Library of Congress Catalogue Card Number 91-77977
ISBN 0-9630106-1-1 (Set)

Printed in the United States of America
on Acid-Free Paper

The Lawbook Exchange, Ltd.
135 West 29th Strret
New York, NY 10001
1992

SELECT ESSAYS

IN

ANGLO-AMERICAN LEGAL HISTORY

By VARIOUS AUTHORS

COMPILED AND EDITED BY A COMMITTEE OF THE
ASSOCIATION OF AMERICAN LAW SCHOOLS

IN THREE VOLUMES
VOLUME III

BOSTON
LITTLE, BROWN, AND COMPANY
1909

tions to the detriment of the converter. A release by the vendor for value to the converter who is ignorant of the sale, although wrongful, extinguishes all right to recover possession from the latter, and so makes him complete owner of the chattel. And, finally, a second purchaser from the dispossessed owner, who in good faith gets the chattel from the converter, may keep it. If, furthermore, statutes existed in all jurisdictions enabling the purchaser from a dispossessed owner of a chattel to sue for its recovery in his own name, there would be a complete harmony between the requirements of legal principle and commercial convenience.

In conclusion, then, the ancient doctrine of disseisin of land and chattels was not an accident of English legal history, but a rule of universal law. Brian's *dictum*, that the wrongful possessor had the property and the dispossessed owner only the right of property, rightly understood, is not a curiosity for the legal antiquarian, but a working principle for the determination of controversies for all time.

68. THE MYSTERY OF SEISIN[1]

By Frederic William Maitland[2]

ANY one who came to the study of Coke upon Littleton with some store of modern legal ideas but no knowledge of English Real Property Law would, it may be guessed, at some stage or another in his course find himself saying words such as these: — 'Evidently the main clue to this elaborate labyrinth is the notion of seisin. But what precisely this seisin is I cannot tell. Ownership I know and possession I know, but this *tertium quid*, this seisin, eludes me. On the one hand when Coke has to explain what is meant by the word he can only say[3] that it signifies possession, with this qualification however that it is not to be used of movables and that one who claims no more than a chattel interest in land can not be seised though he may be possessed. But on the other hand if I turn from definitions to rules then certainly seisin does look very like ownership, insomuch that the ownership of land when not united with the seisin seems no true ownership.'

The perplexities of this imaginary student would at first be rather increased than diminished if he convinced himself, as I have convinced myself and tried to convince others, that the further back we trace our legal history the more perfectly equivalent do the two words *seisin* and *possession* become, that it is the fifteenth century before English lawyers have ceased to speak and to plead about the seisin (thereby being meant the possession) of chattels.[4] Certainly as we

[1] This Essay was originally published in the Law Quarterly Review, 1886, vol. II, pp. 481-496.

[2] A biographical note of this author is prefixed to Essay No. 1, in Volume I of this Collection.

[3] Co. Lit. 17 a, 153 a, 200 b.

[4] Law Quarterly Review, July, 1885. *The Seisin of Chattels.* I am indebted to Mr. M. M. Bigelow, Mr. H. W. Elphinstone, and a learned critic in the Solicitors' Journal for several new examples, both very

make our way from the later to the older books we do not seem to be moving towards an age when there was some primeval confusion between possession and ownership. We find ourselves debarred from the hypothesis that within time of memory these two modern notions have been gradually extricated from a vague ambiguous *seisin* in which once they were blent. In Bracton's book the two ideas are as distinct from each other as they can possibly be. He is never tired of contrasting them. In season, and (as the printed book stands) out of season also, he insists that *seisina* or *possessio* is quite one thing, *dominium* or *proprietas* quite another. He can say with Ulpian, *Nihil commune habet possessio cum proprietate.*[1]

There are some perhaps who would have for the student's questionings a ready and brief answer, satisfactory to themselves if not to him. If, they would say, you are thinking of ownership and applying that notion to English land, you indeed disquiet yourself in vain; dismiss the idea; it is not known, never has been known, to our law; land in this country is not owned, it is holden, holden immediately or mediately of the king. The questioner might be silenced; I doubt he would be convinced. In the first place he might urge, and it seems to me with truth, that the theory of tenure, luminous as it may be in other directions, sheds no one ray of light on the strangest of the strange effects which seisin and want of seisin had in our old law. In the second place he might appeal to authority and remark that Coke, who presumably knew some little of tenures, speaks freely and without apology of the ownership and even the 'absolute ownership'[2] of land, while as to Bracton, who lived while feudalism was yet a great reality, for lands and for chattels he has the same words, to wit, *dominium* and *proprietas.*

early and very late, of the use of the word *seisin* in connection with chattels. (See Litt. sec. 177, also *Paule* v. *Moodie,* 2 Roll. Rep. 131.) But as to the usage of the thirteenth century, I have now, after having copied more than a thousand cases, no doubt whatever: the words *possideo, possessio* are extremely rare, but one can be seised of anything, even of a wife or of a husband. I have known a woman assert, in proof of her marriage, that she remained seised of her husband's body after his death.

[1] Bracton, f. 113, from Dig. 41. 2 (de acquir. vel amit. poss.) 12. § 1.

[2] Co. Lit. 369 a, 17 a, b.

