§ Law in Context

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Property Law

Commentary and Materials

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What we mean by 'property'

2.1. Introduction

In Chapter 1 we provisionally described property law as being about the legal relationships we have with each other in respect of things. We now need to clarify and refine this.

2.1.1. Property as a relationship and as a thing

First, a terminological point. The term 'property' can be used to describe three different aspects of the relationship between people and things. Consider the statement 'I have a right enforceable against you in respect of this car'. 'Property' can be used as an adjective to describe the *nature of the right* I have in the car (as in 'I have a property right in the car, not just a personal right'). Equally, where you and I have a continuing relationship in respect of the car (perhaps I lent it to you, giving rise to the relationship of bailment between us), the term 'property' can be used, again as an adjective but this time to explain the *nature of the relationship* (as in 'bailment is a property relationship'). Finally, 'property' can be used as a noun to denote the thing itself. So, to change the example, if I rent a flat from you, it is terminologically acceptable to say that both you and I have property rights in the flat, and that the lease relationship between us is a property relationship, and that the flat is the property in which each of us has rights.

The use of the term 'property' to denote the thing is sometimes frowned upon. In their introduction to the idea of property in a standard American property textbook, *The Law of Property*, Cunningham, Stoebuck and Whitman dismiss this usage as loose non-lawyerly talk:

> When a layman is asked to define 'property' he is likely to say that 'property' is something tangible 'owned' by a natural person (or persons), a corporation, or a unit of government. But such a response is inaccurate ... [in at least two ways, including that] it confuses 'property' with the various *subjects* of 'property' ... For the lawyer, 'property' is not a 'thing' at all, although 'things' are the subject of property.

However, this is unnecessarily prescriptive. It *is* necessary to be able to distinguish between the thing in respect of which rights are claimed and the rights themselves, but it is not inevitably confusing to describe both as 'property'.

2.1.2. Conceptualising 'things'

Cunningham, Stoebuck and Whitman also ascribe to the unthinking non-lawyer the assumption that property is about tangible things only. As they point out, this is not true. While there must be some 'thing' in respect of which a property right subsists, it need not be a tangible thing. The 'thing' may exist only at the highest level of abstraction. You can have a property right in a song or in shares in a company, and you can have a property right to the flow of water in a stream or to the passage of sunlight through a window or (conceivably) to a pension or to welfare payments, just as much as you can have a property right in a brick, a car or an area of land. We saw in Chapter 1 in relation to property in human bodies and body parts that the law recognises property rights in some things but not in others, and that the decision that a legal system will make as to whether a particular thing can be the subject of property rights is likely to be dictated by pragmatic and principled considerations of varying and fluctuating weights.

If there are good reasons to treat particular rights as property rights, the conceptualisation of the appropriate 'thing' will rarely provide an obstacle. However, perceived practical difficulties in enforcing the rights may be seen as a problem. We see several examples of this in Chapter 9. In *Victoria Park Racing* v. *Taylor* (1937) 58 CLR 479, for example, the High Court of Australia decided that a racecourse owner who organised horse racing at race meetings did not have the exclusive right to view, report or otherwise exploit the race meetings – he had no right to prevent a neighbour from commercially exploiting the event by broadcasting commentaries on the races on the radio. The court had no conceptual difficulty in accepting that a spectacle such as a sporting event might be the subject of a property right, but one of the reasons why it refused to recognise such a right was the practical difficulties it envisaged in enforcing it. They took the view (perhaps misguided, as we see in Chapter 9) that such a right could not be adequately vindicated by the law except by prohibiting everyone else from overlooking the event, even casually from the top of a bus. This they considered to be impractical, and a strong argument against accepting that a property right could exist in a spectacle such as a horse race.

2.1.3. Distinguishing property rights from other rights relating to things

We have just established that there are some *things* in respect of which a legal system will not recognise property rights. But, even if a particular thing can be the subject of property rights, it does not follow that *all rights* in relation to that thing will be property rights. What distinguishes a property right in a thing from other rights in the same thing is the breadth of enforceability of the right. We designate as property rights those rights that the law will uphold against people in general (either the whole world, or everyone except a specified class of exceptions). A right that the law will uphold, but only against a specific person or persons, is not a property right. The simplest of examples is the car hire example given in Chapter 1.

If you own a car but hire it to me for seven days, the rights you have given me in the car (the right to possession of it for seven days) are clearly enforceable against you: if you try to take the car back within the seven-day period, I can call on the law to stop you. In order to be classified as property rights, however, my rights in the car would have to be enforceable not only against you, but against others who come into contact with the car. So, for example, if the police wrongly tow the car away while it is hired to me, I can demand it back from them if my rights in the car are property rights but not if they are not. Similarly, if the day after hiring the car to me you sell it to your uncle, he will be bound by my rights if they are property rights: he will not be entitled to take possession of the car from me until my hire period has expired. If, however, my hire rights are not property rights, your uncle will be entitled to take the car away from me immediately and my only recourse will be against you, for damages for breach of your contractual promise that I could have possession of the car for seven days.

Again, the decision as to whether a particular type of right should be recognised as a property right is dictated by policy reasons. Because property rights have this characteristic of enforceability against the world at large, they are dangerous things, capable of having adverse effects on people not even in contemplation when the rights were created. The justification for allowing enforcement of a right against one particular person is therefore not necessarily sufficient justification for allowing its enforcement against the world at large.

2.1.4. Rights and other entitlements: Hohfeld's rights analysis

So far we have been talking rather loosely about property 'rights'. However, there is an important distinction to be drawn between being free to use, enjoy or exploit a thing and having a *right* to use, enjoy or exploit it. To make this distinction clear, it is necessary to look more closely at different types of entitlement. Hohfeld's article, 'Fundamental Legal Conceptions' (see Extract 2.1 below) contains a classic analysis of legal entitlements which we can use here. There are interesting and important questions as to the utility and significance of Hohfeld's analysis, in particular as to how far it can be said to be telling us necessary truths about rights, but for present purposes our concern is only to identify different types of entitlement.

Hohfeld was concerned primarily with bilateral legal relationships between people, rather than the unilateral relationship of a person with a thing. He criticised the use of the word 'right' to cover different types of legal entitlement, and the consequent tendency to assume that all legal relationships could be reduced to 'rights' and their correlative 'duties'. He distinguished four different types of entitlement that are commonly subsumed under the general term 'right' – right, privilege, power and immunity – each of which, he says, has its own different opposite (no-right, duty, disability and liability respectively) as well as its own different correlative (duty, no-right, liability and disability). In tabular form this can be shown as represented in Table 2.1.

Table 2.1

Opposites		Correlatives	
Right	No-right	Right	Duty
Privilege	Duty	Privilege	No-right
Power	Disability	Power	Liability
Immunity	Liability	Immunity	Disability

He sees the eight elements appearing in this table of opposites and correlatives as fundamental concepts, best explained by relation to each other rather than by separate definition.

2.1.4.1. Rights and duties, privileges and no-rights

The difference between the first two pairs of correlatives and opposites can be illustrated by adopting Hohfeld's own example of entitlements to enter land. If a plot of land is owned by me rather than by you, in Hohfeld's terms I have a *right* as against you to exclude you from the land, and you have the *correlative duty* to me not to enter (and of course I have a similar right/duty relationship with all other non-owners). As landowner, I may enter the land myself, in the sense that I am free to do so and you have no entitlement to stop me. Hohfeld categorises my freedom to enter my own land (when viewed in relation to you) as a *privilege* or 'liberty' as against you, and your *correlative* absence of entitlement to stop me as a *no-right* as against me. To put it another way, I owe you no *duty* that I will keep off my own land, and you have no *claim-right* to exclude me from my own land: my *privilege* as against you to enter my own land is the *opposite* of a *duty* to you to keep away, and your *no-right* to exclude me is the *opposite* of a *right* to exclude me. Hohfeld uses the term 'claim' to refer to this kind of right: here we use the term 'claim-right'.

The point of making these distinctions becomes clear from another example used by Hohfeld. He points to an example given by J. C. Gray in *The Nature and Sources of Law* (1909), section 48, which he says demonstrates the inadequacy of a crude rights/duties analysis of property relations. Gray says:

> The eating of shrimp salad is an interest of mine, and, if I can pay for it, the law will protect that interest, and it is therefore a right of mine to eat shrimp salad that I have paid for, although I know it gives me the colic.

Hohfeld points out that there are two distinct groups of relations here, the first of which could exist without the second. The first is that Gray has a *privilege* as against non-owners of the salad (who here we will call X) to eat the salad, and X has the correlative *no-right* that Gray should not eat it (in non-Hohfeldian terms Gray is free to eat his own salad and X is not entitled to object if he does so). The second is that Gray has a *claim-right* against X that X should not prevent him eating the

salad, and X has a correlative duty not to interfere (i.e. Gray is entitled to insist that no one prevents him eating it). What Hohfeld means when he says that the first could exist without the second is that it is perfectly possible for Gray to have had a *privilege* to eat the salad even if he did not own it. The example he gives of this is the rather unlikely one of X, now being the owner of the salad, saying to Gray: 'Eat the salad if you can; you have my licence to do so, but I don't agree not to interfere with you.' In such a case, says Hohfeld, Gray has a *privilege* to eat the salad in that, if he manages to do so before X spirits it away, he has not infringed the rights of X or anyone else. He does not, however, have a *right* that X will not interfere with him eating it, in that he would have no ground for complaint if X had thrown it away before Gray got to it.

For our purposes, a more useful example of Gray having a *privilege* but not a *right* to eat the salad would be if shrimp salads grew wild on bushes like blackberries, and he and X came across one: if Gray manages to pick and eat the salad himself he has not infringed the rights of X or anyone else – X has a no-right that Gray should not eat the salad. However, Gray has no *right* to eat the salad, in the sense that he has no right that X will not interfere with his eating it, so if X got there first and either ate it himself or hurled it away, Gray would have no cause for complaint.

It is worth noting that, in the two shrimp salad examples he gives, Hohfeld does not expressly state whether X can eat the salad. It is of course implicit in what he says that, in the first example, Gray may eat it and X may not, whereas, in the second, either of them may do so. Hohfeld does not make this explicit because his focus is not on the positive use of the thing or the allocation of positive use between Gray and X. In Hohfeld's perspective, this is a side issue, peripheral to the central question of the relationship between Gray and X in respect of the shrimp salad, and in particular on the relative precariousness of various different levels of entitlement held by one person – i.e. the extent to which a person can *defend* against outsiders.

However, for our purposes, the allocation of positive use between Gray and X *is* important. There is no difficulty in expressing this in Hohfeldian terms. In the case of our third shrimp salad example (shrimp salads growing wild on bushes), we would say that Gray and X each has a *privilege* to eat the salad, and a *no-right* that the other should not eat it first, which is correlative to the other's *privilege*. This is an important example for our purpose because it describes the situation which occurs where there exists a thing in which no property rights are recognised. In the case of Hohfeld's own first shrimp salad example (where Gray owns the shrimp salad), we would say that Gray has, in addition to his *privilege* to eat the salad, and his *right* that X should not interfere with his eating it (both identified by Hohfeld), a *right* that X should not eat it, the correlative of which is a *duty* on X not to eat it. Strictly speaking, this second *right* of Gray's is subsumed within the first one rather than being additional to it: eating food belonging to someone else is just one way of preventing them from eating it themselves. However, we might want to articulate it as a separate *right* in the hands of Gray if we wanted to have a law whereby X is

allowed to interfere with Gray's eating of the salad *by eating it himself first* but not by any other means. We might perhaps want such a law if shrimp salads were scarce and valuable resources (like water in a desert) which the state chose to designate as things that every person has a *privilege* to consume to satisfy their own personal hunger or thirst, plus a *duty* not to despoil.

