Act, excellent legislation, about a subject, sales of goods, with which you might suppose any business man familiar. Read over ten or twenty sections, in ignorance of the cases, and see how little they tell you. Finally, the statute must, as I said, be fitted into something. The fitting can be accomplished only by bringing the two together. The necessary accommodation must in part be mutual; the legislature can hardly be deemed, with its single aim in mind, to have willed the wrenching and ruin of all neighboring existing law it did not mention.

But in another aspect this antagonism to the statute has far less point. Statutes are passed precisely to the end of change. Then they should be given scope. Filling a statute out with meaning from the common law is one thing; emasculating it by artificial construction is another. I suspect, as I have indicated, that pride of skill and jealousy had some part in producing that great maxim that statutes in derogation of the common law are to be strictly construed—which means: are to be made to mean as little as they can be made to mean. Some other part is almost surely due to the training of the judges in reading any writing: first, as property lawyers, holding a conveyance down to the closest confine of its terms (what man would grant away more than he need to?); second, as skilled special pleaders, trained to construe the papers with all cunning against the party who had put them out. It is hardly needful to point out that most of the wordiness of our older statutes reflects this duel of wits against unwilling courts.

On the other hand, we have another maxim of more recent importance: remedial statutes are to be liberally construed. This represents a better insight. But observe here, as in the case of precedents, as throughout the law, the two-faced premise legal technique offers to the judge. At his need, as the case before him urges, he can construe the statute strictly (as "in derogation of the common law") when it would seem to work hardship, or liberally (as "remedial") if that seems indicated.

One more thing I must mention before I leave these statutes: if they are local, territorial in their effect, if they afford no ground for reasoning to the reservoir of law, then when you meet a statute in a case, you can skate over it? It has no *general* bearing? It need not be remembered? *As pure information,* it may be you will not need it, unless like statutes show signs of appearing elsewhere. But as a problem in legal technique, a statute in your case book deserves more intensive study than a common law decision. For whatever the concrete content it may have, it presents to the court a problem: how to interpret—what to do about it? As to that problem, the court's approach and solution are typical of all our courts, typical of a *process* you must know. And of a process which you cannot follow except in its abominable detail. You cannot read a statute like a case. There is no pleasant repetition of the same thought in different forms. Each word stands there. You get it, or you miss the whole. There is nothing that one dares to scant. There is little indeed of dictum in a statute. Eyes out, then, for *each word* of each statute that you meet!

III.

Looking back, I see that I have spoken about how courts *ought* to construe statutes. I doubt not that on several occasions I may have skidded into remarking on what courts *ought* to do. Law has so long been dealt with as a question *exclusively* of Ought that it is hard going to run one's thinking onto the level of description and to keep it there. Yet it will not do, either, to remain exclusively upon that level. So far as law officials order the affairs of men we must take account, too, of how we wish that ordering done. Some of us, more ambitious, will insist on having the ordering done "right". Others may wonder who knows what is "right", and how he can tell it; yet will insist no less vigorously for that on their own best judgment as to how the ordering ought to be.

This level, which I shall call that of social values, has always centered the attention of outsiders who thought about the law—the man in the street or the philosopher, the political scientist or the reformer. Partly this has been a matter of mistaken economy in thinking. Rules are easier to see than their effects; it is easier to seem to get ahead if you take will for deed, rule on the books as equal to activity. Partly it has been due to the nature of the subject: what we want from law is results, if we are laymen. Results in social ordering. It is the business of the law-men to produce results. The citizens' business is merely to instruct them *what* to do. Lastly, the law-men themselves have through the ages lent themselves stature as the priests of what is right; it suits the dignity of the law to pitch discussion upon the moral plane. I find a nobler dignity in digging ditches. I find planes high as they result in action, in effective action on a level each day a little higher than the day before. This, however, is a personal vagary. It interests laymen little, and most law-men less.

