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THE ALIENABILITY OF NON-POSSESSORY INTERESTS, III*

PERCY BORDWELL†

THE FALL OF SEISIN

The downfall of seisin had little of the drama of the Statute of Uses.¹ In the Preamble of the latter the use had been denounced with the greatest heat so that it was long a matter of contention that the execution of the use which the statute had intended was literally such or in other words, its extirpation. No such legislative denunciation of seisin marked its passing. It was not a novelty as the use had been but an antiquity whose mysterious consequences might be disposed of without passion and almost without remark. Years after the reform legislation of the first half of the nineteenth century a distinguished judge could say:

"I am of opinion that there are such things as seisin and disseisin still."²

Had he said, "I believe in ghosts," the impression created by his words would have been much the same. Similarly in the United States at the present time one may say that he believes in the continued existence of feudal tenure though its ghostlike character can hardly be denied. Had the reform legislation of 1833 and afterwards abolished seisin and disseisin by name, however, the elimination of their consequences could hardly have been more thoroughgoing. Maitland went back to that legislation to show that certain conspicuous consequences had survived until that time.³

In 1833 Reform was in the air.⁴ The period from 1760 to 1830 is called by Dicey the period of "Blackstonian optimism" or of "legislative quiescence,"⁵ that from 1825 to 1870 the era of "utilitarian reform."⁶ Bentham, the apostle of utilitarianism, was not himself particularly versed in, or concerned with, the law of real property but he was passionately interested in codification of all kinds, and when James Hum-

* This is the conclusion of an article the second installment of which appeared in (1942) 20 N. C. L. REV. 279. Pressure of events has precluded the completion of the intervening installments.

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¹ St. 27 HEN. VIII c. 10 (1536).

² James, L. J. in *Leach v. Jay*, L. R. 9 Ch. D. 42, 44 (1878).

³ Maitland, *The Mystery of Seisin* (1886) 2 L. QUAR. REV. 481, 483-486.

⁴ For the influence of Bentham, see DICEY, *LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY* (2 ed. 1917), Lecture VI.

⁵ *Id.* at 65-6, 62.

⁶ *Id.* at 63.

phreys, a barrister in good standing of Lincoln's Inn, brought out his *Outlines of a Code of Real Property* in 1826 Bentham hastened to his support.⁷ Humphreys' opening proposal was that all tenures should be utterly abolished except copyhold⁸ and his second the appointment of a commission to do away with copyhold.⁹ To him^{10*} as to Lord Mansfield,^{11*} and in the current opinion of the time,^{12*} seisin was merely one of the incidents of tenure and would fall with it. Instead of disseisin he used adverse possession. In the text of his articles he used the term owner frequently but never seisin or disseisin. He did not cover the Law of Personal Property, but thought fewer changes were necessary there than in the law of Real Property.¹³

Apparently Humphreys had no anticipation of the interest which his proposals would arouse and had not thought of them as a project for immediate legislation.¹⁴ But the favorable response to them caused him to get out a second edition a year later with a view to more immediate legislative action. In this he abandoned the word "code," proposed to reduce tenures but not to extinguish them, retained the fee tail, omitted his comparison between Primogeniture and Equal Partibility, as political, and brought his provisions as to powers more in conformity to the current practice in settlements.¹⁵ In all he proposed 117 articles, two thirds of which were identical with those in the first edition. The differences in many of the remaining articles were merely in matters of detail. The underlying scheme remained the same. Seisin and disseisin had no more place in the second edition than in the first. Humphreys' proposals had a profound influence on the New York Revised Statutes of 1829¹⁶ and hence on American Law. In England, apparently, his project was responsible for the appointment of a Royal Commission in 1828. That Commission was not as radical as Humphreys. To some extent at least

⁷ *Bentham on Humphrey's Property Code* (1826) 6 WESTMINSTER REV. 446.

⁸ p. 180 (1st ed. 1826).

⁹ p. 182 (1st ed. 1826).

^{10*} The chapter on Tenures (*id.* 9-14) does not mention the various kinds of tenure or their incidents but deals with livery of seisin, fines, tortious feoffments, the destructibility and inalienability of contingent remainders.

^{11*} In *Taylor v. Horde*, 1 Burr. 60, 107 (1757), Lord Mansfield says: "Seisin is a technical term to denote the completion of that investiture, by which the tenant was admitted into tenure." He assumes that originally feoffments were made publicly before the peers of the feudal court and with the lord's concurrence.

^{12*} The identification of seisin with feudal tenure has not been easy to down, notwithstanding the demonstration by the historical school of the last century that seisin antedated feudalism and applied to chattels as well as to land. It has had, therefore, to bear the opprobrium of feudalism in a capitalistic age.

¹³ HUMPHREY, *OUTLINES OF A CODE OF REAL PROPERTY* (1st ed. 1826), p. 7.

¹⁴ HUMPHREY, *OUTLINES OF A CODE OF REAL PROPERTY* (2nd ed. 1827) Preface p. viii.

¹⁵ *Id.* at ix-xi.

¹⁶ For an acknowledgment of the influence of Humphrey's work see EXTRACTS FROM THE ORIGINAL REPORTS OF THE REVISERS, 3 REVISED STATUTES OF NEW YORK, 1836, 587.

it shared the optimism of Blackstone.^{17*} But the Commissioners appear to have been singularly free from historical predispositions or dogmatic bias as to the technique of the law. They were competent and intelligent workmen, and displayed an expert common sense that reflected the utilitarian philosophy of the age. They went about in a business-like way to clear the law of real property of that which was obsolete and anomalous.

As first constituted, the Royal Commission consisted of one common lawyer, two equity draftsmen and two conveyancers.¹⁸ At the time of the Second Report three conveyancers had been added of whom Sanders, because of his death, participated only in the Second Report. The common lawyer and head of the Commission was John Campbell, afterwards Chief Justice and Lord Chancellor.¹⁹ Sugden had been offered the place but had declined.²⁰ Neither Sugden nor Preston, an extreme conservative, seems to have participated in the work of the Commission or to have been in sympathy with it. On the other hand Charles Butler answered the questionnaire of the Commission at length.²¹ It was to him that Humphreys had dedicated his second edition.²² The composition of the Commission assured a due regard for the equity point of view. As a common lawyer Campbell says that at the time of his appointment he knew nothing of the land law.²³ Where, as in matters of alienation, equity did not follow the law, there was every likelihood that the law would be made to follow equity not by providing as in the Judicature Act of 1873 that where equity and law were in conflict, equity should prevail,²⁴ but through the dominance of equitable ideas in the minds of the Commissioners. The old Elizabethan devotion to the common law had long ceased. The Commissioners were essentially equity-minded.