2.1.4.2. Privileges and no-rights, and powers and liabilities

The distinction between *right* and *privilege* is therefore a useful tool for property lawyers. Another useful distinction is between *power* and *privilege*. Hohfeld does provide a free-standing explanation of what he means by a 'power'. He defines it as an ability to bring about a change in a given legal relation by one's own volition. An example would be the *power* of A, who is P's agent, to enter on P's behalf into a contract with X. A has the *power* to change P's legal relationship with X by making P contractually bound to X; P has the correlative *liability* to have such contractual duties thrust upon him by A. The *power/privilege* distinction is particularly useful in explaining the property concepts of abandonment and restrictions on alienation.

Abandonment

A, the owner of a gold bracelet (an example we come across in Chapter 11 on acquiring title by possession) has a *power* to change her own legal relation to the bracelet by throwing it away: this extinguishes her interest in the bracelet by the process of abandonment. A component of her ownership interest can therefore be said to be a *power* to abandon it. If she exercises this *power* by throwing the bracelet away, she also and as a consequence changes the relation that the rest of the world has to her in relation to the bracelet. Once the bracelet has been abandoned by A, everyone else in the world acquires a *privilege* as against her to take possession of it for themselves (whereas formerly they had the opposite – a duty owed to A not to take possession from her), plus a *no-right* that anyone else should not do so, plus a *power* to acquire title to it by taking possession of it (although, as we see in Chapter 11, this last element – the power to acquire title by taking possession – is not a new element arising as a result of A's abandonment: it always existed, for reasons explained in Chapter 11).

Effect of restrictions on alienation rights

B, the owner of a watch, has as a constituent of his ownership the *power* to transfer his interest in the watch to X: he has the ability to change the legal relation of both himself and B to the watch, in the sense that by a transfer he can extinguish his own interest and create in X a corresponding interest. It should be noticed that B also has the *privilege* to transfer his interest in the watch to X, in the sense that everyone else in the world has *no-right* that he should not do so.

In both this and the previous example, we describe what the owner can do (abandon the bracelet or transfer the watch) as both a *power* and a *privilege*. Does this mean that these are simply different ways of saying the same thing? The answer

is no: an important point for property lawyers is that the two do not necessarily co-exist. This enables us to understand what happens when a restriction is imposed on the inherent 'right' to alienate a property interest. As we noted in Chapter 1, most private property interests are alienable – in fact alienability is such a common feature of private property interests that it is tempting (but wrong, as we see in Chapter 5) to regard it as a necessary criterion for a private property interest. The holder of an alienable property interest can, however, contract *not* to alienate it. If she does so, she loses the *privilege* of alienating the interest as against the person entitled to enforce the contract (in the sense that that person now has the *right* that she should not alienate, and she owes a *duty* to that person not to alienate). Nevertheless, she retains the *power* to do so (in the sense that, if she nevertheless goes ahead and alienates, she will succeed in extinguishing her own interest in the thing and vesting a corresponding interest in the transferee).

This is illustrated by contractual restrictions on a tenant's right to transfer the lease. Suppose L, the owner of a flat, wants to grant a ten-year lease of the flat to T, at a rent of £10,000 per year. The interest that T would acquire in the flat – a ten-year lease – is a property interest and it is inherently alienable. In other words, T would have the *privilege* of transferring it to anyone she wants at any time (no one would have a right that she should not) and she would also have the *power* to do so (she would have the ability, by entering into a deed of transfer, to extinguish her own interest in the flat and vest a corresponding interest in any transferee). However, L will probably not be very happy with that state of affairs. He is willing to give up possession of the flat to T for ten years because (having taken up references etc.) he is reasonably confident that she will pay the rent promptly and not wreck the flat. But he does not want to run the risk that she will transfer it to someone less trustworthy. So, in practice, L may well insist on making it a term of the lease (i.e. L and T will make a binding agreement, as part of the lease agreement) that T will not transfer the lease to anyone without first obtaining L's consent. The effect of this is to remove T's *privilege* to transfer as against L (L now has a *right* that T should not transfer the lease, and T has the correlative *duty* to L not to transfer). However, it has not affected her *power* to do so (because section 52 of the Law of Property Act 1925 says that a deed of transfer of a legal interest in land *will* operate to transfer that interest). If, therefore, notwithstanding this term in the lease, T goes ahead and enters into a deed of transfer with X, the transfer will be effective to pass the lease to X: X will now hold the lease and T will no longer do so. However, T's *duty* not to transfer the lease will have been broken. One of the remedies that a landlord has if a duty imposed on a tenant is broken is to cancel the lease (by the process of forfeiture), and this can be done whether the lease is still held by the tenant who breached the duty or now held by an assignee. The effect of the unauthorised transfer to X will therefore be to give L the *power* to extinguish the lease by forfeiture (i.e. L will have the ability to alter X's relation to the flat by extinguishing the lease interest in the flat now held by X, and also the ability to alter his, L's, own legal relation to the flat by, in effect, taking back that interest).

2.1.4.3. Powers and liabilities, immunities and disabilities

The nature and significance of this final pair of correlatives appears from an analysis of a fairly common property right – the power of sale held by a non-owner.

A non-owner's power of sale is an exception to the *nemo dat* rule (considered in Chapter 10), which is the basic property principle that, in general, and for obvious reasons, I cannot transfer to you a property interest I do not have. So, if I was now to enter into a deed of transfer with you whereby I purport to transfer to you ownership of Buckingham Palace, the transfer deed will have no effect – you will not thereby acquire ownership of Buckingham Palace. One of the rights, privileges, powers etc. that the Queen has as owner of Buckingham Palace is the *privilege* and *power* to sell it to you, and also an *immunity* from having her ownership divested by anyone else: everyone else has the correlative *disability* (the opposite of a *power*) to alter her legal relationships in respect of Buckingham Palace. As a non-owner I therefore have no *power* to transfer, *unless I acquire the power from some other source* – in which case the Queen as owner of Buckingham Palace will correspondingly lose her *immunity* and acquire instead a *liability* to have her ownership divested by me. I might acquire that power from the Queen: she might have given it to me by power of attorney. Alternatively, I might acquire the power by statute. There are several statutory provisions giving a person power to transfer to a transferee a property interest that the power-holder does not himself have. One example is the power of sale given by section 101 of the Law of Property Act 1925 to a mortgagee, such as a building society, which has taken a mortgage over your house to secure repayment of money it lent you. When you mortgage your house to a building society what happens in legal terms is that you give the building society a property interest (called a mortgage) in the house. You continue to be owner of the house, but the mortgage gives the building society various limited rights/privileges/powers over the house (not as extensive as those of a full owner) which the mortgagee may exercise if you default on repayments of the loan. One of these is a *power* to extinguish both your ownership interest in the house and its own mortgage interest in the house, and to vest the entire ownership in someone else instead. In Hohfeld's terms, by mortgaging your house to the building society you lose your *immunity* from having your ownership divested by someone else. The mortgagee building society has the *power* to sell full ownership of the house to a purchaser, even though it never had full ownership itself. So, if the Queen was to mortgage Buckingham Palace to me to secure repayment of money I had lent her, she would, initially at least, retain ownership of it but would acquire a *liability* to have her ownership divested by me. This of course would have an effect on the value of her interest: we look more closely at this aspect of this example in Notes and Questions 2.1 below.

2.1.5. Hohfeldian analysis of dynamic property relationships

One of the advantages of using Hohfeld's rights analysis is that it can help to chart the changes that take place in the legal relations between parties at different stages

in a dynamic property relationship. We can see how this works by looking at what happens when an option to purchase is first granted and then exercised.

2.1.5.1. Stage 1: Before the grant of the option

Suppose you own development land worth £2 m. At that point, as we have seen, in Hohfeld's terms you have both a *privilege* and a *power* to sell your ownership.

2.1.5.2. Stage 2: Grant of the option

You then grant me an option to purchase ownership of the site at any time within the next five years for £2 m. It is tempting to think of this as a simple grant by you to me of a right (but not a duty) to buy the development site for £2 m. But, as Hohfeld points out, something more complex is going on. As soon as you grant me the option, you have lost your *privilege*, as against me, to sell ownership to anyone else. In other words, your *privilege* as against me has been converted into its opposite, a *duty* to me not to sell to anyone else, plus a *liability* that you may be put under a *duty* to sell to me. I have therefore acquired a *right* that you should not sell to anyone else (the correlative of your loss of *privilege* as against me to sell to whoever you want) and a *power* to put you under a *duty* to sell ownership to me for £2 m.

But, just as important, consider what has *not* happened at this stage: I have not yet acquired a *right* that you will sell ownership to me for £2 m, and you have not yet lost your *power* to sell ownership to whoever you want. Your situation is therefore analogous to that of the tenant in the earlier example who contracted with her landlord not to assign her lease. If you do exercise that power by entering into a deed of transfer transferring ownership to P for £3 m (because the value of the site has gone up), P will acquire ownership. The question will then arise whether the amalgam of *right* and *power* that I had against you (which together make up my interest, the option to purchase) is also enforceable against P. As we saw earlier in this chapter, the answer to this will depend on whether the legal system decides to classify an option to purchase as a property interest in the thing over which the option is created (in which case it will, in appropriate circumstances, be enforceable against P) or as a merely personal interest enforceable only against the grantor personally. If it is enforceable against P, that means, in Hohfeldian terms, that P acquires ownership but with a *liability* that I might exercise my *power* to put him under a *duty* to sell ownership to me for £2 m (giving him a loss of £1 m, which he must try to recover from you as damages for breach of your contract promise that you would sell him ownership *immune* from any such *liabilities*). If my option is not enforceable against P, I will sue you for breach of your *duty* not to sell to anyone else (consider what damages I would get).

2.1.5.3. Stage 3: Exercise of the option

Once I exercise the option, you and I acquire binding obligations to each other: you acquire a *duty* to sell me ownership for £2 m, *and* a *right* that I will buy ownership from you for £2m; I acquire the respective correlatives – a *right* that you

will sell to me and a *duty* to buy from you, both at that price. The constituents of my interest are different from what they were at Stage 2 and my interest accordingly is given a different name: I no longer have an option to purchase, I now have an estate contract. But notice that you have still not yet lost your *power* to sell to someone else. You still have the ability to transfer ownership to anyone else in the world. If at this stage you do in fact sell ownership to P for £3 m, the question of whether my estate contract is enforceable against him (i.e. whether his ownership is subject to a *duty* to sell ownership on to me for £2m) will again depend on whether the legal system chooses to classify estate contracts as property interests or purely personal interests. (In our jurisdiction, as we see in Chapter 12, options to purchase and estate contracts *are* property interests, but the legal system imposes a further condition before they become enforceable against someone who has *purchased* ownership: they must have been registered in a public register – for reasons which are obvious.)

2.1.6. Property rights, property interests and ownership

This brings us on to our final introductory point. It will now be apparent that, in many property relationships each party holds a complex of rights, privileges, duties, liabilities etc. in respect of the thing in question. Despite Hohfeld's strictures, each of the constituent rights, privileges, powers and immunities can loosely but conveniently be called a 'property right' in the relevant thing. The whole complex of rights, duties etc. held by each party is a 'property *interest*' in the thing. Property *interests* are, therefore, complexes of rights, duties etc. held by a person in respect of a thing. In Chapter 1 we noted that the number of different ways in which rights, duties etc. in relation to things can be combined to form property interests is strictly limited. In our jurisdiction there is a relatively short list of recognised property interests, ranging from ownership (which is the most extensive) to such lesser interests as mortgages, easements and charges. The list is exhaustive but expandable: it is always open to Parliament to add a new type of property interest at any time, and on occasions the courts will do so too, either overtly or in the guise of 'discovering' that a claimed type of interest was there on the list all along. We look at this process again in Chapter 9.

Extract 2.1 W. N. Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16

FUNDAMENTAL JURAL RELATIONS CONTRASTED WITH ONE ANOTHER

One of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to 'rights' and 'duties', and that these latter categories are therefore adequate for the purpose of analyzing even the most complex legal interests, such as trusts, options, escrows, 'future' interests, corporate interests,

etc. Even if the difficulty related merely to inadequacy and ambiguity of terminology, its seriousness would nevertheless be worthy of definite recognition and persistent effort towards improvement; for in any close reasoned problem, whether legal or non-legal, chameleon-hued words are a peril both to clear thought and to lucid expression. As a matter of fact, however, the above-mentioned inadequacy and ambiguity of terms unfortunately reflect, all too often, corresponding paucity and confusion as regards actual legal conceptions. That this is so may appear in some measure from the discussion to follow.

