CHAPTER II

LEGAL PERSONS

The term "person"

In books of the Law, as in other books, and in common speech, "person" is often used as meaning a human being, but the technical legal meaning of a "person" is a subject of legal rights and duties.

One who has rights but not duties, or who has duties but no rights, is, I suppose, a person. An instance which would commonly be given of the former is the King of England; of the latter, a slave. Whether in truth the King of England has no legal duties, or a slave no legal rights, may not be entirely clear. I will not stop to discuss the question. But if there is any one who has rights though no duties, or duties though no rights, he is, I take it, a person in the eye of the Law.

As I showed at the end of the first chapter, a legal duty does not imply any exercise of will on the part of the one subject to the duty, and, therefore, for the existence of a legal duty, the person bound need not have a will; but in order that a legal right be exercised, a will is necessary, and, therefore, so far as the exercise of legal rights is concerned, a person must have a will.

In various systems of Law different kinds of persons are recognized. They may be classified thus: (I) Normal human beings; (II) abnormal human beings, such as idiots; (III) supernatural beings; (IV) animals; (V)

inanimate objects, such as ships; (VI) juristic persons, such as corporations. Some of these persons, such as idiots, ships, and corporations, have no real will. How are we to deal with them? That is the most difficult question in the whole domain of Jurisprudence. Let us take these classes in order.

Normal human beings

(I) In the case of normal human beings we are not troubled with any question as to the actual presence of a will. The normal man or woman has a will. Indeed, some German writers make will of the essence of personality. Thus, Hegel defines personality as the subjective possibility of a legal will.[1] So Zitelmann: "Personality . . . is the legal capacity of will. The bodiliness (*Leiblichkeit*) of men, is for their personality, a wholly irrelevant attribute." [2] And again, Meurer: "The juristic conception of the juristic person exhausts itself in the will, and the so-called physical porsons are for the law only juristic persons with a physical *superfluum*." [3]

On the other hand, Karlowa,[4] to whom I am indebted for the foregoing quotations, says: "The body is not merely the house in which the human personality dwells; it is, together with the soul, which now for this life is inseparably bound with it, the personality. So, not only as a being which has the possibility of willing, but as a being which can have manifold bodily and spiritual needs and interests, as a human centre of interest, is a man a person."

It is this last definition which American and English jurists impliedly, if not expressly, adopt as the true defini-

[1] See Philosophie des Rechts, §§ 34-39.
[2] Begriff der juristischen Personen, p. 68.
[3] Begriff der heiligen Sachen, § 10, p. 74.
[4] 15 Grünhut, Zeitschr. 381, 383.

tion of a person. It is that which I shall accept. Jurisprudence, in my judgment, need not vex itself about the "abysmal depths of personality." It can assume that a man is a real indivisible entity with body and soul; it need not busy itself with asking whether a man be anything more than a phenomenon, or at best, merely a succession of states of consciousness. It can take him as a reality and work with him, as geometry works with peints, lines and planes.

It should be observed, before leaving this class of normal human beings, that they can exercise their rights through agents, such as servants, bailiffs, or attorneys, and they can delegate to their agents the decision of the question whether the rights of the principals shall be exercised or not. But there is no difficulty here; the original spring is a real exercise of will by the owner of the right.

Abnormal human beings

(II) Some human beings have no will; such are new-born babies and idiots. Perhaps it is not correct to say that they are absolutely without wills, but their potentiality of will is so limited that it may be neglected. Yet, though without wills, new-born babies and idiots have rights.

But, further, there are certain human beings who are not destitute of natural wills, but to whom the Law, for one reason or another, denies what may be called a legal will; that is, the Law says their natural wills are inoperative for the exercise of certain classes of rights,—not, generally, for the exercise of all their rights but of certain classes of rights. Such denials vary in different systems of law. Let us take a simple instance from the Common Law. Suppose Doe, a young man of nineteen,

owns a house, and Roe, coming along, breaks the windows. Doe has a right to compensation; and yet, if he wills to bring a suit against Roe, either himself or by his agent or attorney, the Law does not regard that will, and the court will refuse in that suit to compel Roe to make compensation, because the right has not been put in motion by a will which the Law regards as operative.

What is to be done? A next friend, or a guardian, exercises his will and brings a suit in the name and behalf of the infant. The will of the guardian is *attributed* to the infant. It is not the guardian, but the infant, who is the subject of the right—the legal person. We usually say this attribution is a fiction.

Fictions in the Law

And here I must make a digression, I fear a rather long digression, on the nature and use of fictions in the Law. There is a strong feeling against the use at the present day of fictions in the Law. This feeling is justifiable or not, according as the fictions belong to the one or the other of two classes, the distinction between which was clearly brought out, for the first time, so far as I am aware, by Ihering,[1]—one of the many services which he has rendered to the science of Jurisprudence.

The first class of fictions is called by Ihering "historic fictions." These historic fictions are devices for adding new law to old without changing the form of the old law. Such fictions have had their field of operation largely in the domain of procedure, and have consisted in pretending that a person or thing was other than that which he or it was in truth (or that an event had occurred which had not in fact occurred) for the purpose of thereby giv-

[1] 3 Geist d. röm. R. (4th ed.) § 58, pp. 301-308.

ing an action at law to or against a person who did not really come within the class to or against which the old action was confined.

The prætors employed such fictions in aiding them to build up the towering fabric of the Roman Law on the narrow basis of the Twelve Tables.[1] Thus, persons to whom the prætor thought it just that a man's property should go on his death,—relations, for instance, on the mother's side, who were not heirs,—were, by a fiction, considered heirs and were allowed to use actions such as heirs could use. *"Heredes quidem non sunt, sed heredis loco constituuntur beneficio prætoris. Ideoque seu ipsi agant, seu cum his agatur, ficticiis actionibus opus est, in quibus heredes esse finguntur."* [2]

So when it was thought just that an action which was given by the Civil Law only to or against a Roman citizen should be extended to or against a foreigner; *"Civitas Romana peregrino fingitur, si eo nomine agat aut cum eo agatur, quo nomine nostris legibus actio constituta est, si modo justum sit eam actionem etiam ad peregrinum extendi."* [3]

In the Common Law

Fictions have played an important part in the administration of the Law in England, and it is characteristic of the two peoples that the use of fictions in England

[1] The prætors were high officers charged with the administration of justice in the earlier days of Roman law. The Twelve Tables were a codification of the ancient customary law, made about the year 450 B. C. and inscribed upon bronze tablets.

[2] "Heirs indeed they are not, but they are put in the place of heirs by favor of the prætor. And therefore whether they sue, or are sued, there must be fictitious suits in which they are feigned to be heirs." Ulp. Fragm. 28, 12.

