

The Disseisin of Chattels: The Title of a Thief

DID a thief ever get property in the goods he had stolen? Professor Ames said that he did, and made it the basis of an extended argument.¹ Mr. Holdsworth² agrees with Pollock and Maitland³ that the statement that a thief acquired property is due to the fact that in the Year Books the two terms "possession" and "property" had not yet been fully differentiated. The controversy has concerned itself largely with the rights of the owner against the third persons into whose hands the article had come. By Roman law he never lost title and the thing as *res furtiva* could never be acquired against him by usucapion until Justinian added the thirty years' period.⁴ That, despite the famous maxim, *mobilia non habent sequelam*, is still the law of Continental Europe as against a thief.⁵ And in the early Germanic law of northern France, in cases of *choses emblées* or *adirées*, the title of the owner was good everywhere, even against bona fide holders.⁶ Mr. Holdsworth is inclined to think that the common law had the same rule for *res adiratae*.⁷

But suppose the owner found his property in the hands of the thief and took it. He might not commit homicide in so doing. That was clear very early. Could he otherwise take it with impunity?

A passage in Britton has been much cited.⁸ It occurs I, 46: "If he (the appellee of robbery) pleads that the horse was his own, and that he took him as his own and as his chattel lost him out of possession and can prove it, the appeal shall be changed from felony to the nature of trespass. In this case let it be awarded that the defendant lose his horse for ever; and the like of all usurpations in similar cases, because our will is that every one proceed rather by course of law than by force."⁹ There is a variant reading, but Mr. Nichols

¹ "The Disseisin of Chattels," 3 Harvard Law Review 23, 313, 337; Lectures on Legal History, pp. 172-209.

² A History of English Law, III, 273.

³ History of English Law, II, 164.

⁴ Code Just. VII, 39, Nov. 117.

⁵ Planiol, *Traité elem. de droit civil* (8th ed.), Sec. 2483.

⁶ Planiol, *op. cit.*, Sec. 2462, citing Beaumanoir (ch. XXI, No. 16): "Cil-la puet poursuivre où qu'ele soit alée car chascun a lieu de demander ce qui doit estre sien à celui qui le tient."

⁷ A History of English Law, III, 274.

⁸ Most recently by Sir Frederick Pollock, *Essays in Law*.

⁹ Nichols' translation, *Am. ed.*, p. 97.

apparently gives the better text.¹⁰ The result surprises Sir James Stephen. Pollock and Maitland, however, take it as a matter of course for the reason assigned by Britton, and treat it as an example of the sanctity of possession even as against ownership.¹¹ Mr. Ames in his "Disseisin of Chattels"¹² makes the statement: "The legal effects of the disseisin of chattels are most vividly seen by looking at the remedy for a wrongful taking. The right of recaption was allowed only *flagrante delicto*. This meant in Britton's time the day of the taking. If the owner retook his goods afterwards, he forfeited them for his 'usurpation.'" But, as can be seen, Britton says nothing about the lapse of the day, but declares the goods forfeited whenever violently retaken. Mr. Ames has obviously confused the two passages which he cites together, the first of which deals with the period of one day in a wholly different connection. If a thief is taken "freshly upon the fact," he is hanged without being allowed to be heard. But if he is not so taken, he must be permitted to answer. And indeed, it is only the commentator in MS. N. of Britton that interprets "*freschement*" as meaning "on the same day."¹³

Where does Britton get the rule that makes the owner lose his horse if he takes it by force? It is not in Bracton. The reasons against self-help in organized communities are many and various, but some right of recaption in an injured owner seems to be generally conceded. If Britton's statement had been as Ames stated it, the reasonable character of the rule might be conceded. In note 9 of his "Disseisin of Chattels" Ames goes on to state: "The right of self-help in general was formerly greatly restricted. The disseisee's right of entry into land was tolled after five days . . . The lord must resort to his action to recover his serf, if not captured *infra tertium vel quartum diem*. A nuisance could be abated by act of the party injured only if he acted immediately. Bract. f. 233, 1 Nich. Britton, 403."

Now, the passage in Bracton to which Ames refers makes the statement (f. 233), *Ea vero quae sic levata sunt ad nocumentum injuriosum vel prostrata vel demollita, statim et recenter flagrante maleficio (sicut de allis disseysinis) demolliri possunt*, etc. The word "immediately" therefore is qualified by the expression "while the injury is fresh" and more precisely by the specification—"as in

¹⁰ Discussed in Stephen, History of the Criminal Law of England, III, p. 133, n. 2.

¹¹ History of English Law, II, 499, n. 7.

¹² 3 Harvard Law Review, 23, 28; Lectures on Legal History, 172, 178.

¹³ Britton, (Nichols' tr. Am. ed.) I, ch. XV, p. 48, 49, n. 1.

other cases of disseisin." What happens in other "cases of disseisin"? Bracton tells us, f. 163. The injured person has four full days "to gather his friends and force," and must eject on the fifth day, if the disseisin is effected in his presence. If he was absent at the time he has a reasonable additional period. The rule about self-help in disseisin is similarly stated by Britton with the explanation taken from the MS. commentator.¹⁴

When Britton, in the other passage cited by Ames, says that "nuisances may be removed immediately upon the fact," there can scarcely be any doubt that "immediately" must be taken to be the same as in Bracton, though Britton here, as well in the earlier citation, is, I think, intentionally vague about the time within which abatement would be lawful.

