

CHAPTER FOUR

THE LIBERAL CONCEPTION OF OWNERSHIP

BEFORE WE GO any further in our examination, we need to give some attention to the accepted legal understanding of 'ownership' or full private property rights in rem. Though there are a great many finer details and technicalities, we can divide the concept into eleven major elements. According to A. M. Honoré, taking the term 'ownership' to refer to "the greatest possible interest in a thing which a mature system of law recognizes,"¹ then we can say that:

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.²

This is the 'liberal' conception of 'full' individual ownership. But since it contains the most extensive rights generally granted to the control of any thing, it is useful to compare its provisions with other types of property

¹A. M. Honoré, "Ownership," in A. D. Guest, ed., Oxford Essays in Jurisprudence (Oxford: Clarendon Press, 1961), p. 108. [his emphasis]

²Ibid., p. 113. This now classic essay provides us with a convenient summary of the rights and restrictions that normally inhere in the concept of ownership according to the Common Law. In addition, O. W. Holmes, The Common Law (Boston: Little, Brown & Co., 1923), pp. 206-246, offers some further perspective. Also see, J. W. Jones, "Forms of Ownership," Tulane Law Review, 22 (1947): 82-93 and John Henry Merryman, "Ownership and Estate," Tulane Law Review, 48 (1974): 916-945.

rights. - That we shall propose a less extensive or 'liberal' form of property rights in land does not mean that other things should not be owned in this manner. In any case, let us examine each of these elements of 'ownership' that Honoré describes.

The first thing to notice about ^{the} description is that it contains a number of restrictions regarding use. As Honoré himself notes:

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.³

Even in the most liberal form, property rights entail responsibilities. There can never be absolute and unrestricted control of things against the interests of the whole world. As our examination of Hohfeld's schematic has shown, though liberties may in principle be unrestricted, rights cannot be. They are bounded by duties. Any attempt to establish or suggest a system of property rights which does not recognize and incorporate this fact into its structure is

³Honoré, "Ownership," p. 113.

doomed to self-defeat.

The right to possess

Primary to property rights is possession: indeed, so primary is this notion that justification of property rights sometimes is based on the idea of 'first occupancy' or initial possession. This is something we shall explore, but be that as it may, possession certainly is crucial. Obviously, the concept of possession must be understood in the widest sense, for not every type of property admits of physical handling. Control is perhaps a better word to describe what possession entails.⁴ For possession to be substantial enough to constitute a property right, it must be an exclusive control against the world generally. Yet, as Honore remarks, "this does not, of course, mean that an owner is necessarily entitled to exclude everyone from his property . . . a largish number of officials have the right of entering on private land without the owner's consent, for some limited period and purpose."⁵

The extent of the right to possess is readily seen in the variety of remedies that are available to the owner in

⁴For an analysis of the legal understanding of possession see, D. R. Harris, "The Concept of Possession in English Law," in A. D. Guest, Oxford Essays in Jurisprudence, pp. 69-106. Harris observes that "'Possession' in the legal sense has no meaning at all apart from the rules of law in which it is used as a tool of legal thought." (p. 70)

⁵Honore, "Ownership," p. 114.

order to maintain or restore control over the thing by the owner. Actions for ejectment and wrongful detention and the vindicatio are all designed to enable the owner to obtain or to get back the thing in question. Equally, the criminal courts prosecute theft and fraud and other crimes against property rights. Lending or leasing an item or plot of land grants these same remedies to the user or tenant. Also, of course, these remedies are not available once a thing has been transferred by sale or gift to another, and even in some cases when it has been lost or abandoned.

The right to use

Possession without purpose would make no sense, and so it is only natural that the right to 'use' is considered essential to the concept of property rights. The fewer the limitations there are upon use, the greater the liberty of the right. But, here again, it is understood that use is not negligent or harmful. Honore' restricts his interpretation of 'use' to refer to personal use and enjoyment, because they are distinct from management and income rights. Aside from the logical distinction that can be made among these different rights, there are in addition important consequences to more rather than less extensive use made of one's property. Something that is used personally is not likely to impinge upon others so greatly as something that is used in a more public fashion, especially when others are involved.

Common property shares this element with private

property, and it is entirely possible to be permitted the use but not the management or income of many things, including land. Things which are leased can be used but not always managed or employed for income (productive) purposes. On the other hand, sometimes the legal owner of something, such as an automobile, does not have the license to use the thing, yet nevertheless possesses, manages and even derives income from it.

