SOME REFLECTIONS ON OWNERSHIP IN ENGLISH LAW

Ownership is a word used by legal writers in different meanings.

1.—The most comprehensive meaning is not the most common but we will begin with it. Salmond[1] says it "denotes the relation between a person and any right that is vested in him." In this widest meaning 'own' equals 'have': and a man may be said to own the right *in personam* which he has, for example, against his debtor. It is, however, not easy to understand what Salmond means by "relation between a person and any right which is vested in him." In the first place it seems somewhat circular because "vested in him" must presumably mean "which he owns." So that ownership is the relation between a person and what he owns. In the second place is ownership a relation between a person and a right? It seems rather that ownership is a relation between a person and all other persons: that is to say, in its widest significance it is concerned only with rights *in rem*. As Salmond says: "I may own a debt, or a mortgage, or a share in a company or a lease or a right of way or the fee simple of land. Every right is owned: and nothing can be owned but a right."[2]

But when we use the word "own" in all these cases we are indicating that the man who owns is protected by law against all other people. The right is his: it is no other man's right. This is a relation between people, between the owner and the rest of the world. The owner is the man with whose interest we must not interfere. For example: there is a diamond ring in a jeweller's window; you and I are looking at it and the jeweller is the owner; we may neither of us touch the ring without his permission. You go in and buy the ring; whether you pay or are given credit the ring is yours, *i.e.*, you acquire the ownership, on the completion of the contract, but you do not take delivery or have it moved from its place in the window. You join me outside and we again look through the window. Now the jeweller and I must behave towards you in the way you and I previously had to behave towards the jeweller. The important point is that the relations between the people have altered.

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[1] JURISPRUDENCE, 9th ed. p. 339.
[2] *Ibid.*

Law regulates social relations:[3] it does so by creating subjective rights; ownership is a subjective right, and it must be a relation between persons. The law of ownership is not a set of rules fixing what I may or may not do to a thing but a set of rules fixing what other people may or may not prevent me from doing to the thing, and what I may or may not prevent them from doing to the thing.

Ownership, being a right, is an abstract conception not easily grasped by the untrained mind: but what I do to the thing I own, in the exercise of my right of ownership, is a concrete visible matter easily perceived. Hence the mistaken, but universal, notion that ownership is some close relation between the owner and the thing owned. The owner's sphere of action over some part of the visible external world is apparently marked out by his right of ownership which is therefore termed a "property right". The picture which the word 'owner' calls to the mind in the first instance is that of a man exercising mastership in the form of unlimited physical control over some visible tangible thing (*res corporalis*). It requires an effort to realise that in an organised society a mastership is not a purely physical control but rather a purely juristic one, the result of a combination of personal relations which compels members of the society to respect the situation which has been established for the benefit of one of their number.

2.—In a less comprehensive but more common meaning the word is used to denote the sum of all rights *in rem* relating to a thing that has a money value, whether corporeal or incorporeal. Salmond said "in its full and normal compass corporeal ownership is the ownership of a right to the entirety of the lawful uses of a corporeal thing."[4] Here he was speaking of ownership of corporeal things: we may say that a man owns a house when he holds the aggregate of rights *in rem* over the house. But a man can be said to own an incorporeal thing such as a right of way, or a tithe, a manor, a seignory,[5] goodwill, or trademark, or a non-tenurial rent (especially a rent seck), or a copyright. The definition of ownership therefore must include both corporeal and incorporeal objects; and so it runs, as stated above, "the sum or aggregate of all rights *in rem* relating to a thing that has a money value whether corporeal or incorporeal."

[3] *Cf.* CORNIL, DROIT ROMAIN (1921) p. 164.
[4] *Op. cit.*, p. 344.
[5] See POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, II, pp. 4, 125, 130.

Now everyone knows a man may be owner without by any means having all the rights *in rem* over the thing owned. A may be owner of land over which B has a right of way and C some other easement, while E has a life estate in it and it is leased to D. This is not very satisfactorily dealt with in the books. Salmond[6] says, "He then is the owner of a material object who owns a right to the general or residuary uses of it, after the deduction of all special and limited rights of use vested by way of encumbrance in other persons."

