

HOHFELD'S JURISPRUDENCE.

The publication in volume form of Professor Hohfeld's essays in the field of jurisprudence and law * makes it opportune and desirable to undertake a discussion and estimate of this gifted scholar's contribution to legal science. The untimely death of Professor Hohfeld removed from the scholastic-legal fraternity a man of great promise and no mean achievement. On every page of his writings is evident the painstaking analysis of a keen mind, eager to penetrate to the reality of things legal and refusing to abide in the easy comfort of a fiction, no matter how well recognized and time-worn.

It is impossible in a brief paper to discuss the many topics treated in the collection of essays in the volume. But the main contribution of a somewhat original nature that established the reputation of Professor Hohfeld as a constructive thinker in matters legal is no doubt in the field of analytical jurisprudence, and is contained in the two articles at the head of the volume, entitled, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," which title the editor properly gives to the volume as a whole. For in a sense the subsequent articles dealing with specific legal questions are written *sub specie*, so to speak, *horum articulorum primorum*, as tests and applications of the theoretical analysis contained in the latter.

The fundamental questions that are raised in the mind of a critic are, has Professor Hohfeld shown that the two correlative terms "right" and "duty," with which most legal writers and jurists are content in their analysis of legal relations and treatment of cases, are inadequate?

Secondly, assuming that this question is answered in the affirmative, is the analysis of Professor Hohfeld through the new terms which he introduces more adequate and satisfactory? And finally, granted that as a matter of legal logic Professor Hohfeld's analysis is more thorough-going and more minute, is it practically of much value in the decision of legal questions,

*Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays, by Wesley Newcomb Hohfeld, edited by Walter Wheeler Cook—New Haven, 1923, pp. 420.

and has it materially assisted Professor Hohfeld himself in his treatment of such questions as exhibited in the legal articles in the volume?

According to Holland, "right" is the one sufficient term which is at the basis of law. The proximate purpose of the law is to create and enforce, to declare and protect, "rights." And these rights so declared and protected by law, *i. e.*, "legal rights," denote in the last instance, pragmatically speaking, the ability of the person or persons having such rights to control the acts or forbearances of other persons, with the help of the state force. This makes the existence of at least two persons necessary for the existence of a right. Given A and B, if A has a right, then B's acts, so far as the right of A extends, are not free, and we speak of B as being under a "duty." But the word "duty" does not really add anything substantial, it merely views the right from another angle. And hence either rights or duties may be put at the basis of law, though it seems preferable to use the former.

Now there is no doubt, and no one denies, that the generic term "right," as thus defined, is subject to subdivision and differentiation. Thus, what Hohfeld calls "power" may be regarded as a specific kind of right. It will be recalled that we defined "right" as the ability to control the acts of another with the aid of the state force. Now take one instance of what Hohfeld calls power, namely, "the power of a thief having possession of money, but not, of course, the 'ownership' thereof, to create a good title in a *bona fide* 'purchaser'" (p. 105). It is clear that this power of the thief is a right, because by virtue of this power he can control the acts of all the world in relation to the money in question. The specific character of a power is that it denotes primarily, as used by Hohfeld, the ability to control legal relations, and through these to control acts, whereas rights which are not also powers denote directly the control of acts. The relation between right and power as here suggested may be illustrated by the relation between "word" and "noun." Every noun is a word, but not every word is a noun. Ultimately both denote realities of the natural and human universe, but the

