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Seisin

FRANCIS M. FINCH[1]

During the darkness and confusion of two centuries, from the coming of Duke William to the reign of the first Edward, there is prevalent one legal idea which seems to permeate everything and dominate the whole field of right and remedy. About it cluster a very large part of the medieval rules and customs, and a study of it may serve as a guiding thread through a labyrinth in which everybody loses his way, and no two scholars agree upon the true direction. That legal idea is the large conclusiveness of actual and open and obvious possession as the evidence of ownership and the occasion of remedies, but taking a peculiar form and becoming what the English law knew as the doctrine of seisin. The word has been derived from two different sources, and has taken color from its derivation. It approaches so nearly to our words "seize" and "seizure" as to indicate a violent or forcible occupation of land; but that meaning is quite too narrow, for much the most common use of the word describes a possession taken peaceably and lawfully and with the consent of the parties engaged in the transfer. The better derivation is from *sedeo* or *sedes*. The occupant sits down upon the land; comes to stay. We express the same idea when we speak of the "seat" of war, or describe a legislator as "seated" or "unseated," or buy a "seat" in a stock exchange. The underlying thought is one of possession, of occupation more or less permanent, and arrogating to itself some real or pretended right.

We are struck in almost every age and in every historic field with the prominence and wide sway of a rule which invariably requires as the foundation of all efficient rights some open and obvious public act,

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This was one of a series of lectures delivered by Judge Finch under the title "The History and Evolution of the Law". Since Judge Finch's death many of the alumni have suggested that these lectures be printed. The present article, which has been selected for publication at this time, is typical of the series.

Printed in Germany.

some visible and suggestive ceremony which the transaction witnesses can see, which they can accurately and readily remember, and which supplies the want of records and of writings. It was a rule of necessity. Ancient law was largely unequal to abstractions and saw everything in the concrete. The idea of ownership came slowly and late, for it was an impalpable thought, a purely mental product, which had to wait for its creator. The older ages at times and on occasion dimly realized it, but we find no clear conception of absolute ownership in the period with which we are now busy. The extreme conception seems to have been of a right good till a better one appears, but never wholly excluding such last possibility. We shall see most easily the nature of this right, and its dependence upon the fact described as seisin, if we watch in Anglo-Norman times the process by which land was transferred. Let us take the simple case of the transfer of an estate of freehold which was always a fee or a life estate, and not a term of years or at the will of the lord. We know that the old Germanic way required the parties with their witnesses to go upon the land itself, that the donor cut a sod or twig and handed it to the donee, saying that he thereby gave him the land. The knife used would be preserved with its point broken or blade twisted or words engraved on the haft as a material evidence of the transaction. Pollock and Maitland tell us, that at an earlier date the donor on the land took off his war-glove or gauntlet, and gave it to the donee who drew it on, and with it took the sod or twig, perhaps the "*festuca*," the symbol rod, and thus obtained investiture of the land; the word meaning that he was clothed with the power of maintaining by battle a defense of his possession. Often the donor was required to depart from the land at once, making some gesture of renunciation, and leaving the donee in evident and plain possession.

The method admitted of less decisive acts in process of time because of some troublesome necessities. Land given for the use of a church was often given to the saint whose shrine it held. The dead martyr or devotee was the expressed donee, and it was not quite easy for him to go in his bones to the land, though the consecrated relics were sometimes carried thither. In such cases there was often a symbolic investiture. The twig or sod was laid upon the altar, the rod passed to the abbot, and the whole affair was completed in the church. The Roman system in time depended more upon a written charter or grant, but that had to be formally delivered to the donee. Even now it is not the mere execution of the deed which passes the title but its actual delivery, and we continue to talk about "vested" estates, often unconscious that the word came down from the old form of investiture which clothed the donee's hand with the war-glove for his defense.

