

Ownership

A. M. HONORÉ

Ownership is one of the characteristic institutions of human society. A people to whom ownership was unknown, or who accorded it a minor place in their arrangements, who meant by *meum* and *tuum* no more than 'what I (or you) presently hold' would live in a world that is not our world. Yet to see why their world would be different, and to assess the plausibility of vaguely conceived schemes to replace 'ownership' by 'public administration', or of vaguely stated claims that the importance of ownership has declined or its character changed in the twentieth century, we need first to have a clear idea of what ownership is.

I propose, therefore, to begin by giving an account of the standard incidents of ownership: i.e. those legal rights, duties and other incidents which apply, in the ordinary case, to the person who has the greatest interest in a thing admitted by a mature legal system. To do so will be to analyse the concept of ownership, by which I mean the 'liberal' concept of 'full' individual ownership, rather than any more restricted notion to which the same label may be attached in certain contexts. . . .

If ownership is provisionally defined as the *greatest possible interest in a thing which a mature system of law recognizes*, then it follows that, since all mature systems admit the existence of 'interests' in 'things', all mature systems have, in a sense, a concept of ownership. Indeed, even primitive systems, like that of the Trobriand islanders, have rules by which certain persons, such as the 'owners' of canoes, have greater interests in certain things than anyone else.

For mature legal systems it is possible to make a larger claim. In them certain important legal incidents are found, which are common to different systems. If it were not so, 'He owns that umbrella', said in a purely English context, would mean something different from 'He owns that umbrella', proffered as a translation of 'Ce parapluie est à lui'. Yet, as we know, they mean the same. There is indeed, a substantial similarity in the position of one who 'owns' an umbrella in

England, France, Russia, China, and any other modern country one may care to mention. Everywhere the 'owner' can, in the simple uncomplicated case, in which no other person has an interest in the thing, use it, stop others using it, lend it, sell it or leave it by will. Nowhere may he use it to poke his neighbour in the ribs or to knock over his vase. Ownership, *dominium*, *propriété*, *Eigentum* and similar words stand not merely for the greatest interest in things in particular systems but for a type of interest with common features transcending particular systems. It must surely be important to know what these common features are?

* * *

I now list what appear to be the standard incidents of ownership. They may be regarded as necessary ingredients in the notion of ownership, in the sense that, if a system did not admit them, and did not provide for them to be united in a single person, we would conclude that it did not know the liberal concept of ownership, though it might still have a modified version of ownership, either of a primitive or sophisticated sort. But the listed incidents are not individually necessary, though they may be together sufficient, conditions for the person of inheritance to be designated 'owner' of a particular thing in a given system. As we have seen, the use of 'owner' will extend to cases in which not all the listed incidents are present.

Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuary: this makes eleven leading incidents. Obviously, there are alternative ways of classifying the incidents; moreover, it is fashionable to speak of ownership as if it were just a bundle of rights, in which case at least two items in the list would have to be omitted.

No doubt the concentration in the same person of the right (liberty) of using as one wishes, the

right to exclude others, the power of alienating and an immunity from expropriation is a cardinal feature of the institution. Yet it would be a distortion—and one of which the eighteenth century, with its over-emphasis on subjective rights, was patently guilty—to speak as if this concentration of patiently garnered rights was the only legally or socially important characteristic of the owner's position. The present analysis, by emphasizing that the owner is subject to characteristic prohibitions and limitations, and that ownership comprises at least one important incident independent of the owner's choice, is an attempt to redress the balance.

(1) The Right to Possess

The right to possess, *viz.* to have exclusive physical control of a thing, or to have such control as the nature of the thing admits, is the foundation on which the whole superstructure of ownership rests. It may be divided into two aspects, the right (claim) to be put in exclusive control of a thing and the right to remain in control, *viz.* the claim that others should not without permission, interfere. Unless a legal system provides some rules and procedures for attaining these ends it cannot be said to protect ownership.

It is of the essence of the right to possess that it is *in rem* in the sense of availing against persons generally. This does not, of course, mean that an owner is necessarily entitled to exclude everyone from his property. We happily speak of the ownership of land, yet a largish number of officials have the right of entering on private land without the owner's consent, for some limited period and purpose. On the other hand, a general licence so to enter on the 'property' of others would put an end to the institution of landowning as we now know it.

The protection of the right to possess (still using 'possess' in the convenient, though oversimple, sense of 'have exclusive physical control') should be sharply marked off from the protection of mere present possession. To exclude others from what one presently holds is an instinct found in babies and even, as Holmes points out, in animals, of which the seal gives a striking example. To sustain this instinct by legal rules is to protect possession but not, as such, to

protect the right to possess and so not to protect ownership. If dispossession without the possessor's consent is, in general, forbidden, the possessor is given a right *in rem* valid against persons generally, to remain undisturbed, but he has no right to possess *in rem* unless he is entitled to recover from persons generally what he has lost or had taken from him, and to obtain from them what is due to him but not yet handed over. . . .

