4-1-1941

The Alienability of Non-Possessory Interests

Percy Bordwell

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation
Percy Bordwell, The Alienability of Non-Possessory Interests, 19 N.C. L. Rev. 279 (1941).
Available at: http://scholarship.law.unc.edu/nclr/vol19/iss3/1
THE ALIENABILITY OF NON-POSSESSORY INTERESTS*

Percy Bordwell**

Favorable as were the common law judges to alienability, there were limits to such favor. The *chose in action* was not in general transferable nor the condition, nor, when it came to be recognized, the contingent remainder. Why the favor shown in the one case was withheld in the other has been the matter of much speculation. The avoidance of chain-property and maintenance was long the accepted reason, but more fundamental reasons have been thought to have been discovered in notions of analytical jurisprudence or in the primitiveness of the medieval mind. Further the matter has been obscured by a confusion in terminology. *Chose in action*, seisin and disseisin of chattels, property and right of property have been terms of many and sometimes mystic meanings. In this paper the attempt will be made to show the historic setting and now generally accepted usage of *chose in action*, to indicate how little the supposed principles of universal jurisprudence help to clear up this particular bit of history, to argue that the medieval mind was not so primitive as supposed, and finally to point out that chattels have been thought of in terms of property rather than in terms of possession well back into the Middle Ages and that in the fifteenth century at any rate the generally accepted view was that such property was no more lost by a loss of possession than it is with us today. If this attempt has been successful the ground will have been cleared for taking up the alienability or inalienability of non-possessory interests.

**CHOSES IN ACTION**

The tentative title chosen for this article had been "The Alienability of Choses in Action" and a case could have been made out for the treatment of non-possessory interests under that head. Ames treated the non-alienability of *choses in action* in reverse under the head of "Disseisin of Chattels".1 Modern usage, however, does not support the ap-

---


** Professor of Law, State University of Iowa.

1 The three lectures on *The Disseisin of Chattels, The Nature of Ownership and The Inalienability of Choses in Action* in Ames's *Lectures on Legal History*
plication of *chose in action* to a non-possessory interest in land, and its exact relation to rights of action and to personal property has been the subject of much controversy. As opposed to *choses in possession*, it would off-hand seem, to include "specific chattels of which the owner is out of possession" but Elphinstone thought that in his day 'chose in action' was not commonly used with such a meaning while T. Cyprian Williams "submitted that in modern law, at all events, the owner of a corporeal chattel, which is in another person's possession either through bailment or wrongful taking, has not a mere *chose in action*; the thing is not merely in action to him." These eminent authorities might have gone much further. Back in the fifteenth century when *chose in action* had already made its appearance, it was not used by Brian, C. J. to characterize the right of the dispossessed owner of the chattel. Rather it was 'right of property' that he used. Had he and others thought of such a right as a *chose in action* his argument would have been much strengthened. Brian's statement has added significance in that it was used by Ames as the text for his "Disseisin of Chattels." The tendency to include non-possessory interests in either land or chattels under the head of *choses in action* is believed not to have been very deep nor very old. The phrase 'chose in action real', so much emphasized by Sweet, seems never to have had any real currency notwithstanding its occurrence in a book in such constant use as (1913) published after the author's death appeared under the one head *The Disseisin of Chattels* during his life. 3 *SELECT ESSAYS IN ANGLO-AMERICAN LAW* (1909) 541, 3 *HARV. L. REV.* (1889-1890) 23, 313, 337.

---


4 Ibid.


6 Sweet says that the first case in which the phrase occurs was *Y. B.* 9 Hen. VI (1431) 64. It also occurs in *Y. B.* 37 Hen. VI (1458) 13. Equivalent phrases were even earlier. *Choses in Action* (1894) 10 *L. Q. REV.* 303, 304. Mr. Sweet's main reliance, as that of many others, for the cases in the Year Book was Sir Frederick Pollock's Note F in the Appendix to his *Principles of Contract* (10th ed. 1936) 692.

7 *Y. B.* 6 Hen. VII (1490) 9A.

8 Eight years earlier, Brian had said that an annuity could not be granted over in that it was a "personal chose" that would be barred by a release of all personal actions. *Y. B.* 21 Edw. IV (1482) 84A.


Brooke's *Abridgement*. In the case of land, the question of whether one had an entry or a mere action was one of great importance long antedating *chose in action*. The difference between the two did not cease with the Middle Ages but was brought into even sharper relief from the time of Elizabeth when ejectment became the common method of trying titles to land, for a prerequisite of ejectment was right of entry. Rights of entry and rights of action became exceedingly technical terms and not even for a time was their place seriously threatened by *chose in action*. The common bond between entries and actions as to land on the one hand and the *chose in action* on the other was their non-assignability which, in 1541, was said to be even more stringent in the former case than in the latter. There was a tendency to reverse the historic process and to make things *chooses in action* because they were unassignable rather than making them unassignable because they were *choses in action*. This seems to have been responsible for such application as there was of *chose in action* to interests in land. The outstanding example of such application seems to have been the case just cited from Brooke's *Abridgement*. Not long afterwards, however, the non-grantability of an advowson during a vacancy was placed in part at least on the ground that during the vacancy the right of presentation was not really an advowson, one of the most important of the incorporeal hereditaments, but a *chose in action*. Apparently the judges were hard put to it to ground their decision. Sheppard's *Touch...*
stone, with more discrimination, said that in such a case the presentation was "in the nature of a thing in action" and distinguished between "things in action", as a right or title of action that doth only depend in action, and "things of that nature, as rights and titles of entry to any real or personal thing." Jacob, whose law dictionary first appeared in 1729, was not content with this, however, and stated flatly that: "A person disseises me of land, or takes away my goods; my right or title of entry into the lands, or action and suit for it, and so for the goods, is a chose in action." This is such authority as there seems to have been for the application of chose in action to interests in land and it is not very formidable. Jacob's definition was in addition to what he had taken from Cowell by way of Blount. Neither of them had given any such extension to chose in action. Nor did Termes de la Ley in which in other respects showed important differences. It may be said with a good deal of positiveness that as to land the term chose in action never took. In the case of chattels as well as of land the dispossessed owner was not confined to his action and at any rate after the strong arm of Edward I was removed probably enjoyed a very large measure of self-help. His right did not lie merely in action, therefore, any more than the right of the one who had an entry on land. The two cases are assimilated in the quotations just given from Sheppard's Touchstone and Jacob's Law Dictionary. With regard to land the use of chose in action as we have seen soon disappeared. With regard to non-possess-
sory interests in specific chattels as stated by Elphinstone and Williams,\textsuperscript{28} it is not now common, or perhaps even correct usage. But with regard to such interests \textit{chose in action} proved much tougher in the case of chattels than in the case of land. In the case of chattels, there were no such technical terms as entry and action which had the field to themselves before \textit{chose in action} appeared. On the other hand \textit{chose in possession} came to be used in antithesis to \textit{chose in action} and it was hard to think of the dispossessed owner of a chattel as having a \textit{chose in possession}. If every interest in personal property had to be put in one class or the other, and such an interest was denied to be a \textit{chose in possession}, it would follow that it must be a \textit{chose in action}. Happily this dilemma can now be avoided for \textit{chose in possession} has gone out of general use\textsuperscript{29} and \textit{chose in action} has accomplished what would have appeared its destiny from the first, the designation of an incorporeal thing.\textsuperscript{30}