But it may well be said, and this brings us to more profitable doctrine, that English law knew no true ownership of land because the rights of a landowner who was not seised fell far short of our modern conception of ownership. Deprive the tenant in fee simple of seisin, and he is left with a right of entry. Even now this would be the most technically correct description of his right. Until lately his right might undergo a still further degradation; from having been a right of entry it might be debased into a mere right of action.

Now it is to the nature of these rights, whether we call them ownership or no, or rather to one side of their nature, that I would here draw attention. To simplify matters as much as possible we may for the moment leave out of account all estates and interests less than fee simple. The question then becomes this, what is the nature of the rights given by our old law to a person who is lawfully entitled to be seised of land in fee simple when as a matter of fact some other person is seised? or (to use words which will not be misunderstood though they are not the proper words of art) what is the nature of the rights of an absolute owner when some stranger is in possession?

Such a student as I have imagined might well be prepared to find that possession by itself, or possession coupled with certain other elements such as good faith and colour of title, or possession continued for a certain period, would have certain legal effects, effects which would consist in protecting the possessor against mere trespassers, in entitling him to recover possession if ejected by a stranger, in depriving the true owner of any right to obtain possession save by recourse to the courts, in at last depriving that owner of all right whatever and conferring on the possessor a title good against all men. He might expect too that in a system rich in definite forms of action, some possessory some proprietary, the outcome of different ages, these effects would be very complicated; and certainly he would not be disappointed. He would, for example, find the ousted owner gradually losing his remedies one by one, first the remedy by self-help, then the possessory assizes, then the writs of entry, lastly

the very writ of right itself. He would here find much to puzzle him, for the rules as to the conversion of a right of entry into a right of action seem to us quaint and arbitrary. Still all these manifold and complex effects of possession and dispossession, seisin and want of seisin, are of a kind known and intelligible, partly due to formalities of procedure and statutory caprices, but tending in the main to protect the possessor in his possession and uphold the public peace against violent assertions of proprietary right; analogies may be found in other systems of law modern as well as ancient.

But this is far from all. Seisin has effects of a quite other kind. The owner who is not seised not only loses remedies one by one, but he seems hardly to have ownership, and this, not because all lands are held of the king, but because as regards such matters as the alienation, transmission, devolution of his rights he seems to be in a quite different position from that in which we should expect to find a person who, though he has not possession, has yet ownership. Let a few rules be repeated that were law until but a short while since. They are well known, but it may be worth while to put them together, for they make an instructive whole.

(1) Until the 1st of October 1845, a right of entry could not be alienated among the living.[1] In other words, the owner who is not seised has nothing to sell or to give away.

An explanation of this rule has been found in the law's dislike of maintenance. It may be given in the words of Sir James Mansfield: — 'Our ancestors got into very odd notions on these subjects, and were induced by particular causes to make estates grow out of wrongful acts. The reason was the prodigious jealousy which the law always had of permitting rights to be transferred from one man to another, lest the poorer should be harassed by rights being transferred to more powerful persons.'[2] This bit of rationalism is of respectable antiquity; it is certainly as old as Coke's day:[3] and true it is that at one time our laws did manifest a

[1] 8 & 9 Vict. c. 106, sec. 6.
[2] *Goodright* v. *Forrester*, 1 Taunt. 613.
[3] Co. Lit. 213 b; *Lampet's Case*, 10 Rep. 48 a.

great, but seemingly most reasonable,[1] jealousy of maintenance and champerty, of bracery and the buying of pretenced titles. But still the explanation seems insufficient. Its insufficiency will be best seen when we pass to some other rules. In passing, however, let us notice how deeply rooted in our old law this rule must be. We come upon it directly we ask the simplest question as to the means of transferring ownership. What is the one 'assurance,' the one means of passing ownership, known to the common law? Why, if we leave out of account litigious proceedings real or fictitious, it is the feoffment, and there must be livery of seisin, that is, delivery of possession. One cannot deliver possession to another when a third person is possessing; so a right of entry cannot but be inalienable. Or put it this way: our old law has an action which is thoroughly proprietary, which raises the question of most mere right, the writ of right, the only hope of one who cannot base his claim on a recent possession. Yet even in the writ of right the demandant must count upon his own seisin or on the seisin of some ancestor, and thence deduce a title by descent; he cannot count on the seisin of a donor or vendor, 'for the seisin of him of whom the demandant himself purchased the land availeth not.'[2] This is a rule which can be traced from Coke to Bracton,[3] a rule of procedure, be it granted, but a rule which shows plainly that he who has no seisin has nothing that he can give to another. But to this matter of alienation *inter vivos* we will return.

