Possession and dispossession

mainly in the 12th & 13th centuries : learned law, Anglo-Norman law & some lesser-known customary laws (Ireland, Wales, Norway and Iceland)

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DISPUTES CONCERNING RIGHTS TO SECULAR & ECCLESIASTICAL PROPERTY AND JURISDICTION

We may begin by looking at some typical circumstances in which disputes arose (whether or not submitted to adjudication) over rival claims to territory, its revenues and other valuable rights including jurisdiction. Side by side with such secular examples, there were frequent disputes over appointments to ecclesiastical *officia* and *beneficia*[1]. As so often in medieval law, describing a legal custom in Latin could obscure important distinctions. In Anglo-Norman law for example, even where *possessio* is used to translate «seisin» (Latinised *saisina,* adjectival form *saisitus),* this turns out not to be identical with the basically factual *possessio* protected by the Roman interdicts : seisin of the disputed object is always linked with some right to it and the disseisin complained of had always to be *injuste*[2].

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1 . See J.F. NIERMEYER, *Mediae Latinitatis Lexicon Minus,* Leiden, 1976, s.vv. & cf. also *temporalia ;* for *spiritualia* see Comp. Ia, 5.2 & X.5.3 *de simonia.*

2. N. D. HURNARD, «Did Edward I reverse Henry II's policy upon seisin?», in *English Historical Review* , t. 69 (1954), p. 536, n. 3.

In medieval law, without necessarily using the Roman legal language of *dominium* or *proprietas,* both the Church and lay persons or kin-groups might wish or need to assert their occupation or lordship (what came later to be called *seigneurie* in French, *signoria* in Italian, from the common medieval Latin word *senior* for a *dominus)* of territory and the rights thought of as belonging to it, so as effectively to exclude adverse claims. By contrast, the concern of superiors, whether ecclesiastical or secular, was sometimes more with imposing and keeping the public peace which is disturbed if such disputes are left to be resolved by the parties, or only settled by recourse to archaic procedures such as judicial combat or other forms of the so-called *judicium Dei,* against which the Church itself eventually rebelled, having earlier sanctioned it with elaborate rites and dramatic ceremonies[3]. In the course of the 12th and 13th centuries, side by side with older procedures but soon widely supplanting them, remedies came to be refined in both canon and secular law which emphasised the right of the person in possession, or recently expelled without a judgment, to have that possession confirmed and not to have to answer any plea by an opponent while deprived of it.

(As well as the seizure of territory and the usurpation of jurisdiction, we should not forget that **movables** were capable of being stolen. Side by side with the treatment of theft found in customary laws, the terms *spoliare, dissaisire* and vernacular equivalents were also applied to theft and usupation[4]. The treatment of questions of the title of a person who acquires stolen movables, with or without knowledge of their origin, also deserves discussion; this paper however concentrates on rival claims to territory and to lay or spiritual lordship, though with all the rights, including movables, belonging to it.)

For present purposes, three types of claim to territory and to its associated rights may be distinguished :

• Land taken without the knowledge or consent of a rival claimant, or withheld from the rival, and without a judgement, as distinct from :

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3. IVth Lateran Council, 1215, c. 18 prohibiting clerical involvement in such procedures, after which they withered away.

4 . See F.W. MAITLAND, «The seisin of chattels», in *Law Quarterly Review*, t. 1 (1885), pp. 324-341 (& cf. his «The mystery of seisin», *LQR* , t. 2 (1886), pp. 481-496 ; «The beatitude of seisin», *LQR* , t. 4 (1888), pp. 24-39 & *ibid.* pp. 286-299).

• Original acquisition of «empty» land (never known to have been occupied, or because abandoned, etc) and

•Derivative acquisition by descent (cf. the idea that *le mort saisit le vif*) or *inter vivos* (though not necessarily by feudo-vassalic contract).

Let us first deal with land claimed by virtue of descent from its previous holder or holders, *terra hereditaria* or *aviatica,* i.e. descent from within a defined kin-group, which descent gives some sort of right, not necessarily exclusive, to the land in question. Some features of *terra hereditaria* are :

— Joint occupation and exploitation by a defined kin-group.

— Increasing the size of the group of those dependant on the land or who may claim a benefit in it, by admitting spouses, fosterbrothers etc.

— Kinship and inheritance : the lineage comprised a fixed number of generations (3, 4, 5, even 9), and collaterals but not affines might be included.

— Keeping hereditary land in indivision, or dividing it on customary occasions among the claimant kin; the rules for division, and the recovery (redemption) from remoter kin or strangers of divided land or land which had been alienated (cf. *retrait, óðal,* e.g. as described below, Nordic Law).

— The conversion of property from being inalienable to being alienable, and the converse. The procedure by which inherited land could become alienable, notably because of the holder's destitution, were complex (see Nordic Law, below). Land which is lawfully alienated is *questus* in the hands of its acquirer, but may become *terra hereditaria* among his descendants.

— Under feudo-vassalic pressure, there may be a conflict between right by descent and intervention by the lord. When men come to hold different fiefs of more than one lord (the descent into «bastard feudalism») such conflicts are not uncommon.

Examples of seizure of property left unprotected (as where the tenant has died and his heir is a minor, or where the lord is absent and unable to return quickly) also include boundary disputes or a deliberate encroachment[5]. The qualification of such

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5. Urban examples illustrated with diagrams in J. HEERS, *La ville au moyen âge.* 1990, pp. 247sq. ; and examples from the royal Eyres (judicial visitations) of the City of London in the 13th cent., such as the unauthorised construction of a *pentis* (<Lat. *appendicum,* an extension to a house which

seizure as «violent» or «by force of arms», *vi armata,* ceased to be crucial, in medieval as in Roman law, as litigants came to prefer the rational procedures of these possessory remedies, and their origin in peace-keeping ceased to be dominant.

Typically, disputed possession or unlawful disseisin, actual or threatened, takes one of three forms. We are assuming that the dispute has not been the subject of a conclusive judgment.

• I am occupying the land (or exercising the rights) in dispute, and you threaten to evict me. I want to remain in possession.

• I was the person most recently in possession, but you have evicted me. I take steps as soon as possible to be re-instated. (The time-limit within which I must act is brief : «since last harvest» or «since the king's last crossing to or from Normandy» and so on.)

