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The Person in Imagination or Persona Ficta of the Corporation

Maximilian Koessler*

I. Introduction

The history of the person in imagination or persona ficta can be traced back to the Middle Ages. In the law of the Catholic Church, this sinister child of conceptualistic thought sprang up from case law concerning certain concrete legal problems that had high actuality in those days. It was originally a figure of speech: the metaphoric expression for a dogmatic fiction¹ which was believed to be needed for a functional purpose. It should help to recuperate a convenient lawyer's tool, possessed, under different names, by the Roman law,² but forgotten by subsequent generations. Reference is herewith made to the possibility of attaching the status of separate legal entity or of a rights and duties bearing unit³ to something which is not a human individual, but an organization of several human beings or a human institution. Perhaps it is well to remember in this connection that *legal* personality is not a necessary adjunct of the physical existence of a human individual.⁴ On the other hand, law may attribute this capacity to a social organism or to a social institution, in other words, to something different from a human individual.

When the dogmatic fiction, personifying separate legal entities other than human individuals, had conquered the legal world, the term "person," originally the exclusive designation of man, came in addition to mean any rights and duties bearing unit.⁵

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1. Against the use of dogmatic fictions in law, see Bentham, *The Theory of Legislation* (Ogden's edition, London, 1931) 71, 74. Cf. however, Vaihinger, *Die Philosophie des Als Ob* (9 and 10 ed., Leipzig, 1927) xxiv, cited with approval by Cardozo, *The Paradoxes of Legal Sciences* (1928) 33, 34.

2. Sohm, *Institutionen, Geschichte und System des Roemischen Privatrechts* (17 ed., Munich and Leipzig, 1923) 200; Buckland, *Textbook of Roman Law* (2 ed., Cambridge, 1932) 175; Buckland and McNair, *Roman Law and Common Law* (Cambridge, 1936) 52; 2 Savigny, *System des Heutigen Roemischen Rechts* (Berlin, 1840) 241, n. 3.

3. On the corresponding German term "Rechtssubjekt," see Jellinek, *Allgemeine Staatslehre* (Berlin, 1900) 150, 151.

4. Illustrated by the institution of slavery. Young, *Foreign Companies and other Corporations* (Cambridge, England, 1912) 51; Weber, *Rechtssociologie* (2 ed., Tuebingen, 1925) 439; Seagle, *The Quest for Law* (1941) 267.

5. Plucknett, *Words* (1928) 14 *Corn. L.Q.* 263, 266; Neckam, *The Personality Conception of the Legal Entity* (1938) 49.

In the lawyer's vocabulary, the moral or juristic person⁶ was thus added to the natural person. It is clear that at this stage of the development, "person," even if used with regard to an entity different from a human individual, ceased to be a metaphor, but was a plain reference to something existing as it was referred to, without any figure of speech involved. At this time, "the question whether the juristic person is real or imaginary should never have been seriously advanced."⁷ Rather should the phrase "persona ficta" or its equivalent in modern language have been jettisoned as an intellectual ballast, as something which had become obsolete by losing its original sense.

However, lawyers are a conservative kind of people, sticking to traditions of their art as long as possible, and unfortunately too long in most cases. Instead of recognizing the obsolescence of the conception of a fictitious personality of the corporation or of the juristic person, the attempt was made to vindicate its preservation by philosophical speculations which, it is believed, did not promote, rather in some respects impaired, the free flow of sound legal thought. One of the unfortunate offsprings of this sophisticated approach to problems which should have been solved with an open view of the realities involved is the still prevailing law that a corporation is no citizen in terms of the "privileges and immunities" clause of the United States Constitution.⁸ Similar and equally unnecessary difficulties arose from the same source in the field of diplomatic protection of stockholder interests abroad.⁹

II. *The Father of the Corporate Fiction*

Under the impact of the penetrating historical studies of the

6. The phrase "moral person" is with preference used by French and other Romanic legal writers. However, since it certainly has nothing to do with morality, Savigny considered it as misleading and suggested its replacement by "juristic person" which phrase is now commonly used by Germanic lawyers. 2 Savigny, *System des Heutigen Roemischen Rechts* (Berlin, 1840) 240, 241, n. 27.

7. Albrecht's translation of Joseph Kohler, *Philosophy of Law* (New York, 1921) 68. But cf. Ehrlich, *Juristische Logik* (Tuebingen, Germany, 1925) 259, according to whom "the juristic person is a systematic abstraction which exists only in lectures and in legal textbooks, but not in real life." (Writer's translation.)

8. Henderson, *The Position of Foreign Corporations in American Constitutional Law* (1918). In spite of his brilliant criticism, the doctrine still prevails. *Asbury Hospital v. Cass County, North Dakota*, 326 U. S. 207, 66 S.Ct. 61, 90 L.Ed. 6 (1945).

