

BOOK REVIEWS

YEAR BOOK OF 13 RICHARD II, 1389-1390. Edited by Theodore F. T. Plucknett. Spottiswoode, Ballantyne & Co. Ltd., 1929. Pp. 1. 205.

The Year Book of the thirteenth of Richard II. does not make lively reading. It can scarcely have been one of those volumes that Serjeant Maynard carried with him in his coach as he followed the itinerant justices on their rounds, having, as he tells us artlessly, "such a relish" for these records of ancient learning that he always chose one of them for his journey before any comedy. But then the times themselves were not lively, and the lawyers were in no mood for jocosity. Only a few months before the time of this Year Book the struggle between the youthful Richard and the party which had had him in tutelage had come to a head, and a temporary victory for the Lords Appellant had been won. The young king had had to submit to the terms imposed upon him, and his friends were flying in all directions. Tresilian, the Chief Justice of the King's Bench, had been hanged at Tyburn, and five of the other judges had been exiled to Ireland. A sudden and unexpected change, however, took place in 1389, although nobody knew how long it would last. The King, who had reached the age of twenty-two, suddenly appeared before his astonished council on May 3rd, and asked the Lords there assembled how old he was. There was, of course, only one answer to the question, and then he bluntly told them that he required their services no longer. He took up the Great Seal from the Earl of Arundel and gave it to William of Wykeham; thenceforward he was his own master.

It was under these dramatic circumstances that Trinity Term of 1389 opened, and we find Charlton, C. J., and Wadham and Rickhill, JJ., discussing in the Common Pleas, with what composure they could summon, the question as to whether three of four joint-tenants could recover lands of which they had been disseised by a wrongdoer. It appeared that an assize had been brought *en pais* by the three joint-tenants, and it was found by verdict that they and a fourth person had been enfeoffed of the land by deed, but that livery of seisin had been made to the three plaintiffs only. Subsequently the fourth person when he came to know of the deed, dissented from it and disclaimed the land by parol. When the matter came to be discussed in the Common Pleas on the point of law, it was argued by Crosby, with much good sense, that no one could be regarded as acquiring an estate of freehold against his will; but it was held by the Court that a disclaimer by parol, without being in a Court of Record, was valueless—a decision which an anonymous commentator criticises thus on the margin of one of the manuscripts: "*Vide mirabile iudicium.*" Whatever else may be said for this decision, it shows that the law had made a distinct advance towards that respect for the written instrument which later was to displace the ceremonialism of earlier times. Serjeant Crosby, who unsuccessful-

fully argued this case for the plaintiffs, had his revenge five hundred years later. In 1870, Romilly, M. R., in *Peacock v. Eastland*¹ answered the question that had been addressed to the court in 1389 almost in Crosby's *ipsissima verba*.

The Ames Foundation is heartily to be congratulated upon the publication of this volume. It has been edited by Mr. Plucknett with his usual thoroughness and care. All the variant readings in five of the six extant manuscripts have been duly noted in the footnotes, and the editor has chosen the reading that seemed to him most in consonance with probability and the context. He has also set out, where it was available, the actual record of the case from the rolls of the Common Bench, and has by that process greatly assisted the reader's appreciation of the facts in the case and the exact point involved. But he has done more. In order that no source of information should be left unexplored, he has ransacked the titles of Statham, Fitzherbert and Brooke, and made a careful analysis of all the cases in this Year Book which are included in those three abridgements, as well as the cases in the Dunn manuscript abridgement in the Harvard Law Library. The general result is a marvel of completeness.

One other source of information has not been neglected. In 1585, one Richard Bellewe, an Irishman living in London, published a small volume of all the cases from the Year Books of Richard II which were to be found in these three sixteenth century abridgements. This compilation is more remarkable for the literary ardour of the author than for its value as a law book, but it has its use in that it enables a clear impression to be formed as to the activities of the Year Book reporters during the reign of Richard II. It would appear that they were particularly active during the second year and from the fifth to the thirteenth, with the exception of the ninth, year. Then there was a period of inactivity, if not of actual cessation, for five years. During the last four years—from the nineteenth to the twenty-second—the work appears to have had a vigorous revival. There is only one reference in Bellewe to a case in each of the first four years. Another reference to the third year is to be found in Brooke (Avowry, 34). There is one reference in Bellewe to the fourteenth, one to the sixteenth and four to the eighteenth year. It is difficult to understand the ups and downs of law reporting in this reign. Perhaps Richard, when he had got well into the saddle in 1389, sternly discouraged this work, even to the extent of withdrawing the yearly stipend which, according to Edmund Plowden, writing in 1578, had been paid by the king to the "fower reporters of our cases of law, which were chosen men." It probably was not for nothing that the 16th Article of Deposition alleged that the King had refused to obey the laws of the realm and that he claimed at one moment that "his laws were in his mouth" and at another that "they were in his breast."