difference is that while "word," if we omit grammatical and other technical terms, denotes the realities directly, "noun" (and the same thing applies to "verb," "adjective," etc.) denotes primarily a certain grammatical relation, or rather a word of a certain grammatical type, and secondarily a physical reality. Power should therefore be considered as a species of the genus right, rather than as a species co-ordinate with right, as Hohfeld regards it. For there is no doubt that the two have something in common (even in Hohfeld's definition of right), which is, for purposes of jurisprudence, more important than that in which they differ. But Hohfeld is left without a generic term, which is at the very basis of the entire science. The term "jural relation" will obviously not do. Hohfeld himself says, "the strictly fundamental legal relations are, after all, *sui generis*; and thus it is that attempts at formal definitions are always unsatisfactory, if not altogether useless" (p. 36). It is clear from this that Hohfeld has no such generic conception at the basis of his jurisprudence as we defined in connection with the term "right." This would seem to be fatal to the science of jurisprudence. Assuming, then, that we are correct in using the term "right" as the generic term, and power as a species, as man is a species of the genus animal, the next question is, are there other species, and what are they? Hohfeld adds "immunity" as another fundamental legal relation, and defines it as the correlative of disability (= no power), and the opposite, or negative, of liability. To illustrate, if the thief has no power to give good title to a purchaser of the horse he stole, then the owner is not liable to have his ownership divested, is immune from the thief's power, and hence is said to have an immunity. It does not seem to me that we have here a new jural relation. It is still a phacet of the power relation with which we are dealing. If A has a power in relation to B, B has a liability. This is B's side of the power relation. If A has no power in relation to B, B has an immunity. This is B's side of the no-power relation. No one under the old terminology would make right and no-right, duty and no-duty, four legal relations. There is only one, namely, the right-duty relation, which may be or not be.

But Hohfeld introduces still another jural relation, which he calls "privilege." I can not find any precise definition of this term, as indeed we have seen that he objects to definitions in these fundamental legal relations as of not much use. We have to gather the meaning of it from its negative and correlative, from a statement of what it is not and from illustrations. We find, then, that a privilege is the correlative of a no-right and the negative of a duty. Therefore if I have a privilege to do anything, say to eat my dinner, it means that no one has a right or claim that I should not eat it, and that I am under no duty to any one not to eat it. And if it is suggested that I may very well be said to have a *right* to eat my dinner, because everybody else is under a duty to refrain from interference with my eating my dinner, Hohfeld would say that that is a different thing. I do have a right or claim against the world that they shall not prevent my eating my dinner, but that is different from the privilege I have of eating my dinner. Even if no one were under a duty to refrain from preventing my eating my dinner, I would still have the privilege (though not the right) to eat my dinner, so long as I had no duty not to eat it, and no one else had a right that I should not eat it. Or to quote Hohfeld's own words (substituting for the example of the dinner above given, that of a salad owned by A, B, C and D): "A, B, C and D," says Hohfeld, "being the owners of the salad, might say to X: 'Eat the salad, if you can; you have our license to do so, but we don't agree not to interfere with you.' In such a case the privilege exists, so that if X succeeds in eating the salad, he has violated no rights of any of the parties. But it is equally clear that if A had succeeded in holding so fast to the dish that X couldn't eat the contents, no right of X would have been violated" (p. 41). This example brings out clearly the essential nature of privilege as Hohfeld understands it.

There are two objections to this point of view. In the first place, assuming that such a relation as just illustrated has a place in the law, it is fundamental and requires a specific technical term only if it can not be expressed completely in the terms we already have. Otherwise we are merely encumbering our

nomenclature without improving our insight into the conceptual bases of law. What we are after in jurisprudence, which is the science of law, is the *necessary* and *sufficient* basic concepts. To have more terms than necessary is just as harmful to a clear understanding as to have fewer terms than necessary. And the test of necessity is whether a proposed term can or can not be expressed in the terms we already have. Applying this test to Hohfeld's privilege, we find that for me to have a privilege of doing a thing, means as mentioned before, (1) to have no duty of doing the thing, (2) to have no claim or right against others that they should refrain from interfering with my doing the thing, and (3) to be under no duty not to do the thing. In other words, the relation contained in the term "privilege" is completely expressed by using the terms "right" and "duty." This is, of course, no objection to introducing the term "privilege" as a matter of convenience so as to avoid circumlocution. In fact it may be very desirable to do so and the term may be for stylistic purposes almost indispensable. But it is not scientifically fundamental. The concept denoted by it is composite and derivative, and not elementary and original.

