

### THE JURISTIC PERSON.—III.

For the purpose of adjusting rights where they conflict with the rights of others or where they are modified by the rights of others the law finds it necessary to consider a right as located in some individual or personality. These rights must at times be administered without reference to their ultimate holder—that is, without reference to the person who may in the end derive the benefit of them. The person or personality in which the right may be considered as vested is known as the *Destinataire* of the right. It has been seen above that the law, in the majority of cases where corporate rights are involved, is never called upon to pursue the rights beyond the corporate body; that is, the law for the purpose of administration, for the purpose of adjusting rights as between a corporation and a private individual, or another corporation, must deal with the rights of the corporation as if they were vested in some distinct personality. The law has always accepted this fact as it was, and called the rights those of a fictitious person.

The thought that what the law was dealing with was actually a person of a certain kind, did not originate in a desire for mystery; it was something more than mere scholastic quibble. There are problems in which the group stands opposed to the individual although he may be a member of the group;—there are situations in which the rights of groups themselves are antagonistic, and these rights must be administered as group rights.

It must be recognized that the mere motive force that lifts an object and puts it in a different position, acts by virtue of a principle that is absolutely intangible. That is true of the manifestations of electricity and other subtle forces of nature; it is equally true of acts that result from a mental force. If we transfer this thought to the corporation it will be readily conceded that the physical activity

of a corporation is produced by the mental activity of the associates. The decision of the stockholders acting as a unit is not the distinct act of any individual, it is the resultant of desires never entirely harmonious but fused together by discussion and compromise. We may consider this collective consciousness as the personality of the corporation.

It is true that the ultimate holder of the right should never be ignored. But it is impossible to reach the corporation through him. And in fact, he is the least interesting, the least momentous fact in corporate life, as an individual, after he has entered the corporate sphere. The rights of the corporation are never administered as stockholders' rights because they cannot be. The rights of a group of individuals united together for a common purpose, the purpose to be pursued as a common enterprise, are the rights of the group as a group. And group rights are not in the least spectral. It is the group personality that concerns the law.

When its rights and duties are considered, it is treated as capable of bearing them, whereupon arises immediately the problem of whether or not it is self-sufficient or autonomous—whether or not it is responsible?

The answer to these questions is found in the facts themselves. Responsibility for corporate acts is invariably fastened upon the corporation itself. It brings suits as a unity and defends them as a unit. The stockholder never becomes visible in any transaction so long as corporate life lasts. In the conferring upon it of certain rights there is exacted from it corresponding duties, and if the activity of the group and the property of the group afford the machinery through which an offense is committed, it is the group and not any individual to which responsibility is affixed.

But while it is correct to speak of legal subjectivity or legal capacity in a corporation its capacity exists only in a certain circumscribed sphere. There is a line drawn between individual activity and corporate activity. The object of the formation of the corporation is, it is true, to

make possible the accomplishment of things impossible for an individual, but they are matters of a special and not of a general kind. The implication of human personality is unfettered power to act subject to the regulations of an entire legal and judicial system. The implication of corporate personality is power to act only within a certain sphere—the corporate sphere.

There is nothing absurd in the statement that there are no such things as the natural rights of corporations. Certain of them are in their nature impossible. Such are rights of family and other rights by their nature incompatible with collective exercise. There is no need to visualize further the juristic person. We do not need to feel its antennæ to feel certain of its existence. The fact exists that the moment a powerful group begins to act toward a common end it produces a capacity for aggression that individuals can only in the rarest cases combat. It is not important whether they effect their purpose by massing property together or whether the powers and influences controlled by the entire group are concentrated upon the accomplishment of the object. It presents the old problem of genus against species and the genus must in the very nature of things prevail.

And from this circumstance arises the necessity on the part of the state of confining group activity within certain definite lines in order that the effects of its activity may with some degree of precision be measured.

Let us for an instant consider the question of responsibility for acts ordinarily prohibited. Suppose the existence of a great fund of property makes possible the commission of certain misdemeanors. If responsibility can attach only to the individuals who perpetrate the act there is left in existence the same large fund of property which may be manipulated by another person for the commission of some other offense. When an offense becomes a corporate act for which the corporation itself is responsible the individual interested in the prevention of the offense is multiplied by the number of persons engaged in the enterprise. The

stockholders acting together have certain powers of supervision, which they are bound to exercise, failing which certain of their property rights are injured.