* * *

To have worked out the notion of 'having a right to' as distinct from merely 'having', or, if that is too subjective a way of putting it, of rules allocating things to people as opposed to rules merely forbidding forcible taking, was a major intellectual achievement. Without it society would have been impossible. Yet the distinction is apt to be overlooked by English lawyers, who are accustomed to the rule that every adverse possession is a root of title, *i.e.* gives rise to a right to possess, or at least that '*de facto* possession is *prima facie* evidence of seisin in fee and right to possession'.

The owner, then, has characteristically a battery of remedies in order to obtain, keep and, if necessary, get back the thing owned. Remedies such as the actions for ejectment and wrongful detention and the *vindicatio* are designed to enable the plaintiff either to obtain or to get back a thing, or at least to put some pressure on the defendant to hand it over. Others, such as the actions for trespass to land and goods, the Roman possessory interdicts and their modern counterparts are primarily directed towards enabling a present possessor to keep possession. Few of the remedies mentioned are confined to the owner; most of them are available also to persons with a right to possess falling short of ownership, and some to mere possessors. Conversely, there will be cases in which they are not available to the owner, for instance because he has voluntarily parted with possession for a temporary purpose, as by hiring the thing out. The availability of such remedies is clearly not a necessary and sufficient condition of owning a thing; what is necessary, in order that there may be ownership of things at all, is that such remedies shall be available to the owner in the usual case in which no other person has a right to exclude him from the thing.

(2) The Right to Use

The present incident and the next two overlap. On a wide interpretation of 'use', management and income fall within use. On a narrow interpretation, 'use' refers to the owner's personal use and enjoyment of the thing owned. On this interpretation it excludes management and income.

The right (liberty) to use at one's discretion has rightly been recognized as a cardinal feature of ownership, and the fact that, as we shall see, certain limitations on use also fall within the standard incidents of ownership does not detract from its importance, since the standard limitations are, in general, rather precisely defined, while the permissible types of use constitute an open list.

(3) The Right to Manage

The right to manage is the right to decide how and by whom the thing owned shall be used. This right depends, legally, on a cluster of powers, chiefly powers of licensing acts which would otherwise be unlawful and powers of contracting: the power to admit others to one's land, to permit others to use one's things, to define the limits of such permission, and to contract effectively in regard to the use (in the literal sense) and exploitation of the thing owned. An owner may not merely sit in his own deck chair but may validly license others to sit in it, lend it, impose conditions on the borrower, direct how it is to be painted or cleaned, contract for it to be mended in a particular way. This is the sphere of management in relation to a simple object like a deck chair. When we consider more complex cases, like the ownership of a business, the complex of powers which make up the right to manage seems still more prominent. The power to direct how resources are to be used and exploited is one of the cardinal types of economic and political power; the owner's legal powers of management are one, but only one possible basis for it. Many observers have drawn attention to the growth of managerial power divorced from legal ownership; in such cases it may be that we should speak of split ownership or redefine our notion of the thing owned. This does not affect the fact that the right to manage is an important element in the notion

of ownership; indeed, the fact that we feel doubts in these cases whether the 'legal owner' really owns is a testimony to its importance.

* * *

(4) The Right to the Income

To use or occupy a thing may be regarded as the simplest way of deriving an income from it, of enjoying it. It is, for instance, expressly contemplated by the English income tax legislation that the rent-free use or occupation of a house is a form of income, and only the inconvenience of assessing and collecting the tax presumably prevents the extension of this principle to movables.

Income in the more ordinary sense (fruits, rents, profits) may be thought of as a surrogate of use, a benefit derived from forgoing personal use of a thing and allowing others to use it for reward; as a reward for work done in exploiting the thing; or as the brute product of a thing, made by nature or by other persons. Obviously the line to be drawn between the earned and unearned income from a thing cannot be firmly drawn.

* * *

(5) The Right to the Capital

The right to the capital consists in the power to alienate the thing and the liberty to consume, waste or destroy the whole or part of it: clearly it has an important economic aspect. The latter liberty need not be regarded as unrestricted; but a general provision requiring things to be conserved in the public interest, so far as not consumed by use in the ordinary way, would perhaps be inconsistent with the liberal idea of ownership. . . .

An owner normally has both the power of disposition and the power of transferring title. Disposition on death is not permitted in many primitive societies but seems to form an essential element in the mature notion of ownership. The tenacity of the right of testation once it has been recognized is shown by the Soviet experience. The earliest writers were hostile to inheritance, but gradually Soviet law has come to admit that citizens may dispose freely of their 'personal property' on death, subject to limits not unlike those known elsewhere.

