CHAPTER 7

LEGAL RIGHTS

38. Wrongs

We have seen that the law consists of certain types of rules regulating human conduct and that the administration of justice is concerned with enforcing the rights and duties created by such rules. The conception of a right is accordingly one of fundamental significance in legal theory, and the purpose of this chapter is to analyse it, and to distinguish its various applications. Before attempting to define a right, however, it is necessary to define two other terms which are closely connected with it, namely, wrong and duty.

A wrong is simply a wrong act—an act contrary to the rule of right and justice. A synonym of it is injury, in its true and primary sense of *injuria* (that which is contrary to *jus*), though by a modern perversion of meaning this term has acquired the secondary sense of harm or damage (*damnum*) whether rightful or wrongful, and whether inflicted by human agency or not.

Wrongs or injuries are divisible for our present purpose into two kinds, being either moral or legal. A moral or natural wrong is an act which is morally or naturally wrong, being contrary to the rule of natural justice. A legal wrong is an act which is legally wrong, being contrary to the rule of legal justice and a violation of the law. It is an act which is authoritatively determined to be wrong by a rule of law, and is therefore treated as a wrong in and for the purposes of the administration of justice by the state. It may or may not be a moral wrong, and conversely a moral wrong may or may not be a wrong in law. Natural and legal wrongs, like natural and legal justice, form intersecting circles, this discordance between law and fact being partly intentional and partly the result of imperfect historical development.

In all ordinary cases the legal recognition of an act as a wrong involves the suppression or punishment of it by the physical force of the state, this being the essential purpose for which the judicial action of the state is ordained. We shall see

later, however, that such forcible constraint is not an invariable or essential incident, and that there are other possible forms of effective legal recognition. The essence of a legal wrong consists in its recognition as wrong by the law, not in the resulting suppression or punishment of it. A legal wrong is a violation of *justice according to law*.

39. Duties

A duty is roughly speaking an act which one ought to do, an act the opposite of which would be a wrong. The duty and the act, however, are not strictly identical. We have duties, may be under a duty, can be in breach of a duty. We cannot have acts, be under, or in breach of, acts. To ascribe a duty to a man is to claim that he ought to perform a certain act.

Yet not all the acts which a man ought to do constitute duties (*a*). His duties he owes to others by virtue of his position or station. The servant has a duty (*debitum*) to serve his master, the child to obey his parent and so on. Moreover a duty consists in positive acts, not in mere abstaining from acting: a duty not to do something, except in so far as this is a manner of describing a duty to do something else—a duty not to reveal something is a negative way of describing a positive duty to keep it secret—is a duty of a rare and unusual sort.

With duties we may contrast obligations. These a man has through having taken them upon himself of his own choosing. The typical example is the obligation that results from making a promise.

But there may be many other things which a man ought to do, but which fit into neither of these categories. Many dictates of common morality, such as that one should not kill or steal, hardly constitute duties or obligations in the strict sense. Lawyers, however, tend to speak loosely of anything which one ought, or ought not, to do as a duty, and it is in this wide sense that we shall use the term.

Duties, like wrongs, are of two kinds, being either moral or legal. These two classes are partly coincident and partly distinct.

(*a*) A detailed analysis of the concept of "obligation" and "duty" is provided in Brandt, "The Concept of Obligation and Duty" (1964) 73 *Mind* 374.

For example, in England there is a legal duty not to sell or have for sale adulterated milk, whether knowingly or otherwise, and without any question of negligence. In so far as the duty is irrespective of knowledge and negligence it is exclusively a legal, not a moral duty. On the other hand, there is no legal duty in England to refrain from offensive curiosity about one's neighbours, even if the satisfaction of it does them harm. Here there is clearly a moral though not a legal duty. Finally, there is both a moral and a legal duty not to steal.

When the law recognises an act as a duty, it commonly enforces the performance of it, or punishes the disregard of it. But this sanction of legal force is in exceptional cases absent. A duty is legal because it is legally recognised, not necessarily because it is legally enforced or sanctioned. There are legal duties of imperfect obligation, as they are called, which will be considered by us at a later stage of our inquiry.

40. Rights

We have seen that in the strict sense a duty is something owed by one person to another. Correspondingly the latter has a right against the former. The master has a right against his servant, the parent against his child and so on. To ascribe a right to one person is to imply that some other person is under a corresponding duty.

But the term "right", like "duty", can be used in a wider sense. To say that a man has a right to something is roughly to say that it is right for him to obtain it. This may entail that others ought to provide him with it, or that they ought not to prevent him getting it, or merely that it would not be wrong for him to get it. What exactly is being claimed by the assertion that he has a right is not always clear.

Rights are concerned with interests, and indeed have been defined as interests protected by rules of right, that is by moral or legal rules. Yet rights and interests are not identical. Interests are things which are to a man's advantage: he has an interest in his freedom or his reputation. His rights to these, if he has such rights, protect the interests, which accordingly form the subject of his rights but are different from them. To say he has an interest in his reputation means that it is to his advantage to

enjoy a good name; to say he has a right to this is to imply that others ought not to take this from him (*b*).

Now since law and morals are primarily concerned with human interests, every wrong involves some interest attacked by it, and every duty involves some interest to which it relates, and for whose protection it exists (*c*). The converse, however, is not true. Every attack upon an interest is not a wrong, either in fact or in law, nor is respect for every interest a duty, either legal or natural. Many interests exist *de facto* and not also *de jure*; they receive no recognition or protection from any rule of right. The violation of them is no wrong, and respect for them is no duty. For the interests of men conflict with each other, and it is impossible for all to receive rightful recognition. The rule of justice selects some for protection, and the others are rejected. Whether his interest amounts to a right depends on whether there exists with respect to it a duty imposed upon any other person.

Rights, like wrongs and duties, are either moral or legal. A moral or natural right is an interest recognised and protected by a rule of morality—an interest the violation of which would be a moral wrong, and respect for which is a moral duty. A legal right, on the other hand, is an interest recognised and protected by a rule of law—an interest the violation of which would be a legal wrong done to him whose interest it is, and respect for which is a legal duty.

Bentham set the fashion still followed by many of denying that there are any such things as natural rights at all. All rights are legal rights and the creation of the law. "Natural law, natural rights", he says (*d*), "are two kinds of fictions or metaphors, which play so great a part in books of legislation, that they deserve to be examined by themselves. . . . Rights properly so called are the creatures of law properly so called; real laws give rise to real rights. Natural rights are the

(*b*) For a full discussion on the analysis of such terms as "right" and "duty" see Hart, "Definition and Theory in Jurisprudence," (1954) 70 L.Q.R. 37.

(*c*) This statement, to be strictly correct, must be qualified by a reference to the interests of the lower animals. It is unnecessary, however, to complicate the discussion at this stage by any such consideration. The intereste and rights of beasts are moral, not legal.

(*d*) *Theory of Legislation* (Dumont, Hildreth's trans. 8th ed.), pp. 82–84. See also *Works*, III. 217.

creatures of natural law; they are a metaphor which derives its origin from another metaphor." Yet the claim that men have natural rights need not involve us in a theory of natural law. In so far as we accept rules and principles of morality prescribing how men ought to behave, we may speak of there being moral or natural duties; and in so far as these rules lay down that men have certain rights, we may speak of moral or natural rights. The fact that such natural or moral rights and duties are not prescribed in black and white like their legal counterparts points to a distinction between law and morals; it does not entail the complete non-existence of moral rights and duties.