Such is the situation on the assumption that the relation expressed by the term "privilege" has a place in the law, is a legal relation. But if we can show that the relation is purely factual and extra-legal, its introduction among legal relations, and especially among fundamental relations, is not merely useless, but positively harmful, because it leads to a misconception. From the point of view of analytical jurisprudence no relation is legal, which the state does not regulate and protect. Privilege, as Hohfeld conceives it, is a relation between persons which the state does not regulate, nor protect. In the illustration of the salad above quoted from Hohfeld, the state says to the parties interested: "In the matter of X's eating the salad, I leave it to your physical strength and caprice. I will not interfere. I will protect neither X in his attempt to eat it, nor you in your effort to prevent him if you so desire." Clearly the state has washed its hands of the whole affair. Looking at the matter from another point of view, we have seen that privi-

lege may be expressed as a relation composed of (1) no right in person of inherence, (2) no affirmative duty in person of inherence, and (3) no negative duty in person of inherence. In other words, it is composed of three *negations* of legal relations. Can a sum of negations be a positive legal relation? You might as well say that my desire to be a rich man is a legal relation, because the state does not forbid me to have the desire.

As a matter of pure logic, therefore, it would seem from the above discussion that Hohfeld's classification of jural conceptions is untenable. To sum up, (1) Hohfeld has no generic term corresponding to Holland's conception of legal right, which is absolutely fundamental and indispensable. (2) Hohfeld's "power" should be classed as a species under the genus right in Holland's sense, and not as a species co-ordinate with right as a co-species. (3) Immunity is superfluous, because it is merely the negation of liability. According to Hohfeld's own account, the right-duty relation is one, and the power-liability relation is another. Immunity-no-power relation is the negative of the latter and not a new fundamental relation. (4) Privilege is (a) superfluous, and (b) irrelevant, because (a) it can be expressed as a combination of three negations of right-duty relations, and (b) because, being purely negative legally, it is not a legal relation at all, and does not belong in jurisprudence.

But the question should be judged not merely from the strictly analytical, logical and theoretical point of view. The purpose of Hohfeld, as he tells us, is not logic and analysis as ends in themselves. He believes that an adoption of his terminology will lead to a more correct solution of legal problems, and actually cites instances where courts have blundered for want of such analysis as he suggests. It behooves us, therefore, to examine those instances to see if the author's contention is borne out.

There is a quotation from the opinion of Lord Lindley in *Quinn v. Leatham* (Hohfeld, p. 42), in which the learned judge argues that the liberty to deal with other persons who are willing to deal with me is a right recognized by law; that its correlative is the general duty of every one not to prevent the free

exercise of this liberty except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him.

Hohfeld finds fault with the judge's reasoning, as well he might. He says: "A privilege or liberty to deal with others at will, might very conceivably exist without any peculiar concomitant rights against 'third parties' as regards certain kinds of interference. Whether there should be such concomitant rights (or claims) is ultimately a question of justice and policy; and it should be considered, as such, on its merits. It would therefore be a *non sequitur* to conclude from the mere existence of such liberties that 'third parties' are under a duty not to interfere" (p. 43). So far Hohfeld's reasoning is, I think, correct. It is, if one will, in essence an argument against the jurisprudence of conceptions and in favor of sociological jurisprudence. The question is to what extent an admitted right or privilege should be protected by preventing others from interfering with it, or more precisely it is a question of the extent of the right, as that measures the extent of the correlative duty in others. And this question of the extent of the right should not be determined from the traditional wording of it, and purely logical consequences drawn as if we were dealing with concepts *in vacuo*. But the question of justice should determine our interpretation of the extent of the right or privilege in a given situation. To this we may all agree.

But when Hohfeld proceeds to tell us that one cause of Lord Lindley's erroneous argument is the lack of distinction between right and privilege, we demur. That the judge identifies right with liberty is perfectly true. He says, "This liberty is a right recognized by law." He also speaks of "a liberty, or right to deal with others." Hohfeld insists that the liberty to deal with others is a privilege and not a right. Hence there is no duty in third parties not to interfere, and Lord Lindley's argument falls to the ground. The judge's error arises from the fact that "there is a sudden and question-begging shift in

