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LEGAL PERSONALITY—LEGISLATIVE OR JUDICIAL PREROGATIVE?

BY WILEY B. RUTLEDGE

Once upon a time the legislature of Arkansas undertook to control by statute a matter of popular pronunciation.[1] On another occasion, an Indiana legislator "attempted to eliminate parental difficulties in assisting in geometric problems by legislating out of existence the infinite tail of decimals that attaches to the ratio π."[2] Chief Justice Holt's claim "that an Act of Parliament can do anything save alter sex,"[3] has recently been bolstered by the solemn determination by the Wyoming legislature, "in the interest of historical accuracy," that "the ascent of the Grand Teton Peak in Teton County, Wyoming, made by William O. Owen, Franklin S. Spaulding, Frank L. Peterson, and John Shive, on the eleventh day of August, 1898, is the first ascent ever made of that renowned mountain."[4] Thus are history fashioned and immortality conferred by legislative fiat.

It seems that the limit of legislative power has been closely approached in recent attempts to preserve inviolate for posterity, by means of statutory enactments, the tradition of Adam's accomplishments. Nevertheless, a suggestion of further extension of legislative control of thought has recently appeared not

[1] That of the name of the state.

[2] Lee, Corporate Criminal Liability, 28 COL. L. REV. 113 at 194 (1928).

[3] Ibid. See also Corwin, The "Higher Law" Background of American Constitutional Law, 42 HARV. L. REV. 407 (1928).

[4] Session Laws of Wyoming, 1927, p. 215.

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from Tennessee or Mississippi or Arkansas, but from within the walls of that New England institution which has always taken pride in its atmosphere of intellectual and academic freedom.[5] Its purpose is to limit all recognition of "corporate personality" to legislatively prescribed instances. In any other age than one of political, social, economic and religious fundamentalism, the mere suggestion of legislative absolutivity in the control of modes of thought which are so common that there are evidences of them "in all literatures, even the rudest,"[6] and which admittedly are "familiar" in popular and legal (and it might be added, in *all*) thinking, would be shocking. When the *only* purpose and effect of the suggestion are to preserve the legislatively prescribed "round-about mode" of thinking without reference to the objectives to be reached by the thinking process,[7] the idea would appear absurd did it not proceed from so eminent an authority. Therein lies its danger. If for no other reason than the influence which it may have by virtue of its distinguished origin, it and its foundations should be examined.

"Legal Personality" is one of the perennial problems of the science of jurisprudence and of the administration of justice. Many a "practical" corporation lawyer would be astonished to learn that the argument he has just advanced in favor of his corporate client's immunity from liability is the same as that made in the Papal Courts in the thirteenth century upon issues of excommunication. The so-called modern doctrine of "disregarding of the corporate fiction" was "promulgated if not originated by Pope Innocent IV (1243-1254),"[8] who placed the ban upon *omnes singulos* without regard to the existence of the corporate body, the *collegium, universitas,* or *capitulum.* So immortal are ideas, so mortal their origins.

The concept of legal personality is implicit (though often not

[5] CORPORATE ADVANTAGES WITHOUT INCORPORATION, Edward H. Warren, Weld Professor of Law, Harvard Law School. New York: Baker, Voorhis & Co., 1929. Pp. X, 1012.

[6] Ibid., 7.

[7] Ibid., 14 and 454; see also post pp. 343-349. In general, throughout the discussion which follows, italics are the writer's, though there are a very few instances in which they originate with the author quoted.

[8] Dewey, The Historic Background of Corporate Legal Personality, 35 YALE L. J. 655 at 665 (1926).

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consciously considered) in every legal situation. It inevitably ensnares the attention of the abstruse legal theologian, the utilitarian philosopher of the law, the damage suit lawyer and his opponent, the corporation counsel, as well as that of His Honor on the Bench. It reaches out into so-called non-legal fields and grips the interest of the economist,[9] the philosopher,[10] the student of politics,[11] the sociologist[12] and the historian.[13] Evidently the last word has not been said upon the subject.

In recent years the spot-light of professional discussion has centered upon problems of corporate organization, reorganization and activity, particularly in cases involving "de facto corporations," the doctrine of "ultra vires," and "the disregard of the corporate fiction." Less frequently, but often enough to create much confusion, it has bobbed up in partnership cases, particularly in problems arising on winding up, those involving the nature of partnership property and of the partner's interest therein, and those growing out of the adjustment of relations among the partners themselves. Still less often, but with greater recurrence in the last two decades, it has appeared in litigation involving other unincorporated groups, particularly social, fraternal, religious and commercial associations not ordinarily viewed as technical partnerships, and, in many instances, labor unions and employers' associations. It is implicit in cases involving trusts, business or otherwise, decedents' estates, and many other forms of group and individual activity, though in such instances it is often accorded merely the recognition given by "polite" society to total strangers or "speaking acquaintances." Throughout the whole range of discussion and application of the concept, it is shunted back and forth between "law" and "equity," Federal and State "jurisdiction," until the wonder is that the concept has survived at all. Yet, with each kick from legal pillar to legal post, it absorbs strength and virility.

The usual attack upon the problem is by discussion limited to some one of the particular fields in which it arises. Perhaps this is one of the reasons why lawyers frequently view it, not as the same, but as in some way distinct and unrelated concepts,

[9] Ripley, MAIN STREET AND WALL STREET (1927).
[10] Op. cit. *supra*, n. 8.
[11] Ibid., 671, n. 19.
[12] Ibid., 670, n. 18.
[13] Ibid., 656, n. 2.

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when it arises, say, in the field of corporations and in that of partnerships. We are indebted to Professor Warren for collection and correlation of cases in all of these fields, with an eye single to "legal unity" or "legal personality," and for his attempt to discover whether the concept is itself a unit or a collection under one term of several and distinct concepts. It is but natural that after his long study of the problem, "Under What, if Any, Circumstances the Corporate Fiction Should Be Disregarded,"[14] he should examine the law of business associations "for the purpose of determining under what, if any, circumstances there may be corporate advantages without incorporation."[15]

It should be stated at the outset that the purpose of the following discussion is not to review Professor Warren's work, but rather to examine its thesis and the author's approach to the subject. At the risk of some prolixity, it is deemed best to state his approach as nearly as possible in his own language. This will involve considerable direct quotation in the initial stages of the discussion.

II

Though he disclaims intention to engage in philosophic speculation (p. 7), his approach is a psychological discussion of methods of the mind in conception. There are, he says, "two familiar modes of thought," whether concerning associated men or objects: one, that of thinking of them "as so many individuals"; the other, "as merged into a composite unit." Inquiring whether "one method is more familiar than the other," he finds answer in the number of associates. "If there is only a small number, . . . the first (i. e., the individualistic conception) . . . is more familiar. But, as the number increases, the second (the unital) becomes the more familiar. If there are only a few trees (or soldiers or partners), each one has individuality for us, but if there are thousands, . . . we incline to think of the forest," (the army or the company) (p. 4).

He then asks: "Which mode *does* the law adopt?" (pp. 2 and 7), and "Can it be said that although both . . . are familiar, yet

[14] Warren, CASES ON CORPORATIONS (2d Ed.) 82 (1916); Collateral Attack on Incorporation, 20 HARV. L. REV. 456 (1907), 21 HARV. L. REV. 305 (1908).
[15] Op. cit. *supra*, n. 5.