9. This topic will be covered in a dissertation entitled "Jurisprudential Handicaps in the Diplomatic Protection of Stockholder Interests Abroad" which the writer is preparing in his capacity as candidate for the Ph.D. degree at Columbia University.

famous German scholar Otto von Gierke,¹⁰ it has become undisputed that the conception of the imaginative personality of a corporation or juristic person appeared for the first time in the writings of an Italian jurist, Sinibaldus Fliscus (de Flisco or Fiesco), who is however better known as Innocent IV under which name he was Pope between 1243 and 1254.¹¹ In his *Apparatus*, a commentary of the five books of decretals of Pope Gregory IX,¹² Innocent IV, in accordance with the method generally followed at that time, decided certain practical questions in a casuistic way, but with general observations destined to rationalize the results reached. It is mainly to two passages of this treatise that the origin of the corporate fiction theory is traced by those who consider him its father. In the one, the rule was announced that when an ecclesiastical corporation of the type called a college (*collegium*) was supposed to deliver an oath, it had the option of doing this in the form of an oath sworn by a single person, representing the college, rather than in the form of oaths respectively sworn by the several members of the corporation. It is in this connection that the Pope, as rationale of his decision, used those often quoted words: "since the College is in corporate matters figured as a person."¹³ In the other of the two passages,

10. His main work, *Das Deutsche Genossenschaftsrecht* appeared in instalments under the following titles. Vol. I: *Rechtsgeschichte der Deutschen Genossenschaft* (Berlin, 1868); Vol. II: *Geschichte des Deutschen Koerperchaftsbegriffes* (Berlin, 1873); Vol. III: *Die Staats- und Korporationslehre des Altertums und des Mittelalters und Ihre Aufnahme in Deutschland* (Berlin, 1881); Vol. IV: *Die Staats- und Korporationslehre der Neuzeit* (Berlin, 1915). Other pertinent publications are Johannes Althusius und die Entwicklung der Naturrechtlichen Staatstheorien (Breslau, 1880); *Genossenschaftstheorie und die Deutsche Rechtsprechung* (Berlin, 1887); *Deutsches Privatrecht* (Leipzig, 1895); *Juristische Person in II/1 Holtendorff's Rechtlexikon* (2 ed., Leipzig, 1875) 844; *Das Wesen der Menschlichen Verbaende* (Berlin, 1902) (a lecture).

Only part of the foregoing publications is available in English. Maitland, *Dr. Otto Gierke, Political Theories of the Middle Ages* (Cambridge, England, 1 ed. 1900) is an English version of part of 3 *Genossenschaftsrecht*; Barker, *Otto Gierke, Natural Law and the Theory of Society* (Cambridge, England, 1934), is an English version of part of 4 *Genossenschaftsrecht*; Freyd, *Otto V. Gierke, The Development of Political Theory* (New York, 1939), is an English version of Johannes Althusius und die Entwicklung der Naturrechtlichen Staatstheorien.

11. History credits this Pope for a letter to the Bishops of France and Germany, exonerating the Jews from the suspicion of indulging in ritual murders, but charges him with having sanctioned the use of torture in the examination of heretics. 2 Schulte, *Die Geschichte der Quellen und Literatur des Kanonischen Rechts* (Stuttgart, 1887) 91; 14 Mann, *The Lives of the Popes in the Middle Ages* (London, 1928) 17.

12. Published shortly after the Second Council of Lyons (1245). First print in Strassburg, Germany, 1477; second print in Venice, Italy, 1481.

13. Writer's translation of the original (Latin) phrase: "*cum collegium in causa universitatis fingatur una persona*" the whole context of which is quoted by Gillet, *La Personnalité Juridique en Droit Ecclésiastique* (Malines, Belgium, 1927) 165. It is submitted that the key word "*fingatur*" in the above

the question was raised whether a *universitas*¹⁴ could be hit by the sanction of excommunication. The Pope's answer was in the negative¹⁵ and he justified his decision by stating: "since Corporation as well as Chapter, Tribe, and so on, are legal terms rather than names of persons."¹⁶

In an attempt to evaluate the importance of the above-quoted two announcements of Innocent IV, the writer wishes to submit the following two points. In the first-mentioned passage, the Pope, by suggesting that a college should be imagined as a human individual,¹⁷ recommended a device of legal technique whereby certain practical problems could be solved in a convenient way, namely, the treatment of a corporation as a separate legal entity. While he thus opened the way for the restoration of the distinction between a *societas* or partnership and a *universitas* or corporation, which had been familiar to the classic Roman law, but was ignored by those of its medieval commentators whose teachings crystallized in the famous Glossa,¹⁸ he went a step further than the classic Roman law which had not yet known what he invented, namely, the legal personification of corporate entity. The idea was stimulated by him that law, by a dogmatic fiction, could for certain legal purposes recognize a separate entity which, though not being a human individual, would, like a

Latin passage does, in this specific connection, not mean "feigned" but "figured." Similarly, but not with specific reference to Innocent IV, but to the early fiction theory in general, see Pollock, *Principles of Contract* (London, 1876) 81, and Pollock, *A First Book of Jurisprudence* (4 ed., London, 1918) 117.