[3] "Roman Citizenship is fictitiously given to a foreigner, if he sue or be sued under a head under which by our laws an action lies, if only it be just that that action be extended also to a foreigner." Gai. 4, 37.

was bolder and, if one may say so, more brutal in England than it was in Rome.

Thus, for instance, in Rome the fiction that a foreigner was to be considered as a citizen was applied in this way. It was not directly alleged that the foreigner was a citizen, but the mandate by the prætor to the judge who tried the case was put in the following form: "If, in case Aulus had been a Roman citizen, such a judgment ought to have been rendered, then render such a judgment." In England the plaintiff alleged a fact which was false, and the courts did not allow the defendant to contradict it.

One of the purposes for which the English courts allowed fictions was to extend their jurisdiction. A maxim says that to extend jurisdiction is the part of a good judge. When judges and their officers were paid largely by fees, there was a somewhat less exalted motive. The modes in which the courts employed fictions for this end are familiar to all readers of Blackstone.

Of the three superior Courts of Law, the King's Bench, the Common Pleas and the Exchequer, the Court of Common Pleas alone had original jurisdiction of causes between subject and subject not involving violence or fraud; but, as an exception, when a man was in the custody of the Marshal or prison-keeper of the Court of King's Bench, he could be sued also in the latter court. Now a plaintiff, wishing to sue in the King's Bench for an ordinary debt, would allege that the defendant was in the custody of the Marshal, and that therefore the case was within the jurisdiction of that court. The allegation was false, but the court did not allow the defendant to contradict it.

By a like fiction, the Court of Exchequer extended its

jurisdiction. It was properly a court of revenue only, but a debtor of the King was allowed to sue another subject in that court, on the ground that the defendant, by withholding from the plaintiff his due, made the plaintiff less able to discharge his debt to the King. Now a plaintiff, desiring to sue in the Exchequer to collect money or damages to which he was entitled, brought a writ called *quo minus,* in which, after stating his claim against the defendant, he alleged that by reason of the withholding by the defendant of the plaintiff's due, the plaintiff was the *less able* to discharge his debt to the King. The allegation that the plaintiff was indebted to the King was false, but the court did not allow it to be contradicted.[1]

These devices, however, were not applicable to suits for the recovery of a freehold interest,—that is, of an interest in fee or for life in land. Of such suits the Court of Common Pleas had sole jurisdiction. But suits to recover interest less than freehold—*i.e.* terms for years —could be brought in the King's Bench. Thomas Plowden, then, desiring to sue in the King's Bench to recover a freehold interest from Henry Moore, who was in possession, caused a suit to be bronght in that court by one John Doe, in which it was alleged that Plowden had leased the land to Doe for a term of years, that Doe entered upon the premises leased, that one William Stiles, known as the casual ejector, entered upon the premises leased, and with swords, knives, and staves ousted Doe from the land. At the same time Plowden sent to Moore a letter purporting to be written to Moore by his "loving friend" Stiles, the casual ejector, saying that unless

[1] 3 Blackstone, Com. 43, 45.

Moore appeared as defendant, Stiles would suffer judgment to be entered against him. Doe and his lease, Stiles and his swords, knives, and staves, were the creatures of fiction, but the court would not let Moore in to defend the suit unless he would confess lease, entry, and ouster.[1] The fictitious proceeding was brought over to this country, and prevailed everywhere in the Colonies, except in Massachusetts and New Hampshire. The fictitious Doe changed his name to Jackson in New York and to Den in New Jersey. I do not know if even now the old fiction has entirely disappeared in the United States.[2]

There was no lack of other fictions in the English Law, in the shape of allegations which one of the parties made and the other was not allowed to deny, in order that the wine of new law might be put into the bottles of old procedure. Thus, in an action of trover to recover damages for the detention of goods to which the plaintiff was entitled, he alleged that he casually lost the goods and that they came to the possession of the defendant by finding. The most grotesque of these fictions was that by which, for the purpose of giving a remedy in England for a wrong done in the Mediterranean, it was alleged that the Island of Minorca was at London, in the parish of St. Mary Le Bow in the Ward of Cheap;[3] and yet, perhaps, the palm must be given to that fiction of the United States Federal Courts that all the stockholders in a corporation are citizens of the State which incorporates it. This fiction is remarkable for the late date

[1] 3 Bl. Com. 203.

[2] The common law action of ejectment still exists in Alabama. See Civil Code (1907), sec. 3838; *Perolio* v. *Doe*, 197 Ala. 560.

[3] *Mostyn* v. *Fabrigas*, Cowper, 161.

of its origin and for its absurd results. I shall return to it in another connection.[1]

Disuse of fictions

As Maine says, in his "Ancient Law," [2] fictions of the historical kind are almost a necessity of the Law at a certain stage of human development. "They satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present." But as a system of Law becomes more perfect, and its development is carried on by more scientific methods, the creation of such fictions ceases, and better definitions and rules are laid down which enable us to dispense with the historic fictions which have been already created. Such fictions are scaffolding,—useful, almost necessary, in construction,—but, after the building is erected, serving only to obscure it. A chief objection to their continuance,—to quote again from Maine,[3]—is that they are "the greatest of obstacles to symmetrical classification. . . . There is at once a difficulty in knowing whether the rule which is actually operative should be classed in its true or in its apparent place."

Thus, to take an instance from the practice as to the jurisdiction of the Court of Exchequer, of which I have spoken, should we say: The Court of Exchequer has jurisdiction only over matters concerning revenue, but as the ability of the King's debtor to pay the Sovereign may depend upon his collecting money due him from other subjects, the King's debtors may sue in the Exchequer to recover their debts, and if any one alleges that he is a

[1] P. 184, *post*.
[2] Pollock's ed. p. 31.
[3] *Ib.*, p. 32.

debtor of the King's, the Court of Exchequer will hold it to be an uncontradictable truth? Or should we say, all persons can sue in the Court of Exchequer to recover money due them, if they allege in their declaration—truly or falsely is immaterial—that they are debtors to the King?

Dogmatic fictions

The second class of fictions, according to Ihering's division, which he calls dogmatic fictions, instead of being obstacles to symmetrical classification, have been introduced and used as aids to it. These dogmatic fictions are not employed to bring in new law under cover of the old, as are the historic fictions, but to arrange recognized and established doctrines under the most convenient forms.

