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## LEGAL PERSONALITY<sup>1</sup>

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To be a legal person is to be the subject of rights and duties. To confer legal rights or to impose legal duties, therefore, is to confer legal personality.<sup>2</sup> If society by effective sanctions and through its agents will coerce *A* to act or to forbear in favor of *B*, *B* has a right and *A* owes a duty.<sup>3</sup> Predictability of societal action, therefore, determines rights and duties and rights and duties determine legal personality.

Whatever the controversies about the "essential nature" of legal personality, there seems to be a uniform concurrence in these as respectively the test of its existence in a given subject, and the manner in which it is conferred, whether upon a natural person or upon an inanimate thing.

Among definitions to be found in discussions of the subject, perhaps the most satisfactory is that legal personality is the capacity for legal relations.<sup>4</sup> But there is, nevertheless, an objection to the word "capacity" which seems of some importance. It suggests the possibility that the subject may have a capacity for legal relations without yet having become a party to such relations. A minor with capacity to marry is not necessarily married, whereas, when legal personality is conferred, the sub-

<sup>1</sup> This paper was read before the Round Table on Business Associations at the meeting of the Association of American Law Schools at Chicago in December, 1926.

<sup>2</sup> GRAY, *THE NATURE AND SOURCES OF THE LAW* (2d ed. 1921) 27; SALMOND, *JURISPRUDENCE* (5th ed. 1916) 272; HOLLAND, *JURISPRUDENCE* (9th ed. 1900) 88; POLLOCK, *A FIRST BOOK OF JURISPRUDENCE* (1923) 114.

<sup>3</sup> Corbin, *Legal Analysis and Terminology* (1919) 29 *YALE LAW JOURNAL* 163; *ibid.*, *Jural Relations and Their Classification* (1921) 30 *YALE LAW JOURNAL* 226; HOLMES, *COLLECTED LEGAL PAPERS* (1921) 167 *et seq.*

<sup>4</sup> SALMOND, *op. cit. supra* note 2, at 272; HOLLAND, *op. cit. supra* note 2, at 88, 91; *cf.* Geldart, *Legal Personality* (1911) 27 *L. Q. REV.* 90, 95.

ject by that very act is made a party to legal relations. It would seem preferable, therefore, to define legal personality either as an abstraction of which legal relations are predicated, or as a name for the condition of being a party to legal relations.

It is believed that this is all there should be to the story. But legal philosophers and students of jurisprudence have not been content with so simple an explanation. They have sought for the "internal nature" of legal personality, for an abstract essence of some sort which legal personality requires. Thus Mr. Gray thinks there can be no right, and therefore no legal personality, without a *will* to exercise the right. "That a right should be given effect," says he, "there must be an exercise of will by the owner of the right."<sup>5</sup> But, after having adopted the premise that a will is of the essence of a right, he then proceeds to explain how it is that certain human beings without wills and even inanimate objects do have legal personality, a task which he complains is the most difficult "in the whole domain of Jurisprudence."<sup>6</sup>

Mr. Salmond, on the other hand, discovers a different quality which, by his definition, is essential to a right. "No being is capable of rights," says he, "unless also capable of interests which may be affected by the acts of others," and "no being is capable of duties unless also capable of acts by which the interests of others may be affected."<sup>7</sup> But Mr. Salmond's presupposition of an intrinsic essence does not give him as much trouble as did Mr. Gray's, for no sooner has he discovered the necessity of an interest to the existence of a right than he also discovers that the same act of investiture which attributes the right also attributes the interest. He defines a legal person, therefore, as "any being to whom the law attributes a capacity of interests and, therefore, of rights, of acts and, therefore, of duties."<sup>8</sup> This is substantially the same conclusion Mr. Gray reached with respect to the necessity of a will. Where there is no will in fact the law attributes one. So long as it has unlimited power of attribution, neither theory need hinder the sovereign in bestowing legal personality upon whomever or whatever it will.

A more difficult task than to define the concept itself is to explain this persistent tendency to make it mysterious. It is believed, however, without professing to give an adequate explanation, that some light can be thrown on the subject by contrasting the typical case of a human being, acting alone and in his own right, with some of the marginal cases. A Hindoo idol,

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<sup>5</sup> *Op. cit. supra* note 2, at 25, 26.

<sup>6</sup> *Ibid.* 28.

<sup>7</sup> *Op. cit. supra* note 2, at 273.

<sup>8</sup> *Ibid.*

being a legal person, it has been held, has peculiar desires and a will of its own which must be respected.<sup>9</sup> A corporation, it is said, "is no fiction, no symbol, no piece of the state's machinery, no collective name for individuals, but a living organism and a real person with a body and members and a will of its own."<sup>10</sup> A ship, described as a "mere congeries of wood and iron," on being launched, we are told, takes on a personality of its own, a name, volition, capacity to contract, employ agents, commit torts, sue and be sued.<sup>11</sup> Why do lawyers and judges assume thus to clothe inanimate objects and abstractions with the qualities of human beings?

The answer, in part at least, is to be found in characteristics of human thought and speech not peculiar to the legal profession. Men are not realists either in thinking or in expressing their thoughts. In both processes they use figurative terms. The sea is *hungry*, thunder *rolls*, the wind *howls*, the stars *look down* at night, time is not an abstraction, rather it is "father time" or the "grim reaper"; the poet sees darkness as "the black cheek of night," or complains that "time's fell hand" has defaced the treasures of "outworn buried age." Speech is forceful as its terms are concrete. Word pictures stir the imagination and enrich the language. Even if it were possible to inhibit this disposition to speak in images and even if the inhibition would produce clarity in legal analysis, it would be to purchase the end at too great a price.

