A PLEA FOR A MODERN DEFINITION AND CLASSIFICATION OF REAL PROPERTY.

In the course of my teaching, it has seemed to me that a number of what have, heretofore, been regarded as essential preliminary conceptions in the law of real property, require fuller treatment than is accorded them in the text-books, and that the definition and classification of real property should be re-modeled. The object of this paper is to go over some of the fundamental definitions in the law of real property, to frame comprehensive ones, and to suggest what the modern definition and scope of that law should be. While it repeats much that is elementary, the reason and the excuse is that I have been able to find no adequate definition of real property as that property is known in the law, so have had to frame one of my own out of the elements. The elementary is often the least understood, and is, in fact, just that in the law of real property which, to-day, for student purposes, most requires careful consideration.

PROPERTY.

To begin then, at the beginning, the word "property" is derived from the Latin word *proprius,* which means one's own. The word "property" means either (1) anything corporeal or incorporeal which a person may acquire, own and dispose of to the exclusion of some other person, or (2) any legal or equitable incorporeal right to or interest in such corporeal or incorpeal thing, which right a person may acquire, own and dispose of to the exclusion of others.

Exactness requires that the corporeal or incorporeal *thing* which is the subject of ownership be discriminated from the incorporeal *right to or interest in it,* even though the incorporeal right to or interest in the corporeal or incorporeal thing is itself the subject of ownership. The *thing* should be called *property,* and *the right to or interest in it,* should be called *a right of property.* A right of property is a right to the exclusive enjoyment of any property, or to the exclusive enjoyment of some part of, or undivided interest in such property. Unfortunately, however, the distinction between

the thing owned and the rights of ownership in it has not been adhered to by judges and writers in the common law, even where it has been made, and the confusion between the two is now so great that it is necessary often to use the word "property" to cover rights of, in and to property.

I repeat then, that at common law, the word "property" means either (1) anything corporeal or incorporeal which a person may acquire, own and dispose of to the exclusion of some other person, or (2) any legal or equitable incorporeal right to, or interest in such corporeal or incorporeal thing, which right a person may acquire, own and dispose of to the exclusion of others.

Property, so defined, consisted at common law of (1) real property, comprising things real, certain incorporeal interests in things real, and a few things personal and interests in things personal, falling under the head of hereditaments, and (2) personal property, comprising things personal, certain incorporeal interests in things personal, and certain incorporeal interests in things real.

DISTINCTION BETWEEN REAL AND PERSONAL PROPERTY.

The broad distinction between real property and personal property was, and, in general, is that between (1) immovable things and rights in them, and (2) movable things and rights in them. But this distinction was and is far from exact, largely because both things and the rights of ownership in things have been and to-day are called property.

The distinction between real property and personal property which is the most important in theory, has been found in what becomes of each after the death of its owner. At common law, when a man died and left no will, his real property went to his heir direct, and if he left a will, it went directly to his devisee; but his personal property went to his administrator if he left no will or to his executor if he left a will, and only after the decedent's debts were paid was distributed, in the case of intestacy, to the next of kin specified by statute, or, in the case of a will to those named by the will. This distinction was very important in England, where, in the first instance, the heir was the eldest son, but in the first instance, the next of kin comprised the widow and all the children. It is much less important in many of the States of the United States, where, by statute, the same persons are heirs and distributees, and the administrators and executors are authorized by statute to sell, lease or mortgage the decendent's real estate to

pay his debts and the legacies charged upon the land, where the personal estate is insufficient. Still, the distinction exists and is important, even in these States where the same persons are heirs and next of kin[1] ; and it should be held clearly in mind that, in general (1) real estate goes directly to the heirs or devisees, and (2) personal property goes directly to the administrators or executors, and only after the debts of the decedent are paid to the next of kin or legatees. The chief exception in the case of real estate, consists of estates for life in tenements which cannot go to any body, because of their termination on the death of the owner.

Because for certain historical reasons, hereinafter referred to, certain interests in things real went to a man's personal representative, in the first instance, instead of to his heir or to the beneficiary under his will, those interests were held at common law to be personal property; and in common law States, where the rule has not been changed by statute, they are to-day held to be personal property. They are known in the law as chattels real.

REAL PROPERTY.

