

RIGHTS IN REM

We may begin by inquiring, What is a right in rem? The definition of Austin adopted from the modern civilians has been so often repeated that it seems *prima facie* a doubtful labor at this late day to question it. The definition runs as follows: "Rights in rem may be defined in the following manner—'rights residing in persons and availing against other persons generally.' Or they may be defined thus: 'Rights residing in persons, and answering to duties incumbent upon other persons generally. By a crowd of modern civilians *jus in rem* has been defined as follows: '*facultas homini competens, sine respectu ad certam personam,*' a definition I believe invented by Grotius."¹

Difficulty has often been found with the terminology,² but, in essence, Austin's definition, or, perhaps, more accurately, the civilian definition, remains the standard accepted one, not only in Anglo-American, but also in Continental jurisprudence.³ But in recent years discussions have appeared which expressly or implicitly raise doubts as to the validity of the civilian definition.

It has been, heretofore, universally admitted that rights and duties are correlatives. One can not speak of a right without at the same time implying a duty, nor, conversely, can one speak of a duty without at the same time implying a right. Right and duty are two sides of the same idea. Consequently, when a right begins or ends, a corresponding duty begins or ends; and, conversely, when a duty begins or ends, a corresponding right begins or ends.⁴ The analysis of "protected rights" by Mr. Terry in his notable book,⁵

¹ *Austin*, "Jurisprudence," (4th Ed.).

² Thus, *Holland*, ("Jur." 143, 11th Ed.) who would prefer to speak (144) of "rights of indeterminate incidence." See also *Markby*, "Elements of Law," §165 (6th Ed.).

³ *Windscheid*, ("Pandekten," 9th Ed.) whose book is the leading Continental work in its field, says that "absolute rights [rights *in rem*] are those which avail against all persons" (§41).

⁴ *Austin*, "Juris." I, 34 (4th Ed.).

⁵ "Leading Principles of Anglo-American Law," Philadelphia, 1884.

seems to run counter to the classical notion of the correspondence in terms of right and duty, if "protected rights" are rights at all and not merely, as Mr. Salmond has suggested⁶ "the *objects* of rights *stricto sensu*." In speaking of rights in rem Mr. Terry says:⁷

"Sometimes the investitive facts on which the right depends may arise independently of the remaining investitive facts whose presence is necessary to the creation of the duty, and even at different times."

Mr. Terry gives as an example of such a severance of right and duty, the case where one takes possession of a thing previously unowned with the intention of becoming owner. He admits that duties exist arising out of the facts stated against certain persons, but adds that as to persons not within the jurisdiction of the state which confers the rights, duties do not exist, but first come into existence when these persons come within the jurisdiction. In order fully to understand the point, it is necessary to go back to Mr. Terry's analysis of "protected rights." In passing, it may be remarked that no analysis is to be found in the literature of jurisprudence which shows a more interesting and penetrating dialectic and which at the same time is more difficult of apprehension than Mr. Terry's discussion of "correspondent" and "protected" rights.

The content of a "correspondent" right according to Mr. Terry is acts, while the content of a "protected" right "is a condition of fact which will begin or continue to exist as a consequence of the acts being done or omitted."⁸ One of the very striking peculiarities of the analysis is that to give a cause of action, it is not sufficient that a "correspondent" right be violated—the "protected" right also must be infringed. In some cases, that is to say, in the case of rights *in personam*, the same act violates both the correspondent right and the protected right, but in the case of rights *in rem*, the mere violation of the correspondent right

⁶ *Salmond*, "Jurisprudence," §76, p. 197, n. 2 (3rd Ed.).

⁷ "Leading Principles," §129.

⁸ *Op. cit.*, §125.

is not enough for an actionable claim, since the protected right is not necessarily infringed. One of Mr. Terry's illustrations will make this more definite:

"Suppose that a city is charged by statute with the duty of keeping its streets in repair and negligently allows a dangerous hole in one of them to remain open and unguarded. A, when passing along the road at night and using due care, falls into the hole and breaks his leg. The first impulse of any one on being asked what duty the city had broken would be to reply, the duty to keep the street in repair, or at least to use due diligence to keep it in repair; and if asked what right of A's was violated, to answer, his right of personal security. But this brings up difficulties. If the statement of the duty is correct, then it was broken as soon as the street was allowed to remain in the unsafe condition and a reasonable opportunity had been presented for making the repairs, and before A fell into the hole; and it would equally have been broken had A never fallen in at all. Consequently, whatever right of this kind corresponded to the duty must have been at the same time violated. But A's right of personal security was not violated until he was actually hurt."⁹

