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The 'legal history' debate on 'absolute ownership' at common law and the changed notion of ownership in the legal theory: from Bartolus' ownership as right to Hohfeld's legal relations.

The paper revisits the 1940s debate on 'absolute ownership' between Hargreaves and Holdsworth.¹ The significance of the debate is apparent from the attention it received in the judicial decisions² and in the academic literature³. The focal point of the debate was the action of ejectment, which, with the decline of the old real actions, seemed to become the principal means to try 'title' at common law. The action evolved as a remedy for the tenants 'for a term of years', who could not use the real actions, available to freeholders (such as, the assize of novel disseisin).

To demonstrate the growing role of the lessor's title Holdsworth highlighted the doctrine of 'disseisin at election' (in contrast to 'actual' disseisin), relied upon in cases of dispossession of the lessor's tenant.⁴ This line of argument could be traced to *Taylor v Horde*. In Holdsworth's view, since the dispossessed lessee relied upon the lessor's title, *ius tertius* was effectively pleaded.

Hargreaves did not deny that the lessor's title was relied upon, but pointed out that seisin, not ownership, was the issue at hand, and seisin was never 'absolute' title at common law. Hargreaves, though, doubted that factual possession was at a root of the title (as *Asher v Whitlock* was to imply). But seisin was equated with a factual possession in, for example, tortious seisin of disseisor (survival of 'adverse possession' in the common law jurisdictions with the land registration system (of 'absolute' title by registration) shows the resilience of this notion). Still Bracton saw seisin as Roman law 'civil possession' (as *corpus* and *animus*) and denied seisin to termors (later, a termor was thought to 'hold possession'). As Hargreaves noted, in ejection the lessor was to prove disseisin to him or his predecessor in title, provided the right of entry had not been tolled. The question then comes back to what disseisin meant.

At Roman law *dominium* was contrasted with *iure in re aliena*, such as servitudes. The notion of *dominium* was of the late origin, preceded by '*proprietas*' and '*res sua*' (the ancient *legis actio sacramento in rem* (G 4.16), like a writ of right, was about a better claim to some *res*). Hence, *rei vindicatio* was possible only regarding *res sua*, a separate (interdict) remedy was devised for the occupants of the public land, thus, *possessio* became to be protected. Later *possessio* was seen as requiring *corpus* and *animus* (denoting 'civil possession'), possibly, shaping the notion of *dominium* itself as apparent in '*animus domini*'. *Dominium* remained, when *possessio* was lost (with the loss of *corpus*) (D 41.2.17). Since *dominium*, as the issue in *rei vindicatio*, was a successor to *res sua* (and, besides, was linked to *possessio*, possible only in relation to *res corporalis*) there was a dichotomy of *dominium* and *ius*, due to the distinction drawn between *res corporalis* and *res incorporalis* (G 2.14).

The feudal notion of 'split' ownership (*dominium directum* & *dominium utile*) emerged out of the Roman law *emphyteusis* (perpetual lease, one of *iura in re aliena*). Bartolus then famously defined ***dominium as ius de re corporali perfecte disponendi nisi lex prohibeat*** (*Commentaria*, ad Dig 41.2.17.1.nr. 4). Instead of the old distinction between *res corporalis* and *res incorporalis* (as servitudes and obligations, which, indeed, were *iura*, or 'rights'), the distinction was now between rights *in rem* and rights *in personam*.

Hohfeld took the next 'logical' step and dispensed with 'rights *in rem*' altogether.⁵ His positive contribution was to define 'right' as a correlative to 'duty'. Bartolus' right, hence, became Hohfeld's 'privilege'. But Hohfeld's privilege seems to be hardly *multital* relation *in personam*, but something more like the common law possession. Hohfeld's right (or duty of non-interference) could be, then, seen as of delict nature (in line with Savigny's explanation of the Roman law possessory remedies). But could the action of ejectment be seen in this way? This question the paper attempts to address.

¹ Hargreaves, "Terminology and Title in Ejectment", (1940) 56 *Law Quarterly Review* 376, 390; Holdsworth, "Terminology and Title in Ejectment-A Reply", (1940) 56 *Law Quarterly Review* 479.

² *Allen v Roughly* [1955] 94 CLR 98, per CJ Dixon and J Fullagar.

³ J Gordley, U Mattei, "Protecting Possession", (1996) 44 *Am. J. Comp. L.* 293 at 319-329.

⁴ Holdsworth, 7 *History of English Law*, 36-57

⁵ Hohfeld *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1917) 26 *Yale Law Journal* 710

Introduction

The paper's broad focus is on the evolution of the remedies with respect to land at common law, and the common law notions of seisin and disseisin. The paper submits that the common law seisin was, in many ways, similar to the Roman law notion of civil possession. This position could be seen as, essentially, a restatement of the well-known critique by Butler (in his note 285 on *Coke's Commentary upon Littleton*)⁶ of Lord Mansfield's view of seisin as a feudal 'investiture'. This critique has a modern relevance too, since, already at our time, a variant of Lord Mansfield's feudal theory of seisin was advanced by Milsom.⁷

However, at stake there is not only the old legal history controversy whether the common law retained the possessory title (prior to the introduction of the modern land registration system of title 'by registration')⁸. The common law story of possessory title has a poignant significance to the legal theory debates on the nature of ownership.

The paper's second main focus is on the development of the notion of ownership. It is maintained that at Roman law the notion of *dominium* (just as the notion of civil possession) was contrasted with any *ius* as *res incorporalis*, with the definition of ownership as 'right' *in rem* being Bartolus' medieval invention. This 'accidental' definition (meant to account for the feudal realities) had far reaching legal theory consequences. Hohfeld in his theory of legal relations questioned the necessity of distinction between rights *in rem* and rights *in personam*. His notion of right as a correlative of duty, however, was more like the Roman law 'narrow' notion of *ius* than Bartolus' right of ownership, which, in its turn, looked very much like Hohfeld's 'privilege'. Next, though the Legal Realists' intermediary, Hohfeld's notion of ownership as a bundle of legal relations *in personam* became the Law and Economics' notion of ownership as a bundle of (tradable) rights.

This is not the end of the story. The legal positivists long asserted there is no such thing as 'independent' private law (as something existing apart from the public law). The notion of ownership as a bundle of rights *in personam* is just that what they were looking (or must look) for (the effective abolition of the 'independent' concept of property), in so far as no legal right could be beyond the legislature's reach.

The common law possessory title provides the unambiguous proof of independent private law existence of possessions in land. Possession (as the root of title) as a matter of fact clearly involves no legal relations *in personam*.

More specifically, several theses are put forth:

1. Common law never knew the Roman law clear separation between proprietary remedies (like vindication) and possessory ones (as interdicts). In contrast, even in the most proprietary common law real action - a writ of right - the real issue at hand was possession (seisin) of the immediate ancestor of the clamant.
2. The early common law hardly had any notion of *proprietas* as the Roman law *res sua* with respect to the land.

⁶ Vol II (19th ed, 1832): L3.C.11. Sect 611

⁷ S.F.C. Milsom, *Historical Foundations of the Common Law*, (1969), 104-5; S.F.C. Milsom, *The Legal Framework of English Feudalism* (1976), 39-40, 71.

⁸ Using the expression of CJ Barwick in *Breskvar v Wall* (1971) 126 CLR 376: "...not a system of registration of title but a system of title by registration. That which the certificate of the title describes is not the title which the registered proprietor formally had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor.")

3. The evolution of the common law remedies was towards use of more simple possessory and, then, personal remedies (like trespass) as a means to try titles. The evolution of action of ejectment was just a last step of this development.
4. A by-product of this development was a loss by those possessory and personal remedies of their original 'pure' tortious character (through the move towards the looser notion of disseisin). Nevertheless, the underlined issue continued to be the involuntary loss of seisin.
5. Holdsworth's case for the emergence of the notion of absolute ownership at common law rested on the *theoretical* foundation laid down by Lord Mansfield: the contention that the doctrine of 'disseisin at election' expanded the powers of the 'owner' out of possession at expense of disseisor in possession.
6. As a matter of *fact*, Hargreaves-Holdsworth's dispute was centred on a handful of cases of ejectment. The main issue in dispute was around the alleged appeal to *ius tertius*. Holdsworth, though, accepted that in any case of tortious dispossession, no issue of title arose. Otherwise, he claimed (with support of Lord Mansfield's *dicta*), the plaintiff in the action of ejectment needed to prove a right of entry based on, at least, 20 years of prior possession (necessary for the statute of Limitation came into play). Moreover, in his view, *ius tertius* (the title in somebody else) could be pleaded. Hargreaves disputed these claims.
7. Peculiarity of Holdsworth's position was that 20 year of adverse possession against the presumed 'owner' was the only common law 'absolute' title which he could pinned down (this factual finding seemed to point at the opposite direction from his theoretical presumption of the raise of the powers of the 'owner' out of possession).
8. It is argued, that 20 years of adverse possession provided for 'absolute' title only with respect to the claimant against whom the limitation period had run out, but not against other potential claimant with still current right of entry.
9. On more basic point, the issue in ejection was always disseisin, as involuntary dispossession of freehold: possession, indeed, was at the root of the common law title to land.
10. The possessory title at common law could be contrasted with the dominance of the notion of ownership at civil law. Still the development of the notion of ownership at civil law was not a 'linear' one. At Roman law, while possessory remedies were strictly separated from proprietary ones, the evolution of the notion of possession (as required not only *corpus* but also *animus*) affected the development of the notion of ownership.
11. As a rule, ownership was accompanied by the civil possession, and, just as possession, was possible only in relation of *res corporalis*, hence, it was contrasted with any *ius* (such as a servitude or obligation) as *res incorporalis*.
12. On the basis of anomalous late Roman law perpetual hereditary lease emphyteusis, the medieval civilians developed a (feudal) construction *dominium utile* (as separate from *dominium directum*). Bartolus then revolutionarily described *dominium* as *ius*.
13. Thus, ownership became defined as right in rem. Hohfeld's theory of legal relation further eroded the old contrast of *ius* and *dominium*. He substituted the right *in rem* on the 'multital' right *in personam* (against many), which he contrasted with the 'paucital' right *in personam* (against a few), such as an obligation.
14. Hohfeld's contribution was to distinguish 'right' as a correlative of duty (essentially, the Roman law *ius*) from 'privilege' (essentially, Bartolus' *ius*). Such privilege, contrary to Hohfeld's presumption, though, could hardly do anything with relations with other persons.
15. The narrow understanding of right, as a correlative of duty, could explain the tortious origin of the possessory remedies. It could also shed a light on the historical evolution of the action of ejectment: the right of entry could never lose its link with some prior act of disseisin.

16. The legal realists took over Hohfeldian notion of ownership as a set of rights, privileges, powers and liabilities, redefining ownership as a bundle of rights. Namely in such a sense, ownership became to be understood by 'Law and Economics'.
17. The notion of ownership as a bundle of rights *in personam* could be exploited not only by the legal realists but the legal positivists too. Their presumption of no independent private law is particularly helped by the notion of ownership as a bundle of legal rights *in personam*.
18. The common law, in contrast to the civil law, succeeded to protect possessions in land, without any notion of ownership, by means of the possessory title. But at Roman law too, the notion of *dominium* evolved, hand in hand with understanding of possession through *corpus* and *animus*, with no reference to any legal relations with others persons.

I. The civilian distinction between 'proprietary' and 'possessory' remedies

In Roman law there were a 'proprietary' action of vindication and a number of 'possessory' interdicts.

In the old Roman law action of vindication *legis actio sacramento in rem* the both parties were to claim that *res* in question was 'their' by the law of Quirites [EX IURE QUIRITIUM MEUM ESSE AIO]. The formal issue was the breach of oath *sacramentum*, when monies were deposited with (sacred) oath but the real issue was who of the two parties had a *better* claim to the thing *ex iure Quiritium*.⁹ Trials *rei vindicatio* (for restitution of the thing) were, in Roman law, contrasted with the possessory interdicts, where the issue was 'possessio', not *res sua*. As Ulpian famously declared, 'proprietas' had nothing to do with 'possessio' (D 41.2.12.1),¹⁰ highlighting the distinction between an action of vindication and a (possessory) interdict.

The Roman law interdict *unde vi* gives an example of a strictly tortious possessory remedy. If you dispossessed me of my land by force, the issue in litigation would be just the question of fact: whether you did it by force. Clearly, this is in no way a proprietary remedy: I only need to prove the tortious fact of force (but not my title). The well-known Savigny's position with respect to all *possessory* remedies was that they *must be* of tortious (delict) nature. The problem with the interdict *unde vi*, though, was that it did protect not just *any* dispossession (of immovable) by force but, according to Savigny, either civil possession and possession *bona fide justa causa usucapionis* or detention with *animus* but without *bone fide & juste causa* (such as in a case of thief).¹¹ So it would not protect one who 'possessed' in the name of another, such as usufructuary. But it is not clear why, if possessory remedy is, by definition, of unambiguously delict nature, it should not extend to the case of detention.

The Roman law possessory interdicts, probably, were originally devised for the protection of the occupants of the public lands, who could not resort to the action of vindication (which was about *res sua* – one's own thing).¹² Then the possessors – owners also were given a benefit of the possessory interdicts,

⁹ For example, in the case of a slave: EGO HOMINEM EX IURE QUIRITIUM MEUM ESSE AIO SECUNDUM SUAM CAUSAM (the procedure is described in G 4.16).

¹⁰ *nihil commune habet proprietas cum possessio: et ideo non denegatur ei interdictum uti possidetis, qui coepit rem vindicare: non enim videtur possessio renuntiasse, qui rem vindicavit*

¹¹ There were also four anomalous cases of sequester, pledge-holder, precarist and *emphyteuta* (who had perpetual hereditary lease *emphyteusis*), who all were considered to be 'civil' possessors and, thus, had the possessory interdicts. The last notion of perpetual lease (*emphyteusis*) became the foundation of the medieval conception of split ownership (*dominium directum* and *dominium utile*). All four exceptions were cases of 'split' possession/ownership at odds with the established maxim that there could not be two possessors or owners of the same thing.

¹² Max Kaser, Roman Private Law, [tr. R. Dannenburg 9th ed. *Romishes Privatrecht*], Durban, Butterworths, 1968, 84.

but not those who ‘possessed’ in the name of another, like a lease-holder, because they were not ‘civil’ possessors.¹³ Possessory interdicts, such as *uti possidetis*,¹⁴ might also serve as a sort of preparatory step for a subsequent vindication proceeding: they would determine the actual ‘civil’ possessor (holding possession in his own name), who could be a respondent in the action of vindication.¹⁵ As a by-product of this development, those who possessed in the name of another, like a lessee, were left without a sufficient protection in the case, where the ‘civil’ possessors had no intention to defend them against dispossession, for example, by a third party – a grantee of the lessor.

The development of possessory remedies in the civil law went through the stages. There is no dispute that the development of a wider protection of possession in the medieval civil law was influenced by the canon law *Redeintegranda*. The canon *Redeintegranda* introduced the principle *spoliatus ante amnia restituendus* (C. 3. C III., q.1) of *Decretum Gratiani* or *Concordia discordantium canonum* (1140-1150?).¹⁶ The canon itself was by and large the reproduction of the text from the 9th century Pseudo-Isidorian decretals. In contrast to the Roman interdict *unde vi* [*interdictum recuperandae possessionis*], *Redeintegranda* covered not only the case of *violenitia* but also *dolus* and *metus*, moreover, it also allowed for recovery of possession from the third party (while only action *quod metus causa* allowed for recovery from the third party in Roman law). In 1215 Innocent III issued the canon *Saepe contingit* (C.18 X de restit. Spoliare II.13), where he attempted to confine *Redeintegranda* by allowing to recover possession only from the *mala fide* third party. Innocent IV in his Commentaries to c. 18 *Saepe contingit* interpreted *Redeintegranda* even more narrow, similar to the Roman law remedies (*Commentaria*, f.97 n.6, Turin, 1581). But the wider interpretation of *Redeintegranda* prevailed in the civil law - as a remedy for all ‘wrongful’ dispossession (and not only immovable as interdict *unde vi*), including merely detention – any ‘factual’ prior possession (as obvious on the example of the 14th century French remedy of *reintegrande*), against even innocent third party. But if, the issue became not the act of dispossession by force, but the loss of possession, then the possession itself (rather than the delict act) became to be scrutinised. This development had been controversial, and the modern civil codes attempt, with various degree of success, to draw the line between ‘proprietary’ and ‘possessory’ remedies.

II. *The evolution of the remedies with respect to land at common law: from the writ of right to the writ of trespass*

¹³ Though, later on, the interdictory protection was extended to a usufructuary (*unde vi*: D. 43.16.3.15 & *uti possidetis utile*: D.43.17.4; a usufructuary had *quasi-possessio*: D 4.6.23.2) and servitude-holders, who, for example, had special interdict *de itinere actuque privato*.

¹⁴ *Uti possidetis* was not of pure delict nature, as the clamant need to prove possession *nec vi nec clam nec precario* (G 4.150). It was described as *duplicita* (G 4.160), as it could be used when both parties claim to be in possession.

¹⁵ On the ‘reception’ of the Roman law with respect to the interdicts in the early medieval England through the *Liber Pauperum* of Vacarius and its possible companion: the [anonymous?] commentary circa 1200 on Institutes of Justinian, see Ioshua Tate, Ownership and Possession in the Early Common Law, 48 Am. J. Legal Hist. (2006) 280 at 284-5, 288-90.

¹⁶ On *Redeintegranda* see J Gordley, U Mattei, “Protecting Possession”, (1996) 44 Am. J. Comp. L. 293. The description in the present text is from S. P. Nikonov, *Razvitiie zashchity vladenia v srednievekovoi Evrope* [Development of protection of possession in the medieval Europe], Kharkov (1904), 128-134. Nikonov not only surveyed the literature on the subject (rather overzealously disputing Bruns’ *Das Recht des Besitzes*), but also reproduced the large extracts from the original sources (which, as he noted in the introduction, were not easily accessible for the Russian readers).