The words "real property" are modern, and are synonymous with the feudal words "lands, tenements and hereditaments." The feudal phrase was awkward, and because the common law allowed the demandant of lands, tenements and hereditaments to recover *the real thing sued for,* while, ordinarily, for other property the remedy was against the *person* of the defendant, lands, tenements and hereditaments came to be called *real property,* and the actions for their recovery *real actions,* while all other property came to be called *personal property* and all other actions, *personal actions.*[2]

Real property, therefore, consists of lands, tenements and hereditaments, and to know just what it is, we must scrutinize carefully each one of these terms.

LANDS.

"Land" means, in general, the exposed parts of the earth, as contrasted with the parts covered at all times by public navigable waters. "For land," says Sir Edward Coke, "comprehendeth, in its legal signification, any ground, soil or earth whatsoever; as arable,

[1] For instance in Colorado, an interest in mining claims passes directly to the heirs of an intestate, and they and not the personal representatives are the parties to bring suit to quiet title. Keeler vs. Trueman, 15 Colo. 143.

[2] Williams on Real Property, *7.

meadows, pastures, woods, moors, waters, marshes, furzes and heath."[1] All such land has at common law an indefinite extent upwards as well as downwards, and ordinarily includes everything existing above the soil, and everything in and under the soil. "Under the term land, therefore, are included the buildings, made so under the doctrine of accession, and the trees and other things growing upon the land, under the doctrine of acquisition by production, as well as the minerals which may be embedded in the earth—even trees which have been cut and are lying upon the land have been said to pass with the land."[2] "Even the air is not free, for the maxim is that the owner of the soil is owner up to the height above and down to the depth beneath. I conceive it is indisputable that to pass over land in a balloon at whatever height, without the owner's or occupier's license, is technically a trespass."[3] So the water on the land is, for the time being, part of the land. If the wind blows away the air now over my land, it ceases to be part of my land, just as the water which runs away does; but for all that, in the eyes of the law, the air over and the water on my land, form changing parts of my land. There are other changing parts of my land known as emblements (if emblements be defined to be the growing annual crops planted by a tenant, which he has a right to take and carry away, rather than the right to the crops, in which latter sense the word is also used), and still others known as fixtures (if fixtures be defined to cover that which was chattel, which is now land because of actual or constructive attachment to the land, and which, under certain circumstances and between certain parties, can legally be restored to its chattel nature by actual or constructive severance). All these variable parts of land may be grouped under the description of "everything on, in and over the soil that goes with it;" and then our first definition of land will be:

Land is any ground, soil or earth whatsoever, together with everything on, in and over it that goes with it.

But because the thing which is the subject of property and the right of ownership of that thing are both of them called property, land has still another definition. When we say that a man inherits land, for instance, we mean that he has succeeded to the rights of ownership which his ancestor had in the physical thing

[1] 2 Bl. Com. *19.
[2] Tiedeman on Real Property, Sec. 2.
[3] Sir Fred. Pollock's Land Laws, pages 15—16.

land. So, too, when we say that a man has conveyed land, we mean, in any place where the common law rule about chattels real has not been changed by statute, that he has transferred to some one an incorporeal freehold interest in the corporeal thing known as land. In some States by statute, the word "land" is made to cover interests less than freehold in the corporeal thing known as land. In Colorado, for instance, "the words 'land' or 'lands' and the words 'real estate' shall be construed to include lands, tenements and hereditaments and all rights thereto and all interests therein." [1] But at common law, apart from statute, only freehold rights to or interests in land are land. In other words, the term land has come to mean at common law a freehold interest in the corporeal thing known as land, as well as the corporeal thing itself.[2] As the word land is used by common law writers and judges, it means in a given case the physical thing which we have already defined as land, or a freehold interest in that thing, or both.

We are now ready for our final common law definition of land, viz:

Land is, at common law (1) any ground, soil or earth whatsoever, together with everything on, in and over it that goes with it, or (2) any freehold incorporeal interest in the corporeal thing known as land, or (3) both. Where a man owns in fee a piece of real estate, for instance, his land is (1) the physical ground, including the minerals, etc., in it, the houses, etc., upon it, and the air, etc., over it, or (2) the fee simple incorporeal estate in it, or (3) both.

TENEMENTS.

Tenements is in itself a broader word than land. It includes everything of a permanent nature which may be held in tenure, whether that nature be corporeal or incorporeal.