Another of Mr. Terry's illustrations will be useful:

"Let A, for example be the possessor of a large dog having a propensity known to A, to kill sheep, and let B be a neighbor of A's and the possessor of sheep. A owes a duty to B to keep his dog from killing the sheep, and B has a correspondent right covering exactly the same ground as the duty, that the dog be kept from so doing. Here the two sets of facts, the possession of the dog on one side and of the sheep on the other . . . are obviously quite independent of each other. A may have had the dog with the known vicious propensities long before B had any sheep, or, on the other hand, B might have kept a flock of sheep if A had never possessed a dog . . . If B is the possessor of sheep, though he will not have a correspondent right against A of the sort just mentioned until A becomes possessed of a dog.

⁹ *Op. cit.*, §119.

yet there may be often persons in the vicinity having such dogs between whom and B complete jural relations will at once exist . . . Still it is conceivable that a right of this kind, a preparedness to have jural relations, might exist where there was no one who had any corresponding duty."¹⁰ An example of the situation last mentioned is where "the legislature should create a new sort of property right in the sea or seabottom below low-water mark or in waste lands belonging to the state, to be acquired by filing a claim in some public office, but available only against aliens. A man who had duly filed his claim might be said to have a right, although there was not for time being a single alien within the jurisdiction of the State."¹¹

These illustrations may be summarized under three juristic situations:

(1) Where certain acts, required by law for the protection of the interests of personal property, security, and other life interests, are not performed, but no invasion of the interest results from what is done or omitted to be done; as, for example, the case of the failure of a municipality after reasonable notice of a defect in the public street, to repair.

(2) Where, as to persons within the jurisdiction, there is an absence, on one side or the other, of the facts necessary to create a jural *nexus* as to certain specific acts; as, for example, when A owns sheep but there is no owner of a vicious dog, or when there is an owner of a vicious dog but no owner of sheep.

(3) Where there is an interest but no person can be found in the jurisdiction who owes a duty in respect of it; as, for example, ownership of the seabottom as against aliens only.

As to the first situation, it is clearly incorrect to say that the mere failure to keep a street in repair is a violation of any duty. This usage, however, is prevalent in technical parlance, but only as an elliptical expression, where the con-

¹⁰ *Id.*

¹¹ *Id.*

sequences of the omission are already present. It is difficult to see the inconvenience of saying that the complete and accurate expression of the duty is to exercise reasonable care to avoid harm to the interest of another. It seems contrary therefore, to the usage of professional speech (properly understood as an elliptical symbol) and to the prevailing scientific analysis to regard an act of the kind under consideration (i. e., a duty *in rem*) as a violation of any right whatsoever. The supposed difficulty presented by the fact that the persons to whom the duty-act is due may be unknown or be not yet within the jurisdiction, seems to rest on the view that the duty in such a case exists *in solido*, while the corresponding rights exist *pro parte*. It is the merit of the late Professor Hohfeld to have brought out clearly that in its normal ambit a so-called right *in rem* is not a single right, but that there are as many rights *in rem* as there are persons who owe corresponding duties.¹² As to all persons—at least as to all those already in the jurisdiction—the municipality in the example given, owes each one a duty not to cause harm to his interests. If strict legal theory requires that when any one of such persons goes out of the jurisdiction, the particular duty which was due to him comes to a legal end, there is no diminution of the duties owed to all other persons. If there is any inconvenience in regarding duties as owed to persons who are not ascertained, this inconvenience is one which embraces all so-called rights *in rem*. The obvious solution is to abolish all rights *in rem*.

As to the second situation, it may be argued that A, an owner of sheep, is as much entitled as against B, his neighbor, not to have his sheep killed by a vicious dog of B's as well before as after B becomes possessed of such a dog. Whether B presently has such a dog or not would seem to be irrelevant. The duty is conceptual and not factual. The law takes no note in prescribing duties whether the person owing the duty has the physical or economic capacity to perform or to violate his duty. This may be illustrated even

¹² Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning," Yale, L. J., XXVI—710 (740 sq.).