In addition to a general circular asking for communications, the

^{17*} The Commission divided the Law of Real Property into the two great divisions of *enjoyment* and *transfer*. As to the former, which the Commission evidently regarded as *the* Law of Real Property, the introduction went far beyond Blackstone and said that it appeared to come almost as near to perfection as could be expected in any human institution. But the modes by which estates and interests in Real Property were created, transferred and secured seemed to the Commissioners exceedingly defective. FIRST REPORT MADE TO HIS MAJESTY BY THE COMMISSIONERS APPOINTED TO INQUIRE INTO THE LAW OF ENGLAND RESPECTING REAL PROPERTY (1829) 6-7. This gives the key to their recommendations. They thoroughly approved of primogeniture, the widest power of testamentary disposition and strict family settlements but as long as these were untouched, they were open-minded as to the means by which these could be accomplished.

¹⁸ 12 PROPERTY LAWYER (1829) 33.

¹⁹ 1 LIFE OF LORD CAMPBELL (1881) 457-9.

²⁰ LORD ST. LEONARD'S DEFENCE (1869) 44.

²¹ FIRST REPORT MADE TO HIS MAJESTY BY THE COMMISSIONERS APPOINTED TO INQUIRE INTO THE LAW OF ENGLAND RESPECTING REAL PROPERTY (1829) 113-121. See also APPENDIX TO THE SECOND REPORT 37, 150.

²² HUMPHREY, OUTLINES OF A CODE OF REAL PROPERTY (2nd ed. 1827) Preface pp. v-vi.

²³ See notes, 19, 20 *supra*.

²⁴ 36-37 VICT. c. 66, S. 25, ss. 11 (1873).

Commissioners got out an elaborate questionnaire on Tenures, Descent, Dower, Curtesy, Alienation by Deed, Settlement, Fines and Recoveries, and Limitation of Action and Prescription, addressed to leading barristers and solicitors with a request for answers either in writing or by *viva voce* examinations and to this apparently there was a most generous response.²⁵ The questions and answers and many of the communications are printed in the Appendix to the First Report of the Commission and give a unique picture of the professional opinion of the time as to what was obsolete and as to what had long outlived its usefulness. There was little or no inclination to abolish tenure without at any rate substituting something in its place although one of the barristers²⁶ listed as inconveniences of tenure, "disseisin, discontinuance, forfeitures and tortious conveyances, that the freehold could not be conveyed without livery of seisin or *in futuro* and that contingent remainders might be destroyed and could not be transferred at law." Commonly these matters were treated under other heads than that of tenure. The exclusion of ascendants²⁷ and of the half-blood²⁸ in the law of descent aroused real feeling, and that the entry of any person should alter the course of descent was termed inconvenient and absurd.^{29*}

Under Alienation by Deed, the questionnaire asked if there were any objection to transfer by deed without livery of seisin or entry or any equivalent; if it were advisable that any assurances should have the peculiar effects ascribed to tortious conveyances; if the doctrine of *scintilla juris* should be laid to rest; if freeholds *in futuro* and conditional limitations should be allowed to be created by deeds though not operating by way of use; and finally if there were any objection to the transfer of contingent remainders and executory interests by deed.³⁰ Hardly a voice was raised for the retention of livery of seisin or entry or any equivalent;³¹ the tortious operation of assurances was almost universally condemned;³² the *scintilla juris* was felt by some to be already dead but in general a legislative declaration of death was felt desirable;³³ there was practical unanimity for allowing the creation of freeholds *in futuro* and conditional limitations without resorting to the Statute of Uses;³⁴ and there was like agreement for allowing the transfer by deed of contingent remainders and executory devises.³⁵ No ques-

²⁵ FIRST REPORT (1829) 6.

²⁶ WILLIAM CLOWES, FIRST REPORT (1829) 153.

²⁷ See the answers to Question 1, Descent.

²⁸ See the answers to Question 7, Descent.

^{29*} Richard Brooke, 198, Ans. 11. John Tyrrell, afterwards a Commissioner, was of opinion that the elimination of entry "would have the advantage of getting rid of the rule of *possessio fratris*," 311, Ans. 11. Most of the answers to Question 11 were along similar lines.

³⁰ See FIRST REPORT (1829) 90, Alienation by Deed, Questions 2, 3, 7-10.

³¹ See answers to Question 2.

³² See answers to Question 3.

³⁴ See answers to Questions 8 and 9.

³³ See answers to Question 7.

³⁵ See answers to Question 10.

tion was asked as to the desirability of making alienable non-possessory interests other than contingent remainders and executory interests, such as conditions and land in the adverse possession of another, but the trend as to these is seen in the opposition to tortious conveyances and in general to estates by wrong.³⁶ Conspicuous among the objections to these were the destruction of contingent remainders³⁷ and the forfeiture of terms for years and life estates,³⁸ but there is every indication that the opposition to the doctrine of estates by wrong³⁹ was to the doctrine in its entirety including its effect on the alienability of the dispossessed owner's right.⁴⁰ This is borne out by the views expressed by the Commissioners.⁴¹ There was general agreement that there should be some substitute for Fines and Recoveries.⁴²

Under Limitation of Action and Prescription there was general agreement that there should be one period for the limitation of actions,⁴³ that the distinction between right of property and right of possession could be advantageously abandoned,⁴⁴ that anyone having title to an estate in possession should have a right of entry, notwithstanding any discontinuance, descent cast or other existing impediments,⁴⁵ that the real actions should be abolished⁴⁶ and that one or at most two actions for the recovery of land should be substituted.⁴⁷ In the questionnaire disseisin was not mentioned but where one might have expected it adverse possession was used instead.

The First Report of the Commissioners followed in general the lines indicated by the answers to their questionnaire. The rules excluding ascendants⁴⁸ and the half-blood⁴⁹ and the rule requiring the entry of the heir to make him a stock of descent were rejected.⁵⁰ Instead, ancestors were given a preference over collaterals,⁵¹ the full-blood were preferred to the half-blood but the latter were not excluded,⁵² and it was proposed that estates should pass to the heirs of the person who last died entitled although he may not have had seisin.⁵³ In the Inheritance Act of 1833⁵⁴

³⁶ See *supra*, n. 32 and the answers to Question 11, Fines and Recoveries.

