THE KINDS OF LEGAL RIGHTS

By F. K. H. MAHER*

There are topics on which so much ink has been spilt that one shrinks from any effort to haul them up from the black pools in which they have been submerged. Legal rights and duties are such; so are Possession, Corporate Personality and Property. Nineteenth century pundits, by overemphasizing difficulties arising out of the nature (or essence) of these terms, produced a chaos of conflicting views, so that later lawyers despairing left such subjects alone.

But none of these matters can be left submerged for ever. There is a new fashion of examining such concepts: one asks what the legal system has done with them (rather than by treating them as absolute concepts from which flow inevitable and complete conclusions). Thus legal personality becomes an element in specific propositions which can be tested by looking at the decisions of the courts about various legal entities in given situations. It is not so easy to treat rights and duties themselves in just this way; but it is at least useful to try. For, while law can never be an exact science, it ought to use terms which mean much the same thing to all lawyers; otherwise there can be no effective communication between lawyer and lawyer, lawyer and judge, lawyer and client. Even more necessary is agreement about these terms when it concerns teacher and student.

It is curious that only at such a late stage in the history of our law should keen debate have arisen on these most basic legal terms. Kocourek maintained that in the older books various synonyms for rights are used indiscriminately, even up to Blackstone's time.[1] 'Right' is the most frequently employed, 'privilege' is a little less common; 'duty' is quite old in a general sense, but 'duty' and 'power' as technical terms are late in appearing. The topic was vigorously dissected by the Germans in the late nineteenth century in an effort to make concepts 'scientific'; the argument then flowed over into the United States. Writing in 1928, Kocourek was able to say that 'the nature of the chief type of jural relation, a "right", is still a subject of animated debate'.[2] The debate has continued spasmodically until our own time, when further linguistic attempts have been made to clarify concepts by other means, especially in the writings of Hart and other English jurists.[3]

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[1] Kocourek, *Jural Relations* (2nd ed. 1928) 8 pp. [2] *Ibid.* 29.

[3] Hart, 'Definition and Theory in Jurisprudence' (1956) 9 *Journal of Legal Education,* and *Oxford Essays in Jurisprudence* (1961 ed. Guest).

In attempting to explain rights and duties to prospective lawyers one is often tempted to despair. One refers them to Salmond, Austin, Holland, Holmes, the Germans, the Romans. One hopes the class may receive light from perusing Hohfeld's Table and its commentators, but most students seem to end in a cloud of unknowing. Yet as lawyers they will have to advise clients about their rights and duties, to decide whether a liberty is a right, whether a so-called privilege entitles one to a writ of certiorari, whether an interest amounts to a real right or only to a licence—and so on.

I shall not attempt here any ambitious project. Ignoring debated dogmas of philosophy, fundamental meanings, arguments as to what terms ought to mean, I hope merely to throw some light into one small corner—namely the distinctions between the terms which often serve as synonyms in this area.

Hohfeld nearly fifty years ago was troubled by the disputes among usually precise lawyers; his famous Table was a gallant and valuable effort to clarify the issues. Unfortunately it has left us still in much confusion. We are deep in his debt but we recognize defects in his methods and his conclusions.

Hohfeld, as law students are informed, looked at the numerous words we employ to describe what Austin (and later Kocourek) called 'legal advantages'—such words as privileges, immunities, liberties, powers, abilities, capacities, interests, claims, exemptions, demands. On the other side of the semantic fence he observed duties, liabilities, inabilities, disabilities, defects, obligations, which we may label as 'legal disadvantages'. He thought that by excluding some terms as too vague (such as 'abilities') he was left with four concepts relating to 'advantages'. Inspired probably by the current notion that one should (like Salmond) begin by talking about duties, he constructed a table from which you could tell what kind of legal advantage A had in a given relationship with B by asking what kind of obligation or disadvantage (if any) B owed to A in those circumstances.

Such a table, if effectively constructed, would solve our linguistic difficulties. This I consider it fails to do. For if it is the lower half that governs the upper half, then there must be no defects in the lower half. The correlatives must be completely distinguished from other correlatives and the opposites must be true opposites. Now, while the upper line of the Table includes comprehensive rights—as distinct from lesser and limited advantages (privileges, powers, immunities)—his lower line consists of correlatives that overlap in meaning. Thus a 'power' is a limited kind of right, but a 'liability' is not a limited kind of duty. If I am liable (or subject) to a policeman's power to arrest me, I am under a duty to submit to arrest; and I am disabled from resisting and have a 'no-right' to resist.

Moreover, the main argument, as has been pointed out by various critics, is circular. If A is owed a duty by B, then clearly A has a right against B. But equally, if B owes A a duty, it is because A has a right to demand that B perform the duty. In explaining the law, it may help B to understand his position by setting out what he must do (or not do) for A. But it adds nothing to our knowledge to say this; we are merely putting the same proposition in another way: 'Which is the chicken, which the egg?' Duty, as we shall see later, is itself an unsatisfactory and vague term as a starting point—except in the area of obligations of a public law character. It can, in private law, never be regarded as creating rights, though it helps to describe them.

Before going further we must look at what Hohfeld was trying to do.[4] First he wanted to give exactness to legal words, starting with those he rightly considered fundamental so that we could communicate ideas more precisely to one another. He rightly saw that 'right' and 'power' were essential; the other terms are built around them. Those related to power are not specially helpful; it is trite that immunity is an absence of liability. One can juggle these words neatly but they do not matter greatly. What was vital for him was to establish a clear distinction between right in the *strict sense* and 'privilege'. By privilege he clearly meant what we would normally call liberty. He believed he had found an absolute criterion. He knew that Salmond and others had correctly seen a difference between liberty and some other types of rights. He went further: his analysis was that where there was no correlative duty there was only a privilege (liberty) and that this liberty (privilege) was in this clear and exact sense not a true right.

He did not develop this theme very extensively or set out in any further detail the main distinction. For his major purpose went much further than word-games. What had perplexed him—as it perplexed his entire generation of legal thinkers—was the apparent conflict between legal rights. The phantoms of Hegel and Marx haunted these later lawyers. Law arose from the contradictions of thesis and antithesis; the synthesis was born out of the struggle. One only had to look at any case that reached an appellate court to see the same kind of struggle between legal principles. Each counsel was always able to produce masses of authorities to support his principle. Both enabled the parties to maintain valid rights; yet these rights appeared contradictory. How then was a court to choose? Eminent judges like Cardozo and Holmes had seen the dilemma; law was plainly full of paradoxes. These men saw the problem but were not able to supply

[4] Hohfeld, *Fundamental Legal Conceptions* (1923).

really satisfactory answers; the best they could urge was that judges must use many sources and develop a wisdom that could lead to sound judgments.

This suspicion is reinforced by Pound's revealing comment that

> Hohfeld in 1913, a pupil of Howison, one of the chief American expounders of Hegel, building on Salmond and thus indirectly on Bierling, constructed an elaborate scheme of opposites and correlatives based on the Hegelian logic. The defects of Hegel's logic, now well understood, are brought out in this ingenious and in many ways useful scheme. Croce has pointed out that Hegel's opposites are often not opposites but only contrasts. This is true also of the 'opposites' in Hohfeld's scheme, *e.g.*, power and disability, right and no-right.[5]

Pound finds other Hegelian traces in Hohfeld's assumption that there can only be one opposite and one correlative and in 'the finding of "opposites" (*i.e.* usually contrasts) and correlatives, whether they have significance or not'.[6]

However I do not wish to embark on philosophical debates of this sort. I think that the dialectic logic is there and that Hohfeld thought such a method would put an end to many legal puzzles. He does not, of course, state so in words; but one can see his preoccupation. His celebrated treatise begins by deploring the difficulty of understanding trusts and equitable interests,[7] especially because of the conflicts of law and equity on many aspects, and the confusion generally between legal and non-legal terms.[8] Discussions on property, torts, possession become blurred. The tort cases are almost impossible to understand because the principles contradict one another. He returns later to the law-equity conflict (to which he devotes an entire essay) and then goes on to the area of easements and licenses. Here he agrees with the New Jersey judge who lamented that 'the adjudications upon this subject are numerous and discordant'.[9] Everywhere one can see such discord, such clash of rules and decisions: the law as often expounded in the rules must somehow be better organised and explained.