14. This was the Roman law term closest to the modern conception of a corporation.

15. This was a reversal of the previous law. For, according to a decretal of Pope Gregory IX, issued in 1234, that is, before the Second Council of Lyons, the sanction of excommunication was applicable also to corporations. Smith, *The Law of Associations* (Oxford, 1914) 152.

16. Writer's translation of the original (Latin) passage: "*quia universitas, sicut est capitulum, populus, gens et haec nomina sunt juris et non personarum,*" the whole context of which, quoted by Gillet, *op. cit. supra* note 13, at 121, 122, contains an additional phrase reading (writer's translation): "moreover a corporation cannot possibly act in bad faith." The last mentioned doctrine is of course discredited by the modern theory of representation in tort. Smith, *op. cit. supra* note 15, at 58. Moreover, Innocent IV himself, on another occasion, recognized even the idea of criminal responsibility of corporations. Smith, *op. cit. supra* note 15, at 153, n. 1, and Levy, *Criminal Responsibility Individual and International Law* (1945) 12 *U. of Chi. L. Rev.* 313, 319.

17. It must, of course, not be forgotten that "person," at that time, was still exclusively used as designation of the human individual.

18. The Glossa contained this passage: "*universitas nihil aliud est, nisi singuli homines qui ibi sunt.*" Writer's translation: "The corporation is nothing else but the individuals of whom it is composed." Ruffini, *La classificazione delle persone giuridiche in Sinibaldo dei Fieschi (Innocenzo IV) ed in Federico Carlo di Savigny, 2 Studii Giuridici Dedicati e Offeriti a Francesco Schupfer* (Torino, Italy, 1898) 313, 320.

human individual, be considered a separate rights and duties bearing unit. However, as Innocent IV, by his first-quoted statement, showed that he well understood the practical need of legal technique for the conception of separate corporate entity, he revealed by his second-quoted statement that he was also aware of certain reasonable limitations inherent in such legal fiction. Since the corporation could only be treated *as if* it were a human being, but actually was no human being, law could not extend the effect of the fiction to such matters in which the specific legal measure was based upon the assumption of the existence of a human soul in the affected subject. Therefore, he believed the fiction could not be applied when the issue was whether the sanction of excommunication could be meted out to a corporation. Irrespective of whether he was right or wrong in this particular decision, the Pope, by his second-quoted statement, became a precursor of those American lawyers who centuries later established that well-known principle which is usually referred to as the doctrine of "disregard of corporate entity."¹⁹

III. *The case of Sutton's Hospital Revisited*

In his write-up on the case of Sutton's Hospital,²⁰ which like most of his "reports" was an essay rather than a digest, Lord Coke used the often quoted phrase: "the incorporation itself is only in *abstracto*, and rests only in intendment and consideration of the law."²¹ Though Coke himself did not refer, in this discussion, to "fiction" or "fictitious," his comments on that occasion

19. Wormser, *Disregard of the Corporate Fiction and Allied Corporation Problems* (1927); Anderson, *Limitations of the Corporate Entity: A Treatise on the Law Relating to the Overriding of the Corporate Fiction* (1931); Latty, *Subsidiaries and Affiliated Corporations: A Study in Stockholders' Liability* (1936) 5; Ballantine, *Corporations: "Disregarding the Corporate Entity" as a Regulatory Process* (1943) 31 Calif. L. Rev. 426.

20. The case of Sutton's Hospital, 10 Jac. 1612, 10 Co. Rep. 23a, 32a; 77 Eng. Rep. 960, 972, 973.

21. Obviously inspired by this phrase, Mr. Chief Justice Marshall, in *The Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 636 (U.S. 1819) said: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law." Previously, in *The Bank of the United States v. Deveaux*, 5 Cranch 61, 86 (U.S. 1809), Mr. Chief Justice Marshall referred to "that invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate." But cf. the following passage from 1 Kyd, *Treatise on the Law of Corporations* (London, 1793) 16: "A corporation is as visible a body as an army; for though the commission or authority be not seen by every one, yet the body, united by that authority, is seen by all but the blind: When, therefore, a corporation is said to be invisible, that expression must be understood of the right in many persons, collectively, to act as a corporation, and then it is as visible in the eye of the law, as any other right whatever of which natural persons are capable. . . ."

are generally considered as the classic exposition of the "fiction theory of the common law."²²