• I claim the right to take possession of land I have not yet had the chance to enter, and you prevent me.

These cases, also familiar from Justinian's Institutes 4.15, *de interdictis,* have customary law equivalents and canonical variants which we shall discuss.

ROMANO-CANONICAL LAW

This, in summary, is the romano-canonical law on the re-instatement etc. of those dispossessed or otherwise deprived of lands or benefices, offices, jurisdiction and so on[6].

The early glossator Placentinus (a critical pupil of more than one of the Four Doctors, Irnerius' immediate successors, fl. 1160; ob. Montpellier c.1192[7]) proposed four presumptions as to ownership, possession and their inter-relation :

> *Qui dominus fuit, nunc dominus esse praesumitur;*
> *Qui possessor fuit, adhuc possidere praesumitur*

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encroached on the street or on a neighbour's land) in the volumes of the *London Record Society.*

6. See RUFFINI.

7. H. KANTOROWICZ and W.W. BUCKLAND, *Studies in the Glossators of the Roman Law,* 1938, reissued & ed. P. WEIMAR, 1969. Placentinus' surviving work is included in a reprint of 16th cent printed editions, *Corpus Glossatorum Iuris Civilis,* pub. Turin, 1966 et seq., vol. 1, *Varii,* including a celebrated treatise on actions, *Libellus de varietate actionum.*

Qui detinet, possidere praesumitur;
Qui possidet, titulum possessionis habere praesumitur.

It remains to be seen whether *qui possidet dominus esse praesumitur*[8], a view toward which Maitland and others have inclined. Let us try to trace this possible evolution.

The Roman background

The Roman background lies in the emergence of a *condictio possessionis,* the *actio* (or *interdictum) momentariae possessionis* and the *exceptio vitiosae possessionis*, together with the insistence on prompt action by the limitation *intra annum.* The *interdicta possessoria* were (a) *unde vi (armata vel non),* Dig.43.16, *de vi et vi armata,* CJ 8.4 & 5; (b) *utrubi*, Dig.43.31.1, (under which possession went to whichever of the rival claimants had held the item longest in the preceding year) and (c) *uti possidetis,* Dig.43.17 *(retinendae vel recuperandae possessionis),* CJ 8.6. We might add for completeness' sake the *actio Publiciana,* which was effective against everyone except the *dominus :* Dig.6.2. In the Institutes, the distinction is noted between remedies *adipiscendae possessionis* and *retinendae vel reciperandae possessionis :* Inst. 4.15.2-6. The earlier canonists would have known about *unde vi* from the constitution 4.22 of Theodosius' Code, which appears in the *Lex Romana Visigothorum, h.t.*[9]

The basic CJCiv texts on ownership claims, *rei vindicatio,* are Dig.6.1 and CJ 3.32. Dig. 41.2 *(de adquirenda vel amittenda possessione)* Ulpian, 12.1 (cf. CJ 8.1.3, a.293) states the classic Roman rule that ownership and possession have nothing in common. The context shows this to mean that they are not mutually exclusive : on the contrary, the failure of a proprietary claim does not prevent the defeated party from seeking a possessory intedict, and *vice versa : Nihil commune habet proprietas cum possessione : et ideo non denegatur ei interdictum 'uti possidetis', qui coepit rem vindicare : non enim videtur possessioni renuntiasse, qui rem vindicavit.*

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8. See article of this name by H. KIEFNER, in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (rom. Abteilung)* , t. 79 (1962), pp. 239-275 & 294-306.

9. In G. HAENEL's ed. of *LRV,* 1849, p.128.

Canon law

The Canonists came to express the Roman distinction between ownership and possession rather differently, preferring that where both questions were in issue, they should if possible be disposed of in the same judgment : *Liber Extra* (X) 2.12 *de causa possessionis et proprietatis,* e.g. c.1, *tam momenti quam proprietatis causam sub uno eodemque iudice debere cognosci.* That did not mean that no weight was to be given to the respective grounds for the claim or defence : for example, a decretal of Celestine III[10] ruled that where both kinds of claim were joined, the judge-delegate could begin by hearing the evidence as to the right of possession and, if convinced, decide the case on that evidence alone : another example of treating possessory remedies as conclusive. Much depends on the circumstances : for example, Tancred's *Ordo iudiciarii* (c.1216) 2.9-13 continues to set out the procedure for possessory and petitory actions consecutively, since the wording of the *libelli* have to be distinguished[11].

A little before Tancred, the canonist Richardus Anglicus, c.1196, gave *libelli* for two of these possessory claims. The *querela de possessione recuperanda* reads :

Deo et vobis (the names of the judges) *conqueror ego R* (the *actor* or demandant, plaintiff) *de G* (the *reus*, defendant in wrongful possession) *qui vi mihi abstulit fundi illius possessionem, etc.*

The *querela de retinenda possessionis* of an *actor* who fears imminent eviction is :

Deo et vobis, etc conqueror ego R de G qui mihi inquietat possessionem illius rei or *qui non sinit me quietate possessionem illam possidere, etc*[12].

Tancred's *formulae* propose a *libellus recuperanda possessionis vel restitutionis* in these terms :

Vobis, domino H, Bononensi episcopo, conqueror ego Titius de Seio qui me spoliavit de possessione (vel : quasi possessione

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10. Comp. IIa, 2.6.un.>X.2.12.2 (a1191x98).

11. F.C. BERGMANN ed., *Pillius, Tancredus, Gratia libri de iudiciorum ordine* , Göttingen, 1842, repr. Aalen, 1965, pp. 164 sq.

12. L. WAHRMUND ed., *Summa de ordine judiciario* , in *Quellen zur Geschichte des römisch-kaknonischen Prozesses im Mittelalter* , II.3 (1915), repr. Aalen, 1962, §8 at p. 5.

talium rerum vi deiecit, etc) unde (quasi-) possessionem ipsarum rerum cum fructibus inde perceptis et qui percipi potuerunt, mihi restitui peto ...(2.9).