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persons with trained minds agree, after reflection, that one . . . more nearly accords to reality than the other?" (p. 4.)

For reply to the first inquiry we are plunged into an examination of the modes of legal thought prevalent during the American Revolution, in the time of Blackstone, and in the reigns of Henry II and Edward III, presumably upon the theory that the mind (at any rate, the legal mind) works in the same fashion in all ages (pp. 7-9). This excursion into legal antiquity gives us "a clear answer," one "in no wise dependent on the answer which a particular judge may make to the difficult questions (a) as to when one of two modes of thought is more familiar than the other, and (b) . . . more nearly accords to reality than the other" (p. 11).

In keeping with its clarity, the answer is brief: "It is only necessary to *inquire whether the legislature has consented* that a body of men should be *a legal unit*" (p. 11).[16] Upon this Blackstonian Rock of Ages (p. 11), Professor Warren would build our present law of business associations. This thesis he reasserts under the guise of three "reasons," which are substantially (stated inversely to the author's order): That it is neither (1) wise, nor (2) proper, for courts to treat bodies of men as legal units, absent legislative authority; and (3) that the legislature could not constitutionally delegate to the courts the power to so treat them at their pleasure (p. 12). While he promises careful consideration "whether there should be any exception," his conclusion is against one, even "in the one case in which . . . the most powerful argument can be made for an exception . . . the problem suggested by the Coronado case" (p. 13).

Masquerading as "two facts tending to show that it is not wise" (p. 12), the actual reasons appear to be: (1) the doctrine of *stare decisis;* (2) the necessity for certainty in the law. To the first, attention is given throughout the book. Of the second, after a reference to our old friends, the "two familiar modes of thought," their relation to reality, etc., it is urged: "All these *sources of confusion* are avoided, if we adhere to the law that a body of men is not to be treated as a legal unit, without legislative authority therefor. For this treats the question as to which of two modes of thought should be adopted as a question

[16] Discussion of the author's definition of "legal unit" appears post, p. 349.

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of division of power between the legislative and judicial branches of our government, and thereby rests the law upon a principle which can be easily understood and consistently applied" (p. 13).[17]

Professor Warren also proposes (p. 13) to give consideration "to some other questions relating to bodies of men which are closely related." Thus, "we shall inquire to what extent two or more human being who join to further their financial interests can, *without being regarded as members of a legal unit,* nevertheless attain by force of agreement advantages approximating the corporate advantages," and "to what extent a legislature may, if it sees fit, give to (such) human beings . . . advantages approximating the corporate advantages *without treating them as members of a legal unit*" (p. 14).

It is to be observed that it is the domain of "legal unity" which is marked out as sacred to legislative occupancy; that this is the element common to all the inquiries proposed: (1) are bodies of men to be *treated as legal units* without legislative authority? (2) What "approximate corporate advantages" can associated men secure by contract, *without being regarded as legal units?* (3) To what extent may legislatures confer on them such advantages *without treating them as members of a legal unit?* Because of the presence of this common element, these "related" inquiries resolve themselves into phases of a single issue, namely, "What is a legal unit?" Without further light on this, we cannot proceed with the inquiry in any of the forms in which it is stated.

It is important to observe that *the advantages* referred to are not necessarily either controlling or material in the court's determination of issues presented with reference to bodies of men, for

(1) "We believe that a legislature can (unless restrained by some constitutional provision) give such human beings advantages very closely approximating *all* the corporate advantages, without treating them as a legal unit, if it desires to proceed in that *roundabout mode.*" (p. 14);[18]

[17] It may be added that it also assumed to make the division, and that such power is legislative and not judicial.

[18] The writer assumes (as indeed the author does) that "corporate ad-

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(2) Men may attain "a very close approximation" to them by agreement or contract, e. g., in the Massachusetts trust cases, *provided*, the courts enforce such agreements;[19] and

(3) While the author does not so state, his argument necessarily implies that there could be no objection to the courts conferring or recognizing such advantages, so long as they steer clear of the legislative preserve of "legal unity," so long as they proceed in a "roundabout (hence individualistic) mode."

What we are primarily concerned with, therefore, and the first barrier we have to cross, is that of "legal unity," not that of "advantages." Before we can proceed to consider advantages as such, we must know that we are not treating as legal units the men who claim them.

So fundamental a premise requires elaboration. It receives attention in one short sentence at the end of the introductory chapter: "A legal unit," we are informed, "is whatever has capacity to acquire a legal right and/or incur a legal obligation" (p. 15). This is the cornerstone of the book.

It is probably because of his aversion to philosophy that the author leaves us thus to speculate upon the nature of "whatevers." Had he undertaken to elaborate upon them, he would have come squarely to face with the initial difficulty which confronts every writer in the field of jurisprudence, the problem of where to begin. "The law is so closely concatenated that it is hard to determine where to approach it; an attack upon any part, to be successful, seems to call for previous knowledge of other parts. Yet one must begin somewhere."[20] Professor Warren begins with legal personality.

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vantages" are at least illustrative of those secured by and characteristic of "legal units." Upon the importance of the "round-about mode," see the text, p. 454. Professor Warren's stress upon it is made despite his admission (pp. 503-4) that such legislation "usually has a tendency to complicate and confuse the law," and "to bewilder the public," as for example, the statutes involved in Hibbs v. Brown, 112 App. Div. 214, 98 N. Y. S. 853; (1907) 190 N. Y. 167, 82 N. E. 1108; Warren, CASES ON CORPORATIONS (2d E.) 63.

[19] A limitation which the author properly classifies as a question of policy (p. 14), but of course, since by hypothesis the individuals so acting are not to be "regarded as members of a legal unit," the policy involved is not merely that of sacredness of the unital concept.

[20] Gray, THE NATURE AND SOURCES OF THE LAW (2d Ed., 1927), p. 7.

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Analysis of the definition is necessary, that we may clarify, if possible, our conception of this thing which all but legislatures must avoid as if it were poison. Taking it as it stands, what has been done? The term "whatever" seems to have no independent significance. Hence, the distinguishing characteristic of legal units, by our definition, is "the capacity to acquire legal rights and/or incur legal obligations." By necessary implication we have asserted that anything which has not this capacity is not a legal unit. The problem therefore becomes one of determining what has this capacity and what has it not. The former we shall call legal units, the latter not legal units.

III

The orthodox method of attack is by reference to the views of others who have thought about the problem. As has already been noted, material is not lacking here. A few illustrative references may be helpful.

Let us take for a beginning, a comparatively recent thinker, Mr. Salmond: "A person, then, may be defined for the purposes of the law,[21] as *any being* to whom the law attributes the capability of interests and therefore of rights, of acts and therefore of duties."[22]

Professor Gray speaks more simply, defining a legal person as "a subject of legal rights and duties."[23] This, of course, is substantially Holland's expression,[24] through whom it is traceable to Savingny[25] and other continental jurists. Professor Smith,

[21] The concept defined is the same as that denominated "legal unit" by Professor Warren.

[22] JURISPRUDENCE (7th ed.), p. 330. It should be noted that his use of "person" and "being" is not intended to include only human beings, but is extended to cover "*any subject-matter* to which the law attributes," etc. See p. 336.

[23] Op. cit. *supra*, n. 20, p. 27.

[24] JURISPRUDENCE (1st ed.), p. 64.

