

# SPOLIATION AND DISSEISIN: POSSESSION UNDER THREAT AND ITS PROTECTION BEFORE AND AFTER 1215

*Fecha de recepción: 27 de octubre de 2015 / Fecha de aceptación: 3 de diciembre de 2015*

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*Abstract:* Each of the two great law-making events of 1215, *Magna Carta* and the Fourth Lateran Council, included provisions relating to dispossession (*spoliation, disseisin*) and how to remedy some of its previous deficiencies. This paper considers the legal texts in some detail and the history behind them, in canon law and, in relation to this topic, its Roman base; and in England, notably the legislation of the Anglo-Norman King Henry II (1154-1189). It then considers the effect of these changes in both canon and secular law after 1215 in the rest of the 13<sup>th</sup> century and a little beyond. The Anglo-Norman royal law is also compared with variants found in boroughs or cities (like London); in northern France; and in the *Liber Augustalis* of Frederick II for his kingdom in Sicily and southern Italy.

*Keywords:* Spoliation, disseisin, possession, 1215, IV Lateran Council, Magna Carta.

*Resumen:* Los dos grandes acontecimientos legislativos de 1215, la Carta Magna y el Cuarto Concilio de Letrán, incluyeron disposiciones relativas a la desposesión (expoliación, usurpación) y a la forma de remediar algunas de sus deficiencias anteriores. Este artículo considera los textos legales en detalle y la historia detrás de ellos, en derecho canónico y, en relación con este tema, su base romana, y en Inglaterra, en particular la legislación del rey anglo-normando Enrique II (1154-1189). A continuación, considera el efecto de estos cambios tanto en derecho canónico como secular después de 1215 y en el resto del siglo XIII, y un poco más allá. La ley real anglo-normanda también se compara con las variantes que se encuentran en distritos o ciudades (como Londres); en el norte de Francia; y en el *Liber Augustalis* de Federico II para el reino de Sicilia y el sur de Italia.

*Palabras Clave:* Expolio, usurpación, posesión, 1215, IV Concilio de Letrán, la Carta Magna.

1. INTRODUCTION<sup>1</sup>

In 1072, or a little later, a trial took place<sup>2</sup> between Lanfranc and William's half-brother, Odo (in French texts, Odon or Eudes) a son of William the Conqueror's mother Herleva by Herluin de Conteville. Lanfranc<sup>3</sup> was Abbot of Caen, but William I wanted him as archbishop of Canterbury in place of Stigand, the last pre-conquest archbishop. Lanfranc was born in Pavia, a notable centre of legal learning, c1010 where he had had a lay career in both civil and canon law. Before Caen, he had served as prior of the Benedictine house of Bec in Normandy which he had entered in 1042, his scholarly reputation preceding him. He died in 1089.

<sup>1</sup> Abbreviations and Bibliography of works cited more than once: *Beaumanoir* BEAUMANOIR, P., *Coutumes de Beauvaisis*, ed. SALMON, A, 3 vols. Paris 1899, repr 1970 (3rd vol. historical & juristic commentary by HUBRECHT, G, 1974); BRACON *De legibus et consuetudinibus Angliae* text & English tr by THORNE, S.E., 4 vols 1968-1977, Harvard University Press & Selden Society. Thorne's text and translation, while based on that of WOODBINE, G.E. (1922), is based on substantially more mss. and the translation is much improved; CARPENTER, D. *Magna Carta* Penguin Classics, London, 2015, including the Latin text of the Charter And its re-issues, with English translation and extensive commentary. CHENEY, C. R, *Innocent III & England* (1976) – series *Papst u. Papsttum* Bd 9 (series editor G. DENZLER), Stuttgart; D., *Cod.* In the *Corpus Iuris Civilis* (to avoid confusion with Gratian's Dist., *distinctio* & C., *causa*): The KRÜGER-MOMMSEN-SCHÖLL-KROLL edition 1872-1895, repr Weidmann, Dublin & Zürich, various dates. DOWNER ..., *Leges Henrici Primi* (text datable to 1114x18; edited with English tr. facing Latin, Oxford 1972); FOREVILLE, Raymonde *Latran I-IV* Paris 1965 repr Fayard, 2007 (series: *Histoire des conciles œcumeniques* t. VI, series editor Gervais Dumleige S.J.; GARCÍA Y GARCÍA, A. *Constitutiones Concilii quarti Lateranensis una cum Commentariis glossatorum* ed. A. GARCÍA Y GARCÍA, Vatican 1981 (*Monumenta Iuris canonici series A : Corpus Glossatorum vol 2*); GARCÍA Y GARCÍA, A. *Iglesia, Sociedad y Derecho* (collected papers) 2 vols Salamanca 1987; GLANVILL *Tractatus de legibus et consuetudinibus regni Angliae qui Glanvill vocatur* Ed. & tr. HALL, G.D.G., 1965 & 2<sup>nd</sup> ed. N COFFELT & M.T. CLANCHY, edited with English tr. facing Latin, Oxford 1997; GRATIAN, *CJ Canonici* (ed. FRIEDBERG, E. after RICHTER, E.L.; Leipzig 1879 repr Akademische; DRUCK U. Verlagsanstalt, Graz 1959, 2 vols: vol 1, *Decretum Gratiani* & vol 2, the five; *Decretalium collectiones* of which the decretals of Gregory IX, i.e. the *Liber Extra* ("X") 1234, the Sext (VI) of Boniface VIII, 1298 & the Clementines, 1314 are cited here; HARTMANN, W & PENNINGTON, K. (eds.) *History of medieval canon law: KÉRY, L. Canonical collections of the early middle ages c.400-1140 – a bibliographical guide*, Washington 1999; and (various authors), *The History of medieval canon law iun the classical period ...1140-1234*, 2008; HINSCHIUS, P. *Decretales Pseudo-Isidorianae*, (Leipzig, 1863; repr Scientia Vg. Aalen 1963). See also FUHRMANN, H., *Einfluss u. Verbreitung der pseudo-isidorischen Fälschungen* 3 vols, Stuttgart 1972-7; HOLT, J.C. *Magna Carta* Cambridge 2015<sup>3</sup>, revised & ed. with new introduction by GARNETT, G. & HUDSON, J. appendices 4-6 for texts; JOUÛN DES LONGRAIS, F. *La conception anglaise de la saisine du XIIe au XIVe siècle* (Paris 1925) ; KIEFNER, H "Qui possidet dominus esse praesumitur" in (1962) 79 ZSS, rA, 239-275 & 294-301 repr in E.J.H. SCHRAGE (ed) *Das römische Recht im Mittelalter* (1987) ; KUTTNER, S. (abbrev. Kuttner, Rep) *Repertorium der Kanonistik (1140-1234) – Prodromus Corporis Glossarum I*, Vatican, 1937, repr 1981.

<sup>2</sup> The trial is recorded in various chronicles; see VAN CAENEGEM, R.C., *English Lawsuits from William I to Richard I* (1066-1199), §5, in the first of two Selden Society publications (abbrev. SS with volume number & year of publication) 106 (published 1990). For further examples also well before Henry II's reforms, see §134 (1088 & after) under William II; for vol.2 (SS 107, published 1991, covering 1155-1199) see index of subjects, s.v. disseise. *Diratiocinatio*, anglicised as "deraign," appears once in *Leges Henrici Primi* 48.12: see DOWNER, L.J., p.160; and as *dirationatus* in Henry II's *Constitutions of Clarendon*, 1164 c.9 alongside the word *saisina* when introducing the assize *Utrum* (text in STUBBS p.166.

<sup>3</sup> For Lanfranc see the study under that name by COWDREY, H.E.J., Oxford 2003.

Odo had been made bishop of Bayeux before the Conquest and after the Battle of Hastings William made him Earl of Kent and was there when Lanfranc arrived to take up office as Archbishop. The trial, presided over by bishop Geoffrey of Coutances on the king's behalf, was by the Shire Court at its traditional site, Penenden Heath in mid-Kent. On this occasion the court included both French and English, lay and ecclesiastic, who were acquainted with the pre-Conquest laws and customs; one valued expert was Ægelric, bishop of Chichester for whom William provided a chariot to ensure his attendance: *Ægelricus episcopus Cicestra, vir antiquissimus et legum terre sapientissimus...ad ipsas antiquas legum consuetudines discutiendas et edocendas...*<sup>4</sup> Lanfranc had complained to the King that Odo and others had despoiled the Church of Christ at Canterbury of its lands, *terras proprias*, depriving it of the secular jurisdiction it had customarily enjoyed. The lands were extensive and are listed<sup>5</sup> in Kent and seven other counties, north and south of the Thames. The archbishop's claim is described as a "derainment," that is, an assertion or accusation of spoliation – what would later be thought of as disseisin, and on a grand scale. The parties deliberated for three days: *omnes consederunt, et quoniam multa placita de diraciocinacionibus terrarum et verba de consuetudinibus legum inter archiepiscopum et Odonem Bajocensem episcopum, qui multas terras de archiepiscopatu sibi usurpaverat*. The names are given of those who had seized lands and associated customary rights claimed by the church (using their Old English names). After hearing the claim and the evidence, restitution was ordered.

This is a reminder that disseisin and re-seisin refer to procedures and remedies wider than those for spoliation in canon law or novel disseisin in Anglo-Norman law; as the titles both to Glanvill and Bracton call it, Anglo-Norman law is by Henry II's reign "the law of England" *leges Angliae*, (not "the law of the English," *leges anglorum*.) "AN law" is used here for "the AN law of England."

This paper is concerned with remedies available to those deprived of *res* which they claimed should be in their ownership or possession (confusing labels addressed at some length below, I.2.) It takes as its focus legislation made in 1215 at the IV<sup>th</sup> Lateran Council and in England by *Magna Carta, la grande chartre des franchises*, the Great Charter of liberties; what prompted the making of these provisions; and their aftermath. The loss of Normandy in 1204 to Philip

<sup>4</sup> SS 106 §5, extract C at p. 9.

<sup>5</sup> SS 106 §5, extract C at pp.10-11. Extracts G & H give further accounts of Odo's depredations. He died 1097.

Augustus; Innocent III's interdict upon England in 1208 and his excommunication of John in 1209<sup>6</sup> following the king's massive depredations of church property; John's re-acceptance of Stephen Langton and his *traditio* of the kingdoms of England and Ireland to the pope, their re-enfeoffment upon homage, fealty and an annual payment of 1,000 marks (which status endured well over a century); England's release from the papal interdict and John's restoral to communion in 1213; Innocent III's quarrel with archbishop Stephen Langton and his annulment of John's oath to observe *Magna Carta* - all illustrate the persistent tensions between the papacy and England which continued into Henry III's reign and beyond. This is the bitter context in which to look at the use of legal reform as an instrument to resolve particular disputes over the possession of *res*, property (in the comprehensive sense Ulpian gave it: *Dig.50.16.23*, '*Rei' appellatione et causae et iura continentur*) and its associated rights<sup>7</sup>.

In addition to the legislation of Henry II in the 1160's and 1170's and that of his grandson Henry III, two legal treatises were compiled, one before *Magna Carta* and one subsequently; frequent references to them will be made in this paper (see bibliography for editions). The first is "Glanvill," *Tractatus de legibus et consuetudinibus regni Angliae qui Glanvill vocatur*, composed in the last two years of Henry II's reign, 1187-9 by Ranulf de Glanvill, the justiciar, or another royal judge. The second is "Bracton," with the same title as Glanvill, *de legibus &c.* Henry de Bracton, c.1210- 1268, was a judge *coram rege* c.1247-1257, but his original text, relying heavily on plea-rolls in Bracton's hands, was composed in the 1220's and '30's. The text was later much amended, by whom it is not known, and ends somewhat abruptly. It relies heavily on cases heard before two great judges of the period, Martin Pateshull, formerly canon of Salisbury and William Raleigh, bishop of Winchester 1243 until his death in 1250: for example, in Bracton's treatment of mort d'ancestor, he cites cases decided by each of them, by name, a couple of sentences apart (fol.271b, Thorne's vol.3 p.294). The ms. of his *Notebook (BNB)* of some 2000 cases was discovered in 1884 in the British Museum library by P.G. Vinogradoff and then edited and published in 1887 at Cambridge by F.W. Maitland. It has

<sup>6</sup> Not his "deposition" - see CHENEY C.R., «The alleged deposition of King John» in HUNT, R.W., PANTIN, W.A. & SOUTHERN, R.W., *Studies ... presented to Frederick Maurice Powicke* in bibliography, c.7.

<sup>7</sup> King John's conflicts with his barons were not ignored at Lat. IV. GARCIA Y GARCIA, A. published *A new eye-witness account of the Fourth Lateran Council 20 Traditio* 1964 pp.115-178, in collaboration with Stephan Kuttner; final version in GARCIA Y GARCIA A., *Iglesia, Sociedad y Derecho*, 2 vols Salamanca 1987, vol.2 pp.61-121. At pages.73-4 (viz §12 lines 156 to 159, reference is made to the excommunication of the English barons for opposing John, who, being *crucisignatus*, was entitled to be free from dispute: *..omnes barones Angliae et universi tam consilio quam auxilio ipsis contra regem suum cruce assistentes, districta excommunicatione percelluntur*); & pp 100-104 for the author's comments.

recently been republished (Cambridge, 2010)<sup>8</sup>. Bracton was clearly familiar with the legist Azo's work and that of the decretalist Tancred. There has been much dispute over the influence of such learning in Bracton's *de legibus*, and whether his use of Roman categories led him to impose on English law technical terms unsuited to it, for example with possession<sup>9</sup>.

Part II of this paper reviews Roman and canon law texts and the circumstances which gave rise to them – or to which they in turn gave rise -- in the 11<sup>th</sup> to 13<sup>th</sup> centuries in Europe, from Canossa<sup>10</sup> and, after the reception of the bulk of Justinian's *Corpus Iuris* and its use by Irnerius and his immediate followers, secular as well as canon lawyers – or by those like Vacarius in the 12<sup>th</sup> century and William of Drogheda in the 13<sup>th</sup> – who combined both disciplines. The papacy's growing confidence as universal legislator led it to adapt, amend and on occasion set aside that Roman law legacy as it reacted to new threats and opportunities. A different kind of revolution was taking place in Anglo-Norman law from the reign of Henry II (1154-1189), for example, as the protection of seisin came to dominate legal process in land disputes. The second part of this paper is devoted to the Angevins and to parallels in the customary law of other territories, mostly those which fell to Norman and other adventurers during this “aristocratic diaspora”<sup>11</sup>. Both parts II and III concentrate on normative texts and contemporary expositions and commentaries, though their application was more flexible than the norms might suggest. The relevant texts from 1215 are set out below, namely constitutions 39 to 41 of the Fourth Lateran Council (hereafter “Lat IV”) in part II under *II.1, Spoliation in canon law* and *III.2, Magna Carta ...redress for disseisin* (hereafter *MC*). I shall try to trace the evolution, in the case of the *actio spolii*, back through the canonical *exceptio* to the Roman possessory interdicts; and in the case of disseisin, to look at its widened application. To this must be added

<sup>8</sup> F.W. Maitland was in the course of publishing studies in the *Law Quarterly Review* on seisin when Vinogradoff discovered Bracton's notebook: *The mystery of seisin* (1886) 2 LQR 481-496; *The beatitude of seisin*, in two parts, (1888) 4 LQR 24-39 & 286-299 (and earlier in (1885) 1 LQR 324-341 on the seisin of chattels (movables), not relevant to this paper).

<sup>9</sup> KANTOROWICZ, H, *Bractonian Problems* Glasgow 1941; with a strong dissent by RICHARDSON, H.G. «Azo, Drogheda & Bracton» in *English Historical Review* 59 (1944) pp. 22-47. For a survey of the debate see MEEKINGS, C.E.F., «Martin Pateshull and William Raleigh» in 26 *Historical Research* 26 (1953) PP. 157-180 repr in his collected essays, *Studies in Thirteenth Century Justice and Administration*, 1981 c.11; for a brief biography of Bracton, see c.7 “Henry of Bracton, Canon of Wells” The author was a former Assistant Keeper of the Public Records.

<sup>10</sup> Of the vast *libelli de lite* of the Investiture contest onwards, see (for documents) TIERNEY, B. *The crisis of Church & State 1050-1300* New Jersey 1964 esp. Part III “The age of the lawyers” (series: *Sources of civilisation in the West* ed. Robert Lee Wolff).

<sup>11</sup> to borrow the title to c.2 in BARTLETT, R. *The Making of Europe: Conquest, Colonization, and Cultural Change, 950-1350* Princeton, 1994.

reference to the debate over the distinction between *dominium* and *possessio*, whether used descriptively or when given a technical legal gloss; and between *rectum*, right and *seisin* as a potent form of possession.