But in England the ancient habit strongly prevailed through the tenth and eleventh centuries, and took the form of livery of seisin. While it is true that there seem to have been occasions when the transfer was away from the land and more or less symbolic, yet in the Norman period and under the ruling of the king's court an actual and formal delivery of possession became indispensable; and this was necessary in order to fit in with the judgment of the recognitors. These were the twelve men of the vicinage, chosen for their probable knowledge of the facts, and expected to give a true verdict upon them, and for this medieval jury there was no means of knowledge unless there were visible acts. And so in the transfer of land livery of seisin and its open and obvious ceremonies became the one essential element. How it has clung to the disposition of real estate even in its rude and barbaric form is shown in some recently unearthed Connecticut records in which land was said to have been acquired and transferred "by Turf and Twig," and in the survival in our practice of the possessory action of ejectment and of the rules which yet attend seisin in law and seisin in deed. Obviously, in times when land was generally transferred without a writing, some public and visible change of possession was the only possible evidence and the one decisive fact. And so it is not strange that livery of seisin became firmly imbedded in the English doctrine, and even though it grew to be needless was not abolished until 1845.

But this seisin, so necessary and important, had to be in some manner protected; for behold the sweeping consequence of a disseisin. Bracton and the court-rolls tell us that the disseisor,—the man who ejects the occupant and gains possession,—gets almost everything from his successful force. He becomes seized in fee. He has the *jus disponendi,* and may sell the land or devise or lease it. It will descend to his heir, it may escheat to his lord, it may be taken on execution for his debt. His wife will have dower in it, and if his possession is disturbed he may have a remedy by action or entry. On the other hand the disseised owner, the person put out of possession, not only loses the power of present enjoyment but has left only a right of action, and that, in Bracton's time, was neither assignable nor devisable, and would not descend, for it had become a mere chose in action. Surely the intruder into the land has become practically owner, and possession is very close to ownership. The tenant disseised had a remedy by the writ of right which in the end determined who should lawfully possess, but this action was difficult and dilatory, and might end in battle. With its almost interminable essoins and the difficulty of proof it was a very inadequate remedy for the owner summarily dispossessed. He therefore was given the two

writs of novel disseisin and mort d'ancestor which Pollock and Maitland, who never enlarge the debt of the common law to Rome, frankly concede were founded upon "the canonists *actio spolii* which itself had its origin in the Roman interdict *Unde vi*."

These writs operated wholly upon the possession, and the judgment favored priority of seisin. The earlier seisin gave the better right, and the only questions asked or answered were, was the demandant in possession of the land and did the defendant disseise him? If the recognitors said yea the demandant was put in and the defendant put out. The latter might in truth be the real and honest owner but was not allowed to make that defense. Judge Holmes asserts the contrary, but his statement has been shown to be only true of a much later period. The possession as it stood must first be reinstated, and the disseisor ousted of possession must go to his writ of right, and leave his adversary choice of the assize or the battle. Seisin thus was a vital thing and vigorously protected.

But the writ of novel disseisin might not always suffice. We have said that the heir of the disseisor would inherit. Suppose that he did. *He* had disseised nobody. *He* entered as of right and without wrong of his own. The novel disseisin would not touch him. There must be another writ to fit the emergency, and the King's Chancery could always frame one if paid for it; but that Chancery was merely the clerk of the growing morality. The facts made the writs and they grew, one after another, out of emergencies actually arising. Thus came the writ of entry *sur disseisin*. This was the first of an active group of writs depending upon an entry by the claimant. There were some curious and some complicated rules about that entry, especially when and how it could be tolled or barred. The claimant had to go upon the land and assert his right. If there was a house upon it he had to go to the front door. A claim at the back door would not suffice. It made no difference whether the disseisor was present or not. If the latter barred the claimant's path, obstructed his entrance, put him in danger of life or limb, he could stand outside in view of the land and make an effective claim there. Apparently, the process was a collision of two seisins, and on the issue of the writ it was determined which of the two had a priority and so which had the better right. It charged the heir with an entry under a disseisin, and that heir could not go back of his entry. Did your ancestor diseisse the complainant and did you enter as heir under that disseisor? If yea, leave the premises. There is no other question. And so seisin will be upheld even as against the heir of the disseisor coming in by inheritance and guiltless of any personal wrong. But observe the principle of this writ and how certain it was to breed a

multitude of similar remedies. Here is a mere termor, holding an estate for years, not even regarded as a free-holder, whose term has expired, but who holds over and claims a fee. Against him there comes the writ of entry *ad terminum praeteriet* which alleges an entry for years which have expired. That is the only question. Has the entry lost its right; has it become wrongful. No proprietary defense is admissible. Here again is a husband who has assumed to sell his wife's land. Many noblemen marry to rob. While he lives his feofee can hold and the wife has no remedy, but when the husband dies she is entitled to recover her lost seisin, and the writ of entry *cui in vita* runs against the feofee.

