THE HISTORY OF ENGLISH LAW

REVISED WITH A NEW INTRODUCTION AND SELECT BIBLIOGRAPHY BY

S. F. C. MILSOM

VOLUME 2

21

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OF

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BEFORE THE TIME OF EDWARD I

BY

SIR FREDERICK POLLOCK

AND

FREDERIC WILLIAM MAITLAND

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p. 149. As to the ownership and possession of movables, the articles by Mr J. B. Ames in Harv. L. R. vol. xi. pp. 277 ff. should be consulted.

p. 360, note 1. As to the forfeiture of the goods of a man who dies desperate, see Art. 30 of the Preston Custumal (Harland, Mamecestre, vol. iii. p. xxxviii.).

p. 363, note 2. Add a reference to Records of Leicester, p. 219. In 1293 the burgesses decide that the heir is to have the best cauldron, the best pot and so forth. In Scotland the 'heirship movables' were of considerable importance. In the seventeenth century the heir would take, among other things, 'the great House Bible, a Psalm-book, the Acts of Parliament.' See Hope's Minor Practicks, ed. 1734, p. 538.

p. 372, note 1. An interesting historical account of the Scottish law of marriage by Mr F. P. Walker will be found in Green's Encyclopædia of the Law of Scotland. Pre-Tridentine catholicism seems to find its best modern representative in this protestant kingdom.

p. 485, note 5, and p. 636, note 2. The Annals of Winchester, p. 25, and Thomas Wykes, p. 235, differ about the number of the compurgators, which may have been 25 or 50.

p. 500, side-note, should read 'Treason contrasted with felony.'

p. 537, note 5. So the burgess of Preston who has charged a married woman with unchastity must proclaim himself a liar holding his nose with his fingers: Harland, Mamecestre, vol. iii. p. xl.

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.

carefully eschewed, we are coming by a law of 'estates in land.' We have as yet, though not without a conscious effort, refrained from using that term, and this because, so far as we can see, it [p. 11] does not belong to the age of Bracton. On the other hand, so soon as we begin to get Year Books, we find it in use among lawyers[1]. As already said[2], it is the Latin word *status*; an estate for life is, in the language of our records, *status ad terminum vitae*, an estate in fee simple is *status in feodo simplici*; but a very curious twist has been given to that word. The process of contortion can not at this moment be fully explained, since, unless we are mistaken, it is the outcome of a doctrine of possession; but when once it has been accomplished, our lawyers have found a term for which they have long been to seek, a term which will serve to bring the various proprietary rights in land under one category, that of duration. The estate for life is finite, *quia nihil certius morte*; the estate in fee is infinite, for a man may have an heir until the end of time. The estate for life is smaller than the estate in fee; it is infinitely smaller; so that if the tenant in fee breaks off and gives away a life estate, or twenty life estates, he still has a fee. Thus are established the first elements of that wonderful calculus of estates which, even in our own day, is perhaps the most distinctive feature of English private law.

The estate and the *forma doni*.

In the second half of the thirteenth century this calculus is just beginning to take a definite shape; but in all probability some of the ideas which have suggested it and which it employs are very ancient. One of them is that which attributes to the alienator of land a large power of controlling the destiny of the land that he is alienating. By a declaration of his will expressed at the moment of alienation—in other words, by the *forma doni*—he can make that land descend in this way or in that, make it 'remain,' that is, stay out, for this person or for that, make it 'revert' or come back to himself or his heirs upon the happening of this or that event. His alienation, if such we may call it, need not be a simple transfer of the rights that he has enjoyed; it is the creation of new rights, and the office of the law is to say what he may not do, rather than what he may do in this matter; it has to limit his powers, rather than to endow him with them, for almost boundless

[1] See, for example, Y. B. 20-1 Edw. I. p. 39.

[2] See above, vol. i. p. 408.

powers of this kind seem to be implied in its notion of ownership. Not that land has been easily alienable; seignorial and family claims must be satisfied before there can be any alienation at all; but when a man is free to give away his land, [p. 12] he is free to do much more than this; he can impose his will on that land as a law that it must obey[1].

The power of the gift.

In this context we ought to remember that the power to alienate land is one that has descended from above. From all time the king has been the great land-giver. The model gift of land has been a governmental act; and who is to define what may or may not be done by a royal land-book, which, if it is a deed of gift, is also a *privilegium* sanctioned by all the powers of state and church? The king's example is a mighty force; his charters are models for all charters. The earl, the baron, the abbot, when he makes a gift of land will consult, or profess that he has consulted, his barons or his men[2]. This influence of royal *privilegia* goes far, so we think, to explain the power of the *forma doni*. Still it would not be adequate, were we not to think of the hazy atmosphere in which it has operated. The gift of land has shaded off into the loan of land, the loan into the gift; the old land-loan was a temporary gift, the gift was a permanent loan; and if the donee's heirs were to inherit the land, this was because it had been given not only to him, but also to them[3]. This haze we believe to be very old; it is not exhaled by feudalism but is the environment into which feudalism is born. And so in the thirteenth century every sort and kind of alienation (that word being here used in its very largest sense) is a 'gift,' and yet it is a gift which always, or nearly always, leaves some rights in the giver[4]. In our eyes the transaction may be really a gift, for a religious house is to hold the land for ever and ever, and the only service to be done to the giver is one which he and his will receive in another world; or it may in substance be a sale or an exchange, since the

[1] Bracton, f. 17 b: 'Modus enim legem dat donationi, et modus tenendus est contra ius commune et contra legem, quia modus et conventio vincunt legem.'

[2] See above, vol. i. p. 346.

[3] See Brunner's two essays, Die Landschenkungen der Merowinger, and Ursprung des droit de retour, which are reprinted in his Forschungen zur Geschichte des deutschen und französischen Rechts. Also, Maitland, Domesday Book, 299.

[4] The exception is when there is 'substitution' not 'subinfeudation.'

so-called donee has given money or land in return for the so-called gift; or it may be what we should call an onerous lease for life, the donee taking the land at a heavy rent:—but in all these cases there will be a 'gift,' and precisely the same two [p. 13] verbs will be used to describe the transaction; the donor will say 'I have given and granted (*sciatis me dedisse et concessisse*)[1].'

The form of the gift a law for the land.

If then 'the form of the gift' can decide whether the donee is to hold in fee or for life, whether he is to be a heavily burdened lessee, or whether we must have recourse to something very like a fiction in order to discover his services, we can easily imagine that the form of the gift can do many other things as well. Why should it not provide that one man after another man shall enjoy the land, and can it not mark out a course of descent that the land must follow? The law, if we may so put it, is challenged to say what the gift can not do; for the gift can do whatever is not forbidden.

The gift to a man and his heirs.

One of the first points about which the law has to make up its mind is as to the meaning of a gift to a man 'and his heirs.' The growing power of alienation has here raised a question. Down to the end of the twelfth century the tenant in fee who wished to alienate had very commonly to seek the consent of his apparent or presumptive heirs[2]. While this was so, it mattered not very greatly whether this restraint was found in some common-law rule forbidding disherison, or in the form of a gift which seemed to declare that after the donee's death the land was to be enjoyed by his heir and by none other. But early in the next century this restraint silently disappeared. The tenant in fee could alienate the land away from his heir. This having been decided, it became plain that the words 'and his heirs' did not give the heir any rights, did not decree that the heir must have the land. They merely showed that the donee had 'an estate' that would endure at least so long as any heir of his was living. If on his death his heir got the land, he got

[1] The medieval 'gift' is almost as wide as our modern 'assurance.' Bracton, f. 27: 'Item *dare* poterit quis alicui terram ad voluntatem suam et quamdiu ei placuerit, de termino in terminum, et de anno in annum.' However Bracton, f. 17, says that a lease for years is rather a grant (*concessio*) than a *donatio*, and gradually the scope of *dare* is confined to the alienation or creation of freehold estates; one demises or bails (Fr. *bailler*) for a term of years.

[2] Of this more fully below in the chapter on Inheritance.

it by inheritance and not as a person appointed to take it by the form of the gift[1].

Duration of a fee.

This left open the question whether the donee's estate was [p. 14] one which might possibly endure even if he had no heir. Of course if the estate was not alienated, then if at any time an heir failed, the land escheated to the lord. But suppose that it is alienated: then will it come to an end on the failure of the heirs of the original donee? We seem to find in Bracton's text many traces of the opinion that it will. Early in the century it became a common practice to make the gift in fee, not merely to the donee 'and his heirs,' but to the donee, 'his heirs and assigns[2].' What is more, we learn that if the donee is a bastard, and consequently a person who can never have any heirs save heirs of his body, and the gift is to him 'and his heirs' without mention of 'assigns,' it is considered that he has an estate which, whether alienated or no, must come to an end so soon as he is dead and has no heir[3]. However, this special rule for gifts to bastards looks like a survival; and the general law of Bracton's time seems to be that the estate in fee created by a gift made to a man 'and his heirs' will endure until the person entitled to it for the time being—be he the original donee, be he an alienee—dies and leaves no heir. This was certainly the law at a somewhat later time[4].

[1] Bracton, f. 17: 'et sic acquirit donatorius rem donatam ex causa donationis, et heredes eius post eum ex causa successionis; et nihil acquirit [heres] ex donatione facta antecessori, quia cum donatorio non est feoffatus.'

[2] Generally in a collection of charters we shall find two changes occurring almost simultaneously soon after the year 1200:—(1) the donor's expectant heirs no longer join in the gift; (2) the donee's 'assigns' begin to be mentioned.

[3] Bracton, f. 12 b, 13, 20 b, 412 b; Note Book, pl. 402, 1289, 1706; Britton, i. 223; ii. 302.

[4] Alienation would chiefly be by way of subinfeudation, and Bracton on more than one occasion discusses the case in which a mesne lordship escheats but leaves the demesne tenancy existing; f. 23 b, 48. But unless the donor expressly contracted to warrant the donee's 'assigns' he was not bound to warrant them; f. 17 b, 20, 37 b, 381. See also Note Book, pl. 106, 332, 617, 804, 867, 1289, 1906; also Chron. de Melsa, ii. 104. The position of a tenant who had no warrantor was very insecure, for he could be driven to stake his title on battle or the grand assize; hence the great importance of 'assigns' in the clause of warranty. It was important also in the grant of an advowson: Bracton, f. 54. Apparently too it might be valuable if the donor's apparent heir was convicted of felony: Ibid. f. 134. But by this time the word in its commonest context was becoming needless: Y. B. 33-5 Edw. I. p. 363. The writer of the Mirror (Selden Soc.), pp. 175, 181, holds that no one should be able to alienate unless his assigns have been mentioned. On the whole we can not doubt that the use of this term played a large part in the obscure process which destroyed the old rules by which alienation was fettered. See Williams, Real Property, 18th ed., pp. 66–70.

Limited gifts.

Another matter that required definition was the effect of attempts to limit the descent of the land to a special class [p. 15] of heirs, to the descendants of the original donee, 'the heirs of his body.' It is possible that the process which made *beneficia* or *feoda* hereditary had for a while been arrested at a point at which the issue of the beneficed vassal, but no remoter heirs of his, could claim to succeed him; but this belongs rather to French or Frankish than to English history. So far as we can see, from the Conquest onwards, collateral heirs, remote kinsmen, can claim the ordinary *feodum*, if no descendants be forthcoming. But a peculiar rule arose concerning the marriage portions of women.

The *maritagium.*

It is necessary here to make a slight digression. Our English law in its canons of inheritance postponed the daughter to the son; it allowed her no part of her dead father's land if at his death he left a son or the issue of a dead son. In such a case the less rigorous Norman law gave her a claim against her brothers; she could demand a reasonable marriage portion, if her father had not given her one in his lifetime[1]. Even in England her father was entitled to give her one, and this at a time when as a general rule he could not alienate his fee without the consent of his expectant heirs, who in the common case would be his sons. Whether the Norman rule that he could give but one-third of his land away in *maritagia* ever prevailed in this country, we do not know. But we must further observe that in this case he might make a free, an unrequited gift. Of course a free gift was far more objectionable than a gift which obliged the donee to an adequate return in the shape of services; for in the latter case the donor's heir, though he would not inherit the land in demesne, might inherit an equivalent for it. To this state of things it apparently is that the term 'frank-marriage' (*liberum maritagium*) takes us back. A father may provide his daughter, not merely with a *maritagium*, but with a *liberum maritagium*:—his sons can not object to this. If land is given in frank-marriage it will be free from all service; as between donor and donee it will even be free from the forinsec service until it has

[1] Très ancien coutumier, pp. 10, 83; Ancienne coutume, p. 84; Somma, p. 83.

been thrice inherited by the heirs of the body of the donee[1]. When that degree has been passed, the tenant will be bound to do homage to the donor's heir and perform the forinsec service. [p. 16] Probably under twelfth century law the estate of the donee was deemed inalienable, at all events until this degree had been passed. The *maritagium* was a provision for a daughter—or perhaps some other near kinswoman—and her issue. On failure of her issue, the land was to go back to the donor or his heirs[2].

Gifts to a man and the heirs of his body.

Meanwhile about the year 1200 gifts expressly limited to the donee 'and the heirs of his body' and gifts made to a husband and wife 'and the heirs of their bodies' begin to grow frequent[3]. Before the end of Henry III.'s reign they are

[1] Bracton, f. 21 b.

[2] The *maritagium* appears already in D. B., *e.g.* i. 138 b: 'dedit cum nepte sua in maritagio.' It appears in Henry I.'s coronation charter as *maritatio*; see also Round, Ancient Charters, p. 8, for an example from 1121. Glanvill discusses it in lib. i. 18; Bracton, f. 21–23. During the period between Glanvill and Bracton it causes a good deal of litigation; see cases in Note Book, indexed under 'Marriage Portion' and Select Civil Pleas (Selden Soc.), pl. 184. It has been said that 'Frank marriage is the name not of a species of tenure but of a species of estate' (Challis, Real Property, 2nd ed. p. 12). This is hardly true of the early period with which we are dealing. The most striking feature of the *liberum maritagium* is a tenurial quality, namely, tenure which for three generations is tenure without service. The term *maritagium* points, we may say, to a peculiar kind of estate; but *liberum maritagium* points also to a highly peculiar kind of tenure. See Y. B. 30–31 Edw. I. 388. In later days the gift in frank marriage is deemed to create an estate in special tail for the husband and wife, and the main interest of it lies in the creation of such an estate without any words of inheritance; see Challis, Real Property, 2nd ed. pp. 12, 265. But from an early time it was usual, as a matter of fact, to employ words marking out a line of descent, and in Bracton's day this was not always that of an estate in tail special for husband and wife. The *maritagium* may be given to husband and wife and the heirs of their two bodies, or to the wife and the heirs of her body, or to the husband and the heirs of his body; and there are other variations. See Bracton, f. 22, 22 b. So long as feudal services are grave realities it is important to maintain that the marriage portion, whichever of these forms it may take, may be a *liberum maritagium*. In 1307 counsel urges that a gift to a woman and the heirs of her body can not be frank marriage. A judge replies 'Why so? If I give you a tenement in frank marriage can I not frame the entail as I please?' See Y. B. 33–5 Edw. I. p. 398.

[3] Fines (ed. Hunter), i. 34, 85, 95, 102, 110, 160, 251; ii. 78, 91, 100. These are instances from the reigns of Richard and John. An instance of a royal marriage settlement is this:—in 1252 Henry III. gave land to his brother Richard, to hold to him and his heirs begotten of his wife Sanchia, with an express clause stating that the land was to revert on the failure of such heirs to the king and his heirs; Placit. Abbrev. 145.

common. An examination of numerous fines levied during the first years of Edward I. and the last of his father brings us to the conclusion that every tenth fine or thereabouts contained a limitation of this character. The commonest form of such [p. 17] gifts seems to have been that which designated as its objects a husband and wife and the heirs springing from their marriage; but a gift to a man and the heirs of his body, or to a woman and the heirs of her body, was by no means unusual. On the other hand, a form which excludes female descendants, any such form as created the 'estate in tail male' of later days, was, if we are not mistaken, rare[1]. These expressly limited gifts begin to be fashionable just at the time when the man who holds 'to himself and his heirs' is gaining a full liberty of alienation both as against his lord and as against his apparent or presumptive heirs. No doubt the two phenomena are connected. It has become evident that if a provision is to be made for the children of a marriage, or if the donor is to get back his land in case there be no near kinsman of the donee to claim the bounty, these matters must be expressly provided for.

The conditional fee.

Now before the end of Henry III.'s reign the judges seem to have adopted a very curious method of interpreting these gifts. They held that they were 'conditional gifts.' We may take as an example the simplest, the gift 'to X and the heirs of his body.' They held that so soon as X had a child, he had fulfilled a condition imposed upon him by the donor, could alienate the land, could give to the alienee an estate which would hold good against any claim on the part of his (X's) issue, and an estate which would endure even though such issue became extinct. Even before the birth of a child, X could give to an alienee an estate which would endure so long as X or any descendant of X was living. On the other hand, they stopped short of holding that, so soon as a child was born, X was just in the position of one holding 'to himself and his heirs'; for if he afterwards died without leaving issue and without having alienated the land, his heir (who of course would not be an 'heir of his body') had no right in the land, and it reverted to the donor[2].

[1] Calendarium Genealogicum, i. 111; Robert de Quency before 48 Hen. III. enfeoffed the Earl of Winchester and the heirs male of his body.

[2] The preamble of Stat. West. II. c. 1 has been supposed to show—and this

History of the conditional fee.

How the lawyers arrived at this odd result we do not [p. 18] know; but a guess may be allowable. When men were making their first attempts to devise these restricted gifts, they seem to have not unfrequently adopted a form of words which might reasonably be construed as the creation of a 'conditional fee.' In the first years of the century a gift 'to *X* and his heirs if he shall have an heir of his body' seems to have been almost as common as the gift 'to *X* and the heirs of his body[1].' At first little difference would be seen between these two forms. In either case the donor, with no precedents before him, might well suppose that he had shown an intention that the land should descend to the issue, if any, of *X*, but to no other heirs. But without doing much violence to the former of these clauses ('to *X* and his heirs if he shall have an heir of his body') we can make it mean 'to *X* and his heirs' upon condition that he shall have a child born to him. If then *X* has a child, the condition is fulfilled for good and all; *X* is holding the land simply to himself and his heirs[2]. A mode of interpretation established for the one form of gift may then have extended itself to the other, namely, 'to *X* and the heirs of his body': intermediate and ambiguous forms were possible[3].

The leaning in favour of alienability.

But explain the matter how we will, we can not explain it sufficiently unless we attribute to the king's court a strong bias

(see Challis, Real Property, 2nd ed. p. 239) is now the received opinion—that in certain cases the birth of issue of the prescribed class made it possible for the estate to descend to issue outside the prescribed class. This goes further than Bracton would have gone; see Bracton, f. 22. As to the second husband's curtesy, see Bracton, f. 437 b, 438 b; Note Book, pl. 487, 1921.

[1] See for example Rot. Cart. Joh. p. 209: charter of king John (1215): gift to H to hold to him and his heirs, and we will that if he has an heir begotten on a wife he shall hold as aforesaid, but if not the land is to revert to us. Fines (ed. Hunter), i. 85, 95, 110, 160, 251; Note Book, pl. 429, 948.

[2] Bracton, f. 18, 47. Bracton was evidently familiar with gifts of this kind. It is to be remembered that in the past the maxim *Nemo est heres viventis* had not been observed. In the most formal documents an heir apparent or presumptive had been simply *heres*.

[3] This is no new explanation; it is given in Plowden, Comment. p. 235. The transition may have been made the easier by the clauses which attempted to define the event upon which a reverter is to take place :—'but if he shall not have—but if he shall not leave—but if he shall die without leaving—without having had—an heir of his body, then the land shall revert.' Such a clause might be regarded as defining a condition. When the deed says that the land is to revert if the donee never has an heir of his body, we may argue that only in this case is there to be a reversion; also that a man has an heir of his body directly he has a child.

in favour of free alienation. Bracton apparently would have held that if the gift is 'to *X* and the heirs of his body,' the rights, if rights they can be called, of his issue are utterly at his mercy. An heir is one who claims by descent what has [p. 19] been left undisposed of by his ancestor; what his ancestor has alienated he cannot claim. Others may think differently, may hold that the issue are enfeoffed along with their ancestor; but this, says Bracton, is false doctrine[1]. Whether he would have taken the further step of holding that *X*, so soon as he has a child, can make an alienation which, even when his issue have failed, will defeat the claim of the donor—that is, to say the least, very doubtful[2]. But that step also was taken at the latest in the early years of Edward I.[3] Gifts in 'marriage' and gifts to the donee and the heirs of his body were to be treated as creating 'conditional fees.'

Statutory protection of conditional gifts.

But this doctrine was not popular; it ran counter to the intentions of settlors; 'it seemed very hard to the givers that their expressed will should not be observed.' Already in 1258 there was an outcry[4]. In 1285 the first chapter of the Second Statute of Westminster, the famous *De donis conditionalibus*, laid down a new rule[5]. The 'conditional fee' of former times became known as a fee tail (Lat. *feodum talliatum*, Fr. *fee taillé*), a fee that has been carved or cut down, and about the same time the term *fee simple* was adopted to describe the estate which a man has who holds 'to him and his heirs.' But the effect of this celebrated law can not be discussed here[6].

[1] Bracton, f. 17 b; Note Book, pl. 566.

[2] Bracton, f. 17 b.

[3] The clearest contemporary authorities are Stat. West. II. c. 1 and Y. B. 32–3 Edw. I. 279=Fitzherbert, *Formedon*, 62.

[4] Oxford Petition, c. 27 (Select Charters). This is one of the first proofs that these *dona* are being regarded as *conditionalia*. The petitioners seem to complain not of this, but of some doctrine which they regard as permitting an infringement of the 'condition.'

[5] Stat. 13 Edw. I. c. 1.

[6] It seems that the term *fee tail* was already in use before the statute was passed; it occurs in the statute (c. 4) though not in the famous first chapter. We have found it on a roll slightly older than the statute; De Banco Roll, Mich. 11–12 Edw. I. m. 70 d: 'Emma non habuit...nisi feodum talliatum secundum formam donationis praedictae.' At any rate it was in common use within a very few years afterwards. See *e.g.* Y. B. 21–2 Edw. I. 365, 574, 641. It is about the same time that *fee simple*, alternating with (Fr.) *fee pur*, (Lat.) *feodum purum*, becomes very common. In Bracton we read rather of *donatio pura* or *donatio simplex* as opposed to *donatio conditionalis*. The modern learning of 'conditional fees at the common law' can be found in Co. Lit. 18 b; Second

Settlements in cent. XIII.

These are the three principal elements which the settlors [p. 20] of the thirteenth century have in their hands. To give them their modern names they are (1) the fee simple absolute, given to a person and his heirs, (2) the fee simple conditional, given to a person and the heirs, or some class of the heirs, of his body, and (3) the estate for life. Already there are settlors. As the old restraints which tended to keep land in a family dropped off, men became more and more desirous of imposing their will upon land and making family settlements. Such settlements seem to have been made for the more part by fines levied in the king's court or by a process of feoffment and refeoffment. How much could be done by these means may for a long time have been doubtful, but we can see that a good deal could be done.

Joint-tenancies.

Something could be done by the creation of co-ownership or co-tenancy. About this there is not much to be said, except that the form known in later days as 'joint tenancy' seems decidedly older than that known as 'tenancy in common.' If land is given to two men and their heirs, there is a *ius accrescendi* between them: when one dies, the survivor takes the whole. The conditional fee given to the husband and wife and the heirs of their marriage is not uncommon. Also we may sometimes find land settled upon a father, a mother, a son, and the heirs of the son. The object thereby gained seems to have been that of defeating the lord's claim to the wardship of an infant heir or to a relief from an heir of full age[1]. Already conveyancers had hopes of circumventing the lord; already the legislator had set himself to defeat their schemes[2]. But

Inst. 331; *Paine's Case*, 8 Rep. 34; *Barkley's Case*, Plowden, 223; and is excellently summed up in Challis, Real Property, c. 18. On the whole it is well borne out by such authorities as we have from the thirteenth century. These are chiefly Bracton, f. 17 b, 47; Britton, i. 236; ii. 152; Fleta, f. 185; the cases in the Note Book indexed under 'Fee Conditional,' of some of which a partial knowledge descended through Fitzherbert to Coke; a few cases of Edward's reign collected by Fitzherbert under 'Formedon,' several of which with others appear now in Horwood's Year Books; and lastly the long and important recital in the statute. About one small point we speak in a note at the end of this section.

[1] Coke, 2nd Inst. 110.

[2] Stat. Marlb. c. 6. Even by taking a joint tenancy with one's wife something could be done to hurt the lord. Gilbert of Umfravill holds of the king in chief in fee simple. He and his wife have a son who is one year old. He wants to enfeoff a friend and take back an estate limited to himself and his wife and their heirs. An inquest finds that this will be to the king's damage. If Gilbert dies in his wife's lifetime the king may lose a wardship. Cal. Geneal. ii. 650.

we must pass to more ambitious enterprises, devices for making one estate follow upon another.

[p. 21] Reversion and remainder.

Two technical terms are becoming prominent, namely, 'revert' and 'remain.' For a long time past the word *reverti*, alternating with *redire*, has been in use both in England and on the mainland to describe what will happen when a lease of land expires:—the land will 'come back' to the lessor. We find this phrase in those 'three life leases' which Bishop Oswald of Worcester granted in King Edgar's day[1]. We find it also in a constitution issued by Justinian, which is the probable origin of those 'three life leases' that were granted by the Anglo-Saxon churches[2]. But occasionally in yet remote times men would endeavour to provide that when one person's enjoyment of the land had come to an end, the land should not 'come back' to the donor or lessor, but should 'remain,' that is, stay out for, some third person[3]. The verb *remanere* was a natural contrast to the verb *reverti* or *redire*[4]; the land is to stay out instead of coming back. Both terms were in common use in the England of the thirteenth century, and though we may occasionally see the one where we should expect the other[5], they are in general used with precision. Land can only 'revert' to the donor or to those who represent him as his heirs or assigns: if after the expiration of one estate the land is not to

[1] See, *e.g.* Kemble, Cod. Dipl. vol. iii. p. 4: 'ad usum primatis redeat'; Ibid. p. 22: 'ad usum revertatur praesulis.' In these leases *redeat* and *restituatur* are the common terms.

[2] Nov. 7, cap. 3, § 2: in the Greek ἐπανιέναι: in the Latin *redeat*: in the 'Authentic' *reverti*. For the connexion between this Novel and the practice of the English prelates, see Maitland, Domesday Book, 303.

[3] See the will (A.D. 960) of Count Raymond of Toulouse, in Mabillon, De Re Diplomatica, p. 572, where numerous remainders are created by use of the verb *remanere*. Thus: 'et post decessum suum *R.* filio suo remaneat, et si *R.* mortuus fuerit, *B* et uxori suae *A* remaneat, et si infans masculus de illis pariter apparuerit ad illum remaneat, et si illi mortui fuerint qui infantem non habuerint, *H* remaneat, et si *H* mortuus fuerit...' See also Hübner, Donationes post obitum (Gierke's Untersuchungen, No. xxvi.), p. 70.

[4] This contrast appears in the classical Roman jurisprudence. Ulpiani Fragmenta, vi. §§ 4–5: 'Mortua in matrimonio muliere, dos a patre profecta ad patrem *revertitur*.....Adventicia autem dos semper penes maritum *remanet*.'

[5] Thus Bracton, f. 18 b, uses *reverti* where we should expect *remanere*. So in Hunter, Fines, i. 99 (temp. Ric. I.), we may find what we should describe as the converse mistake.

come back to the donor, but is to stay out for the benefit of another, then it 'remains' to that other. Gradually the terms 'reversion' and 'remainder,' which appear already in Edward I.'s day[1], are coined and become technical; at a yet later date we have 'reversioner' and 'remainderman[2].'

Remainders after life estates.

When creating a life estate, it was usual for the donor to [p. 22] say expressly that on the tenant's death the land was to revert. But there was no need to say this: if nothing was said the land went back to the donor who had all along been its lord. But the donor when making the gift was free to say that on the death of the life tenant the land should remain to some third person for life or in fee. As a matter of fact this does not seem to have been very common; but in all probability the law would have permitted the creation of any number of successive life estates, each of course being given to some person living at the time of the gift[3].

Reversion and escheat.

If an estate in 'fee conditional' came to an end, then the land would go back to the donor. We have seen that the king's court did something towards making this an uncommon event, for the tenant so soon as issue of the prescribed class had been born to him, might if he pleased defeat the donor's claim by an alienation. Still even when this rule had been established, such an estate would sometimes expire and then the land would return to the donor; it would 'revert' or 'escheat' to the donor and lord. Now in later days when the great statutes of Edward I. had stopped subinfeudation and defined the nature of an estate tail, no blunder could have been worse than that of confusing a reversion with an escheat. These two terms had undergone specification:—land 'escheated' to the lord *propter defectum tenentis* when a tenant in fee simple died without heirs, and the lord in this case could hardly ever be the donor from whom that tenant acquired his

[1] Y. B. 33–5 Edw. I. p. 429.

[2] As a matter of history it is a mistake to think that a remainder is so called because it is what remains after a 'particular estate' has been given away. The verb is far older than the noun and is applied to the land. Indeed in our law Latin the infinitive of the verb has to do duty as a noun; a remainder is a 'remanere.' The words 'reversioner' and 'remainderman' are yet newer. In the thirteenth century one says 'he to whom the reversion or remainder belongs' or 'he who has the reversion or remainder.'

[3] An early case of successive life estates will be found in Cart. Rams. i. p. 150.

estate[1]; while, on the other hand, on the death of a tenant for life, or the death without issue of a tenant in tail, land 'reverted' to the donor who had created that tenant's estate. But at an earlier time there was not this striking contrast. In the common case, so long as subinfeudation was permissible, the tenant in 'fee simple absolute' just like the tenant in 'fee conditional' held of his donor. If the heirs of the one or the [p. 23] heirs of the body of the other fail, the land goes back to one who is both lord and giver. The two cases have very much in common, and the words 'revert' and 'escheat' are sometimes indiscriminately used to cover both[2].

Remainders after conditional fees.

According to the orthodoxy of a later age what the donor has when he has created a conditional fee is not a reversion but a 'possibility of reverter.' Whether the lawyers of 1285 had come in sight of this subtle distinction we may doubt, without hinting for a moment that it is not now-a-days well established. As a matter of fact the land reverts to the donor. So early as 1220 it is possible for the donor to get a writ which will bring the land back to him[3], and before the end of Henry's reign a writ for this purpose seems to have taken its place among the writs of course[4]. But it is further said that after the

[1] If the king made a feoffment he was both lord and donor.

[2] Bracton, f. 23, speaks plainly of an absolute fee simple reverting to its donor on failure of the heirs of a tenant. And on the other hand gives, f. 160 b, a writ of escheat suitable for a case in which tenant in fee conditional dies without an heir of his body. In a MS. Registrum Brevium of Henry III.'s reign a writ which answers the purpose of 'formedon in the reverter'—and we have seen no earlier specimen of any such writ—is called a writ of escheat: H. L. R. iii. 170. Fitzherbert, *Formedon*, 63, gives a record of 13 Edw. I. (the year of *De donis*): 'T. petit versus A. unam carucatam terrae in quam non habet ingressum nisi per R. cui praedictus T. illam dimisit in liberum maritagium suum cum A. filia sua et heredibus qui de praedicta A. exierint, et quae ad ipsum reverti debet *tanquam eschaeta sua* eo quod praedicta A. obiit sine herede de se.' It is to be remembered that even in later days the writ of escheat contained the words *reverti debet:* Reg. Brev. Orig. 164 b. Also we may observe that the word *escheat* (*excadere*) had no special aptitude for expressing a seignorial right. In medieval French law land *descends* to a lineal, but *escheats* to a collateral heir; Beaumanoir, vol. i. pp. 225, 296.

[3] Note Book, pl. 61 = Fitz. *Formedon*, 64.

[4] Stat. Westm. II. c. 13 and see above note 2. Coke in Co. Lit. 22 a, b, seems to say that even after the Statute *De donis*, there had been a doubt as to whether there could be a reversion on a fee tail. The references to ancient authorities that he gives in his margin seem for the more part to be misprinted; as they stand they are beside the mark. The Second Statute of Westminster itself (c. 4) speaks of a *reversio* where there is a *feodum talliatum*. So far as we

conditional fee there could be no remainder. To this, without the slightest wish to disturb the well settled law of later days[1], we can not unreservedly assent. In the first place, such a remainder had come before the court as early as 1220 and to all appearance had not shocked it[2]. In the second place, Bracton [p. 24] distinctly says that land can be given to *A* and the heirs of his body, and on failure of such heirs to *B* and the heirs of his body, and on failure of such heirs to *C* and the heirs of his body[3]. In the third place, during the first years of Edward and the last of Henry such gifts were common. So far as we can see, about one out of every two fines that create a conditional fee will in plain language create a remainder after that estate. To judge by these fines, of which many hundreds are preserved, a remainder on a conditional fee was commoner than a remainder on a life estate. In the fourth place, directly the Year Books begin—and they begin about seven years after the statute *De donis*—the lawyers are treating a remainder after a conditional fee or estate tail as a very natural thing[4]. Fifthly, though that statute did not by any express words take notice of the remainderman or do anything for him, we find that while Edward was still alive the remainderman was enjoying that full protection which the statute had conferred on the reversioner[5]. Lastly, Bracton distinctly says that the remainderman has an action to obtain the land when the previous estate has expired. This action, he says, can not be an assize of *mort d'ancestor*, nor can it be a writ of right, for the remainderman claims nothing by way of inheritance; but *ut res magis valeat quam pereat* the remainderman will have an 'exception' if he is in possession, while if he is out of possession he will have a writ founded on the 'form of the gift[6].'

have observed in the Year Books of Edward I. and II. (which were not printed in Coke's day) the lawyers invariably speak in this context of a reversion, never of a 'possibility of reverter.' See *e.g.* 21–2 Edw. I. pp. 58, 187; 30–1 Edw. I. p. 124; 32–3 Edw. I. p. 100.

[1] Challis, Real Property (ed. 2), Appendix II.

[2] Note Book, pl. 86.

[3] Bracton, f. 18 b. On f. 18 he has spoken of a gift to husband and wife and their common heirs, and if such heirs fail then to the heirs of the survivor.

[4] Y. B. 21–2 Edw. I. pp. 58, 196, 266. Three cases from two terms.

[5] Y. B. 33–5 Edw. I. pp. 20, 130, 157. The last two of these cases are formedon in the remainder on the expiration of an estate tail. The first is formedon in the remainder on the death of tenant for life. Of this hereafter.

[6] Bracton, f. 69, and again on f. 262 b. 263.

Their validity questionable.

However, it must be confessed that though Bracton says that he is going to give us the words of this writ[1], he does not fulfil this promise, also that we have looked through a good many plea rolls without finding any instance of such a writ being brought into court before the statute of 1285. On the whole we must leave it a doubtful question whether before [p. 25] that statute the remainderman had any writ adapted to his case. But the want of an appropriate writ is one thing, the want of right another. Such certainly was the case in the thirteenth century. New writs could be made when they were wanted; lawyers were not yet compelled to argue always from writ to right, never from right to writ. For some forty years past such remainders as we have in view had been frequently created by instruments drawn up by officers of the court. Bracton had expressed his approval of them, had said that defences ('exceptions') could be founded upon them, had said that an action could be given for their protection. Whether that action was first given a few years after or a few years before the statute is a small question; the action was not given by the statute, but was the outcome of pure common law doctrine and the practice of conveyancers. It is quite as difficult to prove that the remainderman whose estate was preceded by an estate for life had any action, as to prove that there was a writ for the remainderman whose estate was preceded by a conditional fee; yet no one doubts that the common law of the thirteenth century allowed the creation of a remainder after a life estate[2].

Gifts upon condition.

But—to leave this disputable point—the creation of remainders is only one illustration of the power of the *forma doni*. The gage of land, the transaction which makes land a security for money lent, was being brought under the rubric 'Conditional Gifts' or 'Gifts upon Condition.' A creditor might be given a term of years in the land, which upon the happening of a specified event, to wit, the non-payment of the debt at a certain date, would swell into a fee[3]. Again, it was becoming a common practice for a feoffor or a lessor to stipulate that if the services due

[1] Bracton, f. 96: 'breve autem tale est ut liquere poterit'; no writ follows. In the Digby MS. a large blank space is left at this point as if for the reception of the writ. See Bracton and Azo, 243.

[2] See the note at the end of this section.

[3] See below, the section on The Gage of Land.

to him were in arrear for a certain time, he might reenter on the land and hold it as of old:—he made his gift subject to the express condition that rent should be duly paid. Again, the liberty of disposition which the king's courts had conceded to landholders was so large that it sometimes gave rise to new forms of restraint. As the common law about alienation became definite, feoffors sought to place themselves outside of it by express bargains. Sometimes the stipulation is that the lord shall have a right of preemption[1], sometimes that the land shall not be conveyed to men of religion[2], sometimes that it shall not be [p. 26] conveyed at all. A man who took land from the Abbot of Gloucester had, as a matter of common form, to swear that he would neither sell, nor exchange, nor mortgage the land, nor transfer it to any religious house without the consent of the monks[3]. Bracton regarded such conventions as binding on the land: a purchaser can be evicted on the ground that he has purchased land which the vendor had covenanted not to sell[4]. The danger of the time was not that too little, but that too much, respect would be paid to the expressed wills of feoffors and feoffees, so that the newly acquired power of free alienation would involve a power of making land absolutely inalienable.

The form of the gift and testamentary power.

On the other hand, the form of the gift, if it could restrain alienation, might give to the donee powers of alienation that he would not otherwise have enjoyed. We have already noticed that the introduction of the word 'assigns' had at one time been of importance. But just about the middle of the century we find for a short while a more ambitious clause in charters of feoffment. It strives to give the feoffee that testamentary power which the common law denies him. The gift is made not merely to him, his heirs and assigns, but to him, his

[1] Cart. Glouc. i. 222. See also Cart. Rams. ii. 279.

[2] Cart. Glouc. i. 302; Chron. de Melsa, i. 361.

[3] Cart. Glouc. i. 179, 181, 188, 194, 195, 337, 370. See also Chron. de Melsa, i. 376: *N* gives to the abbot the homage and service of *T*, who pledges faith that he will not mortgage or sell, or permit any of his freeholders to mortgage or sell, save to the abbot (A.D. 1210–1220).

[4] Bracton, f. 46, 46 b. At one point a doubt is expressed as to the necessity for some words expressly giving the donor power to reenter on an unauthorized 'alienation. This hardly assorts with the rest of the text and may be an addition.' But at any rate if apt words be used, the land can be made inalienable. See Note Book, pl. 18, 36, 543, 680.

heirs, assigns and legatees[1]. Whether any writ was ever penned which would enable the legatee—or as we should now call him 'devisee'—to recover the land from the heir, we may doubt. Bracton's opinion as to the validity of such clauses seems to have fluctuated. At one time he thought them good and was prepared to draw up the writ which would have sanctioned [p. 27] them. At another he thought them ineffectual, and we may guess that this was his final doctrine[2]. However, just in his time a famous case occurred in which an enormous tract of land was effectually devised. In 1241 Henry III. gave the honour of Richmond to Peter of Savoy 'to hold to him and his heirs or to whomsoever among his brothers or cousins he should give, assign, or bequeath it.' In 1262 the king amplified this power of bequest; he declared by charter that Peter might bequeath the honour to whomsoever he would. A few years afterwards Peter died and the honour passed under his will to Queen Eleanor[3]. It is possible that the discussion of this famous case convinced the king and the great feudatories that they would lose many wardships and marriages if land became devisable *per formam doni*. At any rate, so far as we have observed, it is just about the moment when the honour of Richmond actually passed under a will, that the attempt to create a testamentary power was abandoned[4]. But that men were within an ace of obtaining such a power in the middle of the thirteenth century is memorable; it will help to explain those devisable 'uses' which appear in the next century.

Influence of the *forma doni*.

We have dwelt for some while on the potency of the *forma doni*. To our minds it is a mistake to suppose that our common law starts with rigid, narrow rules about this matter, knows only a few precisely defined forms of gift and rejects everything that deviates by a hair's-breadth from the established models. On the contrary, in the thirteenth century it is elastic and liberal, loose and vague. It has a deep reverence for the expressed wish of the giver, and is fully prepared to accept any

[1] An early example from John's reign is found in Rot. Cart. 160. Almost any monastic cartulary which contains deeds of the middle of the century will give instances, *e.g.* Gloucester, i. 204; Malmesbury, ii. 101; Whalley, i. 319; Sarum, p. 217; Note Book, pl. 1906; Northumberland Assize Rolls, p. 193.

[2] Bracton, f. 18 b, 49, 412 b.

[3] Foedera, i. 417, 475, 482.

[4] The clause appears in a precedent book compiled after 1280; but at that date it may have been a belated form: L. Q. R. vii. 63–4.

new writs which will carry that wish into effect. From Henry III.'s day onwards, for a long time to come, its main duty in this province will be that of establishing some certain barriers against which the *forma doni* will beat in vain[1].

We have now taken a brief survey of those 'estates,' those [p. 28] modes of ownership, which were known to the law. Much yet remains to be said, but we can make no further progress without introducing a new idea, that of 'seisin.' In order to understand our English ownership, we must understand our English possession.

Additional Note.

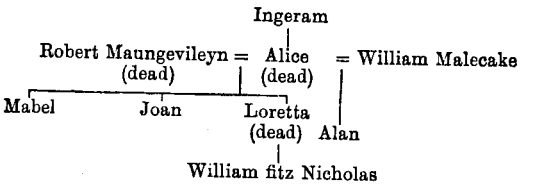
The conditional fee.

We will here state shortly the results obtained by a search among the unprinted plea rolls for writs of formedon. (1) Writs of *formedon in the reverter* after a conditional fee are quite common a few years before the statute. We have seen five in one eyre of 9 Edw. I. Late in Henry's reign such writs appear rarely and still speak of the land as 'escheating' for want of heirs of the prescribed class. (2) We have seen no writ of *formedon in the descender* before the statute. It has been a matter of controversy whether such a writ existed. See Challis, Real Property, ed. 2, p. 74. It is, we think, fairly certain that the issue in tail (it is convenient to give him this name, even if we are guilty of an anachronism) could use the *mort d'ancestor* if he was also heir general and if his ancestor died seised. It is also clear from Bracton, f. 277 b, 278, that as early as 1227 Pateshull had given the issue in tail an 'exception' against a *mort d'ancestor* brought by the heir general. In the case stated at the end of the present note we see the issue in tail, who is not heir general, recovering in a *mort d'ancestor* against the heir general; but whether he could have done this if the heir general wisely abstained from special pleading seems to us very doubtful. We have seen no direct proof that the issue in tail had any other writ than the *mort d'ancestor*. (3) As said above, we have seen no instance of *formedon in the remainder* where the remainder follows a conditional fee. (4) We have seen no instance of *formedon in the remainder* where the remainder follows a life estate, earlier than the clear case in Y. B. 33–5 Edw. I. p. 21. The position of any and every remainderman if he has not yet been seised, is for a long time precarious, because the oldest actions, in particular, the writ of right and the *mort d'ancestor*, are competent only to one who can allege a seisin in himself or in some ancestor from whom he claims by hereditary right.

[1] To take one more example, Bracton (f. 13) distinctly contemplates the possibility of a gift to unborn children; Britton follows him; a glossator of the fourteenth century has to point out that this is against the law. See the interesting note to Britton, i. 231.

Lastly, we must confess that we have but glided over the surface of a few of the many plea rolls. All our conclusions therefore are at the mercy of any one who will read the records thoroughly.

About one small point we are able to quote a case which runs counter to the received doctrine as to what was law before the statute *De donis*. If land was given to husband and wife 'and the heirs of their bodies,' and after her husband's death the wife married again, the issue of the second marriage could not inherit, nor could the second husband have an estate by the curtesy, although the 'condition' had been fulfilled by the birth of [p. 29] issue of the first marriage. Such is the law that is laid down very positively in 7 Edw. I. (Assize Rolls, No. 1066, m. 20). We have this pedigree:—



Ingeram enfeoffed Robert and Alice and the heirs of their bodies. In an assize of *mort d'ancestor* brought by Mabel, Joan and William fitz Nicholas against William Malecake, to which Alan was also made a party, it is adjudged that Alan can not inherit, nor can William Malecake have curtesy. When the statute speaks of the curtesy of the second husband, it probably has in view a gift to the wife and the heirs of her body begotten by her first husband, but it speaks largely, and was soon supposed to have had that wider meaning which is attributed to it now-a-days.

§ 2. *Seisin.*

In the history of our law there is no idea more cardinal than that of seisin. Even in the law of the present day it plays a part which must be studied by every lawyer; but in the past it was so important that we may almost say that the whole system of our land law was law about seisin and its consequences[1]. Seisin.

Seisin is possession. A few, but only a few words about etymology may be ventured. The inference has been too hastily Seisin and possession.

[1] Langlois, Le règne de Philippe le Hardi, 267: 'La saisine avait, au moyen âge, une valeur extraordinaire, supérieure même, en quelque sorte, à celle du droit de propriété.' Among students of medieval law on the Continent few questions have been more debated than those which we touch in this section. It will be sufficient to refer here to Heusler's Gewere, and the same writer's Institutionen.

drawn that this word speaks to us of a time of violence, when he who seized land was seised of it, when seizing land was the normal mode of acquiring possession. Now doubtless there is an etymological connexion between 'seizing' and being 'seised,' but the nature of that connexion is not very certain. If on the one hand 'seisin' is connected with 'to seize,' on the other hand it is connected with 'to sit' and 'to set':—the man who is seised is the man who is sitting on land; when he was put in seisin he was set there and made to sit there. Thus seisin [p. 30] seems to have the same root as the German *Besitz* and the Latin *possessio*. To our medieval lawyers the word *seisina* suggested the very opposite of violence; it suggested peace and quiet. It did so to Coke. 'And so it was said as *possessio* is derived *a pos et sedeo*, because he who is in possession may sit down in rest and quiet; so *seisina* also is derived *a sedendo*, for till he hath seisin all is *labor et dolor et vexatio spiritus*; but when he has obtained seisin, he may *sedere et acquiescere*[1].'

Sitting on land.