This clash of rights comes out most blatantly in the Conspiracy cases: Hohfeld very early in his treatise tackled it, taking as his starting point what he thought was a typically confusing use of terms in Lord Lindley's speech in *Quinn v. Leathem*[10] where his Lordship uses liberty and right as almost interchangeable. No wonder, Hohfeld concluded, that the Conspiracy cases were so hard to understand. It must be confusing if you were dealing with two rights which were contradictory. But if the issue was between a strict right and some-

5 Pound, 'Fundamental Legal Conceptions' (1937) 50 *Harvard Law Review* 572.
6 *Ibid.* 573.
7 Hohfeld, *op. cit.* 23.
8 *Ibid.* 28-29.
9 *Ibid.* 160.
10 [1901] A.C. 495.

thing less: liberty (privilege), then the mystery was solved. For a strict right would always overcome a mere liberty (privilege). Professor Julius Stone cites similar phrasing of Lord Bowen in *Mogul Steamship v. McGregor*[11] that 'we are presented with an apparent conflict or antimony between two rights'.[12]

Now, with the aid of his Table and the catalyst of duty, it would apparently always be possible to clean up the right-liberty tangle. The way was clear then to go on to other legal terms; in these areas, too, he displayed admirable ingenuity and discernment.

However, I suggest, with respect to this able man and to the able scholars who have adopted his analysis, that it does not do what Hohfeld had hoped to achieve with it. The problem of conflicts between principles is not solved by the right-liberty distinction; one cannot understand the great cases by stating that the winning side had a right and the losers only a liberty. The antimonies of the law can be reconciled, but not by Hohfeld's method.

Let us look more closely at 'liberty'. It has many legal meanings:

(a) that in acting in a given way one commits no legal wrong. 'The law tolerates this action.' One does not breach the criminal law, or the law of tort, property or contract. Thus, if one adopts Hohfeld's example, when a man enters on land with the leave and licence of the occupier, he cannot be treated as a trespasser. (On the other hand he has no *right* to remain, as Hohfeld correctly points out.)

(b) that a man in many ordinary ways is *free to act* in any manner not forbidden by law. He has a liberty to walk down the High Street or to take a bath in his own home, to enjoy a view . . . to read Baudelaire or Bond. Such liberties do not involve anyone else in active duties; the law does not oblige them to take any action to further your behaviour. On the other hand—and Hohfeld does not explore this aspect—they are under strict and numerous duties *not to interfere* with the exercise of the liberty. No one, except a person specifically empowered by law, is entitled to obstruct my passage down the High Street. Nor does the exercise of my liberty in such affairs bring me into separate and direct relationships with particular persons.

It may be objected that these liberties are scarcely lawstuff. But they deserve more attention than Hohfeld and his supporters have given them. Nevertheless we leave them and go on to more important matters.

(c) that one has *capacities to take actions* which will involve one in precise and momentous legal relations with other persons. No

[11] (1889) 23 Q.B.D. 598.
[12] Stone, *The Province and Function of Law* (1946) 122.

> one would object to statements that one has a liberty to marry, to bring up his children, to enter into contracts (including labour contracts), to join a trade union, to register a vote, sell a piece of land, form a corporation with others.

These are surely most significant in law. Even though liberty originally seems to have described special rights—those of a town, a guild, a monastery—it has long been extended. Lawyers in their documents speak of 'rights and liberties'; so do judges in their courts. These are the fundamentals of the legal order: these liberties to marry, to contract, to vote and so forth.

How do they fit into Hohfeld's scheme? Are they species of rights? Are they extremely limited rights? Or are they not rights at all? He gives no clear answer. His liberties are rather flimsy narrow ones like licenses; but the ones we describe are surely the basic ideas. We must know whether they are to be regarded as inferior to true rights, or even non-existent as having no legal significance.

Now it may be that Hohfeld, like some other legal analysts, is not interested in these liberties because he considers that law begins to operate only when it can deal with matters which are regulated by imposed duties. Salmond sometimes wrote in this vein. There is no right unless and until the duty has been laid down; with the liberties we describe no one is under a positive duty concerning them. People simply may not prevent a man from marrying, joining a union, voting and so on. In that case liberties simply do not exist in law. One may say 'X has a liberty'; but it is a figure of speech only, except that it implies X is not a wrong-doer. Law operates only when people claim remedies.

Yet it is not satisfactory to picture the legal order as simply up in the air, resting on no basis of the normal liberties. Does it make sense to say that law will enforce liberties, will provide a remedy if liberty is infringed—but takes no account of the liberty itself. And I cannot see that Hohfeld ever adopted such a drastic view. It was enough for him to have concepts that he could define accurately ('scientifically'), show their inter-relation and their utility in describing the intricate web of possible legal relationships. My understanding on the precise point we are discussing is that, although he does not specifically state that a privilege (liberty) is not a right at all, the whole manner of his contrasts, his phrasing, his examples, indicate that the only value a liberty (privilege) has in law is that one does no wrong if one exercises it.

I am confirmed in this conclusion by Max Radin, whose survey of Hohfeld seems particularly penetrating.[13] Radin observes:

[13] Radin, 'A Restatement of Hohfeld' (1938) 51 *Harvard Law Review* 1141.

> The two rights are obviously not of the same sort at all. One is a right in the form of a demand; and the other is a right in what Hohfeld called a "privilege", citing legal warrant enough for the use of the word in that sense. It, however, may also be called a "liberty" or a "licence" and it turns out that none of these terms, "privilege", "liberty", or "licence", is exclusively used in legal literature in the sense Hohfeld required. "Privilege" will do as well as any other word, provided we keep in mind that only one of the several legal meanings of "privilege" is being employed.
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> But Hohfeld mistakenly insisted that this sort of privilege is not to be called a "right" at all. This unfortunately contradicts so fully established a usage both in law and literature, that it is idle to suppose that any terminological reform will overcome it. So clearly are these "privileges" rights, that they are usually the first thing that are thought of as rights when the word occurs in speech. This sense is found in such phrases as "a man's right to do what he likes with his own"; and in so capital an instance as the expression "bill of rights", as well as in "fundamental rights", and other expressions like them, most of the "rights" involved are privileges.
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> It is, therefore, impossible, unless we wish to rewrite a good part of English literature, to refuse the term "right" to these situations. The distinction, however, that Hohfeld made is of first-rate importance, and must be maintained.[14]

It is not my purpose in this article to criticise Hohfeld's technique in detail. My objection is that it is an unnecessarily complicated method to solve some issues that can be solved far more simply—and that in important respects it puts forward answers that are misleading, although he deserves our gratitude for raising important and neglected nuances of meaning.

My main criticisms are rather that he (and others after him) misconceived the basis upon which the distinctions ought to be made.