The right to manage

Here we consider the right to decide how, when and by whom the thing owned shall be used. Generally, it refers to granting some powers to others to participate in the utilization of the thing. This right is thus subject to conditions or obligations laid down regarding licensing. With personal things, such restrictions are minimum; but when considering economic resources or wealth, they become extensive. Today there is at once much criticism regarding 'red tape' involved in many business activities and much agitation for greater regulation of economic and natural resources. Especially in modern corporate structures where management is quite different from ownership, the right to manage has assumed a new dimension in the concept of property.⁶ Indeed it is instructive to realize how powerful

⁶James Willard Hurst, Law and the Conditions of Freedom in the Nineteenth Century United States (Madison: University of Wisconsin Press, 1956) is a seminal work on the role of the changing ideas about corporations and the sanctity of contract in establishing the legal conditions for nineteenth

even one aspect of the right to property can be.

The ability to transfer use extends the possibilities of ownership into a wide domain. As freedom of speech was augmented enormously through the technology of telecommunications, so also were property rights vastly increased through the development of that 'legal fiction' known as the corporation. Some wit has dubbed it 'a fictitious body without a soul.' We are not concerned to discuss the dangers and difficulties of the corporation here, for that is beyond our scope.⁷ But insofar as the right to manage is part of the powers of ownership, then responsible management becomes an important aspect of our examination. There is a need to insure that certain social duties are fulfilled by those who exercise far-reaching powers of management. These duties must protect the liabilities of those who are affected by managerial prerogatives.

The right to income

If use and management provide us with the two major

century capitalism in America. Two more recent studies are Morton J. Horwitz, The Transformation of American Law 1780-1860 (Cambridge, Mass.: Harvard University Press, 1977) and J. R. Pole, 'Property and Law in the American Republic', in his Paths to the American Past (New York: Oxford University Press, 1979), pp. 75-108.

⁷Walter Robert Doedecke, "Corporations and the Philosophy of Law", The Journal of Value Inquiry, 9 (1975): 81-90 is a strong appeal for a philosophical examination of the justifications for the present legal tolerance of corporate bodies whose only essential legal feature seems to be the fact that they are creatures with charters from the State of Delaware. Horwitz, The Transformation of American Law 1780-1860, p. 112 notes that there were only

forms of control that property is usually subjected to, then income and capital are the two most common ways it is profitably enjoyed. While personal use may include enjoying or deriving income from the thing, we more ordinarily speak of income as the fruits, rent or profit that may be obtained through the productive employment of things. This may be earned or unearned: that is, it may come through the talents and efforts of the owner or not. The right to income guarantees that no matter who uses the thing, the owner may exact for himself at least a portion, and often the entire, material benefit.⁸ That wealth is distributed by property

335 business corporations chartered in the United States at the end of the eighteenth century, and of them only 4 were for manufacturing. Moreover, in 1809 the Supreme Court of Virginia upheld a legislative act amending the charter of an insurance corporation with the observation: "With respect to acts of incorporation, they ought never to be passed, but in consideration of services to be rendered to the public . . . It may be often convenient for a set of associated individuals, to have the privileges of a corporation bestowed upon them; but if their object is merely private or selfish; if it is detrimental to, or not promotive of, the public good, they have no adequate claim upon the legislature for the privileges." Currie's Admin. v. Mutual Ass. Soc., 4 H & M 315, 347-48 (Va. 1809). Also, John Dewey, 'The United States Incorporated', in his Individualism: Old and New (New York: G. P. Putnam, 1930), pp. 35-50 is a noteworthy attack upon the tendency of big business to increase consumption just in order to maintain the volume of trade necessary to their survival rather than in order to increase efficiency or reduce cost.

⁸See, Charles A. Reich, "The New Property," Yale Law Journal, Vol. 73 (1964): 733-787 for a discussion of how government 'largess' in the form of direct grants and assistance, but even more importantly in the form of licenses, franchises and regulated monopolies (such as in television and radio frequencies, airline routes, public utilities and telephone services), are becoming ever-increasing sources of wealth and power in society.

rights is known by all. And so exploitation of others is often possible because of the particular form of property rights individuals possess.

In the case of property rights in land, when they conform to the 'liberal' concept of ownership, the right to income becomes especially powerful. Henry George succinctly summarized this power:

Place one hundred men on an island from which there is no escape, and whether you make one of these men the absolute owner of the other ninety-nine or the absolute owner of the soil of the island, will make no difference either to him or to them.

