5. Not all jurisdictions have the same rule for condemnation proceedings as Wisconsin. 2 P. NICHOLS, EMINENT DOMAIN § 5.2(3), at 42 (rev. 3d ed. 1970):

> [I]t is generally held that in condemnation proceedings ... , proof of possession under claim of title will be treated as *prima facie* evidence of ownership in fee, and will be sufficient to entitle the person in such possession to receive the compensation awarded for the land, if no one showing a better title lays claim to it.

See, e.g., United States v. Certain Land, 314 F.Supp. 1372 (D.Mass.1970).

W. HOHFELD, SOME FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING

23 YALE L.J. 16, 28–59 (1913)

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 toward improvement; for in any closely 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. ...

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 proceeding to exemplify their individual scope and application in concrete cases. An effort will be made to pursue this method:

Jural	rights	privilege	power	immunity
Opposites	no-rights	duty	disability	liability

Jural	right	privilege	power	immunity
Correlatives	duty	no-right	liability	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; and this looseness of usage is occasionally recognized by the authorities. ...

Recognizing, as we must, the very broad and indiscriminate use of the term, "right," what clue do we find, in ordinary legal discourse, toward 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. ...

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 toward 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. ...

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 ... . It is equally clear, as already indicated, that ... 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. ...[1]

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? ...

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 co effect the particular change of legal relations that is involved in the problem.

The 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

[1] [Query: When you were told in the first grade that going out to recess was a "privilege" not a "right," was the teacher using these words in their Hohfeldian sense? Ed.]

"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. ...

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 lat[t]er 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 X'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. ...

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. ...

[Consider, for example, an 1861] Virginia statute providing "that all free white male persons who are twenty-one years of age and not over sixty, shall be *liable* to serve as jurors, except as hereinafter provided." It is plain that this enactment imposed only a liability and not a duty. It is a liability to have a duty created. The latter would arise only when, in exercise of their powers, the parties litigant and the court officers, had done what was necessary to impose a specific duty to perform the functions of a juror. ...

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.*, 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 every one 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. ...

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.

... In short, the deeper the analysis, the great[er] become one's perception of fundamental unity and harmony in the law.

NOTES AND QUESTIONS ON DISABILITY PROVISIONS

Consider the following statutory provisions (DKM3, p. 79):

a. "If any person be within the Age of twenty-one, *non compos mentis*, or imprisoned at the time the right to bring said action shall have accrued, he may, notwithstanding the said twenty-one years be expired, bring his action within ten years after his full age, coming of sound mind, or enlargement out of prison." [Derived from the statute of 21 Jac. 1.]

b. "[B]ut if any person entitled to bring the action is, at the time the cause of action accrues, within the age of minority or of unsound mind, such person, after the expiration of twenty-one years from the time the cause of action accrues, may bring the action within ten years after such disability is removed." [Basically the current Ohio provision.]

What did the Ohio legislature do to the English statute? (Notice the assumption about legislative history here.) (1) Removed the stuff about prison. (2) Fussed around with the wording. The first change is clear enough. It's the second we want to focus on. (TO = "true owner" and AP = "adverse possessor".)

AP enters in 1980. The limitations period is 21 years. AP has possessed in all the ways that AP is supposed to possess. The age of majority in both England and Ohio is 21. When does the statute run out under the following assumptions (suggested answers are given in square brackets):

1. TO was of sound mind in 1980. TO became insane the day after AP entered. TO is alive and not well today. [2001] The limiting case and the plain meaning rule.

2. TO was 18 in 1980. [2001] It is highly probable that under either wording, if the disability ends within the basic statutory period and if the ten year extension is not as beneficial to the holder of the cause of action as is the basic statutory period, the holder gets the basic period. The language of the English statute may clearer in this regard, but that of the Ohio statute probably does the job just as well.

3. TO was 5 in 1980. TO died in 1990. H, TO's heir, was of full age, of sound mind, and not in prison at the time. [2001] It is less clear, but probable, that a court would hold that once the disability had ceased because of the death of the holder of the cause of action, the heir, if himself not disabled, cannot claim a hypothetical disability. This is particularly apparent if one considers the disability of insanity.

