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James W. Simonton

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Recommended Citation

James W. Simonton, *Austin's Classification of Proprietary Rights*, 11 Cornell L. Rev. 277 (1926)
Available at: <http://scholarship.law.cornell.edu/clr/vol11/iss3/1>

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The Cornell Law Quarterly

VOLUME XI

APRIL, 1926

NUMBER 3

Austin's Classification of Proprietary Rights

JAMES W. SIMONTON*

The common law, though at least eight or nine centuries old, is an infant in years compared with the civil law system derived from the Roman Law. But the former is nevertheless a matured system. On examining what has been accomplished in the way of classifying this system, one is struck with the fact that no very satisfactory classification has yet been made. Perhaps the system of law has only recently been developed to a point where a reasonably good classification is possible. The general unrest of the present age has strikingly manifested dissatisfaction with the law, and the movement for the re-statement of the law, undertaken by the American Institute of Law, is evidently one result. Since classification is essential to a successful restatement of the law, it is of present interest, but the importance of classification is apt to be over-emphasized. The common sense of the matter is well expressed by Dean Roscoe Pound as follows:¹

"If the conclusions reached with respect to classification in general are sound, we must renounce extravagant expectation—as to what may be accomplished through classification of law. . . . At the outset, then, I disclaim expectation that we may set up a classification which will render restatement of the law a mere matter of mechanics. I disclaim belief that any classification is possible which will enable us to solve problems of substantive law or that will help us much in the solution of such problems. I disclaim expectation of achieving a classification which will enable a lawyer or a judge, by merely going mechanically through an analytical table, to put his finger infallibly upon the exact preappointed legal precept applicable to any problem that may chance to confront him. Classification is an important thing. It is important to make it the best of which we are capable. But it is not a solving device whereby we may obviate the difficulties inherent in ascertaining and applying the law."

John Austin made an attempt to classify the law analytically, but

*Professor of Law, University of Missouri.

¹Classification of Law, 37 Harv. L. Rev. 933, 938.

it is doubtful whether any good classification can ever be made along the lines he adopted. Below is a discussion of his attempt to classify the law of things, which may throw some light on the defects of a classification based on the analysis of rights and duties.

While Austin's larger work on the *Province of Jurisprudence Determined* was not published until after his death, which occurred in 1859, his productive work was done prior to 1832.² This larger work was published partly from his notes and consequently is in an unfinished condition. The work of Austin apparently had little influence, at least until its value was pointed out by Sir Henry Maine. But it has great value, particularly his careful analysis of various legal conceptions, and as Maine said of his work and of Bentham's, "They are indispensable, if for no other object, for the purpose of clearing the head." A careful reading of Austin's work will well repay any lawyer or jurist, who will thus discover what Maine meant by the above quoted remark, and who will also acquire a high respect for John Austin.

Austin attempted the task of making a universal classification of the law—one that would fit both the common law and those systems which have been developed from the Roman law. But the final outcome appears to be that he borrowed chiefly from the civilian forms of classification and what he actually classified was the common law with which he was familiar. In other words, he turned out a common law classification on a civil law scheme.

This was a bold and ambitious attempt at a universal classification of law. Austin believed there was an existing positive law, capable of being discovered and systematically classified, and that a common basis of classification might be found which would fit the two existing developed systems of law. He sought this common basis in his analysis and classification of rights and duties.

We are here interested only in his treatment of rights concerning things, and according to him these rights have correlative duties. By the term "right" as used in his lectures, Austin seems to refer to the legally delimited interest or claim which the law protects or secures, taking the word "law" in the limited meaning

²The productive period of Austin's life, so far as jurisprudence is concerned, was from 1828 to 1832. The first six lectures of his work was published by him in 1832, and the larger work was published after his death from notes which he left. Austin once said that his special vocation was that of untying intellectual knots. One of the great values of his work lies in his clear and ruthless analysis of vaguely comprehended terms, and his refusal to accept current assumptions. He presents a great contrast to Blackstone in this respect.

he attributes to it.³ Henceforth, unless otherwise indicated the word "right" will be used in this sense.

We are here concerned only with the law as to things. Austin divides rights and duties concerning things, into primary rights with primary relative duties, and, sanctioning rights with sanctioning duties. Sanctioning rights and duties are those which are the consequences of delicts, in that they are conferred either to prevent violation of primary rights and duties, or to cure or repair the evils and mischiefs which such violations engender.⁴ Thus if A owns land, he has a primary right that others shall keep off; if B walks on the land without permission, he violates this primary right, giving rise to a sanctioning right to recover damages for the trespass. Since these sanctioning rights and duties are preventative or remedial in their nature, we are not concerned with them here, but are concerned only with the primary rights, with relative primary duties. Roughly primary rights are the rights that constitute ownership, while the sanctioning rights and duties are for the purpose of protecting and effectuating the primary ones.

It is next necessary to take up the distinction between things and persons.⁵ Every legal right in a thing has its corresponding correlative legal duty or obligation, for Austin uses duty and obligation synonymously. Rights reside in and are exercised by persons, either natural or artificial. The subjects of these rights and the objects of these rights are things, acts and forbearances as to which the rights are conversant.⁶ We are here concerned with things as the subjects of rights.

If one is bound by contract to do certain acts, or to forbear from doing certain acts, then such acts or such forbearances to which one is so obligated may be said to be the objects of the rights in question. An act or a forbearance is not a thing, and therefore the right is not a right in a thing, though rights with such objects were classed as incorporeal things by the Romans, and the common law has been guilty of a similar practice in some cases.⁷

³To him laws are commands of the sovereign. "Every positive law is set, directly or circuitously, by a sovereign individual or body, to a member or members of the independent political society wherein its author is supreme." *Province of Jurisprudence Determined*, 5 ed., 330.

⁴*Ibid* 43.

⁵Lecture 13 deals with the distinction between persons and things. *Ibid*, 357-364.

⁶*Ibid*, 360. Things to Austin are the subjects of rights. "Strictly speaking, the act or forbearance is not a thing. It is not an external object. Strictly speaking, it is the object or end of the right, and of the obligation which corresponds to the right; or it is the purpose for the accomplishment of which the right and the obligation exist."

⁷For example as to incorporeal hereditaments.