The would-be Latin words *seisina, seisire*, came in with the Conqueror; but in all probability they did but translate cognate English terms. When in a famous passage the Saxon Chronicle tells us that 'ealle tha landsittende men' swore fealty to William[2], it tells what was done by all who were seised of land. 'To sit upon land' had been a common phrase, meaning to possess land; in the cartularies we read of *landseti, cotseti, ferlingseti, undersetles*, as of various classes of tenants. To this day we call the person who takes possession of land without having title to it a 'mere squatter'; we speak of 'the sitting tenant,' and such a phrase as 'a country seat' puts us at the

[1] 6 Co. Rep. 57 b. Skeat, s. v. *seize*, thinks that 'to seize or seise' in the sense of 'to grasp' is posterior to 'to seize or seise' in the sense of 'to put into possession.' Diez, s. v. *sagire*, holds that the idea of taking to oneself probably preceded that of putting into possession. See also Brunner, Geschichte d. Röm. u. Germ. Urkunde, p. 242, where the earliest instances of the word are given. The problem can not be worked out on English soil; but in the time immediately following the Norman Conquest, the verb meaning 'to put into possession' was commoner than the verb meaning 'to take possession'; *e.g.* in D. B. i. 208: 'comitatus negat se vidisse sigillum vel saisitorem qui eum inde saisisset'; in D. B. the 'saisitor' is one who delivers seisin to another. The use of the one verb may be illustrated from Mag. Carta, 1215, c. 9: 'Nec nos nec ballivi nostri seisiemus terram aliquam'; that of the other from Glanv. ii. 4, 'Praecipio tibi quod seisias M. de una hida terrae'; the latter disappeared in course of time in favour of 'facias M. habere seisinam.'

[2] A.-S. Chron. ann. 1085.

right point of view. The seated man is in quiet enjoyment. We reverence the throne, the bishop's see, 'the Right Reverend Bench,' the bench of judges, we obey the orders of the chair; the powers that be are seated.

Technicalities of seisin.

Now in course of time *seisin* becomes a highly technical word; but we must not think of it having been so always. Few, if any, of the terms in our legal vocabulary have always been technical terms. The licence that the man of science can [p. 31] allow himself of coining new words is one which by the nature of the case is denied to lawyers. They have to take their terms out of the popular speech; gradually the words so taken are defined; sometimes a word continues to have both a technical meaning for lawyers and a different and vaguer meaning for laymen; sometimes the word that lawyers have adopted is abandoned by the laity. Such for a long time past has been the fate of *seisin*.

Seisin and remedies.

The process by which words are specified, by which their technical meaning is determined, is to a first glance a curious, illogical process. Legal reasoning seems circular:—for example, it is argued in one case that a man has an action of trespass because he has possession, in the next case that he has possession because he has an action of trespass; and so we seem to be running round from right to remedy and then from remedy to right. All the while, however, our law of possession and trespass is being more perfectly defined. Its course is not circular but spiral; it never comes back to quite the same point as that from which it started. This play of reasoning between right and remedy fixes the use of words. A remedy, called an assize, is given to any one who is disseised of his free tenement:—in a few years lawyers will be arguing that *X* has been 'disseised of his free tenement,' because it is an established point that a person in his position can bring an assize. The word *seisin* becomes specified by its relation to certain particular remedies.

Possession.

What those remedies were it will be our duty to consider. But first we may satisfy ourselves that, to begin with, seisin simply meant possession. Of this we may be convinced by two observations. In the first place, it would seem that for at least three centuries after the Norman Conquest our lawyers had no other word whereby to describe possession. In their theoretical discussions, they, or such of them as looked to the Roman

books as models of jurisprudence, could use the words *possessio* and *possidere*; but these words are rarely employed in the formal records of litigation, save in one particular context. The parson of a church is 'in possession' of the church:—but then this is no matter for our English law or our temporal courts; it is matter for the canon law and the courts Christian; and it is all the more expedient to find some other term than 'seised' for the parson, since it may be necessary to contrast the rights of the parson who is possessed of the church with those of the [p. 32] patron who is seised of the advowson[1].

Seisin of chattels.

In the second place, this word 'seisin' was used of all manner of things and all manner of permanent rights that could be regarded as things. At a later date to speak of a person as being seised, or in seisin of, a chattel would have been a gross solecism. But throughout the thirteenth century and in the most technical documents men are seised of chattels and in seisin of them, of a fleece of wool, of a gammon of bacon, of a penny. People were possessed of these things; law had to recognize and protect their possession; it had no other word than 'seisin' and therefore used it freely[2]. It may well be, as some think, that the ideas of seisin and possession are first developed in relation to land; one sits, settles, squats on land, and in early ages, preeminently during the feudal time, the seisin of chattels was commonly interwoven with the seisin of land. Flocks and herds were the valuable chattels; 'chattel' and 'cattle' are the same word; and normally cattle are possessed by him who possesses the land on which they are levant and couchant. Still when the possession of chattels was severed from the possession of land, when the oxen were stolen or were sold to a chapman, there was no word to describe the possession of this new possessor, this thief or purchaser, save seisin[3]. Sometimes we meet with the phrase 'vested and

[1] For a somewhat similar reason it is not uncommon to speak of a guardian as having possession of the wardship, while the ward is seised of the land. Plac. Abbrev. p. 165: 'in pacifica possessione custodiae praedictae.'

[2] Maitland, The Seisin of Chattels, L. Q. R. i. 324. Numerous other instances will be found in the indexes to Bracton's Note Book, and to vols. i., ii. of the Selden Society's Publications.

[3] Heusler, Institutionen, i. 333, discoursing of the German equivalent for our seisin (*Gewere*), says that one never spoke of a man having the *Gewere* of a movable, though one said that it was in his *Gewere*. So in England as regards chattels it seems to have been much commoner to say 'equus fuit in seisina sua,' or 'seisitus fuit de equo' than 'habuit seisinam de equo.'

seised,' which was common in France; this however seems to mean no more than 'seised,' and though we may now and then read of 'investiture,' chiefly in relation to ecclesiastical offices, this does not become one of the technical terms of the common law[1].

[p. 33] When we say that seisin is possession, we use the latter term in the sense in which lawyers use it, a sense in which possession is quite distinct from, and may be sharply opposed to, proprietary right. In common talk we constantly speak as though possession were much the same as ownership. When a man says 'I possess a watch,' he generally means 'I own a watch.' Suppose that he has left his watch with a watchmaker for repair, and is asked whether he still possesses a watch, whether the watch is not in the watchmaker's possession, and if so whether both he and the watchmaker have possession of the same watch at the same time, he is perhaps a little puzzled and resents our questions as lawyers' impertinences. Even if the watch has been stolen, he is not very willing to admit that he no longer possesses a watch. This is instructive:—in our non-professional moments *possession* seems much nearer to our lips than *ownership*. Often however we slur over the gulf by means of the conveniently ambiguous verbs 'have' and 'have got'—I have a watch, the watchmaker has it—I have a watch, but some one else has got it. But so soon as there is any law worthy of the name, right and possession must emerge and be contrasted:—so soon as any one has said 'You have got what belongs to me,' the germs of these two notions have appeared and can be opposed to each other. Bracton is never tired of emphasizing the contrast. In so doing he constantly makes use of the Roman terms, *possessio* on the one hand, *proprietas* or *dominium* on the other. These are not the technical terms of English law; but it has terms which answer a like purpose, *seisina* on the one hand, *ius* on the other. The person who has right may not

Contrast between seisin and proprietary rights.

[1] Note Book, pl. 1539: a thief is 'vested and seised' of some stolen tin. This phrase appears more frequently in French than in Latin. The Latin rolls give *seisitus*, where the precedents for oral pleadings give *vetu et seisi*. *Investura* or *investitura* is occasionally found, but rather in chronicles than in legal documents. Hist. Abingd. ii. 59: 'investituram, id est saisitionem accepit.' Madox, Formulare, p. ix., supplies some instances. As yet we are far from any talk of 'vested estates.'

be seised, the person who is seised may not be seised of right[1].

Seisin and enjoyment.

The idea of seisin seems to be closely connected in our ancestors' minds with the idea of enjoyment. A man is in seisin of land when he is enjoying it or in a position to enjoy it; he is seised of an advowson (for of 'incorporeal things' there may be seisin) when he presents a parson who is admitted to [p. 34] the church; he is seised of freedom from toll when he successfully resists a demand for payment. This connexion is brought out by the interesting word *esplees* (*expleta*). In a proprietary action for land the demandant will assert that he, or some ancestor of his, was 'seised of the land in his demesne as of fee 'and of right, by taking thence esplees to the value of five 'shillings, as in corn and other issues of the land.' The man who takes and enjoys the fruits of the earth thereby 'exploits' his seisin, that is to say, he makes his seisin 'explicit,' visible to the eyes of his neighbours[2]. In order that a seisin may have all its legal effects it must be thus exploited. Still a man must have seisin before he can exploit it, and therefore in a possessory action it is unnecessary for the plaintiff to allege this taking of esplees. The moment at which he acquires his seisin may not be the right moment for mowing hay or reaping corn. Seisin of land therefore is not the enjoyment of the fruits of the earth; it is rather that state of things which in due time will render such an enjoyment possible[3].

Who is seised?

Law must define this vague idea, and it can not find the whole essence of possession in visible facts. It is so now-a-days[4]. We see a man in the street carrying an umbrella; we can not at once tell whether or no he possesses it. Is he its owner, is he a thief, is he a borrower, a hirer, is he the owner's servant? If he is the owner, he possesses it; if he is a thief, he possesses it. If he is the owner's servant, we shall probably

[1] The terms *possessio* and *proprietas* are used even in judicial records, *e.g.* Note Book, pl. 240: 'differtur actio super proprietate quousque discussum fuerit super possessione.' Indeed the word *possession* is frequently used in describing a possessory writ; it is 'bref de possession'; rarely, if ever, is it 'bref de seisine.' See *e.g.* Y. B. 33–5 Edw. I. p. 469: 'We are in a writ of possession, not a writ of right, and it is sufficient for us to maintain possession.'

[2] Skeat, Dict., s.v. *explicit, exploit.* The history of these words begins with the Latin *explicare.*

[3] Bracton, f. 40, 284, 373; Note Book, pl. 1865.

[4] Pollock and Wright, Possession in the Common Law, p. 11.

deny his possession. If he is a borrower, we may have our doubts; the language of every-day life may hesitate about the matter; law must make up its mind. Before we attribute possession to a man, we must apparently know something about the intentions that he has in regard to the thing, or rather about the intentions that he must be supposed to have when the manner in which he came by the thing has been taken into consideration. Probably the better way of stating the matter is not to speak of his real intentions, which are often beside the mark, nor of the intentions that he must be supposed to have, which are fictions, but to say at once that we require [p. 35] to know how he came by the thing[1]. This being known, problems await us. If the carrier of the umbrella is its owner, he possesses it; if he is a thief making off with a stolen chattel, he possesses it; if he has by mistake taken what he believes to be his own, he probably possesses it; if he has borrowed it or hired it, the case is not so plain; law must decide—and various systems of law will decide differently—whether possession shall be attributed to the borrower or to the lender, to the letter or the hirer

Seisin and medieval land law.

When deciding to whom it would attribute a seisin, our medieval law had to contemplate a complex mass of facts and rights. In the first place, the actual occupant of the soil, who was cultivating it and taking its fruits, might be so doing in exercise, or professed exercise, of any one of many different rights. He might be there as tenant at will, tenant for term of years, tenant in villeinage, tenant for life, tenant in dower, tenant by the curtesy, tenant in fee simple, guardian of an infant, and so forth. But further, at the same moment many persons might have and be actually enjoying rights of a proprietary kind in the same plot of ground. Giles would be holding in villeinage of Ralph, who held in free socage of the abbot, who held in frankalmoin of the earl, who held by knight's service of the king. There would be the case of the reversioner to be considered and the case of the remainderman.

Case of tenant in villeinage.

In the thirteenth century certain lines have been firmly drawn. The royal remedies for the protection of seisin given

[1] A servant who is carrying his master's goods can not become a possessor of them by merely forming the intent to appropriate them. If we say that he must be supposed to have an honest intent until by some act he shows the contrary, we are introducing a fiction.

by Henry II. were given only to those who were seised 'of a free tenement:' the novel disseisin lies when a man has been disseised *de libero tenemento suo.* Doubtless these words were intended to exclude those who held in villeinage. This is well brought out by a change in the language of Magna Carta. The original charter of 1215 by its most famous clause declares that no free man is to be disseised, unless it be by the lawful judgment of his peers or the law of the land. The charter of 1217 inserts the words 'de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis[1].' It is not intended, it would not be suffered, that a man holding in villeinage, even though [p. 36] personally *liber homo,* should have a possession protected by the king's court. Such a tenant is not seised of free tenement, and, as royal justice is now beginning to supplant all other justice, it is said that he has no seisin recognized by the common law. The lord of whom he holds is the person protected by the common law, and is seised *de libero tenemento*; if you eject the villein tenant, you disseise the lord. But within the sphere of manorial justice this tenant is seised—seisin has been delivered to him by the rod according to the custom of the manor—and when he pleads in the manorial court he will say that he is seised according to the custom of the manor. Here then already we have a dual seisin:—the lord seised *quoad* the king's courts and the common law, the tenant seised *quoad* the lord's court and the manorial custom.

Case of the termor.

In the past the tenant for term of years, though he was in occupation of the soil, had not been considered to be seised of it. In the days of Henry II. when the great possessory remedy, the assize of novel disseisin, was being invented, tenancies for terms of years seem to have been novelties, and the lawyers were endeavouring to treat the 'termor'—this is a conveniently brief name for the tenant for term of years—as one who had no right in the land, but merely the benefit of a contract. His lessor was seised; eject the lessee, and you disseise the lessor. Already in Bracton's day, however, this doctrine was losing its foundation; the termor was acquiring a remedy against ejectors. But this remedy was a new action and one which in no wise affected the old assize of novel disseisin. For a while men had to content themselves with ascribing a seisin of a certain sort to both the termor

[1] Charter, 1215, c. 39; Charter, 1217, c. 35.

and his lessor[1]. Eject the termor, you lay yourself open to two actions, a *Quare eiecit infra terminum* brought by him, an assize of novel disseisin brought by his lessor. The lessor still has the assize; despite the termor's occupation, he is seised, and seised in demesne, of the land; and he is seised, while the termor is not seised, 'of a free tenement'—this is proved by his having the assize. Thus the term 'free tenement' is getting a new edge; the termor has no free tenement, no freehold, no seisin of the freehold. At a later date lawyers will meet this difficulty by the introduction of 'possession' as a [p. 37] new technical term; they will deny 'seisin' of any sort or kind to the termor, and, on the other hand, will allow him possession. But of tenancies for years we shall have more to say hereafter.

Case of the guardian.

An infant's guardian, though the wardship was a profitable, vendible right, was not seised of the infant's land; his occupation of the land was the infant's seisin[2]. It is true that about this matter language might hesitate and fluctuate[3]. It is, for example, common enough to speak of the lord and guardian putting the ward into seisin of the land when he has attained his majority; but for the main purposes of the law the guardian's own right, the *custodia,* is converted into an incorporeal thing, an incorporeal chattel, of which there may be a seisin or possession, and for the protection of such a seisin there is a special possessory action. If a person who is in occupation of the land as guardian is ejected from the land, and wishes to make good his own rights, he will complain, not of having been disseised of the land, but of having been ejected from the wardship[4].

[1] Note Book, i. p. 91; L. Q. R. i. 341.

[2] Bracton, f. 165, 167 b; Britton, i. 287. Y. B. 30–31 Edw. I. p. 245: 'car nous tenoms la seisine le gardeyn lor seisine'; so also Y. B. 21–2 Edw. I. p. 369.

[3] This is due to the fact that the current language has no term whereby to express that 'occupation' or 'detention' which is not a legally protected seisin. Hence we are driven to such phrases as 'The seisin of the termor, or the guardian, is the seisin of the lessor, or ward.' Bracton endeavours to meet the case by distinguishing between *esse in seisina* and *seisitus esse*: the guardian *est in seisina,* the ward *seisitus est.* But this slip of Romanism does not take root in England.

[4] See *e.g.* Note Book, pl. 1709. The law of Glanvill's time speaks of the guardian as 'seisitus de terra illa ut de warda': Glanv. xiii. 13, 14. This phrase gives way to 'seisitus fuit de custodia' or 'habuit custodiam terrae illius,' or 'fuit in possessione custodiae illius.' But the guardian is seised of the ward as well as of the wardship, 'seisitus de corpore heredis.'

Case of tenant for life.

As to the tenant for life—including under that term tenant in dower and tenant by the curtesy—our law seems never to have had any doubt. The tenant for life, if he is in occupation of the land by himself, his servants, his villein tenants or his termors, is seised, seised of the land, seised in demesne, seised of a free tenement. If ejected, he will bring exactly the same possessory action that he would have brought had he been a tenant in fee.

Case of the lord.

Then we must consider the ascending series of lords and tenants. Let us suppose that Ralph holds in fee and in free socage of the earl, who holds in fee by knight's service of the king. If all is as it should be, then both Ralph and the earl [p. 38] may be said to be seised of the land. Ralph, who is occupying the land by himself, his servants, his villein tenants or his termors, is seised in demesne. The earl, to whom Ralph is paying rent, also is seised; he is seised of the land, not in demesne but in service[1]. We have here to remember that if the feudal idea of seignorial justice had been permitted to develop itself freely, this ascending series of seisins would have had as its counterpart an ascending series of courts. The king's court would have known of no seisin save that of the earl, the tenant in chief. The seisin of Ralph, the earl's immediate tenant, would have found protection—at least in the first instance—only in the earl's court; and so downwards, each seisin being protected by a different court. The seisin of the tenant in villeinage protected only in the manorial court is an illustration of this principle[2]. But then Henry II. had restrained and crippled this principle; he had given a remedy in his own court to every one who could say that he had been disseised of a free tenement. The result of this is for a while a perplexing use of terms. Ralph, the tenant in demesne, he who has no freeholder below him, is indubitably seised of the land, however distant he may be in the feudal scale from the king. Eject him, and he will bring against you the assize of novel disseisin; indeed if his lord, the earl, ejects him or even distrains him outrageously, he will bring the assize against his lord, thus showing that as between him and his lord the seisin of the land is with him[3]. It is possible that at one time by ejecting Ralph, a stranger would have disseised both Ralph and

[1] For this use of words see Bracton, f. 81, 392.

[2] Heusler, Institutionen, ii. 32. [3] Bracton, f. 217-8.

his lord and exposed himself to two actions; but this does not seem to have been the law of Bracton's day. The lord was ceasing to have any interest in what we may call the personality of his tenant. If Ralph is ejected by Roger, the earl can not complain of this; he is in no way bound to accept Roger as a tenant; he can distrain the tenement for the services due to him from Ralph; he is entitled to those services but to nothing else[1]. More and more an incorporeal thing or group of in- [p. 39] corporeal things supplants the land as the subject matter of the lord's right and the lord's seisin. He is entitled to and seised of, not the land itself, but a seignory, the services, fealty, homage of a tenant. As the earl can be guilty of disseising Ralph of the land, so Ralph can be guilty of disseising the earl of the rent or other service that the earl has heretofore received, and an assize of novel disseisin lies for such incorporeals; he disseises the earl if he resists a lawful distress for services in arrear[2]. So a stranger by compelling Ralph to pay rent to him instead of to the earl, can be guilty of disseising the earl[3]. The existence as legal entities of those complex units known as 'manors,' a seisin of which when analyzed consists in part of the actual occupation by oneself or one's villein tenants of certain parcels of land, and in part of the receipt of rents or other services from freehold tenants, sadly complicates the matter; but on the whole the 'seisin of land in service' is ceasing to be spoken of as a seisin of the land, and is being regarded more and more as the seisin of the service, an incorporeal thing.

Case of the reversioner.

This sort of seisin could be attributed to a 'reversioner,' for in truth a reversioner was a lord with a tenant below him. The tenant for life was seised, but he was capable of disseising the reversioner; he would, for example, be guilty of this, if he made a feoffment in fee, an act incompatible with his lawful position and injurious to the reversioner[4]. On the other hand, we can not find that any sort or kind of seisin was as yet attributed to the remainderman. He was not seised of the

[1] If the lord's tenant is disseised and dies out of seisin and without heirs, it seems doubtful whether at this time the lord has any action by which as against the disseisor, his heirs or feoffees, he can insist on his right to an escheat. Note Book, pl. 422; The Mystery of Seisin, L. Q. R. ii. 487.

[2] Bracton, f. 203; Britton, i. 275, 281.

[3] Bracton, f. 169, 203 b. [4] Bracton, f. 161 b.

land in demesne, and he was not, like the reversioner, seised of it 'in service,' for no service was due to him.

Infants etc. We can not find that our law ever saw the slightest difficulty in an attribution of seisin to infants or to *communitates*. It is common also to speak of a church as being seised.

General doctrine. On the whole we may say that the possession of land which the law protects under the name of a 'seisin of freehold,' is the occupation of land by one who has come to it otherwise than as tenant in villeinage, tenant at will, tenant for term of years or guardian, that occupation being exercised by himself, his servants, guardians, tenants in villeinage, tenants at will or tenants for term of years. This seems the best statement of the matter:—occupation of land is seisin of free tenement unless it has been obtained in one of certain particular ways. If, however, we prefer to look at the other side of the principle, we may say that the *animus* required of the person who is 'seised of free tenement' is the intent to hold that land as though he were tenant for life or tenant in fee holding by some free tenure. [p. 40]

Protection of possession. More remains to be said of the nature of seisin, especially of that element in it which we have spoken of as occupation; but this can best be said if we turn to speak of the effects of seisin, its protection by law, its relation to proprietary rights.

Modern theories. We may make our task the lighter if for one moment we glance at controversies which have divided the legal theorists of our own day. Why does our law protect possession? Several different answers have been, or may be, given to this question. There is something in it that attracts the speculative lawyer, for there is something that can be made to look like a paradox. Why should law, when it has on its hands the difficult work of protecting ownership and other rights in things, prepare puzzles for itself by undertaking to protect something that is not ownership, something that will from to time come into sharp collision with ownership? Is it not a main object of law that every one should enjoy what is his own *de iure*, and if so why are we to consecrate that *de facto* enjoyment which is signified by the term *possession*, and why, above all, are we to protect the possessor even against the owner?

It is chiefly, though not solely, in relation to the classical Roman law that these questions have been discussed, and, if any profitable discussion of them is to be had, it seems essential

that some definite body of law should be examined with an accurate heed of dates and successive stages of development. If, scorning all relations of space and time, we ask why law protects possession, the only true answer that we are likely to get is that the law of different peoples at different times has protected possession for many different reasons. Nor can we utterly leave out of account motives and aims of which an abstract jurisprudence knows nothing. That simple justice may be done between man and man has seldom been the sole object of legislators; political have interfered with juristic interests. An illustration may make this plainer. We may well believe that Henry II. when he instituted the possessory assizes was not without thought of the additional strength that would accrue to him and his successors, could he make his [p. 41] subjects feel that they owed the beatitude of possession to his ordinance and the action of his court. Still, whatever may be the legislator's motive, judges must find some rational principle which shall guide them in the administration of possessory remedies; and they have a choice between different principles. These may perhaps be reduced in number to four, or may be said to cluster round four types.

Possession and criminal law. In the first place, the protection given to possession may be merely a provision for the better maintenance of peace and quiet. It is a prohibition of self-help in the interest of public order. The possessor is protected, not on account of any merits of his, but because the peace must be kept; to allow men to make forcible entries on land or to seize goods without form of law, is to invite violence. Just so the murderer, whose life is forfeited to law, may not be slain, save in due form of law; in a civilized state he is protected against irregular vengeance, not because he deserves to live, for he deserves to die, but because the permission of revenge would certainly do more harm than good to the community. Were this then the only principle at work, we should naturally expect to find the protection of possession in some chapter of the criminal law dealing with offences against public order, riots, affrays, and the like.

Possession and the law of tort. Others would look for it, not in the law of crimes, but in the law of torts or civil injuries. The possessor's possession is protected, not indeed because he has any sort of right in the thing, but because in general one can not disturb his possession without being guilty, or almost guilty, of some injury to his

person, some act which, if it does not amount to an assault, still comes so dangerously near to an assault that it can be regarded as an invasion of that sphere of peace and quiet which the law should guarantee to every one of its subjects. This doctrine which found expression in Savigny's famous essay has before now raised an echo in an English court:—'These rights of action are given in respect of the immediate and present violation of possession, independently of rights of property. They are an extension of that protection which the law throws around the person[1].'

Possession as a bulwark of property.

A very different theory, that of the great Ihering, has gained ground in our own time. In order to give an adequate protection to ownership, it has been found necessary to protect [p. 42] possession. To prove ownership is difficult, to prove possession comparatively easy. Suppose a land-owner ejected from possession; to require of him to prove his ownership before he can be reinstated, is to require too much; thieves and land-grabbers will presume upon the difficulty that a rightful owner will have in making out a flawless title. It must be enough then that the ejected owner should prove that he was in possession and was ejected; the ejector must be precluded from pleading that the possession which he disturbed was not possession under good title. Possession then is an outwork of property. But though the object of the law in protecting possession is to protect the possession of those who have a right to possess, that object can only be obtained by protecting every possessor. Once allow any question about property to be raised, and the whole plan of affording easy remedies to ousted owners will break down. In order that right may be triumphant, the possessory action must be open to the evil and to the good, it must draw no distinction between the just and the unjust possessor. The protection of wrongful possessors is an unfortunate but unavoidable consequence of the attempt to protect rightful possessors. This theory would make us look for the law of possession, not in the law of crimes, nor in the law of torts, but in very close connexion with the law of property.

Possession as a kind of right.

There is yet another opinion, which differs from the last, though both make a close connexion between possession and proprietary rights. Possession as such deserves protection, and really there is little more to be said, at least by the lawyer.

[1] *Rogers* v. *Spence*, 13 Meeson and Welsby, 581.

He who possesses has by the mere fact of his possession more right in the thing than the non-possessor has; he of all men has most right in the thing until someone has asserted and proved a greater right. When a thing belongs to no one and is capable of appropriation, the mere act of taking possession of it gives right against all the world; when a thing belongs to *A*, the mere fact that *B* takes possession of it still gives *B* a right which is good against all who have no better.

Contrast between various principles

An attempt might be made, and it would be in harmony with our English modes of thought, to evade any choice between these various 'abstract principles' by a frank profession of the utilitarian character of law. But the success which awaits such an attempt seems very doubtful; for, granted [p. 43] that in some way or another the protection of possession promotes the welfare of the community, the question still arises, why and in what measure this is so. Under what sub-head of 'utility' shall we bring this protection? Shall we lay stress on the public disorder which would be occasioned by unrestricted 'self-help,' on the probability that personal injuries will be done to individuals, on the necessity of providing ready remedies for ousted owners, on the natural expectation that what a man possesses he will be allowed to possess until some one has proved a better title? This is no idle question, for on the answer to it must depend the extent to which and the mode in which possession ought to be consecrated. Measures, which would be quite adequate to prevent any serious danger of general disorder, would be quite inadequate to give the ejected owner an easy action for recovering what is his. If all that we want is peace and quiet, it may be enough to punish ejectors by fine or imprisonment; but this does nothing for ejected possessors, gives them no recovery of the possession that they have lost. Again, let us grant that the ejected possessor should be able to recover the land from the ejector if the latter is still in possession; but suppose that the land has already passed into a third hand; shall the ejected possessor be able to recover it from him to whom the ejector has given or sold it? If to this question we say Yes, we shall hardly be able to justify our answer by any theory which regards injury to the person, or something very like injury to the person, as the gist of the possessory action, for here we shall be taking possession away from one who has come to it without violence.

The various principles in English law.

Now we ought—so it seems to us—to see that there well may be a certain truth in all these theories. That the German jurists in their attempts to pin the Roman lawyers down to some one neat doctrine of possession and of the reasons for protecting it, may have been engaged on an impossible task, it is not for us to suggest in this place; but so far as concerns our own English law we make no doubt that at different times and in different measures every conceivable reason for protecting possession has been felt as a weighty argument and has had its influence on rights and remedies. At first we find the several principles working together in harmonious concert; they will work together because as yet they are not sharply defined. Gradually their outlines become clearer; discrepancies between them begin to appear; and, as the result of long [p. 44] continued conflict, some of them are victorious at the expense of others.

Disseisin as an offence.

A glance at the law books of the thirteenth century is sufficient to tell us that this is so. The necessity of keeping the peace is often insisted on by those who are describing the great possessory action, the assize of novel disseisin. Every disseisin is a breach of the peace; a disseisin perpetrated with violence is a serious breach. In any case the disseisor is to be amerced, and the amount of the amercement is never to be less than the amount of the damages. But the justices will inquire whether he came with force and arms, and, if he did so, he will be sent to prison and fined. Besides this he has to give the sheriff an ox, 'the disseisin ox' or five shillings[1]. If he repeats his offence, if he disseises one who has already recovered seisin from him by the assize, this of course is a still graver affair; he must go to prison because he has broken the king's peace, and because he has contemned the king's court[2]. The necessity for a statute against these 'redisseisors' shows us how serious a danger to the state was the practice of 'land-grabbing'; men did not scruple to eject those who had been put in seisin by the king's court.

Disseisin as a tort.

In the second place, the disseisor can be condemned to pay damages to the disseisee. This is a notable point, for in the first quarter of the thirteenth century the assize of novel disseisin was the only action in which both land and damages could be recovered. The man who merely possessed land

[1] Bracton, f. 161 b, 186 b, 187. [2] Bracton, f. 236; Stat. Mert. c. 3.

without having any right to possess it did not incur any liability for damages, and it would seem that he was entitled to the fruits of the land taken by him before judgment; but the disseisor was guilty of an *iniuria*, of a tort, for which he had to pay damages. Bracton is very clear that a disseisin is an *iniuria*; the assize of novel disseisin, when it is brought against the disseisor himself, is a personal action founded on tort; and this is the reason why if the disseisor dies there can be no assize against his heir; that heir in taking possession of what his ancestor possessed is guilty of no tort; the tort dies with the person who committed it[1].

Possessory action against the third hand.

[p. 45] But in the third place, the possessory assizes extend far beyond what is necessary for the conservation of the peace and the reparation of the wrong done by violent ejectment. Suppose that *A* is seised; *B* disseises *A* and enfeoffs *C*; *A* can bring the assize of novel disseisin against *B* and *C* jointly; against *B* it is an action for damages founded on tort; against *C* it is an action for the recovery of the land; *C* will not have to pay damages, for he has not been guilty of any *iniuria*, unless indeed the feoffment followed so close on the disseisin that *C* must be treated as a participator in *B*'s guilt; but in any case *C* will have to give up the land[2]. It is obvious that a doctrine which treats the possessory action as an action founded on delict, will hardly account for this; still less, as we shall see hereafter, will it account for the assize of mort d'ancestor.

Proof of seisin and proof of ownership.

There is a great deal in our ancient law that countenances a different theory, namely, that which looks upon possession as 'an outwork of property.' In the thirteenth century the proprietary action for land is regarded as cumbrous and risky. It has been urged[3] against this theory that 'in ninety-nine cases out of a hundred, it is about as easy and cheap to prove at least a *prima facie* title as it is to prove possession.' That may be so in modern times; but our ancestors would not have accepted the

[1] Bracton, f. 164 b, 175 b–179, 187. This doctrine comes out strongly in a small tract found in MSS. (*e.g.* Camb. Univ. Lib. Ll. 4. 17, f. 181) *Articuli qui in narrando indigent observari*: 'Item breve novae disseisinae currit in dominico tantum, quum breve illud supponit arduam transgressionem; et ne quis ex tam recenti iniuria videatur commodum portare, conceditur in odium spoliatoris seu disseisitoris quod disseisitus statum suum, etiam non coloratum de feodo aut iure, propter personale factum illatum sibi disseisito, possit recuperare, dummodo per assisam seu per recognitionem constet de abiectione.'

[2] Bracton, f. 175 b. [3] Holmes, The Common Law, 211.

saying. The procedure in an assize of novel disseisin was incomparably more speedy than the procedure in a writ of right, and in the latter the tenant could always refuse the foreknowable verdict of men and put himself upon the unforeknowable judgment of God. But further, it seems constantly assumed in our books that the possessory remedy exists chiefly for the benefit of those who have good title: that normally the possessor is one who has a right to possess. If he is disseised, he can bring a writ of right; but he will not do so, because he has a far more expeditious and certain remedy[1].

Seisin as a root of title.

But in the fourth place, the protection of seisin and of [p. 46] rights begotten by seisin seems to be carried far beyond what is necessary for the adequate protection of ownership. Seisin, we may say, generates a title to the land, a title good against all who have no better because older title. Suppose that *A*, who of all men has best right, is seised; *B* disseises him; *B* has a title good against all but *A*; *C* disseises *B*; *C* has a title good against all but *A* and *B*; and so on; *Z* the last of a series of disseisors will have a title good against all, save those signified by the other letters of the alphabet. And these titles are descendible; *B*'s heir will have a worse title than *A*'s heir but a better title than *C*'s heir. English law both medieval and modern seems to accept to the full this theory:—Every title to land has its root in seisin; the title which has its root in the oldest seisin is the best title. We have not to deal with two persons and no more, one of whom has *dominium* while the other has *possessio*; we may have to deal with an indefinitely large number of titles relatively good and relatively bad.

Introduction of possessory actions.

This by way of preface. We must now trace the growth of a set of definitely possessory actions, actions for the protection of seisin or of that sort of title which is begotten by seisin. We can hardly pursue this matter beyond the assizes of Henry II. We are told, however, by German historians that a distinctly possessory action is not native in the law of our race[2]. Wherever it appears, whether in France or Germany or England, it

[1] Thus in the popular tract *Cum sit necessarium:* 'In omni casu de placito terrae ubi aliquis petit tenementum aliquod de seisina propria vel per descensum hereditarium potest fieri breve de recto patens quod est omnium aliorum in sua natura supremum. Set propter istius brevis de recto *nimiam dilacionem et manifesta pericula evitanda* possunt fieri per alia brevia remedia celeriora.'

[2] Heusler, Gewere, 255.

bears witness to the influence of Roman law, acting either immediately, or through the medium of canon law. Of course under the old formal procedure the position of a defendant in an action must as a general rule have been preferable to that of a plaintiff. It is so now-a-days; but while we describe the defendant's beatitude by saying that the burden of the proof lies on the plaintiff, our remote ancestors would have said that the benefit of the proof is enjoyed by the defendant. And the benefit of the proof was often enormous; the party to whom it is adjudged may have merely to swear to his right and find others who will swear formally and in set phrase that his oath is true. Therefore when there is to be litigation every one would wish to be defendant. Normally the possessor of the thing must be the defendant; but it must soon have been apparent that the unqualified action of this rule would lead to [p. 47] gross injustice. Both *A* and *B* assert a title to land; *A* is in possession; *B* turns *A* out in order that he (*B*) may play the easy part of defendant in the forthcoming action. To prevent this flagrant wrong it might become necessary to inquire whether the defendant in the action was really entitled to the advantages normally given to defendants, to inquire whether *B* had ejected *A*, as a preliminary to deciding whether *A* or *B* had the better right. The possessory question would here appear as a mere preliminary to the proprietary question. It is said that German law without foreign help got as far as this, and there are passages in the *Leges Henrici* which suggest that this is true of English law also[1]. Even the definitely possessory actions which Henry II. made general both in Normandy and in England, may have had forerunners[2].

The novel disseisin.

Be this as it may, in Henry II.'s day, and seemingly in the year 1166[3], we came by a distinctly possessory action, the assize

[1] Leg. Hen. 29, § 2: 'et seisiatus placitet.' Ibid. 61, § 21: 'et nemo placitet dissaisiatus.' Ibid. 53, § 3: 'Nullus a domino suo inplegiatus, vel inlegiatus, vel iniuste dissaisiatus ab eodem implacitetur ante legitimam restitutionem.' Ibid. 53, § 5: 'Et nemo dissaisiatus placitet, nisi circa ipsam dissaisiationem agatur.' But even these passages seem to show the influence of the canonists' *exceptio spolii*. William of Malmesbury, Gesta Regum, ii. 553, makes the legate say to King Stephen, 'Rex itaque faciat quod etiam in forensibus iudiciis legitimum est facere, ut revestiat episcopos de rebus suis; alioquin iure gentium dissaisiti non placitabunt.' This is the *exceptio spolii*, and apparently by *ius gentium* is meant the temporal law.

[2] Bigelow, Placita, 128.

[3] See above, vol. i. p. 145.

of novel disseisin. There can we think be no doubt that this action was suggested by the canonist's *actio spolii*, which itself had its origin in the Roman interdict *unde vi*[1]. But when once adopted, English law very speedily made it her own. It soon became an exceedingly popular action. The plea rolls of Richard's reign and John's are covered with assizes of novel disseisin, many of which are brought by very humble persons and deal with minute parcels of land.

A summary action.

It was, according to the notions of the time, and it would [p. 48] be even according to our own notions, a summary action. At every point it was sharply contrasted with the proprietary action for land, the writ of right. The writ by which the plaintiff begins his action bids the sheriff summon twelve men to declare (*recognoscere*) whether since some recent date, for instance, the king's last voyage to Normandy, the defendant has unjustly and without judgment disseised the plaintiff of 'his free tenement' in a certain vill[2]. We need not here speak of the expeditious procedure, the exclusion of essoins, of vouchers to warranty and so forth; but must notice that if the defendant does not appear, the assize will be taken by default, and that if he does appear there need be no pleading between the parties. There is properly speaking no pleading to issue[3]. The question to be addressed to the jurors has been formulated before the defendant appeared. On the earliest rolls we seldom see any pleadings in this action. The question is put to the jurors. They answer with a monosyllable, Yes or No, and judgment is given; in the one case the plaintiff recovers his seisin with damages, in the other his action is dismissed. Sometimes, however, the defendant will plead some *exceptio*, some special plea: that is, he will allege some reason why the assize should

[1] The terms 'iniuste et sine iudicio' point to the *actio spolii*. They are to be found in the Leges Henrici, 74, § 1, though oddly enough in connexion with homicide: 'qui iniuste vel sine iudicio fuerint occisi.' They occur also in a writ of Henry I.; Bigelow, Placita, 128, 130: 'unde ipsi sunt iniuste et sine iudicio dissaysiti.' A similar phrase often occurs in John of Salisbury's legal correspondence with the Pope touching English ecclesiastical causes; thus *e.g.* Opera, ed. Giles, i. p. 5, 'violenter et absque ordine iudiciario expulisset'; p. 10, 'spoliatum.....absque iudicio'; p. 13, 'violenter et sine iudicio destitutus'; p. 18, 'absque ordine iudiciario spoliatum.'

[2] Glanvill, xiii. 33; Bracton, f. 179; Summa, p. 220; Ancienne coutume, c. 94 (ed. de Gruchy, p. 214).

[3] Brevia Placitata, ed. Turner, p. 27.

not be taken, why the formulated question should not be answered; and this grows more frequent in course of time. Also—and this is the practice of Bracton's day—the justices begin to require that the plaintiff shall explain his case, explain how he came to be seised[1]. Sometimes again a special plea (*exceptio*) will lead the litigants down a bye path, and they will come to issue about some question which is not that which was formulated in the writ. Thus the assize may be converted into a jury (*assisa vertitur in iuratam*); the verdict of the twelve men who have been summoned, or it may be of another twelve, will be taken about the new question which has arisen out of the pleadings[2]. In all these ways what were [p. 49] by this time regarded as questions of law, were being withdrawn from the jurors; they were often questions about the nature of 'seisin,' 'disseisin,' 'free tenement.' A great deal of law was growing up around these matters. Still even in Edward I.'s day the question stated in the writ was often left to the jurors, and they answered it as of old by a monosyllable.

Protection of wrongful seisin.

But the most important point for us to observe is that in Bracton's day this assize protects a thoroughly wrongful, untitled and vicious possession. Any special pleas that are regarded as pleas of proprietary right are strictly excluded[3]. It is perfectly possible that a true owner should be guilty of having disseised 'unjustly and without a judgment' one who not merely was a wrongful possessor, but obtained his possession by unlawful force, and unlawful force directed against the true owner. We will suppose that *A*, the lawful tenant in fee, or for life, is ejected by *X*, who has no right whatever; the assize sets a strict limit to *A*'s right of self-help. He must re-eject *X* at once or not at all; if he does this after a brief delay, then he is guilty of disseising *X* unjustly and without a judgment from his (*X*'s) free tenement; *X* will bring an assize against him; *A* will not be permitted to plead his better right; *A* will lose the land and will be amerced; if he has

[1] Bracton, f. 183 b.

[2] The distinction between a verdict given *in modo assisae* and one given *in modo iuratae* was of great importance in Bracton's day (f. 288 b, 289 b), for in the former case the jurors might be attainted, while in the latter there could be no attaint, since both parties had put themselves upon the verdict.

[3] This has been argued at length in The Beatitude of Seisin; L. Q. R. iv. 24.

come with force and arms, he will be imprisoned. Now Bracton seems to have inherited an ancient set of rules as to the time within which a re-ejectment is a lawful act and no disseisin. If *A* in person was expelled from the land, he has but four days for the re-ejectment. We are elsewhere told that he may ride one day east, another west, another north, another south, to collect friends and arms, and must perpetrate the re-ejectment on the fifth day at the latest[1]. If he was away from the land when the disseisin was done, then he has a somewhat longer time, which is reckoned from the moment when he hears of the disseisin. A reasonable time must be allowed him for hastening to the tenement, and then he will have his four days. Bracton, however, seems inclined to make light of these rules, which look old, and to explain them away in terms that he has learned from the glossators. The ejected *A* so soon as he is ejected has ceased to possess *corpore*, but [p. 50] he has not ceased to possess *animo*; he has lost the *possessio naturalis*, but not the *possessio civilis*. This 'possession in law' he does not lose until in some mode or another he has acquiesced in the fact of the disseisin. This thought, that the disseisor gets his seisin by the acquiescence or negligence of the ousted possessor, becomes prominent in after times. Under its influence the justices begin to require that a plaintiff shall show something more than mere possession, that he shall show either that he came to the land by title, for example, by a feoffment, or else that he has been in possession for some little time. But there seems no doubt that in Edward I.'s day, though the old rule about the four days may have been disregarded in practice, the disseisor, and the disseisor who had no title whatever, could still somewhat easily acquire a 'seisin of free tenement,' a seisin protected by the assize, even as against the ejected owner[2].

Relativity of seisin.

Protected even as against the ejected owner—this we say, for in the very moment of the disseisin, the disseisor, so soon as *de facto* he has the land to himself, is protected against all others. As against them he is seised of free tenement, and it is nothing to them, says Bracton, that his seisin is slight (*tenera*) and wrongfully acquired[3]. Here we come upon a very curious idea, but one which is to become of great importance

[1] L. Q. R. iv. 30. [2] L. Q. R. iv. 287.
[3] Bracton, f. 209 b.

hereafter, the relativity of seisin. One may be seised as regards the world at large, and yet not seised as regards him whom one has ejected.

Novelty of the disseisin.

The disseisin must be 'novel.' In Normandy the action must be brought within a year after the wrongful act. The question for the jurors is whether the defendant has disseised the plaintiff since the last harvest[1]. Harvest is the time when a man exploits his seisin in a very obvious fashion under the eyes of all his neighbours. Every one knows who it was that garnered the last crop. In England—unfortunately, as we well may think,—the matter was otherwise settled. From time to time a royal ordinance set a limit to the action. When Glanvill was writing, the king's last passage to Normandy fixed the boundary; and this can hardly have given the disseised even a [p. 51] year for his action[2]. But kings forget to make such ordinances and the action is showing itself to be useful. When our plea rolls begin in 1194, the limiting date is that of Richard's first coronation in 1189. In 1236 a period of near twenty years, that which has elapsed since Henry III.'s first coronation, has been open to plaintiffs. In 1236 or 1237 a statute or ordinance gave them a term of some six or seven years by confining them to the time that had passed since the king's voyage to Britanny in 1230[3]. No change was made until 1275, when a day in 1242 was chosen, and that day limited the assize of novel disseisin until the reign of Henry VIII.[4]. Somewhat the same fate had befallen the mort d'ancestor. In Normandy it was an annual action[5]. In England it was never so straitly limited. When Glanvill wrote, a plaintiff could still go back to 1154[6]. In 1236 or 1237 he was allowed to go back to 1210[7]. In 1275 he was allowed to go back to 1216, and this he might do

[1] Somma, p. 220; Ancienne coutume, c. 94 (ed. de Gruchy, pp. 214, 218).
[2] Glanvill, xiii. 32, 33. Henry crossed to Normandy in February 1187, returned to England in January 1188, and crossed once more in July 1188.
[3] Stat. Merton c. 8 (Statutes, i. 4); Note Book, i. p. 106; iii. p. 230. The best evidence points to *Britanniam* not *Vasconiam*.
[4] In 1236 or 1237 Henry's first voyage to Britanny was mentioned; in 1275 by Stat. West. I. c. 39, his first voyage into Gascony. Now in 1230 Henry went to Britanny and passed thence through Anjou and Poitou into Gascony; but this can not we think be the first voyage to Gascony of the Statute of 1275. We take that voyage to be the expedition of 1242. Coke, Sec. Inst. 238, speaks of a voyage to Gascony in 5 Hen. III. There was no such voyage.
[5] Somma, p. 239; Ancienne coutume, c. 99.
[6] Glanvill, xiii. 3. [7] Note Book, pl. 1217.

until 1540[1]. These are not uninteresting details. A possessory action is likely to lose some of its possessory characteristics if the plaintiff is suffered to rely on ancient facts.

'Unjustly and without judgment.'

The words of the writ charge the defendant not merely with a disseisin, but with a disseisin perpetrated 'unjustly and without a judgment.' We might think perhaps that the word *iniuste* left open a door for pleas of proprietary right, and that though a man has done a disseisin, he has not done it unjustly if he has but ejected from possession a man who acquired it by unlawful force. But it is very doubtful whether the word was intended to have this effect. The model for possessory actions was the interdict *unde vi* of Justinian's day, which would protect one who had acquired his possession by force and by force used against the true owner[2]. At any rate, in Bracton's day the [p. 52] construction put upon this term left no room for proprietary pleas. He who disseises another without judgment—unless he is but re-ejecting an ejector who has not as yet acquired seisin as against him—does this unjustly; in one sense he may have *ius*, proprietary right, on his side, but he infringes a right given by possession[3]. As to the words *sine iudicio*, which are equivalent to the *absque ordine iudiciario* of the canonists, we may translate them by 'without process of law,' noticing, however, that a disseisin done 'by judgment' may still be an unjust and an actionable disseisin[4].

Rigorous prohibition of self-help.

The maintenance of a possessory action as rigorous as that which we are considering requires of those who control it a high degree of that quality which we may call lawyerly courage. They will often be called upon to do evil that good may come, to protect the land-grabber against his victim in order that land may not be grabbed. They must harden their hearts and enforce the rule. We can not say that the judges of Bracton's age, or Bracton himself, always hardened their hearts sufficiently, always closed their ears to the claims of 'better right'; they would sometimes lean towards 'substantial justice.' Still it seems to us that they had no other theory of the novel

[1] Stat. West. I. c. 39; 32 Hen. VIII. c. 2.

[2] Inst. iv. 15. 6; Bracton, f. 210 b. However, the Norman assize seems to have been denied to one who obtained possession by force; Somma, p. 234; Ancienne coutume, c. 95. It is possible that the words of the Institutes may have influenced the English practice.