There is nothing contained in Coke's remarks which would indicate that he should have challenged the reality of the separate legal entity of a corporation. How could he have done it within a discussion whereby he attempted to rationalize the holding of a court that went to a great length toward upholding the legal reality of a corporation for which theretofore only the franchise had been granted but which had not yet been created.²³ Rather was Coke's emphasis an essentially different one. Confusing, like numerous other distinguished scholars, the organic personality of the human being with its legal personality, and therefore considering legal personality as an attribute naturally inherent in the human being,²⁴ he wished to stress, and especially in view of the holding in the case of Sutton's Hospital, that the legal entity of a corporation, its capacity as a separate rights and duties bearing unit, was an artificial creation of the law, and as such independent of the existence of a physical substratum. In this respect, there is no substantial difference between his theory and the doctrine of *réalité technique* (technical reality) or *réalité juridique* (legal reality) expounded at a much later period by certain French writers,²⁵ or by a modern English lawyer who states: "The legal personality of a corporate body is not a fiction. . . . It is as real as the legal personality of the individual human being . . . the conception of corporate personality expresses a juristic reality, that

22. Budington Du Bois, *The English Business Company After the Bubble Act 1720-1800* (1938) 86, states: ". . . the lawyers continued to repeat the platitudes developed in earlier centuries and distilled in concentrated form by Lord Coke." (Citing the case of Sutton's Hospital.)

23. The gist of one of the legal problems, posed by the case, was, it is submitted, whether the corporation of a hospital to be founded could legally exist before the physical existence of the hospital. The court answered in the affirmative. Warren, *Collateral Attack on Incorporation* (1908) 21 Harv. L. Rev. 305, 306, thus summarizes the facts: The king, at the petition of Sutton, had granted a charter for the purpose of incorporating the master and governors of a hospital to be founded by Sutton. Sutton thereafter purported to convey land to such corporation. His heir contended that there was no corporation, and that the conveyance was void, but the court held both the incorporation and the deed to be valid.

Coke's report states in this connection:

"And as to the sixth objection, that till an hospital be founded no incorporation can be, . . . it was answered that there was an hospital *in potestate*. . . . And as to the creation of an incorporation an hospital *potestate, potentia, seu nomine* sufficeth; as one may by letters patent be governor of an army before there be an army. . . . And it is great reason that an hospital, . . . in expectancy or intendment, or nomination, should be sufficient to support the name of an incorporation when the incorporation itself is only *in abstracto*, and rests only in intendment and consideration of the law. . . ." 10 Co. Rep. 23a, 32a, 77 Eng. Rep. 960, 972, 973.

24. *Contra*: supra note 4.

25. See, e.g., 1 Michoud, *Personnalité Morale* (3 ed., Paris, 1932) 70.

is, a reality from the juristic point of view, nothing more and nothing less."²⁶

Lord Coke's learned disquisition on the case of Sutton's Hospital is, indeed, less responsible for the fiction theory, as such, than for one of its peculiar ingredients within the corporation doctrine of the common law:²⁷ the so-called franchise or concession theory.²⁸ This idea, which has meanwhile become obsolete in the Anglo-American law, ran somewhat like this: Since the corporation was a legal rather than a natural creature, it could not exist without an individual license for its creation, to be granted by the legislative body which, in those early days, was the king.²⁹ Later on, an act of Parliament or, in the American states, a so-called private statute, authorizing the establishment of a specifically indicated corporation, took the place of a Royal Charter. As a final development, statutes would in a general way, that is, without reference to a specific corporation, fix in advance the conditions under which corporations could be created with validity before the law. When this stage was reached, the demise of the franchise theory had become a fact.³⁰

IV. Savigny's Fiction Theory

When Otto von Gierke discovered the trace leading from the so-called fiction theory of the juristic person back to the writings of Pope Innocent IV, he also claimed a great similarity between the Pope's pertinent propositions and those which were, centuries later, expounded by the German scholar Savigny.³¹ Other scholarly writers, challenging this part of Gierke's conclusions, alleged

26. Hallis, *Corporate Personality* (London, 1930) 240. Similarly, McGovney, *A Supreme Court Fiction* (1945) 56 *Harv. L. Rev.* 853, 867.

27. Early English cases only rarely refer to the fictitious entity of the corporation. Note, however, *Nabob of Arcot v. The East India Company* [1791] 3 *Broc. C.C.* 292, 303, 29 *Eng. Rep.* 544, 549, 550; Attorney General, Sir R. Sawyer (for the king) in *The King v. City of London* [1681-1683] 8 *Howell, State Trials* 1039, 1175.

28. According to Kent's definition, "A corporation is a franchise possessed by one or more individuals . . . vested by the policy of the law with the capacity of . . . acting in several respects, however numerous the association may be, as a single individual." 2 *Holmes' 12th edition of Kent, Commentaries on American Law* (1873) 335 (267).

29. *Budington Du Bois*, *op. cit. supra* note 22, at 87, states:

"It was the authority granted by the state through royal charter or act of Parliament that was the distinguishing mark of the corporation to the eighteenth century lawyers. Whatever fragment of coherent theory existed relating to the business corporation was centered in that relatively frequently appearing phrase, 'The corporation is the creature of the state'."