Still further: the disseisor in possession dies leaving an heir who enters, and who then makes a feofment to A who in turn conveys to B. Here came a new trouble. How reach B? For some reason, difficult to ascertain, the writ of entry *sur disseisin* ran only in degrees. It could be brought against the fourth hand but not the fifth. Counting the disseisee as the first hand, the disseisor is the second, his heir the third, A the fourth, but B is the fifth, and the writ will not run against him. There was neither sense nor logic in that rule. If the original disseisin was a wrong and gave only a voidable title every derivative title had the same defect and was equally voidable. Ere long the statute remedied the defect and the writ ran against anyone holding under the original disseisor.

That seisin even dominated the charter, the indenture, the deed,—Roman document though it was,—with its splash of seals and fringe of witnesses, and the model of which is admitted to have been the conveyance of a Roman landholder. That is evident from the fact that if one makes a written feofment to his daughter for life with remainder to his son in fee, but gives the daughter no livery of seisin, the remainder is void, the son takes nothing, the fee reverts to the grantor, and so seisin of the tenant for life is necessary to uphold the fee granted in remainder. And yet seisin, on some rare occasion, was more liberal and less exacting. Two men, each owning a fee, may exchange their tenements without any formal livery, and seisin in each case will quietly accept its new master But the lands exchanged must both be in that mixture of French and Saxon known as a County. The County, ruled by a Norman count takes its name from him; ruled by the Saxon shire-reeve or sheriff it becomes the shire. But usually and normally seisin is quite despotic, and imposes a penalty on those who refuse to yield to its authority; for, if one by deed grants a fee but withholds livery of seisin the grantee becomes merely tenant at will. The charter for a long time does homage to that English doctrine which has its roots in a far away social life.

But seisin had a much wider reach and as a doctrine took on an enormous extension. There was the same trouble everywhere in the long search for the abstract and complete idea of ownership, and nothing is more interesting than to trace the steps, blind and halting though they be, by which judicial reasoning reached its ultimate end. Let us follow the trail.

Here is an owner of a right of common. Almost every tenant had such right appendant to his farm or lot, and exercised in accordance with a well understood custom. He was not seised of the pasture land but only of a right in or over it, but there was unmistakable seisin of that right, and for a disseisin, that is for a disturbance in the exercise of the right, there was a purely possessory remedy. The grave importance of this seisin of a right is made known to us by Bracton. If a feofment is granted to which a right of common is appendant the feofee at once acquires what is termed a fictitious seisin by viewing the ground over which the right may be exercised, but so long as it is merely fictitious he has nothing which he can convey. To be safe he must get an actual seisin, and from the necessity of the case he can only do that by user. He must take the first opportunity to turn his beasts in or he will lose his right.

But go a step in advance. Here is an owner of a knight's fee upon which a neighbor has trespassed. He has turned in his cattle or is putting an axe to the trees. We know very well that to-day an action of trespass for breaking and entering the close would be the remedy, and that, while the action sounds in damages the defendant may raise a question of title and thus transcend the possession. It was not so in Bracton's day. The injured party could treat the trespass as a disseisin *pro tanto*, and shut off any inquiry beyond the possession, and so drive the trespasser to his writ of right.

But again, one's neighbor affects the possession by creating and maintaining on his own land a nuisance. He does not overstep boundaries, but he so uses his own freehold as to mar or hurt the enjoyment of the adjacent land. The writ of nuisance is awarded to abate the constructive disseisin, and it does abate it instead of merely giving damages. Mr. Reeves says a nuisance was considered as in the nature of a disseisin, and here seisin is reaching out beyond the land and demanding protection against something that is only in the air.