the use of terms. First, the 'liberty' in question is transmuted into a 'right'; and then, possibly under the seductive influence of the latter word, it is assumed that the correlative must be 'the general duty of every one not to prevent,' etc." This is decidedly beside the point. Lord Lindley is not interested at all in privilege as Hohfeld understands it. It is not a legal relation at all. When the judge says that the plaintiff was at liberty to deal with other persons, he means that he was entitled to protection against unjustified interference with this legal liberty. There is no flaw in his logic when he adds that the correlative of this "liberty or right" is "the general duty of every one not to prevent the free exercise of this liberty *except so far as his own liberty of action may justify him in so doing.*" If there is any flaw at all, it is in the next sentence in which he seems to ignore his own qualification of the correlative duty, as italicized (by the present writer) in the sentence quoted. For the learned judge continues: "But a person's liberty or right to deal with others is nugatory unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him." Yes, it does affect him, but the interference may be justified by the liberty of action of the one interfering. And the adjustment of their respective liberties in a given situation can not be determined by analyzing the conceptions of right and liberty and duty, but by our ideas of justice and policy. The reasoning in Lord Lindley's opinion has therefore nothing to do with legal terminology.

It is neither possible nor desirable to examine all the instances cited by Hohfeld in defense of his ideas. But one more case may be taken up to show that nothing is gained in the solution of legal problems by adopting the new terminology.

Hohfeld's article in 27 *YALE LAW JOURNAL* 66, reprinted in the present volume, pages 160-193, entitled "Faulty Analysis in Easement and License Cases," discusses *Penman v. Jones* (256 Pa. 416, 100 Atl. 1043), and comes to the conclusion that the majority opinion of the Supreme Court of Pennsylvania is probably erroneous. The error is due, according to Hohfeld,

to faulty analysis, which he treats under four heads. It is the second of these that interests us here (p. 176).

To follow the present, necessarily brief, discussion the reader should consult the article in question. But a few quotations will here be absolutely necessary.

"In 1873, A (Lackawanna Iron and Coal Co.), the owner of a certain large tract of land, sold and conveyed a part of it to B, excepting and reserving to the grantor, its successors and assigns, the underlying mineral estate, in apt words creating a fee therein, together 'with the sole *right and privilege* to mine and remove the same (coal and minerals) by any subterranean process incident to the business of mining, *without thereby incurring, in any event whatever, any liability for injury caused or damage done to the surface of said lot.*'

"Eighteen years after this, that is, in 1891, A, by a single instrument, sold and conveyed to C (Lackawanna Iron & Steel Co.) all the coal under its lands; that is, created subjacent estates in fee, the superjacent estates being, by exception, vested in the grantor. Included in the deed of conveyance, conveying all told about sixty-two parcels, was the subjacent mineral estate below B's lot. While this deed conferred, comprehensively, the 'right' to 'mine and remove the said coal' from the sixty-two parcels, the right and privilege of letting down the surface were given *in specific terms* only as regards a single tract not directly connected with B's lot.

"On the other hand, as regards all the parcels included, the instrument purported to convey 'all the estate, right, title, *interest, benefit, property, claim, and demand whatsoever*' together with 'all and singular the . . . *appurtenances* . . . belonging to the said . . . property or in any wise appertaining to the same.'

"Twenty-four years later A executed a deed to D, a trust company, for 'all and every the real estate or interest of any kind or nature' in certain land including, *inter alia*, the lot previously sold to B and 'the coal and minerals underlying the same.' Subsequently D quitclaimed to E (who had derived title from B), with the express purpose of investing E with the right of surface support against the owner of the subjacent estate.

"In a suit by E against F for breach of a contract to purchase the surface lot, it was held by the Supreme Court of Pennsylvania, Moschzisker and Stewart, *JJ.*, dissenting; that the 'right and privilege' of letting down the surface of B's lot did not pass from A to C by the conveyance of 1891; that such 'right and privilege' did pass by the later conveyance to D; and that by the latter's quitclaim deed the 'right and privilege' were released and extinguished in favor of E, so as to make E's interest perfect as regards the right of surface support." (Pp. 160-162.)

The question in which we are interested is, "Under the conveyance of 1891, did the 'right and privilege' of letting down the surface of B's lot pass to C as an easement appurtenant to the subjacent mineral estate?" (p. 162).