The strictly fundamental legal relations are, after all, *sui generis*; and thus it is that attempts at formal definition are always unsatisfactory, if not altogether useless. Accordingly, the most promising line of procedure seems to consist in exhibiting all of the various relations in a scheme of 'opposites' and 'correlatives', and then proceedings to exemplify their individual scope and application in concrete cases. An effort will be made to pursue this method:

Opposites		Correlatives	
Right	No-right	Right	Duty
Privilege	Duty	Privilege	No-right
Power	Disability	Power	Liability
Immunity	Liability	Immunity	Disability

RIGHTS AND DUTIES

As already intimated, the term 'rights' tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense ...

Recognizing, as we must, the very broad and indiscriminate use of the term 'right', what clue do we find, in ordinary legal discourse towards limiting the word in question to a definite and appropriate meaning? That clue lies in the correlative 'duty', for it is certain that even those who use the word and the conception 'right' in the broadest possible way are accustomed to thinking of 'duty' as the invariable correlative. As said in *Lake Shore and MSR Co.* v. *Kurtz*, 10 Ind App 60 (1894):

> A duty or a legal obligation is that which one ought or ought not to do. 'Duty' and 'right' are correlative terms. When a right is invaded, a duty is violated.

In other words, if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty towards X to stay off the place. If, as seems desirable, we should seek a synonym for the term 'right' in this limited and proper meaning, perhaps the word 'claim' would prove the best ...

PRIVILEGES AND 'NO-RIGHTS'

As indicated in the above scheme of jural relations, a privilege is the opposite of a duty, and the correlative of a 'no-right'. In the example last put, whereas X has a *right* or

claim that Y, the other man, should stay off the land, he himself has the *privilege* of entering on the land; or, in equivalent words, X does not have a duty to stay off. The privilege of entering is the negation of a duty to stay off. As indicated by this case, some caution is necessary at this point; for, always, when it is said that a given privilege is the mere negation of a *duty*, what is meant, of course, is a duty having a content or tenor precisely *opposite* to that of the privilege in question. Thus, if, for some special reason, X has contracted with Y to go on the former's own land, it is obvious that X has, as regards Y, both the privilege of entering and the *duty of entering*. The privilege is perfectly consistent with this sort of duty, for the latter is of the *same* content or tenor as the privilege; but it still holds good that, as regards Y, X's privilege of entering is the precise negation of a duty to stay off. Similarly, if A has not contracted with B to perform certain work for the latter, A's privilege of *not* doing so is the very negation of a duty of *doing* so. Here again the duty contrasted is of a content or tenor exactly opposite to that of the privilege.

Passing now to the question of 'correlatives', it will be remembered, of course, that a duty is the invariable correlative of that legal relation which is most properly called a right or claim. That being so, if further evidence be needed as to the fundamental and important difference between a right (or claim) and a privilege, surely it is found in the fact that the correlative of the latter relation is a 'no-right', there being no single term available to express the latter conception. Thus, the correlative of X's right that Y shall not enter on the land is Y's duty not to enter; but the correlative of X's privilege of entering himself is manifestly Y's 'no-right' that X shall not enter.

In view of the considerations thus far emphasized, the importance of keeping the conception of a right (or claim) and the conception of a privilege quite distinct from each other seems evident; and, more than that, it is equally clear that there should be a separate term to represent the latter relation. No doubt, as already indicated, it is very common to use the term 'right' indiscriminately, even when the relation designated is really that of privilege; and only too often this identity of terms has involved for the particular speaker or writer a confusion or blurring of ideas. Thus, Professor Holland, in his work on *Jurisprudence*, referring to a different and well-known sort of ambiguity inherent in the Latin '*Ius*', the German '*Recht*', the Italian '*Diritto*', and the French '*Droit*' – terms to express not only 'a right', but also 'Law' in the abstract – very aptly observes:

> If the expression of widely different ideas by one and the same term resulted only in the necessity for ... clumsy paraphrases, or obviously inaccurate paraphrases, no great harm would be done; but unfortunately the identity of terms seems irresistibly to suggest an identity between the ideas expressed by them.

Curiously enough, however, in the very chapter where this appears – the chapter on 'Rights' – the notions of right, privilege, and power seem to be blended, and that too, although the learned author states that 'the correlative of ... legal right is legal duty', and that 'these pairs of terms express ... in each case the same state of facts viewed from opposite sides'. While the whole chapter must be read in order to appreciate the seriousness of this lack of discrimination, a single passage must suffice by way of example:

> If ... the power of the State will protect him in so carrying out his wishes, and will compel such acts or forbearances on the part of other people as may be necessary in order that his wishes may be so carried out, then he has a 'legal right' so to carry out his wishes.

The first part of this passage suggests privileges, the middle part rights (or claims), and the last part privileges.

Similar difficulties seem to exist in Professor Gray's able and entertaining work on *The Nature and Sources of Law*. In his chapter on 'Legal Rights and Duties' the distinguished author takes the position that a right always has a duty as its correlative; and he seems to define the former relation substantially according to the more limited meaning of 'claim'. Legal privileges, powers, and immunities are *prima facie* ignored, and the impression conveyed that all legal relations can be comprehended under the conceptions 'right' and 'duty'. But, with the greatest hesitation and deference, the suggestion may be ventured that a number of his examples seem to show the inadequacy of such mode of treatment. Thus, e.g. he says:

> The eating of shrimp salad is an interest of mine, and, if I can pay for it, the law will protect that interest, and it is therefore a right of mine to eat shrimp salad which I have paid for, although I know that shrimp salad always gives me the colic.

This passage seems to suggest primarily two classes of relations: first, the party's respective privileges, as against A, B, C, D and others in relation to eating the salad, or, correlatively, the respective 'no-rights' of A, B, C, D and others that the party should not eat the salad; second, the party's respective rights (or claims) as against A, B, C, D and others that they should not interfere with the physical act of eating the salad, or, correlatively, the respective duties of A, B, C, D and others that they should not interfere.

These two groups of relations seem perfectly distinct; and the privileges could, in a given case, exist even though the rights mentioned did not. A, B, C, and D, 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 privileges exist, 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.

Perhaps the essential character and importance of the distinction can be shown by a slight variation of the facts. Suppose that X, being already the legal owner of the salad, contracts with Y that he (X) will never eat this particular food. With A, B, C, D and others no such contract has been made. One of the relations now existing between X and Y is, as a consequence, fundamentally different from the relation between X and A. As regards Y, X has no privilege of eating the salad; but as regards A or any of the others, X has such a privilege. It is to be observed incidentally that X's right that Y should not eat the food persists even though X's own privilege of doing so has been extinguished.

On grounds already emphasized, it would seem that the line of reasoning pursued by Lord Lindley in the great case of *Quinn* v. *Leathem* [1901] AC 495 [a trade union

case, where a union leader threatened industrial action against one of the customers of a butcher, to persuade the customer to stop doing business with the butcher, because the butcher refused to sack all his non-union employees and employ union members instead; the butcher sued the union leader] is deserving of comment:

> The plaintiff [the butcher] had the ordinary *rights* of the British subject. He was at *liberty* to earn his living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This *liberty* involved the *liberty* to deal with other persons who were willing to deal with him. *This liberty is a right* recognized by law; 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.

A 'liberty' considered as a legal relation (or 'right' in the loose and generic sense of that term) must mean, if it have any definite content at all, precisely the same thing as privilege; and certainly that is the fair connotation of the term as used the first three times in the passage quoted. It is equally clear, as already indicated, that such 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. The only correlative logically implied by the privileges or liberties in question are the 'no-rights' of 'third parties'. 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, etc. Yet, in the middle of the above passage from Lord Lindley's opinion 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 work, it is assumed that the 'correlative' must be 'the general duty of every one not to prevent', etc.

Another interesting and instructive example may be taken from Lord Bowen's oft-quoted opinion in *Mogul Steamship Co*. v. *McGregor* (1889) 23 QBD 59:

> We are presented in this case with an apparent conflict or antinomy between two rights that are equally regarded by the law – the right of the plaintiffs to be protected in the legitimate exercise of their trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others.

As the learned judge states, the conflict or antinomy is only apparent; but this fact seems to be obscured by the very indefinite and rapidly shifting meanings with which the term 'right' is used in the above quoted language. Construing the passage as a whole, it seems plain enough that by 'the right of the plaintiffs' in relation to the defendants a legal right or claim in the strict sense must be meant; whereas by 'the right of the defendants' in relation to the plaintiffs a legal privilege must be intended. That

being so, the 'two rights' mentioned in the beginning of the passage, being respectively claim and privilege, could not be in conflict with each other. To the extent that the defendants have privileges the plaintiffs have no rights; and, conversely, to the extent that the plaintiffs have rights the defendants have no privileges ('no privilege' equals duty of opposite tenor).

Thus far, it has been assumed that the term 'privilege' is the most appropriate and satisfactory to designate the mere negation of duty. Is there good warrant for this? ... The closest synonym of legal 'privilege' seems to be legal 'liberty' or legal 'freedom'. This is sufficiently indicated by an unusually discriminating and instructive passage in Mr Justice Cave's opinion in *Allen* v. *Flood* [1898] AC 1 at 29:

> The personal rights with which we are most familiar are: 1. Rights of reputation; 2. Rights of bodily safety and freedom; 3. Rights of property; or, in other words, rights relating to mind, body and estate ... In my subsequent remarks the word 'right' will, as far as possible, always be used in the above sense; and it is the more necessary to insist on this as during the argument at your Lordships' bar it was frequently used in a much wider and more indefinite sense. Thus it was said that a man has a perfect right to fire off a gun, when all that was meant, apparently, was that a man has a freedom or liberty to fire off a gun, so long as he does not violate or infringe any one's rights in doing so, which is a very different thing from a right, the violation or disturbance of which can be remedied or prevented by legal process.

While there are numerous other instances of the apt use of the term 'liberty', both in judicial opinions and in conveyancing documents it is by no means so common or definite a word as 'privilege'. The former term is far more likely to be used in the sense of physical or personal freedom (i.e. absence of physical restraint), as distinguished from a legal relation; and very frequently there is the connotation of *general* political liberty, as distinguished from a particular relation between two definite individuals ...

POWERS AND LIABILITIES

As indicated in the preliminary scheme of jural relations, a legal power (as distinguished, of course, from a mental or physical power) is the opposite of legal disability, and the correlative of legal liability. But what is the intrinsic nature of a legal power as such? Is it possible to analyze the conception represented by this constantly employed and very important term of legal discourse? Too close an analysis might seem metaphysical rather than useful; so that what is here presented is intended only as an approximate explanation, sufficient for all purposes.

A change in a given legal relation may result (1) from some superadded fact or group of facts not under the volitional control of a human being (or human beings); or (2) from some superadded fact or group of facts which are under the volitional control of one or more human beings. As regards the second class of cases, the person (or persons) whose volitional control is paramount may be said to have the (legal) power to effect the particular change of legal relations that is involved in the problem.

This second class of cases – powers in the technical sense – must now be further considered. The nearest synonym for any ordinary case seems to be (legal) 'ability' – the latter being obviously the opposite of 'inability', or 'disability'. The term 'right', so frequently and loosely used in the present connection is an unfortunate term for the purpose – a not unusual result being confusion of thought as well as ambiguity of expression. The term 'capacity' is equally unfortunate; for, as we have already seen, when used with discrimination, this word denotes a particular group of operative facts, and not a legal relation of any kind.

