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THE ALIENABILITY OF NON-POSSESSORY INTERESTS*

PERCY BORDWELL**

II

The matter of the alienability of non-possessory interests at common law was not an isolated phenomenon. Nor would it seem to have been an incident of feudalism or of champerty and maintenance or of *choses in action*. Attornment by the tenant was necessary to complete the grant of a reversion and commonly this has been ascribed to feudalism¹ just as livery of seisin was at one time taken to have been a feudal ceremony.² In neither case would feudalism seem to have been the answer. Feudal law was land law but neither seisin nor the significance of the acknowledgment of the transfer by the one in possession was peculiar to land law.³ The association of champerty and maintenance with the buying of non-possessory titles apparently arose out of St. 32 Hen. VIII, C. 9 §2 (1540).⁴ Under that statute the buying of pretended titles was primarily a matter of criminal law and public policy and only secondarily of the general law of property. As a crime it never made any great impression but as an explanation for the non-transferability of rights of entry occupied a conspicuous place in the law of property during the time that lawyers talked in terms of right of entry. The term *chose in action* never had any great application to interests in land⁵ but was used in the first place for debts⁶ and then for rights of action also but primarily for rights of action personal.⁷ This term does not go back to the beginnings of the law but seems to have become current in the reign of Henry VI.⁸ Actions were recognized as non-transferable much earlier⁹

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¹ See WILLIAMS ON REAL PROPERTY (23d ed. 1920) 369; CHALLIS'S REAL PROPERTY (3d ed. 1911), 51.

² By Lord Mansfield in *Taylor d. Atkyns v. Horde*, 1 Bur. 60, 108 (K. B. 1757).

³ For the analogy between attornment and the acknowledgment by the bailee of a transfer by a bailor, see Maitland, *Mystery of Seisin* (1886) 2 L. Q. REV. 481, 492, 3 SELECTED ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1909) 591, 605. That in the case of land, attornment was not peculiar to tenure whether feudal or otherwise, see 2 L. Q. REV. at 490-492, 3 SEL. ES. at 603-605.

⁴ See WINFIELD, HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE (1921) 159 and *infra*.

⁵ Bordwell, *The Alienability of Non-Possessory Interests* (1941) 19 N. C. L. REV. 279, 280-282.

⁶ *Id.* at 283.

⁷ *Id.* at 284.

⁸ *Id.* at 280, n. 7.

⁹ BRACTON, fol. 13b; FLETA, Lib. III, c. 6, §2.

but not as *choses in action*. Happily the use of the term *chose in action* has been confined in most part to the law of personal property¹⁰ and the confusion that has marked its use has to that extent been isolated.

The whole matter of the transferability and transmissibility of property rights during the formative period of the English law was put in a new light by Maitland in his earlier writings¹¹ and in collaboration with Sir Frederick Pollock in their *History of English Law*.¹² If in his *Mystery of Seisin* Maitland seemed to attribute to the English of the thirteenth century an incredible backwardness about the transfer of rights without a transfer of some physical thing which was the object of those rights,¹³ in the *History* this theory assumed a very minor place.¹⁴ It was probably a more or less passing phase in Maitland's progress from long current misconceptions to the clearer vision of the *History*.

The keynote of the *History* is the statement that "in the past it (seisin) was so important that we may almost say that the whole system of our land law was law about seisin and its consequences."¹⁵ Despite this the medieval law was "rich with incorporeal things."¹⁶ The explanation of this paradox would seem to be that while the common law started from such matter-of-fact things as possession and delivery and entry and in this respect was materialistic yet as a whole this materialism was of the creative kind that makes ideas real rather than of the negative kind that sees little beyond the bare fact. Things were not confined to what one could touch and see, but incorporeal, abstract things like reversions and rents and advowsons and later uses were treated as real as the land itself. In consequence, the common law of land was not the crude and inadequate thing it has sometimes been pictured. Whatever its imperfections, it was an amazing piece of creative work. As supplemented by the trust, which was but another surge of the same creative imagination, it gave rise to a system of property law which could hold its own with that of the civil or any other body of law.

The trust was the more modern element. Its successes have been touched on elsewhere¹⁷ and need not be repeated here except insofar as they involve the transferability of non-possessory interests. The logic of the trust based on agreement and intent was opposed in many ways

¹⁰ Bordwell, *supra* note 5, at 279-280.

¹¹ Maitland, *Seisin of Chattels* (1885) 1 L. Q. REV. 324; Maitland, *Mystery of Seisin* (1886) 2 L. Q. REV. 481, 3 SEL. ES. 591.

¹² 2 POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW* (2d ed. 1923).

¹³ Maitland, *Mystery of Seisin* (1886) 2 L. Q. REV. 489-490, 3 SEL. ES. 601-603; see Bordwell, *supra* note 5, at 288-292.

¹⁴ 2 POLLOCK AND MAITLAND, *op. cit.* *supra* note 12, at 89.

¹⁵ *Id.* at 29.

¹⁶ *Id.* at 124.

¹⁷ Bordwell, *Equity and the Law of Property* (1934) 20 IOWA L. REV. 1; Bordwell, *The Conversion of the Use into a Legal Interest* (1935) 21 IOWA L. REV. 1.

to the logic of the common law based on possession and livery and entry. The complete fusion of law and equity has not yet been accomplished and is problematical for the future. The most striking examples of such fusion have been the Statute of Uses in 1540,¹⁸ the Judicature Acts of 1873¹⁹ and 1875²⁰ and the Law of Property Act of 1925.²¹ The Statute of Uses changed many equitable into legal interests. The Law of Property Act of 1925 reversed the process.²² The Judicature Act of 1873 provided that where law and equity were in conflict equity should prevail.²³

Perhaps as fully important as these direct attempts at fusion was the penetration of equitable ideas into the law through the more gradual processes of legal development. With this interpenetration the dominance of chancery after the Restoration of Charles II had much to do. As a consequence seisin and livery and entry in the latter half of the eighteenth century had become more or less meaningless and seemed either relics of feudalism or empty formalities and were in no position to meet the impact of Benthamite reform. These reforms took shape in the recommendations of the Real Property Commissioners of 1829-1833 and the legislation that followed. That legislation eliminated the old technique of seisin in most thoroughgoing fashion and thus destroyed the juristic basis for the non-transferability of non-possessionary interests. It went further and decreed their transferability.²⁴ But this was done as incident to the fall of seisin and not from pragmatic reasons peculiarly applicable to non-possessionary interests. This is what was meant when it was said at the outset that the alienability of non-possessionary interests was not an isolated phenomenon.²⁵ At any rate it will be considered here as incident to the reign of seisin, its decline and fall.