Austin states that the term "right" as here used, includes what may be styled permissions or liberties. "For it will appear in the sequel that where the law only permits, it as clearly confers a right as where it commands."⁸ It may be noted that this liberty of Austin is much like Hohfeld's privilege. Austin had distinguished this liberty, but had not gone farther, and his term "right" included in addition to the above, powers and immunities. Here appears a difficulty with the primary right and its correlative duty. As to a power, or a liberty, where is the correlative duty? This is not answered by Austin. Seemingly his analysis had not gone far enough to note the difficulty as to a liberty, but he must have been aware of certain powers, particularly powers of appointment, though throughout his work he ignores them.

Rights reside in persons and their subjects are things. "Things are such permanent objects, not being persons, as are susceptible or perceptible through the senses. Or things are such permanent external objects as are not persons."⁹ But things are not only to be distinguished from persons, but also from what may be termed facts or events. Things differ from persons in that they are incapable of rights and obligations, except by personification or legal fiction. They differ from facts and events in that things are permanent, external objects, while facts and events are transient and, "consist of determinations of the will, with other affections of the mind, as well as objects perceptible through the senses . . . Sensible objects, or objects perceptible through the senses, are permanent or transient. The former are persons or things: the latter rank with the objects which are demominated facts or events."¹⁰ A permanent sensible object is, "An object which is perceptible repeatedly, and is considered by those who repeatedly perceive it, as being one and the same object. . . . Transient objects which rank with facts and events are not perceptible repeatedly. They exist for a moment; disappear; and never recur to the senses though they may be recalled to the memory."¹¹

Austin states that the above indicates rather than determines the boundary. As a matter of fact we have little difficulty in actual

⁸*Ibid*, 354. Liberties, powers, immunities, disabilities and liabilities were distinguished by Salmond. See *Jurisprudence*, 1 ed. Sections 75-78. But Salmond defined and used the term right in a wide sense to include "any advantage or benefit which is in any manner conferred upon a person by a rule of law." Sec. 74. This is about the sense in which Austin uses the term. It includes rights (in the strict sense), liberties, powers and immunities.

⁹Province of Jurisprudence Determined, 5 ed., 358.

¹⁰*Ibid*, 358.

¹¹*Ibid*, 359.

legal practice, in distinguishing things from facts and events. Of course many things which are capable of ownership, are more or less temporary in character, and do not remain in one form long. This is true of fungible things and still more true of many sorts of chemical compounds in use today, which may change form rapidly without losing the character of things.

The Romans divided things into *res corporeales* and *res incorporeales*, or corporeal and incorporeal things. As Gaius said,¹² "Corporeal things are such as can be touched, as a farm, a slave, a garment, gold, silver and innumerable other things; incorporeal things are those that cannot be touched; as those things which consist in a right, such as an inheritance, a usufruct, and all obligations contracted in whatever way." Thus by things corporeal they meant what Austin means by things, and things incorporeal seemed to include all obligations of value arising out of legal transactions or otherwise. The term *res corporeales*, refers to the tangible object which is the subject matter of the right (the right itself being intangible), while the term *res incorporeales* refers to the right itself. In other words the term "*res incorporeales*" was applied to the intangible right, in cases where such right had no tangible subject, but where it had an act or a forbearance as its object.¹³ The common law does not go so far as this, but it does have incorporeal hereditaments, as distinguished from corporeal hereditaments, the former referring to certain intangible rights such as rents, advowsons and the like, while the latter refer to the land or the heirloom or the like, which is the subject of the intangible right. In one case the right is called a thing, while in the other the subject of the right is called the thing.

Terry in his *Leading Principles of Anglo-American Law*¹⁴ says the Romans first regarded ownership as absolute, and then conceived the owner of a right other than that in a thing, as being in a similar relation to it, and so came to call these rights which were thus capable of ownership, things also, and the term "incorporeal" was used to distinguish them from the rights in things proper. Then as other lesser rights in things arose such as the usufruct, they did not look on these lesser rights as broken off of the bundles of rights which constituted absolute ownership, but looked on them as new rights, and looked on the ownership in the thing as still existing. Thus the *dominium* or ownership was not mutilated

¹²Institutes of Gaius, II, 12-14. For English translation see Muirhead's Institutes of Gaius, 78.

¹³See Terry, *Leading Principles of Anglo-American Law*, Sections, 43-47.

¹⁴*Ibid.*, Sec. 43.

but was burdened by these new rights. These lesser rights in land were regarded as subjects of ownership.

Austin does not make the natural classification of things into moveable and immoveable, as both the civilian and common law jurists frequently do, though such a division would seem to be more convenient to the common law system than to the civil law. But after all, the question as to whether it is advisable to make such a division is arguable, and such division can be ignored so far as the main divisions of property classification are concerned.

Having distinguished things from persons on the one hand, and from facts and events on the other, Austin proceeds to divide primary rights with their correlative primary duties, into four divisions:¹⁵

1. Rights *in rem* as existing simply, or as not combined with rights *in personam*.
2. Rights *in personam* as existing simply, or as not combined with rights *in rem*.
3. Such combinations of rights *in rem* and *in personam* as are less complex, of which he gives as examples mortgages, pledges, and sales of goods with warranty.
4. Such more complex aggregates of rights *in rem* and *in personam* as are called by the civilians *universitatis juris*, or universities of rights and duties.

It seems to have been the intent to treat the law of things under the first, third and fourth of these heads, the principal portion coming under the first head. But it would seem that a vast lot of material would fall within the third head, if one follows closely such a subdivision. Some explanation of this third head is found in the following,¹⁶ "For example, the right conferred by a mortgage, is a combination of rights *in rem* and rights *in personam*. So is the right conferred by a sale, completed by delivery, at least under some circumstances. If accompanied by a warranty, express or tacit, it does not confer a *jus in rem* simply, or a *jus in personam* simply. The sale completed by delivery, passes a right to the thing sold, which avails against the world in general, but, by the warranty, there also accrues to the buyer, a right availing against the seller determinately or exclusively." There is no further attempt to proceed with the development of the third and fourth heads above, this being left unfinished. But Hearn in his *Legal Rights and Duties* in chapter 13, takes up this third head under the title "The Com-

¹⁵Province of Jurisprudence Determined, 5 ed. 46, 784.