Tenure implies, not only the actual holding of land by one from

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[1] 2 Mills Ann. Stats. (Colo.), Sec. 4185 Sub. 5.

[2] "The term land, at common law, has a twofold meaning. In its more general sense, it is held to comprehend any ground, soil or earth whatsoever, as meadows, pastures, woods, marshes, furze, etc. 1 Inst. 4, a; 2 Black., Com. 18. In its more limited sense, the term 'land' denotes the quantity and character of the interest or estate, which the tenant may own in lands. 'The land is one thing,' says Plowden, 'and the estate in the land is another thing; for an estate in the land is a time in the land, or land for a time.' Plowd. 555. When used to describe the quantity of the estate, 'land' is understood to denote a freehold estate at least. Black. Com. 18; Shepp. Touch. 88."—Johnson vs. Richardson, 33 Miss. 462 at P. 464.

or under another, but also the terms upon which he holds. Tenure is the mode of holding certain property. It is, collectively, both the conditions and terms upon which the sovereign power in a State permits land and incorporeal hereditaments to be held by an individual, and the rights and obligations which arise from those conditions and terms. The thing held, whether it be corporeal or incorporeal, is called a *tenement,* the holder is called a *tenant,* and the manner of the tenant's holding constitutes a *tenure.* All land owners in feudal times were tenants directly or indirectly of the king, and their holding constituted a tenure. The word tenure is a feudal name.

Tenements, in the phrase, "lands, tenements and hereditaments," covers everything which can be held in tenure. *Liberum tenementum* means freehold, and is "applicable, not only to lands, and other solid objects, but also to offices, rents, commons and the like . . . So is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are all of them legally speaking tenements."[1] Washburn errs in saying that an incorporeal hereditament cannot be regarded "properly speaking" as a tenement;[2] for "a tenement comprises everything which may be holden, so as to create a tenancy in the feudal sense of the word, and no doubt it includes things incorporate, though they do not lie in tenure."[3] An incorporeal hereditament was legally a tenement, and certainly was covered by the word tenements, in the phrase, lands, tenements and hereditaments. A tenement was at common law anything which could be held in feudal tenure, and in the phrase "lands, tenements and hereditaments" covered incorporeal hereditaments as well as land.

HEREDITAMENTS.

Hereditaments, is in a way, a still broader word than land or than tenement, for it embraces everything which may be *inherited,* and so includes heirlooms, which are neither lands nor tenements, yet, by custom, go to the heir; but, in another way, since it does not cover an estate for life in lands and tenements, it is a narrower word.

Hereditaments were those things, which on the owner's death, intestate, went at common law, to the deceased's heir as such.

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[1] 2 Black. Com., *17.

[2] 2 Washburn, Real Property, 5th Ed., p. 284 (Book 2, Chap. 1 *4).

[3] 3 Kent's Com., *401.

I have used the words "heir as such," because in an estate *pur auter vie* the heir took, if at all, as a special or as a common occupant and not as heir. If the estate was limited to his ancestor *and heirs* for the life of another, he took as special occupant, but if it ran only to the ancestor for the life of another, then, if the heir took at all, it was as common occupant without priority by virtue of his heirship. In any event, at common law, the heir of a deceased owner of an estate *pur auter vie* never took the estate *as heir,* though in some States to-day he does so by virtue of a State statute.[1]

Since hereditaments include everything which goes to a man's heir as such, it includes heirlooms, for "heirlooms are such goods and personal chattels, as contrary to the nature of chattels shall go by special custom to the heir along with the inheritance."[2] It also includes all heritable interests in land and tenements, that is, all interests larger than life estates.

The term hereditament includes, therefore, heirlooms and all lands and tenements except estates for life in tenements; and, with the exception of such estates for life in tenements, nothing is real property which is not heritable.

By heritable, as applied to property, is meant, that if the owner dies intestate, the physical thing itself, or, to be accurate, the estate the owner has in it, will go direct to his heir and not first to his administrator. One can ordinarily be an heir of only lands and tenements, but heirlooms are an exception. Annuities are strictly another exception, but those which go to the heir, although really personal property, are usually classed as tenements, and it is as well to follow the ordinary classification. Heirlooms exist from immemorial custom. They cannot be created to-day, because personal property, from its very nature, goes to the personal representative and cannot be made to go to the heir. An annuity is the only kind of personal property which to-day can be made to go to the heir; if it is settled on a man and his heirs, and the man dies intestate, his heir will get it instead of his personal representative.