Pollock[7] says, "Ownership may be described as the entirety of the powers of use and disposal allowed by law. . . . The owner of a thing is not necessarily the person who at a given time has the whole power of use and disposal; very often there is no such person. We must look for the person having the residue of all such power when we have accounted for every detached and limited portion of it; and he will be the owner even if the immediate power of control and use is elsewhere."

It is difficult to obtain any clear conception from these passages of Salmond and Pollock. Salmond does not explain what he means by "general or residuary uses" nor does he explain how, if at all, they differ from what he calls "all special and limited rights of use vested by way of encumbrance in other persons."

Pollock "describes" ownership as "the entirety of the powers of use and disposal" but then says the owner is "not necessarily the person who . . . . has the whole power of use and disposal."

Both writers begin with an emphatic use of the word 'entirety' but proceed almost immediately to abandon it. In effect it seems that they say "An owner is a person who has all the rights; but an owner need not have all the rights."

In the hope of being able to arrive at some definite conclusion it is necessary to consider briefly the history of the word "ownership" in English Law. According to Maitland[8] the earliest known use of the word "owner" was in 1340 (Ayenbite of Inwyt p. 27) although the verb "to own", is older; "ownership" is not known to occur before 1583. Coke[9] says "Of an advowson wherein a man hath an absolute ownership and propertie as he hath in lands or rents". Before these dates the expressions 'possessors', 'possessioner', 'he to whom the thing

[6] *Ibid.*
[7] JURISPRUDENCE 2nd ed. p. 175.
[8] P.& M., II, 153 n. 1.
[9] CO. LIT., 17 b.

belongs or pertains', 'he who has the thing' occur. The word lord is common; lord of the ox, (Exod. 21:28) lordis of the colt (Luke 19:33), lord of the ship (Acts 27:11) are found in Wiclifite versions of the Bible. Even the Authorised Version although it uses 'owner' does not use 'ownership' or 'property': but 'possess' and its derivatives are common. Things owned are "possessions" frequently. The word 'owner' appears in statutes from 1487 onwards. The words 'possessions' and 'estate' were used more frequently than the word 'property' in the Middle Ages.

Now Maitland[10] has shewn that in Bracton's time persons having interests in land (fee simple etc.) were described by the name *dominus*: "the tenant in fee who holds lands in demesne, is, like the owner of a chattel, *dominus rei;* he is *proprietarius*; he has *dominium et proprietatem rei.*" The feudal services by which land was held were regarded more as we should regard a tax than as we should regard a rent. The lord's right was a 'seignory', an incorporeal thing, and it did not seem to detract from the *dominium rei* any more than did a tithe or similar right: there might be seignories over, up to the ultimate seignory of the king: "we have not here many ownerships of one thing, we have many things each with its owner". Maitland[11] has further shewn that in the feudal age movable goods were of greater importance than has sometimes been supposed although their ownership and possession were often quite distinct from the ownership and possession of land. Their chief characteristic was, however, fungibility: the words 'pecunia' and 'chattel' mean cattle: oxen once served as money. Gradually cattle are arranged in classes each having a different value (the genus *equus* contains the *dextrarius*, (destrier) the *iumentum*, the *palefridus*, (palfrey,) the *runcinus*, (rouncey). Long after coin became common (in the XIIth and XIIIth centuries) the law did not draw sharp distinctions between it and other chattels, in the sense that one ox was still considered as equivalent to another ox and so on.

But whereas in land two or more persons could be conceived as having different rights of which each could be seised (*e.g.* one in service, another in demesne) or have possession (for a lord could enter on the land and distrain for his services and thus make patent his seisin of his seignory), men did not achieve the same conception with movables. Thus if a bailee has

[10] P. & M., II, 2.
[11] P. & M., II, 149 *et seq.*

possession the bailor has not, it would appear; and it was not easy to see how he could be owner of this fungible if he not only had not got the possession but had not even the right to possess. The result was that the machinery of law gave a much more complete and effective protection to the owner of land than to the owner of chattels. "Indeed," says Maitland, "we may be left doubting whether there was any right in movable goods that deserved the name of ownership."