The incorporeality of the \textit{chose in action} was formulated at an early time by Cowell in his dictionary,\textsuperscript{31} the first edition of which appeared in 1607, as follows: “Chose in Action, is a thing incorporeal, and only a Right, as an Annuity, an Obligation of Debt, a Covenant, or Voucher by Warranty, Bro. \textit{tit. Chose in Action}.” This definition was somewhat enlarged by Blount\textsuperscript{32} and added to by Jacob\textsuperscript{33} in their law dictionaries. The illustrations were taken from Brooke though the generalization was probably Cowell’s own.\textsuperscript{34} In emphasizing annuity, obligation of debt, covenant and voucher by warranty, however, Cowell seems to have caught the predominant note of the Year Books. A debt or duty seems to have been typical \textit{chose in action} and this confirms the now generally received opinion that the explanation of the non-assignability of the \textit{chose in action} was that it was something akin to the \textit{obligatio} of the Roman Law, a personal relationship between the parties and so not transferable.\textsuperscript{35} But \textit{obligatio} was broader than contract. It included obligations arising out of tort.\textsuperscript{36} Here the obligation was the right of

\textsuperscript{28}See p. 280, \textit{supra}.
\textsuperscript{29}See \textit{Salmond, Jurisprudence} (8th ed. 1930) 481. The disuse of \textit{chooses in possession} may be credited to the Married Women’s Property Acts for it was used most commonly to designate such of the wife’s personal property as went to the husband on marriage at the common law. However, \textit{Choises in Possession} still survives as a division of personal property in the works of Williams and of Goodeve on personal property.
\textsuperscript{30}Salmond, \textit{op. cit. supra} note 29, at 282-3 and see p. 285, \textit{infra}.
\textsuperscript{31}See note 22, \textit{supra}.
\textsuperscript{32}See note 23, \textit{supra}.
\textsuperscript{33}See note 21, \textit{supra}.
\textsuperscript{34}Editorial note by Pollock (1895) 11 \textit{L. Q. Rev.} n. 5.
\textsuperscript{35}This explanation goes back to 2 \textit{Spence, Equitable Jurisdiction} (Am. ed. 1850) 850. It has been accepted by Ames (\textit{op. cit. supra} note 1, 3 \textit{Sel. Es.} 582 n. 5, 3 \textit{Harv. L. Rev.} 337) ; by Pollock, \textit{Principles of Contract} (10th ed. 1936) 213 n. (n) ; and more recently by 7 \textit{Holdsworth, H.E.L.} (ed. 1926) 520 n. 5.
\textsuperscript{36}Holdsworth, \textit{ibid}.
action itself and although, as has been argued, *chose in action* never came to take the place of 'actions' or 'right of action' in the case of land; it was used even to cover these by Brooke though with greater finality also to include personal and mixed actions, such as actions of debt, damages and ravishment of ward. And so Blount enlarged Cowell’s definition of *chose in action* to include “generally all causes of suit for any debt, duty or wrong.” Possibly Blount was influenced by the definition of *chose in action* in *Termes de la Ley*, the first edition of which under that name appeared in 1624. It said: “A thing in action is, when a man hath cause, or may bring an action for some Duty due to him; as an Action of Debt upon an Obligation, Annuity or Rent, Action of Covenant, or Ward, Trespass of Goods Taken away, Beating or such like.” This, in substance, would seem equivalent to what was added by Blount. But the definition did not stop here. It went on to say: “and because they are things of which a Man is not possessed, but for recovery of them is driven to his Action, they are called Things in Action.” According to this the ‘chose’ is not the right of action itself or the debt or annuity or covenant on which the right of action is based but the thing to be recovered. Blackstone gave great currency to this idea. It has been thought to be more in accord with common law tradition than Cowell’s and Blount’s definitions which are criticized as smacking unduly of the Roman Law. But if one starts in with a debt as the typical *chose in action* the definition of the latter as an incorporeal thing is much more natural than its identification with the fruits of a recovery. And even such pronounced Germanists as Ames and Pollock have treated the *chose in action* as akin to the *obligatio*.

The view that by ‘chose’ is meant the fruits of recovery rather than the intangible right of action or the debt enforceable only by action has been supposed to fall in with the materialism which characterized so much of medieval law. But that materialism lay not in excluding incorporeal rights but in visualizing them as things. Sir William Holdsworth states that “mere rights of action were not touched by this realism.” But “touched” would seem too strong a word. Debts owed to the King seem to have been touched by it. They were visualized as things. It was in connection with such debts that the phrase *chose in action*
Non-Possessory Interests

Action first gained currency. Rights of action belonging to the King also seem to have been touched by this realism provided the amount to be recovered was not too uncertain. From the case of the King the phrase was carried over into private life but there the realism stopped. Choses in action of the King might be transferred but not those of private persons. Had the typical right of action illustrative of chose in action been an action to recover a chattel such as replevin or detinue, the argument that the 'chose' in mind was the thing to be recovered rather than the right of action itself would have been more plausible. But even in the Termes de la Ley the actions referred to are debt, covenant, ward, "trespass of goods taken away, beating or such like". Actions to recover a specific chattel are conspicuously lacking. Doubtless a shift from 'chose' as the cause of action to the thing to be recovered is an easy one and this shift was encouraged by the unfortunate dichotomy of choses in possession and choses in action, but fortunately that dichotomy is outmoded and chose in action as an incorporeal thing would seem to sum up what has been its essential characteristic from the first. This in principle is embodied in the definition of Channel, J. which Sir William Holdsworth states has generally been accepted as correct: "'Chose in action' is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession." Enough, perhaps, has been said to show that the problems of the assignability of choses in action and of non-possessory interests are distinct. Their confusion, it is believed, vitiated the whole of Ames' treatment.

Two Theories

A great law teacher and an historical genius have advanced theories as to the non-transferability of non-possessory rights which after

45 Eleven of the fourteen placita in Brooke's Abridgement, tit. Choses in action & choses in Suspence concern the King and most of them either involve debts or contain some reference to a debt as the typical chose.

46 Id. pl. 11.

47 In Colonial Bank v. Whinney, L. R. 30 Ch. D. (1885) 261, 285, Fry, L. J. said: "According to my view of that law, all personal things are either in possession or in action. The law knows no tertium quid between the two."

48 See note 29, supra. Fry, L. J.'s dictum, quoted in the preceding note, would seem to be responsible for such vogue as it has at present.

49 Chose in action might well go the way of chose in possession for it is a great extension from the debts and rights of action of the earlier law to the vast field of intangible personal property, much of it of a substantially permanent nature, of the present. To indicate this field chose in action is not a very suitable title. But it has been too long and too well established to be likely to go the way of chose in possession.

50 7 H.E.L. (ed. 1926) 515.


52 Ames, loc. cit. supra note 1.

all are theories and not to be identified with the history which they attempt to explain. The one was a venture in analytical jurisprudence, the other in historical philosophy.

Ames' theory is as follows:

"A derivative title is commonly acquired from an owner by purchase or descent. The title in such cases is said to pass by transfer. For all practical purposes this is a just expression. But if the transaction be closely scrutinized, the physical res is the only thing transferred. The seller's right of possession, being a relation between himself and the res, is purely personal to him, and cannot, in the nature of things, be transferred to another. The purchaser may and does acquire a similar and coextensive right of possession, but not the same right that the seller had. What really takes place is this: the seller transfers the res and abandons or extinguishes his right of possession. The buyer's possession is thus unqualified by the existence of any right of possession in another, and he, like the occupant, and for the same reason, becomes absolute owner."

