CHAPTER IV.

OWNERSHIP AND POSSESSION.

[p. 1] The law of property.

We have already spoken at great length of proprietary rights in land. But as yet we have been examining them only from one point of view. It may be called—though this distinction is one that we make, rather than one that we find made for us—the stand-point of public law. We have been looking at the system of land tenure as the framework of the state. We have yet to consider it as a mesh of private rights and duties. Another change we must make in the direction of our gaze. When, placing ourselves in the last quarter of the thirteenth century, we investigate the public elements or the public side of our land law, we find our interest chiefly in a yet remoter past. We are dealing with institutions that are already decadent. The feudal scheme of public law has seen its best or worst days; homage and fealty and seignorial justice no longer mean what they once meant. But just at this time a law of property in land is being evolved, which has before it an illustrious future, which will keep the shape that it is now taking long after feudalism has become a theme for the antiquary, and will spread itself over continents in which homage was never done. Our interest in the land law of Henry III.'s day, when we regard it as private law, will lie in this, that it is capable of becoming the land law of the England, the America, the Australia of the twentieth century.

§ 1. *Rights in Land.* [p. 2]

Distinction between movables and immovables.

One of the main outlines of our medieval law is that which divides material things into two classes. Legal theory speaks of the distinction as being that between 'movables' and 'immovables'; the ordinary language of the courts seldom uses such abstract terms, but is content with contrasting 'lands and tenements' with 'goods and chattels[1].' We have every reason to believe that in very remote times our law saw differences between these two classes of things; but the gulf between them has been widened and deepened both by feudalism and by the evolution of the ecclesiastical jurisdiction. We shall be better able to explore this gulf when, having spoken of lands, we turn to speak of chattels; but even at the outset we shall do well to observe, that if in the thirteenth century the chasm is already as wide as it will ever be, its depth has yet to be increased by the operation of legal theory. The facts to which the lawyers of a later day will point when they use the word 'hereditaments' and when they contrast 'real' with 'personal property' are already in existence, though some of them are new; but these terms are not yet in use. Still more important is it to observe that Glanvill and Bracton—at the suggestion, it may be, of foreign jurisprudence—can pass from movables to immovables and then back to movables with an ease which their successors may envy[2]. Bracton discourses at length about the ownership of things (*rerum*), and though now and again he has to distinguish between *res mobiles* and *res immobiles*, and though when he speaks of a *res* without any qualifying adjective, he is thinking chiefly of land, still he finds a great deal to say about things and the ownership of things which is to hold good whatever be the nature of the things in question. The tenant in fee who holds land in demesne, is, like the owner of a chattel, *dominus rei*; he is *proprietarius*; he has *dominium et proprietatem rei*. That the law of England knows no ownership of land, or will concede such ownership only to the king, is a dogma that has never entered the head of Glanvill or of Bracton.

Is land owned?

We may well doubt whether had this dogma been set [p. 3]

[1] But in certain contexts it is common to speak of movable and immovable goods; in particular the usual form of a bond has 'obligo omnia bona mea mobilia et immobilia.'

[2] See for example Glanvill, x. 6; Bracton, f. 61 b.

before them, they would have accepted it without demur. It must be admitted that medieval law was not prepared to draw the hard line that we draw between ownership and rulership, between private right and public power; and it were needless to say that the facts and rules which the theorists of a later day have endeavoured to explain by a denial of the existence of land-ownership, were more patent and more important in the days of Glanvill and Bracton than they were at any subsequent time. But those facts and rules did not cry aloud for a doctrine which would divorce the tenancy of land from the ownership of chattels, or raise an insuperable barrier between the English and the Roman *ius quod ad res pertinet*. This cry will only be audible by those who sharply distinguish between the governmental powers of a sovereign state on the one hand, and the proprietary rights of a supreme landlord on the other: by those who, to take a particular example, perceive a vast difference between a tax and a rent, and while in the heaviest land-tax they see no negation or diminution of the tax-payer's ownership, will deny that a man is an owner if he holds his land at a rent, albeit that rent goes into the royal treasury. In the really feudal centuries it was hard to draw this line; had it always been drawn, feudalism would have been impossible. The lawyers of those centuries when they are placing themselves at the stand-point of private law, when they are debating whether Ralph or Roger is the better entitled to hold Blackacre in demesne, can regard seignorial rights (for example the rights of that Earl Gilbert of whom the successful litigant will hold the debatable tenement) as bearing a political rather than a proprietary character. Such rights have nothing to do with the dispute between the two would-be land-owners; like the 'eminent domain' of the modern state, they detract nothing from ownership. All land in England must be held of the king of England, otherwise he would not be king of all England. To wish for an ownership of land that shall not be subject to royal rights is to wish for the state of nature.