¹⁶*Ibid.*, 785.

binations of Rights." This chapter subject is broader than Austin's third head, however, for Hearn includes combinations of rights *in personam* with other rights *in personam*. He divides Austin's third division into the following two sub-heads, (1) those combinations in which the primary right is *in rem*, and the right *in personam* is accessory to such right *in rem* and, (2) those combinations in which the primary right is the right *in personam*, and the right *in rem* is accessory to it.¹⁷ The first division would include transfers of land with covenants, express or implied, and sales of goods with warranties. The second would include such things as pledges, other types of liens, and many bailments. The result does not seem admirable. In the first place, many of these complex combinations are after all mainly rights in things, and should be treated there, and many of them perhaps ought to be treated with rights *in personam*.¹⁸ Should we take practically all leases and conveyances of land, out of the main part of the law of things and treat them in a section together with much of the law of sales? In the second place, this third head includes an exceedingly numerous and miscellaneous lot of materials brought together in one place, merely because they all involve some combination of rights *in rem* and *in personam*. Thus Hearn includes, insurance, marriage, master and servant (including employers' liability), agency, sales, partnership, bailments, mortgages, pledges and other security rights, bills and notes, bills of exchange and bills of lading. The last three are included because he includes combinations of rights *in personam* in his division. It seems that, as this heading includes considerable portions of the above named subjects, the result will be that this heading will contain more of the law of things, than the first heading of Austin.

Hearn does not take up Austin's fourth heading at all, nor does he even mention corporations either *de facto* or *de jure*. The Romans treated these aggregations of rights or *universitatis juris* with rights *in rem*, to which treatment Austin objects as being illogical, since these aggregations include rights *in personam* also. Furthermore he says the Romans illogically scattered the less complex combinations of rights throughout the *corpus juris* under various heads.

¹⁷Besides these two subdivisions, Hearn includes (3) combinations of rights in rem with other rights in rem, of which he finds none, and (4) combinations of rights in personem with other rights in personem, of which he finds a great many examples.

¹⁸It is more than mere chance that mortgages and pledges are usually treated under property, while sales are treated more in connection with contracts. In the case of the mortgage or pledge it is the accessory real right that is peculiar and important. The right in personem is not strikingly different from other contract rights.

The admirable thing about Austin's four heads is their logic, but practically, there are not many rights *in rem* existing simply, because most rights *in rem* will be found to be combined with rights *in personam*. The result of carrying out this classification is indicated by Hearn's attempt mentioned above. As to very complex aggregates of rights, insofar as the law has come to treat them as legal entities, or has personified them, so that there can be said to be a fictional person as owner, the complexity of the combinations disappear. It has been the habit to treat the chief types of these combinations separately. Thus we treat estates of decedents as a subject, usually with property, while insolvent estates have been frequently treated in connection with obligations. Yet as mere combinations of rights one can not distinguish the insolvent estate from the estate of the decedent. Trusts have also been placed with property. One can see reasons why it has been considered convenient to treat two of these with property and the other with obligations.

Since rights *in rem* are those which avail against the world at large, it is apparent that many such rights do not concern things, hence there must be a further subdivision of rights *in rem*. Austin divides rights *in rem* into three classes:¹⁹

1. Those of which the subjects are things, or of which the objects are such forbearances as determinedly regard specifically determined things.
2. Those of which the subjects are persons or of which the objects are such forbearances as determinedly regard specifically determined persons.
3. Those without specific objects such as patents, copyrights and the like, or what Terry calls ideal things.

We are concerned only with the first of the above divisions. Within this Austin places all the rights concerning things which he discusses. He confines himself to those rights *in rem* concerning things as existing simply, or as not combined with rights *in personam* for he says,²⁰ "In treating of rights *in rem* as existing simply (or as not combined with rights *in personam*) the only rights which I shall consider directly are, rights over things, in the strict acceptance of the term: that is to say such permanent external objects as are not persons."

This brings him at last to the main distinction of his classification of property rights, that is the division of property rights into

¹⁹*Ibid.*, 787. For a discussion of the third subdivision see Terry, Leading Principles of Anglo-American Law, Sec. 48. He terms these ideal things.

²⁰*Ibid.*, 789. For the discussion of *dominium* and *servitus* see Lecture 48.

dominium and *servitus*. The term *dominium* is carefully defined to mean property, or ownership. *Servitus* means rights in the property of another, or limited real rights. But the interesting thing is the line of demarcation drawn between the two.

But before proceeding further it may be well to refer to the marked difference in the way in which the Romans and the common law lawyers looked at ownership in land, for Austin here is applying two Roman law terms to the common law estates and he is disposed to criticise the Romans for their classification of interests in land. It is apparent the *dominium* and *servitus* of the Romans do not fit the common law estates in land very well. At first the Romans looked at *dominium*, as the ownership of property, which could be vindicated if the owner lost possession. As other lesser rights in property developed, they regarded these as new rights, and still looked on the *dominium* as there, but now burdened by the lesser new right or rights. These lesser rights eventually came to be called *jura in re aliena*, even the *emphyteusis* which, in effect gave almost absolute ownership in some cases. The Romans kept their eyes on the *dominium* or absolute ownership and, to them, every new right in the same tract of land, was simply a right which burdened that *dominium* or ownership.²¹ These lesser rights are the ones the civilians now term limited real rights. So even at the time of the maturity of the Roman law, *dominium* was opposed to such rights as *emphyteusis*, *superficies*, *usufruct* in its various forms, pledges and other security rights, and the *operae servorum*. There were no leaseholds as we know them, nor were there life estates, estates tail, remainders and reversions. The common law lawyers, on the other hand instead of looking at the *dominium* or ownership, and regarding every lesser right as a burden on such ownership, look at the interest of the one seised of the land or entitled to the seisin. It is needless to discuss why this was, but it had its origin in the feudal system as did much of our law. It was probably partly due to the importance seisin, a Germanic institution, came to have. Also later the ancient real actions became obsolete, and the actions which took their places were possessory in character. At any rate, ownership of land came to be looked at as a whole, which might be sliced up into various interests called estates, each of which might be owned by a different person. In one tract, A might have a life estate, B a remainder in fee tail, and C a remainder in fee simple, the sum total of all being equivalent to one fee simple estate, but each one was

²¹See Terry, Leading Principles of Anglo-American Law, Sec. 43.

owner of his portion. Each had a freehold interest and all freeholders had property or ownership in the land. So the terms *dominium* or ownership, and *servitus* or limited real rights, if applied to our law, must be given a different content from that attributed to them in the civil law.²² As to the common law, one cannot easily oppose the remainder or reversion in fee, to all other estates in land, calling the first *dominium* and the rest limited real rights. Certainly only confusion could result from thus Romanizing our terminology. Our life estate is the ancient estate of our land law, the life tenant having been the first freeholder, and he has always been looked on as an owner, and not as one who merely has an interest in the land of another. We ought not attempt to discard our common law notions of estates merely for purposes of adopting a civil law classification. Austin realizing this tried to draw the line between property and servitudes at the point he thought would best fit the common law estates.

