Law and litigation concerning dispossession *c.* 1050-1250: a comparative study

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The aim of this project is to break down the tradition of examining legal development in different countries and systems in isolation, rather than comparatively. It is brought to you by members of the European Research Council project: 'Civil Law, Common Law, Customary Law: Consonance, Divergence and Transformation in Western Europe from the late eleventh to the thirteenth centuries.'

We have chosen 'litigation concerning dispossession' as our subject for several reasons. Dispossession was, and remains, a phenomenon of great social concern. A study of the legal history of dispossession therefore helps us to understand how this recurring social problem has been addressed in the past. It also sheds light on the history and nature of elementary legal ideas – for example, what is the nature of possession – is it a fact or some sort of right? Can actions concerning dispossession be classified as criminal or civil? A study of dispossession therefore exposes the interplay of ideas, practice, and broader social context, which was crucial to the development of law in this period.

In these podcasts, we examine some of the main historiographical traditions on the subject. We then explore the situations that led to litigation, how cases were brought and then decided, and finally the wider conclusions that can be drawn from these explorations.

We hope the discussions will be of general interest, and helpful to anyone who is teaching or studying mediaeval law. We have chosen to use audio-recording as our main medium to enhance the sense that comparative legal history needs to proceed through conversation. Further, the whole series, individual episodes, or short extracts may be helpful for teaching purposes. We provide some written materials, to accompany individual recordings and the project as a whole.

The participants are: Professor Emanuele Conte (University of Roma Tre); Professor John Hudson and Drs Andrew Cecchinato, Will Eves, Matt McHaffie, Attilio Stella, and Sarah White (University of St Andrews).

Production and editing: John Hudson and Sarah White.

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Episode 1: Dispossession Project – Introduction

In this introductory episode, Emanuele Conte and John Hudson discuss with Sarah White the conceptual categories of possession and property and indicate ways in which dispossession may have been dealt with in the early Middle Ages.

Discussants: Professors Emanuele Conte and John Hudson. Chair: Dr Sarah White

Categories: starts at 1 min. 40 seconds

- *praetor urbanus* – one of the highest magistrates in the Roman Republic and Empire, who had jurisdiction in Rome and the right to promulgate edicts to supplement or correct existing law. The law thereby created consisted primarily of procedural remedies, and is referred to as *ius honorarium*
- *usucapio*, usucaption – right to full ownership acquired by continued possession by the lapse of time defined by law
- action – legal formulae used by plaintiffs to initiate lawsuits against another party. *Legis actiones* were the oldest form of civil procedure in ancient Rome and became the
- cornerstone of the Civil and Canon law ordinary procedure from the twelfth century onwards
- interdict, *interdictum* – in ancient Roman law, a special decree by a magistrate ending a dispute before the judicial phase. In medieval Civil law, (1) a special decree by a magistrate ending a dispute before the judicial phase or (2) a form of action aimed at the recovery of possession
- lease – an agreement regulating the use of property, by which a lessor conveys property to a
- lessee for a given time or at will in exchange for some remuneration, such as the payment of rent or the provision of a service
- *possessio* – possession
- Vulgar Roman law – Roman law as practised in the late antique and early medieval west, and associated texts
- *vestitura* – putting in possession, installing; linked to the idea that someone can own something or exercise some power, including some public power, because he has been “dressed” (vested) by a superior
- *gewere* – a notion often traced to ancient Germanic law, whilst probably linked to the ecclesiastical *vestitura*, meaning the lawful exercise of public or private rights over land or persons
- *exceptio*, exception – a plea by a defendant that his opponent’s complaint or claim is inapplicable to the case, for reasons of fact or law; the defendant should not, therefore, be required to make a formal defence to the complaint or claim. A successful ‘peremptory exception’ should lead to dismissal of the case, a ‘dilatory exception’ to a halt in its progress
- *exceptio spolii* – an exception that the litigant should not answer on another matter while despoiled

- *dominium utile* – the rights over land acquired by the lord's tenants and fief-holders
- Pillius de Medicina, a law professor who taught in Modena from 1180
- seisin – possession based on some justifiable claim
- seise – transfer of land or another rights
- Justinian, Eastern Roman Emperor, 527-65

Dealing with dispossession: starts at 7 mins 51 seconds

- real (thing/property) – immoveable property, particularly land, and anything attached to or erected on it
- subjective right – a legally recognized claim, for example to land
- *unde vi* – Roman law interdict against violent dispossession
- Lombard law – legal system based on the laws enacted by the Lombard kings of Italy, from the 7th century onwards
- formulary of Marculf – late seventh-century legal text
- pledge – a person who acts as a surety for another; sometimes also used of money or property

Conclusion: starts at 13 mins. 52 seconds

See also Illustrative texts: esp. nos 1-3.

Episode 2: Historiography

In this episode, Andrew Cecchinato, Will Eves, Matt McHaffie, and Sarah White discuss with John Hudson different traditions of legal historiography in relation to dispossession.

Discussants: Drs Andrew Cecchinato, Will Eves, Matt McHaffie, Sarah White. Chair: Professor John Hudson

Introduction

- Assize of Novel disseisin – English procedure dealing with cases of recent unjust dispossession; probably established in 1166. 'Assize' can also refer to the legislation itself

Roman law: starts at 1 min. 48 seconds

- *ius commune* – the law, both Roman and Canon, taught in universities as the standard law across western Christendom
- *Friedrich Carl von Savigny*, *Das Recht des Besitzes* (1803)
- Wilhelm Albrecht, *Die Gewere als Grundlage des älteren deutschen Sachenrechts, Königsberg* (1828; reprinted Aalen, 1967)
- *possessio* - possession
- *gewere* – a notion often traced to ancient Germanic law, whilst probably linked to the ecclesiastical *vestitura*, meaning the lawful exercise of public or private rights over land or persons
- Francesco Ruffini, *Actio spolii: studio storico-giuridico* (Turin, 1889)
- spoliation – dispossession
- pseudo-Isidore – ninth-century Canon law collection
- Gratian's *Decretum* – twelfth-century Canon law collection
- *exceptio*, exception – a plea by a defendant that his opponent's complaint or claim is inapplicable to the case, for reasons of fact or law; the defendant should not, therefore, be required to make a formal defence to the complaint or claim. A successful 'peremptory exception' should lead to dismissal of the case, a 'dilatory exception' to a halt in its progress

Canon law: starts at 6 mins 28 seconds

- *unde vi* – Roman law interdict against violent dispossession
- *condictio ex canone reintegranda*, canon *Redintegranda* – an exception found in the False Decretals of Pseudo-Isidore (collected in in Causa 3, q. 1, c. 1-6 of Gratian's *Decretum*), which were composed in the ninth century by an unknown author. According to this exception,a bishop whom secular authorities had deprived of his property or his bishopric was protected from any criminal prosecution until these had been returned to him

- *actio spolii* – an action in Civil and Canon law allowed to recover any kind of right, goods or offices unlawfully subtracted to the plaintiff

English Common law: starts at 7 mins 25 seconds

- Sir Frederick Pollock and F. W. Maitland, *The History of English Law before the Time of Edward I* (2 vols; 2nd edn reissued with a new introduction by S. F. C. Milsom, Cambridge, 1968)
- Henry II, king of England 1154-89
- mort d'ancestor – an assize in England whereby an heir may claim his inheritance through a recognition
- Paul Brand, 'Henry II and the creation of the English common law', in *Henry II: New Interpretations*, ed. C. Harper-Bill and N. C. Vincent (Woodbridge, 2007), 215–41
- R. C. van Caenegem, ed. and tr., *Royal Writs in England from the Conquest to Glanvill*, (77 Selden Soc., 1958–9)
- Donald Sutherland, *The Assize of Novel Disseisin* (Oxford, 1973)
- Mary Cheney, '"Possessio/proprietas" in ecclesiastical courts in mid-twelfth-century England', in *Law and Government in Medieval England and Normandy: Essays in Honour of Sir James Holt*, ed. G. S. Garnett and J. G. H. Hudson (Cambridge, 1994), 245–54
- *iniuste et sine iudicio* – unjustly and without judgment
- G. Richardson and G. O. Sayles, *Law and Legislation from Æthelberht to Magna Carta* (Edinburgh, 1966)
- *exceptio spolii* – an exception (see above) that the litigant should not answer on another matter while despoiled
- Gratian's *Decretum,* Causa 3, q. 1, c. 1-6
- Eugenius III, pope 1145-53
- decretal – a papal decree concerning an issue of Canon law, usually issued in response to a query
- Thomas Becket, archbishop of Canterbury 1162-70
- S. F. C. Milsom, *The Legal Framework of English Feudalism* (Cambridge, 1976)
- *coutumiers* – French law books, purporting to be statements of custom
- attach – to compel a defendant to provide gages and sureties that he would appear in court on a specified day
- *Glanvill* – English legal treatise (c. 1188-90)
- appellor and appellee – respectively the parties bringing and answering an accusation
- amercement – a monetary penalty, exacted from one who had fallen into the king's mercy because of an offence

Northern and western France: starts at 15 mins 26 seconds

- Ernest Champeux, *Essai sur la vestitura ou saisine et l'introduction des actions possessoires dans l'ancien droit français* (Paris, 1898).
- Ernest Glasson, 'De la possession et des actions possessoires au Moyen Âge', *Nouvelle revue historique de droit français et étranger*, 14 (1890), pp. 588–633.
- Robert Besnier, 'Le procès possessoire dans le droit normand du XIIe et du XIIIe siècle', *Revue historique de droit français et étranger*, 4th ser., 30 (1953), pp. 378–408.