Ownership and lordship.

And again, any difficulty that there is can be shrouded from view by a favourite device of medieval law. As we shall see hereafter, it is fertile of 'incorporeal things.' Any right or group of rights that is of a permanent kind can be thought of as a thing. The lord's rights can be treated thus; they can be

converted into 'a seignory' which is a thing, and a thing quite distinct from the land over which it hovers. The tenant in demesne owns the land; his immediate lord owns a seignory; there may be other lords with other seignories; ultimately [p. 4] there is the king with his seignory; but we have not here many ownerships of one thing, we have many things each with its owner. Thus the seignory, if need be, can be placed in the category that comprises tithes and similar rights. The tithe-owner's ownership of his incorporeal thing detracts nothing from the land-owner's ownership of his corporeal thing[1].

Ownership and feudal theory.

By some such arguments as these Bracton might endeavour to defend himself against those severe feudalists of the seventeenth and later centuries, who would blame him for never having stated the most elementary rule of English land law, and for having ascribed *proprietas* and *dominium rei* to the tenant in demesne. Perhaps as a matter of terminology and of legal metaphysics the defence would not be very neat or consistent. The one word *dominium* has to assume so many shades of meaning. The tenant *qui tenet terram in dominico*, is *dominus rei* and has *dominium rei*; but then he has above him one who is his *dominus*, and for the rights of this lord over him and over his land there is no other name than *dominium*. When we consider the past history of the *feodum*, and the manner in which all rights in land have been forced within the limits of a single formula, we shall not be surprised at finding some inelegances and technical faults in the legal theory which sums up the results of this protracted and complex process. But we ought to hesitate long before we condemn Bracton, and those founders of the common law whose spokesman he was, for calling the tenant in demesne an owner and proprietor of an immovable thing[2]. Only three courses were open to

[1] See, for example, Bracton's emphatic statement on f. 46 b. The tenant makes a feoffment without his lord's consent. The lord complains that the feoffee has 'entered his fee.' No, says Bracton, he has not. The lord's fee is the 'service' (the seignory) not the land.

[2] The double meaning of *dominus* is well illustrated by a passage in Bracton, f. 58, where in the course of one sentence we have *capitalis dominus* meaning chief lord, and *verus dominus* meaning true owner. A gift made by a *verus dominus* [= true owner] is confirmed by the *capitalis dominus* [= the owner's immediate lord] *vel ab alio non domino* [= or by some one else who is not the owner]. We shall have to remark below that the English language of Bracton's day had not the word *ownership*, nor, it may be, the word *owner*. In a sense therefore the law knew no ownership either of lands or of goods. We are only