So I return to what is of common interest, the right of way of law, the legal right. And here at once you will find great confusion. *Right* as applied to law, as used by some, will mean *just,* or *correct, morally sound,* or *socially desirable.* Right law in this sense is justice. As such, it is a matter of debate. People do not agree on what is just. We can limit the disagreement somewhat by distinguishing between *social* justice, justice in the whole set-up of society, and what I shall call *legal* justice, justice so far as it is possible within the framework which society at any given time has set. Any one man's views on the two will be related, yet his demands on the second must be more modest than on the first. On the side of social justice he will criticize the law entire, and indeed the other institutions of society. He will attribute to them much evil that is in them; he will attribute also to them

much misery which nature, not society, must answer for. His appeal will be for legislation, or constitutional amendment, or for revolution. But on the side of *legal* justice, he must address and criticize the courts. And if he has sense, he will see that the courts must move within the framework of the given rules. The rules, however socially unjust they seem to him or others, still are there. The court is in part their mouthpiece. What it can do, all it can do, is to soften a little here and there in a detail the rigor of the general scheme. Here, too, there will be room for dispute. Those who voice criticism of the general scheme, in gross or in a fraction, will call for the court to move to the full limit of its powers—or beyond. Others will cry wolf if the court seems to budge a hair. But most, on both sides, will *lack* what I have spoken of as sense. They will take no distinction between legal justice and social. They will demand all of both kinds, and in their own desired shape, and at once, and from all law officials, courts as well as others. If they fail to get it, they will curse "the law". In one way it is well that this is so. A fighting sense of injustice in "the law" will unchain forces for reform which a dispassionate weighing well might leave quiescent. On the other hand, he who sees clearly how the matter lies will, if *he* moves into battle, do more effective and more lasting work.

All of which touches us here because almost everyone who deals with law introduces at some stage of the discussion his notion of the justice or correctness of the court's actions and the rules laid down. And because in so doing he rarely distinguishes, and still more rarely makes express, which kind of justice he is talking of—legal or social. And because he even more rarely makes explicit what the assumptions, the premises of value, are, from which he argues to the justice or injustice of particular cases; which means that he gives you no idea of whether it is wise to follow him. And, finally—this applying peculiarly to legal writers—because his judgment once made on justice or injustice, he becomes commonly imbued with a valor to defend his view which keeps him from seeing, or discussing, or duly weighing, the cases and authorities which tell against it. We could forgive him for omitting the arguments of policy against his view. But it is harder to forgive him when he misrepresents what courts are really doing, in his zeal to persuade them to do something else. And few indeed are the writers who can be acquitted of this charge.

The question of justice and legal right requires to be opened up for another bearing it has, a bearing even more directly practical. Legal rightness leads to the question of *legal rights,* and legal rights to rights at large; and rights is a phrase that drips confusion. In the first place, as between law and non-law, as between matters having to do with courts and matters not concerning courts at all. For *rights* are in common language, often indeed in court opinions, aspects of action or relation which are desirable and are socially approved. "Now don't you think I am within my rights?"

"All I want is my rights." These have to do with what I want, or do, and with a social approval of my want or action. I have a right in this sense to what people think I ought to have. Yet it is clear that these matters may not touch the court, may indeed bring the court to act against me. I may be socially approved when I insist on the deal passing to the left, or stop you as you lead from the wrong hand. I may be socially approved when I chase and beat up the man who threw an onion in my eye. The one the court will not notice; the other it will fine me for. So that in *legal* discussion one must start early, and be vigorous, in limiting the word *right* to matters *purely legal.* We have another term apt enough to denote the things you *want* or need irrespective of the law: an interest.

This, however, is not all. *Rights,* in law, are (as in non-legal usage) beneficial. And, as in non-legal usage, they are thought of as pertaining *to an individual. He* has rights. The law, in this sphere of thinking, is conceived as made up of rules. Out of the rules flow the individual's rights. The rules which breed rights are peculiarly the *substantive* rules, the rules which are conceived to direct the course of action in society. If a right is infringed, you then have, as a remedy, a different kind of right, a "right of action", a "secondary right", a "right to recover damages". You will see that the *contents* of the primary right and the remedy-right are different. As a primary right my right is to have you perform your agreement, or keep off my land, or refrain from striking me. But in all these cases my secondary right is likely to be merely one to *damages* at law.