³⁷ See *supra*, n. 32 and answers to Question 11, subhead 3, Fines and Recoveries.

³⁸ See answers to Question 11, subhead 5, Fines and Recoveries.

³⁹ See especially answers to Question 11, subhead 1, Fines and Recoveries.

⁴⁰ See especially the answers of Sanders, 123, Dixon, 186, Bell, 237, Ker, 305, Tyrrell, 320.

⁴¹ FIRST REPORT (1829) 58.

⁴² See the answers to Question 1, Fines and Recoveries.

⁴³ See the answers to Question 2, Limitation of Action and Prescription.

⁴⁴ See the answers to Question 3, Limitation of Action and Prescription.

⁴⁵ See the answers to Question 4, Limitation of Action and Prescription.

⁴⁶ See the answers to Question 5, Limitation of Action and Prescription.

⁴⁷ See the answers to Question 6, Limitation of Action and Prescription.

⁴⁸ FIRST REPORT (1829) 10, 12, 63 (Propositions 1-5).

⁴⁹ *Id.* at 11, 12-13, 63 (Propositions 7-9).

⁵⁰ *Id.* at 15-16, 64 (Proposition 13).

⁵¹ See *supra*, n. 49.

⁵² See *supra*, n. 48.

⁵³ See *supra*, n. 50.

⁵⁴ ST. 3 & 4 WILLIAM IV c. 106 (1833).

the proposals as to ascendants⁵⁵ and the half-blood⁵⁶ were adopted but instead of tracing descent from the one last entitled it was provided that descent should be traced from the purchaser.⁵⁷ This was more favorable to the half-blood than the proposal of the Commissioners. That proposal went even further than the *possessio fratris* in deflecting the descent from its original course whereas the statute restored that course and utterly eliminated any suggestion of the *possessio fratris*.⁵⁸ The shift from the one last entitled to the first purchaser as the source of title was a return to the earlier law as expounded by Blackstone.⁵⁹ The influence of Blackstone and the dislike for the *possessio fratris* probably had much to do with the shift. The proposal of the Commissioners had eliminated the importance of what they considered the accident of entry but had exaggerated what was apparently considered the more substantial evil, the change in the course of the descent. The canon that descent should be traced from the purchaser remained with slight modification⁶⁰ the law in England until January 1, 1926 when under the Administration of Estates Act, 1925,⁶¹ all the old canons of descent as to the fee simple were abolished⁶² and new rules established applicable alike to realty and personalty.⁶³ That Act provides that all the real estate to which a deceased person was entitled shall pass,⁶⁴ as recommended by the Commissioners almost a century before.

Seisin in law had been sufficient to support dower at common law⁶⁵ but seisin in fact had been necessary to entitle the husband to curtesy.⁶⁶ The Commissioners recommended that dower be given out of lands to which the husband had a right but to which he had neither seisin in law nor in fact⁶⁷ and that a like rule be adopted for curtesy.⁶⁸ The recommendation as to dower was adopted in The Dower Act, 1833,⁶⁹ but no like act as to curtesy was passed, so that in July 1896 Charles Sweet could say that the reform legislation had deprived seisin of its theoretical as well as its practical importance in all cases except two, the one where land had been conveyed by feoffment which could not operate as any other mode of assurance and the other where a man claimed an estate by the curtesy.⁷⁰ The anomaly as to curtesy was greatly cut down by

⁵⁵ INHERITANCE ACT OF 1833, s. 6.

⁵⁶ INHERITANCE ACT OF 1833, s. 9.

⁵⁷ INHERITANCE ACT OF 1833, s. 2.

⁵⁸ See the comment of Joshua Williams, WATKINS, THE LAW OF DESCENTS (4th ed. 1837) 284.

⁵⁹ See *supra*, p. 286.

⁶⁰ See LORD ST. LEONARD'S ACT, 1859, 22, 23 VICT. c. 35, ss. 19, 20.

⁶¹ 15 GEO. V c. 23 (1925).

⁶² *Id.* s. 45.

⁶³ *Id.* s. 46.

⁶⁴ ADMINISTRATION OF ESTATES ACT, 1925, s. 1(1).

⁶⁵ FIRST REPORT (1829) 16.

⁶⁶ *Id.* at 19.

⁶⁷ *Id.* at 18, 69 (Proposition 1).

⁶⁸ *Id.* at 19, 70 (Propositions 1 & 2).

⁶⁹ ST. 3 & 4 WM. IV c. 105, s. 3 (1833).

⁷⁰ Sweet, *Seisin* (1896) 12 L. QUAR. REV. 239, 244.

the abolition of curtesy as to the fee simple by the Administration of Estates Act, 1925,⁷¹ but curtesy as to the fee tail is still a possibility.⁷² However as the fee tail is now exclusively equitable,⁷³ and the requirement of an actual seisin for curtesy did not apparently extend to equitable estates,⁷⁴ the continued possibility of curtesy in an entail does not apparently keep alive the distinction between seisin in law and seisin in deed. Equitable seisin of some kind may still be required but the case will be a rare one, for most entails are in remainder and on that account not subject to curtesy.⁷⁵

Fines and recoveries were one phase of the old land law that was still in full vigor at the time of the reform legislation. These assurances still performed a useful function in the transfer of the property of a married woman and in the docking of entails⁷⁶ but their validity depended upon seisin of freehold^{77*} which had come to be very capricious,⁷⁸ they were very expensive⁷⁹ and because of their extraordinary operation extremely dangerous except in the hands of the most skilled conveyancers.⁸⁰ The mischiefs arising from the necessity of the freehold being in the tenant to the *praecipe* in the case of the recovery occupy more than a page of the Commissioner's First Report.⁸¹ Accordingly in the substitute for the recovery which the Commissioners recommended,⁸² they abandoned the principle that the life tenant would have to be a party to the docking of an entail by a remainderman but substituted for him a 'protector of the settlement'⁸³ who would normally be but did not have to be, the life tenant.⁸⁴ Moreover to dock the entail, either seisin or title was to be sufficient.⁸⁵ The substitute proposed for both the fine and the recovery was an enrolled deed⁸⁶ which like other deeds would operate innocently. These recommendations of the Commissioners were embodied in the Fines and Recoveries Act of 1833.^{87*}

⁷¹ 15 GEO. V c. 23, s. 45 (1925).

⁷² *Ibid.*

⁷³ LAW OF PROPERTY ACT 1925, s. 1 (1), (3).

