

THE INSTITUTE OF LAW RESEARCH AND REFORM

LAND TITLES PROJECT

SECTION 2(11): THE DEFINITION OF "LAND"

Submitted by:
Robert L. Phillips
August 25, 1975

I. INTRODUCTION

The purpose of this memorandum is to examine some of the terms that comprise the definition of the term "land" contained in the Land Titles Act¹ and whether any changes or amendments should be made therein. Section 2(11) provides:

"2.(11) "land" or "lands" means lands, messuages, tenements and hereditaments, corporeal and incorporeal, of every nature and description, and every estate or interest therein, whether such estate or interest is legal or equitable, together with paths, passages, ways, watercourses, liberties, privileges and easements appertaining thereto and trees and timber thereon, and mines, minerals and quarries thereon or thereunder lying or being, unless any such are specially excepted;"

II. EXPOSITION

A. Legislative History of Section 2(11)

The definition of land contained in Alberta's first Land Titles Act was in exactly the same form as it appears today.² There have been no changes in its legislative history.

B. General Definition of the Term "Land"

It is beyond the scope of this paper to examine what is included in the common law definition of land. For

¹R.S.A. 1970, c. 198.

²See S.A. 1906, c. 24, s. 2(a).

completeness, however, the following quotation from Halsbury's is included:³

" The term "land", in its legal signification, includes any ground, soil, or earth, such as meadows, pastures, woods, moors, waters, marshes, and heath; houses and other buildings upon it; the air space above it, and all mines and minerals beneath it. It also includes anything fixed to the land; and growing trees and crops, except those which, broadly speaking, are produced in the year by the labour of the year....For the purposes of ownership, land may be divided horizontally, vertically or otherwise, and either below or above the ground."

And further:⁴

" The meaning of land may be extended for the purpose of a particular instrument when this is required by the context; and it is extended for the purpose of statutes....Thus, under statutory definitions, the word "land" is usually extended to include not only land in the physical sense, with all that is above it or underneath it, but also all rights in the land."

Francis⁵ states that the repetition of the word

³Halsbury's Laws of England, (3d. ed), vol. 32 at 249.

⁴Id. at 250.

⁵Francis, E. A., Torrens Title in Australasia (Vol. 1), Butterworths 1972 at 99; see also Baalman, J., The Torrens System in New South Wales, The Law Book Co. of Australasia Pty. Ltd., (1951) at 14.

"land" in this type of definition (although the Alberta definition purports to be a restrictive one by use of the word "means"), has the effect of incorporating therein the common law meaning of the word "land". He suggests further that the same result would follow even more strongly if an extensive type of definition were employed by, for example, the use of the word "includes".

C. Messuages, Tenements and Hereditaments; Liberties and Privileges

Francis provides:⁶

" The inclusion in the statutory definitions of "land"...of the words "messuages, tenements and hereditaments" is not, it seems, of any very great significance, save as an express indication of the intention of the legislatures to extend the definition as widely as possible, and to negative any possible limitation of the meaning of the term. These are terms themselves of wide meaning and the use of the word "land" in a statute ordinarily includes messuages, tenements and hereditaments, unless the contrary intention appears. All are words of well-established meaning in law."

(i) Messuages

The term "messuage" is synonymous with, or, at least, as comprehensive as "house" or "dwelling house".⁷ Originally, a distinction existed between messuage and dwelling house in that the former included not only the

⁶Supra, n. 5 at 102.

⁷Stroud's Judicial Dictionary (4th ed.), vol. 3 at 1666; Halsbury's Laws of England (3d. ed.), vol. 23 at 483.

dwelling house but the "curtilage" as well.⁸ Stroud's suggests that this distinction is no longer to be relied upon. It may, however, be added that where under special circumstances, the word "house" would carry land or buildings beyond its own ambit, a like result would follow if the word "messuage" were employed.

In the Canadian case of Reid v. Mimico,⁹ the Court referred with approval to the old English case of Buck v. Norton,¹⁰ the headnote of which stated:

"Lands usually occupied with a house, will not pass under a devise of 'a messuage, with the appurtenances', unless it clearly appears that the testator meant to extend the word 'appurtenances' beyond its technical sense."¹¹

The term is not so restricted in Australia. In Royal Sydney Golf Club v. Federal Comp. of Taxation, the Court stated:¹²

⁸See Fenn v. Grafton (1836) 2 Bing. N.C. 617 at 618-619; "Curtilage" is defined by Black's Law Dictionary (4th ed) at 460 as "a space; necessary and convenient and habitually used for the family purposes, and the carrying on of domestic employments. It includes the garden, if there be one, and it need not be separated from other lands by a fence."

⁹[1927] 1 D.L.R. 235 (Ont. C.A.).