(2) Before the 1st of January 1838[4] a right of entry could not be devised by will. About devises of course we cannot expect much ancient common law. The question depended on the meaning of the statutes of 1540[5] and 1542;[6] but the manner in which these statutes were interpreted is worthy of note. Throughout the verb used of the person who is empowered to make a will is the verb *to have*. The

[1] Stubbs, Const. Hist. § 295.
[2] Co. Lit. 293 a.
[3] Bracton, f. 376.
[4] 1 Vic. cap. 26, sec. 3.
[5] 32 Hen. VIII, cap. 1.
[6] 34 Hen. VIII, cap. 5.

person who *has* any manors, lands, tenements or hereditaments may dispose of them by will. But though some modern judges did not much like the interpretation, still the old interpretation was that the disseised owner *has* not any land, tenement, or hereditament, and therefore has nothing to leave by his will.[1] A case from the year 1460 shows plainly that before the statutes a similar rule prevailed; to give validity to a devise under local custom it was essential that the testator should die seised, though it was doubted whether he need be seised when making the will.[2]

(3) Until the 1st of January 1834[3] *seisina fecit stipitem.* Now this when duly considered seems a very remarkable rule, for it comes to this, that a landowner who has never been in possession has no right that he can transmit to his heir, or in other words, that ownership is not inheritable. Such a person may be (to use a venerable simile) the passive 'conduit-pipe' through which a right will pass, but no one shall ever get the land by reason that he was this man's heir; a successful claimant must make himself heir to one who was seised. But what explanation have we for this? A fear of maintenance very obviously fails us, and as it seems to me feudalism must fail us also, unless we are to suppose a time when seisin meant not mere possession but possession given, or at least recognized, by the lord of the fee. But for imagining any such time we have no warrant. It seems law from the first that the rightful tenant can be disseised, though the lord be not privy to the disseisin, and that the disseisor will be seised whether the lord like it or no.

And to constitute a new stock of descent a very real possession was necessary. The requisite seisin was not a right which could descend from father to son; it was a pure matter of fact. Even though there was no adverse possessor, even though possession was vacant, the heir was not put into seisin by his ancestor's death; an entry, a real physical

[1] The cases are collected in Jarman on Wills, 4th ed., vol. 1, pp. 49, 50. Perhaps they leave open some questions which will never now be answered. But the main doctrine seems beyond dispute. See Co. 3 Rep. 35 a.
[2] Y. B. 39 Hen. VI. f. 18 (Mich. pl. 23).
[3] 3 & 4 Will. 4. c. 106; Co. Lit. 11 b.

entry, was necessary. We all know the old story of the man who was half inside half outside the window, and who was pulled out by the heels. It was certainly a nice problem whether he possessed *corpore* as well as *animo;* but at any rate on this depended the question whether he had been seised and could maintain the novel disseisin against those who extracted him.[1]

(4) The Dower Act of 1833[2] for the first time gave a widow dower of a right of entry; but for that statute the widow of one who has not been seised goes unendowed. It is true that in this case 'a seisin in law or a civil seisin' would answer the purpose of 'a seisin in deed.'[3] But this 'seisin in law' only existed when possession was in fact vacant. A man was seised neither in fact nor yet in law if some other person had obtained and was holding seisin. If such an one did not get seisin during the coverture his wife would get no dower.

Here it may be remarked that seisin did to some extent become a word with many meanings or rather shades of meaning. The seisin which is good enough for one purpose is insufficient for another. 'What shall be said a sufficient seisin' to give dower, to give curtesy, to constitute a stock of descent, to maintain a writ of right[4] — each of these questions has its own answer. But I believe that the variations are due (1) to the treatment of cases in which no one has corporeal possession of the lands, and (2) to the application of the idea of possession to subjects other than lands, namely, the incorporeal hereditaments, an application which must necessarily be difficult and may easily be capricious. No fictitious seisin in law was, so far as I am aware,[5] ever attributed to one who however good his title was clearly dispossessed, to one whose land was being withheld from him by a stranger to the title. And the 'seisin in law' may well set us thinking. When we hear that *A* is *B* in law we can

[1] 8 Ass. f. 17, pl. 27.
[2] 3 & 4 Will. 4. cap. 105.
[3] Co. Lit. 31 a.
[4] Co. Lit. 15 b, 29 a, 31 a, 181 a.
[5] It may be more to the point that Mr. Challis (Real Property, p. 182) has written to the same effect. See *Leach* v. *Jay,* 9 C. D. 42.

generally draw an inference about past history: — it has been found convenient to extend to *A* a rule which was once applied only to things which were *B* in deed and in truth; in short, there was a time when *A* was not *B* even in law. For a few but by no means all purposes we may say with the old French lawyers, 'le mort saisit le vif;' the seisin in law would, e. g. give dower, but it would not make a stock of descent.

(5) To give a husband curtesy seisin during the coverture was necessary. This rule has never yet been abolished, though it has been somewhat concealed from view both by Equity and by statutes.

So far we have been concerned with rules which are still generally known, and one of them, the rule about curtesy, has not yet become a matter for the antiquary. It now becomes desirable to glance at some obscurer topics. Since we are sometimes assured that in one way or another the strange effects of seisin and want of seisin are due to feudalism, we ought to ask how the rights of a lord were affected by the fact that 'the very tenant,' the true owner, was out of seisin and some other person in seisin.