And again:

"A right of action in one person implies a corresponding duty in another to perform an agreement or to make reparation for a tort. That is to say, a chose in action always presupposes a personal relation between two individuals. But a personal relation in the very nature of things cannot be assigned. Even a relation between a person and a physical thing in his possession, as already stated, cannot be transferred. The thing itself may be transferred, and, by consent of the parties to such transfer, the relation between the transferror and the thing may be destroyed and replaced by a new but similar relation between the transferee and the res. But where one has a mere right against another, there is nothing that is capable of transfer."

The second quotation refers to choses in action. The first carries over to the relation between a person and a physical thing the same non-assignability that in the case of the chose in action was attributed to the personal relation between two individuals. It does not make all rights into personal relationships as the Hohfeldians did but it reaches the same result as far as assignability is concerned. It is believed that it was this theory of the general non-assignability of all rights that Ames was referring to when in concluding his article he said: "The ancient doctrine of disseisin of land and chattels was not an accident of English legal history, but a rule of universal law." If, by "the

86 See p. 287, infra.
87 Op. cit. supra note 1, 3 HARV. L. REV. 345, 3 SEL. ES. 590. Ames uses almost identical language in referring to "the rule which prohibits the assignment of rights of action in general" (3 HARV. L. REV. 338-339, 3 SEL. ES. 582) and it would seem that in the quotation in the text he is merely extending the principle of universality to the nontransferability of rights in general.
ancient doctrine of disseisin" he did mean the general non-assignability of all rights then this statement is intelligible, whether one agrees with it or not.

The Hohfeldian doctrine, that all rights consist of personal relationships, is not very old. Hohfeld's outstanding critic, who as to this, thoroughly agrees with Hohfeld, traces it back to the Swiss writer, Roguin, in 1889. Ames' doctrine seems to have been his own but derived, as he saw it, from the Year Books and especially Brian, C. J.'s dictum that a right was not transferable. His statement that a right was personal and that it was non-transferable was merely saying the same thing in two ways. There was no logical process in this, nor any explanation, nor any enlightenment but merely blank assertion. Given one's own premises one can prove anything. Nor would it seem that Brian, C. J.'s dictum was meant in any such large way as Ames took it. By right, he would seem to have meant a mere right, one that was unaccompanied by possession and not amounting to property or ownership. Unlike Vavasor, J. and others he believed that a trespass changed the property in the goods and it was the right of property that he considered to remain in the trespasser that he considered inalienable. To take his statement more largely is to ignore the context. That the trespasser had something he could transfer provided he still had property or ownership seems to have been assumed throughout the Year Books.

Not only would there seem to be no foundation in the early law for extending Brian, C. J.'s dictum to rights accompanied by possession, but it would seem that if any such doctrine of the general inalienability of rights had existed the development of the law would have been very different. The perdurability of the fee simple and the inherency of the latter's alienability would have been most unlikely. If the generally accepted doctrine that the inalienability of the chose in action was due

88 Just what Ames meant by "the ancient doctrine of disseisin" has been a puzzle. It is incredible that he should have meant the ancient system of devestments and discontinuances with which the name disseisin is often associated or the related notion of an estate turned to a right.

89 Hohfeld himself brought this out in a somewhat negative way (see SOME FUNDAMENTAL LEGAL CONCEPTIONS (1923) 75). It was stated more explicitly by Cook (id. 14) and Corbin (Legal Analysis and Terminology (1919) 29 YALE L. J. 165). See KOCOURK, JURAL RELATIONS (1927) 425 n. 21. The Hohfeldian doctrine was adopted by the Property Restatement of the American Law Institute, §13, Comment a, but the definition of transfer (id. 13, (1)) which goes with it would seem so artificial as to raise serious doubts not only as to the practical utility but as to the scientific value of the whole doctrine.

90 Kocourk, id. at 425.
91 Id. at 425 n. 21.
93 Y. B. 6 Hen. VII 8 pl. 4 (1490).
94 Y. B. 19 Hen. VI 65 pl. 5 (1440) per Newton, C. J.; Y. B. 2 Edw. IV 16 pl. 8 (1462) per Danby, C. J. See also (1916) 29 HARV. L. REV. 385.
to its kinship to the *obligatio* be warranted, then the alienability of the fee would seem to have been influenced by its analogy to *dominium*. Whatever justification there may be analytically for lumping all rights as inalienable, there can be very little historical justification. In the alienability of the *dominium*, the non-alienability of the *obligatio*, the alienability of possessory interests, the non-alienability of non-possessory interests, there is something to unravel, and such a theory does not help in that unraveling at all. Proceeding from it Professor Cook argued, and very convincingly, that there is no substantial difference between the assignability of *chooses in action* and the transfer of other rights. This was diametrically opposed to the position of Ames, who, far from freeing himself from the materialism of an earlier time, would have made it universal by insisting on the importance of the transfer of the physical thing. That importance did manifest itself in the law of Littleton's time in a stress on the necessity and consequences of livery of seisin in the transfer of the freehold but this stress was quite contrary to the greater emphasis placed on the form of the gift in Bracton's time and to the flexibility of the use in Littleton's own. The ascription of universal importance to the transfer of the physical thing is very puzzling to anyone at all familiar with the history of the English law of property. The creative periods of that law would seem to be marked by the attempts, at last successful, to escape from any such formalism.

In taking the position that things could be transferred but not rights, Ames was at variance with Maitland whose *Seisin of Chattels* had suggested Ames' *Disseisin of Chattels* and whose *Mystery of Seisin* had been the source from which Ames had drawn the materials on which his "doctrine of disseisin of land" had been based. Far from regarding such a principle as universal, Maitland had regarded it as primitive but one from which society had only slowly emancipated itself. He said: "I may have here and there a reader who can remember to have experienced in his own person what I take to be the history

---

65 See p. 283, supra.
68 See 29 id. at 817.
69 Property was one of the few subjects in the law school curriculum that Ames never taught. (See LECTURES ON LEGAL HISTORY (ed. 1913) 19.) In so far as it concerns the law of property, *Disseisin of Chattels* strikes one as the work of a brilliant amateur.
70 (1885) 1 L. Q. Rev. 324.
71 See op. cit. supra note 1, 3 Harv. L. Rev. 23, 3 Sel. Es. 541.
72 (1886) 2 L. Q. Rev. 481, 3 Sel. Es. 591.
73 Op. cit. supra note 1, 3 Harv. L. Rev. 25 n. 1, 3 Sel. Es. 543 n. 3. For the specific rules that were the starting point of Ames' "doctrine of disseisin of land" see id. 3 Harv. L. Rev. 25-28, 3 Sel. Es. 543-548.
of the race, who can remember how it flashed across him as a truth, new though obvious, that the essence of a gift is a transfer of rights * * * A very large part of the history of Real Property Law seems to me the history of the process whereby Englishmen have thought themselves free of that materialism which is natural to us all."75

To prove that this materialism did not go "back to a merely hypothetical age of darkness"76 Maitland cited the treatment of incorporeal hereditaments. These lay in grant and not in livery. They would therefore seem to have been opposed to Maitland's theory. In fact the doctrine that they operated innocently and not tortiously—in that they were a transfer of the right and not of the possession—appears as early as the time of Edward II.77 Notwithstanding this, Maitland considered the treatment which these rights received in our oldest books as the very stronghold of his doctrine.78 "They are transferable just because they are regarded not as rights but as things, because one can become not merely entitled to, but also seised and possessed of them, corporeally seised and possessed."79

Suggestive as this statement is, it is not to be taken too literally. Incorporeal interests may have been regarded as things but, in the Roman Law, at least, this did not necessarily mean that they were regarded as corporeal things for the classification into corporeal things and incorporeal things was well known.80 Secondly, to whatever extent such incorporeal hereditaments as rents were treated as corporeal things the seisin of the seigniory or of the reversion or of the remainder throughout the historic phases of the common law seems to have been treated as fundamentally different from the seisin of the freehold. The validity of the fine and of the recovery, for example, depended upon seisin of freehold.