There is no suggestion of "laughter in court" when these cases were being argued before Charlton, C. J., and his fellows. The uncomfortable memory of Tresilian's body dangling from the gibbet at Tyburn did not make for an easy mind on the part of the judges. Perhaps it was not a bad hit on the part of Shakespeare where he makes John of Gaunt on his deathbed say bitterly to Richard: "Landlord of England art thou now, not King. Thy state of law

¹ L. R. 10 Eq. 17 (1870).

is bond-slave to the law." The only relief from seriousness that the volume affords consists in certain colloquialisms which Mr. Plucknett has introduced into his translation. These add a touch of the picturesque to the narrative and do not detract to any serious extent from the accuracy of the general result. Thus, Rickhill, J., in answer to Brynchesley, who had stated that he would not demur on a point of law to a certain allegation of fact by the plaintiff, said: "*Modice fidei quare dubitasti*", which the learned editor translates as: "Oh thou of little faith, wherefore didst thou doubt?"

But if the language of the lawyers is austere and relevant even to the point of dullness, the personality of those who took part in these discussions is of great interest. Here we see William Gascoigne practising his trade as an advocate and learning the lessons that will make him one of the shining lights of the English bench. Whether or not it was he who had the courage to commit Prince Hal and his dissolute companions to prison, as related in the second part of "King Henry IV", he certainly left a great reputation behind him as a judge. William Hankford, another of the advocates of this year, was one of those who went with Richard to Ireland in 1394, where he was Chief Justice of the King's Bench for about a year. Subsequently he became a justice of the Common Pleas in England in 1398. He is said to have been the judge who was the subject of a very remarkable case which is set out in Hale's Pleas of the Crown. Being very depressed and ill he determined to commit suicide. He gave strict orders to his gamekeeper to shoot any person found at night in his park who would not stand when challenged. He then threw himself in his keeper's way and was shot in pursuance of his own commands. Of the judges Thirning, J., seems to have been by far the ablest. He succeeded Charlton, C. J., as Chief Justice in 1396. Rickhill, J., is probably the first of the eminent lawyers—a sadly lengthy list—who adopted the bad practice of himself acting as his own lawyer. He left a will behind him that was the despair of Lord Coke, so full was it of "imperfections".

But it is not merely the historian and the jurist who will find this volume instructive. Even the practising lawyer—such of them, at any rate, as do not scorn the old books, "the fountains out of which these resolutions issue"—will find much in it to interest him. What could be more instructive on the subject of the growth of the law as to the separate trading of married woman than the case of *Selby v. Palfrayman*? The case of *Prior of Lewes v. Oxford* is an early one on the subject of the enticing away of servants. A careful study of *Shymplyng v. Parfey* will disclose how deeply rooted is the peculiar practice and procedure in an action of account as between accounting parties. Other points of present-day interest are discussed in *Monceux v. Monceux* (attornment by a tenant to a landlord); *Anon. v. Anon.* (bailment by a person not the owner of goods); *Brugge v. Spelly* (dower claimed out of the whole of a manor) and *Onyng v. Morys* (forfeiture for breach of condition in a lease). It is desirable that the ordinary workaday lawyer or judge when, as sometimes happens, he wishes to go back to the origin of a particular rule of law, should not be entirely dependent upon the abridgments or the text-books for the Year Book cases. Even in the House of Lords, *Mandeville's Case*² appears to

²Y. B. 3 Edw. III.

have been cited in 1858 from Coke-Littleton³; and the same case was cited to the Master of the Rolls in Ireland in 1918 from the same source.⁴

This valuable publication represents a further advance in the work of rescue, which is being carried on by the Selden Society in England and the Ames Foundation in the United States. Both these societies have made a place for themselves in the estimation of those lawyers in all countries who draw their inspiration from the common law.

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THE CONSTITUTIONAL LAW OF THE UNITED STATES. By Westel Woodbury Willoughby. (2d ed.) Baker, Voorhis and Company, New York, 1929. 3 volumes. Pp. lxxxiii, 2022.