(6) The Right to Security

An important aspect of the owner's position is that he should be able to look forward to remaining owner indefinitely if he so chooses and he remains solvent. His right to do so may be called the right to security. Legally, this is in effect an immunity from expropriation, based on rules which provide that, apart from bankruptcy and execution for debt, the transmission of ownership is consensual.

However, a general right to security, availing against others, is consistent with the existence of a power to expropriate or divest in the state or public authorities. From the point of view of security of property, it is important that when expropriation takes place, adequate compensation should be paid; but a general power to expropriate subject to paying compensation would be fatal to the institution of ownership as we know it. Holmes' paradox, that where specific restitution of goods is not a normal remedy, expropriation and wrongful conversion are equivalent, obscures the vital distinction between acts which a legal system permits as rightful and those which it reprobates as wrongful: but if wrongful conversion were general and went unchecked, ownership as we know it would disappear, though damages were regularly paid.

In some systems, as (*semble*) English law, a private individual may destroy another's property without compensation when this is necessary in order to protect his own person or property from a greater danger. Such a rule is consistent with security of property only because of its exceptional character. Again, the state's (or local authority's) power of expropriation is usually limited to certain classes of thing and certain limited purposes. A general power to expropriate any property for any purpose would be inconsistent with the institution of ownership. If, under such a system, compensation were regularly paid, we might say either that ownership was not recognized in that system, or that money alone could be owned, 'money' here meaning a strictly fungible claim on the resources of the community. As we shall see, 'ownership' of such claims is not identical with the ownership of material objects and simple claims.

(7) The Incident of Transmissibility

It is often said that one of the main characteristics of the owner's interest is its 'duration'. In England, at least, the doctrine of estates made lawyers familiar with the notion of the 'duration' of an interest and Maitland, in a luminous metaphor, spoke of estates as 'projected upon the plane of time'.

Yet this notion is by no means as simple as it seems. What is called 'unlimited' duration (*perpetuité*) comprises at least two elements (i) that the interest can be transmitted to the holder's successors and so on *ad infinitum* (The fact that in medieval land law all interests were considered 'temporary' is one reason why the terminology of ownership failed to take root, with consequences which have endured long after the cause has disappeared); (ii) that it is not certain to determine at a future date. These two elements may be called 'transmissibility' and 'absence of term' respectively. We are here concerned with the former.

No one, as Austin points out, can enjoy a thing after he is dead (except vicariously) so that, in a sense, no interest can outlast death. But an interest which is transmissible to the holder's successors (persons designated by or closely related to the holder who obtain the property after him) is more valuable than one which stops with his death. This is so both because on alienation the alienee or, if transmissibility is generally recognized, the alienee's successors, are thereby enabled to enjoy the thing after the alienor's death so that a better price can be obtained for the thing, and because, even if alienation were not recognized, the present holder would by the very fact of transmissibility be dispensed *pro tanto* from making provision for his intestate heirs. Hence, for example, the moment when the tenant in fee acquired a heritable (though not yet fully alienable) right was a crucial moment in the evolution of the fee simple. Heritability by the state would not, of course, amount to transmissibility in the present sense: it is assumed that the transmission is in some sense *advantageous* to the transmitter.

Transmissibility can, of course, be admitted, yet stop short at the first, second or third generation of transmittes. The owner's interest is char-

acterized by *indefinite* transmissibility, no limit being placed on the possible number of transmissions, though the nature of the thing may well limit the actual number.

In deference to the conventional view that the exercise of a right must depend on the choice of the holder, I have refrained from calling transmissibility a right. It is, however, clearly something in which the holder has an economic interest, and it may be that the notion of a right requires revision in order to take account of incidents not depending on the holder's choice which are nevertheless of value to him.

(8) The Incident of Absence of Term

This is the second part of what is vaguely called 'duration'. The rules of a legal system usually seem to provide for determinate, indeterminate and determinable interests. The first are certain to determine at a future date or on the occurrence of a future event which is certain to occur. In this class come leases for however long a term, copyrights, etc. Indeterminate interests are those, such as ownership and easements, to which no term is set. Should the holder live for ever, he would, in the ordinary way, be able to continue in the enjoyment of them for ever. Since human beings are mortal, he will in practice only be able to enjoy them for a limited period, after which the fate of his interest depends on its transmissibility. Again, since human beings are mortal, interests for life, whether of the holder or another, must be regarded as determinate. The notion of an indeterminate interest, in the full sense, therefore requires the notion of transmissibility, but if the latter were not recognized, there would still be value to the holder in the fact that his interest was not due to determine on a fixed date or on the occurrence of some contingency, like a general election, which is certain to occur sooner or later.

* * *

(9) The Prohibition of Harmful Use

An owner's liberty to use and manage the thing owned as he chooses is in mature systems of law, as in primitive systems, subject to the condition that uses harmful to other members of society are forbidden. There may, indeed, be much dispute

over what is to count as 'harm' and to what extent give and take demands that minor inconvenience between neighbours shall be tolerated. Nevertheless, at least for material objects, one can always point to abuses which a legal system will not allow.