Maitland's main argument was that the attornment which was necessary to complete a grant was in effect a receipt by the grantee and that a receipt signified that the thing granted was something corporeal.81 Thus Littleton referred to "such things, whereof a man may have a manuell occupation, possession or receipt."82 Granted that there was more of receipt in attornment than of the consent of the tenant to the

75 Ibid.
76 2 id. at 490, 3 Sel. Es. at 602.
77 Y. B. 3 Edw. II 7 (1310) (Seld. Soc.) Note 1 by Maitland is: "In other words a feoffment may have a tortious operation, a grant cannot."
79 Ibid.
80 Bracton, ff. 10 b, 52 b-53 b; Fleta, Lib. III, c 15; 1 Britton (ed. Nichols) 213, 228-230. It would seem that Maitland (2 L. Q. Rev. 495, 3 Sel. Es. 607) unduly discounted the great stress laid by the thirteenth century writers on the distinction between corporeal and incorporeal things.
82 Lit. Tenures, §10; see also Pollock, A First Book of Jurisprudence (4th ed. 1918) 132.
landlord's transfer, yet its character as a receipt was not so obvious as to show a conscious identification of reversions and remainders with corporeal things. That the attornment of the tenant was analogous to the receipt of the land by the feoffee or the entry on the land by the one who took under an exchange would seem clear but that it was anything more than an analogy would seem doubtful. For many reasons livery of seisin had in the thirteenth century come to have an importance that one would not have anticipated though its importance did not reach its peak for perhaps two centuries more. When it became obvious that certain interests were not adapted to livery, the grant took on an importance that the charter of feoffment did not have. But its complete sufficiency for a transfer would have been a matter for surprise. Mere agreement was not sufficient. Some formal act corresponding to the livery was necessary and this was found in the attornment. The grant might entitle the grantee to the reversion or remainder but he did not have it so that he could grant it over until there had been an attornment. To the writer it would seem that the fact that grant and attornment was necessary is rather evidence that the reversion and the remainder and the like were not considered corporeal things and that Maitland was merely making the best of a bad case. In the *History of the English Law* his theory, it would seem, is stated much more tentatively than in the earlier article.

To make Maitland's theory hold, namely, that the medieval mind was unable to conceive of the transfer of a right without the transfer of a thing, it had to be true of chattels as well as of land. The key to the land law was seisin. For three hundred years and more prior to the appearance of Maitland's "The Seisin of Chattels" in 1885 seisin had been identified with seisin of freehold and so was not predicative of chattels even of chattels real. Maitland showed that this had not always been so, that seised had formerly been used as equivalent to possessed and as such was as applicable to chattels as to land. This showed that the idea of seisin was not feudal and lessened the gap between the law of chattels and the law of land. But Maitland's discovery did not turn out to be as revolutionary as at the time it seemed to be. The very fact that it took a great legal historian like Maitland to discover

---

83 See Maitland, *supra* note 72, 2 L. Q. Rev. 490-492, 3 Sel. Es. 603-605.
84 2 Pollock and Maitland, *H.E.L.* (2d ed. 1923) 87-89.
85 Namely, in Littleton's Tenures. 86 *Bracton*, fol. 53.
87 "At the same time there is a great deal in our law, especially in the 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." 2 H.E.L. 89.
88 (1885) 1 L. Q. Rev. 324.
89 Its importance at the time is reflected in the decision of Cochrane v. Moore, 25 Q.B.D. (1890) 57, that delivery was necessary for the oral gift of a chattel and especially in Fry, L. J.'s opinion and in Ames, *Disseisin of Chattels* (1890) op. cit. *supra* note 1.
NON-POSSESSORY INTERESTS

that the term seised was once properly used of chattels is convincing
evidence of its relatively minor role in the law of the latter. To this
relatively minor role Pollock and Maitland ascribe the meagerness of
the medieval law of chattels.90 It is not surprising therefore that in the
fifteenth century the judges refer to the transfer of a chattel by deed
or grant without the delivery of the chattel itself without explanation
or any apparent consciousness of innovation or anomaly.91 The appar-
ent application by Bracton92 of the requirement of a delivery in the
case of a chattel as in the case of land had disappeared. Nor though the
chattel was at a distance and so not available for delivery was there any
insistence on the necessity of a deed to effect the gift. From all that
appears mere words would have been sufficient.93 Surely at this time
there was no incapacity to conceive of a transfer of a right without the
transfer of the thing.

An admitted weakness in Maitland's argument was the possibility
that in the case of the sale of a chattel the transfer without delivery
was even older than in the case of gift.94 Certainly Brian, C. J. stated
what looks like the modern rule in 147795 “namely, that the ownership
of moveables can be transferred by mere agreement, by bargain and sale
without delivery.” His brothers, Littleton and Choke, made no more
point of delivery than he did but in the case at hand insisted on the
payment of the purchase price. Such payment seems also to have been
sufficient for Glanvill96 although he placed the risk of loss on the
possessor.97 Bracton agreed as to the risk of loss but accounted for it
on the ground that title did not change until there was a delivery.98
For this he vouched the maxim of the Roman Law ‘traditionibus et
usucaipionibus dominia rerum, non nudis pactis, transferuntur.’99 Pol-

90 2 H.E.L. 182.
91 Y. B. 7 Edw. IV pl. 21 fol. 20 (1467); and see 7 Edw. IV pl. 14 fol. 29
(1468).
92 Ff. 38 b, 41; 2 POLLOCK AND MAITLAND, H.E.L. (2d ed. 1923) 180, 180 n. 2.
93 See Y. B. 2 Edw. IV pl. 14 fol. 29 (1462). In Cochrane v. Moore, 25
Q. B. D. (1890) 57, 69, 70, the assumption is made that these gifts were very
likely by deed but as Sir Frederick Pollock says: “It does not seem at all neces-
sary so to read them” (Gifts of Chattels Without Delivery (1890) 6 L. Q. Rev.
446, 448). He agreed with the result in Cochrane v. Moore but on reasoning
that greatly minimized the importance of delivery.
95 Y. B. 17 Edw. IV, fol. 1, translated in BLACKBURN ON SALE (3d ed. 1910)
286. Blackburn says of Brian's argument: "His judgment might have been de-
ivered yesterday, as it is precisely what the law now is after the lapse of three
centuries and a half" id. 288.
96 BEALES Ed. (Beames trans.) Bk. X, c. XIV, pp. 216-218. See Williston,
Delivery as a Requisite in the Sale of Chattel Property (1922) 35 HARV. L. Rev.
797, 798.
97 Glanville (op. cit. supra note 96) 218.
98 Fol. 62. That there is no necessary correspondence between the risk of loss
and the title, see Sergeant Manning's note to Bailey v. Culverwell, 2 Man. Ry.
(1828) 564, 566.
99 Cod. 2, 3. 20; see also Bracton, ff. 38 b, 41.
lock and Maitland minimize the influence of this maxim but here it seems to account for the departure from Glanvill, whom, in other respects in his account of sales, Bracton followed very closely. It is Glanvill's exposition of the law, however, that is reflected in the reports of the fifteenth century and in the Statute of Frauds and we may suspect that the English tradition is represented by his statement rather than by the views expressed by the thirteenth century writers under the influence of the Roman Law maxim. This is confirmed by what Maitland himself says: "It seems to me that the law of an earlier time required a change of possession on the one side or the other, delivery or part-delivery of the goods, payment or part-payment of the price." This is requiring something more than mere agreement but is inconsistent with the theory that property in the thing could not be transferred except by a delivery of the thing.