Another aspect of this same phenomenon is that men are not apt in the invention of original terms for abstract ideas. Without being a philologist, one may know that, in its beginnings, language deals with the material and tangible world.<sup>12</sup> When, after generations of mental development and the accumulation of knowledge, abstract ideas finally begin to appear and multiply, the tendency is inevitably to stretch old words to new uses and to crowd the abstractions in under concrete terms which cover a bundle of ideas with which the newcomer appears to have most in common. To do so serves the double purpose of supplying a word where one is needed, and of obtaining a welcome for the new idea by introducing it under a familiar name.

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<sup>9</sup> *Pramatha Nath Mullick v. Pradyumna Kumar Mullick*, L. R. 52 I. A. 245 (1925); see Comment (1925) 41 L. Q. Rev. 419.

<sup>10</sup> Maitland, quoted by Geldart, *op. cit. supra* note 4, at 93.

<sup>11</sup> Justice Brown in *Tucker v. Alexandroff*, 183 U. S. 424, 433, 22 Sup. Ct. 195, 201 (1902), cited by Justice McKenna in *The Western Maid*, 257 U. S. 419, 436, 42 Sup. Ct. 159, 162 (1922).

<sup>12</sup> "Much of the difficulty, as regards legal terminology, arises from the fact that many of our words were originally applicable only to physical things; so that their use in connection with legal relations is, strictly speaking, figurative, or fictional." HOFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1923) 30.

This disposition to label the field of abstractions with the names of a physical world is not confined to poetry or the higher reaches of literature. It has invaded also the prosaic legal vocabulary. Negotiations *take place* and *ripen* into a contract whose rights and duties *attach* and later *mature*. If the contract is *closed* it is *binding*, but may be *broken*. If not closed, notice may *operate a retraction* of the offer. A rule is said to be *settled* that the defendant must *restore* his adversary to the *position* he *occupied* before it was *altered*, and to *rest*, or to be based upon such and such *grounds*. A guarantee which we call *open* may be *withdrawn* or *recalled*. All these words, which bear unmistakable evidence of having been borrowed from the dictionary of the physical and the tangible, are taken from two pages of Corbin, *Cases on Contracts*, without by any means exhausting the material. The very sound of the word "break" resembles that of breaking a stick. Whether or not there is onomatopoeia in its origin, we hazard the statement that men broke many sticks before anyone ever broke his word, and still more before they became law breakers.<sup>13</sup>

Another characteristic of human thinking, relevant to the inquiry, is that which for certain purposes disregards human beings as individual units of classification and arranges its distinctions on the basis of functions. Eleven men as applicants for admission to the university are distinct individuals each with his own credentials; but as football players they become a team. For some purposes, each student in a university is a distinct and an individual problem, differing in essential particulars from every other student enrolled. For other purposes these individual peculiarities are of no importance and lose themselves in the junior class. For still other purposes, faculty, students, president, administrative officers and board of control, all fade out of the picture and become just Harvard, Yale, or Chicago. And so it is with any group. They are individuals in severalty or a unital aggregate, depending on the purpose in mind.

The same faculty which ignores the individual in the group function, also, for relevant purposes, divides a single human being into different functions. A man is said to be a good neighbor but a bad citizen, an affectionate husband and a stern father, a competent banker but a poor soldier. Even a scarecrow, for a particular purpose, *is* a human being, or a human being may be a scarecrow. The parable of the Samaritan shows how a stranger from distant parts may for some purposes be a

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<sup>13</sup> It would be interesting to speculate whether the application to contracts of terms of biology and horticulture, such, for example, as "ripen" and "mature," had anything to do with judicial aversion to the doctrine of anticipatory breach!

neighbor. Nor is this method of analysis confined to our dealings with human beings. It characterizes our mental reactions throughout the whole field of experience. The same faculty of the mind, which, in certain circumstances and for certain purposes, looks upon the universe as one, in other circumstances and for other purposes, breaks up the atom.

If we bear in mind these characteristics of our mental processes, we may be able to discover in them an explanation of the phenomenon of legal personality as exemplified in the more difficult cases of legal persons which combine many human beings in one, or subdivide a single human being, or which are not predicated of human beings at all. The typical subjects of rights and duties, of course, are normal human beings, acting in a single capacity and in their own right. It is between such persons, so circumstanced, that most disputes come to be settled; it is around them and with reference to them that legal ideas develop. The wording of laws, the language of the courts, the statements of causes of action, the forms of the writs, contemplate such beings as the parties plaintiff and defendant in litigation. By repetition the language becomes habitual, the forms grow rigid, the behavior patterns are fixed.<sup>14</sup> Then, for some reason or other, it becomes necessary or convenient to deal with an inanimate object such as a ship, or with a human being in a multiple capacity, as a trustee or a guardian, or with an association of human beings in a single capacity, as a partnership or a corporation. A merchant, for example, who has furnished supplies for a voyage, or a boss stevedore who has renovated the ship, cannot reach the owner of the vessel, who is outside the jurisdiction. The obvious solution is to get at the ship itself and, through it, satisfy the owner's obligations. But to devise a new system of jurisprudence for the purpose, to work out new forms and theories and processes, would too severely tax the ingenuity of the profession. The alternative is for the judges to shut their eyes to the irrelevant differences between a ship and a man and to treat the ship as if it were a man for the purpose of defending a libel. The master of the vessel appears in court to represent the ship and the ship vindicates the rights or makes vicarious atonement for the wrongs of its owner.<sup>15</sup>

"'I have tasted eggs, certainly', said Alice (in Wonderland), who was a very truthful child: 'but little girls eat eggs quite as much as serpents do, you know.'