in rights *in personam* where the inability of a debtor to pay does not in the slightest way affect the full measure of his legal duty. But the converse of the argument does not follow. The owner of a vicious dog can not owe duties to another with respect to an ownership of sheep, unless such other person owns sheep. The existence and ownership of sheep are the investitive facts which create at once the right and the corresponding duty. If the physical or economic capacity of persons owing duties were to be taken into account for any purpose, then such factors would be essential for consideration for all similar purposes; and it might then be claimed that a resident of New York City has no right not to have an assault and battery committed against him by a resident of Buffalo because the physical distance between the owner of the right and the bearer of the proposed duty is too great to make the violation physically possible. To say, as Mr. Terry does, that correspondent rights are enlarged by the fact that a man stores gun-powder in his house, or becomes editor of a newspaper and may thus utter libelous statements, is clearly a departure from the traditional analysis of rights *in rem*; since it would appear that correspondent rights *in rem* avail not as against persons generally but only against those who have the physical capacity to violate one of the specific duties which the law prescribes for the protection of interests. Whether one agrees with Mr. Terry's analysis or not, it has the great value of emphasizing the complex and varied character of legal duties. When the point of departure in juristic or legal analysis is rights instead of duties, the richness of detail of legal duties as dependent on factual circumstances is sure to be submerged in a meaningless generalization difficult of practical application.¹³

As to the third situation, where there is no person within the jurisdiction who owes a duty, it may be argued that just as the investitive facts of a right are determinative as well of the duty as of the right, regardless of the physical capa-

¹³ It is to be noted, however, that Mr. Terry adopts a double arrangement of rights and duties treated separately: *op. cit.*, §337.

city of the bearer of the duty either to perform it or to violate it, so likewise the determinative fact of such a right as is now under consideration is the place of its legal recognition and not the residence of the bearer or bearers of the corresponding duty or duties. The law has nothing to do with the exigibility of a claim. The right exists where the law promises legal remedies concerning it.¹⁴ If it were otherwise, when a debtor removed to another jurisdiction, the creditor's right would become extinguished, or, at least, would become reduced to the level of an imperfect right. In the seabottom example, when there is no alien within the jurisdiction, there is a protected right in the seabottom as an object of ownership, but there are no corresponding duties, according to Mr. Terry, because there is no one within the jurisdiction who can owe a duty. The only point of contact here with our discussion is that it is a case of a protected right *in rem* where there are no duties; but it seems clear that Mr. Salmond's suggestion is substantially correct, and that Mr. Terry's category of protected rights are not rights at all but only the objects for which rights in the strict sense are created.¹⁵ While Mr. Terry appears to accept the civilian definition of rights *in rem*, his actual analysis of "correspondent" rights *in rem* is a departure in introducing a factual element which disturbs the classical synchronism of right and duty, and, by way of corollary, eliminates the indeterminate element which is the characteristic factor of the definition, by limiting the jural relation to concrete data which serve to identify the persons owing duties. In a certain sense, the persons of incidence of the right are still indeterminate since the investitive facts of the duty may be independent of the investitive facts of the right, but this

¹⁴ It is not within the scope of this paper to discuss the local situation of rights, or questions of private international law which grow out of a recognition of rights in plural jurisdictions.

¹⁵ An idea in some respects similar to Mr. Terry's "Protected Right" is the "Rechtsverband" developed by Puntchart but derived theoretically from Roman law sources, and employed for other technical purposes: "Die Moderne Theorie des Privatrechts und Ihre Grundbegrifflichen Mangel," Leipzig, 1893.

indeterminateness is of another kind than the civilian definition implies since by that definition there is but a single set of investitive facts which mark, at the same instant, the right and the duty.

The next doubt which has been raised against the traditional definition is that suggested by Mr. Salmond in a work celebrated for its clarity of presentation. Mr. Salmond says:

“In defining a real right (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 . . . Even as so explained, however, it can scarcely be denied, that if intended as an exhaustive classification of all possible cases, the distinction between real and personal rights [rights *in rem* and rights *in personam*]*—*between duties of general and of determinate incidence*—*is logically defective.”¹⁶

The author then proceeds to give as an illustration the example proposed by Mr. Terry:

“Why should there not be rights available against particular classes of persons, as opposed to the whole community and to persons individually determined, for example a right available only against aliens? An examination, however, of the contents of any actual legal system will reveal the fact that duties of this suggested description either do not exist at all, or are so exceptional that we are justified in classing them as anomalous. As a classification, therefore, of the rights which actually obtain legal recognition, the distinction between real and personal rights may be accepted as valid.”¹⁷

According to this analysis, there are theoretically duties of three, instead of two, classes of incidence*—*duties of indeterminate incidence where neither the individuals nor the classes have been identified; duties of partly indeterminate

¹⁶ *Salmond*, “Jurisprudence,” §81, p. 208 (3rd Ed.).