Perhaps too much time has been spent on this historical hypothesis, even though of a great master like Maitland. Without questioning its suggestiveness or perhaps its importance in the more primitive stages of the law, those stages would seem to have been passed before the appearance of the historic common law. The importance of seisin and delivery of seisin in the law of land was due to many contributing factors, not the least of which was the insularity of the judges after the great constructive period of the thirteenth century was passed. In many respects the land law took a course of its own and the reading of the technicalities of seisin and disseisin or their terminology into the law of chattels has not been happy.

'Property' in the Thief, Trespasser, Bailee

Turning now from analytical jurisprudence and historical philosophy, we come to what has been termed an "episode in English legal history", the ascription of 'property' to the thief, the trespasser and, in a somewhat different way, to the bailee. Insofar as this carried with it a denial of 'property' to the one whom we would call the owner, it vitally concerned the alienability of the latter's interest, for to deny him property was to risk placing his interest in the category of a mere right or of a chose in action with their disabilities as to alienability. 'Property' was something more substantial than these. 'Property' was likely to be identified with the thing which was the subject of the 'property' and so to lend itself to the materialism which was so conspicuous in the medieval law. Once disassociate it from possession, the

100 2 H.E.L. (2d ed. 1923) 89.
101 Id. 207 n. 3.
102 See p. 291, supra.
103 St. 29 Ch. II c. 3, §17. See POLLOCK AND MAITLAND, loc. cit. note 101.
105 Ames, op. cit. supra note 1, 3 HARV. L. Rev. 40, 3 SEL. ES. 561.
case for the alienability of non-possessory interests was much strengthened.

Under the influence of the Roman Law, property or _proprietas_ was coupled by Bracton and the writers of the thirteenth century with ownership or _dominium_ in contrast with possession. This corresponded roughly but only roughly with the indigenous distinction between right of property and possession, _jus_ on the one hand and _seisina_ on the other. Right of property was of the essence of the writs of right which were called proprietary on that account in contrast to such possessory writs as the assizes. In them one alleged a _seisin_ as of right so that the highest interest in land was thought of not as an abstract ownership but as a lawful possession. Possession was not thought of as something apart from ownership but as one of its constituent elements. In his _Disseisin of Chattels_, Ames tried to show that this conception was carried over to the law of chattels and that in the medieval law at any rate possession was as constituent an element in the ownership of chattels as in the ownership of land. For lack of adequate remedies he would even have made possession the only ownership that the law of chattels knew in the fourteenth century except possibly in the case of theft. Passing for the moment his thesis of absolute ownership in the trespasser, there remains the other question as to whether the same conception of ownership as a conjunction of right of property and possession as existed in the case of land also existed in the case of chattels or whether the law of chattels and a conception of ownership more like that of the Roman Law and such as we have today wherein ownership and possession are fairly distinct.

That the doctrine of tortious freehold, applicable to land, had its counterpart to a certain extent in the law of chattels, as urged by Ames, cannot be denied. But that such application to chattels was ever very important or had any far-reaching consequences in the subsequent law may be denied with equal positiveness. A number of cases from the reign of Edward III constitute Ames' authority for the fourteenth century. They are all within a few years of each other. In 1335 Shardelow, J. said: "The timber of the house pulled down during the estate of the disseisor is never said to be the chattel of the disseisee, for if you pull down my house and carry off the timber and I bring my writ of trespass, the writ will say _Quare prostravit domum suam, meremium asportavit_ and not _meremium sun_". It was on this principle.

---

107 Pollock and Maitland, H.E.L. (2d ed.) 33. See note 1, supra.
108 Id. 3 Harv. L. Rev. 316, 29, 3 Sel. Es. 565, 549.
109 See p. 299, infra.
that the taking of the timber was not larceny. In similar vein, in 1352, on a bill in trespass where the defendant was charged with carrying away and killing the plaintiff's horse, objection was made that after the taking the horse was the defendant's and could not be killed contra pacem. But on a new bill more carefully worded the plaintiff recovered. Similar language had been used in 1334 by Herle, C. J. where replevin had been brought against one, who had a franchise to have the goods of felons, to recover sheep that had been stolen and abandoned in the defendant's hundred. This was a bold attempt to use replevin against the third hand. Herle, C. J.'s statement that "you shall not have the sheep again, for he gives a mesne: namely, the felon in whom the property was", leaves one somewhat in doubt whether the fact that the defendant was the third hand was not the real ground for the decision rather than any change of property. The physical property had been in the hands of the thief and possibly that is all he meant. It is easy to slip from property as ownership to property the subject matter of ownership, and it must have been even easier in those days when 'ownership' had not yet come into use. At any rate Herle, C. J. thought it would be "hard law" if the stolen goods should be considered the thief's for the purpose of forfeiture. Replevin against the third hand was another matter. Of more vital concern as to Ames' thesis on alienability is a fourth case from 1358 of which all we have is an abstract in Fitzherbert. "If the beasts of my villein are taken in name of distress, I shall have a replevin, although I never seized them before, for the property is in my villein, so that suing of this replevin is a claim which vests the property in me. But it is otherwise if he who took the beasts claimed the property." Coke's commentary on this is: "* * * because the villein had but a right." Coke had in mind no doubt Brian, C. J.'s distinction between property and right of property but it is only by inference that this can be read into the quotation. Replevin is denied the lord where the taking of the villein's property has been under claim of property but it had not been so many years that a claim of property would have defeated any action in replevin and the remarkable thing about the case is that replevin was allowed the lord in the case of distress not that he was denied it in case of trespass. In

---

112 See Pollock and Wright, Possession in the Common Law (1888) 230.
113 Y. B. 23 Ass. pl. 64, (1916) 29 Harv. L. Rev. 381.
116 Transl. Ames 3 Harv. L. Rev. 37 n. 4, 3 Sel. Es. 559 n. 1.
117 Co. Lit. 145 b.
118 See p. 298, infra.
119 See p. 295, infra.
120 This was remarkable for two reasons, first, in making the bringing of the action equivalent to a seizure and, secondly, because the property was not in the lord at the time of the taking. See 1 F.N.B. (ed. 1794) 69 F.
fact it is highly probable that the remark as to claim of property was Fitzherbert's own and not in the original text at all.\textsuperscript{122} But be this as it may, if the analogy to disseisin had been followed in the case of trespass, the lord would have had a right to seize the chattels in the name of the villein although he had no right of action.\textsuperscript{123} Right of entry was by no means so personal as right of action.

To sum up these cases, 'property' in the thief or trespasser had some slight vogue in the reign of Edward III. This would seem to have been due partly to justify the taking of stolen goods by the king,\textsuperscript{124} partly because of the use of 'property' to indicate the thing owned as well as ownership itself,\textsuperscript{125} partly because seisin or possession had no such vogue in the case of chattels as it had in the case of land\textsuperscript{126} and partly on analogy to the tortious freehold.\textsuperscript{127} The thief or trespasser had the chattel just as the disseisor had the land. In a certain sense it was 'his'. It would seem, however, that this was a nicety of pleading rather than anything much more substantial. The one case\textsuperscript{128} having any bearing on the alienability of non-possessory interests is not in the Year Books themselves and its abstract by Fitzherbert reflects the thought of the following century.