Suppose tenant in fee simple is disseised and then dies without an heir, what can be plainer on feudal principles (feudal principles as understood in these last times) than that the land will escheat to the lord, that the lord will be able to recover the land from the disseisor or from any person who has come to the land through or under the disseisor? But such was not the law even in the last, even in the present century, and if it be law now, a point about which I had rather say nothing, this must be the result either of the statutes which have deprived feoffments and descents of their ancient efficacy or else of a convenient forgetfulness. In Coke's day it seems to have been settled that from the original disseisor the lord could obtain the land either by entry or by action (writ of escheat), provided that he had not accepted the disseisor as tenant. If however before the death of the disseisee the disseisor made a feoffment in fee, or died seised leaving an heir, there was no escheat at all, 'because the lord had a tenant in by title;' he had, that is, a tenant

who could not personally be charged with any tort. Of a right of action, as distinguished from a right of entry, there was no escheat; 'such right for which the party had no remedy but by action only to recover the land is a thing which consists only in privity, and which cannot escheat nor be forfeited by the common law.'[1] What is more, it had been held that the most sweeping general words in acts of attainder would not transfer such rights to the crown; they were essentially inalienable, intransmissible rights.

But if we go behind Coke we find that so far from the law having been gradually altered to the detriment of the lords, if altered at all it had been altered to their profit. We come to a time when there seems the greatest uncertainty whether the lord can get the land from the very disseisor. The writ of escheat, his only writ, distinctly says that his tenant has died seised. I do not wish to dogmatize about a very obscure history, but it will be enough to say that under Henry VII Brian C. J. denied that the lord could enter or bring action against the disseisor.[2]

It was so with the other feudal casualties. Coke says[3] that if the disseisee die having still a right of entry and leave an heir within age the lord shall have a wardship. Doubtless the law was so in his day, but the earliest authority that he cites is from the reign of Edward III and to this effect — 'In a writ of ward it is a good plea that the ancestor of the infant had nothing in the land at the time of his death; for if he was disseised the lord shall *not* have a wardship, neither by writ of ward nor by seizing him [the

[1] *Winchester's Case,* 3 Rep. 2 b.

[2] It may be convenient if I here collect in chronological order the main authorities as to escheat and forfeiture of rights of entry and rights of action. Reg. Brev. f. 164 (F. N. B. f. 144); 27 Ass. pl. 32. f. 136, 137; Fitz. Abr. *Entre Congeable,* pl. 38 (Hil. 2. Ric. 2); 2 Hen. 4. f. 8. (Mich. pl. 37); 7 Hen. 4. f. 17 (Trin. pl. 10); 32 Hen. 6. f. 27 (Hil. pl. 16), comp. Litt. sec. 390; 37 Hen. 6. f. 1 (Mich. pl. 1); 15 Edw. 4. f. 14 (Mich. pl. 17), per Brian; 6 Hen. 7. f. 9 (Mich. pl. 4); 10 Hen. 7. f. 27 (Trin. pl. 13); 13 Hen. 7. f. 7 (Mich. pl. 3); Bro. Abr. *Eschete,* pl. 18; Co. Lit. 240 a, 268 a, b; 3 Inst. 19; 3 Rep. 2, 3, 35 a; 8 Rep. 42 b; Hale, P. C. Part I, ch. 23; Hawk, P. C. Bk. 2, ch. 49, sec. 5: *Burgess* v. *Wheate,* Eden, 177, 243. It will be noticed that none of these authorities, except perhaps the writ in the Register, is older than the middle of the fourteenth century.

[3] 3 Rep. 35 a; Co. Lit. 76 b.

heir], until the tenancy is recontinued.'[1] But at all events of a right of action there was no wardship. On the other hand, if the disseisor died without an heir the lord got an escheat, if the disseisor died leaving an infant heir the lord got a wardship, though in either case his rights were defeasible by the disseisee. In short, the lord must take his chance; it is no wrong to him if his tenant be disseised; he cannot prevent this person or that from acquiring seisin, yet thus he may be a great loser or a great gainer. The law about seisin pays no regard to his interests.

There is another side to the picture we have here drawn. He who is seised, though he has no title to the seisin, can alienate the land; he can make a feoffment and he can make a will (for he who *has* land is enabled to devise it by statute), and his heir shall inherit, shall inherit from him, for he is a stock of descent; and there shall be dower and there shall be curtesy, and the lord shall have an escheat and the king a forfeiture, for such a one has land 'to give and to forfeit.' This may make seisin look very much like ownership, and in truth our old law seems this (and has it ever been changed?[2]) that seisin does give ownership good against all save those who have better because older title. Nevertheless we err if we begin to think of seisin as ownership or any modification of ownership; after all it is but possession. A termor was not seised, but certainly he could make a feoffment in fee and his feoffee would be seised. This seems to have puzzled Lord Mansfield,[3] and puzzling enough it is if we regard seisin itself as a proprietary right, for then the termor seems to convey to another a right that he never had. But when it is remembered that substantially seisin is possession, no more, no less, then the old law becomes explicable. My butler has not possession of my plate, he has but a charge or custody of it; fraudulently he sells it to a

[1] Fitz. Abr. *Garde*, pl. 10.

[2] See *Asher* v. *Whitlock*, L. R. 1 Q. B. 1. Holmes, Common Law, p. 244.

