick experienced in keeping Charles the First’s head out of his memorial.32 Infinite harm has come from assuming that the doctrine of corporate fiction will solve all problems in the law of corporations.

One cause of this unfortunate tendency to regard the corporate fiction as a touchstone to be applied to all questions connected with corporations—a tendency which is evinced by those who affect to disapprove the doctrine that a corporation is a separate entity or personality, almost as much as by those who earnestly preach that doctrine—one cause of this tendency is the belief that has been noticed above that the conception of the corporate entity is something very technical. We lawyers are naturally prone to take an especial interest in those rules of law which are most inexplicable to the lay mind. We like to perch ourselves upon some pinnacle of learning from which we may look down with complacency upon the whole world that lieth in darkness at our feet. This is the secret of the fascination of the rule in Shelley’s Case for many lawyers. It is a sacred mystery into which the uninitiated cannot pry. In consequence of the scholastic terms in which the doctrine that a corporation is an entity, and that this entity is a person, has been handed down to us, we have erroneously come to regard it too as one of these mysteries of the profession, and have therefore taken a delight in applying it on all possible occasions—even on some occasions in which its application was in reason impossible.33 The writer cannot claim an exemption from this tendency to apply the doctrine of the corporate fiction to cases where it properly has no application.34 But the subtlety of this temptation ought to serve as a warning against this dangerous error of overestimating the importance of the denial, or acceptance, of the conception of a corporation as a legal entity or person, and of treating the doctrine as the decisive point in many cases with which it really has nothing to do.

Particularly, in any discussion as to the justice or injustice of a proposed rule, the fiction of corporate personality is altogether irrelevant. The corporate fiction has no proper place in legislative debates. In order to determine whether a law is just or unjust, its effect upon human beings, and not corporate personalities, must be considered. Yet nothing is more common than an effort to justify the justice or policy of certain laws by means of the doctrine

31 Old Dominion Copper Co. v. Lewisohn, 210 U. S. 206. Contra, Old Dominion Copper Co. v. Bigelow, 88 Mass. 315, 89 N. E. 193. See also Mason v. Carrothers, 74 Atl. 1030 (Me.).

32 For instance, a learned Italian writer, after mentioning a long list of mooted questions in company law, adds, “A tutte queste domande è la teoria della personalità giuridica che deve dare una risposta.” Ferrara, Le Persone Giuridiche, 2.

33 See passage from de Vareilles-Sommières, Les Personnes Morales, quoted infra, note 25.

34 See 10 Col. L. Rev. 183, criticising, perhaps not without justice, a statement by the present writer.
of corporate personality. Thus, in the French Revolution, the republicans sought to justify confiscation of property belonging to corporations, under the plea that the property in question belonged, not to human beings, but to legal personalities whose existence depended upon the gracious pleasure of the state and might therefore be terminated at any time, so as to leave their property without an owner and to cause it to escheat to the state.\textsuperscript{35} We stand aghast at these excuses; but even in America similar excuses for unjust laws are often heard in our halls of legislation.

The distinction between the abuse and the legitimate use of the doctrine of corporate personality may be made dearer by a concrete case. The question has often arisen whether the dispensing of liquor by an incorporated club to its members is within the meaning of laws regulating or prohibiting the sale of intoxicating liquors; and a majority of the courts before whom the point has come have held, applying the doctrine of the corporate fiction, that when an incorporated club, which is in law a person, transfers liquor to one of its members, a sale takes place from one person to another, and that such a transfer is therefore within the statute. This is a perfectly proper application of the doctrine that a corporation is to be regarded in law as if it were a person. But suppose the question should come before the legislature whether such laws ought to be so framed as to exempt incorporated clubs selling liquors to their members. Opponents of such an exemption would be very apt to base their arguments in part upon the doctrine of corporate personality, and to contend that because a corporation is a legal person it ought in reason and justice to be governed by the same rules as other persons. Yet it is perfectly dear that the legislature can only be confused by such an argument. For the justice or injustice, the policy or impolicy, of the proposed exemption must be judged with reference to actual facts and not with reference to legal fictions.

Another illustration of the mistaken extension of the corporation fiction to the domain of politics will suffice. Gladstone, in his Tory days, reasoning in support of a religious establishment, contended that the state is a person, and therefore bound like natural persons to maintain divine worship. He was, of course, not so illogical as to base his argument on any legal fiction that the state is a person, but he reasoned, or assumed, with Gierke and his school, that the entity formed by the cooperate union of natural persons is a real person. Had he adopted what we conceive to be the true doctrine that such an entity is really impersonal and is regarded as a person only by way of metaphor or legal fiction, the fallacy of founding an argument in support of a state church on so sandy a foundation would have been apparent. As it was, his critic, Macaulay, confuted him by a \textit{reductio ad absurdum}, showing that every collection of individuals is a person in the same sense as the state, so that Gladstone’s argument would lead to the absurdity that every collection of individuals would be bound to support a church. Said Macaulay:

> “Is it not perfectly clear that this argument applies with exactly as much force to every combination of human beings for a common purpose as to governments? \textit{Is there any such combination in the world, whether technically a corporation or not, which has not this collective personality} from which Mr. Gladstone deduces such extraordinary consequences? Look at banks, insurance offices, dock companies, gas companies, hospitals, dispensaries, associations for the relief of the poor, associations for apprehending malefactors, associations of medical pupils for procuring subjects, associations of country gentlemen for keeping foxhounds, book societies, benefit societies, clubs of all ranks, from those which have lined Pall Mall and St. James’s Street with their palaces, down to the Free-and-easy which meets in the shabby parlour of a village inn. Is there a single one of these combinations to which Mr. Gladstone’s argument will not apply as well as to the state? In all these combinations, in the Bank of England, for example, in the Athenæum club, the will and agency of the society are one, and bind the dissentient minority. The Bank and the Athenæum have good faith and a justice different from the good faith and justice of the individual members. The Bank is a person to those who deposit bullion with it. The Athenæum is a person to the butcher and the wine-merchant.”\textsuperscript{36}

7. Above all, we should lay to heart the utter futility, and worse, of speaking or thinking of a corporation as “endowed by the state with personality.” Such expressions are very common both with us and on the Continent of Europe. Yet they are devoid of value. So far as corporate entities are real, they rise into being whenever men cooperate for a common purpose, quite independently of the state.

The state may strive to suppress them, as many rulers have done; but the difficulty which such rulers have encountered is enough to demonstrate that the beings they sought to suppress were not created by the power which found such difficulty in suppressing them.\textsuperscript{37} Indeed, we ourselves see how the state is sometimes forced to recognize in part the existence of de facto corporations which, being formed contrary to its laws, certainly cannot be regarded as created by it. Moreover, if corporations are endowed with personality by the state, who endowed the state, which also is a corporation, with that mysterious

\textsuperscript{35} De Vareilles-Sommières, Les Personnes Morales, 65; x Michoud, La Théorie de la Personnalité Morale, 380-381.