It is to be noticed that in order that an interest should become the subject of a legal right, it must obtain not merely legal protection, but also legal recognition. The interests of beasts are to some extent protected by the law, inasmuch as cruelty to animals is a criminal offence. But beasts are not for this reason possessed of legal rights. The duty of humanity so enforced is not conceived by the law as a duty *towards* beasts, but merely as a duty *in respect* of them. He who ill-treats a child violates a duty which he owes to the child, and a right which is vested in him. But he who ill-treats a dog breaks no *vinculum juris* between him and it, for there is no bond of legal obligation between them. Similarly a man's interests may obtain legal protection as against himself, as when drunkenness or suicide is made a crime. But he has not for this reason a legal right against himself. The duty to refrain from drunkenness is not conceived by the law as a duty owing by a man to himself, but as one owing by him to the community.

It should also be noticed that the foregoing statement of the connection between rights and human interests is merely a generalisation based upon Western legal systems, and may be found contradicted in some parts of the world. There is nothing in the nature of things to prevent a legal system from regarding right as inhering in animals or idols, and in fact some Eastern systems do regard rights as inhering in idols (*e*). Rights may also be bestowed by law on artificial persons such as corporations. Yet in both cases the ultimate effect concerns the interests of human beings.

Although a legal right is commonly accompanied by the power

(*e*) *Infra*, § 61.

of instituting legal proceedings for the enforcement of it, this is not invariably the case. As we shall see, there are classes of legal rights which are not enforceable by any legal process; for example, debts barred by prescription or the lapse of time. Just as there are imperfect and unenforceable legal duties, so there are imperfect and unenforceable legal rights.

The question has been debated whether rights and duties are necessarily correlative. According to one view, there can be no right without a corresponding duty, or duty without a corresponding right, any more than there can be a husband without a wife, or a father without a child. For, on this view, every duty must be a duty *towards* some person or persons, in whom therefore, a correlative right is vested. And conversely every right must be a right *against* some person or persons, upon whom, therefore, a correlative duty is imposed. Every right or duty involves a *vinculum juris* or bond of legal obligation, by which two or more persons are bound together. There can therefore be no duty unless there is some one to whom it is due; there can be no right unless there is some one from whom it is claimed; and there can be no wrong unless there is some one who is wronged, that is to say, whose right has been violated (*f*).

The opposite school distinguishes between *relative* and *absolute* duties, the former being those which have rights corresponding to them, and the latter being those which have none (*g*). This school conceives it to be of the essence of a right that it should be vested in some determinate person, and be enforceable by some form of legal process instituted by him. On this view, duties towards the public at large or towards indeterminate portions of the public have no correlative rights; the duty, for example, to refrain from committing a public nuisance.

The truth is surely that duties in the strict sense have corresponding rights, and duties in the wider sense do not. To say that a debtor owes a duty to his creditor and that the latter has a corresponding right stresses the fact that the creditor is intimately concerned, that he will be personally injured by breach of the duty, and that by law the choice of attempting to compel obedience is his. To say that a duty to refrain from committing a

(*f*) This was the view taken by Sir John Salmond (7th ed. § 72).
(*g*) See Austin, *Lect* 17; Allen, *Legal Duties* (1931) 183–193.

public nuisance is owed to the society or to the crown or to the prosecutor either adds nothing to the statement that it is enjoined by law; or else it mistakenly suggests that this case is of the same kind as the former, thus blurring the distinction between them and preventing us from gaining true insight into either. For in the second case these three factors of concern, injury and choice do not obviously relate to one and the same person in the same way as they do in the first.

41. The characteristics of a legal right

Every legal right has the five following characteristics:—

(1) It is vested in a *person* who may be distinguished as the *owner* of the right, the *subject* of it, the person *entitled*, or the *person of inherence*.

(2) It avails against a *person*, upon whom lies the correlative duty. He may be distinguished as the person *bound*, or as the *subject* of the duty, or as the *person of incidence*.

(3) It obliges the person bound to an *act* or *omission* in favour of the person entitled. This may be termed the *content* of the right.

(4) The act or omission relates to some *thing* (in the widest sense of that word), which may be termed the *object* or *subject-matter* of the right.

(5) Every legal right has a title, that is to say, certain facts or events by reason of which the right has become vested in its owner.

Thus if A buys a piece of land from B, A is the subject or owner of the right so acquired. The persons bound by the correlative duty are persons in general, for a right of this kind avails against all the world. The content of the right consists in non-interference with the purchaser's exclusive use of the land. The object or subject-matter of the right is the land. And finally the title of the right is the conveyance by which it was acquired from its former owner (*h*).

(*h*) The terms subject and object are used by different writers in a somewhat confusing variety of senses:
(a) The subject of a right means the owner of it; the object of a right means the thing in respect of which it exists. This is the usage which has been here adopted: Windscheid, I. sect. 49.
(b) The subject of a right means its subject-matter (that is to say, its object in the previous sense). The object of a right means the act

Every right, therefore, involves a threefold relation in which the owner of it stands:—

(i) It is a right *against* some *person* or persons.

(ii) It is a right *to* some *act* or omission of such person or persons.

(iii) It is a right *over* or *to* some *thing* to which that act or omission relates.

An ownerless right does not appear to be recognised by English law (*i*). This is not because an ownerless right is an impossibility, for there would be nothing to prevent such a concept being used in legal reasoning if lawyers chose to employ it. However, the fact is that they do not appear to do so. Yet although ownerless rights are not recognised, the ownership of a right may be merely contingent or uncertain. The owner of it may be a person indeterminate. He may even be a person who is not yet born, and may therefore never come into existence. Although every right has an owner, it need not have a *vested* and *certain* owner. Thus the fee simple of land may be left by will to a person unborn at the death of the testator. To whom does it belong in the meantime? We cannot say that it belongs to no one for the reasons already indicated. We must say that it is presently owned by the unborn person, but that his ownership is contingent on his birth.

Who is the owner of a debt in the interval between the death of the creditor intestate and the vesting of his estate in an administrator? Roman law in such a case personified the inheritance itself, and regarded the rights contingently belonging to the heir as presently vested in the inheritance by virtue of its fictitious personality. According to English law before the Judicature Act, 1873, the personal property of an intestate, in

or omission to which the other party is bound (that is to say, its content): Austin, pp. 47, 712.

(c) Some writers distinguish between two kinds of subjects—active and passive. The active subject is the person entitled; the passive subject is the person bound: Baudry-Lacantinerie, *Des Biens*, sect. 4.

(*i*) A possible exception is in the case of the parson's glebe land; here there appears to be an "abeyance of seisin" when a parson dies and before his successor is appointed. See Maitland, "The Corporation Sole", in his *Selected Essays*, at pp. 98–99.

the interval between death and the grant of letters of administration, was deemed to be vested in the Judge of the Court of Probate, and since 1925 both the real and the personal property of an intestate vests in the President of the Probate, Divorce and Admiralty Division (*j*). But neither the Roman nor the English fiction is essential. There is no difficulty in saying that the estate of an intestate is presently owned by an *incerta persona*, namely by him who is subsequently appointed the administrator of it. The law, however, abhors a temporary vacuum of vested ownership. It prefers to regard all rights as presently vested in some determinate person, subject, if need be, to be divested on the happening of the event on which the title of the contingent owner depends (*k*).