Conclusion: starts at 20 mins 38 seconds

- Joüon des Longrais, *La Conception Anglaise de la saisine du xiie au xive siècle* (Paris, 1925)

See also Illustrative texts: esp. nos 1, 3

Episode 3: The Disputes

In this episode, Will Eves, Matt McHaffie, Attilio Stella, and Sarah White discuss with John Hudson the kinds of dispute that involved dispossession and the types of litigant who were involved.

Discussants: Drs Will Eves, Matt McHaffie, Attilio Stella, Sarah White. Chair: Professor John Hudson

Introduction

- nuisance – disturbance of another's enjoyment of their rights, particularly real property

Who is allowed to bring cases? starts at 57 seconds

- interdict, *interdictum* – in ancient Roman law, a special decree by a magistrate ending a dispute before the judicial phase. In medieval Civil law, (1) a special decree by a magistrate ending a dispute before the judicial phase or (2) a form of action aimed at the recovery of possession
- *unde vi* – Roman law interdict against violent dispossession
- civil possession – possession created and granted by law, by a lawful title
- natural possession – the visible, material possession of a thing
- Roffredus de Benevento – an Italian jurist (c.1170 – after 25 June 1243) born in Benevento, who wrote one of the most famous treatises in Civil law procedure (*Libelli de iure civilis*, c.1216-33)
- *coloni* – tenant farmers tied to the land and paying the landlord with a portion of their crops
- unfree tenant – a villein or serf
- free tenement – a tenement held freely, for example in contrast to villeinage
- Assize of Novel disseisin – English procedure dealing with cases of recent unjust dispossession
- tenure– the terms on which land is held from a lord
- villeinage – tenure by which villeins held land of their lords, which was subject to heavy
- dues, often including labour service. Persons of free status might also sometimes hold lands by villeinage tenure
- bailment – handing over of moveables to another for a specific purpose, to be carried out faithfully by the latter on the former's behalf
- tenant at will – a tenant holding by permission of another, without security of tenure
- seise – to put in possession of lands or other rights
- *Customs of Anjou and Maine* – early, anonymous coutumier from western France (1246); also known as the Customs of Touraine and Anjou
- *gentilshomme* – nobles; elite

- *hommes coutumiers* – commoners
- Beaumanoir – French judge and jurist (c.1250–1296); author of the *Coutumes de Beauvaisis* (1283).
- induct – appoint someone to an ecclesiastical office
- darrein presentment – a procedure in England using a recognition to determine who is the lawful possessor of an advowson
- presentation – the right of a lay patron to provide a candidate to a church office.

Who does bring cases? starts at 5 mins 34 seconds

- plea rolls – rolls of parchment containing records of cases which came before courts
- *Les Olim* – the royal court records from the Parlement; earliest records survive from 1254
- *Parlement* – French royal court in Paris; operates both as an appellate court and a court of first instance
- seigneurial courts – lords' courts
- *contado*– in Italy, a city's surrounding district

Against whom are cases brought? starts at 8 mins 7 seconds

- entry *sur disseisin* – in England, an action against someone whose entry to the land is based on the possession of someone who had committed disseisin
- spoliation, despoliation – dispossession
- patronage of a church – the right to present a new incumbent of a parish to the diocesan bishop for appointment

The circumstances in which disputes arose: starts at 10 mins 51 seconds

- S.F.C. Milsom, *The Legal Framework of English Feudalism* (Cambridge, 1976)
- tithes – a form of taxation consisting of one tenth of an individual's income paid to an ecclesiastical or lay authority
- benefice – an ecclesiastical living with an income, usually granted by presentation by a patron

Of what did the act of dispossession actually consist? starts at 17 mins 22 seconds

- conveyance – the transfer of land or other rights
- right of entry – the right to enter peacefully a tenement in order to exercise a lawful purpose, such as to take or resume possession
- *vis*, *vi* – force, by force

Issues of force and violence: starts at 21 mins 22 seconds

- *coutumiers* – French vernacular law books, purporting to be statements of custom

- *à tort et à force* – wrongly and by force
- *Très ancien coutumier* – Norman lawbook, the earliest version of which is from c. 1200
- Milsomian – relating to the views of S.F.C. Milsom (see above)
- Balliol manuscript of Glanvill

Does it have to be recent dispossession? starts at 25 mins 54 seconds

- prescription *annale* – year-long prescription, prescription being a right to resist a legal claim based on lapse of time

Conclusion: starts at 28 mins 39 seconds

See also Illustrative texts: esp. nos 1-5, 8, 10-11, 14, 17

Episode 4: Bringing The Case

In this episode, Will Eves, Matt McHaffie, Attilio Stella, and Sarah White discuss with John Hudson the ways in which litigation concerning dispossession was started and the means used to get the parties into court.

Discussants: Drs Will Eves, Matt McHaffie, Attilio Stella, Sarah White. Chair: Professor John Hudson

Introduction

Bringing a complaint: starts at 32 seconds

- writ – a formal written command issued by a competent authority
- sheriff – a royal official with responsibility for the administration of a county on the Crown's behalf
- *Très ancien coutumier* – Norman lawbook, the earliest version of which is from c. 1200
- *bailli* – an official (usually royal) whose function is to perform assorted, delegated functions
- *bailliage* – the district of a bailli
- *Summa de legibus* – mid-thirteenth-century Norman lawbook
- serjeant-at-arms– in Normandy, a legal officer charged with various duties such as overseeing views of land and ensuring that the judgments of assizes are carried out
- view – a procedure whereby a group of men inspected a disputed tenement, to establish its precise extent and appurtenances
- *praecipe* – a writ conveying a command, disobedience of which will lead to the matter being heard before the king or his justices
- executive writ – writ conveying an instruction
- Customs of Anjou and Maine – early, anonymous coutumier from western France (1246); also known as the Customs of Touraine and Anjou
- pledge – a person who acts as a surety for another; sometimes also used of money or property
- libel, *libellus* – particularly in Civil and Canon law, the written document of the plaintiff containing his or her allegations and initiating the lawsuit. In principle, the libellus had to specify the actions to be brought against the opponent
- attorney – a person who represents another in litigation or other legal matters
- *unde vi* – Roman law interdict against violent dispossession
- *constitutio Si quis in tantam* – a constitution enacted in 389AD by Emperors Valentinian, Theodosius, and Arcadius, which forbade owners to violently dispossess any possessor of a disputed property before due process, under penalty of the loss of ownership in favour of the possessor and payment of a composition (Codex 8.4.7). In the medieval Romano-canonical

procedure, this constitution provided the grounds for an action for recovery of possession and chattels, with the option of claiming further compensation

- *rei vindicatio* – Roman law action to claim ownership.
- *placitum* – (i) a judicial court held by lords in their lordships, or (ii) a plea or lawsuit

Summons: starts at 6 mins 16 seconds

- citation – lawful summons for a person to appear in court
- mandate of citation –a written order of summons
- peremptory citation – a final or ultimate summons to appear in court, after which no other summons or warning should be expected.
- contumacy – wilful disobedience to the summons or order of a court, usually by non-appearance
- serjeant – an official or servant, including of a court
- bailiff – a legal officer whose function is to perform assorted, delegated official functions
- *vicinia* – in Italy, a neighbourhood, the ensemble of villagers, dwellers of the same village or town; by extension, the public gathering involving all the *vicini*