THE REIGN OF SEISIN

A

SEISIN AS A SOURCE OF TITLE

In the old Writ of Right the demandant alleged that he or some ancestor had been seised of the tenements in his demesne as of fee and of right within such a time by taking the profits thereof to such a value.²⁶ Seisin and right therefore were the two elements that went to make up the highest title known to the law and the seisin was an exploited seisin

¹⁸ 27 Hen. VIII, c. 10 (1536).

¹⁹ 36 & 37 Vict., c. 66 (1873).

²¹ 15 Geo. V., c. 20 (1924).

²³ 36 & 37 Vict., c. 66, §25, subs. 11 (1873).

²⁴ By devise, 7 Wm. IV & 1 Vict., c. 27, §3 (1837); by deed, 8 & 9 Vict., c. 106, §6 (1845).

²⁵ *Supra*, p. 387.

²⁶ STEARNES ON REAL ACTIONS (ed. 1824) 488; COKE'S ENTRIES (1614) 182.

²⁰ 38 & 39 Vict., c. 77 (1874).

²² *Id.* at §1.

by the taking of esplees or profits. Whatever the relative importance of these two elements, right could claim the distinction of giving its name to the writ.²⁷ The right was the right of property and the writs of right were generally known as proprietary writs. Had the proprietary writs retained the importance they had while the feudal courts still flourished the balance between proprietary right and seisin might well have been very different.²⁸ But they did not retain their importance. They were forced into the background first by the assizes and then by the writs of entry²⁹ by means of which the King's Court rapidly took to itself the administration of the land law. The important assizes of *Novel Disseisin* and *Mort d'Ancestor* said nothing of the right nor of an exploited seisin.³⁰ They were based on just plain seisin and on rights of property springing therefrom. These rights of property did not have the finality of the right of the Writ of Right but were good until a better was proved. The better or more right of the Writ of Right, like the writ itself, faded into the background. By an apparent mistake in translation from more to mere³¹ it came to be known as mere right. This name in itself was enough to make it lose face if it had not done so already. Seisin and its consequences were left with the field pretty much to themselves.

Seisin was possession and the emphasis on seisin was an emphasis on having. One had or was vested with that of which he was seised. Such things constituted his possessions. Possessions is Biblical or Elizabethan³² but has the same atmosphere of peace and quietude that marked the older seisin. Seisin spoke not of seizure or violence but rather of a time when although these things may have happened they were now past.³³ On the contrary disseisin did speak of seizure and violence and that is why if one approaches the law of the Middle Ages from the point of view of disseisin he will utterly misread it.³⁴ Normally seisin would not

²⁷ Originally the name came from the direction to the feudal lord to do full right to the demandant but with the establishment of the possessory actions in the King's Court was used more broadly to indicate all writs originating proprietary actions for land. See Maitland, *Register of Original Writs* (1889) 3 HARV. L. REV. 110, n. 1.

²⁸ Glanvill commenced with Right and ended with Possession and the Register of Writs of later days followed this order but in Bracton the order was reversed and he never finished his treatment of the Writ of Right. See *id.* at 109.

²⁹ As to the relative order of the Assizes and of the Writs of Entry, see 2 POLLOCK AND MAITLAND, *op. cit. supra* note 12, at 80, n. 1.

³⁰ BRAC. ff. 284, 373; 2 POLLOCK AND MAITLAND, *op. cit. supra* note 12, at 34; STEARNS, *op. cit. supra* note 26, at 364.

³¹ 2 POLLOCK AND MAITLAND, *op. cit. supra* note 12, at 78, n. 2.

³² *Id.* at 153 n.

³³ *Id.* at 30.

³⁴ Fundamentally that is the fault of Ames' *Disseisin of Chattels*. In giving to estates by wrong the predominate place held by seisin, it gives an impression of the normality of wrong that, it is to be hoped, was never true of any system of law. Certainly the Year Books made no such impression on Coke. He regarded disseisin as next door to robbery. CO. LITT. *18b.

be acquired by such acts but by the ordinary processes of transfer or lawful entry. But whether the possessor was in by tort or by title, seisin emphasized the fact that he was in, not how he got there.³⁵ At the outset two things must be distinguished, first, the acquisition of seisin, second, its loss. Once acquired, seisin at common law was notoriously hard to lose. Mere abandonment was not sufficient, nor the lease of the land for years, nor, in a certain sense, the grant of an estate for life or even in fee tail.³⁶ A tenancy at sufferance did not put an end to it nor a disseisin at election.³⁷ Bracton was of the opinion that after one had ceased to be seised in body, he might still be seised in mind.³⁸ Certain very serious acts³⁹ did constitute a discontinuance of the possession⁴⁰ but a disseisin was not a discontinuance and the life estate of one who had been disseised was still sufficiently an estate in possession to support a contingent remainder.⁴¹ As to discontinuance and disseisin more will be said hereafter. Enough perhaps has been said to indicate that seisin once acquired was hard to lose.