¹⁰(1797) 126 E.R. 774.

¹¹See also Rogers v. Hosegood [1900] 2 Ch. 388 (C.A.) where the term "messuage" was equated with the term "dwelling-house".

¹²(1955) 91 C.L.R. 610 at 625; see also Francis, supra, n.5 at 102.

"In conveyancing the expression 'messuage' means not only the house itself but the outbuildings, courtyard, garden and adjacent land used and occupied with it."

(ii) Tenements

Halsbury's provides that the word "tenement" is not restricted to lands and others matters which are the subject of tenure. Everything in which a man can have an estate of freehold, and which is connected with land or savours of the realty, is a tenement.¹³ It therefore includes not only the land itself, and any freehold or other estate therein, but also all rights which issue out of the land, or are exercisable in respect of or over it, such as rents, rent charges, annuities and other payments charged on land, and profits à prendre.¹⁴

(iii) Hereditaments

The term "hereditaments" has been used generally to mean all rights which are capable of passing by inheritance. Thus they are things capable of being inherited, be they corporeal or incorporeal, real, personal, or mixed.¹⁵ Blackstone's Commentary¹⁶ refers to hereditaments as "the largest expression", and to their division into two kinds,

¹³Halsbury's Law of England (3d ed), vol. 32 at 250.

¹⁴Francis, supra, n.5 at 102.

¹⁵Black's Law Dictionary (4th ed) at 859.

¹⁶Vol. II at 17.

corporeal and incorporeal, and continues: "Corporeal consist of such as affect the sense; such as may be seen and handled by the body; incorporeal are not the object of sensation, can neither be seen nor handled, are creatures of the mind and exist only in contemplation. Corporeal hereditaments consist of substantial and permanent objects."

Halsbury's provides:¹⁷

" Land itself, and also such physical objects as are annexed to and form part of it, or are treated as forming part of it, are corporeal hereditaments; and strictly are the only corporeal hereditaments. Those estates in land, however, whether legal or equitable...which entitled the owner to present possession of the land or to receipt of rents and profits, were classed as corporeal hereditaments...Whatever the interest may be, if it entitles the owner to present possession or receipt of rents and profits...it is treated as taking on corporeal nature and ranks as a corporeal hereditament.

Incorporeal hereditaments include rights in land which are not accompanied by exclusive possession; these are seigniories,¹⁸ franchises, profits à prendre, advowsons,¹⁹ rent charges, rights of common, and probably, easements; certain heritable rights not necessarily connected with land, such as offices. Reversions,

¹⁷ Supra, n.13 at 251-254.

¹⁸ Black's Law Dictionary defines "seigniories" as a lordship or manor; the rights of a lord, as such, in lands.

¹⁹ Black's Law Dictionary defines "advowsons" as a term in English ecclesiastical law, the right of presentation to a church or ecclesiastical benefice; the right of presenting a fit person to the bishop, to be by him admitted and instituted to a certain benefice within the diocese, which has become vacant.

remainders, and executory interests and conditions have usually been classed as incorporeal hereditaments, but the classification is not satisfactory.

Incorporeal hereditaments may be either appendant, as seigniories; appurtenant, as easements; or in gross, as rent charges. Rights of common and profits à prendre may be either appendant or appurtenant or in gross. Advousons may be either appendant or in gross, and seigniories may exist in gross.

Hereditaments were also formerly divided into real and personal. Real hereditaments included land and estates of inheritance in land, and also all heritable rights which were connected with or incident to land. Heritable rights which had no connection with land were personal hereditaments."

(iv) Liberties

Stroud's provides:²⁰

"'liberty' is something which results from a permission given to, or something enjoyed under sufferance by, a particular person or body of persons, as opposed to enjoyment by all and sundry."

(v) Privileges

Stroud's provides:²¹

²⁰ Stroud's Judicial Dictionary (4th ed), vol. 3 at 1533.

²¹ Id. (4th ed), vol. 4 at 426; see also Words and Phrases (Canada) (2d ed), vol. 1 at 286.

"A privilege is some advantage to an individual or group of individuals. It is a right enjoyed by a few as opposed to a right enjoyed by all."

D. Provisions in Other Jurisdictions

(i) Australia

Francis provides:²²

" By N.S.W.s.3(a) it is provided that "land" shall bear the meaning following: "Land, messuages, tenements, and hereditaments corporeal and incorporeal of every kind and description or any estate or interest therein, together with all paths, passages, ways, watercourses, liberties, privileges, easements, plantations, gardens, mines, minerals, quarries, and all trees and timber thereon or thereunder lying or being unless any such are specially excepted."

Whilst the definition is of the restrictive type, it could scarcely be contended that it is not extensive in content.