The majority opinion, as we have seen, decided that the right in question did not pass to C as an easement, etc. Hohfeld thinks the court is wrong, and that the erroneous opinion is founded among other things on "the court's confusing of the *subjacent* owner's legal *privilege* of removing surface support, etc., with the *superjacent* owner's right (in the sense of 'legal claim') that another person shall *not* remove the surface support." In support of his statement, Hohfeld quotes four passages from the court's opinion:

(1) "No such *privilege* [of removing surface support ('free from liability')] follows from the mere conveyance," etc.

(2) "The conveyance . . . is properly referable to . . . the coal conveyed and does *not* necessarily amount to a waiver of the right of the grantor to insist upon *support being left for the surface.*"

(3) "The insertion" etc. . . . "indicates an *intention* upon the part of *the grantor not to waive the right of support as to other lots*" [including superjacent lot in question].

(4) "In the present case, whatever right" [privilege] "the coal company retained to *interfere with the surface support* was relinquished by it to the Scranton Trust Company." [D], etc.

Hohfeld finds no fault with passages (1) and (4). They both have reference, he says, to the question whether the "privilege" of A, the Coal Company, has been alienated to another person, C or D. And the court decides that it has not been alienated to C, and that it has been alienated to D. So far there is no confusion. But in passages (2) and (3), we are told, "that question is treated as *identical* with the question whether '*the grantor*' of the subjacent estate has made a 'waiver' of an assumed 'right' [= claim] 'of support' as to B's lot." Since the ownership of the superjacent lot in question was in B, Hohfeld says, it is evident that the grantor of the subjacent lot had no right of surface support to waive or extinguish.

It is clear to the present writer that the question of differentiating between privilege and right has nothing to do with the court's opinion. In the first place, with mere privilege, in the Hohfeldian sense, the court is not concerned at all. When they speak of the privilege of A to let down the surface of B's lot, they mean the right that A has that B shall not prevent him from letting down the surface if A so desires. And this right the court says did not pass to C by the mere conveyance because it is not an easement. Whether they are correct or not in this decision is not the question. Now, as to identifying the right with the grantor's right of support as to B's lot, it is not at all clear that the court so identifies them. It merely associates them. A's right that B shall not prevent the letting down of B's surface is coupled in this case with the right (or power, as Hohfeld would say) of transferring it to C or not as he chooses. This means that A has the choice whether B is to have surface support or not. If A conveys his above right to C, B has no surface support. If A retains it, and does not convey it to C, B has the right of support against C. There is no reason why this power in A can not be called a right of support as to B's lot. And if not identical it is surely associated with A's admitted right that B shall not prevent him from letting down the surface.

We have thus seen that Hohfeld's terminology does not commend itself on the purely theoretical, logical or analytical

side, and, as might have been expected, is not helpful in the practical solution of legal problems.

Professor Hohfeld planned to continue his discussion of legal conceptions and to treat of such "overspreading classifications as relations in personam ('paucital' relations), and relations in rem ('multital' relations); common (or general) relations and special (or particular) relations; consensual relations and constructive relations; primary relations and secondary relations; substantive relations and adjective relations; perfect relations and imperfect relations; concurrent relations (*i. e.*, relations concurrently legal and equitable) and exclusive relations (*i. e.*, relations exclusively equitable)" (p. 67). Unfortunately he did not live to complete his plan. But we have an article on "The Relations Between Equity and Law" (pp. 115-154), a "Supplemental Note on the Conflict of Equity and Law" (pp. 155-159); and a treatment of rights in rem and rights in personam (pp. 65-114).

Professor Hohfeld objects to the traditional terms, "rights in rem" and "in personam," because the expressions "in rem" and "in personam" are also applied to actions or proceedings, to judgments and decrees and to enforcements, but are used here in a different sense. To avoid misunderstanding, different terminology should be employed to denote different conceptions. Besides, the expression "in rem" is misleading. Accordingly, Hohfeld suggests "multital rights" for rights in rem, and "paucital rights" for rights in personam. But Hohfeld goes further and defines the two rights in question in a somewhat different way from the ordinary. "A paucital right, or claim (right in personam), is either 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 respectively against a few definite persons. A multital right, or claim (right in rem), is always one of a large class of *fundamentally similar 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."