\textsuperscript{36} Macaulay’s “Gladstone on Church and State,” Works (London, 1875), vol. 6, P337

\textsuperscript{37} I Michoud, La Théorie de la Personnalité Morale, 33-34.
attribute? On the other hand, so far as a corporate entity is personal, its personality is fictitious, or metaphorical; and it is not “endowed with personality by the state” for the simple reason that its personality is imaginary. As well speak of John Doe or Richard Roe as endowed by the state with personality.

Still more erroneous is it to speak of corporate personality as a privilege conceded by the state. This notion that corporate personality is some mysterious gift from a higher power, bestowed like manna from heaven, goes back, like so much that is confusing in this matter of the corporate entity, to the Roman law. Corporate personality is not a concession from the state, and it is not properly a privilege. So far as it is real, it is a fact recognized but not created by the state; and so far, if at all, as it comes from the state, it is imaginary, and is, therefore, like any other imaginary gift, of no value. All manner of injustice and false reasoning have resulted from the conception of corporate personality as a great privilege presented to loyal subjects by a gracious sovereign.

That the mysterious personality attributed by the courts to an incorporated body of men is of little or no deep legal importance is taught by the extraordinary difficulty of determining whether a given body of men possess this attribute of legal personality, and the uncertainty of the consequences which should follow from its possession. What are the necessary legal consequences of endowing a body of men with this mysterious attribute of a corporate personality? What vital distinction is there between a corporation and a voluntary association? The courts have never been able to find a satisfactory answer. Such intangible distinctions ought not to be emphasized by the law.

Of course, there may be fine distinctions that are yet of great importance. But in all such cases, however great may be the difficulty of drawing the line, yet as soon as it has been determined that a case falls on a particular side of the line there is no doubt that very different rules are to be applied than if it had fallen on the other. In such cases the distinction, however difficult to draw, is very useful, and indeed indispensable. Thus the distinction between a mushroom and a toadstool may be a fine one, but it cannot safely be ignored. Whatever may be the difficulty in determining to which class a certain fungus belongs, once that question is answered there is no doubt at all but that the growth is to be treated very differently from the way it ought to have been treated if it had been determined to belong to the other category.

There are many instances in the law of similar fine but necessary distinctions. For instance, take the distinction between a vested and a contingent remainder. Nothing may be more difficult than to determine whether a given limitation in a deed or will is vested or contingent. Lawyers constantly differ upon the question; and the judges, who are forced to decide one way or the other, doubtless often feel that a toss of a penny would furnish the most satisfactory mode of reaching a conclusion. Yet, if once the limitation in question is decided to be vested, there is no doubt about the rules of law by which it is to be governed, and no doubt that those rules of law are very different from those that would have applied if the limitation had been determined to be contingent. Such a distinction is serviceable.

The distinction between those associations which are to be regarded as fictitious legal persons, or in other words corporations, and those which are not, is not of this character. One association will possess certain rights and attributes and be subject to certain liabilities; and the courts will pronounce it a corporate entity. Another association will be judicially declared not to be such an entity, and yet it will possess according to the laws under which it is formed exactly the same rights and attributes and be subject to exactly the same liabilities as the other association.

9. What then is the practical conclusion? What are the results of this discussion? The conclusion is that the somewhat confused and self-contradictory statements which we have inherited through Coke and Blackstone from the Roman law and the canon law, and the modern metaphysical discussions in Europe about the nature of corporate personality, combine to teach that we shall walk most safely if we pay least heed to our footsteps, trusting to nature and to common sense to guide our feet in the way they should go. The doctrine of corporate personality is a natural though figurative expression of actual facts. It is only by study and artificiality that we can train ourselves to make it confusing or misleading. The best method of dealing with the doctrine that a corporation is a legal personality is, therefore, to think less about it. The conception itself is a natural one. We do not need to be instructed to regard a corporation as an entity and to regard that entity as a person: our minds are so constituted that we cannot help taking that view. Being a natural conception, it will tend to find its proper place in the law, if only we cease to regard it as something mysterious or technical.
Arbitrary, technical rules must be carefully studied in order to be properly applied. For example, nobody would assert that the application of the rule against perpetuities could safely be left to the natural man. But in applying natural rules or principles, study leads to artificiality. If the truth that twice two makes four had been stated as an abstruse technical doctrine and embedded in a mass of legal terms, we should be much less liable to error by trusting to the multiplication table than by striving to understand and bear in mind the technical statement.

The case with respect to the doctrine of the corporate entity, although similar in kind, is unfortunately not so simple. In the first place, the conception of a corporate personality, although natural and simple, is not so natural or so simple as the conception of twice two as equivalent to four. Consequently, it is not possible to the same extent to dispense with explanations of its legal effect. In the second place, we cannot by an effort of will efface the memory of the familiar terms in which from the earliest days of our legal education we have heard the doctrine of the corporate entity stated. But we can, and should, fully recognize that the conception is simple and natural, and should endeavor to apply it, though logically and consistently, yet simply and naturally, and not artificially. This is the explanation of the fact, observed with wonder by some jurists, that all the scholarship which has been devoted to the subject in Europe in recent years has only served to increase the confusion.

The feasibility of treating the doctrine naturally and yet logically is shown by the state of the law in England. The English courts apply the doctrine at least as logically and consistently as the American courts—perhaps more logically and consistently than we do—and yet the doctrine has received an insignificant degree of consideration in modern English law. Our nomenclature, “law of corporations,” tends to accentuate the importance of the doctrine of corporate personality, whereas the corresponding expression in England, “law of companies,” tends to relegate it to its proper place. Lord Lindley’s great work on the law of companies, from beginning to end, contains no definition of a corporation, and no discussion of the distinction between a corporation and an unincorporated company. Mr. Hamilton begins his treatise with a definition of a corporation, but he is obliged to resort to an American case as the source of the definition, and from that point on has little or nothing to say on the subject. The very title of Lord Lindley’s book, “The Law of Companies considered as a Branch of the Law of Partnership,” shows that he is not troubled by abstruse distinctions between companies that are, and those that are not, metaphysical legal persons. Yet, if an American lawyer should publish a book under Lord Lindley’s title, he would probably find few purchasers. To the old-fashioned American lawyer it would seem about as reasonable to speak of the law of corporations as a branch of the law of partnership, as to speak of the law of libel as a branch of the law of contingent remainders.

This, then, is the comforting conclusion. We need only trust to nature and strive to forget or disregard the technical rules and statements of doctrine in which we have been educated. As scholars, or as students of the history of jurisprudence, we may peruse with interest the erudite and brilliant essays of French, German, and Italian jurists, but as practical lawyers we may and should disregard all that wealth of learning, contemplating it only as something to be avoided, and as teaching the dangerous character of the similar artificial statements which we find in our own law books. To understand and apply correctly the doctrine of corporate personality, no other guide is desirable than sturdy common sense.