[25] Ibid., quoting Savigny, SYSTEM, ii, p. 1; Puchta, ii, p. 291. Holland's "improvement" upon the continental expression is in the inclusion of duties as well as rights: "A 'Person' is often defined as the 'Subject,' or Bearer of a Right. . . . Persons are the subjects of Duties as well as of Rights." Of course Holland's language, "subject" or "bearer," is more abstract and inclusive than Salmond's "person" or "being," but he also goes on to discuss expressly the concept of "artificial legal persons." "Persons, i. e., subjects of Rights or of Duties are in general human beings; but . . . the law rec-

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in his recent very valuable contribution,[26] introduces his discussion with a reiteration of this form of statement. He finds another form "perhaps the most satisfactory," namely: "legal personality is the capacity for legal relations"; but because of his objection to the use of the word "capacity,"[27] his own definition is framed as follows: "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."[28]

Even so abstract a thinker as Professor Kocourek predicates the minimum of legal existence (his "personateness") upon the presence of some (though very few) legal relations . . . "a minimum, a reduction of which would imply a condition of slavery."[29]

While these views and the forms in which they are expressed are by no means exhaustive, they are sufficiently representative of thought in the field, whether in respect to matters of common agreement, or in reference to differences of viewpoint, to form a basis for the beginning of our study. There are in them, implicit if not expressed, significant differences and significant points of agreement. Multiplication of examples would serve no useful purpose.

We shall notice first some of the resemblances.

In the first place, there are some points of common agreement as to the scope and extent of the concept. No one of them limits it, in application, to human beings. With one exception, all agree that at times it is to be applied to ships, aggregates of property, idols, groups of people, and in some form or other in nearly every system of law, to pure abstractions; in other words, that the concept is wider than that of natural personality.

Again, all recognize that it does not include all of the concept of natural or human personality. This in several ways. For instance, that some natural persons have *no* legal personality.

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ognizes certain groups of men or of property . . . as Persons in an artificial sense."

[26] Smith, Legal Personality, 37 YALE L. J. 283 (1928).

[27] Idem. The basis of Professor Smith's objection will be discussed at a later point.

[28] Ibid., p. 284.

[29] Kocourek, JURAL RELATIONS, pp. 4-5 (1927).

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The stock illustration is the slave, though similar assertions have been repeatedly made concerning monks, felons, married women, and perhaps other classes of humanity. The assertion is probably not strictly true with reference to any of them, for it seems to the writer doubtful whether this condition of *complete* legal negation has ever been imposed upon any individual or class of individuals in any society, despite the often repeated contrary assertions. There is however enough of truth in the illustrations to support the general conclusion above stated. Further, all recognize that with reference to some (and in reality very many) kinds of fact situations, it is, always has been, and probably always will be, improper (not to say impossible) for *any* human being to be considered as having legal personality. This will include all *purely* subjective factual situations as well as many which have expression in conduct and are objective. One of the authorities quoted goes so far in this direction as to assert: "Legal relations, in strictness, therefore, *never* exist between human beings."[30] This, in very striking contrast to the equally positive assertion of another thinker: " . . . all jural relations must, in order to be clear and direct in their meaning, be predicated of . . . human beings."[31]

While agreement is general in the respects noted in a broad way, there are great divergences of view among all of these thinkers when it becomes necessary to apply the concept of legal personality to a new and concrete situation, and these similarities are therefore of no great practical advantage.

The matter upon which there is universal agreement, and which therefore has greatest significance, is the fact that however varying these forms of statement may be, each one relates the concept of legal personality to legal relations, or legal rights and duties. There is implicit or expressed difference of view as to just what the relation is, but relation of some sort there must be. Absent this, absent legal personality. It is legal relations, therefore, which must be investigated.

IV

Before proceeding with this investigation a preliminary in-

[30] Ibid., p. 57.
[31] Hohfeld, FUNDAMENTAL LEGAL CONCEPTIONS, p. 75.

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quiry must be made concerning one divergence of viewpoint which is apparent. It is to be noted that some of the definitions are stated in terms of possibility of future existence of legal relations thus indicating a possibility of legal personality apart from legal relations while others predicate and some expressly require the present existence of legal relations for the creation of legal personality. For instance, among the former are Warren's "capacity to acquire . . . or incur," Salmond's "capability of," and the language "capacity for" in the definition approved generally, but criticised in this particular by Professor Smith. On the other hand, Mr. Smith's own statement "an abstraction of which legal relations *are* predicated or a name for the *condition of being a party to* legal relations" is so worded because of his objection to the use of the word "capacity," as "suggesting the possibility that the subject may have a capacity for legal relations without yet having become a party to such relations."[32] His objection is on the ground that "when legal personality is conferred, the subject by that very act is made a party to legal relations."[33] The briefer statement of Gray, Holland and others, "the *subject of* legal rights and duties," is ambiguous in itself in this respect, but Professor Dewey has recently demonstrated that the statements of Continental and other English jurists from whom this form was derived postulate some kind of entity having properties "antecedently and inherently" in order to be "a right-and-duty-bearing unit."[34]

Our preliminary inquiry then is this: Is legal personality merely a present capacity for becoming at some future time a "party" to legal relations, or is it rather the condition of being presently a party to such relations? Had Professor Smith's unmarried minor with "capacity to marry" a legal personality? Has A ten minutes before he contracts with B legal personality? Or must the minor wait until he marries, and A until B actually accepts his offer, before they can properly be said to be legal persons? Even in the *language* of Professor Smith, "the condition of being *a party* to legal relations" there is something of the implication of this "antecedent and inherent property." It is

[32] Op. cit. *supra*, n. 26, pp. 283-4.
[33] Ibid.
[34] Op. cit. *supra*, n. 8, p. 658. And see post p. 365.

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one thing to assert that legal personality exists where there are present legal relations, but it is an entirely different thing to assert that there can be no legal existence where legal relations do not now exist, but may come into being tomorrow. Admitting the former statement, we cannot *assume* the latter to be true, in the face of such evident opposing opinion. It is part and parcel of the problem. That the idea of present legal existence predicated solely upon the fact of the possibility of "becoming a party to" legal relations *in futuro* is at least subconsciously present in the thinking of many jurists, is shown by Professor Dewey:

> "The postulate, *which has been a controlling principle* although usually *made unconsciously*, leading to the merger 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."[35]

Professor Smith states the present distinction clearly, but he assumes the point. Perhaps he is right, but his unmarried minor for instance, and many unmarried adults also, would be very painfully surprised to learn that they are not legal persons for the purpose of marrying. However, their disappointment will be completely dispelled by the further information that at the instant they say "I do" in proper legal form, they will acquire such legal personality. A, in the example above given, would probably seek another lawyer, if advised that he were not a legal person to contract with B. The "postuate," made so unconsciously, may have some practical value and basis of fact. If so, we cannot disregard it. It is for us to determine whether such value exists and, if it does, in what it consists.

Mr. Salmond, in his effort to clarify the notion of legal personality, carries this idea further than the implicit assumption present in the use of his word "capability." "A legal person," he says, "is any subject-matter to which the law attributes a merely legal or fictitious personality. . . . The law, in creating legal persons, always does so by personifying *some real thing*. . . . The *thing* personified may be termed the *corpus* of the legal person so created; it is *the body* into which the law infuses

[35] Ibid.