What appears to have been the destined use of 'property' as to chattels from the first came not through disseisin but through the action of replevin and the writ \textit{de proprietate probanda} which came to supplement it. Replevin as Herle, C. J. said was the most "possessional thing" there was.\textsuperscript{129} As a preliminary to the action the possession was restored to the plaintiff. Fundamentally it had far more in common with the assize of novel disseisin than had trespass which was merely for damages. The most common example given by Maitland of seisin of chattels was the plea of 'still seised' in replevin.\textsuperscript{130} Its summary process was as unsuitable for the trial of title as was the assize and at first, as in the case of the assize, pleas of title in the defendant were strictly excluded.\textsuperscript{131} In both cases, however, it proved hard to stick to the rigorous logic of a summary proceeding and in replevin pleas of property in the

\textsuperscript{122} See 29 \textit{Harv. L. Rev.} 379 n. 28, 393.
\textsuperscript{123} Co. Lit. 118 b.
\textsuperscript{124} See 2 \textit{Pollock and Maitland, H.E.L.} (2d ed.) 165-6.
\textsuperscript{125} See p. 292, supra.
\textsuperscript{126} While the tendency was to talk of land in terms of seisin or possession, the tendency was to talk of chattels in terms of property. So pronounced was this at times that Sir Frederick Pollock says: "Possession largely usurped not only the substance but the name of Property." \textit{Pollock \& Wright} (op. cit. supra note 112) 5.
\textsuperscript{127} See p. 293, supra.
\textsuperscript{128} See p. 294, supra.
\textsuperscript{129} Y. B. 3 and 4 Edw. III (1310) Sel. Soc. 72.
\textsuperscript{130} \textit{Seisin of Chattels}, (1885) 1 L. Q. Rev. 324, 325; (1916) 29 \textit{Harv. L. Rev. } 391.
\textsuperscript{131} Ames, \textit{Lectures on Legal History} (1913) 66, 69, 182 n. 3.
The defendant came to be allowed after the case had gotten into court. In the beginning a plea of property before the sheriff would have stopped him and have prevented the case from coming into court. The perils of trespass or even more of a criminal appeal in the case of a false claim had perhaps under the strong rule of Edward I been adequate to keep down false claims but apparently this did not continue to be the case and soon the writ de proprietate probanda was provided which allowed the question of title to be determined on inquest before the sheriff on which, if the property were found in the plaintiff, the replevin proceeded, if in the defendant, the property was returned to him and the replevin was at an end. Such currency as 'property' had prior to the fifteenth century is attributed by Pollock and Maitland to its use in this writ. Here there was no plea of right but a plea of property or ownership and so property or ownership came to take the place in the law of chattels occupied by right of property in the law of land. And it was to fill a great void, for seisin and possession in the case of chattels had proved unfertile.

During the fifteenth century the use of 'property' became more general. Once replevin had become an action in which the title to the property could be tried there was no procedural difficulty in the way of allowing it in case of trespass. There was not perhaps the same call for trespass in case of a wrongful distress but trespass was a popular action and so it came to be allowed in such a case. This concurrence of replevin and trespass was laid down by Bereford, C. J. as early as 1312 but there was some doubt as to this and it is not until the early part of the fifteenth century that we get a clear cut statement from Gascoigne, C. J., that replevin and trespass were alternative remedies in case of a trespass contra pacem. In 1440 Newton, C. J. asserted that one whose grain had been taken from him could still call the goods his own. He said:

"If you had taken my chattels it is at my wish to sue a replevin, which proves that the property is in me, or to sue a writ of trespass, which proves that the property is his who took them and so it is at my wish to waive the property or not. So here, he has not waived the property for he has justified for damage feasant in the said grain."

---

322 Y. B. 5 Edw. III (1331) 3-11, transl. Ames, id. 66 n. 5.
133 Id. 67, 182.
134 Ibid.
136 Ames, Lectures on Legal History (1913) 69, 183.
139 Ibid.
140 Y. B. 7 Hen. IV (1405) 28B; Ames, Lectures on Legal History (1913) 69. There were some who did not agree with Gascoigne. Ibid.
141 Y. B. 19 Hen. VI 65-5.
From that time to this it has been a commonplace of the law that trespass affirms property in the defendant, replevin in the plaintiff.\textsuperscript{142} With replevin were classed detinuum\textsuperscript{143} and the appeals.\textsuperscript{144} The matter was one of election of remedies and no longer to be determined on the analogy to disseisin as in the case of the preceding century where the bill in trespass for carrying off and killing the plaintiff's horse had been condemned for repugnancy.\textsuperscript{145} The procedural character of the change of property by a trespass was brought out still more strongly by Vavasor, J. in 1490\textsuperscript{146} when he invoked the doctrine of disseisin at election, then conspicuous in connection with rents. Another commonplace of the law has been that disseisin at election unlike disseisin was remedial and not substantive.\textsuperscript{147} It would seem clear that to these judges property meant ownership as it had in the writ \textit{de proprietate probanda}, and as it does to us today.\textsuperscript{148}

To the doctrine that the change of property by a trespass was purely remedial there was distinguished dissent. The case involving the villein in the fourteenth century\textsuperscript{149} had assumed that as long as the villein had the property, as undoubtedly he did in the case of distress, he had something that the lord could seize or, in other words, that was transmissible. If now property remained at his will in the trespassor, he had something he could transfer\textsuperscript{150} and Danby, C. J.,\textsuperscript{151} Needham, J.,\textsuperscript{152} and Vavasor, J.\textsuperscript{153} expressed themselves accordingly. The stock case was that of a taking from a bailee and a gift or sale to the trespasser by the bailor. Danby, C. J. was of the opinion that the sale or gift was good whether made before or after the taking. Littleton, as counsel, in support of his pleading, argued that the subsequent gift would be void because the property would be in the trespasser by the taking and so could not be given to him. In this he was opposed by both Danby and Needham. In the later case, Keble, of counsel, argued for the validity of the gift on the ground (1) that property was not changed by the taking and (2) that if it were, an oral release of the chattel was sufficient. Vavasor, J. denied the validity of an oral release even in case

\textsuperscript{142}See the opinion of Holmes, J. in Miller v. Hyde, 161 Mass. 472 (1894).
\textsuperscript{143}Y. B. 6 Hen. VII (1490) 8 B \textit{per Vavasor}, J.
\textsuperscript{144}Y. B. 4 Hen. VII (1489) 5-1; BEALE, CASES ON CRIMINAL LAW (2d ed.) 820.
\textsuperscript{145}See p. 294, supra; see also Ames, \textit{op. cit. supra} note 1, \textit{3 HARV. L. REV.} 32, 3 SEL. ES. 553.
\textsuperscript{146}Littleton states this as clear law in the case of disseisin by election. See TENURES, \textsection 589.
\textsuperscript{147}LIT. TENURES, \textsection 589; 3 GRAY, CASES ON PROPERTY (2d ed.) 34 n. 1.
\textsuperscript{148}An early use of 'owner' is made in this connection by Keble, of counsel, in his argument with Brian, C. J. He said: "The true owner has the property and not the wrongdoer, as I understand" Y. B. 10, Hen. VII (1495) 27-13.
\textsuperscript{149}See p. 294, supra.
\textsuperscript{150}Ibid.
of a chattel but supported the gift on the first ground. In his support of the gift, Vavasor was opposed by Brian, C. J. on the same reasoning used by Littleton as counsel so many years before. Brian said: "In my opinion the property is devested by the taking, and then he had only a right of property; and so the property and right of property are not all one. Then, if he has only a right, this gift is void; for one cannot give his right." 154 And again five years later: "The gift is void to him who had the goods as much as it would be to a stranger, and I think a gift to a stranger is void in such a case." 155