The difference between the conception of a right in rem as thus expressed and the traditional conception is that, according to the latter, a single right in rem in the person of inherence avails against all the world, whereas a single right in personam in the person of inherence avails against one or two or a group of determinate persons. According to Hohfeld, a single right, whether in rem or in personam, avails against one person (or one group of persons) only. Thus, essentially, a right in rem is indistinguishable from a right in personam. My right against X that he shall pay me the debt which he owes me is *in itself* indistinguishable from my right against X that he shall not enter on my premises without permission. That the one correlates with an affirmative duty and the other with a negative does not matter. For I may also have a right against X that he shall not carry on the trade of a shoemaker in a given locality. What distinguishes the two kinds of right, according to Hohfeld, is that a multital right (= right in rem) is one which resides in the person of inherence in company with an indefinite number of identical rights, each availing against a different person, whereas if the same right has no company or a very small company of identical rights, it is a right in personam. All that is necessary to change a right in rem to a right in personam is to exempt all persons except one or a few from the duty under which they would otherwise be. Thus, if I give permission to all the world except X and Y to enter on my premises, my right that X shall not enter on my premises is a right in personam, whereas, before I gave this permission to the rest of the world, my right against X was a right in rem. (Professor Kocourek has somewhere called attention to this point before.) This is not necessarily a criticism of Hohfeld's conception, and there is no reason why we should not conceive of a right in rem in this way. That very much is gained by doing so is not very clear.

Hohfeld goes further in his analysis than any other writer in applying the classification, multital (= in rem) and paucital (= in personam), to all the eight legal relations which he establishes, although, usually, we hear of rights in rem and rights in personam, whereas we do not to my knowledge speak of duties

in rem and duties in personam. If we should define a duty in rem on the analogy of a right in rem, we should have to say that a duty in rem is a duty in the person of incidence which he owes to all the world, and a duty in personam is one which he owes to a determinate person or persons only. Thus, I owe a duty in rem not to trespass on premises belonging to others; whereas I owe a duty in personam to pay my creditor what I owe him. A right in personam would thus always correlate with a duty in personam, the two being one and the same legal relation viewed from two different angles, that of the person of inherence in the one case and of the person of incidence in the other. This is as it should be. But take the case of a right in rem. I have a right in rem that no one shall trespass on my premises. If this is one right, where is the duty corresponding to the right? Can we say there is one duty residing in the world as a whole? Obviously not. The world does not owe me that duty as a unit. Every individual has a separate duty not to trespass on my premises. That duty in A, for example, which corresponds to my right, is, according to the above definition, a duty in personam. We have the curious result then that the correlative of a right in rem is a duty in personam. Again, take my duty in rem not to trespass on any premises not belonging to me. The rights corresponding to this duty are many, residing in every individual. The right in A corresponding to my duty is a right in rem. Thus, the right corresponding to a duty in rem is a right in rem, but the duty corresponding to a right in rem is a duty in personam.

Adopting the Hohfeldian terminology the situation is different. A multital (= in rem) duty is a duty in one person which is accompanied by a large number of fundamentally similar duties in the same person. To every such duty there corresponds a right in one person. Is that right also multital (= in rem)? Not necessarily. My duty not to trespass on other people's premises is, according to Hohfeld, really a class of many single multital duties. One of them I owe to A. The corresponding right in A is multital (in rem) or paucital (in personam) depending on whether a great many other persons have duties to A similar to my own. In some cases they have, in some

not. If A gives everybody except me permission to enter his premises, his right against me is paucital, while my duty to him is multital. Or let us start with multital rights in A that no one shall enter on his premises. The duty in B corresponding to the multital right in A is multital or paucital according as B has similar duties to a large number of persons or not. B may have been given permission to enter on all premises except those of A. Then B's duty would be paucital, whereas A's corresponding right is multital. The situation is not much improved. The better symmetry would seem to be here on the side of Hohfeld.

These criticisms are not intended to detract from the value of Hohfeld's stimulating analyses. Whether Hohfeld's ideas are accepted or not, his insistence in precept and example on extreme precision in nomenclature and analysis can not but stimulate others in the same direction to the benefit of clear thinking and fair judging.

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