[3] I refer of course to *Taylor* v. *Horde*, 1 Burr. 60, a case which profoundly dissatisfied the great conveyancers of the last century, and which has lately put Mr. Challis to his Greek (Real Property, p. 329). Butler's note on this case (Co. Lit. 330 b) seems to me the best modern account of seisin that we have.

silversmith; the silversmith now has possession: so with the termor, who has no seisin, but who by a wrongful act enables another to acquire seisin.

But, it will be urged, the termor's feoffee (here is the difficulty) acquires an estate in fee simple and no less estate or interest. Certainly, and what of the silversmith who buys of the fraudulent butler? He has possession, and in a certain sense he possesses as owner; he claims no limited interest, such as that of a bailee, in the goods. How his rights would best be described at the present day we need not discuss, but it seems plausible to say that at least if an innocent purchaser, he has ownership good against all save those who have better because older title.[1] Regarded from this point of view the termor's tortious feoffment is no anomaly. It is true that in our modern law there may be nothing very analogous to the process whereby an infirm title gained strength as it passed from man to man, the ousted owner losing the right to enter before he lost the right of action; still it is conceivable that in the interests of public peace law should, for example, permit me to take my goods by force from the thief himself, but not from one to whom the thief has given or sold them, nor from the thief's executor. Thus would my entry be tolled and I should be put to my action.[2]

But this by the way, for the position of the non-possessed owner is more interesting and less explicable than that of the possessed non-owner. Now we seem brought to this, that ownership, mere ownership, is inalienable, intransmissible; neither by act of the party nor by act of the law will it pass from one man to another. The true explanation of the foregoing rules will I believe be found in no considerations of public policy, no wide views of social needs, but in what I

[1] Holmes, Common Law, p. 241.

[2] Coke (Co. Lit. 245 b) says that 'by the ancient law' the entry of the disseisee was tolled not only by a descent cast, but by the disseisor's feoffment followed by non-claim for year and day. There was very similar law both in France and in Germany, as may be seen at large in Laband, *Die Vermögensrechtlichen Klagen*, and Heusler, *Die Gewere*. I have never been able to find definite authority for Coke's statement, but it looks to me very probable. It deprives the descent cast of its isolated singularity, and fits in with the learning of fines.

shall venture to describe as a mental incapacity, an inability to conceive that mere rights can be transferred or can pass from person to person. Things can be transferred; that is obvious; the transfer is visible to the eye; but how rights? you have not your rights in your hand or your pocket, nor can you put them into the hand of another nor lead him into them and bid him walk about within their metes and bounds. 'But,' says the accomplished jurist, 'this is plain nonsense; when a gift is made of a corporeal thing, of a sword or a hide of land, rights are transferred; if at the same time there is a change of possession, that is another matter; whether a gift can be made without such a change of possession, the law of the land will decide; but every gift is a transfer of ownership, and ownership is a right or bundle of rights; if gift be possible, transfer of rights is possible.' That, I should reply, doubtless is so in these analytic times; but I may have here and there a reader who can remember to have experienced in his own person what I take to be the history of the race, who can remember how it flashed across him as a truth, new though obvious, that the essence of a gift is a transfer of rights. You cannot give what you have not got: — this seems clear; but put just the right accent on the words *give* and *got*, and we have reverted to an old way of thinking. You can't give a thing if you haven't got that thing, and you haven't got that thing if some one else has got it. A very large part of the history of Real Property Law seems to me the history of the process whereby Englishmen have thought themselves free of that materialism which is natural to us all.

But it will be said to me that this would-be explanation is untrue, or at best must take us back to a merely hypothetical age of darkness, because from time immemorial there were rights which could be transferred from man to man without any physical transfer of things, namely, 'the incorporeal hereditaments which lay in grant and not in livery.' In truth however the treatment which these rights receive in our oldest books is the very stronghold of the doctrine that I am propounding. They are transferable just because they are regarded not as rights but as things,

because one can become not merely entitled to, but also seised and possessed of them, corporeally seised and possessed. Seisin, it may be, cannot be delivered; I cannot put an advowson into your hand, nor can an advowson be ploughed and reaped; nevertheless the gift of the advowson will be far from perfect until you have presented a clerk who has been admitted to the church. In your writ of right of advowson you shall count that on the presentation of yourself or your ancestor a clerk was admitted, nay more, that your clerk exploited the church, took esplees thereof in tithes, oblations and obventions to the value of so many shillings.[1] But we may look at a few of these things incorporeal a little more closely.

And first then of seignories, reversions, remainders. These, it is said, lie in grant. But for all that the tenant of the land must attorn to the grantee; the attornment is necessary to perfect the transfer of the right. Such was the law in 1705.[2] Whence this necessity for an attornment?

It may be replied: — Here at all events is a feudal rule. Just as (before the beginning of clear history) the tenant could not alienate the land without the lord's consent, so in the reign of Queen Anne the lord could not alienate the seignory without the tenant's attornment. There was a personal bond between lord and vassal; the need of attornment is to start with the need of the tenant's consent, though certainly in course of time he could be compelled to give that consent.