Now in respect of movables we find in the law of remedies in the mediaeval period a similarity to a point of Roman Law in the formulary period in connection with the *vindicatio*. It will be remembered that although the plaintiff asserted his *dominium ex iure Quiritium* of the *res* yet, if successful, he did not get direct judgment for specific restitution, *condemnatio* being always for the money value. In earlier days, before the introduction of money at Rome, perhaps the claimant was allowed, if successful, to carry off the *res*, under the early *legis actio* procedure. How and why the formulary rule became established is not clear but possibly the answer would be found in some peculiarity of procedure—that it is not a point of substantive but of adjective law. For English law Maitland has shewn[12] that in the earliest period, when law was preoccupied with the great problem of preventing cattle lifting ("if only cattle lifting could be suppressed, the legislators will have done all or almost all that they can hope to do for the protection of the owner of movables"), the action that was prominent was the *actio furti* by which the stolen thing could be recovered not merely from the wrongdoer but from anyone into whose hands it had come. We may note that the procedure by *actio furti* was such that only the person from whose possession the thing had been taken could 'prosecute' by *actio furti* (*e.g.*, the bailor could not have the action in the case where the thing had been taken from his bailee; the bailee must take proceedings). In course of time, however, the old procedure by *actio furti* was modified and it became simply a criminal prosecution resulting in the punishment of the thief and only in special circumstances in restitution of the *res*, which commonly now was forfeited to the Crown. This assisted in the formation of a notion that the thief has 'property' in the stolen goods: for a felon forfeits his own goods and "those which he seemeth to have." Therefore if the King takes the stolen goods they must be the thief's when the King takes them. But the *actio furti* was superseded by

[12] P. & M., II, 157 *et seq.*

the later writ of trespass (which was popular by the end of the XIIIth century) in the form *'trespass de bonis asportatis'*. This was only available against the wrongdoer and not against a later taker from him—and it could only be brought by a bailee, not by his bailor, if the goods were taken from the bailee. Thus the bailor is in a weak position and it is clear that although in the earliest period a bailee may have been an insurer to his bailor, yet by Bracton's day the rule was not so strict. Even when the action of detinue developed out of debt two characteristics must be noted: (1) the action only gave damages not specific restitution, and (2) the bailor could only bring the action against the bailee or his representative by testate or intestate succession. Yet in Bracton's time the texts do not admit that the bailee became owner by the bailment—he was said to have only *custodia*. Of course later on when *detinue sur trover* developed the peculiarity that the allegation about finding was no longer traversable, any detainer could be dealt with, but at first this was not so. All this shews that for a long time the conception of ownership in chattels was not very thorough. "The Roman law may say that possession has nothing in common with ownership. . . . Bracton, though he repeats the Roman rules, is forced to admit that possession insensibly shades off into ownership. . . . He may talk about "dominium" but his "dominium" is really a seisin which no one can dispute."[13] In fact we may say that men were not troubled with a conception of ownership in the modern sense, and that their interests in their chattels were not protected as well as their interests in land.

All this goes to establish that the conception of ownership over different kinds of property is a relative matter. It is a speculative point, a conception arrived at by consideration of the procedural remedies available to "owners". I do not know of any case in English law in which, in the course of strict pleading, ownership must be alleged. If a man is what we call owner we shall find he may have many remedies for interference with his property but they will not involve his specifically setting up his ownership. In the mediaeval law of England 'real' action means an action by which specific restitution can be obtained—it does not mean *'in rem'* in the Roman sense of setting up and proving *dominium ex iure Quiritium*; the original real actions, the writs of right, merely decided as between two litigants, demandant and tenant, which had the better right

[13] HOLDSWORTH, H.E.L., II, 263.