At this point you come upon a division of opinion among those whom you may call the happy idealists and the black-visaged cynics. The idealists (and they, by the way, are orthodox and powerful, and have in this matter controlled the legal thinking of the past) see primary rights—my right, e.g., that you perform your agreement with me—almost as things. Almost, these primary rights are real. They are the *substance* of that insubstantial thing, the law. The idealists therefore have no great difficulty in thinking of you as having a perfectly good right which—simply because your only witness dies—is unenforceable. It is only the secondary thing, the remedy, which has failed. The right remains, to comfort you. Remedies—secondary rights —even in the absence of such misfortunes, may be so set-up that they are inadequate: you cannot net at law the full value of your primary right. That, too, to the idealist, is unfortunate—but it is non-essential to the right.

The lunatic, the lawyer, and the lover
Are of imagination all compact.

The quotation is spurious, but Shakespeare wrote before this theory of rights was born to write of.

The cynic, on the other hand, says: a right is best measured by effects in life. Absence of remedy is absence of right. Defect of remedy is defect

of right. A right is as big, precisely, as what the courts will do. The differentiation between substantive law and adjective law is an illusion, although the prevalence of this illusion (as of any other) has results in human behavior, and must be taken account of. What the idealist calls substantive rights are not things, not even shadowy things; they are *purposes* the legal officials have set themselves: to get you to perform your agreement, to keep you off my land. But the law can be seen only in its *effects*. Surely it is useful to measure the effects by the purposes, to see the effects, to line them up for seeing, in terms of purposes; but once more, let us not mistake words for results. Words—rules of substantive law—concepts of rights derived from them—these may be a good first step; they may be necessary to the goal. They are both. But they do not get us there alone. Let us go on.

You will have observed that I hold with the cynics. Yet even if you go with me there, you will have to become intimate with the other point of view. For it is a point of view which has repeatedly shaped court decisions as well as legal writing.

In addition to this quarrel between the idealists and the cynics, or the orthodox and the realists—give them what names you will—there is another quarrel which centers about rights, that over Hohfeld's analysis, as further developed by Corbin and Cook. Space is too short here to do justice to the row. I shall present the thing, or a part of it, in briefest outline. I am of those who think it has great merit for your legal study.

In essence the matter is this: legal usage of technical words has sinned, and does still, in two respects; it is involved in ambiguity of two kinds: multiple senses of the same term, and terms too broad to be precise in application to the details of single disputes. First, it does not use terms in single senses, but uses the same term in several senses; and in several senses, indiscriminately, without awareness. This invites confusion, it makes bad logic almost inevitable, it makes clear statement of clear thought difficult, it makes clear thought itself improbable. No logician worth his salt would stand for it; no scientist would stand for it. But law is rooted in tradition, and legal terms of art are in large measure borrowed from lay speech: trust, agency, sale, contract, offer, revocation, negligence. Some of the lay flavor clings still to the terms—and sometimes more, sometimes less, sometimes the nutmeg, sometimes the salt. Even as to terms purely legal, a similar ambiguous usage prevails: a system which moves ad hoc owns no academy to refine and make precise its terms. First, then, ambiguous terms. And second, terms too broad: contract, trust, agency, sale, property: each term comprises hosts of connotations. They are unusable, said Hohfeld, as common salt and quartz to chemistry. Surely one can find smaller common *elements* whose varied combinations make up these larger complexes. He found a number, described them, defined them, showed their interrelations,

gave them unambiguous names. And these smaller common elements, in essence, prove to be subdivisions of the concept *right*, as found in common legal use. I should say here that I shall now present Hohfeld from the standpoint of the cynic whose views I have described above. I am not sure that Hohfeld would approve. But I must labor to improve upon my teacher as you, I trust, will labor to improve upon yours.