Indeed it did not hesitate in its aggressive march. It boldly entered the field of incorporeal rights, at first mastering those which savored of the realty and which could be deemed in some sort an appurtenance, but soon passing beyond these and leaving the land far behind. Here is the writ of advowson. Who may present a par-

son to the living? The fox-hunting parson of those days was an institution. He had his tithes, his revenues, his manse. Favorite guest at the table of the manor, he could often out-drink its lord. He left preaching to his curate and grew fat and sleek, red of nose and flabby of face, secure of happiness in two worlds. If he went astray, and we are afraid he did, he had benefit of clergy and could only be tried in the ecclesiastical court which meant an easy escape. But which lord shall be allowed to fill the vacant place? Here anew comes in the doctrine of seisin. He who last presented to the living was seised of the advowson, and that seisin settles the controversy. So we have the assize of "*darrein presentment*" raising the question for the recognitors to answer before the Justices in Eyre or those of the king's bench, who, by himself or his ancestors, presented on the last previous occasion of vacancy a clerk to the bishop for investiture. That answered, the judgment follows the answer, seisin of the advowson settles the quarrel, except that the defeated claimant may have his writ of right closely analogous to that relating to land. Now normally the advowson is an appurtenance to the manor. Who gets the manor gets also the advowson. Who sells the manor passes the advowson. But the advowson is a thing by itself,—an incorporeal right,—and may exist separated from the manor, in gross as it is called, so that it ceases to be an appurtenance of the freehold. Yet seisin follows it and so attaches itself to a purely incorporeal right, and in so doing settles largely the value and character of that right.

Very like the case of an advowson is the way in which the feudal lord protects his right to the services due from his tenants. Seisin had to reconcile itself with the feudal system, and did not find it altogether easy. Let us suppose a case. The lord has enfeoffed Charles, giving him a knight's fee, reserving the usual feudal services. Charles has acquired a freehold estate and is seized in fee of the land. There can be but one such seisin and the lord has parted with it and no longer has it. Now, Charles withholds the stipulated services; nay more, he renders them to another lord as being his of right. How is seisin to deal with this problem? It boldly shifts itself from the land to the services. The lord who enfeoffed Charles and gave him seisin of the land could, by taking the services, be seized of the services, that is of the incorporeal right to demand them; and when Charles rendered them to another he disseised his feoffer of the services due. That is true on the supposition that the latter has at least once received them so as to have had an actual seisin. While a mere failure to render them would have for its remedy a distraint of the tenant's goods, his resistance of that distraint and especially his attornment to another would work a disseisin. The injured lord will

have his assize of novel disseisin, and the writ will run precisely in the same form as in the case of land. Look sharply at the situation. Here is no debt, no contract, no obligation, no suit on a promise. The action of assumpsit is yet in the future. Instead of that there is a restoration or recovery of a thing. The right to the feudal services is a thing, like an acre of land of which the lord was seised, and now he is merely recovering his seisin. And he, like the freeholder, if he does not resort to the novel disseisin, may have his proprietary action by writ of right; but even then he is quite sure to show his title by going back to some ancestor having an ancient seisin and then tracing his right by descent.

A similar thing was true where services were commuted into rent and the tenant held on condition of its payment. When it became due the lord went upon the land and demanded it. If the tenant refused or simply stood silent, much more if he shut his enclosure against the lord or resisted his approach, that was a disseisin of the rent and the usual writ issued. And further, if the lord sold the rent charge to another and the tenant attorned to that other the debt became a rent seck, and the new holder must get a penny or a half-penny of the tenant so as to become seised of the rent, and then for a failure of payment he could have the novel disseisin. It cannot be far from the truth to say that the medieval conception of ownership was neither more nor less than priority of seisin.

A freeholder has seisin of a hundred hydes of land. He has one son who happens to be not at home when death ends the seisin of the father. The baron in his castle, hungry for escheats and forfeitures, and always ready to steal land, sees the vacant seisin, the unoccupied farm, and at once swoops down upon it. He has gained the seisin. What shall the heir do? Nowadays we master the problem easily. The heir is seised in law at the moment of the father's last breath. That heir may be a thousand miles from the land. No matter; he is seised in law of an estate of inheritance instantly and absolutely. But the medieval courts had no such abstraction. They only knew the seisin of actual hard fact and the baron has got that. To meet the necessity the law gave the heir the assize of mort d'ancestor, and promptly turned the lord out. It did more than that. To help the heir it played a trick on death. Bracton, as was his habit, went back to the Roman law. Always when in trouble he flies to it for help and gets it. He cited Paulus for the doctrine that seisin is both "*animo*" and "*corpore,*" and holds that it is not gone while the dead body is in the house. Is that the reason why the corpse lies silent, gripping the seisin in its dead hand, for the