⁷⁴ FIRST REPORT (1829) 19; LEWIN ON TRUSTS (13th ed. 1928) 744; Parker v. Carter, 4 Hare, 400, 418 (1844).

⁷⁵ That this was the rule as to dower at common law notwithstanding that seisin in law was sufficient to support it, see 1 SCRIBNER ON DOWER (2 ed. 1883) 321.

⁷⁶ See FIRST REPORT (1829) 31.

^{77*} In the case of the fine, this requirement was embodied in the plea *partes finis nihil habuerunt tempore finis levati*, in the case of the recovery in the necessity of the freehold being in the tenant to the *praecipe*.

⁷⁸ See FIRST REPORT (1829) 24-25, 26-27 and *supra*, p. 285.

⁷⁹ The Commissioners mention one case in which 4000 pounds Sterling had been paid for a fine, FIRST REPORT (1829) 25. ⁸⁰ FIRST REPORT (1829) 21.

⁸¹ FIRST REPORT (1829) 24-25.

⁸² FIRST REPORT (1829) 32-33.

⁸³ This phrase was not the Commissioners' own but embodied their ideas. It appeared in the FINES AND RECOVERIES ACT, 1833, c. 74, s. 22.

⁸⁴ FIRST REPORT (1829) 32-33, 71-72 (Propositions 3-5).

⁸⁵ *Id.* at 71 (Proposition 3).

⁸⁶ *Id.* at 31, 72 (Proposition 8).

^{87*} ST. 3 & 4 WM. IV c. 74 (1833). By s. 15 any "actual tenant in tail" was empowered to dock the entail and under s. 1 a tenant was to be deemed an actual tenant although the estate tail may have been divested or turned to a right. See 1

In dealing with the limitation of actions the Commissioners had their work pretty much laid out for them. The old real actions had long been superseded in general practice by ejectment. However admirable they had been in the thirteenth century in building up the common law, they were highly formal, stereotyped and ill-suited to the changes in the law wrought by uses and the Statutes of Uses and Wills. Had not ejectment taken their place, probably some other action would have.⁸⁸ But they still lay in the background and though discouraged, apparently were sometimes brought.⁸⁹ In a few instances there was no period of limitation.⁹⁰ As to most real actions the period was either sixty, or fifty or thirty years⁹¹ although the period for writs of formedon had been reduced to 20 years, by the same statute, 21 Jac. I c. 16 (1623), that had limited for the first time rights of entry⁹² and thus indirectly the action of ejectment. That statute had also fixed 20 years as the period for rights of entry. Obviously this diversity was not conducive to the quieting of title.^{93*} There was general agreement that the real actions should go and that a uniform period of limitation should be established. A few thought two forms of action should be substituted in their place⁹⁴ but ejectment had the field and was recommended by the Commissioners as the only form of action for the recovery of land except in two special cases.⁹⁵ The natural complement to this was one period of limitation.

Had the reform stopped with ejectment and a single period of limitation there would have been, without more, a substitution of the possession on which ejectment was based for the seisin on which the old writs were based, a substitution of dispossession or discontinuance of possession for the old disseisin, abatement, intrusion and deforcement and a substitution of the recovery of possession for the recovery of seisin.⁹⁶ These changes were reflected in the language of the Commissioners. This change in language alone was almost certain to relieve the law of much that was technical in the old law of seisin and disseisin, but the Commissioners did not leave this to chance. They recommended that wher-

HAYES ON CONVEYANCING (5th ed. 1840) 155. That the substituted assurance would not operate as a tortious conveyance, see *id.* at 193.

⁸⁸ SEDGWICK & WAIT, *TRIAL OF TITLE TO LAND* (2nd ed. 1886) 3 HALE'S COMMON LAW (4 ed. 1792) 176; Finlason's notes to 4 REEVES' HISTORY OF ENGLISH LAW (1880) 235, 238, 242.

⁸⁹ FIRST REPORT (1829) 42.

⁹⁰ *Id.* at 40.

⁹¹ *Id.* at 39; see 32 HEN. VIII c. 2 (1540).

⁹² FIRST REPORT (1829) 39.

^{93*} The same criticism could not be made of the process by fine with proclamations under St. 4 HEN. VII c. 24 (1488), under which rights might be barred if claim were not made within five years but here the Commissioners felt that the law went too far in the opposite direction. FIRST REPORT (1829) 43.

⁹⁴ See *supra*, p. 288.

⁹⁵ Dower and *Quare Impedit*. FIRST REPORT (1829) 41, 77 (Proposition 1).

⁹⁶ These implications of ejectment had been stressed by Lord Mansfield in *Taylor v. Horde*, 1 Burr. 60, 111-114 (1757).

ever one was entitled to the possession he should have a right of peaceable entry and that no claim to lands and that no entry on land should be of any avail to the person making the same, unless he obtain actual possession of such lands.⁹⁷ This was to eliminate the old doctrines of descent cast and continual claim, and in the act that followed these were abolished by name.⁹⁸ The Commissioners were apparently unwilling to give such perpetuation to the old learning as would be involved in using the old terminology for its abrogation. These changes made the right of peaceable entry and the right of action co-existent⁹⁹ so that, while these remained as distinct remedies to the one entitled, they ceased to represent successive stages in the deterioration of title as they had under the older system. Henceforth there were to be no such successive stages, no discontinuance by which a right of entry would be turned into a right of action or as some preferred to call it a right of possession into a right of property. These distinctions were accidents of the old system and the profession was glad to get rid of them. Right of entry might still be used to indicate the right of one entitled to land in the adverse possession of another, but more as a quaint survival than as anything else. Right of entry and disseisin were complementary, and the new proposals left disseisin in no better place than discontinuance. Dispossession had taken its place and dispossession, while broad enough to include the old disseisin at election as well as the old disseisin, was not the mere sum of those two things but something new, and not to be circumscribed by the distinctions of the old system. In interpreting the Limitation Act of 1833 the judges of a later time seem hardly to have been conscious of them.¹⁰⁰

One might have thought that adverse possession would have fared better in the later English law than disseisin, for it is used in the propositions of the Commissioners while disseisin is not. If it had, the statute would have run from the commencement of the adverse possession, as is generally true in the United States, and not from the time the action accrued; but the decisions did not take that course.¹⁰¹ In one case, that of the tenant at will, the Statute had provided for the running of the statute of limitations—although there was clearly no adverse possession.¹⁰² Perhaps in general adverse possession smacked too much of the old disseisin. The two were treated as identical by counsel¹⁰³ in a

⁹⁷ FIRST REPORT (1829) 41-42, 77 (Propositions 3, 4).