The "In my opinion" and "I think" of Brian, C. J. was for a man of his authority and positiveness to confess that the matter was controversial and that he did not purport to state accepted law. The law of chattels he would have adapted to the law of land, made property correspond to the tortious freehold and right of property to right of entry and right of action. It is clear that the law might easily enough have taken this turn. Had the law of estates applied to chattels no doubt it would have done so. But the law of estates had not been applied to chattels and this made any application to chattels of the notion of an estate turned to a right anomalous. Some substitute for the law of estates was necessary in the case of chattels and this had already come to be found in the notion of property or ownership disassociated from possession. This has been the tradition of the English law and despite the discovery that at one time the word 'seised' was used of chattels, it is believed that it is a sound tradition. For better or for worse the law of chattels took a different turn.

That Brian, C. J.'s opinion was contrary to the trend the common law had taken does not mean it was without some effect. He was a great judge and his words had authority. It was in just such pithy sentences as his that the abridgement makers reveled. Brooke, in particular, out-Brianed Brian for whereas the latter, in an action by one whose horse had been taken against the second trespasser, denied recovery, this was not on the ground of a change of property by the first trespass but of a change of possession, 156 while it was left to Brooke to add the comment: "For the first offender has gained the property by the tort." 157

The opinion that Brian expressed of the invalidity of a gift to a stranger of property taken by a trespasser probably had more effect than his more general analysis. This was reaffirmed in Sheppard's Touchstone but a gift to the trespasser was approved on the ground that

---

157 ABR. TRESP. 358.
"I may give the goods to the trespasser, because the property of them is still in me."\(^{158}\) Neither the gift to the stranger nor the gift to the trespasser seems ever to have been much more than a moot case and if we may judge from Ames\(^{159}\) and Holdsworth,\(^{160}\) there has been little authority on the matter in England since the time of the *Touchstone*.\(^{161}\) Had it come up, there is little likelihood that the courts would have based their decision on a loss of property by a trespass any more than the *Touchstone* did. Like the *Touchstone* they might have denied the validity of the gift to the stranger on analogy to disseisin or even gone further than the *Touchstone* did and called the right of the dispossessed owner a *chose in action*. That the latter has not been approved usage in England for a very considerable time at any rate has already been shown.\(^{162}\) There has been some authority to support it in the United States\(^{163}\) but there has been little excuse for this since the early dictum of Mr. Justice Story that "the sale is not, under such circumstances, the sale of a right of action, but is the sale of the thing itself."\(^{164}\) Dean Ames criticized this\(^{165}\) yet not only modern usage but history as well would seem to be more in accord with the views of his great predecessor.

Not content with property in the trespasser and right of property in the one from whom the property had been taken, Dean Ames would have it that at one time in the fourteenth century,\(^{166}\) before replevin became theoretically concurrent with trespass, the trespasser "gained by his tort both the possession and the right of possession; in a word, the absolute property in the chattel taken."\(^{167}\) This was riding a hobby.\(^{168}\) Certainly no intimation of any such theory appears anywhere

\(^{159}\) Op. cit. *supra* note 1, 3 Harv. L. Rev. 35, 3 Sel. Es. 556.
\(^{160}\) "*H. E. L.* (ed. 1926) 456. In his quotation of Preston's comment on the passage in the *Touchstone*, Sir William Holdsworth shows the influence of Ames as he does throughout his entire treatment of the law of chattels in the Middle Ages. Not unmindful of this, the writer is as much as ever of the opinion that *The Disseisin of Chattels* gives a very distorted idea of that law.
\(^{161}\) First published in 1641.
\(^{162}\) See pp. 279-285, *supra*. The confusion in vocabulary as to chattels, of which Pollock and Maitland complain (2 *H. E. L.* (2d ed.) 168), would not seem to have been so much medieval as of a somewhat later date, nor so much the consequence of the application of disseisin to chattels in the fourteenth century or of the distinction between property and right of property made by Brian, C. J. as of the more modern indiscriminate use of *chose in action* in contrast with *chose in possession*. Ames' entire thesis is vitiated by his identification of Brian's right of property with the *chose in action*.
\(^{163}\) See Ames, *op. cit.* *supra* note 1, 3 Harv. L. Rev. 35, 3 Sel. Es. 556.
\(^{164}\) Brig Sarah Ann, 2 Sumner 206, 211 (1835).
\(^{165}\) *Op. cit.* *supra* note 1, 3 Harv. L. Rev. 344, 3 Sel. Es. 588.
\(^{166}\) *Op. cit.*, in note 1, 3 Harv. L. Rev. 316, 29, 3 Sel. Es. 565, 549.
\(^{167}\) Id. 3 Harv. L. Rev. 29, 3 Sel. Es. 549.
\(^{168}\) It is a conspicuous example of what is said in his Memoir (Lectures on Legal History (1913) 17): "Once satisfied that a certain principle was sound . . . his enthusiasm would lead him to believe that judges had acted on the prin-
in the sources. Rather it is a deduction from our very inadequate knowledge of the remedies of the time as to chattels.\(^{169}\) Furthermore it assumes that specific recovery is essential to a right in rem, an assumption the unsoundness of which has been demonstrated by Cook\(^{270}\) and Hohfeld.\(^{171}\) A very persistent conception of ownership may be realized through an action for damages. But taking Ames' own case, he limits it to the time before the institution of the writ *de proprietate probanda*\(^{172}\) and that seems to go back further than he thought,\(^{173}\) back of the reign of Edward III and into that of Edward II. If so, it was already an existing institution when the early instances of ascription of property to the trespasser and thief, which he cites, occurred.\(^{174}\) And in the case of the thief there had always been the specific recovery of the appeals. Therefore it does not look as if the fact that trespass was an action for damages was responsible for the early examples that we have of the ascription of property to the trespasser.\(^{175}\) Nor in the relatively short time trespass had been in existence prior to the writ *de proprietate probanda* does it seem likely that it had effected any fundamental changes in notions of property. It was a very effective remedy just as was the assize but no more than the latter would it seem to have affected notions of proprietary right. That relief in the King's court as to chattels was very limited may be admitted without impugning the persistency of title which seems characteristic of pioneer conditions. Cattle-lifting was just as outstanding an offense in the early Germanic law as horse-stealing in the pioneer West. That the success of an action

\[^{169}\text{The whole theory of absolute property falls if there was any such extensive right of self-help as there was in the later law. But whatever may have been true of the right of recaption in Edward I's time, there is every probability that thereafter the extension of recaption went at least step by step with the extension of re-entry. See note 25, supra. In a letter to Ames dated March 23, 1890 (2 CAM. L. J. (1924) 16) Maitland recognized the possibility of the gradual enlargement of the sphere of self-help and said he should like to be able to trace its different stages but apparently never did so.}}