A **writ of right** was the earliest ‘real action’ (a remedy regarding land) at common law.¹⁷ The original procedure was a trial by battle by ‘champion’.¹⁸ Later, though, the tenant could choose a trial by the grand assize instead (which did not allow so many essoins, or excuses of non-appearance as a trial by battle). A writ of right required the demandant asserted that he or his ancestor had been seised not merely ‘as of fee’ but also ‘as of right’. The question, put before the grand assize of 12 jurors, was who of the two (the demandant or the tenant) had a greater right to the land (*majus ius habeat in terra petita*: Glanvill, ii, 18).¹⁹ Although, the trial was conclusive as between the parties, there, theoretically, could be an indefinite number of trials (with different parties) regarding the same title.

Since the question of ‘right’ was tried, it is commonly described as ‘proprietary’ remedy. It is useful to compare this old proceeding by the writ of right with the ancient Roman law *rei vindicatio* proceeding *legis actio sacramento in rem*, which was about *res sua* – one’s own thing. The Roman law, hence, draw a strict distinction between ‘proprietary’ remedies, protecting *proprietas*, and ‘possessory’ remedies, protecting *possessio*.

At common law, in comparison, the real issue always was *seisin* (which from the times of Bracton was understood as *possessio*).²⁰ At the trial commenced by the writ of right, the demandant claimed that his father was *seised* in his demesne as of fee, so that the right and inheritance had passed to the demandant. As Maitland put it, “seisin is not heritable; but the man who dies seised as of fee transmits a heritable right to his heir; his seisin generates this heritable right”.²¹ As a result, at common law there was no a sharp distinction between the proceedings with respect *proprietas* (or *res sua*) and *possessio*. At the root of any matter there was always seisin, or *possessio* (and, hence, heritable *ius possessionis*).

¹⁷ The writ had two forms. The writ of right as *breve de recto tenendo* could be directed at a seigniorial court or as a *Præcipe* to the king’s court (Pollock & Maitland (P&M), ii *The History of English Law* (2nd ed., 1967) 62).

¹⁸ Reeves gives the early example of the demandant’s claim: “I demand against B. one hide of land in such a vill (naming it) as my right and inheritance, of which my father (or grandfather, as it might be) was seised in his demesne as of fee, in the time of Henry I (or after the first coronation of the king, as it might be), and from which he received produce to the value of fifty shilling at least (as in corn, hay, and other produce); and this I am ready to prove by this my free man John: and if anything should happen to him; by him, or to him” (for he could name several, though only one could wage battle) “who saw and heard this.” Or he might conclude in this form: “and this I am ready to prove by this my free man John, whom father, on his deathbed, enjoined, by the faith a son owes a father, that if he ever heard of any plea being moved concerning this land, he would deraign (or prove) this, as what his father had seen and heard”(Reeves, 1 *History of the English Law* (London, 1869), 184. Also Glanville, lib 2. c.3 (*hoc dirationaret, sicut id quod pater suus vidit, et audit*).

¹⁹ In Maitland’s words:” He will offer battle by the body of a champion who theoretically is also a witness, a witness who testifies this seisin either of his own knowledge or in obedience to the injunction of his dead father. The person attacked in the action (he is called the tenant) may be able to plead some special plea (exception), but he always has it in his power to deny the demandant’s case and to put himself on battle or the grand assize. If he chooses the grand assize, the recognitors will swear in answer to a question which leaves the whole matter of fact and of law to them – namely, whether the demandant has **greater right** to demand the land than the tenant has to hold it. As a result of the trial a very solemn judgement is pronounced. The land is adjudged to the one party and adjudged (*abiudicata*) from the other party and his heirs for ever (M&P, ii, 62-3). See also P&M, ii, 74-6.

²⁰ Seisin might be compared to the Roman law ‘civil’ possession (which required corpus and animus –intention to possess in own name) with one important distinction. As Maitland put it, “seisin is not heritable; but the man who dies seised as of fee transmits a heritable right to his heir; his seisin generates this **heritable right**” (P&M, ii, 61). As soon as a heir set foot on the land he was seised (Y.B 33-5 Edw I 53-5: *sola pedis posicio vero heredi seisinam contulit*; cite in P&M, ii 61, n.4). A heir was giving an opportunity to enter by a rule that no stranger could acquire a seisin until funeral (P&M, ii, 61). Later heir was described to have at death of his ancestor’s death a ‘seisin at law’ (Littleton s.448). In contrast, at Roman law, possession did not generate such heritable right (in comparison, *dominium* (ownership) would not cease where possession was lost (by loss of *corpus*)).

²¹ P&M, ii, 61.

Thus, not only ‘better’ (not ‘absolute’) title was not an issue at the trial, but also no purely ‘proprietary’ remedy (as concerned only with *proprietas* not *possessio*) was known to the early common law.²² Terminological confusion started with Bracton, who seems did not appreciate the difference in remedies in Roman law. Bracton referred to *ius proprietatis* and *proprietas* as descending to the heir on the ancestor’s death (*quia proprietatis statim post mortem ancessoris descendit heredi propinquiori*: f.434b). But the real issue at common law, as we saw, was seisin of the ancestor, and, Bracton’s Roman law notion of *proprietas* was rather out of place in the common law setting.²³ Why at the common law ‘*res sua*’ in land could hardly be an issue? The answer lay in the system land tenure with all tenements being derived ultimately from the crown grant. Lord Mansfield has provided the compelling argument as to the confinement of the notion of *proprietas* (at least, as ‘absolute’ title) in land to the crown: “all real property was held, mediately, or immediately, of the King;[only] in the King himself, all real property was allodial”.²⁴

Thus, not only the common law shied the notion of ‘absolute title’ but it also seemed to shy the notion of a ‘proprietary’ remedy as such. While a writ of right was only abolished, together with all the old real actions, only in the 19 century, early on, the common law tended to devise simpler and simpler (possessory and, then, personal) remedies in place of the old writ of right. Not only the common law showed the predisposition for possessory remedies (which at least could bring a specific recovery of land) but also, from 15 century, it would increasingly employ personal actions in litigation over real property. Thus, due to the cumbersome nature of the writ of right, the writ of entry and, then, the assize of novel disseisin became the alternative means to try the title.

²² Reeves shows how there could be two competing ‘*iura proprietatis*’ (Reeves, v.1, 449-50 (ch vii)). His analysis proceeds in the terms of *proprietas* and *possessio* and the maxim *possessio sequitur proprietatem*. The maxim is correct in the sense of proprietary remedies being of the higher order than possessory ones. It is commonly assumed, from Bracton onwards, that seisin meant possession. It is less clear what could *proprietas* mean (as well as *ius proprietatis* and *ius possessionis*). Due to the centrality of seisin at common law, the real issue was ‘inheritability’ of seisin (when one was seised as of fee). Could such inheritable ‘right’ (essentially, to possession) be understood as *ius possessionis* or *ius proprietatis*? Reeves’ example illuminates the issue. On the death of the ancestor, in Reeves’ words, “the *proprietas* immediately descended to the next heir, where he was present or not; but not being present, the *possessio* might be obtained by another, who put himself into seisin; by virtue of which the *ius possessionis* would descent to his heirs, through the negligence of him who had the *proprietas*. Thus, while the *ius proprietatis* descended on the elder brother, the younger brother might obtain seisin and died seised, transmitting to his heirs, together with the *ius possessionis* which he himself had, a sort of *ius proprietatis* [Bracton 434b]; so there would be two *iura proprietatis* in different persons by different descents; but one, as the descendants of the elder brother, would have *majus ius proprietatis*, on account of the priority; and those from the younger brother *minus ius*; yet the possession of the latter would prevail till the former evicted them of the *ius proprietatis*” (Reeves, I (ch vii), 449-50). Thus seisin of the younger brother did create its own inheritable right to it (*ius possessionis*?), but it is, probably, misleading to talk about ‘*proprietas*’ or even ‘*ius proprietatis*’.

²³ David J. Seipp in his *The Concept of Property in the Early Common Law* (12 Law & Hist. Rev. (1994) 29) provided a fascinated account of the absence in the Year Books of the use of the term ‘*proprietas*’ in relation to land until the turn of the 15th century, with re-incorporation of the Roman law ‘property’ terminology in the 16th-17th century [with early but development of the usage of *proprietas* with respect to chattels, with remarkable development of the notion of ‘relative’ property in chattels in the end of 15th - the early 16th century (ibid, 61-2)].

²⁴ “Nobody can disseise the King; neither can any one be disseised to the use of the King. The King may be wrongfully dispossessed: but the intruder’s injurious possession is sine aliquo vestimento, and called intrusion. The King cannot be made a disseisor; not because it is wrong: (for he may, in fact, withhold the possession of land from a subject contrary to right:) but the reason seems, according to the feudal system, to be this: a subject never could stand in the King’s seisin or tenure; and the King never could be in the seisin, tenure, or feudal relation of a subject. By that policy, all real property was held, mediately, or immediately, of the King; in the King himself, all real property was allodial” (1 Burr at 109).

First, the **assize of novel disseisin** came to life as a new remedy available to a freeholder.²⁵ It had significant procedural advantages over the writ of right. It did not require a trial by battle or even a trial of the great assize. It did deal with the question of fact (of being disseised) rather than of right.²⁶ The question of fact was decided by a jury of the twelve men of neighbourhood.²⁷ The assize could only be brought, if both the disseisor and the disseisee were still alive (but it could be brought against one who had come to it through or under the disseisor while the latter was still alive)²⁸; there were no requirements of good faith (so, as Maitland noted, the assize was not of purely delict nature).²⁹ Another particular feature of the assize was its unsettled limitation period.³⁰

Next remedy (evolved to be used instead of a writ of right) was a **writ of entry**.³¹ The writ of entry sur disseisin came into existence by 1205.³² It was a remedy for the past dispossession (either of the demandant himself or of his ancestor but no more than of the 'fourth degree' or the 'third hand').³³ The degree rule was, probably, a common sense requirement (having in mind the difficulty of proof after certain passage of time). The rule of the degrees was abolished in 1267 by the statute of Marlborough, opening the door for the writ of entry replacing the writ of right.

²⁵ It thought to be one of the so-called "petty assizes", introduced by the Assize of Clarendon by Henry II in 1166. Its close relative was the assize de morte antecessoris: both were original writs (original commencement to suit) (Reeves (ed. of 1869), vol1, 230. The influence of Redeintegranda on the assize of novel disseisin is a matter of the considerable dispute. See Tate, Ownership and Possession in the Early Common Law, 291-305.

²⁶ The assize, however, was available only to persons who had seisin of freehold estate (*liberum tenementum*). (Bracton f.164, De assize novae disseisinae [*quod oportet de necessitate at superiorem recurrere ubi non poterit disseisitus per se disseisitorem suum incontinenti reicere, et fiat ei ubi breve de nova disseisina*]). *Si taliter feoffatus per aliquod tempus in pace tenuerit, a vero domino eici non poterit sine brevi et iudici, dum tamen tale sit tempus quod sufficere possit pro titulo... Item competit ei remedium et restitution per assisam qui omnino sine aliquot titulo in sesina fuerit per disseisinam vel intrusionem sine iudicio disseisitus, dum tamen tempus habeat quod sufficiat pro titulo, versus omnes sive ius habeant sive non, et ita iuvat possessionem aliquando tempus sicut titulus...*

But (!) for purpose of the assize of novel disseisin, a stranger could not plead want of freehold in the disseisee. (Bracton, vol 3 ?, De interrogationibus faciendis cum partes comparuerint in iudicio ...) *Item talibus non competit aliqua exception contra assisam, nec de tenera seisina nec de libero tenement. Feoffatoru de re aliena non competit propter factum suum, extraneis vero non quia nullum ius habent. Vero domino non propter tempus, quia post tempus disseisivit sine iudicio.*

See also J M Lightwood, A Treatise on Possession on Land (London, 1894), 85-6.

²⁷ No essoin (excuse not to appear) was allowed, but proceeding then was by way of default.

²⁸ The rule was later relaxed: not only the principal disseisor, but anyone taking part in the act of disseisin, could be joined as a defendant (aside from the current tenant) D. Sutherland, The Assize of Novel Disseisin (Oxford at the Clarendon Press, 1973), 141. The survivor just needed to be alive (not to be present) (*ibid*).

²⁹ Bracton f.275b-177; P&M, ii, 54-5.

³⁰ In 1275 by Stat West.I c39 the limitation day became 1242 and it lasted until Henry VIII (P&M, ii, 51).

³¹ As Maitland explained: "The tenant, it is alleged, had no entry into the land except in a certain mode, which mode will be described in the writ and is one incapable of giving a good title. The object of this formula is to preclude the tenant from the mere general denial of the demandant's title which would be appropriate in the writ of right, and to force him to answer a certain question about his own case

³² P&M, ii, 64.

³³ "A demandant might say that the tenant had no entry save per (through) X cui (to whom) Y granted it, which Y disseised his ancestor. Or he could say that the tenant had no entry save per X, cui his ancestor had granted it while out of his mind." (Milsom, Historical Foundations of the Common Law, 1968, 121-2). The Statute of 1267, Stat. 52 Henry III (Marlborough), c.29.

In the old action by ‘writ of entry sur disseisin’, the defendant needed to answer whether he had no entry save as the successor of a disseisor, and he was precluded from going behind the disseisin and pleading ‘proprietary right’.³⁴ Here, clearly, the issue was disseisin.

A new action of ‘entry in the nature of an assize’ grew out of its ancestor, entry sur disseisin (which was more an extension of the assize rather than its substitute) by mid 1380s.³⁵ It effectively stood in the place of novel disseisin.³⁶

In Maitland’s view, by the writ of entry a disseisee or his heir could bring an action for the recovery of the land “against any person who has come to the land through or under the disseisor or by disseising the disseisor: and this action will be possessory”.³⁷ Maitland conceded the divergence of opinions as to the character of the writ of entry action.³⁸ But he pointed out that even if, actions based on the writ of entry (aside from one based on the writ of entry sur disseisin) were not possessory in the sense of not being concerned with violated possession, still such actions could be classified as possessory, since either the defendant was precluded from relying upon his ‘proprietary right’ or the question of the better right to the land was left open.³⁹

With a passage of time, a strange metamorphosis also happened to the **assize of novel disseisin**. It was originally purely possessory remedy for the wrongful dispossession (disseisin) *injuste & sine iudicio*, without judgement and unjustly.⁴⁰ It seems that ‘injustly’ initially was taken to mean merely ‘without judgement’. Then, by early 14th century, the entry by the clamant with the right of entry [as one who had been disseised before or who could be in seisin due to his ancestor’s seisin, if not the defendant] became no more a disseisin (with few exceptions, as when one had come to land by inheritance: the case of the

³⁴ P&M, ii, 67; Bracton, f 282b. Maitland pointed out that some actions were brought up by more general formula of writ of right which did not suppose any violation of seisin, as when a termor held on after termination of his term, *A Praecepto*, when would allege any kind of ‘invalid’ entry (P&M, ii, 68-9).

³⁵ Sutherland, *ibid*, 170.

³⁶ A writ of entry, according to Sutherland, went to the court of Common Pleas; if the tenant failed to appear the court would not proceed to trial by default as in the assize but would use instead the procedure common to most real actions, seizing the land in distraint, resummoning the tenant...” (Sutherland, 170-1).

³⁷ P&M, ii, 66.

³⁸ Bracton seemed to think that aside from writ of entry sur disseisin (as supplements to the assize) other writs of entry lie ‘in causa proprietatis’ (f. 218b; 317b), Fleta and Britton thought that it had something of possession but in part ‘savour’ of property (Fleta, p.360; Britton, ii 2096) (P&M, ii 72)

³⁹ P&M, ii, 72-3.

⁴⁰ The plaintiff had to be ‘seised and wrongfully disseised’. The original meaning of a freeholder (or somebody holding in his name) being putting out against his will seemed to become later to mean any interference with a freeholder’s use and disposal of his own (Sutherland, *ibid*, 145). Such relaxation of the meaning was of the consequence for the termor making a feoffment of the freehold to a stranger. Originally, it was not strictly a disseisin, for the stranger entered not by forcing anyone out. But by the Statute of Westminster II c. 25 of 1285 it became a disseisin for a termor to enfeoff a stranger. Thus, “the assize could be used to recover after any tortious feoffment by one who held in the freeholder’s name and did not himself possess a freehold (*ibid*, 146). Next, The original notion of seisin (as receiving by full and peaceable livery of seisin under a valid feoffment that worked no wrong to any man (Bracton *fos.* 39b, 43) or by putting in by authority, or otherwise to be continued at least for few days [to take esplees]) became to be relaxed (*ibid*, 148). One “had only to come to the tenements openly and in the daytime, enter them, declare his intention and make a show of taking control, and charge any adverse occupier to withdraw” (*ibid*, 148).

‘descent cast’).⁴¹ So, when the tenant put such clamant out, he might commit a disseisin himself.⁴² This created a remarkable window of opportunities for relatively easy means to try titles, but it did not stay open for long.⁴³

In 1381 the statutes were passed against forcible entries (with violence) by those with a right of entry and peaceful entries by those without a right of entry (with penalty of imprisonment and ransom at the king’s pleasure).⁴⁴ As a result, the cost of using the assize of novel disseisin to try titles increased significantly. What was interesting that a new civil action of **forcible entry** became itself the means to try title.⁴⁵ But it was the only matter of time for even more simple, remedies to emerge. By 1500 the assize was passing out of use, with the rise of a personal action of trespass.⁴⁶

By 16th century, while the writs of rights were still occasionally used, the vast majority of actions in litigation over land were already personal actions, such as forcible entry, replevin (declining after 1555) and, most of all, trespass *quare clausum fregit*.⁴⁷

From the late 14 century (the later part of Edward III’s reign) the **writs of trespass** was brought, in Sutherland’s view, either in the cases of genuine trespass, or continuous use after a formal entry (a refusal to make way for the plaintiff with a right of entry).⁴⁸ Still, as Baker noted, in trespass *quare clausum fregit*, the complaint was of an entry on land in the plaintiff’s possession,⁴⁹ though the plaintiff only had to be in possession at the time of trespass.⁵⁰ The real issue became a right of entry, which a successful plaintiff might “exercise on his own without any order from the court or any help from the

⁴¹ Sutherland argued that from the early 14 century, long tenure was not a sufficient answer on the plaintiff part’s to the defendant’s right of entry (ibid, 154). However, he himself noted that “to prevent a plaintiff from recovering on the strength of long tenure along the defendant *had to plead in bar of the assize*, setting forth his own title to the tenement and showing how it was superior to his opponent’s claim. If the defendant did not plead in bar but let the case go straight to the assize, the jurors should... give the plaintiff a recovery by their verdict, regardless of any superior title in the defendant, if they found that the plaintiff had been seised for a considerable time before the defendant ejected him” (ibid, 155).