⁹⁸ ST. 3 & 4 WM. IV, c. 27, ss. 10, 11, 39 (1833).

⁹⁹ "Wherever there is a right of action there should be a right of entry, and wherever there is a right of entry there should be a right of action." FIRST REPORT (1829) 41.

¹⁰⁰ See LIGHTWOOD, POSSESSION OF LAND (1894) 63, Sweet, *Seisin* (1896) 12 L. QUAR. REV. 239, 249.

¹⁰¹ See LIGHTWOOD, THE TIME LIMIT OF ACTIONS (1909) 6.

¹⁰² 3 & 4 WM. IV, c. 27, s. 7 (1833).

¹⁰³ Sir W. W. Follett in *Nepean v. Doe*, 2 M. & W. 894, 900 (1837).

case soon after the Statute of 1833 in which was argued that the statutes of limitation contained no reference to adverse possession which had been engrafted by the courts upon the statute 21 Jac. I. c. 16. The court went even further than this, and held that the second and third sections of the new act had done away with the doctrine of non-adverse possession.¹⁰⁴ Accordingly, adverse possession has no such place in England as in the United States. Instead of looking under Adverse Possession, one looks there under Limitation of Actions.

The effect of the old disseisin has been minimized by the assumption that the entry of the younger brother, or other more remote heir, was not adverse to the older brother¹⁰⁵ and by the requirement of proof of actual ouster in the case of tenants in common, joint tenants and coparceners.¹⁰⁶ The Commissioners deemed neither rule desirable,¹⁰⁷ and their recommendations¹⁰⁸ were embodied in the Statute.¹⁰⁹ Another recommendation hit at the forfeitures which had characterized tortious conveyances. The proposal was made¹¹⁰ that if a person held under an assurance purporting to pass a larger estate than it did rightfully pass, the time would not commence to run until the rightful interest should have terminated. The Statute, however, did not mention the tortious conveyance, but did make a like provision for the running of the statute where there had been a breach of condition.¹¹¹

One of the advantages that the Commissioners felt would accrue from the abolition of the real actions was "in rendering useless the vast mass of technical learning connected with them."¹¹² One of these matters was warranty.¹¹³ Another, apparently, was remitter. Remitter had once been a matter of considerable importance. Littleton had devoted a chapter to it.¹¹⁴ Where one with an older right had come to a defeasible estate other than by his own act or his own assent he was remitted to his older right, thus defeating the possessory action which could have availed against him as to the defeasible estate.¹¹⁵ This was a doctrine springing from the hierarchy of real actions and clearly out of place in the new scheme of things. Accordingly, when Challiss suggested it in

¹⁰⁴ *Id.* at 911.

¹⁰⁵ FIRST REPORT (1829) 47.

¹⁰⁶ *Id.* at 48.

¹⁰⁷ *Id.* at 47-48.

¹⁰⁸ *Id.* at 79 (Propositions 20, 21).

¹⁰⁹ ST. 3 & 4 WM. IV, c. 27, ss. 12, 13 (1833).

¹¹⁰ FIRST REPORT (1829) 79 (Proposition 19).

¹¹¹ ST. 3 & 4 WM. IV, c. 27, s. 4 (1833).

¹¹² FIRST REPORT (1829) 42.

¹¹³ That a right to enter should not be defeated by warranty see *id.* at 39; ST. 3 & 4 WM. IV, c. 27, s. 39 (1833). Under Fines and Recoveries, the Commissioners had also recommended that estates tail should not be barred by warranty (FIRST REPORT (1829) 31, 71, Proposition 2) and this recommendation was adopted (ST. 3 & 4 WM. IV, c. 74, s. 14 (1833)).

¹¹⁴ LITTLETON TENURES, bk. III, c. 12.

¹¹⁵ BUTLER, NOTE 1 to CO. LIT. 347 b.

1889¹¹⁶ Charles Sweet, referring to the Limitation Act, replied that "the statute was passed for the express purpose of getting rid of the doctrines of seisin, disseisin and remitter."¹¹⁷

The diversity in the periods of limitation under the older law left little chance for any theory that the right was barred as well as the remedy. The shorter periods could have had no such effect and although a different effect might conceivably have been given to the limitation of the Writs of Right, any such difference in result would have been remarkable. To have picked out the provisions applicable to the Writs of Right and to have given them the effect of a prescriptive bar, whereas the like provisions as to other actions were treated as peculiar to those particular forms of action and therefore distinctly procedural would have been something that apparently did not occur to anyone.¹¹⁸ This was not because the notion of a bar of the right was not familiar. It was familiar as the consequence of the lapse of a year and a day after the obtaining of seisin under a judgment in a Writ of Right¹¹⁹ in pursuance to the levying of a fine.¹²⁰ But there was nothing to suggest anything of this in the statutes of limitation, nor did the judges take it upon themselves to read it into the statutes. By a Statute of Edward III¹²¹ the bar of the fine was abolished and this lasted for over a hundred years.¹²² The maxim gained currency that a right could not die.¹²³ This was probably of ecclesiastical origin¹²⁴ but doubtless it confirmed the remedial character of the statutes of limitation. With the establishment of a uniform period of limitation, however, the situation was quite different. The quieting of titles was present in the minds of the Commissioners as much as the cutting off of stale claims. They rejected the suggestion that possession for a certain period regardless of disabilities or future interests should give an absolute title after the manner of the civil law,¹²⁵ for they thought that the one entitled to a future interest should have his time from the accrual of his action. However, they cut down the time to which the ordinary period of twenty years might be extended by disabilities to a flat forty years¹²⁶ and they made the running of the statute a bar to the right.¹²⁷ Furthermore, the commissioners proposed

¹¹⁶ *The Squatter's Case* (1889) 5 L. QUAR. REV. 185, 186; CHALLISS, *REAL PROPERTY* (3 ed. 1911) App. iii.

¹¹⁷ *Seisin* (1896) 12 L. QUAR. REV. 239, 249; see also Sweet's note to CHALLISS, *REAL PROPERTY* (3 ed. 1911) 435.

¹¹⁸ See 2 POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW* (2nd ed. 1923) 141.

¹¹⁹ 2 *id.* at 101.

¹²⁰ 2 *id.* at 76.

¹²¹ St. 34 EDW. III, c. 16 (1360).

¹²² St. 1 RIC. III, c. 7 (1483). This statute was superseded by St. 4 HEN. VII, c. 24 (1847).