### 1.1. SPOILIATION<sup>12</sup> & DISSEISIN – COMMON FEATURES

*Spoilation & disseisin* (and a number of other words found in customary laws, discussed below) describe loss or deprivation of some *res*, such as land, office or other benefits. Three problems of definition arise at once: the distinction between the different ways in which possession is acquired, (which Bracton discusses, as set out below); possession *de facto* contrasted with the right to possess the *res* not yet actualised; and possession which is claimed to be *de jure*, lawful, as opposed to the dispossessor's, which is not. There will be other procedures to establish the justice or injustice of present possession or the denial of it, in any given case, until the point is reached if the possessory claim and its resolution in favour or against the claimant come to be tried in a single action. The law develops so that the right to possession becomes as much a *res* as possession itself. These points are developed and illustrated in detail in this paper, but let us begin with possession *de facto*. Three cases may be examined:

- *Where I have lost possession* - I was in possession of some property but, without a reason that survives legal scrutiny, you have expelled, ejected, ousted me.

This is spoliatio or disseisin in the narrow sense and the remedy sought is the restoration of the *status quo ante*.

Some customary laws let me regain possession from you, the dispossessor. Perhaps I may use self-help, with force if necessary, without myself infringing the law, if I act promptly; or, in default of self-help, and without the need for proof at this stage of my right to possession, I may use legal process to recover possession from you or from someone else to whom you have transferred it (this is the case addressed by Lat IV c.39). The law may impose time-limits within which I must act, but in practice they may prove to be flexible<sup>13</sup>. Using self-help and initiating legal process to obtain repossession each call for the presence of the dispossessed. His unavoidable absence (for example service to his lord, including suit of court; pilgrimage;

<sup>12</sup> Although spoliatio, like some of the civil law's interdict remedies, includes movables, they are not discussed here unless incidental to land disputes.

<sup>13</sup> In London, neither the time allowed for self-help nor that within which an intrusion claim could be brought were all that strictly observed: see Eyre of 1244; & see Sutherland, *AND* p.97sq.

sickness; or even going on Crusade) may make either choice impossible, so the law may make allowance for the claimant's delay in pursuing his remedy. But delaying before a claim is brought may activate *positive* rules about usucapion (prescriptive acquisition by long usage, where "long" is defined) and *negative* rules which deny a remedy, or even the right to start legal process, to a claimant who delays overmuch. The parallel Roman *interdicta recuperandae possessionis* (*de vi et de vi armata; de precario*) are discussed below, II. 2, *The Roman law background*, as is the Canon law principle that *spoliatus ante omnia restituitur*, to which the corollary is, that *nemo placitet dissaisiatus*: until the *res* is restored to him, the one despoiled cannot be party to any process to determine the rights of the matter.

- *Where my possession is under threat*: I am in possession at present, but you are trying to expell me, or you are encroaching upon what I possess.

The Roman parallels are the *interdicta retinenda possessionis* (*uti possidetis* and *utrui*); cf D.43.24.13.5 (*quod vi aut clam*). In English law as developed under the Anglo-Normans, *novel disseisin* is the appropriate remedy, as will be shown; the assize was widened in scope over time.

- *Where I am being denied what for the first time I should possess*: I am not yet in possession of property which I claim. You have taken possession of it, or are preventing me from doing so. I want to obtain possession. For example, I may claim to be the "next heir" (nearest in line of succession within certain established degrees) of a deceased owner. You deny me possession or take it yourself, or grant or lease the property in dispute to another as in the first case, above.

There is of course no direct Roman law comparison, as its principle of universal succession is far removed from the law of inheritance as it developed in English and other customary laws, where singular succession came to prevail. However, see below, II. 2, *The Roman law background* for further comment. In Anglo-Norman law the assize of *mort d'ancestor* serves this purpose. This assize, at first limited to close kin of the deceased possessor (parents, siblings, parent's siblings) in time became extended to certain remoter kin of the deceased.

## 1.2. “OWNERSHIP” AND “POSSESSION”

Care must be taken in using “ownership” and “possession” and words, Latin and vernacular equivalents, for the thing, *res*, said to be owned or possessed (where such a distinction appears in the texts). We are trying to give names to the juridical nature of something over which a claim is asserted to occupy, exploit, treat as one’s own, to the exclusion of others. It is tempting, but misleading, to equate *disseisin* with *expropriation*, although both describe someone being deprived of a *res*, because the former refers to seisin and the latter to proprietorship. Bracton, choosing to use romanesque terminology, puts the two terms in opposition, as where he comments on the words in the novel disseisin plea “he disseised him,” says that a proprietor must not only have seisin of a free tenement but take also its produce, called in Norman French *dreit dreit*, “double right,” which is not so for a non-proprietor, *est enim ius possessionis et ius proprietatis* (fol.206b, Thorne vol.3 p.125). The late Brian Simpson put the difficulty in a typically succinct phrase: “In order to avoid conundra of this sort it is necessary to abandon the simple dichotomy of ‘proprietary’ and ‘possessory’ which is the source of all our difficulty, and talk of English law in English terms”<sup>14</sup>. Alternatives for *dispossession* are discussed below, III.3 *Seisin & disseisin, just & unjust*.

Words for the nature of the thing owned include *dominium* (i.e. *dominium quoad proprietatem*), *driectura* (e.g. in *Lo Codi* c.1160, ed. FITTING, H., 1906); *droiture* in some French texts (e.g. *Établissements de Saint-Louis* §75)<sup>15</sup> in contrast with *possessio*, “seisin” (latinised *saisina*; French *saisine*), further explored below in Part III under *disseisin*. Where feudo-vassalic language is employed and the *res* is held from a superior, the words include *feodum* or *feudum*, *fief*, *fee* &c but (reflecting one of the ways in which such grants or re-grants came into existence) in the case of free and knightly holders, *beneficium* is used e.g. in the Latin text of the middle low German *Lehnrecht* in the *Sachsenspiegel* attributed to Eike von Repgow, 1221-4, (a contemporary of Bracton)<sup>16</sup>.

<sup>14</sup> SIMPSON, A.W.B., *A History of the Land Law* 2<sup>nd</sup> ed. Oxford 1986, p. 37; see also the excursus on the topic in LAWSON, F.H.’s revised 2<sup>nd</sup> ed. of BUCKLAND, W.W. & MCNAIR, A.D., *Roman law and Common law*, Cambridge 1952 at p.71 ss..

<sup>15</sup> See below, III.13, its last reference.

<sup>16</sup> See (i) ECKHARDT, K.A., *tom.ii, Auctor Vetus de Beneficiis, MGH fontes iuris germanici antiqui, nova series* Hannover 1964 for the Latin text or, (ii) same title, *Archetypus u. Görlitzer Rechtsbuch*, same editor, series *Germanenrechte, neue Folge*, 1966, Latin text (Eike’s original) facing the MLG quoted here.



*Lehnrecht* translates *beneficiali iure* in version (ii) in the preceding note, I.7; *cui autem in bonis possessio* translates the German for “property in his use” (I.23) i.e. which he exploits for himself, and *possessio* as a concept of course translates (*ge*)*were*, (mod. Ger. *Besitz*) e.g. I.94, *nullus a possessione eiiciatur, nisi possessio ab eo vincatur: Nehein man ne mag durch recht uz neheinir sinir gewere geworfin werdin, diu gewere sine werde ime mit recht abe gewunnin*. The juridical nature of this *possessio*, *gewere*, is discussed below.

In English texts, *right* (Latin *rectum*), while not translating *dominium*, is used for the legal basis of the *res* represented by it. Some object that the varieties of feudo-vassalic landholding in 12<sup>th</sup> & 13<sup>th</sup> century Europe make the word “ownership” of a fief held by a vassal or feudal tenant to be a misuse of language, substituting “lordship”, *Herrschaft* and the like. The intensely personal tie between lord and man imagined as classic feudo-vassalism, however, was losing its priority once a free man could hold land of several lords and could contract for services to be performed by a third person. These shifts in the lord and tenant relationship began earlier than the crises provoked by the 14<sup>th</sup> century epidemics which greatly reduced the supply of services from free as well as unfree tenants<sup>17</sup>.

We have to ask whether a distinction between ownership and possession, allegedly so clear in Roman law<sup>18</sup> came to be recognised and, where both words are encountered, how any distinction was expressed: *dominium* as opposed to *possessio*, or *right* as distinct from *seisin*, and whether *possessio* and *seisin* came to be regarded as the primary badge of ownership, and if so, how. *Dominium* after all is lordship: it describes what the *dominus* has as his own, originally, his household (from *domus*). By conscious use of Roman law models, Bracton (fol.159-160, Thorne vol.3 p.13) distinguishes six senses of *possessio*, two of which amount to ownership<sup>19</sup>. The legal historian may take comfort from Bonfante, *Il punto di partenza nella teoria romana del possesso*, *Scritti giuridiche III* p.516sq: “according to the best etymology, *possidere* comes from *sedere*, sit, be seated, established, prefixed by *pot-*, the root of *po(t) -se*, *potestas*, *pot* being from *pat-er*. These words stress dominion over some thing: *possessio* is thus

<sup>17</sup> For *Herrschaft* see BRUNNER, O., *Land & Lordship: structures of government in medieval Austria* English tr. with intro. by KAMINSKY, H. & VAN HORN MELTON, J., Philadelphia 1992, from the 5<sup>th</sup> German ed. *Land u. Herrschaft: Grundfragen d. territorialen Verfassungsgeschichte Österreichs im Mittelalter*, Vienna 1965 repr Darmstadt 1984 pp.xiii-lxi esp pp.xxviii-xxxiii of the English introduction.

<sup>18</sup> See the doubts expressed by RODGER, A., *Owners & Neighbours in Roman Law* Oxford 1972.

<sup>19</sup> PLUCKNETT, T.F.T, *Legislation of Edward I*, p.53; JOUÏON DES LONGRAIS, F. «La portée politique des réformes d’Henry II en matière de Saisine» (1936)15 *Rev Hist Droit français et étranger* (4th series) 540-571, - so after his work of 1925 listed in the bibliography to this paper - for the correction of this tendency.

dominion in fact exercised by someone over a thing having its own value, independent of its legality in some other sense”<sup>20</sup>. Possession thus defined is something which can be “owned.” In his own reluctant foray into etymology, Maitland seems to have accepted that the origin of the word *seisin* also lies in *sedere* and links it to Old English *landsittende men* and adds *See*, the *sedes* of a bishop<sup>21</sup>.<sup>24</sup>

Support for this sense of *possessio* can be found in the mid-12<sup>th</sup> century *Consuetudines Feudorum*, under Frederick I, (cp. the *Libri Feudorum*, the Lombardic text included with Justinian’s Codex in the Vulgate text of the *Corpus Juris Civilis*). The typical situation is of course where the *dominus*, the grantor of a fief or *beneficium* or *precarium*, invests a vassal. The subject-matter of the grant was either land held (in the sense of being within the power of disposition) of the lord, or, in the tumult of wars and invasions, an allod which its owner transferred to such a lord in return for protection and other benefits, receiving back his land or part of it as a fief. I need not list the vast literature on this subject, by Bloch and others. What is significant in the search for the meaning attributed to possession is the use of this word in texts like the *Consuetudines feudorum*. We read *invest* for the action of granting the benefice or fief; and *usurpatio*, (a Roman law term used in D.41.3, *de usurpationibus et usucapionibus* alongside *deiectio*) used for disseisin of it (LEHMANN, Vulgate text, I.12.13.1 at p. 98 lines 17- 21); but the vassal, typically a *miles*, is described as its *possessor*:

*Nemo miles ejiciatur de possessione sui beneficium nisi convicta culpa...* (ibid. I, 21.2 at p. 107 lines 9-12 ), concerning disseisin by the grantor of the fief; and

*Si autem aliquis in possessione feudi sit, de quo dominus dicit eum investitum non fuisse, tunc sine ulla testium probatione debet solus jurare, se vel patrem suum fuisse investitum ...*(ibid., I.25.3 at p. 112 lines 30—36).

Investiture is described as conferring *possessio* on the grantee:

*Investitura proprie quidem dicitur possessio, abusivo autem modo dicitur investitura, quando hasta vel aliud corporeum quodlibet porrigitur a domino, se investituram facere, dicente.*(ibid.,II.2 *Quid sit investitura* at p. 115 line 31 to p.116 line 4.)

(*Ge*)*were* and (in)*vest*, “clothe” someone, are in any case etymologically related.

<sup>20</sup> As cited in ARANGIO-RUIZ, F. *Istituzioni di Diritto Romano* 14<sup>th</sup> ed., Naples, 1960 c.11 §1 p.269.

<sup>21</sup> 2 P & M 30-31, in the section on *seisin*, pp.29-80.

Sometimes texts and commentators avoid technical terms by using verbs like “have” or “hold,” though these in turn can acquire technical senses, their meanings varying across time and place, as referring to different modes of acquisition and differences in the status of the parties, along with possessive pronouns like “mine,” or “ours” and expressions like “(which) belongs to me” or “to us.”

## 2. CANON LAW<sup>22</sup>

### 2.1. SPOLIATION IN CANON LAW IN 1215

Colin MORRIS gives the statistic that in 1200, “something like one-fifth of the land in western Europe was in the hands of ecclesiastical institutions”<sup>23</sup> - much for lay powers, high and low, to despoil. Not all of this land will have been gifts to a church or religious house, held by spiritual tenure (frankalmoign, “free and perpetual alms” in English usage) since the income from canonries and prebends will issue from lands tenanted in lay fee. The canon law giving spoliation remedies largely confined itself to the interests of the bishop and clergy, of religious houses and the like. Although the 12<sup>th</sup> and 13<sup>th</sup> century canonists, commenting on Gratian, Lateran IV and the 1<sup>st</sup> Council of Lyon, were unsympathetic to extending spoliation remedies beyond the needs of the church, the Theodosian sources contain no such restriction.

The 39<sup>th</sup> constitution of Lat IV, *Sepe contingit quod spoliatus iniuste* (text below) deals with a particular extension of the basic rule that *spoliatus ante omnia restituatur* before legal proceedings can be taken to settle the dispute. It assumes the existence of that rule, but extends it by giving a remedy against a *tertius* to whom the despoiler had transferred the *res*. The problem resolved by the new rule centred on prescription: after a year, the one despoiled will have lost *possessio* and with it, proof of his ownership and the benefit of the remedy *ex canone* “*Redintegrandum*.” The solution provided by const.39 was that his property must be restored to him before he can be called on to answer any claim concerning it at the suit of a *tertius* to whom it has been transferred, *non obstante civilis iuris rigore* “notwithstanding the Roman law rule to the contrary.” The source of this principle is discussed at length below, II.5, *Before Lateran IV*. Drawing attention to this, there is a marginal note in one ms. which states explicitly that by this

<sup>22</sup> For the 12<sup>th</sup> & 13<sup>th</sup> century context see GAUDEMET, J., *L'église et cité – histoire du droit canonique* Paris, 1994, Pt III esp §2, «les étapes de la doctrine de la primauté» & §3, «la primauté...dans les collections canoniques de la fin du X<sup>e</sup> siècle aux environs de 1140» and other works listed in the bibliography.

<sup>23</sup> *The Papal Monarchy – the western church from 1050 to 1250* Oxford 1989, p.388 (series: *Oxford History of the Christian Church*).

constitution the Council provided an *actio ad petendum restitutionem in quem spoliator rem transtulit*<sup>24</sup>. The reform addressed the same problem as did the invention of Writs of Entry in English law, the first known example of which, turning on disseisin, dates from 1205<sup>25</sup>. In time, these writs extended the class of persons who could bring an action against the disseisor.

*Lat IV const 39 to 41:*

39. *Sepe contingit quod spoliatus iniuste, per spoliatorum in alium re translata, dum adversus possessorem non subvenitur per restitutionis beneficium spoliato, commodo possessionis amisso, propter difficultatem probationem ius proprietatis amittit effectum. Unde, non obstante civilis iuris rigore, sancimus ut si quis de cetero scienter rem talem receperit, cum spoliatori quasi succedat in vitium, eo quod non multum intersit, presertim quoad periculum anime, detinere iniuste ac invadere alienum, contra possessorem huiusmodi spoliato per restitutionis beneficium succurratur.*

40. *Contingit interdum quod cum actori, ob contumaciam partis adverse, adiudicatur causa rei servande possessio, propter rei potentiam sive dolum actor infra annum rem custodiendam nancisci non potest vel nactam amittit, et sic cum secundum assertionem multorum verus non efficeretur post lapsam anni possessor, reportat commodum de malitia sua reus. Ne igitur contumax melioris quam obediens conditionis existat, de canonica equitate sancimus ut in casu premissa actor verus constituatur elapso anno possessor. Ad hec generaliter prohibemus ne super rebus spiritualibus compromittatur in laicum, quia non decet ut laicus in talibus arbitretur.*

41. *Quoniam “omne quod non est ex fide peccatum est” synodali iudicio diffinimus ut nulla valeat absque bona fide prescriptio tam canonica quam civilis, cum sit generaliter omni constitutioni atque consuetudini derogandum que absque mortali non potest observari peccato. Unde oportet ut qui prescribit in nulla temporis parte rei habeat conscientiam aliene.*

<sup>24</sup> *Constitutiones Concilii quarti Lateranensis una cum Commentariis glossatorum* ed. GARCÍA Y GARCÍA, A., Vatican 1981 (Monumenta Iuris canonici series A : Corpus Glossatorum vol 2), p.81, 1st n. to const 39.