Many examples of legal powers may readily be given. Thus, X, the owner of ordinary personal property 'in a tangible object' has the power to extinguish his own legal interest (rights, powers, immunities, etc.) through that totality of operative facts known as abandonment; and – simultaneously and correlatively – to create in other persons privileges and powers relating to the abandoned object – e.g. the power to acquire title to the latter by appropriating it. Similarly, X has the power to transfer his interest to Y – that is, to extinguish his own interest and concomitantly create in Y a new and corresponding interest. So also X has the power to create contractual obligations of various kinds. Agency cases are likewise instructive ... The creation of an agency relation involves, *inter alia*, the grant of legal powers to the so-called agent, and the creation of correlative liabilities in the principal. That is to say, one party, P, has the power to create agency powers in another party, A – for example, the power to convey P's property, the power to impose (so-called) contractual obligations on P, the power to discharge a debt owing to P, the power to 'receive' title to property so that it shall vest in P, and so forth ...

Essentially similar to the powers of agents are powers of appointment in relation to property interests. So, too, the powers of public officers are, intrinsically considered, comparable to those of agents – for example, the power of a sheriff to sell property under a writ of execution. The power of a donor, in a gift *causa mortis*, to revoke the gift and divest the title of the donee is another clear example of the legal quantities now being considered; also a pledgee's statutory power of sale.

As regards all the 'legal powers' thus far considered, possibly some caution is necessary. If, for example, we consider the ordinary property owner's power of alienation, it is necessary to distinguish carefully between the legal power, the physical power to do the things necessary for the 'exercise' of the legal power, and, finally, the privilege of doing these things – that is, if such privilege does really exist. It may or may not. Thus, if X, a landowner, has contracted with Y that the former will not alienate to Z, the acts of X necessary to exercise the power of alienating to Z are privileged as between X and every party other than Y; but, obviously, as between X and Y, the former has no privilege of doing the necessary acts; or conversely, he is under a duty to Y not to do what is necessary to exercise the power.

In view of what has already been said, very little may suffice concerning a liability as such. The latter, as we have seen, is the correlative of power, and the opposite of immunity (or exemption). While no doubt the term 'liability' is often loosely used as a synonym for 'duty', or 'obligation', it is believed, from an extensive survey of judicial precedents, that the connotation already adopted as most appropriate to the word in

question is fully justified ... Perhaps the nearest synonym of 'liability' is 'subjection' or 'responsibility'. As regards the latter word, a passage from Mr Justice Day's opinion in *McElfresh* v. *Kirkendall*, 36 Iowa 224, 226 (1873) is interesting:

> The words 'debt' and 'liability' are not synonymous, and they are not commonly so understood. As applied to the pecuniary relations of the parties, liability is a term of broader significance than debt ... Liability is responsibility.
>
> ...

IMMUNITIES AND DISABILITIES

As already brought out, immunity is the correlative of disability ('no-power'), and the opposite, or negation, of liability. Perhaps it will also be plain, from the preliminary outline and from the discussion down to this point, that a power bears the same general contrast to an immunity that a right does to a privilege. A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative 'control' over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or 'control' of another as regards some legal relation.

A few examples may serve to make this clear. X, a landowner, has, as we have seen, power to alienate to Y or to any other ordinary party. On the other hand, X has also various immunities as against Y, and all other ordinary parties ... For Y is under a disability (i.e. he has no power) so far as shifting the legal interest either to himself or to a third party is concerned; and what is true of Y applies similarly to everyone else who has not by virtue of special operative facts acquired a power to alienate X's property. If, indeed, a sheriff has been duly empowered by a writ of execution to sell X's interest, that is a very different matter: correlative to such sheriff's power would be the liability of X – the very opposite of immunity (or exemption). It is elementary, too, that, as against the sheriff, X might be immune or exempt in relation to certain parcels of property, and be liable as to others. Similarly, if an agent has been duly appointed by X to sell a given piece of property, then, as to the latter, X has, in relation to such agent, a liability rather than an immunity.

... [T]he word 'right' is overworked in the field of immunities as elsewhere ... [T]he best synonym is, of course, the term 'exemption'. It is instructive to note, also, that the word 'impunity' has the same connotation ...

In the latter part of the preceding discussion, eight conceptions of the law have been analyzed and compared in some detail, the purpose having been to exhibit not only their intrinsic meaning and scope, but also their relations to one another and the methods by which they are applied, in judicial reasoning, to the solution of concrete problems of litigation. Before concluding this branch of the discussion a general suggestion may be ventured as to the great practical importance of a clear appreciation of the distinctions and discriminations set forth. If a homely metaphor be permitted, these eight conceptions – rights and duties, privileges and no-rights, powers and liabilities, immunities and disabilities – seem to be what may be called 'the lowest common denominators of the

law'. Ten fractions (1/3, 2/5 etc.) may, *superficially*, seem so different from one another as to defy comparison. If, however, they are expressed in terms of their lowest common denominators (5/15, 6/15, etc.), comparison becomes easy, and fundamental similarity may be discovered. The same thing is of course true as regards the lowest generic conceptions to which any and all 'legal quantities' may be reduced.

Notes and Questions 2.1

1 One of the advantages of analysing property relationships in Hohfeld's terms is that it makes it easier to ascertain the value of the constituent elements of the relationship. Consider again the mortgagee's power of sale explained in section 2.1.4.3 above. Suppose the Queen, as owner of Buckingham Palace, mortgages it to me to secure repayment of £10 m I have lent her, at a time when ownership of Buckingham Palace is worth £12 m. The effect of this is that she now holds the ownership interest in Buckingham Palace, but I hold a mortgage interest in it as well, and this gives me (among other things) a power of sale, which includes a *power* to divest her of her ownership in Buckingham Palace. The effect of mortgaging her ownership is therefore to give her a correlative *liability* to have her ownership interest divested if she does not repay me the £10 m on time (providing, and intended to provide, an incentive for her to do so). As soon as she mortgages Buckingham Palace to me, the value of her interest in it therefore falls from £12 m to £2 m (consider why). However, my power of sale gives me a power not only to divest her of her interest in Buckingham Palace but also to divest me of *my* interest in it. In other words, by exercising the power, I will vest in the selected purchaser *her* ownership but with an *immunity* from *my* power – which is worth £12 m. If the Queen does not repay my £10 m on time, I will therefore exercise my power of sale in your favour if you pay me £12 m – and I will take out of that enough to repay my £10 m plus my costs in all this, and pass the balance over to the Queen.

2 In Chapter 1 we consider briefly the legal relations we have with others in respect of our own bodies and body parts. Analyse these in Hohfeld's terms.

3 Some publishers of free newspapers currently distribute them by stacking them in stations and inviting people to help themselves. In Hohfeld's terms, what interests do they and you (as a member of the public) have in a newspaper still in the stack? What changes occur when you take a copy for yourself? At what point in the process do you think this change will occur? (On this last point see further Chapter 10.)

4 Why does the distinction between claim-right and privilege matter? Would it be feasible to have a society in which there were no claim-rights but only privileges? What would such a society be like?

5 Does Hohfeld regard owners as having a claim-right to use the thing they own, or only a privilege? If only a privilege, is this consistent with Honoré's conception of the right to use as one of the core incidents of ownership?

2.2. Private property, communal property, state property and no property

2.2.1. Introduction

If we revert for the moment to using 'property rights' as a loose portmanteau term meaning 'property interests', we can say that so far in this chapter we have been looking at property rights held by individuals (or more accurately legal persons, i.e. adult humans or legal constructs such as companies that have a legal personality separate from that of their human representatives). These are private property rights. However, individuals are not the only entities who can hold property rights. In some circumstances, property rights in things can be held by communities, i.e. groups of individuals identified by reference to a particular locality (for example, the residents of Camden) or by reference to membership of a particular class or ethnic or tribal group (for example, the Murray Islanders in *Mabo* v. *Queensland (No. 2)* (1992) 175 CLR 1, discussed in Chapter 4) or by reference to some other general defining characteristic. We can characterise these property rights as communal property rights. Equally possibly, the state may hold all the property rights in a thing, and allocate the use of the thing to particular citizens by administrative rather than property rules. We would characterise this as public or state property.

Classically, political and economic theory seeks to distinguish private, communal and state property rights, and to establish that a regime recognising only one of the three to the exclusion of the other two is by some measure or other superior.

There are well-recognised difficulties with such analyses. First, there are definitional inconsistencies. There is no consensus over what constitutes communal property and state property or (a separate issue) where the dividing line between the two falls. There is not even a clear line between private property and state property: is a state ruled by an absolute ruler who governs by the principle that all rights in things vest in him for the benefit of himself (in other words, the law enforces no rights in things other than his rights in things) a state property regime or a private property regime which vests all property rights in one person? Secondly, there are intermediate positions between the three absolutes, and it is arguably more accurate to describe the range of interests as a continuum rather than as three self-contained categories. Finally, regimes that recognise only one of the three to the exclusion of the other two exist only in the realm of fantasy.

In this chapter, we are concerned primarily with establishing the distinctions between no-property, communal property, state property and private property. In Chapter 3, we return to these distinctions when we consider the economic

justifications made for the institution of property in general, and the related arguments as to the relative efficiency of these different types of property holding.

2.2.2. Distinguishing no-property, communal property, state property and private property

2.2.2.1. No-property: ownerless things

There are some things in respect of which no one has property rights. In Hohfeldian terms, each of us has a *privilege* to use such things (we are free to use them, and the rest of the world has the correlative no-right to object to us doing so), but none of us has the *right* not to have our use interfered with by others, nor the *duty* to abstain from interfering with anyone else's use. To put it in terms of exclusion, none of us has the right to exclude others from such things, nor do we ourselves have the right not to be excluded from use. For example, we cannot complain if careless or profligate use by others spoils or depletes the supply.

Examples are commoner than one might think. One immediately thinks of natural resources which are either not scarce because abundant in supply and not highly valued (like rats in sewers or leaves fallen from trees in autumn) or not scarce because not exhausted by use (like air and sunlight). However, there are also highly industrialised examples which have been created for commercial purposes but to which, for one reason or another, all of us are given free access. These would include free newspapers, radio signals from commercial radio stations, and access to material downloadable from the Internet.

All of these are characterised by the feature that we each have the privilege to use them but no right to complain if our use of them is interfered with by others. *Hunter* v. *Canary Wharf* [1997] AC 655, discussed in Chapter 6, is a case in which the House of Lords decided that terrestrial television signals come within this category. It was held that, although everyone has a *privilege* to receive them, no one has a *right* to do so. Consequently, residents in the Isle of Dogs were held not to be entitled to complain when Canary Wharf Ltd built Canary Wharf Tower which, because of its size and construction, interfered with their television reception by preventing television signals reaching buildings which fell within its 'electro-magnetic shadow'.

It will be apparent from some of the materials discussed in this chapter that these no-property things are sometimes referred to as open access communal property, but for present purposes that term can more usefully be reserved for distinguishing the next category.

2.2.2.2. Open access communal property

Distinction between open access and limited access communal property

The defining characteristic of communal property is that every member of the community has the right not to be excluded from the resource. This is what

distinguishes communal property from no-property. An individual who is a member of the community therefore has not only a privilege to use the thing, but also a right not to be excluded from it, and consequently everyone else in the world has a correlative duty not to interfere with their access to it. Communal property may be either open access (everyone in the world is a member of the community), or closed or limited access (membership of the community is limited to those who share a common characteristic such as membership of a club or tribe or residence in a particular locality).

Distinction between open access communal property and no property

Economists tend to regard open access communal property either as the same as no-property or as the same as public property, but in important respects it is distinct from both. It is the right of each member of the community not to be excluded that distinguishes open access communal property from no-property. There are many examples of facilities which are available for public use and to which individual members of the public have a *right* of access, which they would not have if the facilities were, like Internet access, genuinely no-property. We can give as examples of these the right to use public parks and walk along the pavements of public roads. Again, the House of Lords decision in *Hunter* v. *Canary Wharf* [1997] AC 655 points up the distinction. If the claimants had had a right rather than a privilege to receive television signals (i.e. if television reception was open access communal property rather than no-property) they would have had a right not to be subjected to interference with their television reception and they would have succeeded in their claim against the builders of Canary Wharf Tower.