¹⁷ *Id.*

incidence, where the class or classes but not the individuals have been identified; and duties of determinate incidence where the individuals themselves have been identified (or may be identified). But since the duties are not duties of classes as such, it would seem that the dichotomy of the original classification can not be assailed even theoretically if otherwise valid. The analysis of Mr. Salmond is based on the misconception, which Professor Hohfeld has corrected,¹⁸ that duties exist *in solido*. Since duties are duties of persons and not of classes, these persons are identifiable, or they are not. Even though the pursuit of identification is narrowed to a class such limitation is still insufficient to identify the actual individual persons who owe duties.

The suggestion, though ineffective as a logical distinction, is still useful in calling attention again to the vagueness of the terminology. The phrasing, "against the whole world" (which Markby calls an "arrogant phrase"), "persons generally," or "indeterminate incidence" lack the qualities of logical precision. The expression "indeterminate incidence" is the least objectionable, and as an ultimate characterization is probably faultless. Its chief defect is that it disregards the legal causation which makes some duties indeterminate rather than determinate. It leaves the mystery unexplored why in one group of cases the persons who owe duties are legally important, while in the other group their identity (more correctly, identifiability) is of no consequence. All these terms are descriptive rather than definitive, and while they are usually sufficient for the purpose, especially when accompanied by concrete illustrations, they fail in conveying any clear-cut distinction in the jural relations to which they are sought to be applied. We gain no more by these interpretations in accuracy than if we called rights *in rem* "general rights,"¹⁹ and rights *in personam* "special rights."

¹⁸ See note 12, *supra*.

¹⁹ A learned colleague (Dean Wigmore, "Select Cases on the Law of Torts," II, (Summary, §8) p. 836) has developed a novel classification of "recusable nexus" (jural relation created with the assent of the person bound) and "irre-

The completest examination of the nature of rights *in rem* is that made by Professor Hohfeld,²⁰ the distinguished leader of the Yale jurisprudence group the unity of which has been recently broken by the untimely death of Mr. Hohfeld, and the later retirement from Yale of an enthusiastic co-worker, Professor Cook. Professor Hohfeld shows that the term, right *in rem*, has a four-fold application: (a) in primary rights; (e. g., rights [strict sense] *in rem*); (b), judicial proceedings (e. g., action *in rem*); (c) judgments and decrees (e. g., decree *in rem*); (d) enforcement of judgments and decrees (e. g., writ of assistance—secondary decree *in rem*).

For the purpose of avoiding the "linguistic contamination" which resides in the term "right *in rem*," Professor Hohfeld substitutes "multital claim," and he defines it as—

". . . One of a large class of fundamentally similar

cusable *nexus*" (jural relation created without the assent of the person bound). Both divisions are theoretically sub-divisible into universal (binding all members of the state) *nexus* and particular (binding only one person or a class) *nexus*. "The group of irrecusable universal *nexus* includes only one topic, torts; here termed general rights." It is clear, of course, that torts are not rights of any kind, but what is perhaps intended is that torts are the wrongs which flow from a violation of the kinds of rights found in an irrecusable universal *nexus*. The doubt is due to what follows: The author says, speaking of "general rights," "The burden of respecting them must be imposed on all persons without exception regardless whether they assent." This seems to go back to the category of rights *in rem*. It may be objected that some torts (unless the prevailing definition is amended, and we think it should be) may present a case of irrecusable particular *nexus* (e. g., liability of a common carrier, innkeeper, public warehouseman). Our own preference would be to have a clear-cut distinction where torts (or delicts) are infringements of rights *in rem* and nothing else, and where quasi delicts would absorb the residual cases of wrongs, now called torts, which are violations of rights *in personam* (e. g., duties resting on individuals who belong to a particular class, and who, to reverse the phrase, owe (contingent) duties *in rem*). The striking feature of Professor Wigmore's new classification lies in that, while it rests on a single *fundamentum divisionis*, is constituted of two elements. The usual classifications rest either on the character of the claim (right), on the content (act to be performed), the persons owing the act (identifiable or not), or the interest (objective situation protected or to be attained). An example may be given of each: claim—perfect right; content—primary right (involving a duty act); persons—right *in rem*; interest—proprietary right. In Professor Wigmore's classification, duties and liabilities are found both in irrecusable *nexus* (e. g., tort (liability); hereditary status (child's duty to parent) and in recusable *nexus* (e. g., contract (duty); false representations (liability)). The characteristic features of this classification are shown by the fact that a violation of a contract duty seems to be an irrecusable *nexus* while deceit (as classified) is a recusable *nexus*.