Willoughby on the Constitution was first published in 1910 as a work in two volumes running to 1390 pages. In the twenty years since its appearance it has won a solid reputation not merely in this country but abroad as the most competent and comprehensive single summary of the law of the American constitutional system. It now enters on a new lease of life in a second edition expanded to three volumes with a total of 2022 pages. Because of the larger size of the pages and the somewhat smaller type, the new edition contains substantially double the amount of material in the original one.

The nature and method of treatment adopted in the work are so well known and its usefulness has been so fully tested by experience as to render description unnecessary and criticism superfluous. The book is all that it is intended to be—it lives up in performance to its purpose of bringing together and placing before the reader in succinct form the rulings of the Supreme Court, case by case, on each of the numerous topics of the general field. Access to any given topic can be had without delay by means of an adequate table of contents and index, and a full table of cases.

A large amount of the material in the original edition related to topics not often subject to litigation, such as expatriation, Indians, territories, annexation, international agreements, organization and procedure of Congress, presidential elections and succession, military law and the like. While this important and necessary material is retained and brought down to date, the practical value of the work for lawyers is very greatly enhanced by the fact that the bulk of the new material now added relates to the headings which are today most prolific of recourse to the courts. This is especially true of the sections on interstate commerce and due process of law. The treatment of the former has been expanded from two chapters of 145 pages to eighteen chapters of 375 pages. The material on due process has grown from one chapter of 21 pages to thirteen chapters of 246 pages. These are undoubtedly the parts of the work in which lawyers will be most interested.

The greater part of the new material on the commerce clause consists of elaborate exposition of the various regulatory statutes in many different fields

³ *Vernon v. Wright*, 7 H. L. Cas. 35, 40 (1858).

⁴ *Hamilton v. Loughhead*, [1918] 1 Ir. R. 227, 234.

passed by Congress in recent years under the commerce power, and the cases construing these statutes—the Interstate Commerce Act and its amendments, the Adamson Act, the Transportation Act of 1920, the Railway Labor Act of 1927, the Air Commerce Act, the Radio Act, the Webb-Pomerene Act, the Packers and Stockyards Act, the Grain Futures Acts, the Webb-Kenyon Act, the Harrison Narcotic Act, the Mann “White-Slave Act”, the Dyer Motor Theft Act and others. The Sherman Anti-Trust Act was fully treated in the first edition, and the treatment is now brought down to date and supplemented by a treatment of the Clayton and Federal Trade Commission Acts. Sixty pages are devoted to the history, powers and duties of the Interstate Commerce Commission. A relatively much smaller amount of new material has been added on the relation between the commerce clause and the powers of the states, although there are new sections on state control of motor vehicles, power of the states to prohibit exportation of natural resources, and the doctrine of the *Shreveport* case and its successors.

Professor Willoughby seldom allows himself the liberty of criticism, for the most part contenting himself with summary and quotation from the cases. In the rare instances where he speaks with his own voice his comments are seasoned with admirable caution, even where they may prompt the reader to dissent in a field of law which more than others leaves room for permitted differences of opinion. Thus he suggests that the Supreme Court has gone too far in extending the word “commerce” to cover the mere passage of individuals across state lines, or the transportation of articles otherwise than by common carrier on the one hand or for the purpose of sale on the other.¹ If one does not, like the late Professor Gray, revere the gods enough to rest content with Marshall’s general assurance that commerce is intercourse, one may still feel a practical difficulty in resting a constitutional distinction between kinds of transportation on the sole basis of intention, and question the validity of drawing a constitutional line between transportation of articles and transportation of persons. Again, one may feel that in discussing *Hammer v. Dagenhart* the author’s note of doubt² is too muted, and that it might have been strengthened by pointing out that the Motor Theft Act, held valid, was likewise aimed at an evil occurring prior to the transportation, and which it was solely within state power to directly suppress. There is room to ask whether the difference in result between the two cases does not rest on the assumption, which might well be asked to justify itself, that the power to discourage theft is somehow different in kind from the power to discourage child labor. It seems going too far to imply that an opposite result in *Hammer v. Dagenhart* would have meant that Congress had somehow an arbitrary power to suppress whatever practices it might regard as “objectionable”.³ There remains the test of reasonableness, which if accepted as satisfactory in so many other places, should not without showing cause be rejected here.