[3] Note Book, i. p. 85–6.

[4] Bracton, f. 205 b.

disseisin than that which we are endeavouring to explain, and the thought that violent self-help is a contempt of the king's court helped to prevent any wide aberrations from this theory[1].

Trespass and disseisin.

A few other traits of this action deserve notice. Besides serving as 'an interdict for the recovery of possession,' it will often serve as 'an interdict for the retention of possession.' To constitute an actionable disseisin, a successful ejectment of the possessor is not indispensable; an unsuccessful attempt, a repelled invasion, will be enough. But further, if without [p. 53] attempting to eject, one troubles the possessor in his possession, this will often be disseisin enough, if he chooses to treat it as such[2]. An action in the king's courts founded on mere trespass and aiming merely at the exaction of damages is a comparatively new phenomenon; such actions only become common late in the reign of Henry III. Many mere trespasses, as we should think them, have been treated as disseisins; at all events repeated trespassing can be so treated, if the possessor elects to consider himself disseised[3]. To meet that troubling of possession which is caused by nuisances as distinguished from trespasses, that is, by things that are erected, made, or done, not on the soil possessed by the complainant but on neighbouring soil, there has all along been an 'assize of nuisance' which is a supplement for the novel disseisin[4]. Law endeavours to protect the person who is seised of land, not merely in the possession of the land, but in the enjoyment of those rights against his neighbours which he would be entitled to were he seised under a good title.

Disseisin of an absent possessor.

In the first age of its operation the novel disseisin seems to have been directed against acts which could be called ejectments in the strictest sense of the word, though, as just said, any persistent interference with possession might fall within it.

[1] Occasionally Bracton suggests an examination of the plaintiff's *causa possidendi*, which can not be justified by his general principle. See in particular f. 169 b. A woman is in seisin as doweress; then it is proved in an ecclesiastical court that she was never married; she may be ejected, for her *causa possidendi* is proved to be false. This is a very dangerous decision if the assize is to keep its possessory rigour.

[2] Bracton, f. 161 b. The 'disseisin at election' of later law was an elaborate outgrowth of this idea.

[3] Bracton, f. 216 b: 'Frequentia enim mutat transgressionem in disseisinam.' Y. B. 20–1 Edw. I. p. 393.

[4] Glanvill, xiii. 34–5–6; Bracton, f. 233; Reg. Brev. Orig. f. 198 b.

English law was perfectly ready to say with the Roman text that, if a man goes to market and returns to find on his land an interloper who resists his entry, he has been ejected[1]. Probably it was prepared to hold that a person who has once acquired seisin always retains seisin until he dies, or is disseised, or in some formal manner gives up his seisin, and that for another to take to himself the land of which seisin is being thus retained is a disseisin[2]. But it had to consider other cases, cases in which some person who is in occupation of the land, but who is not seised of it, takes upon himself to deliver seisin to another. [p. 54] For example, the land is occupied by a bailiff, by a villein tenant, by a termor or by a guardian, who takes upon himself to sell the land and enfeoff a stranger. This feoffee is now seised; but is there here a disseisin; is the feoffee a disseisor? The answer that our law gives to this question in later days is, 'Yes; there is a disseisin; both feoffor and feoffee are disseisors.' A statute of 1285 was needed to make the matter plain, but the law of Bracton's day seems to have been inclining towards this answer. This however was, to all seeming, an extension of the original notion of disseisin, and it was one that was likely to occasion many a difficulty in the future[3].

The scope of the assize.

A still more momentous matter is the treatment of those who have come to the possession of the land after the perpetration of the disseisin. Suppose that *M* disseises *A* and enfeoffs *X*; or that *M* disseises *A* and that *X* disseises *M*. Can *A* in either of these cases recover the land by this assize from *X*?

[1] Bracton, f. 161 b; Dig. 43, 16, 1, § 24.

[2] Bracton (see f. 38 b, 39), adopting what is now regarded as a misinterpretation of a famous passage of Paulus, Dig. 50, 17, 153, would hold that the man who has once been seised can retain seisin *animo solo*, and so remain seised though he never cultivates nor goes near the land. It seems very doubtful whether a man could (or can) get rid of a seisin once acquired, except by delivering seisin to some one else.

[3] Stat. West. II. c. 25; 2nd Inst. 412; Ibid. 154; L. Q. R. iv. p. 297. The law of Bracton's day provides for these cases writs of entry—even for the case where the feoffor is a mere bailiff; Bracton, f. 323 b. These writs afterwards dropped out from the Register; see Reg. Brev. Orig. p. 231, where it is noted that the writ of entry on alienation by a villein has given way to the assize; for the actual use of such a writ see Note Book, pl. 713. We may say pretty confidently that in Bracton's day no one would ever have used a writ of entry if he could have brought the assize. But Bracton, f. 161 b (this passage is marginal in some MSS.), is coming to the opinion that a feoffment by guardian or termor is a disseisin, and even that a feoffment in fee by tenant for life is a disseisin of the reversioner.

The answer to this question is very instructive. The writ must say of the plaintiff that he has been disseised by the defendant or defendants. These words are to be construed with some strictness. The action lies for the disseisee against the disseisor. It does not lie for the heir of the disseisee; it does not lie against the heir of the disseisor; nor, if the disseisor is dead, does it lie against the feoffee of the disseisor, or against the disseisor of the disseisor. But suppose the disseisor still alive, then this action can be brought by the disseisee against the disseisor and any person who has come to the land through or under the disseisor or by disseising the disseisor. In the cases that we have just now put, if *M* is still alive, *A* can, and indeed, if he would succeed, must bring the assize against *M* and *X* jointly. He will say in his writ that *M* and *X* have disseised him. Upon [p. 55] *M* will fall the punishment due to disseisors. Whether *X* also has laid himself open to that punishment, is a question as to the time that had elapsed after the disseisin and before *X* came to the land. If, for example, *M* enfeoffed *X* during the time allowed to *A* for self-help—normally, as we have seen, four days—then *X* is treated as a participator in the disseisin; *A* might have ejected him by force, and if *A* sues both *M* and *X* both can be punished. If, on the other hand, the feoffment to *X* was made after the interval which debarred *A* from self-help, then *X* can not be punished. But—and this is what chiefly concerns us—in any case if *X* is sued along with *M*, he can be compelled to restore the tenement to *A*[1].

A possessory action against the third hand.

Now here our law is answering a vital question. It is decreeing that a person who has come to the possession of land fairly and honestly and by feoffment, one who, as it admits, is no disseisor[2], can be compelled to give up the land merely because he acquired the land—it may be at a distant remove—from one who was guilty of a disseisin; and no opportunity will be allowed him of pleading any proprietary right that he may have. It is very possible that when the assize was first instituted this result was not intended or not foreseen. The writ which brings this feoffee before the court will accuse him of having perpetrated or joined in the perpetration of a disseisin. Practice has been extending the scope of the assize. The

[1] Bracton, f. 175 b-177.

[2] Bracton, f. 175 b: 'quia illi non sunt disseisitores.' Yet the writ will distinctly charge them with having joined in a disseisin.

outcome is capricious. Whether the assize will lie against the feoffee (*X*) is a question that is made to depend on the, to our minds, irrelevant question, whether the original disseisor (*M*) is yet alive and is comprehended in the writ; for it is absolutely essential to the success of the assize that the original disseisor should be a defendant[1]. This caprice, however, is becoming more apparent than real, for if the original disseisor is dead, and the feoffee can no longer be hit by the assize, he can be hit by a newer action, called a 'writ of entry sur disseisin.' Of that writ we shall have to speak hereafter, and shall then be in a position to consider the whole policy of our law in giving possessory actions against those who have been guilty of no disseisin. Meanwhile we will follow the chronological order of [p. 56] development and speak of the second possessory assize.

The assize of mort d'ancestor.

The mort d'ancestor is a few years younger than the novel disseisin[2] and is a much more distinctive product of Norman and English law[3]. Its formula runs as follows:

Whether *M* the father [mother, uncle, aunt, brother, sister] of *A* (the plaintiff) was seised in his demesne as of fee of so much land [rent, or the like] in such a vill on the day on which he died; and whether he died since the period of limitation; and whether *A* is his next heir; which land *X* (the defendant) holds[4].

If all these questions are answered in the plaintiff's favour he recovers the land.

A summary action.

The action is summary; not indeed so summary as the novel disseisin; there may be more essoining and the defendant may vouch a warrantor who is not named in the writ; but still it is summary when compared with the proprietary action begun by writ of right. Before there has been any pleading, before the defendant has appeared, twelve recognitors are summoned to answer the formulated question; the assize

[1] Note Book, pl. 336. [2] See above, vol. i. p. 147.

[3] We are not aware of any foreign model after which this assize was fashioned. The plaint of *nouvelle dissaisine*, or more briefly of *nouvelleté*, became a well-known action in French customary law. On the other hand, we do not know that the *mort d'ancestor* is found outside Normandy. Bracton, f. 103 b, 104, while he compares the one to the *unde vi*, sees in the other a *possessoria hereditatis petitio*. However ingenious this may be (see Ihering, Besitzesschutz, pp. 85–87), it is probably an afterthought.

[4] Glanvill, xiii. 3; Bracton, f. 253 b. There are variations adapted to the case of civil death by monastic profession and death on pilgrimage.

can be taken and the plaintiff can get judgment even though the defendant does not appear.

The mort d'ancestor possessory.

It is regarded as a strictly possessory action. The plaintiff asserts that, within some recent time fixed by ordinance, one, whose next heir he is, died seised of the tenement in question. He has to make out not merely that he is this ancestor's next heir, but that there was a very near relationship between them. The plaintiff must be son, daughter, brother, sister, nephew or niece of this ancestor. This restriction of the assize is curious. There can be no principle of jurisprudence involved in the denial of this action to one who is grandson or cousin of the ancestor; a next heir is a next heir however remote he may be. [p. 57] But in the history of our forms of action we have frequently to notice that law begins by providing for common cases, and will often leave uncommon cases unprovided for, even though they fall within an established principle. In this particular instance, however, there is more to be said. The mort d'ancestor is a blow aimed at feudalism by a high-handed king. Not only does it draw away business from the seignorial courts, but it strikes directly at those lords who, for one reason or another, are apt to seize the land that is left vacant by the death of a tenant[1]. But even a high-handed king must, as the phrase goes, draw the line somewhere, and may have to draw it without much regard for legal logic. Besides if the plaintiff must rely on remote kinship, we can not urge that, since the relevant facts must be known to the neighbours, there is no place for trial by battle. About half-a-century later, after a dispute between the justices and the magnates, the former succeeded in instituting the actions of aiel, besaiel, tresaiel and cosinage (*de avo, de proavo, de tritavo, de consanguinitate*) as supplements for the assize of mort d'ancestor[2].

[1] Assize of Northampton, c. 4. The words of this ordinance do not expressly give the assize against any one but the lord, and as a matter of fact the lord was a common defendant.

[2] Bracton, f. 281–2; Note Book, pl. 1215. These new actions do not take the shape of formulated assizes; they begin with a *Praecipe quod reddat*. Even they did not cover the whole ground. Bracton, f. 281, seems to have thought that an action might be brought on the seisin of any lineal ancestor however remote, 'ad triavum et ulterius si tempus permittat.' But at a little later date we find it said that one can not go back further than one's besaiel, one's grandfather's father; Nichols, Britton, ii. 164, 300: Northumberland Assize Rolls, p. 260. Ultimately, so it would seem, one might go back to one's tresaiel, but no further; Fitzherbert, Natura Brevium, f. 221. This question can hardly have

Seisin as of fee.

The action, we say, was possessory; but of course in this case the heir had to allege something more than a seisin, a seisin in demesne, or a seisin of free tenement, on the part of his ancestor. He had to allege a seisin 'as of fee' (*ut de feodo*). On the other hand, he had not to assert, as the demandant in a writ of right always had to assert, a seisin 'as of right' (*ut de iure*). A man may well be seised 'as of fee' though he be not seised 'as of right.' Seemingly we may put the matter thus:—every person who is seised is seised as of fee, unless he has come to his seisin by some title which gives him no more than an estate for life. A disseisor who has, and knows that he has, no right whatever, becomes seised in fee[1].

Exclusion of proprietary pleas.

Consequently the defendant is not suffered to urge pleas [p. 58] (*exceptiones*) of a proprietary character. To insist on this is the more necessary, for at a yet early time this assize gives occasion for a good deal of special pleading[2]. In the first place, the defendant may wish to plead and establish some fact inconsistent with the plaintiff's possessory case. Thus, for example, instead of saying, 'I deny that you are next heir of the ancestor named in your writ,' he may well wish to say, 'You have an elder brother living,' and thus concentrate the attention of the jurors on this fact. But this of course is not a proprietary plea. Then, again, he may admit that the plaintiff's case is true and yet may have a possessory defence to urge. Thus he may say, 'True your ancestor died seised as of fee; true also that you are now his next heir; but he left at his death a nearer heir, who by means of a release conveyed his rights to me, and in whose shoes I now stand[3].' In this last case if the assize were taken by default or without special pleading, the defendant would succumb; but he has a perfectly good defence if he pleads it properly. It has already become apparent, as this

had any interest so long as the action was confined by a decent statute of limitations. It had the same limit of time as the mort d'ancestor.

[1] Bracton, f. 264: 'Item dicitur *ut de feodo* ita quod *ut* ponatur pro *quasi* et denotet similitudinem, vel quod *ut* denotet ipsam veritatem. Ipsam veritatem, sicut de ipsis dici poterit qui iustum habent titulum, et iustam causam possidendi ab eis qui ius habent conferendi; et tunc pro *sicut* ut supra. Item similitudinem, pro *quasi*, sicut de illis dici poterit qui ingrediuntur sine causa et sine iusto titulo.' And see the strong words on f. 262: it matters not what sort of seisin the ancestor had, whether by disseisin or by intrusion, whether acquired from an owner or from a non-owner, if only he was seised *quasi* of fee.

[2] Glanvill, xiii. 11.

[3] Bracton, f. 270 b.

case shows, that the formula of the assize does not fully state all those positive and negative conditions, a fulfilment of which will of necessity entitle the plaintiff to recover the land[1]. But here there is no proprietary pleading; the defendant does not seek to go behind the 'seisin as of fee' of the ancestor. He would not be allowed to do that. He would not be allowed to say, 'Yes, your ancestor was seised as of fee when he died; but I, or some third person, had a better right to the land than he had[2].'

[p. 59] The principle then which is the foundation for this assize seems to be this, that whenever a man dies seised and did not come to his seisin by some title which would make him only a life-tenant, his heir is of all the world the person best entitled to be put into seisin. If any other person, no matter that he had better right than the dead man, forestalls the heir and acquires seisin, he shall be turned out in favour of the heir, be told to bring some action against the heir, be told that he ought not to have helped himself. On the whole this principle seems to be well maintained throughout the enormous number of actions which are brought in the thirteenth century. The 'dying seised' is strictly insisted upon, and the physical element of seisin is brought prominently forward. For a short period after the *de facto* ejectment an ejected possessor is, we have seen, allowed recourse to self-help, and if he dies within this period then his heir can say that he died seised. But this period is very short in our eyes; according to Bracton it should be in the commonest case but four days[3].

Principle of this assize.

[1] By means of a special plea, to take another example, the defendant may allege that the ancestor's fee was a fee conditional (estate tail), and thus the heir *per formam doni* may protect himself against the heir general; Bracton, f. 268 b, 277 b, 283.

[2] Bigelow, Hist. Procedure, 178: 'Even in the time of Glanvill.....the course of a cause begun by a writ for the trial of a question of seisin could be entirely deflected by the defendant's plea on the appearance of the recognitors. From a simple question of seisin, the cause might turn into a question of the right of property.' With this we can not wholly agree. No one of the pleas to the *mort d'ancestor* suggested by Glanvill or Bracton is proprietary; no one of them goes behind the seisin of the ancestor at the time of his death. Such pleas as, 'You have released to me,' 'You have already brought an assize against me and failed,' 'You were seised since your ancestor's death,' and the like, are possessory. Of course, however, the plaintiff may consent to the introduction of a proprietary question.

[3] Bracton, f. 262.

Is seisin heritable?

Now how are we to explain this matter? Are we to say that seisin can be transmitted from ancestor to heir; that the heir is seised so soon as the ancestor dies; that the defendant who succumbs in an assize of mort d'ancestor has been found guilty of disseising the heir? Such is not the theory, and of this we may be easily convinced. For one thing, were seisin itself a heritable right there could be no place for the mort d'ancestor, since its whole province would be covered by the novel disseisin. The stranger who entered on the ancestor's death would always be a disseisor. But this he was not if he entered before the heir entered; and throughout the first half of the thirteenth century it was a matter of much importance to him that this distinction should be observed. In the novel disseisin he could be compelled to pay damages; it was not until 1259 that damages could be given in the mort d'ancestor, and to all appearance until that date the man who forestalled [p. 60] the heir and entered on a vacant tenement, the 'abator' of later law, could not by any procedure be forced to make compensation in money for what he had done[1]. Secondly, in an assize of mort d'ancestor the objection that the plaintiff heir has himself been seised since his ancestor's death is an objection that is often urged and that can sometimes be urged successfully. If he himself has been seised of free tenement since his ancestor's death, he should be bringing the novel disseisin and not the mort d'ancestor[2].

Seisin in law.

The law of a later age ascribes to the heir at the moment of his ancestor's death a certain 'seisin in law' which it contrasts with that 'seisin in deed' which he will not acquire until he has entered on the land; and this seisin in law is good enough seisin for a few, but only a few purposes[3]. We can not find that the law of Bracton's day held this language[4]. It knew such a thing as vacant seisin. So soon as the ancestor died, or, at all events, so soon as his corpse was carried from the house,

[1] Bracton, f. 253 b, 285, would have liked to give damages. They were given as against the lord by Prov. Westminster, c. 9, and Stat. Marlb. c. 16.

[2] Glanvill, xiii. 11; Bracton, f. 273. An heir ejected almost immediately after his ancestor's death might have his choice between the two assizes.

[3] Littleton, sec. 448.

[4] Bracton, f. 434 b: 'Et quandoque dividitur ius proprietatis a possessione, quia proprietas statim post mortem antecessoris descendit heredi propinquiori ...sed tamen non statim acquiritur talibus possessio quia alius.....se ponere possit in seisinam.'

seisin was vacant until some one assumed it—unless indeed the heir had been dwelling along with his ancestor, in which case seisin would not be vacant for a moment. We have said that the vacancy began at latest as soon as the dead man's body was carried out for burial. Bracton has some curious words about this matter[1]. He thinks himself bound by the authority of Paulus[2] to hold that a man can not lose possession until he has given it up both *animo* and *corpore*; but it is not impossible that his ascription of possession to a corpse, grotesque though it may seem to us, had a real foundation, and that until the funeral no stranger could acquire a seisin:—this might prevent unseemly struggles in the house of mourning and give the heir an opportunity of entering[3]. The heir again acquires seisin with [p. 61] great ease; so soon as he sets foot on the land he is seised; still he must enter[4]. Seisin is not heritable; but the man who dies seised as of fee transmits a heritable right to his heir; his seisin generates this heritable right. The substance of a famous French maxim, 'le mort saisit le vif,' we accept, though the phrase is not quite that which is sanctioned by our books[5].

Acquisition of seisin by an abator.

The 'abator'—that is, the person who excludes the heir—does not very easily acquire a seisin that is protected against the heir's self-help. An occupation for four days which will protect the disseisor seems not long enough to protect this interloper. The reason for this distinction may be that, though disseisin is a more serious offence and a graver wrong than an abatement, the heir must be allowed some reasonable time for hearing of his ancestor's death and of the interloper's entry. An opinion current in Bracton's day would have given him a year for self-help, but some would have given less[6].

Against whom does the assize lie?

This assize can be brought against any person who is holding the land, however remote he may be from the original 'abator.' He is not accused of having been guilty of an

[1] Bracton, f. 51 b, 262.

[2] Dig. 50, 17, 153.

[3] Y. B. 33–5 Edw. I. 53–5.

[4] Y. B. 33–5 Edw. I. 53–5: 'sola pedis posicio vero heredi seisinam contulit.'

[5] The general opinion seems to be that the French *saisine* and the German *Gewere*, unlike the Roman *possessio*, were heritable. See Heusler, Gewere, 172. Ihering, Besitzwille, p. 33, has good remarks on the controversy as to whether what passes to the possessor's heir should be called possession or a right to possession.

[6] Bracton, f. 160 b, 161; Britton, i. 288; ii. 2; Somersetshire Pleas, pl. 1433 a case decided by Bracton.

unlawful act; he may have come to his seisin by inheritance, or by feoffment and purchase in good faith, and none the less he may be turned out by this action. In this direction the scope of the assize is unlimited. On the other hand, it will not serve to decide disputes between two would-be heirs. If both parties claim the land as heir to the ancestor named in the writ, the procedure by way of assize is out of place[1]. One reason for this limitation may be found in the existence of another remedy adapted for the settlement of such controversies. In a writ of right between kinsmen, if both litigants claim as heirs of the same man and their pedigrees are not disputed, then there will be neither duel nor grand assize; the question will be decided on the pleadings, or, as the phrase goes, 'by count counted and plea pleaded': the question must be one of pure law. But also, as will appear more fully when we speak of the law of inheritance, our courts, influenced, so it seems, by King John's [p. 62] usurpation of the throne, were in some cases very unwilling to turn out of possession a would-be heir at the suit of a kinsman who had a better, but only a slightly better, right[2].

The writs of entry.

We see then our common law starting on its career with two possessory actions for land. In sharp contrast to these it keeps a definitely proprietary action, that begun by writ of right. Had the development of forms stopped here, we should have had a story to tell far simpler than that which lies before us. It is to be regretted that we can not state the law about seisin and proprietary right without speaking at length of what we would fain call mere matters of procedure; but we have no choice; unless we can understand the writs of entry we cannot understand seisin.

The writ of right.

Let us cast one glance at the proprietary action. It is begun either in a seignorial court by a *breve de recto tenendo* or in the king's court by a *Praecipe*. Both of these writs are often spoken of as 'writs of right.' They deal not merely with *seisina* but with *ius*. The demandant will appear and claim the land as his right and inheritance. He will go on to assert that either he or some ancestor of his has been seised not merely 'as of fee' but also 'as of right.' He will offer battle by the body of a champion who theoretically is also a witness, a

[1] Glanvill, xiii. 11; Bracton, f. 266; Britton, ii. 115.
[2] Bracton, f. 267 b, 268, 282, 327 b.

witness who testifies this seisin either of his own knowledge or in obedience to the injunction of his dead father. The person attacked in the action (he is called the tenant) may be able to plead some special plea (*exceptio*), but he always has it in his power to deny the demandant's case and to put himself on battle or the grand assize[1]. If he chooses the grand assize, the recognitors will swear in answer to a question which leaves the whole matter of fact and of law to them—namely, whether the demandant has greater right to demand the land than the tenant has to hold it. As a result of the trial a very solemn judgment is pronounced. The land is adjudged to the one party and his heirs, and abjudged (*abiudicata*) from the other [p. 63] party and his heirs for ever. Nothing could be more conclusive. We may notice in passing that such an action is a tedious affair, that it may drag on its slow length for many years; men are not lightly to be abjudged for ever, they and their heirs, from their seisin. But it is more important to observe that, even if all goes swiftly, the tenant has great advantages. He can choose between two modes of trial. He can insist that the whole question of better right, involving, as it may, the nicest questions of law, shall be left all in one piece to the knights of the neighbourhood; and then, if he fears their verdict, he can trust to the God of battles; he can force the demandant to a *probatio divina*, which is as much to be dreaded as any *probatio diabolica* of the canonists.

Invention of writs of entry.

The law is too hard upon a demandant, who, it may well be, has recent and well-known facts in his favour. This is keenly felt and a remedy is provided. The change, however, is effected not by any express legislation, but by the gradual invention of a whole group of writs which shall, as it were, stand mid-way between the indubitably possessory assizes and the indubitably proprietary writ of right. The basis for this superstructure is found in the simple writ of *Praecipe quod reddat*, which is the commencement of a proprietary action. That writ bids the tenant give up the land which the demandant claims, or appear in the king's court to answer why he has not done so. All the new writs have this in common

[1] It seems that occasionally a demandant could drive the tenant to an issue of fact; Note Book, pl. 17; but as a general rule he could not. The whole development of special pleas in writs of right seems to be post-Glanvillian and for a long time they are by no means common.

that they add some definite suggestion of a recent flaw in the tenant's title. This they do by the phrase:—

'in quam [terram] non habuit ingressum nisi....'

The tenant, it is alleged, had no entry into the land except in a certain mode, which mode will be described in the writ and is one incapable of giving him a good title. The object of this formula is to preclude the tenant from that mere general denial of the demandant's title which would be appropriate in a writ of right, and to force him to answer a certain question about his own case:—'Did you or did you not come to the land in the manner that I have suggested?' If the tenant denies the suggestion, then here is a question of fact that ought to be sent to a jury.

Entry sur disseisin.

For a moment we may isolate from the rest of these writs one small class which is very closely connected with the assize of novel disseisin. We have seen that the assize can only be [p. 64] employed if both the disseisor and the disseisee are still alive. But in principle our law has admitted that an ejected possessor ought to be able to pursue his land into the hands of those who have come to it through or under the disseisor. This can be done by the assize if the disseisor is still living, and clearly his death ought not to shield his feoffees. Furthermore, if we hold that a possessory action should lie even against one who comes to the land by feoffment and in good faith, then we can no longer say that the action is admissible only against one who has been guilty of a delict, an act of unlawful violence, and there can be no reason why the heir of the disseisee should not have a possessory action against any one in whose hands he finds the land.

Scope of the action.

Slowly this principle bears practical fruit in the evolution of the 'writs of entry sur disseisin.' In this instance we may enjoy the rare pleasure of fixing a precise date. A writ of entry for the disseisee against the heir of the disseisor was made a 'writ of course' in the autumn of the year 1205[1]. Very soon after this, we may find a writ for the heir of the disseisee[2]. For a while such actions seem only to have been allowed where an assize of novel disseisin had been begun, but

[1] Rot. Cl. Joh. p. 32: 'Hoc breve de cetero erit de cursu.' But already in Richard's day we find 'in quam ecclesiam nullum habet ingressum nisi per ablatorem suum.'

[2] Note Book, pl. 383 (A.D. 1230); pl. 993 (A.D. 1224).

had been brought to naught by the death of one of the parties[1]. This limit was transcended without legislation, but another and a very curious limit was discovered. A writ of entry can be made for the disseisee or his heir against the third hand or against the fourth hand, but not against the fifth or any remoter hand. We count the disseisee's hand as the first, the disseisor's as the second. The action will lie against the disseisor's heir or the disseisor's feoffee; his is the third hand. It will also lie against the heir's feoffee, the feoffee's heir, the feoffee's feoffee; but it will go no further; it is only [p. 65] effectual within these 'degrees[2].' Why so? We must probably find our answer to this question in politics rather than in jurisprudence. These writs of entry draw away litigation from the feudal courts and impair the lord's control over his tenantry; they are but too like evasions, or even infringements, of the Great Charter[3]. Some barriers must be maintained against them and the legal logic which impels them forward. A temporary defence may be found in the argument that the only excuse for these writs is that the questions raised by them are questions about recent facts, and therefore to be solved by verdict rather than by battle. When, however, there have been three or four feoffments since the disseisin, the facts are elaborate and remote. Jurors should testify to what they have seen; on the other hand, the champion in the writ of right can testify to what his father has told him. The new procedure must not encroach on the proper sphere of the old and sacral procedure. Another defence for the frontier that lies between the fourth hand and the fifth may perhaps have an ancient rule about warranty of which we shall speak hereafter[4]. But in truth this frontier was not defensible. Bracton was for

[1] This seems the state of things represented by Bracton, f. 218 b, and the Note Book.

[2] Bracton, f. 219 b: 'usque ad tertiam personam inclusivam.' The first stage is 'into which he had not entry save by (*per*) *X*, who demised it to him and who had disseised the demandant [or his ancestor].' The second stage is 'into which etc. save by (*per*) *X*, to whom (*cui*) *Y* demised it, who had disseised etc.' The first form is a writ in the *per*, the second in the *per* and *cui*.

[3] Charter, 1215, c. 34: 'Breve quod vocatur *Praecipe* de cetero non fiat alicui de aliquo tenemento unde liber homo amittere possit curiam suam.' But the writ of entry does begin with *Praecipe*.

[4] See below, p. 70.

crossing it[1], and the statute of Marlborough crossed it[2]. That statute gave the disseisee or his heir 'a writ of entry sur disseisin in the *post*,' an action, that is, in which he might allege that his adversary 'had no entry into the land save after (*post*) the disseisin' that some one or another (*X*) perpetrated against the demandant or his ancestor. In such an action it was unnecessary for the demandant to trace the process by which the land passed from the disseisor (*X*) to the tenant whom the action attacked.

The English *possessorium* and the canon law.

Thus by a series of gradual concessions we arrive at the result that if a disseisin has been committed and the time—an ever lengthening time—allowed for an action based upon that disseisin has not yet elapsed, an action can be brought for the recovery of the land by the disseisee or his heir against [p. 66] any person who has come to that land through or under the disseisor or by disseising the disseisor: and this action will be possessory. This is a matter of great interest in the general history of law, for hardly a question of jurisprudence has caused fiercer combats than the question whether a possessory action for the recovery of land should lie against 'the third hand,' or, to use our English terms, against the disseisor's feoffee; and these combats have not yet ceased. Just in the reign of our King John, when the writs of entry were becoming writs of course, his antagonist Pope Innocent III. was issuing a memorable decree[3]. It often happens, he said, that because the despoiler transfers the thing to a third person, against whom a possessory action will not lie, the despoiled loses, not only the benefit of possession, but even his property, owing to the difficulty of proof; and so, notwithstanding the rigour of the civil law (whose *unde vi* will not lie against the third hand), we decree that the despoiled shall have the remedy of restitution against one who receives the thing with knowledge of the spoliation. Thus a possessory action was given against the *mala fide* possessor. But the canonists were not content with

[1] Bracton, f. 219 b, as is often the case, suggests his own opinion under a 'nisi sit qui dicat.'

[2] Stat. Marlb. c. 29: Second Institute, 153.

[3] c. 18. X. de restitut. spol. (2. 13); Lateran Council of 1215. To some modern Romanists this famous canon is the abomination of desolation. To Ihering it is an exploit worthy of the greatest of the popes, a genuine development of Roman law: Besitzwille, p. 459.

this; they found or thought that they found in ancient texts authority enough for a possessory action even against the *bona fide* possessor[1]. English law seems never to have taken any notice of this distinction. Psychical researches, inquiries as to good faith, as to knowledge or ignorance, were beyond its powers. If its possessory action is to be given against any, it must be given against every third hand; but it felt with Pope Innocent that to refuse a possessory action was often enough to obliterate proprietary right '*propter difficultatem probationum*[2].'

Illustration of the English doctrine.

[p. 67] The possessory character of the English action by 'writ of entry sur disseisin' can be best shown by means of a very curious case reported by Bracton. Great people were concerned in it. William Marshall, Earl of Pembroke, the famous regent, had a wife; that wife was entitled to land which was being withheld from her by one Richard Curpet. The earl took the law into his own hands and disseised Curpet. The earl died; his wife held the land; she died; his heir and her heir, William Marshall the younger, entered. A writ of entry was brought against him, and he had to give up the land. He had to give up what was his own because he and his mother before him had come to it by virtue of a disseisin. To-morrow he may bring his writ of right and get back this land; but at present he must give it up, for into it he had no entry save as the successor of a disseisor, and he is precluded from going behind the disseisin and pleading proprietary right[3].

That seems to be the principle of this action. You are not to go behind the entry with which you are charged. If you admit that entry you may still have many defences open to you, as for example a deed of release executed by the disseisee; but behind that entry you are not to go.

The other writs of entry.

The actions of which we have been speaking are possessory

[1] By the side of the action given by the canon of Innocent III. (condictio ex c. 18) they develop a condictio ex c. *Redintegranda*, which they trace back to a passage in the Decretum, c. 3. C. 3. qu. 1. The process is described at length by Bruns, Recht des Besitzes, 163–262.

[2] Bracton, f. 282 b. It would, says Bracton, be hard to send a man to his writ of right when he has on his side so recent a seisin; 'quod grave esset petenti de tam recenti seisina.'

[3] Bracton, f. 219; Fleta, p. 364; Britton, ii. 209. Later law met some of the cases in which a man having good title came to the land under a bad title, by holding that when once he was seised he was 'remitted' to his good title. See Littleton, lib. 3, cap. 12. But this seems to belong to the future.

in this amongst other senses, namely, that they presuppose what may fairly be called an infringement of possession and have that infringement for their foundation. This is obviously the case with the assize of novel disseisin and the writs of entry sur disseisin. There has been a disseisin, the dispossession of a possessor. We may say the same of the mort d'ancestor, if we give the name 'seisin in law' to that right which a man who dies seised 'as of fee' transmits to his heir. But the same can not be said of the large group of writs of entry which is now to come before us. We shall have before us actions which are, and well may be, called possessory, and yet they do not presuppose any violation of seisin, not even of a 'seisin in law.'

The various forms of writs.

Most of these writs suggest that the person who is attacked in the action has come to the land by virtue of an alienation made by someone who, though he was occupying and rightfully occupying, had no power to alienate it. He was a bailiff or a [p. 68] tenant in villeinage, a termor or a guardian, and took upon himself to make a feoffment; he was a tenant for life, tenant in dower or by the curtesy, and made a feoffment in fee; he was a husband who alienated his wife's land; he was a bishop or an abbot who without the consent of chapter or convent alienated the land of his church; he was of unsound mind; he was an infant. For one reason or another the alienation was voidable from the moment when it was made, or has become voidable. The person who is entitled to avoid it seeks to do so, and seeks to do so by a possessory action.

Historical evolution of the writs.

Some of these cases attracted attention at an early time. A tenant in fee lets or pledges (*vadiare*) the land for a term of years. That term expires; but the termor holds on, and insists perhaps that he is tenant in fee. It seems hard that the lessor should not be able to get back his land without battle or grand assize. And so too if this termor makes a feoffment, it seems hard that when the term has expired his feoffee should hold on and force the lessor to a difficult proof. In Glanvill's day English law was apparently showing an inclination to meet some of these cases by actions similar to that which was competent to the disseisee, that is to say, by formulated assizes, and in Norman law we find several actions of this kind[1]. But

[1] Norman law has a recognition *Utrum de feodo vel de vadio*, another *Utrum de feodo vel de firma*, another *Utrum de feodo vel de warda*, also an *Utrum de maritagio* which answers to our *Cui in vita*. See Brunner, Schwurgerichte, c. 15. Glanvill, xiii. 26–31, knows some of these recognitions; but in general the writs which direct them to be taken are 'judicial' rather than 'original' writs: that is to say, litigants came to these recognitions only in the course of actions begun by other writs. In very early plea rolls a jury summoned in course of the pleadings is occasionally called an assize.

soon in this country a flexible and comprehensive formula was adopted, namely, that of a *Praecipe* qualified by a suggestion as to the tenant's mode of entry. Thus: 'into which land he (*A*) had not entry save by *B*, the father of the demandant (whose heir the demandant is) who demised it to him (*A*) for a term that has expired[1].' This form was flexible. Any kind of in- [p. 69] valid 'entry' might be suggested. For example, one of the earliest and commonest of these writs was that which enabled a widow to recover land which had belonged to her but had been alienated by her husband. During his life this alienation was valid; during his life she could not oppose him in any thing —*cui in vita sua contradicere non potuit*; but when he died leaving her alive, she could avoid the alienation, and a possessory action was given to her for this purpose. These two are old forms, the *ad terminum qui praeteriit* and the *cui in vita*; but many others were soon invented as, for instance, the *dum fuit infra aetatem*, by which after attaining his majority a man could recover the land that he had alienated while an infant; the *sine assensu capituli* which aided the successor of a bishop who without the consent of his chapter had made away with the lands of his church, and those writs called the writs *ad communem legem* (to distinguish them from others given by Edwardian statutes) which lay when a tenant for life had alienated in fee and had died[2]. Between the days of Glanvill and the days of Bracton the chancery was constantly adding to the number of these writs. In Bracton's day the process was almost

[1] The evolution of the writ *ad terminum qui praeteriit* which supplies the place of several Norman recognitions can be traced in the earliest plea rolls, *e.g.* Curia Regis Rolls (Pipe Roll Society), 50, 66, 67, 74, 123; Rot. Cur. Regis (Palgrave), i. 341; ii. 37, 38, 85, 211, 227; Select Civil Pleas (Selden Society), pl. 143, 192; and so on into Bracton's Note Book where the fully developed form appears. The evolution of the *cui in vita* may be similarly traced; already in John's reign its characteristic formula is seen; Rot. Cur. Regis (Palgrave) ii. 168. These are for a while the commonest writs of entry.

[2] They are *ad communem legem* to distinguish them from the writ (*in casu proviso*) given by Stat. Gloucester, 6 Edward I. c. 7, and other writs (*in consimili casu*) framed after its likeness, which enabled one to insist that an alienation in fee by tenant in dower, tenant by the curtesy, or tenant for life, was a forfeiture of the alienor's estate.

complete; he knew nearly all those writs of entry which in after ages were reckoned as common law writs, and he knew some which soon went out of use owing to statutory extensions of the assize of novel disseisin[1]. The scheme of writs of entry had crystallized; what more could be done for it was done explicitly by statutes of Edward I.

Principle of these writs.

Now we must not discuss these actions at any length; we could not do so without losing our chief theme, the nature of seisin, in a maze of obscure details. But a few main principles should be understood. These we may bring to light by means of the question: How far will these possessory actions extend; to whom and against whom are they competent?

Active transmission.

To the first part of this question we answer that as a general [p. 70] rule they are hereditarily transmissible on the demandant's side. If the ancestor had an action, the heir has an action. I can base my action on the fact that I, or that my father (whose heir I am) demised this land for a term that has expired. If the widow has an action (*cui in vita*) to avoid an alienation made by her husband and dies without using it, her heir has an action (*sur cui in vita*) for the same purpose[2].

Passive transmission.

Turning to the other side of the question, we see that no good faith, no purchase for value, will protect the man who is attacked by the action; but we also see that curious boundary which has been mentioned above. Until the Statute of Marlborough otherwise ordained, a writ of entry could only be brought 'within the degrees[3].' To take one example, the widow can bring her action against her husband's feoffee, or against that feoffee's feoffee; but if there has been a third feoffment, then her only remedy is by writ of right. This limitation seems illogical, though it may have for its excuse some rule limiting the number of warrantors who may be called. At any rate, the Statute of Marlborough removed

The doctrine of degrees.

[1] Bracton, f. 317 b. As already said, writs of entry on alienations by bailiffs, guardians, termors, and tenants in villeinage went out of use, since in such cases alienor and alienee could be treated as disseisors.

[2] There seems to have been some doubt as to the possibility of a writ of entry in case the demandant would have had to go back for a seisin to his grandfather's grandfather. See Nichols, Britton, ii. p. 300. Such a case would be exceedingly rare; but in 1306 a man has attempted to get from the chancery a writ on the seisin of his great-grandfather's grandfather, and failed in his endeavour: Y. B. 33–35 Edw. I. 125.

[3] Bracton, f. 318: 'Non enim excedit tertium gradum.'

it[1]. Thenceforward the widow, or her heir, could bring the writ of entry against any one (however remote from the wrong-doing husband) who was holding the land in consequence of the wrongful alienation. And what we say of the widow's writ might be said of the other writs of entry. The writ of right fell into the background; and, though still popular in Edward I.'s day, it was hardly needed by any but those whose claims were of a rare character, or who had allowed so long a time to elapse that they were debarred from writs of entry by the extremely patient statutes of limitation that were in force[2].

[1] Stat. Marlb. c. 29. This speaks only of writs sur disseisin; but seems to have been construed to give a general authority for writs 'in the *post*.' See Fleta, p. 360; Britton, ii. 297.

[2] The boundary set by the common law to the writs of entry we can not thoroughly explain, but a suggestion about it may be ventured. Bracton, f. 320 b, 321, seems to connect it with two rules, (1) that vouching to warranty never goes beyond the fourth degree, (2) that in a writ of entry the tenant may only vouch the persons named in the writ. This latter rule is of some interest. A widow (*A*) charges *O* with having come to the land as feoffee of *N*, who was the feoffee of her husband *M*. Now the only person whom *O* may vouch is *N* (or *N*'s heir), and the only person whom *N* may vouch is *M*'s heir. The reason is that *O* could only be entitled to vouch another person, *e.g. X*, if *O* acquired the land from *X*, and the mere assertion that he acquired it from *X* would be an answer to *A*'s action, for it would deny the entry by *N*, on which *A* relies. This rule was still observed after the Statute of Marlborough and served to differentiate the old action 'within the degrees' from the statutory action 'beyond the degrees.' In the latter you might 'vouch at large,' vouch whom you would; in the former you could only vouch along the line of alienors mentioned in the writ. See Stat. West. I. c. 40. So much as to Bracton's second rule. As to the rule which would bring the process of voucher to an end when the third warrantor had been called, we are not certain that Bracton means to lay this down as a general rule which will extend even to writs of right, for he elsewhere (f. 260, 388) suggests that the chain of warrantors may be traced to infinity. But the rule seems to have existed in all its generality both in Normandy and in Scotland; it had been applied in England to the case of chattels; similar rules are found in Lombardy, France, Germany, Anglo-Saxon England, Scandinavia, Wales (Ancienne coutume de Normandie, c. 101; Somma, p. 132; Regiam Maiestatem, i. 22; Quoniam Attachiamenta, c. 6; Glanvill, x. 15, where *quotum warrantum* should be *quartum warrantum*; Laws of Cnut, II. 24; Leg. Henrici, 64, § 6; Brunner, D. R. G. ii. 502; Ancient Laws of Wales, i. 439). Now assuming these two rules, namely, (1) there may be three vouchers but no more, and (2) the defendant may only vouch along the line suggested in the writ of entry, we come to the result that this line must be limited in length. There are difficulties in the way of this explanation, for apparently our writs within the degrees allow only two vouchers; thus, in the case put above, when *O* has vouched *N*, and *N* has vouched the husband's heir, there can seemingly be no further vouching, unless the chance of rebutting a demandant by his own or his ancestor's warranty is reckoned as a third voucher. There is something to be

Are the writs of entry possessory?

Now were these actions possessory or were they not? The [p. 71] lawyers of the thirteenth century hardly knew their own minds about this question. Bracton seems to have thought that the writs *sur disseisin* and a few others were possessory, but that in general the writs of entry were proprietary[1]. A little later some justices of Henry III.'s reign record their opinion that a writ of entry, since it touches property, is of a higher nature than an assize of novel disseisin which only touches possession[2]. Fleta and Britton tell us that the causes, [p. 72] pleaded by writs of entry have something of possession in them, but in part 'savour' of property[3]. About the same date a lawyer says that a writ of entry is a writ mixed of right and possession[4]. At a later time it seems generally agreed that these writs are possessory. We must attempt to make up our minds as to what this term implies.

No violation of possession necessary.

If it be of the essence of a possessory action that the plaintiff complains of a violated possession, then none of the actions with which we have been dealing are possessory, except the assize of novel disseisin and the writs of entry *sur disseisin*, to which, as we have explained above, we may perhaps add the mort d'ancestor and its attendant writs of cosinage and the like; but even these can be brought against persons who have not been concerned in the violation of possession; they can be brought against those who have come to possession by honest and legitimate means, even against those who have purchased in good faith.

The right of defence is limited.

When, however, we are speaking of actions in which the possession of land may be adjudged to the plaintiff—and with actions which aim at mere damages we have at present no concern—the term 'possessory' may very rightly be used in another sense. For the moment it will be enough to say that such an action is possessory if the defendant in it may find

discovered in this obscure region; we can not profess to have thoroughly explored it. It is darkened by inconsistent methods of counting the degrees.

[1] Bracton, f. 218 b, treats the writs *sur disseisin* as mere supplements for the assize: so also, f. 160, the writs of intrusion; but, f. 317 b, the other writs of entry lie 'in causa proprietatis.'

[2] Placit. Abbrev. 183 (Kanc.).

[3] Fleta, p. 360; Britton, ii. 296.

[4] Y. B. 20–21 Edw. I. p. 27. So in Y. B. 33–5 Edw. I. p. 125: 'our action is mixed in the possession.' Ibid. 421: 'the writ is mixed, to wit, in the possession and in the right.'

himself precluded by a rule of law from relying upon his proprietary right in the land. To put the matter another way: the action is possessory if it will leave open the question whether the successful plaintiff has better right to the land than the vanquished defendant.

The writs of entry possessory.

Now in this sense all our writs of entry seem to be possessory. We will put a case: Alice who was seised in fee simple married Adam; during the marriage Adam enfeoffed Roger in fee simple, who enfeoffed William in fee simple; Adam died leaving Alice his widow; Alice now seeks to recover the land from William. She brings a writ of entry. 'She claims the land as her right and inheritance and as that into which William had no entry save through Roger to whom Adam her [p. 73] husband (whom in his lifetime she could not contradict) demised it[1].' Now William is at liberty to deny that this was his entry; he is at liberty to assert that he entered in quite different fashion, for example that he was enfeoffed by Peter. If a jury is against Alice on this point, if it finds that she has not correctly stated the means by which William came to the land, then she fails; but—and here we see an illustration of the possessory character of the action—she can at once begin another action by writ of right and in that she may prove by the arm of her champion or the verdict of a grand assize that after all she has better right than William[2]. But—to go back to Alice's writ of entry—William has other defences open to him. He may admit the suggestion that Alice has made; he may say 'True it is that I entered in the manner that you have described; but you in your widowhood have released your rights to me; see here your charter.' And other defences may be open to him. If, for example, we suppose the action to be brought not by Alice, but by one Benedict who calls himself her heir, then William may say 'You are not Alice's heir, for she is yet alive,' or 'You are not Alice's heir, for you have an elder brother Bertram[3].' All this William may do; but there

[1] In the writs of entry the term 'demise' is used in its very largest sense: it will *e.g.* cover a feoffment in fee.

[2] Bracton, f. 319 b: 'remanebit tenens in seisina quousque petens sibi perquisierit per breve de recto.' And yet Bracton treats these writs of entry as being rather proprietary than possessory.

[3] This is all that Bracton means when he says, f. 320 b, 'Item excipi poterit contra petentem quod alius ius maius habet quam ille qui petit.' He does not

is one thing that he must not do:—if he does not dispute the entry suggested in the writ, he must not go behind it; he must not 'plead higher up' than the facts upon which Alice has based her claim. Thus, for example, he must not say, 'All that you urge is very true, but I tell you that you obtained your seisin in this or that illegitimate manner and that when you married your husband I, or some ancestor of mine, or some stranger to this action, was the true owner of this land.' The whole object of that clause in the writ which suggests a particular mode of entry, is to impose an artificial limitation upon the defendant in his defence. By an artificial limitation we mean one which prevents him from asserting in this action rights which he really has, rights which to-morrow he can assert [p. 74] in another action. The writ of entry does not finally decide the dispute between the parties; the vanquished tenant may hereafter be a victorious demandant[1].