"'I don't believe it' said the Pigeon, 'but even if they do, why, then, they're a kind of serpent; that's all I can say!'"

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<sup>14</sup> For significance of habit in shaping legal institutions, see Moore, *Rational Basis of Legal Institutions* (1923) 23 COL. L. REV. 609.

<sup>15</sup> For other and similar "fictions," see GRAY, *op. cit. supra* note 2, at 30.

So it is that the ship, a kind of a man, takes on a personality, acquires volition, power to contract, sue and be sued. If it must have some of the qualities of human beings to adapt itself to the novel situation and avoid embarrassment both to itself and to the court, the law can readily bestow them by the simple process of attribution.<sup>16</sup>

The ship, therefore, derives its personality from the compelling fact that it sails the seas between different jurisdictions. In the case of the corporation, the demand, although perhaps equally compelling, is for other reasons. Of the mental processes previously discussed, that which ignores the individual in the group function is most responsible for the phenomenon of corporate personality.

Large aggregations of capital carry tremendous economic advantages. To accumulate the requisite funds, it is necessary to draw from a large number of investors. It is impracticable that each investor have an active part in the conduct of the enterprise. If he cannot participate he will not invest if, in doing so, he must hazard his entire fortune in a venture over which he has only the most limited control. The solution is to limit his risk to the amount of his contribution. This done, the shareholder becomes irrelevant to the purposes of one who wishes to do business with the group enterprise.<sup>17</sup>

There is also great economic advantage in an unbroken continuity of effort. If a dissolution and the necessity for reorganization followed the death or the transfer of interest of any individual shareholder, the enterprise could not function. The solution is found in perpetual succession, by virtue of which each shareholder becomes still less significant, and even presidents and boards of directors lose their identity in the regular flow of successors.

If a creditor wishes to enforce a claim against the enterprise, it is impracticable and unnecessary to make all the participants, in whatever degree, parties to the action. The solution is to permit the organization to sue and be sued in a group name.

So it is that for one purpose and another, it becomes convenient, if not indeed necessary, to let the individual participants fade out of the picture and to look upon the organization

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<sup>16</sup> This purely functional justification of the personality of a ship is only suggestive, of course, and does not profess to be historical. Justice Holmes finds its history in the primitive notion which gave life to things that moved; but thinks its survival may be due to its utility. HOLMES, *THE COMMON LAW* (1881) 28.

<sup>17</sup> The shareholder "is the least interesting, the least momentous fact in corporate life, as an individual after he has entered the corporate sphere." Deiser, *The Juristic Person* (1909) 57 U. PA. L. REV. 300, 301; see also, Vinogradoff, *Juridical Persons* (1924) 24 COL. L. REV. 594, 595.

as a unit.<sup>18</sup> And so it is that the corporation, like the ship, comes to be fitted into the old behavior patterns and to be treated and spoken of as if it were a natural person.

Whenever society, in the administration of justice, sees fit to disregard the individual members of an organization for a particular purpose, and for that purpose to look upon the organization as a unit, the organization to that extent or for that purpose becomes a legal person. This is true even where the group is organized as a partnership or other unincorporated association.

The single human being in a dual or multiple capacity is not ordinarily regarded by writers as a part of the subject of legal personality.<sup>19</sup> The corporation sole, as exemplified in the parson, the bishop, or the crown, has been given a hearing and dismissed as either "natural man or juristic abortion."<sup>20</sup> Except for the corporation sole, it is usually assumed that one human being is only one legal person, in however many different capacities he may function. But such an assumption, consistent though it may be with some of the language we use, does not describe our conduct. As an individual in his own right, A can transfer property to himself as trustee,<sup>21</sup> or do business with himself as a member of a firm to which he belongs,<sup>22</sup> or, in a triple

<sup>18</sup> "The germ of the corporate idea lies merely in a mode of thought; in thinking of several as a group, as one." Raymond, *The Genesis of the Corporation* (1906) 19 HARV. L. REV. 350.

<sup>19</sup> "This concept of the oneness of personality is bound up in our concept of a man. The trustee and the same man conducting his private business has one and the same personality . . . The law may take the position that one person in fact can have but one legal personality, or that he may have many . . . The legal theory that a man is one legal person . . . has this in its favor—the theory corresponds to the facts." Lewis, *The Uniform Partnership Act—A Reply to Mr. Crane's Criticism* (1915) 29 HARV. L. REV. 158, 161.

"When a man is executor, administrator, trustee, bailee, or agent, we do not feel it necessary to speak of corporateness or artificial personality." 3 MAITLAND, *COLLECTED PAPERS* (1911) 242.

"A human being is, in the nature of things, a unit. A philosopher might entertain a doubt upon this,—*homo* might seem to him merely a convenient word to designate a large number of molecules. But the common law judges seem never to have doubted." Warren, *Collateral Attack on Incorporation* (1908) 21 HARV. L. REV. 305. For a recognition and treatment of this phenomenon as a distinctive feature of the subject of legal personality, see SALMOND, *op. cit. supra* note 2, at 278. "Every contract, debt, obligation, or assignment requires two persons; but those two persons may be the same human being." *Ibid.*

<sup>20</sup> 3 MAITLAND, *op. cit. supra* note 19, at 243.

"A queer creature that is always turning out to be a mere mortal man just when we have need of an immortal person." 3 *ibid.* 280.

<sup>21</sup> *Smith's Estate*, 144 Pa. 428, 22 Atl. 916 (1891).