The retention of seisin was one thing, its acquisition another. Bracton said that mind and body must concur in its acquisition but that mind alone was sufficient for its retention.⁴² Until such acquisition the one entitled did not have the thing to which he was entitled⁴³ and hence had nothing he could transfer or transmit. The difficulty, it is believed, lay not in crude notions of transfer but in the conviction that until a right was clothed with seisin it remained an inchoate and imperfect thing. Only then did it become a source of title. Livery, entry, attornment, were important, it would seem, because the exigencies of the times needed some formal act to show that the acquisition of seisin, the vesting, was complete. The fortunes of seisin may be traced by following the extent to which these formal acts of acquisition faded into the back-

³⁵ Just as disseisin has been overemphasized so it would seem has livery of seisin. See *infra*, p. 394. These were merely methods of acquiring seisin, means to an end and not the end itself.

³⁶ The feoffee for life or in tail, was seised of the freehold, the feoffor of the reversion.

³⁷ The tenancy at sufferance and disseisin at election, especially the latter, were comparatively late developments aimed at the avoidance of loss of seisin.

³⁸ BRAC., fol. 38b, 39. See 2 POLLOCK AND MAITLAND, *op. cit. supra* note 12, at 54, n. 2.

³⁹ Three cases of discontinuance given by Littleton were the alienation by an abbot of land held in fee, the feoffment by a husband of land held in right of his wife, and the feoffment by a tenant in tail. LIT., §§593, 594, 595.

⁴⁰ That the discontinuance was a discontinuance of the possession, see 2 BUTLER, CO. LITT. (1853) 325a, n. 1, "When the right of entry is thus lost, and the party can only recover by action, the possession is said to be *discontinued*. This is the general import of the word *discontinuance*."

⁴¹ FEARNE, CONTINGENT REMAINDERS (6th ed. 1809) 286.

⁴² Ff. 38b, 39.

⁴³ "Give me the handle of the church door' says the grantee of an advowson," Sir Frederick Pollock in 2 HOLMES-POLLOCK LETTERS (1941) 186.

ground and a fictitious seisin took the place of one that might be imaginative but was nonetheless real.

The seisin with the taking of the esplees or profits of the Writ of Right⁴⁴ was a very substantial seisin in which emphasis was placed on enjoyment. Like emphasis on enjoyment was placed in the possessory assize for the recovery of an advowson—the all-important right to present a clerk for institution as parson—though here the thing that constituted the enjoyment and gave its name to the assize was the last presentation of a candidate.⁴⁵ In the case of rent, stress on enjoyment was still evident in the requirement of a token payment as a prerequisite to an assize, although for other purposes attornment was enough. The token payment was said to give seisin in deed, the attornment only seisin in law.⁴⁶ In the Assizes of *Novel Disseisin* and *Mort d'Ancestor*, however, no allegation of the taking of the profits was made.⁴⁷ And in the case of incorporeal hereditaments generally attornment was sufficient to complete a transfer.

The change from the seisin with the taking of esplees of the Writ of Right to the bare seisin of the *Novel Disseisin* and the *Mort d'Ancestor* and from the actual enjoyment of incorporeal things to token payments and even to attornment did not, it is believed, mark any fundamental change from the notion of the necessity of seisin for the completion of title. If attornment only gave seisin in law its significance lay in the fact that it was considered to give a kind of seisin. As to incorporeal hereditaments, the application of notions of seisin was bound to be more or less fanciful. As to corporeal hereditaments seisin in law never made much headway as a source of title and that only later. The old writs were still in the background and the writs of entry which were somewhat modeled on them had the same allegation as to the taking of the profits. The taking of the profits involved a certain time element which might well amount to a year and be comparable to the common law possession for a year and a day⁴⁸ or the year's possession of the Pretended Title Act.⁴⁹ In the *Novel Disseisin* and the *Mort d'Ancestor* effective seisin was somewhat accelerated but this was natural in view of their summary character. This abbreviated seisin did not mean a departure from the requirement of a real seisin. Quite the contrary. The whole emphasis of these assizes was on possession although now more stress might be laid on such overt acts as livery and entry than had formerly been the

⁴⁴ *Supra*, p. 389.

⁴⁵ 2 POLLOCK AND MAITLAND, *op. cit. supra* note 12, at 137-138.

⁴⁶ LIT., §§235, 565; CO. LIT. 315a; 2 POLLOCK AND MAITLAND, *op. cit. supra* note 12, at 132.

⁴⁷ *Supra*, p. 390.

⁴⁸ See Maitland, *Possession for Year and Day* (1889) 5 L. Q. REV. 253.

⁴⁹ 32 Hen. VIII, c. 9, §2 (1540).

case. Overt acts were particularly adapted to the new procedure with its jury system. That there was at least increased insistence on an actual seisin is generally agreed. How to explain this, especially in the case of the feoffment, has been and still is the subject of controversy.⁵⁰ Attention will therefore be directed to the case of the feoffment. But it should be remembered that the feoffment was not an isolated problem. The new writs and procedure and, more fundamental still, seisin as a source of title were also involved.

In the early Germanic law transfers seem to have been made by an elaborate ceremony culminating with the delivery of the land and the renunciation of the donor.⁵¹ All this was on the land itself. But at a yet remote period the transaction became differentiated into gift and ceremony. The gift and then much at least of the ritual now more symbolic than ever, often came to take place off the land in some public place such as marketplace, court or church. The delivery of the land might be symbolized by the transfer of a twig or turf or of a knife or glove or, when written instruments came in, by their delivery.⁵² Probably the deed was at first primarily evidentiary rather than symbolic⁵³ but its symbolic use was possible.⁵⁴ The natural tendency of the deed was to render the presence of witnesses on the land unnecessary for it was more enduring and in many ways better evidence of such things as boundaries and in general of the intent of the parties than the uncertain memory of the witnesses. For a time the theory prevailed that the Anglo-Saxon charter was something more than evidentiary, that it was dispositive and constituted the grant itself. This theory is now regarded as highly speculative.⁵⁵ It would have divorced still further the transfer from the land.