Now it may not be denied that in this region feudal influence was at work. To deny this one must contradict Bracton. But the sufficiency of the explanation should not be admitted until some text of English law is produced which says that the tenant can as a general rule refuse consent to

[1] *Capiendo inde expleta;* this phrase conveys a sense of manifest and successful achievement. When the possessor takes a crop from his land, he achieves, exploits his seisin; his seisin is now explicit. See Skeat, s. v. *explicit, exploit.* There is a great mass of information in Ducange, s. v. *expletum.* Coke, 6 Rep. 58, gives almost the true meaning, though his etymology is at fault; he derives the word from *expleo* (instead of *explico*) and says that the grantee of a rent hath not a perfect and explete or complete estate until he hath reaped the esplees, *scilicet* the profit and commodity thereof.

[2] 4 & 5 Ann. c. 16. sec. 9.

an alienation. Bracton does say that except in exceptional cases there can be no transfer of *homage* unless the tenant consents; on the other hand he says that all other services can be transferred and the tenant shall be attorned *velit nolit*.[1] It is of course possible to regard this state of things as transitional, to urge that in Bracton's day the tenant had already lost a veto on alienation that he once had; but before we adopt this theory let us see how much less ground it covers than the rules which have to be explained.

(*a*) The doctrine of attornment holds good not only of a seignory and of a reversion but of a remainder also;[2] but between the remainderman and the tenant of the particular estate there is no tenure, no feudal bond.

(*b*) Much the same doctrine holds good when what has to be conveyed is the land itself (immediate freehold) but that land is in lease for years. Here the transfer can be made in one of two ways. There may be a grant and then attornment will be necessary,[3] or there may be a feoffment. But if there is to be a feoffment, either the termor must be a consenting party or he must be out of possession.[4] If the termor chooses to sit upon the land and say 'I will not go off and I will not attorn myself,' there can be no effectual grant, no effectual feoffment; recourse must be had to a court of law. But surely it will not be said that in the days of true feudalism, when, as we are told, the termor was regarded much as his landlord's servant, he had a legal right to prevent his landlord from selling the land?

(*c*) The doctrine of attornment holds good of rents not incident to tenure.[5] The terre-tenant will not hold of the grantee of the rent, nevertheless he must attorn if the grant is to have full efficacy. Indeed the learning of rents as it is in Coke,[6] and even as it is at the present day, seems to me very suggestive of an ancient mode of thought. The rent is regarded as a thing, and as a thing which has a certain

[1] Bract. f. 81 b, 82. The writs for compelling attornment are the *Quid juris clamat* and the *Per quae servitia*.
[2] Co. Lit. 309 a; Lit. sec. 569.
[3] Lit. sec. 567.
[4] Co. Lit. 48 b; *Bettisworth's Case*, 2 Rep. 31, 32.
[5] Co. Lit. 311 b.
[6] *Brediman's Case*, 6 Rep. 56 b.

corporeity (if I may so speak); you may be seised, physically possessed of it; you have no actual seisin until you have coins, tangible coins, in your hand. On getting this actual seisin much depended; in modern times a vote for Parliament.[1] An attornment would give you a fictitious 'seisin in law;' nothing but hard palpable cash would give you seisin in fact. Such an incorporeal hereditament as a rent can be given by man to man just because it occasionally becomes corporeal under the accidents of gold or silver; this seems the old theory.

Now as to attornment, a valuable analogy lies very near to our hands. Suppose that we shut Coke upon Littleton and open Benjamin on Sales. Describing what will be deemed an 'actual receipt' of sold goods within the meaning of the Statute of Frauds, Mr. Benjamin writes thus:—'When the goods, at the time of the sale, are in the possession of a third person, an actual receipt takes place when the vendor, the purchaser, and the third person agree together that the latter shall cease to hold the goods for the vendor and shall hold them for the purchaser. . . . All of the parties must join in the agreement, for the agent of the vendor cannot be converted into an agent for the vendee without his own knowledge and consent.'[2] This is familiar law, and surely it explains much. Baron Parke used a very happy phrase when he said that there is no 'actual receipt' by the buyer 'until the bailee has attorned, so to speak' to the buyer, a happy phrase for it explained the obscure by the intelligible, the old by the modern.[3]

Without transfer of a thing there is no transfer of a right.

Starting with this in our minds, how, let us ask, can a reversioner alienate his rights when a tenant for life is seised, how can a tenant in fee simple alienate his rights

[1] *Orme's Case*, L. R., 8 C. P. 281; *Hadfield's Case*, ibid. 306. The last Reform Act (48 Vict. c. 3, sec. 4) has, one regrets to say, made it improbable that we shall have in the future similar displays of antique learning.
[2] Benjamin, Sales, 2nd ed., p. 132.
[3] *Farina* v. *Home*, 16 M. & W. 119. I believe that it was Parke, B. who first introduced the term 'attornment' into the discussion of cases concerning the sale of goods; but in this I may be wrong.