The hierarchy of actions.

A graduated hierarchy of actions has been established. 'Possessoriness' has become a matter of degree. At the bottom stands the novel disseisin, possessory in every sense, summary and punitive. Above it rises the mort d'ancestor, summary but not so summary, going back to the seisin of one who is already dead. Above this again are writs of entry, writs which have strong affinities with the writ of right, so strong that in Bracton's day an action begun by writ of entry may by the pleadings be turned into a final, proprietary action. The writs of entry are not so summary as are the assizes, but they are rapid when compared with the writ of right; the most dilatory of the essoins is precluded; there can be no battle or grand assize[2]. Ultimately we ascend to the writ of right. Actions are higher or lower, some lie 'more in the right' than

mean that every *ius tertii* can be pleaded. The only *ius tertii* that can be pleaded is one that is inconsistent with the demandant's possessory claim.

[1] A good illustration occurs in Y. B. 33-5 Edw. I. p. 359: 'Maud first disseised Robert while she was sole and then took a husband, who alienated to Nicholas; Nicholas was seised; Robert released and quit-claimed to Nicholas; Maud's husband died, and she deraigned these tenements from Nicholas by the *cui in vita*.' Nicholas had a better right than Maud, for by the release he had Robert's right; but he could not set this up in Maud's action; he had come to the land by an alienation made by her husband which she could avoid.

[2] As to the conversion of the writ of entry into a writ of right, see Bracton, f. 318, 319. This doctrine seems to have become obsolete and so the possessoriness of the writs of entry became more apparent.

others. You may try one after another; begin with the novel disseisin, go on to the mort d'ancestor, then see whether a writ of entry will serve your turn and, having failed, fall back upon the writ of right[1].

The hierarchy of seisins.

Now we can not consent to dismiss these rules about writs of entry as though they were matters of mere procedure. They seem to be the outward manifestation of a great rule of substantive law, for this graduated hierarchy of actions corresponds to a graduated hierarchy of seisins and of proprietary rights. The rule of substantive law we take to be this:—Seisin generates a proprietary right—an ownership, we may even say—which is good against all who have no better, because [p. 75] they have no older, right[2]. We have gone far beyond the protection of seisin against violence. The man who obtains seisin obtains thereby a proprietary right that is good against all who have no older seisin to rely upon, a right that he can pass to others by those means by which proprietary rights are conveyed, a right that is protected at every point by the possessory assizes and the writs of entry. At one and the same moment there may be many persons each of whom is in some sort entitled in fee simple to this piece of land:—*C*'s title is good against all but *B* and *A*; *B*'s title is good against all but *A*; *A*'s title is absolute.

Is the writ of right possessory?

But is even *A*'s title absolute? Our law has an action which it says is proprietary—the writ of right. As between the parties to it, this action is conclusive. The vanquished party and his heirs are 'abjudged' from the land for ever. In the strongest language that our law knows the demandant has to assert ownership of the land. He says that he, or his ancestor, has been seised of the land as of fee 'and of right' and, if he relies on the seisin of an ancestor, he must trace the descent of 'the right' from heir to heir into his own person. For all this, we may doubt whether he is supposed to prove a right that is good against all the world. The tenant puts himself upon the grand assize. What, we must ask, will be the question submitted to the recognitors? It will not be this, whether the demandant is owner of the land. It will be this,

[1] The final form of this doctrine will be found in *Ferrer's Case*, 6 Rep. 7 a.

[2] Of course to generate a hereditary right the seisin must be 'as of fee.' But there are writs of entry that can be used even by one who has been seised as life tenant; Bracton, f. 326.

whether the demandant or the tenant has the greater right to the land[1]. Of absolute right nothing is said; greater right is right enough. Next we must observe that the judgment in this action will not preclude a third person from claiming the land. The judgment if it is followed by inaction on his part for some brief period—ultimately year and day was the time allowed to him—may preclude him, should he be in this country and under no disability; but the judgment itself is no bar[2]. But lastly, as we understand the matter, even in the writ of right the tenant has no means of protecting himself by an assertion that the ownership of the land belongs neither to him nor to [p. 76] the demandant but to some third person. This needs some explanation, for appearances may be against what we have here said.

Clement brings a writ of right against William. He pleads that his grandfather Adam was seised in fee and of right, that from Adam the right descended to Bernard as son and heir, and from Bernard to Clement as son and heir. William may put himself upon battle or upon the grand assize; in the latter case a verdict will decide whether Clement or William has the greater right. But a third course is open. William may endeavour to plead specially and to bring some one question of fact before a jury. In this way he may attack the pedigree that Clement has pleaded at any point; he may, for example, assert that Bernard was not Adam's son or was a bastard. In so doing he may seem at times to be setting up *ius tertii*, to be urging by way of defence for himself the rights of a stranger. But really he is not doing this. He is proving that Clement's right is not better than his own. For example, he says: 'Bernard was not Adam's heir, for Adam left an elder son, Baldwin by name, who is alive.' Now if this be so, Clement has no right in the land whatever; Clement does not allege that he himself has been seised and he is not the heir of any one who has been seised. But what, as we think, William can not do is this, he can not shield himself by the right of a stranger to the action whose title is inconsistent with the statement that Adam was seised in fee and of right. He can not, for example, say, 'Adam your ancestor got his

[1] This form goes back to the first days of the grand assize; Glanvill, ii. 18.

[2] The exception against him will be not *exceptio rei iudicatae*, but *exceptio ex taciturnitate*; Bracton, f. 435 b; Co. Lit. 254 b.

seisin by disseising Odo, or by taking a feoffment from Odo's guardian, and Odo, or Odo's heir, has a better right than either of us[1].'

Thus our law of the thirteenth century seems to recognize in its practical working the relativity of ownership. One story [p. 77] is good until another is told. One ownership is valid until an older is proved. No one is ever called upon to demonstrate an ownership good against all men; he does enough even in a proprietary action if he proves an older right than that of the person whom he attacks. In other words, even under a writ of right the common law does not provide for any kind of judgment *in rem*. Relativity of ownership.

The question whether this idea—'the relativity of proprietary right'—should be called archaic, is difficult[2]. A discussion of it might lead us into controversies which are better left to those who have more copious materials for the history of very remote ages than England can produce. For our own part we shall be willing to allow that the evolution of the writs of entry, a process to be explained rather by politics than by jurisprudence, has given to this idea in England a preternatural sharpness. The proprietary action by writ of right is cumbrous and is irrational, for it permits trial by battle. Open attacks upon it can not be made, for it brings some profit to the lords and is supported by a popular sentiment which would gladly refer a solemn question of right to the judgment of the Omniscient. But covert attacks can be made, and they take the form of actions which protect the title begotten by seisin, actions in which artificial limits are set to the right of defence. On the other hand, we can not but think that this idea of relatively good proprietary right came very naturally to Englishmen. It developed itself in spite of cosmopolitan jurisprudence and a Remote history of ownership and possession.

[1] It is very difficult to offer any direct proof of this doctrine, more especially as Bracton never finished his account of the writ of right. But see the remarkable passage on f. 434 b, 435, which culminates in 'plura possunt esse iura proprietatis et plures possunt habere maius ius aliis, secundum quod fuerint priores vel posteriores.' After reading the numerous cases of writs of right in the Note Book and many others as well, we can only say that we know no case in which the tenant by special plea gets behind the seisin of the demandant's ancestor. As to later times there can be no doubt. See *e.g.* Littleton, sec. 478, quoted below, p. 78. See also Lightwood, Possession of Land, 74.

[2] Dr Brunner in a review of the first edition of our book (Political Science Quarterly, xi. 540) gave an affirmative answer, and vouched early Frankish law.

romanized terminology. The lawyers themselves believe that there is a wide gulf between possessory and proprietary actions; but they are not certain of its whereabouts. They believe that somewhere or another there must be an absolute ownership. This they call *dreyt dreyt*[1], mere right, *ius merum*. Apparently they have mistaken the meaning of their own phrases; their *ius merum* is but that *mere dreit* or *ius maius* which the demandant asserts in a writ of right[2]. Bracton more than once protests with Ulpian that possession has nothing in common with property[3], and yet has to explain how successive possessions beget successive ownerships which all live on [p. 78] together, the younger being invalid against the older[4]. The land law of the later middle ages is permeated by this idea of relativity, and he would be very bold who said that it does not govern us in England at the present day, though the 'forms of action' are things of the past and we have now no action for the recovery of land in which a defendant is precluded from relying on whatever right he may have[5].

Seisin and 'estates.'

We can now say our last word about that curious term 'estate[6].' We have seen that the word *status*, which when it falls from Bracton's pen generally means personal condition, is soon afterwards set apart to signify a proprietary right in land or in some other tenement:—John atte Style has an estate of fee simple in Blackacre. We seem to catch the word in the very act of appropriating a new meaning when Bracton says that the estate of an infant whether in corporeal or in

[1] Bracton, f. 434 b.

[2] It is probable that the Latin *ius merum* is a mistaken translation of the Anglo-French *mere dreit*, or as it would stand in modern French *majeur* (**maire*) *droit*. We have Dr Murray's authority for this note.

[3] Bracton, f. 113, 284: 'nihil commune habet possessio cum proprietate.' Dig. 41, 2, 12, § 1.

[4] Bracton, f. 434 b, 435.

[5] Holmes, Common Law, p. 215; Pollock and Wright, Possession, 93–100; Lightwood, Possession of Land, 104–127. One of the most striking statements of this doctrine is in Littleton, sec. 478. 'Also if a man be disseised by an infant, who alien in fee, and the alienee dieth seised and his heir entreth, the disseisor being within age, now it is in the election of the disseisor to have a writ of entry *dum fuit infra aetatem* or a writ of right against the heir of the alienee, and, which writ of them he shall choose, he ought to recover by law.' In other words, a proprietary action is open to the most violent and most fraudulent of land-grabbers as against one whose title is younger than his own; 'and he ought to recover by law.'

[6] See above, vol. ii. p. 10.

incorporeal things must not be changed during his minority[1]. A person already has a status in things; that status may be the status of tenant for life or the status of tenant in fee. It is of course characteristic of this age that a man's status—his general position in the legal scheme—is closely connected with his proprietary rights. The various 'estates of men,' the various 'estates of the realm,' are supposed to be variously endowed with land; the baron, for example, ought in theory to be the holder of a barony; he has the status of a baron because he has the estate of a baron. But a peculiar definiteness is given to the term by that theory of possession which we have been examining. Seisin generates title. At one and the same time there may be many titles to one and the same piece of land, titles which have various degrees of validity. It is quite possible that two of these titles should meet in one man and [p. 79] yet maintain an independent existence. If a man demands to be put into the possession of land, he must not vaguely claim a certain piece of land, he must point out some particular title on which he relies, and if he has more than one, he must make his choice between them. For example, he must claim that 'status' in the land which his grandfather had and which has descended to him. It becomes possible to raise the question whether a certain possessor of the land was on the land 'as of' one status, or 'as of' another status; he may have had an ancient title to that land and also a new title acquired by disseisin. What was his status; 'as of' which estate was he seised[2]? One status may be heritable, another not heritable; the heritability of a third may have been restricted by the *forma doni*. And so we pass to a classification of estates; some are estates in fee, some are estates for life; some estates in fee are estates in fee simple, others are estates in fee conditional; and so forth. We have come by a word, an idea, in which the elements of our proprietary calculus can find utterance.

[1] Bracton, f. 423 b, 424.

[2] A good example is given by Y. B. 33–5 Edw. I. p. 197: 'By his entering into warrantry he is, as it were, in the estate which he received by the feoffment of Eustace and of that estate he pleads.' 'By your entering into warranty alone you are in your first estate.' Ibid. p. 467: 'Although you had alienated the estate that you had by Simon and had afterwards retaken that estate...you are in your first estate.'

Seisin and title.

One other principle should be noticed. Every proprietary right must have a seisin at its root. In a proprietary action the demandant must allege that either he or some ancestor of his has been seised, and not merely seised but seised with an exploited seisin, seised with a taking of esplees. Nor is this all; every step in his title, if it be not inheritance, must comprise a transfer of seisin. Every owner of land must have been seised of it or must have inherited it from one who was seised. Such, at all events, was the old and general rule, as we shall now see when we turn to speak of the means whereby proprietary rights could be conveyed[1].

§ 3. *Conveyance.*

Modes of acquiring rights in land.

De acquirendo rerum dominio—this is the title of what is [p. 80] printed as Bracton's second book. In the main that book deals with but two modes of acquisition, namely, gift and inheritance, and if for a while we concern ourselves only with the ownership of land, and if we relegate the whole subject of inheritance to a later chapter, we shall find that practically a projected essay *de acquirendo rerum dominio* will become an essay *de donationibus*.

No title by occupation.

Of the occupation of unowned land we have not to speak, for no land is or can be unowned. This rule seems to be implied in the principle that the king is lord of all England. What is not held of him by some tenant of his is held by him in demesne. In all probability no tenant can abandon the land

[1] In closing this section we have to say that the account here given of the relation of the writs of entry to the possessory assizes is utterly at variance with the traditional doctrine sanctioned by Blackstone (Comment. iii. 184), which makes 'our Saxon ancestors' acquainted with writs of entry. Now, however, that large selections from the early plea rolls have been printed, there can be no doubt at all that the assizes are older than the writs of entry, though even a comparison of Bracton with Glanvill should have made this clear. To this must be added that throughout the thirteenth century there is no writ of entry for the disseisee against the disseisor. No one would think of using such a writ, because the assize of novel disseisin is far more summary. At a much later period when the assize procedure was becoming obsolete—obsolete because too rude—such a writ of entry, 'the writ in the nature of an assize,' or 'writ in the *quibus*' was invented. But in Bracton's time the writs of entry presuppose the assizes. The credit of having been the first to explain the relation between the assizes and the writs of entry is due to Dr Brunner's Entstehung der Schwurgerichte.

that he has been holding in such wise as to leave it open to the occupation of any one who sees fit to take it to himself. The tenant can indeed 'waive' his tenancy; he can, says Bracton, do this even though his lord objects; but, this done, there will be no vacant ownership; the lord will be entitled to hold the land in demesne[1]. Later law discovered one narrow sphere within which rights in land could be acquired by occupation. Suppose that *A* a tenant in fee simple gives land to *B* for his (*B*'s) life, and that *B* gives this land to *C* (saying nothing of *C*'s heirs), for his (*B*'s) life, thus making *C* 'tenant pur autre vie'; and suppose that *C* dies during *B*'s lifetime; who is entitled to enjoy the land while *B* still lives? Not *C*'s heirs, for they have not been mentioned; not *B*, for he has given away all that he had to give, an estate for his life; not *A*, for he has given away the land for the whole of *B*'s lifetime. Whoever chooses may occupy the land and enjoy it during this unforeseen interval. But, old though this rule may look, it does not seem to belong [p. 81] to the thirteenth century. Bracton has a different solution for this difficult case. He does not regard the 'estate pur autre vie' as a freehold; it is only a chattel like a term of years; *C* can dispose of it by will, and, if he fails to do this, the land will revert to *B*[2]. Thus even here there was no room for a lawful occupation.

No acquisitive prescription.

Again, our law knew no acquisitive prescription for land, it merely knew a limitation of actions. Even to the writ of right a limit was set. Before 1237 claimants had been allowed to go back to a seisin on the day in 1135 when Henry I. died; then they were restricted to the day in 1154 when Henry II. was crowned; in 1275 the boundary was moved forward to the coronation of Richard I. in 1189, and there it remained during the rest of the middle ages[3]. Thus actions are barred by lapse of time; but acquisitive prescription there is none. On the other hand, we have to remember that every acquisition of seisin, however unjustifiable, at once begets title of a sort, title good against those who have no older seisin to rely upon.

[1] Bracton, f. 382, § 5.

[2] Bracton, f. 13 b, 27, 263; Fleta, p. 193, 289. In Hengham Parva, c. 5, there is a transitional doctrine:—If a tenant for his own life alienates, the alienee, the tenant *pur autre vie*, has a freehold. If a tenant in fee demises for his own life, the lessee has a freehold 'according to some'; but the question seems to be open.

[3] Note Book, pl. 280, 1217; Stat. Merton, c. 8; Stat. West. I. c. 39.

Alluvion etc.

Bracton copies from the Institutes and Azo's Summa passages about alluvion and accession, the emergence of islands and the like[1]. It is not very probable that English courts were often compelled to consider these matters, and a vacant field was thus left open for romanesque learning[2].

Escheat, forfeiture, reversion.

Escheat, again, and forfeiture and reversion, can hardly be described as modes by which proprietary rights are acquired. The lord's rights have been there all along; the tenant's rights disappear; the lord has all along been entitled to the land; he is entitled to it now, and, since he has no tenant, he can enjoy it in demesne. As yet, again, there can be no seizure and sale of land for the satisfaction of debts, and so we have not to speak of what is sometimes called 'involuntary alienation.' Thus in truth we are left with but few modes of acquisition, and, if we set on one side inheritance and marriage, we are left with but one mode. That mode can be described by the wide word 'gift,' which, as already said[3], will cover sale, exchange, gage [p. 82] and lease.

The gift of land.

How can land be given? We will begin with the simple and common case. A tenant in fee simple wishes to give to another for life or in fee. In the latter case he may wish either to create a new tenancy by way of subinfeudation or to substitute the donee for himself in the scale of tenure. He must make a feoffment with livery of seisin. What, we must ask, does this mean?

Feoffment.

Feoffment is a species of the genus gift[4]. A gift by which the donee acquires a freehold is a feoffment. It is common to speak of such a gift as a feoffment, but in making it the donor will seldom use the verb 'enfeoff' (*feoffare*); the usual phrase is 'give and grant' (*dare et concedere*). Also we may note—for this is somewhat curious—that the feoffee (*feoffatus*) need not acquire a fee (*feodum*); the gift that creates a life estate is a feoffment.

The expression of the donor's will.

Now, of course, if there is to be a gift there must be some expression of the donor's will. It is unnecessary that this

[1] Bracton, f. 9; Bracton and Azo, 99.

[2] Smyth, Lives of the Berkeleys, i. 112, gives a curious and early case touching land torn by the Severn from one of its banks, added to the opposite shore and afterwards restored.

[3] See above, vol. ii. p. 12.

[4] Britton, i. 221: 'Doun est un noun general plus qe n'est feffement.'

expression should take the form of a written document[1]. It is, to say the least, very doubtful whether the Norman barons of the first generation, the companions of the Conqueror, had charters to show for their wide lands, and even in Edward I.'s day men will make feoffments, nay settlements, without charter[2]. Later in the fifteenth century Littleton still treats them as capable of occurring in practice. Furthermore, the charter of feoffment, if there be one, will, at all events in the thirteenth century and thenceforward, be upon its face an evidentiary, not a dispositive, document. Its language will be not 'I hereby give,' but 'Know ye that I have given.' The feoffor's intent then may be expressed by word of mouth; but more than this is necessary. It is absolutely essential—if we leave out of account certain exceptions that are rather apparent than real—

The livery of seisin.

—that there should be a livery of seisin. The donor and the donee in person or by attorney must come upon the land. There the words of gift will be said or the charter, if there be one, will be read. It is usual, though perhaps not necessary, that there should be some further ceremony. If the subject of [83] gift is a house, the donor will put the hasp or ring of the door into the donee's hand (*tradere per haspam vel anulum*); if there is no house, a rod will be transferred (*tradere per fustem et baculum*) or perhaps a glove[3]. Such is the common and the safe practice; but it is not indispensable that the parties should actually stand on the land that is to be given. If that land was within their view when the ceremony was performed, and if the feoffee made an actual entry on it while the feoffor was yet alive, this was a sufficient feoffment[4]. But a livery of seisin either on the land or 'within the view' was necessary.

[1] Bracton, f. 33 b.

[2] See *e.g.* Y. B. 20–1 Edw. I. p. 32, and Stat. Marlb. c. 9.

[3] Bracton, f. 40; Britton, i. 261–2.

[4] Bracton, f. 41: 'Ex hoc enim quod patior rem meam esse tuam ex aliqua causa, vel apud te esse, videor tradere. Idem est de mercibus in orreis. Idem etiam dici poterit et assignari, quando res vendita vel donata est in conspectu, quam venditor vel donator dicit se tradere, ut si ducatur in orreum vel campum.' This is romanesque and goes back to Dig. 41. 1. 9, § 6, and Dig. 41. 2. 1, § 21; but it probably fell in with English ideas; and the requirement that in such a case the feoffee must enter while the feoffor is still alive—a requirement to be discovered rather in later law than in Bracton's text—is not Roman. In 1292 (Y. B. 20–1 Edw. I. p. 256) Cave J. asks the jurors whether the feoffor was so near the land that he could see it or point it out with his finger.

Until such livery had taken place there was no gift; there was nothing but an imperfect attempt to give. We may for purposes of analysis distinguish, as Bracton does, the *donatio* from the *traditio*, the feoffment from the livery, the declaration of the donor's will from the induction of the donee into seisin; but in law the former is simply nothing until it has been followed by the latter. The *donatio* by itself will not entitle the donee to take seisin; if he does so, he will be guilty of disseising the donor[1]. Nor does the *donatio* by itself create even a contractual right and bind the donor to deliver seisin. The charter of feoffment, which professedly witnesses a completed gift, will not be read as an agreement to give[2]. Until there has been livery, the feoffee, if such we may call him, has not even *ius ad rem*. Furthermore, the courts of Bracton's day are insisting with rigorous severity that the livery of seisin shall be no sham. Really and truly the feoffor must quit possession; really and truly the feoffee must acquire possession. [p. 84] No charter, no receipt of homage, no transference of symbolic rods or knives, no renunciation in the local courts, no ceremony before the high altar, can possibly dispense with this, for it is the essence of the whole matter—there must be in very truth a change of possession, and rash is the feoffee who allows his feoffor's chattels to remain upon the land or who allows the feoffor to come back into the house, even as a guest, while the feoffment is yet new[3].

The ancient German conveyance.

It seems probable that in this respect our law represents or reproduces very ancient German law, that in the remotest age to which we can profitably recur a transfer of rights involved of necessity a transfer of things, and that a conveyance without livery of seisin was impossible and inconceivable. Of

[1] Bracton, f. 40, 44, holds that, in such a case, if the donor dies without having objected to the donee's assumption of seisin, he may be deemed to have ratified it.

[2] In Edward I.'s day a covenant to enfeoff was not uncommon; it formed part of the machinery of a settlement by way of feoffment and refeoffment; but the courts seem never to think of reading a charter of feoffment as a covenant to enfeoff.

[3] In the Note Book and the earliest Year Books hardly a question is commoner than whether there was a real and honest change of possession. The justices examine the jurors about the relevant facts and will not be put off with ceremonies. See *e.g.* Note Book, pl. 780, 871, 1209, 1240, 1247, 1294, 1850; Somersetshire Pleas, pl. 1440, 1491, 1497.

the ancient German conveyance we may draw some such picture as this:—The essence of the transaction may be that one man shall quit and another take possession of the land with a declared intention that the ownership shall be transferred; but this change of possession and the accompanying declaration must be made in formal fashion, otherwise it will be unwitnessed and unprovable, which at this early time is as much as to say that it will be null and void. An elaborate drama must be enacted, one which the witnesses will remember. The number and complexity of its scenes may vary from time to time and from tribe to tribe. If we here speak of many symbols and ceremonies, we do not imply that all of them were essential in any one age or district. The two men each with his witnesses appear upon the land. A knife is produced, a sod of turf is cut, the twig of a tree is broken off; the turf and twig are handed by the donor to the donee; they are the land in miniature, and thus the land passes from hand to hand. Along with them the knife also may be delivered, and it may be kept by the donee as material evidence of the transaction; perhaps its point will be broken off or its blade twisted in order that it may differ from other knives. But before this [p. 85] the donor has taken off from his hand the war glove, gauntlet or thong, which would protect that hand in battle. The donee has assumed it; his hand is vested or invested; it is the *vestita manus* that will fight in defence of this land against all comers; with that hand he grasps the turf and twig. All the talk about investiture, about men being vested with land, goes back, so it is said, to this impressive ceremony. Even this is not enough; the donor must solemnly forsake the land. May be, he is expected to leap over the encircling hedge; may be, some queer renunciatory gesture with his fingers (*curvatis digitis*) is demanded of him; may be, he will have to pass or throw to the donee the mysterious rod or *festuca* which, be its origin what it may, has great contractual efficacy[1].

Symbolic livery.

We are told that at a yet remote time this elaborate 'mode

[1] Heusler, Gewere, p. 7 ff.; Heusler, Institutionen, ii. 65; Brunner, Geschichte der Röm. u. Germ. Urkunde, i. 263 ff.; Schröder, D. R. G., 59, 270. The talk about 'vesting' can be traced back to the sixth century. As to broken and twisted knives, see Baildon, Select Civil Pleas, p. xv. The gesture with curved fingers was a Saxon practice; it is described by Schröder *op. cit.* p. 59, and was employed in Holstein within recent years.

of assurance' began to dissolve into its component parts, some of which could be transacted away from the land. It is not always very convenient for the parties to visit the land. In particular is this the case when one of them is a dead saint. One may indeed, if need be, carry the reliquary that contains him to the field that he is to acquire; but some risk will thus be run; and if the saint can not come to the field, the field must come to the saint. In miniature it can do so; turf and twig can be brought from it and placed with the knife upon the shrine; the twig can be planted in the convent garden. And then it strikes us that one turf is very much like another, and since the bishop, who has just preached a soul-stirring sermon, would like to secure the bounties of the faithful while compunction is still at work, a sod from the churchyard will do, or a knife without any sod, or a glove, or indeed any small thing that lies handy, for the symbolical significance of sods and knives and gloves is becoming obscure, and the thing thus deposited is now being thought of as a gage or *wed* (*vadium*), by which the donor can be constrained to deliver possession of the land[1]. When, under Roman influence, the written document comes into use this also can be treated as a symbol; it is delivered in the name of the land; the effectual act is not the [p. 86] signing and sealing, but the delivery of the deed, and the parchment can be regarded as being as good a representative of land as knife or glove would be. Just as of old the sod was taken up from the ground in order that it might be delivered, so now the charter is laid on the earth and thence it is solemnly lifted up or 'levied' (*levatio cartae*); Englishmen in later days know how to 'levy a fine[2].' And lastly there are, as we shall see hereafter, advantages to be gained by a conveyance made before a court of law after some simulated litigation; and one part of the original ceremony can be performed there; the donor or vendor can in court go through the solemnity of surrendering or renouncing the land; the rod or *festuca* can be passed from hand to hand in witness of this surrender.

Symbolic livery on the Continent.

It seems to be now generally believed that long before the Norman conquest of England this stage of development had been traversed by the continental nations. Land, it is said, could be conveyed without any transfer of possession, by a symbolical investiture, by the delivery of a written charter, by a surrender in court; and we suppose that this must be considered as proved, though, had our fully developed common law stood alone, we might have come to another conclusion.

[1] Heusler, Gewere, 18.

[2] Brunner, Geschichte d. Urkunde, 104, 303.

As regards the Anglo-Saxon law, our evidence is but very slight. We know nothing about the conveyance of any land that was not book-land, and book-land we take to be an alien, ecclesiastical institution, from which few inferences can be drawn. Even as to this book-land some questions might be raised which could not easily be answered. On the whole, though the books may speak of the gift in the perfect or in the future as well as in the present tense, it seems probable that the signing or the delivery of the parchment was the effectual act. It would even seem that, when once land had been booked, a delivery of the original deed was sufficient to transfer proprietary rights from one man to another[1]. Occasionally, though but rarely, we hear of a turf being placed upon the altar[2].

Anglo-Saxon law.

For some time after the Norman Conquest the shape that our law will take seems somewhat uncertain. In the first [p. 87] place, throughout the Norman period we often come upon royal and other charters which assume the air of dispositive documents and speak of the gift in the present tense. It is only by degrees that the invariable formula of later days, 'Know ye that I have given and granted,' finally ousts 'I give and grant[3].' In the second place, we read a good deal about the use of symbolical knives, rods and other such articles. Thus, for example, we are told that when the Conqueror gave English land to a Norman abbot by a knife, he playfully made as though he were going to dash the point through the abbot's hand and exclaimed, 'That's the way to give land[4].' Often it is clear

Law of the Norman age.

[1] Brunner, *op. cit.*, 149–209.

[2] Pollock, Land Laws, 3rd ed., p. 199. This, or something equivalent, may well have been done in other cases where it is not mentioned.

[3] For one instance see Round, Ancient Charters, p. 6; but there are many examples among the earliest charters in the Monasticon.

[4] Cartulaire de l'abbaye de la Sainte Trinité du Mont de Rouen (Documents inédits), p. 455: 'Haec donatio facta est per unum cultellum, quem praefatus Rex ioculariter dans Abbati quasi ejus palmae minatus infigere, Ita, inquit, terra dari debet.'

that the transfer of the symbol did not take place upon the land that was in question; it took place in a church or a court of law. The donor is said to put the land upon the altar by a knife (*mittere terram super altare per cultellum*)[1]. Charters are preserved which still have knives attached to them, and in some cases a memorandum of the gift is scratched on the haft of the knife[2]. Now and again this symbol is spoken of as a *vadium*, or gage, and this may for a moment suggest that, even if a real transfer of possession is necessary to complete the conveyance, the transaction with the knife constitutes a contractual obligation and gives the donee *ius ad rem*[3]. On the other hand, such a transaction, which takes place far away from the land, is sometimes, though rarely, spoken of as though it were itself a delivery of seisin[4]. It is thus that a chronicler describes how a dispute between the Abbot of St Albans and the Bishop of Lincoln was compromised in the king's court: 'Then the bishop arose and resigned into the king's hand by [p. 88] means of his head-gear (which we call a *hura*) whatever right he had in the abbey or over the abbot Robert. And the king took it and delivered it into the abbot's hand and invested the church of St Alban with complete liberty by the agency of the abbot. And then by his golden ring he put the bishop in ownership and civil possession of the land at Tynhurst with the consent of the abbot and chapter[5].' Thirdly, we have to remember that at a later time, within the sphere of manorial custom, seisin was delivered in court 'by the rod' which the steward handed to the new tenant.

A real livery required.

When all this has been considered—and it is not of rareties that we have been speaking—we shall probably come to the conclusion that some external force has been playing upon our law when it recurs to the rigorous requirement of a real transfer

[1] Madox, Formulare, p. x.; Cart. Glouc. i. 164, 205; ii. 74, 86; Cart. Rams. i. 256; ii. 262. But examples are numerous.

[2] Selby Coucher Book, ii. 325.

[3] Hist. Abingd. ii. 100, 168; Winchcombe Landboc, i. 212: 'et per cultellum super altare posuerunt signum pactionis huius.'

[4] This is so even in records of the king's court. Thus so late as 28 Hen. III. it is recorded that John de Bosell came before the barons of the Exchequer and in their presence put Robert Gardman in full seisin of lands and houses in Lincoln; Madox, Formulare, p. xii.

[5] Gesta Abbatum, i. 156. For the *hura* see E. C. Clark, English Academical Costume, p. 39.

of possession and a ceremony performed upon the land[1]. We have not far to seek for such a force. In bygone times Roman influence had made in favour of conveyance by charter, for, though the classical jurisprudence demanded a *traditio rei*, the men of the lower empire had discovered devices by which this requirement could be evaded and the ownership of land might practically, though not theoretically, be conveyed by the execution of a written instrument—devices curiously similar to those which Englishmen would be employing for a similar purpose in the nineteenth century[2]. It was a world in which ownership was apparently being transferred by documents that the barbarians invaded. If the Anglo-Saxon land-book passes ownership, it derives its efficacy, not indeed from classical Roman law, but from Italian practice. But when our common law was taking shape the Roman influence was of another and a more erudite kind and made for an opposite result. 'Traditionibus et usucapionibus dominia rerum, non nudis pactis, transferuntur[3]'—no text could be more emphatic. At the same time there is a great deal in our law, especially in the [p. 89] law relating to incorporeal things, which shows that Englishmen even of the thirteenth century found much difficulty in conceiving a transfer of rights unembodied in a transfer of things, and what we must ascribe to the new Roman influence is, not the requirement of a *traditio rei*, but the conviction that when land is to be given the delivery of no rod, no knife, no charter will do instead of a real delivery of the land. To this we may add that the king's justices seem to have felt very strongly that *donner et retenir ne vaut*. They are the same judges who, as we shall see, stamped out testamentary dispositions of land. Besides, their new instrument for the discovery of truth, a jury of the country, would tell them of real transfers of possession, but could not reveal transactions which took place in private[4].

[1] In Edward I.'s day there were some jurors, 'simplices personae, qui cum non essent cognoscentes leges et consuetudines Anglicanas,' supposed that a charter might suffice without livery of seisin: Calendar. Genealog. ii. 659.

[2] Brunner, *op. cit.* p. 113 ff. The conveyance with reservation of a nominal usufruct evaded the *traditio* as the conveyance by 'lease and release' evaded the livery of seisin.

[3] Cod. 2. 3. 20; Bracton, f. 38 b, 41.

[4] Ecclesiastical law knew the symbolic investiture. Jocelin of Brakeland (Camden Soc.), p. 69, tells how the pope appointed judges delegate to hear the

Practice in cent. xiii.

As a matter of fact, in the first half of the thirteenth century it was still common for the feoffor and the feoffee to attend the county or hundred court, to have their charter read there and to procure its attestation by the sheriff and the leading men of the district[1]. In addition to this, if the gift was to be made to a monastery, the charter would be read in the chapter house and then it would be carried into the church and offered upon the altar along with knife or rod. Beside this there would be a ceremony on the land, including sometimes a perambulation of boundaries in the presence of witnesses; and this was the more necessary because the charter rarely described the many small strips of land which made up that hide or virgate which had been bestowed. One could not be too careful; one could not have too many ceremonies. But what the king's court demanded was a real delivery of a real possession[2].

Royal conveyances.

No exception was made in the king's case. Even a royal [p. 90] charter did not by itself confer seisin. With it there went out a writ to the sheriff directing a livery. If the king made two inconsistent gifts, a later charter with an earlier seisin would override an earlier charter with a later seisin[3].

The release.

To the rule that requires a *traditio* it is hardly an exception that a *traditio brevi manu* is possible. The English *traditio brevi manu* is the 'release.' Suppose that X is occupying the

cause of the Coventry monks. The monks were successful and 'a simple seisin' was given to them in court by means of a book, the corporal institution being delayed for a while. So, Chron. de Melsa, i. 294, in John's day judges delegate restore land *per palmam viridem*, and some time after *corporalis possessio* is delivered in their presence. In our own day the ceremonies observed at the induction of a parson are good illustrations of medieval law.

[1] See the Brinkburn Cartulary (Surtees Soc.) *passim*, where many of the charters are witnessed by the sheriff of Northumberland.

[2] The Winchcombe Landboc in particular is full of evidence of these accumulated ceremonies. Very often there is a transaction before the county or the hundred court of a renunciatory character. In 1182 (p. 197), on the day after the ceremony on the land involving a perambulation of boundaries with one set of witnesses, the donor attends the chapter house and executes his charter before another set of witnesses, then he goes into the church and 'renews his gift' on the altar of St Kenelm. Note Book, pl. 375, seisin is given in the county court; pl. 754, in the hundred court and afterwards on the land. In Abbrev. Placit. 266, there is an odd and untranslatable story; a man delivers seisin of a house *per haspam*, 'et reversus versus parietem cepit mingere.' Was this a renunciatory act?

[3] Bracton, f. 56 b.

land as tenant for years or for life, that A has the fee simple; or suppose that X is holding the land adversely to A; and then suppose that in either of these cases A wishes to pass his rights to X. It would be an idle multiplication of ceremonies to oblige X to quit possession merely in order that he might be put into possession once more by a feoffment[1]. In the thirteenth century English law is meeting these cases by holding that A can pass his rights to X by a written document without any change in possession. As yet there is no well-defined specific term for such a transaction. It belongs to the great genus 'gift'; it is effected by such verbs as 'grant, render, remit, demit, quit-claim' (*concedere, reddere, remittere, dimittere, quietum clamare*)[2]. Hereafter 'release' (*relaxare, relaxatio*) will become the technical word, and there will be subtle learning about the various kinds of releases. The curious term *quietum clamare*, the origin of our 'to cry quits,' is extremely [p. 91] common, especially when the right that is to be transferred is an adverse right; for example, a disseisee will quit-claim his disseisor. Very possibly in the past such transactions have been effected without written instruments. We often read of the transfer of a rod in connexion with a quit-claim, and the term itself may point to some formal renunciatory cry; but in the thirteenth century a sealed deed or the record of a court was becoming necessary, and so in these cases we see proprietary rights transferred, or (it may be) extinguished, by the execution and delivery of a written document[3].

The quit-claim.

[1] Bracton, f. 41: 'Quandoque sine traditione transit dominium et sufficit patientia; ut si tibi vendam quod tibi accommodavi, aut apud te deposui vel ad firmam vel ad vitam, et si quod ad vitam, vendo tibi in feodo, et sic mutaverim casum [*corr.* causam] possessionis, hoc fieri poterit sine mutatione possessionis.' This passage is based on Dig. 41. 1. 9, § 5, but is in harmony with English practice. See Littleton, sec. 460: 'for it shall be in vain to make an estate by a livery of seisin to another, where he hath possession of the same land by the lease of the same man before.'

[2] See *e.g.* the releases in Madox, Formulare; also Bracton, f. 45. Littleton, sec. 445: 'And it is to be understood that these words *remisisse et quietum clamasse* are of the same effect as these words *relaxasse* etc.'

[3] As to the grammatical use of the term, what I quit-claim is usually my right, thus I quit-claim my right (*ius meum*) in Blackacre to William; but I may also be said to quit-claim the land to William, or, but more rarely, to quit-claim William. It would seem from Ducange that the term was hardly in use out of England and Normandy, but elsewhere *quietare* was used in much the same sense. A solemn 'abjuration' of claims in court or in church had been common in England, as any cartulary will show; *e.g.* Melsa, i. 309: 'et illam postmodum

The surrender.

Another case in which a feoffment would have been unnecessary, and indeed misplaced, was that in which the tenant made a surrender to his lord. Here if the tenant was but tenant for term of years, his lord was already seised in demesne of the land, and if the tenant held for life or in fee, the lord was already seised of the land 'in service.' It is probable that in such a case the transaction could be accomplished in an informal fashion without deed or other ceremony[1]. But deeds of surrender are by no means uncommon. The verbs that were commonly used for this purpose seem to have been *reddere et quietum clamare*[2].

Change of estate.

For what may be called the converse case to that in which the release was used our law made no special provision. Suppose, for example, that *A* is seised in fee simple and desires to become a mere tenant for life or to acquire a conditional fee; no course seems open save that which necessitates two feoffments; he must enfeoff *X* in order that *X* may re-enfeoff him. In Edward I.'s day this machinery is being frequently employed for the manufacture of family settlements[3]. To take one famous [p. 92] example, the earl marshal surrenders office and lands to the king in fee simple, and after a few months is re-enfeoffed in tail, and, as it is clear that he is going to die without issue, King Edward has thus secured for himself the fief of the Bigods[4]. Probably in this case our law has had to set its face against looser practices. There is a great deal to show that men have thought themselves able by a single act or instrument to transfer the fee while retaining a life estate, and to make those *donationes post obitum* which have given rise to prolonged discussion in other countries. It is by no means impossible that many of the so-called Anglo-Saxon 'wills' were really instruments of this kind, irrevocable conveyances which were to operate at a future time. Our law will now have none of these[5].

sicut ius proprium nostrum in pleno wapentagio de Hedona, tactis sacrosanctis evangeliis, coram omnibus penitus abiuravit. Insuper se et heredes suos carta sua obligavit etc.' For the use of a stick, see Guisborough Cartulary, p. 71: 'Noveritis me...lingno et baculo reddidisse.' But this is common enough.

[1] It was so in later law; Co. Lit. 338 a.

[2] See *e.g.* Guisborough Cartulary, pp. 50–3–4–5, 70, 156.

[3] See *e.g.* Calendar. Genealog. ii. 650, 702. The feoffee does not make the refeoffment until he has had a 'full and peaceful seisin.'

[4] Foedera, i. 940–1.

[5] Of this more hereafter in our section on The Last Will.

Gifts when the donor is not in occupation.

Another case which requires some special treatment is that in which neither the donor nor the donee is in occupation of the land, but the occupier is a tenant of the donor. Here we must distinguish. If the tenant is holding in villeinage, the common law pays no heed to any customary rights that he may have; he is simply occupying in the name of his lord, and in this case a regular feoffment with livery of seisin is possible. That livery, however, will very likely include a recognition by the tenant of the transfer of lordship. Thus we may see one Richard de Turville giving seisin to the Abbot of Missenden; he sends his steward with letters patent to the villeins; they are congregated; seisin of them and of their tenements is delivered to the abbot; the abbot takes their fealty and demands rent, but, as no rent is due, some pence are lent to them and they each pay a penny for leave to remain in occupation[1]. If, however, the [p. 93] tenant on the land was a freeholder whether for life or in fee, the case was not so simple. The lord would have no business to enter on the land and make a feoffment there. Slowly the doctrine is evolved that the seignory or reversion which is to be transferred can be treated as one of those incorporeal things which 'lie in grant,' as distinguished from that corporeal thing the land itself which 'lies in livery.' Still even here men will not allow that there can be a transfer of proprietary right until there has been what can be pictured as a transfer of a thing. A deed of grant is executed—the word 'grant' (Fr. *graunter*, Lat. *concedere*) becomes the term appropriate to such a transaction[2]—but this leaves the transaction incomplete; the tenant who is on the land must attorn himself to the grantee; pro- Attornment. bably an oral acceptance of his new lord is enough; often a nominal payment is made[3]. In most cases he can be compelled to attorn himself; if he will not do it, the court will attorn him[4]; but, until there has been attornment, the transaction is incomplete and ineffectual. The case in which the tenant is a termor stands midway between the two that we have already mentioned. He has a possession, or even a certain sort of

[1] Note Book, pl. 524.

[2] Among ancient documents it is difficult to distinguish those which, according to later theory, are deeds of grant from those which are charters of feoffment. All are charters of gift and commonly employ the same verbs: 'Sciatis me dedisse, et concessisse, et hac mea carta confirmasse.'

[3] An oral statement was enough in later days: Littleton, sec. 551.

[4] See above, vol. i. p. 347.

seisin, which the law has begun to protect; but still his lord is seised of the land and seised in demesne. It seems to be thought that two courses are open to the lord. There may be a deed of grant followed by an attornment; but a feoffment with livery of seisin may perhaps be possible. Bracton argues that the lord has a right to enter on the tenement for the purpose of making a feoffment: thereby he does no wrong to the termor, for the two concurrent seisins, that of the lord and that of the tenant, are compatible with each other[1]. However, in later days, the lord could not proceed by way of feoffment, unless he obtained the termor's consent or waited for some moment when the termor and all his family were absent from the land[2].

Feoffments with remainders.

When making a feoffment it was possible for the giver to impose conditions or to establish remainders, and all this by [p. 94] word of mouth. It is probable, however, that a charter was executed if anything elaborate was to be done, and, if we mistake not, remainders were seldom created in the thirteenth century except by those 'fines' of which we are about to speak. The remainder-man is for a while in a somewhat precarious position. This is due to two facts:—(1) he is usually no party to that transaction which gives him his rights; (2) neither he nor any ancestor of his has ever been seised. Thus if his rights are to be protected he must have special remedies.

Charters of feoffment.

The charter of feoffment or of grant is generally a very brief and simple affair. We seldom find after the end of the twelfth century any examples which depart far from the common form, though a few new devices, such as the mention of 'assigns' and the insertion of a well-drawn clause of warranty, were rapidly adopted in all parts of the country. It is almost always an unilateral document, a *carta simplex*, or as we should say 'deed poll,' not a bilateral document, a *carta duplicata, carta cyrographata.*

The fine.

There is something of mystic awe in the tone which already in Edward I.'s time lawyers and legislators assume when they speak of the 'fine,' or, to give it its full name, the final concord levied in the king's court. It is a sacred thing, and its sanctity is to be upheld at all cost[3]. We may describe it briefly and

[1] Bracton, f. 27, 44 b, 220 b; Note Book, pl. 1290.

[2] Litt. sec. 567; Co. Lit. 48 b; *Bettisworth's Case*, 2 Co. Rep. 31, 32.

[3] See the so-called Statute de Modo levandi Fines (Statutes of the Realm, i. 214); the Statute de Finibus levatis, 27 Edw. I. (Ibid. 126); Placit. Abbrev. 182; Rot. Parl. i. 67.

roughly as being in substance a conveyance of land and in form a compromise of an action. Sometimes the concord puts an end to real litigation; but in the vast majority of cases the litigation has been begun merely in order that the pretended compromise may be made.

Origin of fines.

'For the antiquity of fines,' says Coke, 'it is certain that they were frequent before the Conquest[1].' We do not think that this can be proved for England, but in Frankland the use of litigious forms for the purpose of conveyancing can be traced back to a very distant date; and in the Germany of the later middle ages a transaction in court which closely resembled our [p. 95] English fine became the commonest, some say the only[2], 'mode of assurance.' The advantages to be gained by employing it instead of an extrajudicial conveyance are in the main two. In the first place, we secure indisputable evidence of the transaction. In the second place, if a man is put into seisin by the judgment of a court he is protected by the court's ban. A short term, in general a year and day, is given to adverse claimants for asserting their rights; if they allow that to elapse and can offer no reasonable excuse for their inertness, such as infancy or absence, they are precluded from action; they must for ever after hold their peace, or, at all events, they will find that in their action some enormous advantage will be allowed to the defendant, as, for example, that of proving his case by his own unsupported oath. When Bracton charges with negligence and 'taciturnity' all those persons living in England who are silent while the land upon which they have claims is being dealt with by the king's court, this may look absurd enough, for how is a man in Northumberland to know of all the collusive suits that are proceeding at Westminster[3]? But the courts of old times had been local courts; the freeholders of the district had been bound to attend them; and to the man who alleged that he was not at the moot when his land was adjudged to another, there was this reply—'But it was your duty to be there[4].'

[1] Second Institute, 511. Plowden, Comment, 369. The lawyers of the Elizabethan age seem to have been imposed upon by some of the forgeries that proceeded from Croyland. See Madox, Formulare, p. xiii; Hunter, Fines, i. p. 11.

[2] See Heusler, Institutionen, ii. 88.

[3] Bracton, f. 435 b.