If one turns from this picture of the earlier law to the time of Glanvill and Bracton he must needs be shocked by the insistence on an actual delivery of the land itself. Was this a throw-back of several centuries to the early Germanic law? Had livery of seisin continued all the time as a method of transfer though very much in the background as it was in the later law after the lease and release became the current method of transfer? Had it continued to be necessary to the completion of a transfer by symbols or deed though lost sight of in the stress laid on

⁵⁰ This controversy reflects somewhat the celebrated controversy as to the nature of the Anglo-Saxon charter and the resulting status of bookland. For a brief survey of that controversy see Plucknett, *Roman Law and English Common Law* (1939) 3 U. OF TORONTO L. J. 24, 26-28.

⁵¹ 2 POLLOCK AND MAITLAND, *op. cit. supra* note 12, at 84-85.

⁵² *Id.* at 85-88; Thorne, *Livery of Seisin* (1936) 52 L. Q. REV. 345, 348-355.

⁵³ Thorne, *supra* note 52, at 349-350.

⁵⁴ 2 POLLOCK AND MAITLAND, *op. cit. supra* note 12, at 86; but see Thorne, *supra* note 52 at 351, n. 18.

⁵⁵ Plucknett, *supra* note 50, at 27. For recent criticism of this theory of Brunner, see Thorne, *supra* note 52, at 352, n. 21.

these more conspicuous factors? Any answer to these questions must also be more or less speculative. Professor Thorne would deny that it was a throw-back on the ground that the new seisin was more like the Roman possession while the old seisin had more in it of right.⁵⁶ He would also admit that livery of seisin had continued to be a possible method of transfer⁵⁷ but would deny that it was a necessary supplement to symbolic transfers.⁵⁸ Mr. Turner believes it incredible that the old livery of seisin was ever superseded by the charter of feoffment without livery.⁵⁹ Both agree that insofar as the charter of feoffment was an evidentiary rather than a dispositive instrument, it was evidence of the gift and not of the livery as it customarily preceded the livery and in such a case could not be evidence of something that did not exist.⁶⁰ Both agree that the livery was rather subsidiary and not the outstanding fact of the feoffment.⁶¹ Whatever their differences of opinion they have put the feoffment in a new light and made a distinct contribution. Whatever the continued necessity of an actual delivery, the practice of transferring land by livery does not seem to have gone out nor the necessity of an entry before the completion of title. The necessity of seisin as a source of title seems so ingrained into the beginnings of the historic common law writs of right and possessory assizes alike, that it is hard to believe that there was ever a time in the earlier law when a transfer was complete without an entry or something like it.

That in the time of Glanvill and Bracton there was at least a new emphasis on actual delivery or on actual change of possession no one questions. Here Professor Thorne gives greater weight to the influence of the procedure in the new King's Court as compared with that of the old feudal courts;⁶² Pollock and Maitland to the classic texts of the Roman law.⁶³ No one can read Bracton without attaching some importance to the latter. Both influences were no doubt at work. There were also what may be called political influences. The conflict between the new King's Court on the one side and the feudal courts and the courts of the church on the other was essentially political. Take for instance the *post obit* gifts—in effect reservations of the property for

⁵⁶ Thorne, *supra* note 52, at 347, 355, 363.

⁵⁷ *Id.* at 352.

⁵⁸ *Id.* at 355.

⁵⁹ TURNER, BOOKLAND AND FOLKLAND IN HISTORICAL ESSAYS IN HONOR OF JAMES TAIT (1933) 357, 362.

⁶⁰ *Id.* at 358-359; Thorne, *supra* note 52, at 345, n. 3.

⁶¹ TURNER, *op. cit.* *supra* note 59, at 358-359. Thorne, *supra* note 52, at 361. Professor Thorne believes there has been a tendency "to elevate the actual delivery of seisin to an undeserved prominence in the transfer of the freehold," *id.* at 347. It is believed that this is true of Bracton's time but not to the same extent of Littleton's. Littleton pursued the logic of the livery with lawyerly courage. Its subsequent prominence largely stems from him. See *infra*, p. 397.

⁶² Thorne, *supra* note 52, at 355-361.

⁶³ 2 POLLOCK AND MAITLAND, *op. cit.* *supra* note 12, at 88-89. Pollock and Maitland, however, do not ignore the influence of the new institution, the jury. See *ibid.*

life.⁶⁴ These had more or less flourished in the older law but were now rigidly excluded. They probably owed their demise as much if not more to the fact that they looked testamentary and therefore, if valid at all, properly within the jurisdiction of the ecclesiastical courts, as to the technical requirement of an actual change of possession in the lifetime of the donor. A technical reason for the compromise by which they were disallowed altogether was likely to have more finality than any suggestions of compromise.⁶⁵

Too little weight it would seem has been given to the distinction running all through Bracton between the *donatio* and the *traditio*.⁶⁶ There has been a tendency to identify livery of seisin with the feoffment itself as though the livery were the whole thing. It is believed that in Bracton's day the danger was just the other way and that it was the livery that was likely to be slighted in favor of the charter. Bracton set his face against this but his very persistence in asserting the need of an actual livery is some indication that he feared it might otherwise be overlooked. Tradition has it that the Conqueror had distributed land to his followers without charters and that other ancient feoffments had been charterless⁶⁷ but this tradition apparently spoke of a practice that had now become unfamiliar. The old practice was still possible and continued to be so⁶⁸ and on this very slight foundation has often been built an argument that the livery was the essence of the feoffment. But it is a very slight foundation. On the other hand the importance of the charter spoke for itself. What had to be laid stress on was that it was not indispensable nor all-sufficient. The stress laid on an actual livery would indicate that only too often feoffors and feoffees overlooked this formality and feoffees entered without livery. In such a case, Bracton says, the feoffee might find himself guilty of a disseisin if the feoffor changed his mind and revoked the gift.⁶⁹ This was contrary to the

⁶⁴ *Id.* at 92, 317-329.