Certain writers define the object of a right with such narrowness that they are forced to the conclusion that there are some rights which have no objects. They consider that the object of a right means some material thing to which it relates; and it is certainly true that in this sense an object is not an essential element in the conception. Others admit that a person, as well as a material thing, may be the object of a right; as in the case of a husband's right in respect of his wife, or a father's in respect of his children. But they go no further, and consequently deny that the right of reputation, for example, or that of personal liberty, or the right of a patentee, or a copyright, has any object at all.

The truth seems to be, however, that an object in the wide sense adopted here is an essential element in the idea of a right. A right without an object in respect of which it exists is as impossible as a right without a subject to whom it belongs. A right, as we have said, serves to protect an interest; and the object of the right is the thing in which the owner has this interest. It is the thing, material or immaterial, which he desires to keep or to obtain, and which he is enabled to keep or to obtain by means of the duty which the law imposes on other persons.

(*j*) Administration of Estates Act, 1925, ss. 9, 55 (1) (xv). The rule for personal property between 1875 and 1925 was in some doubt, but Sir John Salmond suggested that such property vested either in the President of the Probate, Divorce and Admiralty Division, or in the Judges of the High Court collectively. Real property before 1926 vested in the heir. Where an executor is appointed all property vests in him at the moment of the death.

(*k*) As to ownerless rights, see Windscheid, I. sect. 49, n. 3. Dernburg, *Pandekten*, I. sect. 49.

The possible objects of a right are many and various. A man may have rights over material things. He may have rights in respect of his own person, *e.g.*, the right not to be physically injured or assaulted. He has a right of reputation, rights in respect of domestic relations, and even rights in respect of other rights: if I contract to purchase a piece of land from A, I acquire against him a right that he transfer to me certain rights now belonging to himself. One may also have rights over immaterial property; *e.g.*, patent-rights, copyrights, trade-marks and commercial good-will. Finally we have to take account of the rights vested in one person to the services of another: the rights, for example, which are created by a contract between master and servant, physician and patient and so on. In a law which recognises slavery, men themselves may be bought and sold. In our law the only right that can be acquired over a human being is a temporary right to his services.

42. Legal rights in a wider sense of the term

Hitherto we have confined our attention to legal rights in the strictest sense in which they constitute the correlatives of legal duties (*l*). We must now consider the wider use of the term, according to which rights, do not necessarily correspond with duties. In this generic sense a legal right may be defined as any advantage or benefit conferred upon a person by a rule of law. Of rights in this sense there are four distinct kinds. These are (1) *Rights* (in the strict sense), (2) *Liberties*, (3) *Powers*, and (4) *Immunities*. Each of these has its correlative, namely (1) *Duties*, (2) *No-rights*, (3) *Liabilities*, and (4) *Disabilities*. The four pairs of correlatives may be arranged in the following table, the correlatives being obtained by reading downwards.

Right (*stricto sensu*)	Liberty	Power	Immunity
Duty	No-right	Liability	Disability

(*l*) In this narrow sense the word "right" is by some writers replaced by the word "claim", "demand", "claim-right" or "demand-right". This distinguishes it from a right in the generic sense.

As we shall see, the four concepts within each rectangle are intimately related to each other, whereas there is not the same relationship between the concepts in the one rectangle and the concepts in the other rectangle. Having already sufficiently considered rights and their correlative duties, we shall now deal briefly with the others (*m*).

1. *Liberties and no-rights.* Just as my legal rights (in the strict sense) are the benefits which I derive from legal duties imposed upon other persons, so my legal liberties (sometimes called licences or privileges) are the benefits which I derive from the absence of legal duties imposed upon myself. They are the various forms assumed by the interest which I have in doing as I please. They are the things which I may do without being prevented by the law. The sphere of my legal liberty is that sphere of activity within which the law is content to leave me alone. It is clear that the term right is often used in a wide sense to include such liberty. I have a right (that is to say, I am at liberty) to do as I please with my own; but I have no right and am not at liberty to interfere with what is another's. I have a right to express my opinions on public affairs, but I have no right to publish a defamatory or seditious libel. I have a right to defend myself against violence, but I have no right to take revenge upon him who has injured me.

(*m*) The analysis of rights (in the wide sense) into the four pairs of correlatives exhibited in the above table was a matter of slow evolution, and reached its culmination with the work of Hohfeld. See his *Fundamental Legal Conceptions*, published posthumously in 1923, and reprinting (*inter alia*) essays first published in (1913) 23 Yale L.J. 16 and (1917) 26 Yale L.J. 710. The above table is taken from Hohfeld, with the exceptions that his "privilege" is here called "liberty"; also, Hohfeld did not divide off the eight concepts into the two rectangles. Sir John Salmond, upon whose work Hohfeld built, did not assign a separate place in the scheme to the concept of immunity (the absence of power), and he did not have separate terms for the concepts of no-right and liability, but called both of them liabilities. For the work of Salmond and the other predecessors of Hohfeld see Pound, "Fifty Years of Jurisprudence". (1937) 50 H.L.R. 557 at 571–572. Most of the literature that has collected around the work of Hohfeld will be found referred to in Hall, *Readings in Jurisprudence*, Chap. 11; see especially the table showing the terminology of different writers on p. 527. A clear presentation of Hohfeld for the beginner is Corbin, "Legal Analysis and Terminology" (1919) 29 Yale L.J. 163, reprinted in Hall, *op. cit.* 471. See also Campbell, "Some Footnotes to Salmond's Jurisprudence" (1940) 7 C.L.J. 206. An advanced treatment will be found in Kocourek, *Jural Relations* (2nd ed. 1928).

See also Radin, "A Restatement of Hohfeld" (1938) 51 H.L.R. 1141; Maher, "The Kinds of Legal Rights" (1965) 5 *Melbourne University Law Review* 47.

The interests of unrestrained activity thus recognised and allowed by the law constitute a class of legal rights clearly distinguishable from those which we have already considered. Rights of the one class are concerned with those things which other persons *ought* to do for me; rights of the other class are concerned with those things which I *may* do for myself. Both are advantages derived from the law, but they are two distinct species of one genus.

It is often said that all rights whatsoever correspond to duties; and those who are of this opinion contend that a legal liberty is in reality a legal right not to be interfered with by other persons in the exercise of one's activities. It is alleged that the real meaning of the proposition that I have a legal right to express what opinions I please is that other persons are under a legal duty not to prevent me from expressing them. So that even in this case the right is the correlative of a duty. Now there is no doubt that in most cases a legal liberty of acting is accomplished by a legal right not to be hindered in so acting. If the law allows me a sphere of lawful and innocent activity, it usually takes care at the same time to protect this sphere of activity from alien interference. But in such a case there are in reality two rights and not merely one; and there are instances in which liberties are not thus accompanied by protecting rights. I may have a legal liberty which involves no such duty of non-interference imposed on others. If a landowner gives me a licence to go upon his land, I have a right to do so, in the sense in which a right means a liberty; but I have no right to do so, in the sense in which a right vested in me is the correlative of a duty imposed upon him. Though I have a liberty or right to go on his land, he has an equal right or liberty to prevent me. The licence has no other effect than to make that lawful which would otherwise be unlawful. The right which I so acquire is nothing more than an extension of the sphere of my rightful activity. So a trustee has a right to receive from the beneficiaries remuneration for his trouble in administering the estate, in the sense that in doing so he does no wrong. But he has no right to receive remuneration, in the sense that the beneficiaries are under any duty to give it to him. So an alien has a right, in the sense of

liberty, to enter British dominions, but the executive government has an equal right, in the same sense, to keep him out (*n*).