[4] It has been customary among English writers to find 'the origin of fines' in the *transactio* of the civilians and canonists. But this leaves unexplained the one thing that really requires explanation, the peculiar preclusive effect of a fine, or rather of seisin under a fine.

Practice in the Norman age.

In England after the Conquest we soon begin to see men attempting to obtain incontestable and authoritative evidence of their dealings with land. While as yet the great roll of the exchequer is the only roll that is regularly kept, men will pay money to the king for the privilege of having their compromises and conveyances entered among the financial accounts rendered by the sheriffs—a not too appropriate context; and at a much later time we may still see them getting their charters of feoffment copied onto the plea rolls of the king's court. In Henry II.'s day one William Tallard solemnly abandoned a claim that he had been urging in the county court of Oxfordshire against the Abbot of Winchcombe. The abbot obtained a royal charter confirming this 'reasonable fine' of the suit, and [p. 96] he further obtained testificatory charters from the Abbots of Oseney and Ensham, and yet another charter to which the sheriff set his seal 'by the counsel and consent of the county[1].'

Possession under a fine.

Evidence of a transaction is one thing; a special protection of the seisin that is held under that transaction is another. To obtain this men at one time allowed a simulated action to go as far as a simulated battle. The duel was 'waged, armed and struck'; that is to say, some blows were interchanged, but then the justices or the friends of the parties intervened and made peace, 'a final peace,' between them[2]. This had the same preclusive effect as a duel fought out to the bitter end. All whom it might concern had notice that they must put in their claims at once or be silent for ever. This might happen in the county court or in a seignorial court, and when the king's court has developed a model form of *concordia* we may see this closely imitated by less puissant tribunals[3].

Fines in the Angevin age.

But our interest has its centre in the king's court. After some tentative experiments[4] a fixed form of putting compromises on parchment seems to have been evolved late in

[1] Winchcombe Landboc, i. 186–192.

[2] Note Book, pl. 147, 168, 316 ('concordati fuerunt in campo'), 363, 815 ('concordati fuerunt in campo'), 851, 1035, 1619. Chron. de Melsa, ii. 99 (compromise while the battle is being fought); Ibid. 101 (the battle has been going on all day; our champion is getting worsted; Thurkelby J., who is a friend of ours, intervenes).

[3] For example, in Camb. Univ. Lib. Ee. iii. 60, f. 206 b, a regular fine levied in the court of the Abbot of St Edmunds in the seventh year of John. Guisborough Cartulary, ii. 333. Madox, Formulare, p. xv. Dugdale, Origines, 93. See also Note Book, pl. 992, 1223, 1616, 1619.

[4] See *e.g.* Note Book, pl. 1095; Dugdale, Origines, 50.

Henry II.'s reign, just about the same time when the first plea roll was written. From the year 1175 onwards we begin to get, in a few cases at first hand, in many cases at second hand, chirographs, that is, indented documents, which have as their first words what is to be the familiar formula: 'This is a final 'concord made in the court of our lord the king[1].' Glanvill writing a few years afterwards has already much to say of these [p. 97] final concords[2]. Then there is happily preserved for us a document of this kind dated on the 15th of July, 1195, which bears an endorsement saying that this was the first chirograph that was made in the form of three chirographs, of which one was to remain in the treasury to serve as a record; it adds that this innovation was due to the justiciar Hubert Walter and the other barons of the king[3]. What is new seems to be this:—heretofore when a compromise was made, its terms were stated in a bipartite indenture, one 'part' of which was delivered to each litigant; henceforth there is to be a tripartite indenture and one 'part' of it is to be preserved in the treasury. This 'part' or copy (perhaps owing to some confusion between the French *pes* which means peace, concord, and the Latin *pes* which means foot) soon becomes known as the 'foot' of the fine, and with the summer of 1195 begins that magnificent series of *pedes finium* which stretches away into modern times and affords the best illustrations that we have of medieval conveyancing[4]. Soon the fines became very numerous;

[1] See Round, Feudal England, 509, and E. H. R. xii. 293. Some other early fines were mentioned in Select Pleas of the Crown, Selden Society, p. xxvii. Since then others have come before us. The Winchcombe Landboc, i. 201–211 has six. There are five more in a Register of St Edmunds, Camb. Univ. Lib. Ee. iii. 60, f. 183 d, 187, 189, 205. All these fines ought to be collected in one place.

[2] Glanvill, lib. viii.

[3] Feet of Fines, Hen. II. and Rich. I. (Pipe Roll Soc.) p. 21: 'Hoc est primum cyrographum quod factum fuit in curia domini Regis in forma trium cyrographorum secundum quod...dominum Cantuariensem et alios barones domini Regis ad hoc ut per illam formam possit fieri recordum. Traditur Thesaurario ad ponendum in thesauro, anno regni Regis Ricardi vi° die dominica proxima ante festum beate Margarete coram baronibus inscriptis.' The fine itself is dated on the previous day. The Pipe Roll Society is publishing such of the fines of Richard's reign as are not in Hunter's collection. That collection (2 vols. Record Commission) contains fines of Richard's and of John's day; it will be of great service to us.

[4] This suggestion as to the origin of the 'foot' is due to Horwood, Y. B. 21–2 Edw. I. p. x; but, so far as we are aware, the *pes* was always the lowest

every term, every eyre (for a fine can be levied before justices in eyre as well as in the central court) supplies a large number of *pedes*; often they are beautiful examples of both exquisite caligraphy and accurate choice of words. The curious term 'levy' soon comes into use. It may take us back to the Frankish *levatio cartae*, the ceremonial lifting of a parchment from the ground[1]; but the usual phrase is, not that the litigants levy a fine, but that a fine levies between them[2].

Procedure when a fine is to be levied.

An action was begun between the parties by writ. Many [p. 98] different forms of writ were used for this purpose, but ultimately one of the less cumbrous actions, the writ of covenant, or the writ of *warantia cartae*, was usually chosen[3]. In the earliest period the parties seem often to plead and to go so far as the summoning of a grand assize[4]; and of course the fine is at times the end of serious litigation; but in general so soon as they are both before the court, they ask for leave to compromise their supposed dispute (*petunt licentiam concordandi*):— compromising a suit without the leave of the court is an offence to be punished by amercement, and the king makes money out of the licences that his justices sell[5]. Having obtained the requisite permission, the litigants state to the court (four justices at least should be present) the terms of their compact[6].

'part' of the indenture, and our phrase 'the foot of the page' deserves consideration. Already in Henry III.'s reign we have 'quesiti sunt pedes cyrographorum...et nullus pes inveniri potuit': Placit. Abbrev. 182.

[1] See above, p. 86.

[2] The common phrase on the rolls of Edward I. seems to be 'et finis levavit [*not* levavit se] inter eos.' Coke, Second Institute, 511, remarks that 'finis se levavit' is better than 'J. S. levavit finem.'

[3] In Richard's and John's reigns the action is often a mort d'ancestor, often a writ of right. Coke, *Tey's Case*, 5 Rep. 39, says that any writ by which land is demanded, or which in any sort concerns land, will do. *Warantia cartae* and *Covenant* are according to thirteenth century ideas personal actions, and the process in them is simple. There is in manuscript (*e.g.* Camb. Univ. Add. 3097 *ad fin.*) a tract on the practice of levying fines, which seems as old as the fourteenth century. It should be printed.

[4] Fines, ed. Hunter, i. 89, 91, 109 etc.

[5] The payments due to the king as ultimately fixed are described by Coke, Second Institute, 510. He gets in all a quarter of one year's value of the land.

[6] Modus levandi Fines, Statutes of the Realm, i. 214. This document was long called a statute of 18 Edw. I. In the Commissioners' edition it has been relegated to the *Tempus Incertum*. Its style and the fact that we have no better warrant for it than private MSS. make its statutory origin exceedingly doubtful. It may however have been sanctioned by the judges and have been what we should call a rule of court. It is to be distinguished from the

Throughout the middle ages the justices exercise a certain supervision over the fines that are levied before them. When a married woman is concerned, they examine her apart from her husband and see that she understands what she is doing. In other cases they do not inquire into the subject matter of the compromise; they have not to protect the material interests of the parties or of strangers, but they do pretty frequently interfere to maintain formal correctness and the proprieties of conveyancing: they refuse irregular fines. Even the formal correctness of the arrangement they do not guarantee, but they are not going to have their rolls defaced by obviously [p. 99] faulty instruments[1]. Then the indenture is drawn up by an officer of the court; one 'part' of it is delivered to each party, and the *pes* is sent to the royal treasury, there to remain until its conclusive testimony is required[2].

Form of the fine.

A fine is generally a bilateral instrument: that is to say, each of the parties professedly does something for the other. The one whom we may for the moment call the conveyor grants or releases his rights in the land or the incorporeal thing, for example, the advowson, which is the subject matter of the suit, or else he solemnly confesses (*cognoscit*) that the said thing 'is the right' of the other party. In this last case we may speak of the party who makes the confession or 'conusance' as the 'conusor' while his adversary in the suit becomes a 'conusee.' Then a separate clause will state that, in return for what he has thus done, the conveyor receives some benefit. This may be 'the fraternity and prayers' of a convent[3]; very often it is a sum of money paid down: in some cases a trivial sum, in others so large that the transaction seems to be a sale of the land for its full value. But again,

unquestionable Statute de Finibus Levatis of 27 Edw. I. In the last years of Henry III. many fines were levied before but two justices.

[1] Many instances of fines rejected for irregularity can be found in the Year Books. Some are collected in Fitz. Abr. tit. *Fines*. See *Tey's Case*, 5 Rep. 38 *b*; also *Barkley's Case*, Plowden, 252, where great weight is given to the argument that the fine in question would never have been received by such learned judges as Brian and his fellows if it had been invalid on its face.

[2] This is but a rough statement. The somewhat complicated relationship between the 'concord,' the 'note,' and the 'foot' as described in *Tey's Case* would be of no interest here; it must be enough to say that for some purposes the fine is valid before the chirograph has been drawn up. This was so already under Edward I.: Y. B. 33–5 Edw. I. p. 487.

[3] Fines, ed. Hunter, i. 60, 128.

it is possible that this recompense will take the form of some right in the land; *A* having confessed that the land belongs to one *X*, this *X* will grant the whole or part of it to *A* to hold of him (*X*) by some service more or less onerous. Thus a way is opened for family settlements, for we can sometimes see that *X* is a mere friend of the family, who is brought into the transaction for the purpose of enabling *A* to exchange an estate in fee simple for a life estate with a remainder to his son. It will be for future ages to distinguish accurately between the various classes of fines[1].

Advantages of a fine. [p. 100]

Of the advantages that could be obtained by the use of a fine a little can now be said.

Evidence secured.

(1) Incontestable evidence of the transaction was thus secured, and this was no small boon at a time when forgeries, or at all events charges of forgery, were common. Men would not scruple to forge even the chirograph of a fine, but then, owing to the retention of the *pes* in the treasury, the forgery could be detected[2]. In the old days, before the reform that we have attributed to Hubert Walter, the justices might indeed have borne record of a fine that was levied before them, and, if they did so, their record was conclusive; but their record was based upon their memory, not upon parchment, and, if they were uncertain about the matter, then the question whether or no there had been a fine was open to contest, and we may see it contested[3]. When, however, the practice of retaining *pedes* had been introduced, a search in the treasury would settle this question for good and all[4].

Action on the fine.

(2) A man who was party to a fine was bound by a stringent obligation to perform and respect its terms. If he infringed them, an action lay against him and he could be sent to prison; seemingly in Glanvill's day he could be compelled

[1] In the early fines either the demandant (*D*) or the tenant (*T*) may be the conveyor; thus in Hunter's collection, *D* quit-claims to *T* (p. 1), grants to *T* (p. 6), confesses to *T* (p. 14), while *T* quit-claims to *D* (p. 6–7), grants to *D* (p. 109), confesses to *D* (p. 8). An early specimen of a settlement effected by fine is this from 1202 (Hunter, p. 34):—Bartholomew demandant, Maria tenant; Maria confesses the land to be the right of Bartholomew; in return he grants half of it to Maria for life, with remainder to her son Hugh and the heirs of his body, with remainder to her son Stephen and his heirs.

[2] Placit. Abbrev. 182.

[3] Glanvill, viii. 5–8; Note Book, pl. 715, 1095.

[4] Placit. Abbrev. 182.

to find security for the future; but at any rate he could be imprisoned[1]. At a time when contractual actions, actions on mere covenants, were but slowly making their way to the royal court, the action *Quod teneat ei finem factum* was already popular[2].

The preclusive bar.

(3) We come to the most specific quality of the fine. Like a final judgment in a writ of right, it sets a short preclusive term running against the whole world 'parties, privies and strangers.' If there be any person who thinks that he has a right to the land comprised in the fine, he must assert that right at once; otherwise—unless he has been under one of the recognized 'disabilities,' such as infancy or absence beyond sea—he will be barred for ever. This statement needs some qualification. In order that the fine shall have this preclusive effect, it is necessary that one of the parties to it be seised: a seisin acquired by wrong will be good enough, but a seisin [p 101] there must be. It is not to be suffered that a man who is in peaceful seisin of land in Yorkshire, and who may be the true owner, should be done out of his rights by a collusive ceremony perpetrated at Westminster by two tricksters who 'have nothing in the land.' Our law may have doubted for a while whether such a fine, one levied between persons neither of whom was seised, would have any effect at all, would bind even those persons or their heirs. A statute of 1299 decided that the parties and those claiming under them were bound; but strangers were not affected by the fine[3]. We have further to notice that in many cases the preclusive term did not begin to run until the fine took effect in a change of seisin. It is difficult to speak in general terms of this matter because there were various kinds of fine; but just as, when there had been judgment on a writ of right, the fateful year and day did not start until seisin had been delivered by the sheriff to the victorious demandant, so, when a fine was levied, it was often necessary that a writ of seisin should be sued out and that seisin should be delivered[4]. Seisin under the order of the king's court; seisin under the king's ban,—it is this rather

[1] Glanvill, viii. 5; Note Book, pl. 454, 496.

[2] Note Book, vol. i. p. 186.

[3] Stat. de Finibus Levatis, 27 Edw. I. See Coke's commentary in Second Institute, 521; also Bracton, f. 436 b.

[4] See Coke, 1 Rep. 96 b, 97 a, and the books there cited.

than the mere compromise of an action that, if we look far enough back, seems the cause of preclusion[1].

The year and day.

As to the length of the preclusive term, Bracton seems to hold that the bar is established so soon as the chirograph is delivered to the parties. This is never done until fifteen days after the concord has been made in court, and fifteen days is the time usually allowed to a litigant who has been summoned[2]. A little later we find that year and day are allowed[3], and as this was the period allowed from of old in Germany[4], we may perhaps infer that the judges of Bracton's day had been attempting to abbreviate an ancient term[5]. In order to prevent his right being barred, a man must either bring an action or else enter his claim upon the *pes* of the fine. On ancient *pedes* it is [p. 102] common to see a claim entered, or even two or three claims; this seems to show that what went on at Westminster was soon noised abroad[6].

Value of the bar.

Now here of course we see an advantage of enormous importance that the fine has over any extrajudicial transaction, and, when we remember how easily seisin begets proprietary rights, how at one and the same moment half-a-dozen possessory titles to the same piece of land—titles which are more or less valid—may be in existence, we shall not be surprised at the reverential tones in which the fine is spoken of. It is a piece of firm ground in the midst of shifting quicksands.

The married woman's fine.

(4) In Bracton's day the fine had already become the married woman's conveyance. If her land was to be lawfully and effectually conveyed, she and her husband were made parties to an action, and before the 'concord' was accepted by the court, the justices examined her and satisfied themselves that she was acting freely[7].

[1] And therefore it is that we find it doubtful whether judgment in a writ of right in favour of the tenant can have a preclusive effect; Y. B. 7 Edw. III. f. 37 (Trin. pl. 41).

[2] Bracton, f. 436.

[3] Fleta, p. 443; Modus levandi, Statutes of the Realm, i. p. 214.

[4] Laband, Die vermögensrechtlichen Klagen, 295; Heusler, Gewere, 237.

[5] Throughout the Note Book those who plead 'non-claim' make no mention of year and day. It seems possible that an old rule was for a while thrown into confusion by the new practice of making chirographs and retaining *pedes*.

[6] On the back of the *pes* we read '*A* de *B* apponit clamium suum.' In later days one might assert one's right by action, by claim on the *pes*, or by entry. In Bracton's day entry would have been dangerous owing to the severe prohibition of self-help.

[7] Bracton, f. 321 b. Of the married woman we speak in a later chapter.

Conveyance of reversions

(5) If what was to be conveyed was a seignory or a reversion, a fine was useful[1]. It was possible that the tenant who was in possession of the land would make some difficulty about attorning himself to the purchaser. But if a fine was levied, there was a regular procedure in common use for compelling such tenants to appear before the court and confess the terms of their tenure, and then they would be forced to attorn themselves or would be attorned by the court, unless they could show some good reason for their refusal[2].

Family settlements.

(6) Lastly, it might seem that family settlements could be effected more simply and more securely by fine than by other means. If *A* is tenant in fee simple and wishes to obtain a life estate followed by remainders, or a conditional fee limited to the heirs of his body, or the like, he may be able to effect this [p. 103] by enfeoffing *X* in order that he may be re-enfeoffed. But there are obvious objections to this practice. For one thing, *X* may be dishonest and do much harm by enfeoffing a stranger; and then again, someone may hereafter urge that *X* never acquired a real and true seisin of the land and that the transaction was therefore but a sham. On the other hand, it may be that by fine the whole settlement can be effected at one moment.

The fine and seisin.

This leads us to speak of the relation between the law about fines and the law about seisin. Can a fine transfer seisin? Is the operation of a fine an exception to the general rule that land can not be conveyed without a *traditio rei*, a transfer of seisin?

A judgment can give no seisin.

To the first of these questions we must answer, No. Seisin is for the men of the thirteenth century a fact; the physical element in it is essential. It can not be transferred by a written instrument, nor by a compromise however solemn, nor even by the judgment of a court. The judgment awarded to a successful demandant does not even confer upon him a right to enter and to acquire seisin; if he enters without waiting for the sheriff, who is to execute the judgment, he will be guilty of disseising the defeated tenant[3]. And so the preclusive term, the year and

[1] Britton, f. 229.

[2] There seem to be in Bracton's day two writs for this purpose:—*Per quae servitia* and *Quid iuris clamat;* proceedings upon them are common in the Note Book; see vol. i. p. 184–5. There is some learning about the latter of them in *Tey's Case*, 5 Rep. 39 b.

[3] See *e.g.* the strong statement of Berwick, J. in Y. B. 20–1 Edw. I. p. 52; also Y. B. 33–5 Edw. I. p. 200. Whether a judgment can confer the *Gewere* (seisin) has been a question much debated among the Germanists. See Heusler, Gewere, p. 186.

day, does not begin to run in favour of a victorious demandant until he has been put in seisin.

A fine gives no seisin.

It is so also with the fine. It does not transfer seisin of the land. We have already seen that some one who is no party to the fine may be seised at the time when the fine is levied, and in that case his seisin and his rights will remain unaffected by the collusive action and the feigned compromise. But we must pass to the case in which one of the two parties to the fine is seised of the land, and even here we shall see that the fine standing by itself—the mere recorded compromise—is incapable of transferring seisin of the land. Of course in many cases there can be no talk of any transfer of seisin. The parties are merely doing by fine what they could have done, though not so effectually, by a deed: that is to say, the one of them who is not seised is releasing or quit-claiming some right to the one who is seised. Also of 'things incorporeal' we are not speaking; but the mere fine is incapable of transferring seisin of land. This [p. 104] we shall see if we turn from our first to our second question.

The fine does not convey land.

Just because the mere fine is incapable of transferring seisin, it is incapable of conveying land. This may seem a startling statement to those who have been bred up to consider the fine as one of the most potent of the 'common assurances' of the common law. But what we have said seems to be true in the thirteenth century. We put a simple case:—*A* is seised in fee simple; in an action brought against him by *X* he solemnly confesses that the land is the right of *X*[1], or goes further and confesses (what is not true) that he, *A*, has given it to *X* by feoffment[2]; nevertheless *A* remains in occupation of the land. Now, at any moment during *A*'s lifetime *X* can obtain execution of the fine; thereby he will obtain seisin and so the conveyance will be perfected. But suppose that *A* dies seised, it seems exceedingly doubtful whether his confession, his false confession of a feoffment, can according to the doctrines of the thirteenth century bar the claim of his heir[3]. Of another case we may speak with greater certainty. It was very common. The tenant in fee simple, *A*, wishes to make a settlement; by the fine he

[1] This is the fine *sur conusance de droit tantum.*

[2] This is the fine *sur conusance de droit come ceo que il ad de son don.*

[3] Bracton, f. 242 b. At all events if the conusee after the conusor's death entered and forestalled the heir, the heir would have the assize of mort d'ancestor against him; Bracton, f. 262.

confesses that he has enfeoffed *X*, and then the chirograph will go on to say that *X* grants and renders the land to *A* for some estate (for example a life estate) which will entitle him (*A*) to remain seised as heretofore, and then some remainders are created[1]. Really there has been no feoffment; *X* has never for a moment been on the land; *A* has occupied it all along and continues to occupy it until his death. Now his heir is not bound by that fine. If an attempt is made to enforce it against the heir, he will plead that *A* was seised at the date of the fine and continued seised until his death; and this plea will be good. We learn this from a statute of 1299 which alters the law; it takes away this plea from the heir of any one who was party to the fine. Thereafter such a fine as we have supposed will be effectual as against those who stand in *A*'s shoes. [p. 105] Taken by itself and without a transmutation of seisin it will be effectual. But this operation it owes to a statute. According to the law as it stood at the end of Henry III.'s reign, a fine unaccompanied by a *de facto* change of seisin could never be a substitute for a feoffment; and so we have to qualify a statement with which we started, namely, that a fine is a conveyance[2].

Return to seisin.

Thus have we once more been brought back to seisin. Our conception of the seisin of land which our law knew in the thirteenth century is being made clearer by negative propositions. Seisin of land can not pass from man to man by

[1] This would be a fine *sur grant, don et render.*

[2] This is the best opinion that we can offer about a difficult matter. The Statute de Finibus Levatis, 27 Edw. I., states that for some time past, during the present king's reign and that of his father, the parties to fines and their heirs have been suffered to annul them by the plea of continuous seisin. This practice, it says, was contrary to the old law. A tradition current in Edward III.'s reign ascribed the innovation to 'the maintenance of the great': Coke improved upon this by an allusion to the Barons' War. See Y. B. 6 Edw. III. f. 28, Pasch. pl. 75; Second Institute 522. But the heir's plea is sanctioned by Bracton, f. 242 b, 262, 270, and can be traced back to very near the beginning of Henry III.'s reign; Note Book, pl. 125, 778, 853. See also Y. B. 33–5 Edw. I. pp. 201, 435. The Statute speaks of the plea as having been used not merely by the heir, but even by the person who was party to the fine. This may have been a recent innovation, and one hardly to be reconciled with sound principle; for certainly it seems strange that a man should be allowed to dispute a solemn confession that he has made in court. We seem to see here as elsewhere that the justices of the first half of the century have been insisting rigorously on a *traditio rei* as an essential part of every conveyance. In this instance they may have overshot the mark. But further investigation of this obscure tract of history is needed. In later days a large mass of intricate learning clustered round the fine. Here we have merely tried to find its original germ.

inheritance, by written instrument, by confession in court, by judgment; it involves a *de facto* occupation of the land. On the other hand, without a transmutation of seisin—which may however in appropriate cases take the form of a *traditio brevi manu*—there is no conveyance of land.

§ 4. *The Term of Years.*

The term of years.

From time to time we have been compelled to speak of the curious treatment that the tenancy for a term of years has received at the hands of our law[1]; we must now discuss it at some length. And in the first place we observe that the law has drawn a hard line which does not of necessity coincide with any economic distinction. A feoffment for life may in substance be an onerous lease, a lease for years may be granted for so long a term and at so trivial a rent that the lessee's rights [p. 106] will be very valuable. For all this, the tenant for life will be a freeholder, while the tenant for years, or 'termor,' will be no freeholder.

Attempt to treat the term as a personal right.

At the end of the twelfth century the law was apparently endeavouring to regard the termor as one who has no 'real' right, no right in the land; he enjoys the benefit of a covenant (*conventio*); he has a right *in personam* against the lessor and his heirs. His action is an action of covenant (*quod teneat ei conventionem factam*), an action which seems to have been invented chiefly for the enforcement of what we should call leases[2]. In this action he can recover possession, or rather seisin (for such is the phrase commonly used), of the land. The judgment is, we may say, a judgment for the 'specific performance' of the covenant[3]. Frequently, if not always, the termor enjoys the benefit of a warranty. If he is evicted by some third person, he can claim from the lessor an equivalent for the benefit of which he

[1] See above, vol. i. p. 357, vol. ii. p. 36.

[2] A plea of covenant appears on the earliest plea roll: Curia Regis Rolls (Pipe Roll Soc.), p. 53. The writ occurs in very early registers: Harv. L. R. iii. 113, 169. Actions of covenant are fairly common in the Note Book; see vol. i. p. 186.

[3] Note Book, pl. 1739 (A.D. 1226): 'et ideo consideratum est quod convencio teneatur et quod Hugo habeat seisinam suam usque ad terminum suum decem annorum.'

has been deprived[1]. Add to this that if his lessor attempts to turn him out, he is allowed *vim vi repellere;* a speedy re-ejectment would be no disseisin, no wrong to the lessor[2]. But as against the world at large he is unprotected. At all events he is unprotected against ejectment. Eject him, and you disseise the freeholder under whom he is holding; that freeholder will bring the assize of novel disseisin against you. How far the termor is protected by an action for damages against mere trespassers who stop short of ejectment, we can not say. The action of trespass only becomes common in the king's courts near the middle of the thirteenth century, and of what went on in the local courts about the year 1200 we know very little.

[p. 107] Even if no ejector appeared from without, the termor was not very secure in his holding. His rights had to yield to those of the guardian in chivalry, as well as to those of the lessor's widow. If the doweress, as she might, turned him out of one-third of the land, he was allowed to hold the other two-thirds for an additional period by way of compensation[3]. If his lessor's lord, who had got his lessor's heir in ward, turned him out, his term was, not indeed destroyed, but it was 'deferred[4].' The lessor's assigns were not bound by the lessor's covenant; the lessor's feoffee could oust the termor and leave him to his remedy against the lessor or the lessor's heir.

Insecurity of the termor.

But, at all events in this last particular, the law was not expressing the common sense of mankind. About the year 1235 a new action was given to the termor, the *Quare eiecit infra terminum.* This reform is attributed to Bracton's master, William Raleigh, who was then presiding in the king's court. Bracton was loud in its praise[5]. Writing a few years afterwards, he distinctly says that this new action, which will restore the ejected termor to the land, will lie against all manner of ejectors, and he appeals to the broad principle that to eject

Failure of the old doctrine.

[1] Note Book, pl. 106, 638. The doctrine that a demise for years implies a warranty seems to flow as a natural consequence from the original character of such a demise. The lessor gives the lessee no right in the land, but covenants that the lessee shall enjoy the land; this covenant he must fulfil *in specie*, if that be possible: otherwise he must render an equivalent.

[2] Hengham Parva, c. 7.

[3] Bracton, f. 312; Note Book, pl. 658, 767, 970; Y. B. 33–5 Edw. I. p. 267.

[4] Bracton, f. 30: 'custodia non adimit terminum sed differt.' Britton, ii. 8.

[5] Bracton, f. 220; Maitland, History of the Register, Harv. L. R. iii. 173, 176; Note Book, pl. 1140.

a termor is as unjustifiable as to disseise a freeholder[1]. However, as has not unfrequently happened, some words got into the new writ which restricted its efficacy. The most scandalous case of ejectment is that in which the termor is turned out by one who has purchased the land from the lessor. Not only may it be urged that the purchaser should be in no better position than that which the vendor has occupied, but an obvious door is opened to fraud:—the lessor, who dares not himself eject the lessee, effects his object by the mediation of a collusive purchaser, and contrives that an action on the covenant shall be of no value[2]. The new writ in the form which it takes when it crystallizes in the register, contains [p. 108] words which strike directly at this particular case. It supposes that the defendant has purchased the land from the lessor. In spite of what Bracton says, the golden opportunity has been missed. This action can not be used against ejectors in general; it will only lie against one who has purchased from the lessor[3].

The termor and the writ of trespass.

For protection against ejectors who were in no way connected with his lessor, the termor had to look to another quarter: to the development of the new, and for a long time semi-criminal action which accuses the defendant of having entered and broken another man's close 'with force and arms and against the king's peace,' the action of 'trespass *quare clausum fregit*.' Such actions were becoming popular during the last years of Henry III.'s reign. Apparently they were for a while held in check by the doctrine that they ought not to be used as substitutes for the assize of novel disseisin[4]. Nor was this doctrine unnatural. By choosing an action of trespass instead of an assize one was threatening the defendant with all the terrors of outlawry and using a weapon which had in the past been reserved for felons. Now at what moment of time

[1] Bracton, f. 220.

[2] See the reasoning in the printed Register: Reg. Brev. Orig. 227: 'Et quia multotiens contingit quod dimisor non habet unde conventionem teneat, et fraus et dolus nemini debent patrocinari.' The printed book ascribes the writ to William of Merton, apparently a person compounded out of William of Raleigh and Walter of Merton. The older MSS. speak of Raleigh.

[3] It is remarkable that while Fleta, f. 275, follows Bracton pretty closely, Britton, i. 417, apparently denies the existence of any writ that will avail the ejected termor against his lessor's feoffee. Perhaps there were some who had doubts as to the validity of the writ. In Y. B. 18 Edw. II. p. 599 there is question as to whether the allegation of sale to the defendant is traversable or no.

[4] Bracton, f. 413.

the termor became entitled to this new action, it is very difficult to say, for in the action of trespass the plaintiff but rarely asserts by express words any title, or seisin or possession. He simply says that 'his' close has been entered and broken by the defendant. We should not be surprised at discovering that from the very first, that is, so soon as actions of trespass became common, the termor was allowed to say in this context that the land in question was 'his' close[1]. The principle that he ought to be protected against the world at large had been fully conceded by Bracton. An investigation of this matter would take us far beyond the moment of time that we have [p. 109] chosen for our survey. It must suffice if we here say that the termor did acquire the action of trespass, an action for damages against all who unlawfully disturbed him in his possession; that a specialized writ of trespass *de eiectione firmae* (which is to be carefully distinguished from the old *quare eiecit infra terminum*) was penned to meet his particular case; and that just at the close of the middle ages it was decided that in this action he could recover, not merely damages, but his possession of the land—he could 'recover his term[2].'

Further protection of the termor.

In another quarter a statute of 1278 gave the termor some much needed protection. In the old actions for land he had no *locus standi* either as the active or as the passive party. He did not represent the land. If you brought a writ of right or writ of entry against him, he would plead that he was but a termor and your action would be dismissed. Consequently his interest could be destroyed by a collusive action. Some one sued his lessor; that lessor allowed judgment to go by default, and the recoveror, who had by supposition shown a title

[1] If the lessor attempts to eject the termor, the latter may use force in the defence of his possession: Hengham Parva, c. 7. We may argue *a fortiori* that he may use force against the mere trespasser who endeavours to eject him; and from the concession of a right to maintain possession by force to the concession of an action for damages, the step seems short.

[2] It seems to us that the relation between the two writs is often misrepresented in modern books owing to a mistake which can be traced to Fitzherbert. He knew from the note about 'William of Merton' in the Register that the *Quare eiecit* was a modern action, but seems to have supposed that *De eiectione firmae* was primeval. This has led Blackstone (Comment. iii. 207) to represent the *Quare eiecit* as a mere supplement for the *De eiectione*. But the writ whose invention is recorded by Bracton and Fleta is the *Quare eiecit*, while the growth of the action of trespass is post-Bractonian. In the MS. Registers the *Quare eiecit* appears long before the *De eiectione firmae*.

superior to the lessor's, ousted the termor. Already, however, in Edward I.'s day the Statute of Gloucester empowered the termor in divers cases to intervene in the action for the protection of his interest. This statute required a supplement in Henry VIII.'s reign; but during the interval a vigilant termor who had a written lease was fairly well defended against the easiest devices of chicane[1].

Seisin and possession.

From the thirteenth century onwards English law has on its hands the difficult task of maintaining side by side two different possessions or seisins, or (to adopt the convenient distinction which is slowly established during the fourteenth and later centuries) a seisin and a possession[2]. There is the old seisin protected by the assize, there is the new possession protected [p. 110] by the writ of trespass. Of course one and the same man may have both. The tenant in fee or for life, who occupies his own land, is both seised and possessed of it. But the two may be divided; they are divided when there is a termor occupying the land; he is possessed, but the freeholder is seised. Even at the present day, though the old possessory remedies which protected seisin are things of the past, we have still to be always distinguishing between seisin and possession[3].

Explanation of termor's history.

It is natural therefore that we should ask how it came about that in the twelfth century the courts arrived at the conclusion that the ejected termor was not to have the assize of novel disseisin. Why is he not seised of a free tenement? The question is not easy. If in such a context we are entitled to speak of the natural inclination of English law, we ought apparently to say that this was in favour of attributing a legally protected possession to any person who is in enjoyment of the land and can take the fruits as his own, albeit he is there only for a time and is paying rent to a lord. The tenant for life, however heavily he may be burdened with rent or other service, is indubitably seised of free tenement. We are told also that Germanic law, when left to itself, always displays this inclination. It does not require of the man to whom it attributes

[1] Stat. Glouc. c. 11; Stat. 21 Hen. VIII. c. 15; Co. Lit. 46 a.

[2] In Bracton's day and much later seisin is habitually ascribed to the termor; *e.g.* Note Book, pl. 1739: 'et ideo consideratum est quod convencio teneatur et quod Hugo habeat seisinam suam usque ad terminum suum decem annorum.' See L. Q. R. i. 332. As already said, in pleadings and judgments the word *possessio* is rare. See above, p. 31.

[3] See Pollock and Wright, Possession, p. 49.

possession that he shall behave as owner of the thing possessed; if he takes the fruits as his own, that is quite enough. We are told also that when this inclination is not manifested, then the operation of a Roman influence may be suspected[1].

Early leases for years.

The requisite explanation we shall hardly find in the mere rarity of tenancies for terms of years. No doubt in the year 1150 they were still uncommon, and it is not until 1200 that we begin to read much about them. How rare they had been in yet older times we can not tell. For example, the fact that they are hardly ever mentioned in the Anglo-Saxon land-books will not prove that they were practically unknown in England before the Conquest. The solemn 'book' would hardly have been used for so humble a purpose as that of creating short tenancies. Still we can see enough both in England and on the continent [p. 111] to say that during the dark age leases for determinate periods were not very common. They seem to imply a pecuniary speculation, a computation of gain and loss, which is impossible where there is little commerce. The man who was in quest of land was looking out, not for a profitable investment, but for a home and the means of livelihood. He had to think of the days when he would no longer be able to work, and, if he could not obtain a secure provision for his whole life, he would take land on precarious terms and trust to a lord's generosity or inertness: very likely his precarious estate would become hereditary. The Roman *locatio conductio* of land disappeared; it was overwhelmed by the *precarium* which tended to become a *beneficium* or a lease for life[2]. We can not say for certain that none of the *locationes* and *commendationes terrae* mentioned in Domesday Book were leases for years[3]; such leases begin to appear very soon after the Conquest[4]; but it is noticeable that the first of such tenancies of which we obtain definite tidings are rarely, if ever, what we should call 'husbandry leases.' In the Conqueror's reign the Abbot of St Albans leased the manor of Aldenham to the Abbot of Westminster for twenty years at the rent of a hundred shillings:

[1] Heusler, Gewere; Heusler, Institutionen, ii. 22 ff.

[2] Brunner, D. R. G. i. 210. The *precarinm* (so-called) for a fixed term of years was not utterly unknown.

[3] D. B. i. 260: 'ibi ij. homines reddunt iiij. solidos de locatione terrae.'

[4] Cart. Burton, 21, 23: temp. Hen. I., two manors are already leased for sixteen years.

such at least was the story current at St Albans[1]. In the reign of Rufus land is being let for years to secure a debt of £20[2]. In the twelfth century the beneficial lease was by no means unknown; it was one of the expedients employed for raising money. Thus under Henry II. William Fossard obtains a large sum from the Abbot of Meaux, and, by way of return, grants him among other things, two whole vills for a term of fifteen years[3]. A little later the abbot obtains a lease of thirteen bovates for forty years at the cost of a heavy sum[4]. In 1181 a gross sum is paid down for a lease for twenty-nine years and no rent is reserved[5]. What is more, as we shall see [p. 112] hereafter, the lease for years had become a common part of the machinery whereby land was gaged for money lent. In the first half of the thirteenth century the termor is often visible[6]. He holds for fairly long terms and his rights are valuable; he has often paid a 'premium,' as we should call it, for his lease[7]. Nor is the sub-lessee unknown, and the sub-lessee may be an abbey[8]. It is possible that for a while the notion prevailed that a lease should not be for a longer term than forty years. The writer of the Mirror protests that this was the old law[9], and it would certainly have been very dangerous to make a longer lease by word of mouth, for, when the witnesses to the transaction were dead, the termor would have been much tempted to claim the fee and drive his lessor to battle or the grand assize[10].

[1] Gesta Abbatum, i. 43. [2] Hist. Abingd. ii. 40.

[3] Chron. de Melsa, i. 174–5.

[4] Ibid. i. 231: 'acceptis inde multis denariis.' Cart. Rams. ii. 268 (A.D. 1149) lease for seven years to the abbot; he is to educate the lessor's son; in return he pays thirty marks.

[5] Newminster Cartulary, p. 73.

[6] The writ of entry *ad terminum qui praeteriit* is common on early plea rolls. See above, p. 69.

[7] Select Civil Pleas, pl. 177: lease of sixty acres for seven years in consideration of 5 marks paid down. Note Book, pl. 106: lease of a manor for seventeen years at a rent of £16. Ibid. 638: lease for twenty-two years. Ibid. 970: lease of a house for forty years. Ibid. 1140: lease of a messuage and thirty acres for twenty years in consideration of 50 marks paid down. Madox, Formulare, No. 220: lease for thirty years. Ibid. 122: lease for two years; no rent; consideration, 20 shillings paid down. Ibid. 223: lease for thirty-two years at a rent of a mark per year, but the whole 32 marks are paid in advance. Ibid. 228: lease for two years in consideration of 24 shillings paid down

[8] Whalley Coucher, i. 24 (A.D. 1271); Chron. de Melsa, ii. 183 (A.D. 1286).

[9] Mirror (Selden Soc.), p. 75; Blackstone, Comment. ii. 142.

[10] Bracton, f. 318 b, 319.

But Bracton contemplates the possibility of a lease for a term which exceeds that of human life; Britton speaks of a lease for a hundred years[1]; and in 1270 such a lease was granted[2]. It must be allowed, however, that in the days when the assize of novel disseisin was yet new—and this for our present purpose is the critical moment—tenancies for terms of years were very rare when compared with tenancies for life or in fee. Still we can not find our explanation in this rarity, for we have not to say why no special remedy was granted to the termor; we have to say why he was excluded from a very general remedy. Why has he no free tenement?

Why has the termor no free-hold?

Assuredly in asking this question we must not lay an accent on the word 'free.' The termor's tenement, if he can be said to have one, is in no sense unfree. Abbots of West- [p. 113] minster, Newminster, Meaux, men who have paid large sums for their leases, have not done anything 'unworthy of a free man.' Nor can we dispose of them as 'mere farmers or husbandmen...who were considered as the bailiffs or servants of the lord[3].' All the evidence that we can collect tends to show that the husbandry lease is a late institution when compared with the beneficial lease purchased by a premium. Again, we shall hardly help ourselves by saying that the tenancy is not 'feudal.' The termor had no *feodum*; but the tenant for life had none. The termor did no homage; the tenant for life even of a military fee did none; the tenant of a socage fee was not in general bound to do it[4]. On the other hand, it seems fairly plain that the tenant for years swore fealty[5].

Arbitrary distinctions.

We must further notice that the language of everyday life and the language of pleading refused to fit in with the only theories which the lawyers put forward to justify their denial of the assize to the termor. Indubitably the termor, like the tenant in fee, holds a tenement: there is no other phrase by which his position can be described. Men do not say, lawyers do not say when they are dealing with concrete cases, that he has the benefit of an obligation, nor that he has an usufruct, nor that he has a servitude comparable to a right of way; they say

[1] Bracton, f. 27; Britton, ii. 302.

[2] Gloucester Corporation Records, ed. Stevenson, p. 253.

[3] Blackstone, Comm. ii. 141.

[4] Bracton, f. 77 b.

[5] Bracton, f. 80; Co. Lit. 67 b.

boldly that he holds a tenement[1]. They add that he is seised of a tenement; he is not merely in seisin, he is seised. They have no verb specially appropriated to the act which creates a tenancy for years, they use 'grant,' and even 'give,' as well as 'deliver' (*tradere, bailler*) and 'demise'; and a 'lease' may be for life[2]. What is more, they have a word in common use which throws rent-paying termors into one class with rent-paying freeholders. People who pay full rents are farmers, *firmarii*. This word describes an economic fact. But many *firmarii* are not termors; they are freeholders holding for life or in fee. Through this natural class of *firmarii* a hard [p. 114] line is drawn, an arbitrary line, for many termors hold on far easier terms than those to which the fee farmer is subjected[3]. As a matter of economic fact it is untrue that while the freeholder always holds *nomine proprio*, the termor always holds *nomine alieno*.

Influence of Roman theory.

Lastly, the only explanation that the lawyers have to give is a romanesque explanation. They go back to Paulus:—the term is an usufruct, and the usufruct is no part of the *dominium*; it is a servitude like a right of way. All Europe over, lawyers were being at once attracted and puzzled by the Roman doctrine of possession. They could not conceive it in all its simplicity. They could not deny every sort of *dominium* and every sort of *possessio* to the vassal who held of a lord. In England an attempt to do this would have led to the useless dogma that the king owns and possesses every inch of land. They do what they can with the adjectives *civilis* and *naturalis*, *directus* and *utilis*; there must be several *dominia*, several *possessiones*. But a line must be drawn somewhere, for clearly Roman law compels us to hold that there are some occupiers who are not possessors[4]. In an evil hour the English judges,

[1] It is possible to find talk of usufruct in a few very early deeds: but there it will stand for a life tenancy. Thus in Cart. Rams. i. 121 (A.D. 1088).

[2] Bracton, f. 27: 'si autem fiat donatio ad terminum annorum.....concedere ad terminum annorum.' Note Book, pl. 1140 (A.D. 1235–6): A termor pleads—'Robertus tradidit et *concessit* ei...mesuagium et fecit ei *donum*...ita quod positus fuit inde in seisinam...et fuit in seisina.' Ibid. pl. 1739: a leaseholder recovers his seisin. On the other hand, a feoffment could be made by the word 'demise'; see Second Institute, 295.

[3] For the fee farmer, see above, vol. i. p. 293.

[4] See Bruns, Recht des Besitzes, 106–8; Heusler, Gewere, 300. Some of the Italian jurists come very near to our English result. The vassal possesses, at least *naturaliter*; the *colonus* does not possess, at least unless he has a long lease; whether the usufructuary possesses or no is for them very uncertain.

who were controlling a new possessory action, which had been suggested by foreign models, adopted this theory at the expense of the termor. He must be the *conductor* who does not possess, or he must be the usufructuary who does not possess the land but has '*quasi* possession' of a servitude. But they can not go through with their theory. In less than a century it has broken down. The termor gets his possessory action; but it is a new action. He is 'seised,' but he is not 'seised of free tenement,' for he can not bring an assize. At a somewhat later time he is not 'seised' but is 'possessed.' English law for six centuries and more will rue this youthful flirtation with Romanism[1].

[115] Some compensation was made to the termor, and at the same time the gulf that divided him from the freeholder was widened, by the evolution of another doctrine. In the first half of the thirteenth century lawyers were already beginning to say that his interest in the land is a *quasi* chattel[2]; soon they were saying boldly that it is a chattel[3]. The main import of this doctrine is that he has something to bequeath by his will. There was a writ in common use which prohibited the ecclesiastical courts from meddling with lay fee (*laicum feodum*), but the termor's interest was no 'lay fee,' and, if he bequeathed it by his will, the spiritual tribunal would not be prevented from enforcing the bequest. On the other hand, the time had not yet come when the term would be treated as a chattel by the law of intestate succession. It was common to make the lease for years to the lessee 'and his heirs,' and, at all events if this were done, the term would pass to the heir if it were not bequeathed by the lessee's will. However, he was able to bequeath it. We can see the analogy between the term and the chattel at work in another quarter: if the termor commits a felony, his interest does not escheat to his lord, it is forfeited to

The term as a chattel.

[1] The most instructive passage on this matter is Bracton, f. 220 b, where a romanizing gloss has invaded the text. See L. Q. R. i. 341. The gloss is from Paulus, Dig. 50. 16. 25 pr. So in Bracton, f. 167 b, the termor does not possess, because he is an usufructuary. Bracton there says that the *firmarius* does not possess, but has immediately to qualify this by allowing possession to the fee farmer.

[2] Bracton, f. 407 b.

[3] Y. B. 33–5 Edw. I. p. 165: 'la terme nest qe chattel.'

the king *quasi catallum*[1]. Indeed the analogy was beginning to work in many quarters. This is not a purely English peculiarity. In Normandy also the term of years is accounted a movable; it is *firma mobilis*, as contrasted with fee farm (*feodi firma*,[2].

Chattels real.

At first sight it is strange that the termor should be able to do what the tenant in fee can not do, namely, to give his right by testament. We can not explain this by painting him as a despised creature for whom the feudal land law can find no proper place, for he is thus being put into one category with those who are exercising the most distinctively feudal of all rights in land. To a modern Englishman the phrase 'chattel real' suggests at once the 'leasehold interest,' and probably it suggests nothing else. But in the middle ages the phrase covers a whole group of rights, and the most prominent member of that group is, not the leasehold interest, but the seignorial right of marriage and wardship[3]. When a wardship falls to [p. 116] the lord, this seems to be treated as a windfall; it is an eminently vendible right, and he who has it can bequeath it by his will. At all events in the hands of a purchaser, the wardship soon becomes a bequeathable chattel: already in John's reign this is so[4]. The analogy between his right and that of the termor is very close. The purchaser of the wardship, though he is in occupation of the land, has no seisin of free tenement; he can bring no assize. On the other hand, he obtains possessory protection by the writ *Quare eiecit de custodia*[5], which is a parallel writ to the termor's *Quare eiecit infra terminum*. What then, we must ask, have these two cases in common? Is there any economic reason for this assimilation of a term of years to a wardship, and for the treatment of both of them as bequeathable chattels? We believe that there is, namely, the investment of capital, and by the way we will remark that the word *catallum*, if often it must be translated by our *chattel*, must at others be rendered by our *capital*[6]. Already

[1] Bracton, f. 131.