By Qld., s.3, it is provided that "'land' shall extend to and include messuages, tenements..."--the following words being almost identical with those of the N.S.W. definition quoted; A.C.T., s.6(1), provides that "'Land' includes land, messuages, tenements..."--the following words being identical with those of the N.S.W.

²²Supra, n.5 at 98-99.

definition, but for the insertion of the word "and" between "minerals" and "quarries"; and the definition in s.3(1) of the Tas. Act is identical with the A.C.T. definition, except for the omission of the word "land" preceding "messuages", and the substitution of the words and brackets "(whatever may be the estate or interest therein)" for the words "or any estate or interest therein" in the A.C.T. definition. The definition in N.S. s.2 is identical with the Tas. definition, with insignificant differences in its terminology.

Section 3 of the S.A. Act provides that: "'Land' shall extend to and include all tenements and hereditaments corporeal and incorporeal of every kind and description, and every estate and interest in land."

The Vic. Act attains even greater brevity, providing, by s.4(1), that: "'Land' includes any estate or interest in land."

The W.A. definition, contained in s.4(1) of the W.A. Act, is also of the extensive type, and is bipartite in form. It is as follows: "'Land' includes messuages, tenements and hereditaments corporeal or incorporeal; and in every certificate of title transfer and lease issued or made under this Act such word also includes all easements and appurtenances appertaining to the land therein described or reputed to be part thereof or appertaining thereto."

The first part of this definition is patterned along the same lines as the S.A. definition, and the second part of the definition adds a still wider meaning to the word when used in a certificate of title, transfer or lease--but not, it seems, when

used in any mortgage encumbrance or other instrument, or in any other dealing or application made under the Act. As was noted above, and subject to the qualification as to context, the introductory words of W.A. s.4(1) apply the definition "in the construction of this Act" only, and not in all instruments made or purporting to be made thereunder, as is the case with the N.S.W., Qld. and S.A. definitions. By the application of the "*expressio unius*" principle of construction, it would seem that, notwithstanding the inclusion of hereditaments incorporeal in the first part of the definition, and unless the context otherwise requires, the word "land" when used in the W.A. Act would not include easements, but would include easements only when used in a certificate of title, transfer or lease.

It may well be that a close examination of the limits of meaning and connotations of the word "land", as defined in the enactments, but out of any specific context, and, as it were, "in gross", is neither necessary nor justifiable. It is considered, nevertheless, that some general comment upon the connotations of the term, and upon the various forms of property, corporeal or incorporeal, thereby comprehended, made at this stage, may be of assistance in the later examinations of the term in a particular context.

As is pointed out by Mr. Baalman, the repetition of the word "land" in the N.S.W. definition (although the definition purports to be a restrictive one), has the effect of incorporating therein the common law meaning of the word "land". Whenever the word is used as meaning the physical parcel, the maxims "*cujus est solum, ejus est usque ad coelum et ad inferos*" and "*Quicquid plantatur solo, solo cedit*" are applicable. The same result must flow, perhaps even more strongly, from the repetition of the

word in the A.C.T. definition, which is of the extensive type. From the definitions in the other enactments, although the word "land" is not repeated, because they are of the extensive type, it would seem that the common law meaning of the word "land" is the basic and primary meaning for the purposes of the Acts, with the same effect. Indeed, apart altogether from the incorporation of the common law meaning of the word, it would seem that under the Qld., W.A., Tas., and N.Z. definitions, the same effect is achieved by the very comprehensiveness of the words in the definitions to which the meaning of the term "land" is extended.

(ii) New Zealand

The Land Transfer Act, 1952, section 2 provides:

"'Land' includes messuages, tenements, and hereditaments, corporeal and incorporeal, of every kind and description, and every estate or interest herein, together with all paths, passages, ways, waters, watercourses, liberties, easements, and privileges thereunto appertaining, plantations, gardens, mines, minerals, and quarries, and all trees and timber thereon or thereunder lying or being, unless specially excepted;"

(iii) Manitoba

The Real Property Act, section 2(1)(3) provides:²³

"'land' means land, messuages, tenements, hereditaments, corporeal and incorporeal, of every kind and description, whatever the estate or interest therein, and whether legal or equitable, together with all paths, passages, ways, watercourses, liberties, privileges, and easements, appertaining hereto, and all trees and timber thereon, and all mines, minerals, and quarries, unless specially excepted;"

²³R.S.M. 1970, C.R-30.