The chapter on the commerce clause as affecting state power to tax obtrudes the difficulty, present in treating every constitutional law topic, of how best to

¹ Vol. ii, pp. 733-4.

² Vol. ii, p. 996.

³ Vol. ii, p. 994.

group the cases to bring out the state of the law. This difficulty is of less consequence in a work planned like Professor Willoughby's to be a mere catena of decisions, than it would be in a more ambitious effort to build them into a pattern of doctrine. But in these tax cases the reader is sometimes impelled to ask for more of the facts of the case than are given. He is not guarded against confusing the special doctrine of *Pullman Palace Car Co. v. Pennsylvania* with the more general principle of the so-called "unit rule",⁴ and is left to discover for himself that the former case has been in substance overruled by *Union Tank Line Co. v. Wright*, and *Wallace v. Hines*, while leaving *Adams Express Co. v. Ohio* apparently undisturbed.⁵

In the chapters on Due Process of Law Professor Willoughby has indulged in somewhat greater freedom to express personal judgments than elsewhere. He notes his inability to distinguish *Moore v. Dempsey* from *Frank v. Mangum* and expresses dissent from the conclusive effect given in the latter case to the judgment of the highest state court, and from the Supreme Court's refusal to examine the facts for itself.⁶ Contrary to the position of Taney and Holmes, he accepts the view which regards the police power, the power to regulate public callings, and the power to regulate industries affected with a public interest as separate and distinct powers.⁷ He acknowledges difficulty in finding a basis for the constitutionality of workmen's compensation laws except in "those employments which the individual cannot be said to have an original common law right to engage in, and which, therefore, when engaged in, are subject to such limitations as the State may see fit to impose".⁸

Important new chapters are added on topics which have come into special recent importance either in connection with the war or otherwise—freedom of speech, war powers, quasi-judicial administrative powers, appointment and removal of officers. In the latter connection he states the Myers case at length,⁹ but without criticism, and mentions the doubt as to whether it covers other than "purely executive" officers—*e. g.* officers having quasi-judicial powers—without expressing an opinion.¹⁰ Under war powers he would include the power to draft persons and property for non-military as well as military service.¹¹

Those parts of the work which are carried over from the first edition require no comment. In its new form the book as a whole is more than ever fit to be of service as a compendium and guide. It makes no pretense to do the more subjective critical and constructive work of law-review articles. One might wish for that reason that more references to such articles had been given in the footnotes. As it is, they are almost wholly lacking, although monographs in book form are more freely cited.

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⁴ Vol. ii, p. 1079.

⁵ Vol. ii, p. 1081.

⁶ Vol. iii, pp. 1715-1717.

⁷ Vol. iii, pp. 1751-2, 1775, 1776-7.

⁸ Vol. iii, p. 1838.

⁹ Vol. iii, p. 1517.

¹⁰ Vol. iii, p. 1526.

¹¹ Vol. iii, p. 1557.

JURAL RELATIONS. By Albert Kocourek. The Bobbs-Merrill Company, Indianapolis, 1927. Pp. xxiii, 482.

When the reviewer was an unsuspecting college student his instructors put him with his betters into a class studying Jacobi's *Vorlesungen über Dynamik*—Mr. Kocourek has revived memories of that earlier struggle with terminology, symbols, and formulas that defied absorption and manipulation. Even the "glossary" he provides for weaklings requires heroic effort. It would be unreasonable, however, to enlarge upon his extraordinary language, since he is not responsible for the weakness of his reader; nor is a reviewer his author's keeper, even when the author happens to be a good friend. Besides, the professional lethargy which taboos all novel terminology is so regrettable that Mr. Kocourek's contempt for it is inspiring. Nor is it unrefreshing to find someone with such old-fashioned faith in analytical jurisprudence that he is content to hew his way with logic and build with graphs and Greek roots. There are even times when one regrets that English is not further replaced by Greek—as when one finds that Claim and Noclaim are "negatives or contradictories" in one sense (89, 364); Claim and Privilege "negatives" in another (81, 85); and Claim and Power "contraries" in a third (81); in addition to which one must distinguish negative "terms" from "situations" and "relations", and both from "non-legal-content relations" (91, 412 n.).