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the animus of a fictitious personality."[36] The idea seems to be that we not only have a "capability" which constitutes legal personality, but that this capability must have a seat, a "corpus" and that this seat *is* always "some real thing," though he admits that it is not *necessary* for this to be so in the nature of things.[37] But he gives us no identification marks by which we are enabled to distinguish legal Adam's ribs from other real things. True he enumerates some specific instances, but we are left in ignorance whether the general concept would include microbes or elephants, a grain of sand or the solar system, an unborn infant or a corpse.

It is strange to find something of the same notion in the thought of the jurist who so violently disagrees with Mr. Salmond's view of legal personality as to assert that jural relations cannot exist between men, or "between objects," or "between human being and object," including animals.[38] Professor Kocourek uses the term "substrate"[39] to express the idea Mr. Salmond attempts to convey by "corpus." It will be necessary to examine Professor Kocourek's theory of legal personality rather fully, in order to arrive at his meaning in the term "substrate," and in doing so we shall find that he introduces another element or "device" which bears directly upon our preliminary inquiry concerning the nature of legal personality.

His scheme for expression of the full concept of legal personality consists of three subdivisions or sub-concepts: (1) the substrate; (2) personateness; (3) legal personality.

The substrate may include a human being or other natural object (or groups of them), and complexes of objects and legal relations, depending upon the system of law with which we are concerned.[40] In the case of human substrates, they may be presently existing, as individuals, aggregates or successions, de-

[36] JURISPRUDENCE (7th ed.), p. 336.

[37] His view seems to be that while "the law *might* . . . attribute the quality of personality to a purely imaginary being" (ibid., p. 336), yet it does not do so. On the whole the nature of the "corpus" is to him apparently a matter of no great importance, since its choice "is a matter of form rather than of substance, of lucid and compendious expression rather than of legal principle" (ibid., p. 338).

[38] Op. cit. *supra*, n. 29, pp. 57 and 58.

[39] Ibid., p. 58.

[40] Ibid.

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ceased ("retrospective") or unborn ("anticipated"). Apparently also all forms of substrates are non-jural in character, except in the case of the Roman law complexes of objects and jural relations, and we may assume that these would be considered non-jural for substrate purposes by a convenient fiction, in order to avoid too great complication in conception, and perhaps a "logical" circle.

The second element of the system is introduced as follows:

> "The factual basis of social phenomena is legally organized through the device of personateness—*centers* of legal force and of attraction of legal force—having a *capacity* for claims, duties, powers, liabilities, or some of these."[41]

Legal ganglia, so to speak; or, if we may use astronomical rather than anatomical terminology, planets in the legal solar system. We are then informed that "personateness being recognized, it remains *a constant* center of legal force or attraction," and that this is so "whatever the vicissitudes which reduce or augment *legal capacity.*"[42]

Our hope of finding here the "essential or internal nature"[43] of legal personality is raised only to be destroyed by the information that personateness is "constant only in a relative sense, i. e., in relation to acts," and that it "may be regarded as a constant even though it is susceptible of diminution or of augmentation." Further, that while it is a constant in relation to acts, yet "acts are highly variable" and "through acts personateness may be enlarged or diminished." Perhaps what Professor Kocourek is trying to tell us is that personateness is constant in relation to some acts, but variable relative to others. The difficulty is that there is no general classification of acts, nor any formulation of a determinant for use in discriminating between them. More comprehensible is the description of personateness as "the minimum capacity for legal relations." But apart from the logical difficulty involved in thinking of the capacity (the quality) as identical with that in which it inheres (the thing qualified) "*centers* of legal force . . . *having* a capacity for legal claims,"

[41] Ibid., p. 4.
[42] Ibid.
[43] Op. cit. *supra*, n. 26, p. 284.

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etc., it is confusing to be informed on the one hand that "personateness may be enlarged or diminished (through acts), that is to say, *capacities for jural relation* may be . . . increased or reduced . . .," and on the other that it "remains constant whatever the vicissitudes of legal condition which reduce or augment *legal capacity.*" Is personateness a capacity or a center of capacities—a quality or a thing qualified? If a capacity, is it merely a minimum capacity, or one variable, "that is to say," one that "may be enlarged or diminished," or "reduced or augmented?" Despite the assertion that personateness is a "pure concept," we also find difficulty in "attributing" capacities, acts and capabilities of acting, legal condition and its vicissitudes, and all such things to purely imaginary points of concentration of imaginary "forces."

Finally, we are informed that in the case of a poor man become wealthy, "while his legal personateness remains the same, the economic ambit of his jural relations, his legal *personality,* has increased." This is the third element of Mr. Kocourek's analysis. Legal personality, it appears, is a variable, but "here, also, there is a minimum which cannot be passed without destroying personateness itself." If the variation is too great it disappears and carries with it personateness.

Just what is meant by the implicit assertion that legal personality is "the economic ambit of his jural relations?" Is it that "he" has become *a party* to more numerous jural relations or simply that he has acquired a wider capacity *to do so in futuro?* The term "ambit" rather indicates the latter meaning, but of course his actual legal relations must of necessity have greatly expanded, whether he acquired his wealth honestly or by stealth. Further, what is the relation of legal personality to personateness? If both are mere capacities, it seems that personateness is simply the minimum of legal personality, and hence not different from it in kind, but only in quantity, scope, and extent. If, however, personateness is only a capacity, and legal personality is what Professor Smith has called "a name for the condition of being a party to legal relations," then we have two distinct concepts and Professor Kocourek's invention of the device of personateness to designate one of them is justified, despite the need of clarification of the concept.

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Which of these is his thought? Much of his language regarding personateness is in terms of mere capacity, but when he undertakes to illustrate the minimum of legal capacity necessary for the existence of personateness, he uses a child just born of pauper parentage. This infant, he asserts, "would *have legal claims* which attach to the protection of his body—life, limbs, freedom of locomotion, etc. He would *have no other legal relations* except those whose object is protection of his integrity as a free human being. So much, at least, is a *minimum*, a reduction of which would imply a condition of slavery." This is not the language of mere present possibility of future acquisition; it denotes "present investiture." The pauper infant *now has* legal claims, legal relations. The concept of personateness expresses always more than mere capacity. If legal relations disappear entirely, out goes personateness with them. This is also true of legal personality. In their ultimate extinction at least, personateness and legal personality are Siamese twins. In birth and death they are one; how it is they function separately and distinctly in life remains to the writer a mystery. While it is possible a distinction should be drawn for legal purposes between the condition of "being a party" to legal relations and the condition of merely having a capacity to do so, Professor Kocourek's "device of personateness" is not helpful in making the distinction, nor in discovering of what value it would be, for what legal purposes it might be profitably employed. It seems only to add to the confusion. When concretely applied the "device" always postulates the present existence of some legal relations. It cannot therefore aid in finding the answer to our preliminary inquiry.

Professor Corbin senses such a distinction in his assertion: "It seems to some of us that society not only commands, but also *permits* and *enables* and *disables*."[44] While the statement is suggestive, it was made incidentally in the course of a discussion not primarily concerned with the concept of legal personality, and we are not shown how and when these permissive, enabling and disabling societal acts occur. The suggestion, with its im-

[44] Corbin, Jural Relations and Their Classification, 20 YALE L. J. 226 at 237 (1921).

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plications, bears directly upon our problem, however, as will more fully appear at a later point in our discussion.