Those without access to land must depend upon the favor of those with the right to income from land, as every peasant, serf, or vassal knew too well. This fact has not changed because industry has replaced cottage crafts or because most people now live in urban areas and not on farms. Property rights in land give the possessor as much, and oftentimes more, leverage today as yesterday.

⁹Henry George, Progress and Poverty, 100th Anniversary Edition, (New York: Robert Schalkenbach Foundation, 1979), p. 347. George also makes the same point by utilizing the story of Robinson Crusoe: "Robinson Crusoe, as we all know, took Friday as his slave. Suppose, however, that instead . . . he had welcomed him as a man and a brother; had read him a Declaration of Independence, an Emancipation Proclamation, and a Fifteenth Amendment, and informed him that he was a free and independent citizen, entitled to vote and hold office; but had at the same time informed him that that particular island was his (Robinson Crusoe's) private and exclusive property. What would have been the difference? . . . Crusoe's ownership of the island would be equivalent to his ownership of Friday." Social Problems, (New York: Robert Schalkenbach Foundation, 1966), pp. 148-149.

The right to the capital

Like the right to income, the right to the capital enables one to enjoy materially whatever is owned. But in this case reference is made to the power to alienate the thing or the liberty to consume, modify, waste, or even destroy it. This is an even greater right than the right to income, and thus it has a potentially greater economic effect. To be sure, there are restrictions upon the liberty to waste or destroy valuables, especially land and natural resources, but the sheer fact that such a right exists demonstrates the problems inherent in avoiding unnecessary consumption, waste, or destruction. Recent attempts to stop pollution, despoiling of the environment or wonton waste illustrate how difficult it is to protect the earth when property rights are so liberal.¹⁰

Fortunately, most people do not willfully destroy permanent assests. They tend, instead, to sell them. The power of alienation includes giving, bequeathing, selling, mortgaging, or transferring title in whole or in part. The power to bequeath is one that always has received much criticism since it has often involved primogeniture or other restrictions. But whatever one may say about the pros and cons of disposition on death, the fact remains that it

¹⁰See, Christopher Stone, Should Trees Have Standing? (Los Altos, Calif. William Kaufman, Inc., 1974). Also, Chapter Eight, 'Property and the Environment,' below.

is somewhat strange, to say the least, that a dead man can dictate to the living what shall be done with his estate. John Stuart Mill was one among many who found the idea disturbing.¹¹

The right to capital is sometimes limited by the incident of transmissibility which is dealt with below.

The right to security

Possession in this world is often threatened, and the right to security attempts to guarantee that expropriation of property is strictly limited. This general immunity, except for bankruptcy and payment of debts, from having one's property alienated or siezed against one's will is as fundamental as possession. No system of property rights could operate if expropriation was an imminent possibility. The Bill of Rights in the Constitution contains several clauses protecting the right to security of property and also providing for 'due process of law' in all cases where expropriation is deemed necessary. Since other rights sometimes conflict with private property rights, the concept of eminent domain has arisen to enable public authorities to

¹¹ John Stuart Mill, The Collected Works of John Stuart Mill, ed. John M. Robson, vol. 2: Principles of Political Economy (Toronto: University of Toronto Press, 1965), pp. 218-226. Thomas Jefferson was also an outspoken critic of the Common Law tradition regarding inheritance. He believed that "the earth belongs in usufruct to the living, that the dead have neither powers nor rights over it." (Letter to James Madison, Oct. 28, 1785) See, Alexander Laing, "Jefferson's Usufruct Principle," The Nation (July 3, 1976): 7-16.

expropriate things in the essential interests of society. This power needs to be strictly limited and compensation must be paid when it is exercised. Even then the mere existence of such a power has led some to rail against the omnipotence of the state to deny one's rights. But surely it is only consistent with fact that there can be both positive and negative in rem rights that the good of the whole cannot be ever frustrated by the desires of the part.

Honoré points out nevertheless, expropriation is in fundamental conflict with the 'liberal' concept of property, even where compensation is paid.

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 of the resources of the community.¹²

The important point is that while property rights are not things, they often give control over things, most especially land, and such control cannot be converted into an equivalent right to other things or forms of wealth.¹³ If this

¹²Honoré, "Ownership," p. 120

¹³It is always worth remembering how specific the right to property in land is. One site is never the same as another, and hence property rights in land involve certain objective features that other forms of rights to property do not have. The consequences of this are much more extensive and important than is often realized. See, Chapter Five, "The Special Importance of Land," below.

were so, then possession, use and security would not be such a concern. Everyone could have credit cards instead of houses and land, goods and capital. But we live in a finite, physical world, and we need and develop desires for specific material things. This simple fact cannot be overlooked or diminished when considering the problems of property rights.