The book deals with matters which, though assumedly implicit in judicial doctrine, have by their very basicness escaped notice in the law's conscious fabrication. Its remarkable novelty needs no comment; and that it is the production of a keen, a tough, and a powerful mind is known to all acquainted with the articles of which it is an outgrowth. Moreover, though earlier scholars put both Hohfeld and Kocourek upon notice of the problem of legal relations, and though a criticism of Hohfeld was the nucleus of Kocourek's system, his own analysis is so much more elaborate, and his substantive additions so considerable, as to make his final product essentially original.

The author is full of acute thoughts. Sometimes one sees no present practicality in them (compare, for example, the mathematical remarks on co-tenancy, 247; and the curious propositions regarding mesonomic relations, 72); still, Mr. Kocourek's faith is that applications may arise. Sometimes there is over-refinement, as in the remark (79) that a duty, as such, cannot be performed by its servus, nor indeed performed at all—"performance" being the exercise of a power by its dominus! Similarly his remarks (ix) upon the "entire inaccuracy" of the phrase "acceptance of an offer"—the offer "no longer exists", the offeree exercises a Power! However, after pointing them out, he himself ignores these baseless niceties. Again, one is surprised by the author's rigidity in controversy, as in his discussion of rights *in rem* (198-99), where, after supposing that an owner's rights be cut down by easements granted to everybody except *A*, he says: "Yet there can be no doubt that his right is still a right in rem"; assuming the very matter in issue.

The reasoning is necessarily primarily logical; but the assumptions underlying it are sometimes peculiar. For example, we say that *A*, holding a \$100 claim, "assigns half" to *X*. But Mr. Kocourek thinks that only matter has the quality of partibility; therefore there cannot be a "division" of *A*'s claim; there is "destruction" of one claim and "creation" of two new claims (244-45, 257). But when \$50 is paid on a \$100 claim, the result is not to "destroy" this and "create" a new claim for \$50, but to "reduce" the larger to a smaller claim (124-25); since the law—*accepting* in this case its language—regards the old claim as "remaining" (231). When *A* grants *B* an easement, what is the effect upon *A*'s former Claim that nobody might trespass (45n, 115-21)—is it "destroyed" against *B* only, or wholly destroyed but new Claims against all others "created", or "destroyed" as to nobody but merely "overshadowed" as to *B* by the easement? If the first, and *C* later trespasses on the way, Mr. Kocourek's reason why *B* has no action is that he "did not acquire the claim previously owned by *A* and now gone out of *A*". The practically minded will see in problems like the above nothing "practical"; the historically minded will shrink from ratiocinations that ignore historical explanations. But justice to the author requires one to remember that in Formal Jurisprudence "we are not concerned . . . with the nature of law or the sources of law" (viii). Hence, for example, the author's indifference to actual law and to history in reference to the power of equity courts to act *in rem* (251); indifference to the actual distinction between vested and contingent remainders (211); indifference to the established conception of an "estate", and traditional views regarding its partibility (332, 255-56); and disregard of actual doctrines respecting the marital *res* (234; *cf.* ix, 243n.). Formal Jurisprudence cannot satisfy historians and practitioners; but the possible demerits of the subject are not demerits of Mr. Kocourek.

The book is cleared of past controversies concerning the Hohfeldian and Kocourekian systems of jural relations, but they are preserved in the appendices. Hohfeld's antithetical terms indicate, with reference to one person, that he either holds some right in the broad sense (a Claim, a Privilege, etc.), or, not holding such, holds a Noright, or is under a Duty, etc. Mr. Kocourek criticized particularly the pairs Privilege-Duty, Immunity-Liability. It is possible to argue that Noduty is a useless universal negative meaning *anything* except Duty; and in places Mr. Kocourek still preserves this argument. A layman would assume his Privilege to act or not act in a matter of law when under no control, no duty in the broadest sense, in *law*. But, though willing to assume that Hohfeld wrote of jural relations only, one might still argue that Noduty, in negating any constraint, denies the existence of any and all legal relations (which constitute constraint); thus Mr. Kocourek, ten years ago, made Hohfeld's Privilege *synonymous* with Liberty, and then attacked this as non-jural—and this is necessarily still his view, though little emphasized, and presented merely (82 n.) as a matter of practicality in terminology. In both views the reviewer agrees with him, but it would seem that the "universal negative" stage of controversy should completely disappear in a presentation of the author's present system, as distinguished from a record of juristic battles.