Austin uses the term property rather than the term ownership, as the English equivalent of *dominium*, though he pointed out that this word has some six different meanings in the common law.²³

Rights *in rem* simply, or not combined with rights *in personam* whose subjects are things, are, therefore, divided into:

1. *Dominium* or property, and
2. *Servitus* or servitudes.

Under *dominium* or property are classed estates in fee simple, in fee tail, for life and for years. Interests in land such as profits, easements, tithes, advowsons and the like are classed as servitudes. By *dominium* or property Austin means²⁴ "any right concerning a thing, which gives to the entitled party such a power or liberty of using or disposing of the subject as is indefinite; or that which gives the entitled person such a power or liberty of using or disposing of the subject as is not capable of exact circumscription; as merely limited generally by the rights of all other persons, and by the duties (absolute or relative) incumbent on himself." By servitude is meant

²²It is difficult for a lawyer trained in the common law to get a good understanding of the view point of the civil law, which is based on the old Roman Law. If land is given to several in succession each one takes by substitution by the civil law, where such arrangement is permitted at all.

²³It is not at all uncommon to find in many countries two, three or four persons indicated as successive owners of property; the property shifting over from one to the other on the happening of certain events. These persons in their turn become owners of the property, each taking by substitution for the one who preceded him: each in his turn being complete owner; but each taking nothing till his turn comes." Markby, *Elements of Law*, 6 ed. Sec. 330.

²⁴*Ibid*, 790-93.

²⁵*Ibid*, 794.

“any right which gives the entitled party such a power or liberty of using or disposing of the subject as is defined or circumscribed exactly.”

The words “using” and “disposing” in the above statements, which might lead one to suppose he meant the *jus disponendi*, only indicate the privilege of consuming or destroying or wearing out the thing in question, the *usus* and *abusus*, of the civilians. This is clearly indicated by subsequent passages.

This line of demarkation is perhaps more clearly expressed by the civilian jurist Cosack than by Austin. Cosack says:²⁵

“The contrast is rather in this (between limited and unlimited real rights) that in the case of the limited rights the limitation is grounded in their intrinsic nature, while in the case of ownership any particular limitation is imposed from without. In the former case the limitation is a positive characteristic of the right, while in the latter the limitation has only a negative significance and is a mere check upon it. In the former it is a necessary element of the concept; so that one cannot describe such a right without at the same time thinking of the limitation, while in the latter the limitation is a pure possibility. Accordingly we may lay down this formula: The holder of a limited right may only do with the thing subjected to his right what is affirmatively permitted to him; the owner may do therewith anything which is not affirmatively forbidden him.”

Here we have the same line Austin draws, but, while the civilian can thus oppose ownership to limited real rights, making the distinction as drawn above, it is difficult to make such a classification in the common law. To the civilian there is ownership with indefinite or undefined powers of user, on the one hand, and on the other hand, limited real rights such as usufruct, the servitudes, and in some countries interests analogous to the *emphyteusis* of the Romans, all of which he may say cannot even be thought of without thinking at the same time of the limitation which is a necessary element of the concept. The ownership, no matter how small it may appear to be as a practical matter, is nevertheless an interest limited on the one side only by the existing limited real rights in the particular thing, and on the other side by various limitations such as those we call natural rights. But where can we draw a similar line in the common law? In the common law we find the right of the life tenant or of the tenant for years is limited as to duration, and both are subject to certain limitations as to use, which are imposed on them by law, because the interests of the remainder men and reversioners which follow them must be protected. These limitations we might say are imposed from

²⁵Cosack, Lehrbuch des Deutschen Burgerlichen Rechts, 5 ed., II, Sec. 195.

without. As to other common law interests such as easements, profits, rents and the like, we might say the limitations on user are an intrinsic part of the interest; that one thinks of the limitation every time one thinks of the interest. Thus an easement or a profit is specific when created as to the quantum of the right to use the land, that is, the extent of the limitations are expressed. Austin classes terms for years with *dominium* or ownership though he admits there may be contract limitations imposed by the lease, but he still insists the tenant for years has every right of user which is not restrained, either by contract, or from without, and therefore, the tenant's rights of user are indefinite, whereas the rights of one who has an easement are exactly circumscribed,—are exactly laid down. He says:²⁶ "The right of the owner for life, or of the owner for years, may be distinguished from the right of the absolute owner, by an enumeration of the powers of user belonging to the absolute owner, from which the owner for life or for years is excluded," but nevertheless he insists the right of user of the latter owners is indefinite. "This indefiniteness (of user) is the very essence of the right; and implies that the right (in so far as concerns the power of user) cannot be determined by exact and positive circumscription."²⁷

If there is a lease for years of a building, with a proviso that the premises are not to be used for certain specified purposes, then, since the tenant could use for all other lawful purposes,—an indefinite number—the right as to user can be said to be indefinite and the term will fall on the property side of Austin's line. But suppose the lease is of a building to be used for one specific purpose, which is not uncommon today, then, the power of user would be just as exactly circumscribed as in the case of an easement or a profit. Such leases as this must have existed to some extent in Austin's day.²⁸ The line as drawn, therefore, will cut through leaseholds and place those of the latter type with limited real rights, while those of the former type will be classed with property or ownership. It would be very difficult to explain such a distinction to the average lawyer and impossible to persuade him it ought to be adopted. Austin probably got his idea from the civil law jurists and attempted to apply it to common law estates. If he thought of this type of lease at all, he simply chose to ignore it, for it would be troublesome. Austin correctly classified

²⁶Province of Jurisprudence Determined, 799.