<sup>22</sup> *Farney v. Hauser*, 109 Kan. 75, 198 Pac. 178 (1921); *Huffman Farm Co. v. Rush*, 173 Pa. 264, 33 Atl. 1013 (1896).

capacity, as an executor he can transfer property to himself as a trustee.<sup>23</sup> What shall we call such distinctions as these, if not distinctions of legal personality?

In an action in 1429 against the Commonalty of Ipswich and one Jabe, the defense was made that Jabe was a member of the Commonalty of Ipswich and therefore was being named twice as defendant in the same action, that if the defendants were found guilty Jabe would be charged twice over, that if the Commonalty should be found guilty, and Jabe not guilty, the result would be that Jabe was both guilty and not guilty. The case is cited in Pollock and Maitland to illustrate the failure to recognize the personality of Ipswich,<sup>24</sup> but it illustrates also, and equally well, does it not, the failure to distinguish Jabe as a private individual from Jabe as a member of the Commonalty?<sup>25</sup>

We smile at such a defense, as the naive reasoning of a time long past, and, indeed, we may boast that in many particulars we are more at home with the problems of dual personality than were those lawyers of 500 years ago.<sup>26</sup> But we have, nevertheless, missed some distinctions of the sort whose recognition we might have found very useful. In this, the 20th century, it is still the law, except where changed by statute, that a partner cannot, in a court of law, sue the firm of which he is a member,<sup>27</sup> nor can one firm sue another where the two have a common member.<sup>28</sup> Jabe the legal person is still only Jabe the human being. In 1920 the United States Supreme Court held that the federal income tax, levied on all classes alike, was, as applied to the salaries of federal judges, a violation of the constitutional prohibition against reducing their salaries while in office.<sup>29</sup> A provision intended to protect the judges from mistreatment in their office as judges, was misapplied, was it not, to exempt them from their obligations as private citizens? The distinction be-

<sup>23</sup> *Williams v. Cobb*, 242 U. S. 307, 37 Sup. Ct. 115 (1916).

<sup>24</sup> 1 *HISTORY OF ENGLISH LAW* (2d ed. 1899) 493.

<sup>25</sup> For another case illustrating the same sort of confusion, see *ibid.* 492.

<sup>26</sup> For example, in *Bank of Syracuse v. Hollister*, 17 N. Y. 46 (1858), *S*, acting as agent for the holder of a check, in contemplation of law, demanded payment of himself as teller of the bank on which it was drawn. Acting as teller, he refused to pay himself as agent for the holder, because the drawer had no funds in the bank. Then, as teller, he handed the check back to himself as agent for the holder and as agent for the holder he returned it to himself as notary public to have it protested for non-payment. After he had protested it as notary, he delivered it back to himself as agent for the holder and, thereupon, in that capacity, turned it over to his principal, the owner. Such multiplicity we take as a matter of course.

<sup>27</sup> *MECHEM, ELEMENTS OF PARTNERSHIP* (2d ed. 1920) § 199.

<sup>28</sup> *Thompson v. Young*, 90 Md. 72, 44 Atl. 1037 (1899).

<sup>29</sup> *Evans v. Gore*, 253 U. S. 245, 40 Sup. Ct. 550 (1920).



tween Jabe as a private individual and Jabe as a member of the Commonalty of Ipswich is only slightly more obvious than the distinction between X as a judge on the bench and X as an ordinary member of the community.

But enough of dual personality. It is submitted that the breaking up of human beings into plural capacities is not only an appropriate, but a most important, part of the subject of legal personality.<sup>30</sup> Whenever society, through its legislatures and courts, sees fit for a particular purpose to give effect to rights and duties in a human being in more than one capacity, such human being, for that purpose and to that extent, becomes more than one legal person.

It is believed that most of the confusion of thought with respect to the subject comes from the disposition to read into legal personality the qualities of natural human personality.<sup>31</sup> So Mr. Gray gets his "will"<sup>32</sup> and so Mr. Salmond his "interest."<sup>33</sup> So it is that Mr. Geldart is led to observe that:

"If corporate bodies are really like individuals the bearers of legal rights and duties, they must have something in common which qualifies them to be such and if that is not personality we may fairly ask to be told what it is."<sup>34</sup>

As evidence of the personality of such bodies, apart from the personality of the individuals who compose them, we are reminded that the same individuals may form two distinct corporations.<sup>35</sup> But the same has been held of partnerships.<sup>35</sup> We are

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<sup>30</sup> "In recognizing the possibility of one man having, as we should say, two capacities, a natural and a politic or official capacity, the law made an important step; these are signs that it was not easily made." 1 POLLOCK & MAITLAND, *op. cit. supra* note 24, at 506.

Whether the profession wishes to regard this as a problem in legal personality or not, the phenomenon has long been common property. In "Iolanthe," one of Gilbert and Sullivan's comic operas, the old Lord Chancellor, who has fallen in love with his rich and beautiful young ward, faces with trepidation the dilemma which confronts him by reason of the numerous capacities in which he has to deal with the situation. "Can the Lord Chancellor," he asks, "give his own consent to his own marriage with his own ward? Can he marry his own ward without his own consent? And if he marries his own ward without his consent, can he commit himself for contempt of his own court? Can he appear by counsel before himself to move for arrest of his own judgment? Ah, my lords, it is indeed painful to have to sit upon a woollen sack which is studded with such thorns as these."

<sup>31</sup> "It is personality, not human nature, that is fictitiously attributed by the law to bodies corporate." SALMOND, *op. cit. supra* note 2, at 272.