Again, although leading Hohfeldians now agree¹ with his contention that negative *terms* lack utility for juristic analysis, however useful in speech (vii, 25, 93, 398), and though he admits that "juristic conversion can never become useful in practical legal analysis as applied to the eight basic terms" (26), an entire chapter is nevertheless devoted to this process of Juristic Conversion by which "specific" negatives can be accurately identified (25-8, 96-100), and it is emphasized as a major contribution of his book (vii).

In final result the divergence from Hohfeld's terms is not great. Mr. Kocourek's original emendations of Hohfeld's Privilege-Duty, Immunity-Liability (365-66) made them Privilege-No privilege (or Liberty-No liberty) and Immunity-No immunity. He soon published, however, a distinction² between general and specific negatives, which now becomes (91, 97) one between universal, ultimate, and specific negatives: the first, like *Hohfeld's* Noduty (as first interpreted), disclosing nothing; the second, as in *Kocourek's* No privilege, No immunity, etc., either signifying "by its context" "the absence of any jural relation whatsoever", or, if specific, implying by its context some other jural relation. And the *specific* negative of Privilege then appears as Duty, and that of Immunity appears as Liability (26, 27, 97-100)! This approach to Hohfeld was originally admitted only for quasi-jural relations; but neither then, in his tables, nor in the present volume is there any indication that the agreement is so limited. Similarly as regards Hohfeld's correlatives Immunity-Disability. This was originally pronounced of absolutely no legal content; it was denied that a correlative to Immunity could exist.³ But it is now accepted (23, 97). Thus, of the four Hohfeldian pairs originally rejected—two negatives (Privilege-Duty, Immunity-Liability) and two correlatives (Immunity-Disability, Privilege-Noright)—all except the last (Inability replacing Noright) are now part of Mr. Kocourek's system; though with some variant meanings.

One great departure from Hohfeld is in the meaning of Privilege; which involves another great difference of view respecting the bounds of Liberty and the classification—under Liberty or within the field of jural relations—of relations negative in *substance* ("non-legal-content relations"). In turn, these differences lead to Kocourek's mesonomic ("simple" or quasi-jural) relations. The development of these is the most original feature of his book.

The author's objections in 1915 to Hohfeld's Privilege (371-72, 373-76) were that it included Power and Liberty. To be sure, in his own system, "anything that is a claim is also an immunity and anything that is a power is a privilege" (84, though clearly the last two terms should be reversed)—Claim and Power being the two fundamental concepts (10, 45, 81-4, 162), the other

¹ Corbin, *Jural Relations and Their Classification* (1921) 30 YALE L. J. 226, 229; Clark, *Relations, Legal and Otherwise* (1922) 5 ILL. L. Q. 26, 27.

² Kocourek, *Tabulae Minores Jurisprudentiae* (1921) 30 YALE L. J. 215, 218, 219, 225.

³ Kocourek, *The Hohfeld System of Legal Concepts* (1920) 15 ILL. L. REV. 24, 39.

terms "only special varieties employed for the convenience of speech". But, in Kocourek's system, Privilege is an irregular or abnormal power, "which departs from the general rule" (24, 78, 81). I agree with Mr. Green⁴ that Kocourek's usage preserves the *usual* connotation of "privilege". In segregating and emphasizing Powers of peculiar characteristics, it delimits more clearly Privileges and Powers (for Kocourek, Powers in general, 126-28)—and also Privilege and Duty—than is possible under Hohfeld's definition of Privilege as a universal "negation of legal duty". Of course, there may be difficulties in agreeing upon the general rule to which a Privilege is an exception.⁵ If there exists a general rule that *A* shall not strike *B*, then *A* exercises a Kocourekian Privilege (120, 125) when he strikes *B* in self-defense—but Mr. Page denies that the rule exists.⁶ If it does not, there is still a Hohfeldian Privilege.

Hohfeld's correlatives included two pairs that respectively asserted and negated the existence of rights in the narrow sense (Kocourek's "Claims")—namely, Right: Duty, Noright: "Privilege"; and two pairs that respectively asserted and negated the existence of ability to create, alter, or destroy such rights—namely, Power: Liability, Disability: Immunity. Owing to the different meaning of Privilege, Mr. Kocourek's system is slightly less simple, since *his* pair, Inability: Privilege, clearly has legal content. To Kocourek two of Hohfeld's pairs are not jural relations but the negation of such. His contention seems sound that law does not "deal with" the substantive negatives (Noclaim, etc.) which courts refer to solely in denying the existence of their affirmatives (92, 94, 394-98, 409); nor with Liberties (5, 22); and that it is impracticable to state the law⁷ in terms of either. One need not agree that relations negative in substance "cannot be" jural relations, for it depends on definitions, but a definition that excludes them seems desirable. To say that between *B* and *A*, who has no Power against *B*, there is a jural relation of Disability-Immunity passes the limit of practicality (92-3, 87 n.).