²⁰ "Fundamental Legal Conceptions as Applied in Judicial Reasoning," Yale, L. J., XXVI, 710.

yet separate rights, actual and potential, residing in a *single* person (or single group of persons) but availing *respectively* against persons constituting a very large and indefinite class of people."²¹

For the contrasting term, "right *in personam*," Professor Hohfeld substitutes "paucital claim" which he defines as—

" . . . A unique right residing in a person (or group of persons) and availing against a single person (or single group of persons); or else it is one of a *few* fundamentally similar, yet separate rights availing against a few definite persons."²²

Professor Hohfeld would have been the first to repel the thought that an approximate definition would suffice, where a definition was attempted. We shall, therefore, not hesitate to examine his definition in the spirit in which his own work was done.

Acknowledgment is due, and it has been made, that Professor Hohfeld has clarified thought by showing that a right *in rem* is correlated by a single duty, but apart from that contribution it may be doubted if he has made any advance in his definition of a right *in rem*. When it is said that a right *in rem* is "one of a large class of fundamentally similar yet separate rights," it may be asked, What is a large class? and, What is the meaning of fundamentally similar? The author was more concerned with the misapplication of the term under discussion than with the definition, in spite of the evident care taken to formulate an exact one. The insufficiency of the definition will be demonstrated if a single case can be found of a right such as the author illustrates which avails against only a few persons or against a definite class of persons. Suppose that A, a land owner, has granted an easement to every person in the state to walk across his land except to B. What is A's right against B with respect to the duty not to come on the land? By the definition it is a right *in personam*. Moreover, it would be, in the author's

²¹ *Op. cit.*, 718—author's italics.

²² *Id.*

terminology, a "unital claim" (i. e., "unique" and "un-companioned"). Yet, there can be no doubt that this right is only a right *in rem*. The proof of the conclusion is A's right against B was a right *in rem* before A made grants of easement to all other persons, and since no new juristic fact has entered as to this *nexus* between A and B the right continues to be what it was—a right *in rem*. Again, to take the illustration given by Mr. Terry, of a right in the seabottom available only against aliens—this is a right against a definite class of persons, and if it may be supposed that there are no rights against non-resident aliens, let it be assumed that X, an alien, becomes a resident. In that case, and by the supposition, there would be a right *in rem* against X only. If these objections are well grounded, we may pass to the inquiry whether a definition can be constructed of a right *in rem* which avoids the criticisms offered.

The attempt has been made to distinguish rights *in rem* from rights *in personam* by the character of the facts which give rise to them; rights *in rem* being based on so-called general facts (e. g., possession) and rights *in personam* being based on so-called special facts (e. g., contract). The terms general and special, however, are not satisfactory as applied to facts. They are of indeterminate meaning. They present no single concept out of which a logical proposition may be constructed. It would seem, moreover, that all facts are special even though it may be urged that some facts give rise to precisely the same kinds of duties, and may, in that sense, be called general. For example, the taking possession of a thing by occupation, has precisely the same general incidence of duties in one case as in another; or, again, the fact of a human being born alive, creates in every case the same general right of corporal integrity, and, likewise, the same general incidence of duties. The last illustration shows the fallacy of the distinction, for the supposed general fact of birth may also create rights between parent and child which are rights *in personam*.

Causal relation, also, has been suggested as the true test of distinction. Rights *in rem* are those, according to

this view, which in their origin involve no causal relation between the parties to the jural *nexus*, and rights *in personam* are those which, on the contrary, show a causal relation between the parties to the jural *nexus*. Thus, in title by occupation, there is no causal relation between the owner of the thing and the persons who owe the negative duties of non-interference with the interest of the owner. Again, in contract, there is a causal relation between the parties to the *nexus* created by offer and acceptance. But this solution also breaks down. One illustration will suffice. Where title to goods is obtained by specification, there is as much of a causal relation between the old and new owner as in the case of a violation of a contract duty, yet the right originated is *in rem*.