<sup>25</sup> 2 P & M 64; & generally p.62 ss.

The spoliation in question was not restricted to a bishop's *Sedes*, nor to the lands which provided its revenue, but applied to all "wrongly gotten gains" generally<sup>26</sup>; but I will limit myself to deprivation of office, See, and associated lands. Lat IV c.39 was included in Ramón of Penafort's post-Gratian decretal collection (based on the five *Compilationes antiquae*) in the 1234 *Liber Extra* of Gregory IX, 2.13.18. Following the 1<sup>st</sup> Council of Lyon, 1245, c.10 of that Council, which made more precise the procedure in *redintegranda* cases, was incorporated in 1198 into Boniface VIII's *Sext*.

Const.39 thus distinguishes claims based on ownership from those based on possession as under the Civil law rule, D. (Ulp) 41.2.12.1 that *nihil commune habet proprietas cum possessio*, but with this change, that the two claims should be joined in one action where possible. Of course, Ulpian's text states that failure in the one action does not prevent success in the other: it continues *et ideo non denegatur ei interdictum uti possidetis, qui coepit rem vindicare: non enim videtur possessioni renuntiasse, qui rem vindicavit*. Lat.IV const. 40 also changed the civil law rule about prescriptive acquisition in such cases, so that the third party does not acquire possession after a year's custody of the thing and the claimant has his restitution remedy against the third party even after a year has passed. Const.41 then invalidates any acquisition by prescription which is not supported by good faith in the acquirer: *nulla valeat absque bona fide praescriptio tam canonica quam civilis* which is defeated if the acquirer knows the property to belong to another: *in nulla tempore parte rei habeat conscientiam alienae*. This illustrates again the case where a lay party is involved. These constitutions like almost all of Lat IV, were incorporated in the *Liber Extra*, c.39 as 2.13.18, c.40 as 2.14.9 and c.41 as 2.26.20.

So too in English law, novel disseisin could be brought against a *tertius* in certain circumstances, as Bracton states (fol. 175b, 176, Thorne vol.3 p.47sq; & cf. fol.204b, p.120): the section is entitled *si res disseisita post disseisinam ad alium transferatur per disseisitorem unum vel plures* stating that the assize lies both against the original disseisor and against one or more transferees who take immediately after the first disseisin (thus satisfying the requirement of being novel), the transferee being *recenter ingressi sunt rem vitiosam post disseisinam* (another ms. has...*odium disseisinae*).

<sup>26</sup> Quoting POWICKE, F.M., *Stephen Langton Ford lectures Oxford 1927, repr London 1965 Studies in medieval history presented to Frederick Maurice Powicke* ed. HUNT, R.W., PANTIN, W.A. SOUTHERN, R.W., Oxford 1948 & repr 1969, p.90.

The three forms of dispossession required some remedy designed (i) to restore to possession (not *dominium*, for which there were other remedies) someone who has been evicted; or (ii) to prevent a threatened eviction; or (iii) to obtain possession which the claimant asserts but which is prevented, or which others treat as uncertain. The remedies do not prejudice an as yet unproved legal claim to *dominium*; but as we shall see, over time customary law came to treat the possession we call *seisin* as sufficient for most purposes and thus equivalent to ownership (below, III.5, *Henry II's reforms*).

## 2.2. THE ROMAN LAW BACKGROUND TO CANON LAW - THE POSSESSORY INTERDICTS

The vocabulary includes *usurpatio*, *deiectio*, &c in connection with acts undertaken to prevent *usucapio*; cp. Cicero, *de Oratore* 3.110 as well as legal texts (e.g. D.41.3). The Roman remedies, like those of canonical and customary laws, can be said to have been directed at securing public or at least communal peace, by procedures designed to maintain peace; or to restore peace which had been disturbed; or to impose it on the unruly<sup>27</sup>.

Let us remind ourselves that the Roman background, summarised in Justinian, Inst. 4.15, *de interdictis* is the emergence of a *condictio possessionis*, the *actio* or *interdictum momentariae possessionis* which in post-classical law replaced the interdict *unde vi* and the *exceptio vitiosae possessionis*, and limiting them to promptness by the claimant within a year. Possession has to be shown not to be *vi*, *clam* or *precario*: CJ 8.6 (a.294) on *uti possidetis*; D.(Ulpian, on the edict) 41.2.6 for meaning of *clam*; *ibid.* 43.26.2.1 showing that the *interdictum restitutorium* belongs to the grantor of the lease, not the lessee (e.g. threatened with eviction)<sup>28</sup>. Justinian's Institutes 4.15.2-6 sets out the distinction between remedies *adipiscendae possessionis* and *retinendae vel recipendae possessionis*. The *interdicta possessoria* were:

(i) *unde vi (armata vel non)* (cp. D.43.16; CJ 8.4), *de vi et vi armata* (Cod.J 8.4 & 5) and cp. D.43.24, *quod vi aut clam*, 1.pr, (Ulpian) which cites the edict *quod vi aut clam factum est, qua de re agitur, id cum experiendi potestas est, restituas...add i<sup>a</sup> de precario...*

<sup>27</sup> See RUFFINI, F., *L'Actio Spolii – studio storico-giuridico*, Turin 1889 & repr Rome 1972, which begins with the Roman interdict *unde vi*.

<sup>28</sup> For Lenel's reconstruction of the Praetor's edict see *F.I.R.A* vol.1, ed. RICCOBONO, S., 1941 pp.333-389; for the interdicts, 375 ss.; or GIRARD, P.F., *Textes de droit romain* Paris, 1903<sup>3</sup>; for the interdicts, pp.150-155. Girard was editor of the *negotia* section of *F.I.R.A*.

- (ii) *utrubi* (D.43. 31) favouring whichever of two rival claimants had held for longer in the year past). 1 and
- (iii) *uti possidetis* (D.43.17) (*retinendae vel recuperandae possessionis*). These are the sole possessory interdicts addressed by name in Justinian's Codex; 8.1 *de interdictis* is non-specific. There was a further remedy available against all but the *dominus*: the *actio Publiciana* (Dig.6.2).

In the context of protecting succession rights, the interdict *quorum bonorum* allowed someone to whom the Praetor had granted *bonorum possessio* to demand restitution from anyone else who had corporeal possession of it (as opposed to being indebted to the *hereditas*): D.43.2 and Cod.8.2. The rule in D.(Paul) 4.6.30, pr, *possessio defuncti quasi iniuncta descendit ad heredem...* is mirrored in some customary laws concerning the passing of seisin from the dead to the living: see Part III.7 below, *mort d'ancestor*. These civil law texts of course state the position before Justinian's reform of the heir's position in 531 (Cod.6.30.22), the reception of which in the 12<sup>th</sup> century determined subsequent developments. The pre-reception texts available to canonists before Gratian were LRV 4.19.1, *quorum bonorum* from C.Theod. 4.21.1 (which after the reception would be cited from Cod.J, 8.2).

### 2.3. ROMAN VULGAR LAW AND THE CANONISTS' USE OF IT BEFORE THE RECEPTION

The Roman law precedents for canonical spoliation remedies prior to the reception of Justinian's law by the canonists (that is, before Gratian's *Decretum* initiated the so-called *ius novum*) are derived from such knowledge as vulgar Roman law provided<sup>29</sup>. Canonists of the pre-Irnerian period would find their Roman law in Theodosius' Code, using as much of it as they found in *Lex Romana Visigothorum* (Breviary of Alaric): for example, the interdict *unde vi* in LRV 4.22 (in G. Haenel's ed, 1849 at p.128)<sup>30</sup>.

<sup>29</sup> See LEVY, E., *West Roman Vulgar law - the law of property* Philadelphia, 1951.

<sup>30</sup> See HARRIES, J. & WOOD, I., *The Theodosian Code* 1993, my c.9, «From Benedict to Gratian: the Code in medieval ecclesiastical authors» & add refs in Plucknett 353 ss. to P.Sententiae & C.Theod. MGH Leges folio vol 5 has various epitome of LRV; GIRARD, P.F. *Textes de droit romain* includes a text of P. Sententiae; 8<sup>th</sup> cent *Lex Romana Rhaetica curiensis* (Sangallensis); 9<sup>th</sup> cent *LR Canonice Compta*; some Lombardic notarial protocol books - VACCARI, on Lombardic law & legal literature in IRMAE1.4.b.ee (in Italian); GOURON, A., 11<sup>th</sup> & 12<sup>th</sup> cent legal science in France – civil & canon law before Gratian (in Fr) IRMAE 1.4.d & e.

2.4. THE BOLOGNESE VULGATE<sup>31</sup> AND THE POST-RECEPTION LEGISTS AND CANONISTS

The texts on possessory interdicts are in what the jurists of the reception called the *Digestum novum*, that is Dig.39-50; they also used book 8 of the *Codex* and to a lesser extent, the Institutes 4.15.

H. KIEFNER, “*Qui possidet dominus esse praesumitur*” in (1962) 79 ZSS, rA, pp. 239-275 & 294-301, repr in SCHRAGE, E.J.H. (ed) *Das römische Recht im Mittelalter* (1987) pp. 233-280, discusses the opinions of Placentinus, Bassianus, Azo· Accursius & Odofredus, under four suppositions:

*qui dominus fuit, nunc dominus esse praesumitur;*

*qui possessor fuit, adhuc possidere praesumitur;*

*qui detinet, possidere praesumitur;*

*qui possidet, titulum possessionis habere praesumitur,*

in order to test the proposition in the article’s title, *qui possidet dominus praesumitur*. This is close to the apparent juristic evolution of the status of seisin in AN law discussed in part III, and deserves attention: cp. Pollock & Maitland, vol 2 p.47sq. including Maitland’s phrase, that seisin becomes something more than possession<sup>32</sup>.

<sup>31</sup> *Corpus glossatorum juris civilis*, 5 vols, University of Turin, *Centro di studi di storia del diritto italiano*, pub. Augustae Taurinorum, ex Officina Erasmiana, 1966-73, general editor VIORA, M.

For the work of Pepo and of Irnerius and his immediate successors see RADDING C.M., *The origins of medieval jurisprudence – Pavia & Bologna, 850-1150* Yale (New Haven) 1988, c6, “From Masters to Schools, 1100-1150”. For the composition of the Bolognese *Vulgata* of the Justinianic texts and *novellae* see e.g. CLARENCE SMITH, J.A., *Medieval law teachers & writers, civilian & canonist*, Ottawa 1975 cc.2 & 3; NOAILLES, P. *Collections des Nouvelles de Justinian*, (1912-14), 156 et s., 166 etc for the *novellae constitutiones*; KANTOROWICZ, H. & BUCKLAND, W. W. *Studies in the glossators of the Roman law* 1938, reissued & ed. P.Weimar, 1969; HAZELTINE, H.D., ‘Roman & Canon Law in the M.A.’, 5 *Camb. Med. Hist.* (1926) 697-764 & bibliog. at 921-933; VINOGRADOFF, P.G. *Roman Law in med. Europe*, 1929, esp. c.1 (the decay of RL) & c.2 (the revival of jurisprudence); CALASSO, F. *Medio evo del diritto* (1954) 599; ULLMANN, W., *Law & Politics in the M.A.* 1975, cc 2 & 3.

<sup>32</sup> STEIN, P. “Vacarius & the civil law” in BROOKE, C.N.L. & others, *Church & Government in the middle ages – essays presented to C.R.Cheney* Cambridge 1976 p.119 ss.. In addition to the *Liber pauperum* of Vacarius, the Selden Society has published some volumes on the Civil law touching England: MAITLAND, F.W. *Select passages from Bracton & Azo SS* vol 8 (1894) & DE ZULUETA, F’s ed. of the *Liber Pauperum* of Vacarius, SS vol 44 (1927). See also RATHBONE, E., «Roman law in the Anglo-Norman realm» in *Studia Gratiana* 11 (1967) 253 ss..



## 2.5. THE DEVELOPMENT OF THE ACTIO SPOLII

Canonical spoliation remedies developed from an *exceptio spoli*, then into a *condictio* or *remedium* “*ex canone Redintegrandum*” and finally into an *actio spoli*. The relevant texts primarily refer to deprivation of ecclesiastical office, commonly that of a bishop (and with it, loss of revenue from land or other interests, secular or ecclesiastical) and to whom canon law gives a right not to have his interests contested while he remains dispossessed: *CJCan Decretum Gratiani* C.2 q.2 (...*expoliatus ante iudicem stare non possit...*)<sup>33</sup> Gratian’s C.3, q.1 *de restitutione spoliatorum* cc.3,4 provided the proximate reference to the canon *Redintegranda* as it applied up to 1215 (that is, before the changes set out in *Liber Extra* 2.13 incorporated constitutions from Lateran IV and, after the 1<sup>st</sup> Council of Lyon 1245, c.10 of that Council being incorporated into the *Sext* 2.5.1).

Gratian’s texts were collected by Bernard of Pavia<sup>34</sup> at the close of the 12<sup>th</sup> century in his *Summa Decretalium* 1.13, *de in integrum restitutione*; 2.8, *de causa possessionis et proprietatis in eodem iudicio mota*; 2.9 *de restitutione spoliatorum* and 2.18, *de praescriptionibus* providing an index to the *Decretum* of the greatest utility. The rubric or *dict.Gr.ante* of C.3,q.1 reads: *quod restitutio quibuslibet danda sit, multis auctoritatibus probatur* and c.3 begins, *redintegranda sunt omnia expoliatis vel ejectis episcopis* ... (c.4 to the same effect). Friedberg set out the well-known sources of this statement. In the False Decretals of Pseudo-Isidore, a forged *epistola* of Eusebius says that a bishop is not to face legal process or judgment while deprived of office: ... *nec convocari ad causam nec diiudicari potest expoliatus vel expulsus...*

<sup>33</sup> For establishing the text of Gratian, see WINROTH, A., *The Making of Gratian’s Decretum* (Cambridge studies in medieval life & thought, 4<sup>th</sup> series) Cambridge 2000 & my revue in (2004) *CX Le Moyen Age* 200-1. Friedberg also refers to Anselm of Lucca, III.44 as one of Gratian’s possible sources: see SZUROMI, S.A., 'Pre-Gratian Medieval Canonical Collections: Texts, Manuscripts, Concepts' pub. Frank & Timme, Berlin 2014 (series: *Aus religion und Recht*, Bd 18) c.6, *Anselm of Lucca* ...; KÉRY, Lotte, *Canonical collections of the early middle ages (ca.400-1140) – a bibliographical guide to the mss. & literature* (series: *History of Medieval canon Law* ed. HARTMANN, W. & PENNINGTON, K.), Washington, 1999. For canonical collections between Gratian and Bernard of Pavia see FRIEDBERG, E., *Canones-Sammlungen zwischen Gratian und Bernhard von Pavia* Leipzig 1897, repr. Graz 1958 and HARTMANN, W. & PENNINGTON, K. (eds, series as above vol 3) *The History of Medieval Canon Law in the Classical Period, 1140-1234* Washington, 2008.

<sup>34</sup> See bibliography, *SD*. Bernard exploited the reception of *CJCivilis* with copious citation of the Roman texts available in the 12<sup>th</sup> cent. See KUTTNER, S., *Repertorium de Kanonistik (1140-1234) – Prodromus Corporis Glossarum* Vatican 1937 (series: *Studi e Testi* 71) §26 at p. 389. Bernard was a great taxonomist; his division of canon law into the five parts *iudex*, *iudicium*, *clerum*, *connubium*, *crimen* was usually followed by his successors; certainly in the *Liber Extra* and its *sequelae*.

This echoes the epitome of Ægidius from *Pauli Sententiae* 1.7 (p.237-8 in Hinschius' edition of Pseudo-Isidore<sup>35</sup>).