Distinction between open access communal property and state property

Open access communal property differs from state property in two ways. First, in the case of open access communal property, the facility is not necessarily provided by or owned by the state, or indeed by any other public body. So, for example, a public right of way (which is open access communal property) may lie over private land just as it may over the pavement of a road provided by the highways authority. *Hunter* v. *Canary Wharf* is instructive here as well. It would have been open to the House of Lords to find that the residents of the Isle of Dogs had a right not to have their television reception obstructed (that television reception was open access communal property rather than no-property) even if television signals in this country were provided solely by private bodies. The fact that every member of the public is free to use a thing and has a right not to be excluded from it does not make the thing (or the right) into state property.

The second distinction lies in the nature of the relationship between the state and the member of the public in respect of the facility provided by the state. If the user has the right not to be excluded from use by the state (i.e. the state cannot

prohibit the use by that individual without changing the law) then we can usefully categorise this as open access communal property rather than as state property. If, on the other hand, the state provides the facility and merely licenses users to use it by permission revocable by administrative action, then we can call this state property.

Adopting this last distinction, library books in public libraries would be categorised as state property, whereas public highways would be open access communal property.

Distinction between allocation and provision of resources

Note that, in two important respects, open access communal property does not provide a guarantee of use for every member of the community. First, the question of *allocation* of available resources – whether everyone in the world should be entitled to use them (open access communal property), or merely be free to use them (no-property) or whether use should be restricted to a limited class (limited access communal property) – is quite distinct from the question of whether anyone should be made responsible for ensuring that the resources are available in the first place. Consequently, a right of every member of the public to unimpeded use of a public park, or the pavement of a public road (the privilege to use and the right not to be excluded), does not connote a correlative duty on the owner of the site to provide the park or pavement in the first place, or to continue to provide existing ones (any more than a right for Isle of Dogs inhabitants to be free from interference by Canary Wharf Tower with their reception of television signals would have imposed a duty on the BBC or anyone else to transmit signals in their direction). There may of course be other reasons why the provider of the facility is not entitled to withdraw or discontinue it. The provision of public parks by local authorities is regulated by statutes which give them no power to divert the land to other uses except in specified circumstances and by following prescribed procedures, but this does not mean that the right of members of the public to use public parks puts local authorities under a duty to provide them. Similarly, private landowners over whose land public rights of way are exercisable have a duty not to obstruct the way, but no duty to maintain it or otherwise ensure that it is available for use.

Secondly, your privilege to use, and your right not to be excluded from, open access property are subject to the like privilege and right of everyone else. In other words, what you have is not an exclusive right to use but a right to use *in common* with everyone else. You may no more interfere with their right than they may with yours. This robs you of any right to complain if someone else is already sitting on the bench in the park where you wanted to sit, or standing on the bit of pavement you wanted to stand on.

Regulation of communal property

This last point reveals an important feature of most types of communal property, whether open access or limited access. Most real-life examples of communal

property involve rights to make a *particular* use of a resource, rather than a right to do whatever the users want with the resource, and they tend also to be highly regulated. Sometimes regulation is by formal legal rules (which, for example, tell you quite explicitly what you can and cannot do in public parks or on public rights of way over private farmland) but it may also be by tacitly accepted conventions about behaviour, establishing, for example, that the first person to get to the bench may sit there for as long as she wants.

2.2.2.3. Limited access communal property

Limited access communal property (sometimes referred to as restricted access or closed access communal property) differs from open access communal property in that membership of the community is restricted to a specific class. Each member of the community accordingly has not only a *privilege* to use the resource (everyone else in the world, whether a member of the community or not, has *no-right* to object), and a *right* not to be excluded (giving everyone else a duty not to interfere with her access): she also has a *right* to exclude all non-members of the community.

Distinction between communal property and co-ownership

Limited access communal property is not the same as private co-ownership. Private co-owners are each individually identifiable, and each is entitled to an identifiable share in the resource, even if the share is not yet choate or severable. Members of a family, or a group of friends, or business associates, or members of a club, can hold property as private co-owners. If they do, each individual has a transmissible property interest, i.e. a *power* to assign their share to anyone else, although in practice they may contract with each other not to exercise the power (consider why). Members of a community, on the other hand, are identified by reference to a defining characteristic, and no individual member has a transmissible interest. If the residents of Lambeth have a right to play games on my field (as the inhabitants of Washington were held to have in the playing fields owned by the council in *R. (Beresford)* v. *Sunderland City Council* [2004] 1 AC 889) each resident has a right not to be excluded from the field, a privilege to use the field himself and a right to insist that no non-resident uses it, but he has that interest only because and for so long as he has the defining characteristic of residing in Lambeth. Consequently, he has no power to transfer his interest. If he tries to sell it to his aunt who lives in Wandsworth, the aunt will get nothing because she lacks the necessary characteristic of living in Lambeth; if on the other hand he tries to sell it to a fellow resident of Lambeth, he has nothing to give that the fellow resident does not already have.

However, although this distinction is clear in principle, in practice there are borderline institutions which do not fit easily into either category. We have already said that members of a club can be seen as private co-owners, each of whom has *power* to transmit her share in the club's assets to outsiders but has contracted out of her *privilege* to do so *vis-à-vis* the other members, and indeed this is the conventionally accepted legal analysis as we see in Chapter 16. However, there

are difficulties with this analysis, and arguably it is more accurate to describe the club members as communal owners of the club's assets, with each individual member's interest in the assets arising on and by virtue of their acquisition of the defining characteristic of membership, and ceasing automatically when they lose that characteristic (by resigning or dying). Such an interest would by its nature be intransmissible. We look at this particular problem more fully in Chapter 16.

Again, there are types of communal property where each individual user's entitlement *is* tradable, either fully or to a limited extent. Glenn Stevenson records this as one of many variations of communal use currently in use in Swiss alpine grazing (Stevenson, *Common Property Economics*), and as we see in Chapter 5 communal property interests of this type (usually referred to as rights of common) exist in this country as well. Indeed, the recent House of Lords decision in *Bettison* v. *Langton* [2001] UKHL 24, discussed in Chapter 5, has had the effect of converting nearly all communal grazing rights in this country into fully tradable rights (i.e. rights that can be sold separately from the adjoining farms they were originally intended to benefit). Nevertheless, such rights still involve communal resource use and so for most purposes it makes sense to put them in the limited access communal property category rather than the private property category.

Particular use rights rather than general use rights

Like open access communal property, limited access communal property tends to involve particular use rights rather than general use rights (leaving each member of the community free to make a specific use of the resource in common with all the others, rather than allowing each to do exactly as he wishes with it). Also, and again like open access communal property, it tends to be highly regulated, usually, although not necessarily, by self-regulation rather than by regulation by an outside body.

2.2.2.4. State property

Property interests in things may be vested in the state rather than in individuals or communities. When ownership of a particular resource is vested in the state (or any branch of the state, such as a local authority) individuals may nevertheless be allocated use rights of various types, or even limited management or control rights. However, these rights would not be property rights, in the sense that they would be personal to the holders and not transmissible. So, for example, in the Soviet Union a family which was allocated an apartment might have been granted a tenancy of the apartment that was lifelong and inheritable, but the management and control rights would be held by various government departments, and no one would be able to sell the apartment or grant leases of it. We would therefore say that the apartment was state-owned rather than privately owned. Similarly, state-owned shops in the Soviet Union might have individuals who acted as managers, but they would be managing on behalf of the relevant government departments (for fuller details of both examples, see Michael Heller, 'The Tragedy of the Anticommons', referred to again in the next section).

2.2.2.5. Anticommons property

If open access communal property denotes a resource which everyone has a privilege to use and a right not to be excluded from, but no right to exclude others from, its mirror image would be a resource which everyone has a right to exclude all others from, but no right or privilege to use for themselves. At first sight, it is difficult to think of a real-life example of such a form of property – usually called anticommons property, as the antithesis of communal property. Its theoretical existence seems to have been first suggested by Frank Michelman in 1982 (in 'Ethics, Economics and the Law of Property', p. 3). However, the usefulness of the concept did not become apparent until it was reformulated by Michael Heller a few years later. In a seminal article, 'The Tragedy of the Anticommons', Heller used the term 'anticommons' to describe a situation in which the ownership rights to a resource are distributed between multiple owners in such a way that each has the right to prevent use by the others, and hence none has the privilege to use for himself (except by consent of all the others, which they are freely entitled to withhold). A simple example (given by Lee Anne Fennell in 'Common Interest Tragedies', discussing Heller's analysis) would be a garden communally owned by ten adjoining houseowners, each of whom has put a separate lock on the gate leading into the garden, so that each houseowner has effectively excluded all the others, but cannot herself use the garden without first persuading all the other houseowners to unlock their locks. However, Heller produced his reformulation in an attempt to explain a phenomenon he (and others) had noted in post-Soviet Moscow. After state ownership of shops was relinquished, shops in Moscow nevertheless remained virtually empty of consumer goods, while at the same time flimsy privately owned metal kiosks, crammed with goods, mushroomed on the pavements outside. Why did the kiosk operators not move into the shops, either by taking leases or by coming to some other arrangement with the shop-owners to operate from there? His diagnosis of the problem was that, because property rights in shops were distributed among a number of different bodies in an attempt to placate or compensate socialist-era stakeholders, shops had become anticommons property: no single individual was given full ownership rights. Instead:

> [i]n a typical Moscow storefront [shop] one owner may be endowed initially with the right to sell, another to receive sale revenue, and still others to lease, receive lease revenue, occupy, and determine use. Each owner can block the others from using the space as a storefront. No one can set up shop without collecting the consent of all of the other owners. (Heller, 'The Tragedy of the Anticommons', p. 623).

This made it prohibitively difficult for the kiosk operators to come to any arrangement with the shop-owners, whereas it was relatively easy for them to operate illegally from the pavement: all they had to do was bribe the local officials responsible for keeping the pavements free from obstruction and pay protection money to the Mafia. As one kiosk operator explained to Heller:

> You have to pay bribes to get permission to put your kiosk up on a promising site. And, even after things are all set up, you have to pay bribes to make sure they don't close you down. The mafia is the easiest of all to deal with. They don't charge too much, they tell you exactly what they want up front, and when an agreement is made, they live up to it. They don't come back asking for more ... The hardest part was finding out who was the right [official] to bribe. (Heller, 'The Tragedy of the Anticommons', p. 643)

Unsurprisingly, Heller's conclusion is that anticommons property is inefficient because it tends to cause underuse of the resource, a conclusion that is even more apparent from Fennell's locked garden example. While this articulation of the principle is new, the principle itself is not, and we come across it again in Chapter 8 when we look at the highly complex systems the law has evolved to regulate fragmentation of ownership rights between multiple owners.

2.3. Economic analysis of property rights

2.3.1. What economic analysis seeks to achieve

Economics provides a useful tool for the analysis of property rights. As we see later, it has limitations: anyone viewing property solely from an economics perspective would be in danger of forming a distorted view of how societies do and should function. One of the principal criticisms made of economic analysis is that it does not always recognise its own limitations. In general, it aspires to be positive rather than normative, i.e. to describe what *does* happen in the world and predict the consequences of given actions, rather than to prescribe what *ought* to happen and what ought to be done. However, the line between prediction and prescription is easily crossed, and it is easy to confuse (consciously or unconsciously) the *is* with the *ought*, and to present what are essentially normative statements in the guise of statements of inevitable consequences.

Economics was famously defined by Lionel Robbins in 1935 as 'the science which studies human behaviour as a relationship between ends and scarce means which have alternative uses' (*An Essay on the Nature and Significance of Economic Science*). As applied to property rights, the key factors in economics are scarcity of resources and individual choice. As Anderson and McChesney point out (*Property Rights: Co-operation, Conflict and Law*, p. 2), economics emphasises that 'life is a series of choices among alternatives, choices because we face limits. There is only so much time, so much money, so much land, so much oil, and so forth.'