[2] Somma, p. 284; Ancienne coutume (ed. de Gruchy), c. 114.

[3] Y. B. 32-3 Edw. I. p. 245. In a writ of wardship the demand is for 'no more than a chattel.'

[4] Rot. Cart. Joh. p. 108.

[5] For an early example see Note Book, pl. 1709.

[6] In the Jewish mortgage deeds the principal sum is the *catallum*. the interest is *lucrum*; so in Magna Carta, 1215, c. 10.

in the year 1200 sums of money that we must call enormous were being invested in the purchase of wardships and marriages[1]. There was a speculative traffic in these things at a time when few other articles were being bought and sold on a large scale. Now it is very natural that a man who invests a round sum should wish for a power of bequest. The invested sum is an utterly different thing from the landed estate which he would desire to keep in his family. And then, as to the term of years, we believe that in the twelfth century and yet later, this stands often, if not generally, in the same economic category. It is a beneficial lease bought for a sum of ready money; it is an investment of capital, and therefore for testamentary purposes it is *quasi catallum*[2]. If this explanation be thought untrue—and perhaps it runs counter to some traditional theories—we must once more ask attention to the close similarity that there [p. 117] is between our law's treatment of the termor and its treatment of one who has purchased a wardship. Such a purchaser was no despised 'husbandman,' no 'mere bailiff'; in John's day an archbishop who had been chief justiciar invested four thousand marks in a wardship[3].

§ 5. *The Gage of Land.*

The gage.

Closely connected with the lease for years is the gage of land. A single root has sent out many branches which overshadow large fields of law. Gage, engagement, wage, wages, wager, wed, wedding, the Scottish wadset, all spring from one root. In particular we must notice that the word 'gage,' in Latin *vadium*, is applied indiscriminately to movables and immovables, to transactions in which a gage is given and to those in which a gage is taken. When a lord has seized his tenant's goods in distress they are in his hands a gage for the payment of the rent that is in arrear, and the sheriff is always taking gages from those who have no mind to give

[1] See above, vol. i. p. 324.

[2] See above, vol. ii. pp. 111–2.

[3] Rot. Cart. Joh. p. 108. For some long leases granted in the thirteenth century, see Gloucester Corporation Records, ed. Stevenson. The doubts, expressed by some modern lawyers as to whether a term of years is a 'tenement,' imply a conception of a metaphysical 'tenement' which Bracton had not apprehended. See Challis, Real Property, 2nd ed. p. 55 and App. I.

them. The notion expressed by the word seems to be that expressed by our 'security'; some thing has either been given or been seized, and the possession of it by him in whose hands it now is, secures the payment of money or the performance of some act by the person by whom it was given or from whom it was taken. But it is the given gage of land that concerns us now[1].

Antiquity of gages.

Such transactions had long been known. We read of them in some of the Anglo-Saxon land-books, and it is highly probable that in England as elsewhere we might from a very early age distinguish several different methods by which land was made to serve as a security for money lent. We seem to see the conveyance which is subject to a condition, also the beneficial lease for years which enables a lender to satisfy himself by taking the fruits of the land, also a form of gage which does not set off the fruits against the debt[2]. Already in Domesday Book we may see land in the possession of one to whom it has been gaged[3]. Soon afterwards the duke of [p. 118] the Normans had gaged his duchy to the king of the English[4]. Before the end of the twelfth century very large sums of money had been lent upon gage. The crusaders wanted ready money and there were Jews who would supply it. In Henry II.'s day

[1] The term *pignus* is occasionally used both of movables and immovables, *e.g.* by Bracton, f. 268: and *impignorare* sometimes takes the place of the common *invadiare*, *e.g.* Cart. Guisborough, 144. The term *hypotheca* will hardly be found except in instruments executed in favour of foreigners; the Abbot of Winchcombe hypothecates lands and goods to the pope; Winchcombe Landboc, i. 255. The chapter of York binds a manor *ypotecae seu pignori* to secure money lent by the succentor; Historians of Church of York, iii. 174. What is seized by the distraining landlord is more frequently a *namium* than a *vadium*, but *divadiare* or *devadiare* often describes the act of distraining, *e.g.* in *Leg. Henrici*. In Germany *Pfand* seems to have covered the wide field of our *vadium*, and the *genommenes Pfand* has to be distinguished from the *gesetztes Pfand*: Franken, Französiches Pfandrecht, 11. See also Wigmore, The Pledge Idea, Harv. L. R. vol. x. xi., for the early history of gage and pledge in various systems of law.

[2] Brunner, Zur Rechtsgeschichte der röm. u. germ. Urkunde, 193; Brunner, Political Science Quarterly, xi. 541; Crawford Charters, ed. Napier and Stevenson, pp. 9, 77.

[3] D. B. ii. 137, 141, 217; in the last of these cases one Eadric has gaged land to the Abbot of St Benet; in the first a woman is ready to prove by ordeal that a debt, for which land was gaged, has been paid.

[4] See Freeman, William Rufus, i. 155. The chroniclers differ widely in their accounts of this transaction. According to some there was rather a rentless lease for three years than a gage.

William Fossard had gaged his land to the Jews for some twelve hundred pounds[1].

Glanvill's mortgage and vifgage.

The forms which these early gages took are not in all respects so clear as might be wished. Glanvill, who perhaps leaves out of sight the conditional feoffment which required no special treatment, draws several distinctions. One of these is famous: that between the *mort gage* and the *vif gage*[2]. The specific mark of the mortgage is that the profits of the land received by the creditor are not to reduce the debt. Such a bargain is a kind of usury; but apparently it is a valid bargain, even though the creditor be a Christian. He sins by making it, and, if he dies in his sin, his chattels will be forfeited to the king; but to all seeming the debtor is bound by his contract[3]. As to the Jew, he was not prohibited from taking usury from Christians; he took it openly. Even the Christian, if we are not much mistaken, was very willing to run such risk [p. 119] of sin and punishment as was involved in the covert usury of the mortgage. The plea rolls of the thirteenth century often show us a Christian gagee in possession of the gaged land, but we have come upon no instance in which he was called upon to account for the profits that he had received. We infer that the gagee was usually a mortgagee in Glanvill's sense of that term[4].

[1] Chron. de Melsa, i. 173.

[2] *Mortgage* seems to imply *vifgage*, and the latter term occurs in the Norman Grand Coutumier, ed. de Gruchy, p. 274: but we know of no direct proof that it was used in England.

[3] The words 'dead' and 'living' seem to have been applied to the gage in several different senses. To Glanvill (x. 8) the deadness of the mortgage consists in the fact that the gaged thing is not by its profits reducing the debt. Beaumanoir, c. 68, § 11, agrees with this. See also Somma, pp. 54, 279. Littleton (sec. 332) has a different explanation. If the debt is not paid off, the land is dead to the debtor; if the debt is paid off, the land is dead to the creditor. Then, by way of contrast, we find that the German *Todsatzung* is the gage which is gradually 'amortizing' or killing the debt. As to all this see Franken, Französisches Pfandrecht, 8, 123. Glanvill's words about the validity of the *mortuum vadium* are not quite plain. A bargain which provides for the reduction of the debt by the profits which the creditor receives 'iusta est et tenet.' The other sort of bargain 'inhonesta est...sed per curiam domini Regis non prohibetur fieri.' Having said this, he speaks of the forfeiture of the chattels of the usurer who dies in his sin. The next following words 'cetera serventur ut prius de vadiis in rebus mobilibus consistentibus dictum est' (in which case 'stabitur conventioni,' c. 6. *ad fin.*) appear to mean that the court will enforce the terms of the *mortuum vadium*. Compare Dial. de Scac. lib. ii. c. 10; Somma, p. 54.

[4] An early instance of a Jewish gagee accounting for profits in reduction of

Glanvill's gage.

Then again (to return to Glanvill) the gage is given either 'for a term' or 'without a term.' In the former case we have another distinction. There may be an express bargain that, if at the fixed term the debtor does not pay, the creditor shall hold the gaged thing, be it land or chattel, for ever. In this instance the creditor has no need of a judgment to make the thing his own. Or there may be no such express bargain, and in that case the nature of the transaction is apparently this, that when the term has elapsed the creditor can sue the debtor and obtain a judgment which will order the debtor to pay the debt within some 'reasonable' time, and will declare that, should he make default, the gaged thing will belong to the creditor. If the gage be given 'without a term,' then, to all seeming, the creditor can at any time obtain a judgment which will order the debtor to pay within some fixed and 'reasonable' period, and will declare that if this be not done, the creditor may do what he pleases with the gaged thing[1]. It will be noticed that we have here something very like those 'decrees of foreclosure' which courts of equity will make in much later days.

Disappearance of the Glanvillian gage.

But of the practice described by Glanvill we know exceedingly little; it is not the root of our classical law of mortgage, which starts from the conditional feoffment[2]. It seems to have soon become antiquated and the cause of its obsolescence is not far to seek. The gagee of Glanvill's day is put into possession of the land. Unless the gagor has put the gagee into possession, the king's court will pay no heed to the would-be gage. It will be one of those mere 'private conventions' which that court does not enforce[3]. So the gagee must be put into [p. 120] possession. His possession is called a seisin, a *seisina ut de vadio*[4]. For all, this, however, it is unprotected. If a stranger

the debt is found on the Pipe Roll of 10 Ric. I.: see Madox, Formulare, No. 142. See also the very interesting transaction in Round, Ancient Charters, p. 93.

[1] Glanvill, x. 8: compare Ancienne coutume, c. 111 (ed. de Gruchy, p. 269); Somma, p. 277.

[2] Glanvill, it will be seen, gives the creditor something that is not very unlike an 'equity of redemption': that is to say, there are forms of gage which compel the creditor to go to court before he can become owner of the gaged thing, and the court will give the debtor a day for payment. For this purpose the gagee has a writ calling upon the debtor to 'acquit' the gage (Glanvill, x. 7). We can not find this writ even in the earliest Registers.

[3] Glanvill, x. 8.

[4] Glanvill, xiii. 28.

casts the gagee out, it is the gagor who has the assize. But more; if the gagor casts the gagee out, the gagee can not recover the land. The reason given for this is very strange:—What the creditor is really entitled to is the debt, not the land. If he comes into court he must come to ask for that to which he is entitled. If he obtains a judgment for his debt, he has obtained the only judgment to which he has any right[1].

Position of the Glanvillian gagee.

Now, if a court of law could always compel a debtor to pay his debt, there would be sound sense in this argument. Why should the court give a man a security for money when it can give him the money? But a court can not always compel a debtor to pay his debt, and the only means of compulsion that a court of the twelfth century could use for such a purpose were feeble and defective. Thus the debtor of Glanvill's day could to all appearance reduce his gagee from the position of a secured to that of an unsecured creditor by the simple process of ejecting him from the gaged land. Such a state of things can have been but temporary. The justices were learning to use those new instruments, the possessory actions, and they may have been distracted by foreign theories of possession. They did not well know whether the gagee's seisin was really a seisin or no[2].

Later law.

Soon after this English law seems to abandon the attempt to treat the rights of the gagee in the land as rights of a peculiar character. If he is to have any right of any sort or kind in the land, he must take his place in some category of tenants. He must be tenant for years, or for life, or in fee. In the first case he will obtain his rights under a demise for years and will have the termor's remedies. In the other cases he must be enfeoffed and he will have the freeholder's remedies.

[p. 121] The gage for years and the beneficial lease.

Now in our records it is not always easy to mark off the gage for years from those beneficial leases of which we have

[1] Glanvill, x. 11.

[2] If it be urged that Roman law would have taught them that the creditor with a *pignus* has possession, the reply is that the Roman law of the Italian glossators would have taught them the reverse. At all events Placentinus denied the creditor possession: Savigny, Besitz, § 24; Bruns, Recht des Besitzes, p. 106. Bracton, f. 268, follows this lead; the usufructuary (termor) and the creditor do not possess.

spoken above[1]. Both of them will serve much the same purpose, that of restoring to a man a sum of money which he has placed at the disposal of another, though in the case of the beneficial lease there is nothing that can be called a debt. As already said the beneficial lease was common[2]. It was particularly useful because it avoided the scandal of usury. There was no usury, because there was no debt; and yet the terms of the lease might be such as to provide that the money paid for it by the lessee should be returned to him out of the profits of the land with handsome interest.

The Bractonian gage for years.

But the true gage for years is a different thing:—In consideration of money lent, *A* demises land to *X* for a term of years, and there is a provision that, if at the end of that term *A* does not pay the debt, then *X* is to hold the land in fee. This seems to have been the usual gage of Bracton's day. It gives the gagee a term of years which, on the fulfilment of a certain condition, becomes a fee; the condition is that at the end of the term default is made in payment of the debt. During the term the gagee is entitled to have, and usually has, that sort of possession or seisin of the land that a termor can have, while the gagor remains seised in fee; but, on the fulfilment of the condition, the fee shifts to the gagee, and his possession or seisin becomes a seisin in fee[3]. The lawyers as yet see nothing shocking in this, because 'demise' and 'feoffment' both belong to the great genus 'gift' and they have a deep reverence for the *forma donationis*: it can enlarge a term of years into a fee on the happening of a certain event, or reduce a fee to a term of years on the fulfilment of a condition[4].

The classical mortgage.

At a later time straiter notions prevail. In substance the termor has become as well protected as the freeholder is; freeholders indeed begin to wish that they had the termor's remedies. But the age which sees this, sees the lawyers deepening the theoretic gulf which lies between the 'mere [p. 122]

[1] See, *e.g.* Note Book, pl. 50, 370, 1140, 1770. The transaction that is called an *invadiatio* seems in some cases to be a beneficial lease. See Kemble, Cod. Dip. 924 (iv. 263) for an early instance of this kind.

[2] See above, vol. ii. p. 111.

[3] Bracton, f. 20, 268–9; Britton, ii. 125–9; Madox, Formulare, No. 503; Cart. Guisborough, p. 144; Note Book, pl. 889. Variants on this form may be found in Madox, Formulare, No. 230; Chron. de Melsa, i. 303; Round, Ancient Charters, No. 56. It appears in Y. B. 21–2 Edw. I. p. 125.

[4] Bracton, f. 268 b.

chattel' and the freehold. They begin to see great difficulties in the way of a transaction whereby a man obtains a term of years which will swell into a fee so soon as something is or is not done[1]. The mortgage of our classical common law employs a different machinery. The debtor enfeoffs the creditor and his heirs upon condition that, if upon a certain day the debt be paid, then the feoffor or his heirs may re-enter and hold the land[2].

The mortgagee in possession.

The gage, whatever form it took, could be effected without deed. In the thirteenth century it is not uncommon to find a dispute as to whether or no there has been a gage, and yet neither disputant produces a charter[3]. We believe that as a general rule the gagee, or at least the Christian gagee, not only took but kept possession. It was only by taking the profits of the land that he could get anything in the nature of interest for his money. Perhaps he sometimes redemised the land to the gagor. Thus the Abbot of Meaux in consideration of 800 marks demised a manor to William and Andrew Hamelton for twenty years without rent; they redemised to the Abbot for nineteen years at a rent of £100 and covenanted that their gage should come to an end when they had received by way of rent the capital sum that they had advanced[4]. We may see Isaac the Jew of Northampton demising the gaged land to the gagor's wife at a rent which is to go in reduction of the debt due from her husband[5]. But the Jew in these matters was a highly privileged person, privileged because what belonged to him belonged potentially to the king. Certainly the Jewish gagee was not always in possession, and it seems possible that, under the system of registration which had been introduced in Richard's reign, a valid gage could be given to him, though

[1] See the long discussion in Co. Lit. 216–8. The thirteenth century lawyers have hardly come in sight of the difficulty. See Fitz. Abr. *Feffements*, pl. 119.

[2] It is very possible that this form of gage, the conditional feoffment, had been in use from an early time, but that the text-writers found little to say of it, because it fell under the general doctrine of conditional gifts.

[3] See *e.g.* Y. B. 30–1 Edw. I. p. 210, where the gagee has a charter testifying an absolute feoffment, but the gagor establishes a condition by the country.

[4] Chron. de Melsa, ii. 183 (A.D. 1286).

[5] Madox, Formulare, p. xxii., from a chirograph of 1207 or thereabouts. Madox mentions this among demises 'which appear pretty singular.' See also Round, Ancient Charters, No. 56.

the gagor never went out of possession for a moment. Very early in the thirteenth century we may see an abbot searching [p. 123] the register, or rather the chest, of Jewish mortgages at York in quite modern fashion[1]. A little later an abbot of the same house, when buying land, has to buy up many incumbrances that have been given to Jews, but has difficulty in doing so because some of them have been transferred[2]. The debts due to Israelites were by the king's licence freely bought and sold when as yet there was no other traffic in obligations[3]. We may guess that, if the Jews had not been expelled from England, the clumsy mortgage by way of conditional conveyance would have given way before a simpler method of securing debts, and would not still be incumbering our modern law.

§ 6. *Incorporeal Things.*

Incorporeal things.

The realm of medieval law is rich with incorporeal things. Any permanent right which is of a transferable nature, at all events if it has what we may call a territorial ambit, is thought of as a thing that is very like a piece of land. Just because it is a thing, it is transferable. This is no fiction invented by speculative jurists. For the popular mind these things are things. The lawyer's business is not to make them things but to point out that they are incorporeal. The layman who wishes to convey the advowson of a church will say that he conveys the church; it is for Bracton to explain to him that what he means to transfer is not that structure of wood and stone which belongs to God and the saints, but a thing incorporeal, as incorporeal as his own soul or the *anima mundi*[4].

Their thinglikeness.

A complete list of incorporeal things would be long and miscellaneous. Blackstone's list may serve us as a starting point. 'Incorporeal hereditaments are principally of ten sorts; 'advowsons, tithes, commons, ways, offices, dignities, franchises, 'corodies or pensions, annuities and rents[5].' Now with such a

[1] Chron. de Melsa, i. 377. [2] Ibid. ii. 115.

[3] Curia Regis Rolls (Rec. Office), No. 115, m. 10 (18–9 Hen. III.). Complaints are made against Robert Passelew, justice of the Jews. The 'ark' has been tampered with; 'pedes quorundam cyrographorum exposita fuerunt venalia apud Weschep per garciones ipsius Roberti.'

[4] Bracton, f. 53; f. 10 b. [5] Comment. ii. 21.

catalogue before us, one which puts the 'way' next to the [p. 124] 'office,' it would be only too easy for us to digress into remote fields of legal history, to raise once more that eternal question about the origin of tithes and then to wander off to pasture rights and the village community. If we are to keep our discussion of these things within reasonable bounds it must be devoted to that quality which they have in common. To describe that quality such terms as 'real' and 'reality' are too feeble; we must be suffered to use 'thinglike' and 'thinglikeness.' They are thinglike rights and their thinglikeness is of their very essence[1].

The seignory as a thing.

We may begin by observing that the line between the corporeal and the incorporeal thing is by no means so clear in medieval law as we might have expected it to be, could we not remember that even our modern institutional writers have shown some uncertainty as to its whereabouts[2]. We must return to the case in which a lord has a freehold tenant and that tenant has been duly performing his services. How shall we describe this lord's position? Shall we say that he is seised of the tenant's homage and fealty and services, or shall we say that he is seised of the land? We may take whichever course we please; but if we say that he is seised of the land, we ought to add that he is seised of it, not in demesne, but in service[3]. On the other hand, if we say that he is seised of services, we must understand that these services are a thing, and a thing that is exceedingly like an acre of land. This we shall understand the better if we give a few words to (1) the means by which the lord's rights are enforced against his tenant, (2) the means by which they are protected against the world at large, (3) the means by which they can be transferred.

Rights of lord against tenant.

(1) The tenant will not perform his services; they are in arrear. The lord can distrain him; but distress is not always a safe or easy remedy, more especially if there is reason to fear that the tenant will deny his liability. The lord must have an action. He has an action: the writ of customs and services

[1] See Heusler's treatment of the incorporeal things of German law (Institutionen, i. 329). Almost every item in our English list has its parallel in Germany. We have to envy our neighbours such a word as *Dinglichkeit*.

[2] Joshua Williams, for example, treated 'reversions and remainders' in land as incorporeal things; and this treatment is inevitable if we say that whatever 'lay in grant' was an incorporeal thing.

[3] See above, vol. i. p. 233; vol. ii. p. 38.

(*de consuetudinibus et servitiis*)[1]. It is an action of the 'realest' [p. 125] kind, closely similar to the proprietary action for land that is begun by the writ of right. The lord—we will suppose that he can not rely upon a recent seisin—will have to say that some ancestor of his was seised of these services as of fee and of right by taking esplees to such or such a value in rents or in pleas or the like. Then he will trace the descent to himself and then he will offer battle[2]. The tenant can accept this offer or he can put himself upon the grand assize. Should the lord be victorious, he will 'recover his seisin' of the services[3]. In the thirteenth century the lord has often to use this cumbrous and dilatory, because proprietary, action. But he enjoys possessory protection even as against his tenant. If once this lord has been seised of this tenant's services, this tenant can be guilty of disseising this lord. Mere default in render of services will not be a disseisin, but the tenant will probably become a disseisor if he resists the lord's distraint, and he will certainly be such if he without coercion renders the services to an adverse claimant[4]. Whether in the latter case he will not also be forfeiting his tenancy, that is another question which he should seriously consider[5]; in the past he would have left himself open to a charge of 'felony[6].' But at any rate he is a disseisor. The lord will bring against him an assize of novel disseisin. The writ will be word for word the same as that which a man brings when he is ejected from the occupation of land. It will report how the plaintiff alleges that he has been disseised of 'his free tenement' in such a vill, and only at a later stage will come the explanation that the thing to be recovered is, not so many acres of land, but so many shillingsworth of rent.

Contract between lord and tenant.

We have here no enforcement of an obligation; we have the recovery of a thing. Of course between lord and tenant there often is an obligation of the most sacred kind, that begotten by homage and fealty; a breach of it has borne the name of felony. The tenant will often have sworn to do these services. Nevertheless, the idea of a personal obligation or contract plays but

[1] Glanvill, ix. 9; Bracton, f. 329; for numerous instances see Note Book, vol. i. p. 177.

[2] See *e.g.* Note Book, pl. 895, 1738. [3] Note Book, pl. 960.

[4] Bracton, f. 169, 203; Note Book, pl. 1239; Britton, i. 281, 290.

[5] Bracton, f. 203 b; Note Book, pl. 109.

[6] Note Book, pl. 1687.

[p. 126] a subordinate part in the relation between lord and tenant. We see this when we say that as a general rule that relation never gives rise to an action of debt. We shall hereafter raise the question whether the action of debt was contractual; but it seems to have had about it too strong a trait of personalness to be an appropriate action for the landlord. The landlord who demands the rent that is in arrear is not seeking to enforce a contract, he is seeking to recover a thing[1].

Rights of lord against the world.

(2) After all that has been said, it will be needless to repeat that the lord has rights which are good against the world at large. He is entitled to a thing with which other people ought not to meddle. True that an ejectment of his freehold tenant is no disseisin to him; it is no invasion of his right, it is an invasion of the tenant's right, and the disseisor will find that the seignory is subsisting when his cattle are taken because the land owes rent or other services. But suppose that we have *A* as the well entitled lord and *M* as his tenant, and that *X* has succeeded in obtaining from *M* those services that are due to *A*; then *X* is detaining a thing that belongs to *A*. It may be that *A* will have to bring a proprietary action by writ of right. Litigation between great lords is often carried on, if we may so speak, over the heads of their freehold tenants. This fact is sometimes obscured from view by the convenient term 'manor.' We may find *A* demanding from *X* a manor, just as though it were a physical object like a field, and yet there may well be freehold tenants of this manor, and neither *A* nor *X* is asserting any right to disturb them; the suit passes over their heads[2]. What is more, *A* will say that some ancestor of his was seised in demesne of this manor. He will not thereby mean that at the time of which he

[1] Very grudgingly our law in later days allowed an action of debt for rent due from a freeholder in some cases in which there was no other remedy; see *Ognel's Case*, 4 Coke's Reports, 48 b; Co. Lit. 47 a; Blackstone, Comment. iii. 231, and (for the doctrine has been important even in recent years) *Thomas* v. *Sylvester*, L. R. 8 Q. B. 368; *In re Blackburn etc. Society*, 42 Ch. Div. 343. See also Cyprian Williams, Incidence of Rent, Harv. L. R. xi. 1. and L. Q. R. xiii. 288. Even the action of debt against the termor, which became common, seems rare in Bracton's day. As early as 1225, Note Book, pl. 946, it is brought after the term has expired.

[2] When a writ of right for land is brought against *X* and he wishes to plead non-tenure, *i.e.* to escape from the action by alleging that he does not hold the land, he has to say that he holds it neither in demesne nor in service. Bracton, f. 433; Note Book, pl. 102, 1067, 1164.

speaks there were no freeholders, and that his ancestor held every parcel of the land in demesne; he will mean that of this [p. 127] composite thing, the manor taken as a whole, his ancestor had an immediate seisin; he held the whole manor in demesne, though of some parcels of the land which are within the precincts of the manor he was seised in service[1]. The county palatine of Chester[2], nay, for the matter of that, the kingdom of Scotland, can be demanded in a proprietary action, just as Blackacre can be demanded.

Seisin of services.

Very often, however, there is no need for a proprietary action, because the seisin of services is fully protected by possessory actions. It is protected by the same actions that protect a seisin of land. If *M* has hitherto been paying his rent to *A*, and is coerced by distress into paying it to *X*, then *A* has been disseised by *X* and can bring the assize of novel disseisin against *X* and recover his seisin[3]. If *M* has paid unwillingly, then he ought not to be made a party to the action; the litigation should go on over his head[4]. The wrong complained of is not in our modern phrase 'a malicious interference with contractual rights'; it is a disseisin, the ousting of another from that of which he is possessed. A possessory protection of a receipt of money-dues or other services naturally gives rise to far more difficulties than such as are incident to a possessory protection of those who sit upon land. Cases arise in which we have to say that *A* has a choice between behaving as one who has been disseised and behaving as one who is still seised; 'disseisin at election' becomes the title for an intricate chapter of law[5]. Nevertheless, a gallant attempt is made to press this thought through all obstacles:—a seisin of services, however it may have been obtained, ought to be protected.

Conveyance of seignory.

(3) Then as to the conveyance of the lord's rights, we have but to repeat once more[6] that the attornment of the tenant is an essential element in the transaction. Somehow or another a seisin of the thing that is to be conveyed must be transferred, and when that thing is the feudal superiority with

[1] See Littleton, sec. 587–9, which are full of instruction as to the sort of seisin and disseisin that there can be of that composite entity a 'manor.'

[2] Note Book, pl. 1227, 1273.

[3] Bracton, f. 203 b; Co. Lit. 323 b.

[4] Note Book, pl. 1239.

[5] Littleton, sec. 589.

[6] See above, vol. ii. p. 93.

its accompanying right to services, we can naturally say that [p. 128] there has been such a transfer when the occupier of the land has confessed that, instead of holding it under the grantor, he now holds it under the grantee[1].

Rents as things.

In the case that we have been discussing we see an incorporeal thing that is very closely implicated with a corporeal thing; to sunder the two is not easy. Now, starting from this point, we may notice various degrees of incorporeality This may seem a strange phrase, and yet it will serve to describe a phenomenon which deserves attention. Starting with the rent which is a service rendered by tenant to landlord, a rent which has been 'reserved' when the tenancy was created and is thought of as something which remains to the giver or lessor after he has made the gift or lease, we may pass by three steps to a rent or annuity which is quite unconnected with land.

Various kinds of rents.

In this country the one word *rent* (Lat. *redditus*) was used to cover several things which were of different kinds. In other countries such a rent as that of which we have been speaking, a rent payable by tenant to landlord, was generally known as *census*, *cens*, *zins*, while *redditus* or *rent* was reserved for those rents of which we are now to speak. In England the term *census*, though by no means unknown in old times, failed to gain a permanent place in the legal vocabulary. The tenurial rent was a *redditus*: to use a term which comes into use somewhat late in the day, it was 'rent service.' But there were other rents; we may call them 'non-tenurial,' there being no technical term which covers them all. These non-tenurial rents fall into two classes, for each of which in course of time lawyers invent a name. If the non-tenurial rent can be exacted by distress, it is a *rent charge*; if not, it is a *rent seck*, *redditus siccus*, a dry rent. Bracton knew these distinctions, though he had not the names that mark them in after ages[2].

[1] The word *feoffment* is sometimes applied to such a transaction even in formal pleadings. Northumberland Assize Rolls, p. 271: 'ipse feoffavit praedictum Johannem de servitio praedictorum tenementorum recipiendo per manus ipsius Angnetis.'

[2] Bracton, f. 203 b, after dealing with rent due from tenant to lord (*rent service*) says: 'Si autem sit redditus qui detur alicui ex tenemento...aut datur cum districtione (*rent charge*) vel sine (*rent seck*)...Si autem redditus sit proveniens ex camera (*personal annuity*)'.....The terms *rent service* and *rent charge* were already current in Edward I.'s day: Y. B. 33–5 Edw. I. p. 211, 352.

Non-tenurial rents.

A non-tenurial rent often comes into being by virtue of a [p. 129] grant. The holder of land imposes such a rent upon his land in favour of some other person. It may be a rent for life or a rent in fee. If he expressly concedes to the grantee a power of distress, there is a rent charge; otherwise there is a rent seck. The creation of a rent charge was by no means uncommon. The purchase of a rent was a favourite mode of investing money at a time when any receipt of interest for a loan was sinful, and a religious house would have many rents constituted in its favour by those whose piety or whose wealth fell short of a gift of land. Sometimes again a rent which had started by being a rent service would become a rent seck. Thus *A*, who has a rent-paying tenant *M*, may grant the rent to *X*, but continue to be *M*'s lord and retain for himself any other services that are due, together with the feudal casualties. In that case, when *M* has attorned himself to *X*, the rent will no longer be a rent service, it will no longer be due from tenant to lord, it will be a rent seck[1].

Rents charge as things.

Now these non-tenurial rents, whether they be rents charge or rents seck, are treated as things. They are exceedingly like rents service. Often in a record of litigation about a rent we can see nothing that tells us to what class that rent belongs. Two people are disputing about the title to an existing rent; nothing is said about its origin; the person who will have to pay it, the 'terre tenant,' the occupant of the land, is no party to the action. The 'thinglikeness' of the rent charge may not surprise us, for in one most important respect it resembles the rent service:—it carries with it the power to distrain, and this power manifests itself in a procedure that attacks the land. Into the land the rent-owner enters; he takes the chattels that are found there; they may or may not be the chattels of the tenant; they are on the burdened land and that is enough. In such a case it is easy for us to picture the rent 'issuing out of' the land and incumbering the land. The thinglikeness of a rent seck is therefore a more striking phenomenon. This right does not empower him who has it to make any attack upon the land by way of distress. The most that he is entitled to do to the land is to enter on it for the purpose of demanding payment of his rent. And yet the rent seck is very truly a thing.

[1] Littleton, sec. 225.

Rents owed by the land.

(1) In the first place the governing idea is that the land is bound to pay the rent, and it is by no means necessary to the [p. 130] existence of the rent that any person should be bound to pay it. In later days the creator of a rent seck or rent charge was in general personally bound to pay it, and, if he had expressly bound his heirs to pay it, then his heirs were bound; but it was always open to the creator of a rent to exclude this personal liability[1]. The personal liability was enforced by an action of annuity, an action in which the plaintiff demanded the arrears of an annual rent that was due to him. But this action is by no means one of our oldest. If we mistake not, it was very new when Bracton was writing[2]. To the last, protection by this writ is not of the essence of a valid rent; there often may be a rent which no person is bound to pay. Of course, if we must be analytic, a payment is always made by a person and is never made by land, and if a payment is due some person must be bound to make it. But the terre tenant has only to pay the rent that becomes due while he is terre tenant. We may almost go the length of saying that the land pays it through his hand. The rent-owner's weapon against him is not a contractual action, it is an assize of novel disseisin. When the rent-owner has received an instalment of rent and the terre tenant refuses another, the rent-owner has been disseised of his free tenement in a certain vill. Another refusal to pay will make the tenant a redisseisor; he will be sent to gaol and will have to pay double damages[3].

The rent-owner's rights against the world.

(2) The assize of novel disseisin enables the rent-owner to coerce the tenant of the land into paying the rent as it becomes due. It also protects him as against the world at large in the enjoyment of his incorporeal thing. The rent is a thing about which there can be litigation between adverse claimants. One of them is possessed of it, the other claims possession and

[1] Littleton, sec. 220–1. See Cyprian Williams, The Incidence of Rent, Harv. L. R. xi. 1, and L. Q. R. iii. 288.

[2] The *breve de annuo redditu* is mentioned in Bracton, f. 203 b. We do not think that the Note Book supplies a single instance of it, unless pl. 52, which hovers between 'debt' and 'annuity,' be one. It seems to get into the Register late in Henry III.'s reign. Harv. L. R. iii. 173.

[3] Littleton, sec. 233 and Coke's comment. Heusler, Institutionen, i. 347, asserts the same principle for Germany. The rent-owner's action against the terre tenant is a real, not a contractual action. Its foundation is not 'dare mihi debes,' but 'malo ordine retines.'

perhaps alleges that he has been unlawfully disseised. Every sort of action that can be brought for the recovery of land can be brought for the recovery of rent; one has but to put in the writ ten shillingsworth of annual rent instead of ten acres of [p. 131] land[1]. Even a writ of entry can be used; there is not the least impropriety in saying that a man entered into a rent charge[2], or was ejected from it[3].

Creation and transfer of rents.

(3) Next we see that in order to create one of these non-tenurial rents a transaction that is closely akin to a livery of seisin is necessary. In the thirteenth century the execution and delivery of a deed is becoming an essential element in the transaction, and, since the creation of such rents can hardly be traced beyond the time when the use of sealed writings had become common, we may perhaps treat the requirement of a deed as aboriginal. Such a deed will be closely similar to a charter of feoffment; the creator or transferor of the rent will say, 'Know ye that I have given and granted a rent,' and very possibly the transaction is actually spoken of as a feoffment[4]. But the execution and delivery of the deed were not sufficient. If we suppose *A*, the tenant of the land, to be creating a rent in favour of *X*, the delivery of the deed may be enough to give *X* a power to distrain for the rent if the rent be a rent charge; but, in order to give him an action for a rent charge and in order to give him any remedy whatever for a rent seck, he must obtain a 'seisin in deed' of the rent. This will be given to him if *A* hands to him a penny or, it is said, any other valuable thing in name of seisin of the rent[5]. Next we suppose that the rent has been created, that *A* is still the terre tenant and that *X* wishes to convey the rent to *Y*. The mere execution and delivery of a deed will do nothing effectual. In order to give *Y* the power to distrain for the rent, which for the moment we suppose to be a rent charge, *A* must attorn to *Y*. But more than attornment—which may be made by mere words without act—is required if *Y* is to have an action for a rent charge or any means whatever of exacting a rent seck. The

[1] Littleton, sec. 236 and Coke's comment.

[2] See *e.g.* Y. B. 18 Edw. II. p. 588.

[3] Northumberland Assize Rolls, p. 151.

[4] See the model charter in Britton, i. 270. As to the use of the word *feoffment* see Pike, L. Q. R. v. 29-32.

[5] Littleton, sec. 235, 565.

terre tenant *A* must pay something to *Y* in name of seisin of the rent. The right is not completely transferred until there [p. 132] has been some act that can be regarded as a manual transfer of the thing[1].

Annuities as things.

We have been gradually leaving the land behind us. The rent service is part of a lordship over land; the rent charge authorizes a distress upon land similar to that which a landlord makes; the rent seck does not authorize a distress but still it 'issues out of,' it is owed by, land. One more step we must make, for we have yet to speak of rents that do not issue out of land. Of 'rents' we say. At a later time they will generally be called 'annuities,' 'personal annuities.' But let an action be brought for such an annuity, then in the precise language of pleading it will be called an annual rent, *annuus redditus*[2]. Such annuities were known in the thirteenth century, and it was allowed that they did not 'issue out of' land. Did they then issue out of nothing? No, that would have been inconceivable. A permanent right of this kind, a right to receive money year by year, could not exist unless it had some point of contact with the physical world; it must issue out of some thing. These annuities issue out of the grantor's 'chamber,' the place where he keeps what treasure he has[3]. To our eyes they are merely personal annuities, unsecured annuities; the grantee has nothing to trust to but the grantor's honesty and solvency. Still they are things, incorporeal things, and in the thirteenth century they must be thought of as having in some sort a visible fountain-head in the world of sense.

Annuities lose their thinglikeness.

Our materials give us but little information as to the treatment of these personal annuities by the law of Bracton's age. Probably the only things of this sort that were at all common were the corodies granted by religious houses, of which we must speak hereafter. But it was decided that the actions for land could not be made to serve for the recovery of these 'chamber rents.' The writ of novel disseisin was inapplicable,

[1] The great repertory of learning about the seisin of rents is *Bevill's Case*, 4 Coke's Reports, 8. The general rule is, 'As to an avowry [*i.e.* right to distrain], seisin in law is sufficient; but as to have an assize, actual seisin is requisite.'

[2] Reg. Brev. Orig. f. 158 b.

[3] Bracton, f. 180, 203 b; Note Book, pl. 52, 439. We find the writ of annuity called *Bref de rente de chambre*: Camb. Univ. MS. Ee. i. 1. f. 247 b. See also Brevia Placitata, ed. Turner, 31.

because there was no land of which a view could be given to the jurors. The grantor's chamber was no fixed place[1]. Therefore the person who is deforced of such a rent has not been disseised of his free tenement; therefore such a rent is not a [p. 133] tenement[2]. Late in Henry's reign an appropriate action, the writ of annuity, or rather of 'annual rent,' was given for their recovery. They fell apart from land, and in course of time they slowly assumed the guise of merely contractual rights; but in the earlier Year Books their thinglikeness is visible. For many reasons it was important for the annuitant that he should be able to allege a seisin of his annuity[3].

Corodies as things.

One class of annuities has an instructive history of its own. It consists of the corodies (*conredia*) granted by religious houses. In consideration, as we should say, of some benefit conferred, or some services done or to be done, a religious house undertakes to supply some man at stated intervals with victuals and clothes or other commodities. Sometimes he may be a distinguished canonist and the corody is his retaining fee. Sometimes one of the abbey's land agents, steward or woodward, is to be thus rewarded for his labours. Sometimes the king will exact a corody for one of his chancery clerks from a house of royal foundation. Sometimes a man will invest ready money in the purchase of a corody and thus provide for his old age. In many cases an elaborate document will be executed. The quantity and quality of the meat, drink, clothes, candles, firewood, that the grantee is to receive will be carefully defined; even the mustard and garlic will not be forgotten. Perhaps he will be entitled to the use of one of the convent's horses or to stabling for his own horse. Perhaps a room in the house must be found for the use of him or of his servants if he requires it[4].

Treatment of corodies.

In Bracton's day the temporal courts were leaving the corody alone. It was very like a rent seck. It 'issued out of' a fixed place, and in this respect it differed from the mere personal annuity which was supposed to issue from the grantor's 'chamber.' Such a chamber may be here to-day and

[1] Rot. Cart. p. 14: King John grants an annuity of forty marks 'to be received from our chamber until we assign them in some certain and competent place.'

[2] Bracton, f. 180, 203 b. Cf. Heusler, Institutionen, i. 343, as to the 'chamber rent' in Germany.

[3] See *e.g.* Y. B. 21–2 Edw. I. pp. 129, 541.

[4] The Winchcombe Landboc has many good specimens of corody deeds.

gone to-morrow, but the religious house is permanent. The corody, however, issued from a house which was on consecrated soil, a house which, to use Bracton's phrase, was *in bonis Dei*. Therefore it is a spiritual thing and its exaction must be left to the ecclesiastical court[1].

[p. 134] A new rule was introduced by statute in 1285[2]. A temporal action was given for the corody, and this action was the assize of novel disseisin. If an annual supply of victuals or other necessaries is to be received in some certain place, the right to receive it is to be treated like land. To us this treatment of what in our eyes is but the benefit of a contract may seem very awkward. It was deliberately chosen as the proper treatment by the great lawyers who surrounded King Edward. They might have given an action of annuity, of debt, of covenant; they gave an assize of novel disseisin; they told the man whose corody was in arrear to complain of an ejectment from his free tenement; they sent the jurors to view the monastery whence the corody issued. A better example of medieval realism could hardly be given.

Disseisin of corodies.

If rights that appear to us to be merely contractual are thus dealt with, we shall not be surprised to find that where the contractual element is wanting, incorporeal things are very easily created. If 'offices' are to fall within the pale of private law at all, if they are to be heritable and vendible, perhaps we can not do better than treat them as being very like pieces of land.

Offices as things.

The statute that we have just mentioned gave the assize of novel disseisin for 'the wardenship of woods, parks, chases, warrens and gates, and other bailiwicks and offices in fee.' Some have said that this was no innovation[3]. Be that as it may, at the end of the century the assize which protects the possessor of land seems the natural defence for the possession of an office, at all events if that office has a local sphere, if the jurors can be shown some place in which it has its home or its being. Our law is following in the wake of the canon law. The canonists have been carrying their doctrine of 'the possession of rights' into almost every province of jurisprudence.

[1] Bracton, f. 180.

[2] Stat. West. II. c. 25.

[3] Coke, Second Institute, 412; Coke, 8 Reports, 47. We have not found an assize for an office before the statute; but in 47 Hen. III. a *Praecipe quod reddat* was brought for the stewardship of a manor: Placit. Abbrev. 154.

By a famous decretal the Archbishop of York gained a possessory and provisional protection for the right, if right it were, of carrying his cross erect in the province of Canterbury; and in days when the two primates were hardly to be kept from [p. 135] fisticuffs, this *iuris quasi possessio* made for decency[1].

The advowson as a thing.

But we shall learn most about the thinglikeness of our incorporeal things if we turn to the advowson. The advowson is a thing of great value and importance, the subject-matter of frequent litigation and copious law. Generally[2] an advowson is the right to present a clerk to the bishop for institution as parson of some vacant church; the bishop is bound to institute this presented clerk or else must show one of some few good causes for a refusal. There can be little doubt that historically the patron's right has it origin in an ownership of the land upon which the church stands[3]. The law of the thirteenth century regards the advowson as being normally an appurtenance of some manor. Make a feoffment of the manor, and the advowson is conveyed. Disseise a man of the manor, and you become seised of the advowson. But advowsons are often severed from the manors to which, in legal theory, they have at some time or another belonged. The lord gives the manor but retains the advowson, or else he gives the advowson but retains the manor. The latter transaction is common; numerous advowsons are detached from their manors by being given to religious houses. An advowson thus detached becomes, to use a phrase which is current in the last years of the century, 'a gross,' that is, a thing by itself, a thing which has an independent existence[4].

Where is the advowson?

We may see Bracton struggling with the notion that such a right can not exist unless it exists somewhere. There must be some corporeal thing in which it inheres. It no longer inheres in a manor. It must inhere in the church itself, the structure of wood and stone. Every day advowsons are being taken into

[1] c. 1. X. 2. 16; Bruns, Recht des Besitzes, 208; Historians of the Church of York, iii. 73. The Abp. of York asserted that he had been despoiled 'de possessione huius rei.'

[2] Of collatives and donatives we need not here speak.

[3] See above our section on Corporations and Churches.

[4] The phrase 'this advowson is a gross' seems older than the to us more familiar 'it is in gross.' See *e.g.* Y. B. 21–2 Edw. I. p. 609. So too it was but slowly settled that an advowson is *appendant* rather than *appurtenant* to a manor. See Co. Lit. 121 b.

the king's hands; this is a common episode in litigation. The sheriff goes to the church and declares before witnesses that he seizes the advowson. The advowson must be there, in the church, or how could he seize it[1]? Still Bracton knows that the advowson is incorporeal, invisible, impalpable, and speaks with some pity of the layman who says that he gives a church when he means that he gives a right of patronage[2].

[p. 136] If, however, the advowson is incorporeal it is none the less a thing—a thing for the purposes of litigation, a thing for the purposes of conveyance. In the first place, there is a proprietary action for the recovery of the advowson, a writ of right of advowson, which is closely parallel to the writ of right for land; it leads to battle or the grand assize[3]. In the second place, there is definite possessory protection for the possessor of the advowson. This takes the form of an assize of darrein presentment (*de ultima presentatione*) which is almost, if not quite, as old as the analogous novel disseisin[4]. To apply the idea of seisin or possession to an advowson is not altogether easy. The only actual exercise that there can be of this right is a successful presentation. If you have presented the man who is now parson of the church, then it may well be said that, rightfully or wrongfully, you are seised of the advowson. But you can not exercise such a right just when you please, nor can you exercise it periodically. Now and again at longish intervals a man has a chance of showing that he is seised. Nevertheless, seisin there is, and it ought to be protected. The question addressed to the recognitors of the assize is this:—

Actions for advowsons.

> Who was the patron who in time of peace presented the last parson, who is now dead, to the church of Middleton, which is vacant, and the advowson whereof Alan claims against William?

The principle of law which lies at the root of this formula

[1] Bracton, f. 378 b.

[2] Bracton, f. 53; Note Book, pl. 1418. See c. 7. X. 3. 24 (Innocent III. to the Bp. of Ely).

[3] Glanvill, ii. 13; iv. 2; Note Book, vol. i. p. 178; Reg. Brev. Orig. f. 29 b. The classical writ of right of advowson is a *Praecipe quod reddat*, which at once brings the case before the king's court; but in an early Registrum a *breve de recto tenendo* addressed to the feudal lord may be found, though it is there called a rare writ. See Harv. L. R. iii. 170.

[4] Glanvill, xiii. 18; Bracton, f. 237 b; Summa, p. 265; see above, vol. i. p. 148.

seems simple. The person who, by himself or his ancestors, presented on the last occasion, ought to present upon this occasion also. But this principle is too simple, or rather, the formula that enshrines it is too rude. The jurors may be compelled to answer the question in favour of Alan, and yet William ought to prevail, even in a possessory action. For one thing, since the last presentation Alan may have granted the advowson of the church to William, and already in Glanvill's day such a grant will entitle the grantee to the next presentation[1]. But William, if he wishes to rely upon such a grant, must plead it by way of *exceptio* (special plea); if the original question be answered by the recognitors, Alan will succeed in his action and present a clerk. At a comparatively early time special pleas became common in this assize[2]. Probably it was for this reason that, while the novel disseisins and mort d'ancestors were disposed of in their proper counties by justices of assize, darrein presentments were reserved (except when there was a general eyre) for the justices of the bench[3]. For all this, however, the action was a purely possessory action. The defendant could not go behind the last presentation. The victor in to-day's assize may succumb to-morrow before a writ of right brought by the very adversary whom he has vanquished. [p. 137]

Conveyance of advowsons.