The *epitome Ægidii* text does not reproduce the whole of *Pauli Sententiae* 1.7, but reads:

*Redintegrandum est a praesentibus iudicibus et in eius, unde abscesserit, potestate revocandum, quod quacunq[ue] conditione temporis aut captivitate aut fraude aut virtute maiorum aut per quemcunq[ue] iniustam necessitatem substantiam suam aut statum ingenuitatis perdidisse noscuntur*

(preserved in the *Lex Romana Visigothorum*, Hänel's edition p.344), from the constitution of Constantine, a.319, in *Codex Theodosianus* 9.10.3 in the title *ad legem Juliam de vi publica et privata*, reappearing in Cod.J. 9.12.7. The gist of this constitution is that someone who believes that landed property is being forceably withheld from him, can bring a claim for possession of it, *unde vi*; alternatively he can bring a criminal charge but if so, he runs the risk that if he fails, he will suffer the same fate as would the convicted accused. So the letter, though forged, contains a citation of a genuine Civil law source. The first nine books of Justinian's *Codex* were known to Gratian (see account of the Bolognese Vulgate, below) and for England we have the evidence of their thorough use by the legist Vacarius<sup>36</sup> around 1149 in his glosses, the *Liber Pauperum*.

## 2.6. BEFORE LATERAN IV<sup>37</sup>

The principles which emerge by 1215, benefitting in large part from the incorporation of texts of the Digest and Code from the *CJ Civilis* into Gratian's *Decretum (Concordantia Discordantium Canonum)* are often summarised in three maxims:

(1) *Spoliatus ante omnia restituitur*

<sup>35</sup> The text of P.Sent. as reconstituted by Mommsen and others, is given in *F.I.R.A. (fontes iuris romani anteiustiniani)* ed. BAVIERA, J., Florence, vol.2, 1940 pp.319-417) and by GIRARD, P.F., *Textes de droit Romain* 3<sup>rd</sup> ed. Paris 1903, p.359-430.

<sup>36</sup> See bibliography, under "Selden Society," & DE ZULUETA'S introduction, xiii-clxv and his index X, s.vv. *Decretum Gratiani, glosses, Gratian, Liber Pauperum, Vacarius*. Note that in this index the roman numerals of the introduction have been replaced by arabic numerals.

<sup>37</sup> See HARTMANN, W. AND PENNINGTON, K.(eds) in bibliography.

(where *ante omnia* refers to time, not to the legal nature of what is claimed – “before anything else” not “above all other things” – so it leaves open the question of ownership, *dominium*).

(2) *Nemo placitet dissaisiatus* – *Panormia* 4.82 (formerly attributed to Ivo of Chartres)<sup>38</sup>

That is, if he has been disseised, he cannot be made to plead concerning it: a text much cited in the so-called *Leges Henrici Primi* (but reflecting a mixture of Romano-canonical and customary sources):

53.3 *Nullus a domino suo inplegiatus vel inlegiatus uel iniuste dissaisiatus ab eodem implacitetur ante legitimam restitutionem*

53.5 *...nemo dissaisiatus placitet nisi in ipsa dissaisiatione agatur*

repeated in 61.21 *...nemo placitet dissaisiatus*.

Bracton (q.v. below) begins his treatment of the assize of novel disseisin by echoing this maxim: *...qualiter et qua actione cum amissa fuerit spoliato restituatur...* (fol.161a, Thorne vol.3 p.18).

(3) *Causa possessionis et proprietatis in eodem iudicio mota*

– the rubric to Bernard’s *Summa* of Gratian, 2.8 (showing that the Roman rule in D.(Ulp) 41.2.12.1 that *nihil commune habet proprietatis cum possessione* does not mean that failure in the one action prevents possible success in the other: see II.1, above for the full text.

Bernard of Pavia’s *Summa Decretalium* of Gratian summarises the spoliation rule as *in integrum restituo est prioris status vel iuris redintegratio; est autem a iudice facienda* (SD 1.31.1,2) stating the position more amply in five rules:

*Nullus iniuste spoliatus accusari super illo vel alio crimine ante integri restitutionem*

*Omnia ablata in eo loco sunt restituenda, unde constat esse ablata*

*Omne damnum ex iniuste expoliatione ipsi spoliato contingens est ab spoliatore restituendum*

<sup>38</sup> For the *Panormia* as a derivative work based on Ivo, see now ROLKER, Christof, *Canon law & the letters of Ivo of Chartres* Cambridge 2010 (series: *Cambridge Studies in medieval life & thought*, 4<sup>th</sup> series) pp.123-6& c.7, p.2487 ss..

*Nulli spoliato induciae sunt denegandae*

*In damno dato creditor eius qui damnum passus et juramento (SD 2.9.2-6)*

## 2.7. WRITERS OF SUMMAE ON GRATIAN BEFORE 1215

Who comment on C.3, q.1, c.3 from which the canon *Redintegranda* took its common label, include Stephen of Tournai (of which he became bishop; Kuttner *Rep.* 135), a pupil of Rufinus whom he quotes. In his *Summa* (no later than 1159) he commented on this text (and referred to its civil law origins):

*quibus ablatae sunt res suae vel etiam sedes [episcopi] non per iudicalem sententiam sed per violentiam, unde et restituendi sunt per possessoria iudicia, i.e. per interdicta vel per actiones in factum redditas loco interdictorum* (ed. von SCHULTE, J.F., Giessen 1891, repr Aalen 1965 p. 165).

To this example could be added *Paucapalea*, *Rufinus of Bologna* and the author of the *Summa Parisiensis*<sup>39</sup>.

As we have seen, the canonists modified the Civil law rule (D.41.2.12.1) that failure in the one action does not affect possible success in the other, by expressing a preference for trying both issues together, where possible: Bernard of Pavia's *SD 2.8, de causa possessionis et proprietatis in eodem iudicio mota*, citing Justinian's Cod 3.1.10 and 3.32.13, a title repeated for X.2.12, c.3 of which (a decretal letter of Innocent II in 1200) has the rubric *Si spoliatus possessorio et petitorio simul agens possessionem et spoliatorem probat, sed non dominium seu proprietatem, obtinet in possessorio sed succumbit in petitorio*. This imagines the reverse of the statement of Glanvill for the use of the possessory assizes, where, if the assize does not avail the claimant, he can use a writ of right: see *CRR* p.344 and references.

<sup>39</sup> *Paucapalea* (1140x1148?); KUTTNER *Repertorium der Kanonistik* 126), ed. VON SCHULTE, J.F., Giessen 1890, repr Scientia Vg Aalen 1965, p.64: *Sola restitutionis sententia non sufficit, nisi iudicis officio praesentialiter omnia restituantur ... i.e. corporalem possessionem recipiat ...*; *Rufinus of Bologna* (later bishop of Assisi), (1157x1159, ob.1190/90 ; KUTTNER *Rep.* 132, KUTTNER observing that this is more an *apparatus* than a *summa*), ed. SINGER, H. Paderborn 1902, repr Aalen 1963, p. 261: after referring to earlier comment on C.2.2. that *expoliatis non posse vocare ad iudicem antequam restituantur* (dict.Gra ante) Rufinus, in comment on q.2, discusses the kinds of permissible delays, *indutiae* (i.e. *dilationes*, periods of time allowed the *actor* or *reus* before the next stage in the proceedings: cp. *essoins* in Anglo-Norman law). He makes the same point as *Paucapalea*, that the judgment must be backed up by action to restore: *quod non solum per sententiam, sed etiam per officium iudicis omnia praesentialiter restituenda sunt expoliatis...*; *Summa Parisiensis* (c.1170; KUTTNER *Rep.* 177) ed. MCLAUGHLIN, T.P., Pontifical Institute of Medieval Studies, Toronto, 1952 p.116: *non solum restituetur per signum sed corporaliter debet...in possessionem..*

## 2.8. AFTER LATERAN IV, THE LIBER EXTRA, 1234 AND THE SEXT, 1298

These are teaching examples from *Ordines Iudiciorum* on Conc Lat.IV. c.39 showing how canonists, using Roman law models, would have handled a spoliation case. An important example comes from Henry III's reign in the person of William of Drogheda, whose *Summa Aurea* (c.1239), as his *de ordine Iudiciorum* came to be called, thoroughly combines civil and canon law in the *libelli* he sets out<sup>40</sup>. William taught at Oxford at least after 1234 (since he cites the *Decretals*) until his death in 1245. Maitland (p.107-8) quotes Joannes Andreae, “the fount and trumpet of the law” as including William among those who compiled such an *ordo*. Maitland also observes (p.112) that William's account of the impetration of a papal writ is closely followed in English practice, noting that the word is used by Bracton in this context: *facta igitur impetratione* (fol.253b, p.249, line 8 in Thorne's 3<sup>rd</sup> volume) when describing the procedure for obtaining a writ of mort d'ancestor. (There are other instances – e.g. fol.255a, Thorne p.252, where the rubric reads *qualiter procedendum sit post impetrationis brevis*).

Here is an example from William based on the possessory interdicts *si quis in tantam* (expulsion from land); *quod vi aut clam*; and *uti possidetis* ( pp. 223-6 (§§ 232-236):

§232, a *libellus restitutionis*:

*Conqueror de N., qui me expulsit de possessione fundi talis, cuius fines sunt tales, unde ut restituat mihi possessionem eiusdem fundi et omnem causam dampni dati, ago contra ipsum interdicto unde vi vel actione &c*

citing Dig. 43.16.12.18 for *de vi et et vi armata* and Dig.41.26,1 if the taking was *clam*<sup>41</sup>.

The 10<sup>th</sup> constitution of the 1<sup>st</sup> Council of Lyon 1245 also built upon *Sepe contingit quod spoliatus iniuste* (c.39 Lat IV > X.2.13) as did Boniface VIII, 1298 in VI.2.5, *de restitutione*

<sup>40</sup> ed. WAHRMUND, L., 1914 repr 1962, *Quellen .. römisch-kanonischen Prozesses im MA ..*, the index to which is printed in *Richardus Anglicus* ed. Wahrmund, *Quellen &c*, 1915 repr 1962. For William see MAITLAND, F.W., “William of Drogheda & the Universal Ordinary,” c.3 of *Roman Canon Law in the Church of England*, London, 1898, esp pp.107-116; HELMHOLZ, R.H., «William of Drogheda (c 1200-1245)» in *Ecclesiastical Law Journal* 16 (2014) p. 66. Drogheda is a port on the east coast of Ireland, north of Dublin.

<sup>41</sup> Further examples abound: see for example Tancred, for *querelae* for recovering lost possession or to protect its present possessor from disturbance (BERGMANN, F.C., *Pillius, Tancredus, Gratia libri de iudiciorum ordine* 1842, repr Aalen 1965 pp. 164 ss. for *de possessio recuperanda*; WAHRMUND, *Summa de o.j.* in *Quellen* II.3 (1915 repr Aalen 1962 §8 at p.5 for *de retinenda possessionis*); Johannes Teutonicus, comment on c.39 in *apparatus* of by, (GARCÍA Y GARCÍA, A., *Constitutiones Concilii quarti Lateranensis...* cit. p. 238); Vincent of Spain (ibid. p.343 line 3).

*spoliatorum*, c.1 *Frequens et assidua* .... requiring that in civil cases, *infra quindecim dierum spatium post diem in quo proponitur, quod asseruit comprobabit* : a fifteen day limit between the despoiled making his claim, and proving it. Failing to seek restitution in time incurs loss of the *exceptio spoli*: *si infra tempus indultum restitutionem non petierit...non obstante spoliationis exceptione*. The last sentence of Lyon I c.10 prohibits the use of this procedure to recover private property from an ecclesiastic, which seems to indicate that spoliation remedies were employed by the laity against the clergy and vice-versa – *sancimus ut rerum privatarum spoliatio agenti super ecclesiasticis vel e contrario nullatenus apponatur*.

The procedure was further amended and simplified at Avignon, 1306, widening the remedy to apply to actions *adipiscendae et recuperandae possessionis* by *Clementinae* 5.11.2, *Saepe contingit, quod causas committimus*, which also admonished the parties or their advocates to proceed *simpliciter et de plano ac sine strepitu* – the heartfelt wish of judges down the ages...

### 3. CUSTOMARY LAW

This part in the main presents legislative texts and the work of the two principal exponents of English law, *Glanvill* at the end of Henry II's reign and *Bracton* in the reign of Henry III; but with a few exceptions, it does not include illustrative cases from the plea rolls and other public records; that would require more than one book and a collaborative enterprise. Guides to these records are listed in the following note<sup>42</sup>.

#### 3.1. LAND CLAIMS IN AN ENGLAND – THE POSITION BEFORE HENRY II'S ASSIZES

Just as cases of canonical spoliation were common before the canon *Redintegranda*, so in Anglo-Norman England and elsewhere, occupiers were being disseised of their property, for reasons bad or good, well before procedures like novel disseisin were introduced. The Norman conquest from 1066 itself, the civil war between Matilda and Stephen during 1135 and 1154,

<sup>42</sup> GALBRAITH, V.H., *Intro. to the use of the Public records* Oxford 1934 (lectures for post-graduate students. Professor Galbraith had formerly been Assistant Keeper of the Public records); *ibid.*, *Studies in the Public Records* Oxford 1948 (including a chapter on *Magna Carta*); GIUSEPPI, M.S., *Guide to the contents of the Public Record Office vol. 1, legal records &c*, revised to 1960, published HMSO 1963 (the PRO is now called The National Archives, TNA, and maintains a website); FLOWER, C.T., *Intro. to the Curia Regis Rolls*, SS 62, also summarises pleas concluded by final concord (p.266-275). For collections of ms. Rolls, by reign and in some cases by place, as well as some local and ecclesiastical records, see the *Bibliography of Primary Sources* in CARPENTER, D., *Magna Carta Penguin Classics*, London, 2015, (including the Latin text of the Charter And its re-issues, with English translation and extensive commentary), pp. 481-491. See also the same author's website publishing "feet of fines" e.g. s.v. "Stephen Langton & MC": <http://www.finerollshenry3.org.uk/content/month/fm-11-2010.html> with main site link

the exile of archbishop Becket during Henry II's reign, leaving the See of Canterbury vacant *de facto*<sup>43</sup>; John's repeated struggles with his barons and with the Pope and the English defeat at Bouvines in 1214 with its territorial losses, all illustrate occasions for the widespread seizure of land and the rights that go with it. After 1215, conflict between Henry III and his magnates continued with baronial revolts against the King, especially from 1258<sup>44</sup>.

There are numerous cases of re-seisin by command of the King before the 1160's – the case summarised at the beginning of this paper is an example – indeed, the procedure remained available long after; but it is distinct from *novel* disseisin. Glanvill I.6 gives a writ *precipe quod reddat* directed to the sheriff for such cases:

*Rex vicecomiti salutem. Precipe N. quod iuste et sine dilatione reddat R. unam hidam terre in illa villa unde idem R. queritur quod predictus N. sibi deforciat. Et nisi fecerit, summo eum per bonos summonitores quod sit ibi in crastinum post octabas clausi Pasche coram me vel iusticiis meis ostensurus quare non fecerit. Et habeas ibi summonitores et hoc breve. Teste Rannulfo de Glanuill' apud Clarendunam.*

F.M.Stenton<sup>45</sup> prints a lengthy agreement made in Stephen's reign for final peace and concord between two opposing magnates, Ranulf Earl of Chester and Robert Earl of Leicester and mediated by the bishop of Lincoln, made between 1148 and 1153 (text in Stenton's appendix, no.48, with translation at pp.250-253) by which, among other things, each agrees not to disseise lands belonging to the other or to their dependents. Just how "being seised" becomes the crucial test of lawful occupation of a free tenement may become clear in the following paragraphs<sup>46</sup>.

<sup>43</sup> In the two SS volumes of *English Lawsuits from William I to Richard I* (1066-1199) VAN CAENEGEM R.C. (see bibliography) includes 665 items, not from court records but from chronicle and other sources; for example, that of the trial between Lanfranc and Odo in 1072 at Penenden Heath in Kent which introduces this paper; and case 443 from 1165-67, a request from Gilbert Foliot, by then bishop of London, to his successor as bishop of Hereford asking him to re-seise four of Gilbert's former retainers whom the successor had disseised.

<sup>44</sup> See TREHARNE, R.F., *The baronial plan for reform, 1258-1263* Manchester 1932, repr with additions, 1971.

<sup>45</sup> Ford Lectures for 1929, *The First Century of English Feudalism* 2<sup>nd</sup> ed. Oxford 1961.