By the end of the 12th century, these canonical texts (canons and decretals, including forgeries then accepted as genuine, and commentaries) are often grouped under the rubric *de restitutione spoliatorum* (see e.g. X.2.13 and Bernard of Pavia, *Summa Decretalium* 2.11). The terms commonly used from Gratian onwards are *expoliatus* or *spoliatus, ejectus* or *expulsus* for the one who, or whose property, has been despoiled. Repeatedly the texts say that he is to be restored to his possessions (Gratian C.2, q.1, c.10 & q.2 and elsewhere). In C.3, q.1, c.1, we read *Episcopis suis rebus expoliatus vel a propriis sedibus ejectis omnia, que eis ablata sunt, legibus sunt redintegranda*[13] ... (likewise cc.2-4 and many other canons in qq.1 & 2 of C.3) and need not answer to any plea concerning the property or office in question until so restored, the words used being *restitutio* or *redintegrandus*[14] :

Si episcopus suis fuerit aut ecclesiae sibi commissae rebus expoliatus ... a sede propria ejectus aut in detentione aliqua a suis ovibus fuerit sequestratus, tunc canonice ante in pristino statu restituatur cum omni privilegio sui honoris, et sua omnia, que insidiis inimicorum suorum ei ablata fuerant, legibus redintegrentur. Non enim convocari vel preiudicari poterit ...(subject to certain exceptions, and to voluntary submission to legal process on his part) : C.3, q.2, c.8.

The exemption from answering any relevant plea when deprived of possession appears in the mid-9th century, in a forged Epistle of Pope Eusebius II (a.309/10) c.12[15] :

Nam nec convocari ad causam nec diiudicari potest expoliatus vel expulsus ... unde et antiquitus decretum [viz. C. Theod., 130 years later than Eusebius] *omnes possessiones et omnis sibi sublata ... ante litem contestatem* [i.e. prior to any petitory action] *preceptor vel primas possessori vestituat* ... cp. cc. 11, 13, 14.

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13. From the forged decretals (Pseudo-Isidore) ; in HINSCHIUS, p. 215.

14. The word *redintegrandum* seems first to appear in the *interpretatio* to *Pauli Sententiae* 1.7 and the *epitome Aegidii,* constituents of the *Lex Romana Visigothorum* or Breviary of Alaric.

15. c. 850 ; in HINSCHIUS, p. 237-238.

This is the text adopted by Gratian, Decretum C.3 qq 1, 2. (It had already been copied earlier, *via* Ivo of Chartres, in the secular Anglo-Norman compilation called the *Leges Henrici Primi*, 1114x1118, e.g. in cc 5.3, 53.5, 61.21.) In his *Summa* of Gratian written no later than 1159, Stephen of Tournai (1128x35–1203) summarised C.2,q.2, c.1 thus : *quibus ablatae sunt res suae vel etiam sedes [episcopi] non per judicialem sententiam sed per violentiam, unde et restituendi sunt per possessoria judicia, i.e. per interdicta vel per actiones in factum redditas loco interdictorum*[16].

The practical effect of these canons was to give a procedural advantage to the person dispossessed, exempting him from answering any plea concerning the property or office in question until re-instated. This was both realistic and widely effective at a time when there was little public authority to enforce judgments. A judgment, and even less convincingly the order of the judge *ex officio* (as in Gratian, C.3, q.1, *dictum post* c.2) commanding a wrongful occupant to surrender possession, might be difficult, even impossible, to enforce.

Bernard of Pavia, in his *Summa Decretalium*[17] (c.1191x98) on Gratian's *Decretum* states the principle like this :

... in integrum restituo est prioris status vel juris redintegratio; est autem a judice facienda ...(1.31.1,2).

He then gives five rules to be followed in these cases :

—nullus iniuste spoliatus potest accusari super illo vel alio crimine ante integri restitutionem;

— omnia ablata in eo loco sunt restituenda, unde constat esse ablata;

— omne damnum ex iniusta expoliatione ipsi spoliato contingens est ab spoliatore restituendum;

— nulli spoliato induciae sunt denegandae (i.e. the person despoiled is not to be denied the right to invoice legal delays, *induciae);* and

— in damno dato creditur eius qui damnum passus et juramento (2.9.2-6).

By the early 13th century, the canonists came to classify possessory actions in the way suggested above. Actions *recuperandae possessionis* or *restitutionis* were available to recover

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16. J.F. von SCHULTE ed., *Die* Summa *über das Decretum Gratiani*, Giessen, 1891 repr. Aalen, 1965, p. 165.

17. See bibliography.

possession of property from which one had been ejected; *adipiscendae possessionis,* to be put into possession which was being prevented or which the *actor* feared would be denied; and *retinendae seu defendendae possessionis,* to maintain a threatened possession[18]. A further strengthening of the first of these remedies was made in 1215 by the IV Lateran Council. Canon 39, incorporated into *Compilatio IIIa* and thence into the *Liber Extra* 2.13.18, recognised the difficulty of bringing a petitory claim, but made subsequent legitimate possession of a *beneficium* (land or other property and rights) by a third party subject in effect to the acquirer's good faith[19], adding a passing reference to the soul's danger in retaining property known to have been wrongly taken from another. (Innocent III's draftsman was criticised by some contemporary decretalists and legists who pointed out that *vitium reale* normally afflicts the subsequent possessor anyway, citing Inst.2.6, a text which also refers expressly to the requirement of *bona fides* by a subsequent acquirer if he is to defend himself against the rightful claimant). The reformed *condictio ex canone 'Redintegranda'* of c.39 was presented like this :

> *Sepe contingit quod spoliatus iniuste, per spoliatorem in alium re translata, dum adversus possessorem non subvenitur per restitutionis beneficium spoliato, commodo possessionis amisso, propter difficultatem probationem ius proprietatis amittat effectum. Unde, non obstante civilis iuris rigore, sancimus ut si quis de cetero scienter rem talem receperit, cum spoliatori quasi succedit in vitium, eo quod non multum intersit, presertim quoad periculum animae, detinere iniuste ac invadere alienum, contra possessorem huiusmodi spoliato per restitutionis beneficium succurratur*[20].

By this time, the canonists had come to treat Justinianic Roman law (that is, the *Corpus Juris Civilis* in the form known as the Bolognese *Vulgata),* for example the doctrine about *metus* and *bona fides* as well as the rules governing the possessory interdicts,

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18. e.g. Tancred, *op. cit.*, above (n.11) 2.9-11.