Ensuring parties' appearance in court: starts at 9 mins 0 seconds

- attach – to compel a defendant to provide gages and sureties that he would appear in court on a specified day
  gage – a thing given as security
- *Bracton* – English legal treatise, the earliest version of which dates from c. 1230
- amercement – a monetary penalty, exacted from one who had fallen into the king's mercy because of an offence
- Ricardus Anglicus – a twelfth-century English canonist and lawyer who was trained in Bologna and wrote a number of famous legal works.
- Justinian's Code – component book of Justinian's Corpus iuris, comprising of legislation
- surety – a person pledged to ensure another's appearance in court or fulfilment of some other obligation
- excommunication – the formal exclusion of a person from the communion of the Church
- outlawry – the condition of being put outside the protection of the law after failing to appear in court when accused of a crime, or when ignoring a summons in certain non-criminal actions
- pre-judicial stages – stages of a case before final judgment

Consequences of unexcused non-appearance: starts at 12 mins 6 seconds

- take into hand – take into possession, sometimes with restrictions as to use and disposal
- joinder of issue – parties' agreement to proceed with the case

- default – failure to attend court when required, often resulting in loss of case
- essoin – a lawful excuse for non-attendance at court
- inspection days – days where the parties and judges go to the disputed property to establish the facts
- Beaumanoir, Philippe de – French judge and jurist (c.1250–1296); author of the Coutumes de Beauvaisis (1283)
- *re servanda* – 'for the sake of preserving the thing in question'; the act of putting the plaintiff in possession in the absence of the defendant
- *in blasmo* – in twelfth- and thirteenth-century Milan, a lesser degree of outlawry devised for parties failing to appear in court, which could be redeemed upon payment of a fine within a fixed period

Situation of disputed possession during the process: starts at 18 mins 53 seconds

- *Parlement* – French royal court in Paris; operates both as an appellate court and a court of first instance

Conclusion: starts at 21 mins 30 seconds

See also Illustrative texts: esp. nos 5-7, 9, 12, 14, 15, 17

Episode 5: Deciding The Case

In this episode, John Hudson, Matt McHaffie, Attilio Stella, and Sarah White discuss with Emanuele Conte the conduct and judgment of cases concerning dispossession.

Discussants: Professor John Hudson, Drs Matt McHaffie, Attilio Stella, Sarah White. Chair: Professor Emanuele Conte

Pleading and arguments: starts at 47 seconds

- recognitors – twelve law-worthy men empanelled to swear on oath whether the issue put to them (in these cases, the alleged disseisin) was true
- period of limitation – the period of time in which a party must make a claim before the right to initiate an action is extinguished
- exceptions – arguments raised by the defendant which, if accepted by the court, would delay or defeat the action
- writ – a formal written command issued by a competent authority
- free tenement –a tenement held freely, for example in contrast to villeinage
- villeinage – tenure by which villeins held land of their lords, which was subject to heavy dues, often including labour service. Persons of free status might also sometimes hold lands by villeinage tenure
- tenure– the terms on which land is held from a lord
- Beaumanoir, Philippe de – French judge and jurist (c.1250–1296); author of the *Coutumes de Beauvaisis* (1283)
- libel, *libellus* – particularly in Civil and Canon law, the written document of the plaintiff containing his or her allegations and initiating the lawsuit. In principle, the libellus had to specify the actions to be brought against the opponent
- warranty – a guarantor
- exceptions – arguments made in court which delayed or halted
- proceedings. Dilatory exceptions paused litigation until they were resolved but did not conclude the case. Peremptory exceptions put an end to the case
- minor – one not yet of age
- *intentiones* – a list of main issues and minor points identified by the judge or court official, which parties need to prove
  positiones – a procedural step introduced in northern Italian procedure and in canon law in the late twelfth century according to which, after the joinder of issue, parties exchanged their versions of the facts relevant to a case through statements that could be either confirmed or rejected by the opponent. This stage aimed at identifying facts that were acknowledged by both parties which did not require proof in the following steps of the trial

- joinder of issue – parties' agreement to proceed with the case
- replication – a reply to an exception brought by the opposing party

Decisions on matters of fact: starts at 8 mins 50 seconds

- recognition – inquiry undertaken by recognitors (see above)
- *enquêtes* – inquests
- *coutumiers* – French law books, purporting to be statements of custom
- inspection days – days where the parties and judges go to the disputed property to establish the facts
- *Parlement* – French royal court in Paris; operates both as an appellate court and a court of first instance
- interrogatories – in Canon law procedure, questions asked of witnesses
- induct – appoint someone to an ecclesiastical office
- *Libri feudorum* – the earliest and most famous collection of customs and decrees concerning
- fiefs, assembled in northern Italy between the early twelfth century and the first half of the thirteenth century

Making judgment: starts at 13 mins 20 seconds

- *consul* – in the ancient Republic of Rome, one of the two chief office-holders who ruled the state, elected annually. In high medieval Italy, especially from the early twelfth century onwards, a member of a panel of officials who jointly ruled a city commune. *Consules* were elected annually or every six months, depending on the local municipal custom
- *milites* – knights
- default judgment – a court judgment awarded in favour of a litigant upon the failure of their opponent to act or comply with certain procedural rules
- *prévôt* – local official, usually of a lord
- *bailli* – an official (usually royal) whose function is to perform assorted, delegated functions
- seneschal – a lord's steward who, in some parts of France, often had judicial duties
- verdict – a jury or recognition's decision on an issue submitted to them
- assize – trial

Expenses and compensation: starts at 15 mins 57 seconds

- *constitutio Si quis in tantam* – a constitution enacted in 389AD by Emperors Valentinian, Theodosius, and Arcadius, which forbade owners to violently dispossess any possessor of a disputed property before due process, under penalty of the loss of ownership in favour of the possessor and payment of a composition (*Codex* 8.4.7). In the medieval Romano-canonical

procedure, this constitution provided the grounds for an action for recovery of possession and chattels, with the option of claiming further compensation

- *Glanvill* – English legal treatise (c. 1188-90)
- appellor and appellee – respectively the parties bringing and answering an accusation
- amercement – a monetary penalty, exacted from one who had fallen into the king's mercy because of an offence
- *sous* – term for currency in France, comparable to a *schilling* in England; 20 *sous* equal a *livre* (or pound)

Re-opening disputes: starts at 21 mins 30 seconds

- chancery – royal office responsible for the writing of documents
- attaint – a process in English law for reviewing court decisions, through a jury generally of twenty-four men who might convict recognitors of having made a false oath
- certification – a process in English law for reviewing a court decision, by re-assembling the assize justices, the parties, and generally the recognitors before another court, normally the king's
- dual process –the losing party in a case concerning possession thereafter bringing an action concerning property
- writ of right – writ ordering a lord to do justice to a man typically concerning land, determining who has the 'greater right' to the disputed property
- *rei vindicatio* – Roman law action to claim ownership

Conclusion: starts at 26 mins 35 seconds

See also Illustrative texts: esp. nos 8, 14, 17

Episode 6: Conclusion

In this concluding episode, Emanuele Conte and John Hudson discuss with Sarah White similarities and particularities of law concerning dispossession in different areas and systems, and also assess developments during the eleventh to thirteenth centuries.

Discussants: Professors Emanuele Conte and John Hudson. Chair: Dr Sarah White

Similarities across areas and forms of law: starts at 23 seconds

- Alain Boureau, *La loi du royaume. Les moines, le droit et la construction de la nation anglaise (XIe-XIIIe siècles)*, (2nd ed, Paris, 2004) – 'judicial abstraction'
- writ – a formal written command issued by a competent authority
- libel, *libellus* – particularly in Civil and Canon law, the written document of the plaintiff containing his or her allegations and initiating the lawsuit. In principle, the *libellus* had to specify the actions to be brought against the opponent
- nuisance – disturbance of another's enjoyment of their rights, particularly real property

Differences across areas and forms of law: starts at 3 mins 22 seconds

- 'procedural fact', 'fictive fact' – a particular narrative of what actually happened
- *positiones* – a procedural step introduced in northern Italian procedure and in canon law in the late twelfth century according to which, after the joinder of issue, parties exchanged their versions of the facts relevant to a case through statements that could be either confirmed or rejected by the opponent. This stage aimed at identifying facts that were acknowledged by both parties which did not require proof in the following steps of the trial
- free tenement –a tenement held freely, for example in contrast to villeinage
- recognitors – twelve law-worthy men empanelled to swear on oath whether the issue put to them (in these cases, the alleged disseisin) was true
- assize – trial
- *litis contestatio* – joining of issue in court, signifying the close of the initial proceedings and indicating that the parties have agreed on the substance of the case

Developments in litigation and developments in ideas: starts at 7 mins 53 seconds

- action – legal formulae used by plaintiffs to initiate lawsuits against another party. *Legis actiones* were the oldest form of civil procedure in ancient Rome and became the cornerstone of the Civil and Canon law ordinary procedure from the twelfth century onwards.
- interdict, *interdictum* – in ancient Roman law, a special decree by a magistrate ending a dispute before the judicial phase. In medieval Civil law, (1) a special decree by a magistrate ending a dispute before the judicial phase or (2) a form of action aimed at the recovery of possession