The correlative of A's liberty to do a thing is B's no-right that it shall not be done, and the correlative of A's liberty not to do a thing is B's no-right that it shall be done. "No-right" is a manufactured word indicating the absence of right against another in some particular respect. To say that B has a no-right against A is simply another way of saying that B has not a right against A, just as to say that A has a privilege against B is simply another way of saying that A is not under a duty towards B. Thus a trespasser has a no-right not to be forcibly ejected (*i.e.* has not a right not to be forcibly ejected), corresponding to the occupier's liberty to eject him. Again, the owner of a building generally has a no-right not to have his windows darkened or his foundations weakened by the buildings or excavations of his neighbours. In short, all cases of *damnum sine injuria* (*o*) are cases of no-right.

The term "no-right" which was invented by Hohfeld, has been derided as a purely negative concept: if a no-right is something that is not a right, then the class of no-rights must, it is said, include elephants. The short answer to this is that just because a term is a negative one, this does not justify its application outside its universe of discourse, *i.e.*, in this case the class of legal concepts. To say that an alien has a liberty to enter a country means that he is under *no duty not* to enter; to say that the authorities have a no-right against him is an inelegant way of saying that they have *no right in the strict sense* that he should not enter, though they may have a liberty (*i.e.*, be under no duty not) to prevent him.

We can see, then, that the correlative of B's no-right that an act shall be done is not A's liberty to do the act but A's liberty *not* to do it. Similarly the correlative of B's no-right that an act shall *not* be done is A's liberty *not not* to do it, i.e., A's liberty to do

(*n*) *Musgrove* v. *Toy* [1891] A.C. 272. On the analysis of this case, see the discussion by Cameron (1964) Jurid.Rev. 155.
On the distinction between liberties and rights, see Bentham, *Works*, III. 217; *Starey* v. *Graham* [1899] 1 Q.B. at p. 411, *per* Channel J.; *Allen* v. *Flood* [1898] A.C. at p. 29, *per* Cave J.; Terry, *Leading Principles of Anglo-American Law*, 90; Brown, *Austinian Theory of Law*, 180; Hohfeld, *Fundamental Legal Conceptions*, 38–50.
(*o*) *Infra*, § 85.

it. The correlative to " no-right " then is " no-duty " which is the precise equivalent of " liberty not "; the correlative of " no-right not " is " no-duty not " which is the precise equivalent of " liberty ".

The existence of a liberty—no-right relationship between A and B can be the result of a legal rule conferring the liberty on A. This is so with the law relating to the lawful use of force, where special rules allow for exceptions to the general principles prohibiting assault. The relationship may, however, result simply from the absence of law on the matter. This is so with many liberties in English law, which works from the principle that no act is unlawful unless there is a rule to the contrary, *i.e.*, unless the act constitutes a crime, tort, breach of contract and so on.

But while the categorisation of such rights as liberties helps to a clearer understanding of the law (*p*), it also diverts attention from the dynamic or fluid nature of such rights (*q*). For example, if the right to work is regarded simply as a liberty, this militates against the claim that this right should be protected by laws prohibiting others from preventing a man from doing his work. If on the other hand it is spoken of as a right, this may operate to ground claims that the law should protect this right by prohibiting interference, by guaranteeing employment and so forth. A liberty is in fact not so much a lack of duty as an incipient right.

2. *Powers and liabilities.* Yet another class of legal rights consists of those which are termed powers. Examples of such are the following: the right to make a will, or to alienate property; the power of sale vested in a mortgagee; a landlord's right of re-entry; the right to marry one's deceased wife's sister; the power to sue and to prosecute; the right to rescind a contract for fraud; a power of appointment; the right of issuing execution on a

(*p*) See Dias, *Jurisprudence* (2nd ed.) 233–235. *Chapman* v. *Honig* [1963] 2 Q.B. 502 was a case where Hohfeld's analysis might have been of use. A tenant having given evidence against his landlord, the latter served notice to quit. In a subsequent action by the tenant against the landlord for damages for contempt of court, the majority in the Court of Appeal confessed themselves unable to see how an act could be lawful and unlawful at one and the same time. According to Hohfeld the landlord would have a *power* to terminate the tenancy by notice to quit and he would in general have a *liberty* to serve a notice, but would have no *liberty* to do so in order to revenge himself upon the tenant.

(*q*) See Sawer, *Law in Society*, 43–45.

judgment; the various powers vested in judges and other officials for the due fulfilment of their functions. All these are legal rights —they are legally recognised interests—they are advantages conferred by the law—but they are rights of a different species from the two classes which we have already considered. They resemble liberties, and differ from rights *stricto sensu*, inasmuch as they have no duties corresponding to them. My right to make a will corresponds to no duty in any one else. A mortgagee's power of sale is not the correlative of any duty imposed upon the mortgagor; though it is otherwise with his right to receive payment of the mortgage debt. A debt is not the same thing as a right of action for its recovery. The former is a right in the strict and proper sense, corresponding to the duty of the debtor to pay; the latter is a legal power, corresponding to the liability of the debtor to be sued. That the two are distinct appears from the fact that the right of action may be destroyed (as by prescription) while the debt remains.

It is clear, therefore, that a power is not the same thing as a right of the first class. Neither is it identical with a right of the second class, namely, a liberty. That I have a right to make a will does not mean that in doing so I do no wrong. It does not mean that I *may* make a will innocently; it means that I *can* make a will effectively. That I have a right to marry my cousin does not mean that such a marriage is legally innocent, but that it is legally valid. It is not a liberty that I have, but a power. That a landlord has a right of re-entry on his tenant does not mean that in re-entering he does the tenant no wrong, but that by so doing he effectively terminates the lease (*r*).

A power may be defined as ability conferred upon a person by the law to alter, by his own will directed to that end, the rights, duties, liabilities or other legal relations, either of himself or of other persons. Powers are either public or private. The former are those which are vested in a person as an agent or instrument of the functions of the state; they comprise the

(*r*) A power is usually combined with a liberty to exercise it; that is to say, the exercise of it is not merely effectual but rightful. This, however, is not necessarily the case. It may be effectual and yet wrongful; as when a thief sells stolen property in market overt. In such a case the sale is a wrongful act, an act which the thief has no right to do. But the sale will nevertheless be effectual and pass a good title to an innocent purchaser. Here there is a power without a co-existing liberty.

various forms of legislative, judicial, and executive authority. Private powers, on the other hand, are those which are vested in persons to be exercised for their own purposes, and not as agents of the state. Power is either ability to determine the legal relations of other persons, or ability to determine one's own. The first of these—power over other persons—is sometimes called *authority*; the second—power over oneself—is usually termed *capacity* (*s*).

The correlative of a power is a liability (*t*). This connotes the presence of power vested in someone else, as against the person with the liability. It is the position of one whose legal rights (in the wide sense) may be altered by the exercise of a power. Examples are the liability of a tenant to have his lease determined by re-entry, that of a mortgagor to have the property sold by the mortgagee, that of a judgment debtor to have execution issued against him, and that of an unfaithful spouse to be divorced. The most important form of liability is that which corresponds to the various powers of action and prosecution. Such liability is independent of the question whether the particular action or prosecution will be successful, and is therefore independent of (say) the duty to pay damages for a civil wrong. A tortfeasor is under a duty to pay damages for his wrong (this is called " tortious liability ") and is liable to be sued in tort; but a person who has committed no tort is also liable to be sued in tort, though in this case the action will fail (*u*).