<sup>32</sup> *Supra* notes 4, 5.

<sup>33</sup> *Supra* notes 6, 7.

<sup>34</sup> Geldart, *op. cit. supra* note 4, at 97.

<sup>35</sup> Brown, *The Personality of the Corporation and the State* (1905) 21 L. Q. REV. 365, 366.

referred also to a so-called group mind<sup>37</sup> and cited the obvious fact that people behave differently and get different results in an organization than when acting alone. But the isolated individual will also behave differently in different circumstances, and yet there is no need to read this variety into his legal personality. If it should suit the convenience of the economist or the sociologist to recognize in the group an economic or a social personality, he would certainly be privileged to do so, and, if he did, doubtless he would fix upon some one or more of the various aspects of group behavior as the identifying quality which the group must share with a natural person. But the ship, the corporation and the natural person all require the same thing to make them legal persons, namely, to be a party to legal relations. None of them requires anything more.

The voluminous arguments about whether corporate personality is real or fictitious, are, for the most part, to no purpose, chiefly for lack of a definition of terms.<sup>38</sup> One man's reality is

<sup>36</sup> West & Co. v. The Valley Bank, 6 Ohio St. 169 (1856); Second Nat'l Bank of Oswego v. Burt, 93 N. Y. 233 (1883).

<sup>37</sup> "In every group of men acting together for a common purpose, the common purpose inevitably begets a common spirit which is real, though it may be vague and indefinite to us because our vision is limited, or because the group is in the making. The group becomes, or tends to become, a unit, and as Bluntschli so well said, a mere sum of individuals as such can no more become a unit than a heap of sand can become a statute. So a symphony is something more than a mere concurrence of sounds and a cathedral than so much stone and mortar. . . . The group is not an organism (natural), and numberless difficulties have to be overcome when the group mind seeks realization in the external world . . . . The difficulties will be overcome somehow, though possibly the group may never pass beyond the state when action of the whole is only possible by combined action of each of the parts." Brown, *op. cit. supra* note 35, at 368, 369.

<sup>38</sup> For discussions by "realists" see: GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGES* (1900), Maitland's Introduction; Geldart, *loc. cit. supra* note 4; Laski, *The Personality of Associations* (1916) 29 HARV. L. REV. 404; chapter on "Moral Personality and Legal Personality" 3 MAITLAND, *op. cit. supra* note 19.

"Much disinclined though he may be to allow the group a real will of its own, just as really real as the will of a man, still he has to admit that if *n* men unite themselves in an organized body, jurisprudence, unless it wishes to pulverize the group, must see *n* plus 1 persons. And that for the lawyer should I think be enough . . . . A fiction that we needs must feign is somehow or another very like the simple truth." *Ibid.* 316.

For discussions by non-realists, see: FREUND, *THE LEGAL NATURE OF CORPORATIONS* (1896); Cohen, *Communal Ghosts and other Perils in Social Philosophy* (1919) 16 JOURNAL OF PHILOSOPHY, PSYCHOLOGY, AND SCIENTIFIC METHOD 673. The latter writer would be tempted "to conclude that the quarrel between those who believe in the reality of corporate personality and those who believe it is fictional is a quarrel over words," were it not that "no question of this sort can be *merely* verbal, because

another man's fiction.<sup>39</sup> In a sense, every idea that enters the human mind is a fact and has reality. In another sense it may be a fiction. One may as well ask if the "Private Life of Helen of Troy" is real or fictitious. There is certainly such a book. The legal personality of a corporation is just as real as and no more real than the legal personality of a normal human being. In either case it is an abstraction, one of the major abstractions of legal science, like title, possession, right and duty.<sup>40</sup>

If, without suggesting that there is an analogy for all purposes, we compare title with personality, it may be that we shall clarify somewhat our ideas about the latter term. To say that a subject has legal personality is to say that it is a

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words are most potent influences in determining thought as well as action." *Ibid.* 681. If, by the reality of group personality, it is meant that group persons "have all the characteristics of those we ordinarily call persons," Mr. Cohen thinks that "we are dealing with the kind of a statement which is believed because it is absurd." *Ibid.* 680.

"Whether the corporation is a fictitious entity, or whether it is a real entity, with no real will, or whether, according to Gierke's theory, it is a real entity with a real will, seems to be a matter of no practical importance or interest. On either theory the duties imposed by the state are the same. GRAY, *op. cit. supra* note 2, at 55. That a corporation is only a bundle of working rules, see COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (1924) c. 4.

The difficulty is that we conceive of a corporation as something ultimate, or absolute and fundamental and so attempt to define it. The limit of any useful definition is only a certain aspect or for a particular purpose. "At one time it (the corporation) appears to be an *association* of persons, at another time a *person*; at one time it is an independent existence separate from its members, at another, a dummy concealing the acts of its stockholders. At one time it is a fiction existing only in contemplation of law and limited strictly to the powers granted in the act that created it; at another it is a set of transactions giving rise to obligations not authorized expressly by the charter, but read into it by operation of law." *Ibid.* 291.

This paper is interested in the corporation as a functional aspect of an organized group of which legal rights and duties are predicated. Other aspects of the corporation may be just as important for other purposes, but they are strangers to its legal personality.

<sup>39</sup> The possibilities for discussion are suggested by Mr. Kocourek's distinctions. According to him, corporate personality is not a fiction but a fact. But neither, says he, is it real, nor is it either natural or artificial. Rather, it is a conceptual fact. Kocourek, *Review of Hohfeld, Fundamental Legal Conceptions* (1923), (1924) 18 ILL. L. REV. 281 *et seq.* To our mind, Mr. Kocourek's is a discriminating treatment, and yet, without further definition, a conceptual fact may as well be a fiction for lack of correspondence to an objective world. For some purposes this would satisfy the definition of a fiction.