- easement – an interest in land owned by another, giving the right to use or control it for a specific limited purpose
- servitudes – a right to limited use of a piece of land without possession of the land
- *gewere* – a notion often traced to ancient Germanic law, whilst probably linked to the ecclesiastical *vestitura,* meaning the lawful exercise of public or private rights over land or persons.
- seisin – possession based on some justifiable claim
- *vestitura* – putting in possession, installing; linked to the idea that someone can own something or exercise some power, including some public power, because he has been "dressed" (vested) by a superior
- Thomas Becket, archbishop of Canterbury 1162-70

Connections to specific circumstances and cases: starts at 11 mins 1 second

- Azo – law professor at Bologna (died c. 1230)
- solutio – answer given to question posed as subject for academic debate
- Huguccio – canonist and bishop of Ferrara (died 1210)
- petitory action – category of legal actions used to claim something to which the plaintiff is entitled. The burden of proof falls on the plaintiff. In Civil law, these actions were specifically brought to recover ownership over a thing on grounds of a lawful title. cf. possessory actions
- *possessio* and *proprietas* – possession and property/ownership
- homage – the ceremony of becoming a lord's man

Procedure leading to changes in ideas and substantive law: starts at 15 mins 26 seconds

- dual process –the losing party in a case concerning possession thereafter bringing an action concerning property
- *dominium* – right to land; ownership
- *dominium directum* – lord's right to land
- *dominium utile* – the rights over land acquired and enjoyed by the lord's tenants and fief-holders
- substantive law – the elements of law determining rights, claims, obligations; e.g., law as to whom an inheritance should pass on the death of a tenant. Generally distinguished from procedural law, concerned with the mechanics of court action
- real (thing/property) – immoveable property, particularly land, and anything attached to or erected on it
- *Code Napoléon* – French law code of 1804

Continuities: starts at 18 mins 3 seconds

Conclusion: starts at 19 mins 23 seconds

See also Illustrative texts: esp. nos 8, 11

Example Dispossession Cases

The supplementary podcasts below provide examples of dispossession cases from the regions discussed in the above episodes. These include disputes which are quite typical of those found in the surviving records, and also more unusual cases. Under 'Details and Glossary' you will find a summary of the details of each case, and a glossary to assist with the discussion. We have also provided references to further reading from our collection of 'illustrative texts'.

Early Canon Law Case: Papacy and Empire, 1085

Parties: Pope Gregory VII *c.* Emperor Henry IV

Date: 1085, in the village of Gerstungen, Germany

Issue: Excommunication of Henry IV

Source: *Liber de unitate Ecclesiae conservanda*, ed. W. Schwenkenbecher, in MGH, *Libelli de lite*..., vol. 2, 1892, pp. 234-5.

Briefsammlungen der Zeit Heinrichs IV, ed. C. Erdmann and N. Fickermann, in MGH, *Briefe der dt. Kaiserzeit*, vol. 5, 1950, p. 378, 13 e s.

Glossary:

- Gregorian Reform – a papal reform movement, named after its leading pope, Gregory VII
- excommunication –formal exclusion of a person from the communion of the Church
- pseudo-Isidorean decretals – ninth-century canon law collection: ‘anyone dispossessed (*spoliatus*) of his property or rejected from his position cannot be accused, summoned, judged or condemned before being integrally restored’ Otto, cardinal of Ostia, later Pope Urban II
- *ius commune* – the law, both Roman and Canon, taught in universities as the standard law across western Christendom

See also Illustrative texts: esp. no. 3

Discussants: Professors Emanuele Conte and John Hudson

Early canon law case, England, 1088

Parties: King William II 'Rufus' *c.* William of St Calais, bishop of Durham

Date: 1088

Location of disputed property: bishopric of Durham

Source: The *De iniusta vexatione*; edited and translated in *English Lawsuits from William I to Richard I*, ed. R. C. van Caenegem (2 vols; 106, 107 Selden Soc., 1990–1), no. 134.

Glossary:

- Robert Curthose, duke of Normandy, son of William the Conqueror and brother of William
- Rufus
- William the Conqueror, king of England (1066-87)
- Domesday survey, 1086.
- disseise – dispossess
- 'according to his order' – i.e. as an ecclesiastic
- 'according to the law of the bishop' – according to Canon law
- Salisbury, Wiltshire
- *sine judicio* – without judgment
- writ of novel disseisin – writ initiating procedure to deal with cases of recent, unjust disseisin
- invest – give possession
- despoiled – dispossessed
- *exceptio spolii* – an exception (i.e. court argument) that the litigant should not answer on another matter while despoiled
- Lanfranc, archbishop of Canterbury (1070-89)
- pseudo-Isidorean decretals – ninth-century Canon law collection
- 'Decreta Pontificum' – literally 'decrees of the popes', here a reference to Lanfranc's Canon
- law collection, based on pseudo-Isidorean decretals
- Library of Peterhouse College Cambridge
- *actio spolii* – an action in Civil and Canon law allowed to recover any kind of right, goods or offices unlawfully subtracted to the plaintiff
- sureties – people pledged to assure attendance at court

See also **Illustrative texts**: esp. no. 3

Discussants: Professor John Hudson and Dr Sarah White

Early French case, 1097 or 1098

Parties: Yves, a monk of Marmoutier *c.* Hugh, the viscount of Châteaudun

Date: 1097 or 1098, in a court at Châteaudun, presided over by Adela, countess of Blois, when her husband, Count Stephen, was in the Holy Land with the First Crusade

Location of disputed property: identified only as *Castinniacum* (? Châtenay); near Châteaudun (roughly 70 mi. south-west of Paris)

Source: *Cartulaire de Marmoutier pour le Dunois*, ed. Émile Mabille (Châteaudun, 1874), no. 156; survives as original (Archives départementales d'Eure-et-Loir, H 2431).

Glossary:

- priory of Saint-Hilaire-sur-Yerre, roughly 6 mi. south-west of Châteaudun
- Geoffrey *Freslavena*
- fief – property, generally heritable land, held in return for service, usually military service
- possessory – concerning possession
- proprietary – concerning ownership
- *ius* – right, e.g. to land
- *ante placitum* – 'before the trial'
- *actio spolii* – an action in Civil and Canon law allowed to recover any kind of right, goods or offices unlawfully subtracted to the plaintiff
- *spoliatus ante omnia restituendus* – the principle that someone who has been despoiled must have those things returned before anything else can happen, i.e. before trial
- pseudo-Isidore – ninth-century canon law collection
- Blois – a county in northern France
- Anjou – a county in north-western France; adjective is Angevin
- Durham, 1088
- seneschal – a lord's steward, often with judicial duties
- Robert *Legisdoctor* – 'teacher of law'; also known as Robert *Legisdoctus*, 'learned in law'

See also Illustrative texts: esp. no. 3

Discussants: Dr Matt McHaffie and Professor John Hudson

English case, 1202

Parties: Hugh son of Richard *c.* William son of Haldein

Date: 1202, court of itinerant justices at Lincoln (pleas before Eustace de Faucenberg)

Location of disputed property: Wellingore, a village in Lincolnshire about ten miles south of the city of Lincoln

Source: *The Earliest Lincolnshire Assize Rolls, 1202–1209*, ed. D. M. Stenton (22 Lincoln Record Soc., 1926), no. 345

Glossary:

- eyre – a visitation by the king or his justices
- free tenement – a tenement held freely, for example in contrast to villeinage
- plea rolls – rolls of parchment containing records of the cases which came before the royal courts
- writ – a formal written command issued by a competent authority
- chancery – royal office responsible for the writing of documents
- sheriff – a royal official with responsibility for the administration of a county on the Crown's behalf
- recognitors – twelve law-worthy men empanelled to swear on oath whether the issue put to them (in these cases, the alleged disseisin) was true
- view – a procedure whereby a group of men inspected a disputed tenement, to establish its
- precise extent and appurtenances
- period of limitation – the period of time in which a party must make a claim before the right to initiate an action is extinguished
- verdict – a jury or recognition's decision on an issue submitted to them
- disseise – dispossess
- writ of novel disseisin – a writ initiating a swift procedure, making use of a recognition, to reverse recent, unjust disseisin
- lease – an agreement regulating the use of property, by which a lessor conveys property to a lessee for a given time or at will in exchange for some remuneration, such as the payment of rent or the provision of a service
- villeinage – tenure by which villeins held land of their lords, which was subject to heavy taxation and, often, labour services
- serf, villein – person of unfree status

- mort d'ancestor – an assize in England whereby an heir may claim his inheritance through a recognition
- acre – a unit of land area equal to 4,840 square yards
- amercement – a monetary penalty, exacted from one who had fallen into the king's mercy because of an offence
- tenure– the terms on which land is held from a lord

See also **Illustrative texts**: esp. no. 7

Discussants: Dr Will Eves and Professor John Hudson

North Italian case, 1205

Parties: Nicola Capra *c.* Obertus *pelliparius*, a furrier

Date: 1205; case heard by Judge Petrus de Ranfredo, vicar of the *potestas* of the city commune of Savona, who was Wilielmus Guertius

Location of disputed property: a vineyard in Albisola, a small village in Liguria, north-western Italy

Source: D. Puncuh, *Il cartulario del notaio Martino. Savona 1203-1206* (Genova, 1974), records no. 99, 119, 222, 802, 804.