<sup>46</sup> A major and comparative study is JOUÛN DES LONGRAIS, F., *La conception anglaise de la saisine du XIIIe au XIVe siècle* (Paris 1925) in particular the introduction, II. ii pp.47-77; Pt I (*terminologie anglaise intéressante la saisine*,) c.II §5 pp.114-117 & c.III in general (p. 123sq) and §IV, *Saisine* (pp.166-177); Pt II (*les diverses saisines de franc ténement*) c.1, §4, *Saisine* (pp.242-265) which is valuable for the discussion of the phrases such as "seised in his demesne of a free tenement as of fee" (*seysitus in dominico suo ut de libero*

## 3.2. MAGNA CARTA 1215 c.39 &amp; c.40 – REDRESS FOR DISSEISIN IN ENGLISH LAW

At first reading, *MC* c.39 (c.29 of *MC* 1225, see below) seems preoccupied with King John's disseisin of lands of his tenants in chief, the impersonal third person in the first clause changing to first person in the second clause. In *MC* 1215, we read:

*c.39 Nullus liber homo capiatur vel imprisonetur aut dissaisiatur aut utlaghetur aut exuletur aut aliquo modo destruat, nec super eum ibimus nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terre.*

*c.40 Nulli vendemus, nulli negabimus aut differemus rectum aut iustitiam.*

We may add c.52, by which John promised to restore immediately the castles, liberties or rights of anyone (during the tensions prior to the issue of the Charter) whom he had disseised or separated from them:

*Si quis dissaisitus vel elongatus per nos sine legali iudicio parium suorum...*

And any dispute concerning this was to be settled by the judgment of the twenty-five barons appointed in the Charter for its supervision:

*tunc inde fiat per iudicium...*

From 1217 onwards (that is, after re-issue under the young King Henry III, rejecting the papal annulment of John's Charter) the amended text is found in the versions of 1216 cc.32 & 33; 1217 cc.35 & 36 and then in 1225, c.29 (combining the amended c.39 and c.40 of 1215) read:

*c.29 Nullus liber homo capiatur vel imprisonetur, aut dissaisietur de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis, aut utlagetur (&c, as before in 1215: addition emphasised).*

Its antecedents, including the *Articuli baronum* which was the draft of the 1215 *MC*, are discussed below<sup>47</sup>. "No free man is to be disseised of his freehold," that is, his frank tenement,

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*tenement et ut de feodo*). See also his «La portée politique des réformes d'Henry II en matière de Saisine» in *Rev Hist Droit français et étranger* (4th series) 15 (1936) pp. 540-571.

<sup>47</sup> The re-issued *MC* 1225 converted the charter of promises of 1215 into royal legislation. For extensive commentary see CARPENTER, D., (*Magna Carta Penguin Classics... cit.*) or HOLT, J.C. (*Magna Carta* Cambridge 2015<sup>3</sup>, revised & ed. with new introduction by GARNETT, G. & HUDSON, J. appendices 4-6 for texts). For all the post-1215 reissues under Henry III, see *Statutes of the Realm (vol.1) s.v. charters of*



in land or other interests (&c, as before in 1215). In 1225 the former c.40 of 1215 was joined to this renumbered c.29. The unfree, the villeins, were outside this law. If it was proved that one bringing a petty assize was unfree, the case stopped: Gl.XIII.11.

This provision gave rise to the potent phrase “due process of law” (which in the 18<sup>th</sup> century passed into the 5<sup>th</sup> and 14<sup>th</sup> amendments of the United States Constitution). In Edward III’s reign (1327-1377) at least three statutes emphasised due process: in 1352 (25 Edw III st.5) c.4 provided:

*Estre ceo, come contenu soit en la grant chartre des franchises Dengleterre (i.e. MC) qe nul soit pris ne emprisonne, ne ouste de son franktenement, ne de ses franchises custumes, sil ne soit par lei de la terre, acorde est, assentu, et etabli qe nul desore soit pris par peticion ou suggestion faite a nostre seignur le roi ou a son Conseil, sil ne soit par enditement ou presentement des bones et loialx du visnee ou tiele fait se face, et en due manere, ou proces fait sur brief original a la commune lei ...*<sup>48</sup>

The statute of 1368 (42 Edw III c.3) ordered that there be no further abuse of process by accusers pursuing private vengeance or profit (*accusementz plus pur vengeance et singulere profi ... encontre la ley*) and stated that it was agreed that for the good government of the community no-one need respond to an accusation without appearing before the justices *ou par due processe et brief original*, with the rider that otherwise the accusation will be void in law.

This development has a canon law competitor. KENNETH PENNINGTON has described<sup>49</sup> how, even before Lat IV c.18 prohibited clerical participation in the ordeal, from the mid-12<sup>th</sup> century at least, church courts were rejecting the ordeal in favour of inquiry to establish proof, giving rise to a principle of “due process” (see below, III.8 *Grand Assize and ..trial by battle*), thus putting an end to the prayers and ceremonies of the kind prescribed in the *Ordines*

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*liberties*. The 1225 re-issue omitted transitional provisions in 1215, for example c.52, which echoes c.39 but provides for delay in process for those defendants who had taken the Cross, as did King John 12<sup>th</sup> March 1215 after reconciliation with Innocent III see Stubbs, p.273), but without fulfilling his vow.

<sup>48</sup> See further 1363 (37 Edw III c.18), *Item, come qen la Grande Chartre soit contenuz qe nul homme soit pris ou emprisonnez, ne ouster de son franktenement, sanz processe de ley...et qe adonques proces de ley soit fait devers eux ...* Texts in CHRIMES, S.B. & BROWN, A.L., *Select documents of English constitutional history 1307-1485*, London 1961.

<sup>49</sup> PENNINGTON, K., *The Prince & the Law 1200-1600*, California 1993, p.135 ss. & passim; an augmented version of the topic is his paper «Due process, community & the Prince in the evolution of the *Ordo Iudiciarius*» in *Rev. Int. di diritto comune* 9 (1998) pp. 9-47. See also KNÖRR, K.W., «*Ordo Iudiciorum und Ordo Iudiciarius*» in *Studia Gratiana* 11 (1967) p.327 ss..

*Iudiciorum Dei* appended to *MGH Leges* in 4to §V, *Formulae Merovingici et Karolini aevi* ed. ZEUMER, K. 1886 repr 1963 (with colour reproductions facing p.672).

Bracton repeats the rule in *MC* 1225 c.29 at the start of his treatment of novel disseisin<sup>50</sup>: *Nemo debet sine iudicio disseisiri de libero tenemento suo, nec respondere sine precepto domini Regis nec sine brevi*. The *Articuli baronum* had proposed: *Nec corpus liberi hominis capiatur, nec imprisonetur, nec dissaisietur, nec utlagetur, nec exuletur, nec aliquo modo destruat, nec rex eat vel mittat super eum vi, nisi per iudicium parium suorum vel per legem terre* (AB 29). *Ne jus vendatur vel differatur vel vetitum sit* (AB 30). By the date of Henry III's re-issue of the charter in 1225, a chronicler could say of its 29<sup>th</sup> chapter, *Post multas vero sententiarum revolutiones, communiter placuit, quod rex tam populo quam plebi libertates, prius ab eo puero concessas, jam major factus indulsit*<sup>51</sup>.

The call for trial by one's social equals was not new, of course. Conrad II (c.990 –1039, Holy Roman Emperor 1027 - 1039) had provided in 1037 that no-one should be tried *nisi secundum constitutionem antecessorum nostrorum et iudicium parium suorum*<sup>52</sup>. This change, reflected in the wording of legal proceedings, should be borne in mind when the chapter is considered in cases and treatises post-1216. Its antecedents, including the *Articuli baronum* which was the draft of the 1215 *MC*, are discussed below<sup>53</sup>.

### 3.3. SEISIN AND DISSEISIN, JUST AND UNJUST

In the mid-1160's, a lord giving seisin to his tenant becomes more significant than his enfeoffment of him as a vassal. It amounts to proof of entitlement against all except one who could show a higher right, so that a free man, seised of land – his tenement or holding – and exploiting it for the needs of his household, is not merely a vassal bound to his lord, needing his agreement to alienate the fee, tenement, benefice (according to the language used at the time & place) or, at his death, to have his heir receive seisin of it. On the contrary: Glanvill recognises a free tenant's right to sell his land: X.15, provided the heirs apparent warrant the sale: *warantizare autem tenentur venditor illum generaliter et heredes eius emptori et heredibus suis*

<sup>50</sup> folio 161 in Thorne vol.3 p.18.

<sup>51</sup> *Annals of Dunstable* for 1215 in Stubbs, pp.322-3.

<sup>52</sup> *MGH Legum sectio IV – Constitutiones et Acta Publica Imperatorum et Regum a.911-1197* ed. WEILAND, L., 1893, repr Hannover 1963 – *Constitutiones* vol.1 p.90 (no.46) at lines 17,18.

<sup>53</sup> For the so-called "Unknown Charter" discovered 1863 in the French national archives, *archives du royaume* MS. J655, see HOLT, J.C., *MC*, appendix 4.

*rem venditam, si fuerit res immobilis et inde ponatur in placitum emptor ipse vel heredes eius...* a relic of collective kin ownership of *terra aviatica*, once widespread in Europe. Medieval conveyancing is an arcane subject<sup>54</sup>, but typically the transfer of a tenement to a grantee consisted of “enfeoffment with livery of seisin” – that is, along with seisin of the tenement (symbolic (de)livery by handing the grantee a baton or turf or the like) the grantor would in consequence become the grantee’s lord, to whom service would be due: a case of subinfeudation, which ended in 1290 when the statute of Edward I, *Quia emptores terrarum*, substituted the grantee for the grantor so far as the tenurial relationship with the lord of the fee was concerned. Glanvill had given a royal writ by which a lord could demand services deemed to be due (Gl. IX.9) and the tenant could have a writ *ne vexes* to stop the demand for services which were not due (Gl. XII.16). Bracton points out that by their intangible nature, there can be no delivery of rights ancillary to the tenement, for these pass with it: *iura traditionem non patiantur, sed cum ipsa re cui insunt* (fol.226b, Thorne vol.3 p. 177).

When in time some men come to hold land of more than one lord (e.g. through marriage to a woman having land) the “lord and man” bond is further weakened, although, by the end of the 13th century, non-performance of services due to a lord had come to be redressed, not by disseisin of the tenement, but by an act of self-help, *distrain*, the lord’s seizure of the tenant’s chattels (movables, including livestock); though the distrained chattels could not lawfully be exploited, for then the distrainor would become liable in trespass. If, instead of self-help, the lord troubled to obtain a favourable judgment in his own court, he could distrain against the fief, which is a sort of disseisin: it is *distrain per feodum*. The King often did this and, in his case, without a judgment<sup>55</sup>.

Not every disseisin is unjust. A tenant may, without good cause, refuse service due to his lord, who may then disseise him, without any judgment (though the tenant can seek a remedy by pleading some reason for the refusal). As to rights arising from tenure, a lord may disseise his tenant if there is *defiance*, that is, repudiation of fealty, *fides*, which is at the heart of the feudo-vassalic contract, inconsistent with the homage and fealty given by tenant to lord; but the problem remains where land is held of different lords, homage being only to one lord (saving what is due to the lord’s lord – for example, the King). Tenurial obligations are however

<sup>54</sup> See SIMPSON, A.W.B., *A History of the Land Law*, Oxford, 1986<sup>2</sup>, c.6, “Medieval conveyancing”

<sup>55</sup> PLUCKNETT, T.F.T., *Legislation of Edward I*, p.55-6 & ss..

reciprocal: a lord who abandons his tenant also breaks the bond and what the tenant then does is not defiance. Glanvill IX.4 explains this mutuality: *mutua quidem debet esse dominii et homagii fidelitatis connexio...* excepting only “reverence,” what a man owes his lord. Or the tenant and lord may take opposite sides in rebellion or civil war, frequent enough in the reigns of John and Henry III; or one of them may lapse into apostasy or heresy<sup>56</sup>.

### 3.4. DESCRIBING THE ACT OF DISSEISIN

At the start of his discussion *de actionibus civilibus* Bracton uses a variety of words for seisin and disseisin, in part drawn from the Roman categories he sometimes prefers (fol.159-161, Thorne vol.3 p.1-17.), Beside *disseisin* or its Latin equivalent, some texts and commentaries use *intrusio*, for example Bracton, *de actionibus civilibus* starts with bare possession by intrusion (fol.159b sqq, Thorne vol.3 p.13sq.) but in the same context as disseisin (fol 262a, Thorne vol.3 p.270): *vel per disseisinam vel intrusionem*, the distinction being between wilful disseisin which challenges the seisin of the one in occupation, based on belief by the intruder in the justice of his intrusion, and intrusion by accident. In a phrase echoing feudal investment by a lord, the Normandy *TAC* c.22 has the rubric *de devestement* as well as using *dessesine* (c.73) and *deforcement* (c.74). In other texts, the words disseisin and intrusion are used synonymously along with *Fresh Force* (as in the London records discussed below); and we find *deforcement*, *ejectment*, *abatement* and *propresturum*. We saw a similar variety of terms used for Romano-canonical law -- *deiectio*, *usurpatio*: D.(Gaius) 41.3.5. *Deforcement* is used in the royal writs of right: an example, in the *precipe quod reddat*; and in the *breve de recto*, addressed not to the sheriff but to the complainant's lord, to the same effect, ordering him to do full right to the complainant, *plenum rectum teneas...*(Glanvill XII.3sqq) as well as in Bracton, e.g. if what the claimant is deprived of is rent, not land (fol.253b, Thorne vol.3 p.249): *si obiit post ultimum redditum* adding that the summoners are to view the land of whoever deforces him of that rent from which it should issue, *..redditum illum ei deforciat*. It is *ejectment* where a lessee is ousted by his lessor, against whom an action can be brought to reverse it. *Abatement*, “cessation,” is found in several contexts: a person who breaks and enters my tenement (a trespasser *quare*

<sup>56</sup> see e.g. MULDOON, J., *Popes, lawyers & infidels* Liverpool 1979, esp. c.2 “Innocent IV..”; STOYANOV, Y., *The hidden tradition in Europe* London 1994, e.g. c.5 “The crusade against dualism”; MOORE, R.I., “Heresy as politics & the politics of heresy 1022-1180”, c.2 of KARRAS, R.M., KAYE, J. & MATTER, E.A., *Law & the illicit in medieval Europe* Philadelphia 2008; MOORE, R.I. *The war on heresy – faith & power in medieval Europe* London 2012 esp. c.11 “Sounding the alarm” (for Henry II as Duke of Aquitaine, and the assault on Toulouse) & c.17 “The sleep of reason.”

*clausum fregit*) is invading my tenement but is not laying a claim to it. For this wrong, a different remedy is open to me; it is not disseisin. Or suppose that one of my boundaries is a watercourse: someone who constructs a mill and dam upstream, which when opened allows water to flood my tenement, commits a nuisance which calls to be abated because he has allowed an invasion of my tenement; but again, he does not assert a claim to possess it. Such cases are covered by the *assize of nuisance*, thought to have been provided in the lost legislation which gave rise to novel disseisin. But if his unneighbourly behaviour leads to *proprestura*, encroachment on my tenement, Glanvill IX.11 uses *occupare* to explain this wrong<sup>57</sup>. Sometimes the choice of plea is doubtful, as where water from the miller's opened dam causes wooden structures on my tenement to rot, or when fumes from a nearby smithy render my tenement uninhabitable. There is a tendency, reflected in Glanvill and in pleas well into the 15<sup>th</sup> century, to treat this not as nuisance but as disseisin<sup>58</sup>.

The variety of disseisins seems endless. In *CRR*, FLOWER gives many examples, including such things as fishing rights (p.24; p330); having livestock graze on another's pasture (SS 84 no. 907, at York, 1204; the index to this lists a wide variety); as well as the urban encroachment cases discussed below, III.12.

### 3.5. HENRY II'S REFORMS: THE SO-CALLED PETTY ASSIZES<sup>59</sup> AND THE GRAND ASSIZE (MAGNA ASSISA)

Here we consider only *novel disseisin* and *mort d'ancestor*, leaving aside the two other petty assizes *utrum* (to decide if a tenement is held as a lay fee or ecclesiastical, that it, in free alms: Gl. XIII.24; cf. Bracton fol.237b, Thorne vol.3 p.205sq) and *darrein presentment* (to establish who last presented a clerk to an ecclesiastical benefice: an *advocatio*, in English *advowson*: Gl.XIII.19; Bracton fol.285b, Thorne vol.3 p.329sq.). Also omitted for lack of space are details of many other grounds for the plea of novel disseisin, for example where a widow is denied her dower by the heir, a topic dealt with extensively by both Glanvill and Bracton.

### 3.6. NOVEL DISSEISIN<sup>60</sup> AND THE ALTERNATIVE WRIT OF RIGHT:

<sup>57</sup> Other spellings are *purprestura*, *porprisum*, *proprisura*; from vb. *proprehendere*, seize, enclose.

<sup>58</sup> See the discussion in BAKER, J.H., 94 SS for 1977, i.e. vol.2 of *Spelman's Reports*, Introduction pp.232-6.

<sup>59</sup> Petty" came to be used in contrast with the Grand Assize: see Glanvill II.6 -21.

<sup>60</sup> The original text is lost but is from c.1166 ; The term n.d. is first found in 1181: VAN CAENEGEM, SS 77; SUTHERLAND, D.W., *The Assize of Novel Disseisin* Oxford, 1973, p.10 n.6.