<sup>40</sup> "The legal personality of the so-called natural person is as artificial as is that of the thing or group which is personified. In both cases the character or attribute of personality is but a creation of the jurist's mind—a mere conception which he finds it useful to employ in order to give logical coherence to his thought." WILLOUGHBY, *THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW* (1924) 34.

party to legal relations without indicating in particular what the relations are. To say that one has title, is to say that one is a party to a particular class of legal relations, namely, those which go with the ownership of property. In either case, if one takes away all the rights, powers, privileges and immunities that shelter under the term, there is nothing left except the shelter which, thereafter, is but a word without a meaning.<sup>41</sup> To regard legal personality as a thing apart from the legal relations, is to commit an error of the same sort as that of distinguishing title from the rights, powers, privileges and immunities for which it is only a compendious name. Without the relations, in either case, there is no more left than the smile of the Cheshire Cat after the cat had disappeared.

The concession theory, that the corporation must be created by legislative act, has mystified the concept of corporate personality. But this theory, as well as the fiction theory, was devised for a purpose.<sup>42</sup> Joint stock companies and de facto corporations testify that the legislative grant is by way of control rather than an act of creative magic.<sup>43</sup> That the legislature has seen fit "to interpose a non-conductor through which," to quote Justice Holmes, "it is impossible to see the men behind"<sup>44</sup> is properly effective to the extent of the legislative intent, but it does not mean, either that the non-conductor is to make a Frankenstein creature of the corporation, or that the same non-conductor may not properly be applied in appropriate situations to unincorporated associations.<sup>45</sup> The distinction is in degree and not in kind.

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<sup>41</sup> HOHFELD, *op. cit. supra* note 12, at 23-64; HEARN, *LEGAL RIGHTS AND DUTIES* (1883) 186.

<sup>42</sup> Dewey, *The Historic Background of Corporate Legal Personality* (1926) 35 *YALE LAW JOURNAL* 655; Raymond, *op. cit. supra* note 18, at 362; 3 MAITLAND, *op. cit. supra* note 19, at 308 *et seq.*; Geldart, *loc. cit. supra* note 4; 1 POLLOCK & MAITLAND, *op. cit. supra* note 24, at 502.

<sup>43</sup> 3 MAITLAND, *op. cit. supra* note 19, at 389. "The sovereign act was not creation, but permission." Raymond, *op. cit. supra* note 18, at 363; Warren, *loc. cit. supra* note 19; *ibid. De Facto Corporations* (1907) 20 *HARV. L. REV.* 456; Deiser, *op. cit. supra* note 17, at 304.

<sup>44</sup> *Donnell v. Safe Co.*, 208 U. S. 267, 273, 28 Sup. Ct. 288, 289 (1908).

<sup>45</sup> "The extent to which a group is treated as one by those dealing with it depends entirely on the demands of practical convenience." Raymond, *op. cit. supra* note 18, at 352.

"There is therefore nothing in the nature of things which prevents a court from recognizing as a legal unit a body of persons unauthorized by the sovereign to act as a unit, but in fact acting as a unit." Warren, *op. cit. supra* note 19, at 309.

"If the law allows men to form permanently organized groups, those groups will be for common opinion right-and-duty-bearing units; and if the law-giver will not openly treat them as such, he will misrepresent, or, as the French say, he will 'denature' the facts; in other words, he will make a mess and call it law." 3 MAITLAND, *op. cit. supra* note 19, at 314.

We have assumed that to be a legal person is to be a party to legal relations, and have seen that the sovereign can, and, if it suits its purposes, does, confer legal personality upon subjects that are not human beings. If we are to be consistent with these premises, we shall have to abandon the idea sponsored by Austin, Hohfeld, Justice Holmes, and others, that only natural persons are parties to legal relations.<sup>46</sup> In so far as legal persons and natural persons are the same, this is true. But if the sovereign power confers legal personality upon a ship, or an idol, or upon an abstraction, such as one of the functional aspects of an individual or of an organized group, such ship or idol or functional aspect ipso facto is a party to legal relations. To insist that only human beings are competent to the part is to confuse the concept of legal personality, in the same way as reading into the concept, when applied to non-human subjects, the attributes of human beings.

It is true, of course, that the benefits and burdens of legal personality in other than human subjects, on ultimate analysis, result to human beings, which, we have no doubt, is what the writers above cited mean. But the very utility of the concept, particularly in the case of corporate personality, lies in the fact that it avoids the necessity for this ultimate analysis.<sup>47</sup>

And this leads us back to the question put in the beginning, as to why lawyers and judges assume to clothe inanimate objects

<sup>46</sup> HOHFELD, *op. cit. supra* note 12, at 75, 76, 198, 199, 200 and notes.

"The only entities who can really be invested with rights are natural persons." BATY, *The Rights of Ideas—And of Corporations* (1920) 33 HARV. L. REV. 358, 360.

"All rights reside in, and all duties are incumbent upon, physical or natural persons." AUSTIN, JURISPRUDENCE (5th ed. 1885) 354, quoted by HOHFELD, *op. cit. supra* at 200.

"There are not two kinds of persons. There is but one, and the law makes its enactments only for men." DEISER, *op. cit. supra* note 17, at 231.

<sup>47</sup> "It is beside the question that ultimate rights reside in the individuals. That question may well rest until we have to deal with the individual." DEISER, *op. cit. supra* note 17, at 234.