⁴² Milsom gives two early examples: “In 1332 a clamant was hauled out by his heels when half-way through a window, and an assize on this determined the validity of a deed of grant. Thirty years later another claimant was held to have been disseised although he had not actually to enter at all... (YB.8 Lib.Ass.,pl25,f.17; YB 38 Lib. Ass., pl 23, f. 228d; Milsom, 1968, 134). Sutherland gives the example of 1300 of one two years old, who was set down by the door of the house by his grandmother and had claimed an estate through her words (C.P. 40/134 m.128d; Sutherland, ibid, 148-9).

⁴³ In case of nominal entry and suit on the technical disseisin, a (real) claimant would appear as a plaintiff, so his adversary could elect to plead straight to the assize and win on his own long-continued seisin (*Eyre of London* 1321, 157-52; Sutherland, 157). Hence the claimant needed a true and effective entry (so that he could stand as defendant), but it might be a precarious undertaking.

⁴⁴ Statutes of forcible entry: 5 Richard II Stat. I.c.7 (1381), 15 Richard II c. 2 (1391), 4 Henry IV c. 8 (1402), 8 Henry VI c. 9 (1429).

⁴⁵ As a result of the statutes of forcible entry, new actions of forcible entry came to life: ‘forcible entry on the Statute of 8 Henry VI’ or ‘forcible entry on the Statute of 5 Richard II’ (Sutherland, 174). The last of these civil actions for forcible entry was used in a case of illegal entry without violence (ibid, 174-5). In both cases, a refusal to make a way for the plaintiff with a right of entry might account for ‘forcible entry’ (ibid, 175). But only damages could be sought (*Paschall v Tendring* (1554), Benl. 37; Baker, ibid, 723). The primary use of the actions was to try titles. Besides of the question of force, the specific title was to be pleaded (*Happy v Benet* (1502) 2 Caryl 406), in contrast with trespass (Baker, 723). Like in novel disseisin the complaint was of dispossession (ibid).

⁴⁶ Sutherland, ibid, 176.

⁴⁷ John Baker, Oxford History of the Laws of England, vol Vi 1483-1558, 720.

⁴⁸ Sutherland, 171-2.

⁴⁹ Anon. (1491) 1 Caryl 71, pl. 76 per Townshend J; Baker, ibid, 723.

⁵⁰ *Pope v See* (1534) Spelman 215; 94 Selden Society 367 at 358; Baker, ibid, 723.

sheriff".⁵¹ The "purpose was to show that the title in the bar derived from seisin gained by disseisin".⁵² However, as Baker pointed out, the litigation, often resting on general pleading, could hardly furnish either party with any recorded title, and might be sometimes used just to test the opponent's case.⁵³

Then, the action of ejectment became to be used to try titles.

III. From the history of the action of ejectment.

The action of ejectment emerged as a remedy for a termor, who could not use the assize of novel disseisin.

Termor at common law

A position of termor was rather precarious at the early common law. The concept of the term of years developed at common law outside of its original feudal tenure framework.⁵⁴ As Milsom noted, tenant for years was more like the bailiff rather than tenant for life.⁵⁵ According to Bracton, a 'usufructuary', who held for a term of years, had no remedy of assize [of novel disseisin] (Bract. f.167).⁵⁶

It seems that Bracton treated termor and usufructuary alike. In this sense, termor had, unlike a lessee for a term of years in Roman Law, but just like usufructus, who had *ius in re aliena*. In such a case lessee had no [civil] possession (but only quasi possession). However, Bracton's language is not precise – on an occasion, termor could be described as having seisin, so each of them [the termor and the donee (who received seisin subject to the termor's term)] may be in seisin of the same tenement without prejudice to the other, one as of term and the other as of fee or free tenement (fo. 220)).⁵⁷ Still Bracton adds the orthodox Roman Law observation: we speak rightly when we say that the whole estate is ours even when the usufruct is another's, since a usufruct is not part of dominium but a servitude (fo. 220).⁵⁸

At whole, Maitland's explanation⁵⁹ of this confused position [collapsing termor into usufructuary]⁶⁰, as the attempt to account for the Roman law position, seems to be the right one: Bracton used the language of the unmistakably Roman law origin (not of the later (post Bartulus) *ius commune*): *servitutes* as *iure in re aliena*, and not part of dominium. According to Bracton, because [termors] do not possess

⁵¹ Sutherland, 173. Possibly "even men who won at the assize or other real actions usually did not trouble to see execution of the judgement restoring them to seisin but simply made their entries on their own with the same confidence as one who had just succeeded in Trespass" (ibid).

⁵² Baker, *ibid*, 724.

⁵³ Baker, *ibid*, 721-2.

⁵⁴ "There was no relationship of lord and man between the parties and no homage was done. Correlatively no warranty was inherent in the arrangement... there was no obligation to acquit, and we hear nothing of 'defence'" (S.F.C. Milsom, *Historical Foundations of the Common Law*, Butterworths, L., 1969, 127).

⁵⁵ Milsom, *ibid*, 128.

⁵⁶ *usufructuarius qui tenet ad terminum annorum...not habeunt nec remedium per assisam) because such person, although in possession in the name of another, did not possess (qui in possessione fuerit nomine alieno...non possidet Cf Fleta IV.3.I: Nulli competit querela nove disseisine, qui in possessione fuerit nomine alieno.*

⁵⁷ *...poterit enim quilibet eorum sine praeiudicio alterius in seisina esse eiusdem tenement, unus ut de termino et alius de feodo vel libero tenement.*

⁵⁸ *...recte dicimus totum fundum nostrum esse etiam cum usufructus alienus sit, quia non dominii pars est usufructus, sed servitus fit.*

⁵⁹ Pullock and Maitland (P&M), ii, 114-5, 115 note 1.

⁶⁰ There was another dissimilarity: the Roman law usufructuary (who did not have the civil possession at Roman law) became a freeholder (of life estate) at Common law having a lawful seisin and enjoying most of remedies available to a freeholder of estate in fee, such as the assize of novel disseisin. It was a freeholder, or tenant in demesne, who was seised of land in demesne; his lord of whom he held also seised of the land, not of demesne, but in service (Bracton f. 81, 392; P&M, ii, 38).

[incorporeal things] but only quasi possess , therefore they do not need to deliver [possession] (Bract . f.39) .⁶¹ Still, the common law term of years was, neither the Roman law *locatio conductio*,⁶² nor ‘civil’ possession.

The pedigree of the action of ejectment: *quare ejecit infra terminum* and *de ejectione firmæ*

The termor’s possessory protection at common law was an evolving historical phenomenon.

For some time a termor seemed to have no direct remedy aside from the action of covenant (*quod teneat ei conventionem factam*) against the lessor.

Britton [1.160 b] book 1, chapter XXXIII par 5 discussed the case of termor, ejected without the consent of the lessor, pointing out that it was for the lessor to proceed by assize of novel disseisin, though the damages were due to the termor. The termor, according to Britton, also had no remedy against his lessor who parted with his freehold, if new freeholder put another in seisin and ousted the old termor (ibid, par 3),⁶³ though if he was ousted by his own lessor he could by a writ have recovered the rest of term against him (ibid, par 2).⁶⁴

According to Bracton, the termors, who were ejected before their term expired, once sued by the writ of covenant, which laid only between him who had given the land to farm for a term and him who had accepted it.⁶⁵ However, the termors also, by the testimony of Bracton, had then got a remedy (*breve ad recuperandam firmæ*) against anyone who ejected them (*contra quoscumque deieectores per tale breve*) (Fol. 220). The writ seemed to address either the lessor or the person to whom the original lessor sold the land.⁶⁶ The effect of this alleged remedy is, though, a matter of some dispute. In view of Plucknett, the

⁶¹ ...*quia non possunt [res incorporalis] possideri sed quasi. Ideo traditionem non patiuntur...* Cf. Littleton (L.1.C.7.Sect.59) still declared that in a case of a lease for years there needed no livery of seisin (but just entry by the force of the lease). Coke agreed (48 b). But this time termor ‘held possession’ if not seisin.

⁶² One explanation is that in the dark ages the Roman *locatio conductio* “was overwhelmed by the precarium which tended to become a beneficium or a lease for life”; even for some time after the Conquest (until the 13th century) ‘husbandry leases’ were rare (Pullock and Maitland (P&M), ii, 111-2). The interest of a termor was described as chattel under Edward I (Y.B. 33-5 Edw. I, 165; P&M, ii, 115 note 3: ‘la terme nest qe chattel’). Bracton referred to it as quasi chattel (f.407 b).

⁶³ This Britton’s observation puzzled Milsom, who referred to five instances of trespass writ *de ejectione firmæ* under Henry III (S.F.C. Milsom, *Studies in the History of the Common Law* (London, The Hambledon Press), 1985, 4-5). The first two were against the lessor, and the three others were against persons claiming by title paramount (in one (KB. 26/161, m. 3) of the last three writs the defendants claimed that the plaintiff held only as a guardian of the wife, and in another (KB. 26/161, m.12) one the defendants claimed to have the wardship (ibid, 5; cf P&M, 116-7). Milsom explained Bracton’s assertion of *quare ejecit* as an universal termor’s remedy by “proliferation of *quare* writs [which] then obscured its ancestry, making it look like just one kind of possessory protection for the termor” (Milsom, ibid, 5-6). Milsom referred to the hypothesis that the writ *ejectione firmæ* emerged as a remedy against the freeholder against whom the writ of trespass *quare vi & armis & contra pacem* would not lay (ibid, 4-7). In ANON. (1383) (Y.B. Mich. 7 Ric II) Belknap CJ argued that “my tenant for term of year” may have a writ of trespass “against me as against the greatest stranger in the world, for during the term the lessor has no greater cause to interfere than the greatest stranger in the world” (Baker and Milsom (B&M), *Sources of English Legal History*, 2nd ed, Oxford UP, 2010, 197).

⁶⁴ It might be that *quare ejecit infra terminum* protected against dispossession by somebody who purchased from the lessor, but not against ejectors in general (Pollock & Maitland, *The History of English Law before the time of Edward I*, vol 2, 2nd ed, 1968, 108). So a specialised writ of trespass *de ejectione firmæ* was developed on the basis of the writ *quare clausum fregit (vi & armis & contra pacem)* in the last years of Henry III’s reign (ibid, 108-9).

⁶⁵ ...*Solent aliquando tales cum ejecti essent infra terminum suum perquirere sibi per breve de conventionem. Sed quia tale breve locum habere non potuit... nisi tantum inter illum qui ad firmam tradidit et ad terminum et illum qui recepit...* (Bracton, Fol.220)

⁶⁶ In Plucknett’s view, *quare ejecit infra terminum* was laying only between rival lessees who both claimed to hold from the same lessor (Plucknett, 373, note 3). In Pollock and Maitland’s view too, it only laid against one who had

older action *quare ejecit infra terminum*, cited by Bracton (possibly invented by Raleigh in 1235),⁶⁷ despite of Bracton's assurances of it as being, effectively, equivalent to assize of novel disseisin, had been almost immediately reduced to an action between rival lessees who both claimed to hold from the same lessor.⁶⁸

Under Edward II, another action *de ejectione firmæ* already gave a termor remedy against any wrongdoer who ejected him, giving him damages, though not the recovery of the term.⁶⁹ It seemed, a termor was able to recover his term by 1383.⁷⁰

Regarding two co-existing remedies to lessor, it seemed to be settled by 1481, that *de ejectione firmæ* was in nature of trespass writ and laid against the lessor (against whom the lessee had also a writ of covenant), but against his feoffee the writ *quare ejecit* laid.⁷¹

purchased from the lessor (History of English Law, 2nd ed, 1968 vol 2, 108. They pointed out, that Fleta (fo. 275) followed Bracton (ibid, 108, note 3).

⁶⁷ Maitland, "History of the Register", Harv. L.R. iii.173, 176. Bracton, fo. 220 referred to *praecipue quod reddat [praecipue A quod iuste et sine dilatione reddat B tantum terrae cum pertinentiis in tali villa quam idem A, qui dimisit scilicet] and a summons ostensurus quare [si talis fecerit te securum et cetera et infra, ostensurus quare deforciat tali tantum terrae cum pertinentiis in tali villa, quod talis dimisit ipsi tali ad terminum qui nondum praeteriit, infra quem terminum praedictus talis illud vendidit tali, occasione cuius venditionis ipse talis praedictum talem de praedicta terra eiecit ut dicit...]*

⁶⁸ T. F. T. Plucknett, *A concise History of the Common Law*, 5th ed, (London, Butterworth), 1956, 373, note 3; 571. In Plucknett's view, *quare ejecit infra terminum* was related to various forms of *quare ejecit* for holders of wardships, as terms of years were bought and sold as investments in the 13th century, just as feudal wardships and marriages (ibid, 571, note 5). Milson also thought that the writ also known as *occasione cuius venditionis* laid against the grantee of the lessor, and noted that the ejected lessee needed to recite his grant

⁶⁹ Plucknett, 571. in Anon. (1383) (Y.B. Mich. 7 Ric II) Belknap CJ said that *de ejectione firmæ* 'is only an action of trespass in its nature', and 'in action of trespass one cannot recover damages for a trespass which has not been done but is to be done', but 'one must sue by action of covenant at common law to recover a term' (Baker and Milsom, *Sources of English Legal History*, 2nd ed, 2009, 196.

⁷⁰ Plucknett, 373, note 5 (De Banco Roll, Michs. 13 Ric II, roll ccclxxxvii). Specific recovery of the term by a *quare ejecit infra terminum* might even happen even before 1317 (Anon. Y.B. 4 Edw.II, Baker and Milsom *Sources of English Legal History*, 2nd ed, 2010, Oxford UP, 195). In *Brancaster v Master of Royston Hospital* (1383)(Y.B. 6 Ric II, ibid 196-7), it was said by Belknap CJ that a writ *de ejectione firmæ* was an action of trespass in nature, the plaintiff could not recover the term, which was still to come; he also confirmed that "when someone was ejected from his term by a stranger, he could have had *quare ejecit infra terminum* against the person who ousted him, and if was ousted by his lessor a writ of covenant against him, and if ousted by his lessor's lessee or by a grantee of the reversion, a writ of covenant against the lessor with a special count."(ibid). It was noted in 1454 by Choke Sjt (Y.B. Mich. 33 Hen VI, fo.42, pl.19) that "if a lease is made to me for a term of years, and the lessor alienates to a stranger during the term ... and I am put out from my possession of my term by the said alienee, I can have a genera writ of trespass *quare vi et armis* against him ... as well as the *quare ejecit infra terminum* etc. But in the writ of trespass I shall recover only damages etc., whereas in the *quare ejecit* etc. I shall recover my term, if any is left, and for such o it as is past I shall recover damages, or if it is all past I shall recover wholly in damages."(ibid, 197). However, Plucknett noted that in 1467 (Y.B. 7 Edward IV, Pasch. no. 16, fo.6), and in 1481 (21 Edward IV, Michs. no. 2, fo. 11) there was the opinion (not a decision) that *de ejectione* might give recovery of the term, and in 1498 or 1499 (F N B 220 H) there was already the decision to this effect. He also referred to the case 1389 (De Blanco Roll, Michc 13 Ric. II, roll ccclxxxvii), where the term was allegedly already recovered (Plucknett, 373)

⁷¹ In 1481, Choke J said (Y.B. Mich. 21 Edw. IV, fo. 10, pl.1.) that "*quare ejecit infra terminum* lies against someone who is in by title, but *ejectione firmæ* is always *vi et armis* and always lies against someone who is wrongdoer and not against someone in through title. If my lessor ejects me, I shall have *ejectione [firmæ] vi et armis* against him, whereas if he enfeoffs a stranger I shall have *quare ejecit infra terminum* against him and not *ejectione firmæ*" (B&M, 198). Soon after (Y.B. Pas. 21 Edw. IV, fo 30) it was agreed by the whole court that against the lessor *ejectione firmæ* lies and not *quare ejecit infra terminum*, for his entry contrary to his own lease is absolutely wrongful [and] the lessee could have a writ of covenant against him (B&M, 199).

Thus, with respect to dispossessed termor, two different remedies had crystallised: one, in the case of clear wrongdoer (including the lessor himself), in the nature of trespass, and another, in the case of dispossessor 'by title', where, accidentally, not only damages, but the term itself could be recovered. Thus *de ejectione firmae*, as was settled by the end of 13th century, laid against somebody who was a wrongdoer and not against somebody who was by title. It seemed to originate from the writ of trespass *quare clausum fregit*.⁷² Clearly, *de ejectione firmae* had tortious (delict) roots, with no question of title to be tried, in contrast to *quare eject* (where the ejected lessee recited his grant).