[p. 5] them: (1) to deny that any land in England is owned: (2) to ascribe the ownership of the whole country to the king: (3) to hold that an owner is none the less an owner because he and his land owe services to the king or to some other lord. We can hardly doubt that they were right in choosing the third path; the second plunges into obvious falsehood; the first leads to a barren paradox. We must remember that they were smoothing their chosen path for themselves, and that social and economic movements were smoothing it for them. As a matter of fact, the services that the tenant in fee owed for his land were seldom very onerous; often they were nominal; often, as in the case of military service, scutage and suit of court, they fell within what we should regard as the limits of public law. Again, it could hardly be said that the tenant's rights were conditioned by the performance of these services, for the lord, unless he kept up an efficient court of his own, could not recover possession of the land though the services were in arrear[1]. The tenant, again, might use or abuse or waste the land as pleased him best. If the lord entered on the land, unless it were to distrain—and distress was a risky process—he was trespassing on another man's soil; if he ejected the tenant 'without a judgment,' he was guilty of a disseisin[2]. As against all third persons it was the tenant in demesne who represented the land; if a stranger trespassed on it or filched part of it away, he wronged the tenant, not the lord. And then the king's court had been securing to the tenant a wide liberty of alienation—for an owner must be able to alienate what he owns[3]. The feudal casualties might indeed press heavily upon the tenant, but they need not be regarded as restrictions on ownership. An infant land-owner must be in ward to some one, and to some one who as a matter of course will be entitled to make a profit of the wardship[4]; but if a boy's ownership of his land would not be impaired by his being in ward to an uncle, why should it be impaired by his being in ward to his lord? If the tenant commits felony, his lands will escheat to his lord; but his chattels also will be forfeited, and

contending that the lawyers of the time see no great gulf between rights in movables and rights in land. In Anglo-French the owner of a chattel is *le seignur de la chose*; see *e.g.* Britton, i. 60.

[1] See above, vol. i. p. 352.
[2] Bracton, f. 217.
[3] See above, vol. i. p. 329.
[4] See above, vol. i. p. 322.

it may well be that this same lord (since he enjoys the franchise known as *catalla felonum*) will take them. It is very possible that Bracton saw the Roman land-owner of the classical age holding his land 'of' the emperor by homage and service; it [p. 6] was common knowledge that the modern Roman emperor was surrounded by feudatories; but at any rate there was no unfathomable chasm between the English tenancy in fee and that *dominium* of which the Institutes speak. On the whole, so it seems to us, had Bracton refused to speak of the tenant in demesne as the owner of a thing, or refused to treat his rights as essentially similar to the ownership of a movable, he would have been guilty of a pedantry far worse than any that can fairly be laid to his charge, a retrograde pedantry. But, be this as it may, the important fact that we have here to observe is that he and his contemporaries ascribed to the tenant in demesne ownership and nothing less than ownership. Whether he would have ascribed 'absolute ownership,' we do not know. Might he not have asked whether in such a context 'absolute' is anything better than an unmeaning expletive[1]?

Tenancy in fee and life tenancy.

And now, taking no further notice of the rights of the lord, we may look for a while at those persons who are entitled to enjoy the land. For a while also we will leave out of account those who hold for terms of years and those who hold at the will of another, remembering that into this last class there fall, in the estimation of the king's court and of the common law, the numerous holders in villeinage. This subtraction made, those who remain are divisible into two classes: some of them are entitled to hold in fee, others are entitled to hold for life. As already said, 'to hold in fee' now means to hold heritably. The tenant in fee 'has and holds the land to himself and his heirs' or to himself and some limited class of heirs. This last qualification we are obliged to add, because, owing to 'the form of the gift' under which he takes his land,

[1] Foreign feudists attempted to meet the difficulty by the terms *directum* and *utile*, which they borrowed from Roman law. The lord has the *dominium directum*, the vassal a *dominium utile*. This device is quite alien to the spirit of English law. The man who is a tenant in relation to some lord, is *verus dominus* (true owner) in relation to the world at large. We shall hereafter raise the question whether English law knew any property either in land or goods that was *absolute*, if we mean to contrast *absolute* with *relative*. We shall also have to point out that the ownership of lands was a much more intense right than the ownership of movables.

the rights of the tenant in fee may be such that they can be inherited only by heirs of a certain class, in particular, [p. 7] only by his descendants, 'the heirs of his body,' so that no collateral kinsman will be able to inherit that land from him. A donor of land enjoys a wide power of impressing upon the land an abiding destiny which will cause it to descend in this way or in that and to stop descending at a particular point. But this does not at present concern us. We may even for a while speak as though the only 'kind of fee' that was known in Bracton's day—and it was certainly by far the commonest—was the 'fee simple absolute' of later law, which, if it were not alienated, would go on descending among the heirs of the original donee, from heir to heir, so long as any heir, whether lineal or collateral, existed; if at any time an heir failed, there would be an escheat.