"Rights must at times be administered without reference to this ultimate holder—that is, without reference to the person who may in the end derive the benefit of them." *Ibid.* 300.

It is submitted that these are more discriminating than the statements quoted in the preceding note. So is the statement that: "Every right belongs to a legal *unit* or *units*; every obligation binds a legal *unit* or *units*." WARREN, *op. cit. supra* note 19, at 305.

That the personality of a corporation is only a "shorthand expression," or a mere "figment," "for the sake of brevity in discourse," does not distinguish the corporate legal personality from the legal personality of a human being. To say that X, a human being, has a right against Y, is merely a shorthand way of predicting that in certain contingencies governmental agencies will bring some one of a variety of sorts of pressure to bear on Y to make him act or forbear in certain particulars in X's favor. See Corbin, *op. cit. supra* note 3, at 164.

and abstractions with the qualities of human beings, a question which we trust we may now be permitted to modify so as to ask why it is that on such objects and abstractions we confer legal personality. Mr. Dewey says we do not make molecules and trees legal persons because "molecules and trees would continue to behave exactly as they do whether or not rights and duties were ascribed to them."<sup>48</sup> But, though the function of legal personality, as the quotation suggests, is to regulate behavior, it is not alone to regulate the conduct of the subject on which it is conferred; it is to regulate also the conduct of human beings toward the subject or toward each other. It suits the purposes of society to make a ship a legal person, not because the ship's conduct will be any different, of course, but because its personality is an effective instrument to control in certain particulars the conduct of its owner or of other human beings. The broad purpose of legal personality, whether of a ship, an idol, a molecule, or a man, and upon whomever or whatever conferred, is to facilitate the regulation, by organized society, of human conduct and intercourse.

If we grant this, we should be in a position to make effective use of the concept, without overworking it on the one hand, as it may be we have done in the case of corporations, or making too little use of it on the other, as we may have done in the case of unincorporated associations. It is conventional and orthodox to say that a corporation is a legal person and a partnership is not. The statement is only partially true. For some purposes a partnership is a legal person<sup>49</sup> and for some purposes a corporation is not.<sup>50</sup> But, aside from its inaccuracy, there is a double danger in such an unqualified statement. One we have already noted, namely, that the use of the word "person," in accordance with Mr. Hohfeld's "principle of linguistic contamination," is an open invitation to read into the concept the qualities of natural persons, which, according to the statement, would be attributed to a corporation and denied to a partnership.<sup>51</sup> The other danger

<sup>48</sup> *Op. cit. supra* note 42, at 661.

<sup>49</sup> BURDICK, *PARTNERSHIP* (3d ed. 1917) 83.

<sup>50</sup> (1926) 5 TEX. L. REV. 77, 78, 79.

<sup>51</sup> "It is unfortunate that the word Person, as a technical term, should have found lodgment in jurisprudence, for the idea connoted by it is quite distinct from the meaning attached to it by the moralist or psychologist, and, the difference not being steadily kept in mind, much confusion of thought has resulted." WILLOUGHBY, *op. cit. supra* note 40, at 31, 32.

"The power of words is such that, this word person once launched into circulation, has attached to it an absolute value." Deiser, *op. cit. supra* note 17, at 231.

"There is a danger of being led by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the grounds on which the name was applied." Justice Holmes in *Guy v. Donald*, 203 U. S. 399, 406, 27 Sup. Ct. 63, 64 (1906).

is that the two propositions, thus defined, may be exalted to the dignity of principles from which to deduce conclusions.<sup>52</sup> Indeed, corporate personality is the principle from which much, if not most, of the present law of corporations, in form at least, has actually been deduced. We say in form, because the facility with which corporate personality has adapted itself to the inevitability of the deductive process suggests that not infrequently there is something more compelling than the major premise back of the phraseology of the opinions or between the lines, which demands a workable conclusion.<sup>53</sup>

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<sup>52</sup> One writer makes the fateful statement that "whatever deductions may be made from the theorem (of corporate personality), what corollaries may be said to flow from it, must inevitably be made," a statement hardly to be reconciled with the same writer's treatment of the theorem as a "working principle." Deiser, *op. cit. supra* note 17, at 307, 308.

<sup>53</sup> The Continental Tyre and Rubber Co. v. Daimler Co. [1915] 1 K. B. 893, [1916] 2 A. C. 307, is a happy illustration. The plaintiff in that case, suing in an English court on contract for a debt, was a corporation chartered under English law and doing business in England. All of its directors and shareholders, however, were Germans living in Germany, except the secretary who was a naturalized Englishman, formerly German, who held one share. The case was tried during the World War and the question arose whether the company was English or German within the meaning of the Enemy Trading Act. In the Court of Appeal the corporate personality prevailed, so that the enemy character of the directors and shareholders had no effect either upon the character of the firm or upon its power to sue. In the House of Lords, Lord Halsbury, disagreeing with the conclusion, had to rely on a different principle. He chose for his purpose that which makes lawful means unlawful if used for unlawful ends. Lord Parmoor agreed with Lord Halsbury's conclusion, but as a deductive logician he displayed greater astuteness and finesse in getting the desired result without going back on the corporate entity. Like a Daniel come to judgment, he decided what he called the principle issue for the plaintiff, namely, that it was an English company despite the enemy character of its directors; but, even so, it was helpless to appoint a solicitor to represent it in litigation without the act of the Germans, so that it could not sue. "The pound of flesh is yours, but be careful of the blood!"