All lands and tenements, therefore, with the exception of estates for life in tenements (and under the head of tenements, we class annuities limited to a man and his heirs) and all personal property which by custom comes under the head of heirlooms, descend to a man's heir in the absence of other disposition of them by him in

[1] Tiedeman on Real Property, Sec. 61 and notes.

[2] Black. Com., *427.

his lifetime, or in his will;[1] while in such case other property—known as personal—goes first to the personal representative and then after debts are paid to the next of kin specified by statute. Hereditaments, therefore, include heirlooms, and all lands and tenements except estates for life in tenements; and hereditaments are divided into (1) corporeal hereditaments and (2) incorporeal hereditaments.

CORPOREAL HEREDITAMENTS.

Corporeal hereditaments comprise all heritable property of a substantial and permanent nature, such as lands, houses, mines, woods, heirlooms, etc. Blackstone, to be sure, says that all corporeal hereditaments "may be comprehended under the general denomination of land only,"[2] thereby ignoring heirlooms; but Blackstone made this mistake because he confused heirlooms with fixtures which go to the heir as part of the land.[3] So too, Kent is wrong in saying that "corporeal hereditaments are confined to land."[4] Corporeal hereditaments not only comprise all heritable property of a substantial and permanent nature, such as lands, houses, mines, woods, heirlooms, etc., but also comprise all inheritable interests or estates in possession in such substantial and permanent property, that is, all heritable estates in land which at common law could be transferred only by livery of seisin (except, of course, life estates which were not heritable).

Estates for less than life were not heritable and, of course, did not come under the term hereditaments any more than life estates did; while future interests in land, such as remainders, reversions, executory devises, contingent uses, springing uses and shifting uses, like equitable estates, were transferable by grant, and were, therefore, incorporeal interests which could in no sense be corporeal hereditaments.

Since the words "corporeal hereditaments" include all land except estates for life, lesser estates, equitable estates and future

[1] "Heirlooms, it is held, cannot be devised or bequeathed by will, for the technical reason that the will cannot operate until after death, whereas, the ancient custom takes effect the instant one dies; so that the law preferring custom to the devise or bequest, they vest in the heir at once. But during his life the owner may, of course, sell or dispose of chattels which would otherwise descend as heirlooms."

[2] 2 Black. Com., *17.

[3] Chase's Blackstone, p. 536, Note 2.

[4] 3 Kent Com., *401.

interests, in the physical thing land, they necessarily embrace not only the physical thing land, but also those legal incorporeal freehold interests *in possession* in the physical thing which come within the meaning of land, could be conveyed at common law only by livery of seisin [1] and go to the heir. The heritable incorporeal interests in land which were created and passed by livery of seisin at common law and which did not lie in grant are the only incorporeal interests which come under the head of "corporeal hereditaments." They come under the head of corporeal hereditaments because the word land has an incorporeal as well as a corporeal meaning, and because the confusion between the thing owned and the right of ownership in it is inherent in the law of real property. The words "corporeal hereditaments" do not include equitable estates or incorporeal freehold estates in remainder or reversion or future estates in use or by way of executory devise in land, even though such estates are heritable; for those could be passed at common law by grant without livery of seisin, and therefore were not close enough to the possession of the physical thing land for them to be hopelessly confused with the physical thing itself.

INCORPOREAL HEREDITAMENTS.

Incorporeal hereditaments comprise all heritable property of an intangible nature not already shown to be a corporeal hereditament. In incorporeal hereditaments the heir has no right to the possession of any particular thing corporate, as such, but only to the use, "effects and profits" [2] of corporate things. Still in the case of rights of way, commons, etc., it is hard to make a clear distinction between the use of the thing and the right to the possession of the thing. "An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning or annexed to or exercisable within the same. It is not the thing corpo-

[1] It will be noticed that I am particular to except from the classification of corporeal hereditaments those incorporeal interests in land which, while regarded as interests in possession in land are yet subject to chattel interests of such a nature that the interests in possession may be conveyed by grant. "An estate of freehold is said to be in possession, although it is subject to an existing prior chattel interest." (6 Am. & Engl. Ency. of Law, 1st Ed., p. 896); but such estates in possession, if inheritable, must be classed as incorporeal hereditaments because conveyable by grant. The fact that with the consent of the tenant for years such freehold estates could be conveyed by livery of seisin does not justify classifying them with corporeal hereditaments, for they are remainders or reversions and as such incorporeal hereditaments.