Since the foregoing article was in type, an article entitled “Legal Personality” by Professor W. M. Geldart, an advocate of the reality theory, has appeared in 27 L. Q. Rev. 90. The last-mentioned article informs us that Sir Frederick Pollock has contributed to the recent Gierke Festschrift a discussion of the question, “Has the Common Law received the Fiction Theory of Corporations?” We may look forward to a discussion of the subject by such a master with great interest, not unmindful, however, with apprehension lest the entrance of such a champion into the lists may be the signal for the outbreak in the common-law world of a metaphysical contest similar to that which has absorbed so much attention upon the Continent of Europe.

41 Ferrara, Le Persone Giuridiche, 3. “E singolare che le numerose e sempre più acute e penetranti ricerche, invece di chiarire i problemi, l’hanno di più complicato.” See also the same work, 131-132.

42 Hamilton, Manual of Company Law, I.

The Historic Background of Corporate Legal Personality

John Dewey

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1. Logical Methods of Definition

The survey which is undertaken in this paper points to the conclusion that for the purposes of law the conception of "person" is a legal conception; put roughly, "person" signifies what law makes it signify. If this conclusion had not been disputed, if it were even now generally accepted, if even when it is accepted in substance it were not complicated by the use of non-legal concepts employed to justify certain reasonings and conclusions, this paper would have no particular excuse for being written. For in that case, being a legal concept, it would be one to be discussed by lawyers rather than by a layman. Accordingly, the justification for a layman venturing into the field is precisely the fact that discussions and theories which have influenced legal practice have, with respect to the concept of "person," introduced and depended upon a mass of non-legal considerations: considerations popular, historical, political, moral, philosophical, metaphysical and, in connection with the latter, theological.1 So many of these extraneous influences have received a formulation in philosophy and from thence have proceeded to affect legal doctrines that a student of

1 Thus Geldart, an upholder of the doctrine of "real personality," says: "The question is at bottom not one on which law and legal conceptions have the only or the final voice: it is one which law shares with other sciences, political science, ethics, psychology, and metaphysics." Geldart, Legal Personality (1911) 27 L. Quart. Rev. 90, at 94. On the next page he goes on to assert that "To say that all legal personality—whether of so-called natural or so-called juristic persons—is equally real because in fact the law gives it an existence, and equally artificial or fictitious because it is only the law which gives it an existence, is really to confound personality with capacity." But he makes no attempt to show the difference between them, nor to state what harm would result in law if the two were "confounded." That "artificial" is not synonymous with "fictitious" is shown by Machen, Corporate Personality (1910) 24 Harv. L. Rev. 253, at 257: "That which is artificial is real, and not imaginary; an artificial lake is not an imaginary lake." Again he says: "A corporation cannot be at the same time 'created by the state' and fictitious. If a corporation is 'created' it is real, and therefore cannot be a purely fictitious body having no existence except in the legal imagination." Much the same points were made by Pollock. He says, that "artificial" means "in accordance with rules of art, lawyer-like, juridical," and that "fiction" should be derived from fingere in the sense of creating or making, not feigning. Theory of Corporations in Common Law (1911) 27 L. Quart. Rev. 219, 220, reprinted in Essays in the Law (1922) 153. Geldart's introduction of the word "only" in the phrase "because it is only the law" is like saying of a locomotive that "only" man gives it existence.

2 Maitland, Collected Papers (1911) 307. Throughout this paper, "corporate" is used in its broad sense, of which a business corporation is but a species and which includes bodies not technically incorporated.
members of the corporation would possess a right *sui generis*. In a similar way, even if it were true, as it is not, that “natural person” is a wholly unambiguous term, to term a “natural” person a person in the legal sense is to confer upon it a new, additive and distinctive meaning; a meaning *sui generis*, as far as “natural person” is concerned.

If in justification of a particular decision in some particular and difficult controversy, a court supports itself by appealing to some prior properties of the antecedent non-legal “natural person,” the appeal may help out the particular decision; but it either involves dependence upon non-legal theory, or else it extends the legal concept of “natural person,” or it does both. This statement cuts in two ways. On the one hand, it indicates that much of the difficulty attending the recent discussion of the real personality of corporate bodies is due to going outside the strictly legal sphere, until legal issues have got complicated with other theories, and with former states of scientific knowledge; and on the other hand it suggests that law, at critical times and in dealing with critical issues, has found it difficult to grow in any other way than by taking over contemporary non-jural conceptions and doctrines. Just as the law has grown by taking unto itself practices of antecedent non-legal status, so it has grown by taking unto itself from psychology or philosophy or what not extraneous dogmas and ideas. But just as continued growth with respect to the former requires that law be again changed with great changes in further practices, just as, to be specific, the adoption of the law-merchant will not provide law adequate for the complex industrial relations of today, so it is even more markedly true that old non-legal doctrines which once served to advance rules of law may be obstructive today. We often go on discussing problems in terms of old ideas when the solution of the problem depends upon getting rid of the old ideas, and putting in their place concepts more in accord with the present state of ideas and knowledge. The root difficulty in present controversies about “natural” and associated bodies may be that while we oppose one to the other, or try to find some combining union of the two, what we really need to do is to overhaul the doctrine of personality which underlies both of them.

The purpose of the article is, in other words, to point out some of the non-legal factors which have found their way into the discussion of the personality of so-called natural and artificial persons, and to indicate the original conditions which gave these extraneous factors their efficacy. The postulate, which has been a controlling principle although usually made unconsciously, leading to the merging of popular and philosophical notions of the person with the legal notion, is the conception that before anything can be a jural person it must intrinsically possess certain properties, the existence of which is necessary to constitute anything a person. If the conception as to the nature of these inherent and essential attributes had remained constant perhaps no harm would have resulted from shoving such a notion under the legal idea; the legal doctrine would at least have remained as constant as that of the nature of the seat of personality. But the history of western culture shows a chameleon-like change in the latter notion; this change has never, moreover, effected complete replacement of an earlier by a later idea. Almost all concepts have persisted side by side in a confused intermixture. Hence their influence upon legal doctrine has necessarily been to generate confusion and conflict.

We may illustrate by recourse to Maitland. The quotation above made, taken apart from its context, would appear to use “person” in a neutral sense, as signifying simply a right-and-duty-bearing unit. But actually his discussion depends upon an assumption that there are properties which any unit must antecedently and inherently have in order to be a right-and-duty-bearing unit. They are stated in his summary of Gierke’s position, although the statement is found in another book. A “*universitas* [or corporate body] … is a living organism and a real person, with body and members and a will of its own. Itself can will, itself can act … it is a group-person, and its will is a group-will.” \(^3\) I do not intend to imply that Maitland or Gierke ever adopted all the extreme analogies with an “organism” into his corporate unit, but a “will” he certainly thinks is presupposed for being a legal person. In short, some generic or philosophic concept of personality, that is, some concept expressing the intrinsic character of personality *sui generis*, is implied. And here is room for questions of general theory and the writing of many books to show that legal units do or do not have the properties required by the concept, and that “will” means this or that or the other thing.