Thus, there is a legal doctrine of unimpeachable soundness that a purchaser or mortgagee cannot be deprived of his interest in the land by any dealings by the seller or mortgagor, subsequent to the sale or mortgage, with one who knows of it. Thus, if A. mortgages land to B., and afterwards makes a deed of it to C., who knows of the mortgage to B., C. can hold nothing as against B. Further, it is desirable that a purchaser or mortgagee should be able to protect himself by recording his title. Thus, to take the example just given, if A. mortgages to B. and B. records his mortgage, a deed from A. to C. will pass nothing as against B., whether C. knows of the mortgage or not. Now, C. is excluded in both the cases suggested, but really on distinct technical grounds. In the first case, he is excluded because he knows of the mortgage to B.; in the second, because B. has recorded his mortgage; and yet, because it is convenient to treat the whole subject together as the results in both cases are the same, we put it under the head of notice, and say

that the registration is constructive notice—that is, notice by fiction—to all the world.

Fictions of the dogmatic kind are compatible with the most refined and most highly developed systems of Law. Instead of being blameworthy, they are to be praised when skilfully and wisely used. Yet, though handy, they are dangerous, tools. They should never be used, as the historic fictions were used, to change the Law, but only for the purpose of classifying established rules, and one should always be ready to recognize that the fictions are fictions, and be able to state the real doctrine for which they stand.

Attribution of will to abnormal human beings

Let us return, now, to the particular occasion for the application of a dogmatic fiction which we have to consider,—the case of a human being who is either naturally destitute of will, or to whose will the Law, for one reason or another, has denied the power of putting in motion his rights in certain matters. We have defined a man's legal rights as those rights which society will enforce on his motion,[1] but with more entire accuracy it may be said that a man's legal rights are the rights which society will enforce on the motion of some one authorized by society to put his rights in motion. In the case of a normal human being, the only one authorized by society to put a man's rights in motion is the man himself; but in the case of an abnormal human being, the person authorized to do so is not the man himself, but some one else. Who such person is, is a matter to be determined by the rules of each particular system. The fiction comes in when we say that what is, in truth, the will of some one

[1] P. 18, *ante*.

else exercised on his behalf, is the will of the possessor of the right,—when we attribute another's will to him. It is convenient to bring together, by means of this attribution, the rights of normal and abnormal persons, for the interests which the rights are given to protect are the same in both classes, and in both classes the same results follow from the exercise of the rights.

Where action on behalf of an abnormal human being is taken in the courts, the will attributed to him is that of some other definite person. How about cases where the administrative officers of the State protect him or his property?[1] Where the inability to will is not natural, but impesed by Law, as in the case of a young man just under age, the imposed inability does not extend to these cases. The young man may request the police to protect him or his property. Where the ability to will is really absent—as in the case of a new-born child or of an idiot —the will which the Law attributes to the abnormal human being is not that of any definite individual, but that which is common to all, or the vast majority, of normal human beings. In the case of juristic persons, as we shall see, the application of dogmatic fictions is more complicated.

Unborn children

Included in human beings, normal and abnormal, as legal persons, are all living beings having a human form. But they must be *living* beings; corpses have no legal rights. Has a child begotten, but not born, rights? There is no difficulty in giving them to it. A child, five minutes before it is born, has as much real will as a child five minutes after it is born; that is, none at all. It is just as easy to attribute the will of a guardian, tutor, or

[1] See p. 22, *ante*.

curator to the one as to the other. Whether this attribution should be allowed, or whether the embryo should be denied the exercise of legal rights, is a matter which each legal system must settle for itself. In neither the Roman nor the Common Law can a child in the womb exercise any legal rights.[1]

But putting an end to the life of an unborn child is generally in this country an offence by statute against the State; and in our Law a child once born is considered for many purposes as having been alive from the time it was begotten.[2]

Supernatural beings

(III) We have hitherto been considering as persons, human beings. We have now to pass to beings who, though not human, are intelligent, that is, *supernatural* beings. There is no difficulty in giving legal rights to a supernatural being and thus making him or her a legal person. Supernatural beings—Gods, angels, devils, saints —if they deal in earthly business and appear before earthly tribunals, must do so through priests or other human beings, but the relation which obtains between a God and his priests is like that which obtains between a

[1] See 1 Windscheid, Pand. § 52.

[2] The history of the development of the Common Law on this subject is curious. Originally, a child does not seem to have been considered for any purpose as living before his birth. The House of Lords, at the end of the seventeenth century, misunderstanding the existing law, and to the great disgust of the Judges, allowed a child who was begotten but not born at the end of a life estate to take the property as if he had been born at that date. Then the doctrine was extended to cover all cases where it was for the benefit of the child to be considered as having been born. Is the doctrine to be extended to cases where such extension benefits, not the child, but others? It is well settled that it does so extend in cases arising under the Rule against Perpetuities; whether it should be extended to other cases is yet *sub judice*. The leading authorities are collected in 5 Gray, Cases on Property (2d ed.) 47-54, 718-720 (1908).

normal man and his agents or attorneys, and not like that which exists between an infant and his guardian, where, as we have seen, the will of the latter is attributed to the former. There is no need of fiction here. In the society which recognizes the legal rights of a God, the existence of the God is a fact of revealed religion, and that authority to represent him has been given by the God to the priests, is also a fact of revealed religion. The society is dealing with what it believes to be a reality, just as much as when it deals with human beings; it is not pretending that that is true which it knows or believes not to be true.

In several systems of Law, supernatural beings have been recognized as legal persons. This was true, to a limited extent, in ancient Rome.[1] The temples were, perhaps, owned by the Gods. The Romans held very different views from those of Mr. Malthus. He who had the most children served the State best, and so, a privilege to take by will was given to those women who had had at least three children,—*jus trium liberorum*. In the course of time, the same privileges were given as a reward to persons who had not had three children, or indeed, any children at all, but the same name was retained, and so, oddly enough, to Diana, of all persons in the world, or rather out of the world, was given the *jus trium liberorum*.[2]

When, under Constantine, Christianity took the place, as the State Church, of the older religions, it might have

[1] 3 Gierke, Deutsche Genossenschaftsrecht, 62-65.