Vital for use here are three of Hohfeld's major groupings: *right* or claim, in the narrow sense he chose; *privilege* or liberty; *power*. Very briefly, as Corbin puts it, a *duty* (the other end of a right) is what I *must* do; a *privilege* is what I *may* do; a power is what I *can* do. A *right*, then is what some other person *must* do for me. Now in this set up the *must* and the *may* and the *can* all have reference only to what the *courts* are likely to do in the situation. *Must* do, or have the court on your neck; *may* do, and not be bothered by the court; *can* do, and so affect what the court will do. Let us take up these narrow concepts one by one.

A man has a *right* only in regard to another man. All of these legal relations are relations between people, and only between people. There is a person on *each* end, always. A has a right that B shall do something, I repeat, when, should B fail to do it, A can get the court to make trouble for B. But the right has B on the other end. The right *is indeed* a *duty*, a duty seen other end to. The relation is identical; the only difference is in the point of observation. If you look at the man whom the court may smite, you see it as a duty. If you look at the man who may call upon the court to smite the other, you see it as a right. You see the same elephant, in either case, whether he look like a wall or like a tree. If B has a *duty* to A to do something, that means that, should he fail to do it, A can get the court to make trouble for B.

Now observe what this means to the cynic. "Performance" of the so-called duty (be it to paint a house, as I agreed; or to refrain from calling you a thief; or to fence my cattle in from your garden) is to the cynic but *a certain line of action or abstention which will keep the court off the duty-bearer's neck*. There is, to the cynic, no content *to the duty* as such at all, nor any moral force. To him it is a matter of pure prediction about the court. *Unless* I paint the house, the court may climb my frame. The *measure* of the duty, on the other hand, is very clear. It is twofold: how hard will the court climb, if it climbs at all? how likely is the climbing? With decrease in either vigor or probability of climbing, the duty dwindles. Which is to say also, the right dwindles. For practical purposes it may sometimes be convenient to talk *as if* the probability were a certainty; and *as if* the frame climbing were precisely as uncomfortable as the conduct necessary to prevent it. But it never pays to lose track of the fact that for *any individual duty bearer* the degree of probability, and the extent of the climbing, are of the essence of the situation. Just one last thing. There is one, and

only one, *certain* test of whether a duty existed, on the facts assumed. That is: a judgment by the court *against the defendant.* This, you observe, by definition.

A judgment *for the defendant* is ambiguous in regard to duty. It may mean: there never was a duty—e.g., the defendant never made the promise, or the promise was without consideration, and so of no interest in law. Or it may mean: although there was a duty, the defendant has done all he had to: "performance". Or it may mean: the plaintiff has on his part failed to do what was necessary in order to make the defendant's duty become *immediate;* e.g., the plaintiff insists on getting the goods without offering the price. Or it may mean: the plaintiff has slipped in his procedure—and it becomes unnecessary to determine whether there was really any duty on the defendant or not. But a judgment *for the plaintiff* always indicates a duty. So does a judgment for the defendant *on a cross-action* in which he acts in substance as a plaintiff, and the procedure simply allows two cross-claims to be tried at once, for convenience, because both are based on pretty much the same transaction.

So far for the right-duty. And Hohfeld would remind you to always look for the *duty* before you use the term *right. Who* is the particular duty-bearer you have in mind? Can you phrase the conduct expected of him to correspond point for point and line for line with the conduct to which you say the other party has a right? If not, says Hohfeld, you are not talking about what *I* call a right. Have you a *right* to use your watch as you wish? Then who bears the duty on the other end? Everybody—each one with a duty to let you alone, or not to interfere? Does not-interfering by X correspond with and cover your using your watch? Something is out of kilter here. What is it?