To return to Professor Dewey.[45] He takes an illustration from Maitland, who defines a corporation as "a right-and-duty-bearing unit."[46] The definition, and the language immediately following, "would appear to use 'person' in a neutral sense, as signifying simply a right-and-duty-bearing unit," but Maitland's discussion, says Dewey, "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." To demonstrate he quotes further from Maitland's summary of Gierke's position:

> "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 a group will." "In short," he says, "some generic or philosophic concept of personality, that is, some concept expressing the intrinsic character of personality *ueberhaupt*, 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."

Dewey then shows how this search for something of a subjective nature breaks down in its application to corporate bodies, foundations, or associations, or results in voluminous mental gymnastics in the attempt to escape the disaster.[47]

At this point another matter of common agreement among those attempting to clarify the concept of legal personality should be noted. By a shifting of emphasis it appears clearly in Mr. Salmond's statement when he speaks of "any being to whom *the law attributes* the capability of . . . rights . . . and of duties"[48] and more explicitly again: "*The law, in creating legal persons,* always does so by personifying some real thing,"

[45] For a recent valuable discussion of the influence of "non-legal" thought on legal action, see Dickinson, The Law Behind Law, 29 COL. L. REV. 113 and 285 (1929).

[46] COLLECTED PAPERS, 307 (1911).

[47] Op. cit. *supra*, n. 8, pp. 658-660, from which are derived the quotations immediately foregoing.

[48] *Supra*, n. 22.

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etc.[49] That it is implicit in Professor Warren's "whatever has capacity to acquire legal rights and/or incur legal obligations," is shown by his statement:

> "Of course it is *for the law to determine* what are legal units. There is *no* legal unit whatever except as something is a unit *in the contemplation of the law.* Even a human being is not a legal unit *in the nature of things,* he is only a legal unit if the law so contemplates him, and sometimes (as in the case of monks or slaves) the law did not so contemplate him."[50]

So it is with the briefer form statement adopted by Professor Gray and others, "the subject of legal rights and duties," as evidenced by Gray's statement: "The state may not have *created* a corporation, but unless it *recognizes it* and *protects its interests* such corporation is not a juristic person, for such a corporation has no legal rights."[51] At times it is necessary to emphasize the obvious. Legal personality, it appears, is *created by the law.* It is the law which in Salmond's language "attributes" or "creates," in Warren's "determines" legal personality. Its origin is in law, *not,* as Professor Warren says, "in the nature of things."

If we are unwilling to follow Professor Dewey's conclusion, if we are to assert that it is sufficient for the creation of legal personality that there be merely a capacity for legal relations *in futuro,* let us inquire *when* it is that the law creates or "determines" legal personality. What is the specific legal creative process? What are the time, the place, the circumstances of the "birth" of legal persons? Is there a definite act of legal conception and birth quite apart and distinct from other legal processes? *Are* there two distinct processes, by one of which is performed the sole function of creating legal personality, by the other that of creating legal relations? Just what is the process by which the law "personifies some real thing" or creates "personateness" out of "substrates," or "determines what are legal units?"

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[49] *Supra,* n. 36.

[50] Op. cit. *supra,* n. 5, pp. 841-2.

[51] Op. cit. *supra,* n. 20, 57. Italics are the writer's. Professor Gray's use of the term "corporation" here is in the sense of physical aggregation of persons—not in its legal significance.

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It may be parenthetically inquired also, whether the fact that legal personality is created by the law is consistent with the often-made implicit assumption of the existence of a subjective entity for discovery of which there is so prolonged a struggle.

Until these matters are determined, we shall not have disposed of our unmarried and anxious-to-marry minor, nor of A who wants to contract with B. We shall have occasion to refer to their problems later, but for the present it appears that we shall not solve them by any direct search for physical objects or for abstractions which in their constitutional make-up possess the *capacity* for legal relations. Search for Kocourek's "substrate," for Salmond's "corpus," for Warren's "whatever," for Gray's "subject," for Maitland's "right-and-duty-bearing unit," for Gierke's "living organism," or for the "abstraction" of others would run us through the vast latitudes of the physical and mental universes, and mayhap land us in the middle of the bog of "will." The difficulty is in our lack of an omniscient sign-painter whose business it would be to label the proper objects and ideas "Legal Unit."

Equally futile is search for Salmond's "animus" and Kocourek's "personateness." When we find eminent authorities informing us, one that in its ultimate analysis legal personality is always found in human beings, the other that it is never in strictness to be found in them, the problem of where to look for it becomes indeed perplexing. At any rate our preliminary inquiry must remain unanswered for the present. Direct search for legal capacity and its constitutive body or seat are unavailing.

V

There remains, however, as we have already noted, another approach—the point upon which all thinkers upon our subject agree, namely, the relation between legal personality and legal relations. While there is divergence as to the nature of the relation, each recognizes that *some* relation is essential—that the existence of legal relations *in praesenti* or *in futuro* is the *sine qua non* of legal personality. The only common-to-all starting point is legal relations. If we can discover when, where and by what agencies they are created, we shall certainly find at least part of the concept of legal personality. Whether we shall

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find the whole, and thus the answer to our preliminary inquiry must await the result of our examination of that which we know to be discoverable. We are therefore squarely confronted with the problem, "what is a legal relation," or in Professor Warren's language "a legal right . . . or a legal obligation," or duty? If we learn this, determining by what they are "acquired" or "incurred," we may trail the "whatever," the "legal unit," "legal personality" to its lair.

Again we must have recourse to the thought of others. It should be noted at the start that in some forms of expression the terminology is "legal right" and "legal duty or legal obligation," while in others it is "legal relations" or "jural relations." However, these expressions are intended to state a single fundamental concept, and are in themselves not of superlative importance for the first stages of our inquiry. The important thing is to understand that the varying forms of expression do represent or embody a single concept.

"A legal right," Mr. Salmond informs us, " . . . is an interest recognized and protected by a rule of legal justice . . . an interest the violation of which would be a legal wrong done *to him whose* interest it is, and respect for which is a legal duty," and more broadly, "any *advantage or benefit* which is in any manner conferred *upon a person* by a rule of law."[52] He also quotes the more simply stated definition of Jhering: "Rights are legally protected *interests*."[53] Professor Beale has used substantially similar language: "A right may be defined as a legally recognized *interest* in, to or against a person or a thing."[54] Professor Gray tells us that "the full definition of *a man's* legal right is this: That *power* which he has to make a *person or persons* do or refrain from doing a certain act or certain acts, so far as the power arises from society imposing a legal duty *upon a person or persons*," and "the rights correlative to those duties which the society will enforce on the motion of *an individual* are *that individual's* legal rights."[55] Holland's statement is similar: "We may define a 'legal right' as a capacity residing *in one man* of

[52] JURISPRUDENCE (7th ed.), p. 238.
[53] Ibid.
[54] Beale, TREATISE ON CONFLICT OF LAWS (1916), Sec. 139.
[55] Op. cit. *supra*, n. 20, 12, 18.
[56] JURISPRUDENCE, p. 56.

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controlling, with the assent and assistance of the state, the actions of others."[56]

Among those who speak in the terminology of "relations," Professor Kocourek "roughly describes" a jural relation as "a situation of fact by virtue of which *one person* presently or contingently may affect the natural physical freedom of *another person* with legal consequences"[57] and in another place as "a situation of legal and material fact upon which *one by his own will* may restrict or claim to restrict presently or contingently, with the aid of the law, freedom of action of another."[58] In his review of definitions of jural relation,[59] he begins with Savigny's statement, "a relation *between person and person,* determined by a rule of law."[60] Examples could be multiplied to no present use.