[2] Dion Cassius, 55, 2; Ulp. Fragm. 22, 6; 1 Pernice, Labeo, 260-263. It should be observed that it is to *Diana Ephesiaca* that Ulpian allows testamentary privilege, and it is perhaps not clear that the Ephesian Artemis did not have children.

been supposed that the Christian God and his saints would have become legal persons; but this does not seem to have been the case. The early Christians were wary of imitating the religious establishments of the Empire; in their own organizations they had recourse more readily to the analogies and precedents of the civil administration. The Church buildings and charitable institutions were owned by corporations, or were like the modern German *stiftungen,*[1] and Justinian[2] enacted that if any one should make Christ his heir, the church of the testator's domicil should be the heir, and, if any archangel or martyr was named as heir, his oratory should be deemed the heir. I will return later to this law of Justinian's, in connection with juristic persons.[3]

Though the sound view undoubtedly is that in the Civil Law of the present day there are no supernatural persons, yet the opposing view has not been without defenders. Thus Uhrig says: "Since the Church (*Kirchengemeinde*) is the bride of Christ, she dwells with him in this house of God, and the property of the Church (*Kirchenvermögen*) belongs as dowry to her, but the Lord has *durante matrimonio* the property in her dowry."[4]

But in the Germany of the Middle Ages, God and the saints seem to have been often regarded as true legal persons.[5] Sometimes the expression is odd enough: Thus, a donor declares, *"Dat unse leve frauwe Maria die moder Christi Jesu und der ritter Sanctus Georgius disses*

[1] P. 58, *post.*
[2] 1 Cod. 1, 2, 25 (26).
[3] Pp. 293-297, *post.*
[4] See 1 Meurer, Der Begriff der heiligen Sachen, § 57, p. 282, note 1.
[5] 2 Gierke, Deutsche Genossenschaftsrecht, 527 *et seq.*, quoting the following instances, with many others.

kirspels gruntherrn sein"; or *"Domini genetrici beatæ Mariæ in perpetuum possidendum perdono"*; or to Saint Widon *"in perpetuam hereditatem,"* or *"Deo omnipotenti ejusque prænominatis apostolis hereditario jure conceditur."* [1] Sometimes the supernatural person is charged with a legal duty. Thus, *"Sanctus Spiritus tenetur* 40 *sol. pro duabus mansis quas habuit in domo laterali." "Sanctus Spiritus in Travemunde dat* 5 *marcas annuatim de molendino et pratis et agris."* [2]

In the Common Law, neither the Deity nor any other supernatural being has ever been recognized as a legal person.[3] Blasphemy has been dealt with as a crime, but the legal person who has a legal right, and who alone can put it in motion, is, as in all crimes, the State. Very probably the motive of the State in giving itself this right to sue for blasphemy was, originally, because it was deemed that such prosecution was pleasant to the Almighty or would avert his wrath. Now such prosecutions are usually defended on the ground that the utterance is offensive to many of the community.

Animals as having rights

(IV) Thus far we have been considering human beings and supernatural beings, but animals may conceivably

[1] "That our dear lady Mary the mother of Jesus Christ and the knight Saint George be the feudal lords of this parish." "To Our Lord's mother, the blessed Mary, I grant to be possessed for ever." "For a perpetual inheritance." "It is granted to Almighty God and his aforesaid apostles to be held by hereditary right."

[2] "The Holy Ghost is bound to pay 40 shillings for the two fields which it has had in the side farm." "The Holy Ghost in Travemunde gives 5 marks annually as rent of a mill and meadows and fields."

[3] There is on record, however, in the registry of deeds for Sullivan County, Pennsylvania, a deed of land in the town of Celestia, by which Peter Armstrong and his wife grant said land "to Almighty God, who inhabiteth Eternity, and to his heirs in Jesus Messiah." Armstrong was a member of a religious community that flourished in that place for many years.

be legal persons. *First,* legal persons because possessing legal rights.[1] In the systems of modern civilized societies, beasts have no legal rights. It is true there are everywhere statutes for their protection, but these have generally been made, not for the beast's sake, but to protect the interests of men, their masters. Such statutes have sometimes, however, been enacted for the sake of the animals themselves. It has, indeed, been said that statutes passed to prevent cruelty to animals are passed for the sake of men in order to preserve them from the moral degradation which results from the practice of cruelty, but this seems artificial and unreal; the true reason of the statutes is to preserve the dumb creatures from suffering. Yet even when the statutes have been enacted for the sake of the beasts themselves, the beasts have no rights. The persons calling upon the State for the enforcement of the statutes are regarded by the Law as exercising their own wills, or the will of the State or of some other organized body of human beings. The Law of modern civilized societies does not recognize animals as the subjects of legal rights.

It is quite conceivable, however, that there may have been, or indeed, may still be, systems of Law in which animals have legal rights,—for instance, cats in ancient Egypt, or white elephants in Siam. When, if ever, this is the case, the wills of human beings must be attributed to the animals. There seems no essential difference between the fiction in such cases and in those where, to a human being wanting in legal will, the will of another is attributed.

[1] P. 20, *ante.*

Animals as subject to duties

Secondly, animals as legal persons, because subject to legal duties. In modern systems of law, beasts are not subject to legal duties. As we have seen, the power of obeying or of understanding a command is not necessary for the creation of a duty. And, if a dog is unable to understand the words of a statute, so is an idiot or a new-born child. But in order that any being may become a legal person by virtue of a command issued by organized society, the command must be directed to that being. Now, the State does not give commands to dogs. If there is an ordinance that the town constable may kill all dogs without collars, the constable may have a legal right to kill such dogs, but the dogs are not under a legal duty to wear collars. A legal duty to put collars on the dogs is imposed on their masters.[1]

In modern Jurisprudence, animals have no legal duties, but in early stages of the Law, they seem to have been regarded for some purposes as having legal duties, for a breach of which they were liable to be punished. The fiction here, if fiction there was, did not consist, as would be the case if legal rights were given to beasts, in attributing to them the will of human beings, but in attributing to them a capacity to receive commands directed to them. It is likely, however, that there was often no conscious use of fiction at all. It was genuinely believed that the animals really knew that they were disobeying the Law. Moreover, it is highly probable that in primitive times such dealings with beasts originated in a crude notion of vengeance, without any distinct attribution of intelligence or will to the animal, and when such practices survived. they often, it is likely, took on the form

[1] Pp. 24, 25, *ante.*

of religious expiation, rather than of punishment for breach of legal duty.[1]

This idea of regarding an animal as the subject of a legal duty prevailed among the Jews and the Greeks. Thus, "And surely your blood of your lives will I require; at the hand of every beast will I require it, and at the hand of man";[2] "If an ox gore a man or a woman that they die; then the ox shall be surely stoned and his flesh shall not be eaten."[3] So in Plato, "Ἐὰν δ' ἄρα ὑποζύγιον ἢ ζῶον ἄλλο τι φονεύσῃ τινά . . . ἐπεξίτωσαν μὲν οἱ προσήκοντες τοῦ φόνου τῷ κτείναντι, διαδικαζόντων δὲ τῶν ἀγρονόμων οἷσιν ἂν καὶ ὁπόσοις προστάξῃ ὁ προσήκων, τὸ δὲ ὄφλον ἔξω τῶν ὅρων τῆς χώρας ἀποκτείναντας διορίσαι."[4]