But could we say that *quare ejecit* was the means of trying the title? Probably not, as the title of freehold as such was not an issue. Typical scenario involved the lessor, during the term of lessee, granting his tenement to another, with new freeholder leasing the same land to another lessor. The lessor's title was not in dispute. The issue at hand in *quare ejecit*, just as in *de ejectione firmae*, was dispossession, while not of 'directly' tortious nature, but without 'justa causa'.⁷³

The writ *quare ejecit*, however, with time, was supplanted by *de ejectione firmae*. By 1499, not only damages but also the term was recovered by *de ejectione firmae*. Blackstone reported that by his time *de ejectione* completely replaced *quare ejecit infra terminum* (Bl Com., 3, 206-7)

As a result of the availability of specific performance (aside from damages), termor's possession became not only to be as good as freehold's possession, but he had, in place of the assizes and writs of entry, 'a swifter and simple action of trespass' to recover his term.⁷⁴ Moreover, 'the form of action was always the same, without regard to the source and nature of the lessor's title [! AT], or the character of the disseisin, deforcement, or ouster. This dispensed with the delicate task of selecting a writ exactly suited to the nature of each particular case, and the necessity of tracing or disclosing the demandant's title or specifying the character of the ouster'.⁷⁵

IV. The action of ejectment: a new means of trying title. The dispute between Holdsworth and Hargreaves

By the early 17th century, *ejectione firmae* had overgrown its initial purpose as a termor's remedy to become a new means of trying the title. More specifically, *ejectione firmae* had become used for testing the right of entry. The action was put in motion by the claimant entering and making a lease, with his 'lessee' ('the faithful John Doo') then being ejected either by the tenant or by an accomplice of the claimant ('Richard Roo'). For the real tenant (defendant) to join in the ejectment proceeding against the 'casual ejector' he was to confess the lease [to the causal ejector], entry and actual ejectment, insisting on the title only.⁷⁶ Thus the action assumed a wholly fictitious character (with fictitious lease and fictitious ejectment). Coke already testified that "at this all titles of lands are for the greatest part tried in actions of ejectment" (Alden's Case (1601) 5 Co Rep. at fo. 105b)⁷⁷

Let us concede that the claimant needed to assert his right of entry. But where does it leave us? Would the proof of the right of entry mean a testing of the 'absolute' title? It never was the test even in the action

⁷² But if *quare clausum fregit* spoke of the breach of 'his close', *de ejectione firmae* writ recited the lease to the plaintiff of the premises, and his ejection from his term (*firmae sua*) (Plucknett, 373).

⁷³ Plucknett noted that *quare* could be only brought during the term, while *de ejectione* firstly laid only in cases after the lease had expired (Plucknett, 574, note 2).

⁷⁴ Plucknett, 574.

⁷⁵ Sedgwick and Wait, *Ejectment*, Essays A.A.L.H. iii 616, cited with apparent approval by Holdsworth, 7 *History of English Law*, 7.

⁷⁶ W. Blackstone, III *Commentaries on the Law of England* (1765), appendix

⁷⁷ Holdsworth, vol 7, 9.

by the writ of entry. The logics of the development of the common law remedies seemed to point in the opposite direction. It was towards the simple possessory or, later, even personal remedies (in the nature of trespass). How then the action of ejectment based on the claim of the right of entry could come to be seen as being about the 'absolute' title?

Holdsworth cited with approval lord Mansfield's view, that in every case of ejectment the plaintiff must show that his lessor had a right to enter, by proving a possession within the period of twenty years allowed by the statute 21 of James I c. 16, "or accounting for the want of it, under some exceptions allowed by the statute"(*Taylor d. Atkins v Horde* (1757) 1 Burr. at 119).⁷⁸

In comparison, Hargreaves claimed that in the action of ejectment "the plaintiff would succeed if he could show a disseisin done to him or to his predecessor in title, provided the right of entry arising thereout had not been tolled; and that the defendant was not entitled to rebut his claim by setting up a *ius tertii*."⁷⁹

In his view, in ejectment "(1) The plaintiff must show either (a) seisin in himself or his predecessor in title, or (b) possession for such a chattel interest as is recoverable by ejectment; (2) the defendant may rebut this by showing that the possession so proved was neither seisin nor possession for such a chattel interest as is recoverable by ejectment; (3) a defendant cannot use a *ius tertii* as a defence; (4) he may, however, set up a title in himself based on a seisin or possession earlier in time than that relied upon by the plaintiff"⁸⁰.

The dispute between Holdsworth and Hargreaves had centred on a handful of cases.

Allen v. Rivington, 2 Wins. Saund. 111, 85 E.R. 813 (K.B. 1670): case of trespass?

In this case, the plaintiff has a priority of possession, and no title was found for the defendant, so judgement was given for the plaintiff.⁸¹

The most comprehensive description of the facts of the case is given by Gordley and Mattei.⁸²

According to John Hiblin's will, his land was to go to Ann Harrison, the daughter of his son-in-law, only if his own son Thomas has no son. Thomas had a son Richard, but the son died. The land was then claimed by Ann Harrison and by the female heirs of Richard, Ann and Elizabeth Hiblin. The court, however, thought the arrangement was like a fee tail, so that when Richard died, the land should go to the heirs of John Hiblin. But these heirs were unidentified and not before the court. When Richard died, it seems that Ann Harrison took possession first and was ousted by Rivington, the guardian of the Hiblin sisters. Ann Harrison brought ejectment and won "because it appeared in the record that the plaintiff had a priority of possession and that there was not any title found for the defendant." The only hint as to when this prior possession occurred is the finding of the jury reported *Allen v. Rivington*, 2 Wms. Saund. 108, 85 E.R. 811 (KB. 1670): "that the said Richard ... died without issue male, and that

⁷⁸ Holdsworth, vol 7, 7.

⁷⁹ Hargreaves, 380. He also noted that "ejectment also lay for the recovery of land by one who claimed not the right to seisin but the right to possession, by virtue of some chattel interest such as a term of years [but] ... not all chattel interests give a possession protected by ejectment; an evident example is a tenancy at sufferance. If, therefore, the plaintiff in ejectment relied on possession, as opposed to seisin, one would expect that the defendant could rebut his claim by showing that the possession relied upon was not by virtue of such a chattel interest as would enable him to maintain ejectment. This defence is generally confused with that of *ius tertii*" (ibid).

⁸⁰ Ibid, 381.

⁸¹ The problem in *Allen*, however, was what to do when it was clear that neither party had title. If it seems odd to protect the first to take possession, it would be odder to protect the second party who ousted the first (Gordley & Mattei Protecting Possession, (1996) 44 *The American Journal of Comparative Law* at 321 note188).

⁸² Gordley & Mattei (G&M) Protecting Possession, (1996) 44 *The American Journal of Comparative Law* at 321 note 188.

the said Ann Harrison entered into the lands within written, and demised them to the within named Geo. Allen, the plaintiff."

As Gordley and Mattei summed it up the respective positions, "Hargreaves thought that Ann won because, as a prior-possessor, she had seisin. (Hargreaves, at 393). But the court spoke of "a priority of possession." If there had been a requirement of seisin, it is odd that neither this court nor Lord Holt mentioned it. Holdsworth thought that the case showed that English law hesitated between requiring plaintiff to prove ownership and requiring plaintiff to prove priority of possession, an issue that was settled in *Stokes*. (7 Holdsworth, *History*, at 62-63). The court in *Allen* dealt with that problem without laying down a general principle. Lord Mansfield laid down his general principle in a case that did not involve that problem.

Holdsworth, however, also suggested that the case *Allen v Rivington* (1669)⁸³ might be based on the reasoning that in ejectment the plaintiff could win against a wrongdoer.⁸⁴ Holdsworth seemed to be right to argue that ejectment could be maintained against a merely trespasser. Action of ejectment is offshoot of the action trespass, and this is clearly the general rule in trespass. His reference to *Cary v Holt* (1746) 2 Str.1238 is up to the point.⁸⁵ Moreover, this was the rule in the assize of novel disseisin too. It is always enough to prove a tortious dispossession to prove disseisin. "Prior possession, however short, is sufficient prima facie title in ejectment against a mere wrongdoer." (*Doe dem Hughes v. Dyeball* (1829)).⁸⁶

Doe v Barnard (1849)⁸⁷: ius tertius?

The case was, probably, best analysed by Ames, who pointed out that "from time immemorial, a disseisor, if dispossessed by a stranger, has had the right to recover the land from the wrongdoer by entry, by assize, or by ejectment".⁸⁸

In that case B occupied without right for eighteen years, and died leaving a son; C excluded the son and occupied for thirteen years, when he was ousted by A, the original owner. C brought ejectment against A, but failed; not, however, because of any right in A; on the contrary, the latter, as plaintiff, in an ejectment against C, had been already defeated because the statute had

⁸³ C. 2 Keb. 606; 1 Sid. 445

⁸⁴ Holdsworth, 7 *History*, 60 note 1.

⁸⁵ The plaintiff declared in trespass upon his possession; the defendant makes title, and gives colour to the plaintiff; the plaintiff replies, de injuria sua propria, and traverses the title set out by the defendant; ... the Court held this a good replication; for it lays the defendant's title out of the case, and then *it stands upon the plaintiff's possession, which is enough against a wrong-doer; and the plaintiff need not reply a title.*

⁸⁶ M. & M. 345, 173 E.R. 1184 (N.P. 1829); cited in G&M at 323. See also *Doe v. Dyeball* (1828) 3 CAR. & P. 609. This case is an authority that if, in an ejectment, it be proved that the lessor of the plaintiff let the *locus in quo* to a tenant, who held peaceable possession for about a-year: this is sufficient evidence of title as against a party who came in the night and forcibly turned such tenant out of possession. As Lord Tenterden, C. J. memorably put it at 611: peaceful possession "is sufficient proof of title as against a man who comes and takes forcible possession at three o'clock in the morning".

Hargreaves' attempts to rebut Holdsworth's assumption that the disseisee could win against a trespasser on the force of his previous possession are not convincing. According to Hargreaves (ibid, 391): "The Crown land cases and the rectory cases make it equally clear that possession without an estate is not a title, even against a trespasser". But these cases were not cases of disseisin, as he himself pointed out (as crown could not be disseised, and in the rectory cases too seisin could not be disseised, so there could not be disseisin)

⁸⁷ 13 Q.B. 945, 116 E.R. 1524 (1849). "Cooter took possession and let his son John live on the premises from 1815 to 1834. Then his widow remained in possession for thirteen years. Then, as in *Doe dem Hughes v. Dyeball* and *Doe dem Humphrey v. Martin*, the defendant "turned her out and shows no title in himself." Defendant's claim under a mortgage from Cooter in 1829, was barred by lapse of time. The widow lost, however, because, according to the court, prior possession was only prima facie evidence of title. One could see she did not have title since she had proven the prior possession of her husband" (G&M, 325).

⁸⁸ James Barr Ames, *Lectures on Legal History*; XVII. The Nature of Ownership, Harvard UP, 1913, 206 note 2.

extinguished his title (*Doe v Carter* 9 QB 863). The court decided against C in *Doe v Barnard*, on the ground that he, being a disseisor of A's heir, who had the superior right, could not maintain ejectment at all, even against a wrongful dispossessor. This view... is, of course, untenable, being a departure from the law as settled by the practice of six centuries. For, **from time immemorial, a disseisor, if dispossessed by a stranger, has had the right to recover the land from the wrongdoer by entry, by assize, or by ejectment.** Bract. f. 165a; Britt. 296; *Bateman v Allen*⁸⁹. ... *Allen v Rivington*... The doctrine of *Doe v Barnard* is open to the further criticism that it is a distinct encouragement of private war as a substitute for legal proceedings. For C, unsuccessful plaintiff, has only to eject A by force in order to turn tables upon him. Once in possession, he could defeat a new ejectment brought by A, in the same way as he himself was rebuffed; that is by setting up the superior right of B's heir. Fortunately *Doe v Barnard* has been overruled, in effect, by *Asher v Whitlock* L R 1 QB 1. The suggestion of Mellor J, in the latter case, although adopted by Mr Pollock (*Poll & Wr.*, Poss. 97, 99), that the former may be supported on the ground that the superior right of B's heir was disclosed by the plaintiff's evidence, will hardly command approval. If an outstanding superior right of a third person is a relevant fact, it must be competent for the defendant to prove it; if it is irrelevant, its disclosure by the plaintiff's evidence must be harmless. *Doe v Barnard* may be regarded as thoroughly discredited by *Perry v Clissold* [1907] AC 73, 79-80.

Hargreaves also discussed *Doe v. Barnard* at some length.⁹⁰ He seems to think that the plaintiff did not have a right of entry, because his father's possession afforded no presumption of fee, so nothing descended to him.

The tenant in fee simple allowed the plaintiff's husband to occupy the land as tenant at will; later he mortgaged the land to the defendant's predecessor in title. The mortgage probably converted the tenancy at will into a tenancy at sufferance, but the Court held that for the purposes of the Statute of Limitations any such change was immaterial. After eighteen years' possession the husband died, leaving a widow, the present plaintiff, and a son. The widow remained on the premises. At that moment, therefore, the tenancy at will had determined by the death of the tenant; the landlord could have re-entered and could have recovered damages in trespass (by relation) against the widow. The widow's entry was also, presumably, a disseisin. In fact, however, the widow remained in possession for eleven more years. The mortgagor and his mortgagee had thus been out of possession for twenty years since the accrual of their right of entry, and by section 34 of the Act of 1833 not only their right of entry and of action but also their title had gone. Now it must be remembered that before 1833 the possession of a tenant at will was not adverse to his lessor, so that there existed no precedents for and no analysis of the working of this part of the Act. Indeed, no such analysis yet exists. The plaintiff's case, however, was very ably presented. Counsel pointed out that as the husband's possession did not continue for the statutory twenty-one years he was still tenant at will when he died. His possession being thus accounted for it 'afforded no presumption of a fee; nor was he a disseisor'. *Having thus shown that the husband had no fee but merely a tenancy at will which was determined by his death, he came to the conclusion that' nothing therefore descended to his son* '. It is difficult to find an answer to this argument. No answer is given by the Court; indeed it is doubtful whether they appreciated its force. But counsel went on to argue that as section 34 of the Act had barred the fee simple, and that as the husband's title was also at an end, it followed that the widow's title alone benefited by the Act. 'Unfortunately he insisted that section 34 operated to transfer the fee simple so extinguished to the widow, thus starting the hare of the 'parliamentary conveyance' " which the Court only too willingly followed. They treated the problem independently of the context in which it had been raised, and contented themselves with pointing out the impossibility of applying this parliamentary conveyance' to the case of a series of twenty trespassers each occupying for the space of a year.'" Having thus disposed, as they thought, of the plaintiff's argument, the Court proceeded to ignore its premises, and based their judgment on the assumption that the husband's possession raised the presumption that he was seised in fee." The way being thus somewhat tortuously opened, the Court turned to the plea of *ius tertii*, dealing with it in a remarkably cavalier manner: 'If the husband's possession raised a presumption that he was seised in fee, that fee must have descended on his child, and *of course*, the lessor of the plaintiff must fail."

Holdsworth, in his turn, pointed out that it "is only upon the hypothesis that the defendant was a trespasser that the plaintiff's prior possession for thirteen years could have entitled him to succeed; and, if he was a trespasser, the fact that the title was in another, whether by a plaintiff's own showing or not, seems to be immaterial. The decision can only be supported on the hypothesis that, on the facts, it was a case where a plaintiff was suing another, who was in possession of his property, without having committed a trespass against him (the plaintiff); and where, therefore, he must recover, if at all, on the strength of his own title. Whether that was a correct view to take of that facts is more than doubtful..."⁹¹

⁸⁹ (1593) Cro. Eliz. 437 : "it is not found that the defendant had the primer possession, nor that he entered in the right, or by the command of any who had title, but it is found that he entered upon the possession of the plaintiff without any title, his entry is not lawful, and the plaintiff had good cause of action against him : wherefore the plaintiff should recover". Moreover it was said "they by their entry gained the possession : and although they be in as disseisors, their lease is good to the plaintiff, and the defendant without title is not to eject him".

⁹⁰ Hargreaves, *ibid*, 395.

⁹¹ Holdsworth, *7 History*, 67.

In Gordley and Mattei's view," neither Holdsworth nor Hargreaves could explain this result. Though Holdsworth cited it to show plaintiff must prove title, he admitted that by his rules the widow should have won because, by his theory, a plaintiff without title can recover against a dispossessor. Hargreaves thought the widow should have won, not because the defendant was a wrongdoer, but because she had seized". However, their own explanation seemed did not pay sufficient attention to the fact that in *Doe v Barnard*, the defendant was a trespasser.⁹²

Patterson J seemed to refer to *ius tertius*⁹³:

The lessor of the plaintiff must therefore rely on her own possession for thirteen years as sufficient against the defendant who has turned her out and shews no title himself. According to the case of *Doe dem. Hughes v. Dyball* (Moo. & M. 346), that possession for thirteen years would be sufficient; for in that case the lessor of the plaintiff shewed only one year's possession, and yet Lord Tenterden said, "That does not signify; there is ample proof; the plaintiff is in possession, and you come and turn him out: you must shew your title." See also *Doe dem. Humphrey v. Martin* (Car. & Marsh. 32). These cases would have warranted us in saying that the lessor of the plaintiff had established her case, if she had shewn nothing but her own possession for thirteen years. The ground however of so saying would not be that possession alone is sufficient in ejectment (as it is in trespass) to maintain the action; but that such possession is prima facie evidence of title, and, no other interest appearing in proof, evidence of seisin in fee. Here, however, the lessor of the plaintiff did more, *for she proved the possession of her husband before her for eighteen years, which was primâ facie evidence of his seisin in fee; and, as he died in possession and left children, it was primâ facie evidence of the title of his heir, against which the lessor of the plaintiff's possession for thirteen years could not prevail*; and, therefore, she has by her own shewing proved the title to be in another, of which the defendant is entitled to take advantage.

It is apparent that J. Patterson misread Lord Tenterden's reasoning, who did not refer at all to any presumption of possession as prima facie evidence of seisin in fee. The latter explicitly said, that even if no title was shown at all (no deed [of release] was put in), "peaceable possession ... is sufficient proof of title as against a man who comes and takes forcible possession". As was argued, this line of reasoning is going back to *Allen v Rivington*.

At whole, there seems to be a consent that the case was wrongly decided, the apparent reference to *ius tertius* was misplaced and misleading. To view this case as one of wrongful dispossession would be then the most logical solution.

*Doe d. Wilkins v. Cleveland*⁹⁴ no proof of livery of seisin- recover on the strength of one's own title?

The ratio decidendi of the case seems to be 'as he [the plaintiff] relied on the feoffment to his ancestor, he should have proved livery of seisin.'