usual four days and waiting for the heir to come, and are we unconciously following that custom, though for other reasons, to this hour? At all events the seisin is not vacant until the funeral is over, and at least an unseemly struggle between lord and heir is averted while death is in the house. And it is made easy for the heir to become seised. He need not take *esplees* and so exploit his possession. He has only to set foot upon the land to be seised at once. But suppose him to be an infant. The feudal law puts him in ward of the lord who enters as guardian, except where the estate is in free socage. He takes the profits and products and it is long before he renders an account or is punished for waste. Where is the seisin now? Surely it is in the heir for his baby foot is on the land. Yes, but then the lord is seised of the wardship, of the *custodia*, which becomes a thing; not an impalpable right but a thing, actual and tangible, of which the lord can be disseised as if it were a hyde of land. And very much of a thing it sometimes was for his empty purse.

But difficulties thickened. How manage a mortgage? It was common of course that a freeholder desired to borrow money upon the security of his land. But how give that security in accord with the law of seisin and in the absence of the executory contract? Easy enough for us who understand a lien, but not easy in the Middle Ages when no such idea had dawned. What *had* dawned was the notion of an estate on condition, of a conditional fee. The famous statute "*De donis*," often yet referred to, shows that. In the eleventh and twelfth centuries gifts became common which were limited to the donee and the heirs of his body and to husband and wife and the heirs of their bodies. Very soon the courts construec these to be conditional gifts, so that where there was a limitation to Charles and to heirs of his body it meant simply on condition that he shall have such heirs. Hence, on the birth of a child, that condition was fulfilled and the estate vested in Charles absolutely. He could alienate the land and his feofee would hold even if the issue of Charles should all die and he himself decease leaving no issue, and no heirs of his body. By that ruling the donor lost his reversion and if there were heirs they were disinherited by the alienation. To meet this trouble the statute of Westminster was passed in 1285, usually cited as the statute *De donis*, which explicitly required that the form of the gift should be observed, and so the right of the heirs be saved and the possible reversion be protected. Thus grew the estate in fee tail which has played so large a part in the English law.

There could then be a conditional estate in the donee with a possible reversion to the donor. That idea helped out the mortgage. The borrower put the lender in actual possession of the land, gave him the

seisin but upon the condition that full payment should end the estate and the land revert to the mortgagor. Meantime and while the condition of payment was awaiting its fixed date the mortgagee, having possession of the land, could appropriate the annual profits to his own use, and so gain compensation for his money loan. This was an exceedingly convenient way of getting usury. It needed only that the lender should require as his security a sufficiently large estate to furnish a liberal or even an excessive income. We read how a Norman duke gaged his duchy to the English king, and how William Fossard had gaged his land to the Jews for twelve hundred pounds. When the usurers thus got possession of duchy or manor the tenants had to work for a full day, and pay to the last farthing. This was the dead gage, the *mort*-gage.

But what happened to the seisin? At first it is necessarily in the gagee. He can have no title without it. On payment the gagor may enter and regain his seisin. If he does not pay, the land vests absolutely in the gagee. But until payment the gagee is seised. Pollock and Maitland assure us that his possession is called seisin. And yet they add that if a stranger ejects the gagee it is not he but the gagor who has the assize of novel disseisin: and, what is worse, if the gagor evicts his gagee the latter has no remedy except an unsecured judgment for his debt. These results are inexplicable except upon the suspicion that the seisin of the gagee is becoming shadowy and doubtful, and the judges are giving him merely a seisin as pledgee,—*ut de vadio*,—leaving the seisin in fee in the gagor. It is no wonder that there was confusion, and that the strain upon the doctrine of seisin was severe. Later the logic of the situation was improved by a new theory. The lawyers began to say that the gagee was a tenant for years, that is, a termor, and so having only a termor's remedies. Now, the tenant for years was not a freeholder and if ejected could not have the novel disseisin. He was regarded as having merely a possession, while the seisin remained in his lessor, and we begin to open our eyes to a distinction between possession and seisin which some day will ripen into estates in land, each with its own variety of seisin. It is close work, but the gagee reduced to the level of a termor explains why he could not have the novel disseisin and why, if the gagor ejected him, he had no remedy except to sue on his debt.