The tenant in fee.

A person who is entitled to hold land in fee and demesne may be spoken of as owner of the land. When in possession of it he has a full right to use and abuse it and to keep others from meddling with it; his possession of it is a 'seisin' protected by law. If, though he is entitled to possession, this is being withheld from him, the law will aid him to obtain it; his remedy by self-help may somewhat easily be lost, but he will often have a possessory action, he will always have a proprietary action.

The life tenant.

The rights of a person who is entitled to hold land for his life are of course different from those just described. But they are not so different as one, who knew nothing of our land law and something of foreign systems, might expect them to be. The difference is rather of degree than of kind; nay, it is rather in quantity than in quality. Before saying more, we must observe that when there is a tenant for life there is always a tenant in fee of the same land. In the thirteenth century life-tenancies are common. Very often they have come into being thus—one man *A*, who is tenant in fee, has given land to another man *B* for his, *B*'s, life; or he has simply given land 'to *B*' and said nothing about *B*'s heirs, and it is a well-settled rule that in such a case *B* will hold only for his life, or in other words, that in order to create or transfer a fee, some 'words of inheritance' must be employed[1]. Then on *B*'s death, the land will 'go back' or 'revert' to *A*. Very

[1] See above, vol. i. p. 308.

possibly an express clause in the charter of gift will provide for this 'reversion'; but this is unnecessary. Despite the gift, *A* will still be tenant in fee of the land; he will also be *B*'s lord; *B* will hold the land of *A*; an oath of fealty can [p. 8] be exacted from *B*, and he and the land in his hand may be bound to render rent or other services to *A*. These services may be light or heavy; sometimes we may find what we should call a lease for life at a substantial rent; often a provision is being made for a retainer or a kinsman, and then the service will be nominal; but in any case, as between him and his lord, the tenant for life will probably be bound to do the 'forinsec service[1].' But more complicated cases than this may arise:—for example, *A* who is tenant in fee may give the land to *B* for his life, declaring at the same time that after *B*'s death the land is to 'remain' to *C* and his heirs. Here *B* will be tenant for life, and *C* will be tenant in fee; but *B* will not hold of *C*; there will be no tenure between the tenant for life and the 'remainderman'; both of them will hold of *A*. Or again, we may find that two or three successive life-tenancies are created at the same moment: thus—to *B* for life, and after his death to *C* for life, and after his death to *D* and his heirs. But in every case there will be some tenant in fee. Lastly, we may notice that family law gives rise to life-tenancies; we shall find a widower holding for his life the lands of his dead wife, while her heir will be entitled to them in fee; and so the widow will be holding for her life a third part of her husband's land as her dower, while the fee of it belongs to his heir.

Position of the tenant for life.

Now any one who had been looking at Roman law-books must have been under some temptation to regard the tenant for life as an 'usufructuary,' and to say that, while the tenant in fee is owner of the land, the tenant for life has a *ius in re aliena* which is no part of the *dominium* but a servitude imposed upon it. Bracton once or twice trifled with this temptation[2]; but it was resisted, and there can be little doubt that it was counteracted by some ancient and deeply seated ideas against which it could not prevail. Let us notice some of these ideas and the practical fruit that they bear.

[1] See above, vol. i. p. 238.

[2] Bracton, f. 30 b: 'propter *servitutem* quam firmarius sibi acquisivit...de usu fructuum habendo ad terminum vitae vel annorum.' And so on f. 32 b. Usually however Bracton reserves the term *usufructuary* for the tenant for years.

Tenant for life and the law of waste.

In the first place, it seems probable that in the past a tenant for life has been free to use and abuse the tenement as [p. 9] pleased him best: in other words, that he has not been liable for waste. The orthodox doctrine of later days went so far as to hold that, before the Statute of Marlborough (1267), the ordinary tenant for life—as distinguished from tenant in dower and tenant by the curtesy—might lawfully waste the land unless he was expressly debarred from so doing by his bargain[1]. This opinion seems too definite. For some little time before the statute actions for waste had occasionally been brought against tenants for life[2]. Still the action shows strong signs of being new. The alleged wrong is not that of committing waste, but that of committing waste after receipt of a royal prohibition. Breach of such a prohibition seems to have been deemed necessary, if the king's court was to take cognizance of the matter[3]. At any rate, repeated legislation was required to make it clear that the tenant for life must behave *quasi bonus pater familias.*

Tenant for life and public law.