[2] 2 Black. Com., *20.

rate itself . . . but something collateral thereto . . . [Incorporeal hereditaments] exist merely in idea and abstracted contemplation, though their effects and profits may be frequently objects of our bodily senses."[1] "Incorporeal tenements and hereditaments comprise certain inheritable rights, which are not strictly speaking, of a corporeal nature or land, although they are, by their own nature, or by use, annexed to corporeal inheritances and are rights issuing out of them or concern them. They pass by deed without livery because they are not tangible rights."[2] An incorporeal hereditament cannot be perceived by the senses—being a mere legal right of one kind or another—and, therefore, at common law, no livery of seisin of it could be had. It passed at common law by delivery of the deed of grant, and for that reason all incorporeal hereditaments "as advowsons, commons, rents, reversions, etc., [are said] to lie in grant."[3]

Under the head of incorporeal hereditaments are included all equitable estates of inheritance and all future estates of inheritance in lands, whether in reversion or remainder or limited to take effect by executory devise or contingent, shifting, or springing use. But incorporeal and inheritable present estates of possession in land fall under the head of corporeal hereditaments, unless they are subject to some existing prior chattel interest which permits them to be conveyed by grant, in which latter case, they fall, like other remainders and reversions, under the head of incorporeal hereditaments.

Incorporeal hereditaments, therefore, include all heritable rights, except those inheritable incorporeal freehold estates in possession in tenements, which, at common law, could be transferred only by livery of seisin. The heritable incorporeal estates just excepted, and the corporeal things which are the subject of heritable rights, fall under the head of corporeal hereditaments.

In Austin's Lectures on Jurisprudence, the author attacks the division by common law writers of hereditaments into corporeal and incorporeal. For instance, in Lecture 13, in unnumbered paragraph 32, he says: "In the English law we have the same jargon about 'incorporeal things'—With us *all* rights and obligations are not *incorporeal things;* but certain rights are styled *in-*

[1] 2 Black. Com., *20.
[2] 3 Kent's Com., *402.
[3] 2 Black. Com., *317.

corporeal hereditaments, and are opposed by that name to *hereditaments corporeal.* That is to say *rights* of a certain species, or rather of numerous and very different species, are absolutely opposed to the *things* (strictly so called) which are the subjects or matter of rights of another species.

"The word 'hereditament' is evidently taken in two senses in the two phrases which stand to denote the species of hereditaments. A corporeal hereditament is the thing itself which is the subject of the right; an incorporeal hereditament is not the subject of the right but the right itself."

Great as is the objection on which Mr. Austin insisted in the above passage, how much greater would have been his condemnation of the classification had he realized that besides opposing certain incorporeal rights in things to the things which are the subjects of the rights, it also identifies certain other incorporeal rights with the things which are the subjects of the rights, and calls those other *incorporeal* rights *"corporeal* hereditaments."

DEFINITION OF REAL PROPERTY.

We have now concluded our scrutiny of the phrase "lands, tenements and hereditaments" and are in a position to give a comprehensive definition of "real property," namely:

Real property consists of lands, tenements and hereditaments, that is, it consists of any ground, soil or earth whatsoever, together with everything in, on and over that ground, soil or earth that goes with it, together with all freehold interests in possession in it which at common law could be conveyed only by livery of seisin, together with all present equitable[1] freehold interests in it, together with all legal and all equitable life estates in reversion or remainder in it, or limited to take effect in it in the future by executory devise, or by contingent, springing or shifting use, together with all incorporeal hereditaments (which include all future interests, whether legal or equitable, larger than for life) and together with heirlooms. All of these except heirlooms are tenements, and all except life estates in tenements are hereditaments.

But it is not enough to stop with this definition. Our definition of real property must be supplemented by one of personal property.

[1] Equitable freehold estates are certainly real property—McKeithan v. Walker, 66 No. Car. 95 at page 97. See Wall v. Fairly, 67 No. Car. 105.

PERSONAL PROPERTY.