19. Commentators on the canon cite the Roman law on *metus* (e.g. Ulpian in Dig.4.2.16 : see next note, *op. cit.*, p. 343 for Vincent of Spain).

20. Text as in A. GARCÍA Y GARCÍA, *Constitutiones Concilii quarti Lateranensis una cum commentariis glossatorum,* Vatican, 1981 (series : *Monumenta Iuris Canonica A : corpus glossatorum* vol. 2). It includes the commentaries *(apparatus)* of John Teutonicus at p. 238, Vincent of Spain, p. 343 and Damasus, p. 440.

as a contributory source[21] both to canonical texts and the *apparatus* on them. As we see, however, they were not afraid to adapt Roman principles to what were perceived to be the legal needs of their age. The process of simplifying the procedure implied in the conciliar canon *Saepe contingit quod spoliatus iniuste* was carried further at the turn of the century by the decretal *Saepe contingit, quod causas committimus*[22] (1306) which introduced a new summary procedure, among other things applicable to actions *adipiscendae* and *recuperandae possessionis.*

ANGLO-NORMAN LAW

The sequence of possessory remedies «invented» under Henry II Plantagenet (1154-89) and extended under other names and forms in the 13th century, is concentrated in the period 1164–1180, although the *Leges Henrici Primi* (1114x1118) claim as English the canonical rule, *nemo placitet dissaisiatus*[23].

The innovations of Henry II Plantagenet's reign were as follows :

• 1164, Assize of Clarendon, the assize *Utrum,* to determine whether a disputed property was held according to lay or ecclesiastical law. It seems already to have existed in Normandy.

• [before 1166, the assize of «Fresh Force» in the City of London[24].]

• ?1166[25], the assise of Novel Disseisin, the original text of which has not survived but which is easily reconstructed from

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21. RUFFINI, p. 288.

22. *Clementinae* 5.11.2.

23. LJ DOWNER ed., Oxford, 1972 ; cf. LHP 5.3, 53.5 which makes *dissaisiatus* equivalent to *expoliatus* ; 61.21, and note to 5.3 at p. 307 ; but this appears to quote the canonical version given by Ivo of Chartres, *Panormia* 4.82 (c. 1095).

24 . T.F.T. PLUCKNETT, *Concise History of the Common Law,* 5th ed., 1956, p. 317, n. 3.

25. R.C VAN CAENEGEM, *Birth of the English Common Law,* 2nd ed., Cambridge, 1988, p. 42, n. 47.

innumerable records. The equivalent in Normandy is *nova dissaisina*[26].

• 1176, by c.4 of the Assize of Northampton, the assize *Mort d'Ancestor* by which, upon the tenant's death, his heir sought to compel the lord to give him seisin. In Normandy a claimant *de saisina patris* could use the *querela de antecessoris saisina*[27].

• 1179x1180, *darrein presentment,* to settle which among rivals enjoyed an advowson, i.e. *ius patronatus.* In Normandy the equivalent is called *de ultima praesentatione ecclesiae.* It was in the patron's interest to use the assize, since c. 17 *in fine* of the 3rd Lateran Council, 1179 made the presentation pass to the bishop if the patron failed to exercise it within three months of the vacancy (the rule is repeated in X.3.38, *de iure patronatus* c.3).

The law-book known as «Glanvill», c.1187-9[28] gives formulae for all these assizes.

The key period is 1166 to 1170. In 1166 there was a General Eyre (a general visitation of the realm by the king's judges), among other things to enforce the penal provisions of Clarendon made in 1164. The Eyre was suspended in 1170. The Pipe Rolls for 1166–1170 (exchequer records listing royal revenue, including that derived from judicial proceedings) contain entries linked to cases of disseisin, but not again until 1175 when the Eyre resumed[29].

As we have seen, in developed Canon law possessory and proprietary claims were ordered to be heard together if possible and a single judgement delivered. In customary laws, claims based on descent or feudo-vassalic contract and on possession were subject to different procedures, reflecting various ways in which a person or a kin-group acquired control, particularly of land, which legal custom recognised and for the revindication of which it

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26. See E. TARDIF, *Coutumiers de Normandie*, 1881 ; *Très ancien coutumier (TAC)*, part II, c. 73.1 dealing with *possessio* and *proprietas ; de spoliatione*, the *querela novae dissaisinae* etc).

27. *TAC*, pt II, c. 21.

28. G.D.G. HALL ed., *Treatise on the laws & customs of the realm of England commonly called Glanvill,* London, 1965. Book 12 deals with proprietary actions and book 13 with seisin. Cf. also J.H. BAKER, *Introduction to English Legal History,* index s.vv.

29. R.C. VAN CAENEGEM, *op. cit.*, n. 25 above, pp. 57sq. & refs. for these details.

provided procedures – procedures which did not necessarily stress any dichotomy between ownership and possession as understood in *droit savant.* In England the possessory assizes came to be treated as final by the parties in most cases and were rarely followed by petitory/proprietary claims (in the archaic form of trial by Battle)[30].

Largely for want of sufficient record evidence, some questions remain unanswered about the influence of the Romano-canonical developments discussed above on the reforms of Henry II Plantagenet's reign. Richardson & Sayles, in the introduction to their edition of *Select cases of Procedure without writ under Henry III*[31] and van Caenegem[32], argue that the remedy *ex canone Redintegranda,* which first appears c.1189, or the early 13th century *actio spolii* (that is, the *condictio* or *actio* rather than the *exceptio)* cannot, for obvious chronological reasons, have inspired Henry II's legislation. Richardson & Sayles perhaps are over-partial to English innovation in rejecting Romano-canonical parallels when they say that, because Henry II's possessory assizes introduced a «new principle» of near-finality, «few of the many thousands of actions [i.e. using the assize of novel disseisin] were followed by litigation to decide ownership. The work of jurors and judges was well enough done to discourage the disappointed litigant from venturing further, and the English possessory action decided, for most practical purposes, the question of title»[33]. Canon law had reached the same point, as we have seen, certainly by the close of the 12th century, in Celestine III's decretal *Ad ultimum*[34].

