BEES AND THE LAW.

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Bees have raised many problems for the law. Their propensity to sting has led certain counsel to suggest that they should be classed as dangerous animals. In Ireland,[1] this plea has been rejected, and in New Zealand the view has been expressed that it is doubtful if bees fall within this category.[2] Clearly if a bee is *mansuetae naturae*, the doctrine of *scienter* can hardly be applied—even the most enthusiastic apiarist could hardly be held to have actual or constructive knowledge of the habits of any one particular bee. It may, however, be negligent to keep bees too near the highway, and a plaintiff whose horse dies after being stung may recover, if in fact negligence be proved.[3] Again, so many bees may be kept that a neighbouring occupier may successfully plead that a nuisance is created.[4]

There is no property in bees (since they are *ferae naturae*) unless and until they are reduced into the possession of one particular person. (In passing it may be noted that *ferae naturae* is a rather ambiguous phrase; rabbits are *ferae naturae* in the sense relating to title, but even their worst enemies could hardly consider that they were savage in the sense of possessing a dangerous propensity to attack mankind). The acquisition of bees may thus be an example of the Roman doctrine of *occupatio*. Once reduced into possession bees are property and may be the subject of larceny.[5] The English rules as to the acquisition of other wild animals are complicated by the game laws and English law cannot boast the simplicity of Roman law on this point.

How long continues the title of one who has reduced a swarm of bees into possession? Bees roam far afield and to deprive the owner of his right if they fly on to the land of another would be an inconvenient rule. The Roman rule for "migratory" domestic animals was that they remained in an owner's possession, even though they wandered far, so long as they had the intention of returning. There are many dicta concerning the difficulty of proving what is in a man's mind, but to prove the animus of an ass or a bee may be a much more difficult task. The Romans recognised this and ended with the rather tame conclusion that "they are considered to have lost the intention of returning when they have given up the habit of returning."[7] Thus, ownership of wild animals was lost as soon as effective control was lost and the owner of a tiger was not responsible for its depredations after it had escaped, since liability for delict was based on ownership.[8]

1. *O'Gorman v. O'Gorman* (1903), 2 Ir R. 573, cited Winfield, Tort, 556.
2. *Robins v. Kennedy* (1932) N.Z. G.L.R. 24.
3. *Earl v. Van Alstine*, N.Y. (1850) 8 Barb. 630.
4. *Parker v. Reynolds*, The Times Newspaper, 1906, Dec. 17. The hives accommodated about half-a-million bees. Incidentally the plaintiff also kept bees, but his hives were 200 yards from his neighbour's property, whereas defendant kept his bees actually beside the fence dividing the two properties.
5. Per Bayley J., *Hannam v. Mockett*, 2 B. & C. at 934, at 944.
6. Holdsworth, H.E.L., VII., 493-4; *Blades v. Higgs*, 11 H.L. C. 621.
7. Digest 41. 1. 5. 5.
8. Inst. 4. 9. pr.

At periodic intervals, however, bees break up their community; if they swarm upon a neighbour's land, has the previous owner of the bee any right to enter to recover them? This is the problem of a recent case before the Court of Appeal, *Kearry v. Pattinson.*[9] Some of the plaintiff's bees swarmed and settled on defendant's land. The defendant refused to allow the plaintiff to enter and the bees were lost. The plaintiff brought an action to recover the value of the bees. This raises three questions:—

(a) That of property in the bees.

(b) The right to enter on another's land to retake chattels.

(c) How far refusal to allow an owner to enter to recover a chattel may be evidence of conversion.