Glossary:

- notary – a trained individual who produced legal documents on behalf of courts and litigants.
- *positiones* – A procedural step introduced in northern Italian procedure in the late twelfth century according to which, after the joinder of issue, parties exchanged their versions of the facts relevant to a case through statements that could be either confirmed or rejected by the opponent. This stage of the trial aimed to identify facts that were acknowledged by both parties and did not require proof in the following stages of the trial.
- libel, *libellus* – particularly in Civil and Canon law, the written document of the plaintiff containing his or her allegations and initiating the lawsuit. In principle, the *libellus* had to specify the actions to be brought against the opponent.
- *constitutio Si quis in tantam* – a constitution enacted in 389AD by Emperors Valentinian, Theodosius, and Arcadius, which forbade owners to violently dispossess any possessor of a disputed property before due process, under penalty of the loss of ownership in favour of the possessor and payment of a composition (Codex 8.4.7). In the medieval Romano-canonical procedure, this constitution provided the grounds for an action for recovery of possession and chattels, with the option of claiming further compensation
- chattels – moveable property.
- marquesses of Ponzone, local noblemen from Liguria.
- *potestas*, podestà – In Latin, literally, ‘power, legal authority’. In high medieval Italy, especially from the late twelfth-century onwards, the elected ruler of a city commune, usually coming from another city and theoretically less involved in local politics and feuds. *Potestates* were elected annually or every six months, depending on the local municipal custom
- default judgment – a court judgment awarded in favour of a litigant upon the failure of their opponent to act or comply with certain procedural rules.
- verdict – decision on an issue or case.
- peremptory summons – a final or ultimate summons to appear in court, after which no other summons or warning should be expected.
- default – failure to attend court when required, often resulting in loss of case.

Discussants: Dr Attilio Stella and Professor John Hudson

English case, 1206

Parties: William ‘Blackbeard’ *c.* Everard; Everard’s brother, Stephen, and several others

Date: 1206, court of itinerant justices at Lincoln

Location of disputed property: Booton (Norfolk)

Source: *The Earliest Lincolnshire Assize Rolls, 1202–1209*, ed. D. M. Stenton (22 Lincoln Record Soc., 1926), no. 1384

Glossary:

- eyre – a visitation by the king or his justices
- gaol delivery - the process of trying prisoners currently in gaol to establish their guilt or innocence
- plea rolls – rolls of parchment containing records of the cases which came before the royal courts
- acre – a unit of land area equal to 4,840 square yards
- writ of right – a writ initiating a proprietary action in England and Scotland. It was directed at the lord of land in dispute, directing them to ‘do full right’ to the parties
- Newton Longville priory, Buckinghamshire
- writ of novel disseisin – a writ initiating a swift procedure, making use of a recognition, to reverse recent, unjust disseisin
- verdict – a jury or recognition’s decision on an issue submitted to them
- compurgation – an oath taken with the formal support of a specific number of others, in order to prove or disprove a point in court
- record – a formal statement of the proceedings of an earlier hearing of a case
- default –failure to attend court when required, resulting in loss of case
- judicial combat – a form of trial by ordeal in which two parties to a dispute would engage in a
- duel, either in person or through their champions. In theory, God would grant victory to the party in the right
- recognitors, recognition – twelve law-worthy men empanelled to swear on oath whether the issue put to them (in these cases, the alleged disseisin) was true
- action of right – action, begun by writ, to investigate which of the two parties had the ‘greater right’ to the tenement in dispute
- dual process – the losing party in a case concerning possession thereafter bringing an action concerning property

- substantive law – the elements of law determining rights, claims, obligations; e.g., law as to whom an inheritance should pass on the death of a tenant. Generally distinguished from procedural law, concerned with the mechanics of court action

See also Illustrative texts: esp. no. 7

Discussants: Dr Will Eves and Professor John Hudson

Canon law case, England, 1267

Parties: Robert de Pitchford *c.* Thomas de Neville

Date: 1267-71/2, Court of Canterbury

Location of disputed property: church of Houghton on the Hill (Leicestershire)

Source: N. Adams and C. Donahue Jr (eds.), *Select Cases from the Ecclesiastical Courts of the Province of Canterbury, c. 1193-1300* (Selden Society, 1981, Vol. 95), pp. 256-336.

Glossary:

- *sede vacante* – the jurisdiction held (usually by the prior and chapter of a cathedral) while the episcopal seat was unfilled (i.e., there was no bishop).
- benefice – an ecclesiastical living with an income, usually granted by presentation by a patron
- tithes – a form of taxation consisting of one-tenth of an individual's income paid to an ecclesiastical or lay authority
- Richard Corbet, the patron of the church of Houghton
- quitclaim – the surrender of lands or other rights and all claim to them
- right of presentation – the right of a lay patron to provide a candidate to a Church office
- Nicholas, abbot of St-Pierre-sur-Dives
- Robert, son of Richard Corbet
- *darrein presentment* – a procedure in England using a recognition to determine who is the lawful possessor of an advowson
- chirograph – an agreement written out twice (or three times) on a single piece of parchment, with the word *CIROGRAPHUM* written between the texts. The parchment was then cut, intersecting this word, and each party received a copy of the agreement
- induction – the action of appointing someone to an ecclesiastical office.
- papal legate – a representative of the pope, empowered to act as a judge in ecclesiastical matters.
- rector – the incumbent of a parish church
- prior of Bradley – the prior of an Augustinian priory in Leicestershire, to whom the papal legate, Cardinal Ottobuono, delegated the case in question
- despoiled – dispossessed
- proctor – a representative who appears in court on behalf of a litigant
- *Liber extra* – decretal collection from 1234

- decretal – a papal decree concerning an issue of Canon law, usually issued in response to a query
- *condictio de redintegranda* – an exception found in the False Decretals of Pseudo-Isidore (collected in Causa 3, q. 1, c. 1-6 of Gratian's *Decretum*), which were composed in the ninth century by an unknown author. According to this exception, a bishop whom secular authorities had deprived of his property or his bishopric was protected from any criminal prosecution until these had been returned to him.
- exceptions – arguments raised by the defendant which, if accepted by the court, would delay or defeat the action
- commissary – a representative appointed by the official of a n ecclesiastical court to act in his stead.
- Official - an officer of the episcopal court (usually with legal training) to whom a bishop delegated his metropolitan authority
- excommunication – formal exclusion of a person from the communion of the Church
- plea rolls – rolls of parchment containing records of the cases which came before the royal courts in England
- Shropshire
- spoliation - dispossession

See also Illustrative texts: esp. nos 3, 5, 6

Discussants: Dr Sarah White and Professor John Hudson

French case, 1269

Parties: Abbot and monks of Nogent-sous-Coucy *c.* Enguerrand IV, lord of Coucy

Date: 1269, Pentecost term, at the *Parlement*, the royal court in Paris

Location of disputed property: probably Leuilly-sous-Coucy

Source: *Les Olim*, the registers containing the decisions of the *Parlement*, the royal court: *Les Olim, ou registres des arrêts rendus par la cour du roi*, vol. 1: *1254–1273*, ed. Le Comte Beugnot (Paris, 1839), pp. 751–2. **See Illustrative texts**: no. 16.