Disregarding for the present the confusion evident in the denomination of a right variously as "an interest," and "advantage or benefit," a "power," a "capacity," and "a situation of fact," of what significance for our purposes are these statements of jurists as to the nature of rights or jural relations? What have they to do with legal personality?

Simply this, that in every case the definition of "right" or "duty" or "legal relation" is predicated of persons. Note that Salmond, Gray, Holland and Kocourek expressly employ the term "person" or "man," while it is implicit in the expression "legally protected interest" of Jhering and Beale. Without the concept of persons, in whom the right inheres or of whom the relation is predicated, definition of the concept of legal right, or legal relation is impossible. Even in the more limited and accurate use of the term "right" as denoting simply one form of jural relation, this necessity appears: "The capability to claim an *act* from *another* is called a 'right' (in the strict sense)";[61] and so of other specific relations: "The capability to *act against another* is called a *power*."[62]

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[56] Op. cit. *supra*, n. 29, p. 5.
[57] Various Definitions of Jural Relation, 20 COL. L. REV. 394, 412 (1920).
[58] Op. cit. *supra*, n. 29, Chap. III.
[59] Ibid., pp. 31-32.
[60] Kocourek, JURAL RELATIONS, p. 3.
[61] Ibid.

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This necessity is given full expression by some. For instance Mr. Salmond says:

> "An *ownerless* right is an impossibility. There *cannot be* a right without a *subject* in whom it inheres, any more than there can be a weight without a heavy body; for *rights are merely attributes of persons,* and can have no independent existence."[63]

So Holland:

> "A right . . . postulates: a *Person* of inherence . . . In order therefore to understand not only the nature of a right . . ., but also the manner of its creation, transfer and extinction, it is necessary to acquire clear ideas of the full meaning of the following terms: *I. Person* . . ."[64]

This "full understanding" he proceeds to give us by defining "Persons" in terms of "Rights."[65] So also Kocourek:

> "Stated summarily, the characteristics of a jural relation . . . are:
>
> 1. *Two* legal persons.
> 2. An Act.
> 3. A definite legal effect following the act,"[66]

and "a jural relation must have one dominus and one servus."[67]

One further query remains before the paradox is complete. In defining legal rights or relations in terms of "persons," is the term used in the sense of natural persons or of legal persons? Despite the conceptual difficulty of predicating *acts* of other than natural persons, it is clear that in all cases the term is used in its legal and not in its natural significance. There can be no doubt as to Mr. Kocourek, when we recall his assertion that "a human being is *never* directly the dominus or servus of a legal relation. Legal relations, therefore, never exist between human beings."[68]

So also with Professor Gray, who begins the process of defining legal rights by predicating them of *men*[69] but very soon

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[63] JURISPRUDENCE (7th ed.), p. 330.
[64] JURISPRUDENCE, p. 64.
[65] *Supra,* n. 24.
[66] JURAL RELATIONS, p. 19.
[67] Ibid., p. 54.
[68] Ibid., p. 57.
[69] Op. cit. *supra,* n. 20, p. 18 and throughout the first chapter.

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is inquiring whether they may be predicated of other things than men, of ships, of cattle, and other animals, of ideal conceptions, even of the Deity. His finding is that in every stage of legal development, from the rudest systems of barbaric peoples to the most complex systems governing modern society, legal personality has been attributed to some of these non-human "objects," among the most interesting and *naive* instances being cases where the Holy Ghost, the Sacred Virgin, and even the Messiah were subjected to the operation of human laws through this device.[70]

The same logical sin may be charged expressly to Salmond and Holland, and it is safe to assert, to most philosophers writing before the beginning of the present century. So far from clarifying our concept of legal personality, our investigation of thought concerning the nature of legal rights only confuses. In our search for understanding of legal relations, we get back to legal personality.

This then is the dilemma. If we undertake to define "legal personality," we are compelled to find out the nature of legal rights and duties; when we attempt to discover the nature of legal rights and duties, we are confronted with the enigma of legal personality. The doctrine of the *renvoi* in conflict of laws is no better illustration of the vicious circle in logic. Such an approach only shunts us back and forth between two "Unknowable Somewhats."[71]

VI

The dilemma itself indicates the ultimate connection between legal personality and legal relations. By a shift in emphasis in the language of the definitions, it appears that there is also implicit common agreement upon the obvious but important fact that legal relations, like legal personality, have their origin in and are created by the law. Whether the form of expression be that of Salmond's "recognized and protected by a rule of law," of Jhering's "legally protected interest," or of Gray's "which the society will enforce," all postulate a system of law, existing and operating, for the creation of legal relations. To determine when and how legal relations are created, and thus what their

[70] Ibid., Chapter II.

[71] The writer is unable to cite the author to whom he is indebted for this phrase.

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relation is to legal personality, to understand what they are and how they are segregated from the other relations of life which have no legal significance, requires consideration of the nature of law, its content, mode of operation and function. This is a large order, but one we must accept. Since Professor Warren has not accepted it, the premise upon which his conclusion rests is unexpressed and of questionable validity.

The confusion which envelops legal personality, legal relations, and their relation to each other is only a manifestation of the deeper confusion concerning law, its nature, origin and function. As Mr. Justice Cardozo has put it, "We shall find that our theory of the genesis of law has philosophical implications which do not spend their force in determining our notion of the origin of law in general, but spread out and affect our judgment in specific controversies."[72] He finds no more notable instance than "the influence of metaphysics upon the law of corporations and the theory of juristic persons."[73] His "tyro in legal studies," seeking "a quiet nook where my ears will not be assailed with the babble of contending schools . . . opens a book on corporations and seeks to understand the nature of juristic persons. Nominalist and realist are at each other's throats again. . . . Platonist and Aristotelian flock to the standards of their leaders."[74] "Neither lawyer nor judge . . . is conscious at all times that it is philosophy which is impelling him to the front or driving him to the rear. None the less, the goad is there. If we cannot escape the Furies, we shall do well to understand them."[75]

There are lawyers who in their hearts regret the passing of feudal society and the advent of industrialism because thereby the feudal system of tenures of land has been warped and twisted, if not disrupted. It would be interesting to know to what extent Blackstone's philosophy of law dominates legal thought in America today. When we consider that his works constituted practically the Inns of Court of our legal system for almost the first hundred years of its existence and the juristic Bible of our

[72] Cardozo, THE GROWTH OF THE LAW, p. 126 (1924).

[73] Ibid., p. 129.

[74] Ibid., pp. 28, 29, 30. For a detailed discussion of the origin of some of the philosophic influences upon the legal conception of the juristic person, see Professor Dewey's article cited *supra*, n. 8.

[75] Ibid., p. 26.

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Courts for many years, it is not to be supposed that the influence of his thought could be other than powerful now. Perhaps this is one explanation for the fact that "Corporate Advantages Without Incorporation" is dominated by the Blackstonian philosophy of juristic persons. That philosophy, however, is but an illustration of the process of Blackstone's "theory of the genesis of law . . . spreading out and affecting his judgment in specific controversies." Professor Warren has swallowed the instance whole, without reference to its foundation. In this he is not without present company, and in high places.