The court disposed of the question of the property in bees very simply. To show that there could be property in bees when they were reduced into possession, the court cited Blackstone. The origin of this passage could be traced through Bracton to the Institutes of Justinian—an interesting example of the antiquity of some of the material sources of English law. But Blackstone also said that if a swarm fly out "they are mine so long as I can keep them in sight and have power to pursue them: and in those circumstances no one is entitled to take them." Does power to pursue mean physical power or legal power? The court held that it meant the latter and therefore that the neighbour did not commit an actionable wrong by refusing permission to enter. If this decision is correct, there is little left of *Quantrill v. Spragge.*[10]

This case, it is clear, has important results for apiarists. Bees do not only enter a neighbour's land when they swarm, but almost daily. Every time one of my bees flies over a neighbour's hedge, I lose title to it and my neighbour (if he has the skill) may imprison or kill the bee and thus cause me loss. The queen bee could be seized if it crossed the boundary fence and thus an apiarist might lose a complete swarm. It is for these reasons apparently (and not for the value of one swarm of bees) that the question is to be taken to the House of Lords. Perhaps they will prove more learned in Roman law than the Court of Appeal: perhaps they will take the view that it matters not what is the rule of Roman law, but what Bracton and Blackstone wrote. Yet their words are so ambiguous that the question still remains fairly open. Dr Cohn has recently pointed out[11] that neither Blackstone nor Bracton rendered quite accurately the Roman text on which they based their rule, and Blackstone also translated Bracton incorrectly. Gaius writes: "donec in conspectu nostro est nec difficilis eius persecutio est."[12] Bracton renders this "nec sit impossibilis eius persecutio," while Blackstone refers to lack of power to pursue. Most writers take the view that Gaius was referring to physical rather than legal obstacles,[13] but there is no direct

9. (1939) 1 K.B. 471.
10. (1907) 71 J.P.Jo.425. An owner of bees was first refused permission and then allowed to enter his neighbour's garden subject to liability for trespass. It was held that the bees were still his property as hey could be identified and the Court apparently held that if the landowner had frightend the bes away he would have been liable.
11. 55 L.Q.R. (1939) 289.
12. Dig. 41.1.5.4.
13. Cohn, op. cit., at 290-291.

authority. The Romans, however, did not grant a direct action for trespass to land, although *iniuria* provided a remedy for wanton disregard of an owner's right; clearly *iniuria* would not lie against one who entered not to annoy the owner, but to recover his bees. But if the landowner was present and refused a right of entry we can only guess what the Roman answer would have been—even if the use of violence to force an entry would have been unlawful, the owner could probably have sued for the value of the bees. But some authorities lay down that in Roman law there was a right of entry on land in order to recover property.[14]

Let us then discuss the English authority as to the limits of the right to enter another's land in order to recover goods. Discussion usually begins with the judgment of Tindal C.J. in *Anthony v. Haney*,[15] which laid down that a mere plea that a person entered to re-take his own goods is not sufficient, for such a doctrine would tend to encourage the parties to resort to self-help and thus lead to breach of the peace. Entry is permissible if the goods came there by accident, by felonious act of third party,[16] or if the owner of the land placed the plaintiff's goods there.[17] These rules are regarded as established to-day, provided that accident is interpreted to mean inevitable accident—the dictum that a man may enter his neighbour's land to recover the fruit that has fallen there from his own trees is rather open to question. One who is carefully driving cattle along the highway is not responsible for their trespass to adjoining land, but if they do trespass the driver apparently has a right of entry to remove them, presumably on the doctrine that the goods came on to the land by "accident." The only direct authority for the right to enter is an old case,[18] but modern cases discuss the duty to remove the cattle as soon as possible[19] and it is difficult to see how this duty can be carried out without a right of entry. But another example given by Tindal C.J. is that the owner of chattels may enter if the occupier refuses to restore the goods or to make any answer to a demand for their restoration.[20] This dictum is of doubtful authority. Wright J. has stated that ownership of chattels does not per se give a right of entry on another's land in order to recover them,[21] and this view is supported by a decision of a Divisional Court.[22]

Where the owner is tortiously responsible for the appearance of the goods on a neighbour's land, most writers deny that there should be a right of recaption. But Winfield suggests that where the owner of goods is not responsible in tort for their appearance on the occupier's land, he *should* be allowed to enter, provided he does no damage or gives adequate