The Custom of London

A number of urban centres in the British Isles (some in Scotland and Ireland as well as in England) had local courts where customary forms of possessory remedies were available, customs

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30. R.C. VAN CAENEGEM, *Royal Writs (...) from the conquest to Glanvill,* (Selden Society, vol. 77), passim.

31. Selden Society, vol. 60 (1941), pp. cxxix sq.

32 .*Royal Writs* ... (n. 30 above) at pp. 268 sq. ; pp. 270-271, 387-389.

33. *Op. cit.*, n. 31 above, p. cxxix.

34 . Above, n. 10.

which remained in force long after the reforms of Henry II[35]. Book 1 :2, c.55, of the *Liber Albus* of the City of London provides a remedy *de dissaisina sine judicio*; and c.56, *de assisa facta* which may be the lost Assize of 1166. It speaks of *de recognitione novae disseisinae* and Book III.1 has *Fresh Force*, an alternative name for novel disseisin[36]. The action of *Fresh Force* was commenced by a plea or plaint of *intrusion*[37]. Several cases in the London records show the use of this form of novel disseisin to claim, not land itself but the rent due from it to the lessor or his successor in title, which rent the party opponent has withheld. The 13th law-book known as Bracton has an account of the attempt to resolve a conflict between the Royal and local courts in dispossession cases[38] .

The close parallels between these examples and the treatment of the problem *de nova dissaisina, de saisina patris*, etc. in Northern France will be obvious. We could consider examples from Normandy or from Clermont en Beauvaisis; in the latter, *force, nouvele dessaisine* and *nouvel tourble* (paras 955-7) in Beaumanoir c. 32[39] ; and in the Touraine-Anjou and Orléans

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35. See generally M. BATESON, *Borough Customs* (Selden Society, vols 18 & 22).

36. Examples : London Eyre of 1244 (London Record Society [=LRS], vol. 6) 188-240, 243, P,47 (N.D.) & 244 (MdA) ; London Eyre of 1276 (LRS, vol. 12) 499 (ND of rent) ; 504, 516 (ND) ; 494, 502 (MdA) ; 514 (writ of right patent) ; London Possessory Assizes (LRS, vol. 1), e.g. no 271, in 1317, assize of *Fresh Force.*

37. A.H. THOMAS, *Calendar of Plea & Memoranda Rolls* 1323-1364, 1926, Introduction, and entries for 20.ix.1341, 30.vii.1343, 2.ix.1349 etc. The entry for 18 May 1338 at p.169 reports Oxford's request to London for procedural details of *Fresh Force*. Plucknett suggested it was earlier than the common law's novel disseisin.

38. f.272a, WOODBINE and THORNE edd., vol. 3, p. 295 : mort d'ancestor yields *(cadit)* to local custom if the land or rent, etc. lies within the borough (or other place in which it is claimed that local custom prevails) and is *questus ;* cp. Mary BATESON (above, n. 35) Selden Society, vol. 18, pp. 243-245 (vol. 1, Borough Customs), at Carlisle, 1310.

39. Philippe DE BEAUMANOIR, *Coutumes de Beauvaisis* , ed. A. SALMON, 2 vols., 1899-1900, repr. Paris, 1970 ; vol. 1, § 954 et s. ; and see the imaginary case *Pierre contre Jean*, §§ 979-982. For Normandy see e.g. TARDIF, *TAC* 73 et s, *querela novae dissaisinae* & 21, *qu. de antecessoris saisina ;* and cp. J. YVER, in *Ius Romanum Medii Aevi* , I.4.a.

customs recorded in the *Etablissements de Saint-Louis*[40]. The surviving French texts, however, are all later that those of Henry II Plantagenet. The comparison of seisin with Germanic *gewere,* Lat. *(in)vestitura,* would take us too far from the 12th and 13th centuries, but deserves study[41].

We now turn to a different world, to examine briefly the equivalent remedies in the customary laws of Ireland, Wales, Norway and Iceland. In the case of Ireland in particular, the law which the texts describe is extremely archaic, but has features worth examining.

CELTIC LAW – IRELAND

A claim to *fintiu,* kin-land or *terra hereditaria,* was made by three ceremonial entries on the land, called *tellach* (literally 'entry'), the third giving *tuinide,* lawful possession. This is a solemn disseisin of the adverse possessor or detainer (D), by a claimant who has kin-right, closely defined within the 4-generation group[42].

Each entry is public and witnessed, the second and third being made after fixed intervals. The usual entry by a male claimant, *ferthellach,* (F) is made thus :

F makes his first entry, *céttellach,*

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40. e.g. I.69; cf. Beaumanoir, § 685. See *The Etablissements de Saint Louis : thirteenth century law texts from Tours, Orléans & Paris*, trad. & intro. F.R.P. AKEHURST, Philadelphia, 1996, I, § 158 sq.

41. For *gewere* see J. GRIMM, *Deutsche Rechtsaltertümer,* Leipzig, 1899, repr 2 vols, Darmstadt, 1955, vol. 2, pp. 85 sq, pp. 143 sq., glossing it as *exutus, indutus, vestitus*, i.e. «clothed». Mod. English «wear» (e.g. clothing) is cognate.

42. *Text = 1 Corpus Iuris Hibernici* (not translated), ed. D.A. BINCHY, Dublin, 1979, 205.22 et s (TCD MS 1433), a tract on *tellach* describing such a claim in verse and in prose, in the form of instruction by a master, Nin (or Ninne) to his pupil Doidin. English tr. D.A. BINCHY in C. WATKINS, «Indo-European metrics & archaic Irish verse», in *Celtica* , t. 6 (1963), p. 221. *Commentary & description :* T.M. CHARLES-EDWARDS, *Early Irish & Welsh Kinship*, Oxford, 1993, Pt III (Claims to land by virtue of kinship), c. 5.

— by crossing his ancestors' *fert* or *fertae,* grave-mounds[43], glossed *paternum sepulcrum* and marked by ogham-stones or in some other customary way at the edge of the land claimed,

— with a cart drawn by two horses which remain in harness, and

— accompanied by one witness, and

— then withdraws to his (other) land.

The possible consequences are :

D may yield, or agree to arbitration or judgment (Ir. *fuigell* means both the award and submission to it). If D yields or the arbitral/judicial award (Ir. *tulfuigell)* is in F's favour, F gets his *dliged,* 'right', after 5 days.