Hargreaves succinctly described the cases:

More than forty years before the action, part of the manorial waste was enclosed by a squatter who purported to convey it to Wilkins' father by feoffment. The charter was indorsed with a memorandum of livery of seisin, which

⁹² "The court, however, was simply taking seriously the statements English judges had made in *Smith*, *Dyeball*, and *Humphrey* that prior possession and dispossession by the defendant were only evidence of title in the plaintiff, and the importance they had attached in *Davison* to the fact that the plaintiff might have had title. Here the plaintiff did not". G&M saw the ratio in Lord Romilly saying (in *Dixon v. Gayfere* (1853) 17 Beav. 421, 51 E.R. 1097) that at law when there is a series of trespassers, each holding less than 20 years, but the entire period extending over 20 years, the person actually in possession would keep the property "not by reason of the validity of his own title, but by reason of the infirmity of the title of the claimants." 17 Beav. at 430, 51 E.R. at 1101 (G&M, 325, note 203). This, of course, would be correct reasoning, if only in *Doe v Barnard*, the defendant would not be a trespasser!

⁹³ 13 QB 945 at 953-4.

⁹⁴ (1829) 9 B and C 864

was witnessed by one person only. As this witness was not called and not shown to be dead, the plaintiff sought to establish the livery by relying on the eight years' possession which followed as setting up a presumption that livery had been made. This the Court refused to accept, insisting that at least twenty years' possession was needed for that purpose. Consequently, the father had not been shown to be seised or possessed of such an estate as would descend to the son, and the son's action necessarily failed. The defendant was himself the lord of the manor. He had been out of possession for more than twenty years, but had recovered possession from Wilkins' mother, who had remained in possession on the father's death. It was to this that Lord Tenterden referred when he said (9 B. & C. p. 868): 'I do not mean to decide that even if a feoffment and livery of seisin had been proved it would have constituted a good title under the circumstances of this case.' The point that the Jacobean Statute of Limitations did not destroy the title.⁹⁵

Hargreaves summed up his analysis: “[i]f the origin of the possession be before the Court, then it must be such as to vest the seisin in the possessor. If, for instance, the possession was taken under a conveyance, such as a feoffment, which required livery of seisin for its completion, then the fact of livery must be shown by the proper evidence. In this case, however, the plaintiff could take advantage of an entirely separate presumption, that possession under a feoffment for at least- twenty years raised a presumption of livery of seisin [in *Doe d. Wilkins v. Cleveland*] the plaintiff sought to establish the livery by relying on the eight years' possession which followed as setting up a presumption that livery had been made. This the Court refused to accept, insisting that at least twenty years' possession was needed for that purpose. Consequently, the father had not been shown to be seised or possessed of such an estate as would descend to the son, and the son's action necessarily failed”.⁹⁶

G&M noted that “[c]uriously enough, this anomalous case is one that both Holdsworth and Hargreaves cited in support of their views”.⁹⁷ Holdsworth thought it showed that twenty years possession was required.⁹⁸ Hargreaves argued that the twenty year period was important, not to show title by adverse possession, but to raise a presumption of livery of seisin.⁹⁹

Much was done, in this case, of the absence of the proof of livery of seisin. Hargreaves commenting on Lord Tenterden's remark noted that “Jacobean Statute of Limitations did not destroy the title”. Lord Tenterden referred to *Doe dem Jakson v Wilkinson* (1824), which decided that permissive occupation was not adverse possession. G&M also remarked that “dispossession had not been forcible, and the defendant was not a complete stranger but the lord of the manor to which the property originally belonged.”¹⁰⁰ But the lessor's title was not an issue at the trial (aside of the argument that he did not benefit under the deed of feoffment). It might become an issue, if there was a claim of adverse possession of twenty years, so that the question of permissive occupation could arise.

In the case at hand, the defendant was in possession (which was voluntarily surrendered to his lessor by Wilkin's mother [who effectively dispossessed him in the first place]). The lessor of the defendant *might be* a disseisor (if the proof of livery of seisin would be accepted), because he disseised the heir in law of the prior possessor. Even if the lessor was not tortious disseisor, still he, effectively, put the heir out of possession. Still the formal issue in ejectment was always about the right of entry: did the heir of the prior possessor of eight years have it? The suggestion is that he only would have a right of entry if his father was seised. If he was not, then he could not be disseised. If the disseisin by the lessor of the defendant was tortious, then the question of seisin would be irrelevant, like in *Allen v Lenington*, where the both parties to the suit were without title. May be in the case at hand the lack of the proof of livery of seisin, indeed,

⁹⁵ Hargreaves, 382; 382 n.27.

⁹⁶ *Ibid*, 382.

⁹⁷ G&M at 321 note 191.

⁹⁸ 7 *History*, at 64-65.

⁹⁹ Hargreaves, at 382-83.

¹⁰⁰ G&M at 321.

was crucial: such livery, just as 20 years of adverse possession, would disseise the previous possessor for good, who, otherwise, 'sprang to life' again in this case, insofar as he was not tortious disseisor himself.

Action of ejectment and disseisin

The issue of the right of entry must ultimately be rest on the question of disseisin - when the claimant's lost his seisin or the hereditary right to it. But we saw that the notion of disseisin itself had changed. Not only the tortious acts account as disseisin, but also putting out off possession without *justa causa*. Moreover, we have seen that a writ of entry, then, assize of novel disseisin, then, even actions for forcible entry and trespass were used for trying title.

The demise of the assize was a result of it overreaching itself. This happened when the time honoured rule that one cannot bring the assize against the long peaceful possession was given way to new relaxed notion of seisin as continuous claim or just momentary possession (by somebody with the right of entry). This development prepared way for the subsequent full-blown fictitious proceeding in ejectment. Another long living legacy of the assize was the early relaxation of the notion of disseisin itself. It is remarkable that Hargreaves, who was so attentive to the common law tradition, so completely overlooked the original notion of disseisin as purely tortious act. In the same time he was right in his intuition that in many cases the issue was not forcible dispossession but the right of entry based on the notion of prior seisin. Indeed when notion of disseisin became relaxed, the question of fact to be decided by jury became just this: who had a prior seisin .

Sadly, the common law doctrine of seisin (or possession) and its loss, or disseisin, never was developed with anything like Roman law's clarity.

Termor controversy : re-play

The common law struggled to explain the possession of termor. Unlike the civil law, it did not draw a clear distinction between 'civil' possession and 'factual' one (i.e. detention). In Bracton, the common law had an adherent to the Roman law's notion of seisin (possession) as defined by corpus and animus. But this notion would not exhaustively describe the position of termor at common law (who indeed did not have seisin, but did he have merely 'factual' possession either).

In comparison, the prominent place of tortious disseisin at common law, could be explained on the Roman law lines of possession for oneself (not in the name of other), thus, he would be seised as of fee.¹⁰¹ Then, the tortious possession of a wrongdoer (trespasser) and 'bare' possession of termor seems to be very different specimens, indeed.

It became, unsurprisingly, a matter of dispute whether the termor could enfeoff a stranger (as a tortious disseisor could), and, pass a freehold (which he himself did not have). Lord Mansfield doubted it in *Taylor v Horde*,¹⁰² whereas his critic Butler seemed to be successful in refuting these doubts. Butler

¹⁰¹ In 3 Atk. 562, Lord Hardwicke, talking of the distinction between a feoffment and other conveyances, says, "If the defendant had a mind to gain an estate by wrong, he should have made a feoffment with livery, which would have been a disseisin: and then a fine levied afterwards, and five years non-claim, would have been a bar." In 3 Atk. 339, Lord Hardwicke says in effect the same thing; "That a bare entry with feoffment by livery will gain a seisin." (cited in *Doe ex dim Atkyns v Horde* (1777) 2 Cowper 689 at 697 per Mr. Kenyon for the defendant).

¹⁰² *Taylor ex dimiss. Atkyns v Horde* (1757) 1 Burr. 60 at 113-4 per Lord Mansfield: "Suppose it a real proceeding—the termor of a disseisee might, at the old law, recover against the disseisor: he might recover against the feoffee of his lessor. But he never could thereby become a disseisor of the freehold: he never could be other than a termor, enjoying, in the nature of a bailiff, by virtue of a real covenant. In respect of the freehold, his possession enured always by right, and never by wrong. If the lessor had infeoffed, it enured to the alienee; if the lessor was disseised and might enter, it enured to the disseisee; if his entry was taken away, it enured to the heir or feoffee of the

argued, in line with Bracton, that "the termor held the possession, but he was said it to hold in *nomine alieno*, in contradistinction to the freeholder himself, who was said to hold it *nomine proprio*" (Brit. c.32).¹⁰³ According to Butler, "the freeholder, by trusting the termor with it, exposed himself to lose it, by the termor's negligence or treachery".¹⁰⁴ But, in contrast with cases of bailiff, Butler described termors' situation as them having, or rather holding, the possession, even seemed to concede (?) it being "in as of the seisin of the fee". To Butler, the termor's holding the possession enabled him to feoff a stranger. In the same time, Butler drew the parallel with possession gained by tort (disseisin, deforcement, abatement, or intrusion). But in the latter cases, possessors did not hold in *nomine alieno* (having animus to possess for themselves): they became immediately to be seised as of fee.¹⁰⁵ Butler (with reference to Bracton) treated tortious and 'slender' possession alike on the strength of his argument that any possession, *if accompanied by livery of seisin*, would be sufficient to enfeoff a stranger in fee.¹⁰⁶ This position reflected the peculiarity of the common law enfeoffment with the livery of seisin as, essentially, factual delivery of possession, where the main issue was whether the livery of seisin was witnessed.

Originally, the case of termor's enfeoffment of a stranger, probably, was not seen as disseisin. The ancient meaning of disseisin was, according to Reeves, wrongful seizure by force.¹⁰⁷ Obviously, a stranger who was put in seisin (with the livery of seisin) by the termor did not seize anything by force.

disseisor, who in that case had the right of possession. Suppose the proceeding (as it is) a fictitious remedy. Then in truth and substance, a judgment in ejectment is a recovery of the possession, (not of the seisin or freehold,) without prejudice to the right, as it may afterwards appear, even between the parties. He who enters under it, in truth and substance can only be possessed according to right, prout lex postulat. If he has a freehold, he is in as freeholder. If he has a chattel-interest, he is in as a termor; and in respect of the freehold, his possession enures according to right. If he has no title, he is in as a trespasser; and, without any re-entry by the true owner, is liable to account for the profits."

Cf *Taylor v Horde* (1758 HL): The point of the action is, that the plaintiff may gain possession under his term. The possession of the lessee being that of the lessor, the way in which it always operates to the lessor's benefit is, that by obtaining judgment for the possession of his supposed tenant he is enabled to enter; and having entered, the possession unites with any present freehold in himself, whether it be a particular estate or an estate in fee, according to his right.

¹⁰³ The first Part of the Institute of the Laws of England; or a Commentary upon Littleton by Edward Coke, the 19th ed. By Charles Butler, vol II, (London, 1832), L/3 C.11. Sect. 611, [330b], note 285.

¹⁰⁴ Ibid.

¹⁰⁵ As Hargreaves noted, "The disseisor has an estate which can be bought and sold (*Ex p. Winder*, 6 Ch. D. 696); and devised by (*Asher v. Whitlock*). And this estate, which is his title, is quite distinct from the original estate and present title of the disseisee; *Tichborne v. Weir* (1892) 67 L. T. 735; *Taylor v. Twinberrow* [1930] 2 K. B. 16." (Hargreaves, 377, n.7).

¹⁰⁶ Butler, *ibid*. He referred to Bracton lib 2 c.5 fo.11b; lib 2 c.14. fo. 31. Indeed Bracton implied that *aliquis se posuerit in seisinam per disseisinam vel per intrusionem cum forte inverit rem vacantem [et] ... si dum ita fuerit in sesina donationem fecerit, valebit quantum ad ipsum et feofatum suum et alios qui ius non habent, ...donec per illum qui ius habet revocetur. Item poterit esse aliena [ad ius et proprietatem, feodum et liberum tenementum...] et alicuius in possessione existentis quoad nudum usum, vel quoad hoc quod servitutem habet in re quoad usumfructum percipiendum, sive ad certum terminum vel ad voluntatem.... si dum sic fuerint quali quali donationem fecerint, statim fit res data accipientis quoad dantem et accipientem et quoad illos qui ius non habent. But quad verum dominum, numquam erit liberum tenementum nisi ex longa et pacifica seisina. (De acquirendo rerum dominio. si fiat donatione de re aliena [fo.31]). Again Bracton's Roman law language of proprietatem is misleading, insofar as feofation is about transfer of seisin.*

¹⁰⁷ Reeves, I *History*, 231. Note a. Disseisin it is said is a personal trespass in a wrongful putting out of possession, "and if I takr from you forcibly anything of which you have had the peaceablr possession, I do disseise you; and I do wrong to the king when I use force where I ought to use judgement (*Mirror* c.ii.125; *ibid*). Reeves noted that the wrong was taken as well for deforcement or disturbance as ejectment. "Deforcement, as if one entereth into another's tenement when the rightful owner is elsewhere, and at his return cannot enter therein, but is kept out, and hindered so to do. Disturbance is if one disturb me wrongfully to use my seisin which I have peaceably had..." (*ibid*).

Bracton, since he thought that termor could enfeoff a stranger (on the basis of his 'naked' possession), was forced to consider it to be a disseisin: since, no two persons could be in seisin of the same tenement.¹⁰⁸ Thus, disseisin became not only tortious acts per se but putting out of possession without *justa causa*.

If so, then, indeed, the issue of disseisin became an issue not only of tortious act. As we saw, the later history of the assize of novel disseisin might testify to this development.¹⁰⁹

The doctrine of disseisin at election

The main relaxation in the notion of disseisin came with the doctrine of 'disseisin at election'. The most famous proponent of this doctrine was Lord Mansfield, who, once, even exclaimed: "if it was not for this doctrine of election, what a condition would men be in!"¹¹⁰

Disseisin was defined in Co Lit 153b as when one entered, intending to usurp possession, and, to oust another of his freehold (*Blunden v Baugh* (1634) Cro Car 302).¹¹¹ In *Blunden v Baugh*, "the party to whom the lease is made doth not claim any freehold". This case of lease for 21 years by tenant at will (with no freehold passing hands) is in contrast with the case of a termor enfeoffing a stranger with livery of seisin! Holdsworth seemed to interpret the part of the judgement which stated "there was no intent in any of the parties to make a disseisin", as meaning that the doctrine became to be "based more and more upon the intentions of the parties".¹¹² But this is clearly a misinterpretation.

Holdsworth's line of thought is, essentially, similar to Lord Mansfield's one. Only the latter, instead of the intentions, talked about the licence of the lord, so that originally feoffment was before the peers of

¹⁰⁸ Bracton c. 3, De Assisa Novae Disseysinae, 161 b. (a): "Item facit quis disseysinam, cum quis in seysina fuerit ut de libero tenemento & ad vitam, vel ad, terminum annorum, vel nomine custodies, vel aliquo alio modo: alium feoffaverit, in praajudicium veri domini, & fecerit alteri liberum tenementum; cum duo simul et semul, de eodem tenemento & in solidum, esse non possunt in seysina."

¹⁰⁹ "For, after the assize of novel disseisin was introduced, the Legislature, by many Acts of Parliament, and the Courts of Law, by liberal constructions in furtherance of justice, extended this remedy, for the sake of the owner, to every trespass or injury done to his real property; if, by bringing his assize, he thought fit to admit himself disseised. It lay against advisers, aiders, or abettors, who were not tenants. Co. Litt. 180 b. It lay against the tenant who was no disseisor; - as the heir of a disseisor, or his feoffee. Stat. G-loueeester. It lay for the owner, against the disseisor of the disseisor. The tenant's not being ready to pay a rent-seeke when demanded, was, for the benefit of the owner's remedy, a disseisin. Lit. § 233. It lay for outrageous distress. 2 Inst. 412. It lay against guardian, or particular tenant who made a feoffment, as well as against their feoffees. 2 Inst. 412. The Stat. of Westm. 2, c. 25, extends it to a man's depasturing the grounds of another; or taking fish in his fishery. If one receives my rent without my consent, I may elect to make him a disseisor. Style, 407. If a guardian assigns dower to a woman not dowable; the owner may elect to make her a disseissoress. 24 Ed. 3, 43 (cited in Cro. Car. 203). In a word; for the sake of the remedy, as between the true owner, and the wrong doer, **to punish the wrong**; and as between the true owner and naked possessor, **to try the title**; the assize was extended to almost every case of obstruction to an owner's full enjoyment of lands, tenements or hereditaments" (*Taylor v Horde* (1757) 1 Burr 60 at 110 per Lord Mansfield)

¹¹⁰ *Taylor dem Atkyns v Horde* (1757) 1 Burr 60 at 113.

¹¹¹ In this case the lessee for years of the tenant at will, was a disseisor at the election of the original lessor, for the sake of his remedy; but never could be looked upon as the freeholder, or a disseisor in spite of the owner, or with regard to third persons. Littleton (§ 279) defines disseisin as "where a man enters into lands or tenements (where his entry is not congeable,) and ousteth him which hath the freehold". And Co. Lit. 153 b. says, "disseisin is putting a man out of seisin, and ever implies a wrong: but disseisment or ejectment, is putting out of possession, and may be by right or wrong. Disseisin est un personal trespass de tortious ouster del seisin."

Lit. § 395, "If a disseisor infeoff his father in fee, and the father die seised of such estate, by which the lands descend to the disseisor as son and heir, &c.; in this case, the disseisee may well enter upon the disseisor, notwithstanding the descent: for that as to the disseisin, the disseisor shall be adjudged in but as a disseisor, notwithstanding the descent; quia particeps criminis."

¹¹² Holdsworth, 7 *History*, 40-1.

the court with the lord's concurrence.¹¹³ So, following this reasoning, dispossession would not be disseisin, if it is not against the will of the lord. So in disseisin by election, the disseisor was neither a tenant nor the stranger, but just a disseisor at the will of the disseisee (if the latter wish to access the assize).