An advowson can be conveyed by one person to another. Often it passes from one person to another as appendant to a manor which is being conveyed. In such a case no deed is requisite; there will be a feoffment; seisin of the manor will be delivered, and, when the church next becomes vacant, the feoffee will be entitled to present; in the meantime he will have a seisin in law, a 'fictitious seisin.' But we have more concern with the case in which the advowson is to be conveyed by itself as 'a gross.' Probably in this case also, whatever could be done by deed could be done without deed. Late in the next century all the justices agree that in order to grant an advowson it is sufficient that the two parties shall go to the door of the church and that the grantor shall there speak the words of grant and deliver 'seisin of the door[4].' However, the common practice certainly was that a deed should be executed. But the

[1] Glanvill, xiii. 20. [2] Note Book, vol. i. p. 184.

[3] Charter of 1217, c. 15, amending Charter of 1215, c. 18.

[4] Y. B. 43 Edw. III. f. 1. (Hil. pl. 4); Pike, Livery of Incorporeal Things, L. Q. R. v. 35; Pollock and Wright, Possession, p. 54.

mere delivery of the deed can not be for all purposes a sufficient conveyance. In Bracton's eyes such a deed transfers a 'fictitious' or 'imaginary' seisin[1]. This is effectual for some purposes. We will suppose that Alan, who made the last presentment, has by deed granted the advowson to William. Now if the church falls vacant and William has not parted with the advowson, he will be entitled to present. Against an assize of darrein presentment brought by Alan he can protect himself by an exception. Further, he has himself an action which will enable him while the church is vacant to enforce his right against Alan or a third person. This is the *Quare impedit*, a possessory action invented for the sake of those who can not (and William can not) use the assize[2]. But we will suppose that, before the church falls vacant, William by a deed grants the advowson to Roger. Then the parson dies. Who is entitled to present? Four times over Bracton, with many references to decided cases, has given us the answer, and curious it is[3]. Alan is entitled to present. The 'quasi-possession,' the imaginary or fictitious seisin, that his deed gave to William was not transferable, and therefore Roger has got nothing. On the other hand, William has succeeded in depriving himself of whatever he had or seemed to have. The only real seisin is with Alan, and he is entitled to present. Until the grantee of an advowson has obtained an actual seisin by a successful presentment, he has nothing that he can give to another. [p. 138]

Seisin of advowsons.

But further, the grantee until he has successfully presented is in an extremely insecure position. The church falls vacant; he is entitled to present, and he can make good this right by means of the *Quare impedit*. But suppose that he does not seize this opportunity. Suppose that some mere wrong-doer presents and gets his clerk instituted. Then our grantee's rights are gone for ever. Of course he can have no possessory action, for seisin is now with the usurper. But he can have no proprietary action, for he can not allege—and this in a writ of right he would have to do—that either he or some ancestor of

[1] Bracton, f. 54, 55, 242-3, 246.

[2] Coke, Second Institute, 356, finds the *Quare impedit* in Glanvill; we can not see it there; but it appears very early in the thirteenth century and is common in the Note Book. See Bracton, f. 245.

[3] Bracton, f. 54, 54 b, 242 b, 243. Most of his cases are in the Note Book. The law is the same if the advowson has been given as appendant to a manor.

his has been seised with an exploited seisin. Such was the law until a statute of 1285 allowed him six months after the usurpation for his *Quare impedit;* but down to Queen Anne's day an usurpation followed by inaction for more than six months would utterly destroy his right[1].

Rights of common as things.

The same ideas are applied to other incorporeal things, more especially to those rights that are known as rights of common. If a feoffment is made of a piece of land to which a right of [p. 139] common belongs, the feoffee, says Bracton, at once acquires a fictitious seisin by viewing the ground over which the right of pasturage or the like extends[2]. It may be that he has at the moment no beasts to turn out; it may be that the season of the year during which the right is exercisable has not yet come. But he ought to take the first opportunity that occurs of converting this imaginary into a real seisin; if he lets that slip, he may well find that he can no longer turn out his beasts without being guilty of a disseisin[3]. To this we must add that, so long as his seisin is fictitious, he has nothing that he can convey to another. Such at all events is the case if the right of pasturage was granted to him 'as a gross[4].'

Possessory protection of rights of common.

Then again, there is a possessory protection for these incorporeal things. The novel disseisin for common of pasture is coeval with the novel disseisin for land[5]. The practice of Bracton's day was extending the same remedy to rights of turbary and fishery[6]. The Second Statute of Westminster sanctioned this extension and carried it further. The right to take wood, nuts, acorns is to be included, also the right to take toll and similar dues. The assize of novel disseisin is regarded as a most successful institution; the best method of enforcing these rights is to protect those who are seised of them[7].

Law of prescription.

Seisin itself is protected, seisin of the incorporeal thing. We see this best if we consider the modes in which the ownership of such a thing can be acquired. It can be acquired by inheritance; it can be acquired by conveyance,

[1] Bracton, *l.c.*; Stat. West. II. c. 5; 7 Anne, c. 18; Blackstone, Comment. iii. 243–4.

[2] Bracton, f. 225. [3] Bracton, f. 223 b. [4] Bracton, f. 225.

[5] Glanvill, xiii. 37; Harv. L. R. iii. p. 114. There are good illustrations in Mr Chadwyck-Healey's Somersetshire Pleas.

[6] Bracton, f. 231; Note Book, pl. 1194, 1915.

[7] Stat. West. II. c. 25; Second Institute, 411.

though, as we have just seen, the grantee has never got full and secure ownership until he has got possession, actual exploited possession; it can also be acquired by long-continued user. Of the effects of long-continued user Bracton speaks somewhat obscurely; his romanesque terms, *usucapio* and the like, perplex his doctrine[1]. We must, however, draw a marked line between [p. 140] land and incorporeal things. Our medieval law knows no acquisitive prescription for land; all it knows is a limitation of actions. This principle seems to be implicit in the form which every demand for land by proprietary action must take. The claimant must allege that he or some ancestor of his was seised as of right; he must deduce his title from a seisin that was rightful. He must not indeed 'plead higher up' than a certain limiting period. In Bracton's day he must allege a seisin as of right on this side of Henry II.'s coronation. That date will leave him a hundred years or thereabouts. He will have to tender a champion prepared to swear to this rightful seisin, as one who either saw it, or was enjoined to bear witness of it by a dying father[2]. Thus a limit is set to the action. Mere lapse of time may serve as a shield for the tenant, but it can not serve as a sword for the demandant. He can not say, 'I claim this land because my ancestors were seised of it for twenty, thirty, a hundred years.' He must begin with some ancestor who was seised as of right. But further, we may doubt whether for land there is any extinctive prescription. The man who can not allege a seisin on this side of Henry II.'s day has lost every action for the land; but it does not follow that his right is extinct. Hereafter it may prove its vitality, if this man, having obtained seisin under some new and defeasible title, is 'remitted' to the oldest title that he has. We can not say with certainty that this was so in Bracton's day; but at a later time 'it is commonly said that a right can not die[3]' and this we may well believe to be an old, as well as a common, saying.

Incorporeals acquired by prescription.

By way of contrast we may see that many incorporeal things can be acquired by prescription, by long-continued user[4]. In

[1] Bracton, f. 51 b, 52. When Bracton is speaking of this matter, it is not always easy to say whether he is dealing with the acquisition of good right or with the acquisition of protected seisin. He has a, to us misleading, habit of calling the short period which protects the disseisor against the self-help of the disseisee (it may be but four days) 'longum tempus,' 'longum intervallum,' etc.

[2] Bracton, f. 373; Note Book, pl. 1217. [3] Littleton, sec. 473.

[4] See Salmond, Essays in Jurisprudence, p. 99.

particular we may see this in the case of rights of common. There is an action by which the landowner calls upon the person who asserts such rights to prove his title, the action *Quo iure clamat communam*[1]. It is regarded as a thoroughly proprietary action; it may lead to a grand assize. Now one of the usual answers to this action is a prescriptive claim—'I and those whom I represent have commoned here—always—from before the Norman Conquest—from time immemorial.' In most cases the Norman Conquest is mentioned. Behind the great resettlement of the land one must not go; on the other hand one can, to all seeming, be required to allege a continuous seisin ever since that remote event[2]. [p. 141]

Possessory protection of an inchoate right.

This is a proprietary action; but it is fairly evident that a man can acquire a legally protected possession of an incorporeal thing on much easier terms. We put this case:—For some time past a man openly and peaceably, and as though asserting a right, has been turning his beasts out on my land; he may have been doing it for so long a time that I can no longer bring an assize against him as against one who has been disseising me of my land; still he can not assert a user that goes back nearly as far as the Conqueror's days. The question is whether this man is protected against my self-help. May I bar out his beasts from the pasture or seize them if they are there? To this question the answer that Bracton gives is that against self-help this man is protected. My proper course is to bring against him some more or less proprietary action. Possibly I may have to bring the *Quo iure*, and then there may be a grand assize. It is very possible that this man should one day 'recover the common' in an assize and the next day be made a defendant in a proprietary action which will deprive him of the common for good and all[3]. This idea of a purely possessory protection for those who are enjoying 'incorporeal things,' but who can not yet

[1] Bracton, f. 229 b; Note Book, i. 185.

[2] Note Book, pl. 223, 274, 392, 628, 971, 1624. In pl. 818 (A.D. 1293) the assertion 'Seised since the Conquest' is met by 'No, seised only since the war of 1216.' In pl. 135 the defendant only goes back to Henry II.'s day. In pl. 843 a way is claimed by user since the Conquest.

[3] Bracton, f. 230: 'Cum igitur quis per iudicium seisinam suam recuperaverit per assisam propter usum, amittere debet illam, nisi doceat *quo iure* illam exigat.' So on f. 52 b, a man by continuous user obtains possession of a servitude 'ita quod taliter utens sine brevi et iudicio eici non debet.'

say that those things are their own, is one that can not be easily managed. We seem to have before us a pasture right that is only half a right, an incorporeal thing that exists and yet does not exist[1]. But the lawyers of the thirteenth century made a strenuous endeavour to pursue this idea through all speculative difficulties[2].

[p. 142] It is by no means certain that both prescription and the possessory protection of inchoate 'things' were not extended to 'things' which in our eyes consist wholly or in part of the benefit of a contractual obligation. In the Year Book period it is possible to prescribe for rents, and the courts seem to be engaged rather in setting new limits to this doctrine than to widening its scope. One ecclesiastical corporation is allowed to prescribe against another for a mere personal annuity. In 1375 the judges draw a line at this point; they will not hold that a natural person can be bound to pay an annuity merely because from time immemorial his ancestors have paid it[3]. We have but little evidence as to the opinions which the lawyers of Henry III.'s reign held about this matter; but the canonical influence was making for the widest extension both of the sphere of prescription and of the possessory protection of inchoate things[4]; and English law would take little account of the canonist's requirement of *bona fides*. Certainly it was very dangerous for any man to make any payment which could possibly be construed as being made in discharge of a permanent duty, unless he wished to go on making similar payments at periodical intervals to the end of time. You should never attend the county court unless you want to attend it every month, for you will be giving the king and his sheriff the seisin of 'a suit.' But in this region it is not very easy to distinguish between what we may call the generative and the merely evidentiary effects of seisin.

Can annuities be prescribed for?

[1] See Pollock, First Book of Jurisprudence, 184.

[2] We have been dealing with a case which in Holmes, Common Law, 241, 384, is rightly treated as a good test of the so-called 'possession of rights,' and we believe that, if this test is applied to the law of Bracton's age, the result is that an user which falls far short of establishing an indefeasible right obtains a possessory protection.

[3] Y. B. 49 Edw. III. f. 5 (Hil. pl. 9).

[4] Bruns, Recht des Besitzes, p. 123: Azo, as advocate in a cause, argued that there could be no possession of a rent until that rent (which had not been created in any other way) had been created by prescription; but the great canonist Huguccio, who was acting as judge, overruled this argument.

Even when seisin does not beget a right, it will often be good evidence that the right exists.

Prescription for franchises.

How far prescription can be carried in another direction, that in which the 'franchises' lie, was a burning question. The royal lawyers were asserting that the franchises, or at all events such of them as had to do with the administration of justice, could not be gained by continuous user[1]. As regards these, *Nullum tempus occurrit Regi.* They can only be acquired by express grant; a grant will be construed in a manner favourable to the king; if once acquired they are inalienable[2]; they are very easily lost. The man who has the franchise of [p. 143] *utfangthief*, for example, must be vigilant in acquiring and retaining a seisin thereof[3]; if he lets the sheriff hang even one thief who is within the terms of the privilege, he will have forfeited that privilege by non-user and will have to repurchase it by a fine. Edward I was forced to make concessions in this quarter[4]; many of the franchises, even many of the justiciary franchises, became prescriptible; but so long as they were of any real importance there were frequent debates about this matter.

Appurtenances.

Many of the incorporeal things inhere in corporeal things; indeed the notion that they can exist by themselves, that they can exist 'in gross' or 'as a gross' has had difficulties to encounter. Where can the advowson be, if it is not inherent in a manor[5]? A tract of land has rights pertaining to it; they are as much a part of it as the trees that grow out of it and the houses that are built upon it. In a charter of feoffment it is not usual to describe these rights; to say that the land has been conveyed *cum pertinentiis* is quite enough, and very probably even this phrase is needless. Occasionally however we may come upon a copious stream of 'general words.' One example may suffice. Just about the time of Edward I.'s accession the Abbot of Ramsey purchased a manor from Berengar le Moigne for the very large sum of £1666. 13*s.* 4*d.* (this instance of a great sale for ready money

[1] Bracton, f. 56; Select Pleas in Manorial Courts (Selden Soc.), p. xxiv.

[2] Note Book, pl. 1271–2.

[3] Ann. Tewkesbur. p. 511: An amusing and spirited story tells of the difficulties that the abbot had to meet before he could hang John Milksop, it being doubtful whether the right had not been lost by non-user.

[4] Select Pleas in Manorial Courts, p. lxxvii.

[5] See above, vol. ii. p. 136.

is remarkable), and it was conveyed to him 'with the homages, rents, services, wardships, reliefs, escheats, buildings, walls, banks, in whatsoever manner constructed or made, cultivated and uncultivated lands, meadows, leys, pastures, gardens, vineyards, vivaries, ponds, mills, hedges, ways, paths, copses, and with the villeins, their chattels, progeny and customs, and all that may fall in from the said villeins, merchets, gersums, leyrwites, heriots, fines for land and works, and with all easements and commodities within the vill and without[1].' A manor is a highly complex and organized aggregate of corporeal and incorporeal things. This aggregate may be broken up, but, while it remains intact, the thought that it is a single [p. 144] thing is maintained with consistency, even in favour of a violent wrong-doer. You are seised of a manor to which an advowson belongs; I disseise you of that manor; if the church falls vacant before you have recovered the manor, it will be for me, not for you, to present a clerk[2].

Easements and profits.

One large class of incorporeal things consists of rights to be exercised *in alieno solo.* Normally these inhere in a dominant tenement; but our law does not deny the possibility of their existing as 'grosses[3].' It is as yet vaguely liberal about these matters. It does not make any exhaustive list of the only 'praedial servitudes' that there can be. Men are very free to strike what bargains they please, and the result of such a bargain will be, not an enforceable contract, but the creation and grant of an incorporeal thing. The most elaborate and carefully worded of the private documents that have come down to us are those which create or regulate pasture rights and rights of way. Our law seems to look at these rights from the stand-point of the person who enjoys them, not from that of the person who suffers by their exercise. They are not 'servitudes,' they are 'easements,' 'profits,' 'commodities[4].' A distinction is being established between the 'easement' which does not authorize one to take anything, and the 'profit' that

[1] Cart. Rams. ii. 339.

[2] Bracton, f. 243 b; Note Book, pl. 49; Holmes, Common Law, pp. 382–6.

[3] In Bracton's exposition the rights in gross fall into the background, though they are visible. He likes to speak of 'servitudes,' 'dominant and servient tenements,' and so forth. The common in gross he will hardly call common, it is rather a right of 'herbage.'

[4] Note Book, pl. 720 (A.D. 1225): 'asiamentum de aqua de Pittes.'

authorizes a taking; the typical instance of the one is the right of way, of the other the right to take grass 'by the mouths of one's cattle.' The term common (*communa*) is not confined to cases in which many neighbours have a right to some profit, by fishing, taking turf, depasturing cattle, on the soil of their lord, though it may be that the term has its origin in cases of this sort. You may grant to me 'common of pasture' in your soil, and I may be your one commoner, and it is by no means essential that you should be my lord. Such grants were not unusual and very often they defined with minute particularity the number of beasts that might be turned out and the other terms of the bargain[1]. Nor is it very rare to find the grant of a right to take wood; this is often limited to such wood [p. 145] as may be requisite for the repair or the warming of a certain house or the maintenance of fences on a certain tract of land[2]. The yet feeble law of contract is supplemented by a generous liberality in the creation of incorporeal things. The man of the thirteenth century does not say, 'I agree that you may have so many trees out of my copse in every year,' he says, 'I give and grant you so much wood[3].' The main needs of the agricultural economy of the age can be met in this manner without the creation of any personal obligations.

Liberty and serfage as things.

'Liberty,' again, and 'serfship' can be treated as things of which there is possession or seisin[4]. The lord of a villein owns a corporeal thing and ought to be seised of it, and in the thirteenth century, though a feoffment of a 'manor' will transfer the ownership of men as well as of other things, still in an action for reducing a man to villeinage, the would-be lord claims that man as a thing by itself and seldom, if ever, makes any mention of manor or land. 'My grandfather,' he will say, 'was seised of your grandfather as of his villein, and took esplees of him as by taking merchet from him, tallaging him high and low and making him reeve,' and then the descent of the right and the transmission of the villein blood will be

[1] The Meaux chronicle (Chron. de Melsa) has much about rights of way and of pasture.

[2] Winchcombe Landboc, p. 81: 'husbote et heibote et huswerminge.'

[3] Sometimes the language of the charter is curiously materialistic; *e.g.* Winchcombe Landboc, p. 205: 'I have granted you twelve beasts in my pasture'; this means—'I have granted you a right to turn out twelve beasts in my pasture.'

[4] See above, vol. i. p. 417.

traced step by step. But the lord is only driven to this proprietary pleading if the man whom he claims is 'in seisin of liberty.' This seisin of liberty the villein may somewhat readily gain, if he has the courage to flee. Apparently the lapse of four days will preclude his lord from self-help. After that, he may not seize the body of the fugitive, unless he has returned to 'his villein nest,' nor may the chattels of the fugitive be taken, since they can for this purpose be regarded as appurtenances of his body, and when one loses seisin of the principal thing, one loses seisin of its appurtenances. On the other hand, a man who is free *de iure* may be a villein *de facto*. Until by flight or litigation he destroys this *de facto* relationship, he can, it would [p. 146] seem, be lawfully treated as a villein, be tallaged, for example, or set in the stocks[1].

The marital relationship and possessory protection.

But even to the conjugal relationship the idea of seisin is extended. Possibly we might expect that a husband would be seised of his wife; but, as a matter of fact, we more commonly read in our English records of a wife being seised of her husband. The canon law in its desire to suppress sin has made marriage exceedingly easy; no nuptial ceremony is necessary. The result is that many *de facto* marriages are of doubtful validity, since it is only too possible that one of the parties has some more legitimate spouse. The canon law has been constrained to divide the *possessorium* from the *petitorium*. I can be compelled to live with my *de facto* wife until by reason of an earlier marriage, or of consanguinity, or the like, I have obtained a divorce from her[2]. With this our temporal law is not concerned; but it is by no means improbable that, when a man dies, two women will claim dower, and that one of the would-be widows will put forward a definitely possessory claim: 'I was seised of this man when he died as of a lawful husband; possession of one-third of his lands should be awarded to me, and when I have got that, then let this lady assert her proprietary rights[3].' The position of defendant is coveted and medieval judges will not decide a question of best right if they can help it.

[1] The attempt to treat the villein himself as an 'incorporeal hereditament' belongs to a later age.

[2] Bruns, Recht des Besitzes, 191.

[3] Note Book, pl. 642, 1142 ('seisinam habuit de corpore ipsius Thoraldi antequam traditum esset sepulturae'), 1564, 1597, 1703; Bracton, f. 306.

Wardships as things.

The guardian can and ought to be seised of the body of the ward, and the seisin of a *de facto* guardian is protected against the self-help of a more rightful claimant. As to the wardship of land, this is treated as an incorporeal thing which is distinct from the land. One may, rightfully or wrongfully, have possession of this *custodia*, but this will not give one a seisin of the land. For testamentary purposes the *custodia* is an incorporeal chattel.

Landlikeness of the incorporeals.

For the more part, however, our incorporeal things are conceived as being very like pieces of land. Gradually a word is being told off to express this similarity. That word is 'tenements.' Unless we are mistaken, that word first came into use for the purpose of comprising meadows, pastures, woods and wastes, for at an early time the word *terra* will [p. 147] hardly cover more than the arable land[1]. But *tenementum* will also comprise any incorporeal thing which can be holden by one man of another. Thus in particular it will comprise an advowson, even when that advowson exists 'in gross,' for it will be held of the king or of some mesne lord. Probably the advowson 'in gross' was generally held by frankalmoin, since it was chiefly for the benefit of religious houses that advowsons were severed from their manors; but it might be held by knight's service[2]. Then, as the assize of novel disseisin was extended to one class of incorporeal things after another, the term 'tenements' was extended to things that were not holden of another person, for the writ of assize always supposed that the plaintiff had been disseised 'of his free tenement' in a certain vill. Thus, for example, rents charge, rents seck, rights of common, become tenements. Statutes of Edward I.'s day gave the word a sharper edge[3]. On the whole the analogy is persistently pursued; the incorporeal thing as regards proprietary and

[1] In writs and other legal documents of the thirteenth century *terra* is constantly used in the narrow sense; *e.g.* a demandant claims 'xx. acras terrae et v. acras prati.' Y. B. 33-5 Edw. I. p. 149: meadow can not be demanded as 'land.'

[2] See Co. Lit. 85 a.

[3] In particular Stat. Westm. II. c. 1 *de donis conditionalibus*, and c. 24 extending the scope of the novel disseisin. Under the influence of the first of these chapters the word 'tenement' becomes more metaphysical. It becomes possible to say that a termor has no tenement because he has nothing that he can entail. See above p. 117, note 3. This is a spiritualizing doctrine; the first tenement was of the earth earthy.

possessory remedies, as regards conveyance, as regards succession, as regards the 'estates' that may exist in it, shall be made as like an acre of land as the law can make it. The mere personal or unsecured annuity, when it is no longer conceived as a 'cameral rent,' falls apart from the other incorporeal things; its contractual nature becomes more and more apparent. It is like land for the purposes of succession on death, but not for other purposes; in the language of a later time it is a 'hereditament' but no 'tenement.' That land should have been the model after which these things were fashioned, will not surprise us, when we have turned, as now we must, from the rich land-law to the poor and backward law of movable goods; but we [p. 148] can not leave behind us the law of incorporeal things, the most medieval part of medieval law, without a word of admiration for the daring fancy that created it, a fancy that was not afraid of the grotesque.

§ 7. *Movable Goods.*

Ownership and possession of chattels.

Of the manner in which our English law of the thirteenth century treated the ownership and the possession of movable goods, we know but little. Against the supposition that in the feudal age chattels were of small importance so that there was hardly any law about them, a protest should be needless. Not even in the feudal age did men eat or drink land, nor, except in a metaphorical sense, were they vested with land. They owned flocks and herds, ploughs and plough-teams and stores of hay and corn. A Cistercian abbot of the thirteenth century, who counted his sheep by the thousand, would have been surprised to hear that he had few chattels of any value. Theft has never been a rare offence; and even on the land-owner the law brought its pressure to bear chiefly by seizures of his movable goods. Indeed the further we go back, the larger seems the space which the possession of chattels fills in the eye of the law. An action for the recovery of cattle seems as typical of the Anglo-Saxon age as an action for the recovery of land is of the thirteenth century, or an action on a contract is of our own day. It is, no doubt, worthy of remark that in the feudal time the title to chattels was often implicated with the title to land. The

ownership of a manor usually involved the lordship over villeins and the right to seize their chattels; and so when two men were litigating about a 'manor,' the subject of the dispute was not a bare tract of land, but a complex made up of land and of a great part of the agricultural capital that worked the land, men and beasts, ploughs and carts, forks and flails[1]. For all this, however, by the operation of sales and gifts, by the operation of our dual law of inheritance or succession—to say nothing of the nefarious operations of the cattle lifter,—the ownership and the possession of movables were often quite distinct from the ownership and the possession of any land.

Obscurity of the subject.

In part our ignorance may be explained by the fact that [p. 149] litigation about chattels was prosecuted chiefly in those local courts which kept no written records of their doings, or whose records have not been preserved or have not been published. Even when in Edward I.'s day the competence of those courts had been restricted within a pecuniary limit, they could still entertain by far the greater number of the actions for the recovery of chattels that were brought; for a chattel worth forty shillings was in those days a costly thing[2]. But to this cause of ignorance we must add another, namely, a want of curiosity. It has been common knowledge that medieval land-law was unlike modern land-law and that it would repay the investigator. On the other hand, we have but too easily believed that the medieval law of chattels was simple and straightforward and in all probability very like modern law. A little acquaintance with foreign books would teach us that this can hardly be true. In France and Germany, in countries which are not overwhelmed by such voluminous records of the land-law as those that we have inherited, few questions about legal history have given rise to keener debates than those which touch the ownership and possession of movables. Did medieval law know an ownership of movables? Even this fundamental question has been raised.

The medieval chattel.

A few characteristics of the typical medieval chattel demand our attention. In the first place, we can speak of a typical

[1] The chattels of the villeins are sometimes expressly mentioned in the charter which testifies to the feoffment of a manor; *e.g.* Cart. Rams. ii. 340: 'et cum villanis, catallis, sequelis et cum consuetudinibus eorum.'

[2] In Henry II.'s day for forty shillings one might have bought some thirteen oxen or eighty sheep: Hall, Court Life, p. 221.

chattel; the very word *chattel* tells us this. The typical chattel is a beast. The usage which has differentiated *chattel* from *cattle* is not very ancient; when Englishmen began to make their wills in English a gift of one's 'worldly catell' was a gift of all one's movables. Then, in the second place, this typical chattel was perishable; the medieval beast, horse, ox, sheep, had but a short life, and in this respect but few chattels departed far from the type. With the exception of armour, those things that were both costly and permanent were for the more part outside the ordinary province of litigation; books, embroidered vestments, jewelled crowns and crucifixes, these were safe in sanctuary or in the king's treasure house; there was little traffic in them. Thirdly, the typical chattels had a certain 'fungibility.' Time was when oxen served as [p. 150] money, and rules native in that time will easily live on into later ages. The *pecunia* of Domesday Book is not money but cattle. When cattle serve as money, one ox must be regarded as being for the purposes of the law exactly as good as another ox. Of course a court may have to decide whether an ox is a good and lawful ox, just as it may have to decide whether a penny is a good and lawful penny; but, granted that two animals are legally entitled to the name of ox, the one in the eye of the law can be neither better nor worse than the other. It was by slow degrees that beasts lost their 'pecuniary' character. A process of differentiation went on within each genus of animals; the genus *equus* contains the *dextrarius*, the *iumentum*, the *palefridus*, the *runcinus*. All horses are not of equal value, but all palfreys are or may for many legal purposes be supposed to be, and the value of the destrier can be expressed in terms of rounceys. Rents are payable in oxen, sheep, corn, malt, poultry, eggs. The royal exchequer has a tariff for the commutation of promised hawks and hounds into marks and shillings[1]. We may expect therefore that the law of the twelfth and thirteenth centuries will draw no very sharp line between coins and other chattels; but this means that one important outline of our modern law will be invisible or obscure.

Pecuniary character of chattels.

We are not arguing that the typical chattels of the middle ages were indistinguishable from each other, or were supposed to be so by law. When now-a-days we say that 'money has no ear-mark,' we are alluding to a practice which in all probability

[1] As to what the law understands by a hawk, see Dialogus, ii. c. 25.

played a large part in ancient law. Cattle were ear-marked or branded, and this enabled their owner to swear that they were his in whosesoever hands he might find them[1]. The legal supposition is, not that one ox is indistinguishable from another ox, but that all oxen, or all oxen of a certain large class, are equivalent. The possibility of using them as money has rested on this supposition.

Possession of chattels.

In one other particular a chattel differs from a piece of land. As we have seen, when several different persons, lords and tenants of divers orders, have rights in a piece of land, medieval [p. 151] law can attribute to each of them a certain possession or seisin. One is seised 'in service,' the other 'in demesne'; one is seised of the land, the other of a seignory over the land; one is seised while the other possesses—and so forth. The consequence is that in the case of land a great legal problem can be evaded or concealed from view. If we ascribe possession or seisin to a hirer of land, this will not debar us from ascribing a certain sort of possession or seisin to the letter: *istae duae possessiones sese compatiuntur in una re*[2]. But it is otherwise with chattels. As between letter and hirer, lender and borrower, pledgor and pledgee—in short, to use our convenient general terms, as between bailor and bailee—we must make up our minds, and if we concede possession to the one, we must almost of necessity deny it to the other. The lord's seisin of his seignory becomes evident when he enters to distrain for services that the land owes him, when he enters as the heir's guardian and the like. In the case of goods we can hardly have any similar phenomenon, and if, as we may be apt to do, we attribute possession to the bailee, we shall have to refuse it to the bailor. We may then be compelled to face a case which will tax to the uttermost the forces of our immature jurisprudence. The ownership of a chattel may be divorced, not only from possession, but from the right to possess. Can it in such a case really continue to be ownership? May it not undergo such a transmutation that it will be reduced to the rank of a mere right *in personam*?

Englishmen are accustomed to hear it said that our medieval

[1] See Homeyer, Haus- und Hofmarken; Ihering, Vorgeschichte, 30; Brunner, D. R. G., ii. 500. Modern Australia seems to have reproduced some very ancient phenomena. At all events in romances, the bush-ranger who has confined his operations to the taking of 'clear-skins' (unmarked beasts), and therefore has not been put to the risky process of 'faking a brand,' is pretty safe.

[2] Note Book, i. p. 92.

law knew, and even that our modern law knows, no absolute ownership of land. To many of them the statement that our medieval law knew no absolute ownership of chattels may be new, and yet we shall see that the ownership of land was a much more intense and completely protected right than was the ownership of a chattel. Indeed we may be left doubting whether there was any right in movable goods that deserved the name of ownership[1].

Is there any ownership of movables?

[p. 152] In the course of our investigation, we must distinguish two questions, the one about a remedy, the other about a

English law and recovery of goods.

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played a large part in ancient law. Cattle were ear-marked or branded, and this enabled their owner to swear that they were his in whosesoever hands he might find them[1]. The legal supposition is, not that one ox is indistinguishable from another ox, but that all oxen, or all oxen of a certain large class, are equivalent. The possibility of using them as money has rested on this supposition.

Possession of chattels.

In one other particular a chattel differs from a piece of land. As we have seen, when several different persons, lords and tenants of divers orders, have rights in a piece of land, medieval [p. 151] law can attribute to each of them a certain possession or seisin. One is seised 'in service,' the other 'in demesne'; one is seised of the land, the other of a seignory over the land; one is seised while the other possesses—and so forth. The consequence is that in the case of land a great legal problem can be evaded or concealed from view. If we ascribe possession or seisin to a hirer of land, this will not debar us from ascribing a certain sort of possession or seisin to the letter: *istae duae possessiones sese compatiuntur in una re*[2]. But it is otherwise with chattels. As between letter and hirer, lender and borrower, pledgor and pledgee—in short, to use our convenient general terms, as between bailor and bailee—we must make up our minds, and if we concede possession to the one, we must almost of necessity deny it to the other. The lord's seisin of his seignory becomes evident when he enters to distrain for services that the land owes him, when he enters as the heir's guardian and the like. In the case of goods we can hardly have any similar phenomenon, and if, as we may be apt to do, we attribute possession to the bailee, we shall have to refuse it to the bailor. We may then be compelled to face a case which will tax to the uttermost the forces of our immature jurisprudence. The ownership of a chattel may be divorced, not only from possession, but from the right to possess. Can it in such a case really continue to be ownership? May it not undergo such a transmutation that it will be reduced to the rank of a mere right *in personam*?

Englishmen are accustomed to hear it said that our medieval

[1] See Homeyer, Haus- und Hofmarken; Ihering, Vorgeschichte, 30; Brunner, D. R. G., ii. 500. Modern Australia seems to have reproduced some very ancient phenomena. At all events in romances, the bush-ranger who has confined his operations to the taking of 'clear-skins' (unmarked beasts), and therefore has not been put to the risky process of 'faking a brand,' is pretty safe.

[2] Note Book, i. p. 92.

law knew, and even that our modern law knows, no absolute ownership of land. To many of them the statement that our medieval law knew no absolute ownership of chattels may be new, and yet we shall see that the ownership of land was a much more intense and completely protected right than was the ownership of a chattel. Indeed we may be left doubting whether there was any right in movable goods that deserved the name of ownership[1].

Is there any ownership of movables?

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English law and recovery of goods.

[1] As to the words *owner* and *ownership*:—Dr Murray has kindly informed us that the earliest known example of the former occurs in 1340: Ayenbite of Inwyt, p. 27. The verb to own, *ágnian, áhnian*, can be traced much further back and, says Dr Murray, 'there is no etymological reason why *ágnere*, owner, should not have been formed from it and used in Old English, but no examples appear to be known.' After 1340 it is increasingly common. 'Of *ownership*, which might, etymologically, have been formed so soon as *owner* existed, had there been a want felt for it (since *-ship* has been a living movable suffix for a thousand years or more), we have no instance before 1583.' Coke therefore is making an early use of it when he says (Co. Lit. 17 b), 'Of an advowson wherein a man hath an absolute ownership and propertie as he hath in lands or rents.' So far as we are aware, the term *absolute ownership* was very new when Coke thus applied it to the tenant in fee of English land. In the past the place of *owner* and *ownership* seems to have been filled in common discourse by such terms and phrases as 'possessor,' 'possessioner,' 'he to whom the thing belongs or pertains,' 'he who has the thing.' In the translation of Isaiah i. 3, where the A. V. gives 'The ox knoweth his *owner*' one of the Wiclifite versions gave *welder* [wielder, governor, from A.-S. *gewealdan*] and the other gave *lord*. So these versions speak of the lord of the ox (Exod. xxi. 28), the lordis of the colt (Luke xix. 33), the lord of the ship (Acts xxvii. 11). In the A. V. neither *ownership* nor *property* appears (teste Cruden); on the other hand *possess* and its derivatives are exceedingly common. The things that a man owned were often described as his *possessions*. This usage of *possessiones* is very ancient; witness Paulus, Dig. 50, 16, 78; it runs through the middle ages. The Bankruptcy Act of 1623 (21 Jac. I. c. 19) did much towards giving legal currency to the term *owner* by its famous 'order and disposition clause'; but it occurs in an English statute as early as 1487 (4 Hen. VII. c. 10, sec. 3); in 1494 a statute speaks of the owner of land (11 Hen. VII. c. 17); in 1530 we find owners and occupiers of ground (21 Hen. VIII. c. 11). As to *property*, though throughout the middle ages the French and Latin forms of this word occasionally occur, and the use of it is insured by the writ *de proprietate probanda*, we believe that until the last century it was far less frequent than would be supposed by those who have not looked for it in the statute book. Instead of *property* in the vaguer of the two senses which it now bears, men used *possessions* and *estate*. In a narrower sense *property* was used as an equivalent for best right (*e.g.* Co. Lit. 145 b: 'But there be two kinde of properties; a generall propertie, which every absolute owner hath; and a speciall propertie'), but in the Year Books it is by no means common. We find *owner or proprietary* in 1509 (1 Hen. VIII. c. 5, sec. 4).

mere right *in personam*, a mere contractual right, a promise that in certain events, or after the lapse of a certain time, the chattel shall be returned to him. On the other hand, it has been argued that we have before us not imperfect ownership but defective remedies. The bailor is still owner of the thing that he has bailed; but the law has hitherto been so much occupied with the difficult task of suppressing theft, that it has omitted to supply him with a 'real' action, a vindication: many plausible reasons may be suggested for this neglect. To an Englishman bred up to believe that 'there is no right without a remedy,' some of the controversies that have raged over this matter may seem idle. There may come a time when [p. 155] those legal rules of which we have been speaking no longer express men's natural thoughts about right and wrong. In such a time it may be allowable to say that the defect is in the remedy rather than in the right, more especially if the law courts are beginning to treat the old rules as antiquated and to circumvent them whenever this can be done. But by this means we only throw back the question into a remoter age. If there was any age in which these rules seemed an adequate protection for ownership, then we are bound to say that the ownership known to that age was in one most important particular different from the ownership that is known to us.

English law.

Of late years learned writers have asserted that the negative or restrictive half of this scheme was at one time a part of English law. There is much, it is said, in the Year Books, something even in our modern law, which can not be explained unless we suppose that the rule *Mobilia non habent sequelam* held good in this country, and that the man who had bailed his goods had no action against any save his bailee[1]. But more than this has been said. It has been pointed out that in the Year Books 'possession has largely usurped not only the substance but the name of property[2],' and that the justices have a perplexing habit of ascribing the *propretie* to the trespasser and even to the thief[3]. A thorough treatment of this difficult topic is impossible to those who are debarred from discussing

[1] Holmes, Common Law, Lect. v.; Laughlin in the Essays in A.-S. Law, 197 f.

[2] Pollock and Wright, Possession, p. 5.

[3] Ames, Disseisin of Chattels, Harv. L. R., vol. iii.

in detail the texts of the later middle ages. Still something about it must be said[1].

The 'property' of the thief.

I. Leaving out of sight for a while the cases in which there has been a bailment, we may consider the position of the owner whose goods have been taken from him, in order that we may if possible come to some understanding of that puzzling phenomenon, the ascription of property to the trespasser and even to the thief, which we find in the later Year Books.

Ancient action for the recovery of stolen goods.

Cattle lifting is our starting point. It is a theme to which the Anglo-Saxon dooms and the parallel 'folk laws' of the continental nations are ever recurring. If only cattle lifting [p. 156] could be suppressed, the legislators will have done all or almost all that they can hope to do for the protection of the owner of movables. The typical action for the recovery of a movable is highly penal. It is an action against a thief, or at any rate it is an action which aims at the discovery and punishment of a thief as well as at the restitution of stolen goods. An action we call it, but it is a prosecution, a prosecution in the primary sense of that word, a pursuit, a chase; a great part of the legal procedure takes place before any one has made his way to a court of law. My cattle have been driven off; I must follow the trail; it is the duty of my neighbours to assist me, to ride with me. If we catch the marauder still driving the beasts before him, we take him as a 'hand-having' thief and he is dealt with in a summary fashion; 'he can not deny' the theft. The practice of ear-marking or branding cattle, and the legal duty that I am under of publicly exposing to the view of my neighbours whatever cattle I have, make it a matter of notoriety that these beasts, which this man is driving before him, have been taken from me. Even if we can not catch a thief in the act, the trail is treated as of great importance. If it leads into a man's land, he must show that it leads out again; otherwise it will 'stand instead of a foreoath'; it is an accusing fact[2]. If the possessor has no unbroken trail in his favour, then, when he discovers the thing, he lays his hand upon it and claims it. He declares the ox to be his and

[1] Had Bracton finished his work with chapters on the personal actions, our position would have been very different. As it is, he has given us a valuable account of the *actio furti*, but as regards the bailments we have only some romanesque generalia in which we dare not place a perfect trust.

[2] Æthelst. v. 2.

calls upon the possessor to say how he came by it. The possessor has to give up the thing or to answer this question. He may perhaps assert that the beast is his by birth and rearing; a commoner answer will be that he acquired it from a third person whom he names. Then the pursuer with his left hand grasping one of the beast's ears, and his right upon a relic or a sword, swears that the beast is his and has been stolen from him, and the possessor with his left hand grasping the other ear swears that he is naming the person from whom he purchased[1].

The procedure in court.

Now at length there may be proceedings before a court of law. The possessor must produce this third person in court; [p. 157] he has vouched a warrantor and must find him. If this vouchee appears and confesses the warranty, then the beast is delivered over to him and the accusation is made against him. He can vouch another warrantor, and so, by following backwards the course along which the beast has passed, we may come at length to the thief. The rules about proof we need not here consider, only we must notice that the possessor, though he is not convicted of theft, may often have to give up the thing to the pursuer. The elaborate law of warranty, the attempts made in England and other countries to prevent undue delay by a restriction of the process to some three or four vouchers, these show plainly enough that the man whose beasts have been stolen can claim them from any one in whose possession they are. If the possessor can name no warrantor, it is still possible that he should protect himself against the charge of theft by showing that he purchased the thing in open market before the proper witnesses; but he will have to surrender that thing; it is not his though he bought it honestly[2]. Sales and purchases ought to take place before official witnesses, and the possessor who has neither warrantor nor witness has himself to blame if he is treated as a thief[3].

[1] For this seizure of the ear see Brunner, D. R. G., ii. 500, and (for the ceremony appears in Celtic as well as in Teutonic law) Ancient Laws of Wales, ii. 725.

[2] However in the very early laws of Hlothœre and Eadric, c. 16, the man who has publicly bought in London need not give up the goods unless the price that he paid is offered to him. This seems a curious testimony to the commercial importance of London. Liebermann, Gesetze, p. 11.

[3] It will be sufficient to refer to Brunner, *op. cit.* p. 495, where this old procedure is fully described and due attention is paid to the Anglo-Saxon texts.

The bailee pursues the thief.

When there has been a bailment and the chattel has been taken from the bailee's possession, it is natural that, so long as prosecution means speedy pursuit, the right and duty of prosecution should he his. The bailor, it may be, will never hear of the theft until it is some days old and the tell-tale hoof-marks have been effaced. When the pursuer makes his claim he will say that the thing is 'his'; but this is an assertion of possession rather than of ownership; he means that the thing was taken from him[1].

The bailor's action against the bailee.

[p. 158] Of any other procedure for the recovery of goods we read little or nothing in our old dooms. No doubt the bailor had some action against the bailee for the return of the goods; but whether this action was conceived as based upon ownership or as based upon contract, whether that distinction could have been clearly drawn, whether the bailee could be compelled to deliver back the very thing that had been bailed, or whether the bailor had to be content if he got its value—these are questions about which we have no certain information[2].

Bracton's *actio furti*

In the thirteenth century this ancient procedure was not yet obsolete; but it was assuming a new form, that of the appeal of larceny. Bracton called it the *actio furti*[3]. We should do wrong were we to reject this name as a scrap of romanizing pedantry. English law knew an action based upon theft, and, if we would speak of such an action in Latin, we can but call it *actio furti*. It still had about it many antique traits, though, as already said, it was assuming a new form, that of the appeal of larceny[4]. We are wont to think of the appeal as of a criminal prosecution, though one that was

The A.-S. verb which describes the voucher is *tȳman*. The *team* of the Anglo-Norman charters seems to be the right to hold a court into which foreigners, *i.e.* persons not resident within the jurisdiction, may be vouched. See Acts of Parliament of Scotland, i. 742.

[1] Brunner, *op. cit.* ii. 510.

[2] Essays in A.-S. Law, pp. 199, 200. The two passages there cited as bearing on this action are (1) Alfred, Introd. c. 28, which comes from the book of Exodus, (2) William, I. 37, which is a reminiscence of the *Lex Rhodia de iactu*. But we might argue from analogy that there must have been an action for the restoration of the *res praestita*; Lex Salica, c. 51 (ed. Hessels, col. 334); Sohm, Process der Lex Salica, 34.

[3] Bracton, f. 151 b.

[4] Dial. de Scac. lib. ii., cap. 10. In the twelfth century the owner who prosecuted the thief to conviction might still obtain 'double value.' Of this we shall speak in our chapter on Criminal Law.

instituted by a private prosecutor. A criminal prosecution it was, and if the appellee was convicted, he would as a general rule be sentenced to death; but still throughout the middle ages it had in it a marked recuperatory element; it was constantly spoken of as a remedy competent to the man whose goods had been stolen: it would restore those goods to him[1]. But in Bracton's day the recuperatory element was even more visible than it was in later centuries, and we can see a close connexion between the appeal and that old procedure which we have endeavoured to describe. A little time spent over this matter will not be lost, for it is only through procedural forms that we can penetrate to substantive rights.

Procedure in the action of theft.

The trail has not yet lost its importance. The sheriff and men of Shropshire were wont to trace it into the borough of Bridgenorth and to charge the burgesses with the difficult task [p. 159] of showing its exit[2]. The summary mode of dealing with 'hand-having' thieves, thieves who are 'seised of their thefts' was still maintained; the prosecutor in such a case bore the ancient name of *sakeber*; the fresh suit and capture being proved, a local court sentenced the prisoner to decapitation, giving him no opportunity of denying the theft; in some cases the duty of beheading him was committed to the *sakeber*[3]. But even if such summary justice was out of the question, even if there was to be a regular appeal, a great part of the procedure took place, or was supposed to take place, out of court. The appellor had to allege 'fresh suit' after the criminal. He ought at once to raise the hue and cry, he ought to go to the four nearest townships, 'the four quarters

[1] See *e.g.* Y. B. 4 Hen. VII. f. 5: 'l'appel est a reaver ses biens et affirme proprieté continualment en le party.'

[2] Select Pleas of the Crown, pl. 173.

[3] Bracton, f. 150 b, 154 b; Fleta, f. 54; Britton, i. 56. In the note by Mr Nichols to the last of these passages the meaning of the mysterious word *sakeber* is discussed. See also Spelman's Glossary. The true form of the word seems to be very uncertain. A Scottish book, Quoniam Attachiamenta (Acts of Parl. i. 647), speaks of the pleas of wrong and unlaw which are prosecuted *per sacreborgh*. In this form the last syllable seems to be the word *borh*, which means a pledge. In the English books the term *sakeber* is applied to the prosecutor. In very early Frankish law the *sacebaro* appears as an officer of some sort; little is known of him, and the name disappears on the Continent at a very remote date. Oddly enough however it does appear in our English Quadripartitus, while *sagemannus* occurs both there and in Leg. Henr. 63. See Brunner, D. R. G., ii. 151–4; Liebermann, Quadripartitus, p. 32. Of summary justice we shall speak in another chapter.

of the neighbourhood' and proclaim his loss[1]. At the next county court the appellor must make, and at court after court he must repeat his appeal, until the accused either appears or is outlawed. The king's justices may not hold themselves very straitly bound by the letter of old rules, but they are fond of quashing appeals that have not been prosecuted with the utmost diligence[2].