The attempt to base the true distinction on the character of the duties suffers the same fate and is universally abandoned.²³ Rights *in rem* correspond, in modern law, to negative duties, but, theoretically, positive duties could be conceived of as the correlates of rights *in rem*, as was shown, at least in principle, in the ancient Hue and Cry legislation. In modern law, there are still occasional instances of conditional jural *nexus* where the conditional duty is *in rem* and of a positive character. The rule of law which requires the finder of a lost chattel to deliver it to a public depository for the benefit of the owner is in point. The conditional duty as prescribed by the law rests on all persons within the jurisdiction, but the absolute duty can rest only on the finder. The conditional positive duty is therefore *in rem*, but the absolute duty is *in personam*.²⁴ On the other hand, rights *in personam* while almost exclusively correlated by positive duties, may yet embrace negative duties, as may be illustrated by the case of a contract of a seller of a business not to compete with the buyer, or the contract of the singer who agrees not to sing in a rival theatre.

²³ Cf. Salmond, "Juris.," §81, p. 207 (3rd Ed.).

²⁴ The category of conditional and absolute duties will not be confused with absolute and relative duties. See Holland, "Juris.," p. 128 (11th Ed.). The right of a *cestui* as against third persons—except perhaps as to an equitable *res*, *Cave v. McKenzie*, 46 L. J. Ch. 564—is also a species of conditional right *in rem*. The condition is the taking of the trust *res* with knowledge of the trust.

Rights are created, modified, and lost through juristic facts. Only the creative facts need to be noticed since neither the alteration nor the extinguishment of a jural *nexus* is ordinarily of any importance in determining its nature. The creative fact alone determines what the right is. Juristic facts are of two classes—acts and events—and both must be considered in an effort to define right *in rem*, since each of both classes of facts may create such a right. In the face of evident difficulty in reaching a right solution, and with a due appreciation of the peril of attempting a construction where destruction is the easier task, we venture to propose that a right *in rem* is one of which the essential investitive facts do not serve directly to identify the person who owes the incident duty. A definition of right *in personam* will be formulated in the affirmative—there the essential investitive facts serve directly to identify the person who owes the incident duty.

It is not probable that this proposal will escape criticism and in order to aid it at the points where misunderstanding might arise, a word of explanation may be desirable.

It will be noticed that while in the normal case the number of persons who owe duties corresponding to rights *in rem* is large, the definition proposed is not based on that characteristic, since it is not essential.²⁵ A crucial illustration will quickly show the range and application of the definition at a decisive point. When a person is born, he becomes invested by the mere fact of birth with certain rights *in rem* and rights *in personam*. For example, a child just born is invested with the right of corporal integrity. This right avails against all persons including even the mother of the child. The investitive fact of the right is the being born alive as a human being. The fact that the mother is A is

²⁵ It has already been suggested above that a right *in rem* may theoretically exist against a single person. It is not an extremely exceptional situation that within the same jurisdiction a right *in rem* may avail against all persons except one who himself may have a similar right *in rem* available against all but the other, and in the same object, with a territorial division of the operation of the respective rights as between the two separate owners. This is very likely to happen in the conflict of common law and registered trademarks. See *Hanover Star Milling Co. v. Allen & Wheeler Co.* (1913) 208 Fed. 513; *Sartor v. Schaden* (1904) 125 Iowa 696, 101 N. W. 511.

not an essential part of the legally investitive fact, since the law takes no account of who the mother is or her matrimonial status. The legally operative fact is birth alive as a human being regardless of who is the mother. In this instance the facts of nature must not be confused with the facts of the law. Since, therefore, the identity of the mother is an irrelevant natural fact, the essential investitive fact does not serve directly to point out the mother as one of the persons who owes an incident duty to the child's right of corporal integrity.

On the other hand, the birth of the child may create a right *in personam* to support against the child's father who may be a hundred miles away at the moment of birth. The father is directly identified by the essential investitive fact; but in this case the essential investitive fact has a wider range than in the first instance. Birth alive, while sufficient for the right *in rem*, is insufficient for the right *in personam* now under consideration. The investitive legal fact includes or may include a wide circle of other facts—marriage of the parents, cohabitation within the period of gestation, birth of the child. The father is directly pointed out as owing a duty by the range of facts which the law will consider as relevant for the purpose of determining the existence of the right claimed. In rights *in rem* the identity of the persons of the incident duties is not material to the determination of the existence of the right.

It hardly needs to be added that the identity shown or not shown by the investitive fact has no connection with actual or psychological identification. The claimant of the right may fail to produce evidence of the identity which the operative facts implicate. Thus one may make a contract with the B Co., an unincorporated association, consisting of a thousand members. The operative facts legally identify each one of the members, although the actual fact of the membership may perchance never be ascertained.

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