Glossary

- *de novo dissaisierat* – 'had recently disseised'
- *arrêt* – decision of court
- *Grand chambre* – the primary judicial arm of the *Parlement* in Paris; refers both to the people who make up the court and a physical location (especially from the fourteenth century); cases often began and ended before the *Grand chambre*
- seisin – possession based on some justifiable claim
- reseise, *resaisire* – put back in possession
- disseise, *dissaisire* – dispossess
- *homo de corpore* (Latin), *homme de corps* (French) – someone of less than free personal status

Discussants: Dr Matt McHaffie and Professor John Hudson

LAW AND LITIGATION CONCERNING DISPOSSESSION, *c.* 1050-1250:

ILLUSTRATIVE TEXTS

1: The interdict *unde vi*, from Justinian, *Institutes*, IV.15.6

2: The *Formulary of Marculf*, I, 28 (seventh century)

3: Gratian on *Exceptio spolii*, via Pseudo-Isidore (excerpts)

4. *Libri feudorum* (first half of the twelfth century)

5: Decretals of Alexander III (1159-81; from the *Liber extra*, decretal collection, 1234)

6: Selections from the *ordo* "Editio sine scriptis" by Ricardus Anglicus (*c.* 1179-89)

7: Writ of novel disseisin from *Glanvill*, ch. XIII, 33 (*c.* 1188)

8: Jocelin of Brakelond, *Chronicle*, showing a lord modifying his behaviour because of awareness of the assize of novel disseisin (text early thirteenth century)

9: Très Ancien Coutumier, 'Part One': *"Concerning disseisin without judgment"* (*c.* 1200)

10. Pillius' gloss on the *Libri Feudorum*, 1.4 (*c.* 1200, with a later addition)

11. Azo, *Summa codicis*, on the interdict *unde vi* (*c.* 1210)

12: Norman Writ of Novel Disseisin in the Très Ancien Coutumier, 'Part Two' (*c.* 1220)

13: *Bracton* on novel disseisin (*c.* 1230)

14: Novel disseisin in the *Coutumes d'Anjou et du Maine* (1246)

15: Norman Writ of Novel Disseisin in the *Summa de Legibus* (*c.* 1250)

16: Novel disseisin case heard before the French *Parlement* (1269)

17: Beaumanoir on novel disseisin (1283)

1: The interdict *unde vi*, from Justinian, *Institutes*, IV.15.6[1]

Translated by John Hudson

An interdict is accustomed to be given for the sake of recovering possession, if anyone has been ejected by force from possession of an estate or of buildings; as for him is issued the interdict *Unde vi*, through which the ejector is compelled to restore possession to him, although he [the ejected person] was possessing by force or clandestinely or by revocable licence [*precario*],[2] from him who ejected by force. But, as we have said above, from imperial constitutions, if anyone occupies a thing through force, if indeed it is in his goods, he is deprived of ownership [*dominio*] of it, if it is another's, after his restoration of it, he is also compelled to give the value of the thing to the one who suffered violence.

2: The *Formulary of Marculf*, I, 28 (seventh century)[3]

Translated by John Hudson

Charter regarding a hearing:

King X. to the illustrious man, Count Y. By God's favour, our faithful man has come to our presence and put it to the clemency of our kingship that your *pagensis* [i.e. one of the people in the count's area of control] has taken his land from him by force [*fortia*] in the place called Z., and is retaining it after him unjustly, and that he can attain no justice from him about this. Therefore we have sent to you the present order, through which we fully instruct that you constrain him in such a fashion whereby, if it is happening thus, he should strive to make good the case towards the aforesaid man according to the laws. If, indeed, he is unwilling, and it is not brought to an end properly before you, you are to take pledges from the said man, and you are to strive in every way to send him to our presence on the [specified] Kalends.

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[1] For text in the original language, see *Imperatoris Iustitiani Institutionum*, ed. J. B. Moyle (Oxford, 1912), p. 612.
[2] For this interpretation of *precario*, see Ulpian (Dig. 43.26.1): A *precarium* is what is granted to one seeking with prayers, to use for as long as he who grants [it] allows.
[3] For text in the original language, see *Formulae Merowingici et Karolini aevi*, ed. K Zeumer (MGH, *Legum* sect. V; Hanover, 1886), p. 60.

3: Gratian on *Exceptio spolii*, via Pseudo-Isidore (excerpts)[4]

Translated by M.W. McHaffie

Question II.

That someone who has been despoiled (*expoliatus*) cannot stand before a judge is proven by many authorities. Thus Pope John says:

C. 1. Before issue is joined, all goods are to be returned to their possessor. It was long ago decreed that the preceptor, bishop, or someone with the foremost authority (*primas*) should restore all possessions, everything that had been taken away (*sublata*), and all other fruits (*fructus*) to the possessor before issue is joined (*ante litem contestatam*).

C. 2. Concerning the same. Likewise, [Pope] Nicholas. All laws, both ecclesiastical and common (*vulgares*), publicly order that all things that have been taken away from someone ought to be restored to person who has been despoiled of his goods (*rebus*).

C. 3. No one ought to be accused when he has been despoiled of his goods. Likewise, Pope Stephen. No bishop, when he has been despoiled of his goods, ought to be accused until everything that had been taken from him by whatever means is restored (*redintegrentur*) to him in accordance with the laws, so that the ecclesiastical primates and synod completely restore all possessions and all fruits to the bishop concerning whom the accusation is made, prior to hearing the accusation.

(Gratian, *Decretum*, C. 2, q. 2, c. 1–3)

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[4] For text in the original language, see the online edition at: https://geschichte.digitale-sammlungen.de/decretum-gratiani/online/angebot.

4. *Libri feudorum* (first half of the twelfth century)[5]

Translated by Attilio Stella

[1.4] Concerning dispute over investiture

If there is a dispute between a lord and a vassal over investiture of a fief, let us look what the law is. If investiture is made in the presence of peers of the lord's court or with a certified charter [*brevi testato*], the lord is to be rightly compelled to put him who is invested into possession of the fief. If indeed he [who is invested] is in possession, and the dispute is moved against him by the lord, he should be granted defence [through oath] on the grounds of possession. If, however, he is not in possession, nor can make proof in the aforesaid ways, then defence [through oath] shall be his who is said to have made investiture.[6]

[1.21(22)] When a knight ought to seek investiture.

[…] We establish that no knight should be ejected from possession of his benefice unless by a proved wrong which has been pronounced through the judgment of his peers, as we said above. However, if the knight says that his peers have judged unfairly, the knight ought to stay in possession for six weeks and come to our presence together with those who have so pronounced and judged, and we ourselves shall decide.

[1.22(23)] Concerning dispute between a lord and a vassal over investiture.

If any knight is in possession of his benefice and the lord denies [having made] investiture, the knight should affirm by oath, if he can, that the benefice is his by his lord's investiture. Moreover, if the lord possesses, and the knight likewise says that he was invested by his lord, and the lord denies, the knight's peers should be summoned, and the truth should be found through them. And if there are no peers, the truth should be found through the lord, since it is not good that the truth is denied.

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[5] For text in the original language, see K. Lehmann, *Das langobardische Lenhrecht (Handschriften, Textentwicklung, ältester Text und Vulgattext nebst den capitula extraordinaria)* (Göttingen 1896), 87, 106-8; also https://clicme.wp.st-andrews.ac.uk/online-texts/libri-feudorum-vulgata/

[6] For a gloss on this text, see below, text no. 10.

5: Decretals of Alexander III (1159-81; from the *Liber extra*, decretal collection, 1234)[7]

Translated by S. B. White

Book II, Title 13, Chapter 5

The question of canonical institution cannot be brought by someone suing for restoration of a benefice

Pope Alexander III to the bishop of Brescia

To your letter about that question, that is, when someone says that he was violently ejected from possession and his adversary says that he, i.e., the person ejected, was not canonically instituted, we respond that [the case] concerning the violent ejection should be sued before [the case] concerning the canonical institution, because even a thief ought to be restored according to the rigor of the law.

Book II, Title 13, Chapter 6

The exception of crime is not valid against someone suing by an interdict unde vi, *because [it is] either by force or secretly*

Pope Alexander III to the bishop of Exeter

Likewise, when someone says that he was violently ejected, or his adversary entered into possession secretly, and his adversary accuses him of a crime, so that by reason of the crime, he might be rejected from his intention, it does not seem to us that the adversary's objection should be admitted, or that the execution of the principal case should be delayed on account of this, since his adversary cannot sue him in a criminal matter before restitution is made when he is presumed to be his enemy.

[7] For text in the original language, see Emil Friedberg and Aemilius Ludwig Richter, eds., *Corpus Iuris Canonici* (Lipsiae: Tauchnitz, 1879, reprint 1959), pars secunda, 281-282.

6: Selections from the *ordo* "Editio sine scriptis" by Ricardus Anglicus (*c.* 1179-89)[8]

Translated by S. B. White

Chapter XXXVIII

Concerning exceptions

What is true in a petitory action is not true in a possessory action, as in the *Code*: When anyone has received a field or any other property whatsoever under a lease, he should first restore possession of it, and then litigate concerning the ownership of the same. (C. 4.65.25)

Chapter XLI

Concerning the office of the judge

When someone is placed in possession for the sake of *re servanda* … [this might have been done because] his adversary was contumaciously absent or hiding and therefore, not defending his case. In which case, if the lawsuit was not contested and [the adversary] takes care to appear in court within the year, he will recover possession. But he who was placed in possession possesses it in the interim.