Of the eleven elements that constitute the 'liberal' conception of ownership, these six—the right to possess, the right to use, the right to manage, the right to the income, the right to the capital, and the right to security—that we have just discussed are, strictly speaking, rights and powers, while the following five—the incident of transmissibility, the incident of absence of term, the prohibition of harmful use, the liability to execution and the incident of residuarity—are duties or liabilities incumbent upon the owner.

The incident of transmissibility

As we noted under the right to capital, the incident of transmissibility is a liability upon ownership. Essentially it refers to the fact that title, especially of land, has 'duration'. Some things are held for 'unlimited' duration (perpétuité), while others are held for a determinate length of time. When some thing is held for 'unlimited' duration, the interest may be passed on to the owner's successors and so on ad infinitum. Since the incident of transmissibility is not within the power of the owner to determine, it is a liability.

The incident of absence of term

This is allied with the incident of transmissibility in that it refers to indeterminate duration of interest which entails that the thing may be enjoyed forever, if the owner lived so long. When there is a determinate duration of interest, then even though the thing may be bequeathed, eventually it can no longer be held by the holder or his heirs but must revert back to the owner. Leases, patents, copyrights all have determinate duration and thus cannot be held forever.

It is especially significant in relation to land ownership whether or not incident of transmissibility is present. In English medieval law land interests were always considered 'temporary',¹⁴ and even today it is common to see advertisements for 'freehold' and 'leasehold' offerings of real estate in England. Also, the Mosaic Law prohibits the incident of transmissibility: "The land shall not be sold forever: for the land is mine, for ye are strangers and sojourners with me." (Lev. 25:23)¹⁵

The prohibition of harmful use

The right to use a thing is conditioned by the duty

¹⁴See, A. W. B. Simpson, Introduction to the History of the Land Law (Oxford: Clarendon Press, 1961), pp. 46-48.

¹⁵Francis Neilson, The Eleventh Commandment (New York: The Viking Press, 1935) deals with the idea of the Jubilee Year and the Mosaic conception of land ownership.

not to harm others or their property in so doing.¹⁶ There may be a great deal of dispute as to what inconveniences or activities are considered as being harmful and hence counter to the right to the quiet enjoyment of land. Creating a nuisance can come in many forms: sounds, smells, sights, and so on. Building on a site can deny others sunlight, water rights, or even an open vista.¹⁷ All these things must be carefully considered in judging proper exercise of the right to use.

Today there are many more restrictions upon the use of things than ever before, for it is recognized that unforeseen consequences have a way of turning up when least expected. Moreover, in relation to land zoning laws have attempted to cluster certain types of business and industries in specific areas so as to minimize interference with private habitation. Generally such measures are heralded by the public at large and resisted by the business community. On the face of it, it would seem sensible so to arrange things that way. Yet the question goes deeper:

¹⁶See, Lynton K. Caldwell, "Rights of Ownership or Rights of Use?—The Need for a New Conceptual Basis for Land Use Theory," William and Mary Law Review, 15 (1974): 759-775 and Donald W. Large, "This Land is Whose Land? Changing Concepts of Land as Property," Wisconsin Law Review, (1973): 1039-1083..

¹⁷Recently it has been demonstrated that despite previous opinion on the matter, Roman Law did not allow unlimited freedom to build on one's land. Alan Rodger, Owners and Neighbours in Roman Law (Edinburgh: Edinburgh University Press, 1972) has persuasively argued that even a pleasant view could not be blocked.

what governing principles should guide communal development? Is it necessary to institutionalize government planning boards in order to insure some rational basis for the utilization of land and resources? Could the cure be worse than the illness? Or, perhaps, we're only looking at the symptoms and not the causes? We shall give some consideration to these questions later.

The liability to execution

Since property is generally valuable, and since credit is often extended upon collateral or an owner's right to capital, it is only just that an owner's interest may be taken away from him for debt, either in judgment or insolvency. In the past, particularly with the case of land, the rights of owner were often interpreted so strongly that a wealthy man might defraud his creditors. Even today, through legal maneuvers and false titles, men seek to limit liabilities by deceit. This is one good reason why real names should be listed in all titles and deeds, instead of allowing dummy corporations or attorneys to execute management. Also, the idea of allowing limited liability to corporations to conduct business under a protective clause at the expense of creditors and customers alike has reached a point of serious concern. The duties and liabilities of ownership must be balanced against the rights and powers. Otherwise, ownership becomes oppressive and self-defeating.