In their introductory explanation of the economic perspective on property rights, Anderson and McChesney start with the basic principle that it is the individual (by which they mean the natural person) which forms the basic unit of analysis. They see economic analysis as being concerned with individual preferences and individual actions rather than with the preferences and actions of abstract entities such as corporations, or communities, societies or governments. Analysis of the preferences and actions of those abstract entities can properly be

done only by looking at the preferences and actions of their constituent individuals: 'Not being animate entities, none can act except through the decisions of individuals capable of choosing ... [C]ollective action can only be a manifestation of individual preferences and actions shaped by constraints and conditioned by rules for aggregating individual preferences and actions' (Anderson and McChesney, *Property Rights: Co-operation, Conflict and Law*, p. 3)

In the extract below, Anderson and McChesney give four postulates which they see as guiding the economic analysis of property rights, taking the individual as the basic unit of analysis.

Extract 2.2 T. L. Anderson and F. S. McChesney, *Property Rights: Co-operation, Conflict and Law* (Princeton University Press, Princeton, 2003)

POSTULATE 1: INDIVIDUALS CHOOSE UNDER CONDITIONS OF SCARCITY; NO ONE HAS AS MUCH OF THE WORLD'S RICHES AS HE WOULD LIKE

As already noted, economics begins with the fact that choices are made subject to constraints. Because resources are limited, we must choose which of our unlimited desires to satisfy, meaning we must make tradeoffs. In a world of scarcity, one use of an asset precludes another and, thereby, generates an opportunity cost ... The cost of breathing clean air, building houses, or irrigating crops is measured in terms of the alternative uses that are foregone. Land occupied by a house cannot provide grizzly bear habitat. Water used for irrigation cannot provide a free-flowing stream in which fish can spawn.

POSTULATE 2: INDIVIDUALS ACT RATIONALLY TO PURSUE THEIR SELF-INTEREST BY CONTINUALLY ADJUSTING TO THE INCREMENTAL (MARGINAL) BENEFITS AND INCREMENTAL (MARGINAL) COSTS OF THEIR ACTIONS

Methodological individualism presumes that individuals are rational. By rational we mean that people have well-defined preferences and act systematically to maximize the amount of those things (tangible or intangible) that satisfy those preferences, subject to the cost of achieving satisfaction. An individual's maximization of his satisfaction does not necessarily imply selfishness. Even a person satisfied with what he had for himself would want more for his family, his friends, the members of his church or club, or others. Human desires (including desires to see others better off) are limitless.

But resources are not limitless. Rational maximization therefore requires individuals to weigh the benefits and costs that their choices entail, asking what additional gains there are from additional amounts of a good or service and what must be sacrificed (foregone) to obtain the gains. This does not mean that individuals always measure perfectly and never make mistakes. In fact, making mistakes bears out the assumption of rationality: information is costly to obtain (scarce), so rational actors will never have perfect information when they make their choices ...

POSTULATE 3: SCARCITY AND RATIONAL BEHAVIOR RESULT IN COMPETITION FOR RESOURCES, AND SOCIETAL RULES GOVERN HOW THIS COMPETITION PROCEEDS

Rational maximization of one's satisfaction in the face of resource scarcity means that individuals will compete to own resources conducive to their personal welfare. People will invest time and effort vying with others to determine who gets how much of the resource, and under what conditions. In the case of movie theater seats on opening night, one must arrive early to take first possession ...

The competition for open access resources is costly because the same time and effort spent competing for resources could be expended in other ways. Less obviously, competition for resources may degenerate into violence ... Whatever the type of cost, rational individuals invest in defining rights up to the point where the incremental benefits of competing for resources equal the cost of doing so.

The fact that competition is costly means that individuals may benefit collectively from defining rules to govern competition for resources, choosing those rules that lower the overall costs of resource competition. Individuals might collectively agree, for example, that violence or threats of violence will not be recognized as a way to define property rights. As a way to reduce the costs of violence, rules can be agreed upon privately. For example, there is no statute that requires airline passengers to respect the right of the first passenger who puts his suitcase in the overhead bin to use that space during the flight. Such a rule presumably is preferable to a might-makes-rights system whereby the biggest and strongest passenger takes what he wants, regardless of the desires of others.

Where the number of people competing for a resource is small and the group is homogeneous, there is a greater incentive to minimize wasteful competition for property rights by contracting, rather than warring, over property rights ... Privately contrived and enforced rules may not work best in all situations, however. Increasing group size and heterogeneity at some point may produce the Hobbesian jungle, where life is 'nasty, brutish and short'. Externally imposed rules, embodied in explicit laws or ordinances, then may become preferable to private solutions in minimizing conflict over resources ...

POSTULATE 4: GIVEN INDIVIDUAL RATIONALITY AND SELF-INTEREST, A SYSTEM OF WELL-SPECIFIED AND TRANSFERABLE PROPERTY RIGHTS ENCOURAGES POSITIVE-SUM GAMES WITH MUTUAL GAINS FROM TRADE

Competition for the use of scarce resources can result in conflict or co-operation, depending on the system of property rights. If property rights are not well defined and enforced, the incentive to take by threat or violence increases, with the predictable results that resource owners will invest less in developing their property or even keeping it up ... Likewise, if property rights are not transferable, those who might place a higher value on a scarce resource will have little option to negotiate over it, relative to the incentives to take it by theft or resort to government ... On the other

hand, if property rights are well defined, enforced, and transferable, owners can trade their rights with others, making all parties better off.

The potential for gains from trade is revealed by many comparative studies that show economies with greater economic freedom – secure and tradable property rights defended by the rule of law – outperform other economies. For example, in economies with higher levels of economic freedom, per capita gross domestic product grew approximately 2.5 per cent, as compared to a 1.5 per cent decline in economies with less economic freedom between 1980 and 1994 ... Keefer and Knack ... report similarly that the absence of a secure rule of law diminishes rates of economic growth. Norton ... not only finds that growth rates are higher in countries with more secure property rights, but that environmental quality is better. As Norton ... puts it, 'the specification of strong aggregate property rights appears to have an important place in improving human well-being'.

Notes and Questions 2.2

Only private property satisfies the criterion of transferability given in Postulate 4: communal property rights and state property cannot be transferred, but they can be as secure and well defined as private property rights. Does this mean that the benefits mentioned in the final paragraph of the extract can be gained only by private property? Is this what the authors mean by Postulate 4? If so, is Postulate 4 normative (i.e. telling us what sort of property regime ought to be adopted) or positive (i.e. analysing the effect of adopting a particular type of property regime)?

2.3.2. Key concepts in the economic analysis of property rights

The basic economic analysis of the emergence of property rights and the allocation of resources utilises three key concepts – externalities, transaction costs and efficiency.

2.3.2.1. Externalities

When I decide to use a resource of mine in a particular way, some of the effects of that decision will almost invariably fall on others rather than on me. If I do not take those effects into account when deciding whether to adopt that use of that resource, we would say that those effects are *external* to my decision. Effects (good or bad) that are external to a decision are called *externalities*. So, for example, the building of the Canary Wharf Tower had the effect of interfering with television reception for the residents of the Isle of Dogs (see *Hunter* v. *Canary Wharf* [1997] AC 655, discussed in Chapter 6). That effect was an externality as far as the builders of the tower were concerned: they did not take it into account because (as they then thought) they did not need to do so because (as they then thought, and the House of Lords subsequently held) they had no liability in law to refrain from interfering with television signals. Externalities can be good as well as bad. If I own a field and decide to graze sheep on it, it may improve the view of

neighbour X (who likes sheep and places a higher value on his land because he can watch them), ruin the garden of neighbour Y (because the sheep stray onto her land through gaps in the fence) and disturb the sleep of neighbour Z (whose bedroom is close to the shed where the sheep are herded at night and in the winter). Each of those effects will be externalities of my decision if I do not take them into account when making my decision.

The problem about externalities, as far as economics is concerned, is that they tend to lead to misuse of resources, because the full costs and benefits of the use are not taken into account. The use of the resource may therefore be *inefficient*, in the sense that a different use or use in a different way might yield a higher aggregate value (i.e. the aggregate benefit to all minus the aggregate costs of all would be higher).

The concept of efficiency in this context requires closer consideration. First, however, it is necessary to consider why it is that the ignoring of externalities tends to lead to misuse of resources.

Suppose that grazing sheep on my field gives an annual benefit of £500 to X (the neighbour who likes sheep), but imposes annual costs of £1,000 each on Y (whose garden is ruined by strays) and Z (whose sleep is disturbed by the noise from the shed). By fencing the field and moving and soundproofing the shed I could eliminate that cost to Y and Z without removing the benefit from X. If the annual costs to me of doing so are £1,500 (or anything less than £2,000) then it would be efficient to do so, because it will increase the *aggregate* of the value (benefit minus cost) for the four of us. Economists, however, would not expect me to choose this value-maximising alternative (i.e. carry out the works) because it would make me personally worse off, despite the net gain it would produce in the aggregate.

A change in the example demonstrates how externalities can lead to an inefficient failure to develop resources as well. Suppose my field is covered in grass which I mow regularly but otherwise do not use, and that this use imposes no costs or benefits on X (the neighbour who likes sheep). If I was to graze sheep on the field it would cost me an extra £100 a year (it would cost me that much more to use sheep to keep the grass cut than to use the mower), but it would confer benefits of £500 a year on X. The value-maximisation solution would be to change from mower to sheep, but again I would not be expected to adopt it because the gain is an externality as far as I am concerned.

Note that, in both examples the existence of externalities does not *necessarily* lead to inefficient use: it would be easy to change the figures so that there would be no net aggregate gain if I carried out the work in the first example or changed from mower to sheep in the second. The problem is that, because all the costs and benefits are not borne by the same person, no one will even make the calculation as to net gain.

Why, though, is the situation in which use *is* inefficient not self-adjusting? Specifically, why don't those who are bearing the externalities offer to pay me an

appropriate amount to bear them myself? In the first example, it would seem sensible for Y and Z to offer to pay me anything up to £2,000 a year to carry out the works (if it was exactly £2,000 it would cost them as much as they would gain, so there would be no point, and if it was more they would be paying more than they gain) and sensible for me to accept anything over £1,500 to do so. Similarly, in the second example, X ought to be willing to pay me anything up to £1,000 to graze sheep on the field, and I ought to be willing to accept anything over £100.

Why do people in such situations not make such bargains? Why is the situation not self-adjusting? The answer is *transaction costs*.

2.3.2.2. Transaction costs

The problem about transaction costs becomes apparent if we ask ourselves why the residents of the Isle of Dogs did not bargain with Canary Wharf Ltd either to modify the design of the tower or to install super-aerials for each of their houses, so that the tower did not interfere with their television reception. It may be of course that the cost to Canary Wharf Ltd of doing either of these things would have exceeded the aggregate value of television reception to all residents of the Isle of Dogs. However, let us assume that this was not the case (not inconceivable). Assume that, if the tower is built unmodified, it will block all television signals to 100 residences. Assume also that this will decrease the value of each residence by £50,000, and that the problem could be averted either by a modification of the construction of the tower or by providing each residence with a super-aerial. If either of these solutions would cost less than £5 m in all (i.e. £50,000 $\times$ 100), then everyone would be better off if Canary Wharf Ltd adopted one of the two solutions, and charged the home owners as a group an amount greater than its cost of doing so but less than £5 m. It is nevertheless highly unlikely that Canary Wharf Ltd and the residents will ever come to an agreement to do this, and it is worth considering why. Essentially, there are three factors likely to prevent an agreement being reached: imperfect information, the costs of acting in concert, and the additional costs imposed by free-riders and holdouts.

Imperfect information

In order for this bargain to be struck, both Canary Wharf Ltd and the residents need to know (a) that a tower constructed to the proposed specifications will prevent television signals reaching the residents, (b) that the problem could be solved by adopting one of the two solutions (modification of the original design or installation of super-aerials in each residence), (c) what the costs will be to each resident if neither is adopted, and (d) what the costs will be to Canary Wharf Ltd if it adopts either. It will be difficult and expensive for the parties to obtain this information, especially if the problem is not a known problem (consider how a state planning system, on the lines described in Chapter 6, might help if the potential of towers to interrupt neighbours' television reception is known in advance).