It is in the course of this argument Lord Mansfield put forth his theory of 'feudal' seisin:

Seisin is a technical term to denote the completion of that investiture, by which the tenant was admitted into the tenure; and without which, no freehold could be constituted or pass. Sciendum est feudum, sine investitura, nullo modo constitui posse. Feud. lib. 1, tit. 25, lib. 2, tit. 1. 2 Craig, lib. 2, tit. 2. Disseisin therefore must mean some way or other turning the tenant out of his tenure, and usurping his place and feudal relation. At the time I speak of, no tenant could alien without licence of the lord.¹¹⁴

Butler provided a convincing critique of Lord Mansfield's 'feudal' doctrine of seisin.

Firstly, he demonstrated with reference to Bracton (f.39b), that there was no condition of the presence of the *pares curiae* or recording the entry of the feoffee in the lord's court. Holdsworth did not dispute that only possession and livery of seisin was necessary for feoffment.

Butler's second argument was to point out that by "a disseisin at the election of the party, is not to be understood an act which in itself is a disseisin, but which the party supposed to be disseised, may, if he pleases, consider as *not* amounting to a disseisin: on the contrary, every act which is susceptible of being made a disseisin by election, is no disseisin till the party in question, by his election, makes it such". Indeed, in the case of the feoffment of a stranger by the termor, the stranger, according to prevailing view from the time of Bracton, immediately gained the estate of freehold (except against the disseisee, against whom it will become good in time).

In Holdsworth's opinion, the doctrine of disseisin at election was aimed to improve the position of 'owner', so that to increase his power to deal with the property while 'disseised'. Thus, the title (even not accompanied by seisin) became of growing importance. But as Butler's argument above demonstrated this might not be true: if one was disseised he was disseised for good. The case of disseisin at election was never a case of 'actual' disseisin but a sort of fiction adopted for the purpose of the assize. But it might be true, that such use of the assize did change the character of the remedy it offered: not only some types of [not strictly tortious] dispossession (like feoffment of a stranger by the termor) became to be deemed to be disseisin, but also dispossession of the tenement less than freehold could be remedied as if it was disseisin.

¹¹³ When the lord consented, the only form of conveyance, was by feoffment publicly made, coram paribus Curiae, with the lord's concurrence. Homage, or fealty, was solemnly sworn; and suit of Court and services were frequently done. The freeholder represented the whole fee, did the duty to the lord, and defended the whole fee against strangers. The freehold never could be in abeyance; because the lord must never be at a loss to know upon whom to call, as his tenant; nor a stranger, at a loss to know against whom to bring his praecipe. From the necessity of there being always a visible tenant of the freehold, and the notoriety who acted, and did suit and service as such, many privileges were allowed to innocent persons deriving title from the freeholder de facto. If the disseisor died: after one year's non-claim, the descent to his heir gave him the right of possession, and took away the true owner's entry. The stat. of 32 H. 8, c. 33, requires five years non-claim. The feoffee of a disseisor acquired title and possession, at the time I speak of, by one year's non-claim. The descent to his heir remains privileged as it was at common law: for the 32 H. 8, c. 33, extends not to any feoffee of the disseisor, immediate or mediate, Co. Litt. 256 a. The feoffee of a disseisor was favoured; because he came innocently into the tenure, by a solemn and public investiture, with the lord's concurrence (1 Burr at 107-8).

¹¹⁴ 1 Burr at 107.

Holdsworth's whole reasoning in regard to the disseisee's right of entry (capable to be asserted by an action) is coloured by the distinction between actual disseisin and disseisin at election.¹¹⁵ In his view, Lord Mansfield attempted "to rationalize the law, by giving such a definition of disseisin as would have greatly diminished the number of cases in which an actual disseisin could occur, and therefore the number of cases in which tortious fee simple could be created". However, he himself conceded that Lord Mansfield's doctrine from *Taylor dem Atkyns v Horde* was rebutted in the later cases.¹¹⁶

According to Holdsworth, the doctrine of disseisin at election, as developed and applied to the action of ejectment, gave rise to the doctrine of adverse possession.¹¹⁷ In his opinion, the idea that unless there was an intention to 'usurp the possession and to oust another of his freehold' there was no true disseisin was also at the root of distinction between possession and adverse possession (as adapted to the determination of the question where the possession was such a kind that the statute of Fines and statutes of limitation would run in favour of the possessor).¹¹⁸ However, as we just have seen, the actual disseisin, such as a feoffment with livery of seisin by the termor, could not be undone by the lack of intention to be disseised on the part of the disseisee, since, ultimately, seisin had been a matter of the fact (whether there was a livery of seisin).

'Absolute' right of entry

It might be true that a tenant at will or at severance was not adverse possessor (before he decided to enfeoff a stranger) and, in such a case, the limitation time would not run against the lessor, and thus his right of entry would not be bar for the purpose of the action of ejectment. Indeed, such lessor would prevail in the action of ejectment. But how this fact would make his title absolute?

Lord Mansfield once asserted that "possession gives the *defendant* a right against every man who cannot show a good title... *the plaintiff* cannot recover, but upon the strength of his own title".¹¹⁹ This might be right if 'ejectment' was a fictitious event (but only in the sense that unjust dispossession or a prior seisin

¹¹⁵ "Suppose, Holdsworth says, that A, a person having no interest in land, wrongfully ousted B... If B was the freeholder, and was therefore seised, he would have [the] rights of entry and action [of ejectment] whether A was an actual disseisor, or only a disseisor at election... If A was only a disseisor at election he gained no tortious seisin, and therefore he gained nothing which he could convey to another, or transmit to his heirs. B could therefore enter, not only on A, but also on his alienees or his heir. If A or his alienees levied a fine, B could upset the fine by showing that none of the parties had any interest in the land; and the statutes of limitation would not run against B. But if A was an actual disseisor, he had a seisin which he could convey by feoffment, fine, or recovery; and this seisin would descent to his heirs... B could generally enter upon A's alienees. But, if A or his alienee levied a fine, B's rights would be barred in five years, and the fine was a bar, not only if B was seised of an estate in possession, but also if the land was let to a tenant for years... provided that the acts done by the wrongdoer amounted both to a dispossession of the lessee and a dissein of the lessor [Margaret Podger's Case (1613) 10 Co. Rep. at f. 105b]. Moreover, both A and his alienees could acquire a title under the statute of limitation; and if A died seised, and the land descended to his heir, B was deprived of his right of entry. It is thus obvious that... successive disseisins might beget successive titles to the land, which might be existing together..." (Holdsworth, 7 *History*, 53). It was, however, settled [*Whaley v Tankred* (1672) Sir Th. Raym. 219]... that, if a lessee, whether for life or years, disseised his landlord, and enfeoffed another, and that other levied a fine, the five years fixed by the Henry VII's statute of Fines would not begin to run against the landlord till after the lease had expired (ibid, 54).

¹¹⁶ "...the law of feuds... never was the law of this country..." (*Cholmondeley v Clinton* (1821) 4 Bligh at 107). See also Lightwood, *Possession of Land*, 43, 51-2.

¹¹⁷ Holdsworth, 7 *History*, 69.

¹¹⁸ Ibid, 70. Cf 'whether the estate has, during the whole time, being in fact held and enjoyed by an adverse claim of title, that is, a claim not consistent with the title of the plaintiff' (*Cholmondeley v Clinton* (1820) 2 Jac. and Walker at 164). So a tenant at sufferance (*Doe dem Milner v Brightwen* (1809) 10 East 583), or permissive occupant (*Doe dem Jackson v Wilkinson* (1824) 3 B. and C. 413), or tenant at will (*Smartie v William* (1695) 1 Salk 245; *Hall v Doe dem Surtees* (1822) 5 B. and Ald. 687) was not adverse possessor (ibid).

¹¹⁹ *Roe d. Haldane and Urry v. Harvey* (1769) 4 Burr. 2484.

should be shown), but it should not so when the plaintiff is trying to recover against a trespasser (it is why *Doe v Barnard* became such controversial case).

Arguing that in ejectment the real issue was ‘absolute’ title, Holdsworth put a particular stress on what he described as ‘absolute right to entry’.¹²⁰ He seemed to infer this presumption from the rule that the plaintiff must show a possession for twenty years. In support, he cites *Stokes v Berry*.¹²¹ His reliance of *Stokes v Berry* seems to be questionable, as CJ Holt explicitly referred to the effect of the statute of limitation of James I (which barred the right of entry in the action of ejectment), so that the effect of the statute was “for a possession for twenty years is like a descent which tolls the entry and thus gives a right of possession, sufficient to maintain ejectment”. It is telling, that CJ Holt spoke about the right of possession (not the right of property good against the world).¹²²

It is true, that sometimes a possession for twenty years was understood as giving rise of presuming of livery of seisin (as in *Doe v Marquis of Cleveland*).¹²³ This presumption of the possession twenty years as of livery of seisin went hand in hand with the above rule, championed by Lord Mansfield, that the plaintiff in ejectment should recover on the strength of his own title.¹²⁴ This rule seemed to transform, in Holdsworth’s hands, into the notion, that *ius tertius* could be pleaded in ejectment. According to him, “so far as a plaintiff’s rights were governed by the action of ejectment, he must show a right to enter which could not be defeated, not only by showing a better right in the defendant, but also a better right in some third person, so that, in effect, he must establish an absolute right of ownership”.¹²⁵ What ‘absolute right’ Holdsworth had in mind? Is it twenty years of adverse possession?

It is somewhat paradoxical, that Holdsworth, first, attempted to show that the doctrine of disseisin at election tended to reduce the scope of ‘disseisin’ and its offshoot, adverse possession, and, then, seemed to put his particular faith in the adverse possession of twenty years as a bar for the right of entry. Thus, the ‘absolute’ title became nothing more than the adverse possession of a disseisor of twenty years!

But could the twenty years of possession provide ‘absolute’ (indefeasible) title? Not necessarily so. If the plaintiff came under a new (newly ripened) title, the defendant’s adverse possession of twenty years (which could be effective to bar the right of entry of the plaintiff’s ‘predecessor’ in litigation) would not bar the newly ripened right of entry. The prolonged litigation *Taylor v Horde* gave an example of just such situation.¹²⁶

¹²⁰ 7 *History*, 63, note 3.

¹²¹ (1699) 2 Salk. 421 per Holt CJ: “if A. has had possession of lands for twenty years without interruption, and then B. gets possession thereof, upon which A. is put to his ejectment; though A. is plaintiff, yet the possession of twenty years shall be a good title in him, as if he had still been in possession”

¹²² See also Lightwood, *Possession of Land*, 112 (who suggested that the notion of ‘real title’ as ‘the title of true owner’ must be wrong; “otherwise, how could the disseisor recover in ejectment against the disseisee after the entry of latter being tolled?”)

¹²³ *Doe dem Wilkins v Marquis of Cleveland* (1829) 9 B and C 864 at 871 per Littledale J; *Doe dem Lewis v Davies* (1837) 2 M and W at 516 per Parke B.

¹²⁴ But cf Lord Mansfield’s dicta in *Taylor v Horde* (1757) at 119: “An ejectment is a possessory remedy, and only competent where the lessor of the plaintiff may enter: therefore it is always necessary for the plaintiff to shew, that his lessor had a right to enter; by proving a possession within twenty years, or accounting for the want of it, under some of the exceptions allowed by the statute. Twenty years adverse possession is a positive title to the defendant: it is not a bar to the action or remedy of the plaintiff, only; but takes away his right of possession.”

¹²⁵ See also Holdsworth, *Terminology and Title In Ejectment-A Reply*, 56 *LQRev* 479 at 481.

¹²⁶ While in the early proceedings John Tracy (who in pursuance of the deed in question took the name of Atkyns) lost (in the House of Lord in 1758 (6 Bro. P.C. 633)) because he brought the ejectment in 1752, not within 21 years after his title accrued [as his title was of remainderman (with his brothers) in tale male, after Robert Atkyns, who died without issue and intestate in 1711], and, thus, was barred by the statute of limitation. Next, after the death

It seems clear, that the action of ejectment protected any possessor against just a wrongdoer (as in *Allen v Rivington*). *Doe v Barnard* seems to be wrongly decided. In the same time, in ejectment, the jury's verdict was almost universally turned to the question of seisin. The story should start somewhere (at some point somebody must be seised as of freehold— even at the assize of novel disseisin this was a 'starting point'). May be *Doe d. Wilkins v. Cleveland* could be understood in this way (and this is merely question of fact).¹²⁷

V. From the history of the notion of ownership

Roman law contrast dominium with ius and Bartolus' definition of ownership as ius

The ancient *legis actio sacramento in rem* (G 4.16), as was noted by Kaser, was about a better claim to some *res*.¹²⁸ In *legis actio sacramento in rem*, both parties asserted that the thing in question was their own (*res sua*), the judge had to choose between them (and could not abort the proceeding). Thus, the early Roman law did not know the notion of 'absolute' ownership. The notion of *dominium* (ownership) was itself of the late origin (was unknown to Cicero), preceded by somewhat kindred notion of 'proprietas'.¹²⁹ In classical Roman law *rei vindicatio* had two forms: *per sponsionem* (G. 4.93) and *per formulam petitoriam*.¹³⁰ The proceeding by *sponsio* was archaic: the defendant promised to pay (a nominal sum) if the plaintiff proved the thing to be his own by the law of Quirites, but this promise to pay was just to bring the issue before the judge; the defendant also made the second *sponsio*, promising with sureties to restore the thing, if defeated on the first *sponsio*. In the proceeding *per formulam petitoriam* the parties recited the set formula *in iure*.¹³¹ The plaintiff was to prove that the land in question (if the litigation was about land) was his by the law of Quirites.

While in the Roman law, a proprietary action of vindication had as its subject *res sua* or *proprietas*, the classical Roman law also used 'dominium' as a synonym of *proprietas*. At Roman law *dominium* was contrasted with *iure in re aliena*, such as servitudes. *Rei vindicatio* was possible only regarding *res sua*.

of John Tracy and his brothers without issue, the heir at law of Richard Atkyns (next remainderman in the deed) commenced a new proceeding in 1777, hence his right of entry (under a new title) was not yet barred, where he won (on the strength of Lord's Mansfield opinion delivered in 1757). Butler provides an admirably clear account of the litigation in his famous note 285 to 330b Coke's Commentary on Littleton. So, in this case more than twenty years of possession did not bring the defendants 'absolute' title! This was surely the case, at least, until 1833.

¹²⁷ The curious old case of *Gibbon v Cordell* Cro. Eiz. 25 provides the illustration of livery as a fact: Heydon called the tenants of the house, who were tenants at will, and said, "Sirs, I have sold my house and land to Cordell for twenty pound, if I pay him not the money at such a day; and if I pay him the money, I shall have the land; and if I pay it not, then I clearly bargain and sell them to him;" and puts Cordell into the house, and locks the doors, and delivereth him the keys, and said to the tenants, "Take him for your master." It was ... afterward adjudged it was a good livery, and an estate for life, at the least, passed: but if a fee passed, it was not questioned, because Cordell was alive.

¹²⁸ Max Kaser, Roman Private Law, [tr. R. Dannenburg 6th ed. *Romisches Privatrecht*], Durban, Butterworths, 1968, 93.

¹²⁹ *Proprietas* means quality of a thing or peculiar nature, "*singularum rerum singulae proprietates*," Cic. Ac. 2, 18. The meaning of property is of the post Augustus origin. *Proprietas* relates to *proprius* (peculiar, particular, proper, own's own). *id est cuiusque proprium, quo quisque fruitur atque utitur*: (Cic. Fam. 7, 30, 2)

¹³⁰ Fritz Schulz, Classical Roman Law, Oxford, 1951, 368.

¹³¹ *Si paret fundum Cornelianum, quo de agitur, ex iure Quiritium Auli Agerii [the (fictitious) plaintiff] esse, neque is fundus Aulo Agerio restituetur, quanti is fundus erit, tantam pecuniam iudex Numerium Negidium [the (fictitious) defendant] Aulo Agerio condemnato, si non paret absolvo* (Schulz, 33).

Kaser gave a short account of the emergence of a separate remedy for the occupants of the public land.¹³² The land was originally common, but later was given by the gens (tribes) to the paterfamilias for cultivation, later, with the decline of the gens, such land became private land of paterfamilias. Some of the remaining public land (*ager publicus*) was again distributed between paterfamilias (but already cultivated land was leased for rent as *agri vectigales*; while uncultivated land was given as free *agri occupatorii*). These occupants were protected from unlawful dispossessio, probably, from the early times by possessory interdicts. Then, protection of *possessio* became to be extended to private land.

The ancient meaning of possession is preserved in the survived fragments of *Lexicon* of Sextus Pompeius Festus, who reports that Gallus Aelius defines possession as *use* of certain field or building but not itself field or building (*possessio est, ut definit Gallus Aelius, usus quidam agri aut edificii, non ipse fundus aut ager*).¹³³ This fragment supports the story of the origin of *possessio* as relating to the occupation (use) of the public/common land. Probably, at first, possession was understood as a matter of exclusively physical, or factual, control (*corpus*), a sort of natural detention/custody. Thus, on Paulus's testimony, Labeo linked the meaning of 'possessio' with the actual (natural) holding on to some place, where one is standing (*a sedibus quasi position, quia naturaliter tenetur ab eo qui ei insistit...* (D. 41.2.1.pr). But, sometimes it was difficult to explain possession just by *corpus*. For example, if somebody possessed (used) a seasonable pasture, he was in the 'factual' control of it only during the certain times, how did he possess in between?¹³⁴ Or, when somebody is taking possession of some estate, did he need to step on every bit of it?¹³⁵ These and similar cases were explained with a help of a new concept ('stepped into' the place, left vacant by *corpus*): of one's intention, or *animus*. Thus, *possessio* became seen as requiring *corpus* and *animus*. Thus, Paulus, one of the principle proponents of the new concept, thought that while to acquire possession one need *corpus* and *animus*, one might lose it by either of one of them.¹³⁶ Originally, the loss of physical (factual) control would mean the loss of possession. Thus, according to Gaius, possession would be naturally interrupted when one was expelled or the thing was snatched away.¹³⁷

Although, the notion of *animus* might emerge just to recompense of the lack of *corpus* in some marginal situations, later it took on the life of its own. Probably, the perceived tension between the notions of *corpus* and *animus* was a reflection of the spread of Neoplatonism from 'the East' from the third century (under influence of Plotinus) at expense of Stoicism.¹³⁸ But even on more 'technical' level, the settled rule that nobody could himself change the cause of his possession,¹³⁹ could work in the same direction, separating *animus* from *corpus*. This rule might be linked with the Roman law notion of the 'civil' possession, as requiring not only *corpus* but also *animus*,¹⁴⁰ so that those, who 'possessed' in the name of another, were not

¹³² Kaser, *ibid*, 84.