Self-help had begun to be restricted in Anglo-Saxon times. In early days it is merely provided that the injured person need not avenge himself if he does not choose, but may call upon a court. Later in the *Leges Henrici* 87, 83 (1116 A. D.) self-help is allowed only in self-defense, or after due announcement.¹⁵ A claimant for damages, again, could distrain only by lawful process, and Ailward, who did not do so in Henry II's time, or the anonymous R. who followed his bad example in Edward I's time, were treated as hand-having thieves.¹⁶ It may be doubted whether this was much of an advance upon King Ine, who, in 698 told his West Saxons that if one distrained before asking for justice, he must return the thing taken and its value to boot, as well as pay the king thirty shillings. *Si quis vindictam fecerit (pro vadio quicquam ceperit) antequam sibi rectum fieri postulet.*¹⁷

But the extent to which self-help can be restricted when it involves homicide or distress does not in the least make recaption of one's own property unlawful. The interests of the king's peace may suffer equally in the latter case, but the king will be bolder when he prefers his peace to his subjects' desire to meddle with other people's property than when he prefers it to their claims to their own property. The fact that trespass began to take the place of an appeal of larceny does not confirm the extraordinary rule stated in Britton. One might indeed draw an exactly opposite inference. In an appeal of larceny the bereft man got his goods back, but the form was so cumbersome and complicated that he found it safer to

¹⁴ Britton, *ibid.* II, ch. XIII, p. 238, n. 1. "The disseisee shall go one day to the north, one day to the south, one day to the east and one day to the west, to gather his friends and force." Pollock and Maitland, II, 50.

¹⁵ Liebermann, *Gesetze der Angelsachsen*, II, p. 648.

¹⁶ Pollock and Maitland, *op. cit.*, II, 496, n. 3, and 499, n. 5, n. 8.

¹⁷ Laws of Ine, 9, in Liebermann, *Gesetze der Angelsachsen*, I, pp. 93, 95.

bring trespass. This new action gave him damages, but lost the goods. "For the first offender has gained the property by the tort."¹⁸ But suppose the injured man took the goods back by force, not from a subsequent holder, but from the thief? The thief could scarcely bring an appeal of larceny against the true owner. Is it even conceivable that a court could give him damages in trespass? I find it difficult to believe it, and none of Ames' cases are of this sort. If this is so, recaption of movables, provided it involves no killing or maiming, is apparently permitted when it is from the thief, and if Britton's statement that the recaptor forfeited his reclaimed property is not law, there is no limit anywhere else.

On the contrary, the retaking of property seems to be encouraged. "If the owner retakes his goods from the trespasser, yet he shall have trespass for the taking." Viner's Abridgment, 528, citing Y. B. 11 H. 4, 24 b. And even more precisely Bacon's Abridgment: "If the beast of J. S. has been unlawfully taken by J. N. an action of trespass does not lie for the retaking thereof by J. S. because J. N. was himself the first wrongdoer."¹⁹

If the rule of which we have spoken cannot be shown to be English law, had the anonymous manipulator of Bracton, whom we know as Britton, any other source? His treatise is couched in the form of a statute issued by Edward I. It makes large claims for the king's prerogative in words that vaguely recall the pompous confirming constitutions of Justinian. Throughout there is a special intention to enlarge the king's function and to cut down privileges that conflict with it. It is for that purpose that, although a right of disseisin without recourse to law and of abatement of nuisance is grudgingly conceded, Britton indicates no time within which it may be exercised, although Bracton clearly sets the time, and Britton's commentators find it necessary to insert it in the margin.

It can scarcely be supposed that Britton was a profound civilian, but a cursory acquaintance with the Institutes, almost any literate person in that time may well be credited with. Now in the Inst. IV, 2, 1, a constitution of Valentinian and Theodosius of 389 A. D. (C. VIII, 4, 7) is cited: *Divalibus constitutionibus prospectum est ut nemini liceat vi rapere rem mobilem vel se moventem licet suam eandem rem existimet. Sed si quis contra statuta fecerit, rei quidem suae dominio cadere.* "By imperial constitution it has been provided that no one may take by force any goods, whether movable

¹⁸ Brooke, Abr. Tresp. 358.

¹⁹ Brooke, Abr. Tresp. 323; Chapman v. Thumblethorp, (1594) Cro. Eliz. 329.

or moving themselves (i. e., 'live' or 'dead' property of the Abridgments), though he deems them to be his own. If any one acts contrary to these decrees, he shall lose the property in the goods if they are his own." The reason assigned is not quite the same as that given by Britton. The emperors seek to prevent robbers pleading that the goods are theirs, and using this as a pretext for violence. But at bottom the purpose is the same.

The passage of Britton to which such frequent reference has been made, isolated as it is in English law, not unreasonably surprises Sir James Stephen. It is much less surprising if it is taken from a book which Britton almost certainly knew and which he and his contemporaries regarded as the charter of princely prerogative. Of one thing there need be no doubt. In Britton, as clearly as Liebermann finds it in the *Leges Henrici*, there is a *deutliche Tendenz*,²⁰ a clear underlying motive to establish a new principle of English polity—or at any rate to assert emphatically a principle he deemed to be there—and that is the royal supremacy. Any rule which tended in that direction and did not obviously conflict with established English custom would be eagerly welcomed.

In the passage from the Institutes the owner forfeited his property, and although it is not stated that title vested at once in the possessor, it is almost certain that this result followed. Britton, however, makes it plain that this result would not follow in England, else the possessor would have succeeded in his appeal of larceny and would not be reduced to claiming damages. Who, then, obtains the goods? One must suppose it will be the king, yet the fact that Britton, who is eager enough to enrich the Crown, does not say so, points somewhat to an origin such as here suggested. It is not an English rule, and he has not thought out its details.

Max Radin.

University of California,
Berkeley, California.

²⁰ Liebermann, *Gesetze der Angelsachsen*, II, p. 648.