I may use my car freely but not in order to run my neighbour down, or to demolish his gate, or even to go on his land if he protests; nor may I drive uninsured. I may build on my land as I choose, but not in such a way that my building collapses on my neighbour's land. I may let off fireworks on Guy Fawkes night, but not in such a way as to set fire to my neighbour's house. These and similar limitations on the use of things are so familiar and so obviously essential to the existence of an orderly community that they are not often thought of as incidents of ownership; yet, without them 'ownership' would be a destructive force.

(10) Liability to Execution

Of a somewhat similar character is the liability of the owner's interest to be taken away from him for debt, either by execution of a judgment debt or on insolvency. Without such a general liability the growth of credit would be impeded and ownership would, again, be an instrument by which the owner could defraud his creditors. This incident, therefore, which may be called *executability*, seems to constitute one of the standard ingredients of the liberal idea of ownership.

* * *

(11) Residuary Character

A legal system might recognize interests in things less than ownership and might have a rule that, on the determination of such interests, the rights in question lapsed and could be exercised by no one, or by the first person to exercise them after their lapse. There might be leases and easements; yet, on their extinction, no one would be entitled to exercise rights similar to those of the former lessee or of the holder of the easement. This would be unlike any system known to us and I think we should be driven to say that in such a system the institution of ownership did not extend to any thing in which limited interests existed. In

such things there would, paradoxically, be interests less than ownership but no ownership.

This fantasy is intended to bring out the point that it is characteristic of ownership that an owner has a residuary right in the thing owned. In practice, legal systems have rules providing that on the lapse of an interest rights, including liberties, analogous to the rights formerly vested in the holder of the interest, vest in or are exercisable by someone else, who may be said to acquire the 'corresponding rights'. Of course, the 'corresponding rights' are not the same rights as were formerly vested in the holder of the interest. The easement holder had a right to exclude the owner; now the owner has a right to exclude the easement holder. The latter right is not identical with, but corresponds to, the former.

It is true that corresponding rights do not always arise when an interest is determined. Sometimes, when ownership is abandoned, no corresponding right vests in another; the thing is simply *res derelicta*. Sometimes, on the other hand, when ownership is abandoned, a new ownership vests in the state, as is the case in South Africa when land has been abandoned.

It seems, however, a safe generalization that, whenever an interest less than ownership terminates, legal systems always provide for corresponding rights to vest in another. When easements terminate, the 'owner' can exercise the corresponding rights, and when bailments terminate, the same is true. It looks as if we have found a simple explanation of the usage we are investigating, but this turns out to be but another deceptive short cut. For it is not a sufficient con-

dition of A's being the owner of a thing that, on the determination of B's interests in it, corresponding rights vest in or are exercisable by A. On the determination of a sub-lease, the rights in question become exercisable by the lessee, not by the 'owner' of the property.

Can we then say that the 'owner' is the ultimate residuary? When the sub-lessee's interest determines the lessee acquires the corresponding rights; but when the lessee's right determines the 'owner' acquires these rights. Hence the 'owner' appears to be identified as the ultimate residuary. The difficulty is that the series may be continued, for on the determination of the 'owner's' interest the state may acquire the corresponding rights; is the state's interest ownership or a mere expectancy?

A warning is here necessary. We are approaching the troubled waters of split ownership. Puzzles about the location of ownership are often generated by the fact that an ultimate residuary right is not coupled with present alienability or with the other standard incidents we have listed. . . .

We are of course here concerned not with the puzzles of split ownership but with simple cases in which the existence of B's lesser interest in a thing is clearly consistent with A's owning it. To explain the usage in such cases it is helpful to point out that it is a necessary but not sufficient condition of A's being owner that, either immediately or ultimately, the extinction of other interests would enure for his benefit. In the end, it turns out that residuary is merely one of the standard incidents of ownership, important no doubt, but not entitled to any special status.

* * *

Notes and Questions

JOHN LOCKE, from *Second Treatise of Civil Government*

1. John Locke's basic project here is to show how private property can be justified, even if we start with the basic assumption that all people intrinsically are, or at least originally were, equally entitled to the land and fruits of the earth. Or as Locke might have put it, we are all the children of God. Locke uses religious-sounding language, but all religious references can easily be translated into the language of objective morality. Do not be fooled by the style: That is the way people talked in seventeenth-century England. Nothing in Locke's argument depends on a religious claim. It relies only on reason. Three conditions have to be true for Locke to be right: (1) Morality is objective—that is, there is such a thing as right and wrong; (2) we can figure out what is moral, or right and wrong, by the use of reason; and (3) Locke's analysis is the one supported or compelled by reason.