when there is a termor on the land? There is but one answer. The person who has the thing in his power must acknowledge that he holds for or under the purchaser. If he does this, then we may say (as we do say when construing the Statute of Frauds) that the purchaser has 'actually received' the thing in question. It is I admit difficult to carry this or any other theory through all the intricacies of our old land law. The fact that in course of time there came to be two legally recognized possessions, first the old-fashioned possession or seisin which no termor can have (*possessio ad assisas*), and then the new fashioned possession which a termor can have (*possessio ad breve de transgressione*), complicates what, to start with, may have been a simple notion.[1] But the clue is given us in some words of Britton: — tenant in fee wants to alienate his land, but there is a farmer in possession; until the farmer attorns there can be no conveyance, *car la seisine del alienour sei continue touz juirs par le fermer, qui use sa seisine en le noun le lessour;*[2] the seisin is held for the alienor until the farmer consents to hold it for the alienee. So when the person on the land is tenant in fee simple, here doubtless he is seised on his own behalf, seised in demesne, but the overlord also is seised, seised of a seignory, or, as the older books put it, he holds the land in service (*non in dominico sed in servicio*); he holds the land by the body of his tenant; he can only transfer his rights if he can transfer seisin of the seignory; he transfers seisin when the tenant admits that he is holding under a new lord.[3] So with a rent which 'issues out of the land;' we cannot make a rent issue out of land, or turn the course of a rent already issuing, unless we can get at the land; if some one else has possession of the land, it is he that has the power to start or to divert the rent. This phrase 'a rent issuing out of land' would

[1] I have framed my Latin phrases on the model of Savigny's *possessio ad interdicta*. Seisin, we may say, is 'assize-possession.'

[2] Britton, vol. 2, p. 303.

[3] I am not sure that it was ever technically correct to say that the overlord is seised of the land; but in thirteenth century cases, he certainly has and holds the land, he has and holds it not in demesne, but in service. See Br. f. 432, 433. I have seen many cases to this effect; and I have seen *nunquam aliquam seisinam habuit nec in dominico nec in servicio*.

seem to us very wonderful and very instructive, had we not heard it so often. What a curious materialism it implies!

Bracton's whole treatment of *res incorporales* shows the same materialism, which is all the more striking because it is expressed in Roman terms and the writer intends to be very analytic and reasonable. *Jura* are incorporeal, not to be seen or touched, therefore there can be no delivery (*traditio*) of them. A gift of them, if it is to be made at all, must be a gift without delivery. But this is possible only by fiction of law. The law will feign that the donee possesses so soon as the gift is made and although he has not yet made use of the transferred right. Only however when he has actually used the right does his *possessio* cease to be *fictiva* and become *vera*, and then and then only does the transferred right become once more alienable.[1]

Of all these incorporeal things by far the most important in Bracton's day and long afterwards was the advowson in gross, and happily he twice over gives us his learning as to its alienability with abundant vouching of cases.[2] To be brief: — If *A* seised of an advowson grants it to *B*, and then the church falls vacant, *B* is entitled to present. Thus far have advowsons become detached from land. But if before a vacancy *B* grants to *C*, and then the parson dies, who shall present? Not *C*, nor *B*, but *A*. Not *C*, for though *B* had a quasi-possession when he made the grant he had no real possession, for he had never used the transferred, or partially transferred, right; he had nothing to give; he had nothing. Not *B*, for whatever inchoate right he had he has given away. No, as before said, *A* shall present, for the only actual seisin is with him. One has not really got an advowson until one has presented a clerk and so exploited one's right.

We may take up the learning of advowsons some centuries later. The following comes from a judgment not unknown to fame, the judgment of Holt in *Ashby* v. *White*.[3] He is illustrating the doctrine that want of remedy and want of

[1] Bracton, f. 52 b.

[2] Bracton, f. 54, 55, 246. See Nichols, Britton, vol. 2, p. 185, note f.

[3] Ld. Raym. 938, 953.

right are all one. 'As if a purchaser of an advowson in fee simple, before any presentment, suffer an usurpation and six months to pass without bringing his *quare impedit* he has lost his right to the advowson, because he has lost his *quare impedit* which was his only remedy; for he could not maintain a writ of right of advowson; and although he afterwards usurp and die and the advowson descend to his heir, yet the heir cannot be remitted, but the advowson is lost for ever without recovery.' So, as I understand, stood the law before the statute 7 Ann. c. 18. It comes to this, that if the grantee who has never presented suffers a usurpation, and does not at once use a special statutory remedy,[1] his right, his feeble right, has perished for ever. Writ of right he can have none, for he cannot count on an actual seisin. Very precarious indeed at Common Law was the right of the grantee who had not yet acquired what could be regarded as a physical corporeal possession of a thing. Indeed when we say that these rights lay in grant we use a phrase technically correct, but very likely to mislead a modern reader.

Space is failing or I would speak of franchises, for even to negative franchises, such as the right to be quit of toll, does Bracton apply the notion of seisin or possession; and the more the history of the incorporeal hereditaments is explored, the plainer will it be that according to ancient ideas they cannot be effectually passed from person to person by written words: there is seisin of them, possession of them, no complete conveyance of them without a transfer of possession, which, when it is not real must be supplied by fiction. But now if we put together all the old rules to which reference has here been made (and I will ask my readers to fill with their learning the many gaps in this brief argument), does it not seem that these 'very odd notions' of our ancestors, which Sir James Mansfield ascribed to 'particular causes,' were in the main due to one general cause? They point to a time when things were transferable and rights were not. Obviously things are transferable, but how rights?

[1] Stat. Westm. the Second (13 Edw. I), c. 5. The law is clearly stated by Blackstone, vol. 3, p. 243.