(iv) Saskatchewan

The Land Titles Act, section 2(1)(j) provides:²⁴

"'land' or 'lands' means lands, messuages, tenements and hereditaments, corporeal and incorporeal, of every nature and description, and every estate or interest therein, whether the estate or interest is legal or equitable, together with paths, passages, ways, watercourses, liberties, privileges and easements appertaining thereto, and trees and timber thereon, and mines, minerals and quarries thereon or thereunder lying or being, unless any such are specially excepted;"

(v) Canada

The Land Titles Act, section 2 provides:²⁵

"'land' means lands, messuages, tenements and hereditaments, corporeal and incorporeal, of every nature and description, and every estate or interest therein, whether such estate or interest is legal or equitable, together with all paths, passages, ways, watercourses, liberties, privileges, easements, mines, minerals and quarries appertaining thereto, and all trees and timber thereon and thereunder lying or being, unless any such are specially excepted;"

²⁴R.S.S. 1965, c.115.

²⁵R.S.C. 1970, C.L-4.

III. ANALYSIS

A. Purpose and Effect of the Wide Definitions of Land

In discussing the Australian provisions, Francis provides:²⁶

" In relation to the definition of "land" in N.S.W., s.3(a), Mr. Baalman has expressed the opinion that: "This definition seems to have been designed to remove any necessity for including in transfers and other instruments, the 'general words' clause found in conveyances under the common law." His contention appears to be supported by the provisions of the definition of "land" in W.A., s.4(1), which specifies that "in every certificate of title transfer and lease issued or made under this Act such word also includes all easements and appurtenances appertaining to the land therein described or reputed to be part thereof or appurtenant thereto."...Davidson's Conveyancing, 4th. ed., vol. I at p. 92 contains a passage which describes what is meant by the 'general words', and their functions. It is pointed out that 'easements and privileges legally appurtenant to property pass by a conveyance of the property simply, without any additional words; but easements and privileges may be used or enjoyed with or may be reputed to appertain to property, and may be capable of being conveyed with it without being legally appurtenant, and such easements and privileges will not pass by a conveyance of the property simply, or without being expressly mentioned.'

²⁶Supra, n.5 at 103-105.

...In Dabbs v. Seaman,²⁷ Starke, J., made the following observations: "Under the general law a grant of land passed all that was 'legally appendant or appurtenant thereto' without the words 'with the appurtenances' (see Norton on Deeds, at p. 249). In practice 'general words' were usually added so as to pass all appurtenances enjoyed with the land...

...There seems little doubt, therefore, that whilst under the general law no special words were required to pass, with an assurance of land, all that was "legally appendant or appurtenant thereto", in New South Wales, Queensland, Western Australia, Tasmania, the Australian Capital Territory, and New Zealand, by virtue of the definitions of land in the enactments, when the word "land" is used in an instrument it extends to and includes all those easements and privileges not legally appendant or appurtenant to the land to embrace which "general words" were used in conveyances under the general law.

Under the Vic. and S.A. Acts, however, the definitions do not go so far, the Vic. definition including "any estate or interest in land" and the S.A. definition "all tenements and hereditaments corporeal and incorporeal of every kind and description, and every estate or interest in land." These, it seems, go far enough only to include in "land" that which is legally appendant or appurtenant thereto, and which would have passed under the general law, without the necessity of "general words".

²⁷ (1925) 36 C.L.R. 538 at 574.

B. General Considerations

(i) Retention of Existing Definition

The apparent dearth of case law on the historical terms comprising the definition suggests that there exists no problem in their application. It perhaps suggest as well, however, their lack of relevance. Alberta's definition follows an apparently standard definition which includes everything ex abundante cautela. Its longstanding history and similarity with those of other Torrens jurisdictions in Canada support its retention in its present form.

(ii) Suggested Possible Reforms

The present definition is defective, however, in two basic ways. First, many of the terms used bear historical relevance only. Secondly, there is some degree of overlapping in the meanings of the various terms comprising the definition. A simpler, more precise and more relevant definition is to be preferred. As such, there is merit in a definition along the lines of the Victoria legislation, such as:

"'land' or 'lands' includes land and every estate or interest therein unless any such are expressly excepted."

The use of the word "includes" makes the definition of the extensive, rather than restrictive, type. The inclusion of the word "land" incorporates the common law meaning of the term. The final phrase provides for the express exception of any estate or interest in the land being transferred, leased or mortgaged, etc.

If it is felt that additional clarity is required for some interests, the following additional phrase could be employed:

"Without restricting the generality of the foregoing, the following also comprise interests in land:...."

The use of such an additional phrase would seem appropriate if, for example, the Land Titles Committee members decide to include a right of first refusal as an interest in land.

A final note is worth mention. In light of the increasing complexity of land transactions, especially in today's inflated market, the vast majority of such transactions are being carried out under the guidance of the parties' solicitors. As a result, the careful practitioner is sure to expressly include any interest or right in the property in the instrument if he is not sure that it is already included in the statutory definition.