Personal property is all property corporeal and incorporeal which is not real property; that is, all property which is not covered by the words "lands, tenements and hereditaments." The old term for personal property was "goods and chattels."

The word chattels covers all personal property. A chattel is any species of personal property, that is, it is any species of property which, on the death of its owner, whether testate or intestate, goes directly to his personal representatives, and only after his debts are paid goes to the persons designated by statute or by his will. Just as we found that "land" meant both corporeal things and certain incorporeal interests in corporeal things, we now find that "chattel" embraces both corporeal things and certain incorporeal interests in corporeal things. "Chattel" means, at common law, any species of property which is not an heirloom nor an incorporeal hereditament (including under this head, an annuity limited to an annuitant and his heirs) nor a freehold in land; and chattels are divided into (1) chattels personal and (2) chattels real.

CHATTELS PERSONAL.

Chattels personal include all corporeal things which are not real property, and such incorporeal things other than chattels real, and other than incorporeal hereditaments as in contemplation of law follow the person of the owner. Chattels personal are, in a word, all chattels which are not heirlooms, incorporeal hereditaments or chattels real.

CHATTELS REAL.

Chattels real are such as "savour of the realty," by which is meant that such chattels are interests in lands. They are interests in land which, because not incorporeal hereditaments, do not go to the heir, and, because, not freehold estates in land, do not come under the head of land. Chattels real are in a word all uninheritable interests in land less than a freehold.

At common law ,prior to the American Revolution, chattels real comprised (1) estates or terms for years (2) estates from year to year (3) estates at will (4) estates at sufferance (5) estates by Statute Merchant (6) estates by Statute Staple and (7) estates by elegit. Of these, the first four alone concern us to-day; and to explain the way in which such leasehold interests came to be

treated as chattels and not as real estate, necessitates a brief reference to the feudal system.

Under the feudal system, as it was introduced into England, a life estate in land was considered the least estate which was worthy of the acceptance of a free man; and, consequently, was the least estate which could constitute a freehold. Lesser interests than life interests were turned over to peasants and other persons who performed base services. Such lesser interests, not being freehold, were known as leasehold interests.

The earlier leasehold interests were on farms, and that is why "the word *farm* applies as well to anything let on lease, or *let to farm* as to a farm-house and the lands belonging to it."[1] Farming, in feudal days, required so little capital that the lessees "were considered as bailiffs or servants of the lord, holding possession of the land *jure alieno* and not *jure proprio,* who were to receive, and had contracted for, the profits at a settled price rather than as having any property of their own."[2] Indeed, it was not until about the time of Edward I. that "estates for years seem to have become of importance and to have been considered, after entry made, as actual interests in the land vested in the lessee."[3] Even then, and of course before, if the tenant was deprived of his land, his only remedy was a personal action against his landlord for breach of the latter's covenant in the lease for quiet enjoyment. "The farmer could be scarcely said to be the owner of the land, even for the term of years of the lease; for his interest wanted the essential incident of real property, the capability of being restored to its owner. Such an interest in the land had, moreover, nothing military or feudal in its nature, and was, consequently, exempt from the feudal law of descent to the eldest son as heir at law. Being thus neither real property nor feudal tenement, it could be no more than a chattel."[4]

The tenant's personal action against his landlord for breach of the latter's covenant in the lease for quiet enjoyment was a contract right, in other words, and as such went to the administrator or executor of the tenant on the tenant's death; and the whole term for years was, therefore, held to go to the tenant's personal representative. As all property that went to the administrator or

[1] Williams on Real Property (6th Ed.), *9.
[2] 1 Washburn Real Property (5th Ed.) p. 463, *290.
[3] Ibid.
[4] Williams on Real Property (6th Ed.), *9—10.

executor of a deceased person was *ipso facto* personalty, terms for years were held to be personal property. And as terms for years were so held, lesser leasehold interests, namely, estates at will, from year to year, and at sufferance, were likewise held to be personal property or chattels. As estates at will and at sufferance do not survive the death of the sole tenant, they cannot go to his personal representatives; but estates from year to year do survive and go to the tenant's personal representatives just as do estates for years, and estates at will and at sufferance are classed with them as chattels. All these estates at sufferance, at will, from year to year, and for years, came to be regarded as we have seen, as chattels; but because they were interests in real property, they were known as "chattels real." Even after a succession of remedial acts of Parliament had given a lessee for years who had been deprived of possession of the land, a mode of regaining the leased premises,[1] leasehold interests continued to be chattels. Leasehold interests are still personal property in those common law States which have not made them by statute real estate.