What was Blacktone's philosophy of law? "If man were to live in a state of nature," says he, "unconnected with other individuals, there would be no occasion for any other law than the law of nature and the law of God. Neither could any other law possibly exist; for a law always supposes some superior who is to make it . . . But man was formed for society and . . . is neither capable of living alone, nor indeed has the courage to do it."[76] In considering the nature of civil law, he points out that it "regards him . . . as bound to other duties toward his neighbor than those of mere nature and religion; duties which he has engaged in by enjoying the benefits of the common union; and which amount to no more than that he do contribute, on his part, to the subsistence and peace of the society."[77]

In the fashion of the modern sociological jurist, Blackstone traces the evolution of civil institutions from the family to the three forms of government then prevalent, remarking the advantages and weaknesses of each. He has no modesty about his own preference. The British form, with Parliament as the supreme authority, is the embodiment of governmental perfection. His theory of society flowers in the supremacy of the legislature, confounds it with sovereignity . . . "convertible terms" . . . and identifies legislative mandates with "divine and natural duties."[78] The legislature "acts only . . . in subordination to the great Lawgiver, transcribing and publishing His precepts."[79] This of course applies to all "actions that are

[76] COMMENTARIES, V. I, p. 43.
[77] Ibid., p. 45.
[78] Ibid., pp. 46, 47, 51.
[79] Ibid., p. 54.

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naturally and intrinsically right or wrong," but the jurisdiction of the legislature is apparently wider than that of divinity or nature, for with regard to "things in themselves indifferent" they "*become* either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper, for promoting the welfare of the society."[80] The difficulty of discriminating between the two classes of acts causes him no great concern, nor is the necessity for placing human sanctions behind divine and natural duties explained. Legislative infallibility is such that its mandates automatically accord with divine precepts, and while "obedience to superiors is the doctrine of revealed as well as natural religion," it becomes strangely, "the province of human laws to determine" "*who those superiors shall be,* and *in what circumstances,* or *to what degrees* they shall be obeyed."[81]

In such a scheme, the position of the courts could not be other than subordinate. Theirs are the functions of "putting the laws into execution," of interpreting legislative declarations where ambiguity requires, of administering equity (wherein they act without "established rules and fixed precepts," dealing only with unusual cases not provided for in the law). Perhaps their highest duty concerns the *lex non scripta,* the "*jus commune* or folk-right," which consists of maxims and customs "of higher antiquity than memory or history can reach,"[82] and whose validity is to be determined "by the judges in the several courts of justice."[83] But even in this their action is not conclusive, for where their decision is "most evidently contrary to *reason,* much more, if it be clearly contradictory to *divine law*" or "if it be found that the former decision is manifestly absurd or unjust, it is declared not that such a sentence was *bad law,* but that it was *not law.* . . . So that *the law* and the opinion of the judges are not always convertible terms."[84] Infallibility is no judicial attribute. While their decisions may reach the dignity of strong evidence "of what is common law,"[85] theirs is no part of the business of law *making.* Law is either ready made for them, re-

[80] Ibid., pp. 54, 55.
[81] Ibid., p. 55.
[82] Ibid., p. 67.
[83] Ibid., p. 69.
[84] Ibid., pp. 69, 70.
[85] Ibid., p. 73.

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quiring only that they correctly discern and discover it; or if it be not so, only the legislature can manufacture it.

Out of this hodge-podge of prevailing and antecedent political, religious, social, and "moral" philosophy, two predominant influences, mutually antagonistic in their ultimate assumptions concerning the nature of law, stand in clear relief. They are, first, the influence of theories of "higher law," law as derived somehow from somewhere above and beyond human institutions, chiefly the Deity and/or "natural law" in all the various significances of the term; and second, the influence of the political philosophy of the day, in the theory of legislative absolutivity. The presence of two such contradictory theories might be explained by reference to the author's native inconsistency, did not such an explanation assume his philosophy to be a peculiarly personal one. In fact it was not at all the work of a creative genius, but rather a representative compilation of the dominant thought of his time.[86] His essential conservatism made him a fitting instrumentality for its expression.

The notion of "higher law" was, of course, not new in Blackstone's time. From a century before Demosthenes to the time of Calvin Coolidge is the long span of its life, and each of these philosophers was its devotee.[87] We cannot undertake here to trace, even in rough outline, the history of the concept, in its innumerable transformations from generation to generation, from struggle to struggle, throughout this tenure of "perpetual succession."[88] It is sufficient for our purposes to note that it is the final resort alike of individualist and of absolutist; of Jeffersonian and of Hamiltonian; of abolitionist and of secessionist; of prohibitionist and of anti-prohibitionist. It constitutes the

[86] "The events in 1688 in England established the supremacy of Parliament and Coke's proposition (see post, n. 91) failed to maintain itself." Pound, SPIRIT OF THE COMMON LAW, p. 75 (1921). The same observer also traces the origin of "our absolute ideas which have prevailed so largely in American legal thinking" through Blackstone to Grotius. Ibid., p. 150.

[87] Corwin, The Higher Law Background of American Constitutional Law, 42 HARV. L. REV., 149 and 365, at 153 (1928).

[88] Recent valuable discussions include not only Professor Corwin's article, n. 87 but also that of Professor Dickinson cited *supra* n. 45. *cf.* also Dean Pound's numerous writings on the subject, especially his SPIRIT OF THE COMMON LAW.

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equally secure foundation of the "Rights of Man" and of the "Divine Right of Kings." Within its limits there is room for the inalienable "Right of Revolution" and the unalterable duty to "preserve, protect and defend the Constitution" in its entire integrity. It is the ultimate refuge alike of Pope and Prince and Puritan; of Edward Coke and James I; of Patrick Henry and George III and his ministers. There is no human cause but has its sacred origin in higher law. The difficulty is not as to its existence, but in the fact that each participant in the momentary conflict considers himself its special beneficiary and the exclusive human agency through which it operates.[89]

The theory of legislative supremacy, however, was not so ancient. It was a newer idea, devised as most philosophies are, for a purpose. It too had its transformations. Professor Corwin has recently traced its metamorphosis from its appearance in the philosophy of Coke and of Locke to its ultimate form in the Commentaries.[90] In brief, in their thought, "the *maintenance* of higher law was *entrusted* to legislative supremacy," and Parliament became, not the final author and creator of law, free from its limitations, but simply its champion in the struggle, dating from Magna Carta, to bring the sovereign also within the law. Higher law and the theory of legislative supremacy were simply allies in the struggle with monarchical absolutism. It is no such modest claim which Blackstone makes in Parliament's behalf. While he renders lip-service to the notion of higher

[89] "For, as has always been true when men have believed in absolute theories of the sort, the principles, supposed to be the dictates of nature, flow in practice from one of two sources. On social, economic and ethical questions, nature was always found to dictate the personal views of the individual jurist as they had been fixed and settled by education, association, and, perhaps, class interest. On legal questions, nature was found to dictate for the most part the principles of law with which the individual jurist was familiar, and under which he had grown up. . . . The past generation of lawyers, brought up on Blackstone, learned this mode of thinking as part of the rudiments of legal education." Pound, SPIRIT OF THE COMMON LAW, p. 95.

[90] Op. cit., *supra*, n. 87, p. 365 ff.