Having regard to the logical method exemplified in passages of these opinions, may we not yet hope to learn how many angels can sit on the point of a needle? But it would be unfair to judge the court by its method. In occasional passages the real reasons become articulate. For example, in Lord Justice Bulkeley's observation that, "If the personality of the corporators can for no purpose be regarded, there is nothing to prevent alien enemies from owning and sailing British ships under the British flag," ([1915] 1 K. B. 918), or in Lord Halsbury's objection that, "It seems to me too monstrous to suppose that . . . enemies of the State, while actually at war with us, be allowed to continue trading and actually to sue for their profits in trade in an English court of justice." [1916] 2 A. C. 316. Having regard to such passages, as well as to the conclusion finally reached, we may take comfort in the suggestion that the inevitability of a major premise is perhaps not so inevitable after all.

But the corporation is sometimes more insistent on its personality, as, for example, in *People's Pleasure Park Co. v. Rohleder*, 109 Va. 439, 61

It is not the part of legal personality to dictate conclusions. To insist that because it has been decided that a corporation is a legal person for some purposes it must therefore be a legal person for all purposes, or to insist that because it has been decided that a partnership is not a legal person for some purposes it cannot therefore be so for any purposes, is to make of both corporate personality and partnership impersonality a master rather than a servant, and to decide legal questions on irrelevant considerations without inquiry into their merits.<sup>54</sup> Issues do not properly turn upon a name. Kyngge had the right idea, when, in 1293, in answer to Spigurnel's objection that his client was not a cousin, so as to sue out a writ of cosinage, he urged that, since there was no other remedy available to him, a man's great-great-grandfather was his cousin for that purpose.<sup>55</sup> If the court had followed this reasoning, we may doubt whether even Kyngge would have thought the decision an authority on which to fix degrees of consanguinity for other purposes. A Brooklyn traffic court last summer decided that a hearse is a pleasure vehicle. The issue was whether hearses should drive in a traffic lane assigned to pleasure vehicles or in another traffic lane assigned to trucks and other commercial

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S. E. 794 (1908), where a sale of lands to a corporation composed entirely of negroes, to be used as a recreation ground for negroes, was held not to violate a "condition" that the title should never vest in "persons of African descent."

That there is nothing ultimate or absolute in the personality of the corporation is evident from decisions holding the same corporation to be a legal person in one litigation and for one purpose, *Sloan Shipyards Corporation v. Emergency Fleet Corporation*, 258 U. S. 549, 42 Sup. Ct. 386 (1921); and not a legal person in another litigation for another purpose. *United States v. Walter*, 263 U. S. 15, 44 Sup. Ct. 10 (1923).

That the same is true of the impersonality of unincorporated associations is attested by decisions holding the same joint stock company to be a legal person for the purpose of being prosecuted under a criminal law, *United States v. Adams Express Co.*, 199 Fed. 321 (W. D. N. Y. 1912); and not a legal person for the purpose of getting into the federal courts on diversity of citizenship, *Rountree v. Adams Express Co.*, 165 Fed. 152 (C. C. A. 8th, 1903); and again, to be a legal person for being served with process, *Adams Express Co. v. State*, 55 Ohio 69, 44 N. E. 506 (1896). See (1926) 36 YALE LAW JOURNAL 254 *et seq.*

As courts of law are not consistent in decrying the personality of the firm, so courts of equity are not consistent in admitting it. The very same court will at one time deal with the firm as a person, and at another time assert that it is not an entity. Brannan, *The Separate Estates of Non-Bankrupt Partners in the Bankruptcy of a Partnership* (1907) 20 HARV. L. REV. 589.

<sup>54</sup> The position of the chairman of the committee that drafted the Uniform Partnership Act, that a legal fiction (or postulate) should not be permitted to shut off an examination of the merits of an issue is, it is believed, eminently sound. Lewis, *op. cit. supra* note 19, at 297.

<sup>55</sup> Y. B. 20 & 21 Edw. I, 154.



vehicles. The propriety of the decision, I take it, is unquestioned. But if some later court, on the authority of that case, should apply to hearses a Sunday law against driving pleasure vehicles on the Sabbath, the decision would be neither good logic nor good sense.

Whether a corporation, or a partnership, or other unincorporated association is to be treated as a legal person in any particular respect, is improperly decided unless decided on its own merits. That it is so regarded in other respects, though perhaps relevant, is certainly not conclusive. Cases accumulate in which the courts have recognized a partnership entity,<sup>56</sup> and at the same time cases also accumulate in which the courts look behind the corporate veil.<sup>57</sup> Thus it is that the utility of the concept breaks down the partnership dogma, while, on the other hand, the abuse of the concept exposes limitations on the corporate dogma.<sup>58</sup> Legal personality is a good servant, but it may be a bad master.<sup>59</sup>

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<sup>56</sup> Crane, *The Uniform Partnership Act, A Criticism* (1915) 28 HARV. L. REV. 762; Cowles, *The Firm as a Legal Person* (1903) 57 CENT. L. J. 343.

<sup>57</sup> (1926) 36 YALE LAW JOURNAL 254; (1926) 5 TEX. L. REV. 77; (1926) 10 MINN. L. REV. 598.

<sup>58</sup> *Persona Ficta* "has repaid the hospitality of the law . . . by making the legal household permanently uncomfortable." Deiser, *op. cit. supra* note 17, at 131. If this is true, it has been unnecessarily so.

<sup>59</sup> Without committing him to anything that appears therein, the writer wishes to acknowledge his very great indebtedness to Prof. Walter Wheeler Cook, on whose major ideas of jurisprudence he has drawn freely in the foregoing discussion.