⁶⁵ The compromise involved other elements as well. See *id.* at 325-329.

⁶⁶ Thus: "We may for purposes of analysis distinguish as Bracton does, the *donatio* from the *traditio*, the feoffment from the livery, the declaration of the owner's will from the induction of the donee into seisin; but in law the former is simply nothing until it has been followed by the latter." 2 POLLOCK AND MAITLAND, *op. cit. supra* note 12, at 84. But the analysis shows the ideas that were at work in Bracton's mind. Had Bracton and others of his time seen only the livery, the law of the thirteenth century could hardly have shown the vigor it did. One merit of the contributions of Mr. Turner and of Professor Thorne is that they deflated livery of seisin.

⁶⁷ This is largely based on the language of the Statute of Marlborough, 52 Hen. III, c. 9 (1267). See TURNER, *op. cit. supra* note 59, at 360; 2 POLLOCK AND MAITLAND, *op. cit. supra* note 12, at 83. See also BRAC. fol. 382.

⁶⁸ The reference in the Statute of Frauds, 29 Car. II, c. 3, §1 (1677), to interests created "by livery and seisin only" is some indication that informal transfers of land continued to persist at that time. For the rarity of the practice as indicated on the plea rolls of even the thirteenth and early fourteenth centuries, see TURNER, *op. cit. supra* note 59, at 359.

⁶⁹ Fol. 40. Pollock and Maitland (*op. cit. supra* note 12, at 84) puts this case

later law where such a person was treated not as a disseisor but as a tenant at will.⁷⁰ That disseisin was brought in here at all speaks for the determination of the judges to enforce an actual livery and for the popularity of the Assize of *Novel Disseisin* but, it would seem, for very little else, certainly not for the identification of the feoffment with the livery. The *donatio* loomed much larger in the books of the time than the *traditio*. Today delivery is necessary for a deed but in the whole law of deeds it would seem to occupy a relatively minor place. The case of the feoffment without a charter has been made much of in the subsequent history of the law and used to elevate the *traditio* to a height which it is believed Bracton and his fellows would have been the first to deny.

The importance of the charter has likewise been minimized because its language seemed to speak of a past gift. Accordingly it has been said to have been evidentiary rather than dispositive. Bracton himself was familiar with the words in question and explained them away.⁷¹ They no longer meant to him what they may have meant to the men who first used them nor did they have for him the importance that has sometimes since been attached to them. When elaborate symbolic gifts were the fashion the words in the past tense in the charters may well have referred to them. Professor Thorne takes the words as evidence of the prevalence at one time of these symbolic transfers.⁷² But when these symbolic transfers went out of fashion and an actual livery was insisted upon it seems pretty clear that usually the livery followed the charter and so could not have been in any real sense evidenced by it.⁷³ The words of past tense had evidently become mere form to Bracton and there is no reason why they should mean any more to us.

Perhaps Bracton himself would have been pretty hard put to it to have analyzed just what he meant by the gift as distinct from the livery.⁷⁴ It evidently did not necessarily mean a charter. The declaration of the will of the donor by mere words was sufficient. But whatever form it took the expression of the donor's will was of the gift's very

much stronger than does Bracton. Nowhere in Bracton, it is believed, appears the bald statement that an entry by a feoffee before livery is a disseisin. It is a retention of possession after the feoffor has changed his mind that Bracton mentions.

⁷⁰ *LIT.*, §70.

⁷¹ *Fol.*, 34b. See Thorne, *supra* note 52, at 345-347.

⁷² *Id.* at 364.

⁷³ See note 60 *supra*.

⁷⁴ Perhaps the following statement is as explicit as any. "Likewise it is not sufficient, that a charter has been made and signed, unless it be proved that the donation has been completed, and that all things which constitute a donation have duly preceded and delivery has followed, otherwise the thing given can never be transferred to the donatory. For homage may have preceded, and the charter may have been duly made and be true and good, and have been read over and heard with solemnity, nevertheless it will never be valid, except at that last moment when delivery has followed, and so the charter may be true, but without the fact of seysine, it is mute." BRAC., fol. 38 (Transl. Twiss).

essence. The form of the gift is emphasized over and over again. At a later time Littleton could say: "For that every remainder which be-ginnith by a deed it behoveth that the remainder be in him to whom the remainder is entailed by force of the same deed, before the livery of seisin is made to him which shall have the freehold."⁷⁵ Here is the same broad distinction between gift and livery that appears in Bracton, the same conception of an inchoate transaction completed by induction into seisin and the same contrast between right and possession that Bracton makes in connection with descent.⁷⁶ If no such clear-cut statement of the passing of the right by the deed appears in Bracton there is much in Bracton's treatment of incorporeal interests that is not far removed from this statement of Littleton's.⁷⁷ As the Middle Ages had worn on, the character of the deed as a conveyance of the right had sharpened.⁷⁸ Mr. Turner doubts whether the right could be conveyed without it.⁷⁹ What change there was in this respect between Bracton and Littleton was therefore strictly evolutionary. Much light is thrown on Bracton by the later development.

If in some respects the deed had increased in importance in Littleton's time, in other respects the importance of the livery had increased at the expense of the gift or at any rate of the form of the gift. Littleton himself proceeded from the necessity of a livery with relentless logic. In Bracton's time, livery helped get rid of *post obit* gifts and emphasized the necessity of an entry during the feoffor's life. But it did not require that all the feoffees should be in existence at the time of the livery;⁸⁰ it did not prevent the mortgage term swelling to a fee at some future time;⁸¹ it did not preclude the limitation of one conditional fee after another⁸² nor the existence of the condition precedent.⁸³ To all appearances, Bracton would have found little difficulty in supporting most of the executory interests which the later common law denied and so had to come into the law by way of equity. In Littleton's pages the livery was distinguished from the gift⁸⁴ but it had grown at the expense of the

⁷⁵ LIT., TENURES, §721.

⁷⁶ BRAC., ff. 62b, 253.