A liability may be co-incident with a no-right: thus when a defaulting tenant has his goods distrained for rent, he has both a no-right against his landlord not to have his goods

(*s*) On the distinction between powers and other kinds of rights, see Windscheid, I. sect. 37; Terry, *op. cit.* 100; Hohfeld, *op. cit.* 50–60.

(*t*) All modern analytical jurists writing in the English language (including Salmond and Hohfeld) have used the term " liability " for the correlative of power, and this usage has been adopted in the American *Restatement*. It is therefore retained here, although the term " liability " already has two other meanings. When we speak of a debt as a liability, and also when we speak of tortious liability and the liability to pay damages for breach of contract, we are referring to an enforceable duty *in personam* to pay money; the words " liability " may also be used for the position of any wrongdoer in respect of the remedy of a wrong. Thus we may say that in its narrower sense a liability is an enforceable duty *in personam* to pay money, and in its wider sense it is the position of one against whom legal proceedings can be taken *with success*.

(*u*) He can be forced to enter an appearance, file a defence and so on, on pain of judgment going by default if he does not.

touched and a liability to have them impounded and sold against his will. In this technical use of the term, a " liability " may be an advantageous position. Thus a person has a power to make a gift of his property (for by exercising the power he alters the legal position both of himself and of the donee); hence other persons, who may be given the property, have a liability to have it given to them. This liability is beneficial, not detrimental.

3. *Immunities and disabilities.* The term " right " is used in a fourth sense to mean an immunity from the legal power of some other person. Just as a power is a legal ability to change legal relations, so an immunity is an exemption from having a given legal relation changed by another. The right of a peer to be tried by his peers, for example, was neither a right in the strict sense, nor a liberty, nor a power. It was an exemption from trial by jury —an immunity from the power of the ordinary criminal courts. Immunity stands in the same relation to power as liberty (not) does to right *stricto sensu*: immunity is exemption from the power of another in the same way as liberty (not) is exemption from the right of another. Immunity, in short, is no-liability.

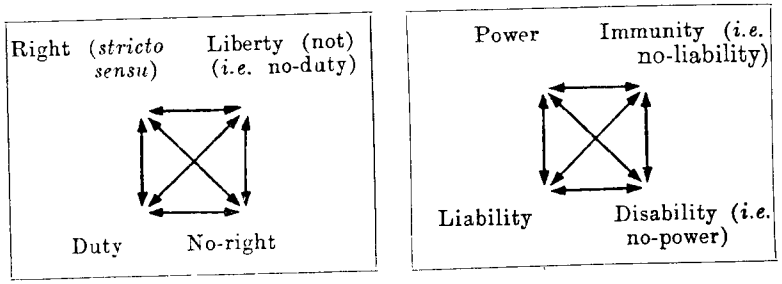
The correlative of immunity is disability (otherwise called inability, or, more clearly though less elegantly, no-power). Disability is simply the absence of power. Thus the rule *Nemo dat quod non habet* can be expressed as a disability on the part of persons in general to transfer property that they do not themselves own.

These, then, are the four classes of rights conferred by the law: right in the strict sense, when the law limits the liberty of others in my behalf; liberty, when the law allows to my will a sphere of unrestrained activity; power, when the law actively assists me in making my will effective; immunity, when the law denies to others a particular power over me. A right in the narrow sense is that which other persons *ought* to do on my behalf; a liberty is that which I *may* do innocently; a power is that which I *can* do effectively; an immunity is that which other persons *cannot* do effectively in respect of me. I enjoy my rights through the control exercised by the law over the acts of others on my behalf; I use my liberties with the

acquiescence of the law; I use my powers with its active assistance in making itself the instrument of my will; I use my immunities through its refusal to accord this active assistance to others.

Of the four classes the first, consisting of rights correlative to duties, are by far the most important. So predominant are they, indeed, that we may regard them as constituting the principal subject-matter of the law, while the others are merely accessory. In future, therefore, I shall use the term right in this narrow and specific sense, except when the context indicates a different usage; and I shall commonly speak of the other forms of rights by their specific designations.

Reverting to the table of legal correlatives in section 42, it will be seen that the four terms in the first rectangle are related to each other in precisely the same way as the four terms in the second rectangle. This can be seen more clearly by connecting each set of terms by arrows, and assigning a meaning to each kind of arrow.



In this diagram the vertical arrows connect jural correlatives, and may be read either way as " is the presence of in another ". Thus right is the presence of duty in another and liability is the presence of power in another.

The diagonal arrows connect jural contradictories and may be read either way as " is the absence of in oneself ". Thus no-right is the absence of right in oneself, and disability is the absence of power in oneself.

The horizontal arrows connect the contradictories of correlatives and may be read either way as " is the absence of in another ". Thus liberty (not) is the absence of

right in another, and immunity is the absence of power in another.

With the aid of the arrows any of the eight expressions can be mechanically defined in terms of three of the others. The broad distinction between the first set of terms and the second set is that the first relates to static legal relationships while the second relates to the changing of relationships.

43. The kinds of legal rights

Rights and their correlative duties may be distinguished in various ways.

1. *Perfect and imperfect rights.* A perfect right is one which corresponds to a perfect duty; and a perfect duty is one which is not merely recognised by the law, but *enforced*. A duty is enforceable when an action or other legal proceeding, civil or criminal, will lie for the breach of it, and when judgment will be executed against the defendant, if need be, through the physical force of the state. In all ordinary cases, if the law will recognise a right at all, it will enforce it. In all fully developed legal systems, however, there are rights and duties which, though undoubtedly recognised by the law, yet fall short of this typical and perfect form (*v*).

Examples of such imperfect legal rights are certain claims barred by lapse of time; claims unenforceable by action owing to the absence of some special form of legally requisite proof (such as a written document); claims against foreign states or sovereigns, as for interest due on foreign bonds. In all those cases the duties and correlative rights are imperfect. No action will lie for their maintenance; yet they are, for all that, legal rights and legal duties, for they receive recognition from the law. The statute of limitations, for example, does not provide that after a certain time a debt shall become extinct, but merely that no

(*v*) In ethics the term " imperfect duty " is sometimes used to describe a duty of such a nature that it is not fit for enforcement, but ought properly to be left to the free will of him whose duty it is. A perfect duty, on the other hand, is one which a man not merely *ought* to perform, but may be *justly compelled* to perform. The duty to give alms to the poor is imperfect; that of paying one's debts is perfect. Perfect duties pertain to the sphere of justice; imperfect to that of benevolence.

action shall thereafter be brought for its recovery (*w*). Lapse of time, therefore, does not destroy the right, but merely reduces it from the rank of one which is perfect to that of one which is imperfect. It remains valid for all purposes save that of enforcement. It may be good as a ground of defence, it may suffice to support any security given for it, and it may possess the capacity of becoming a perfect right. Money paid in satisfaction of a statute-barred debt cannot be recovered; a pledge securing the debt remains valid; and acknowledgment of the debt by the debtor will revive the creditor's right of action (*x*). All these cases of imperfect rights are exceptions to the maxim, ***Ubi jus ibi remedium.*** The customary union between the right and the right of action has been for some special reason severed, but the right survives.

The rights of the subject against the state are sometimes classified as imperfect rights. Even where a system of law allows the subject to sue the state and obtain a judgment recognising his rights, the judgment cannot be enforced. This being so, some would contend that such rights are not in reality legal rights of any kind. This, however, is to confuse obligatoriness with enforceability. Moreover it is contrary to popular and legal usage. To the lawyer, as to the layman, a contract with the state is as much a source of legal rights as is a contract between two private persons.