30. Note, however, that in Austria (before the Anschluss) a joint stock company (*Aktiengesellschaft*) could not be constituted without a special license (*Konzession*) by the government.

31. Gierke, 3 *Genossenschaftsrecht*, *supra* note 10, at 246.

a fundamental difference between the Pope's construction of the possibility of separate legal entity of a corporation and Savigny's doctrine on the legal nature of juristic persons.³² They are apparently supported by the fact that "imagined person" could not mean the same thing to Innocent IV on the one hand and Savigny on the other hand. The denotation of the term "person" had considerably changed in the span of time separating their respective eras. In the medieval Pope's era, "person" still exclusively designated a human individual. At Savigny's time, "person" had already its present double denotation: it was not only a synonym for a human individual, but could be used also in a larger sense, that is, designating any rights and duties bearing unit or *Rechts-subjekt*, be it a human individual or any other kind of separate legal entity.³³ Thus in the Pope's language, "imagined person" meant an imagined human individual; in Savigny's language the phrase could also refer to the imagination or fiction of a separate legal entity, and thus indicate a denial of the reality of separate legal entity other than that of the human individual. As a matter of fact, quite a few scholars, mostly those who have read only quotations from Savigny, as for instance his description of juristic persons as "artificial subjects, conceived merely by our imagination,"³⁴ or who have read only superficially Savigny's pertinent discussions, consider him an exponent of that school of thought which denies the legal reality of juristic persons, especially of corporations. So understood, his pertinent doctrine would certainly not be in accordance with the theories expounded by Pope Innocent IV or Lord Coke, analyzed hereinabove. However, upon careful perusal of Savigny's own statements on the subject, there cannot be any doubt, it is submitted, that Maitland was right when he wrote: "What we call the Bracket Theory or Expansible Symbol Theory of the Corporation really stands in sharp contrast with the Fiction Theory as Savigny conceived it though sometimes English writers seem to be speaking of one and thinking of the other."³⁵

32. Smith, *op. cit.* supra note 15, at 58, and Appendix I, 152; Hohenlohe, *Papstrecht und Weltliches Recht* (Innsbruck, Austria, 1925) 24; Brown, *The Canonical Juristic Personality* (1927) 46; Gillet, *op. cit.* supra note 13, at 80, 121, 160; 3 Holdsworth, *History of English Law* (3 ed. 1927) 470; Dowdall, *The Word "Person"* (1928) 106 *The Church Quarterly* (London) 229, 238. It should be noted that Savigny himself did not indicate any hookup of his theory with the writings of Innocent IV, though he discussed the Pope's view concerning the inapplicability, to corporations, of the sanction of excommunication. 2 Savigny, *op. cit.* supra note 2, at 322.

33. *Supra* note 5.

34. 2 Savigny, *op. cit.* supra note 2, at 236.

35. Maitland's introduction to his English version of Gierke's *Genossen-*

The abstract-philosophical garb of Savigny's observation on the nature of the juristic person³⁶ may be partly responsible for the fact that he was so often misunderstood even by distinguished readers. This is the essence of his pertinent propositions:

The purpose of law is to protect the liberty of mind inherent in man. The original conception of a person or of a legal subject is therefore identical with the conception of a human being. At this stage, only a human being has the capacity of a separate rights and duties bearing unit. However, this initial situation may, in the course of development of positive law, be modified in two ways. On the one hand, that capacity may, partly or in toto, be taken away from a human being. On the other hand, the capacity of separate legal entity may be given by rule of positive law, to something which is not a human being. If the last mentioned thing happens, the artificial creation of a juristic person has taken place.³⁷ Such a person we call a juristic person because it is a rights and duties bearing unit other than man.³⁸ By the term "juristic person" we express the fact that such entity is a "person" only for practical purposes of the law.³⁹ However, the capacities of thought and will are inherent only in human beings. A juristic person, which is a legal construction, can therefore not possess them.⁴⁰

Did Savigny, by developing this theory, attempt to deny the legal reality of the juristic person? It is believed that his own writings clearly indicate an answer in the negative. What he meant by his reference to the imagined nature of the juristic person was not to deny its legal reality, but to emphasize its lack of organic existence. It should be noted that in the German language the term "fiction," or, in German spelling, "Fiktion," more often than in the English language indicates something which does not really exist. However, Savigny's theory on the juristic person had with "fiction" in this sense nothing more to do, it is

schaftsrecht, *op. cit.* supra note 10, at XXIV. Similarly, Pollock, *Has the Common Law Received the Fiction Theory of Corporations?* (1911) 27 L.Q. Rev. 219, 223, n. 2.

36. Savigny was one of the founders of the so-called Historical School of Law and his writings are in general representative of this specific approach to legal problems. However, his doctrine on the juristic person was not related to the Historical School of Law, but due to the impact, upon his trend of legal thought, of the philosophy of Kant and Kant's adepts. Binder, *Das Problem der Juristischen Persoenlichkeit* (Leipzig, Germany, 1907) 10.