Scope of the action of theft

[p. 160] A far more important point is this, that an *actio furti*, we may almost say an appeal of larceny, may very properly be brought against one who is not a thief. We are assured by Bracton and his epitomators that the plaintiff may if he chooses omit the 'words of felony' from his count[3]. He may, even though he thinks that his adversary is a thief, demand his chattels, not as stolen chattels, but as goods that somehow or another have gone from him against his will; they have been *adirata* from him[4]. In the course of his action, and perhaps in consequence of the defendant's answer, he may add the charge of felony. This is permissible; one may thus raise a civil into a criminal, though one may not lower a criminal into a civil charge. Of such a procedure we can, it is true, find but few instances upon our records; but that this should be so is natural, for it is the procedure of local courts, and is not commenced by royal writ. We must not confuse it with that action of 'trespass *de bonis asportatis*' which is being slowly developed by the king's courts. We can see enough, however, to say that Bracton is not misleading us. For one moment in 1233 we catch a glimpse of the court of the royal manor of Windsor. Edith of Wackford charged

[1] Bracton, f. 139 b. Even in very late precedents for appeals the allegation of pursuit is retained: 'dictusque J. ipsum W. recenter insecutus fuit de villa in villam usque ad quatuor villas propinquiores.' As to the 'four neighbouring vills,' see Gross, Coroners' Rolls, pp. xxxvii.–xl.

[2] Any collection of criminal cases from this age will show many appeals quashed for want of a timely and incessant prosecution. The Statute of Gloucester, c. 9, mitigated the requirements of the common law.

[3] Bracton, f. 150 b, 140 b; Fleta, f. 55; Britton, i. 57.

[4] In the Norman books as well as our own, *adiratum* (*adiré*) is contrasted with *furatum* (*emblé*); Somma, p. 28. It occurs elsewhere in French law-books. It is said to have its origin in a low Latin *adextratum*, meaning 'that which is gone from my hand'; but whether in legal texts it means specifically 'lost by accident' or more generally 'lost, whether by accident, wrongful taking, or otherwise' seems to be a moot point. See Jobbé-Duval, Revendication, pp. 91–4; also Y. B. 21–2 Edw. I. p. 467.

William Nuthach with detaining from her three pigs, which were *adirati* from her. William denied that the pigs were hers. She left the court to seek counsel, and on her return counted against William as against a thief, and, as she did so she, in true archaic fashion, held one of the pigs in her hand[1]. A few years earlier, in one of the hundred courts of Gloucestershire, Adam of Throgmorton demanded some hay from Clement Bonpas. It was adjudged that Clement should purge himself with oath-helpers in the county court. When Clement was upon the point of swearing, Adam 'levied him from the oath' and made a charge of felony[2]. But a regular [p. 161] appeal might be properly commenced against one who was not the thief. The appellor was not bound to say to the appellee, 'You stole these goods'; it was enough if he said, as in old days his English or Frankish ancestor might have said, 'These goods were stolen from me, and I can name no other thief than you[3].' We may expand this charge. 'These goods were stolen from me; I have pursued them into your possession; upon you now lies the burden of proving, (1) that you are not a thief, (2) that I ought not to have these goods back again.' At any rate, however, and by whatever words it may be commenced, the English *actio furti* can be effectually used against one who is no thief, but an honest man.

Defences to the action of theft.

We have to consider the appellee's means of defence. The appellor offers battle, and to all appearance the appellee can always, if he pleases, accept the offer[4]. In later days he can

[1] Note Book, pl. 824.

[2] Gloucestershire Pleas of the Crown (ed. Maitland), p. 6. The practice known as levying a man from an oath (*a sacramento levare*) is referred to in Glanvill, x. 5. When he is just going to swear, you charge him with being on the point of committing perjury or theft by perjury, and thus what has as yet been a civil is turned into a criminal suit. The procedure is described by Brunner, D. R. G., ii. 434. Another early instance of it occurs in Rot. Cur. Reg. (Palgrave) i. 451; the hand which the would-be swearer has stretched out is seized by his adversary and the charge of attempted perjury is made. Late in Henry III.'s day the Brevia Placitata (Camb. Univ. Lib. Ee. i. 1. f. 243 b) still teaches us how to catch our adversary's hand when he is on the brink of the oath, and to make the charge of perjury against him with an offer of battle.

[3] Select Pleas of the Crown, pl. 192: 'nescivit alium latronem quam ipsum Edwardum.' Note Book, pl. 1539: 'quod ipse fuit latro vel latronem nominare scivit.' Fleta, p. 55: 'latro est aut latronem inde sic [*corr.* scit] nominare.' See the A.-S. oaths, Schmid, App. x.

[4] Bracton, f. 140. It would be otherwise if the appellor were maimed or too old to fight.

always, if he pleases, put himself upon his country for good and ill. The permission thus accorded to him of submitting to the verdict of a jury tends to change the character of the appeal, to strengthen the criminal or accusatory at the cost of the civil or recuperatory element. This we shall see if we observe that in the days of Bracton the appellee who does not wish to fight has to defend himself in one of three ways; (i) he proves the goods to have been his from the first moment of their existence; (ii) he vouches a warrantor; (iii) he admits the appellor's title, surrenders the goods and confines his defence to a proof of [p. 162] honest and open purchase. Of each of these modes of meeting the action a few words must be said.

Defence of 'birth and rearing.'

(i) The appellee says that the goods have been his from the first: for instance, that the horse in question was the foal of his mare[1]. He enforces this by the production of a 'suit' of witnesses. The appellee may meet this by a counter suit, and in Bracton's day these rival suits can be examined by the court. Each witness can be severed from his fellows and questioned about ear-marks and so forth. The larger and more consistent suit carries the day[2].

Defence by voucher.

(ii) But what is regarded as the common defence is the voucher of a warrantor[3]. The appellee asserts that he acquired the goods from a third person, whom he calls upon to defend the appeal. There is a writ enabling him to compel the appearance of the vouchee[4]. The vouchee appears. If he denies that the goods passed from him to the appellee, there may be battle between him and the appellee, and should he succumb in this, he will be hanged as a thief[5]. If he admits that the goods passed from him to the appellee, then the appellee retires from the action[6]. We see the goods placed in the warrantor's hand, and, when he is seised of them, then the appellor counts against him as against the thief or one who can name the thief[7]. The warrantor can vouch another warrantor. The process of voucher can be repeated until a third, or perhaps a

[1] Bracton, f. 151. In Welsh law, which in its treatment of this subject is very like English law, the proof of 'birth and rearing' is one of the three normal defences.

[2] Note Book, pl. 1115.

[3] Glanvill, x. 15; Bracton, f. 151; Fleta, p. 55; Britton, i. 57.

[4] Glanvill, x. 16; Bracton, f. 151.

[5] Note Book, pl. 1435.

[6] Glanvill, x. 15; Bracton, f. 151; Britton, i. 59.

[7] Select Pleas of the Crown, pl. 192.

fourth, warrantor is before the court[1]. There a doom of Cnut drew a line; similar lines are drawn in other ancient bodies of law, both Teutonic and Celtic:—some limit must be set to this dilatory process[2]. But the point that we have to observe is that the *actio furti* is put to a legitimate use when it is brought against one who is no thief. The convicted warrantor is hanged; the appellor recovers his chattel; but meanwhile the first ap- [p. 163] pellee has gone quit; he is no thief, but he has lost the chattel[3].

Defence of honest purchase.

(iii) If the appellee can produce no warrantor, and can not assert that the thing was his from the first moment of its existence, then he must, if he would avoid battle, confine his defence to an assertion of honest acquisition. He may prove by witnesses a purchase in open market. If he does this, he goes quit of the charge of theft, but must surrender the chattel. The law has still a great suspicion of secret sales. It is no longer so rigid as it used to be; perhaps by this time an appellee will be allowed to prove his honesty though he can not prove a purchase in open market; but the man who can not allege such a purchase is, says Bracton, in peril.' He will probably have to fight if he would escape the gallows[4].

Stolen goods recovered from honest purchasers.

We have spoken at some length of these ancient modes of meeting the *actio furti*, because they are soon overwhelmed by the verdicts of jurors, and because they enable us to lay down a proposition about the substantive law of the thirteenth century, which, regard being had to what will be said in later days, is of no small value:—Stolen goods can be recovered by

[1] Glanvill, x. 15: read 'ad quartum (*not* quotum) warrantum erit standum.' In such reckonings it is never very clear whether the original defendant is reckoned as one of the warrantors.

[2] See above, p. 71.

[3] Actual instances of warranty are Select Pleas of the Crown, pl. 124, 192; Note Book, pl. 67, 1138, 1435, 1461. By the kindness of Dr Jessopp we are enabled to give the following entry from a manorial roll of 1259: 'Postea venit praedictus Willelmus et calumpniavit, dicens quod praedictus bidens ei furatus fuit;...Johannes de venditione dictae pellis vocavit ad warantum praedictum David; qui venit et warentizavit. Et pro distancia inter praedictos Willelmum et David tradita fuit Thomae le Cu in equali manu ad custodiendum.' We see here the deposit of the debatable chattel 'en uele main,' according to the practice described in Leg. Will. I. 21, § 2.

[4] This recovery of stolen goods from an appellee who has proved honest purchase is attested by Glanvill, x. 17; Bracton, f. 151; Fleta, p. 55; Britton, i. 59, 60.

legal action, not only from the hands of the thief, but from the hands of the third, the fourth, the twentieth possessor, even though those hands are clean and there has been a purchase in open market.

Transformation of the action of theft.

Now this old procedure, which is Glanvill's *petitio rei ex causa furtiva*[1] and Bracton's *actio furti*, underwent a further change. The appellee against whom a charge of larceny was brought was expected, if he would not fight, to put himself upon his country. This we may regard as a concession to appellees. The accused had no longer to choose between some two or three [p. 164] definite lines of defence; he could submit his case as a whole to the verdict of his neighbours, and hope that for one reason or another—which reason need not be given—they would acquit him. The voucher of a warrantor disappeared, and with it the appellor's chance of recovering his goods from a hand which was not that of the thief. Men were taking more notice than they once took of the psychical element of theft, the dishonest intention, and it was no longer to be tolerated that a burden of disproving theft should be cast upon one against whom no more could be asserted than that he was in possession of goods that had been taken from another. The appeal had become simply a criminal prosecution; it failed utterly if the appellee was not convicted of theft. If he was convicted, and the stolen goods had been seized by the king's officers, the appellor might, as of old, recover them; a writ of restitution would be issued in his favour, if he proved that he made 'fresh suit.' But more and more this restitution is regarded as a mere subordinate incident in the appeal, and when it is granted, it is granted rather as a favour than as a matter of strict right. The man who has been forward in the prosecution of a malefactor deserves well at the hands of the state; we reward him by giving him his own. In order to explain this view of the matter we must add that our law of forfeiture has been greedy. The felon forfeits his chattels to the king; he forfeits what he has; he forfeits 'that which he seemeth to have.' If the thief is indicted and convicted, the king will get even the stolen goods[2]; if he is appealed, then the appellor will perhaps, if he has shown himself a diligent subject, receive a prize for good

[1] Glanvill, x. 15.

[2] This was altered by Stat. 21 Hen. VIII. c. 11.

conduct[1]. Men will begin to say that the thief has 'property' in the stolen goods and that this is the reason why the king takes them. As a matter of history we believe this to be an inversion of logic:—one of the reasons why the thief is said to have 'property' in those goods is that the king has acquired a habit of taking them and refusing to give them up[2].

Action of trespass *de bonis asportatis.*

But more than this must be said before we can understand [p. 165] the ascription of property to a thief or other wrongful taker[3]. So long as the old practice of bringing an *actio furti* against the third hand obtained, such an ascription would have been impossible. As already said, that practice went out of use. The king's court was putting something in its place, and yet not exactly in its place, namely, a writ of trespass. This became common near the end of Henry III.'s reign. It was a flexible action; the defendant was called upon to say why with force and arms and against the king's peace he did some wrongful act. In course of time the precedents fell into three great classes; the violence is done to the body, the lands, the goods of the plaintiff. The commonest interference with his goods is that of taking and carrying them away; a well-marked sub-form of trespass, is trespass *de bonis asportatis.* If, however, we look back at the oldest precedents, we shall see that the destruction or asportation of goods was generally complained of as an incident which aggravated the invasion of land, the entry and breach of a close, and this may give us a clue when we explore the remedy which this action gives[4].

Scope of the action of trespass.

It is a semi-criminal action. The procedure against a contumacious defendant aims at his outlawry. The convicted defendant is imprisoned until he makes fine with the king. He also is condemned to pay damages. The action is not recuperatory; it is not *rei persecutoria*[5]. In the case of

[1] The law is well stated in Staunford, Pleas of the Crown, lib. iii. c. 10. See also Ames, Disseisin of Chattels, Harv. L. R. iii. 24.

[2] That the thief does not really get property in the goods is proved by this, that if a second thief steals from the first thief, the owner can still obtain restitution by appealing the second thief. Y. B. 13 Edw. IV. f. 3 (Mich. pl. 7); 4 Hen. VII. f. 5 (Pasch. pl. 1). The result is curious, for the owner has had no action against the second non-felonious trespasser.

[3] Two striking illustrations are given by Ames, Harv. L. R. iii. 24.

[4] See Placit. Abbrev. for the last years of Henry III.

[5] There may have been a brief hesitation about this; Maitland, Harv. L. R. iii. 178.

assault and battery a compensation in money is the appropriate remedy. But it is so also if the plaintiff complains of an invasion of his land. Whatever may happen at a later day, the writ of trespass is as yet no proper writ for a man who has been disseised of land. A whole scheme of actions, towering upwards from the novel disseisin to the writ of right, is provided for one who is being kept out of land that he ought to possess. To have made the action recuperatory (*rei persecutoria*) in the case of chattels would have been an anomaly; in Henry III.'s day it might even have been an improper interference with [p. 166] the old *actio furti;* but at any rate it would have been an anomaly. Therefore the man whose goods have been taken away from him can by writ of trespass recover, not his goods, but a pecuniary equivalent for them; and the writ of trespass is beginning to be his only remedy, unless he is hardy enough to charge the defendant with larceny[1].

No action of trespass against the third hand.

This is not all. Whatever subsequent ages may think, an action of trespass *de bonis asportatis* is not an action that should be brought against the third hand, against one who has come to the goods through or under the wrongful taker, or against one who has wrongfully taken them from one who is not the plaintiff[2]. The man who has bought goods from the trespasser, how has he broken the king's peace and why should he be sent to gaol? As to the second trespasser, the action *de bonis asportatis* would have fallen out of touch with its important and influential neighbour the action *de clauso fracto,* if it could have been brought against any one but the original wrong-doer. If I am disseised of land and one disseises my disseisor, a writ of trespass is not my remedy against him; I want land, not money, and a proper action is provided for me. It would be an anomaly to suffer the writ of trespass to do for the disseisee of a chattel what it will not do for the disseisee of land. The mischief is that the two cases are not parallel. The disseisee of land has plenteous actions though the writ of trespass be denied him, while the disseisee of a chattel, when the barbaric *actio furti* was falling into oblivion, had none. And so we arrive at this lamentable result which prevails for a while:—If my chattel be taken from me by another wrongfully but not

[1] Britton, i. 123, cautions his readers against the appeal; it is perilous; the writ of trespass is safer.

[2] See Ames, Harv. L. R. iii. 29.

feloniously, then I can have no action against any third person who at a subsequent time possesses it or meddles with it; my one and only action is an action of trespass against the original taker[1]. A lamentable result we call this, not so much because it may have done some injustice to men who are long since [p. 167] dead and buried, as because for centuries it bewildered our lawyers, made them ascribe 'property' to trespassers and even to thieves, and entailed upon us a confused vocabulary, from the evil effects of which we are but slowly freeing ourselves[2].

Self help.

As to self-help, we must not suppose that the owner's rights of action were supplemented by a right of recapture. The old procedure was a procedure by way of self-help and recapture; but it was no formless procedure; it was a solemn legal act. In the presence of the possessor the pursuer laid hand on the beast and in set phrase he claimed it. We may be pretty certain that if, neglecting ceremonies, he just took his own behind the possessor's back, he was laying himself open to a charge of theft. Even at the end of the thirteenth century he was hazarding the loss of his rights. Britton supposes that John appeals Peter of stealing a horse, and that Peter says, 'The horse was mine and as mine I took it.' If Peter succeeds in proving this assertion, he escapes the gallows, but he loses the horse for good and all, 'for' (King Edward is supposed to

[1] In the case of two felonious takings I can still obtain restitution by appealing the second thief. See above, p. 166. We shall see hereafter that for a long time 'detinue' can not be brought against any but the plaintiff's bailee, and to say that the owner has neither trespass nor detinue, is to say that he has no action against the third hand, unless there be felony. Gradually 'detinue' is extended and 'trover' is invented; but a great deal of harm has been done in the meanwhile.

[2] In the foregoing paragraphs we have had in view Mr J. B. Ames's papers on the Disseisin of Chattels, Harv. L. R. vol. iii. The two criticisms that we have to make on those masterly articles are these. (1) Their learned author has hardly offered a sufficient explanation of the fact that at one point the analogy between land and chattels breaks down. The disseisee of land has, the disseisee of chattels has not, an action against the third hand. (2) It seems to us that this difference can not be regarded as being of vast antiquity or as having its origin among the ideas of substantive law. The old *actio furti* with its chain of warrantors shows that the disseisee once had an action against the twentieth hand. Whatever may be thought of our argument about the scope of trespass, it seems to us clear that at this point we have to deal, not with a defective conception of ownership, but with an unfortunate accident, which has momentous effects because it happens just at the time when the writs are crystallizing for good and all. The old action disappears; a new one is put in its place, but can not fill that place.

say) 'we will that every one shall have recourse to judgment rather than to force[1].' Our common law, which in later days has allowed a wide sphere to recapture[2]—a sphere the width of which would astonish foreign lawyers—seems to have started in the twelfth and thirteenth centuries with a stringent prohibition of informal self-help, and a rigorous exclusion of proprietary pleas from the possessory action of trespass. Thus far it applied a common rule to land and to chattels; but while in the [p. 168] one case the disseisor, after being ousted from the land, might fall back upon those legal methods that he had despised, in the other case no place of penitence was allowed him; he lost for good and all the thing that was his, because he had taken it to himself.

Thus far we have been dealing with what in our eyes is an unlucky chapter of mishaps, which in the fourteenth century has deprived the owner of a remedy which he would have had in the twelfth century, namely, of an action against the third hand for the recovery of goods that had been wrongfully taken. We have now to speak of a more vital rule and one that appears in many lands besides our own.

The bailment

II. Hitherto we have supposed that the thing in question was taken from the owner's possession. We have next to suppose that the owner has bailed the thing to another. And here we may remark that our medieval law has but a meagre stock of words that can be used to describe dealings with movable goods. The owner, whenever and for whatever purpose he delivers possession of his chattel to another, is said to bail it to that other (Fr. *bailler*, Lat. *tradere, liberare*). This word is used even when he is indubitably parting with ownership, when he delivers a sold thing to the buyer, or when he makes a 'loan for consumption' (*mutui datio*)[3]. In more modern times we have restricted the term *bailment* to cases in which there is no transfer of ownership, to cases in which the goods, after the lapse of a certain time or upon the happening of a certain event, are to be delivered by the bailee to the bailor or his nominee. Even these cases are miscellaneous; but our

[1] Britton, i. 115-6.

[2] *Blades* v. *Higgs*, 10 C. B. N. S. 713; Pollock, Law of Torts (5th ed.), p. 362. It is far from clear that the decision would now be approved by a higher Court.

[3] A plaintiff who sues for a money debt usually counts that he 'bailed' a certain sum to the defendant; *e.g.* Y. B. 21-2 Edw. I. p. 255.

lawyers found no great need of words which would distinguish between the various forms of bailment, the pledge, the deposit for safe custody, the delivery to a carrier or to an artizan who is to do work upon the thing, the gratuitous loan for use and return, the letting for hire. All these transactions are regarded as having much in common; one term will stand for them all[1]. And all these transactions were known in the thirteenth century: for example, the deposit for safe custody [p. 169] of those valuable chattels, the title-deeds of land was not uncommon.

The bailee has the action against the wrong-doer.

Now if goods were unlawfully taken from the possession of the bailee, it was he that had the action against the wrong-doer; it was for him to bring the appeal of larceny or the action of trespass[2]. And, having thus given the action to the bailee, we must in all probability deny it to the bailor. As already said, in the days when the *actio furti* still preserved many of its ancient characteristics, when it began with hue and cry and hot pursuit, it was natural that the bailee, rather than the bailor, should sue the wrongful possessor. But already in the thirteenth century a force was at work which tended to disturb this arrangement.

Liability of bailees.

The nature of this force we shall understand if we turn to the question that arises between the bailor and the bailee when the goods have been taken from the bailee by a third person. We are likely to find the rule that the bailee has the action against the stranger in close connexion with a rule that makes the bailee absolutely responsible to the bailor for the safe return of the goods:—if they are taken from him, he, however careful he may have been, must pay their value to the bailor. We have good reason to believe that this rule had been law in

[1] Even the *mutuum* is not kept apart from the *commodatum*, though Bracton, f. 99, knows the difference. Very often the lender is said *commodare* or *accommodare pecuniam*, which the borrower is said *mutuare*; see *e.g.* Note Book, pl. 568, 830. To this day we Englishmen are without words which neatly mark the distinction. We *lend* books and half-crowns to *borrowers*; we hope to see the same books again, but not the same half-crowns; still in either case there is a *loan*. Gibbon, Decline and Fall, c. 44: 'The Latin language very happily expresses the fundamental difference between the *commodatum* and the *mutuum*, which our poverty is reduced to confound under the vague and common appellation of a loan.'

[2] Bracton, f. 151: 'et non refert utrum res quae ita subtracta fuerit, extiterit illius appellantis propria vel alterius, dum tamen de custodia sua.'

England[1]. In 1200 a plaintiff asserts that two charters were delivered to the defendant for custody; the defendant pleads that they were robbed from him when his house was burnt and that he is appealing the robbers; the plaintiff craves judgment on this admission by the defendant that the charters were lost out of his custody; the defendant makes default and judgment is given against him[2]. Glanvill holds that the commodatary is absolutely bound to restore the thing or its value[3]. Bracton, however, with the Institutes before him, seems inclined to mitigate the old rule. Apparently he would hold the depositary liable only in the case of *dolus;* the *conductor* can escape if he has shown a due diligence, and so can the pledgee, and it seems that even the commodatary may escape, though we can not be very certain as to the limits of the liability that Bracton would [p. 170] cast upon him[4]. There is much in later history to make us believe that Bracton's attempt to state this part of our law in romanesque terms was premature[5]; but none the less it is plain that already in his day English lawyers were becoming familiar with the notion that bailees need not be absolutely responsible for the return of the chattels bailed to them, and that some bailees should perhaps be absolved if they have attained a certain standard of diligence[6]. Now this notion may easily begin to react upon the rule which equips every bailee with the action against the wrongful taker and denies that action to the bailor. Perhaps we come nearest to historical truth if we say that between the two old rules there was no logical priority. The bailee had the action because he was liable

[1] Holmes, Common Law, p. 175. To the contrary, Beale, Harv. L. R. xi. 158.

[2] Select Civil Pleas (Selden Society), pl. 8.

[3] Glanvill, x. 13.

[4] Bracton, f. 62 b, 99; Fleta, p. 120–1; Güterbock, Bracton and his Relation to Roman Law (tr. Coxe), pp. 141, 175; Scrutton, Law Quarterly Review, i. 136. We have examined many MSS of Bracton's work for the purpose of discovering the true reading of the well-known passage on f. 99; but, so far as we can see, the vulgate text is right in representing him as applying to a case of *commodatum* the words which the Institutes apply to a case of *mutuum*. See Bracton and Azo, p. 146.

[5] Holmes, Common Law, p. 176.

[6] In 1299 the Prior of Brinkburn brings detinue for charters bailed to the defendant for safe custody. The defendant alleges that the charters had been seized by robbers along with his own goods, and that they cut off the seals; he tenders the charters which have now no seals. The Prior confesses the truth of the defence and the action is dismissed. See the record in Brinkburn Cartulary, p. 105.

and was liable because he had the action[1]. But, when once a limit is set to his liability, then men will begin to regard his right of action as the outcome of his liability, and if in any case he is not liable, then they will have to reconsider the position of the bailor and perhaps will allow him to sue the wrongful taker. In Bracton's text and in the case-law of Bracton's day we may see this tendency at work, a tendency to require of the bailee who brings an appeal of larceny or an action of trespass something more than mere possession, some interest in the thing, some responsibility for its safety. But as yet it has not gone very far[2].

The bailor and the third hand.

That the bailor has no action against any person other than [p. 171] his bailee, no action against one who takes the thing from his bailee, no action against one to whom the bailee has sold or bailed the thing—this is a proposition that we nowhere find stated in all its breadth. No English judge or text-writer hands down to us any such maxim as *Mobilia non habent sequelam.* Nevertheless, we can hardly doubt that this is the starting-point of our common law. We come to this result if one by one we test the several actions which the bailor might attempt to use. These are but three[3]: (1) the appeal of larceny, (2) the action of trespass, and (3) the action of detinue. The first two would be out of the question unless there had been an unlawful taking, and in that case, as already said, there seem to be

[1] Mr Justice Holmes, Common Law, p. 167, maintains the priority of the rule that gives the action to the bailee. But we may at all events believe that at an early date the refusal to the bailor of an action against the taker was justified by the argument that he must look to his bailee. It seems to be this argument that is embodied in the German proverb *Hand muss Hand wahren.* See Heusler, Gewere, p. 495.

[2] Bracton, f. 103 b, 146, more than once seems to require that the appellor shall complain of a theft of his own goods or of goods for which he has made himself responsible, for which *intravit in solutionem erga dominum suum.* This phrase is actually used by appellors in 1203, Select Pleas of the Crown, pl. 88, 126. It is to be remembered that at this time the limit between the servant's *custody* and the bailee's *possession* is not well marked; both are often called *custodia.* The law has to be on its guard to prevent masters from setting their servants to bring appeals which they dare not bring themselves. A servant is not to bring an appeal for the theft of his master's goods unless he has in some definite way become answerable for their safe keeping. But it is also to be remembered that Bracton is thinking of Inst. 4. 2. 2, where it is required of the plaintiff in an action *bonorum raptorum* that he shall have some interest in the thing, 'ut intersit eius non rapi.' See Bracton and Azo, p. 183.

[3] At present the action of replevin needs no mention, for its scope is very limited. See Ames, Harv. L. R. iii. 31.

ample reasons for believing that the taker could be successfully attacked by the bailee and by him only[1].

The action of detinue.

But at first sight there seems to be one action open to the bailor, the action of detinue. This action slowly branches off from the action of debt. The writ of debt as given by Glanvill is closely similar to that form of the writ of right for land which is known as a *Praecipe in capite.* The sheriff is to bid the defendant render to the plaintiff so many marks or shillings, 'which, so the plaintiff says, the defendant owes him, and whereof he unjustly deforces him'; and if the defendant will not do this, then he is to give his reason in the king's court. The writ is couched in terms which would not be inappropriate [p. 172] were the plaintiff seeking the restoration of certain specific coins, of which he was the owner, but which were in the defendant's keeping. Very shortly after Glanvill's day this form gave way to another somewhat better fitted to express the relation between a debtor and a creditor:—the word 'deforces' was dropped; the debtor is to render to the creditor so many pounds or shillings 'which he owes and unjustly detains[2].' This was the formula of 'debt in the *debet et detinet,*' a formula to be used when the original creditor sued the original debtor. If, however, there had been a death on the one side or on the other, then the word *debet* was not in place; the representative of the creditor could only charge the debtor with 'unjustly detaining' money, and only with an unjust detention could the representative of the debtor be charged. In such cases there is an action of debt 'merely in the *detinet*[3].' At the same time the claim for a particular chattel is being distinguished from the claim for a certain quantity of money, or of corn or the like. If a man claims a particular object, he ought not to use the word *debet*; he should merely say *iniuste detinet.*

[1] A century later, in 1374, Y. B. 48 Edw. III. f. 20 (Mich. pl. 8), it is allowed that either the bailor or the bailee can sue in trespass. See Holmes, Common Law, p. 171. But this applies only to a bailment at will. If the bailment was for a fixed term, the bailor could not bring trespass.

[2] A few cases of debt are to be found in the Plea Rolls of Richard I.; Rot. Cur. Reg. (Palgrave), i. 39, 380; ii. 9, 106; and of John; Select Civil Pleas (Baildon), pl. 38, 83, 102, 146, 173, 174. They become commoner in the Note Book, yet commoner on the latest rolls of Henry III. The writ appears in the earliest Registers; see Harv. L. R. iii. 112, 114, 172, 215. We shall speak of it again in the next chapter.

[3] Reg. Brev. Orig. 139 b.

Roughly this distinction may seem to us to correspond with that between contractual and proprietary claims; the action of debt may look like the outcome of contract, while the action of detinue is a vindication based upon proprietary right. The correspondence, however, is but rough. A nascent perception of 'obligation' seems to be involved in the rules that prevail as to the use of the word *debet*, but this is struggling with a cruder idea which would be satisfied with a distinction between current coins on the one hand and all other movable things upon the other. It is with detinue, not with debt, that we are here concerned; but it was very needful that the close connexion between these two actions should not escape us.

Scope of detinue.

Now at first sight the writ of detinue seems open to every one who for any cause whatever can claim from another the possession of a chattel:—*X*, the defendant, is to give up a thing which he wrongfully detains (*iniuste detinet*) from *A*, the plaintiff, or to explain why he has not done so. But so soon as [p. 173] we begin to examine the scope and effect of the action, two remarkable phenomena meet our eye. In the first place, if *X* chooses to be obstinate, he can not be compelled to deliver the chattel—let us say the ox—to *A*. In his count *A* will be bound to put some value upon the ox:—*X*, he will say, is detaining from me an ox worth five shillings. If he makes good his claim, the judgment will be that he recover his ox or its value assessed by a jury, and if *X* chooses to pay the money rather than deliver up the ox, he will by so doing satisfy the judgment. If he is still obstinate, then the sheriff will be bidden to sell enough of his chattels to make the sum awarded by the jurors and will hand it over to the plaintiff. In a memorable passage Bracton has spoken of this matter: memorable for to it we may trace all our talk about 'real and personal property.' 'It would seem at first sight,' he says, 'that the action in which a movable is demanded should be as well *in rem* as *in personam* since a specific thing is demanded and the possessor is bound to restore that thing; but in truth it is merely *in personam*, for he from whom the thing is demanded is not absolutely bound to restore it, but is bound alternatively to restore it or its price; and this, whether the thing be forthcoming or no. And therefore, if a man vindicates his movable chattel as having been carried off for any cause, or as having been lent (*commodatam*), he must in his action define its price,

and propound his claim thus:—I, such an one, demand that such an one do restore to me such a thing of such a price:—or —I complain that such an one detains from me, or has robbed me of, such a thing of such a price:—otherwise, no price being named, the vindication of a movable thing will fail[1].'

No real action for movables.

For a moment we may think that Bracton has gone astray among the technical terms of a foreign system. We may argue against him that the 'vindication' of a chattel, if it really be a vindication, if it be an assertion of ownership, is not the less an action *in rem* because the court will not go all lengths to restore that chattel to its owner, but will do its best to give him what is of equal value. But there is a second phenomenon to be [p. 174] considered. Bracton says nothing about it, though possibly it was in his mind when he wrote this passage. No one, so far as we know, says anything about it for a long time to come, and yet in our eyes it will be strange. It is this:—despite the generality of the writ, the bailor of a chattel can never bring this action against any one save his bailee or those who represent his bailee by testate or intestate succession. In later days there are but two modes of 'counting' in detinue[2]. The plaintiff must say either, 'I lost the goods and you found them,' or, 'I bailed the chattel to you[3].' The first of these counts (*detinue sur trover*) was called a 'new found haliday' in the fifteenth century[4]. We have, however, some reason for believing that it had been occasionally used in earlier times[5]. In the present context it is of no great interest to us, for if the owner has accidentally lost his chattel, that chattel has gone from him against his will, and we are here dealing with cases in which the owner has given up possession to another. In such cases there is clearly no place—if words mean anything—for *detinue sur trover*, for there has been no loss and finding. We must see what can be done with *detinue sur bailment*; and we come to the result that this action will not lie against the third

[1] Bracton, f. 102 b; Bracton and Azo, p. 172.

[2] We may here neglect the action by the widow or child for a 'reasonable part' of a dead man's goods.

[3] A variation on the latter count will be required in an action against the bailee's executor or administrator.

[4] Y. B. 33 Hen. VI. f. 26–7 (Trin. pl. 12); Holmes, Common Law, p. 169.

[5] Y. B. 21–2 Edw. I. 466; 2 Edw. III. f. 2 (Hil. pl. 5); Ames, Harv. L. R. iii. 33. In yet earlier times the finder who did not take the witness of his neighbours to the finding would have stood in danger of an *actio furti*.

hand. In other words, *A* bails a chattel to *M*, and *M* wrongfully gives or sells or bails it to *X*, or *X* wrongfully takes it from *M*:—in none of these cases has *A* an action against *X*; his only action is against *M*. In times much later than those with which we are dealing, lawyers will have begun to say that these phrases about trover and bailment, though one of them must be used, are not 'traversable': that the defendant must not catch hold of them and say, 'You did not lose, I did not find,' or, 'You did not bail to me,' but must deny that wrongful detention which has become the gist of the action. It was not always so; it was not so in the thirteenth century[1]. Early in the fifteenth a man bailed chattels for safe custody to a woman; she took a husband and died; her husband would not restore the goods; the bailor went to the chancery saying that he had no remedy at the common law[2]. Apparently in this instance, as in some other instances, the common law held to its old rule until an interference of the chancellor's equity was imminent.

Has the bailor property?

How shall we explain this? Shall we say that the man who [p. 175] bails his chattel to another parts with the ownership of it, that in exchange for ownership he takes a promise, and that the refusal to call his action an action *in rem* is fully justified, for he has no right *in rem* but only a right *in personam*? There is much to attract us in this answer. It has the plausible merit of being definite; it deals with modes of thought to which we are accustomed. What is more to the purpose, it seems to explain the close relation—in form it is almost identity—between detinue and debt. But unfortunately it is much too definite. Were it true, then the bailee ought consistently to be thought of and spoken of as the owner of the thing. But this is not the case. For example, Bracton in the very sentence in which he concedes to the bailee the appeal of larceny, denies that he is the owner of the things that have been bailed to him. Such things are in his keeping, but they are the things of another[3]. Indeed the current language of

[1] Already in 1292 we see a slight tendency to regard the detainer rather than the bailment as the gist of the action. Y. B. 20–1 Edw. I. p. 192: it is not enough to say, 'You did not bail to me': one must add, 'and I do not detain from you.' But there are much later cases which show that it is impossible, or at least extremely hard, for the bailor to fashion any count that will avail him against the third hand: Y. B. 16 Edw. II. f. 490; Ames, Harv. L. R., iii. 33.

[2] Select Cases in Chancery (Seld. Soc.) p. 113.

[3] Bracton, f. 151: 'et non refert utrum res quae ita subtracta fuerit, extiterit illius appellantis propria vel alterius, dum tamen de custodia sua.' So Glanvill, x. 13: 'Ex causa quoque commodati solet res aliqua quandoque deberi, ut si rem meam tibi gratis commodem ad usum inde percipiendum in servitio tuo; expleto quidem servitio, *rem meam* mihi teneris reddere.'

the time is apt to speak of the bailee as having but a *custodia* (Fr. *garde*) of the goods and to avoid such terms as *possessio* and *seisina*, though the bailee has remedies against all who disturb him. The thought has even crossed men's minds that a bailee can commit theft. Glanvill explains that this is impossible since the bailee comes to the thing by delivery[1]; but he would not have been at pains to tell us that a man can not steal what he both possesses and owns. The author of the Mirror recounts among the exploits of King Alfred that 'he hanged Bulmer because he adjudged Gerent to death, by colour of larceny of a thing which he had received by title of bailment[2].' This romancer's stories of King Alfred have for the more part some point in the doings of the court of Edward I., and it is not inconceivable that some of its justices had shown an inclination to anticipate the legislators of the nineteenth century by [p. 176] punishing fraudulent bailees as thieves. But to us the convincing argument is that, if once the bailee had been conceived as owner, and the bailor's action as purely contractual, the bailor could never have become the owner by insensible degrees and without definite legislation. We know, however, that this happened; before the end of the middle ages the bailor is the owner, has 'the general property' in the thing, and no statute has given him this. Lastly, we must add that, as will appear in the next chapter, to make the bailor's right a mere right *ex contractu* is to throw upon the nascent law of contract a weight that it will not bear. The writ of detinue is closely connected with the writ of debt; but then the writ of debt is closely connected with the writ of right, the most proprietary and most 'real' of all actions.

Evolution of ownership.

The explanation we believe to be that the evolution of legal remedies has in this instance lagged behind the evolution of morality. The law of property in land may be younger than the law of property in chattels, but has long ago outstripped its feebler rival. There may have been a time when such idea of ownership as was then entertained was adequately expressed in a mere protection against theft. From century to century the

[1] Glanvill, x. 13.

[2] Mirror (Seld. Soc.), p. 169.

pursuit and punishment of thieves and the restoration of chattels to those from whom they have been stolen were the main objects which the law had set itself to attain. Meanwhile 'bailments,' as we call them, of goods were becoming common. As against the thief and those who receive the goods from the thief, it was the bailee who required legal weapons. They were given him, and, when he has assumed them, he looks, at least to our eyes, very like an owner. But men do not think of him as the owner; they do not think of his bailor as one who has a mere contractual right. At all events so long as the goods are in the possession of the bailee, they are the goods of the bailor. If the men of the thirteenth century, or of yet earlier times, had been asked why the bailor had no action against the third hand, they would not have said, 'Because he has only a contract to rely upon and a contract binds but those who make it'; they would, we believe, have said, 'We and our fathers have got on well enough without such an action.' Their thoughts are not our thoughts; we can not at will displace from our minds the dilemma '*in rem* or *in personam*' which seems to have been put there by natural law. We can not rethink the process which lies hidden away in the history of those two words *owe* and *own*. What is owing to me, do I not own it, and is it not my own? Nevertheless what has already been said about the 'pecuniary' character of chattels may give us some help in [p. 177] our effort to represent the past.

Pecuniary character of chattels.

We have seen that when a man claims a chattel our law will make no strenuous effort to give him the very thing that he asks for. If he gets the value of the thing, he must be satisfied, and the thing itself may be left to the wrong-doer. Absurd as this rule might seem to us now-a-days, it served Englishmen well enough until the middle of the nineteenth century; it showed itself to be compatible with peace and order and an abundant commerce[1]. In older times it was a natural rule because of the pecuniary character of chattels. If one man has deposited a sovereign with another, or has lent that other a sovereign, the law will hardly be at pains to compel the restitution of that particular coin; an equivalent coin will do just as well. Our language shows that this is so. When we

[1] See above, p. 154. Though the Court of Chancery was prepared to compel the delivery of chattels of exceptional value, applications for this equitable remedy were not very common.

speak of money being 'deposited,' we almost always mean that money is 'lent,' and when we speak of money being 'lent,' we almost always mean that the ownership of the coins has passed from the lender to the borrower; we think of *mutuum* not of *commodatum*. But more than this can be said. True 'bailments' of coins do sometimes occur; coins may be deposited in the hands of one who is bound not to spend them but to keep them safely and restore them; they may even be 'commodated,' that is, lent for use and return, as if one lends a sovereign in order that the borrower may perform some conjuring trick with it and give it back again. In these cases our modern criminal law marks the fact that the ownership in the coins has not been transferred to the bailee, for it will punish the bailee as a thief if he appropriates them[1]. But then, this is the result, sometimes of a modern statute[2], sometimes of the modern conception of delivery for a strictly limited purpose not being a bailment at all; and if we carry back our thoughts to a time when the bailee will not be committing theft or any other crime in [p. 178] appropriating the bailed chattel, then we shall see that a bailment of coins can hardly be distinguished for any practical purpose from what we ordinarily call a loan (*mutui datio*) of money. In the one case the ownership in the coins has been, in the other it has not been, transferred; but how can law mark this difference? The bailee does all that can be required of him if he tenders equivalent coins, and those who, dealing with him in good faith, receive from him the bailed coins, will become owners of them. Some rare case will be required to show that the bailee is not the owner of them. And now if we repeat that the difference seen by modern law between coins and oxen is not aboriginal, we come almost of necessity to the result that there was a time when the lender of an ox or other thing might be called and thought of as its owner and yet have no action to recover it or its value, except one which could be made to look very like an action for a debt created by contract.

[1] Pollock and Wright, Possession, 161–3.

[2] Stat. 20–1 Vic. c. 54, sec. 4; 24–5 Vic. c. 96, sec. 3. The doctrine that a bailee might be guilty of theft if he 'determined the bailment' before he misappropriated the goods, has not been traced back beyond the celebrated carrier's case in 1474 (Y. B. 13 Ed. IV. f. 9, Pasch. p. 5), where it seems to have been forced upon the judges by the chancellor for the satisfaction of foreign merchants.

An elementary question.

We must not be wise above what is written or more precise than the lawyers of the age. Here is an elementary question that was debated in the year 1292:—I bail a charter for safe custody to a married woman; her husband dies; can I bring an action of detinue against her, it being clear law that a married woman can not bind herself by contract? This is the way in which that question is discussed:—

Huntingdon. Sir, our plaint is of a tortious detinue of a charter which this lady is now detaining from us. We crave judgment that she ought to answer for her tort.

Lowther. The cause of your action is the bailment; and at that time she could not bind herself. We crave judgment if she must now answer for a thing about which she could not bind herself.

Spigurnel. If you had bailed to the lady thirty marks for safe custody while she was coverte for return to you when you should demand them, would she be now bound to answer? I trow not. And so in this case.

Howard. The cases are not similar; for in a writ of debt you shall say *debet,* while here you shall say *iniuste detinet.* And again, in this case an action arises from a tortious detainer and not from the bailment. We crave judgment.

Lowther. We repeat what we have said[1].

Any one who attempts to carry into the reign of Edward I. [p. 179] a neat theory about the ownership and possession of movables must be prepared to read elementary lectures on 'general jurisprudence' to the acutest lawyers of that age.

Conveyance of movables.

There are other questions about movables that we should like to ask; but we shall hardly answer them out of the materials that are at hand. We think it fairly certain that the ownership of a chattel could not be transferred from one person to another, either by way of gift, or by way of sale, without a *traditio rei,* also that the only known gage of movables was what we should call a pawn or pledge, which has its inception in a transfer of possession. In Bracton's eyes the necessity for a livery of seisin is no peculiarity of the land law[2]. In order to transfer the ownership of any corporeal thing we must transfer

[1] Y. B. 20-1 Edw. I. p. 191. The question what was the nature of the action of detinue remained open till our own time. See *Bryant* v. *Herbert,* 3 C. P. D. 389.

[2] Bracton, f. 38 b; f. 41: 'idem est de mercibus in orreis.

the possession of it. Naturally, however, we hear much less of the livery of goods than of the livery of land. When land is delivered it is highly expedient that there should be some ceremonies performed which will take root in the memory of the witnesses. In the case of chattels formal acts would be useless, since there is no probability that the fact of transfer will be called in question at a distant day. Besides, in this case the court has not to struggle against the tendency to substitute a sham for the reality, a 'symbolical investiture' for a real change of possession; there is not much danger that the giver of chattels will endeavour both to give and to keep. At a later time our common law allowed that the ownership of a chattel could be transferred by the execution, or rather the delivery, of a sealed writing; but as this appears to have been a novelty in the fifteenth century[1], we can hardly suppose that it was already known in the thirteenth. Nor is it clear that even at the later time a gift by deed was thought to confer more than an irrevocable right to possess the goods. We doubt whether, according to medieval law, one could ever be full owner of goods, unless as executor, without having acquired actual possession. We do not doubt that the modern refinements of 'constructive delivery' were unthought of, at all events in the thirteenth century. Of sales we shall speak in the next chapter.

Land and chattels.

In dealing with chattels we have wandered far from the beaten track of traditional exposition. Had we followed it we should have begun by explaining that chattels are not 'real property,' not 'hereditaments,' not 'tenements.' But none of the distinctions to which these terms point seem to go to the root of the matter. If by a denial of the 'realty' of movable goods we merely mean (as is generally meant) that their owner, when he sues for them, can be compelled to take their value instead of them, this seems a somewhat superficial phenomenon, [p. 180] and it is not very ancient. So long as the old procedure for the recovery of stolen goods was in use, so long even as the appellor could obtain his writ of restitution, there was an action, and at one time a highly important action, which would give the owner his goods. Also, as modern experience shows, a very true and intense ownership of goods can be pretty well protected by

[1] Y. B. 7 Ed. IV. f. 20, pl. 21.

actions in which nothing but money can with any certainty be obtained. Indeed when our orthodox doctrine has come to be that land is not owned but that 'real actions' can be brought for it, while no 'real action' can be brought for just those things which are the subjects of 'absolute ownership,' it is clear enough that this 'personalness' of 'personal property' is a superficial phenomenon. Again, in the thirteenth century —this we shall see hereafter—the distinction which in later days was indicated by the term 'hereditaments' was not as yet very old, nor had it as yet eaten very deeply into the body of the law. Lastly, the fact that movables are not made the subjects of 'feudal tenure,' though it is of paramount importance, is not a fact which explains itself. It is not unlikely that some of the first stages in the process which built up the lofty edifice of feudalism were accomplished by loans of cattle, rather than by loans of land. Of course we must not seem to deny that rights in land played a part in the constitution of society and in the development of public law which rights in chattels did not and could not play; but we have not told the whole of the story until we have said that the dogma of retrospective feudalism which denies that there is any absolute ownership of land (save in the person of the king) derives all such truth as it contains from a conception of ownership as a right that must be more complete and better protected than was that ownership of chattels which the thirteenth century and earlier ages knew. On the land *dominium* rises above *dominium*; a long series of lords who are tenants and of tenants who are lords have rights over the land and remedies against all the world. This is possible because the rights of every one of them can be and is realized in a seisin; *duae possessiones sese compatiuntur in una re.* It is otherwise with the owner of a chattel. If he bails it to another, at all events if he bails it on terms that deprive him of the power to reclaim it at will, he abandons every sort and kind of seisin; this makes it difficult for us to treat him as an owner should be treated, for it is hard for us to think of an ownership that is not and ought not to be realized in a seisin. [p. 181] We may call him owner or say that the thing belongs to him, but our old-fashioned law treats him very much as if he had no 'real' right and no more than the benefit of a contract. Hence the dependent tenure of a chattel is impossible. This, if we approach the distinction from the side of jurisprudence, rather than from the side of constitutional or economic history, seems to be its core. The compatibility of divers seisins permits the rapid development of a land law which will give to both letter and hirer, feoffor and feoffee, rights of a very real and intense kind in the land, each protected by its own appropriate action, at a time when the backward and meagre law of personal property can hardly sanction two rights in one thing, and will not be dissatisfied with itself if it achieves the punishment of thieves and the restitution of stolen goods to those from whose seisin they have been taken.