²⁷*Ibid*, 799.

²⁸In Austin's time probably leases for a specific purpose were not very common. But leases for the purpose of use as public houses or saloons were known. See *Calvert v. Reid*, 10 B. & C. 849 (1830).

life estates under *dominium* or ownership, and he was probably right in placing terms for years thereunder, for we regard the tenant for years as the owner of an estate, and not as having an interest in the land of another. In fact it seems that it was only chance that prevented the tenant for years from being classed as a freeholder.³⁰ For various reasons the tremor, in very early times, did not get the privilege of using the real actions, or the writ of *novel disseisin*, and therefore his interest was not regarded as land, and in due time it was held that he was possessed but not seised.

Salmond terms all *jura in re aliena* incumbrances; and among incumbrances he places leaseholds, servitudes (with the narrow meaning), lien securities, and trusts.³¹ He uses the term incumbrance in its broadest sense, the test being whether it will avail against subsequent owners of the property. According to him ownership includes life estates, but not leases. But it is doubtful whether it improves matters to call a lease an incumbrance instead of an estate in land—likening it to easements and profits.

According to Austin the sovereign cannot have rights against a subject, nor can it be subjected to duties toward a subject. He is,

³⁰The history of the development of terms for years is given in II Pollock and Maitland's History of the English law 106-117. They point out the peculiarity of this interest in developing differently from the others, and finally, leading to the position where the termor was said to be possessed but not seised, though he might have a much longer and much more valuable estate than the life tenant. This was certainly from no idea of inferiority, nor were terms in the hand of persons of little wealth and influence, but quite the contrary. Terms, with wardship and marriages and perhaps advowsons were early forms of investment for those who had money to invest, and this meant the wealthy and influential. Terms were common by the year 1200, and these were often quite long. Terms in the thirteenth and fourteenth centuries ran up to fifty or a hundred years or longer. It was very short terms that were unknown, for being created for investment, long ones were desired. The agricultural type of term did not become common until a couple of centuries later. At first the termor had only an action on the covenant against his lessor, though it seems he could resist forcible ejectment. In 1235 the termor was granted a writ which Bracton insists protected him from all ejectors, and had it done so, the termor would probably have been regarded later as a freeholder. But for some reason this writ so crystallised as to be good only against an ejector who purchased from the lessor, leaving the termor unprotected against other types of ejectors. Maitland suggests that, being investment interests, terms may have been treated on analogy of wardship and marriage, the other great investment interest of the time, and therefore it became devisable and was also protected by the writ of *quare eject*, and eventually to be treated as a chattel. At any rate it was only chance which prevented the termor becoming a freeholder in early times. But in spite of the history of terms, today the tenant is thought of as having an estate in the land,—as being an owner,—as distinguished from the one who has a profit,—who is regarded as having a right in the land, not ownership of land. This distinction persists notwithstanding the fact a railroad, having a right of way has complete control of the land, even to exclusive possession of it, yet has only an easement. Some profits and some leases are also nearly indistinguishable. But various types of legal rights are constantly found which thus shade into each other.

³¹Jurisprudence, Secs. 83, 84.

therefore, forced to say that the sovereign may grant lands to a subject reserving, not a servitude, but a right analogous to a servitude. Likewise, the sovereign may have granted to it, not a servitude, but a right analogous to a servitude.³²

Jura in re aliena include, among other rights, profits and easements. Easements may be affirmative or negative, that is, affirmative where the dominant owner may do some act on the servient land, with a duty on the servient owner and all others not to interfere, or negative, where the dominant owner does not act affirmatively, but nevertheless, there is a duty of forbearance on the part of the servient owner and all other persons. Examples of the latter are easements of light and air, and of lateral support. All these easements are rights *in rem* and give the dominant owner a right to make some use of the servient tenement.³³

But Austin says that if the owner of the right is entitled to an affirmative act from the servient owner, instead of a forbearance, then the right would be a right *in personam*, and, according to his classification, would fall outside rights in things. If we accept his right *in rem* as a basis for the determination of what are rights in things, we must come to this conclusion, for such a right is not a right *in rem*.³⁴ This places the so-called "spurious easements" as to fencing on the outside, and presumably with rights *in personam*.³⁵ It would have the same effect as to the statutory burdens of maintaining line fences, such as are imposed on adjoining owners in some states,³⁶ and also perhaps certain party wall cases where the wall is to be paid for when used.³⁷ But what is of greater moment is that covenants running with the land and equitable servitudes are also left out, and cannot be classed among rights concerning things. Covenants running with the land may call for a forbearance, in

³²According to Austin the sovereign commands, and is not subject to a higher person, body or group, otherwise it would not be sovereign. It cannot be subject to a right enforceable by a subject against it for this would presuppose some higher force or power, which could only mean it is not sovereign. Austin's theory of sovereignty is developed in Lecture 6 of his work.

³³Austin has some difficulty in convincing himself that negative easements are rights *in rem*, but properly concludes that they are. He assumes that every servitude is a right of using a subject owned by another. But he was unable to satisfy himself entirely that a negative easement gave a right to make a use of the dominant tenement. If the matter were of any great importance, his suggestion, that even in case of an easement of light and air the dominant owner does make a use of the servient tenement as a means of access of light and air would seem sound. See p 806-7.

³⁴The right is a right to an act from the owner or occupier for the time being, and not a right to an act from every one. It is clearly not a right *in rem*.

³⁵A leading case is *Castner v. Riegel*, 54 N J L 498 (1892).

³⁶See Stimpson, *American Statutory Law*, Secs. 2182-86, 8815.

³⁷Tiffany, *Real Property*, 1 ed 758.

which case they resemble easements, or they may call for acts on the part of the servient owner. Likewise with equitable servitudes, except that there are few jurisdictions where a servitude calling for an act will be enforced.³⁸ Equitable servitudes and covenants running with the land would seemingly have to be placed under contracts, or under the catch all of "less complex combinations of rights." Probably most of them would fall within this latter heading, but the benefits of covenants may run where the burden is personal,³⁹ and if privity of estate, in the peculiar sense in which it is used by many courts in this country, is not essential to the running of a covenant at law,⁴⁰ then there may be some such covenants which would have to be placed with contracts.