Personal property, therefore, consists of all corporeal and incorporeal property which is not real property, that is, it consists of all interests in land less than a freehold that are not incorporeal hereditaments, of all chattels personal which have not, by custom, become heirlooms, and of all annuities which are not expressly worded to go to the heirs of the annuitants. Real property, we have already defined.

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[1] "A form of action of covenant was the first devised, whereby the tenant might demand his *term* as well as damages, but could only maintain it against his immediate covenantor. In the time of Henry III the writ of *Quare ejecit infra terminum* was framed, which lay against any one in possession of the land, and upon a judgment in the termor's favor, he recovered possession of the land itself. But this writ did not reach a case where a stranger had entered and tortiously ousted the tenant, and in such cases his only remedy was to sue for possession in the name of his lessor. In the time of Edw. III, the writ of *ejectment*, substantially like that now in use [see 1 Gray's Cases on Property, page 1,] was invented and so shaped as to enable the tenant of a term to recover it, when deprived of the possession of the premises leased. And in this way, at last, tenants for years were placed upon the same level with freeholders, in regard to the security of their estates, and their remedy for recovering them, if dispossessed thereof * * * . But it was not before the time of Henry VI that the plaintiff in ejectment recovered the term. At and after that time he recovered this and with it the possession of the land, if his term had not expired; and if it had elapsed, he recovered damages."—1 Washburn on Real Property (5th Ed.), p. 464, *291.

SUGGESTIONS.

We emerge from our career of defining with the feeling that it is no wonder that so many students of the law of real property are unable to tell just what they have been studying. Of course, the law of real property is what, historically, it has developed into, and definitions of real property are what the nature of the growth of that law has made them; but the question is nevertheless open, can nothing be done to simplify the treatment of real property? It seems to me that much can be done, both in the way of definition and of classification.

In the first place, why not insist from the start that the law of real property relates to *all* interests in the physical thing known as land? As it is to-day, a writer on real property has to explain carefully that the interests in land known as chattels real are not real property, and yet has to treat them fully.

In the second place, why not relegate the subject of heirlooms to the law of personal property where it naturally belongs?

In the third place, why not give up entirely the old misleading classification of corporeal and incorporeal hereditaments? We have seen that it is wrong to set off rights in things against the things which are the subject of the rights, and that as a matter of fact, the phrase corporeal hereditaments is misleading, because it includes certain incorporeal heritable interests in land. For the sake of simplicity and of clearness, let the classification be abandoned, and let the word "corporeal" cover, as it properly does, only tangible, physical things.

In the fourth and last place, why not leave to other subjects, such as personal property, corporations, etc., the consideration of those incorporeal things, such as annuities, franchises, etc., which are not interests in land and yet are now grouped in the law of real property under the head of incorporeal hereditaments.

If we do all these things, how comprehensive and simple then are our definitions, namely:

(1) Real property consists of any ground, soil or earth whatsoever, together with everything in, on or over it that goes with it, together with every kind of an incorporeal interest in it;

(2) Personal property consists of all property which is not real property, and includes heirlooms, annuities limited to the heir, etc., which have, heretofore, been treated under the head of real property;

(3) Of real property, those interests in land, less than a freehold, which have not heretofore been classed as incorporeal hereditaments, go to the personal representative instead of to the heir; and of personal property, heirlooms, annuities limited to the heir, etc., go to the heir instead of to the personal representative.

And how simple then is our fundamental classification of real property. Instead of dividing our subject into (1) estates for life in tenements (2) corporeal hereditaments (3) incorporeal hereditaments, and throwing in apologetically as (4) chattels real, we have two main divisions: (1) real property which goes to the heir, and (2) real property which does not go to the heir. And we have corresponding simplicity throughout.

The net result obtained means nothing to the practicing lawyer, perhaps, but to law students it should and doubtless will prove decidedly helpful. The law of real property cannot be made easy of comprehension but it may be made less difficult. And one way of making it less difficult, for students at least, is to adopt some such clear definitions and classification as are herein contended for. The change in the substance of the law of real property which has been wrought by legislation, should be accompanied by a change in the legal definition and classification of real property.

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