¹³³ [De verborum significatu quae supersunt com Pauli epitome](http://archive.org/stream/deverborumsignif00festuoft#page/292/mode/2up)
<http://archive.org/stream/deverborumsignif00festuoft#page/292/mode/2up>

¹³⁴ ...*saltus hibernos aestvosque animo possidemus, quamvis cetis temporibus eos relinquamus* (D. 41.2.3.11).

¹³⁵ ...*non utique ita accipiendum est, ut qui fundum possidere velit, omnes glebas circumambulet: sed sufficit quamlibet partem eius fundi introire, dum mente et cogitatione hac sit, uti totum fundum usque ad terminum velit possidere*. (D.41.2.3.1). This point was made by D.V.Dozhdev in his *Osnovanie zashchity vladeniia v rimskom prave* [The Foundation of Protection of Possession in Roman Law], 1996, 13-36, and further developed in his 'Vladienie v sisteme grazhdanskogo prava' [Possession in the System of Civil Law], *Vestnik grazhdanskogo prava*, 2010, №1.

¹³⁶ *Quemadmodum nulla possessio acquiri nisi animo et corpore potest, ita nulla amittitur, nisi in qua utrumque in contrarium actum est* (D. 41.2.8). Somewhat inconsistently, the same reference to Paulus (65 ad edictum) is used in (D 50.17.153) to support a rather different proposition (*fere quibuscumque modis obligamur, isdem in contrarium actis liberamur, cum quibus modis adquirimus, isdem in contrarium actis amittimus. ut igitur nulla possessio acquiri nisi animo et corpore potest, ita nulla amittitur, nisi in qua utrumque in contrarium actum est*).

¹³⁷ *Naturaliter interrumpitur possessio, cum quis de possessione vi deicitur vel alicui res eripitur* (D. 41.3.5).

¹³⁸ However, already in the end of the second century the early Father of the Church Irenaeus was faced with the task to fight the spread of Gnosticism (also essentially neo-platonic movement, adhered to the notion of duality of body and spirit) (I discussed the early Church Fathers' struggle with Gnosticism in chapter 4 of my *Controversies in Natural Law from Zeno to Grotius* (2010). 'Neoplatonic' influences could be also seen in the New Testament: in the later Gospel of John as well as in Paul's Epistles.

¹³⁹ *neminem sibi causam possessionis posse mutare*(D. 41.3.5 (Gaius)).

¹⁴⁰ *quod si servus vel colonus, per quos corpore possidebam, decesserint discesserintve, animo retinebo possessionem* (D. 41.2. 3.8 (Paulus)).

‘civil’ possessors. Thus, *procurator*,¹⁴¹ tenant (*conductor*),¹⁴² as well as usufructuary,¹⁴³ did not have possession. Hence, *civiliter adquiruntur*,¹⁴⁴ or *civiliter possidere*,¹⁴⁵ or *possessio civilis*,¹⁴⁶ differed from *naturaliter possidere*,¹⁴⁷ or *possessio naturalis*¹⁴⁸ (medieval *detentio*), in the sense of *naturaliter teneatur* (D. 41.2.49 pr).¹⁴⁹

Ulpian’s famous maxim that *proprietas* had nothing to do with possession, as we saw, was, at least, partly, reflection on the separation of proprietary and possessory remedies at Roman law, rooted in the initial separate protection of the occupants of the public land. But soon this protection was extended to possession of *res sua* as well: in this case the possessor also happened to be the *dominus* (owner) of *res* in question. But was it always the case? No, Roman law knew the four exceptions to this general rule: sequester, precarist (a holder of *res* in *precarium* - by good grace or licence of its owner),¹⁵⁰ pledge-holder and emphyteuta (a holder of *emphyteusis* – perpetual hereditary lease), all considered to be the possessors. All these four cases are anomalous cases of sort of ‘split’ possession. For example, pledge-holder and precarist possessed without intention to be owners.¹⁵¹ Here the notion of *animo possidere*¹⁵² gave the way for the notion of *animus domini*. But, rather peculiarly, these cases of possession without *animus domini* might be also cases of possession without any animus (at least, this might be right in the case of precarist).¹⁵³ So it is not clear how *animus domini* was different from *animo possidere*. But maybe this (however, embryonic) notion of *animus domini* helped crystallisation of the notion of *dominium* itself.

There was we are told by Ulpianus one (crucial) difference between the notions of possession and ownership: *dominium* remained, even if one did not wish to be owner, whereas *possessio* would be lost. Here Ulpianus seemed to suggest that *dominium* was something like title (?), but in another place he cited Pomponius, who looked like assuming that in contrast with possession, *dominium* would not be lost with the loss of *corpus*.¹⁵⁴ Here Pomponius as if drew the parallel between *dominium* and *animus*.

In Pringsheim’s opinion (expressed at the height of the interpolation debates), the notion of *animus domini* is of Byzantium’s origin.¹⁵⁵ But we saw the embryonic notion of *animus domini* already in Gaius and Ulpian. Still, the direction of development was away from the initial Roman (Stoic) pure corporeal vision (of *res sua* and possession by *corpus*) towards the ‘Eastern’ (neoplatonic) vision of duality of *animus* and *corpus*.

¹⁴¹ *Generaliter quisquis omnino nostro nomine sit in possessione, veluti procurator hospes amicus, nos possidere videmur* (D 41.2.9 (Gaius)).

¹⁴² D. 41.2.28 (Tertullianus).

¹⁴³ *naturaliter videtur possidere is qui usum fructum habet* (D. 41.2.12 (Ulpianus)).

¹⁴⁴ D. 41.1.53 (Modestinus).

¹⁴⁵ D. 41.2.24 (Iavolenus).

¹⁴⁶ D. 41.5.2.1 (Iulianus).

¹⁴⁷ D. 41.2.12pr. (Ulpianus).

¹⁴⁸ D. 41.5.2.1 (Iulianus).

¹⁴⁹ Cf. *Qui in aliena potestate sunt, rem peculiarem tenere possunt, habere possidere non possunt, quia possessio non tantum corporis, sed et iuris est* (Dig. 41.2.49.1 (Papinianus)). Here the opposition of *corpus* and *animus* became the opposition of *corpus* (as presumably ‘fact’) and *iuris*: uncannily linking the notions of *animus* and *iuris*.

¹⁵⁰ According to a testimony of Pomponius precarist might possess without *animus* (*Placet autem penes utrumque esse hominem, qui precario datus esset, petes eum qui rogasset, quia possideat corpore, penes dominum, quia non discesserit animo possessione* (D 43.26.15.4)).

¹⁵¹ *...neque creditor neque is qui precario rogavit eo animo nascitur possessionem, ut credit se dominium* (6.2.13.1 (Gaius)); *Is qui pignori accepit vel qui precario rogavit non tenetur noxali actione: licet enim iuste possideant, non tamen opinione domini possident* (9.4.22.1 (Ulpianus))

¹⁵² D. 41.2.3.12 (Paulus); D. 41.2.27 (Proculus); D. 41.2.25.2 (Pomponius); D. 41.2.29 (Ulpianus).

¹⁵³ D 43.26.15.4.

¹⁵⁴ *Differentia inter dominium et possessionem haec est, quod dominium nihilo minus eius manet, qui dominus esse non vult, possessionem autem recedit, ut quisque constituit nolle possidere* (D 41.2.17); *Pomponius refert, cum lapides in tiberim demersi essent naufragio et post tempus extracti, an dominium in integro fuit per id tempus, quo erant mersi. ego dominium me retinere puto, possessionem non puto...* (D. 41. 2.13 pr.)

¹⁵⁵ He linked it with its usage by Theophilus, (Inst. Parphr. 2. 1. 40) (Pringsheim, *Animus in Roman Law*, 49 L. Q. Rev. 43 (1933) 54). On *animus possidentis* as interpolation see Bonfante, *Traduzione Windscheid, Diritto delle Pandette*, 1. 2. 966). On *animus sibi et animus alteri possidendi* as probably of post-classical origin see Beseler, Z. Say. Stift. (Rom. Abt.) 44 (1924) 375 ff.

Still, since *dominium*, as the issue in *rei vindicatio*, was a successor to *res sua* (and, besides, was like *possessio*, possible only in relation to *res corporalis*) there was a dichotomy of *dominium* and *ius*, due to the distinction drawn between *res corporalis* and *res incorporalis* (G 2.12-14).¹⁵⁶

It was argued by Villey¹⁵⁷ and Tuck¹⁵⁸ that the modern notion of [subjective] *ius* as [individual] right was unknown to Roman Law. Indeed, *ius* was used at Roman law in rather sparingly. It was commonly applied to servitudes, for example to usufructarius,¹⁵⁹ as well as to the easements. Interestingly, even servitudes seemed initially to be understood as if in analogy with part of *res corporalis*, as *quasi possessio* (G 4.139), only Justinian introduced somewhat peculiar expression *possessio iuris*.¹⁶⁰ The division of things on corporeal and incorporeal was introduced by Gaius's Institutes. In relation to obligations, the usage of *ius* seemed to be confined, in addition to Gaius' Institutes (2.14),¹⁶¹ to Justinian's Institutes *iuris vinculum*.¹⁶²

The feudal notion of 'split' ownership (*dominium directum & dominium utile*) emerged out of the Roman law *emphyteusis* (perpetual lease, one of *iura in re aliena*).¹⁶³ In the fourteenth century the post-glossators, such as Bartolus, defined those (such as *emphyteucarius*) who had this *actio* as *dominii utile*.¹⁶⁴ To account for the feudal reality of the medieval Europe, the post-glossators developed the theory of split or divided ownership, presuming that a vassal had *dominium utile*, while his lord had *dominium directum*.¹⁶⁵ Bartolus then famously

¹⁵⁶ [res] quae tangi non possunt, qualia sunt ea quae iure consistunt ... ipsum ius successionis et ipsum ius utendi fruendi et ipsum ius obligationis incorporale est. Eodem numero sunt iura praediorum urbanorum et rusticorum (Gai 2.14).

¹⁵⁷ Michel Villey, "L'idee du droit subjectif et les systèmes juridiques romains", *Revue historique de droit*, Series 4V, 24-5 (1946), 201-28; "Du sens de l'expression jus in re en droit romain classique", in *Mélanges Fernand de Visscher*, II *Revue internationale des droit de l'antiquité*, 2 (1949), 417-36; "Le 'jus in re' du droit romain classique au droit moderne", *Publications de L'institute de droit romain de l'universite de Paris*, 6 (1950), 187-225.

¹⁵⁸ Richard Tuck, *Natural Rights Theories* (1979), chapter 1.

¹⁵⁹ usufructuarius vero usucapere non potest, primum quia non possidet, sed habet ius utendi et fruendi... (Gai Inst. ii, 93)

¹⁶⁰ Kaser, part three (Law of Things). 19. V fin, 22.II. 1.a; 86, 93

¹⁶¹ Incorporales sunt, quae tangi non possunt, qualia sunt ea, quae in iure consistunt, sicut hereditas, ususfructus, obligationes quoquo modo contractae. nec ad rem pertinet, quod in hereditate res corporales continentur, et fructus, qui ex fundo percipiuntur, corporales sunt, et id, quod ex aliqua obligatione nobis debetur, plerumque corporale est, ueluti fundus, homo, pecunia: nam ipsum ius successionis et ipsum ius utendi fruendi et ipsum ius obligationis incorporale est. eodem numero sunt iura praediorum urbanorum et rusticorum.

¹⁶² Obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei secundum nostrae civitatis iuria (J.I.1. 3.13. pr.).

¹⁶³ *Emphyteusis* was defined by Zenon as 'ius tertium' (Cod. J. 4.66.1), though Justinian re-defined it as a contract (*In emphyteuticariis contractibus*) (Cod. J. 4.66.2 pr). In one place in Codex a holder of *emphyteusis* was even called owner (*atque emphyteuticariis, cum fundorum sunt domini* (Cod. J. 11, 62.12)), in contradistinction to the maxim that two (persons) cannot have ownership or possession in the same thing: *duorum quidem in solidum dominium vel possessionem esse non posse* (Dig.13.6.5.15).

¹⁶⁴ So Bartolus (Gl ad Dig. 41.2.16 Nr 5.6.) claimed with reference to Cod. J. 11.62.12.1 that the owner and *emphyteucarius* both the 'owners': 'et si duo sunt domini, diversa domina sunt, quia non idem dominium potest esse apud duos' (Venediktov, *Gosudarstvennaia sotsialisticheskaia sobstvennost'*, (Leningrad, 1948) <<http://download.nchti.ru/libr/books/Right/ClassicOfRussianCivilistic/Elib/1660.html>>)

¹⁶⁵ R Feenstra, "Dominium and ius in re aliena: The Origins of a Civil Law Distinction", in *New Perspectives in the Roman Law of Property*, ed. P.Birks, (Oxford, 1989),112-3.

defined *dominium as ius de re corporali perfecte disponendi nisi lex prohibeat* (*Commentaria*, ad Dig 41.2.17.1.nr. 4).¹⁶⁶ Bartolus' pupil Baldus already saw ownership as just one of real rights.¹⁶⁷

The Roman law was received in the medieval Europe as *ius commune*. *Ius commune*, however, assimilated the feudal notion, which was rooted in the customary Germanic law, of bundle of proprietary interests attached to the land to the Roman law notion of ownership. Instead of the old distinction between *res corporalis* and *res incorporalis* (as servitudes and obligations, which, indeed, were *iura*, or 'rights'), the distinction was now between rights *in rem* and rights *in personam*.

The medieval notion of split ownership was attacked by the humanists of the 16th century as a corruption of the classical Roman Law.¹⁶⁸ Donellus, thus, re-classified anomalous perpetual rights like *empheutesis* as *ius in re aliena*. But while Donellus already understood that *iure in re aliena* were to be contrasted with *dominium*, he, nevertheless, continued to define ownership through *rights*. This was the *ius commune* lasting legacy! Since then ownership was defined as right *in rem*, alongside other real rights (in comparison with obligation as right *in personam*).

Hohfeld's ownership as a bundle of legal relations in personam

Hohfeld took the next 'logical' step and dispensed with 'rights *in rem*' altogether. He divided legal relations in legal opposites and legal correlatives:

Jural Opposites: right/no-right; privilege/ duty; power/ disability; immunity/ liability

Jural Correlatives: right/duty; privilege/ no-right; power/liability; immunity/disability

More importantly, he saw all legal relations as being ultimately relations between persons. Thus, to him relations '*in personam*' were just paucital relations (between few people), while relations '*in rem*' were multital relations (between many people).

The most interesting for our purpose was Hohfeld's correlatives right/duty and privilege/no-right.

right/duty

According to Hohfeld, synonym of 'right' is 'claim' ('duty' is a legal obligation). A right *in personam* is 'either a unique right residing in a person (or group of persons) and availing against a single person (or single group of persons); or else it is one of a few fundamentally similar, yet separate rights availing respectively against a few definite persons'. Thus, *paucital right* is any contractual right (for example, if B owes A a thousand dollars, A has an *affirmative right in personam*, that B shall transfer to A the legal ownership of that amount of money). In contrast, a right *in rem* is 'one of a large class of fundamentally

¹⁶⁶ Later *ius commune* writers expanded Bartolus' definition of *dominium* to include *ius utendi et abutendi*: '*dominium est ius ac potestas, re quapiam tum utendi, tum abutendi, quatenus iure civili permittitur*': F. Hotman (1524-1590), *Commentarius de verbis iuris antiquitatum romanarum elementis amplificatus*, 569; (R. Feenstra, 'Historische aspecten van de private eigendom als rechtsinstituut', *RM Themis* (1976), 249-54).

¹⁶⁷ *Quod iura realia sunt ius dominii directi, ius dominii utilis, ius quasi dominii, ius hereditatis, iura seruitutum realium & personalium* (Baldus ad librum secundum Codicis tit. De pactis. Lex XXVIII Si certis annis. 19. jura realia & personalia, quae & qualia sunt).

¹⁶⁸ Hugo Donellus rejected '*divisio vulgaris qua dominium dividunt in directum et utile*' (lib IX, cap XIV, p 453-4). He also listed the rights *in re aliena*, including alongside servitudes, already *pignus* and *hypotheca* as well *emphyteusis* and *superficies* (lib IX, cap XIII, p. 443): *Haec iura numero sunt quinque: ius emphyteuticum, seu ius agri vectigalis, ius superficiarium; ius bonae fidei possessoris; pignus seu hypotheca; servitudes. Ex quibus duo priora sunt dominio proxima, et qui ea habent, quasi domini sunt. Cetera a dominio longe recedunt.*' Although Donellus conceded that *emphyteuta* was '*quasi dominus*'. He also re-classified *ius emphyteuticum* as specimen of *iura in re aliena* (Lib IX, cap XX1, p 472) Donellus nevertheless provided the extensive list of the *rights* of ownership, starting with the right to hold and possess, and, including, alongside the rights, such as to be protected from interference and to exclude others, the rights to use and dispose (*Commentarii de iure civili*, 1590), vol. V, lib. IX, cap. IX, p. 295: *...ut qui dominus sit rei, idem dominii iure omnes habeat. Prima, ius tenendae et possidendae rei. Secunda, licere incolumen tueri. Tertia utendi fruendique ius. Quarta, ius ab eius usu arcendi quos libet. Postrema, ius alienandi deminuendive.* (Feenstra, 1989, 112-3, above note 10).

similar yet separate rights, actual and potential, residing in a *single* person (or single group of persons) but availing *respectively* against persons constituting a very large and indefinite class of people'. It is not a right 'against a thing'.¹⁶⁹ Hohfeld acknowledged his debt to Austin.¹⁷⁰

Hohfeld conceded that 'The pair of terms, "*ius in personam*" and "*ius in rem*" as contrasted with the pair of terms, "*actio in personam*" and "*actio in rem*" was not in general use among the Roman jurists'.¹⁷¹

Rights in rem were redefined by Hohfeld as 'multital rights or claims'. Correlative of right was according to him *negative* duty.