My suggested approach starts with the following assumptions:

(1) We ought to use legal terms in the sense in which they are usually employed by lawyers. Obviously many lawyers often use them indiscriminately; but we can find, in history and current usage, a high degree of agreement. If we could not, then law would be a meaningless jumble and we had better invent a new scientific language, as Kocourek and others urge. Hohfeld's first error was that he wavered between that meaning which courts have traditionally given to a word and the meaning he thinks lawyers ought to give it. But no one will adopt either a 'scientific' or a 'new' language on such an *a priori* basis; it is too late in the day for that revolutionary idea.

(2) We recognize that right is an 'umbrella word'. Therefore we should not use it except in its most general sense of any interest or

[14] *Ibid.* 1148-1149.

advantage recognized by law. It is futile to separate rights from liberties, rights from privileges, or from powers or immunities or capacities; all are species of the genus right. (The same goes for duty—this is a broad term embracing all liabilities, disabilities, disadvantages of numerous kinds.) Traditionally this is how we have used these words. Hohfeld's use of the term rights *stricto sensu* leads to grave misunderstandings.[15]

(3) If we can distinguish between the varying kinds of rights, we shall have less trouble in finding terms for duties, which show the other side of the legal coin. There is then no need for a Table of terms in a correlative framework. There is merit in beginning with duties in a text-book explaining the working of law; but for the purpose of clarifying meanings, we must begin with rights. The high ingenuity displayed in conceiving precise opposites and correlatives is simply not necessary.

(4) The practical distinctions which lawyers have traditionally made about rights can be understood only if one realizes that:

(a) The particular terms (liberties, powers, licenses, *etc.*) operate *at different levels* of the legal structure or (to vary the metaphor) at *successive stages* of the operation of the legal machine.

(b) At the primary stage various types of rights differ in quality and strength because their *sources* are so different.

In other words we must ask (a) 'what are you trying to do with the legal advantage which you have?'—and (b) 'where does the primary right come from?' This approach treats law and lawyers' language as part of a living human organism. The physical scientist can afford an artificial jargon (velocity, neutron, indeterminacy) because he uses it only to describe the movement of objects that he observes: he does not hope to define, or even explain, the nature or purpose of the whole process. Scientists know among themselves what the term means. Lawyers' language, however, is not merely playing with words or setting up artificial concepts: it must be concerned with human purposes, with actual human relationships that are clarified and influenced by man-made legal concepts.

(5) Legal rules are concerned with describing certain rights, and with setting out certain consequences if these rights are infringed. So a plain and ancient line has been drawn between primary (antecedent) and secondary (remedial) rights. These rights, we shall see, vary in origin, in strength and in use. In fact we can watch them working in quite different fashions at some four stages. And how

[15] Kocourek said it is clear 'that the term "right" may be used and is used to designate the dominant side, the advantage side, of all types of jural relation': *op. cit.* 8 ff.

they operate depends also on the purpose for which the primary right is recognized by the legal order.

(6) It is neither possible nor desirable to provide exact *definitions* of any of the terms we are considering; we can at most give descriptions reasonably accurate in the eyes of lawyers. Our concepts must have their feet on the ground: the test of meaning is common usage.

GENERAL RIGHTS AND INDIVIDUAL RIGHTS

First, it is important to separate *general* rights from *individual* rights. The former are wide and non-specific expressions of what many writers call 'social interests'. Pound's lists of such interests is well known. They include what are often called 'fundamental' rights, such as those set out in the Charter of the United Nations or in the Constitutions of many countries; *e.g.*, the United States. The right to make contracts, to marry and to practise one's religion without restraint, are examples.

These basic freedoms are expressed in the Great Documents in words with 'fuzzy edges'; in using them one does not attempt to be precise. They therefore create arguments as to how far they extend and what happens when one freedom appears to conflict with some other freedom. I have a right to defend my property. What force can I use to drive off X, a burglar, who yet has, despite his bad intentions, a right to life and physical integrity? I have a right to make a contract, but not one involving wages lower than those fixed by law. These debates are, in this necessarily abstract shape, not determinable by the legal process: decisions can be given only when the competing rights or freedoms are examined with reference to particular facts.

One has to bring them down to individual rights. One should not ask in law: 'have I the right to inherit property?' but 'according to the words used by X in his will, made in a certain country and subject to certain legal rules, may I demand that the trustee Y should transfer to me property Z?' Similarly we do not talk in legal terms if we state that 'people have the right to enjoy their landed property'; the legal situation only arises when the question is (for example): 'May A cut back the roots that have spread into his garden from Y's poplar trees?' The 'right to a fair trial' becomes 'will a writ of *certiorari* lie in these precise circumstances?'

All this is well known to lawyers; though for convenience they sometimes talk in terms of general rights. The dividing line is not strict but it does exist. Therefore, as far as possible, I shall try to consider rights and duties in particular and individual situations, and to avoid those large social and moral aspects that are matters for the

political scientists or the moralists rather than for the lawyers as such. As the High Court of Australia once declared: 'wide generalities are really meaningless and are neither substitutes nor solvents for concrete cases.'[16]

Professor Pound says: 'Interests are claims or demands or desires involved immediately in the individual life and asserted in title of that life.'[17] From him we get perhaps the best definition of a right as a 'legally protected interest', the interest being the kernel of the primary legal right. With the content of any given interests we are not here concerned, only with the terms used.

We remember too that even lawyers sometimes refer to something being 'right' when they merely mean that it is 'not wrong'. 'X has a right to put Y's name on a stop-list.' That implies that X commits no offence by so doing. It does not imply that X and Y are brought into legal relationship. This is true of practically all statements in criminal law. 'Has a man a right to self-defence . . . a right to stand still in a public place . . . to resist arrest. . .?' Here lawyers mean that a man is doing nothing the law forbids. This particular aspect does not enter into the present discussion.

For right refers to a legal relationship between two persons. If X wishes to read Baudelaire, has he a right to do so in his employer's time? Has A a right to leave his property to his nephew C by will? Here we are talking of true legal benefits or advantages in civil law. As Paton says, 'the test is a simple one—is the right recognized and protected by the legal system itself?'[18]

It is only in this latter sense that we use right in this discussion.

I accept Hohfeld's primary statement that where there is a right in what he calls the *strict sense* (others call it a claim) there is a corresponding duty in someone else. But there are many duties for which there are no corresponding rights, especially where the duty is owed to the State.

Radin has insisted that right and duty must not be thought of as separate things, though linked fairly closely. Since we are explaining relationships we might realize that A's duty *is* B's right: the two terms refer to the same thing, the focus of the relationship. Thus in order that there should be a sale of a horse, the right of A to demand delivery is the correlative of the right of B to demand payment: they are correlative rights. So one must ask *related to what?* If it is a liberty, no duty except a negative one is needed; there is no relationship between two definite persons but only between A and other members of the community; so duty is less definable.

16 *Grannall v. Marrickville Margarine Pty Ltd* (1955) 93 C.L.R. 55, 80.
17 Pound, 'A Survey of Social Interests' (1943) 57 *Harvard Law Review* 1.
18 Paton, *Jurisprudence* (3rd. ed. 1964, by D. P. Derham) 248.

One must not confuse the right itself with its consequences. A result of having some rights is that one is able to control the actions of others; but this only describes what happens when one exercises one's right.

THE STAGES OF THE SYSTEM

1. PRIMARY RIGHTS

Primary (or antecedent) rights have not all been created by some sovereign authority at one swoop. Some existed before the modern State: they grew out of necessary customs if men were to live orderly together. These traditionally we have called liberties. Others came from fiats of powerful legislators and have been established by statute. These latter we rarely speak of as liberties, but as *statutory capacities* of various kinds. A third type does not deal with personal rights as such, but gives *authority* to State-appointed officials. (So we ask whether the Board, or the Policeman, or the Minister had *authority* to do what was done, not about his *liberty* to issue licences.)[19]

What terms do lawyers use when they are describing these first-stage rights? May X marry, erect a house, enter into a contract? May Y drive a car on the public highway? May the local Council charge rates? Yes, if these persons have legal rights.