The most remarkable instances of the treatment of beasts as having legal duties are to be found in the judicial proceedings against them which were had in the Middle Ages. They were summoned, arrested, and imprisoned, had counsel assigned them for their defence, were defended, sometimes successfully, were sentenced and executed. I should like to dwell on this curious development of manners and belief, which is little known, but it is so foreign not only to any actual but to any rational jurisprudence that I do not feel as if I ought to linger on it longer.[5]

[1] See Holmes, Com. Law, 7-24.
[2] Gen. ix. 5.
[3] Ex. xxi. 28.
[4] "And if a beast of burden or other animal cause the death of any one, the kinsmen of the deceased shall prosecute the slayer for murder, and the wardens of the country, such, and so many as the kinsmen shall appoint, shall try the cause, and let the beast when condemned be slain by them, and cast beyond the borders." Plato, De Legibus, IX, 12. Trans. by Jowett (1871), vol. 4, 385.
[5] See Amira, Thierstrafen, especially p. 6 and p. 15, note 5; A. Franklin, La vie Privée d'autrefois, Les Animaux, Tom. 2, p. 255; Osenbrüggen, Rechtsgeschichtliche Studien, 139-149; Farmer Car-

Inanimate things as having rights

(V) Now to go a step outside the domain of living beings. Inanimate things may conceivably be legal persons. *First,* legal persons as possessing legal rights. Inanimate things may be regarded as the subject of legal rights, and, as such, entitled to sue in the courts. Such, perhaps, were some of the temples in pagan Rome,[1] and such seem often to have been church buildings and the relics of the saints in the early Middle Ages. Thus, we find gifts *"ad sanctum locum ubi ego jacere cupio, i.e. apud sanctum Albanum"; "locis sanctorum conferimus"; "locis venerabilibus"; "tradidi ad reliquias Sancti Salvatoris et Sanctæ Mariæ et in manus Liudgeri presbiteri, qui easdem reliquias procurabat, portionem hereditatis meæ"; "trado ad monasterium quod dicitur Scaphusa et est exstructum . . . ubi,"*[2] etc. These and many like examples will be found in Gierke.[3] If an inanimate thing is regarded as the subject of a legal right, the will of a human being must, as in the case of an animal, be attributed to it, in order that the right may be exercised.

Inanimate things as subject to duties

Secondly, inanimate things as legal persons, because subjects of legal duties. As is the case with animals, inanimate things have been regarded as the subjects of legal duties,—I was abeut to add in primitive times,

ter's Dog Porter, 2 Hone, Every Day Book, 198; *Quoniam Attachiamenta,* c. 48, pl. 10-13, in *Regiam Majestatem* (Ancient Laws of Scotland), ed. Skene (1609), fol. 86.

Since writing the above I have seen the Criminal Prosecution and Capital Punishment of Animals, by E. P. Evans, New York, 1906. It is of great value as a book of reference.

[1] But see 2 Puchta, Inst. § 191, p. 7; 1 Meurer, § 53.

[2] "To the holy place where I wish to be buried, that is, at Saint Albans"; "we offer to the abodes of the saints"; "to the revered places"; "I have transferred to the relics of the Blessed Savior and the Blessed Mary and into the hands of Liudger the priest, who has charge of the said relics, a portion of my inheritance"; "I transfer to the monastery called Scaphusa, built where," etc.

[3] 2 Deutsche Genossenschaftsrecht, 542-546.

but, as we shall see, the notion has persisted even to our own days. If there was a fiction here, it was not in attributing the real will of a human being to the thing, but in assuming that the thing had an intelligence of its own. It would seem, however, that there was often no conscious fiction, but some vaguely realized belief that the thing had a true intelligence and will; and very often, as in the case of animals, the idea of religious expiation had a great, if not a chief, part in the proceedings against inanimate things.

In Greece, proceedings against inanimate things were not, it would seem, infrequent.[1]

In the Common Law, this attribution of guilt to inanimate things, and this mixture of the idea of punishment with that of expiation, appears in the form of deodands. When a man had been convicted of homicide, the weapon or other article with which the deed was done, the thing itself or its value, was called a deodand, and, as its name imports, was at first forfeited to the Church, but afterwards to the Crown. This is the reason for the allegation of the value of the lethal weapon which appears in the old indictments. Thus, on an indictment for murder or manslaughter by stabbing, the indictment alleged that the prisoner then and there struck the deceased with a certain knife of the value of one shilling, which he then and there in his right hand held. And in England the doctrine was applied as late as 1842,[2] in the case of a locomotive engine. It should be added that anything which had killed a man was liable to be forfeited as a

[1] Besides the citations in Holmes, Com. Law, 7, 8, see Demosthenes, Κατὰ Ἀριστοκράτους, § 18.

[2] *Queen* v. *Eastern Counties R. Co.*, 10 M. & W. 58.

deodand, though there had been no homicidal intent on the part of a human being; and in that form there have been precedents in the early history of this country. In the records of the Colonies of Plymouth and Massachusetts, there are instances of the forfeiture of a boat or a gun as having caused the death of a man.[1]

Judge Holmes, in his book on the Common Law, has shown how the imagination that there must be life in a moving object affected the law of deodands, and, as he justly remarks, this notion appears most conspicuously and persistently in the Admiralty. In the Admiralty, proceedings *in rem* are brought against ships. This, however, at the present day, is a mere form. But a most remarkable instance of application in the substantive law of this barbarous notion of a ship's intelligence occurred only some forty years ago. On land, when a man's vehicle, say his automobile, is taken by the Law out of his custody, law and justice, alike, in all civilized countries, impose on him no liability for accidents that the vehicle may cause while in the hands of the official. A sheriff takes my horse and wagon on legal process against me; his bailiff in charge of them runs over a woman; I am not liable. An officer is appointed to take charge of carriages and drive them over a bridge; he takes possession, by virtue of his authority, of your carriage, and an accident occurs; you are not responsible. Suppose, now, a ship is in the hands and under the orders of a pilot, whom the owner and master have been compelled to take against their will, and, by the pilot's negligence, a collision ensues. The Supreme Court of the United States, in 1868,[2]

[1] *E.g.* a boat. Plymouth Colony Records, vol. I, p. *157. (1638)
[2] *The China*, 7 Wall. 53.

held that in such a case the ship was guilty. Judge Holmes[1] speaks of this decision with more tenderness than it deserves.

Juristic persons

(VI) Thus far we have been dealing with cases where a legal person, the subject of a legal right or a legal duty, is, or is believed to be, some one or something real. Where there has been a fiction, it has consisted in attributing to or assuming for such real entity a will which he, she, or it does not, in truth, possess; but this is the only fiction. The being or thing to which this will is by fiction given is a reality,—a man, a dog, a ship. We have now to consider juristic persons, so called.