The most popular feature for the claimant of Henry II's assizes, petty and grand, in contrast with the writ of right and its hazardous outcome if it went to battle, was procedure by *recognitio* (cf. the Carolingian and to some extent the canonical *inquisitio*). However, if novel disseisin fails, the writ of right avails - as Flower demonstrates in SS vol.62, *Curia Regis Rolls* p.344.

Glanvill XIII.32 sqq, sets out the procedure. It is by royal writ, in the first person, ignoring the court of any mesne lord of whom the tenement in question is held and addressed instead to a royal official, the sheriff, who is ordered to make a *recognitio*, an inquiry or inquest, to be carried out by a body free and lawful neighbours assumed to know the facts and circumstances, sworn (a "jury," *juré*, in the literal sense) to answer questions put in the assize, to view the tenement in dispute and declare whether the disseisin was lawful or was *iniuste et sine iudicio* (although the recognitors' verdict only took effect when the royal judges so ordered). In the passage where Glanvill states that no essoin (postponement) is allowed in a novel disseisin case, he adds that the losing party will always be amerced: Gl.XIII.38. The increasing popularity of the recognition in England is in strong contrast with the *inquisitio* or *purgatio canonica* of the Church, which lost favour by the ease with which suspect heretics and other miscreants (as the church saw them) were too easily absolved<sup>61</sup>.

We may recall the strict formality of the Roman *legis actio* – using prescribed words uttered aloud, available only in restricted cases and only to Roman citizens – giving way progressively to the *formulae* and then to the Praetor's interdicts. The long section of Bracton, *de assisa novae disseisinae* is at fol.161 to 237b, p.18-204.

Glanvill gives the form of the writ (and for variants concerning boundaries, mill-ponds and common pasture dispute, the first two being more cases of nuisance than disseisin) in XIII.33. In setting out this and mort d'ancestor below, I have kept to Hall's translation, but bracketed variable matters of dates:

"The King to the sheriff, greeting N. has complained to me that R. unjustly and without a judgment (*iniuste et sine iudicio*) has disseised him of his free tenement (*dissaisivit eum de libero tenemento suo*) in such-and-such a vill since ["my coronation", "my last voyage (*transfretatio*) into Normandy" for example.] Therefore I command you that, if N. give you

<sup>61</sup> See 2 POLLOCK, F. & MAITLAND, F. W., *History of English law before the time of Edward I.* (i.e. to 1272), re-issue of 2<sup>nd</sup> ed. with new introduction &c by MILSOM, S.F.C., Cambridge, 1968, p.603-4 & the whole of chapter 9 §4, "pleading & proof."

security for prosecuting his claim, you are to see that the chattels which were taken from the tenement are restored to it, and that the tenement and the chattels remain in peace until [the Sunday after Easter]. And meanwhile you are to see that the tenement is viewed by twelve free and lawful men of the neighbourhood, and their names endorsed on this writ. And summon them by good summoners to be before me or my justices on the Sunday after Easter, ready to make the recognition. And summon R., or his bailiff if he cannot be found, on the security of gage and reliable sureties (*et pone per vadium et salvos plegios...*), to be there then to hear the recognition. And have there the summoners and this writ and the names of the sureties. Witness, &c.”

So the writ commands the sheriff to take back the tenement and its chattels into his keeping until the rest of the procedure is completed. It does not restore seisin to the demandant; that abides the decision of the King or his Justices if they accept the recognition made before them.

“Unjustly and without a judgment” are not synonyms – see the comment above on *just and unjust disseisin*. The need for a royal court judgment to justify a disseisin is emphasized by Bracton (fol.161, Thorne vol.3 p.18): *Et qualiter et qua actione cum amissa fuerit spoliato - note this usage - restituatur, quia nemo debet sine iudicio disseisiri de libero tenemento suo, nec respondere sine precepto domini regis nec sine brevi.*

What counts as “novel”? Success in a plea of novel disseisin is subject to two distinct limitation periods. The first is that the disseised has four days in which to exercise self-help, expelling the disseisor, by force if necessary – if he fails to do so and tries later, he is himself a disseisor: so says Bracton, in the section on mort d’ancestor but including novel disseisin in his comment (fol. 262; Thorne vol.3 p.270, lines 13 & 27,28 of the translation.) The Roman law parallel is striking: D.(Ulpian)73.16.1.27, *vim vi repellere licet...apparet autem...arma armis repellere licere*; and Cod.8.4.2, *vi pulsos restituendos esse interdicte exemplo, si necdum excessit, certissimi iuris est...* texts well-known after the reception (see above, II.2, *The Roman law background*). The second limitation concerns the time within which the plea must be made, as illustrated in the specimen writ above: for example a recent crossing of the English Channel by the King, or his coronation. The date changed over time; the variants are discussed by Maitland in 2 P. & M. 51. Some French customary laws use “last harvest,” for example in

Normandy, TAC 21 and 73.2 it is *le derrenier aost*<sup>62</sup>. Glanvill has much to say about essoins, the equivalent of *induciae* or *dilationes* in canon law, by which a trial could be postponed or a party given more time (though novel disseisin did not allow them), not discussed here.

There is a debate as to whether Henry II's policy for introducing *novel* disseisin was to discourage self-help – one favouring a “criminal law” reform as opposed to “civil” (to use anachronistic expressions): that is, providing a remedy for tortious invasion of land, directed at restoring peaceful occupation where the disseisin was unjust (unlawful, not being authorised by legal custom) and *sine iudicio* – where there had been no judgment authorising it. The remedy came to cover both criminal and civil policies: the unjust disseisor was amerced, yielding a profit to the King, and the disseised was awarded damages<sup>63</sup>.

As the development of the disseisin remedies shows, custom is neither backward-looking nor fossilised: the idea that it must be shown to have existed since time immemorial is wrong. As T.F.T. Plucknett wrote, “...the remarkable feature of custom was its flexibility and adaptability ... In an age when custom was an active living factor in the development of society, there was much less insistence upon actual or fictitious antiquity ...we can turn to Azo (d.1230), whose works were held in high esteem by ...Bracton. ‘A custom can be called *long*’ he says ‘if it was introduced within ten or twenty years, *very long* if it dates from thirty years and *ancient* if it dates from 40 years”<sup>64</sup>.

### 3.7. MORT D’ANCESTOR

This remedy is given by c.4 of the Assize of Northampton 1176 but is traceable to 1166. Glanvill prefaces his writ of mort d’ancestor (XIII.2, *in fine*) by defining the circumstances in

<sup>62</sup> *Aost*, August as “harvest time,” *vendange, récolte, moisson*: see *Dict. Hist. de la langue française*, Paris 1992, s.vv. *août, aoûter*.

<sup>63</sup> See JOUÛN DES LONGRAIS, F. «La portée politique des réformes d’Henry II en matière de Saisine», in *Rev Hist Droit français et étranger* 15 (4th series), (1936), pp. 540-571, following his 1925 book *La conception anglaise de la saisine* in the bibliography; PLUCKNETT, T.F.T.; *Legislation of Edward I* (Ford Lectures, Oxford 1947 pub. 1949 p.53 & 157; HURNARD, N., «Did Edward I reverse Henry II’s policy upon *seisin*?», in *English Historical Review* 69 (1954); STENTON, D.M., *English justice between the Norman Conquest & the Great Charter 1066-1215*, Philadelphia 1965, p.32 ss.. Lady Stenton was for long the editor-in-chief of the Pipe Roll Society, which publishes fiscal returns by sheriffs, including purchases of writs of right, to the royal Exchequer from the 12th century onwards. CHENEY, M., in GUY, J.A. & BEALE, H.J, *Law & social change in British history* (1984), “The litigation between John Marshall and Archbishop Thomas Becket in 1164: a pointer to the origin of novel disseisin,” at p.9-26; 2nd ed.1988 p.25-8; HUDSON, J. *Land, Law & Lordship in Anglo-Norman*, Cambridge England 1994, p.262 ss..

<sup>64</sup> PLUCKNETT, T.F.T. *Concise History of the Common Law*, 5<sup>th</sup> (final) ed. 1956, pp. 307-8, citing *English Historical Review, De la coutume dans le droit canonique*, pp. 139-140.



which it arose: *cum quis itaque moritur saisitus de aliquo libero tenemento ita quod inde fuerit saisitus in dominico suo sicut de feodo* – the classic formula – *heres eandem saisinam antecessoris sui recte petere potest* and, if he is of age, uses the writ then set out, Glanvill, XIII.3:

“The King to the sheriff greeting. If G. son of O. gives you security for prosecuting his claim (*de clamore suo*) then summon by good summoners twelve free and lawful men from the neighbourhood of such-and-such a vill to be before me or my justices on a certain day (*eo die*) ready to declare on oath whether O. the father of the aforesaid G. was seised in his demesne as of his fee (*fuit saistus in dominico suo sicut de feodo suo*) of [one virgate of land in that vill] on the day he died (*die qua obiit*), whether he died after [my first coronation] and whether the said G. is his next heir (*et si ille G. propinquior heres eius sit*). And meanwhile let them view the land; and you are to see that their names are endorsed on this writ. And summon by good summoners R., who holds that land, to be there then to hear the recognition. And have there the summoners and this writ. Witness, &c”.

We are concerned with cases where that seisin is denied or contested; in this writ it appears that R. has intruded and thus has seisin, even if that turns out to be unlawful. Instead of referring expressly to a free tenement, it is implied by describing O.’s property as being “in his demesne as of fee.” It has been suggested that mort d’ancestor was at first intended to limit a lord’s right to control succession to his dead tenant’s fee, at a time when feudal control of this kind was coming to terms with the demands of tenants to have a right to inherit, independent of tenure, so that here R. would be O.’s lord. Glanvill adds a writ for use if the ancestor had died on pilgrimage, or had entered the religious life (thus incurring civil death), XIII.4-6. The corresponding treatment in Bracton is at fol.252, Thorne’s vol.3 p.245sq. “*Seised in his demesne as of fee*”: *dominicum* is translated here “demesne,” “land held for his own use” (*demenium, domanium, &c*; cp. *mansa, mansium*; but Bracton adds (fol. 263b, Thorne vol.3 p.273) that *demesne* is land supplying the table – “board land” then called in English, the home farm, and that land “in demesne” is contrasted with land held “in service.”

There is no English maxim like *mortuus facit possessionem vivum sine ulla apprehensione*, in French *le mort saisit le vif* (continuing *son plus prochain heritier habile à luy succeder* – *Coutumes de Lorris-Orléans* XII.6) to reflect the older civil law principle of the passing of possession to heir at the moment of the ancestor’s death (cf. D.4.6.30). It is paraphrased as

*saisina defuncti descendit in vivum* in the *Summa de legibus Normanniae* or *Grand Coutumier de Normandie* (official edition 1583, II.21.) In France, from the late 13<sup>th</sup> century, it is linked with the incorporation into French customary law of Justinian's drastic reform in 531 of the law of succession, giving the heir the option of accepting the inheritance subject to benefit of inventory: *C.Theod.*11.36.22, *Cod.*6.30.22: see Part II.3 above<sup>65</sup>.

### 3.8. THE GRAND ASSIZE (MAGNA ASSISA) 1179 & THE DECLINE OF TRIAL BY BATTLE (PER FINEM DUELLI)

Although later than the petty assizes, let us start with the grand assize and its effect on trial by battle.

Novel disseisin was initially an interim procedure used where someone, claiming to be in lawful occupation of land, etc., was dispossessed by another; it did not resolve matters of right. The claim of the one disseised was either upheld, on the facts, or not, unless one party refused to accept the award; otherwise, the disseisor was amerced by payment being made to the King, and the claimant might be awarded damages. The evolution of a successful award in a plea of novel disseisin into an effective proof of title is remarkable. The Grand Assize differed, in providing an alternative to judicial combat or duel, called "(trial by) battle" in English and thus addressed not just the disseisin but its issue. It was also a slower procedure<sup>66</sup>.

As for battle, *duellum*, the judicial duel was introduced into AN law in England by William I from Normandy and was much used at first in disputes between *Angli* and *Franci*<sup>67</sup>. Battle was also available if a plea of novel disseisin failed. Where either party would not accept the recognitors' verdict, this was the final remedy: the adjudged seisin was valid *adversus omnes* except someone succeeding under a writ of right, but its use was hazardous. Verifying seisin by recognition was free of the uncertainty of this archaic form of trial, where denial of an unproven assertion had to be settled by battle. Glanvill II.4 gives a writ by which, after battle (waged in

<sup>65</sup> See VIOLLET, P., p. 887-890, who adds that Durandus, c.1203-1296 discussed it in his *Speculum Iudiciale* (1271, 1290).

<sup>66</sup> Cf. Lat IV c.18>X.3.31.10; 3.50.9: note that Gl. II.7: the assize is described as royal benefit, paying regard to the value of human life and the rights belonging to a free tenement, while avoiding the doubtful outcome of battle, *duelli casum declinare possunt homines ambiguum...* as well as the ignominy of a shameful death or, as a surviving but defeated combatant, the disgrace of having admitted defeat ("crying craven," *nomine recreantise* Gl.II.3 *in corpore*).

<sup>67</sup> See WORMALD, P. *The Making of English law: King Alfred to the 12<sup>th</sup> century* vol 1 (sole vol. published at the author's early and greatly-regretted death) Blackwell, Oxford 1999, p.399.

person or more often by champions: II.3 *in corpore*) the sheriff is to put the successful party in seisin, carefully saying that it is the King's court which makes the award of seisin following the battle: *quia illa...terra adiudicata est ei in curia mea per finem duelli*. The outcome of battle in the tenant's favour ends the dispute forever: *de eius clamio sine recuperatione eiusdem petentis* Gl II.5. Despite the prohibition of clerical participation in "irrational" modes of trial in which blood might be shed, c.18 of Lat IV it seems to exclude judicial trials, as the "previous prohibitions" of *monomachia sive duella* referred to, seem to relate to tournaments<sup>68</sup>.

The reform effected by the Grand Assize (the original text of which is lost) made by the Assize of Windsor, 1179, gave the tenant (the one in occupation), but not the party adverse, the choice of trying the dispute by battle or by the Grand Assize, that is, by a jury, for the selection of which there is a special procedure II.11 & .15: four local knights are to choose twelve lawful knights, and so on as in other recognitions. Glanvill II.6-21, specifically in II.3, .11 & .15. II.7 gives the purpose of the assize and II.8 says that once it is chosen there can be no resort to battle (unless it has already taken place). The procedure allows the tenant to refuse the assize on various grounds, the validity of which must first be tested in court. Glanvill's text makes it clear that the tenant was expected to choose the assize but sets out various acceptable reasons for refusal, e.g. closeness of kinship (II.6)<sup>69</sup>.

### 3.9. DISSEISIN AFTER MAGNA CARTA AND IN BRACTON

As we have noted, constitution 39 of the Fourth Lateran Council specifically addresses the problem of loss of *possessio* where the transferee of the initial *spoliator* remains in possession for a long time, thus acquiring *possessio* by prescription. In English law by the 15<sup>th</sup> century, Thomas Littleton noted a parallel case: a man is disseised of lands or tenements which he does not recover; the disseisor dies, and by course of law the lands descend to the issue of the disseisor as his (the disseisor's) heir. Is there a remedy? By this date, alongside novel disseisin, since early in the 13<sup>th</sup> century there had been created a wide range of remedies called *writs of*

<sup>68</sup> e.g. as in Conc Lat III c20. Gratian, C.23 q.8c.30, rubric *non debent agitare iudicium sanguinis*, is traced by Friedberg through Ivo and Burchard to the 11<sup>th</sup> council of Toledo, 675, c.6 which begins *His quibus Domini sacramenta tractanda sunt iudicium sanguinis agitare non debet. Ideo magnopere talium excessibus prohibendum est...* (ed. VIVES, J. & OTHERS, *Concilios Visigóticos e Hispano-Romanos*, Barcelona & Madrid 1963, p.360).

<sup>69</sup> See POLLOCK, F. & MAITLAND, F. W., *History of English law before p. 621 ss.*; and *Liber Augustalis II cc30 & 31* (below, III.14); BARTLETT, R. *Trial by Fire & Water*, Oxford 1986 c.6, "Trial by battle" & refs there.

entry to use in such cases (in any case, this disseisin is not novel). Littleton says that because the issue (the heir) comes to the land by course of law and not by any act of his own, the disseisee loses his right of entry against him, and must instead sue out a writ of *entrie sur disseisin* to recover his land (Littleton's *Tenures* §385, at p.427 in Tomlin's edition; and see Maitland (2 P & M 62-66).