Another example will make the implication more explicit. Michoud says: “For legal science, the notion of person is and should remain a purely juridical notion. The word signifies simply a *subject of rights*-duties, [*sujet de droit*] a being capable of having the subjective rights properly belonging to him.” \(^4\) This sounds very much like saying “person” means what the law makes it mean in real distribution of rights and duties—although the word “subjective” prefixed to rights might make wary one who was acquainted with philosophical literature. But Michoud at once goes on to say: “To know if certain beings correspond to this definition, it is not necessary to ask if these beings constitute persons in the philosophical sense of the word. It is enough to ask if they are of such a *nature* that subjective rights may be attributed to them.” Considerations extraneous to law are here nominally excluded, but they are actually taken in under the guise of the necessity of inquiring into the nature of the subjects,

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3 Gierke, *Political Theories of the Middle Age* (1902) xxvi (translated and prefaced by Maitland).

4 Michoud, *La Notion. de Personnalité Morale* (1899) 11 Revue Du Droit Public, 1, at 8.
independently of and prior to the attribution of duty-rights. The word “subject” might have been used in legal theory simply as a descriptive term, denoting whatever is a right-and-duty-bearing unit. But in fact it has not been so used; it has been thought necessary—especially in German theory which has spread—first to define what makes anything properly a subject, as a precondition of having right-duties, and the German theory of “subjectivity” is itself a theme for volumes. This something-or-other must then be the same in whatever has rights and duties. The readiest starting point is a singular man; hence there is imposed the necessity of finding some nature or essence which belongs both to men in the singular and to corporate bodies. If one denies that he can find such a common essence he holds that “person” as applied to corporate bodies denotes only a fiction. But if he denies the fictitious character of a corporate entity, then some personality identical in essence, or with respect to “subjectivity,” must be discovered for all right-and-duty-bearing units, from the singular man on one side (including infants, born and unborn, insane, etc.) to the state on the other, together with all kinds of intervening corporate bodies such as “foundations,” “associations” and corporations in the economic sense. Clearly, this is not an easy task; it is so difficult of accomplishment that it accounts in the main for the voluminous continental literature concerning juridical personality, or as French writers generally say, “Les Personnes Morales.” But this is not the whole story.

“Subject” and “subjectivity” occupy in modern German philosophy (which directly and through writings on jurisprudence has had an enormous influence in Latin countries and considerable in England) the place taken in ancient metaphysics by “substance” and also by “subject” of a judgment in a logical sense. Thus the search for the common essence has been so affected by philosophical theories regarding “the subject” that it is extremely difficult to get the full force of the various solutions proffered for the problem without knowledge of German technical philosophy, that of Kant in particular.

It may be objected, however, that aside from all such philosophical theories regarding an “essence” or “nature” and regarding a “subject,” it is only common sense that whatever is a right-and-duty-bearing unit should have a character of its own in virtue of which it may possess rights-obligations; there must be a subject to which these legal relations belong or in which they inhere or to which, at all events, they are imputed. Otherwise why are not molecules, or trees or tables just as fit candidates for legal attributes as singular men and corporate bodies? The objection seems serious. But consider first an argument ad hominem, or rather ad hoc. There is no general agreement regarding the nature in se of the jural subject; courts and legislators do their work without such agreement, sometimes without any conception or theory at all regarding its nature; it can be shown that recourse to some theory has more than once operated to hinder rather than facilitate the adjudication of a special question of right or obligation. Moreover, English jurisprudence has accomplished by means of “trust” much that Continental law has accomplished by other means. One might then be justified in adopting a position of legal agnosticism, holding that even if there be such an ulterior subject per se, it is no concern of law, since courts can do their work without respect to its nature, much less having to settle it.

It would, however, be retorted that such an attitude does not become jurisprudence, that some theory is implied in the procedure of courts, and that the business of the theory of law is to make explicit what is implied, particularly as false theories have done practical harm, while the lack of intelligent consensus of ideas has encouraged judicial empiricism, and thereby wrought confusion, conflict and uncertainty in specific decisions. This retort brings us to a deeper level. There are two radically different types of definitions; first, the type inherited from Greek logic reflecting a definite metaphysical conception regarding the nature of things. This definition proceeds in terms of an essential and universal inhering nature. There is another mode of definition which proceeds in terms of consequences. In brief, for the latter a thing is—is defined as—what it does, “what-it-does” being stated in terms of specific effects extrinsically wrought in other things. This logical method was first stated by Charles S. Peirce as the pragmatistic rule: “Consider what effects, which might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object.” The mode of definition, however, has no inherent dependence upon pragmatism as a philosophy. It has been stated and adopted on the basis of analysis of mathematics and physics by writers who would be horrified to be called pragmatists. Thus stated, it is the principle known as “extensive abstraction,” and assumes this form: “… what really matters to science is not the inner nature of objects but their mutual relations, and that any set of terms with the right mutual relations will answer all scientific purposes as well as any other set with the same sort of relations.”

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5 The first of these terms have their doctrinal significance in Continental rather than in Anglo-American law, the institution of trusteeship in the latter covering much of the ground. The theory of “associations” derived much of its point in the past from controversies regarding the legal status of religious congregations, to which is now added that of trade-unions.

6 Chance, Love and Logic (1923) 45, edited by Morris B. Cohen. The original article was printed in the Popular Science Monthly for January, 1878.

7 Broad, Scientific Thought (1923) 39. The idea and the name are taken, however, by him from A. N. Whitehead. This is a
From this point of view, the right-and-duty-bearing unit, or subject, signifies whatever has consequences of a specified kind. The reason that molecules or trees are not juridical “subjects” is then clear; they do not display the specified consequences. The definition of a legal subject is thus a legitimate, and quite conceivably a practically important matter. But it is a matter of analysis of facts, not of search for an inhering essence. The facts in question are whatever specific consequences flow from being right-and-duty-bearing units. This analysis is a matter to be conducted by one competent in law, and not by the layman. But even a layman can point out the field within which the search falls. The consequences must be social in character, and they must be such social consequences as are controlled and modified by being the bearing of rights and obligations, privileges and immunities. Molecules and trees certainly have social consequences; but these consequences are what they are irrespective of having rights and duties. Molecules and trees would continue to behave exactly as they do whether or not rights and duties were ascribed to them; their consequences would be what they are anyway. But there are some things, bodies singular and corporate, which clearly act differently, or have different consequences, depending upon whether or not they possess rights and duties, and according to what specific rights they possess and what obligations are placed upon them. If the logical principle be granted, it is a factual matter what bodies have the specifiable consequences and what these consequences are; but it becomes a verbal matter whether we call them all “persons,” or whether we call some of them persons and not others—or whether we abandon the use of the word entirely.8