Primary right, then covers liberty, statutory capacity and public authority. Let us note that so far the concept of duty is not necessary. At this level the only duty is negative: it is one *not* to infringe the primary right. Being negative, duty neither defines rights; nor does it enable us to distinguish liberties from privileges or other capacities. If a client asks you about his duties you can only speak of what will happen at some later stage in the legal process: 'If you should enter into the contract, then in law you are bound to perform what you have promised.'

Two other observations must be made about primary rights.

First, to repeat that no rights are absolute. All are restricted, either by the rights of other persons or by duties imposed by law. A's liberty to use and enjoy his own property does not allow him to emit offensive noises or smells onto his neighbour's property. B's liberty to build a house on his land may be restrained by zoning regulations. C's capacity to drive a car on the highway exists only if he and the car are licensed. The policeman's authority to arrest without a warrant does not extend to any conduct of which the officer disapproves.

Second, one has to fit privilege into this scheme. This, in modern life, is a most important question. I leave a fuller consideration of it until later. Meanwhile we must recall that privilege is a many-

[19] It would be possible to use capacity to cover all these primary rights but its employment in legal language is a little vague for this purpose.

coloured word even in law. It may mean (1) something which is not a right in any real sense: it is contrasted with a right (as Hohfeld did); (2) a special kind of advantage restricted to fortunate persons as members of a select group; (3) a temporary and narrow right—such as a licence to occupy a seat at one performance in a theatre.

I suggest that lawyers normally use it in the second sense. They think of it as a true legal right available to a select group—the privilege of practising law, of being a member of Parliament, of using otherwise defamatory terms in certain situations (qualified privilege).

Therefore, a privilege is not to be contrasted with a right: it is simply a certain type of right which confers special advantages, gives special capacities—but only so long as one remains within the group. Thus a judge's privilege to make otherwise defamatory comments about witnesses ceases when the court rises or the case concludes: he cannot with impunity make the same comments at his club.

Privilege is not liberty; though both words suggest an element of choice. If X, a landowner, allows Y to enter on his land, he may be conferring a liberty on Y and thus allowing him a privilege he would not otherwise possess. But this does not mean that such a privilege (or liberty) is not a real right while it lasts, though Hohfeld clearly suggests this.[20] True X had no duty to allow Y to enter, and having allowed him to enter he may tell him to get off. But while Y is there, X has certain negative duties towards him; Y has some rights and is not a mere trespasser. Liberty is a wider term than privilege. It covers all those primary advantages we possess under the common law.

As Radin shows, privilege will only do if it is confined to one of the many meanings in law. And Glanville Williams, in his reshaped table in Salmond, has substituted liberty for privilege.[21] Some of Hohfeld's other disciples have not been happy with privilege. Others have used it, but sometimes not happily.

2. Secondary Rights—Exercise of Primary Rights

What terms describe the stage at which we need to exercise a primary right, and if necessary, to enforce it by law?

Many writers disliked Hohfeld's use of right. By it he meant a right *stricto sensu* as distinct from a privilege (or, as I would say, liberty. But this left out the question whether liberty (privilege), power and immunity were rights at all. So Paton, for example, substitutes 'claim' for Hohfeld's 'right', with the correlative of 'duty'.

A claim (if valid) certainly involves a corresponding duty; the utility of duty I shall discuss later. But for lawyers a claim implies an exercise or enforcement of a primary right. A trustee claims to

[20] Hohfeld, *op. cit.* 38-39.
[21] Salmond, *Jurisprudence* (11th ed. 1957) 270.

collect the debts of a deceased; a vendor claims rescission of a contract; a creditor claims £500 from a debtor. Only at this point of demanding that the legal order provide a remedy does a claim arise. This clearly separates claim from liberty, for example. If one has a claim it is because something has been done which affected the primary right—a will was made, a contract entered into, a debt created, a tort committed. Does this imply that it is useless to consider primary rights at all? That a liberty, for example, is nothing in law? The answer is, as we saw, that the liberty is the basic right, the legal foundation without which there could be no claim. In considering the validity of the claim, the court must first ask: 'Did he have a liberty or some statutory authority?' This question must be answered affirmatively before one can go any further. So it is proper to talk about a liberty in the past tense; though in the present tense one is concerned with claims only.

A claim also may have more than one origin. It may come from the common law, or from statute—or from both. Thus an injured workman may sue his employer for negligence as well as for breach of a statutory duty—as the result of some defect in the operation of the employer's factory. The original liberty—not to be injured by another's negligence—has been strengthened by imposing specific obligations on the employer, by which the employee has acquired new statutory rights.

If a claim is valid, then, of course, there must be someone with a duty to meet that claim. The duty may have arisen either because the other party has assumed an obligation (as by making a contract) or because the law has imposed one upon him (to pay damages for harm caused by a defective appliance). In our language one does not claim a liberty unless it has already been infringed—or a statutory right, until it has been challenged. The Board does not claim authority to build a road until someone disputes that authority: 'something must have happened.'[22]

However, claim does not always signify that a primary right has been violated. An executor claims control of the testator's property because of the happening of an event (the testator's death) which has entitled him to make that claim. Yet, even here, there is no difficulty about distinguishing claim from a primary right: the executor's claim only arises at the second stage.

To sum up: a claim is a right which operates only after something has happened to a primary right. But, assuming it to be valid, the claim may need to be proved and perhaps enforced by further legal process.

22 Several writers agree that 'claim' best expresses what Hohfeld had in mind by rights *stricto sensu: e.g.*, Paton, *op. cit.* 255.

3. CAUSE OF ACTION

The first question a court asks when a plaintiff opens his case is whether he has a cause of action. The High Court has described this kind of right in these terms:

'When you speak of a cause of action you mean the essential ingredients in the title to the right which it is proposed to enforce.'[23] Here we have a situation in which a claim has been denied, *e.g.*, the vendor refuses to complete the contract.

A cause of action represents a claim that continues to the portals of a court. The court itself is empowered to hear and determine and enforce claims, if valid. So we have the terms 'plaintiff', 'complainant'.

Again, lawyers do not say that one has a liberty to bring an action (except in the secondary sense, that he is free to bring it or not) or that he has a power or a privilege to sue. A claim is plainly a species of right; in general we do talk of a 'right of action', but when we want to be precise we say 'cause of action'. And such a claim, if valid, exists because there was already an antecedent right. We have here in mind mainly that type of 'demand' which has reached the stage of court proceedings. A claim achieves full legal significance when it has taken the shape of a writ or summons. Accompanying the writ is usually the statement of claim. It may have come from the exercise of a liberty (as where A has made a contract with B), from the exercise of a statutory right (as where A has been issued with a driver's licence), or from the exercise of a public authority (as where a Board claims authority to confiscate B's house and B challenges its authority).

The exercise of most claims does not extend to the stage where a claim has to be made. The overwhelming mass of claims operate peacefully. Trustees, policemen, tax-collecting departments and landlords normally find no obstacles placed in their way by others. It is only in the relatively rare situation where the debtor refuses to pay, the citizen refuses to obey, the taxpayer disputes the assessment, or the tenant declines to quit, that the normal powers prove inadequate and their strength has to be reinforced by the more powerful weapons which a court wields.

Clearly, also, a cause of action is a right—a legally protected interest.