On the civil side, because of the diverse citizenship of the persons associated, because of the difficulty of dealing with any of the individuals associated, the law is obliged to deal chiefly with a mass of property. But in dealing with a mass of property the problem is almost invariably, what is the nature of the act that affects the property, whether by way of increasing it, by way of enforcing some rights against it, or by way of changing its character. In other words the courts are concerned with some one's activity in connection with the property; that activity is manifested usually by an agent of some sort, but an agent whose acts are directed and controlled by the corporate will or by the collective will. Now it is only for the collective will that the juristic person is an expression. There is no way of giving the juristic person a body any more than there is of giving electricity or ether a body. The juristic person is the expression simply for the collective activity of the corporators.

The component elements of the juristic person are the parts that the stockholders play in a joint or corporate act. It has already been pointed out that a person has many capacities, and that his act in each capacity is quite recognizable and is distinguished from his act in any other capacity. There is no danger of confusing the act of a father with the act of the same man as a member or stockholder of a corporation. Hence the law is bound to deal with a group as a unity since it has no way whatever of reaching the individuals that compose it.

In the case of railroad and other large corporations the stockholders are scattered through all the known countries of the globe, and there is no possible way of pursuing the individual responsibility of each member. It might be said that a certain fragment of the personality of each stockholder is subtracted from him and fused with similar fragments from all the others to make up the personality.

On the criminal side the situation is slightly different. The law has almost invariably said that a corporation cannot sin, that crime is impossible for it; yet its statutes constantly pronounce certain acts committed by corporations misdemeanors and impose penalties for them. The facts of the matter are dealt with apparently on their own basis without reference to their origin or significance. When the fact arises and it is necessary to impose a penalty the penalty is imposed and the esoteric question of personality or non-personality is ignored, if possible, but it cannot always be ignored.

Since the real matter of importance is group activity such questions as limitation of liability and the like have no bearing on the determination of whether or not an act is in its nature corporate. But even having eliminated this factor there is some difficulty in effecting a recognition of the truth that corporations are not what most existing theories of the corporation insist upon, viz: creatures of the state. As a matter of fact the existence of the corporation is not determined by the state but by its powers to act, which are regulated and limited by the state. What really happens is that the state finding certain persons standing in a certain relation to each other and acting as a unit, upon a request from them, authorizes the group to embark upon a certain course of activity.

In all organizations in which every party is an actual participant in the enterprise, each one having a general range of individual action, no such thing as personification is either desirable or useful. There is in such a case a common fund of property just as there is in the case of a corporation, but such groups neither act nor appear as a unity. The law, therefore, is not interested in their personality when they do act as a whole. In parodying the idea of juristic personality, the relation of husband and wife is sometimes dragged into play, and the property rights of the spouses have been represented as a juristic person. Problems are stated in which impossible attributes are affixed to the corporate body. Thus a case is reported in which building lots were sold

subject to a restriction that they should not be used by or transferred to negroes. One of the lots was purchased by the congregation of a negro church. When the conveyance to the church corporation was attacked the court gravely decided that the corporation was an entity apart from the colored members that composed it, and inferentially that the entity was not colored.

It is the purpose of the theory of juristic personality above all to furnish a useful working principle for the resolution of corporate problems. It was not intended to furnish the doctors of jurisprudence with a cadaver that might serve for dissecting purposes.

While the individual corporator as such is of small moment to the corporate group once it is formed there are certain spheres of activity within some of which the stockholders alone have power to act, and within others of which activity is restricted to the group. There are other spheres in which the rights more or less conflict.

A recent treatise on Constitutional Law contains a diagram in which the co-ordinate and conflicting powers of the States and the United States are exhibited. The diagram is a circle divided by lines into various segments, some of which represent the exclusive domain of federal rights and powers, others the exclusive domain of state rights and powers. There are other segments common to both. The corporate and individual fields of action might be similarly plotted.

The rights of the stockholders individually are of two kinds; there are first of all, rights of participation. There are secondly, rights of prohibition. Stated as affirmative rights the sphere of the corporators' rights and activities contains among others these: The shareholder has by virtue of his interest in the enterprise a proportionate interest or share in the corporate property, which is determined by the extent of his holding or interest. By virtue of his proportionate share in the property he has a claim to whatever part of the profits may fall to his share. Rights of this kind, such as the claim to profits in the shape of dividends are rights that the stockholder may enforce not only in accord-

ance with the desire of the corporation, but even against the desires of the corporation.