### 3.10. WERE THE PETTY ASSIZES OF HENRY II INFLUENCED BY ROMANO-CANON LAW?

The debate on the possible influence of canonical spoliation remedies on the English possessory assizes was summarised by VAN CAENEGEM in SS vol 77 Part III c.2 F at p.386-390, especially the note at p.387 and his own opinion at p.390. He broadly accepted the opinion of RICHARDSON, H.G. (introduction to *Select cases of procedure without writ under Henry III* from the *Curia Regis Rolls*, SS vol. 60 for 1941) that as Henry II's petty assizes pre-date the first known record of the *condictio ex canone Redintegranda* noted by Sicard of Cremona, the *actio spoli* was perfected later than Henry's assizes, so there can have been no conscious imitation. But the matter remains obscure, as RUFFINI remarked, *Intorno a tutte queste difficoltà si affaticarono le menti dei canonisti per tentare di conciliarle, e non sono venute fuori le più disparate ed ingegnose ipotesi*<sup>70</sup>. There are canons and Anglo-Norman rules with identical procedural safeguards, for example, *Liber Extra* 2.26.10 from the papacy of Lucius III (1181-5) which says that there is no prescriptive acquisition in time of war. There is plenty of evidence for the diffusion of Romano-canonical learning among AN "common lawyers," given that the judges were clerics and educated in both laws. But the use of juries in the petty assizes to decide matters of historical fact was a notable development which distanced canon and customary law procedures from each other. However, that does not invalidate a common appreciation by customary and canon lawyers of the basic characteristics of the Roman interdicts and the canonical spoliation remedies already existing in the 12<sup>th</sup> century and recognised in texts earlier than Henry II's reign (e.g. in *Leges Henrici Primi*, 1114-18).

### 3.11. SUMMARIES OF CASES FROM VARIOUS COURT RECORDS IN SELDEN SOCIETY PUBLICATIONS (SS)<sup>71</sup>

To bring all this to life we must examine the records, which is an intellectually pleasing exercise. The industrious reader can make a start with the following:

<sup>70</sup> RUFFINI, F., *L'Actio Spolii*... cit. p.336 and generally pp. 334-338.

<sup>71</sup> For details of this legal history Society and its publications since 1887 see bibliography.

*Introduction to the Curia Regis Rolls 1199-1230* SS vol.62, ed. FLOWER, C.T: *the duel*, p.113sq; *wager of law* (“proof” by compurgation) p.123sq; *grand assize*, p.130sq; *mort d’ancestor*, p.145sq; *novel disseisin*, p.156sq; *petty & grand assizes*, p. 186sq; & *procedure by writ of right*, p. 335sq. Flower published the text of *CRR 1199-1230*, 1922 & following; other editors have continued the work to carry the series beyond 1157-1250.

There are four volumes of *Pleas before the King or his Justices, 1198-1212* ed. PLUCKNETT, T.F.T. & STENTON, D.M. (who completed the series after Plucknett’s death). In the 3<sup>rd</sup> volume, SS 83 (1966) the records from Shrewbury, 1203, include cases brought under the grand assize and novel disseisin: e.g. nos. 774 sqq at p. 92-99.

*Royal Writs in England from the [Norman] Conquest till Glanvill*, ed. VAN CAENEGEM, R.C., SS vol.77 for 1958/9. This includes the two writs of right, *Rectum facias* (p.206sq) and *Praecepte* (p.234sq), allowing comparison with the petty assises (pp. 195-260): *novel disseisin* (pp.261-315) and *mort d’ancestor* (pp.316-324).

For the text of writs see DE HAAS, E. & HALL, G.D.G., *Early registers of Writs* SS vol.87 (1970), analytical index (from p.347) s.vv. *on intrusion* (p.357), *sur disseisin* (p.358), *novel disseisin* (p.361) and the writs of right *de recto & precepte quod reddat* (p.363).

### 3.12. LOCAL URBAN CUSTOMS<sup>72</sup> CONCERNING DISSEISIN: THE EXAMPLE OF LONDON

“London shared the the general desire of medieval towns to develop apart from the main current of national life, and to exclude both the law of the realm and the officers of royal justice”<sup>73</sup>. Royal charters conferring or confirming *franchises*, liberties (privileges) on towns pre-date the Norman conquest and can be seen in detail in those of Henry I (1100) and his successors. Jurisdiction might include novel disseisin and mort d’ancestor; what were often excluded by the royal charters were criminal matters, “pleas of the crown,” highly profitable to the exchequer. Yet the citizens of London dared to challenge the royal jurisdiction. Under Henry I, they had enjoyed the privilege of appointing their own equivalent of the royal judicial officer, the

<sup>72</sup> See generally SS volumes 18 (1904) and 21 (1906) edited by Mary Bateson on *Borough Customs*. These are available on line: <http://www.medievalgenealogy.org.uk/links/selden.shtml> A form of novel disseisin may have been used in towns, earlier than 1166, the date ascribed to n.d.’s introduction in the royal courts, as some town authorities suggest when asking the King to confirm their privileges (so PLUCKNETT, T.F.T., *Concise History of the Common Law*, 5<sup>th</sup> ed. 1956, p.317 n.3).

<sup>73</sup> THOMAS, A. H., *Calendar of Early Mayor’s Court Rolls preserved among the archives of the corporation of the City of London at the Guildhall AD 1298-1307* p.ix; Cambridge 1924 and printed at the order of the Corporation.

justiciar<sup>74</sup>. When two royal justices came to Guildhall in 1258 they were told that no-one but the Sheriffs ought to hear pleas of trespass (*transgressio*) committed in the city; though in 1244 (the date of the eyre cited below) the representatives of the city admitted what they had previously denied: that some pleas of the crown had indeed been heard by the Sheriffs, such as weights & measures offences, whereupon “the sheriffs were amerced and the Mayor and citizens were put to judgment for having concealed their actions.” The city’s justiciarship had disappeared after 1154<sup>75</sup>. The oldest court which heard pleas other than those of the crown was the Court of Husting and there are examples of assizes of novel disseisin being demanded at it.

Helena M. Chew, who edited a calendar of *London Possessory Assizes* for 1317 to 1603<sup>76</sup> (1603 is not a misprint) pointed out that:

“The City of London early developed a possessory procedure of its own. This is said to have been already fully established at the date of the issue by Henry II of his possessory assizes (Novel disseisin, 1166?); and having been explained to the king and his justices, to have received their approval and confirmation.” The earliest recorded examples are from between 1206 and 1216.

We have some records from John’s reign, prior to *Magna Carta*, in “*A London municipal collection of the reign of John*” discussed and illustrated by Mary Bateson<sup>77</sup>. This is a composite ms. containing different *libri*, some already known from the *Liber Albus*<sup>78</sup>. Her study includes Latin and AN French texts, some of the latter being translated into English. Novel disseisin – the inquest of *fresh force* – is heard by the sheriff who will restore the one disseised if the facts as found by the ward alderman and neighbours confirm the disseisin and that it was without a judgment; but, following the assize of Henry II, the text says the sheriff is to take security from the person re-seised until the next pleas of the crown. It adds that the city

<sup>74</sup> THOMAS, previous note, p.x & authors cited.

<sup>75</sup> CAMDEN SOCIETY, O.S. 34 (1846), T. STAPLETON (ed), *De Antiquis Legibus Liber. Cronica maiorum et vicecomitum Londoniarum et quedam, que contingebant temporibus illis ab Anno MCLXXVIII ad Annum MCCLXXIV*, p.40; Thomas, p.xv.

<sup>76</sup> CHEW, H.M. *London Possessory Assizes – a calendar* (vol 1 of the London Record Society’s publications, 1965) introduction, p.xiv and refs in her n.4.

<sup>77</sup> *English Historical Review* 17 (1902) pp. 480-511 & 707-730. The text is BMus add. MS.14252.

LIEBERMANN, F. made some use of it: see his *Leges Anglorum saec.XIII ineunte Londoniis collectae* Halle, 1894.

<sup>78</sup> RILEY, *Munimenta Gildhallae Londoniensis* vol.1, *Liber Albus (&c)* published in the Rolls Series (*Rerum Britannicarum Medii Aevi Scriptores*, London 1859. The Rolls Series does for Britain what *MGH* does for continental medieval Europe.

was allowed to keep this privilege (of initial hearing before the sheriff) but that in fact the *recognition* by the alderman and neighbours took place before the royal judges not at Guildhall but outside the city's jurisdiction in the Tower of London, which belonged to the crown. The records of the London Eyre of 1244 discussed below give a detailed account of this procedure.

The long survival of London's version of the assize of novel disseisin (alternatively called intrusion, or fresh force) is illustrated in the *Liber Albus*, ascribed to John Carpenter, clerk to the City corporation *temp.* Henry IV & V. The following texts are from Carpenter, whose book seems to have been completed in 1419 but preserving much older material.

By way of illustration, here is the English translation made for the Rolls Series text identified in the preceding footnote (book I.114):

c. LV *Of disseisin without judgment given*

“If a person shall disseise another, without judgment given, as holding in fee and of his own right, the Sheriff ought, of his judicial authority, to summon together the Alderman and neighbours of the venue, and enquire of them upon oath and in virtue of the fealty which they owe unto his lordship the King, whether such person has been disseised without judgment given. And if it be so, then upon their legal verdict the Sheriff shall restore seisin to him, and shall put the disseisor upon good sureties until the holding of the Pleas of the Crown”<sup>79</sup>.

<sup>79</sup> Cap. LV – *de disseisina sine iudicio*

*Si quis aliquem sine iudicio disseisiet, ut de feodo et iure suo, Vicecomes per iudicium debet adunare Aldermannum et vicinos de visneto et ab eis inquirere per juramentum et fidem quam Domino Regi debeant, utrum iulle sine iudicio disseisitus fuisset. Et si ita esset, per eorum legale dictum Vicecomes ei seisinam restituat, et disseisitorum ponat per bonos plegios usque ad placita corone.*

Cap. LVI – *de assisa facta in regno a Domino Rege de recognitione novae disseisinae*

*Cum autem assisa facta fuit in regno a Domino Rege de recognitione disseisinae, modus praedictae inquisitionis ei et iusticiariis monstratus fuit. Et placuit eis et permiserunt ita habere civibus ; scilicet eandem inquisitionem, etsi aliquando per vim et voluntatem Iusticiarioru recognitio capta fuit aoud Turrim. Postquam monstratum fuit, eis permiserunt, et voluerunt cives habere antiuquas libertates civitatis.*

<sup>79</sup> Cap. LVI – *de assisa facta in regno a Domino Rege de recognitione novae disseisinae*

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<sup>80</sup> For a survey of the Anglo-Norman & later forms of French, see LEGGE, M. D., “Anglo-Norman and the historian” in *History* (1941) pp. 163-175; & her *Anglo-Norman Literature and its Background*, Oxford, 1963.

c. LVI *Of the Assize established in the realm by his lordship the King as to recognizance of Novel Disseisin*

“At the time when the Assize was established by his lordship the King [i.e. Henry II] of recognizance of [Novel] Disseisin, the form of Inquisition before-mentioned was shown unto him and the justiciars. And it pleased them to grant permission unto the citizens that they should retain it; the same Inquisition namely, although sometime by force and at the caprice of the Justiciars such recognizances were taken at the Tower. After this had been shown unto them, they granted permission unto the citizens, and allowed them, to retain the ancient liberties of the City”<sup>80</sup>.

Book III of *the Liber Albus* gives a description in French<sup>81</sup> of the City’s version of the assize of novel disseisin:

*De assisis novae disseisinae, vocatis “Fresshforce”*

Item, les assises de Nouvelle Disseisine, appelez ‘Fresheforce,’ des terres et tenementz et rentz deinz la citee de Loundres, de disseisins faitz deinz les quarant semaignes, sont tenuz et terminables devaunt les deux Vicountz et le Coroner du dite citee en comune, chescun samady en la Guyhalle, forsprys certain temps qe les assises ne poent estre tenuz pur causes resonables. Et dount le processe est tiel: cestavoire quaut ascume homme se sent greve, et qil soit disseisy de soun fraunc tenement deinz la dite citee ou les suburbes dycelle, il viendra en ascune Hustenge tenuz a la Guyhalle, ou, pur defaute de Hustenge, en la Chambre de Guyhalle en congregacoun des Maire et Aldermans, ascun Lundy, et la ferra une bille. Et serra la bille tiele : « Un tiel *queritur de intrusione versus un tiel de libero tenemento suo in tali parochia Londoniarum in Londoniis, vel in tali parochia in suburbio Londoniarum* » et mesme la bille serra enroulle ...

There was a London Eyre in 1244. The *eyre* (from *itineratio*) was a circuit or visit made by royal judges from Henry II’s time onwards, to hear pleas of the crown and generally to exercise other jurisdiction which might otherwise be left to local officials. A sample list of instructions to the justices itinerant under Richard I survives, dated 1194 (STUBBS, p.251sq). Items 243 and 244 explain how pleas of intrusion and mort d’ancestor are to be dealt with in the City.



Here is a specimen case, headed *de intrusionibus*, from this London eyre of 1244, no.247, copied from the *Liber ordinationum* folios 225d-6:

*Prior hospitalis extra Bysshoppesgate queritur quod Cristina qui fuit uxor Stephani de Blounnie ipsum iniuste eiecit de uno mesuagio...*The prior of a hospital lying outside Bishopsgate, (*that is, in the suburbs of London but over which the Corporation of the City had jurisdiction*) complains that Cristine ejected him from a messuage<sup>82</sup> which his hospital, had received as a gift from Stephen the Marshall. The hospital had been seised for a year before Cristine's intrusion. Cristine denies the force & intrusion, replying that the land was her marriage portion (*not to be confused with dower – this is maritagium, her property which would have fallen into her possession at widowhood*). However, her late husband gave it to Adam the Smith, who died seised of it and that it descended to Adam's son and heir Robert. She says that Robert did devise it (*that is, left it in his Will*) to her (*in order to give effect to the marriage portion due at her widowhood*). The prior countered this by asserting that there was no such devise as Robert did not die seised of it, having long before his death given the property to Stephen the Marshall who had possession for a long time before he gave it to the hospital. (*words in round brackets and italicised are added for explanation*).

Both parties then submit to the verdict of the Aldermen and twelve neighbours, who come to the Tower of London (where the royal judges sat) and, in the presence of both contesting parties, said on their oath, that Robert had died seised of the property in question and had devised it to Stephen the Marshall who in turn gave it to the hospital. It was therefore adjudged that the prior recover his seisin and Christine is amerced (fined, for her false claim). However, it was added that Christine could still sue out a writ of right, "since no other writ runs in the City" (*...inquirat sibi breve de recto si voluerit cum numum aliud breve currat in Civitate*)<sup>83</sup>.

The close connection between different towns, including those in different countries, is illustrated by the incorporation in to the third of King John's charters for Shrewsbury, 1205, of the laws of Breteuil, which provides that the burgesses of Shrewsbury are to have their lands and tenements goverened by"the laws of Breteuil, the laws of the barony and the laws of the

<sup>82</sup> *Messuage* – a household building and its curtilage; etymology uncertain but perhaps from *manège*. The legal sense came to be established as described.

<sup>83</sup> LRS vol 6, no. 247 at pp.107-8. See also no. 240. No. 243, on how such intrusions are to be pleaded. The London Eyre of 1276 (London Record Society vol 12 for 1976) includes cases of novel disseisin (no. 502) and of mort d'ancestor (no. 494).

Englishry” (this last to distinguish it from the Welshry). As early as 1086 the town of Rhuddlan in NE Wales was by charter granted the right to have “the laws of Hereford and Breteuil”<sup>84</sup>.

### 3.13. SOME SIMILAR REMEDIES IN THE FRENCH PAYS DE DROIT COUTUMIER<sup>85</sup>

Here are some references to allow reflection on the similarities and differences between Normandy and AN England in the 13<sup>th</sup> century:

#### TAC 21: *De Dessesine*

*Ill y a j. autre requenoissent qui est fez en autretel maniere, ce est quant alcuns muert sanz propre oir, ce est sanz fill ou sanz fille, e aucuns entre en son heritage qui dit que il estr li plus prochiens oirs al mort, ja soit ce que ce n'est pas voir. Il sera requeneu par le serement a xij. homes li quieux sera li plus prochiens oirs a celui qui morut puis le derrenier aost, e cil avra l'eritage.*

*E se aucuns qui soit plus prochiens oirs al mort suefre que autres porsiee l'eritage al mort par xij. aolz que il n'en fet plainte par devant la justice, il n'avra pas puis requenoissent sus celui qui tient; ainz sera la chose terminee pae plet ou par bataille. (for which see TAC 84bis)*

#### TAC 22: *De devestement fait sanz jugement*

*Nus n'ost devestir home d'aucune chose fors par order des jugemenz. Il sera donc requeneu per le serement de xij. hommes del visné li quiex en ot la sesine el derrenier aost, e se li dui ou li troi se font non sachanz de la verité de la chose, elle soit terminee par les ix., se il en sevent vla verité. [compare this with Glanvill II.17, where recognitors who claim not to know the facts are discharged and replaced by others more knowledgeable.]*

*Autresi est il fet de la sesine au pere a l'orfelin del jor que il morut e de toutes autres dessesines ; quar par dessesine n'est pas tolue autrui droiture, quar la juree n'est pas fete de la droiture, mes de la possession.*

<sup>84</sup> See Mary Bateson's «English Historical Review articles on Breteuil» in *English Historical Review* 15 (1900) pp. 73-78; pp. 302-318; pp. 496-523; pp. 754-757 & *English Historical Review* 16 (1901) pp. 92-110 & 332-345. Breteuil is a Normandy castle-borough in what is now the department of Eure.