4. COURT PROCEEDINGS—TERTIARY RIGHTS

Here, owing to careless use of terms, one can fall into confusion. We often speak of rights to which litigants are entitled: the right to call witnesses, to cross-examine, to refuse to answer certain questions,

[23] *Williams v. Milotin* (1957) 97 C.L.R. 465, 474.

to discover documents. Clearly again, these are rights in the general sense of 'advantages'. Similarly, the liability to be called to testify, to produce receipts, to answer relevant questions involve duties in the general sense of 'disadvantages'.

However the judge may say to a plaintiff: 'You are at liberty to call this witness or not to call him,' or 'you have a privilege to decline to answer questions if your reply may incriminate you,' or 'if you do not answer, I have power to commit you for contempt'. Does this mean that we must abandon our efforts at clarity, since at this fourth stage the various terms seem to be used indiscriminately?

No! The judge would never speak of his liberty or his privilege to commit for contempt; nor would he tell a witness that he has power to decline to answer—or a party that he has power to call a witness. Each term still means something different and precise. The liberty, the privilege, the power all are types of rights, used generally in the role in which we have previously used them.

Secondly, these 'advantages' are not conferred on the litigant by the court, but by the law itself. The court's powers to make rules are themselves delegated by the Legislature. One's liberty to call a witness remains an original right given by the legal system. The privilege about answering goes back to that similar basic right of a select group which the court is merely protecting. It remains limited to the litigants as litigants—a special exemption of a group.

So even though primary, secondary and tertiary rights are used and discussed at the subsequent court level, there is no real difficulty about identifying them in their original true shape, or about calling them 'claims' once they have to be exercised and enforced; as when a witness claims his liberty (also a *privilege*) not to answer certain questions.

The same holds true for rights acquired by the court 'order'. These may be new advantages, such as those of the judgment creditor to distrain goods, or existing ones, such as a declaration that a ministerial power was validly exercised. But they are merely statements (sometimes 'with teeth') that an original right is recognized by the legal system. We have now reached the final stage of the working of the legal machinery.

One feature of a liberty is that 'the law leaves one free to do or not do a particular act'. This is true enough—but it is equally true of every kind of right. No one is obliged (unless he is under a duty, as with a trustee or a public official) to claim money from another. Normally one may assert a cause of action or decline to do so, enforce a judgment or not. So this is not a ground for setting liberty apart from other rights.

What shall we say of the 'right of appeal'? It is, in one sense, like

a right to sue, a liberty: one is free to appeal or not. Once the appeal is demanded then the court is under a duty to hear it and both parties are obliged to submit to the decision. Yet it affects the relationship between plaintiff and defendant very considerably, though the respondent's only duty may be not to interfere with the process of the appeal and to accept the final outcome.

It is proper to recall here that Hohfeld himself clearly understood the notions of primary and secondary rights and of the various stages of operation of some legal concepts; but he did not use them as a basis for his own analysis.

CLOSER ANALYSIS OF TERMS

RIGHT AND LIBERTY

The more difficult analysis comes at the primary level when we try to separate the ideas represented by the various species of rights.

I return to the difficulty caused by the identification by Hohfeld and his disciples of 'privilege' and 'liberty'. Professor Stone points out that

> the "privilege" of Hohfield is, as has been seen, the "liberty" of Salmond more closely defined. It is that kind of "liberty" which the law tolerates but does not support by imposing a duty on anyone else.[24]

Admittedly liberty and privilege overlap. One may say 'You have the privilege of singing in your bath' or 'You have the liberty of singing there'. But this is because liberty is the general term and privilege is one species of liberty. Both present situations in which no one else is called on to perform a positive duty.

Yet there are differences. Normally we do not speak of the privilege of entering into a contract, or of the liberty of a witness to decline to answer. Privilege, we have already suggested, describes the permitted actions of special but limited groups—some of a permanent kind (husbands, stockbrokers, tenants, clergy, officials), others temporary (witnesses in court).

There are real dangers in contrasting a privilege with a right *stricto sensu* because it involves no corresponding duty. The Privy Council in *Nakkuda Ali*[25] dismissed the claim of the textile dealer to a licence on the grounds that the regulation gave him not a right but 'a mere privilege', because the official concerned was under no duty to issue a fresh licence to him.

Taken literally this phrase means that a person possessing 'only a privilege' possesses nothing of legal value. He cannot complain if his

[24] Stone, *op. cit.* 121.
[25] *Nakkuda Ali v. Jayaratne* [1951] A.C. 66.

privilege is cancelled, because it never represented a legal right. It was 'something extra' which the law did not protect. The Privy Council's decision in *Nakkuda Ali*[26] and the Divisional Court's decision in the Taxi Driver's case[27] disturbed many writers.[28] It is true that the House of Lords in *Ridge v. Baldwin*[29] has since suggested that in similar situations one has a *real right* to a hearing. However the actual *content* of rights is not our business here; nor does the House of Lords examine the terminology closely enough for us to know whether they too would describe a privilege as no right at all—a 'mere permission'.

If one says, however, that some people are privileged in having a liberty, it means in ordinary legal language that they belong to a special group with special advantages. This explains privileges of members of Parliament and of officials and of persons entitled to a monopoly of the practice of medicine. Their rights are real enough and certainly cannot be taken away from them by arbitrary action. They represent defined legal advantages. People holding some kinds of licence may more easily lose them; but at least they had something to lose.

Removing the confusion caused by some liberties being also privileges, let us go back to the right-liberty dichotomy. When we look, for example, at the *Mogul Steamship* case[30] we see that Lord Lindley was correctly using traditional and sound terms to describe the role of the competing traders. The liberty he spoke of was clearly something recognized by law: its supposed infringement was the foundation of the action. The liberty to deal with other persons '. . . is a right recognized by law'.[31]

Lord Lindley saw, too, that such a liberty has as a correlative 'the general duty of everyone not to prevent the full exercise of this liberty except in so far as his own liberty of action may justify him in so doing'.[32] There may be therefore an apparent conflict between liberties once one remembers that no rights and no liberties are absolute. They are rights to do this-or-that in such-and-such circumstances. They are circumscribed by facts. Outside that circle they do not exist in law. X has a liberty to make a contract but not an illegal one; he may evict a trespasser but not to the extent of using more force than is necessary; he may build a house but not so as to infringe health regulations. Some rights are self-limiting (as those of

26 *Ibid.*

27 *Regina v. Metropolitan Police Commissioner; Ex parte Parker* [1953] 1 W.L.R. 1150.

28 There was severe criticism from Professor H. W. R. Wade, 'The Twilight of Natural Justice' (1951) 67 *Law Quarterly Review* 103.

29 [1964] A.C. 40.

30 (1889) 23 Q.B.D. 598.

31 In *Quinn v. Leathem* [1901] A.C. 495, 534.

32 *Ibid.*

a tenant in possession); some are limited by public law (crime, health, defence, police requirements). Some stop short where they come up against the rights of others. These last are the most puzzling to define.

This discussion is confined largely to the civil law. In matters where the State is one party, it is not helpful in this age to speak of the State having *rights against* its citizens. *Duty* alone describes this one-sided relationship. In criminal law and administrative law it seems more traditional to speak of duties *of* doing A, B, C, D . . . rather than of duties *to* do A, B, C, D . . . The duties are to the community not to particular persons.

What is meant by a liberty (or right) to compete, to trade freely? The answer generally is found by asking about the scope allowed to this particular liberty by the courts in the past: the decisions delimit the exent to which the law permits this right to operate. Thus in the Conspiracy cases, the argument as to whether A had a liberty to interfere with a liberty claimed by B depended on whether, in the circumstances, A was exercising his liberty unlawfully. If he was, then A's liberty to trade, or to employ others, was cut down to this extent—*beyond this point it had no legal existence* in these circumstances.