If, then, we regard the gagee as a tenant for years—a mere termor—we are compelled to inquire what that termor's remedies were. His lessor sometimes made a collusive sale of the land, and the new owner ejected the lessee with the result that the latter had no action except on the covenants in his lease and ending simply in damages. A new writ was framed under which he could recover possession; but against

everybody outside of the lessor the ejected lessee seems to have had no remedy except to repel force by force, or bring an action of trespass *quare clausum*. It was near the close of the Middle Ages before the writ of *ejectione firmae* restored the possession. So that the gagee, supplied only with the remedies of a termor, seems to have separated possession from seisin, and to hold a very risky and dangerous security but thereby furnishing ample excuse for very high rates of interest. More than that, the logic of the lawyers was obviously lame, and the argument of Pollock and Maitland that the mortgagee was in reality the holder of a "free tenement," and so entitled to the protection of the novel disseisin, seems unanswerable. But we must not be too critical about it. Everything had to be somehow reconciled with seisin and the lawyers had an ugly job.

But the medieval realism was bound to face other situations, and had its ingenuity so severely taxed that the way out was only found with the aid of a fiction odd even to absurdity.

We have noted how seisin is attributed to incorporeal rights by saying that if not land they at least issue out of land. Some link of connection with a real thing is sought in order to make a real thing of what is in truth a mere abstract right. It must smell of the land. Take the case of a simple annuity, and here again we shall follow Pollock and Maitland quite closely. John gives Charles an annuity for his life and Charles is said to have seisin of the annuity. That at least was the law of the earlier year-books, though Bracton begins to see that the non-payment is hardly disseisin of a tenement. But how make the annuity real? What did it issue out of? Why, we should have been regarded as stupid for not seeing that it issued out of the donor's chamber, and was likened to a rent and was called a chamber rent. Its common form was what was termed a corody. The rolls are full of them. A religious house, a monastery, growing rich upon the gifts of the flock and desiring to retain in its service some canonical lawyer, learned and able but shabbily poor, or to pension some retainer grown old and feeble but with a faithful past behind him, gives its donee a support for the rest of his life,—board and clothes and lodging. Pollock says in many cases "an elaborate document will be executed. The quantity and quality of the meat, drink, clothes, candles, firewood, that the grantee is to receive will be carefully defined: even the mustard and garlic will not be forgotten." But out of what real thing does this corody issue? Easily answered, It issues out of the convent, the monastery, the consecrated building, and so at first the courts Christian had exclusive jurisdiction over it: but in 1285 a statute gave the courts temporal an action for it; and what do you think that action was? It was the assize of novel disseisin just as if

the victuals and drink were land. The man who failed to get his garlic was disseised of his free tenement, and the jurors, bound to view the land, went and looked at the convent. With some reason they might have peered into its kitchen. Can the doctrine of seisin go any further? Even that is possible. Let us see.

It seems to be quite clear that there was a disseisin of chattels, and that the analogies of the land-law ran into and shaped the law of movables. We have seen already how strong was the hold of the possessor and how nearly akin to ownership. In nothing does the law of Glanvil's time so much surprise us as in ascribing a right of property to the trespasser in what he has taken, and to the thief in the chattel which he has stolen. Professor Ames cites for us some remarkable illustrations. In a year-book of the fourth Edward the Chief Justice charged the jury thus: "If one takes my horse *vi et armis* and gives it to S, or S takes it with force and arms from him who took it from me, in this case S is not a trespasser to me, nor shall I have trespass against him for the horse because the possession was out of me by the first taking," and the reason added by the glossator is "for the first offender has gained the property by the tort." Fitzherbert says "if one takes my goods he is seised now of them as his own goods," and Finch's definition is: "Trespass in goods is the wrongful taking of them with pretence of title, and therefore altereth the propertie of those goods."

More remarkable still is the case of *John v. Adam* in the time of Edward III which was an action in the *detinet* for sheep. They had been stolen from the plaintiff by a thief who was driving them through defendant's hundred, but, becoming alarmed and to avoid arrest, the felon fled to the church and abjured the realm, and the defendant became seised of the sheep by virtue of his franchise to have the goods of felons. The Chief Justice defeated the plaintiff, holding that there was no trespass as to him since the property was in the felon. Under the rule which gave all the latter's goods to the crown what he had stolen went as his.