37. 2 Savigny, *op. cit.* supra note 2, at 2.

38. *Id.* at 236.

39. *Id.* at 240.

40. 3 Savigny, *op. cit.* supra note 2, at 89.

submitted, than French legal writers by referring to a "moral person"⁴¹ intend to refer to morality or ethics.

V. John Austin's Theory and Similar Ones

According to the founder of the so-called analytical school of jurisprudence, John Austin,⁴² a distinction should be made of "persons properly so-called, from persons who are such by a figment, and for the sake of brevity of discourse." The first are "physical or natural persons," the others "legal or fictitious persons,"⁴³ the reality of which he thus challenges: "All rights reside in, and all duties are incumbent upon, physical or natural persons. But by ascribing them to feigned persons, and not to the physical persons whom they in truth concern, we are frequently able to abridge our description of them."⁴⁴

Austin's theory found adherents among scholars both in England and in the United States. One of his followers describes the personality of the corporation as "a mere shorthand phrase."⁴⁵ Another believes that "the corporation as such is not even a shade, or a ghost or a simulacrum," rather "a verbal symbol, a mathematical expression."⁴⁶

Similar ideas were, probably without any intellectual loan from Austin and certainly in a most original form, developed by the great legal historian and philosopher, Rudolf von Ihering. According to him, it is not the juristic person as such, but the individuals behind it to whom the rights really belong, which externally appear as rights of the juristic person.⁴⁷ On another occasion he says: "The property of the juristic person, which exists in our imagination, is an empty shell since its advantages are not enjoyed by itself, but by those individuals for the benefit of whom it exists, that is its beneficiaries. What appears as property of the

41. Their favorite technical term for the conception of a juristic person. *Supra* note 6.

42. He died in 1867.

43. Note the similarity of Austin's term "legal person" with Savigny's "juristic person." *Quaere*: was there any kind of intellectual contact between them? On the effect of Austin's study in Germany upon the development of his ideas: Pound, *The Influence of the Civil Law in America* (1938) 1 *LOUISIANA LAW REVIEW* 1, 7.

44. The quotations in the text are from 1 Campbell's fifth edition of Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (London, 1911) 347, 354.

45. Baty, *The Nationality and Domicile of Corporations* (1917) 2 *International Law Notes* 133, 135.

46. Radin, *The Endless Problem of Corporate Personality* (1932) 32 *Col. L. Rev.* 643, 658.

47. 3/1 Ihering, *Der Geist des Roemischen Rechts* (3 ed., Leipzig, 1877) 373.

juristic person is merely a device of legal construction, convenient for practical purposes of law, but with a nominal rather than a real owner. Since the juristic person does not hold rights in its own interest, it cannot be their real owner. Rather are its beneficiaries those who really own those rights, as the Roman law recognized by its institution of the *actio popularis*.⁴⁸

A proposition, admittedly stimulated by the just-mentioned casual observations of Ihering, was elaborated in two books by the French lawyer De Vareilles-Sommières. According to him, the juristic person is an abstract entity of an utterly fictitious nature, created by law in order to integrate and better protect rights actually belonging to individual physical persons.⁴⁹

Even more radical than Ihering's idea that the beneficiaries are the real owners of the property of a juristic person, is Alois Brinz' famous theory of *Zweckvermoege*n (Purpose-Property). According to him, lawyers have no more need for a juristic person than zoologists have to do with scarecrows.⁵⁰ Again according to him, to speak of a juristic person makes no more sense than to describe "our Darwinian cousins" as persons.⁵¹ Instead of taking recourse to unrealistic personifications, lawyers should frankly admit that there is such a thing as a property belonging to no person, rather devoted to a certain purpose, a *Zweckvermoege*n.⁵²

It is not felt necessary to submit critical comments on each of the foregoing four theories, that is of Austin, Ihering, De Vareilles-Sommières and Brinz. They may be covered in a single general appraisal, since they are representative of one common trend.⁵³ All of them, in challenging the reality of juristic persons, do this in a manner which places them on the opposite pole from the extremest doctrine affirming that reality: Gierke's so-called organic theory, to be discussed herein below. While Gierke claims

48. Writer's free translation of 1 Ihering, *Der Zweck im Recht* (2 ed., Leipzig, 1884) 469.

49. De Vareilles, Sommières, *La Synthèse de Droit International Privé* (Paris, 1887) 43, and *Les Personnes Morales* (Paris, 1902) 147.

50. 1 Brinz, *Lehrbuch, der Pandekten* (Erlangen, Germany, 1857) xi.

51. 1 Brinz, *Lehrbuch der Pandekten* (2 ed., Erlangen, Germany, 1873) 199.

52. *Id.* at 194, 201, 202. *Contra*: Stammler, *Theorie der Rechtswissenschaft* (Halle, Germany, 1911) 356. Note also that if Brinz' theory were correct this would in Anglo-American law mean the obliteration of the difference between the conceptions of corporations on the one hand, trust on the other hand.