[91] Ibid., p. 404. Coke's famous dictum in Bonham's Case, "that in many cases, the common law will control acts of parliament, and sometimes adjudge them utterly void," etc., amounted, of course, to an assertion of parliamentary subjection to "higher law." Although later as a member of parliament, when his effort was directed against another and a royal foe, he did not hesitate

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law,[92] it is only lip service; for "at the end, despite his previous equivocation," he loses sight of the mission of Parliament as an instrumentality for the maintenance of higher law, and does not "flinch from the conclusion that the whole legal fabric of the realm was . . . at Parliament's disposal."[93]

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to advance the theory of parliamentary supremacy, his argument must be assessed in the light of its purpose, which was no exaltation of parliament above Magna Carta's provisions or assertion of its liberation from all limitation of higher law, but rather was the subjection of the power of the monarch also to its limitations. Professor Corwin points out that in Coke's assertion of legislative supremacy he is apparently referring principally to parliament as a *court*, and that Blackstone consequently misconstrued his statement as an assertion of the parliament's unrestricted authority in its legislative capacity, Ibid., p. 378. See also pp. 367-380 for further discussion of Coke's positions. However this may be, and notwithstanding his apparent inconsistency in language and position, the fact remains that Coke was always "the embattled commoner" (ibid., p. 377), and in this character he asserted the supremacy now of this institution, now of that, as a means of checking and refuting the more absolute claims of some other.

[92] As Professor Corwin says in another place (ibid., p. 376), Blackstone "seems to be attempting to bridge the gap between two conflicting theories of law," and while he appears "undismayed in the presence of the palpable contradictions in his pages, adept in insinuating new points of view without unnecessarily disturbing old ones," (ibid., p. 405) his ultimate conclusion is in accordance with the prevalent theory of legislative supremacy. "True it is, that what Parliament doth no authority upon earth can undo." I Bl. Com. 161, quoted in Corwin, op. cit., p. 407, n. 133.

[93] When one recalls that Parliament, acting as the "trustee" of natural law, and hence of popular sovereignty or individual liberty, had been the instrumentality by which, at the cost of a sovereign head and revolution, a final victory had been achieved in the struggle for limitation of the prerogative of the crown; that this resulted in an unprecedented degree of individual freedom and participation in government by the English people; that Parliament's position was greatly strengthened by the advent of the Hanoverian line; and that the period in which Blackstone wrote was one of extraordinary commercial and national expansion, colonization and international trade operating at the time to relieve congestion of population and bring new wealth to those at home, it appears that there was a veritable conspiracy of events for the exaltation of the parliamentary position. It was not an unnatural step, therefore, for those most excellent results to be attributed to the institution which had been so influential in bringing them about, or for its "fiduciary" position to be ignored. Further it was desirable for these conditions to be perpetuated as far as possible, and it was an entirely natural assumption that the instrumentality by which they had been created could and would perpetuate them. The business of the time, so far as the resident Englishman was concerned, was the maintenance of the *status quo*, and the notion of legislative finality was the most available philosophy for accomplishing this objective.

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The very conditions which brought about the change in the theory from its form as propounded by Coke and Locke to that advanced by the Commentator, were to lead eventually to its limitation within the British Commonwealth of Nations to the British Isles and to its rejection in the establishment of our institutions.[94] How the conception "failed to finally establish itself in our constitutional system," is a matter of our constitutional history, during which "the notion of the sovereignty of the ordinary legislative organ disappeared automatically, since that cannot be a *sovereign* law-making body which is subordinate to another law-making body."[95] Blackstone did not note in his basic principle the very evil which it was, in its origin, designed to eliminate,[96] because he did not take account of the fact that unrestrained power, like wealth, begets itself. The ultimate objective of the age-old struggle, in all its transformations, has been for the discovery and establishment of a human institution

[94] At the very time when Parliament was sloughing off its fiduciary character and throwing higher law into the junk-heap, this ancient idea of law was in process of revivification in America. It was now the colonies which were appealing to higher law, asserting its supremacy over Parliament and Crown. Their grievance was that they were denied the benefit of the provisions of Magna Carta and the "rights of British subjects." It was in the events which led up to the Revolution that the alliance between higher law and the theory of legislative supremacy was finally dissolved, and as is too often true of allies, they became aligned in the subsequent conflict against each other. It is significant that the experience of the colonists with the Legislative Absolute in actual operation led not only to our adoption of the principle of separation of powers, but also contributed to the mother country the modern philosophy of the British state, in which Parliament does not legislate for the dominions, but limits its legislative authority to the British Isles and possessions not occupying the status of dominions. Corwin, op. cit., *supra*, n. 86, p. 402.

[95] Op. cit., *supra*, n. 86, p. 409. Professor Corwin attributes this result not only to the fact that under our governmental machinery the Supreme Court was finally able to establish its superiority to Congress, but also to the fact that "in the American *written* constitution, higher law at last attained a form which made possible the attribution to it of an entirely new sort of validity, the validity of *a statute emanating from the sovereign people.* Thus Congress became subject to two superior authorities in the business of making law, the people and the courts.

[96] Corwin expresses the danger thus: "All the varied rights of man were threatened with submergence in a single right, that of belonging to a popular majority, or more accurately, of being represented by a legislative majority." Ibid., 408. The old foe of unrestricted power had simply substituted legislative garb for monarchical raiment or priestly vestment.

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which, vested with final authority in society, will not abuse its power and assume the role of tyrant. It is the frailty of human nature which makes of today's champion of liberty, victorious in the conflict, tomorrow's defender of privilege. Successively in the course of history, first as liberator, later as tyrant, march the figures of emperor, priest, king, legislator. At the time of the formation of our institutions, the villain in the piece was the legislator. It was to prevent repetition of recent painful experience with him and his philosophy, that the device of "separation of powers" became the foundation upon which the framework of our government was constructed, bolstered by the introduction of "checks and balances." Thus was instituted a new experiment in the limitation of power, out of which was to come a new Ultimate, the judiciary.[97] When it came in the course of time to override the solemnly enacted will of a "co-ordinate" branch of government or of the people themselves, the charge of usurper was again to be raised and new checks proposed, selection of judges by popular vote, the initiative and referendum, the proposal for the recall of judges and their decisions, proposals for requiring more than a bare majority of the court to set aside an act of Congress and other measures to check the final authority in our society.

It is thus that out of the unending struggle for power and its privileges, for limitation upon it and its tyrannies, come philosophies of the day, weaving themselves into the fabric of government and of law. So they become invested with the appearance of ultimate truth, tangled up with all our notions of the sacredness and eternity of law, and remain to deceive and delude, long after life and history have made final disposition of the issues and men which brought them into being. Consequently form, letter, precedent triumph over function, spirit, justice. He who "makes unto himself any graven image, . . . of maxims or formulas, to-wit,"[98] will find himself fighting in opposing armies . . . if he live long enough.

Blackstone's philosophy of law was thus in its day a living thing. But he who today uses "this obsolete legal science,"[99]

[97] *Cf.* Pound, SPIRIT OF THE COMMON LAW, p. 63, where he discusses this constant "shifting of the center of political gravity."

[98] Cardozo, THE GROWTH OF THE LAW, p. 107 (1924).

[99] Pound, THE SPIRIT OF THE COMMON LAW, p. 150 (1921).

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disregards the course of conflict and of life for a century and half, and denies himself the privilege which Blackstone claimed, that of fitting his philosophy to his objective and to the conditions under which he must strive to attain it. We have passed the era of the Legislative Absolute. Professor Warren's basic thesis must be supported, if at all, by more potent consideration than the outworn legal philosophy which he so naively assumes.

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