If D does not yield, F makes a second or «middle» entry, *tellach medónach,* entering 10 days after his first entry and withdrawal, but this time

— accompanied by 2 witnesses, he comes with 4 horses,

— which he unharnesses and leaves to graze, though he does not feed or water them.

If D yields, F gets his *dliged* after 3 days.

If D does not yield after this second entry, F enters a third time, 10 days after the second entry and withdrawal,

— with 8 horses and 3 witnesses.

— He stables his horses, feeds and waters them,

— enters the house and lights the fire, and

— stays overnight.

F now has *tuinide,* possession, without further delay, according to his personal law, *Fénechas,* («Irish law»).

Lastly, F asserts his legal victory by making a circuit, *immitecht,* of the land claimed. To guarantee the legality of his claim, F gives a *naidm,* a binding surety, to D[44].

The progressive nature of the renewed claim is obvious : moving from the boundary to the grazing & from grazing to the

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43. The living and the dead were thought of as forming a community, Ir. *sochraite* (cf. CHARLES-EDWARDS, 1993, p. 262-264). Cf. Herodotus' reference to the early Greek practice of burying one's ancestors at the threshhold of the family home.

44. See T.M. CHARLES-EDWARDS, M.E. OWEN & D.B. WALTERS, *Lawyers & Laymen,* Cardiff, 1986, glossary, p. 350 & refs.

homestead, with opportunities at each stage for D to yield or resist, i.e. to assert or defend his rival claim against that of F.

There is a variant, *bantellach,* for *tellach* by a woman (one source speaks of ewes in place of horses, and bringing cooking-gear at the third entry, a kneading-trough and a flour-sieve), and a simpler version for an 'unsettled' (landless) man or vagrant, *raitech* (literally 'man of the road' who has nowhere to withdraw to after his one entry except to the road)[45]. The reference to fire-lighting provides a parallel with Welsh and some Scandinavian laws : see below.

CELTIC LAW – WALES

The general rules are that land can be claimed or counterclaimed in three ways :

— when unjustly detained *(camweresgyn)* by D;

— by *dadannudd* (explained below) and

— by a *priodolder,* a claimant claiming ownership (not possession) by descent from those whose title is recognised by law *(ach ac edryf)*[46].

Detention by camweresgyn

Detention by *camweresgyn (cam,* «false, wrong, unjust» and *gweresgyn* or *goresgyn* : «ascend, go over», hence «possess.» *Camweresgyn* is therefore unlawful possession). The law recognised three wrongful detentions of land which had been taken or detained from a *dylyedog* and to recover which he can sue. The

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45. CHARLES-EDWARDS 1993, 265-270). Early Irish literature illustrated both types.

46. CHARLES-EDWARDS, 1993, cc. 4 & 6. Justinian's Novel 36 (a535) provides an example of the 3-generation family claim to occupy land. It provided that those dispossessed by the (recently defeated) vandals in North Africa could recover their lands outside the usual limitation period if they could show prior possession by a grandfather or nearer kinsman : see my article *Roman & Romano-canonical law & procedure in Wales,* in XV[e] *Recueil de mémoires et travaux [de la] société d'histoire du droit et des institutions des anciens pays de droit écrit* , Montpellier, 1991, pp. 67-102.

forms are for land taken or detained without a judgment and against the will of :

— a former owner, *perchennog,* who has a right to it (i.e. is *dylyedog); or*

— the heir of a *perchennog* whose ancestor had granted more land than he should have (i.e. giving rise to its redemption, cf. *retrait lignager* in French customary law); or

— the true *dylyedog* by a *gwercheitwat,* glossed as «one who holds or occupies land to which another is entitled» (one ms. adds, «even if by his leave»), i.e. if the grant was voluntary but its continued detention is against the will of the *dylyedog.*

Dadannudd

Dadannudd literally means [resuming the act of] «uncovering the fire» in the domestic hearth, the usual morning act of a householder to revive the fire which had been damped down with turf the night before. Welsh law recognised three kinds of *dadannudd*, i.e. three claims to which this name has been transferred, abbreviated as :

— *dadannudd ar ac aredig,* «by tilth & ploughing;» in the Latin translations of the Welsh laws (H.D. Emanuel, 1967) *cum aratione,* etc ;

— *d. carr;* «with a sledge or drag-cart,» Latin *cum palastro;* and

— *d. burn a baich,* «bearing a burden on the back,» Latin *cum onere dorsi.*

The circumstances which dictate the form of *dadannudd* depend on the status of the claimant :

Dadannudd ar ac aredig is for a son in occupation. He can remain till the new agricultural year begins, 1 Nov[47], evidenced by his ability to turn his back on the rick and, in a country where transhumance is common, bring down the livestock from *hafod* (summer pasture) to *hendref* (main farm).

D. carr is for a son who, or whose father, had his cart, dwelling and hearth on that land.

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47. Cf. Norway, GL, where the date is c. 14 Oct.

D. burn a baich is for one who had demonstrated his occupancy of that land by carrying goods and gear on his back and who had set up a hearth there, like his father before him[48].

These claims are thus available only to someone who can show *dadannudd* by himself or his father. Recent possession is linked with descent in the second and third cases. Claims based on occupancy by remoter ancestors are subject to other procedures *(ach ac edryf)* and are not discussed here[49].

Among many studies of the legal significance of the ancestral hearth in Indo-European society, the anomalous rule of descent of land to all sons according to the supposed Jutish custom of Kent, *gavelkind,* included a ceremony by which the hearth was uncovered[50].

NORDIC LAW – NORWAY

Examples of *terra hereditaria* in W. Norse *Gulathingslög,* GL (c.1100 x1150, and *Fröstathingslög,* FL) :

Norse *óðal* (GL c.270) refers to ownership *(eigg, eign),* not possession *(hafa),* but a claim to repossess was often based on *óðal* right : see below. *Óðal* is land held by a *holdr* (otherwise *hauldr* or *hauldsmadr,* pl. *-menn,* cf. common Scandinavian *óðalsbondi,* pl. *-baendr).* A *hauldr* is defined as freeborn, working ancestral land (or one of the six equivalents given in GL c.270). A *bondi,* on the other hand, even if a head of kin (an *ar-* or *aett-borinn bondi),* worked an independent holding, not of ancestral land but land acquired by lease or purchase, *kaupajord,* lit. «bought earth»[51]. The wergeld of a *hauldr* was double that of a *bondi. Hauldrmenn* were a numerous class in early medieval Norway and provided most of the emigrants to Iceland, c.870-930.