Hohfeld would answer by turning to his second grouping: *privilege.* Using your watch as you wish, says he, is not a "right" at all, but a privilege. It is not a case where you *can* kick if the other party fails to do something; it is a case where the other party *cannot* kick if *you do* something. The situation differs wholly from the right-duty. It is not one measured by the prediction that *unless* something happens the courts *can* be spurred to action. It is one measured by the prediction that *even if* something happens the courts *cannot* be spurred to action. *When I can act, and be safe from courts, I have a privilege.* But a privilege, too, has a definite person at its other end. The privilege, seen other end to, Hohfeld called a *no-right.* When A has a privilege to smash A's own watch, B has a no-right about the smashing. I think you will see this more clearly if you substitute the term *no-kick.* It is not elegant; but it is useful. It brings out graphically Hohfeld's other point: that privileges (like rights in tort) commonly come in huge bunches, all alike in content, all different only as to the persons at the other end. I have a vast bundle of privileges to destroy my watch, one as against any

person you can name—each person you can name has no-kick if I do. But I might contract with B in particular to sell him that watch. Thereafter, though I retained my prior privileges as against you and C, and an infinity of others, I should have lost it as *against this one prospective buyer B.* Now you begin to see the utility of Hohfeld's thinking. It looks very cumbersome to conceive yourself as dragging a thousand bundles of a million privileges each as you pass through the daily round of tying up shoe laces, eating lunch, and smoking cigarettes. But Hohfeld, for all his theorizing, was a practical man. His mind was on the cases which come before the courts: in each case one plaintiff, one defendant, one issue: one privilege or one right is all that needs examination: the one relation between these two people. And here, surely, thinking is greatly clarified when one limits A's *right* to the other squint along B's *duty;* and makes A's *privilege* the other squint along B's *no-kick.*

Privilege becomes of immediate interest in your work in torts. A strikes B. He had a duty not to, prima facie. But B was assaulting A; A struck in self defence: then he was privileged to strike B. B has no-kick. The court gives judgment for A, the defendant. The cataloguing of your cases will be clearer than if you say A had a *right* to strike B, but can find no damages for A to get. The analysis of your cases, too, will be clearer. For if a judgment *for the defendant* is based not on a procedural slip by the plaintiff, but on particular facts, then *something* in the facts assumed is *held* to have created a privilege in the defendant—whereas it cannot possibly be *held,* under the strict doctrine of precedent, to have created any *right* in anybody.

In contracts, on the other hand, you meet especially Hohfeld's third category of relations. It differs greatly from these other two. Right-duty and privilege-no-kick are, so to speak, the elements of the existing legal status. They deal with a world which can for a moment be deemed at rest. *Power-liability,* the third category, deals with a dynamic world, with a change of the legal situation by men's actions. Power-liability looks ultimately toward the *creation* of the conditions we know as right-duty or privilege-no-right between two people. But as yet that anticipated creation has not occurred. For the purpose of considering *powers,* then, we depart from our cynic's point of view. We assume, for the moment and for convenience, that rights and privileges *are* something—in order more conveniently to mark off the different steps which lead to our predictions about what courts will do. In regard to your thinking and talking this is perilous business. I hope, however, that we may weather the storm.

Power, says Hohfeld, is the situation when A *can* in some significant manner *change* some one of B's legal relations, any one of B's legal relations. Power, therefore, is a prediction *two* steps removed from the action of the court. Most powers, like most privileges, are unimportant. We can conceive

them if we will, but there is no point in willing. It makes very little difference that I may be said to have a power to create in you, by assaulting you, an immediate right to damages against me which you did not have before. What is important is the duty aspect of the situation, not the power aspect. Yet when the question is whether I have a power to break my contract with you, and thus not only give you an immediate right to damages, but *limit* you to damages as of a given date, the power concept serves to bring out much more clearly what the so-called right to performance really was.