¹²³ LIT. TENURES, s. 478.

¹²⁴ See MAINE, *ANCIENT LAW* (3rd Am. ed. 1887) 276.

¹²⁵ *FIRST REPORT* (1829) 45-46.

¹²⁶ *Id.* at 45, 78 (Proposition 6). This recommendation was embodied in St. 3 & 4 WM. IV, c. 27, s. 17 (1833).

¹²⁷ *Id.* at 81 (Proposition 37) followed in 3 & 4 WM. IV, c. 27, s. 34 (1833).

that the right should be vested in the party in possession¹²⁸ thus giving color to the theory that the Statute should operate as a Parliamentary conveyance. However, nothing was said to that effect in the Statute, and the theory has not prevailed.¹²⁹ Instead, the English theory is one that looks in the first place to the destruction of the old right, and only incidentally to the creation of the new, as compared with the modern American doctrine of adverse possession where the creation of the new right is primary and the destruction of the old right secondary. The one is a doctrine of negative, the other of positive prescription. Both are a far cry from the old disseisin.

In their Second Report, in 1830, the Commissioners made their most radical recommendation, the adoption of a General Register of Deeds. For a good many years persistent efforts were made to get Parliament to adopt this reform but without success.¹³⁰ Finally in 1853 favor turned towards a Register of Title.¹³¹

The Third Report of the Commissioners in 1832 was a continuation of the First Report plus the additional topics of Perpetuities, Covenants and A Period of Limitation for the Rights of the Church. In line with the general sentiment expressed in the First Report,¹³² the Commissioners now proposed that all future and contingent estates and interests be made assignable and devisable but then seemed to detract from this by providing that this should not authorize the transfer of an estate or interest under a limitation to the heirs of a living person during the life of that person.¹³³ This proviso savored at least of the distinction between uncertainty as to event and uncertainty as to person. The proposal was incorporated by reference in the Fourth Report dealing with Wills but with the omission of the proviso and with the recommendation that the privilege of alienability be extended to rights of entry and of action and suit.¹³⁴ As so-modified the proposal was embodied in Section 3 of the Wills Act of 1837 except that any distinction turning on uncertainty as to person was expressly repudiated.¹³⁵ In the mention of rights of entry and action in the Fourth Report there was a retrocession from the more modern terminology of the First Report and a return to that of

¹²⁸ FIRST REPORT (1829) 81 (Proposition 37).

¹²⁹ See LIGHTWOOD, POSSESSION OF LAND (1894) 273 and the opinion of Cozens-Hardy, M. R. *In re Atkinson and Horsell's Contract*, 2 Ch. 1 (1912).

¹³⁰ See REPORT OF THE REGISTRATION AND CONVEYANCING COMMISSION (1850) Appendix VI, 239-41; REPORT OF THE REGISTRATION OF TITLE COMMISSION (1857) 3.

¹³¹ See REPORT OF THE REGISTRATION OF TITLE COMMISSION (1857) App. F for the REPORT OF THE SELECT COMMITTEE OF THE HOUSE OF COMMONS (1853). This led to the REPORT OF THE COMMISSION OF 1857. The latter definitely turned the tide in favor of Registration of Title in England.

¹³² FIRST REPORT (1829) 57 and see *supra*, p. 287.

¹³³ THIRD REPORT (1832) 26-27, 28, 69 (Proposition 7).

¹³⁴ FOURTH REPORT (1833) 23, 80 (Proposition 8).

¹³⁵ 7 WM. IV, & 1 VICT. c. 26, s. 3 (1837).

the old law, although incident to the abrogation of the latter. In the Wills Act right of entry only was mentioned.

Eight years later like transfers by deed were authorized and again right of entry was mentioned though not right of action.¹³⁶ In their First Report the Commissioners had shown a consciousness of the conflict between such alienability and the prevailing laws against champerty and maintenance and had recommended the repeal of the latter.¹³⁷ Notwithstanding this, section 2 of ST. 32 HEN. VIII c. 9 (1540) against the buying of pretended titles was not repealed until 1897.¹³⁸

Another recommendation of the First Report had been that all estates should be transferable by a single deed without the forms of livery of seisin or entry. The lease and release was to become obsolete.¹³⁹ By a statute of 1841, the necessity of a prior lease was avoided and the conveyance was to take effect as if it had been by lease and release¹⁴⁰ but four years later the grant was preferred to the release and it was declared that henceforth corporeal hereditaments should lie in grant.¹⁴¹ To this extent the rule long applicable to incorporeal hereditaments was applied but whereas the latter lay in grant but not in livery, the Statute expressly allowed transfer by livery as well in the case of corporeal hereditaments and it was not until the Law of Property Act, 1925, that the rule hitherto applicable in the case of incorporeal hereditaments was applied in full to corporeal hereditaments. In that Act it was declared that "all lands and all interests therein lie in grant and are incapable of being conveyed by livery, or livery and seisin, or by feoffment or by bargain and sale."¹⁴² Had the feoffment been abolished with the fine and the recovery, there would thereby have been an end to the conveyances capable of a tortious operation, but as the feoffment lingered on, there was need of express legislation if its tortious operation were to be avoided and this is found in the Acts of 1844¹⁴³ and 1845.¹⁴⁴

The Third Report furthermore struck at the very roots of contingent remainders.¹⁴⁵ The Report said that it was not clear on what principle contingent remainders had been first established. The latter were hard to reconcile with the present operation of the feoffment and the general rule against transfers of the freehold *in futuro*. They were much more like the executory interests arising under the Statutes of Uses and Wills

¹³⁶ 8 and 9 VICT. c. 106, s. 6 (1845). A statute of the previous year, 7 & 8 VICT. c. 76, s. 5 (1844) had made contingent and executory interests and rights of entry for condition broken transferable.

¹³⁷ FIRST REPORT (1829) 58.

¹³⁸ ST. 60 & 61 VICT. c. 65, s. 11 (1897).

¹³⁹ FIRST REPORT (1829) 57.

¹⁴⁰ ST. 4 & 5 VICT. c. 21, s. 1 (1841).

¹⁴¹ ST. 8 & 9 VICT. c. 106, s. 2 (1845).

¹⁴² ST. 15 GEO. V, c. 20, s. 51 (1925).

¹⁴³ ST. 7 & 8 VICT. c. 76, s. 7 (1844).