And there is further vested in each stockholder an expectancy or reversionary interest in the corpus of corporate property. It is true that it is a right which looks to a time subsequent to the extinction of corporate life. Each shareholder has further separate rights in what may be called the collectivity itself. He is interested in the maintenance of corporate rights unimpaired. And from this right springs also a certain right of prohibition. Or he may be given the choice of two alternatives; he is not compelled to take the poorer choice of withdrawal from the enterprise, but may insist on the maintenance of the entire corporate rights unimpaired as something in which he has a substantive interest—an interest which he may defend by recourse to legal action. None the less he is entitled to withdraw if he can persuade some one else to take his place. There are certain spheres within which the corporator alone may act; as a corollary of this follows the right to prevent corporate encroachment on his private rights. Growing out of his right to the maintenance of collective rights unimpaired is the right to forbid the alteration of the character of corporate property or the nature of the undertaking—a right in fact to forbid acts that might change the nature of corporate life. He may exact from the corporation equity of treatment with the other stockholders; may forbid the undue preference of another to the exclusion of himself.

On the side of activity within a certain sphere of influence, the stockholder is a participant in the corporate life. The manner in which this participation is exercised is by means of the right of suffrage; this is again the source of various corollaries of the widest possible range. There is first of all the right to insist upon the legal effect of whatever vote he may cast. He may enforce this right at law—he may prevent its arbitrary exclusion. Negatively the stockholder has the right to contest elections not held in accordance with legal requirements or in which his own votes having been overcome, the act adopted might impose some

unlawful liability on him. These are generally spoken of as minority rights. Whether the individual acts as a unit or whether he acts in conjunction with others who make up the minority, who might constitute a small group within the corporation, the origin of such rights of prohibition is the same.

Minority rights grow, not out of group rights—they are not corollaries of corporate activity; they are individual rights of a shareholder or the sum of the rights of several shareholders to control in certain cases the corporate will—a control exercised in this instance not in accordance with the corporate will, but against it. It will be seen that the law in dealing with such rights expressly assumes that there are group rights—rights vested in the group as such and individual rights, and that the two rights may often conflict—differences which the law is called upon to regulate.

Correlative to the rights of the stockholders are his individual duties. Contained in these are the duties to contribute to the corporate enterprise—to pay for shares, to respond to the demands of corporate necessity wherever made in accordance with law. All of these principles follow as corollaries from the composite personality; the obligations are obligations rooted in a corporate idea, and the rights are those that follow necessarily from the very nature of the group.

It must be recognized that the law does not concern itself with the refinements of sophistry concerning the nature of corporate personalities; the precise kind of body it may have nor its spiritual attributes. It declares generally the moment at which the law recognizes the existence of corporate personality, but from that moment it has before it a subject with which it deals, a subject against which it will enforce not merely the individual rights of its members, but the rights of those who deal with it—the rights of creditors and others. With the consequences of corporate personality, however, the law has much to do, for whatever deductions may be made from the theorem, what corollaries may be said to flow from it, must inevitably be made. Having

adopted a principle, however, all of its consequences may be followed with more or less rigidity. The consequences of an unsettled view of the essential nature of the corporation are, in a jurisdiction like the United States, widely divergent conceptions of individual rights and of corporate rights in each jurisdiction.

When facts present themselves, they appear, if unrelated to principles, as isolated phenomena, each to be dealt with, much in its own way. Facts, however, are rarely absolute. They appear almost always as members of a chain of causation, to interpret which intelligently, it is necessary to have the beginning, and to foresee the end of the chain. If a principle be adopted as a working principle, assuming it to be feasible, and assuming it to offer good results, it reduces the facts that may be brought within its range from chaos to order. The nature of the corporation, it happens, lends itself to *a priori* speculation; it offers a basis from which the necessary consequences may logically follow without straining and without perverting the facts. Thus the corporation is a person—a composite person. Its rights instead of being general like those of individuals are special and definitely limited by law and by the nature of things within a certain circumscribed sphere. Within that sphere its capacity for action is undoubtedly greater than that of any individual could possibly be. Being a composite individual, there is necessary the adjustment of individual and corporate activities. From the main principle easily follow the exclusion of individual influence from any strictly corporate activity, and the exclusion of the corporation from encroachment on any domain purely individual. The life of an individual is comparatively free from the scrutiny of the law. His private life is what he makes it, and he has an absolute right to screen it if he wish, from public notice. His expenditures, his actions, the activities in which he may choose to indulge, so long as they are lawful, are matters with which the law is not concerned. He may, according to the views of his friends, have false ideas concerning the education of his children; he may drop his shoe business

and become a tailor, or cease to be a tailor and write verse. The law is indifferent.