7: Writ of novel disseisin from *Glanvill*, Bk XIII, ch. 33 (*c.* 1188)[9]

Translated by Will Eves

The king to the sheriff, greetings. 'N.' has complained to me that 'R.' unjustly and without judgment disseised him of his free tenement in such-and-such a vill after my most recent crossing to Normandy. I therefore give you the order that, if the aforesaid 'N.' provides you with security for prosecuting his claim, you are to reseise that tenement of the chattels which have been taken from it, and put that tenement, with the chattels, in peace until the Sunday after Easter. Meanwhile, you are to make twelve free and lawful men of the neighbourhood view that tenement, and have their names endorsed on the writ. And summon them through summoners of good-standing so that at that time they may be before me or my justices ready to make the recognition. And put the aforesaid 'R.', or his bailiff, if he himself cannot be found, under gage and reliable pledges so that he may be there at that time to hear the recognition. Also have there the summoners, and this writ, and the names of the pledges. Witness, etc.

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[8] For text in the original language, see Ricardus Anglicus, "Editio Sine Scriptis," in *Quellen Zur Geschichte Des Römisch-Kanonischen Processes Im Mittelalter*, ed. Ludwig Wahrmund, vol. 2, Part 3 (Innsbruck: Verlag der Wagner'schen Universitäts- Buchhandlung, 1915), 94-95, 108.

[9] For text in the original language, see *Tractatus de legibus et consuetudinibus regni Anglie qui Glanvilla vocatur*, ed. and trans. G. D. G. Hall, with a guide to extra reading by M. T. Clanchy (Oxford, 1993), pp. 167-8; also https://clicme.wp.st-andrews.ac.uk/online-texts/the-balliol-glanvill-a-draft-edition/

8: Jocelin of Brakelond, *Chronicle*, showing a lord modifying his behaviour because of awareness of the assize of novel disseisin (text early thirteenth century)[10]

Translated by John Hudson

In the tenth year of the abbacy of Abbot Samson [1192], by common counsel of our chapter, we complained to the abbot in his court, saying that the rents and revenues from all the good towns and boroughs of England were increasing and growing to the profit of the possessors and the benefit of the lords, besides this town [i.e. Bury St Edmunds], which is accustomed to pay forty pounds and is never raised to more. And responsible for this are the burgesses of the town, who hold such large and so many encroachments in the market-place, in shops and booths and stalls, without the assent of the monastery, and from the sole gift of the reeves of the town, who were annual farmers and, as it were, servants of the sacristan, removable at his pleasure. But when the burgesses were summoned, they answered that they were within the king's assize and did not wish to answer, contrary to the town's liberty and their charters, concerning the tenements, which they and their fathers held well and in peace for one year and a day without challenge. And they said that such was the old custom that, without consulting the convent, the reeves should give sites of shops and booths in the market-place, in return for some rent annually to the reeve's office. But we made a counter-claim, so that the abbot would disseise them of such tenements, concerning which they had no warrant. Then the abbot came to our council, like one of us, and said to us in secret that he wished, so far as he could, to do justice [*rectum tenere*] to us; but that he must proceed according to proper procedure [*ordine iusticiario*], and that, without court judgment, he could not disseise his free men of their lands or rents, which they had, held for many years, whether justly or unjustly. He said that if he were to do this, he would fall into the king's mercy through the assize of the realm.

9: Très Ancien Coutumier, 'Part One': ***"Concerning disseisin without judgment"*** **(*c*. 1200)**[11]

Translated by Will Eves, from an edition of the Latin text found in ms. Ott. Lat. 2964, which is not used in Tardif's edition.

Let no-one dare dispossess anyone of anything except by proper judicial process, for the identity of the person who had the last seisin in the most recent harvest shall be recognised by twelve sworn-men of the neighbourhood. If two or three of these do not know the truth of the matter, the case shall be decided by nine, if they know the truth of the matter.

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[10] For text in the original language, see Jocelin of Brakelond, *Chronicle*, ed. and trans. H. E. Butler (London, 1949), pp. 77-8.

[11] For text in the original language, see https://clicme.wp.st-andrews.ac.uk/online-texts/tac-vatican2964/; also *Coutumiers de Normandie, i. Le Très Ancien Coutumier de Normandie; ii. La Summa de legibus Normannie in Curia Laicali*, ed. E.-J. Tardif (Société de l'histoire de Normandie, Rouen and Paris, 1881, 1896), i. 21-2;

10. Pillius of Medicina's gloss on the *Libri Feudorum*, 1.4 (*c.* 1200, with a later addition)[12]

Translated by Attilio Stella

Here [LF 1.4] defence [through oath] is given to the possessor on the grounds of possession, for possessing is the greatest advantage, as in the Digest, title 'Concerning actions for the recovery of property', law 'He who' (Dig. 6.1.24). And I think that this is to be understood in relation to just possession, because if one is found to possess by malicious deceit, such possession should not be protected, as in the Code, title 'Concerning cases involving freedom', title 'She who' (C. 7.16.21), and because one's deceit should not profit anyone, as in the Digest, title 'Concerning [the action on] partnership', law 'It is correct' (Dig. 17.2.63.7). Hence, what shall it be if neither party possesses? You should answer that defence [through oath] shall be given to the defendant because defendants are treated with greater favour than plaintiffs, as in the Digest, title 'Concerning rules of ancient law', law 'With greater favour' (Dig. 50.17.125), and we should be more inclined to absolve than to condemn, as in the Digest, title 'Concerning obligations and actions', law 'Arrianus' (Dig. 44.7.47).

Ver. 1: And this [holds] when the defendant and the plaintiff are of the same reputation in all respects; otherwise the oath is to be assigned to the more reputable, according to what is noted in the Code, title 'Concerning property loaned and the oath', law 'In *bona fide* contracts' (C. 4.1.3) and in one of the following titles [of the *Libri Feudorum*]: 'Oath-making should not always be granted' [LF 2.33.2].

Ver 2 (amended addition – before c. 1250). And this [holds] when the defendant and the plaintiff are of the same reputation in all respects; otherwise the oath is to be assigned to the more reputable, according to what is noted in the Code, title 'Concerning property loaned and the oath', law 'In *bona fide* contracts' (C. 4.1.3) and in the *Libri Feudorum*, title 'Concerning the custom of a rightful fief', chapter 'Oath-making should not always be granted' [LF 2.33.2]. Consequently, what is said concerning the oath that must be given to the possessor, here [LF 1.4] as well as in the next chapter and in all chapters in which this is said, ought to be understood within the terms set in the aforesaid chapter 'Oath-making'.

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[12] For text in the original language, see A. Rota, *L'apparato di Pillio alle Consuetudines feudorum e il Ms. 1004 dell'Archivio di Stato di Roma* (Bologna 1938), 50-1 for version 1; *Corpus Iuris Civilis. Volumen Parvum* (Lyon 1560), col. 5-6 (available at https://amshistorica.unibo.it/176) for version 2. For the passage being glossed, see above, text no. 4.

11. Azo, *Summa codicis*, on the interdict *unde vi* (*c.* 1210)[13]

Translated by Andrew Cecchinato

3.6. *Who is and is not a legitimate person of standing in courts*

3.6.(3). *What the interdict of momentary possession [is]*

Nevertheless, the interdict of momentary possession is that by which it is sued concerning the retaining of possession: as the *uti possidetis* or the *utrubi*; or by which it is sued concerning the obtaining of possession: as the *quorum bonorum, quorum legatorum*; or by which it is sued concerning the recovering of possession: as the interdict *unde vi*. And therefore, it is called momentary possession, because although someone obtains possession, nevertheless, immediately, like a moment that has instantly passed, he can lose [the case] in an adjudication of property. And this is why he will be deprived of his possession.

3.6.(4). *[Who is] condemned by the interdict* unde vi *loses the property*

But in this interdict *unde vi*, this seems to be fallacious: because the [party] condemned in it loses the property, according to *i. unde vi*, law *si quis*. But that is certainly not done by the power of the interdict, but that of that constitution *si quis in tantam C. unde vi*, when the condition was proposed by that law.

12: Norman Writ of Novel Disseisin in the Très Ancien Coutumier, 'Part Two', ch. LXXIII. 2 (*c.* 1220)[14]

Translated by Will Eves

If someone should be deprived of their tenement after the last, or last-but-one, harvest, he ought to seek restitution through this writ:

> The king, or the seneschal, to the *baillie* of such and such a place, greetings. Order 'H.' that he without delay reseise 'R.' of his tenement in such and such a place, whence he ['R.'] was seised at the last, or last-but-one, harvest, and whence afterwards he ['H.'] disseised him unjustly and without judgment. If he ['H'.] does not do this, if he ['R.'] gives you pledges for prosecuting his claim, then summon twelve lawful knights and men of the neighbourhood so that they may be at the first assize of your *bailliage*, ready to make a recognition upon oath concerning this. Meanwhile, ensure that land is viewed and is in peace, with its chattels, and summon the aforesaid 'H.' so that he may be at the view and at the assize, and have there with you the jurors, and the summoner, and this writ.