14. Cohn thinks that the better view is that Roman law did recognise a right to enter another person's land in order to recover property. 55 L.Q.R. 293.
15. (1832), 8 Bing. 186.
16. *Webb v. Beavan* (1844) 6 Man. & G. 1055.
17. *Patrick v. Colerick*, 3 M. & W. 483.
18. Digest, 43, 412, 353.
19. *Goodwyn v. Cheveley* (1859) 4 H. & N. 631.
20. *Anthony v. Haney*, 8 Bing. 186. If the owner of land refused to make any answer to plaintiff's request "a jury might be induced to presume a conversion from such silence, or at any rate, the owner might in such case re-enter and take his property, subject to the payment of any damage he might commit."
21. *Smart Bros. Ltd. v. Holt* [1929] 2 K.B. at 309.
22. *British Economical Lamp Co. Ltd. v. Empire Mile End Ltd.* (1913) 29 T.L.R. 386.

security for making good any unavoidable injury.[23] Many European countries adopt this rule, at least where bees are concerned.[24]

The American Restatement gives fairly extensive powers. "One is privileged to enter land in the possession of another, at reasonable times and in a reasonable manner, for the purpose of removing therefrom a chattel to the immediate possession of which the actor is entitled and which has come upon the land otherwise than with the actor's consent or by his tortious conduct or contributory negligence."[25] The actor is subject to liability for any harm caused by the exercise of this privilege except where the possessor of land is tortiously responsible for the presence of the chattel on the land. The tenant is given power to remove chattels within a reasonable time after the determination of the lease, unless he knew (or should have known) in advance the date of the termination of the lease.[26]

English law, however, seems to be much narrower and to support the right of the landowner to refuse an entry save in narrowly defined circumstances. In the early centuries, prohibition of self-help was due to the fact that a weak system of law was struggling with a violence which it found difficult to control. Pollock and Maitland suggest that the law in the thirteenth century kept up its courage by bold words. "It will prohibit utterly what it cannot regulate."[27] But to-day, the law allows an "amount of quiet self-help that would have shocked Bracton,"[28] and this is possible, for "it has mastered the sort of self-help that is lawless." There is no danger of the law to-day being unable to keep the peace or to require satisfaction from him who breaks it. The doctrine that peace must be preserved is not convincing. Another reason is the great emphasis on the protection of the rights of landed property which is so marked a characteristic of English law. That a man's house is his castle is not only a hackneyed dictum but a true representation of the common feeling of the community. But if the law does not give a right of entry, then it should be very willing to assume conversion if the landowner refuses to restore the goods. If it be asked why a landowner should be required to take any trouble at all, the reply is that he may save himself trouble by giving special permission to the owner of the chattel to come and take the goods.

But English law also favours the landowner by being unwilling to presume conversion from mere refusal to restore. If I lop the branches of a neighbour's tree because it overhangs my land and eat the apples which were on those branches, that is conversion, since there is here a definite act.[29] But where there is no conclusive evidence that the landowner is exercising a right of dominion over the chattel, then appa-

23. Tort, 394-5.
24. See Cohn, 55 L.Q.R. at 294: France, Germany, Italy, Switzerland, Latvia, Portugal, Bulgaria, Finland, Spain; Argentine and Chile limit the right to uncultivated or unhedged land.
25. Restatement of the Law of Torts S. 198. This section taken by itself would not give a remedy to a prior tenant who wishes to recover a picture which he left hanging on the wall, since the picture would not have come upon the land without the actor's consent.
26. Restat. S.178.
27. History of English Law, II. 572.
28. ibid.
29. *Mills v. Brooker* [1919], 1 K.B. 555. Cf. *Walker v. Clyde*, 10 C.B. (N.S.) 381 where there was also a definite act.

rently he may keep the res indefinitely. The cases may be divided into those between a prior and subsequent tenant, those between a prior tenant and the landlord, and those that concern the right of an assignee for value to remove tenant's fixtures.

(a) As between the prior and the occupying tenant, there are dicta supporting the view that the occupying tenant may refuse to allow the former tenant to enter to recover a picture left on the wall. If any dominion is exercised by the occupier over the picture, that would be conversion, but mere refusal of entry and unwillingness to take the trouble to restore are not.[30] This is a particularly strong example, for the full use (as apart from alienation) of which a picture is capable may be enjoyed simply be leaving it on the wall. But an opposite view was taken by Lord Denman and Coleridge J. in *Thorogood v. Robinson.*[31] In *Wansborough v. Maton,*[32] B was in possession of the land as a tenant and the executors of the previous tenant wished to remove a barn which apparently was not attached to the realty. Defendant who had purchased the freehold, locked the gate to prevent plaintiff having access and this was held to be evidence of a conversion. Sir John Salmond himself thought that if the occupier of the land, on which the plaintiff's goods have in any manner come, refuse either to deliver them or to allow the plaintiff to take them, there can be "no real doubt" that he is liable in an action of trover.[33]