Costs of collective action

The difficulties and costs of obtaining all this information will be particularly acute for the residents, private individuals with no pre-existing mechanisms for acting in concert. They must first find some way of organising themselves so that they can seek out this information as a group, avoiding wasteful duplication of cost and effort. They must also set up some sort of organisational structure so that they can raise money to pay agents such as engineers, lawyers and administrators etc. (or find and channel such expertise from among themselves) and make decisions and negotiate as a group rather than as a disparate collection of individuals.

Free-riders and holdouts

Even if the residents do succeed in organising themselves, they will risk wasteful or obstructive action from free-riders and holdouts. Take the problem of free-riders first. Assume the most efficient solution to the problem would be for Canary Wharf Ltd to modify the design of the tower at a cost of £3.5 m, and that the residents are willing to pay them £4 m to do so because otherwise the value of their property will fall by a total of £5 m. A free-rider is a resident who refuses to pay her share of the £4 m because she knows that, if the modification goes ahead, she will get the benefit (uninterrupted television signals) whether she has paid her share or not, and she predicts that the modification will go ahead even if she refuses to pay because the other residents will find some other way of raising the shortfall to avoid frustration of the whole scheme. Free-riding operates in other ways too. All residents who do not participate in the information-gathering/organisational activities are free-riding on the efforts of the activists who do, and the resentment caused by this kind of free-riding is likely to discourage collective action in the first place.

The holdout problem is slightly different. The holdout is the resident who knows that a particular action cannot go ahead without his consent, and therefore refuses to give his consent unless he is paid extra for it. Suppose the most efficient solution would be for Canary Wharf Ltd to install super-aerials in each residence, but that this cannot be done unless they are given access to every residence to lay cables. The holdout will be the resident who refuses access unless paid a large fee, because he knows Canary Wharf Ltd (or the other residents) will have to pay the fee to prevent frustration of the whole scheme.

2.3.2.3. Efficiency

In general terms, when economists talk about efficiency in relation to resources they mean an allocation of resources in which value is maximised. However, it is necessary to look further at what counts as value-maximisation.

Value

In economics, 'value' is an ambiguous term, as we see later when we look at the distinction between 'use value' and 'exchange value'. For present purposes,

however, 'value' can be taken to mean how much someone is prepared to pay for something, or, if they have it already, how much they would demand to part with it (not necessarily the same thing). In assessing value for these purposes, economists do not look at the amount that someone can *afford* to pay for something. What matters is how much they would pay if they had the money. Also, it is necessary to bear in mind that value, when used in this sense, can be dramatically different from utility, or happiness in the utilitarian sense. Posner illustrates the difference with the following example:

> Suppose that pituitary extract is in very scarce supply relative to the demand and is therefore very expensive. A poor family has a child who will be a dwarf if he does not get some of the extract, but the family cannot afford the price and could not even if they could borrow against the child's future earnings as a person of normal height; for the present value of those earnings net of consumption is less than the price of the extract. A rich family has a child who will grow to normal height, but the extract will add a few inches more, and his parents decide to buy it for him. In the sense of value used in this book, the pituitary extract is more valuable to the rich than to the poor family, because value is measured by willingness to pay; but the extract would confer greater happiness in the hands of the poor family than in the hands of the rich one.
>
> As this example shows, the term efficiency, when used . . . to denote that allocation of resources in which value is maximized, has limitations as an ethical criterion of social decision-making – although perhaps not serious ones, as such examples are very rare. (Posner, *Economic Analysis of Law*, pp. 11–12)

Pareto efficiency

Strictly speaking, value is maximised when the allocation of resources cannot be bettered, in the sense that it would be impossible to transfer or reallocate the resources in such a way as to make anyone better off without also making at least one other individual worse off. This strict notion of efficiency is called Pareto efficiency (after the nineteenth-century Italian economist and social scientist Vilfredo Pareto), sometimes Pareto superiority or optimality. Pareto efficiency is not a very useful concept, in particular when assessing whether a transaction is efficient, because while voluntary transactions can be expected to make all the *parties* to the transaction better off (if not, they would not have entered into it) they nearly always make someone somewhere worse off to some degree (if only by altering the market price of the resource).

Kaldor-Hicks efficiency

For this reason, economists more usually use a modified concept of efficiency, termed Kaldor-Hicks efficiency. A transaction is efficient in the Kaldor-Hicks sense if it makes someone better off, provided that it does not make someone else worse off *by a greater amount*. Any transaction that produces a net increase in

value (lumping all affected persons together and balancing their total losses against their total gains) is therefore Kaldor-Hicks efficient. Again, it is important to appreciate that efficiency in this sense has nothing to do with fairness or justice in distribution. A transaction cannot be Kaldor-Hicks efficient unless it leaves the net gainers with a gain that is great enough to compensate the net losers, but no compensation need actually be made. The outcome will remain efficient even if the gainers pocket all the gain and leave the losers worse off. If the transaction in question *did* involve all losers being fully compensated, and still left the gainers with a net gain, it would be Pareto efficient. Because of this, Kaldor-Hicks efficiency is sometimes called potential Pareto efficiency.

For these two reasons, therefore – because value-maximisation is not the same as happiness or utility-maximisation, and because efficiency requires only that there is a net gain in value or wealth, not that the gain is fairly or justly distributed – most people would not use economic efficiency as the sole criterion for judging the efficacy of property rules. It is, however, *a* criterion, and an important one. An inefficient allocation of resources may be justifiable on the basis that it produces socially or morally desirable ends, but it does require justification.

2.4. Things as thing and things as wealth

2.4.1. Functions of things

The final point to note in this chapter is that there are different ways in which an asset might be valued by a person. Specifically, it might be valued for its own intrinsic attributes, or it might be valued for the wealth it represents. In other words, at any one time an asset might serve one of two different functions for its holder: it might be held for its own qualities or it might be held as an investment. In the extract that follows, Bernard Rudden puts this distinction as the difference between things as 'thing' and things as 'wealth'. So, an art gallery that owns a painting by Poussin and a tin of floor polish holds both as thing: it values the Poussin as a painting of the sort that it ought and wants to preserve and display, and it values the tin of floor polish as an aid in polishing the gallery floors. Most assets can be either thing or wealth: if a pension fund held the Poussin as an investment it would be wealth rather than thing, as would a tin of floor polish held by a supermarket as part of its stock.

In the article from which the passage below is extracted, Rudden uses this distinction to mount a sophisticated argument that we are not directly concerned with at this point, although we return to it in Chapter 8 where we look at fragmentation of ownership. For present purposes, it is sufficient to note that, broadly, his thesis is that, when things are treated as thing, modern law uses a fairly uncomplicated set of basic concepts such as ownership and possession, whereas when they are treated as wealth, the law uses concepts and techniques developed for, and more usually regarded as reserved for, feudal landholding. These involve,

among other things, dividing entitlements among different people in sequential time slices.

We consider this argument later. Here we are interested only in two preliminary points.

2.4.2. The idea of a fund

The first is the idea of a fund. When assets are held as an investment, the nature and identity of the assets is usually an irrelevance to the people entitled to the benefit of the investment. They can expect to know the value of the assets held on their behalf, but it is not at all necessary that they know what those assets are. More importantly, one of the functions of the person who holds those investments in their behalf will be to monitor the value of the assets and to sell them and replace them with different types of asset as and when this becomes necessary to preserve or enhance the value of the investment. For all sorts of reasons this will often be done without reference to the beneficiaries. A fund therefore characteristically comprises a fluctuating body of assets, with the discretion as to the composition of the fund (whether, for example, it consists of paintings or shares or money in a bank account) being held by the officer holding the fund rather than by the person entitled to the benefit of the fund.

There are two important aspects of this. One is that the assets comprising the fund at any one time are wealth rather than thing, as far as the beneficiary is concerned. The other is that, when assets are held in a fund to function as wealth rather than as thing, the fund itself becomes an asset (albeit an abstract one), and the law regards the person entitled to the benefit of the fund as having an interest in the abstract entity which is the fund rather than in the specific assets which at any point in time comprise the fund. For further analysis of the idea of property in a fund, see Nolan, 'Property in a Fund', which we look at again in Chapter 18 in the context of floating charges.

2.4.3. Thing versus wealth

The second preliminary point about the thing/wealth distinction is of socio-economic rather than analytical importance. The law often has to resolve conflicts between persons holding different types of property interest in the same thing. Frequently (though not necessarily), one of these will value the thing as thing and the other will value it as wealth. Should greater weight be given to the former interest than to the latter? Suppose you and your partner jointly own the house you both live in and you go bankrupt. The consequence of going bankrupt is that all your assets must, in effect, be handed over to your creditors and distributed rateably between them. This includes your interest in the house but not of course your partner's interest. So from the moment you go bankrupt your partner holds an interest in the house (as we see later, a 50 per cent share in the whole house) and your creditors, in effect, hold another interest (the other 50 per cent share). Your

partner holds his interest as thing (a house to live in), whereas your creditors hold their interest as wealth. They are, necessarily, interested only in the wealth their 50 per cent represents (moving in to live in the house with your partner presumably holds no attractions) but they cannot reach that wealth unless the whole house is sold: realistically, you cannot sell half a house. Should the house be sold? If it is sold, your partner will get 50 per cent of the proceeds, but that will probably not fully compensate him for what he has lost, if he did indeed value his interest in the house as thing rather than wealth. Even assuming he is equally happy living on his own rather than with you, he may well value the amenities provided by your joint house that he has to share with you more highly than he would value those provided by a house costing half the price of which he has the sole use. And of course half the net proceeds of sale of a house is not necessarily enough to finance the purchase of another house, even a much smaller one.

On the other hand, if the house is not sold, your creditors are deprived of the only function of your share in the house which is of any value to them – the right to have it converted into its money equivalent. Which interest should prevail? Is the interest of the person who values the thing as thing more important than the interest of the person who values it as wealth? We return to this point in the Notes and Questions after the extract.

2.4.4. Related conceptions

Finally, parallels can be drawn between this distinction between things as thing and things as wealth and other similarly useful but different conceptions.

2.4.4.1. Fungibles and non-fungibles

Roman law draws a distinction between fungibles and non-fungibles which looks superficially the same as the thing/wealth distinction but is in fact different. A thing is fungible if it is not unique, in the sense that, if lost, it could be replaced by a thing that is to all intents and purposes identical. The archetypal fungible is money: if I drop a £1 coin in the street it is a matter of indifference to me whether I pick up that coin or another £1 coin lying next to it. To revert to the picture gallery example, paintings by Poussin are non-fungible and tins of floor polish are fungible. This explains the difference between the fungible/non-fungible distinction and the wealth/thing distinction. The fungible/non-fungible distinction is not concerned with the different ways in which different people might value the same thing: we can classify a thing as fungible or non-fungible without knowing who holds it and the purpose for which they hold it. A particular tin of floor polish does not become non-fungible just because its holder wants to use it now for polishing floors. It remains fungible because the holder would have no reason to object if you took the tin out of his hand while he was polishing and gave him another tin of the same size and brand instead. The fungible/non-fungible distinction therefore does not enable us to mark the distinctions between the ways different people might value the same thing, which we can mark by using the wealth/thing distinction.

The fungible/non-fungible distinction is complicated by the fact that there are some things that are fungible in some circumstances and non-fungible in other circumstances. For example, a tangible thing that represents value, such as cash or a postage stamp, is fungible when used as currency but can become non-fungible if, for example, a physical abnormality or rarity makes the tangible thing acquire a value in its own right which is greater than its 'face' value. But, even if this does happen, it still does not tell us whether the rare coin or stamp is 'thing' or 'wealth'. This will depend on the purpose for which it is held. A pension fund that holds rare stamps as an investment values them as wealth, whereas a stamp collector (assuming she is of the kind that regards the monetary value of her collection as incidental) values them as thing.