Whether the rights to read one's own book or walk on one's own land are to be classified as Privileges (Hohfeld) or as Liberties (Kocourek) should also be regarded as a question of practicality. Undoubtedly *A* and *B*, if citizens of the same state, may be said to stand, under its government, in political relationships, and to stand within its legal system in legal relations—if we think the statement worth while and *if* (following Hohfeld and Kocourek) we insist that every relation must be directly between two persons. Even the mutual Liberties *permitted* by law seem included in such amorphous "legal" relations. But, to be analytically valuable, these relations must be reduced to less vague forms. One might say that whenever a rule of law is "applicable" to any *A*

⁴ Green, *The Relativity of Legal Relations* (1923), 5 ILL. L. Q. 187, 195.

⁵ Goble, *Terms for Restating the Law* (1924) 10 A. B. A. J. 58.

⁶ Page, *Terminology and Classification in Fundamental Jural Relations* (1921) 4 AM. L. S. REV. 616, 620.

⁷ Kocourek, *Non-Legal-Content Relations* (1922) 4 ILL. L. Q. 233, 235-6; Green, *The Relativity of Legal Relations* (1923) 5 ILL. L. Q. 187, 196.

and any *B* there is a legal relation between them.⁸ But such a concept of applicability is still too broad to aid in the analysis of relations-within-the-law. "The purpose of every legal rule is", for Mr. Kocourek, "to create the formal conditions for the existence of jural relations" (v) in the narrower sense in which he conceives them.

However, after excluding substantively negative relations, Mr. Kocourek recognizes the power to bring suit on a Noclaim as a jural relation, though the Noclaim is not (94-5, 130, 380-81), and in part Hohfeldians agree.⁹ Here we get to Kocourek's mesonomic relations. These "involve persons, an act, and legal consequences" without involving, *in themselves*, potential constraint by adjudication; the constraint being only "contingent and consequential" (61, 67, 178 n., 226). The acts are "non-duty acts, i. e., power acts which are neither in performance of a duty nor in violation of a duty" (18). Such acts are infinite in number; but Mr. Kocourek considers only those which are seen, looking backward, *to have resulted* in the creation of zygnomic relations or to have been capable of creating such. Even thus limited they include all voidable transactions and "ineffective acts", all illegal acts,¹⁰ international law, and very much more. One may, for example, sue or not sue one's debtor, make or accept an offer, make a will, purport to convey a title to which one is a stranger, commit a tort or crime, etc. Shall such acts be left in the anomic field of Liberty, or labeled privileges (Hohfeld), or mesonomic Powers (Kocourek)?

If the last, then, for example, if an owner of land, *A*, grants *B* an easement thereover *A* has still a mesonomic Claim that *B* shall not trespass, since *B* need not plead his easement if sued; although *B* has a zygnomic Privilege to exercise it (118-20, 161, 232). And if *B* has a revocable license to enter *A*'s close, *B* is under a mesonomic Disability to enter and *A* has a mesonomic Immunity against his entry, but *B* has a mesonomic Privilege to enter and *A* is under a mesonomic Inability to prevent it, notwithstanding that *A* also holds a zygnomic Power of revocation (52-4)! It is true, however, that in many simple cases "voidable titles" can be described in terms of mesonomic relations offering no perplexities—and apparently no advantages.

There was a time when Mr. Kocourek saw no utility in distinguishing mesonomic and anomic relations. But by 1920 he had come to feel that mesonomic relations "are so pervasive that they require to be labeled as a type of nomic (legal) relation" (378). Their recognition is rested, in his book, upon the desirability of a complete analytical *history* of zygnomic relations. They are "the missing links in legal reasoning" (in "technical" importance completely overshadowing "other legal relations", vii, 69, 177 n.); they "rationalize the judicial process" and "mark the latest stage reached by legal science" (75). However, selected as he selects them, they bring him very near to Hohfeld's

⁸ 380, 229. Cf. Corbin, *Legal Analysis and Terminology* (1919) 29 YALE L. J. 163, 164; Corbin, *op. cit. supra* note 1, 237; Kocourek, *op. cit. supra* note 7; Clark, *op. cit. supra* note 1, at 30.