Because of unenforceability, then, these rights are sometimes termed imperfect. Yet they differ from the normal type of imperfect right discussed above. The ordinary imperfect right is unenforceable because some rule of law declares it to be so. One's rights against the state are unenforceable, not in this legal sense, but in the sense that the strength of the law is none other than the strength of the state and cannot be turned or used against the state whose strength it is.

2. *Positive and negative rights.* A positive right corresponds to a positive duty, and is a right that he on whom the duty lies shall do some positive act on behalf of the person entitled. A negative right corresponds to a negative duty, and is a right that the person bound shall refrain from some act which would

(*w*) Limitation Act, 1939, s. 2 (1). But lapse of time now extinguishes title to chattels or to land: *ibid.*, ss. 3 (2), 16; but see s. 7 and Land Registration Act, 1925, s. 75.

(*x*) *Cf. Allen* v. *Waters & Co.* [1935] 1 K.B. 200.

operate to the prejudice of the person entitled. The former is a right to be positively benefited; the latter is merely a right not to be harmed.

The distinction is one of practical importance. It is much easier, as well as much more necessary, for the law to prevent the infliction of harm than to enforce positive beneficence. Therefore while liability for hurtful acts of commission is the general rule, liability for acts of omission is the exception. Generally speaking, all men are bound to refrain from all kinds of positive harm, while only some men are bound in some ways actively to confer benefits on others. I have a right against every one not to be pushed into the water; if I have a right at all to be pulled out, it is only on special grounds against determinate individuals.

3. *Rights in rem and rights in personam.* The distinction between rights *in rem* and *in personam* is closely connected but not identical with that between negative and positive rights. It is based on a difference in the incidence of the correlative duties. A right *in rem*, sometimes called a real right, corresponds to a duty imposed upon persons in general; a right *in personam*, sometimes called a personal right, corresponds to a duty imposed upon determinate individuals. A right *in rem* is available against the world at large; a right *in personam* is available only against particular persons. The distinction is one of great prominence in the law, and we may take the following as illustrations of it. My right to the peaceable occupation of my farm is *in rem*, for all the world is under a duty towards me not to interfere with it. But if I grant a lease of the farm to a tenant, my right to receive the rent from him is *in personam*, for it avails exclusively against the tenant himself. For the same reason my right to the possession and use of the money in my purse is *in rem*; but my right to receive money from some one who owes it to me is *in personam*.

A right *in rem*, then, is an interest protected against the world at large; a right *in personam* is an interest protected solely against determinate individuals. The distinction is clearly one of importance. The law confers upon me a greater advantage in protecting my interests against all persons than in protecting them only against one or two. The right of a patentee, who has a monopoly as against all the world, is much more valuable than

the right of him who purchases the goodwill of a business and is protected only against the competition of his vendor If I buy a chattel, it is an important question whether my interest in it is forthwith protected against every one, or only against him who sells it to me. The main purpose of mortgages and other forms of real security is to supplement the imperfections of a personal right by the superior advantages inherent in a right of the other class. Furthermore, these two kinds of rights are necessarily very different in respect of the modes of their creation and extinction. The indeterminate incidence of the duty which corresponds to a right *in rem*, renders impossible many modes of dealing with it which are of importance in the case of rights *in personam*.

Almost all rights *in rem* are negative, and most rights *in personam* are positive, though in a few exceptional cases they are negative. It is not difficult to see the reason for this general coincidence. A right *in rem*, available against all other persons, can be in general nothing more than a right to be left alone by those persons—a right to their passive non-interference. No person is in general given a legal right to the active assistance of all the world. On the other hand almost all personal rights are positive.

It is sometimes contended that a right *in rem* is in reality a conglomeration of separate rights *in personam*, since every right can only correlate with a single duty and not with many different duties (*y*). But the essence of a right *in rem* is that it avails against an open or indefinite class of persons, whereas a right *in personam* avails only against a specific person or persons.

In defining a right *in rem* as one availing against the world at large, it is not meant that the incidence of the correlative duty is absolutely universal, but merely that the duty binds persons in general, and that if any one is not bound his case is exceptional. Similarly a right *in personam* is not one available against a single person only, but one available against one or more *determinate* individuals. The right of the creditor of a firm is *in personam*, though the debt may be due from any number of partners. Even as so explained, however, it can scarcely be denied that, if

(*y*) Hohfeld, *Fundamental Legal Conceptions* (1921), 91 *et seq. cf.* Campbell in (1940) 7 C.L.J. at 211–212.

intended as an exhaustive classification of all possible cases, the distinction between rights *in rem* and *in personam*—between duties of general and of determinate incidence—is logically defective. It takes no account of the possibility of a third and intermediate class. Why should there not be rights available against particular classes of persons, as opposed both to the whole community and to persons individually determined, for example, a right available only against aliens?

The terms right *in rem* (or *in re*) and right *in personam* are derived from the commentators on the civil and canon law (*z*). Literally interpreted, *jus in rem* means a right against or in respect of a thing, *jus in personam* a right against or in respect of a person. In truth, however, every right is at the same time one in respect of some thing, namely, its object, and against some person, namely the person bound. In other words, every right involves, not only a *real*, but also a *personal* relation. But in real rights it is the real relation that stands in the forefront of the juridical conception; such rights are emphatically and conspicuously *in rem*. In personal rights, on the other hand, it is the personal relation that forms the predominant factor in the conception; such rights are before all things *in personam*.

For this difference there is more than one reason. In the first place, the right *in rem* is a relation between the owner and a vague multitude of persons, no one of whom is distinguished from any other; while a right *in personam* is a definite relation between determinate individuals, and the definiteness of this personal relation raises it into prominence. Secondly, the source or title of a right *in rem* is commonly to be found in the character of the real relation, while a right *in personam* generally derives its origin from the personal relation. In other words, if the law confers upon me a right *in rem*, it is commonly because I stand in some special relation to the thing which is the object of the right, *e.g.*,

(*z*) The terms *jus in rem* and *jus in personam* are derived from the Roman terms *actio in rem* and *actio in personam*. An *actio in rem* was an action for the recovery of *dominium*; one in which the plaintiff claimed that a certain thing belonged to him and ought to be restored or given up to him. An *actio in personam* was one for the enforcement of an *obligatio*; one in which the plaintiff claimed the payment of money, the performance of a contract, or the protection of some other personal rights vested in him as against the defendant (Gaius IV. 2). Naturally enough, the right protected by an *actio in rem* came to be called *jus in rem*, and a right protected by an *actio in personam*, *jus in personam*.

because I made it, found it or first acquired possession of it. If on the contrary, it confers on me a right *in personam*, it is commonly because I stand in some special relation to the person who is the subject of the correlative duty, *e.g.*, because I have made a contract with them.

The commonest and most important kind of *jus in personam* is that which has been termed by the civilians and canonists *jus ad rem*. I have a *jus ad rem* when I have a right that some other right shall be transferred to me or otherwise vested in me. *Jus ad rem* is a right to a right. It is clear that such a right to a right must be in all cases *in personam*. The right which is to be transferred, however—the subject-matter of the *jus ad rem*—may be either *in rem* or *in personam*, though it is more commonly *in rem*. An agreement to assign a chattel creates a *jus ad jus in rem*; an agreement to assign a debt or a contract creates a *jus ad jus in personam*.

The distinction between rights *in rem* and *in personam* applies not only to rights in the strict sense, but also to liberties, powers and immunities. Thus freedom of speech is, within its limits, a liberty *in rem*, while a licence to walk over the land of a particular landowner is a liberty *in personam*. The power to make a contractual offer is a power *in rem*, while the power to accept an offer made, and thus to create a contract, is a power *in personam*, availing only against the person who has made the offer.