Servitudes are also divided into real and personal. If attached to a dominant tenement, a servitude is real or appurtenant; if owned personally, apart from any dominant tenement, it is personal, or, as we say, in gross. It is said that easements are always appurtenant, but there seems no good reason why there may not be easements in gross, and they do exist in gross, if rights of way for pipe-lines and for railroads and the like are easements.⁴¹ Profits may be either in gross or appurtenant, but in this country at present the important ones are in gross.

Austin does not divide property into things moveable and things immoveable, but he could easily have added this feature to his scheme of classification. Of course, such a division would cut across his classification of rights in rem as existing simply, which he has divided into *dominium* and *servitus*. As to whether this should be done opinion may differ.

Security rights, such as pledges and mortgages, are combinations of rights *in rem* and rights *in personam*. The thing subject to the lien, or the thing obligated, as the Romans said, may be either *dominium* or a limited real right. We can pledge or mortgage many sorts of these interests. Both systems of law now treat these security

³⁸Pomeroy, Equity Jurisprudence, 4 ed. Sec. 1693; Clark, Equity, Sec. 102; Sims, Covenants, 238-250.

³⁹Shaber v. St. Paul Water Company, 30 Minn. 179. (1883).

⁴⁰For a discussion of this with collection of cases see "The Doctrine of Privity of Estate in Connection with Real Covenants" by Charles E. Clark, 32 Yale L. Rev. 123.

⁴¹Easements in gross it seems are not allowed in England, but there are cases in this country, the leading case being Goodrich v. Burbank, 12 Allen (Mass.) 459 (1866). But in cases like Standard Oil Co. v. Buchi, 72 N. J. Eq. 492, (1907) a court is practically driven to recognise an easement in gross. In case of a right of way for a pipe line or a railroad, there must either be an easement in gross or the interest must be something other than an easement, and it is difficult to fit the right into any other category.

rights as giving a lien on the property as security for an obligation. The real right is accessory to the right *in personam* or the obligation. Thus they more nearly resemble limited real rights than *dominium* or ownership, and are properly so classed.⁴²

One might mention the customary rights which still exist in England. As to these the village or community may have a right in certain land. As to the servient tenement in such case it is clearly like an easement, and, therefore, would be classed with the servitudes. The only peculiarity is that the inhabitants of a village or community has the benefit of the right.

So far, moveables have been neglected. There are no easements or profits in moveables, though there are various security rights analogous to those existing as to land. In addition, there are transactions of hiring, which give rise to rights *in rem*, quite different from these security rights. These more nearly resemble leases, than other rights as to immoveables, and in fact many of them are commonly termed leases.⁴³ Some of these may be so extensive as to fall within Austin's *dominium*, in so far as their substance goes. There may be the requisite indefinite powers of user. On the other hand, like leases of land, some may be for a specific use, and, therefore, fall within Austin's *servitus*. What are we to do with these? Most of them would fall within Austin's "less complex combinations of rights," but most, if not all, leases of land would also come under this all embracing head also.

To sum up Austin's classification of rights concerning things we have the following:

Dominium or property.

Estates in fee simple.

Estates in fee tail.

Life estates.

Terms for years (part).

Hiring of chattels (part).

⁴²The mortgagee is not regarded as owner of the property. He has only a lien on it as security for his debt or obligation. This seems to be a limited real right.

⁴³"Although a lease of land and a bailment of chattels are transactions of essentially the same nature, there is no term which, in its recognised use, is sufficiently wide to include both. The term bailment is never applied to the tenancy in land, and although the term lease is not wholly inapplicable in the case of chattels, its use in this connection is subject to arbitrary limitations. It is necessary, therefore, in the interests of orderly classification, to do some violence to received usage, in adopting the term lease as a generic expression to include not merely the tenancy of land, but all kinds of bailments of chattels, and all incumbrances of immaterial or incorporeal property which possess the same essential nature as a tenancy of land." Salmond, *Jurisprudence*, 1 ed., 510-11.

Servitus or servitudes.

Easements, including customary rights.

Profits.

Terms for years (part).

Hiring of chattels (part).

The above interests all seem clear enough, but there is the very obvious difficulty that terms for years in land and hiring of chattels are partly under one head and partly under the other, unless both terms in land and hiring of chattels, would be treated under the "less complex combinations" as mentioned above. It would seem the line ought to be drawn so as to place leases either within *dominium* or within *servitus*. Salmond has adopted the latter. However, since in our law the lessee is quite generally treated as an owner of an estate today, or at least he is thought of as owner, in contrast to easements and profits in land, it would seem preferable to place the term for years under *dominium* rather than call it an incumbrance as Salmond does. Austin intended terms for years to be so placed, but seemingly for the sake of logic he drew his line so as to exclude some terms and ignored the class thus excluded.

But the difficulty with the above classification is that a number of interests do not fit it. There remain the following interests:⁴⁴ (1) Liens and securities of various sorts. (2) Powers. (3) Covenants running with the land. (4) Equitable servitudes. (5) Rent charges. (6) Equitable charges.

As to security rights such as mortgages, pledges and the like, Austin undoubtedly intended to class these with his division of "less complex combinations of rights." Logically these are combinations of rights and logically they fit there, if it is advisable to have such a division. Some of the objections to the division have already been stated above. But not only would these security rights fall within this division, but most sales of chattels, leases and conveyances of land would also be treated there, a rather strange collection. But if we should discard Austin's third heading, we could very well class the lien and security rights as limited real rights or *servitus*.

Austin does not mention powers of appointment at all. He is not alone in this, for it seems other jurists have shown a like reluctance to even speak of these rights. Powers are bound to prove troublesome to any jurist who attempts to follow Austin's scheme of basing classification on rights *in rem* and *in personam*. In the first place, there is no correlative duty connected with the power of appoint-

⁴⁴This is not intended as an exhaustive enumeration.

ment, or it is not a right in a thing. Holland and Hearn fail to mention powers. Salmond in his first edition takes up very briefly powers of appointment, powers of sale, rights of reentry, rights to forfeit and powers to annul voidable agreements. He says these are incumbrances.⁴⁵ But in his fourth edition he seems to avoid all mention of these things, though he does treat powers with the meaning Hohfeld gives to the term.⁴⁶ Terry does take up powers but he has a new name for them. He calls them faculties or facultative rights.⁴⁷ He says the donee of a power has no right in property for there are no correlative duties, so a power is not a right in a thing, but a right to dispose of a thing. He says:⁴⁸

“The holder of a power has himself no protected right in or to the land, no state of facts involving the condition of the land is protected for him by duties imposed upon others, no duties are owed to him at all about the land. Nor has he any permissive right of use. He has simply a power or legal ability to determine the existing rights in the land of one person or another.”