The general statement as to the type of definition demanded may be made more specific by recurrence to Michoud. He finds what he is in search of primarily in “interests.” Now while he had asserted the necessity of determining whether the beings who are “persons” “are of such a nature that subjective rights may be attributed to them,” his conclusion that “interests” are primary shifts the logical ground. For “interests,” whatever else they are or are not, fall within the region of consequences, not of “beings.” It is true that he adds “will” as a secondary defining element. Certain interests are protected by the rights and duties of charitable foundations; but these interests are those of recipients, who have no rights in the matter. Beings possessed of will, administrators, are necessary as the organs of the interest. His secondary mark or criterion may be said then to introduce an inherent factor, that of “will.” But our former logical question recurs: Is “will” conceived or defined in terms of something intrinsic, or in terms of specifiable consequences? If the former, then we are at once involved in all the controversies regarding the nature of will found in psychology and philosophy: — there is no question upon which there is less consensus than upon the nature of will.9 If the man of “common-sense” retorts, “Away with these metaphysical subtleties; everybody knows well enough the difference between a being with will and one without one,” his retort may be true for most cases; but it involves more than “common-sense” is usually willing to acknowledge: namely, that “will” denotes certain empirically detectable and specifiable consequences, and not a force or entity, psychological or metaphysical. In other words, we determine the absence or presence of “intent,” and the kind of “intent,” by discrimination among concrete consequences, precisely as we determine “neglect,” which by definition is not a peculiar kind of inhering agency. Neglect may, of course, be made into a positive and intrinsic force or agency by hypostatization, but this is parallel to the procedure of school-teachers who make a positive existential entity out of “inattention.” If we recur to the logical method of conception by “extensive abstraction,” “will,” like “interests,” denotes a function, not an intrinsic force or structure.10

8 English statutory law comes, in some respects, close to doing the latter by its very generalization of the term “person.” In (1833) 3 & 4 Wm. IV, c. 74, it is said: “The Word ‘Person’ shall extend to a Body Politic, Corporate, or Collegiate, as well as an Individual.” In the Interpretation Act of 1889, 52 & 53 Vict. c. 63, sec. 19, it is stated: “In this Act and in every Act passed after the commencement of this Act the expression ‘person’ shall, unless the contrary intention appears, include any body of persons corporate or unincorporate.”

I owe the reference to Maitland, op. cit. supra note 2, at 401. He explains the inclusion of “incorporate bodies” is probably due to the desire to include some organs of local government, such as boards of health, under their relevant legal rules. He adds: “It is not inconceivable that the above cited section of the Act of 1889 may do some work hereafter; but I have not heard of its having done any work as yet.” This statement indicates what is meant by the assertion that a generalization of the term “person” may be equivalent to an abandonment of the term, the work being done by specific statutes and judicial decisions bearing upon specific matters.

9 One illustration, trivial in itself, but significant in what it stands for, is the necessity the adherents of the “will” theory find themselves under, of distinguishing volitions from volonté. Volitions may proceed from the singular members of an association; volonté belongs to the association as such. Saleilles, De la Personelité Juridique (1910) 565.

10 It would require an article longer than this one merely to list and describe various theories about will which, as held at one time or another, have influenced legal doctrines. One reference must suffice. Professor Pound has repeatedly shown how the conception of “will” was central in the Roman law idea of legal transactions and how it affected the nineteenth century theory of contracts and related subjects. The entire post-Kantian German concept of real personality is affected by the latter’s theory of
2. Doctrines of Juridical Personality

The foregoing section does not attempt to define what it is to be a “person” in the sense of a right-and-duty-bearing unit. Its purpose is to show the logical method by which such a definition should be arrived at; and, secondly, to show that the question has been enormously complicated by the employment of a wrong logical method, and by the introduction of irrelevant conceptions, imported into legal discussion (and often into legal practice) from uncritical popular beliefs, from psychology, and from a metaphysics ultimately derived from theology. It is not intended, however, to imply that these extraneous considerations have not been historically significant, nor that the causes of their emergence into law is not of importance for legal history. The reverse is the case. To the student, and not merely the historical student, of human culture, they afford a fascinating, if intricate, field of inquiry; and the history and present status of legal institutions is involved in this study of human culture. The sources, career and effects of the conceptions of “intent” and of “malicious” intent would alone lay bare an instructive cross-section of the whole history of religion, morals and psychology. Of more direct significance for our special theme is the fact that the underlying controversies and their introduction into legal theory and actual legal relations, express struggles and movements of immense social import, economic and political. Such a formal or logical analysis as we have been engaged in is in fact but preliminary. What is back of these factors which are logically extraneous? What vital issues have led to their getting so thoroughly mixed up with questions of legal definition? To answer this question is to engage in a survey of the conflict of church and empire in the middle ages; the conflict of rising national states with the medieval Roman empire; the struggle between dynastic and popular will. Practically, the movement fell in with another, quite different in character, which made “liberty” of will the central thing in order to find a universal basis of political liberty—as with Rousseau. Subsequently, the German and French ideas flowed together, and the conflux was affected by the notion of economic liberty, which readily rationalized itself by getting under the cover of the reigning theory of will. That the idea assisted in promoting movements which were socially useful there can be no doubt. To give one instance, Henderson has suggested its utility in liberalizing the treatment of foreign corporations, which upon the “concession” theory find the going very difficult. See Henderson, Position of Foreign Corporations in American Constitutional Law (1918) 5.

My colleague, Professor H. W. Schneider, has called my attention to the important influence exercised upon theories of the “real” legal personality of corporate groups by the traditional association of the ideas of “agency,” “responsibility” and “guilt” with will. I have omitted discussion of this point because its importance would demand an entire paper, at least, for adequate treatment. I would only suggest that the grouping of these ideas together is at present a matter of historic interest, but is unnecessary from the standpoint of contemporary thought. representative forms of government; the conflict between feudal institutions, ecclesiastic and agrarian, and the economic needs produced by the industrial revolution and the development of national territorial states; the conflict of the “proletariat” with the employing and capitalist class; the struggle between nationalism and internationalism, or trans-national relations, to mention only a few outstanding movements.11 These conflicts are primarily political and economic in nature. But there is not one of them which has not left its profound impress upon the law, including particularly the doctrines of the nature and seat of juridical personality. Discussions and concepts may have been in form intellectual, using a full arsenal of dialectical weapons; they have been in fact, where they have any importance, “rationalizations” of the positions and claims of some party to a struggle. It is this fact which gives such extraordinary interest to the history of doctrines of juridical personality. Add to this fact that the intellectual and scientific history of western Europe is reflected in the changing fortunes of the meanings of “person” and “personality,” a history which has both affected and been affected by the social struggles, and the interest and complexity of the doctrines about juridical personality are sufficiently obvious.