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48. Cf. D. JENKINS, «A lawyer looks at Welsh land law», in *Transactions of the Hon. Society of Cymmrodorion* for 1967, (1968), p. 228.

49. See CHARLES-EDWARDS, 1993, cc. 4 & 6

50. G.C. HOMANS, *English villagers of the 13th cent,* 110-1.

51. GL 223, FL XII.25. See generally B. & P. SAWYER, *Medieval Scandinavia from conversion to reformation c. 800 – 1500,* Minneapolis & London, 1993, c. 6 : «Landowners & Tenants».

Óðal land was alienable, but only by the solemn procedure of *skeyting*[52] , glossed in Latin *scotatio,* described below. If such land passed into the ownership of a stranger, it was redeemable, i.e. recoverable within a twelve-month period[53].

Meaning of óðal

The assumed meaning of *óðal* is that it was *ancestral land which could be ploughed* (not grazing land, which was not always subject to specific ownership) or «in-field», i.e. the land immediately surrounding the homestead. It should include an ancestral burial-mound. The equivalent Swedish word in the older West Gothic and East Gothic laws is *aetleve,* 'family inheritance.' GL cc. 282, 294 describe the procedure for the division of *óðal* between brothers, (and division procedures generally). According to GL, land was classed as *óðal* in 7 cases :

— if it had descended through 4 ancestors to a fifth i.e. by inheritance, *erfðum;*

— if it had been forfeited to pay wergeld, *gjold;*

— if it had been used to pay for life-long maintenance or fostering, *branderfð;*

— if it had been given gratuitously as a mark of honour, *heiðlaun;*

— if given by the king in return for hospitality, *drekkulaun;*

— if used to pay for child-fosterage, *barnfostrlaun,* and

— when exchanged for other *óðal (óðalsskipti).*

The law continues, *«all other land is* aurar» (i.e. money-land, and thus equivalent to movables). *Questus* is *fong* or *kaupijorð*, lit. «bought land».

Alienation of óðal by the procedure called skeyting (GL cc. 276, 287, 292) :

The alienor takes soil (he is a *moldtaka)* from four places : from the four corners of his ancestral hearth, from beneath his High Seat *(ondvegissæti),* from the place where his tilled field meets the grazing and from where the enclosed pasture meets the

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52. GL 276, 287, 292 ; FL XII.1, XIV.4

53. GL 87, 88 265 sq., cf. 103 ; 265-269, 271-274, 277-281, 288-291 & 293 ; & cf. FL XII.

woodland. He throws this soil into the lap, *skaut*, (Lat. gl. *gremium)* of the purchaser, hence the word *skeyting*. By these acts he abandoned his claim to the *oðal* land. This echoes the Salic law, *(Pactus Legis Salicae* c.58, *de chrenecruda).*

Redemption of óðal by the procedure called óðalsbrigði (GL c.266)

A *holdr* could not alienate at will. First he had to offer his land to his kinsmen, and only if they refused it could he alienate to a stranger. The kin had 12 months in which to redeem *óðal* thus alienated, by an act which included reciting their ancestry. King Magnus Håkonsson *(Lagabiter,* 'Law-mender'), 1263-80, retained this procedure in his *Landslaw* 6.2.

The three defences open to someone occupying land, who is challenged by one who claims that land by óðal right, but who is out of possession :

— D asserts that it is *óðal;*

— D asserts that he has lawfully bought the land;

— D says P will never get the land until he can wrest it from a dead man[54].

The procedure for such a challenge (GL cc.265-294)

P must find witnesses of his *óðal* right and make a formal demand for a judgment against D, summoning D to be at home, sitting in his High Seat, in daylight on the day of summons. The parties and their witnesses face one another outside the house. They form an alley leading to the entrance, the space between the two lines of men being wide enough to allow wood and water to be brought into the house. P then names his ancestors down to himself as the 5th descendant (since purchased land does not become *óðal* until the 5th generation). D then produces his witnesses. The judgment is to be pronounced midway between P's and D's

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54. Cf. *diasbad uwch annwfn* in Welsh law, lit. «a scream over the grave-pit» by a claimant who is 9 generations away from the ancestor from whom he claimed. This was the remotest descendant who could raise such a claim.

dwellings by a *skiladómr* of 12 men. The matter appears to be settled rationally – there is no compurgation and no judicial battle. If a third attempt to settle the matter fails, however P is allowed to resort to force, including killing D.

NORDIC LAW – ICELAND

So far as the incomers of the age of settlement (c870-930) were concerned, land in Iceland was obviously not ancestral at first, but conquest, *landnám,* literally land-taking. The first settlers, *landnámsmenn,* if they had large holdings, regarded themselves as entitled to grant surplus land to others, as did Aud the Deep-minded, daughter of Ketil Flat-nose, since women as well as men could hold land[55]. Thus when Balki married Thordis Thorhaddsdotir, her endowment was Holmsland[56]. Land could also be exchanged, as was done between Illugi and Holm-Starri (LB 41) – an exchange not only of their farms but of their livestock, gear and even their wives (which proved unacceptable to Sigrid, who hanged herself in the temple).

The first settlements were mainly by Norsemen from *fylki,* districts where the distinction between *hauldr & bondi* was recognised (see above, Nordic Law). *Bondi* became the sole term for the status of free landholder in the Icelandic Commonwealth (although in Norway, from the reign of St Olaf, 1016-1030, a visiting Icelander was accorded *hauldr* rank, provided he did not outstay his welcome – three years[57].

Settlement and possession. No clear distinction emerges between settlement, that is seizing or taking an area of land, and possessing it thereafter. The usual formula in LB is «N. took possession of all the land at [a named place] between [etc] X and Y and made his home at Z.» There may have been a conscious attempt to establish an «ancestral» claim to land in Iceland, not only by the settlers' descendants, of course, but even by the settlers themselves, by a fiction : the jettisoning of their High Seat pillars, *instaffir öndvegissúlur,* on approaching the coast for the first time

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55. LB 95-110 ; cf. 395.