(b) As between tenant and landlord, the tenant has a bare right to remove tenant's fixtures only during the currency of the lease (or perhaps while he remains in lawful possession even after the termination of the lease). Where the lease is suddenly determined by the landlord this rule may operate very harshly. Thus Malins V.C., in recognising a landlord's claim, spoke of it as most unconscionable and ungracious on the particular facts before him.[34]

(c) Many of the older cases lay down that third parties who have acquired the fixtures for value from the tenant may remove them during a reasonable period after the termination of the lease.[35] Certain cases give the mortgagee of the fixtures a right to enter.[36] But a modern decision casts doubt on this protection given to third parties.[37] The plaintiff was the owner of certain lamps which were hired by the tenant of a theatre. When the tenant failed to pay his rent, the landlord re-entered and later refused to restore the lamps When the plaintiff sued in detinue it was held that no action lay, A. T. Lawrence J. putting it that the plaintiff had a remedy against the hirer and that if he desired a right against the landlord he should have obtained his consent before installing the lamps: Lush J. deciding that the landlord had not dealt with the lamps under any plea of dominion and therefore that the facts fell short of

30. *Wilde v. Waters* (1855) 24 L.J. C.P. at 195.
31. (1845) 6 Q.B. 769.
32. (1835) 4 L.J. K.B. 154; Lord Denman, C.J., Patteson and Coleridge, J.J.
33. Torts, 5th Edn. 180.
34. *Pugh v. Arton*, L.R. 8 Eq. 626.
35. *Re Glasdir Copper Works Ltd.* [1904], 1 Ch. 819.
36. *London & Westminster Loan & Discount Co. Ltd. v. Drake* (1859) 6 C.B. (N.S.) 798.
37. *British Economical Lamp Co. Ltd. v. Empire Mile End, Ltd.* (1913) 29 T.L.R. 386.

establishing a conversion.[38] It is submitted that such a case leads to extraordinary results. If the occupier uses the lamps, presumably that would be evidence of conversion. If the chattels in question were electric globes, the occupier to escape condemnation for conversion would be bound to remove the lamps and instal his own to secure light.[39] Why should the law protect a churlish refusal to restore goods which the occupier is not allowed to use? Even if we may impute fault to a tenant who fails to remove goods during the currency of the lease, the same degree of fault cannot be attributed to a third party who has an interest in the goods of the tenant, for in such a case the circumstances surrounding a sudden determination of the lease may be quite unknown to him, although not to the tenant.[40]

The American Restatement says in commenting on s. 237 that a refusal to surrender a chattel may consist of a denial of access to the chattel and refusal to surrender is regarded as conversion unless justified by the particular rules enumerated.

In such cases, the law should allow an action of conversion to the owner of the chattel which is upon another's land at least where the chattel came there without the consent or fault of the owner of the res. But even this qualification may lead to curious results. Smith's car, which is negligently driven, skids and comes through my open gate, doing no damage to my property. Can I eject him and refuse to restore the car? I am driving in the country and park my car on ground beside the road, thinking that the car is not on private property. If the car is actually on Jones' property, can he deny me the right to enter and with impunity refuse to restore the car? In both cases the car came on another's land by the tortious act of the driver—but is it reasonable to deny the driver a remedy?

38. It is difficult to reconcile this case with previous decisions. Surely one who lets goods to a tenant should be in as strong a position as one who takes a charge on the tenant's own fixtures. Cf. *Saint v. Pilley* (1875) L.R. 10 Exchcq. 137.
39. Obtaining light from the globes would clearly be a conversion.
40. This argument that a gracious neighbour would restore the goods cannot be applied to *Kearry's* case, at any rate if the neighbour was not an expert in bees. An inexpert but well meaning attempt to return bees would lead to disaster for the actor.