(4) *Proprietary and personal rights.* Another important distinction is that between proprietary and personal rights. The aggregate of a man's proprietary rights constitutes his *estate*, his *assets*, or his *property* in one of the many senses of that most equivocal or legal terms. The sum total of a man's personal rights, on the other hand, constitutes his *status* or personal condition, as opposed to his estate. If he owns land, or chattels, or patent rights, or the goodwill of a business, or shares in a company, or if debts are owing to him, all these rights pertain to his estate. But if he is a free man and a citizen, a husband and a father, the rights which he has as such pertain to his status or standing in the law.

The distinction lies in the fact that proprietary rights are *valuable*, and personal rights are not. The former are those which

are worth money; the latter are those that are worth none. The former are the elements of a man's *wealth*; the latter are merely elements in his *well-being*.

It makes no difference in this respect whether a right is *jus in rem* or *jus in personam*. Rights of either sort are proprietary, and make up the estate of the possessor if they are of economic value. Thus my right to the money in my pocket is proprietary; but not less so is my right to the money which I have in the bank. Stock in the funds is part of a man's estate, just as much as land and houses; and a valuable contract, just as much as a valuable chattel. On the other hand, a man's rights of personal liberty, and of reputation, and of freedom from bodily harm, are personal, not proprietary. They concern his welfare, not his wealth; they are juridical merely, not also economic. So, also, with the rights of a husband and father with respect to his wife and children. Rights such as these pertain to his legal status, not his legal estate. If we go outside the sphere of private into that of public law, we find the list of personal rights greatly increased. Citizenship, honours, dignities, and official position (*a*) in all its innumerable forms, pertain to the law of status, not to that of property (*b*).

The distinction between proprietary and personal rights is not confined to rights in the strict sense, but is equally applicable to other classes of rights also. A landlord's right (*i.e.*, power) of re-entry is proprietary, no less than his right to the rent; and a mortgagee's right (*i.e.*, power) of sale, no less than the debt secured.

The distinction also has its counterpart in that between personal and proprietary duties, no-rights, liabilities and disabilities. The latter represent a loss of money, just as a proprietary right represents the acquision of it. All others are personal. The

(*a*) In the past, however, public office was regarded as a form of property, to be bought and sold like other property: see Holdsworth, *H.E.L.*, I. 439 *et seq.*; D. W. Logan, "A Civil Servant and His Pay" (1945) 61 L.Q.R. 240 at 249 *et seq.*

(*b*) For a criticism of the above account see Campbell in (1940) 7 C.L.J. at 214–215, arguing that personal rights also are of economic value. Though this is true, it may perhaps be answered that the economic value of personal rights consist in the fact that they afford an opportunity for the acquisition of proprietary rights; they are not of economic value in themselves.

The words status and estate are in their origin the same. As to the process of their differentiation in legal meaning, see Pollock and Maitland, *History of English Law* (2nd ed.) II. 10 and 78. The other uses of the term property will be considered later, in Chap. 13.

duty of fulfilling a contract for the purchase of goods is proprietary, but the duty of fulfilling a contract to marry is personal.

Although the term estate includes only rights (in the generic sense), the term status includes not only rights, but also duties, no-rights, subjections and disabilities. A minor's contractual disabilities are part of his status, though a man's debts are not part of his estate.

The term status is used in a variety of senses. It is used to refer to a man's legal condition of any kind, whether personal or proprietary. A man's status in this sense includes his whole position in the law—the sum total of his legal rights, duties, liabilities or other legal relations, whether proprietary or personal, or any particular group of them separately considered. Thus we may speak of the status of a landowner, of a trustee, of an executor, of a solicitor and so on.

More commonly it is used to denote his personal legal condition in so far as concerns his personal rights and burdens, to the exclusion of his proprietary relations. A person's status, in this sense, is made up of smaller groups of personal rights and their correlative burdens, and each of these constituent groups is itself also called a status. Thus the same person may have at the same time the status of a free man, of a citizen, of a husband, of a father and so on. So we speak of the status of an alien, a lunatic, or an infant; but not of a landowner or trustee.

The term may be used to refer to personal capacities and incapacities as opposed to other elements of personal status (*c*). The law of status in this sense would include the rules as to the contractual capacities and incapacities of married women, but not the personal rights and duties existing between her and her husband.

Status is used by some writers to signify a man's personal legal condition, so far only as it is imposed upon him by the law without his own consent, as opposed to the condition which he has acquired for himself by agreement. The position of a slave is a matter of status, the position of a free servant is a matter of contract. Marriage creates a status in this sense, for although it is entered into by way of consent, it cannot be dissolved in that way, and the legal condition created by it is determined by the law, and cannot be modified by the agreement of the parties. A

(*c*) See Dicey, *Conflict of Laws* (7th ed. 1958), p. 223; Graveson, ***Status in the Common Law*** (1953), 2. See the interesting discussion of this and other

business partnership, on the other hand, pertains to the law of contract and not to that of status.

(5) *Rights in re propria and rights in re aliena.* Rights may be divided into two kinds, distinguished by the civilians as *jura in re propria* and *jura in re aliena*. The latter may also be conveniently termed *encumbrances*, if we use that term in its widest permissible sense (*d*). A right *in re aliena* or encumbrance is one which limits or derogates from some more general right belonging to some other person in respect of the same subject-matter. All others are *jura in re propria*. It frequently happens that a right vested in one person becomes subject or subordinate to an adverse right vested in another. It no longer possesses its full scope or normal compass, part of it being cut off to make room for the limiting and superior right which thus derogates from it. Thus the right of a landowner may be subject to, and limited by, that of a tenant to the temporary use of the property.

A right subject to an encumbrance may be conveniently designated as *servient*, while the encumbrance which derogates from it may be contrasted as *dominant* (*e*).

The terms *jus in re propria* and *jus in re aliena* were devised by the commentators on the civil law, and are not to be found in the original sources. Their significance is clear. The owner of a chattel has *jus in re propria*—a right over his own property; the pledgee or other encumbrancer of it has *jus in re aliena*—a right over the property of someone else.

There is nothing to prevent one encumbrance from being itself subject to another. Thus a tenant may sublet; that is to say, he may grant a lease of his lease, and so confer upon the sub-lessee a *jus in re aliena* of which the immediate subject-matter is itself merely another right of the same quality. The right of the tenant in such a case is dominant with regard to that of the landowner, but servient with regard to that of the sub-lessee.

definitions by J. C. Hicks, "Jargon and Occult Qualities" (1956) 19 M.L.R. 158. See further, Maine, *Ancient Law*, Chap. 5 *ad fin.*, and Pollock's Note L to his edition; Markby, *Elements of Law*, 178; Hunter, *Roman Law* (4th ed.), 138. For a further discussion of status see Allen, "Status and Capacity", in his *Legal Duties* (1931), 28 *et seq.*

(*d*) The Romans termed them *servitutes*, but the English term servitude is used to include one class of *jura in re aliena* only, namely the *servitutes praediorum* of Roman law.

(*e*) The owner of an encumbrance may be termed the encumbrancer of the servient right or property over which it existe.