53. Smith, *Legal Personality* (1928) 37 *Yale L. J.* 283; Stevens, *Handbook of the Law of Private Corporations* (1936) vii. *Contra*: Latty, *op. cit. supra* note 19, at 26, stating: "... the theory of a corporation as a fiction ... exists only in picturesque dicta; our law has not taken the view that the corporation is but an ethereal whiff—at least it is admitted all around that there are some things about a corporation that are not pure fiction."

that juristic persons are more than merely legal realities, that they are in addition organic realities, the above-mentioned full-fledged fictionalists, as we propose to call them, deny not only the organic existence but even the legal existence of juristic persons, that is, even the truth of the allegation that they are separate legal entities, or separate rights and duties bearing units.

The fullfledged fictionalists, it is herewith submitted, are in their corporation theories involved in the same kind of error, though with a reversed practical effect, as was inherent in the association theories of noted exponents of the so-called Natural School of Law. The latter, ignoring the legal distinction between the conceptions of partnership on the one hand, corporation on the other hand, treated each association as a separate legal personality.⁵⁴ Contrariwise, the fullfledged fictionalists, substantially if not in terms, consider each corporation as a partnership. However, definite rules of positive law, respectively applicable either only to partnerships or only to corporations, prohibit such a merger.

To be sure, a given system of law can do without the conception or device of a juristic person, especially of a corporation.⁵⁵ Moreover, even if it possesses that device, it need not couple it with a terminological personification of the separate corporate entity, but may continue to reserve the term "person" for human individuals.⁵⁶ Again, even a system of law which ascribes separate legal entity to things different from human individuals need not apply this technical device with such a logical consistency as to reach a breaking point, from a pragmatic viewpoint, but

54. The Natural School of Law merged the conception of partnership with that of corporation by treating each association as a "moral," that is, a juristic person. The impact of this trend is clearly visible in the Austrian Civil Code (1811), the chief draftsman of which, Professor Franz Zeiler of the University of Vienna, was strongly addicted to the Natural School of Law. Wellspacher, *Das Naturrecht und das ABGB*, in *1 Festschrift zur Jahrhundertfeier des Allgemeinen Buergerlichen Gesetzbuchs* (Vienna, 1911) 173.

55. It would seem to be doubtful whether the conception of separate corporate entity existed in the Year Book period of the common law. Ching Wang, *The Corporate Entity Concept (or Fiction Theory)* in the Year Book Period (1942) 58 L.Q. Rev. 498 and (1943) 99 L.Q. Rev. 72.

56. *Supra* note 5. In the Roman law, which clearly distinguished a partnership (*societas*) from a corporation (*universitas*), the latter was not called a person. The Latin word "*persona*" originally designated the mask which the actor put on in order to indicate thereby the man in the play whom he represented on the scene. By a conversion of meaning which is rather frequent in the development of languages, the term "*persona*" came to indicate the human being represented by the actor, and at an even later phase, any human individual. The still further development that "person" may indicate both a human individual and also another unit constituting a separate legal entity was not reached by the Romans.

may limit its effect so as to keep it in harmony with the practical purposes of law.⁵⁷ Finally, the civil law systems know certain types of associations, legal hybrids as it were, which are only for certain specified purposes regarded as separate legal entities, but in other respects looked upon as mere aggregates of several individuals.⁵⁸

There is nevertheless a fundamental mistake involved in the theories which deny the reality, even as a matter of law, of a juristic person. To the extent to which a given law rules that a certain thing should be treated as a separate legal entity, it is, as a matter of law, just not possible to challenge its real existence as a separate rights and duties bearing unit. A rule of positive law will never abdicate before an injunction of abstract speculation. There are certain hurdles in the rules of positive law before which philosophical ideas of a conceptualistic brand must necessarily stop.

Joseph Kohler was certainly right, though perhaps too acrimonious in his following statement: "The question whether the juristic person is real or imaginary should never have been seriously advanced. It is a reality in the law like every reality created by the law. It is not a human being of flesh and blood. Old and new absurdities that testify to the failure to comprehend this need not be considered."⁵⁹

VI. Gierke's Organic Theory of the Corporation

Otto von Gierke, impressed by the so-called Genossenschaftstheorie of his teacher in Berlin, George Beseler, devoted his own scholarly research to this mainly historical topic, and in this connection developed his "organic theory" on the nature of corporate entities.⁶⁰ The substance of his proposition is a sociological supplement to the doctrine of legal reality of the juristic person.⁶¹ His specific contribution is his claim that the legal personality of the corporation is superimposed upon an organic unit existing in human society irrespective of and before its acknowledgment as a separate legal entity.⁶² According to Gierke him-

57. Supra note 19. What is called "disregard of corporate entity" is, it should be noted, not a disregard of it, but a limitation of its practical effects.