to possession. Under Henry II the question could be decided by the Grand Assize, instead of battle, and we find something like a leaning in favour of the better title. But the writ established really the *maius ius* and that was not the *proprietas* of Roman Law although Bracton so names it. For the demandant pleaded that he or his ancestors had a better right to possession than his opponent, within the period of limitation the point was to find a sufficiently remote seisin on your side.[14] *Ius tertii* could not be proved (although there are some confusing rules and cases about this in a case of conversion.) The assizes and writs of entry superseded the writs of right and these newer remedies were even less concerned with ownership. Holdsworth[15] says "English law only knows various rights of seisin, some more some less recent, which can be asserted by different forms of action. In Roman Law *dominium* and *possessio* can be and are sharply contrasted. In English law we can only compare seisin with seisin, the seisin protected by the writ of right with that protected by the writ of entry, the seisin protected by the writ of entry with that protected by the novel disseisin—the older, in short, with the more recent." Possession differs from seisin in that the latter is strengthened by title but even so there is no clear cut ownership about it—it is more a question of a scale of "possessions", the more ancient and respectable taking precedence down the line; of the better seisin prevailing over the more inferior.

The position is the same now and the rule of *maius ius* still applies. And our conception of it has largely been influenced by the incidents of the fee simple in land because this estate early received very complete legal protection and the feudal organisation created a whole series of tenures each receiving such complete protection. As Maitland says:[16] "On the land *dominium* rises above *dominium*: a long series of lords who are tenants and of tenants who are lords have rights over the land and remedies against all the world." This is possible because their rights can be realised in a seisin in each case: *"duae possessiones sese compatiuntur in una re."* But it was otherwise with a chattel as we have seen. "The compatibility of divers seisins permits the rapid development of a land law which will give to both letter and hirer, feoffor and feoffee, rights of a very real and intense kind in the land, each protected

[14] See HOLDSWORTH, H.E.L., III. p. 8 for the dates. "Before 1237 the limit was Henry I's death day in 1135—then restricted to the day when Henry II was crowned in 1154—next the coronation of Richard I in 1189."

[15] H.E.L., III, 91.

[16] P. & M., II, 182.

by its own appropriate action, at a time when the backward and meagre law of personal property can hardly sanction two rights in one thing, and will not be dissatisfied with itself if it achieves the punishment of thieves and the restitution of stolen goods to those from whose seisin they have been taken."[17]

It will be seen then that a definition of ownership in English law will not be easy.

In the first place I think that the words 'owner', 'ownership', are not strictly terms of art: they are merely descriptive words. Ownership, as stated above, is a relation between persons; it is a social institution. As the history of our law shows it is a convention of society at any given moment that the privileges termed ownership shall be granted to certain persons and that they shall be protected by law in their enjoyment of them.

This convention will not necessarily be the same in all countries at the same time, because their social systems may be different; therefore the relations between its members in respect of property which each society enforces will vary accordingly.[18]

It follows that it may not be possible to frame a definition of ownership which will be sufficient to specify who will be an owner in every case; it will be necessary to know the rules of law before we can ascertain who in fact is to be treated as owner; and these rules may change from time to time to suit the needs of society. If society had decided to grant ownership in obedience to some general principle a definition might be possible. But this is not the case and therefore all that can be done is to learn, as it were, the list of the different cases in which ownership exists, bearing always in mind that it is subject to change. There may however be some characteristic common to all these cases.[19] In searching for this it is suggested that the approach should be as follows:

1. The word owner suggests a person who is in some particular respect in a better legal position than any one else in the world. Ownership therefore is essentially a right *in rem*

[17] P. & M., II, 183.

[18] Thus the law of ownership, at any rate, is consistent with the theory which regards law in general as a social institution developed to satisfy social needs. On this see Dean Roscoe Pound, *"An Introduction to the Philosophy of Law"*, Lecture 2 (1922) especially pages 98 and 99.

[19] Compare the cases of *obligatio naturalis* in Roman Law. "There is no general principle by which it can be determined whether a *naturalis obligatio* has been created or not. They are only a certain number of specific cases, and they were not all recognised at once." BUCKLAND, ELEMENTARY PRINCIPLES OF ROMAN PRIVATE LAW, p. 293.

in itself. We have seen that in the widest sense a man is said to own all his rights because if the law allows a man a right it prohibits all other people from violating it (*e.g.*, even his right to demand payment of a debt).