And here let us remember the memorable fact that the *chose in action* became assignable but the other day. The inalienability of the benefit of a contract, like the inalienability of the rights of the disseised owner, has been set down to that useful, hard-worked 'particular cause,' the prodigious jealousy of maintenance. The explanation has not stood examination in the one case,[1] I doubt it will stand examination in the other. According to old classifications the benefit of a contract and the right to recover land by litigation, stand very near each other. The land-owner whose estate has been 'turned to a right' (a significant phrase) has a thing in action, a thing in action real. There is a contrast more ancient than that between *jus in rem* and *jus in personam*, namely, that between right and thing. Of maintenance there is, I believe, no word in Bracton's book, but that there can be no *donatio* without *traditio* is for him a rule so obvious, so natural, that it needs no explanation, though it may be amply illustrated by cases on the rolls. What the thirteenth century learned of Roman law may have hardened and sharpened the rule, but it seems ingrained in the innermost structure of our law.

I am far from saying that within the few centuries covered by our English books it has ever been strictly inconceivable that a right should be transferred without some transfer of a thing, or without some physical fact which could be pictured as the use of a transferred incorporeal thing. Should it even be proved that the Anglo-Saxon charter or 'book' passed ownership without any transfer of possession, this will indeed be a remarkable fact, but far from decisive, particularly if the proof consist of royal grants. The king in council may have been able to do many marvellous feats not to be done by common men, and we know that ages before the year 1875 the king could assign his chose in action. But old impotencies of mind give rise to rules which perdure long after they have ceased to be the only conceivable rules, and then new justifications have to be found for the wisdom of the ancients, here feudalism, there a dread of maintenance, and there again a hatred of simony.

[1] Pollock, Principles of Contract, 4th ed., Appendix, Note G.

So long as the rules are unrepealed this rationalizing process must continue; judges and text-writers find themselves compelled to work these archaisms into the system of practical intelligible law. Only when the rules are repealed, when we can put them all together and look at them from a little distance, do they begin to tell their true history. I have here set down what seems to me the main theme of that history. For this purpose it has been necessary to speak very briefly and superficially of many different topics, about every one of which we have a vast store of detailed and intricate information. Before any theory such as that here ventured can demand acceptance, it must be stringently tested at every point and other systems of law besides the English should be considered. But it seemed worth while to draw notice to many old rules of law which we do not usually connect together, and to suggest that they help to explain each other and are in the main the outcome of one general cause.[1]

[1] There is one rule of our present Common Law which, were it very old, would make much against what I have said, the rule, namely, that the ownership of movables can be transferred by mere agreement, by bargain and sale without delivery. I have not forgotten this, but it seemed impossible to discuss in a paper already too miscellaneous a question which has divided two masters of the Year Books. Serjeant Manning has maintained that the rule is quite modern. Lord Blackburn, on the other hand, has found it in the books of Edward the Fourth. He was not concerned, however, to trace it any further, and it seems to me that the law of an earlier time required a change of possession on the one side or the other, delivery or part-delivery of the goods, payment or part-payment of the price. Perhaps at some future time I may be allowed to state what I have been able to find about this matter. Since this article was in print examples (A. D. 1305) of pleadings referring to the seisin of chattels have been brought to my notice by Mr. G. H. Blakesley: see Registrum Palatinum Dunelmense (ed. Hardy), vol. 4, pp. 45, 49, 63, 73.

69. THE HISTORY OF THE ACTION OF EJECTMENT IN ENGLAND AND THE UNITED STATES[1]

By Arthur George Sedgwick[2]
and Frederick Scott Wait[3]

§ 1. — The action of ejectment, the legal proceeding by which the title to land in most of the United States is now usually tried, was originally an action of trespass brought by a lessee or tenant for years to redress the injury inflicted upon him by ouster or amotion of possession. The lessee merely recovered damages for the loss of the term and of the possession, the measure of these being usually the mesne profits of the land from which he had been evicted. It was a purely personal action, in which neither lands nor tenements were recoverable, as opposed to a real action, in which a freehold interest in land was recovered or possession awarded.

The remedy of ejectment, as subserving the uses of a real action, in which important character we are about to consider it, has been termed "a modified action of trespass,"

[1] This Essay forms part of a "Treatise on the Trial of Title to Land, including Ejectment, Trespass to Try Title, Writs of Entry, and Statutory Remedies for the Recovery of Real Property" (New York: Baker, Voorhis, & Co., 1886), 2d edition, being pp. 1-47 of Chapter I, with a few omissions.

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Other Publications: editor of the 5th, 7th, and 8th editions of (his father) T. S. Sedgwick's Treatise on the Measure of Damages, 1869-1890; Constitutional Protection of Property Rights, 1882; Elements of Damages, 2d ed. 1909.

[3] Member of the New York Bar. Union College (Albany Law School), LL. B. 1874; Secretary of Barnard College for Women (Columbia University); Secretary of the Legislative Committee of the New York Bar Association.

Other Publications: Fraudulent Conveyances and Creditors' Bills, 3d ed. 1897; Insolvent Corporations, 1888; and articles in legal journals and encyclopedias.