⁷⁷ BRAC., ff. 52b, 53, 53b, 54.

⁷⁸ The matter of the deed as a conveyance of the right will be gone into in a subsequent article.

⁷⁹ TURNER, *op. cit. supra* note 59, at 359.

⁸⁰ BRAC., ff. 13, 28b, 34b; 1 BRITTON (ed. Nichols) 231; *id.* at n. k.; 2 POLLOCK AND MAITLAND, *op. cit. supra* note 12, at 28, n. 1.

⁸¹ *Id.* at 122-123.

⁸² *Id.* at 23-24; Maitland, *Remainders after Conditional Fees* (1890) 6 L. Q. REV. 22.

⁸³ The outstanding example of the condition precedent in the early law was that of the mortgage term raised to a fee. Littleton denied the possibility of the condition precedent (Co. LIT. 216b-218a) and his views were probably of weight in establishing the classic common law mortgage with its condition subsequent. From Coke's discussion it is evident that the early authorities were against Littleton. See also 2 POLLOCK AND MAITLAND, *op. cit. supra* note 12, at 123, n. 1.

⁸⁴ *Supra*, pp. 396-7.

form of the gift. The feoffment was not identical with the livery but it came close to being. All the flexibility of the old feoffment was gone. The logic of the formal act of livery took its place. Even the contingent remainder to an unascertained person was denied.⁸⁵ From a subsidiary act livery of seisin had come to be a destructive force.

The feoffment was not the only instance in which change of possession had assumed larger proportions in the interval between Bracton and Littleton. Another instance, and one concerning a maxim familiar to every student of the law, was that of the *possessio fratris*. In full the maxim read: *Possessio fratris de feodo simplici facit sororem esse haeredem*.⁸⁶ The effect of this as expounded by Littleton was that the entry of the elder brother made the full sister heir as against the younger half-brother who would have inherited had the elder brother failed to enter on the death of the father.⁸⁷ In Littleton's time this was a rule excluding the half-brother from taking at all either as heir to the brother or to the father and not one of postponement with preference to the sister. In Bracton's day the half-brother had been much better off. In the first place the rule as to the half-blood of that day had apparently been one not of exclusion of the half-brother but of preference of the full sister.⁸⁸ In the second place the rule of the half-blood was of doubtful application to inherited property.⁸⁹ Nor did the last seisin seem to cut very much figure. As Bracton's text is he seems to have been inclined at first towards letting entry make a difference and to treat the heir who had entered on the property as in the same position as a first purchaser as far as the half-brother was concerned and in such a case to give the full sister the preference. But then the text goes on to say that this is not law and that in such a case the half-brother will be preferred because of the right of property coming down from the common father.⁹⁰ Neither Fleta nor Britton makes any mention of entry.⁹¹

An early appearance of the maxim *possessio fratris* is in a case in 6 Edward II (1313)⁹² where Inge J. refers to it as coming from the

⁸⁵ LIT., §721.

⁸⁶ *Id.* at §8.

⁸⁷ *Ibid.*

⁸⁸ BRAC., fol. 66b; 2 POLLOCK AND MAITLAND, *op. cit. supra* note 12, at 303.

⁸⁹ Insofar as the course of descent from the common father was not turned by the inheritance of the older brother the rule of the half-blood had no application to inherited property and that it did not change the course of descent seems to have been the considered opinion of Bracton (ff. 65, 65b) and of Fleta (Lib. 6, c. 1, §14). On the other hand Britton would seem to treat the last inheritor as purchaser and the rule of the half-blood applicable without apparent regard to entry or the blood of the first purchaser (2d ed. Nichols, 316-371). The law of inheritance seems to have been very unsettled in his time (see 2 POLLOCK AND MAITLAND, *op. cit. supra* note 12, at 304). The classic common law canons of descent were yet for the future.

⁹⁰ BRAC., ff. 65, 65b.

⁹¹ 2 POLLOCK AND MAITLAND, *op. cit. supra* note 12, at 304.

⁹² Audley v. Deyncourt, Y. B. 6 & 7 Edw. II 68-76 (1313) (Seld. Soc., vol. 30).

Roman law upon which he says the law of the land is founded.⁹³ He uses it however to support the claim of the half-sister as against an uncle and not in exclusion of the half-sister as in Littleton. In this case Inge J. clashed with Bereford C. J. who was taken with the argument that "when the tenements came into the possession of Alan, after William's death, the law as to the descent from William was changed by the fact of Alan's possession. The law (applicable), then, having been once changed, cannot by any means revert to what it was before."⁹⁴ This is an early statement of the rule of the later law tracing descent from the one last seised but apparently it was just making its way at this time for despite Bereford C. J.'s support the record does not show that any judgment was entered.⁹⁵ By Littleton's time the maxim had taken its modern meaning and extraordinary as it may seem was even applied to the use⁹⁶ although the logic of the use was all against making so much turn on entry or the analogous taking of profits. As indicated in the maxim itself it did not apply to the fee tail nor did it apply to honorary dignities nor to the descent of the crown.⁹⁷

In modern times the rule of *possessio fratris* has been the stock illustration of the common law canon of descent that traced inheritance from the person last seised. It is believed that it was more than an illustration and that the canon itself was a generalization from the maxim. If so the canon is not older than the maxim. Bracton, himself, as we have seen⁹⁸ seemed inclined to the last seisin in the case of the half-blood but then stated that such was not the law. In the period between 1313 and Littleton the last seisin established itself. But to reject last seisin as the necessary source of title in the older law is not to reject seisin as the source of title altogether. The alternative has generally been to trace descent from the first purchaser and the fact that, by another canon, the heir had to be of the blood of the first purchaser, is some evidence that this was so. But for the first purchaser to have been a source of title he must have been seised so that the alternative after all was not so much between the one last seised and the first purchaser as between their respective seisins. Nor were their seisins alone involved but the seisins of those intervening in the chain of title. Each new seisin started a new title and where these were adverse, at least, the oldest was the best. In the case of descent it was ordinarily not necessary to go beyond the last but where there were only collaterals it is believed that the law started out by going beyond the last and finally to that of the first purchaser. At any rate such a theory works in well with the common law of descent.