2. But every right ultimately (whether proximately or remotely) takes effect on some part of the material universe, *i.e.*, on something which can be perceived by the physical senses: sooner or later it operates on something which can be touched, heard, or seen. Law regulates the relations between persons in respect of material things. Thus, amongst rights *in rem*, to choose one or two that at first sight appear to be concerned solely with incorporeality, a copyright deals with the reproduction of what a man has written or spoken or painted etc.; goodwill deals with the using of a business name or address. The words copyright and goodwill are merely names like 'rent charge', 'seignory', '*dominium*' which indicate what may be a plurality of rights in each case. Therefore when we speak of "owning the goodwill", "owning the copyright", we should, for purpose of exact comparison, speak of "owning the *dominium*" of land. On the other hand if we speak of "owning land" then the parallel expressions should be something like "owning the name and address", "owning the copy", or "owning the reproduction of a picture" and so on.

But it is not only rights *in rem* that take effect on something material; rights *in personam* also can be traced out to some material object. Let us call this affected part of the material universe *res corporalis*. For our purpose we need only discuss rights *in rem*.

3. More than one right *in rem* may exist in respect of (or "over") one *res corporalis*. The simple example is a piece of land. A man may have a series of rights over a chattel but our law has not been ready to allow these rights over a chattel to be separated and vested in different people as it has in the case of the rights over land. The owner has, I think, more than one right *in rem* contained in goodwill or copyright. For he can use or alter the business name and premises himself—can reproduce his work of art much or little as he likes—and can allow others to do so under all sorts of conditions.

4. Wherever a person has the total number of possible rights *in rem* over a *res corporalis* he is, by a convenient if unscientific netonomy, said to "own" or "be owner of"

the *res corporalis* itself. All writers agree on that. It must be noted once again that when we employ the word "own" in this present sense we ought not, if we are to be consistent in our use of words, to speak of "owning a copyright": but in fact the writers do occasionally make this mistake.

5. But not only is a man called "owner" when he has all the rights *in rem*: he may still be called owner even though many of these rights are held by other people. At the same time however, it is essential that he should have at least one of the rights *in rem* left in himself. Will any one right *in rem* be enough to leave the ownership with him? And if so, how are we to tell as between two or more people who each have a right *in rem* over the *res*, which is the owner of it? Let us assume for the moment that the fee simple absolute represents the greatest possible combination of rights *in rem* over a piece of land (neglecting the dogma that attributes ownership in land to the King alone.) The holder of the fee simple absolute then will be called the owner of the land. He can grant out to other people rights *in rem* in the form of easements, rent charges, estates for life, terms of years: but he will still remain owner because he still has at least one right *in rem*, namely the fee simple: on the other hand, none of the people to whom he has granted the previously mentioned rights will be owners of land. Next let us imagine that our owner has parted with the fee simple, reserving for himself one of these rights *in rem*, *e.g.*, an easement (in favour of course of some other land which he has); now he has ceased to be owner. There is then something special about the fee simple which carries the ownership, something beyond the fact that it is a right *in rem*, because, as we have seen, the owner has an advantage over all other people—and in the case now before us, others have rights *in rem* as well as he—and the value in the way of use or enjoyment of their rights may be much higher than that of the bare fee simple which alone reposes in him. His position will be the same whether he himself has granted out these rights *in rem* to others or whether his predecessors have done so. We need therefore to find the special characteristic of that right *in rem* represented by the fee simple, which causes it to carry the ownership. I do not think it helps us to speak of the residue as some writers do: of course it is a residue

but that is only another name for what one has left, it does not tell us what is the special characteristic of that right which gives it its peculiar effect. It is suggested that the special characteristic can be ascertained as follows:— If a man is to be owner of a thing he must have at least one right *in rem* in respect of it which will still exist even though all the other rights *in rem* in respect of it which are vested in other people may perish. An owner must have some advantage over all other people: and this enduring characteristic of his right *in rem* is the essential advantage which he must have: when the other rights in respect of that thing have perished, no matter how, his will still remain unaffected by their destruction. The utmost, then, that can be said is that ownership is such right in respect of property as law from time to time invests with the characteristic that it will endure after all other rights in respect of the same property have perished. This, it is suggested, is the criterion of ownership for English law.

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