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[13] For text in the original language, see *Azonis Summa aurea* (Lugduni 1557, repr. Frankfurt am Main 1968), fo. 44va.

[14] For text in the original language, see *Coutumiers de Normandie*, ed. Tardif, i. 70.

13: *Bracton* on novel disseisin (*c.* 1230)[15]

Translated by John Hudson

It has been said above how a disseisee can re-eject his disseisor at once, free from penalty and without writ, so long as he retains civil possession. Now, moreover, it must be said how recourse is had to the aid of a superior, when he has lost both types of possession, that is natural and civil. When, therefore, a disseisee has been so negligent in this respect that he does not wish or is unable to re-eject his disseisor, help comes to him from the prince's favour, through the recognition of the assize of novel disseisin, pondered and invented over many wakeful nights, for the sake of recovering possession which the disseisee lost unjustly and without judgment, so that the matter may be brought to an end [*terminetur*] through a summary examination [*cognitionem*] without great solemnity of law, as it were through a short cut [*compendium*].

14: Novel disseisin in the *Coutumes d'Anjou et du Maine* (1246)[16]

Translated by M.W. McHaffie

If any man, noble or commoner, comes to his lord – so long as the lord has jurisdiction (*vaerie*) in his land – and says to him, 'Lord, such-and-such a man recently came to me and disseised me (*a dessesi*) of my house, or of a meadow, or vines, or land, or rents, or some other thing of which I have had enjoyment (*j'ay esplétée*) this year, the year before, and the year before that and for which I have been in the lord's service up until the moment that he [the dispossessor] disseised me wrongly and with force; thus I ask you to take this matter into your own hands.' The lord ought to say: 'I shall willingly do so; but give me pledges to prove that he has disseised you wrongly and with force, as you have said.' If he will not give pledges, then the lord does not have to disseise the other man. If he says: 'I shall willingly give you pledges', then the lord ought to take good pledges of sufficient value according to magnitude of the case. When the lord first takes the pledges, he should deliver a message orally or by letter (*dire ou mander … message*) to the other party that he [the complainant] has given pledges to prove that he [the accused] disseised him wrongly and with force of such-and-such a thing and he speaks about novel disseisin (*nommera de nouvele dessesine*): 'I come to you to find out if you will give pledges to defend yourself.' And if he says, 'I shall give you nothing', then the lord should give seisin to the other party [the complainant] because of the pledges that he gave; but if he [the accused] says, 'I shall give you good pledges to defend myself that there is nothing to what he says, and that [I have acted] in accordance with law (*c'est ma droiture*)', then the jurisdiction-holder (*la justice*) should give the two parties a day in court and keep the property (*la chose*) in his hand until one or the other party wins seisin by a judgment. […]

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[15] For text in the original language, see 'Bracton, Henry de', *De legibus et consuetudinibus regni Anglie*, ed. and trans. S. E. Thorne (4 vols; Cambridge, MA, 1968–77), iii. 25.

[16] For text in the original language, see *Coutumes et institutions de l'Anjou et du Maine antérieures au XVIe siècle*, ed. Charles-Jean Beautemps-Beaupré, vol. 1, pp. 103–5.

15: Norman Writ of Novel Disseisin in the *Summa de Legibus*, ch. XCIII.1 (*c.* 1250)[17]

Translated by Will Eves

It should be noted that the writ of novel disseisin is drawn up with these words:

> Order Robert that he should justly and without delay reseise Richard of land at *Becca* [Le Bec-Hellouin], of which he [Robert] disseised him unjustly and without judgment after the last harvest before this. If he [Robert] does not do this, summon a recognition of the neighbourhood to be at the first assize of the *bailliage*. Meanwhile, ensure that the land is viewed and is in peace.

16: Novel disseisin case heard before the French *Parlement* (1269)[18]

Translated by M.W. McHaffie

The abbot and convent of Nogent were complaining that the lord of Coucy had recently disseised (*de novo dissaisierat*) them of the hay from a meadow—namely, a cartload of hay—even though they were in seisin (*in saisina*) of that meadow at Leuilly and had had the hay from it for many years, and that the meadow belonged to them by gift of one of his [the lord of Coucy's] men. For this reason, they requested that the lord [of Coucy] be compelled to compensate them for this matter and [be compelled] to restore the said hay to them. For his part, the same lord argued (*proponebat*) that he did not have to do this because that meadow, after the death of his *homo de corpore*,[19] should have come to him [i.e. the lord of Coucy], and, according to the custom of his land (*secundum consuetudinem terre sue*), no one other than a *homo de corpore* was able to hold that meadow; he also offered other arguments for why he did not have to do this, and he offered to prove his arguments. He nevertheless confessed that the abbot and convent had been in seisin of the meadow for two years. For their part, the abbot and the convent denied every argument that had been put forward in favour of the aforesaid lord. Afterwards, when the court asked the parties if they wanted to hear a decision about whether the aforesaid abbot and convent ought to be reseised of that hay according to what had been said, they responded that yes they did. This was done: because the lord [of Coucy], who had recognised the monks' seisin, had committed himself to hearing a decision in this manner before he had made his proofs for the things that he had said, it was judged that, according to what had been said, the abbot and the convent ought to be reseised of the hay.

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[17] For text in the original language, see *Coutumiers de Normandie*, ed. Tardif, ii. 220.

[18] For text in the original language, see *Les Olim, ou registres des arrêts rendus par la cour du roi*, vol. 1: *1254–1273*, ed. Le Comte Beugnot (Paris, 1839), pp. 751–2.

[19] A man of less than free personal status.

17: Beaumanoir on novel disseisin (1283)[20]

Translated by M.W. McHaffie

§ 955. Novel disseisin is if someone takes something from me concerning which I have been in seisin peacefully for a year and a day.

§ 956. For this reason, if I hold or wish to make use of something concerning which I have been in seisin peacefully for a year and a day, and someone has taken it from my hand or from the hand of someone under my orders, or if someone wishes to take the property (*la chose*) from me by means of a large number of men or with arms, so that I dare not stay for fear of my life, then in such a situation I have a good case to complain about force and novel disseisin. You can see that there is no force without novel disseisin, but novel disseisin can take place without force, if it is as said above.

§ 961. When a plea of novel disseisin is defeated, then the person losing seisin may have the person who obtains seisin cited in court again concerning ownership, but this must be within a year and a day from when seisin had been delivered to him; if he lets a year and a day lapse, then he has renounced ownership, and may henceforth claim nothing further [concerning that property].

[20] For text in the original language, see *Coutumes de Beauvaisis: Texte critique publié avec une introduction, un glossaire et une table analytique*, ed. A. Salmon, vol. 1, pp. 486, 488.

Law and Litigation concerning dispossession *c.* 1050-1250: Some brief suggestions for teaching purposes

This series of discussions is designed for the general listener, for students, or for teachers of legal history. If you are considering incorporating it in teaching, we very much emphasise that the materials can be used as you like. However, the following are some possibilities:

1. The audio-episodes and textual materials can be incorporated in the bibliography of any course. They would be useful to advanced level students writing papers on subjects ranging from lordship in the twelfth century to the beginnings of the English Common Law, and from the practical influence of Roman and Canon Law in mediaeval Europe to different traditions of legal historiography.

2. Extracts from the audio-materials may be used within lectures or seminars or set as preparation for classes.

3. The collection of illustrative texts provides translated primary source material that can be used for particular study within classes.

You may also wish to use some of the questions that we posed ourselves in formulating the series:

(i) How does litigation over dispossession relate to fundamental concepts such as possession and property?
(ii) Why do actions relating to dispossession feature so prominently in Common Law historiography, less prominently in other historiographies?
(iii) What types of disputes arise over dispossession? Is there a link between type of dispute and socio-economic circumstances?
(iv) What are the similarities and contrasts in litigation over dispossession in different areas and systems?
(v) How far does litigation and procedural development affect legal ideas?
(vi) How does study of dispossession act as a test case for the study of comparative legal history?

We very much welcome further suggestions of how the materials may be useful for teaching purposes and will seek to share ideas. (email: jghh@st-andrews.ac.uk)

Note that written scripts from which we worked for the audio-episodes are available on request.

For purposes of reference please cite as 'Litigation concerning possession c. 1050-1250: a comparative study' (University of St Andrews, 2021).

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