⁹³ *Id.* at 70.

⁹⁴ *Id.* at 75-76.

⁹⁵ Y. B. 8 Edw. II 216, n. 1 (1315) (Seld. Soc., vol. 41).

⁹⁶ Y. B. 5 Edw. IV, f. 7, pl. 17 (1465); WATKINS ON LAW OF DESCENTS (2d ed. 1801) 107, n. (e).

⁹⁷ *Id.* at 108-109.

⁹⁸ *Supra*, p. 398.

The common law scheme of descent has been called the parentelic system.⁹⁹ According to this system, one's descendants took first, then the descendants of one's parents, then the descendants of one's grandparents and so on. Each of these groups constituted a parentela and those in the nearer parentela took to the exclusion of those in the more remote parentela although some in the more remote parentela might be nearer in degree to the dead man than any in the nearer parentela. But not every ancestor's parentela was included unless the property were newly acquired. At a fairly early time we come across the canon that only those of the blood of the first purchaser would be included.¹⁰⁰ If the dead man were first purchaser this canon excluded none of the parentela but the longer the property had passed by unbroken descent the greater number of parentela would be excluded. Those that would be left would be of ancestors who had been seised of the property either as incident to the first purchase or as incident to a subsequent succession to the property. In other words successive seisin begat successive titles most of which got further and further away from the land at each descent but which were ready to take effect when the subsequent parentela fell in. The anomaly of the half-blood was that the entry of the elder brother at first postponed this title of the younger half-brother to that of the full sister and then cut off the title of the half-brother altogether. It changed the course of descent, and by letting the last seisin override the prior seisin made the whole scheme unintelligible. The innovation was not extended to the descent of honorary dignities nor of the crown nor of the fee tail.¹⁰¹ In the case of dignities and of the crown the right was not so likely to be subordinated to entry. In the case of the fee tail there was the additional factor that title could so much more easily be traced to the first purchaser than in the case of the fee simple. In the latter case the first purchaser was likely to be lost in the passage of time. Finally in this system of descents there was no place for ascendants. They simply did not fit in.

The parentelic system in its origin therefore seems to have been a system of descents and of collaterals taking by descent from an ancestor. In this system the collaterals of a first purchaser were without a natural place. Some other system might well have been devised for them. But to have had two distinct systems of descent for the two types of property would have been a great waste and apparently was not attempted. Inherited land would appear to have been the rule, acquired land the exception. Accordingly the parentelic system was applied to newly

⁹⁹ Pollock and Maitland's treatment of this system (*op. cit. supra* note 12, at 295-308) is not the least interesting of their treatment of the whole law of descent.

¹⁰⁰ But that there was some doubt as to this in the time of Britton, see *supra* p. 398.

¹⁰¹ See *supra*, p. 399.

acquired land also except that here the blood of the ancestor was what counted as he had had no seisin. Emphasis was thus placed on the blood of the ancestor even in the case of inherited property instead of on his seisin but nevertheless seisin would still seem to be the explanation of the parentelic system.

This exposition has paralleled to a considerable extent the theory of collateral descent popularized by Blackstone but without resort to the history of the feud which was current in his time.¹⁰² If some of the matters are more or less conjectural this could not have been avoided for there seems to have been no well worked out system at the time Bracton wrote.¹⁰³ Seisin however does afford a working hypothesis that fits in well with the facts we know.

The notion that the purchaser acquired by his purchase a right of property that would descend indefinitely was as important in the law of transfers as in that of descent. The development of the adequate fee simple out of a gift to A and his heirs is hard to account for otherwise. The court held that A was the purchaser and that the heirs were not purchasers, that the word heirs was a word of limitation marking out the right of A but giving nothing directly to the heirs. Had the word heirs been taken to mean what it means in common parlance today, only those who take at A's death, and not an indefinite line of succession, the bounds of A's right would have been limited indeed. Instead Bracton says heirs was taken in a wide sense to include heirs "near as remote, as well present as future" and even assigns although in truth they were not heirs.¹⁰⁴ To these heirs and assigns A's right would pass until heirs and assigns alike had run out and A's right had run its course. Each seisin in fee doubtless started a new title but the strength of the new title was the right of property coming down from the remote ancestor. The new tenant had something of his own but it was reinforced by the right coming from the first purchaser. The descent of the right from the first purchaser came to be overshadowed by the descent from the one last seised but it had played its part in the creation of an adequate common law fee.

In his *Mystery of Seisin*, Maitland gave five common instances of seisin as a source of title.¹⁰⁵ Only two of these, conveyances and devises, involved transfers. Three, descent, dower and curtesy involved devolution by operation of law. Only in conveyances did delivery figure and in only one form of conveyance the feoffment. In the institution of a new source of title, therefore, livery of seisin was greatly outnumbered by other forms of the devolution of property. The secret of the

¹⁰² 2 BL. COMM. *220-224.

¹⁰³ See 2 POLLOCK AND MAITLAND, *op. cit. supra* note 12, at 301.

¹⁰⁴ BRAC., ff. 17, 17b.

¹⁰⁵ (1886) 2 L. Q. REV. 481, 3 SEL. ES. 591.

completion of title lay in what was common to all these forms, including livery, the entry of the one entitled. In the case of the feoffment, even entry without livery might under some circumstances be efficacious.¹⁰⁶ The significance of the entry was that it meant seisin. Not in anything mysterious about a delivery, therefore, would seem the explanation about the transmissibility of land, but in the importance of seisin as a source of title. One had to have a thing before he could transmit it.