2.4.4.2. 'Use value' and 'exchange value'

Some economists draw a distinction between 'use value' and 'exchange value' which, again, bears some resemblance to the thing/wealth distinction. The use value of a thing depends on the uses to which the thing can be put (or, as it is sometimes put, the human needs or desires it fulfils), whereas its exchange value depends on the value of the thing (usually but not necessarily money) for which it can be exchanged. The point about this distinction is that the use value of a thing is often different from its exchange value. Consumer goods that are not in short supply when new (for example, washing machines, cars and books), and which therefore have a low secondhand value, provide an obvious example. You may buy a new washing machine for £500, even though you know that you will never be able to sell it for more than £300 (the current secondhand price for washing machines of that type in good condition) because its use value for you is higher than its exchange value. For some purposes, it may be necessary to distinguish subjective and exchange value. The value to you of £300 very much depends on its marginal utility to you. If after buying the washing machine you run out of money and have no other means of paying the rent, you may well sell the washing machine for £300: its use value to you remains the same, and so does its objective exchange value (£300), but its exchange value *to you* is now higher than its use value. Alternatively, if you unexpectedly win the lottery, you might decide to buy a new and better washing machine and give the old one to a friend: its exchange value to you is now nil, even though its objective exchange value remains £300.

Historically, this discrepancy between use value and exchange value has been significant in varying schools of economic thought. The distinction between use value and exchange value and the analysis of the relationship between exchange value and labour is fundamental to Karl Marx's argument in *On Capital* and, in a rather different way, to Adam Smith's *Enquiry into the Nature and Causes of the Wealth of Nations* (1776). Adam Smith used the classic water/diamond paradox (water has great use value but no exchange value whereas diamonds have little use value but high exchange value) as an illustration of the way in which, as he argued, labour is the 'real measure' of exchange value:

> Every man is rich or poor according to the degree in which he can afford to enjoy the necessaries, conveniencies, and amusements of human life. But after the division of labour has once thoroughly taken place, it is but a very small part of these with which a man's own labour can supply him. The far greater part of them he must derive from the labour of other people, and he must be rich or poor according to the quantity of that labour which he can command, or which he can afford to purchase. The value of any commodity, therefore, to the person who possesses it, and who means not to use or consume it himself, but to exchange it for other commodities, is equal to the quantity of labour which it enables him to purchase or command.

On the other hand, John Law, the Scottish economist and banker who appears to have been the first to articulate the water/diamond paradox (in 1705, in 'Considerations sur le numeraire et le commerce', written in France after he was exiled after a duel) regarded scarcity as the principal creator of exchange value, as would many modern economists.

The use value/exchange value distinction therefore performs a different analytical function from the thing/wealth distinction. The former is primarily concerned with an analysis of the complex concept of value, which is not at issue in the latter. The point about the thing/wealth distinction is that it highlights the different purposes for which the same thing may be held – you can own a diamond because you value its beauty, or as an investment whose nature is a matter of indifference to you. Whichever it is, the diamond still has, for the purposes of the economic arguments where the distinction is relevant, a low use value and a high exchange value.

2.4.4.3. Property and personhood

In 'Property and Personhood', Mary Jane Radin develops a notion of the relationship between person and things (when valued as thing, although this is not the terminology she uses) which is based on Hegel's concept of persons in *Philosophy of Right*. Her basic thesis is that a special bond arises between a person and certain things that that person treats as his own (in a thing sense rather than a wealth sense) and that it is necessary for the law to recognise this bond in order for that person to achieve proper self-development, or as she puts it 'to be a person'. She terms these things 'personal property'. Not all things valued as thing rather than as wealth come within this personal property category:

> Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world. They may be as different as people are different, but some common examples might be a wedding ring, a portrait, an heirloom, or a house.
>
> One may gauge the strength or significance of someone's relationship with an object by the kind of pain that would be occasioned by its loss. On this view, an object

is closely related to one's personhood if its loss causes pain that cannot be relieved by the object's replacement. If so, that particular object is bound up with the holder. For instance, if a wedding ring is stolen from a jeweler, insurance proceeds can reimburse the jeweler, but if a wedding ring is stolen from a loving wearer, the price of a replacement will not restore the *status quo* – perhaps no amount of money can do so.

The opposite of holding an object that has become a part of oneself is holding an object that is perfectly replaceable with other goods of equal market value. One holds such an object for purely instrumental reasons.

She makes it clear that things are held purely for instrumental purposes not only when they are held as wealth (i.e. the wedding ring held by the jeweller as part of his stock) but also when they are held as thing but without there being any special bond, so that something else that performed the same function would be regarded as an adequate substitute. She gives as examples things you use in your house like pots and pans, lawn mowers, and light bulbs (Radin, *Reinterpreting Property*, p. 37, n. 2, where the article is reproduced as Chapter 1). These things that do not come within the category of 'personal property' she calls 'fungibles' (i.e. using the term differently from the way in which it is used in section 2.4.4.1 above).

Her analysis provides support for the argument that long use ought in appropriate circumstances to give rise to entitlement, and we look at it again in that context in Chapter 11. For present purposes, however, the important point is that this is a normative as well as a positive analysis: she is arguing not only that such a distinction between things exists, but that, when as a matter of fact there exists such a bond between person and thing, the law ought to recognise it and to give it higher protection than that given to other relations between person and thing.

Extract 2.3 Bernard Rudden, 'Things as Thing and Things as Wealth' (1994) 14 *Oxford Journal of Legal Studies* 81

The traditional concepts of the common law of property were created for and by the ruling classes at a time when the bulk of their capital was land. Nowadays the great wealth lies in stocks, shares, bonds and the like, and is not just moveable but mobile, crossing oceans at the touch of a key-pad in the search for a fiscal utopia. This is not ... meant to denigrate the importance of land as one of the bases of the economic structure, and a factor whose cost enters into the price of everything. In terms of legal theory and technique, however, there has been a profound if little discussed evolution by which the concepts originally devised for real property have been detached from their original object, only to survive and flourish as a means of handling abstract value. The feudal calculus lives and breeds, but its habitat is wealth not land.

The argument can be more precisely stated by distinguishing, not between things as such ... but in terms of their function. A thing may be treated for itself and be possessed, used, and disposed of for its own qualities, however banal they be. In this

case, the legal regime applicable treats the object as unique: it is this house we own and live in, this book we sell and no other. On the other hand, every thing may be treated merely as the clothing (in-vestment) worn by a certain amount of wealth. In this case, the relevant law accords it the modest role of a member of a class, perfectly replaceable and subject to an implacable regime of real subrogation.

The distinction between the uniqueness of things considered for themselves and their total convertibility when treated as wealth does not follow the classic lines of fungibility: a pound of flour is unique if its owner wants to make bread with it; a Vermeer in the hands of a pension fund is just another investment. Nor is the distinction necessarily tied to the nature of the object in question: most things can be either possessed for their own sake or held as investments for their income stream or in the hope of capital appreciation. The law of property covers impartially the things we own because we need them – our home, food, and clothing – and those we own but could exist without – the flat we lease and do not live in, the first editions that we dare not read. In other words, in most legal systems things of the same type may be held by some as necessaries and by others as investments, while many persons hold part of their property as both. In defining and protecting entitlements, powers, and so on, the law does not need expressly and initially to distinguish between these purposes.

Nonetheless, such a distinction is attempted in what follows. It is beyond the author's powers to render the difference in simple English. In 1901, Josef Köhler used the terms *Substanzrecht* and *Wertrecht*, but the words do not translate readily. In English, then, and for want of better, the expressions used are 'things as thing' and 'things as wealth'.

THINGS AS THING

The thesis advanced is that, when faced with things treated for themselves, the common law employs a set of concepts familiar to jurists from any country, such as ownership, possession, and publicity. But this approach is masked by certain habits which are bred into the common law systems and have laid down patterns of vocabulary which tend to control perception ...

[He goes on to demonstrate how this is the case in relation to tangible immoveables, tangible moveables, industrial/intellectual intangibles and intangible claims.]

THINGS AS WEALTH

... When treated as wealth, things do not, of course, change their physical form: they are still tangible or intangible, moveable or immoveable. But as each is perceived only as the external form of a value, no member of the class enjoys any privileged status. As an investment each individual object is treated in terms, not of its own inherent qualities, but of its opportunity cost. This last function betokens an important fact: as an item in a portfolio every thing can be changed or converted. Nothing is unique.

When one such object is replaced by another we must turn momentarily to the legal regime applicable to things treated as thing. If, for instance, it is decided – for reasons of investment strategy or tax planning – to sell a mansion house and a racehorse so as

to buy some shares and an aeroplane, each of the four transactions will be governed by its particular legal rules, with its own form of transfer, its own register, and so on. But from the point of view of the portfolio, the sales and subsequent purchases effect merely a real subrogation whereby the things sold are transmuted into the sale price which then becomes the things bought. The fund has not changed: the accounts record on one side the disappearance of two assets expressed as sums of money, and on the other the acquisition of the price; the purchase money then leaves the accounts and the shares and patent enter them at asset value. The overall balance is still the same. Maitland said all this first, and put it best: 'The idea of the trust-fund which is dressed up (invested) now as land and now as current coin, now as shares and now as debentures seems to me one of the most remarkable ideas developed by modern English jurisprudence' [Hazeltine *et al.*, *Maitland: Selected Essays*, p. 134] ...

SOME HESITATIONS AND REFINEMENTS

...

Use value/exchange value

A related comment might well be that the scheme put forward is no more than a ponderous restatement of the distinction between use value and exchange value found in some modern English property texts. All that can be said is that neither of these two terms seems quite to express the points made above. Exchange value suggests a momentary monetary assessment at the time of purchase or sale, whereas the notion of a thing functioning as wealth is intended to detach the act of receipt from that of expenditure and to suggest the enduring subjacent value stored in a fund, where any given thing is merely a transient and entirely replaceable investment. Use is not hard to understand, but use value is very problematic, and its relation with exchange value is quite obscure ...

A functional distinction

After a careful examination of the use of the word [thing], Honoré concludes that 'the investigation of things seems to peter out in a false trail'. This paper's distinction between things as thing and things as wealth is cast in terms, not of the meaning of the word thing, nor of the physical nature of any given object, but of the function attributed to the object in the relation being considered. It may well have no part to play in the situation in which one person is undisputed, absolute, and unlimited owner, for, as there are no competing interests to manage or protect, there is little point in asking why its owner holds it; in fact, the joy of being absolute owner is that one does not have to answer that kind of question. It is clear, of course, that some things by their very nature are more fitted for one function than the other: we would be unwise to invest our life savings in milk, and unlikely to hold government stock for pure enjoyment. It is very difficult, however, to think of anything which could never, for some eccentric in a liberal legal system, serve one or other of the purposes (it is within the author's personal knowledge that at least one shareholder in the New River Company Ltd declined to surrender his share certificates when the company was taken over in 1974. The holder preferred the things themselves, worthless as wealth but rich

> as symbol, to the expectation of dividends offered by the new shares in London Merchant Securities plc) ...

Notes and Questions 2.3

1 In discussing an example similar to the bankruptcy example in the text (should a house jointly owned by a bankrupt and her partner be sold so that the bankrupt's share can be realised for the benefit of her creditors), Rudden says later on in the article:

> The particular problem could be solved by a policy decision of the legislator. On the one hand, Parliament might agree that a [creditor's] interest is merely in the thing as wealth, whereas [the] family member's interest is in the thing as a dwelling-house, and so be led to lay down a clear if radical rule: that the ... right of the creditor ... is postponed to that of [the family member]. But a quite different policy might also be adopted, which held that the burden of a black sheep should fall on its kin rather than on a stranger dealing for value and in good faith: and this would lead to an equally clear if quite contrary rule. (Rudden, 'Things as Thing and Things as Wealth', p. 96)

Could similar policy considerations be raised in relation to the bankruptcy example? What arguments could be put forward for advocating the adoption of one policy rather than the other?

2 If there is a dispute about entitlement to a thing between A and B and a court decides in favour of A, it can either order B to return the thing to A, or order B to pay damages to A to compensate A for his loss. Would the distinction between things as thing and things as wealth be useful to the court in deciding which of the two it should order? Would it instead be more useful to adopt either the conventional fungible/non-fungible distinction noted in section 2.4.4.1 above, or Radin's personal property/fungible distinction noted in section 2.4.4.3 above?