The power of conceiving an abstraction which is imperceptible to any of the senses, which yet has men for its visible organs, and which, although not having a will and passions, may yet have the will and passions of men attributed to it,—this power is one of the most wonderful capacities of human nature. If not a necessity of their nature, it is a power which the races of men seem to find no difficulty in exercising. If there was a time when man was without the porsonifying faculty, it is found in full play in the early history of civilization. Among no people has the conception of the personality of the State been more highly developed than among the Greeks, and the idea of the corporation was recognized by the Romans.

One dislikes to call such an entity "fictitious," because "fictitious" is what Bentham would call a "dyslogistic epithet," and the same objection applies, though in a less degree, to the use of "artificial." Perhaps, "juristic"

[1] Com. Law, 28.

is best. But, after all, there is no objection to calling such abstract entities fictitious, if we bear in mind Ihering's distinction between historical and dogmatic fictions. This fiction of an abstract entity is not an historical fiction, like that of the casual finder in trover, or of the casual ejector, invented to bring new law or to extend remedies, but it is used to classify and arrange old and acknowledged law.[1]

Corporations

The usual form of a juristic person is a corporation. Indeed, corporations are the only juristic porsons known to the Common Law.[2] What is a corporation? In *the first* place, there must be a body of human beings united for the purpose of forwarding certain of their interests. *Secondly,* this body must have organs through which it acts; it must be an organized body of men; neighbors turning out to hunt down a robber do not form a corporation. The interests of an organized body of men cannot be effectually forwarded unless these interests are protected by the State; and to give this protection, legal rights must be created, and the organization through which tho body is to act must be recognized by the State. If a body of men acts through an organization which the State does not recognize, the Law will not give effect to the act as the act of the organization, though it may be the act of some or all of its members.[3]

[1] It may be called a "rational fiction." See 14 Columbia Law Rev. 469, 471.

[2] Except the State.

[3] *Corporations de facto.* A statute has enacted that an organized body of men shall become a corporation upon performing certain acts. Sometimes in such a case although the body has failed to perform the acts, the Law will yet accord certain of the rights and impose certain of the duties which would have been created had the acts been performed. This means that the body is recognized by the State as a corporation for certain purposes, but not for all.

As I have said, to effect the purposes of a corporation, its interests must be protected by the creation of rights. To whom shall these rights be given? Whom shall the State recognize as the person or persons on whose motion the rights are to be exercised? That is, *whose* are the rights?

Putting all fictions aside, let us get down to the "hard pan" of fact. A corporation is an organized body of men to which the State has given powers to protect its interests, and the wills which put these powers in motion are the wills of certain men determined according to the organization of the corporation.

How is this state of things to be brought within the scheme of rights and duties upon which the superstructure of the Law rests? In this way. The powers granted by the State are not the rights of the men whose wills put them in motion, for it is not the interests of those individual men that are protected; but, by a dogmatic fiction, their wills are attributed to the corporation, and it is the corporation that has the rights.

Now it is to be observed, that thus far there is nothing peculiar to juristic persons. The attribution of another's will is of exactly the same nature as that which takes place when the will, for instance, of a guardian is attributed to an infant. How far this attribution is allowed to occur in the one or the other class of cases is a question of positive law, but, so far as the process takes place, and by whatever name it is called, it is of essentially the same

Such bodies are called corporations *de facto*. They are discussed by my colleague in the Harvard Law School, Professor E. H. Warren, in two valuable articles in the Harvard Law Review, 20 H.L.R. 456; 21 H.L.R. 305.

character. With all legal persons, except normal human beings,[1] there is the same fiction of attributing the will of a man to some one or something other than himself—it matters not who or what that some one or something else is. The step is as hard to take and no harder, whether he, she, or it be an idiot, a horse, a steam tug, or a corporation. Neither the idiot, the horse, the steam tug, nor the corporation has a real will; the first three no more than the latter. But with the juristic person we have an additional fiction. That additional fiction consists in forming an abstract entity to which the wills of men may be attributed.

Is a corporation a real thing?

This is the common view, but it has been contended that there is no fiction here, that the corporation is a real thing. Is the corporation to which these wills of individual men are attributed a real thing, or only a thing by fiction, a fictitious entity? If it is a fictitious entity, we have a double fiction; first by fiction we create an entity, and then by a second fiction we attribute to it the wills of individual men. If the corporation is a real entity, then we have need only of this second fiction.

Whether a corporation is a real or only a fictitious entity is a question which I shall not undertake to solve. I fear I should find no end in wandering mazes lost. According to an old saying, everybody is born either a nominalist or a realist. And what is true of all the world is true probably of my readers. I shall not undertake to supply any of them with a new set of innate ideas. And I shall not attempt to answer the question whether corporations are realities or fictions, because to

[1] Excepting also supernatural beings. See p. 39, *ante*.

do so is unnecessary for my purposes. The facts are beyond dispute; the State imposes duties upon people for the protection of the interests of the organized bodies of men called corporations, and the rights correlative to these duties it allows to be set in motion by the wills of individual men determined by the organization of the corporation, which wills it attributes to the corporation. Whether the corporation be real or fictitious, the duties of other people towards it and the wills which enforce the rights correlative to those duties are the same. The Law is administered, and society is carried on in precisely the same way on either theory.

It should be observed that even if a corporation be a real *thing,* it is yet a fictitious *person,* for it has no real will, but it would be a fictitious person only as an idiot or a ship is a fictitious person. The reason why idiots and ships have not been called juristic persons, and classed with corporations, is that in the Roman and the Common Law the prevalent idea seems to have been that corporations were fictitious entities, were things only by fiction, and that, therefore, in their case, in distinction from the case of idiots and ships, there was need, as I have said, of a double fiction, and they ought to be put under a separate head and distinguished by a different name, viz. juristic persons.

Under the Roman Law there was little discussion as to the nature of corporations, and under the Common Law there has been little. Such discussion is alien to the eminently practical character of both systems. The prevailing notion has undoubtedly been that a corpora-

tion was not a real thing, but I do not think there can be said to be any settled opinion to that effect.[1]

Has a corporation a real will?

Before leaving the subject I ought to notice a theory which of late years has grown up in Germany, and which holds not only that a corporation is a real thing, but that it has a real will. Gierke, who is the chief expounder of this theory, declares that it is not original with him, but was first taught by Beseler. He confines the doctrine to the old German Law and admits that in the Roman system the corporation was a fictitious person; indeed, he maintains that view with no little warmth against some writers who had attempted to give real personality to the Roman corporation.[2] He believes that in Germany the old national view and the Roman have been struggling for the mastery, and that the former is getting the better of the contest. His view will be found set forth briefly in the article by him on Juristische Person in Holtzendorff's Lexicon.