A power of appointment is the *jus disponendi* separated from the bundle of rights which go to make up ownership, and given to a person who has none of the rest of the bundle.⁴⁹ If the power is a general power to appoint to anyone by deed or will the donee may be treated as having a fee simple ownership. But in any case he certainly has a property right in the land of some sort, whether one calls it a right in a thing or a right concerning a thing. If it is not a property right concerning the thing, then the power of alienation belonging to the absolute owner must not be such a right. It certainly leaves a tremendous gap if the *jus disponendi* is not included among the incidents of ownership.

Covenants running with the land at law present another difficult problem. Here there are correlative duties (in this respect differing from powers), and consequently they may be classed as rights, under Austin's theory of rights. These covenants may call for a forbearance on the part of the servient owner, in which case they resemble easements, or they may call for the performance of an act on the part of the servient owner. But in neither case would they be rights

⁴⁵Jurisprudence led. Secs. 84, 172.

⁴⁶See Sec. 76.

⁴⁷Leading Principles of Anglo-American Law, Sec. 127.

⁴⁸*Ibid.*, 100-101.

⁴⁹Markby in his Elements of Law 6 ed Sec. 334, criticises the policy of permitting such a power to exist separately from the ownership. He says this is peculiar to the common law, but so is the trust peculiar to the common law. We have both of them and we cannot reach a workable classification, by ignoring them.

in rem,⁵⁰ hence Austin could not class them with servitudes. If they are rights *in personam* simply, he would have to place them under contracts; if combined with some right *in rem* they would fall within his "less complex combinations of rights." But these rights could not be rights concerning things or property rights at all, though they clearly bind the owner or possessor of the servient tenement for the time being to forbear, if negative, or to perform some act, if affirmative,⁵¹ while on the dominant side they might attach to and benefit land. Land clearly may be much more or much less valuable because of these covenants. Furthermore, a covenant running with the land may be of such a character as to be specifically enforceable, though as to those calling for affirmative acts, the enforceability may depend on how far equity will enforce acts by mandatory injunction.⁵² These covenants practically are as effective as easements, so far as binding the land is concerned. The owner or occupier of the land is bound where there is privity.

An equitable servitude usually calls for a forbearance, and in effect resembles a negative covenant running with the land. In some jurisdictions, equity will enforce servitudes which call for an affirmative act, though usually this will not be done.⁵³ So there is little difference between these equitable servitudes and covenants running with the land so far as the problem here is concerned. Of course, an equitable servitude will not bind a purchaser for value and without notice, but where nearly all deeds are recorded this is of little consequence.

To Austin covenants running with the land and equitable servitudes cannot be rights in land for he says:⁵⁴

"No right of servitude can exist *in faciendo*; i. e. can consist in a right to an act or acts on the part of the owner or other occupant. This follows from the very nature of the servitude, to which it is essential that it should be *jus in rem*, or a right available against persons generally; for if it consisted in a right to an act to be done by the owner or other occupant, it were merely a *jus in personam* against the determined party."

⁵⁰Austin says of rights in rem and in personem, "The duty which correlates with the latter is restricted to a person or persons specifically determinate. The duty which correlates with the former attaches upon persons generally." *Ibid.*, 371.

⁵¹An obligation to perform an affirmative act is not in rem, for as Austin says, "The duties which correlate with rights in rem, are always negative; that is to say, they are duties to forbear or abstain." *Ibid.*, 371.

⁵²15 C. J. 1292-93. The covenant for further assurance in deeds is usually specifically enforced. Rawle, Covenants for Title, Sees. 99-109.

⁵³*Supra*, n. 38.

⁵⁴*Ibid.*, 811-12.

It is only fair to say that *Tulk v. Moxhay*⁵⁵ was decided in 1848, hence equitable servitudes were not known to the law when Austin wrote. Holland does not mention covenants running with the land nor does he discuss equitable servitudes.⁵⁶ Salmond in his first edition places covenants running with the land under his incumbrances. He says:⁵⁷

“Encumbrances on rights *in rem* are not necessarily themselves rights *in rem*. A real right may be encumbered by an obligation, or by a right in the nature of a power, which is neither real nor personal inasmuch as it corresponds to no duty laid upon any other person.”

In the fourth edition he omitted the above language, and also the entire section in which he treated covenants running with the land as real obligations.⁵⁸ Terry terms these covenants real obligations. He says there are obligations where the duty or right attaches to a specific thing, and avails against the one having control of the servient thing or in favor of the one having the dominant right. He calls them real obligations because of this peculiarity. He says:⁵⁹

“The existence of this sort of obligations may now be justified on ample grounds of expediency. But they appear to have had their origin in the notion which is often found in archaic law, that things may have duties and rights like persons.”

It seems pretty clear he does regard these as interests in land. At any rate, the courts have always so regarded them, for they are held to be incumbrances on the land they burden. The burden is attached to the land in such a way that subsequent purchasers cannot take free from it, but there is no personal obligation after disposal of the land, except for breaches committed while it was held. The benefit of a covenant may also be attached to a dominant tenement, and this benefit may be enforced by the successors of the covenantee against the covenantor. So in the case of the servient tenement a burden may pass,—a thing which is not assignable as a contract obligation—and in case of the dominant tenement there is a sort of assignment of the benefit of the contract which was allowed long before contracts were held assignable. These are certainly rights in and to land.

⁵⁵*Tulk v. Moxhoy*, 2 Phillips, 774 (1848).

⁵⁶Curiously enough he does speak of certain ancient rights to have corn ground at a certain mill and rights of this sort, probably remnants of feudal services. These he classes with patents, trade-marks and the like. But he does not mention *Vyvyan v. Arthur*, 1 B. & C. 410 (1823) where a suit at mill in the form of a covenant was enforced as a covenant running with the land. See Holland, *Jurisprudence*, 12 ed., 315.