¹⁴⁴ ST. 8 & 9 VICT. c. 106, s. 4 (1845). ¹⁴⁵ THIRD REPORT (1832) 23-25.

than like the vested remainder. But unlike these executory interests they were subject to destruction. This the Commissioners characterized as subversive of intent. Accordingly, they proposed that in the case of the destruction or determination of the particular estate before the happening of the contingency, the contingent remainder should be deemed a future estate and not a remainder.¹⁴⁶ An act of 1844 carried out the logic although it went beyond the express proposal of the Commissioners by abolishing contingent remainders altogether and converting them into executory interests. This was evidently too radical for the profession and in slightly less than a year the contingent remainder was restored as though the previous act had not been passed.¹⁴⁸ The new Act made no provision for the preservation of the contingent remainder where the contingency had not happened until after the natural determination of the life estate, but did provide against its destruction by the premature destruction of the life estate.¹⁴⁹ A hard case in 1876¹⁵⁰ is supposed to be responsible for the Act in the following year that in substance adopted the proposal of the Commissioners.¹⁵¹

Under Covenants the Commissioners showed the same favor for their running with the land that they had shown for the transferability of non-possessory interests. To make the running of the covenants turn on whether they touched or concerned the land, on the existence of the subject matter at the time of the covenant, on the use of the word assigns,^{152*} or on privity of estate^{153*} seemed to the Commissioners to introduce unneeded technicalities into a matter where intent alone should be the guide and where intent might well be presumed in favor of the running. Subsequent legislation in England has made the existence of the subject matter immaterial¹⁵⁴ and the word assigns unnecessary.¹⁵⁵ It has also cut down the requirement of privity of estate.¹⁵⁶ But what is in effect the requirement that the covenant shall touch and concern the land is still retained.¹⁵⁷

The Fourth Report of the Commissioners, in 1833, was concerned

¹⁴⁶ *Id.* at 68 (Proposition 1).

¹⁴⁷ ST. 7 & 8 VICT. c. 76, s. 8 (1844).

¹⁴⁸ ST. 8 & 9 VICT. c. 106, s. 1 (1845).

¹⁴⁹ *Id.* s. 8.

¹⁵⁰ *Cunliffe v. Brancher*, 3 Ch. D. 393 (1876).

¹⁵¹ ST. 40 & 41 VICT. c. 33 (1877).

^{152*} These three requirements are referred to in THIRD REPORT (1832) 45 and rejected as artificial apparently not only with regard to leases but also where no landlord and tenant relationship exists (*id.* at 46).

^{153*} That the benefit of covenants should run regardless of privity of estate see *id.* at 52 and that the burden should not run at law where no landlord and tenant relationship exists even though there be privity of estate see *id.* at 53.

¹⁵⁴ 15 GEO. V, c. 20, s. 79 (1) (1925).

¹⁵⁵ *Id.* s. 80 (3).

¹⁵⁶ ST. 44 & 45 VICT. c. 41, ss. 10, 11 (1881); 15 GEO. V c. 20, ss. 141, 142 (1925); See also Bordwell, *English Property Reform and Its American Aspects* (1927) 37 YALE L. J. 1, 19-21.

¹⁵⁷ Bordwell, *English Property Reform and Its American Aspects* (1927) 37 YALE L. J. 1, 19-21.

with Wills and resulted in the Wills Act of 1837.¹⁵⁸ The provision of that Act making nonpossessory interests devisable has already been mentioned.¹⁵⁹ But the Report and the Act went much further than this in the departure from the old law. The old devise had affected only land which the devisor had at the time of making the will. This was a natural interpretation of the language of the Statutes of Wills¹⁶⁰ and was attributed by Coke to that language.¹⁶¹ However, this was denied by Jarman¹⁶² on the ground that the same thing was true of land devisable by custom. In either case the devise was treated as a conveyance and it was fundamental that a man could not convey that which he did not have. That the devise was treated as a conveyance would seem to have been the outcome of the exclusive jurisdiction of the Ecclesiastical Courts over wills. As a conveyance the devise was specific and without the ambulatory character of the true will. The Commissioners recommended that a will might pass after-acquired land, and, that as to the property comprised in it, it should speak as of the testator's death unless a contrary intent were shown.¹⁶³ These recommendations were carried out in substance in the Act.¹⁶⁴

A curious omission in the work of the Commissioners was their failure to set the question of the *scintilla juris* at rest. According to this doctrine there was a scintilla of right left in the feoffee to uses notwithstanding the Statute of Uses that would enable them to enter and destroy springing and shifting uses. In the questionnaire sent out by the Commissioners, the question had been asked as to whether this matter should not be set to rest.¹⁶⁵ The answers had been overwhelmingly in the affirmative. But for some reason nothing appears to have come of this in the Reports and the repudiation of the doctrine was left for an Act of 1860.¹⁶⁶

And so the reign of seisin came to an end. Uses had threatened it from the first. These had been anathematized in the Preamble of the Statute of Uses,¹⁶⁷ but the Statute itself had belied the Preamble by giving the stamp of seisin to the use. For a time in the reign of Elizabeth seisin seemed to have regained its old power.¹⁶⁸ The common law was for the time being in the ascendance and accomplished the destruction of the contingent remainder and the preference for common law interests.

¹⁵⁸ 7 WM. IV and 1 VICT. c. 26 (1837).

¹⁵⁹ See *supra*, p. 295.

¹⁶⁰ 32 HEN. VIII, c. 1 (1540); 34 & 35 HEN. VIII, c. 5 (1542).

¹⁶¹ Butler and Baker's Case, 3 Co. 25a, 30b (1591); Leonard Lovie's Case, 10 Co. 78a, 83b (1613), cited in FOURTH REPORT (1833) 24.

¹⁶² 1 JARMAN ON WILLS (6th ed. 1910) 66. Jarman was perhaps influenced by the opinion of Lord Mansfield in *Harwood v. Goodright*, Cowper, 87, 90 (1774), cited in FOURTH REPORT (1833) 24.

¹⁶³ FOURTH REPORT (1833) 24, 80 (Proposition 9).

¹⁶⁴ 7 WM. IV & 1 VICT. c. 26, ss. 3, 24 (1837).

¹⁶⁵ FIRST REPORT (1829) 90, Alienation by Deed, Question 7.

¹⁶⁶ ST. 23 & 24 VICT. c. 38, s. 7.

¹⁶⁷ 27 HEN. VIII, c. 10 (1536).

¹⁶⁸ Chudleigh's Case, 1 Co. 120a (1594).