Assuming that a corporation is a real thing, the question whether it can have a real will or not depends on whether there is such a thing as a general will. I do not believe that there is. There may be agreeing wills, but not a collective will; a will belongs to an individual. When we speak of the will of the majority on a point, we mean that on that point the wills of the majority agree. A collective will is a figment. To get rid of the fiction of an attributed will, by saying that a corporation

[1] See a discussion of "Corporate Personality" by A. W. Machen, in 24 Harvard Law Rev. 253, 347, and an article by T. Baty in 33 Harvard Law Rev. 358.

[2] 3 Gierke, Deutsche Genossenschaftsrecht, 131.

has a real general will, is to drive out one fiction by another.[1]

On and about this question there has been an enormous number of pages written. But difference in practical results from adopting this theory there seems to be none. Under it acts and forbearances are imposed on men as duties for the purpose of protecting the interests of corporations; the rights corresponding to these duties are given to the corporation; the actual wills by which in fact these rights are exercised are the wills of men designated in accordance with the organization of the corporation and the positive Law of the State; and this is just what happens under the theory of the Roman and the Common Law. In short, whether the corporation is a fictitious entity, or whether it is a real entity with no real will, or whether, according to Gierke's theory, it is a real entity with a real will, seems to be a matter of no practical importance or interest. On each theory the duties imposed by the State are the same, and the persons on whose actual wills those duties are enforced are the same.[2]

I have spoken of the rights of corporations. As to their duties, a word will suffice. The State imposes legal duties upon corporations, to protect the rights of other persons, including the rights of individual members of the corporation. How the State will enforce these duties

[1] 1 Windscheid, Pand. (9th ed.) § 49, *n.* 8.

[2] I ought to add that the lamented Professor F. W. Meitland was a convert to Gierke's views. See the introduction to his translation of a portion of Gierke's Genossenschaftsrecht, under the title of Political Theories of the Middle Ages; also essay in 3 Collected Papers, 304. No one holds Maitland's memory in more respect or affection than I, but it must be remembered that his greatness lay in historic investigation, not in dogmatic speculation.

is matter for the positive Law of the State. It makes no difference whether the corporation is a fictitious person, or a real person with a fictitious will, or a real person with a real will. For instance, take the question of the liability of a corporation for a tort, say for slander. The corporation's liability or non-liability may be held on either theory. The existence of the liability or non-liability depends upon the positive prescriptions of the Law.

Creation of corporations

Who creates the abstraction known as a corperation? It is sometimes said that all corporations are creatures of the State. This is not literally accurate. Whenever men come together for a common purpose, it is the course of human nature for them or their leaders to personify an abstraction, to name it, and to provide it with organs. Such organized bodies may be of every degree of importance, from the Roman Catholic Church down to the poker club that meets at a village tavern.

To say that all such organizations are in truth creatures of the State, because they exist only by its sufferance, might be unobjectionable, if the control of the State over its citizens was absolute. If it had the power of preventing any communication of thought on religious subjects by words or signs, no church could exist in the territory of that State; but it has no such power; and organized societies which a State has forbidden to exist have often continued in spite of its efforts. The Catholic Church existed in England in the reign of Queen Elizabeth; the Carbonari existed in Italy under the Austrian and Bourbon rules; the Knights of the Golden Circle existed in the Northern United States during the Civil War.

But that over which a State has the sole authority is the making of a corporation into a juristic person. 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.

Corporations sole

The term "corporation sole" is used in the Common Law. When a man who has rights and duties by virtue of holding an office or exercising a function, dies, one of three things may happen—the rights and duties may come to an end, or they may pass to his heirs, or they may pass to his successors. Rights and duties enjoyed or imposed by virtue of an office, passing to heirs, or hereditary offices, are hardly ever created at the present day, but in England a few have come down from early times.

In some cases where like rights are enjoyed by successive occupants of an office, a corporation sole is created. In some cases, but not in all. Successive clerks of a city council may have the same right, as, for instance, to a salary, but the succession of such clerks does not usually form a corporation sole. Among the qualities of a corporation sole, which distinguish it from a mere succession of officers or persons exercising the same rights, the most important, apart from matters of procedure, seem to be, that if a corporation sole exists, an occupant of an office can generally acquire property for the benefit of his successors as well as himself; that he can generally recover for injury inflicted on property pertaining to the office while such property was in the hands of his predecessor; and that he can sometimes enter into a contract which will bind or inure to the advantage of his successors.

Whether a corporation sole is in any case created is a

matter for the positive Law of any particular jurisdiction. They are not uncommon. A bishop of the English Church is a corporation sole; so is the minister of a Congregational parish in Massachusetts.

A corporation sole does not seem to be a fictitious or juristic person; it is simply a series of natural persons some of whose rights are different and devolve in a different way from those of natural persons in general.

Corporations are, as I have said, the only juristic persons known to the Common Law. Property is never made into a juristic person. If property is given in England or in the United States for charitable uses, it is always vested in some man or corporation which holds it for the charitable uses, and is the subject of the rights and duties concerning it. If a testator devotes property to a charitable purpose, but names no one to carry out the purpose, the title to the property vests in the heir or executor until some other trustee is appointed to take it. The notion of a subjectless right or duty is utterly alien to the Common Law.[1]

Stiftungen

But in Germany there are juristic persons which are not corporations and which have no members. These are known as *Stiftungen* (foundations). They consist of property devoted to charitable uses, the title to which is not vested in individuals or corporations. As this legal concept is interesting and unfamiliar, I may be excused for dwelling on it a moment.

In pagan Rome, eleemosynary institutions for the relief of the poor and suffering, so far as they existed at all, were institutions of the State, and their administra-

[1] But cf. p. 46, *ante*.

tion was part of the functions of the State. They were simply portions of the machinery of government. It was only upon the establishment of the Christian Church that institutions of the kind independent of the State came into existence. They were probably regarded as corporations.[1]

All fiction apart, what actually takes place in case of a *stiftung?* Persons are subjected to duties with reference to property which has been devoted to charitable purposes. These duties are enforced on the motion of certain persons, but these persons have no rights, for it is not their interests which are protected, nor are there any other persons to whom their wills can be attributed; they exercise their wills not for the sake of any definite persons, but for the sake of certain objects; that is, in the case of a *stiftung* (which, as I have said, is a conception unknown to the Common Law) there are duties, to which there are no correspondent rights residing in definite men or corporations. By a dogmatic fiction the property in question is constituted a juristic person, and the fiction is a justifiable and beneficent one, because the duties which exist when a *stiftung* is created are of the same kind as those which exist as between natural persons, and the employment of the fiction enables them to be classified and treated together.