With a corporation it is quite otherwise. With the internal life of the corporation the law has everything to do. With some kinds of corporations, such as banking companies, the law is bound to watch the expenditure of every penny of its money. It is concerned vitally with the character of the agents that such companies employ; it may even desire to know whether they are given to horse racing or gambling. It is not a matter of indifference to the law whether a company ceases to do banking and starts to manage a railroad. It is intimately concerned with the transformation of an iron company into an oil company, or an oil company into a grocery syndicate.

The juristic person requires the aid of the law to give it an organization by means of which its purpose may be effected. The law, conferring such privileges, defines the manner of its organization and restricts the range of its activities. The law consequently exercises a certain supervision over the life of the juristic person. It does not in any sense accept the office of its guardian. It does not assume responsibility for its acts, nor on that account grant to those who deal with it immunity against loss. It is manifest that the juristic person will need classification; that rules applicable to some are not applicable to others, that as groups, as wholes, as associates, they differ widely among themselves. The examples already given disclose that while the same person may be a stockholder in a banking company, a railroad corporation, a steamship corporation, the rules of law, the attitude of the law, toward each of these corporations as such must be different. It is manifest that the law must always make some regulations for these companies, as such, without any consideration whatever of their stockholders, other than a due regard for their property rights. The extent to which the stockholder can be ignored in some cases makes manifest still farther the absolute necessity for dealing with the group as a group.

Taking the state as the highest type of juristic person

because of certain distinctive marks which make it superior to all persons real or artificial, it has already been shown that the individual as such is a matter of almost no concern. The individuals of the nation are never recognizable. The personality of some individual may for a time seem to visualize the personality of the state, but that is a temporary and accidental quality. The nature of the relations between citizens and state is so complicated that the principal function of the law is to define the activities of each. Its existence is necessarily perpetual; it is far greater than that of any of the individuals in it, and their rights in any of the property owned by it cannot be distinguished. The property is owned by them as an entirety, and moreover the maintenance of those rights depends upon their maintaining themselves in a collective state. Without it they would become the rights of the first persons strong enough to take them. The corporation, it has been stated, is a plurality, bound into an entity. Its body is a composite organism; its vital principle is that of an immanent collective will, in a collective personality.

The continental systems accepted the facts long since, and produced, at least a certain harmony in the legal treatment of corporations. It is not to be supposed that even there it was a simple matter to effect a recognition of a principle that to many seems occult, but when an adherence to the views either of fictions or of loosely grouped individuals leads to the absurd result that no responsibility can be affixed, or that if any is affixed it must be merely to the participants in the act, the need for the principle seems apparent. When a corporate act results in a penalty, whether by way of fine, whether by enjoining an intended act, or whether by restricting an act, or by restricting the future activity of the corporation, the corporation is properly said to be punished. It is corporate property that pays the penalty. It is corporate activity that is restricted, and if the final decree be one of dissolution it is the corporation that is dissolved.

It has already been indicated that there are real practical

reasons as well as theoretical ones for recognizing the principle of the juristic person. There are many acts possible so long as it is known that the individual who does them is responsible, and not the collective body nor the property of the collective body that fathers them. If, for example, the only person concerned in the prevention of a railroad disaster is merely the engineer, railways would be very unsafe means of travel.

In a recent prosecution of a corporation the question involved was like this. A law made it unlawful for any person or corporation to offer or receive any rebate or discrimination in respect of the transportation of property by a common carrier, subject to national laws upon the regulation of commerce. The law provided further that a person or corporation who should offer or receive such rebates should be guilty of a misdemeanor, and on conviction should be punished by a fine of not less than one thousand dollars or more than twenty thousand dollars.

The method in which innocence or guilt of the offense provided against should be determined was somewhat complicated. Every carrier subject to the provisions of the act was bound to print and keep open to public inspection, schedules showing the rates and fares and charges for the transportation of passengers and property in force at the time, upon its route. The schedules must state plainly the places upon its railroad between which property and passengers will be carried, and must contain the classification of freight in force, stating separately the terminal charges and any rules affecting them. These schedules it was provided must be plainly printed in large type and copies for the use of the public posted in two public and conspicuous places in the station or depot of the carrier. These schedules, etc., were required to be filed with a commission.