⁹ Clark, *op. cit. supra* note 1, 31.

¹⁰ Cf. Green, *op. cit. supra* note 7, 199.

conception of legal relations as covering all situations where societal action ultimately appears, including non-legal-content relations.¹¹

Possibly their recognition is consistent with his insistence that all legal relations are coercive (21, 59, 61, 380, 409) and that "until an act in some way comes into contact with a legal rule, it has no legal significance" (176, 178 n.). For mesonomic relations are, *supposedly*, mediately coercive. And they do "come into contact" with legal rules in the vague sense above indicated. Admitting a principle of law that *A* cannot successfully sue *B* upon a Noclaim, may make *B* an offer, and so on, does it follow that *A* and *B*, before *B* is identified by *A*'s act, are in a jural relation that is analytically useful? Are there even "two persons" (which Kocourek and Hohfeld agree are essential to a legal relation) before *A* picks out his offeree, etc.? A western cowboy might, after becoming a national celebrity, consort with a social queen of the East, and a child might be born to them; but no authority on etiquette would consider him subject, while he remains on a western ranch, to the etiquette of the lady's social circle, and it would seem that "law" might with similar good sense disregard his Power, while on the ranch, to alter, by begetting a child, the *then* existing legal "relations" of himself and *some* lady.

But what then—every jurist will impatiently exclaim (*cf.* 69 with 14, 193)—of rights *in rem*? No difference in practical value appears between *A*'s zygomic duty not to violate George V's Claim *in rem* not to be assaulted and *A*'s mesonomic Power to offer him \$1 for his crown. Mr. Kocourek and the Hohfeldians finally agree in accepting both as legal relations, under different names; and of course my suggestions are jurisprudentially unspeakable.¹² Systematically as Mr. Kocourek deals with mesonomic relations, however, their anomalous character remains. Much space is given (86, 108-10, 159) to the problems of "logical conflict" that they present, apparent in the examples above given.¹³

In the end it is all a matter of definition, whether with respect to relations negative in substance or mesonomic relations.¹⁴ The Hohfeldian definition, running in some applications to the periphery of all relations-within-the-law, seems too extensive for satisfactory analytical service. And Mr. Kocourek's inclusion of mesonomic relations, after excluding Liberty and substantively-negative relations, also seems impractical. Even in our public law (where sovereignty restricts sanctions against States) "imperfect" obligations are very exceptional. Mesonomic relations are of even less practical moment in private law. True,

¹¹ *Cf.* Corbin, *op. cit. supra* note 1, 236.

¹² *Cf.* Kocourek, *op. cit. supra* note 7, 237. Mr. Justice Cardozo has said that "negligence, like risk, is a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all; Bowen, L. J., in *Thomas v. Quartermaine*, 18 Q. B. 685, 694 (Eng. 1852). Negligence is not a tort unless it results in the commission of a wrong". *Palsgraf v. Long I. R. R.*, 248 N. Y. 339, 345, 162 N. E. 99, 102 (1928).

¹³ *Cf.* Corbin, *op. cit. supra* note 1, 234.

¹⁴ *Ibid.*, 50 Green, *op. cit. supra* note 7, 197; Clark, *op. cit. supra* note 1, 31.

being only "quasi"-jural, zygomic relations remain the basis of Mr. Kocourek's system; but the emphasis on the former distorts the system as a whole, and they introduce great complexity with very little practical gain in analysis.

Practitioners will not read this book; for them, its vigor, acuteness, and suggestiveness are wasted. If they should read it they would regard much of its dialectic as sterile, and much of its terminology as irritating fancywork. Greater concessions should have been made to them. It was well, perhaps, to appear once in panoply; but it is to be hoped that Mr. Kocourek will, in another presentation of his system, appear in a verbal state as little removed from nudity as his sense of juristic decency can countenance. There should be less repetition of argument and illustration, less suggestion of past controversies, and the new book should have an adequate index. Such a book *should* be read, both for its sound criticisms of Hohfeld's system and for Mr. Kocourek's views. It is regrettable that more than one Reporter of the American Law Institute, in a "restatement" of the law, should have adopted—before even teachers of law have, in general, seriously studied the issues—the Hohfeldian terminology.

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