So we may put it that a liberty is not a fraction of a right. It either exists or does not exist in a given fact situation. If this be true, the concept of correlative duty does not enable us to decide whether it be right or liberty. If X has a liberty to walk on the highway, you may say either that B has a duty not to injure him by negligently driving a car—or that B has *no liberty* to cause A damage by negligent driving.

DUTY AS A CATALYST

Why then is there so much talk of duty in the judgments and the text books? Partly because of the increase in statutory duties imposed on employers, occupiers and officials which may give rise to a cause of action. Partly because of the influence of those authors who begin their descriptions of law by emphasising duties. Partly because of the way the law of negligence has been expressed in the last hundred years. Partly, too, because of the tendency to look at the social consequences of obviously dangerous or careless behaviour to discover whether it should be discouraged by law (as in *Donoghue v. Stevenson*).[33] Partly, too, because the word has several meanings in legal terminology.

Yet even in tort the results have not been happy. Both Winfield[34]

[33] [1932] A.C. 562.
[34] Winfield, *Select Legal Essays* (1952) 96.

and Fifoot[35] have pointed out that the emphasis on duty as a determinant began only in the early nineteenth century and that it has confused our explanations of tort law. Lord Atkin's famous dicta in *Donoghue v. Stevenson*[36] provided a brilliant justification for the new law embodied in the decision; but the difficulties experienced in *Candler v. Crane Christmas*[37] and *Bourhill v. Young*[38] have shown the complications that can arise from such an approach. Duty is, nevertheless, more helpful at the second legal stage. If A has not carried out his contract with B, then A's duty to compensate B for loss is a useful test of B's claim. If X has injured Y by careless driving, X has a duty to pay adequate damages. Similarly it is helpful to talk of a duty to carry out a contract once made, to pay taxes once assessed, to care for children once they are born. These duties are positive and clear: they can be precisely set out after something has happened which enables one to say precisely what is now involved in law. Again, at the stage of court proceedings, there are definable duties to obey subpoenas, to answer relevant questions and interrogations, to submit to sheriffs' distraints . . . But all this is after something has happened which enables duties to be defined. Nothing is gained by going back and asking 'Was he under a duty to foresee at that time certain consequences which would follow certain acts?' The type of duty changes at different stages of legal operation.

The law of negligence has had to reconcile opposing principles: that of not penalising a man except for faults and that of compensating those injured in a prosperous and crowded society. It has never worked out a satisfactory rationale. In this confused state it has tried to simplify its task by asking about duties. If X had a duty then clearly a court could declare Y had a right. Ehrenzweig[39] has shown that this approach is largely fictional, retrospective and objective; it provides a formula that appears convenient and simple as a proposition to place before a court.

Discussing the possible definitions of negligence and duty, the late Sir Wilfred Fullagar commented:

> We may find that the confusion of thought goes even deeper than we had realised, and that not only is there doubt as to whether the concept of negligence involves the element of duty, but there is equal doubt as to the meaning of the word 'duty', which is one of our fundamental terms. For we may be told that a man may owe a duty to himself. Where are we going? Is the behest of Polonious—'To thine own self be true'—to be enshrined as a legal maxim in future editions of Broom?[40]

35 Fifoot, *History and Sources of the Common Law* (1949) 165-166.
36 [1932] A.C. 562.
37 [1951] 2 K.B. 164.
38 [1943] A.C. 92.
39 Ehrenzweig, *Negligence Without Fault* (1951) 35-38.
40 (1957) 1 *M.U.L.R.* 3.

In another area, duty has been considerably employed as of late: that of administrative law. Citizens have claimed numerous rights against officials, many arising out of new situations created by statutes. The privilege of the plaintiff in *Franklin's* case[41] was that of appearing and being heard at the inquiry. As such it was a true right; the Minister or his representative could not refuse it; nor could other persons have impeded it. However Franklin had neither privilege nor right to oblige the Minister to act according to the inquiry. In *Nakkuda Ali*[42] the privilege—while the licence was still valid—included definite legal advantages as regards its exercise. No one else could validly dispute it or interfere with it. To call it a privilege is merely to state that it was temporary as concerned the Controller: it was that sort of right. In the Taxi Driver's case,[43] the driver had a right that brought him an income and other advantages of that group of taxi-drivers. It was the future existence of the right as against the Commissioner that was in doubt, not its standing against anyone else in London.

In these licence cases, the term duty is used to test the scope of the correlative right because it was essentially one created by Statute and, like all statutory rights, was conditional. If the Act itself included a condition that the official could, at his discretion, terminate it, then the question naturally turned on the duties laid down for him. If there was no duty to hear or to act judicially, then the right was sometimes held to be originally circumscribed to that extent. So in this class of case, the correlative duty of the official proves the determining factor as to its continued existence from one day to another. Privileges are rights even though they are conditional.

However, whatever be the usefulness of using duty to test and delimit right in general, our main contention stands, that duty is not the basis for distinguishing a privilege or a liberty from a so-called right *stricto sensu*.

Duty does remain a useful means of explaining a practical aspect of a relationship. 'If A is the father of B, then B is A's son.' 'If Y is a tenant of X, then X is the landlord of Y.' It is often more simple and precise for the law to prescribe actual duties than to attempt the hopeless task of listing the enormous number of possible rights. The extent of the duty enables us better to see the nature and extent of the original right. And, of course, it is too late to stop employing the term.

Nor is any correlative term a positive concept. We do say loosely

41 *Franklin v. Minister of Town and Country Planning* [1948] A.C. 87. There is an excellent brief discussion of the decision by Professor P. Brett, *Cases on Constitutional and Administrative Law* (1962) 275.

42 [1951] A.C. 66.

43 [1953] 1 W.L.R. 1150.

that B has a duty to do this or that, or that X has a liability to pay Y; but 'has' does not here mean 'possesses'. Yet a man does possess his rights. Strictly B is *under* a duty and Y *is* liable! Correlatives do not determine rights, they do make them determinate, give them sharp edges. Pollock realised that 'Duty and Right are not really more divisible in law than action and reaction in mechanics'.[44]

While it is true that the argument as to whether rights come before duties or *vice versa* can be, as Pollock observed, a barren controversy, it yet remains important. He saw the difference between indeterminate and determinate rights. The former included the great mass of liberties which the law never attempts to list in detail and about which it says or does little until these liberties are assailed. Only then does the legal machine begin to move; and the word that so often starts it moving is duty. When there is a failure of duty, then determinate, clear and precise consequences, enforceable by legal process, can be laid down.

Yet indeterminate rights and liberties are, as we saw, of factual social existence and value; once made precise, the law backs them up. So it is not wise in writing of the legal order, to start with duties. Pollock, though he saw clearly that determinate rights (claims we would call them) arise at a later stage, did not follow up this thought.

This is not a matter of mere terminology. Today it is not wise to overstress duties. Sir Carleton Allen pointed this out in a review in 1929 of Pollock's *Jurisprudence*. He saw the dangers in primary emphasis on duties. 'One's only right is to do one's duty.'[45] Totalitarian régimes have since shown themselves so careless of human rights, so clamorous about duties to the State, that we have had to write out fresh Charters of Human Rights to redress the balance. Since with us the State is an instrument of the human persons within it, and since these persons require certain rights to achieve the fullness of their personality, legal rights are seen as the true basis of human freedom.

Perhaps the most dangerous result of concentrating on duty is that some people come to feel that since the test of some rights is whether there are corresponding duties, therefore the duty creates the right. The law, they seem to say, operates only by setting up duties: if you cannot find a duty then there can have been no right. I would prefer to think that our system exists to protect rights and that imposing duties is its method of seeing that rights are made precise and that someone must do something specific about them.