The view taken in the preceding section *as to the actual state of facts* in the case of a *stiftung* agrees, I think, in substance with the theory advanced by Brinz in his *Lehr-*

[1] See Appendix I. There may, however, have been gifts for such purposes to *collegia*, or guilds, under the pagan emperors. S. Dill, Roman Society from Nero to Marcus Aurelius, pp. 254-255, 282. For such gifts to municipalities, see *ib.* pp. 193-195, 224.

buch der Pandekten.[1] But Brinz denied that a *stiftung* was a juristic person. He maintained that there could be legal duties without legal rights, and that the *stiftung* was an instance of it. This theory has excited a hot, and, *more Germanico,* a voluminous controversy. Brinz's opponents declare that a legal duty without a legal right is unthinkable, and that a legal right without a subject is equally unthinkable, and that therefore the allowance of a *stiftung* necessarily carries with it the allowance of a juristic person. We may congratulate ourselves that in the Common Law no such controversy can arise, for the conception of *stiftungen* finds no place in our system.

A word with regard to two entities which are found in the Roman Law, and which, perhaps, should be included among juristic persons, *Fiscus* and *Hereditas jacens.*

The *Fiscus*

Originally a basket of woven twigs used for keeping money, the term *fiscus* came to mean the imperial treasury, in distinction from the *ærarium* or public treasury, but in course of time the fisc absorbed the *ærarium* and became the treasury of the State. The fisc is never called a person, but passages in the Digest and the Code show it to us as a creditor and a debtor and a party to a suit; that is, as a subject of legal rights and duties. The Romans do not seem to have thought much on the personality of the fisc, or to have compared it with that of a corporation. They appear to have considered it distinct from the State. In modern times, the term continues to be used in some systems of Law derived from the Roman, and in them the fisc is now defined as the State in its relation to property. If the term is to be retained, this is a good defini-

[1] Vol. 2, § 228, and elsewhere.

tion, but in this sense it seems superfluous, and that it is best to do away with the word as a legal term altogether, and to speak of the State as the subject of those rights and duties which have been attached to the fisc.[1]

Hereditas jacens

In the interval between the death of the ancestor and the moment when the heir accepted the inheritance, the Romans placed the *hereditas*, commonly known by the civilians as the *hereditas jacens*. This *hereditas* was an abstraction, and probably, to a limited extent at least, a juristic person. There is nothing corresponding to the *hereditas jacens* in the Common Law.[2]

Ihering's doctrine of passive rights

One point more as to legal rights may be noticed. Ihering, who is always worth listening to, even if one does not agree with him, while, in oppesition to Brinz, he denies most strenuously the conceivability of a right without a subject, has a view of his own on rights not only of juristic persons but of all legal persons, which he has elaborated at great length.[3] He divides a right into two sides,—its active side, "the legal position which the right has as a result for the one to whom it belongs"; and the passive side, "the position of legal obligation or limitation in which a person or thing is placed through the right." He admits that as a permanent situation one side cannot exist without the other, but he insists that temporarily the passive side can exist without the active, and that this temporary divorce may take place, either in the interval between the disappearance of one subject and the appearance of another, or, in the case of a right on a

[1] On the fisc and its character, see 3 Gierke, Deutsche Genossenschaftsrecht, 58-61; 1 Karlowa, Röm. Rechtsgeschichte, § 64; 1 Holtzendorff, Rechtslex. *sub. voc.*

[2] On the *hereditas jacens*, see Appendix II.

[3] *Passive Wirkungen der Rechte*, 10 Jahrb. f. Dogm. 387-580.

condition precedent, before the condition is fulfilled. He compares such a right to a bed which has been made up, but which is yet empty; and he puts a case like this: A. owns land and, as such owner, has a right of way over land of B.; A. abandons the land, so that it is without an owner, which state of things can occur in the Civil Law, though with us a man who has become owner of land cannot renounce ownership. Here, Ihering says, there is no longer any one to whom the right of way belongs, but the right still exists on its passive side, and when the property which was abandoned is again occupied, say by C., then the right comes again into full existence on both sides. The case of the *hereditas jacens* furnishes him with another instance.

One criticises a writer of Ihering's ability with diffidence, but has he not been deceived here by a form of words? Certain facts have given A., the former occupier, a right to deal witb B.'s land in a certain way, to put it to a certain use, to walk over it; and certain facts give C., the present occupier of the premises abandoned by A., a similar right to deal with B.'s land,—a *similar* right, but not the same right. The first right has ended; a new one has begun.

Even if we regard the right of C. as the *same* thing as the right of A., yet, in the interval between A.'s occupation and C.'s occupation, if there is a suspension of the right, it is of the whole right,—not only of the active side but of the passive side as well. Both active and passive sides of the right must come into existence together; indeed, the separation between the two sides which Ihering maintains, and the possibility of one existing without the other, is unthinkable. Ihering himself admits that

it is unthinkable as a permanent condition, and, in truth, it is just as unthinkable as a temporary condition. There cannot, even temporarily, be an inside without an outside, a front without a back.

But, it may be said, in the case supposed, let us assume that after A. has abandoned his land, and before C. has come into occupation, B. has obstructed the way. Cannot C., after he has come into occupation, compel B. to take down the obstruction, or to pay damages for having put it up? I am not sufficiently familiar with the Civil Law to know whether this is the case, but certainly there might be a system of law in which it was so. But what would this prove? Only that B. may be under a legal duty; that is, may be commanded by the State to do certain acts which C. has a right to have done, and this legal duty may arise from certain facts (including acts by B.) having happened before C. acquired any right. But this does not show that B. was under a legal duty to C. before C. had any right, but only that among the acts, forbearances, and events which cause a right to spring into existence, past acts and forbearances are often included, a proposition obvious enough.

Although Ihering is careful to indicate that he is speaking of *rechte* in the subjective sense, or, as we say, rights, it seems possible that he has been misled by the ambiguous meaning of "*recht.*" [1] *Recht*, he says, does not exist for itself, but to forward certain purposes,—that the purpose is often a continuing one, intended, for instance, to last beyond the life of any particular individual. True of *recht* in the objective sense, or, as we say, Law. Rules

[1] P. 8, *ante*.

of Law may be established for continuing purposes; and to give effect to these purposes, rights (*rechte im subjectiven sinne*) are given to successive individuals, but there is no need that these rights themselves be continuous.