⁵⁷*Jurisprudence*, led. Sec. 168.

⁵⁸Sec. 173 of led.

⁵⁹*Leading Principles of Anglo-American Law*, 527.

They cannot be explained as mere personal obligations.⁶⁰ They are not rights *in rem*, but we are at a loss what to do with them if we take the position that one can have no right in a thing unless it is a right *in rem*.

Rents, where separated from reversions, that is, the rent charge and the rent seck of the common law, are very ancient interests. They may be for years, for life, or in fee, and, if the latter, they are incorporeal hereditaments. They were known at least as early as the thirteenth century and yet we find them ignored by Austin and by his followers.⁶¹ In the case of the rent, we clearly have a right with a correlative duty, but the duty is affirmative, and therefore the right seems not to be a right *in rem*, but is only a right *in personam*. In this respect, the rent is like the covenant running with the land. Yet the owner of the land for the time being is bound by this rent, while he is owner, but no obligation follows him after he has disposed of the land, except as to rent already accrued. The old common law theory was that the rent attached to the land and issued out of the land. In fact the old common law had a distinct tendency to attach all sorts of rights to land, and treat them as things so that novel disseisin could be used to recover them if the owner was dis-
sessed. Terry classes rents as rights *in rem*,⁶² because the right of

⁶⁰How and why covenants running with the land originated and were enforced is not material here. They are well established and well recognised, so we must accept them. They are quite old interests. Sims insists they were known and enforced both as to benefits and burdens, long before the statute of 32 Hen. VIII, c. 34. Sims on Covenants, Ch IV. The modern tendency is certainly not to restrict them, and as for equitable servitudes, they are constantly increasing in importance.

⁶¹Bracton, fol. 203b speaks of rent charge and rent seck. Pollock and Maitland say the terms rent service and rent charge were already current in Edward the First's day and cite Y. B. 33-5 Edw. I, 211, 352. (History of the English Law, II, 129.) In the early law, rent charge and rent seck were incorporeal things and were protected as things. The owner of the rent was seised and if disseised, could bring novel disseisin. They were not regarded as contract rights for contracts were relatively little developed. Before Austin's time these rents had in fact lost this quality of rights *in rem* and were enforced by contract actions. They cannot be regarded as rights *in rem*.

⁶²"The rent itself is a debt or obligation, and there is not right in the chattel ntil it is actually siezed (by distress); but there is all the time existing what must, I think, be regarded as a right *in rem*, complete or inchoate, in the land." Leading Principles of Anglo-American Law, Sec. 394. He classes the right to distrain as one of the facultative rights, and seems to conclude the rent is a right *in rem* in land because there exists this inchoate right to distrain on default. This is a somewhat slender connection, but it has been severed in many jurisdictions today, for the old right of distress has not appealed to modern legislators. However, a sort of statutory lien has at times been substituted. See Tiffany, Real Property, 1 ed., 800-1. But what Terry does not mention is that there was no right of distress in case of a rent seck. Co. Litt. 150b. But a right of distress was given in England by statute 4 Geo. II, c. 28 s 5. So in Austin's time there was a right of distress, and if this made the rent a right *in rem*, then it could be so disposed of.

distress he says is a right *in rem*, and Salmond, in his first edition, would have called them incumbrances but here again caution led to avoidance, it seems, though rents are ancient and well established rights in land. Since a rent originates in a contract or lease, presumably Austin would treat rents under the all inclusive "less complex combinations of rights."

Equitable charges also bind the land in the hands of purchaser with notice or a volunteer, and if the instrument creating the charge is recorded, then in this country it will bind the land in the hands of all who claim through the chain of title under which the land was charged. They are, therefore, as enforced today, interests in the land.

Nothing has been said of the so-called natural rights, for the reason that these are not limited real rights, or rights in the property of another, as has sometimes been assumed. On the contrary, they are a part of the bundle of legal rights, which go to make up ownership of land.⁶³ They pass by conveyance of the land from grantor to grantee, and are "imposed from without" as Cosack would say.

Because of Austin's attempt to make a universal classification of law based on a classification of rights *in rem* and rights *in personam*, jurists have since been too prone to emphasize this basis of classification. Austin's classification of proprietary rights is a scheme which is beautifully logical, but the difficulty with it is that it will not work. It seems impossible to jam rights into these categories, even if it were desirable. After all Austin's scheme is based on the civil law terminology, while our system of law is far from being like the civil law system. We need a common law system of classification for a common law system. Such a system, made as logical as it can be conveniently made, may be of value in guiding future development of the law to some degree, but any system which ignores to any great extent the fundamental common law theories and principles will be ineffective, for it will be ignored by the courts and the practicing portion of the legal profession.

As appears above, Austin's classification based on rights *in rem* and rights *in personam* shows serious defects, which have been enlarged by the development which has taken place since he wrote. At the time he wrote he left out of account at least three ancient, well established common law rights concerning things, namely, rents, powers of appointment, and covenants running with the land. In

⁶³See Natural Rights by Harry A. Bigelow, in 9 Ill. L. Rev. 541 for a careful discussion of the subject.

addition, we now have equitable servitudes and equitable charges. Equitable servitudes are constantly becoming more and more important and there is a constant pressure on the courts to extend a similar principle to things manufactured under patent rights. Most of the above interests fall somewhere between rights *in rem* and rights *in personam*, are hybrids, so to speak, but they ought not to be ignored merely because they will not fit the scheme. Rather the fact they will not fit the scheme, indicates something must be wrong with the scheme, and, if this scheme of classification will not fit property rights, how can it be expected to fit the portions of the field of law, which are growing much more rapidly and are obviously much more difficult to classify?

It is submitted that property rights at common law could better be classified by dividing them into ownership and limited real rights. Then under ownership could be placed estates in fee, life estates and terms for years, while under limited real rights could be classed profits, easements in gross and appurtenant, powers, covenants running with the land, equitable servitudes, security rights, equitable charges and rent charges. Terms for years should be placed under ownership because we are in the habit of looking on the tenant as being the owner of land, instead of having a right in another's land, though it is true that some leases may be very difficult to distinguish from some profits and from some easements. But we cannot expect to attain a logically perfect classification, even of property rights.