And in many fields the power concept is extremely valuable. Thus when I make you an offer I create in you a *power to accept,* and the whole negotiation between us gains clarity if we think of it in terms of what you now, by your sole act *independent of me,* are able to accomplish in changing our relations with each other. But it will not do to forget the power, seen from the other end: that of the man whose legal relations may *be* affected by the other; the *passive* party in the situation. He is said to have or be under a *liability* that the change in relations (say acceptance of the offer) will occur. The term is stripped of its unpleasant business connotation; I may want sorely to have you accept my offer. The term liability here looks to the one thing only: that some act of one man, of his own motion, will change some legal relation of another; the man thus exposed is under a legal liability.

Now as to the utility of these strange terms to you. The cases are complex, hard to compare. So many facts, so much talk. It is hard to get at the nub of each. It is even harder to get them schematized so as to get their mutual bearings clear. But in *each* one of your cases, if you look closely, you will find the issue centering about some *one* of these Hohfeldian categories between two distinct people. Was there a given duty, or was there not, to the plaintiff—and has there been failure by the defendant in "performance" of its content? Was there a given privilege, or was there not, in the defendant to do what he did, as against the plaintiff? Was there a given power, or was there not—and if there was, was it duly exercised? Some *one* of these is in the center of the fight. And thinking thus, in nicer terms, with nicer tools of thought, you pull the issue into clarity. Thinking thus, you pull a series of issues into clarity for comparison—you see sharply how each decision bears upon the others. Unambiguously, because your terms are not ambiguous. Precisely, because your terms are very narrow.

Then when it comes to putting larger chunks of law together, instead of slithering hither and yon with general terms whose content changes under every context, you build your general concepts up out of these unambiguous bricks—and have a clearcut whole. A whole with which you can work, because you know its parts, you know its structure. "Contract" is a duty of A to B or B to A (more normally both at once) which arises out of some kind of agreement. But observe, first, that even if both duties should be

present (as in an agreement to buy and sell) *only one* is likely to be in litigation in any given case. And how do you know that the court will not let A recover from B, while refusing a recovery by B from A on the same facts? You will have to deal with the duties *one by one,* to find out. Moreover, your "contract" you will observe to have been formed, ordinarily, by a series of remarks of one party to the other. The courts talk of these in terms of offer and acceptance. But you will see the situation much more clearly if you watch for what situations give B (on his *own* motion) the *power* to do something to A's legal set-up; and then ask precisely *what* effect B can have on A's legal set-up, and precisely *how* he must act to have it. For you then discover that even after "acceptance" B *still* has powers with respect to A—for all the world like the power to accept; save only in this, that they mostly are *not revocable* at A's will. A has lost the power to revoke; yet we may be still far from any *immediate* right of B to have A do a thing. "Contract", then, under this analysis loses its vague simultaneous attempted application to a hundred cases. It grows definite because you see its constituent elements. You must make it grow definite because it is these constituent elements, one by one, and not "contract" in block which appear in, which are the turning point, of the individual cases that make up the law—and which will make up your work.

IV.

There is one more matter to take up before we cease our talk of sealing wax and cabbages and kings; it is the most important matter in all this odd-lot jumble of importances. It has to do at once with the apperceptive mass, and with what law is, and with what lies behind the case, and with the relation of adjective to substantive law, and with the relation of your study to your practice, and of both to the world at large. That matter is the almost hopeless bias of all present and past discussion about law. *We talk of legislatures and of courts of last resort. We talk of almost nothing else.* You find me trying at great length to make you see what lies behind the case. For its own sake? Not at all; *only to make you understand the opinion in the appellate court.* You find me trying to analyze the work of "courts" and "judges"—criticizing here, moved there to admiration. What judges? *Judges of appellate courts.* You find me dealing with "the law" and what it is and does. I say its center is the action of officials, *all* law officials—and no sooner say it than I slip off my own platform to land for lecture after lecture in discussion purely of these courts of high review, and what *they* do.

Surely it is clear that I am damned out of my own mouth. If, as I claim, what appellate judges *do* is vastly more important than what appellate judges say, that can be only because importance to *other* people, to the laymen, to the poor devils *to whom* they do it, appears to me the primary