Honore' suggests that part of the liability to

execution, in practice if not in theory, is taxation upon property. This is a good point from several angles. (1) Taxes must ultimately be paid from productivity. (2) The distinctions between property taxes and personal taxes, or income taxes and wealth taxes, are misleading. (3) Taxation is necessary and should bear upon those most able to pay and those who benefit most. (4) Owners of property rights in land meet those criteria best. Of course, the manner in which the tax is levied, and the rate which is collected, are essential aspects of the problem of taxation, but these are matters which can be arranged fairly and economically.¹⁸

Both the liability to expropriation and the incident of taxation are part of the characteristics of ownership, for while rights to property are in rem rights, they are also held at the behest of the community. In Honore's words:

We are left with the thought that it is, perhaps, a characteristic of ownership that the owner's claims are ultimately postponed to the claims of the public authority, even if only indirectly, in that the thing owned may, within defined limits, be taken from the owner in order to pay the expenses of running the state or providing it with essential facilities.¹⁹

Again we see that even the 'liberal' conception of ownership contains several duties and limitations. Formulating and implementing these duties is as great a challenge as

¹⁸See, Chapter Seven, "Site Value Taxation," below, pp. 159 ff.

¹⁹Honore, "Ownership," p. 124.

acknowledging property rights in the first place. In fact, the two cannot be separated, for the neglect of either will spoil the success of both.

The incident of residuarity

One of the ways in which the true owner of some thing may be discovered is to find out to whom the thing is due when all secondary claims upon it have been met or expire. Property generally is open to claims of lesser interest than full ownership, and one of the ways in which ownership can be described is, as we have already noted, "the greatest possible interest in a thing which a mature system of law recognizes." When all easements, short term leases, licences to use, rights of management, powers of appointment, sheer detention, and other possible lesser interests have been satisfied, the question of who ought be said to own the thing really can be answered.

This is what we know as the incident of residuarity: but it should not be confused with physical possession, for the owner may never be allowed to possess the thing owned, if it is under the control of a rightful leasee, for instance. Nevertheless, in principle the incident of residuarity would surrender possession to the owner, if and when there were no valid lesser claims in existence. This is a very significant element of ownership: the owner may in fact be understood best as the person or body in whom 'ultimate' residuarity rests. It is worth asking, can this ever be any one less than the whole of mankind?

It's clear that families disappear without rightful heirs, nations and states collapse without immediate successors and even whole civilizations are lost in the mists of time. Who remains to reclaim the earth and its goods but mankind generally?

It is clear that the liberal conception of ownership involves a good many rights and privileges that need to be carefully scrutinized. It is the most extensive conception of ownership that mature legal systems guarantee. Whether we consider the Roman or Common Law traditions,²⁰ this conception of property rights in things generates numerous difficulties. As we noted in the discussion of rights, in order to develop a logically consistent set of rights, and here especially we mean property rights, the characteristics or nature of those rights must be compatible with a large

²⁰John Henry Merryman describes the differences between the Roman or Civil Law conception of ownership and the Anglo-American Common Law conception as follows: "The basic difference between Romanic ownership and the Anglo-American 'estate' or 'interest' in land can be illustrated by a simple metaphor. Romanic ownership can be thought of as a box, with the word 'ownership' written on it. Whoever has the box is the 'owner.' In the case of complete, unencumbered ownership, the box contains certain rights, including that of use and occupancy, that to the fruits or income, and the power of alienation. The owner can, however, open the box and remove one or more such rights and transfer them to others. But, as long as he keeps the box, he still has the ownership even if the box is empty. The contrast with the Anglo-American law is simple. There is no box. There are merely various sets of legal interests. One who has fee simple absolute has the largest possible bundle of such sets of legal interests. When he conveys one or more of them to another person, a part of his bundle is gone." See, "Ownership and Estate," Tulane Law Review, Vol. 48 (1974): 916-945 at 929.

number of right-holders. If granting certain rights to one individual means that a large number of other individuals will not be able to have equal rights, then some criterion of justice must be employed to justify the special arrangement. It is here that individual ownership finds itself in conflict with society and must provide some rationale for its existence. However, before we consider the various arguments for the ownership of land, we need to look at the special importance of land generally.