\[^{170}\text{Powers of Courts of Equity (1915) 15 Col. L. Rev. 43.}}

\[^{171}\text{Fundamental Legal Conceptions (1917) 26 Yale L. J. 710, 754; reprinted in book of same name (1923) 103.}}

\[^{172}\text{Op. cit. supra note 1, 3 Harv. L. Rev. 32, 2 Sel. Es. 553.}}

\[^{173}\text{In his Lectures, 68, Ames says that the earliest allusion he had found to the writ was in 30 Edw. III (1355) and discounted the reference to it in Fitz. ABR. Proprietae probanda 4 as of 2 Edw. III (1327) as a misprint but there is a reference to the writ in Fitz. ABR. REPLEVIN 20 as of 19 Edw. II (1326) and Sir William Holdsworth is inclined to put it back as far as 1313-1314. See 3 H.E.L. (1927) 284 n. 7.}}

\[^{174}\text{See pp. 293-294, supra.}}

\[^{175}\text{That trespass was an action for damages seems to have had little or nothing to do with the application of disseisin to chattels in the fourteenth century but a great deal to do with the application of disseisin at election to chattels in the fifteenth (see p. 296, supra); but the latter was procedural and not substantive.}}
for damages should have submerged this idea of the persistency of title even for a time is extremely unlikely.\textsuperscript{176}

‘Property’ in the thief may be dismissed with a word. Property had too much of ownership in it to make its ascription to the thief seem natural. The case given by Ames\textsuperscript{177} remained an isolated example. The bringing of an appeal of larceny or robbery affirmed property in the one from whom it had been stolen whereas the bringing of trespass waived the property and affirmed it in the defendant.\textsuperscript{178} Thus the appeals like replevin and detinue were contrasted with trespass and it was said that in this sense trespass altered the property but otherwise was it of theft. That a theft did not change the property in the goods was the accepted law of the Year Books.\textsuperscript{179}

Whatever might be said of the trespasser or thief, the bailee was no disseisor. He held under the bailor and not in opposition to him. His possession was loyal or permissive and not adverse. Brian, C. J. did not ascribe property to him and right of property to the bailor. As a matter of fact he ascribed property to the bailor even where he had no present right to the possession.\textsuperscript{180} Nor did Ames call the bailee a disseisee. But, going Brian one better, he did deny that the landlord, bailor, loser, as well as the diseseisee could properly be called a true owner.\textsuperscript{181} To a great extent this was a matter of words. But Ames did not treat it as such. He identified Brian’s right of property with the \textit{chose in action}, as he did the right of the landlord, the remainderman and the bailor and so brought all under one head.\textsuperscript{182} Nothing could be more unhistorical as to the reversion and remainder,\textsuperscript{183} and Pollock and Maitland have pretty well demonstrated that it could never have been true of the interest of the bailor.\textsuperscript{184} \textit{Chose in action} has been somewhat

\textsuperscript{176}In a letter to Maitland of Nov. 27, 1889 (2 CAMBR. L. J. (1924) 12) Ames summarized his case as follows: “This criminal proceeding [the appeal] was for a long time the only mode of recovering a lost or stolen chattel. In England it continued the only remedy until the action of Detinue was allowed against a finder, and it would seem that long before that the appeal had practically been superseded by trespass. Hence the doctrine that a disseisor of a chattel got an absolute title.” With all deference it does not make much of a case.

\textsuperscript{177}See p. 294, \textit{supra}.

\textsuperscript{178}See p. 297, \textit{supra}.

\textsuperscript{179}STAUNF. PL. COR. 61 a, 188 a; FITZ. ABR. COR. 39; BRO. ABR. COR. 171; FINCH, LAW, 210; VINE, ABR. PROPERTY (E 4); COM. DIG. BIENS (E); (1916) 29 HARV. L. REV. 381.

\textsuperscript{180}Y. B. 17 Edw. IV (1477) 2 A, transl. BLACKBURN, SALE (3 Can. ed. 1910) 286.

\textsuperscript{181}Id. 3 HARV. L. REV. 338, 3 SEL. ES. 581.

\textsuperscript{182}Evidently what Ames meant was that the grant of a reversion or remainder was not complete without attornment. This meant to him that reversions and remainders were in general inalienable and \textit{choses in action}. But to classify reversions and remainders during the Middle Ages as \textit{choses in action} is a \textit{reductio ad absurdum} of his whole theory. However one cannot help admiring the courage of his logic.

\textsuperscript{183}2 H.E.L. (2d ed.) 176-178.
of a loose term but nowhere else, it is believed, has that looseness been carried so far.

There was a certain property recognized in the bailee. He could call the goods 'his' to satisfy the requirements of trespass. But this was a special property and not inconsistent with the general property in the bailor.186

To sum up a long story, 'property' at an early time came to be as cardinal in the case of chattels as seisin in the case of land. The difference was more than one of mere words. 'Property' was not merely possession as of right, but might exist independently of possession. Loss of possession by bailment or losing or trespass or theft, therefore, did not displace 'property' in its general acceptation, although in the case of trespass the words to the contrary of a great judge, Brian, C. J. lingered long in the books and were taken up by Dean Ames in our own day. They led to a confusion in vocabulary but apparently not to very much more. That such loss of possession would convert 'property' into a chose in action was a later development, modern rather than medieval, and resulted largely from the unfortunate dichotomy of personal property into choses in action and choses in possession. Fortunately that dichotomy is outmoded although chose in action continues to hold its ground despite its unsatisfactoriness. But the notion that loss of possession would convert 'property' into a chose in action has had even less place in the law than Brian, C. J.'s right of property. Its importance has been terminological rather than substantial. Unless these difficulties of vocabulary are kept in mind, however, the matter of the alienability of non-possessory interests, especially in chattels, is much obscured.

No tendency has been observed, except in the case of Ames himself, to apply his theory of ownership to our own day. It has often been assumed, however, that it gave a true picture of the medieval law. Thus Mr. Justice Holmes in Miller v. Hyde said:

"... a tortious possession, at least if not felonious, carried with it a title by wrong in the case of chattels as well as in the case of a dis- 
seisin of land, as appears from the page of Viner just cited, and as has been shown more fully by the learned researches of Mr. Ames and Mr. Maitland, 3 Harv. Law Rev. 23, 326. See 1 Law Quarterly Rev. 324. I do not regard that as a necessary doctrine, or as the law of Massachusa-
setts, but it was the common law, and it fixed the relations of trespass and replevin to each other. . . ."188

Professor Williston, however, was more guarded. He said:

"... To what extent Mr. Ames's contention that ownership by the loss of possession was turned into a mere right of action was ever

maintainable, is the less important because it certainly ceased to be so
centuries ago, and such a theory has left no impress on modern
law..."

Were all as clear on this as Professor Williston the foregoing need not
have been written.\textsuperscript{187}

\textsuperscript{187} Williston, \textit{Delivery as a Requisite in the Sale of Chattel Property} (1922)
35 \textit{HARV. L. REV.} 797.

\textsuperscript{188} A penetrating comment on \textit{Disseisin of Chattels} is that of Sir Frederick
Pollock in a letter to Professor Hazeltine. He said: “Thanks for the sight of
the Maitland-Ames letters. My own notion is that our medieval ancestors were
more like ourselves—meaning the English Bar of the nineteenth-twentieth cen-
turies—and cared less about having a logical theory of the forms of actions than
Ames, and for the most part his successors, appear tacitly to assume.” 2 \textit{CAMB.}
L. J. (1924) 3.

(To be continued in a subsequent issue)