PRIVILEGE

Only two observations need be made at this point:

[44] Pollock, *A First Book of Jurisprudence* (5th ed. 1923) 73.
[45] (1930) 46 *Law Quarterly Review* 364.

(a) You cannot have a privilege which is up in the air. You may have a liberty which is privileged, a claim which is privileged, a power which is privileged. These are rights on which the privilege stands, the privilege being any kind of right confined to a select group. We must ignore the popular usage that flows over into legal language – 'That is your privilege'. What the lawyer means is 'You are entitled to act in that way'.

(b) Many privileges can perhaps be more easily taken away from a person than rights which all may enjoy. Malice may destroy a privilege to utter otherwise defamatory words; professional misconduct may cause a lawyer to be deprived of his privilege to practise.

(c) In *Ridge v. Baldwin*[46] the House of Lords came to conclusions not easily reconcilable with those in *Nakkuda Ali*[47] and *Parker*.[48] Lord Evershed's remarks are particularly instructive:

> I am aware that it is sometimes said that a different result may be appropriate where there is in question the grant or withdrawal of a licence as distinct from the taking away of some right or proprietary interest. There is no doubt force in this argument and it has been supported by our Court of Criminal Appeal in the case of *Reg. v. Metropolitan Police Commissioner, Ex Parte Parker.*

With this I respectfully agree. His Lordship then went on to say:

> At the same time I would observe that though the withdrawal of a licence, which can be described as the removal of a privilege, is in some respects different in character from the taking away of vested rights or proprietary interests, nevertheless the withdrawal of a licence from the person from whom it was withdrawn may in fact mean the destruction of his livelihood.[49]

When one remembers how many livelihoods today are dependent on the holding of a licence, one realises the force of these *dicta*.

POWER

The term power as now generally used by lawyers has a special significance. No one would speak of a policeman's liberty to arrest or of a purchaser having power to buy a house. Power is the term commonly employed to describe the exercise of the authority given to public bodies and officials; but in addition, it has a long association with private rights associated with the functions of agents, trustees and representatives as a class. Thirdly, it is often applied to rights

[46] [1964] A.C. 40.
[47] [1951] A.C. 66.
[48] [1953] 1 W.L.R. 1150.
[49] [1964] A.C. 40, 95.

following on some previous agreement, as embodied in a landlord's power to evict a tenant.

Hohfeld, continuing his efforts to classify rights by their correlatives, stressed the essence of power as the 'ability on the part of a person to produce a change in a legal relation by doing or not doing a particular act'.[50] It was the effect he was considering; a correlative involved the liability of the person affected. Here he includes liability to be affected to one's benefit as well as to one's detriment. However this is not the normal lawyers' meaning; in fact several writers have criticized liability as a vague, ineffective word.[51]

Hohfeld's definition of power is not in question. What he fails to do is to distinguish adequately power from right: he leaves it uncertain whether a power is a species of right or not a right at all. Probably he means the former; but then the distinction is made only by using different correlatives. For any right, if exercised, enables one person to produce a change in a legal relation by doing a particular act. As to the correlatives, duty is hard to cut off from liability. I am always liable (in this sense) to do my duty and one of my duties is to be subject to properly exercised powers, *e.g.* of arrest.

The only valid distinctions, I suggest, are that by power lawyers imply:

(a) some delegated right—some right which a person does not possess for himself or in virtue of his own position but because he represents some other person who has transferred this right to him. The person exercising a power of appointment does so on the authority of the original appointor; the trustee on the authority of the testator, the agent of sale on behalf of his principal and so on. The policeman making an arrest does not do so on his own authority, nor does the Electricity Board in imposing a rate. All have been given rights which have empowered them so to act. Some primary right has been vested in B by A.

Powers may arise and be exercised and enforced at any stage in the legal process. The power to give a notice to quit, the power of a Court to compel witnesses to attend; the power of the sheriff to seize goods of a judgment debtor are examples of the wide diversity of operation of such rights.

(b) Secondly, the difference between power and liberty is simply that liberty is an original primary right only and is confined to the benefit of the person for whom it exists. Power is a matter of exercising at any stage rights which do not inhere oneself or exist for one's

50 This is cited by Paton (*op. cit.* 256) as the expression used in the *American Restatement of the Law of Property*. But Hohfeld would have approved of it.

51 Including Glanville Williams, who prefers the term 'subjection'. (Salmond, *op. cit.* 270, 275; and Paton, *op. cit.* 256).

own advantage, but which are derived from others. Thus seen, it is a simple and clear term. Trustees, agents and officials are given powers which they are not to employ for their own advantage.

IMMUNITY

Not much need be said about immunity. Its meaning is clear: that the law confers a certain defence on those who otherwise would be subject to its process. It does so by preventing others from using the machinery of the law against the person rendered immune. As a result there is a corresponding disability (as Hohfeld shows) in anyone else; but this tells us nothing additional about immunity as such. It is a secondary right, not to be subject to legal process; and this right is more powerful than the other party's right to call on the court for help.

An immunity is itself the consequence of a privilege. Judges, witnesses and barristers are immune from sanctions for what they say in court because they constitute a privileged group. So are Ambassadors, Justices of the Peace (under certain conditions), creditors pleading the Statute of Limitations and persons once acquitted of a crime.

An immunity is also the consequence of a liberty to do things or say things without the fear of legal hardship. It is another advantage conferred by the law on certain conditions, an advantage protected by certain procedural rules restraining other persons from bringing actions.

RIGHTS *IN REM* AND *IN PERSONAM*

This form of analysis by stages may also clarify the distinction between rights *in rem* and *in personam*. The writers used to define a right *in rem* as one against the whole world and a right *in personam* as one against a particular individual. They added that rights in tort were examples of the former, those in contract illustrated the latter. Finally, rights *in rem*, if infringed, became rights *in personam* against the particular wrongdoer. Hohfeld improved on the meaning (though not on the terms) when he used 'paucital' rights—those against a single person or a small group, and 'multital' rights—against a large group.

Students confronted with these terms are apt to observe that this is trite stuff: 'Of course I have a right that my windows should not be smashed by anyone in the world and if X does break my window, I have a claim against X in person. So why attach these portentous Roman law terms? Moreover, if my right is "against" a *thing*, what is this thing I proceed against, in the same way as my personal right allows me to proceed against X?'

We know that these terms came from the Roman *'actiones'*. Concerned so closely with procedure, the Romans thought of the object of

the action: sometimes you proceeded against a person, sometimes you had to sue the thing, the piece of property itself, rather than some individual. Now while we very occasionally have to bring an action against a thing (*e.g.* a ship) this is exceedingly rare today in our law. It is no basis for attaching the term to the vast array of liberties, privileges and statutory capacities we possess. (Nor are rights *in personam* more than vaguely connected with the notion that 'Equity acts *in personam*'.)

Hohfeld did not emphasise that all 'multital' or 'general' rights were at the primary level. One's liberties exist with reference to anyone anywhere (saving legal exceptions) but they are not against anyone. It is only when they are attacked that one proceeds against the offender—and at the second (or later) stages. It does not seem worth coining terms for these situations: one need say only that all remedial rights must be vindicated against those persons who have assailed them.[52]

The use of the term *in rem* is, however, too settled to be disturbed in its customary sphere: where an action is truly directed against a fund, a piece of property. Here, though one may be suing the trustees or directors, mortgagees or bailees or agents, the obvious purpose is to get to the *res* behind the hedge of human beings—as where the thing is ownerless or by tradition must be proceeded against directly (such as ships). Such actions and claims are again not at the primary level of rights.