But its return to power was short-lived. With the Restoration, Equity became the Mayor of the Palace and with all its punctiliousness towards seisin and the common law yet ruled in fact if not in name. With the reform legislation seisin was definitely deposed. Like tenure, however, it was deposed but not abolished.

So ingrown a word as seisin, or even disseisin, was not easy to uproot. As late as 1896 Charles Sweet could say: "So recently as 1877, the late Mr. Joshua Williams delivered a course of practical lectures to students in conveyancing under the title of 'The Seisin of the Freehold.' All living writers on real property also treat seisin as a fundamental part of it."¹⁶⁹ Mr. Williams had chosen that subject to illustrate the growth of the English law of Real Property.¹⁷⁰ One suspects that it had been chosen because of its prominence in connection with the rule that a contingent remainder must vest during the continuance or at the determination of the supporting freehold,¹⁷¹ a rule which Mr. Williams thought both "absurd and injurious"¹⁷² and which was abolished before his lectures were published.¹⁷³ He was not enamoured of seisin and was thoroughly in sympathy with the legislation that had stripped it one by one of its important consequences. He used the language of seisin and disseisin and right of entry, however, in his hypothetical case of the squatter,¹⁷⁴ and this was quoted by James, L. J. in *Leach v. Jay*¹⁷⁵ in the opinion in which he stated it was his belief that there were such things as seisin and disseisin still.¹⁷⁶ In that case a testatrix had used the word "seised" and was held to its technical meaning in the old law notwithstanding the great unlikelihood that such could have been her meaning.¹⁷⁷ One doubts whether such a decision would be reached today in England. It would have hard going in the United States.

To the obsolescence of seisin, Sir Frederick Pollock at one time took vigorous exception.¹⁷⁸ His apparent acquiescence however, in what Charles Sweet then said to prove such obsolescence,¹⁷⁹ shows that he was using seisin in an unaccustomed sense. He could not mean that the law about seisin and its consequences of Bracton's time was still law. Much less could he mean that the artificial disseisin and discontinuance

¹⁶⁹ Sweet, *Seisin* (1896) 12 L. QUAR. REV. 239.

¹⁷⁰ WILLIAMS; THE SEISIN OF THE FREEHOLD (1878) 1.

¹⁷¹ *Id.* at 200, 201.

¹⁷² *Id.* at 202. This was not the only rule in connection with which seisin of freehold was used but it would seem to have been the rule that was uppermost in Mr. Williams's mind.

¹⁷³ See *id.* at 200 n(a), 201 n(c), 202 n(d), 205 App. B.

¹⁷⁴ *Id.* at 7-8.

¹⁷⁵ L. R. 9 Ch. D. 42, 44 (1878).

¹⁷⁶ See *supra*, p. 284.

¹⁷⁷ In the court below, L. R. 6 Ch. D. 496, 499 (1877), Jessel, M. R. had said that he had made his decision reluctantly. See also Charles Sweet, *Seisin*, (1896) 12 L. QUAR. REV. 239, 247.

¹⁷⁸ In his discourse on The Vocation of the Common Law delivered at the Commemoration Meeting of the Harvard Law School Association, June 25, 1895 and printed in (1895) 11 L. QUAR. REV. 323, 329.

¹⁷⁹ Sweet, *Seisin* (1896) 12 L. QUAR. REV. 239 n. 2.

and descent cast and continual claim of a later time was still law. Even less by seisin did he mean the fictitious seisin that had come in by the Statute of Uses and that meant little more than legal as distinguished from equitable title.¹⁸⁰ He probably had little sympathy with Ames' views¹⁸¹ as to the nontransferability of mere rights.^{182*} By seisin, he meant the primacy of possession in the law of property.¹⁸³ Two years before he had said, "The leading idea of Germanic property law is not ownership, but possession and rights to possess."¹⁸⁴ Then he had also said, "We have refined in various ways on the right to possess—making it for certain purposes, by benignant fictions, equivalent to possession itself until there remains about it little or no practical difference from ownership as conceived by a Romanized philosophy of law."¹⁸⁵ Still he did not believe they would "ultimately coincide."¹⁸⁶ But if the right to possess in the common law had become practically equivalent to the ownership of the Roman law then possession had lost its primacy and seisin in this primary sense had become a matter of history. As a matter of fact it is doubtful whether even as history Sir Frederick Pollock's theory was sound.^{187*} In the older law seisin in fee as of right was the highest interest one could have in land and of these seisin had the spotlight but that the right that was back of what were called the proprietary writs was conceived of as a mere right to possession would seem to be a pure assumption. Proprietary right only gradually came into its own but right of property and property seem to have been akin to ownership from the first. At least as early as 1477 Brian, C. J. denied that property in a chattel was dependent on a right to possession.¹⁸⁸

Seisin, disseisin and right of entry as quaint phrases in the law will probably still linger on. Equity of redemption still lingers although the right of the owner be no equity but ownership itself. But the system of which they were an integral part has long ceased to function and they should be relegated to their place in that system.

¹⁸⁰ See Charles Sweet, *Seisin* (1896) 12 L. QUAR. REV. 239, 247 n. 4, quoting ELPHINSTONE AND CLARK, *GOODEVE ON REAL PROPERTY* (3rd ed. 1891) 365.

¹⁸¹ Ames, *Disseisin of Chattels* (1889) 3 HARV. L. REV. 23-40, 313-328, 337-346, 3 Sel. es. 541-590.

^{182*} In his POLLOCK, *CONTRACTS* (10th ed. 1936) 213 he explains the non-assignability of contracts at common law "as a logical consequence of the archaic view of a contract as creating a strictly personal obligation between the creditor and the debtor."

¹⁸³ Pollock, *The Vocation of the Common Law* (1895) 11 L. QUAR. REV. 323, 329-331.

¹⁸⁴ Pollock, *Archaism in Modern Law* (1893) 9 L. QUAR. REV. 271, 283.

¹⁸⁵ *Id.* at 284.

¹⁸⁶ *Id.* at 284.

^{187*} Late in life Sir Frederick was less dogmatic. In a letter to Mr. Justice Holmes of July 12, 1926 he said that a learned Frenchman—apparently Joüon des Longrais—appeared to maintain that the Germanic seisin or *gewere* was a real *dominium* quite contrary to what he himself had always collected from the English sources. 2 HOLMES-POLLOCK LETTERS (1941) 186. In his letter of reply Mr. Justice Holmes made no comment on this. *Id.* at 187.

¹⁸⁸ Y. B. 17 EDW. IV, 2A, transl. BLACKBURN, SALE (3 Can. ed. 1910) 286.