<sup>85</sup> for Normandy see bibliography for the various texts in old French & Latin of the *coutumiers*, for a comparison with AN England: two works edited by E.-J Tardiff, *Coutumiers de Normandie & Coutumiers de Normandie VI .2, Le Très Ancien Coutumier de Normandie* (1903, Rouen & Paris, old French text. See also LE PATOUREL, J., *The Norman Empire* Oxford 1976 c.7 “Assimilation” p.264 n.4 for references)

And see TAC 24-29 (omitting TAC 23, *advocatio*); TAC 73, *de dessesine* & 74, *de brief de deforcement*; 86 gives a plea like *mort d'ancestor*, to be resolved by battle.

The Latin *Summa de legibus* (see bibliography) is not just a translation of *TAC* but includes the formulae for writs, with a commentary. C.93 gives a *querela, de brevi nove dissaisine* where the specimen writ, addressed to the bailiff, commands the disseisor Robert *juste et sine mora* to re-seise one Richard of lands at Bec which Robert disseised him *iniuste et sine iudicio* within the limitation period, *post ultimum augustum ante istum*. If this is not done the bailiff is have a recognition made by the neighbours at the next session of the bailiwick, to view the land and keep it in peace. The comment speaks of a jury of 20, credible and not partisan: *fide digniores . . . neutri parti sint suspecti vel affines*. The rest of the procedure is elaborated at pp.220-225. To illustrate the process the text sets out an imaginary dispute, Petrus c. Thomas, which repays close reading (pp.231-234). The procedure, comparable with *mort d'ancestor*, is in c. 98 (p.238sqq).

It is worth noting that the grounds for a plea of disseisin are elaborated in c.32 of Beaumanoir's *Coutumes de Beauvaisis* as being brought about in one of three ways: by *nouvelle désaisine*; by *force*; or by *nouveau trouble*, a distinction only implied in Henry II's petty assize. §955 of this text defines *nouvele dessaisine* as where someone takes the thing (*chose*) of which I have been seised peaceably for a year and a day, *la chose de lequele j'avrai esté en saisine an et jour paisiblement*. §956 shows that this taking may be accompanied by force, so that I have an action *de force et de nouvele dessaisine*, adding that no such act of force is without novel disseisin, but that *nouvelle désaisine* can be without force. §957 defines *nouveaux troubles* as where I am seised of some thing (*chose*) peaceably and for a year and a day but someone so impedes me or, for example my *vendangeurs*, depriving me of enjoyment of the thing. A variant of the imaginary case in *the Summa de Legibus* just mentioned appears in the Beaumanoir text as Pierres c. Jehans (§§979-982, pp.493-496.) The topic covers the whole of c.32, §§.954-988 (pp.485-499 in Salmon's vol.1. Hubrecht's commentary (in vol.3) is at pp.132-139<sup>86</sup>.

<sup>86</sup> The *Etablissements de Saint-Louis* 1272-3 (after St Louis' death in 1270) ed. VIOLLET, P. 4 vols Paris 1881-6, customs of Touraine & Anjou, c.68, has a longer but very similar provision to Beaumanoir §957. There is an English tr. by AKEHURST, F.R.P., *The Etablissements de Saint Louis – 13<sup>th</sup> century law texts from Tours, Orléans & Paris*, Philadelphia 1996.

3.14. SICILY UNDER FREDERICK II<sup>87</sup>

The various Norman territories in southern Italy and Sicily, amounting to over a third of modern Italian territory, were first united under Roger I in 1129<sup>88</sup>. In September 1231, nearly sixteen years after the Fourth Lateran Council and four years before Gregory IX's *Liber Extra*, Frederick II (1194-1250) promulgated his constitutions for his Kingdom of Sicily. These are known under a variety of names: the Constitutions of Melfi, *Liber Constitutionum Regni Siciliae*, *Constitutiones Augustales*, etc but to English readers, the most common is *Liber Augustalis* and that, abbreviated *LA*, is what I shall call them here. They incorporated legislation of his forebears Roger II and the two Williams (amounting to about a third of the whole) adding new laws and repealing earlier law or abolishing former practices, or amending them, often adding reasons for the change in vigorous language. The constitutions are thought to be largely drafted by Pier delle Vigne (born c. 1190, Capua, Campania,—died in disgrace with Frederick in 1249, probably at Pisa).

A number of provisions deal with dispossession, showing the same kind of reforming zeal as found in England and at the Lateran Council. The legal vocabulary includes many words derived from Romano-canonical law, even if describing secular matter. As with Lat IV c.39 and in *Leges Henrici Primi* in AN England, *LA* requires restitution of the dispossessed as a first step:

*LA* I.25, *de violentis et maleficiis clandestinis*

*...Statuimus ut, si quis per violentiam distituerit aliquem rei immobilis possessorem, possessione cum legitimis obventionibus omnibus primitus restituta violentum vel universalem*

<sup>87</sup> Text of the *Liber Augustalis*: *MGH Leges V – Constitutiones et Acta Imperatorum et Regum II* (1198—1272), *supplementum: die Konstitutionen Friedrichs II für der Königreich Sizilien* (1231), ed. STÜRNER, W (1996); text at pp.143-472. It was thus not available to the authors cited below.

For an English translation, see POWELL, J.M. *The Liber Augustalis or Constitutions of Melfi promulgated by the Emperor Frederick II for the Kingdom of Sicily in 1231*. (Syracuse Univ. Press, New York, 1971) based on the text in vol. IV, I, 1-178 of HUIILLARD-BRÉHOLLES, J.A. *Historia Diplomatica Friderici II* (6 vols in 12, Paris 1852-1861). See also CALASSO, F., *Medio evo del diritto, I – le fonti* Giuffrè, Milano 1954, c.4 §22 esp. (pp.441-445); KANTOROWICZ, E.H., *Frederick II* (1957) (series: Makers of the Middle Ages); BERMAN, H.J., *Law & Revolution – the formation of the western legal tradition* Harvard UP, 1983 c.13 esp c.13 at 409 ss. esp p.425 ss. and BELLOMO, M., *The Common Legal past of Europe 1000-1800 – studies in medieval and early modern canon law* (series vol.4) pp.88-96 in the English tr 1995 by COCHRANE, LYDIA G., of *L'Europa del diritto comune* 1989.

<sup>88</sup> A recent history is MATTHEWS, D., *The Norman Kingdom of Sicily*, Cambridge UP 1992 esp. cc.7 & 11 (series: Cambridge Medieval Textbooks).

*successorum eius in medietate extimationis rei, in qua violentiam commisisse probatur, multandum esse censemus.*

The provision continues that at the date of LA, the recompense awarded in such cases had been derisory where the violator could not show that he has ownership, leading to confusion of the possessory and the petitory processes. Frederick therefore reforms the law:

*...demum, quando suam rem violentus probare non possit, et sic possessorium petitorio, a quo separatum esse dignoscitur, immiscere. Et illud etiam modeste ferre nequimus, ut pro violentia aliqua in possessione admissa proprietate rei sue in totum aliquis vel extimatione rei, si non esset res propria, privaretur, iure Francorum etiam, quod certas penas in violentiis statuebat in hac parte sopito.*

LA I.26 continues the same subject, introducing a reform which is close to c.39 of Lat IV, changing the civil law by extending the remedy to cases where property had passed to a tertius:

*Quod destituto contra destituentem tantum vel eius heredes restituende, possessionis beneficium succurrebat nec contra eum, in quem ab ipso violento vel eius heredibus tranferebatur possessio, ad recuperandam eandem aliquod remedium inducebat, imperiali providentia lenire volentes atque ipsius iuris defectum congruo et necessario supplemento supplere disponimus per violentiam destitutum non ut olim provisione carere, sed electionem habere, utrum upsum destituentem vel eius heredes, si possessionem in alterum transtulit, ad interesse convenire, prout predicto iure cavetur, vel detentorem, qui a deiectore causam habet, per quascumque manus possessio ambulaverit, sive sciens sive ignorans fuerit, possessionem recuperare veli amissam, condicione ex lege presenti ad recuperandum possessionem ipsam indulta...*

LA I.83sq lay down the procedure to be followed in civil cases generally, and state the penalties payable to the *Curia Regis* for contumacy by participants, before or after *litis contestatio*. Specifically, I.102 imposes loss of possession on the person whose possession has been contested but who is contumacious prior to *litis contestatio*. In such a case the property, *res*, is to be handed over to the party adverse, the *actor*, who, after a year, will become the true & perpetual owner. For contumacy after *l.c.*, where the facts are unclear, possession is to be awarded to the claimant; if the facts are clear, the judge is to proceed as in personal property cases, deciding according to the facts:

I.102 *De pena contumacie ante litem contestatam conventis rei vindicatione*

*Rei vindicatione conventus lite nondum in iudicio contestata si contumax fuerit, predictam penam tertie partis mobilium curie nostre debitam [cf.I.99.2 & 100] post missionem in possessionem rei petite adversario assignandum causa custodie patietur, ita videlicet, ut anno transacto actor verus et perpetuus possessor per lapsum temporis efficiatur. Lite vero super actione reali contestata, si de causa non liquet, rei petitie possessio petitori vera et perpetuo assignetur. Ceterum si de causa sit liquidum, prout in personalibus cautum est, iudex ad decisionem cause, procedat.*

In this provision, although the rubric refers to *rei vindicatione*, the classic Roman distinction between petitory and possessory claims is not respected, despite the use of Roman legal terms which would have been familiar to those inhabitants of Frederick's Kingdom, Sicily and the mainland of Italy south of the papal domains.

Book II includes a reform parallel to that of Henry II in England, abolishing completely any resort to trial by ordeal of hot iron or cold water (II.31, *de legibus paribilibus*) – the provision seems to anticipate modern physics, for example Kelvin's Second Law of Thermodynamics, as to iron getting hotter or water getting colder, and to the buoyancy of a body which has taken in a gulp of air. Trial by battle, *monomachia*, (*que duellum vulgarter dicitur*) in favour of sworn verdicts (II.32, *de pugnis sublatis*) is forbidden except in rare cases between nobles. Frederick abolishes the older Frankish trial by battle, extending proof based on the evidence of witnesses or documents, and so on, even if one party is not a Frank (e.g. is a Lombard):

*... Predictam igitur probationis modum, per pugnas videlicet, quo iure Francorum viventes hactenus utebantur tam principales personas, eas scilicet sibi invicem offerando, quam circa personas testium invicem producendorum, tam in civilibus quam in criminalibus causis de cetero volumus esse sublatum...* continuing, that the case should be tried *per probationem testium vel instrumentorum et similes, per quas possit plene probari veritas, convincatur...*

Book III.37-39 include provisions standardising prescription periods, retaining for the most part those of Roman law, *generalis comunis iuris locum habere* and repeating the Roman requirement of good faith on the part of the acquirer: *iusta titulo et bona fide ex utraque parte undique concurrente....* Frederick singles out the unfairness of the old Frankish law which

which formerly rendered easy disseisin – *dissasina* (MGH text p.404, line 13) -- after very short periods of time.

Chapter (III.37). III.38, *de prescriptione feudorum*, abolishes the imprescriptibility of fiefs possessed for a very long time but where possession had never become ownership:

*Consuetudinem hactenus in iudiciis obtinentem de medio tollere disponentes, per quam feuda quamvis temporum longinquitate possessa prescribit non poterant et sic possessio possessori vel etiam petitori ad probandum de domino rerum, quas forsitan ipsi et antecessores sui a tempore non extabat, possederant, in nullo valebat, precepimus, cum quis in posterum triginta annis feudum integrum vel quotam partem feudi, de quo certum et designatum servitium nostre curie vel cuilibet alii debeatur, continue et sine interruptione civili vel naturali temporis vel minoris etatis adversarii, presente in regno adversario suo, possederit, in perpetuum fore securum, et actionem ei contra quemlibet possessorem, si a possessione ceciderit, et exceptionem contra petentem quemlibet indulgemus*

adding that this provision gives an *actio* against a dispossessor or raised as a defence, *exceptio*, if his possession is contested by another.

#### LAST COMMENTS

We are celebrating two great law-changing events of 1215, the IVth Lateran Council and *Magna Carta*, each reforming the protection of possession; and revealing parallels and differences with the developed canon law which emerged from the *condictio* or *remedium ex canone* “*Redintegranda*.” Neither space, nor the proper focus on 1215, allow further comparison between the evolution of secular remedies for disseisin in English law like the writs of entry, nor the cases in Canterbury and York church courts<sup>89</sup> showing how contested possession cases were handled there, whether by judges delegate exercising papal jurisdiction<sup>90</sup>

<sup>89</sup> See JACOB, E.F., *The medieval registers of Canterbury & York – some points of comparison* Borthwick publications no.1, York 1953 – but York records are sparse before the end of the 14<sup>th</sup> century: *Medieval records of the Archbishops of Canterbury*, the Lambeth Lectures, London 1960 by CHURCHILL, IRENE; KEMP, E.W., JACOB, E.F & DU BOULAY, F.R.H. “Canterbury & York” – the two provinces – is, as Maitland observed, the correct way to refer to the “Church in England.”

<sup>90</sup> See three books by SAYERS, J., *Papal Judges Delegate in the Province of Canterbury (1198-1254)* Oxford 1971, e.g. p.180 ss. for land disputes, *super terris et rebus aliis*, taken from record sources; *Papal government and England during the pontificate of Honorius III 1216-1227*, Cambridge 1984 and *Original papal documents in England & Wales from the accession of Innocent III to the death of Benedict XI (1198-1304)*.

or by the archbishop of Canterbury through his court (the Court of Arches) once he had acquired tutorial control.

The old nationalistic myth that canon law was only of persuasive authority in medieval England was refuted by Maitland in six essays later published as *Roman Canon law in the Church of England*, London, 1898<sup>91</sup>. On “Stubbs v Maitland” we now have further evidence in ADAMS, N. & DONAHUE, C., *Select cases from the ecclesiastical courts of the Province of Canterbury c.1200-1301* (1981) 95 SS where the introduction (pp.1-103) refers to possessory and petitory proceedings (p.73sq) and ecclesiastical & secular jurisdiction (p.97-103) (the italicised page numbers refer to the introduction). Professor Adams wrote “...we should not always assume that where ecclesiastical jurisdiction came into contact with secular the relationship was always hostile. In daily practice, if not always in theory, there was considerable accommodation and co-operation between the two.”

Romano-canonical law and procedure, though modified over time and after the Reformation, have a long history in the provinces of Canterbury and York. In Henry III’s reign, there were two legatine visitations of the two provinces, each of which led to the publication of further constitutions; most, of course, emphasising existing canon law. The first was that of cardinal Otto, sent by Gregory IX in 1236 and the second, that of cardinal Ottobuoni (Fieschi), later Pope Adrian V, sent by Clement IV and arriving in 1265 with a variety of missions, holding his council and publishing his constitutions in 1268. These legatine constitutions and the gloss on them by John Acton (Joannes de Athone, canon of Lincoln, ob.1350) were still being cited as authority in the ecclesiastical courts of the reformed Anglican Church and were valued enough to warrant republication as late as Charles II’s reign at Oxford in 1679 in William Lyndwood’s collection of canons relevant to the provincers of Canterbury and York, the *Provinciale* of 1433. “Civilians” (who as advocates and proctors were canonists administering matrimonial causes as well as being expert in testamentary and Admiralty law and the *jus gentium*) survived as a separate legal profession into the second half of the 19<sup>th</sup>

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<sup>91</sup> Reprinted 2006, New Jersey, USA. Maitland’s vigorous demolition of Bishop Stubbs’ view has subsequently been modified but largely stands: see “Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-Examined after 75 Years in the Light of Some Records from the Church Courts” by DONAHUE, C., in *Michigan Law Review* 72 (1974), pp. 647-716 which traces the change of opinion since 1898; and see HELMHOLZ, R.H., *Roman Canon law in Reformation England* Cambridge 1990 (series: *Cambridge Studies in English Imegal History*) index, s.v. MAITLAND, F.W.



century until their matrimonial and civilian jurisdiction was absorbed into a unified system and their own professions disbanded<sup>92</sup>.

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<sup>92</sup> See SQUIBB, G.D., *Doctors' Commons: a history of the College of Advocates and Doctors of Law* Oxford 1977. The jurisdiction survives in some places outside England & Wales: there are still Proctors in Admiralty in the State of New York.

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