For example, the “fiction” theory of the personality of corporate bodies, or universitates, was promulgated if not originated, by Pope Innocent IV (1243-1254. St. Thomas Aquinas died in 1274). It is hardly a coincidence that Pope Innocent was one of the strongest upholders of the supremacy of the spiritual over the temporal power, and that he was Pope immediately after the time of the greatest political power of the Papal Empire.12 In outward

11 Since the last-named topic will not concern us further, one illustration may be mentioned. One potent recent motive for the insistence upon the real “personality” of social groups, or corporate bodies, independent of the state, is opposition to the claim that the state is the sole or even supreme Person. The latter notion reflects the increase of importance of the national territorial state. Opposition from the side we are alluding to, is due to the fact that the doctrine of the ultimate personality of these states finds fitting expression in wars. Moreover, these wars confer upon the states too unrestricted power over their citizens, and also unfavorably affect the complex economic interdependences wrought by modern methods of industry and commerce. In an article written before the war, Lindsay rightly cites Norman Angell as a factor “in the newest political gospel” which “makes open and declared war against the doctrine that the State is a personality.” This attack is inspired “not by a belief in the isolation of individuals, but by a conception that the cooperation of individuals and their common dependence on one another extends beyond the bounds of the State.” Lindsay, The State in Recent Political Theory (1914) 1 Political Quarterly, 128, at 130 and 132.

12 Of a not far remote predecessor, it is said that “The fully rounded ecclesiastic theory, at the climax of actual ecclesiastic power, is to be found in the writings of Pope Innocent III (pontificate 1196-1216).” Dunning, Political Theories, Ancient and Mediacral (1902) 162, 163.
form the doctrine that corporate bodies are *persona* _fictae_ was directed at ecclesiastic bodies. The doctrine was stated as the reason why an ecclesiastic _collegium_ or _universitas_, or _capitulum_ could not be excommunicated, or be guilty of a delict. For _nominas sunt juris et non personarum_; they have neither a body nor a will. A chapter was but a name and an incorporeal _res_. Other canonists declared that corporate bodies could not be punished or excommunicated because they had neither a soul nor a body, and carried their nominalism so far as to say that they had being only *in abstracto_, like “man” in respect to men. The doctrine did not imply, however, that excommunication was of no effect; on the contrary, it signified that, in order that a decree of punishment or excommunication should not lack effect, it was to be applied to all, _omnes singulis_. Even if Pope Innocent had not included _populus et gens et hujus modi_ along with ecclesiastical groups (we cannot call them bodies on his theory), we may be sure that what applied to religious organizations applied _a fortiori_ to civil. A chapter or a _populus_ regarded as an entity would not suffer especially from excommunication; it was wholly different when the ban fell upon _“omnes singulis.”_13 The intellectual factor in the doctrine takes us to the fact that being a “person” was denied to these groups because of the dominant conception of person. The current idea is expressed in the definition of St. Thomas Aquinas, _vera persona est rei rationabilis individua substantia_. In this definition every one of the three last words has a technical meaning going back to the metaphysical discussions of Aristotle; the problem of the nature of the “individual” being, indeed, for the middle age philosophers, even more of a problem than that of “substance,” which had been decided once for all by Aristotle.14 The consequences of including “rational individuated substance” in the conception of “person” endured long after the metaphysics and theology which gave it birth were obscured if not forgotten; and they account for much of the difficulty in even recent discussion in attributing “person” to corporate as well as to single units.

The “concession” theory of juridical persons, while often confused with the “fiction” theory, had a different origin, and testifies to quite a different situation of conflict of interests. It is essentially a product of the rise of the national state, with its centralizing tendencies and its objection to _imperia in imperio_ at a time when religious congregations and organizations of feudal origin (_communes_ and guilds) were rivals of the claim of the national state to complete sovereignty. The shortest cut to making good its claims was to treat all minor organizations as “conjunctions” and conspiracies, except as they derived all their powers from an express grant of a supreme power, the State. Certain classes were as much interested in magnifying the government and regulation by statute law as Pope Innocent III was in magnifying the authority and power of the Papacy. The choice of the word “concession” was probably influenced by Roman law.15

In lieu of an extended discussion of the practical motivation of the basic ideas of the concession theory, I shall give one quotation. “In its various forms of ecclesiastical bodies and foundations, gilds, municipalities, trading companies, or business organizations, the corporation has always presented the same problem of how to check the tendency of group action to undermine the liberty of the individual or to rival the political power of the state. The somewhat vague theory of the later Middle Ages that communal organization not sanctioned by prescription or royal license was illegal was at least from the fifteenth century on supplemented by the technical doctrine, developed under canonist influences, that there is no capacity to act as a body corporate without positive authorization. To grant this authority has remained in England an attribute of the royal prerogative. … It is hardly possible to overestimate the theory that corporate existence depends on positive sanction as a factor in public and legislative policy. It is natural that the charter or incorporation law should be made the vehicle of restraints or regulations which might not be readily imposed upon natural persons acting on their own initiative, and the course of legislative history bears this out.”16

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13 I have relied upon Gierke for the references (3 _Das deutsches Genessenschaftrecht_, 279-285.). Gierke says that Pope Innocent IV “was the father of the dogma of the purely fictitious and intellectual character of juridical persons which still rules.” Even if this statement were not literally correct the reference would be of great importance because of the currency Maitland gave to the discussion and to Gierke, and because of the influence of Maitland upon Laski, one of the chief modern propounders of the doctrine that organized groups have personality independent of, and in many Cases prior to, state action.

14 We are far away from the Latin _persona_ which when applied to a man in the concrete hardly meant more than a separate physical body. The change in meaning was undoubtedly of theological origin, the term “persona” having been applied by the fathers (first I believe by Tertullian) to the hypostases of the Trinity.

15 Gaius, Digest, III, 4, 1. In all events, it is suggestive that the statements of Gaius were made at a time (161 A.D.) when the Empire was in full centralizing course. It should be noted, however, that Gaius is not referring explicitly to anything he calls persons. His point is that being a _universitas_ or _collegium_ is something dependent upon statutes, _sensatus consulta_ and imperial constitutions. It is interesting, moreover, to note in connection with the efforts to bring Roman ideas into the whole controversy that Maitland expressly says that “The admission must be made that there is no text which directly calls the _universitas a persona_, and still less any that calls _it persona ficta_.” Gierke (with preface by Maitland), _supra_ note 3, at xviii.

16 Freund, _Standards of American Legislation_ (1917) 39. The quotation continues by indicating the restraints imposed on
It is clear that there is nothing essentially in common between the fiction and concession theories, although they both aimed toward the same general consequence, as far as limitation of power of corporate bodies is concerned. The fiction theory is ultimately a philosophical theory that the corporate body is but a name, a thing of the intellect; the concession theory may be indifferent as to the question of the reality of a corporate body; what it must insist upon is that its legal power is derived. In some respects, the concession theory is the more favorable to expanded power of corporations; a charter of broad powers might be granted and the courts might construe its terms liberally. Its conceded assimilation to the singular person, even when a corporation is called “artificial,” might even enlarge its rights, privileges and immunities. In an “individualistic” period—that is, an era chiefly concerned with rights of private property and contract—it is pretty sure to do so. Consider, for example, the court decisions that a business corporation is a “person” in the sense covered by the Fourteenth Amendment, and the effects of this decision. On the other hand, the fiction theory that a corporation having no soul cannot be guilty of delict gives a corporation considerable room in which to manoeuvre. Thus we cannot say, without qualification in respecting time and conditions, that either theory works out in the direction of limitation of corporate power. 17