The effect of this seisin of the wrongdoer was even worse than in the case of land. In the latter instance, through the assize of novel disseisin, the owner had his possession restored, but there was hardly any such remedy for the man disseised of a chattel. Through an appeal of larceny there might possibly be a restitution, but that was perilous and might end in the risk of a battle, and so the only available remedy was trespass. But that simply awarded damages and brought no restitution. Even when replevin was invented the wrongdoer had a power to choose between a return of the property and payment of its value. It followed inevitably that the influence of seisin on the law

of movables was to postpone the abstract notion of ownership, and instead to depend upon the dominance of possession.

But observe to what astonishing areas that dominance spread, and what a marvellous strength is developed in possession. For it was able to combat and reverse the original and primitive law. Nothing has become more certain than that the law of movables in the earliest ages recognized something closely akin to the abstract idea of ownership. The owner of cattle could pursue and reclaim them into whatever hands they had passed, and however honestly obtained. There was no defense of a purchase in good faith. That fact would indeed save the possessor of another's property from the fine inflicted on a thief, but he had to surrender the cattle to their owner, and seek his remedy on the warranty of his vendor. The claimant, thus, out of the physical possession, stood and could only stand on the right *to* possess, and that right is the chief and vital characteristic of ownership. It is true that such abstract idea had not openly manifested itself in the consciousness of the race, but we can see that it lay hid in the concrete facts which surrounded their dealings with cases of theft: and it seems to us very strange that once on the road to a true conception of property in movables they should have drifted backward to a mere dominance of possession. Yet that is what happened, and seisin was the rebel baron dethroning ownership and passing the crown to possession. This, of course, was a backward step, a break in the line of evolution, but such retrogressions are common, and while they hinder never defeat the march of the natural process. The later law drew elements from both of the precedent doctrines. It recognized the dominance of ownership, but subjected it in special cases to the supremacy of possession, when obtained in good faith and for a valuable consideration.

But greater difficulties confronted seisin when it came to deal with the bailment of chattels. Bailment opened the way to contract. We may say now that it constructed the road to the modern conception of ownership. The common law in Bracton's day scarcely drew any distinctions between the different sorts of bailment. He himself sought to acclimate the civil law in that respect to the English soil and air, but failed for the time to accomplish his purpose, beyond planting the germ thought from which the modern doctrine was to grow. What did take root were those features of the ancient law which treated the bailee as owner in any quarrel with trespassers. If a wrongdoer disseises the bailee the remedy is his for it is his seisin that is invaded, and the right of the bailor is wholly against the bailee for a failure to return the property. But it began to be seen that this doctrine would not work in some directions. It served well enough

where there was a loan for use and the identical thing bailed was not to be returned. Suppose a loan of money. No one ever expected the same coins to be returned, or when cattle served as money always the same identical cattle, and it was not difficult to regard the borrower as owner and the bailor as merely entitled to the return of an equivalent sum. But suppose a loan for hire. Mark wants a horse of John to use at his plough for a month and then to be returned. The bailee, Mark, becomes seised of the animal, but is he therefore owner? And what is John? Everybody knows that the bailee is not owner, that the horse is only in his possession, and while it is natural that the bailee should proceed against the trespasser why deny the bailor's right? It becomes evident that somehow the seisin must be regarded as partible, or predicated of both parties, and by the end of the medieval period the notion of an ownership divorced from possession came to the surface, and it was held that the general property was in the bailor and a special property in the bailee. And that result followed inevitably from the admission of excuses for a non-return. It was possible to deny the bailor's remedy against third persons while his resort to the bailee was absolute and perfect but the moment it ceased to be so by reason of permitted excuses it became intolerable to continue a denial to the bailor of redress against a second or third hand, since that amounted to a denial of all remedy for the loss of the thing bailed. It was Bracton, guided by the Roman law, who opened the door to these excuses, and led the way to remedies of the bailor against trespassers upon the bailee's possession and to that play of astute reasoning which made seisin in effect partible.