One cause for the emphasis on delivery in the Middle Ages was the general restraint of the devise of land. That one could do by feoffment with livery what one could not in general do by will must have accentuated the outstanding difference between the two, the livery, and tended to exalt the latter. But probably few were blind to the fact that the reasons for the general restraint lay in policy and not in anything unique about a delivery. The custom of various boroughs allowing the devise was sufficient to make this plain.¹⁰⁷

When the devise of land came to be allowed by St. 32 Hen. VIII (1540) C. 1¹⁰⁸ the language of the Statute and its interpretation shows how deeply the old seisin still permeated legal thinking notwithstanding the rise of the use and the incorporation of much of the use into the law through the passing of the Statute of Uses¹⁰⁹ four years earlier. Power to devise was given to those *having* lands and great stress was laid on this language of the Statute by the early judges.¹¹⁰ They realized that to confine the power to devise to the lands of which the devisor was seised at the time of making the devise was to render the testamentary power over lands in many ways unsatisfactory but they thought the meaning of the Statute clear and gave it effect. Later judges were inclined to get away from the language of the Statute and to put the result down to the influence of the old practice when devises were made through feoffments to uses¹¹¹ and Sir William Holdsworth thinks these judges were right.¹¹² If so, the old seisin influenced the new practice through the feoffment. But the later explanation is more complicated than the old and would appear an afterthought. The language of the Statute was what one might have expected and its interpretation also. The feeling was still strong that a man did not have land until he had entered upon it and that until he had it he had nothing he could give away. This crippled testamentary power over land for three centuries but was a natural outcome of the old seisin.

¹⁰⁶ BRAC., ff. 40, 44.

¹⁰⁷ See LIT., §167.

¹⁰⁸ This statute was supplemented by 34 & 35 Hen. VIII, c. 5 (1542-3).

¹⁰⁹ 27 Hen. VIII, c. 10 (1536).

¹¹⁰ See Butler and Baker's Case, 3 Co. 25a, 30a-31b, 35a.

¹¹¹ Trevor, C. J., in *Arthur v. Bockenham*, Fitzgibbon, 233, 238; 94 Eng. Rep. 734, 736 (1734); Mansfield, C. J., in *Harwood v. Goodright*, 1 Cowper 87, 90, 98 Eng. Rep. 981, 983 (1774).

¹¹² 7 HOLDSWORTH, HISTORY OF ENGLISH LAW (ed. 1926) 365.

The right descended but not the seisin.¹¹³ In the time of Bracton the entry required to perfect the heir's title and the consequent seisin were real enough.¹¹⁴ But when seisin had become the fashion there was the inevitable tendency to extend it by construction, to find a seisin in law in contrast to the seisin in deed of the time when seisin had its way to make. "Here it may be remarked that seisin did to some extent become a word with many meanings or rather shades of meaning. The seisin which is good enough for one purpose is insufficient for another. 'What shall be said a sufficient seisin' to give dower, to give curtesy, to constitute a stock of descent, to maintain a writ of right—each of these questions has its own answer."¹¹⁵ Constructive or fictitious seisin, however, did not go very far in the Middle Ages.¹¹⁶ In general, seisin still meant entry or something comparable to it. By the Statute of Uses a statutory seisin became possible that was quite fictitious although seisin remained very much of a reality as possession even in transfers until the early nineteenth century. Then the logic of the Statute of Uses worked itself out and seisin in transfers came to mean little more than that the interest was legal rather than equitable and so could be applied to contingent and executory interests.¹¹⁷ Such a seisin was a great remove from the seisin of Bracton.

In the cases of descent, dower and curtesy seisin retained much more of its medieval reality than it did in transfers, until its fall at the hands of the Benthamite reforms of the nineteenth century. In dower and curtesy the husband or wife must have been seised during coverture. In the case of curtesy this meant actual seisin, an entry during the marriage. In this respect, however, the law was more favorable to the wife than to the husband, and for her to obtain dower the seisin in law of the husband was sufficient. If inheritance was cast on him during marriage of land of which his ancestor was seised, he was presumed to have been in seisin for purposes of dower at least for an instant and dower was allowed although he never actually entered.¹¹⁸

Emphasis on entry was not confined to the freehold. Until the lessee for years entered he had no estate that could qualify him to receive a release.¹¹⁹ Nor had the lessor a reversion.¹²⁰ In other respects the leasehold differed from the freehold. Prior to entry the lessee had an

¹¹³ 2 POLLOCK & MAITLAND, *op. cit. supra* note 12 at 61.

¹¹⁴ 2 POLLOCK AND MAITLAND, *op. cit. supra* note 12, at 60; Maitland, *Mystery of Seisin* (1886) 2 L. Q. REV. 481, 485, 3 SEL. ES. 591, 596.

¹¹⁵ *Id.* 2 L. Q. REV. at 486, 3 SEL. ES. at 597.

¹¹⁶ "This seisin in law is good enough seisin for a few, but only a few, purposes." 2 POLLOCK AND MAITLAND, *op. cit. supra* note 12, at 60.

¹¹⁷ See Bordwell, *The Conversion of the Use into a Legal Interest* (1935) 21 IOWA L. REV. 1, 26-27.

¹¹⁸ WATKINS, *LAW DESCENTS* (4th ed. 1837) 24-44, 46-47.

¹¹⁹ LIT., §459.

¹²⁰ *Id.* at §567; CO. LITT. 46b.

interesse termini that could be transferred and he could enter after the lessor's death and his executor could enter after his own.¹²¹ The transferability of the *interesse termini* is remarkable and bespeaks the commercial character of the lease. The entry after the death of either party would seem to reflect its contractual side. In the treatment of the leasehold as an estate, however, the criterion of the land law was applied.

Thus far very little has been said about the non-possessory or incorporeal interests featured in the title. This is because their treatment is not understandable without an understanding of the way in which possessory or corporeal interests were treated. The treatment of non-possessory interests was an imaginative extension to them of the scheme of things at work in the possessory field. And the Middle Ages was rich in imagination.

¹²¹ Co. Litt., 46b.