4. TO was insane in 1980. He died insane in 1995. H is his heir and has no disability. [2005, probable] Both statutes speak in terms of a person who is both disabled and entitled to bring the cause of action. Since H is not disabled, it might be argued that s/he should not get the benefit that O would have gotten had his

disability ceased during his lifetime. Such a result is possible under the words of the statute and might be reached if the statute were viewed with disfavor for policy reasons. But since it is clear that the legislature was simply not thinking about the possibility of inheritance of the cause of action, the court should be free to give H the disability extension on the argument that H inherits the disability extension along with the cause of action.

5. TO was 5 in 1980. He became insane in 1985. He is alive and not well today. [2006, or still tolled under the English statute; 2006 under the Ohio statute] There is a possible argument under the English statute that all disabilities must be removed before the statute runs. The Ohio statute is clearer on this point. Its reference to "such disability" pretty clearly refers only to the disability that existed at the time the cause of action accrued.

6. TO had no disability in 1980. He died in 1985. H is his heir and was 6 in 1985. [2010 under the English statute; 2001 or 2010 under the Ohio]. As I read the Ohio statute, in order to claim disability, the holder of the cause of action must be the holder of the cause of action at the time the cause of action accrued and disabled. The words to focus on are "if *any* person ... bring *his* action in the English statute, and "if a person *entitled* ... *such* person ... *such* disability" in the Ohio. It is possible, however, to read the Ohio statute to refer to the person *now* entitled to bring the cause of action. Another road to the same result is discussed in Question 7, below.

7. TO was 5 in 1980. He is alive and competent today. [2006 under the English statute; 2001 or 2006 under the Ohio statute]. The earlier result under the Ohio statute is predicated on the proposition that the statute refers only to those disabilities that are removed after the expiration of the 21 year period. This leads to harsh results in the limiting case, but such is the nature of statutes of limitation. The mention of the age of minority as a possible disability may indicate legislative intent not to achieve this result, but it may have been a drafting error. The fundamental problem is why did the legislature change the perfectly clear "notwithstanding" in the English statute to the at least ambiguous "after" if it did not intend to change the result? Supporting this reading of the intent is the fact that Ohio eliminated the disability of imprisonment and is probably stricter than the English is situations (5) and (6).

If one is convinced that the result under the Ohio statute is simply irrational, it is possible to arrive at the same result under the English statute by reading the first "after" as if it were a second "if" and by reading the second "after" as referring only to the immediately preceding phrase. This reading ignores the fact that legislature made a change and the fact that the Ohio statute is generally stricter.

8. TO was insane in 1980. TO died insane in 1985. H was 6 at the time of TO's death. [2001 or 2010 under the English statute; 2001 under the Ohio.] This basically combines arguments previously made.

9. Would your answers to any of the above questions be different if you were told that all the disabled parties had a judicially-appointed guardian or conservator who could sue on their behalf?

10. TO disappeared in 1975. You are representing P who wishes to buy the property from AP. When would you advise P that such a purchase is safe? [Consider not only the possible effect of disability provisions but also the possible effect of TO's having divided the land between life estate and remainder before the entry of AP.]

GERAGOSIAN v. UNION REALTY CO.

Supreme Judicial Court of Massachusetts
289 Mass. 104, 193 N.E. 726, 96 A.L.R. 1282 (1935)

LUMMUS, J. In 1927 one Vartigian built a theatre in Somerville on land the rear of which adjoined the rear of land of one Aaronian. Both lots bounded also in the rear upon a private way called Sewall Court, which ran into Sewall Street. There is no finding as to the ownership of the fee in Sewall Court, but it is found that rights of way over Sewall Court are appurtenant to both the Vartigian land and the Aaronian land. The plaintiff, now owning the Aaronian land, seeks an injunction against the present owners of the theatre, for the removal of trespassing structures.