One conclusion may well be that it is not worth troubling oneself about these terms; one should accept them as they have been used. Yet the two meanings of *in rem* should be separated for students; they must also be told why a so-called right *in rem* should, at the remedial stage, be described as a right *in personam* for most purposes; that the true right *in rem* is a claim against a legal thing for the purposes of being able to satisfy one's claim in a few situations in which actions against persons would be ineffective—as with the claims of a mortgagee where the mortgagor has defaulted: the mortgagee has acquired some proprietary rights as well as his personal claims against the mortgagor. Often, of course, it is a fund one is aiming at.

To sum up—the contrast between the two terms is simply that, properly understood, they are used at different legal stages. If you want to describe primary capacities as being rights against anyone who may violate them, you do no harm thereby; nor do you help the understanding. If you are talking at the secondary or remedial level, then right *in rem* may have a plain and practical impact.[53]

52 Kocourek (*op. cit.* 193) praises Hohfeld's treatment and his statement that there are as many rights *in rem* as there are persons who owe corresponding duties.

53 Paton, *op. cit.* 265: 'The distinction is not a very logical one.'

CONCLUSIONS

I accept Hohfeld's main point that there is a difference between 'liberty-privilege' and 'claim'. That difference, as Hohfeld rightly insists, is that liberty in A involves no duty in B, whereas A's claim does signify that B has a duty (positive to A). My argument then swerves away from Hohfeld's in two respects:

(a) He seems to regard a liberty as a nothing in law, whereas I consider most liberties as existent and effective rights. He explicitly declares that it gives A 'no right' to demand any positive act from B. Liberty to him means 'the law allows you to do this act; it's not wrong; but otherwise the law is quite indifferent to it'.

(b) The true distinction, in my view, is that a liberty exists before something has been done to interfere with it. Even if that liberty is given by a contract, the same holds. If X invites me home for dinner I have a liberty to enter his land. If later X tells me to go and I refuse, any legal issues between us then become matters of claim and duty. Similarly, once I enter into possession of a piece of land I have bought, I enjoy (as Hohfeld correctly saw) a whole series of privileges, liberties and immunities. All that other people have is a negative duty not to interrupt my liberties. But these remain at the stage of liberties (even though sometimes they may proceed from the contract and transfer of title) until someone violates them. At this point we have a new kind of right—a claim for remedies, and the other party has a duty of a new kind—to supply the remedy. (X, from whom I bought the land has, of course, special duties to perform his contract, and subsequent duties of a remedial kind if he fails to do so.)

If we want to be clear we should avoid using right except as a generic word. When discussing any particular situation one should speak specifically of liberty, privilege, statutory authority, immunity, claim, power. Only then can we say what is involved.

What the distinction involves is that if X has a claim, he has a more immediate and certain remedy if that claim is denied. This is because, on a contract, he can point to Y as a person who has promised to pay him £50. Y has undertaken the exact duty and the court will act on it. Similarly if Y has defamed X, then there is imposed on him, because of his own wrongful act, a duty of compensating X for his actual loss of reputation. The duty concept enables a court to decide precisely how far the claim has been violated.

But the vital matter is the original primary liberty. Liberties are the substantive elements; claims and duties are only means for protecting liberties.

In truth, this talk of one kind of right being more valuable than

another is beside the point. The simple fact is that we are speaking of terms that are not to be compared in this fashion. It is rather like comparing crude oil with petrol. The uses of petrol are more precise and obvious but one does not say petrol is more or less powerful than the crude oil from which it originates.

Yet one may reply: 'What if I have a shop on a busy street and the Roads Board, by building a by-pass, directs most of the traffic from my street so that my takings drop by half. Since I have only a liberty to trade there, I have no remedy; but if I had a contract that the Board should recompense me, I should have a right *stricto sensu* and be much better off?' This is true, but the effective difference is that, once the Board promised to pay compensation, the liberty to trade was *converted*, not into a right to trade, but into a *claim to compensation* for loss of trade. You may still trade as before in that street; something has by contract or statute been granted to you not as an exercise of your liberty to trade but as a result of the community, by statute, empowering the Board to pay you money. The liberty to trade exists before anything has been done to infringe it; the claim for compensation arises only after a certain course of action has taken place.

For an example of the careful and illuminating use of some of the above concepts one should consult the judgment of Fullagar J. in *Williams v. Hursey*.[54] The issue was that of the rights of a waterside worker whom the Federation had purported to expel for failure to pay his Union dues. Here there was a conflict of principles, involving the common law liberties of Hursey, and the powers and duties of the Union under the relevant Statute. The decision illustrates (though Fullagar J. did not specifically employ these terms) an analysis of (a) the liberty of Hursey to follow his normal vocation and to have access to his place of employment, (b) his liberty, which became a claim in tort and then a cause of action when certain unionists obstructed his passage, and (c) his claim to receive preference in waterside work as a unionist. This was defeated by the Union's power under Statute and its rules to expel those members who had failed to pay their dues. Thus any original liberty in this respect had been abrogated when the Union exercised its paramount statutory power to expel him.

Of course there are priorities of importance. If A has used his liberty of contract to enter an agreement, the claims under the agreement will overcome those derived from his primary liberty. If B is now required to have a licence to sell apples, whereas formerly he could sell them freely, the statutory duty prevails. A public power

[54] (1959-60) 103 C.L.R. 30.

given to the Police Department to order obsolete vehicles off the road will override one's natural liberty to use the highway. An otherwise valid contractual claim may be held unenforceable because it offends against public policy. A liberty to inherit property will disappear if the potential benefactor disposes of the property to someone else. Any rights derived from the common law may be nullified by a statutory provision. But to say all this is merely to repeat what we have always known: the existing rules decide these priorities.

The above analysis is easy to make and to explain; it does not require complicated tables or defined analysis; it can be made in the ordinary language which lawyers employ and understand. However the difference between the terms do not provide a basis for deciding legal controversies. These must be settled by fixing priorities among rights according to their respective origins.

The imagined contradictions between rights which seem to make of judicial lawmaking a piece of occult wisdom (or indeed, a hunch) is illusory. In fact when the two rights have been closely specified and the facts carefully examined and classified, there is no contradiction. One right and one only is relevant, governs those facts. But that is a subject deserving much more adequate treatment than is possible here.

One sympathises with Hohfeld's principal purpose in this study. Not only did he hope to understand legal rules more completely, 'to discover essential similarities and illuminating analogies', to make more use of many decisions, his final hope was: 'the deeper the analysis, the greater becomes one's perception of fundamental unity and harmony in the law.'[55] This Hegelian synthesis, this ultimate reconciliation of opposites, give both point and method to his work. If the method was not fully successful, the aim remains important and, I would consider, quite attainable, though by a different path.

One melancholy consequence of the fury of analysis which Hohfeld stirred up, it would seem, is that lawyers, anxious about not using these terms correctly or regarding the distinctions as futile quibbles, have endeavoured to avoid using them whenever possible. They say X 'acted wrongly' . . . 'is bound to' . . . 'may not lawfully' . . . 'could properly'; or 'ought to' . . . 'is entitled to' . . . 'may'—any phrase that may avoid Hohfeldian terms. Yet this will not do. The terms are too important, too embedded in the language to be thus set aside. Therefore any arrangement must be as simple and normal as we can make it.

My suggestions are only descriptive of the fundamental terms; they are not definitions. The work of the linguistic analysts has made it

[55] Hohfeld, *op. cit.* 64.

plain that exact definitions of legal concepts are not really possible or particularly useful: it is the *content* of the concept that matters and this can be found only by looking into the rules and the cases. For our present purpose all we propose is that, since these terms are being used daily in legal discourse and documents we ought to be reasonably clear what we mean when we use them.