In spite of their historical and logical divergence, the two theories flowed together. Their conflux and its result is exhibited in many decisions of American judges. The practical key to the union, in which the feigned theory on the whole got the better of the concession theory, resides in the allusion just made to an “individualistic” age. When

banking and insurance corporations, railroads and express companies. Historically, the restrictive attitude towards at least business corporations finds its explanation and justification in the fact that they were few and exceptional, being usually huge trading companies, actually and often nominally, monopolies, whose “rights” were privileges and immunities. As so often happened, words, with associated ideas and temper of mind, persisted after corporations had become commonplace and, indeed, the usual means of carrying on business. Henderson, in the work already referred to, has shown the effect of possession of extraordinary privileges by early corporations in creating fear of them and the extent to which this fear influenced court decisions, as for example, that in the case of The Bank of the United States v. Deveaux op. cit. supra note 10, at 19, 55, 56. 17 Imaginary beings or fictions may not only gain privileges because of the absence of souls, but because of the unlimited elasticity of fictions. As Machen says, “If the corporate personality is imaginary, there is no limit to the characteristics and capacities which may be attributed to that personality... If you can imagine a corporate entity is a person, you can also imagine that this person has a mind.” Machen, op. cit. supra note 1, at 347, 348. The “fiction theory,” if it had been separated wholly from the “concession theory,” might have lent itself to liberalizing the theory of foreign corporations. Difficulties regarding “residence” and “migration” might easily have been got over; for imaginary creatures are notoriously nimble. it is difficult to lay hands on the single persons who are said to be the only “real” persons, it is very convenient to do business as a fiction. With respect to its property, the fictitious entity has a clear title as an entity; with respect to its liabilities and burdens outside of property and contract, its position is not so clear; its fictitious character may be cited to relieve it of some obligations usually regarded as moral, and yet legally enforceable as regards single persons. Pope Innocent IV was under no such difficulty. Excommunication could reach down to every part of the aggregate whole; it is not so easy to reach the fluctuating “real” persons who form that “merely collective aggregate,” the share-holders in a joint-stock company, especially if they are “widows and orphans.” To a considerable extent, the corporation has “had it both ways” when the corporation was regarded as nothing but a name for an aggregate or collection of real persons. Adequately to develop this fact and the reasons for it would require an excursion into the change which took place in the eighteenth and nineteenth centuries in the concept of the “singular person,” now become the full-fledged individual in his own right. The excursion cannot be undertaken. Suffice it to say that the single person, as the “real person,” is no longer either a physical body or a rational substance. These two meanings persist, but they are covered up with vestments derived from the theory of natural rights inhering in individual persons as such. The contrast of “natural” and “artificial” persons gets its point from the fact that “natural” connoted possession of inherent and inviolable rights. The dialectic of the courts, under the pressure of social facts, was equal to declaring that corporations, while artificial and fictitious, nevertheless had all the natural rights of an individual person, since after all they were legal persons.

Perhaps a reader may infer that the foregoing amounts to a plea for the “real” personality of corporate bodies. Recurrence to the introductory remarks should, however, dissipate this impression. As far as the historical survey implies a plea for anything, it is a plea for disengaging specific issues and disputes which arise from entanglement with any concept of personality which is other than a restatement that such and such rights and duties, benefits and burdens, accrue and are to be maintained and distributed in such and such ways, and in such and such situations.

3. Fusion & Confusion

The fact of the case is that there is no clear-cut line, logical or practical, through the different theories which have been advanced and which are still advanced in behalf of the “real” personality of either “natural” or associated persons. Each theory has been used to serve the same ends, and each has been used to serve opposing ends. The doctrine of the personality of the state has been advanced to place the state above legal responsibility on
the ground that such a person has no superior person - save God - to whom to answer; and in behalf of a doctrine of the responsibility of the state and its officers to law, since to be a person is to have legal powers and duties. The personality of the state has been opposed to both the personality of “natural” singular persons and to the personality of groups. In the latter connection it has been employed both to make the state the supreme and culminating personality in a hierarchy, to make it but primus inter paros, and to reduce it to merely one among many, sometimes more important than others and sometimes less so. These are political rather than legal considerations, but they have affected law. In legal doctrines proper, both theories have been upheld for the same purpose, and each for opposed ends. Corporate groups less than the state have had real personality ascribed to them, both in order to make them more amenable to liability, as in the case of trade-unions, and to exalt their dignity and vital power, as against external control. Their personality has been denied for like reasons; they have been pulverized into mere aggregates of separate persons in order to protect other laborers from them, to make more difficult their unified action in trade disputes, as in collective bargaining, and to enable union property to escape liability, the associated individuals in their severality having no property to levy upon. The group personality theory has been asserted both as a check upon what was regarded as anarchic and dissolving individualism, to set up something more abiding and worthwhile than a single human being, and to increase the power and dignity of the single being as over against the state. Even the doctrine that true personality resides only in the “natural” person has been worked in opposed directions. It was first used to give church or state a short and direct road of approach which would lessen the power of the singular being over against the collective being, while lately, through being affected by “natural” in the sense of natural rights, it has been employed to exalt private, at the expense of public, interests.

Unfortunately, the human mind tends toward fusion rather than discrimination, and the result is confusion. I quote at length from a recent writer: “A position intermediate between the biological and the psychological theories of the state is held by Gierke and Maitland, whose point of view is shared by such writers as Figgis, Laski and Duguit. The founder of this position was the German jurist, Johannes Althusius. … His theory of the state as a hierarchy of constituent groups was broadened out by his modern interpreter, Otto Gierke, in his Genossenschaftslehre, which was sponsored and clarified by the eminent English historian and jurist, F. W. Maitland. Briefly, the doctrine is that the state is not a collection of individuals but an aggregation of groups. These groups, in turn, are not merely a plural number of individuals, but an organization of individuals designed to achieve a definite purpose. As purposive groups they are psychic organisms, possessing not a fictitious but a real psychic personality. … The exponents of this doctrine of the reality and significance of the group range in their interpretation of the place and significance of the state all the way from the position of such writers as Ernest Barker, who supports an Aristotelian-Hegelian adulation of the state, to the extreme pluralists and the Syndicalists, who would eliminate the state altogether.”