58. E.g., the type of commercial association which is called *société en nom collectif* in the French law and *Offene Handelsgesellschaft* in the German law.

59. Op. cit. supra note 7.

60. "There is no topic in juristic literature which has made a greater noise in the schools or in the world." Freyd, Gierke and the Corporate Myth (1938) 4 *Journal of Social Philosophy* 158.

61. Supra notes 25, 26.

62. Gierke, *Deutsches Privatrecht*, op. cit. supra note 10, at 471.

self, his organic theory considers the state and other associations as social organisms,⁶³ thus claiming the existence of collective organisms beyond and above the individual organisms.⁶⁴ In addition to the will of the individual there exists, he maintains, a collective will incorporated in various social units which become juristic persons the moment they are recognized as separate legal entities.⁶⁵ The collective personality is, he explains, the capacity of an association to be a rights and duties bearing unit, as such different, of course, from a mere aggregate of several individuals.⁶⁶ He expressly states that the collective person is like the individual person, a real rather than an imaginary entity, even though its legal status, again like that of the individual person, is derived from a rule of law.⁶⁷ The gist of his organic theory, as he himself summarizes it, is his conception of the corporation as a collective unit existing in reality rather than as a phantom or fiction.⁶⁸

Gierke himself warned against antropomorphic misrepresentations of his theory.⁶⁹ He was on sound sociological ground when he emphasized the existence of social organisms as an elementary fact of human society.⁷⁰ However, this observation does not add substantially to the legal analysis of the corporate personality.⁷¹ Moreover, it is subject to an important qualification. Under a given system of law, a separate legal entity, other than the human individual, may be established without the substratum of an existing social organism.⁷² On the other hand, a given system of law may not yet have achieved the technical capacity of assigning separate legal entity to a social organism. Legal personality is thus far from being an adjunct of the organic existence of a social body. It is a legal phenomenon, resting on a completely different plane from the sociological phenomenon highlighted by Gierke's organic theory.

63. The main characteristic of organisms, according to Gierke, is their unity in plurality. Wolff, *On the Nature of Legal Persons* (1938) 54 L.Q. Rev. 494, 500.

64. Gierke, *Das Wesen der Menschlichen Verbaende*, op. cit. supra note 10, at 13.

65. Gierke, *Juristische Person*, op. cit. supra note 10, at 847.

66. 1 Gierke, *Deutsches Privatrecht*, op. cit. supra note 10, at 469.

67. *Id.* at 470.

68. Gierke, *Die Genossenschaftstheorie*, op. cit. supra note 10, at 5.

69. Gierke, *Das Wesen der Menschlichen Verbaenie*, op. cit. supra note 10, at 14.

70. Vinogradoff, *Juridicial Persons* (1924) 24 Co. L. Rev. 594, 604; Cardozo, *The Paradoxes of Legal Science* (New York, 1928) 93; 2 Roguin, *La Science Juridique Pure* (Paris, 1923) especially at 435. But cf. MacIver, *The Modern State* (Oxford, 1926) 473, 474.

71. Freun, *The Legal Nature of Corporations* (1897) 14.

72. The best illustration is probably the so-called one-man company. Warren, *Corporate Advantages Without Incorporation* (1929) 845, 846.

Conclusion

The end has been reached of our critical bird's eye view of the most important doctrines on the nature of corporate personality. The purpose was to survey within the compass of a short article a field which is covered by an almost prohibitive volume of literature. This naturally imposed rigid limitations on the selection of material thought to be representative of certain trends of jurisprudential analysis. It is nevertheless hoped that enough has been presented to serve as an initial briefing on a topic which was always a favorite of legal writers.

By approaching the subject matter from a historical angle, the attempt could be made to show that "corporate person" or "juristic person" in general was only so long a metaphoric conception and in this limited sense something fictional as the primary meaning of the term "person" was limited to a designation of the individual physical being. This stage was abandoned, however, when the term "person" was so amplified in its meaning as to include even in a non-metaphoric sense any separate legal entity or rights and duties bearing unit (*Rechtssubjekt*), whether it be an individual physical person or an association or a social organism or a social institution.

Once this point was reached, the originally pragmatic device of legal technique to refer to the corporation or to the juristic person by way of calling it a fictitious person or *persona ficta* had become obsolete and began to create confusion in certain fields of law, especially in American constitutional law and in international law, rather than to promote sound legal development. Correctly understood, "*persona ficta*" can nowadays hardly be anything else than a synonym for "corporate person." Suppose we do away with that cryptic phrase altogether rather than let modern law be further haunted by a ghost from the realm of medieval philosophy of law? It does not serve any practical purpose, but constitutes a permanent temptation to speculations about the reality or unreality of corporate personality which, nowadays, have no more sense than speculations about the reality or unreality of the conception of property or of other established institutions of a legal nature. All of them are, of course, based upon a given system of law, but within the thus ordered society they are as real as the morning sun or the evening star.