56. LB 166 ; cf. 179, 235, 282, 290, 348 last para., 386 & 387.

57. Cf. the opening chapters of *Brennu-Njáls Saga;* P.G. FOOTE & D.M. WILSON, *The Viking Achievement,* London ,1970, p. 86.

and claiming the land where these were washed up, even changing holdings if the pillars were found long after initial settlement[58]. Bench-boards (seats) were used in the same way : LB 371. Two High Seats were set up facing the fireplace, *arinn,* the upper one for the householder and the lower one for his principal guest. (The fireplace provided material used in the *skeyting* ceremony : see above, Norway.) In conscious imitation of Norwegian law, an assertion of land as ancestral could be made by re-burying one's ancestors on it, as in the case of Eyvind Thorsteinsson, who took possession of Reykjadale above Vestmannswater and who made his home at Helgastead, where he is buried in a grave-mound (LB 247). A (pagan) priest from Nidaros (modern Trondheim in Norway), wishing to see Iceland, dismantled his temple and took its pillars and some earth from its floor. Landing in Iceland at Stodvarfjord, he declared it sacred, re-erected his temple and stayed for there rest of his life (LB 297).

LB 189 describes Sæmund carrying fire along the line he chose for the boundaries of his claim (not too effectively – for meanwhile Skefil appropriated some of the land); and LB 218, where Helgi lit a fire at each estuary to consecrate a land-claim. This was the celebrated Helgi «who believed in Christ, but invoked Thor during stormy voyages».

An unusual land-claim was made by Einar (grandson of Earl Turf Einar by his daughter Thordis and Thorgeir the Clumsy). When his kinsmen in Orkney rejected him, he became one of three partners in a ship for Iceland. These three set up an axe, an eagle & a cross at three points of a triangle of land, 'and this is how they consecrated Oxarfjord' (=axe fjord) and claimed the whole of it for themselves' (LB 257). Ketilbjorn the Old left signs that he was in the process of staking a claim. He set up a temporary night-shelter, he left his axe on the site and caught trout in the river while fixing the boundaries of his holding (LB 385).

The original settlers often granted surplus land to kinsmen who came later[59] . As the land was *nám* (cf. *questus*), it was a marketable commodity; it could be bought and sold, and used for paying debts (LB 270). Sometimes a later, more powerful incomer would challenge an earlier settler to single combat for a holding. In

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58. See GL 35, FL X.2.8 & refs in LB, e.g. no.8, Ingolf ; a refusal to do so as too risky, 197 ; discovery of pillars, 289, 307, 310.

59. LB 286, 369, & in 372, to an ally by marriage.

one case (LB 326) the challenge was refused, which was treated as a submission. Part of the holding was then ceded to the challenger[60].

The claim to land, or to mark its boundary, sometimes involved an arrow-shot : LB 348 ('within an arrow-shot' of a holding, perhaps a reference to the measure of its defensibility). In the description of thediscovery of the inland route between south and north Iceland (the original settlement having been from the sea), LB gives two accounts, one of Vekell Shape-Changer of Maellifell, who heard of the pass (LB 196) and explored it, shooting an arrow between the hills thereafter called Vekell's Howes. (Another account attributes finding the route to the slave Rongud, sent to explore it by Eirik of Goddales.)

In the case of Norway there were vestiges of archaic procedures for the disposal of ancestral land, side by side with a commercial attitude to land which was not ancestral. The settlers in Iceland adopted the second attitude as part of the immensely rich legal system which they developed : a system of which the best of them were justly proud, since, as Njal himself said, *Með logum skal land byggja en eigi með ølögum eyða*[61] : «It is with laws that our land shall be built up, but with lawlessness it will be laid waste».

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60. Cf. 389 where an incomer was offered a grant on terms but preferred to fight a duel for it.

61. *Brennu-Njáls Saga* c. 70, and found in some Norse laws texts as well, though some omit the second phrase.

Abbreviations

The usual editions of the *Corpus Juris Civil* and *CJCanonici,* by Mommsen & others and by Friedberg respecively, have been used. Texts of the Norse and Icelandic lawbooks *(Grágás, Jarsiðr, Jónsbók* for Iceland) and the extensive collections for Norway have not been cited here (one volume of an English tr. of the opening sections of *Grágás* has been published by A.DENNIS, P. FOOTE & R. PERKINS, *Laws of early Iceland : Grágás I,* Winnipeg, 1980 but this volume does not include property law). Editions of the Irish and Welsh laws have not been included but are listed in, e.g. CHARLES-EDWARDS (Irish law) and in my article referred to in note 46 (Welsh law).

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Brennu-Njáls Sage (The Saga of Burnt Njal), ed. E.O. SVENSSON, *Íslenzk Fornrit*, vol. 12, Reykjavik, 1954 ; Eng. trad. by M. MAGNUSSON & H. PALSSON, Penguin Books, 1960 & repr.

CHARLES-EDWARDS, 1993 : T.M. Charles-Edwards, *Early Irish & Welsh Kinship,* Oxford, 1993.

COMP : for *Compilatio,* ed. E. FRIEDBERG, *Quinque Compilationes Antiquae*, Leipzig 1882, repr. Graz 1956 (to be used in conjunction with vol 2 of the editor's edition of *Corpus Juris Canonici* containing the texts of those decretals in the *V Compilationes* subsequently incorporated by Raymond of Peñafort in the *Liber Extra* (Decretals of Gregory IX, 1234).

FL, GL : *Fröstathinglög, Gulathinglög*, English tr. L.M. LARSON, *The Earliest Norwegian Laws,* New York, 1935.

HINSCHIUS : P. Hinschius, *Decretales Pseudo-Isidorianae et capitula Angilramni*, 1863, repr., 1963.

LB *Landnámabók :* English tr. H. PÁLSSON & P. EDWARDS, *The Book of Settlements,* Manitoba, 1972.

RUFFINI : F Ruffini, *L'actio spolii – studio storico-giuridico,* Turin, 1889, repr. Rome, 1972.

X : *Liber Extra* (Decretals of Gregory IX, 1234, in Friedberg, *CJCan* vol. 2)