The defendant in the suit under discussion was convicted of accepting a rate of six cents per hundred pounds, where the public was charged eighteen cents and seven and one-half cents were the public paid nineteen and one-half cents. The corporation was convicted and fined. Now the method

in which its guilt or innocence might be determined is interesting. An agent of the defendant inquired of an agent of the railroad company what was the rate and was informed that it was six cents, the rate paid by the defendant. It is certain that there were methods and that the law provided means by which the defendant could have ascertained the correct rate; it might have seen a schedule; it might have inquired of the Interstate Commerce Commission; it might have performed the computations necessary upon an examination of the schedules to reach a conclusion as to the correct rates. After the facts of the case the computations undoubtedly might have been somewhat complicated, and the method adopted by the defendant of securing its information was one that might readily lead to an evasion of the provisions of the law, but having found that it had not used the means of information at its disposal the court reached its decision; that although it is necessary to consult two schedules to find out a lawful rate for carriage the two schedules constitute the lawful rate; that a shipper is chargeable with knowledge of the lawful rate on his shipment where it has been published and filed as required by law where it is accessible to the public after using proper diligence to ascertain such rate; finally that the defendant was guilty of the misdemeanors charged and must pay the fine.

In all of these problems there is no consideration whatever of stockholders, nor can one imagine in such a situation the law either desiring or being obliged to search for stockholders. The wrong that it desires to remedy is a corporate wrong. In the case of corporations whose operations are carried on upon such an enormous scale the court has no method whatever of dealing with stockholders; they are not citizens of one country; they are citizens possibly of all the known countries of the globe. The citizenship of the corporation is that of the country that controls it; in which it has its organization, and in which it carries on its enterprise, and so the law is compelled perforce to regard the corporation as an entity of some sort. If it could be satisfied

with a fiction the fiction might be as convenient a method of disposing of the question as any other, but it is evident that a fiction is unequal to the demands made upon it.

It has been the endeavor in considering the conflicting views regarding the nature of the corporate enterprise to avoid a polemical attitude. The fiction theory none the less is a venerable and decrepit survival of an age that had but little use for a corporation. It afforded much amusement, and produced much sophistry from men who were deliberating gravely how many angels might balance themselves on the point of a needle. To them it came with a halo from the subsidiary common law of all mankind—from the Roman law. It speaks well for their dialectics that the fiction has survived until now. But the law has need now of something more than a plaything for dialectics. The great materializing tendency will now look straight through the theories—through the mist, at the people and the facts themselves. It will deal with the men concerned—it is not concerned with spirits. Like Omar, who, prayed to save the Alexandrian library, exclaimed, "Either the books agree with the Koran, or they do not. If they agree, the Koran is sufficient. If they do not, they are wrong. Let them be burnt," the law says, either the theory agrees with the facts or it does not—if it agrees, it is of little use—if it disagrees, it is of less use. And it has no theory. The law professes to regard the corporation as a fictitious person, and proceeds to fine it and convict it of misdemeanors. If in a desire to face the actual facts we seek to deal with stockholders and property, we find that we can never reach those facts.

This much at least should have become clear. The law must deal with the corporation as a right and duty bearing unit. It cannot avoid granting rights to a group of men to be exercised only while they are a group. And when it grants so much, it must exact corresponding duties. And it cannot go half way. The responsibility must include full responsibility for all acts civil and criminal. It should be recalled in this connection that an entire continent has made use of the conception of the juristic person for sixty years.

The reciprocal rights of shareholder and corporation must proceed from some principle; they flow naturally from the principle of the juristic person. Without it, they are matters of any possible determination until a suit has arisen in which the question is settled.

The writer could scarcely indulge the hope of presenting except in the barest outline a theory to which Professor Gierke devotes nine hundred pages of consistent ratiocination. And he expresses his ideas in words of such length as involuntarily to recall the familiar tale of the lady who stated that she had abandoned the study of German, and upon being asked why replied, "When I discovered that 'pin' was 'stechnadel,' I lacked the courage to keep on until I came to elephant."

All that could be hoped was that the theory might lose some of its spectral attributes, and might be exhibited as offering a working basis for the solution of corporate problems.<sup>1</sup>

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<sup>1</sup> The writer has made use, in the present paper, of the treatise upon the *Genossenschaftstheorie*, by Gierke.