The author is writing from the political point of view, not the legal; and the last sentence makes allowance for divergence of views as to the place of the state. But the passage gives the impression of a single school, coherent in its premises if not in its political conclusions. Analysis of the account, therefore, is not just for the sake of convicting Mr. Barnes of error, but for the sake of revealing the fate of any conception that, by ignoring context and purpose, tries to introduce unity into a conception where the facts show utmost divergence. There is a forced assemblage of persons. Laski, like Althusius, has a political interest; but the political interest of the former was to afford a basis for popular government, while that of Laski was to moralize the idea of the state, to attack the idea of irresponsible sovereignty, and, under the influence of the pluralistic philosophy of James, to utilize the importance of the group, assumed currently in the sociology of the period, to dwell upon the vitality and autonomy of group interests. Althusius, on the other hand, in the latter, in contracting themselves into the state, lost their autonomous standing with respect to it.10

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18 Barnes, Sociology and Political Theory (1924) 29-30.
19 His (Laski’s) article on Personality of Associations closes with a section introduced by these words: “If what we have here been urging is true, it reacts most forcibly upon our theory of the state. Thus far, for the most part, we have sought its unification. We have made it intolerant of associations within itself—associations that to Hobbes will appear comparable only to ‘worms within the entrails of a natural man’. As a result we have made our state absorptive in a mystic, Hegelian fashion. It is all-sovereign and unchallengeable. … But sovereign your state no longer is if the groups within itself are thus self-governing. Nor can we doubt this polyarchism. Everywhere we find groups within the state which challenge its supremacy. They are, it may be, in relations with the state, a part of it; but one with it they are not. They refuse the reduction to unity. We find the state, in James’ phrase, to be distributive and not collective.” Foundations of Sovereignty (1921) 168-169, originally printed in (1916) 29 Harv. L. Rev. 404. The statements about the relation of groups and the state may be true, historically, sociologically and ethically. But they are an argument for the volitional personality of these associations only on the theory that the state is also a personal unified will. It was not the Hobbesian theory, or any similar theory, which produced the magnification of the state; the centralizing tendencies of the new national state produced the theory. Similarly, the rising social, economic and political importance of associations is producing, in analogy with the concept of the older theory of the state, a theory of their metaphysical personality. One can get the same practical results with a theory like Duguit’s, which denies not only the personality of both state and groups but also of the
The interest of Figgis in group-personality appears to be wholly conditioned upon his desire to preserve the autonomy of ecclesiastic organizations, especially that of the Church of England.\footnote{20}

Gierke’s interest was primarily legal; he wrote at a time when no German writer of influence would have thought of depreciating the personality of the state; that was taken for granted. The practical issue was found in the quarrel between Romanists and Germanists; Savigny the great Romanist had come out for the \textit{persona ficta} theory of corporate bodies. Gierke wrote as a Germanist to oppose him, and the quarrel found its practical bearing in the fact that the German Civil Code was being drawn. Maitland writes primarily as a historian of legal institutions, although his political interest is sufficient to make him remark that “the State’s possession of a real will is insecure if no other groups may have wills of their own.”\footnote{21} While he leans toward the real personality theory, it is safe to say that he is much more interested in a comparison of German and English theories and practices than he is in any theory; and any one interested in denying the theory can find much material in the rich store Maitland provides.\footnote{22} Duguit writes as a lawyer, and his political interest is in making the “state,” all officers of government legally liable.

natural individual, as a substratum of rights-duties. “Public law has become objective just as private law is no longer based on individual right or the autonomy of a private will, but upon the idea of a social function imposed on every person.”\footnote{23} Duguit, \textit{Law in the Modern State} (1910, translated by Laski) 49. Again, “In private law the autonomy of the human will is in process of disappearance; the individual will is powerless by itself to create a legal situation.” Duguit, \textit{supra} at 243.

\footnote{20} It is interesting to note, as an instance of the particular and “pragmatic” origin of much of the English theorizing, the large part played by the case of the \textit{Free Church of Scotland v. Overtown} [1904] A. C. 515, and of the trades unions decisions in the \textit{Taff Vale} case [1901] A. C. 426 and the \textit{Osborne} case [1910] A. C. 87. For the former see Vinogradoff, \textit{Juridical Persons} (1924) 24 COL. L. REV. 594, at 597-599. Laski, op. cit. \textit{supra} note 19, at 165-166 has a few comments on the latter two cases. There is a strange logic implied in the reasonings of the “real group personality” school that, since unwise decisions have been reached in a number of cases under cover of the “fictitious person” theory, the “real personality” view must be necessary to reach a correct decision. There is surely more than one omitted alternative possibility.

\footnote{21} Gierke (with preface by Maitland), op. cit. \textit{supra} note 3, at xlii.

\footnote{22} Thus his whole discussion of trusts shows how much has been accomplished, avoiding some of the attending difficulties of German law, “without troubling the state to concede or deny the mysterious boon of personality.” 3 \textit{Collected Papers} 283. His remark that “it’s often struck me that morally there is most personality where legally there is least” certainly cuts both ways. The fact that the family, which is the most intimate emotional and volitional unity, is not a jural personality, has given the adherents of the real personality theory much difficulty.

He denies will and personality to both the state \textit{and} all other groups. “Nor is it [fault] imputable to the collectivity since the latter outside the imagination of lawyers has no personal existence.”\footnote{24} As for Ernest Barker, he is indeed strong for the personality of the state, but his purpose is identical with that of Duguit, who denies precisely what Barker asserts: “What is needed is, in the first place, the conception of the State or the Public as a legally responsible person; and, in the second place, the application to this person of the idea of agency in such sort that it shall admit responsibility for the acts of its servants done in its service.”\footnote{25} Specifically he wants some kind of administrative and law courts, in which the state through its agents, can be rendered liable, although not administrative law of the French type. Finally, the reference to “psychic organisms” is either gratuitous or highly misleading. It is not psychic personality which these writers - as far as they do hold to the personality of the state - are concerned with, but a moral personality, that is unity of organized action involving “will.” The idea of psychic personality is read in from writers on social psychology and sociology.

I do not make this examination for the sake of indicating that Mr. Barnes sins above others. As already said, the collection of commissions and omissions is the sort of thing which is bound to happen when one assumes that there is in existence some single and coherent theory of personality and will, singular or associated. Nothing accurate or intelligible can be said except by specifying the interest and purpose of a writer, and his historical context of problems and issues. Thus we end where we began: with the statement that the entire discussion of personality, whether of single or corporate personality, is needlessly encumbered with a mass of traditional doctrines and remnants of old issues. Almost every English writer, beginning with Maitland, who has written in behalf of the doctrine of the “real personality” of corporate bodies, has felt obliged to quote the following from Dicey: “When a body of twenty or two thousand or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body which by no fiction of law but by the very nature of things, differs from the individuals of whom it is composed.” Assuredly; but why should such a fact be thought to have any bearing at all upon the problem of personality? Only because the doctrine of “fictitious” personality has been employed, under the influence of the “individualistic” philosophy already referred to, in order to deny that there is any social reality at all back of or in corporate action. Hence the assertion of the simple fact that there is some social reality involved got bound up

\footnote{23} Duguit, \textit{Law in the Modern State} (1919) 205.

\footnote{24} Barker, \textit{The ‘Rule of Law’} (May, 1914) \textit{The Political Quarterly}, 117, at 123. For a full discussion of this matter see Borchard, \textit{Government Liability in Tort} (1924) 34 \textit{Yale Law Journal}, 1, 129, 229.
with the notion of a real, as distinct from fictitious personality. The example, it seems to me, is sufficiently striking to enforce the value of eliminating the idea of personality until the concrete facts and relations involved have been faced and stated on their own account: retaining the word will then do no great harm.