Secondly, for all the purposes of public law, the tenant for life in possession of the land seems to have been treated much as though he were tenant in fee. He was a freeholder, and indeed the freeholder of that land, and as such he was subject to all those public duties that were incumbent upon freeholders.

Seisin of tenant for life.

Thirdly, his possession of the land was a legally protected seisin. Not merely was it protected, but it was protected by precisely the same action—the assize of novel disseisin—that sanctioned the seisin of the tenant in fee. His was no *iuris quasi possessio*; it was a seisin of the land. He was a freeholder of the land:—so plain was this, that in some contexts to say of a man that he has a freehold is as much as to say that he is tenant for life and not tenant in fee[4].

[1] Stat. Marlb. c. 23; Stat. Glouc. c. 5. See Coke's comments on these chapters in the Second Institute, and Co. Lit. 53 b, 54 a; also Blackstone, Comm. ii. 282. The matter had been already touched by Prov. Westm. c. 23.

[2] Note Book, pl. 443, 540, 607, 1304, 1371. It is possible also that the reversioner had a remedy by self-help, might enter and hold the tenement until satisfaction had been made for past and security given against future waste: Bracton, f. 169; Britton, i. 290.

[3] Bracton, f. 315; Note Book, pl. 574.

[4] See *e.g.* Bracton, f. 17 b: 'desinit esse feodum et iterum incipit esse liberum tenementum.' The estate ceases to be a fee and becomes a [mere] freehold.

Tenants for life in litigation.

Fourthly, in litigation the tenant for life represents the land. Suppose, for example, that *A* is holding the land as tenant for life by some title under which on his death the land will revert or remain to *B* in fee. Now if *X* sets up an adverse [p. 10] title, it is *A*, not *B*, whom he must attack. When *A* is sued, it will be his duty to 'pray aid' of *B*, to get *B* made a party to the action, and *B* in his own interest will take upon himself the defence of his rights. Indeed if *B* hears of the action he can intervene of his own motion[1]. But *A* had it in his power to neglect this duty, to defend the action without aid, to make default or to put himself upon battle or the grand assize, and thus to lose the land by judgment. We can not here discuss at any length the effect which in the various possible cases such a recovery of the land by *X* would have upon the rights of *B*; it must be enough to say that in some of them he had thenceforth no action that would give him the land, while in others he had no action save the petitory and hazardous writ of right: —so completely did the tenant for life represent the land in relation to adverse claimants[2].

We see then very clearly that a tenant for life is not thought of as one who has a servitude over another man's soil; he appears from the first to be in effect what our modern statutes call him, 'a limited owner,' or a temporary owner.

The doctrine of estates.

We thus come upon a characteristic which, at all events for six centuries and perhaps for many centuries more, will be the most salient trait of our English land law. Proprietary rights in land are, we may say, projected upon the plane of time. The category of quantity, of duration, is applied to them. The life-tenant's rights are a finite quantity; the fee-tenant's rights are an infinite, or potentially infinite, quantity; we see a difference in respect of duration, and this is the one fundamental difference. In short, to use a term that we have as yet

[1] Bracton, f. 393 b.

[2] Littleton, sec. 481. Before Stat. Westm. II. c. 3: 'If a lease were made to a man for term of life, the remainder over in fee, and a stranger by a feigned action recovered against the tenant for life by default, and after the tenant died, he in remainder had no remedy before the statute, because he had not any possession of the land.' The remainderman can not use the writ of right because neither he, nor any one through whom he claims *by descent*, has been seised of the land. See Second Institute, 345. Even the reversioner could be driven to the cumbrous and risky writ of right in order to undo the harm done by a collusive recovery against tenant for life.