A right is not to be classed as encumbered or servient merely on account of its *natural* limits and restrictions. Otherwise all rights would fall within this category, since none of them are unlimited in their scope, all being restrained within definite boundaries by the conflicting interests and rights of other persons. All ownership of material things, for example, is limited by the maxim, *sic utere tuo ut alienum non laedas*. Every man must so restrain himself in the use of his property, as not to infringe upon the property and rights of others. But in these and all similar cases we are dealing merely with the normal and natural boundaries of the right, not with those exceptional and artificial restrictions which are due to the existence of *jura in re aliena* vested in other persons. A servient right is not merely a limited right, for all are limited; it is a right so limited that its ordinary boundaries are infringed.

It is essential to an encumbrance that it should, in the technical language of our law, *run with* the right encumbered by it. In other words, the dominant and the servient rights are necessarily *concurrent*. By this it is meant that an encumbrance must follow the encumbered right into the hands of new owners, so that a change of ownership will not free the right from the burden imposed upon it. If this is not so—if the right is transferable free from the burden—there is no true encumbrance. For the burden is then merely personal to him who is subject to it, and does not in truth limit or derogate from the right itself. This right still exists in its full compass, since it can be transferred in its entirety to a new owner. For this reason an agreement to sell land vests an encumbrance or *jus in re aliena* in the purchaser; but an agreement to sell a chattel does not. The former agreement runs with the property, while the latter is non-concurrent.

Concurrence, however, may exist in different degrees; it may be more or less perfect or absolute. The encumbrance may run with the servient right into the hands of some of the successive owners and not into the hands of others. In particular, encumbrances may be concurrent either in law or merely in equity. In the latter case the concurrence is (apart from statute) imperfect or partial, since it does not prevail against the kind of owner known in the language of the law as a purchaser

for value without notice of the dominant right. Examples of encumbrances running with their servient rights at law are easements, leases, and legal mortgages. On the other hand, an agreement for a lease, an equitable mortgage, a restrictive covenant as to the use of land, and a trust, will run with their respective servient rights in equity, but not at law.

The chief classes of encumbrances are four in number, namely, Leases, Servitudes, Securities, and Trusts. A lease is the encumbrance of property vested in one man by a right to the possession and use of it vested in another. A servitude is a right to the limited use of a piece of land unaccompanied either by the ownership or by the possession of it; for example, a right of way or a right to the passage of light or water across adjoining land.

A security is an encumbrance vested in a creditor over the property of his debtor, for the purpose of securing the recovery of the debt; a right, for example, to retain possession of a chattel until the debt is paid. A trust is an encumbrance in which the ownership of property is limited by an equitable obligation to deal with it for the benefit of someone else. The owner of the encumbered property is the trustee; the owner of the encumbrance is the beneficiary.

(6) *Principal and accessory rights.* The relation between principal and accessory rights is the reverse of that just considered as existing between servient and dominant rights. For every right is capable of being affected to any extent by the existence of other rights; and the influence thus exercised by one upon another is either adverse or beneficial. It is adverse when one right is limited or qualified by another vested in a different owner. It is beneficial, on the other hand, when one right has added to it a supplementary right vested in the same owner. In this case the right so augmented may be termed the *principal*, while the one so appurtenant to it is the *accessory* right. Thus a security is accessory to the right secured; a servitude is accessory to the ownership of the land for whose benefit it exists; the rent and covenants of a lease are accessory to the landlord's ownership of the property.

(7) *Primary and sanctioning rights.* We have discussed in an earlier chapter the distinction between primary and sanctioning rights (*f*). It will be remembered that a sanctioning right

(*f*) § 16.

originates from some wrong, *i.e.*, from the violation of another right. Primary rights have some source other than wrongs.

It should be observed that a primary right can be either a right *in rem*, *e.g.*, my right not to be assaulted, or a right *in personam*, *e.g.*, my right that you perform your contract with me. But the sanctioning right which arises from the violation of a primary right will be in all cases a right *in personam*. If you break your contract, I now have a sanctioning right *in personam* to damages. But equally if you violate my right not to be assaulted, I now have a sanctioning right *in personam* to damages. The reason why sanctioning rights are *in personam* is obvious enough. Rights *in rem* are negative and avail against all the world, *i.e.*, an open or indefinite class of persons. Violations of such rights, therefore, must consist of positive acts, and positive acts can only be performed by specific persons; it makes no sense to talk of a positive act performed by an indefinite class of persons; in other words a violation by all the world is a logical impossibility. Consequently it is only against specific persons that sanctioning rights can be either necessary or operative: they must be, therefore, rights *in personam*.

(8) *Legal and equitable rights.* In England there were formerly two systems of law, administered respectively in the courts of common law and the Court of Chancery. These were to a considerable extent discordant. One of the results of this discordance was the establishment of a distinction between two classes of rights, distinguishable as legal and equitable. Legal rights are those which were recognised by the courts of common law. Equitable rights (otherwise called equities) are those which were recognised solely in the Court of Chancery. Notwithstanding the fusion of law and equity by the Judicature Act, 1873, this distinction still exists, and must be reckoned with as an inherent part of our legal system. That which would have been merely an equitable right before the Judicature Act is merely an equitable right still.

Although all rights, whether legal or equitable, now obtain legal recognition in all courts, the distinction is still of importance.

The methods of their creation and disposition are different A legal mortgage of land must be created by deed, but an equitable mortgage may be created by a written agreement or by a mere deposit of title-deeds.

Equitable rights have a more precarious existence than legal rights. Where there are two inconsistent legal rights claimed adversely by different persons over the same thing, the first in time generally prevails. *Qui prior est tempore potior est jure.* A similar rule applies, in general, to the competition of two inconsistent equitable rights. But when a legal and an equitable right conflict, the legal will (apart from statute) prevail over and destroy the equitable, even though subsequent to it in origin, provided that the owner of the legal right acquired it for value and without notice of the prior equity. As between a prior equitable mortgage, for example, and a subsequent legal mortgage, preference will be given to the latter. The maxim is: Where there are equal equities, the law will prevail (*g*).

(9) *Vested and contingent rights* (*h*). A right vests when all the facts have occurred which must by law occur in order for the person in question to have the right. A right is contingent when some but not all of the vestitive facts, as they are termed, have occurred. A grant of land to A in fee simple will give A a vested right of ownership. A grant to A for life and then to B in fee simple if he survives A, gives B a contigent right. It is contingent because some of the vestitive facts have not yet taken place, and indeed may never do so: B may not survive A. If he does, his formerly contingent right now becomes vested. A contingent right then is a right that is incomplete (*i*).

A contingent right is different, however, from a mere hope or *spes*. If A leaves B a legacy in his will, B has no right to this during A's lifetime. He has no more than a hope that he will obtain the legacy; he certainly does not have an incomplete right, since it is open to A at any time to alter his will (*j*).

(*g*) This rule has been considerably modified in England by the property legislation of 1925, which to a large extent substituted registration for notice. An equitable right validly registered under the Land Charges Act, 1925, becomes, by virtue of the Law of Property Act, 1925 (section 198), binding upon the whole world.

(*h*) See Paton, *Jurisprudence* (3rd ed. 1964), 269–270. This is a different distinction from that made by English law between interests vested in possession and interests vested in ownership. See *infra* § 50.

(*i*) This distinction is particularly important in international law, where the question whether a successor state is bound to respect rights granted by its predecessor may depend on whether the right is vested or contingent. See O'Connell, *The Law of State Succession*, Chaps. 6–13.

(*j*) For an example of a mere *spes* see *Director of Public Works* v. *Ho Po Sang* [1961] A.C. 901. *Cf. Free Lanka Insurance Co. Ltd.* v. *Ranasinghe* [1964] A.C. 541.