But the realism of the early day, born largely of seisin, showed itself very plainly in the form of the action of debt. We naturally expect to find that action an outgrowth and expression of contract, but in that we are disappointed. Contract indeed lurked under it, approached, almost came to the surface, and yet was never distinctively present. Observe the form of the writ and the theory on which it went. It is very like the writ of right which a freeholder uses to recover his land. The debtor is commanded to render up a hundred marks whereof the plaintiff complains that the defendant unjustly deforces him. As a suitor can be disseised of his land so a creditor can be disseised of the money due to him. It is *his* money,—that is the theory,—*his* money the possession of which the debtor keeps and refuses to deliver up. Plainly, the action does not rest on a promise at all. There is no assertion of any; it is a duty not a promise that underlies, and the realism born of seisin rules the writ. We say the realism, for the only cases in which it was generally used were money lent, price of goods sold, arrears of rent on a lease, and a sealed bond.

A mere promise—*nudum*—naked—unclothed with a reality—will not do. The Norman custumal, now believed to have been derived from the English law, states it pithily thus: No one is made debtor by a promise unless a legal *cause* of the promise precedes it: that is to say, debt grows out of the facts constituting the consideration and the duty thence arising: a result which throws a side-light upon Judge Holmes' theory of consideration, which Pollock and Maitland disapprove, but which we are more and more inclined to adopt.

What was thus true of the action of debt as founded on the wrong of a disseisin was equally true of detinue, of replevin, of trover, of trespass *quare clausum*. All of them, influenced, more or less, by the seisin of the land law, went upon the ground that the claimant's rightful possession had in some manner been disturbed or destroyed and should be restored or compensated by damages. It was not until trespass broadened out into case, and the action of assumpsit became developed that the realism of seisin began to lose its hold.

So much for the influence of seisin in the domain of law. We have not exhausted the subject but have given enough to bring into view the persistent realism of the earlier law, and the reason why every known action was an action of tort. For the basis of every such action is never a promise, but always a duty growing out of actual facts and real relations. That duty was obviously a conception of the general morality slowly studying each situation and determining the view of it which the best interests of the parties and the common welfare of the people required. That view in its origin never rose above or drifted beyond the actual and palpable facts, and necessarily the law of the time was thoroughly realistic and had its roots in the prevailing morality.

But dominant as seisin was over all branches of the law it found its match in the doctrine of uses and yielded to an inevitable destruction. We must anticipate somewhat in order to trace the progress of that downfall.

The effort to destroy uses by executing them proved an utter failure under the rulings of the court and especially through the protection of equity. By the name of a trust the use remained, and it survived in a whole group of future estates which owed their existence to a single judicial construction. It was held that the use could only be executed when the statute and the use came together, that is could operate effectually at one and the same moment. This opened the door to a construction of uses planned to take effect in the future and therefore to remain unexecuted and of course undestroyed. Hence arose shifting uses, springing uses and contingent uses creating a group of equitable estates running parallel with and more or less imitating the

corresponding network of legal estates. But something else followed this construction. It furnished opportunity for new methods of land transfer which operated secretly, without the open evidence of seisin, and, by a sort of statutory magic, building its castles in an instant and in the dark. A desires to convey land to B. He makes a feofment to C to the use of B. He gives C the seisin but at that instant the statute and the use come together and the use is executed in B and turned into a legal estate in him without the publicity of seisin or any obvious evidence of his title. The mischief went further. It led eventually to three forms of conveyance, all of which contemned the seisin and were effectual without its aid. One was the covenant to stand seized to the use of the intended donee, founded on a consideration of blood or marriage. The law at once executed the use and so vested the legal estate in the beneficiary. Another was the lease and release. The vendor first executed a lease for a year to the vendee and put him in possession, and then released or quit-claimed to him all his own right in the land, and so converted the estate for a year into an absolute fee. And again, there was the bargain and sale. The vendor bargains to sell the land to the vendee who pays the agreed price, and a use immediately results to him and the statute executes the use, and so the legal estate is transferred.

But all these methods had the vice of secrecy. The man put in open seisin lost ownership at the moment of gaining it and to a concealed or unknown owner. No purchaser could be safe who relied merely on the appearance of seisin which might prove to be only the cover of a hostile title. To redress this evil a new statute was passed which ordained that bargains and sales of lands should not enure to pass title unless made by indenture and within six months enrolled at Westminster or with the keeper of the rolls in the county. And so step by step the coarse and rude method was displaced by the operation of the recording acts. The war-glove surrendered to the peaceable pen. That was the end of seisin. As to land it was supplanted by the recording acts; as to chattels by contract.