For example, relating to a definite *tangible object*: e. g., a landowner's right that any ordinary person shall not enter on his land, or a chattel owner's right that any ordinary person shall not physically harm the object involved,-be it horse, watch, book, etc. -[only 'true' right in rem? A.T]

What sort of duty it could be? Maybe a right of action out of trespass/ejectment? Or possessory and vindicatory suits? Hohfeld cited Ames's view of a right *in rem* as 'a right to recover possession by recaption or action'¹⁷², but Hohfeld insisted that such rights would exist even though no possessory remedy was open. In Lawson's view, it imposes a duty *in personam* upon anybody who takes possession of the thing rather than operates against persons generally.¹⁷³

privilege/ no-right

Synonym of 'privilege' was for Hohfeld 'liberty', not 'licence'. The use of the property at one's own discretion would obvious example. But, as was noted by FH Lawson, in "Rights and other relations in rem" (1952),¹⁷⁴ 'it is difficult to see how [liberty] can possibly be regarded as a relation between two people'.

Still how 'multital' privilege of using property at one's own discretion does entail legal relations with other people? The correlative of privilege is 'no right', but then what 'rights' others do not have? Indeed, the difference between property and obligations may lay in this very feature of 'privilege in rem' - privity of the enjoyment of the thing under one's own control. As Ames, in his *Purchase for Value without Notice* (1887) 1 Harvard Law Review 1 at 9 noted: 'The owner of a house or a horse enjoys the fruits of ownership without the aid of any other person. The only way in which the owner of an obligation can realize his ownership is by compelling its performance by the obligor'.

¹⁶⁹ Cf Ulpianus 17 ad ed (Dig. 8.5.6.2) ...labeo autem hanc servitutum **non hominem** debere, **sed rem**, denique licere domino rem derelinquere scribit

¹⁷⁰ John Austin, *Lectures on Jurisprudence or The Philosophy of Positive Law* (1832): the distinction between rights *in rem* and rights *in personam* is between 'rights which avail against persons generally or universally, and rights which avail exclusively against certain or determinate persons'.

¹⁷¹ cf Austin's referral to 'the distinction between *dominium* and *obligationes*, as they were called by the classical jurists; between *iura in rem* and *iura in personam*, as they were styled by the modern Civilians' (5th ed, vol 2,773)). *Ius* in the Roman law, as we saw, was only used in relation to servitudes and obligations. 'The *ius in re* or *in rem* implies the absolute dominion - the ownership independently of any particular relation with another person. The *ius ad rem* has for its foundation an obligation incurred by another' (*The Carlos F. Roses* (1900) 177 U.S., 655 per Fuller CJ) Blackstone saw property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." (COMMENTARIES, Bk 2, Chapter 1).

¹⁷² *Disseisin of Chattels* (1890) 3 Harvard Law Review, 337.

¹⁷³ *Many Laws* (1977) vol 1, 17.

¹⁷⁴ *Many Laws* (1977) vol 1, 3.

With respect to his 'property', thus, in Hohfeld's view, an owner has *multital legal rights*, or claims, that *others*, respectively, shall *not* enter on the land; shall not cause physical harm to the land, etc., such others being under respective correlative *legal duties*. He also has an indefinite number of *legal privileges* of entering on the land, using the land, harming the land, etc., that is, within limits fixed by law on grounds of social and economic policy, of doing on or to the land what he pleases; and correlative to all such legal privileges are the respective *legal no-rights* of other persons.

Hohfeld's crucial contribution was to define 'right' as a correlative to 'duty'. This would be exactly the Roman law view of *iure* as obligations (or servitudes). But, in contrast, Bartolus' right, is not in the nature of the right which correlates to specific duty. Instead, so called rights of ownership are essentially Hohfeld's 'privileges'. But Hohfeld's privilege is hardly *multital* relation *in personam*, but something more like common law possession or 'civil' possession.

Hohfeld's right (or duty of non-interference) could be, then, seen as of delict nature (in line with Savigny's explanation of the Roman law possessory remedies). This vision provides a support for the view of possessory remedies as being of tortious nature (as the assize or trespass). The relaxation of the notion of disseisin still would not remove 'disseisin' as the issue at hand.

Legal Realists and 'Law and Economics': ownership as a bundle of rights

As Merrill and Smith note, "Hohfeld did not use the metaphor "bundle of rights" to describe property. But his theory of jural opposites and correlatives, together with his effort to reduce in rem rights to clusters of *in personam* rights, provided the intellectual justification for this metaphor..."¹⁷⁵

Already in 1922 Corbin noted with satisfaction: "'property' has ceased to describe any *res*, or object of sense, at all, and has become merely a bundle of legal relations—rights, powers, privileges, immunities."¹⁷⁶

In 1930s, the legal realist, such as Max Radin, attempted to revise Hohfeld's analyses, abandoning his distinction between rights and privileges. According to Radin, "Hohfeld mistakenly insisted that this sort of a privilege is not to be called a 'right' at all ... clearly are these 'privileges' rights. This sense is found in such phrases as 'a man's right to do what he likes with his own'; and in so capital an instance as the expression 'bill of rights', as well as in 'fundamental rights', and other expressions like them, most of the 'rights' involved are privileges".¹⁷⁷ Radin redefined Hohfeld's 'privilege' as *privilege-right* (conceding that such privileges did not entail duty in others) as distinct from *demand-right* (conceding that such right entailed duty in others).¹⁷⁸ But Radin denied that right was a correlative of duty. In his view this error "makes possible the baneful doctrine that there may be rights that are absolute, although, to do Hohfeld justice, he would never have permitted this inference. But it is implicit in any doctrine that recognizes a duty as such or a right as such, separated from each other".¹⁷⁹ Radin seemed to see *privilege-right*, just as *demand-right*, as a basis for demand-right entailed for remedy. He also noted (!) that a "demand-right must be exercised against a definite and determinate person", questioning the utility of Hohfeld's

¹⁷⁵ "What Happened to Property in Law and Economics?", 111 *The Yale Law Journal*, (2001) at 365.

¹⁷⁶ A L Corbin, *Taxation of Seats on the Stock Exchange*, 31 *YALE L.J.* 429, 429 (1922).

¹⁷⁷ Max Radin, *A Restatement of Hohfeld*, (1938) 51 *Harv. L.Rev.* 1141, 1149.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*, 1150.

redefinition of right in rem as ‘multital’ right.¹⁸⁰ He, in comparison, saw the difference between the rights *in rem* and *in personam* only in “ their unspecific and specific character”.¹⁸¹

Radin agreed with the main spirit of Hohfeld’s message – there was no such thing as right *in rem*. According to Radin, by using this expression, “we may be tempted to suppose that an action *in rem* really does dispense with the presence somewhere of two human beings who are declared by the court to have or not to have certain rights in respect of each other”.¹⁸² His ‘advance’ on Hohfeld was to see ownership as a bundle of rights, rather than legal relations.

But the most effective use of the bundle of rights metaphor was made by ‘Law and Economics’.

According to Merrill and Smith, “Coase adopts an extreme version of the bundle-of-rights conception of property favored by the legal realists; in effect, Coase conceives of property in terms of a list of permitted and prohibited uses of particular resources”.¹⁸³

In line with the legal realists’ approach, Coase argued against the idea of ‘absolute’ private property rights in land: “The rights of a land-owner are not unlimited. ... And although it may be possible for him to exclude some people from using “ his” land, this may not be true of others. ...A system in which the rights of individuals were unlimited would be one in which there were no rights to acquire.”¹⁸⁴

In Alchian and Demsetz’ view: “To ‘own land’ usually means to have the right to till (or not to till) the soil, to mine the soil, to offer those rights for sale, etc., but not to have the right to throw soil at passerby, to use it to change the course of a stream, or to force someone to buy it. What are owned are socially recognised rights of action... It is not the resource itself which is owned; it is a **bundle, or a portion, of rights to use a resource that is owned**”.¹⁸⁵

Heller pinned down the fatal consequence of this ‘Law and Economics’ approach: “[w]hile the modern bundle-of-legal relations metaphor reflects well the possibility of complex relational fragmentation, it gives a weak sense of the “ thingness” of private property. Conflating the economic language of entitlements with the language of property rights causes theorists to collapse inadvertently the boundaries of private property”.¹⁸⁶

¹⁸⁰ Ibid, 1156.

¹⁸¹ Ibid, 1163.

¹⁸² Ibid, 1154.

¹⁸³ Merrill and Smith, What Happened to Property in Law and Economics? *111The Yale Law Journal* (2001) 357, 360. Merrill and Smith sum-up Coase’s thesis in his famous paper ‘The problem of Social Costs’: “The first half sets forth Coase’s analysis of social costs, i.e., spillover effects or externalities, in the hypothetical world of zero transaction costs. The second half turns to the problem in the real world of positive transaction costs. In the first half, where contractual exchange is key, property rights serve as baselines from which the process of contractual rearrangement of use rights proceeds. In the second half, where contractual exchange is not feasible, property rights serve as authoritative allocations of use rights that ideally should duplicate the allocation of use rights that would result if contractual exchange were possible. In both roles, however, property rights are essentially viewed as collections of use rights” (ibid, 367-8).

¹⁸⁴ R.H. Coase, *The Problem of Social Cost*, (1960) 3 J.L. & ECON. 1, 44.

¹⁸⁵ A A Alchian & H Demsetz, “The Property Right Paradigm” (1973), *Journal of Economic History* 23 (1), March 16, 17. Another by-product of ‘Law and Economics’ was disappearance of the presumption of *numerus clausus*: Alchian, “Pricing and Society”, Occasional Paper No17, Institute of Economic Affairs, London, 1967, 7,: “ ... With private property, two persons may exchange rights to goods on whatever terms they mutually accept”; Alchian, *Some Economics of Property Rights*, 30 *IL Politico* 816, 818 (1965), in Alchian, *Economic Forces at Work* 127, 130 (1977): “By a system of property rights I mean a method of assigning to particular individuals the ‘authority’ to select, for specific goods, any use from a nonprohibited class of uses.”

¹⁸⁶ Michael A. Heller, *The Boundaries of Private Property*, (1999) 108 *YALE L.J.* 1163, 1193-94.

Legal positivism and the disappearance of private law¹⁸⁷

There is a view, associated with Carl Schmitt, that legal positivism as a formal doctrine could be traced back to Julius Stahl's vision of *Rechtsstaat*. Stahl saw the rule of law state as one that would act in a legal form, establishing the lines and boundaries of its own actions and providing for the free ambit of the citizen according to law.¹⁸⁸ Hence, public law would delimitate the private law sphere. By confining the measure of legality to formal law Stahl, indeed, contributed to the foundation for legal positivism.

In a more formal sense, a 'founder' of German legal positivism was Carl Gerber. Gerber was a pupil of George Puchta, Savigny's close associate and fellow Romanist. For Puchta already, 'the law itself is a system'.¹⁸⁹ Gerber himself was a Germanist but also an adherent of conceptualism. Gerber transferred the conceptual legal (*begriffsjuristisch*) method of the Historical School to the emerging discipline of public law, so that both public and private law could be defined through systematically coordinated concepts.¹⁹⁰ From this new perspective Gerber redefined individual rights as a series of public law effects.¹⁹¹ Gerber and his pupil Paul Laband sought to separate legal analysis from political or sociological approaches. For Laband, similarly, private law rights emanated from public law: "basic rights" were protected only in so far as their violation required clear statutory permission and they were subject to adjudication.

A pupil of Laband Georg Jellinek attempted to enrich the formal legal positivist notion of public law through his doctrine of self-limitation of the state.¹⁹² According to this doctrine, the state submitted itself to regulation by the stable legal norms, which could be created or changed only by the set juridical forms. Thus, by virtue of self-limitation the state changed from a physical to a moral force, rising from an unlimited power to a power legally limited in regard to other legal and natural persons (that is in the rule of law state). Any private rights were, in Jellinek's opinion, dependent upon the public law acknowledgement of individual as a member of society, i.e. person.¹⁹³ As a result, private law was possible only on the basis of public law, while public law was completely independent of it.

¹⁸⁷ This section is partly based on Raff, M, Taitslin, A, "Private Law in the Shadow of Public Law – A Legacy of 20th Century Marxism and the Soviet Legal Model", *Archiv für Rechts-und Sozialphilosophie-Beiheft*, vol II (2011), 171-2.

¹⁸⁸ F. J. Stahl, *Philosophie des Rechts II*, Part 2. See M. Reimann, Nineteenth century German legal science, *Boston College Law Review*, July (1990), 860.

G. Jellinek, *The Declaration of the Rights of Man and of Citizens: A Contribution to Modern Constitutional History* (1895), tr. Farrand, M., Henry Holt & Co., New York, 1901;

http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=1176&chapter=104811&layout=html

¹⁸⁹ Puchta abandoned Savigny's historical Roman Law focus (Reimann, 869). Puchta gave an impulse to 'Pandects' science, which assimilated Roman law concepts to construct the modern private law system.

¹⁹⁰ Carl Friedrich Wilhelm Gerber, *Über öffentliche Rechte [On Public Rights]*, Mohr, 1913 [1852]; *Grundzüge eines System des deutschen Staatsrechts [Main Features of a System of German State Law]* Laupp, 1876-1882; Armin Bogdandy, The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges Facing Constitutional Scholarship in Europe, *International Journal of Constitutional Law*, vol. 7, No. 3 (2009), 372-3. Gerber, together with Ihering, was an editor of the *Yearbook for the Dogmatics of Modern Roman and German Private Law*: Reimann, 870.

¹⁹¹ P. Costa, The Rule of Law – Historical Introduction, in: *The Rule of Law. History, Theory and Criticism*, ed. Costa, P. & Zolo, D., Springer, 2007, 95 www.springerlink.com/content/u5j51tx50u285248/fulltext.pdf

¹⁹² Chapter 11.3 of Jellinek's *Allgemeine Staatslehre [General Theory of State]*, 3rd ed., Springer Verlag, Berlin, 1922

¹⁹³ *Ibid*, Chapter 12, 385.

The most noted legal positivist of the next generation, Hans Kelsen was once a student of Jellinek (attending his seminar in Heidelberg). He, however, doubted the value not only the doctrine of self-limitation, but also of any distinction between private and public law.¹⁹⁴

Recently, the 'normative' legal positivist Jeremy Waldron offered his support to Kelsen's position.¹⁹⁵ His main focus, though, was more specific, or 'auxiliary' to Kelsen's one: to attack the idea of independent private law existence of property (as a 'primeval form of law'). To this purpose, unsurprisingly, he used as Law and Economics concept of property as a bundle of rights.¹⁹⁶

Thus, the denial of the independent existence of private law was a sort of 'original' tenet of legal positivism. The notion of ownership as a bundle of rights *in personam* is just very convenient tool to argue in favour of non-existence of 'primeval' concept of property. If there is no property, what else is left in private law (with obligations being 'classical' legal relations *in personam* presenting no comparative difficulty for the legal positivist world-view)?

But the premise for the legal positivist easy victory was rather a shaky one. Bartolus' definition of ownership as right (which became a basis for Hohfeldian construction), as we have seen, was a product of the medieval aberration. The common law presents rather a different story: of the possessory title in land as a matter of fact (coming down to a proof of the liver of seisin), with no relations *in personam* being part of it.

Conclusion

The notable feature of the common law was the absence of the pure proprietary remedy like the civil law vindication. At common law, not *rea sua, proprietas, or dominium* (ownership), but seisin and a hereditary right to seisin were the only 'proprietary' issues at stake. As a result, the common law developed nothing like civil law notion of ownership.

Another remarkable trend at common law was the evolution of remedies with regard to land from the writ of right, assize of novel disseisin, writ of entry towards the action of trespass (from semi-proprietary, to possessory and, at last, personal actions), resulting in emerging of the (fictional) action of ejectment being used for trying title. The action of ejectment evolved as a result, firstly, relaxation of the notion of disseisin, and, secondly, development of the fictitious proceeding as a consequence of relaxation of notion of seisin. The both developments had its parallels in the civil law evolution of the possessory remedies. Here Hohfeldian 'narrow' definition of right as a correlative of duty, helped to understand the tortious nature of possessory remedies. At both civil and common law, the possessory remedies overgrew their original pure tortious character. The peculiarity of the common law was to frame this development in terms of seisin and disseisin. Though seisin was alike 'civil' possession, the common law never reached anything like the civilian clarity in relation to possession. Thus, the notion of

¹⁹⁴ Kelsen purported to relativize the private/public law dichotomy (as based upon misleading dichotomy between law and non-law, or state and law) in his Pure Theory of the State (1967), 282.

¹⁹⁵ "I share Hans Kelsen's skepticism about the very basis of the distinction between private law and public law. All law involves something like state agency..." (The Hamlyn Lecture 2011: The Rule of Law and the Measure of Property, NELLCO Institutional Repositories in Law http://lsr.nellco.org/nyu_plltwp, 26 (lecture 2)). According to Waldron: "[i]f the property right is to be set up against the environmental legislation, it is as one artifact of public law versus another, not as an entirely different sort of right whose posture in this conflict is entirely a matter of the rule of (private law) and has nothing to do with the legislative rule of men" (ibid, 17 (Lecture 1)) His another theoretical interest was to assail the natural law doctrine, as a foundation of the view that property is determined bottom up on a private law basis in a way that is independent of legislation.

¹⁹⁶ "No one in the modern debate about property needs to be told that, from a legal point of view, ownership is not a single right but comprises a bundle of rights, of various Hohfeldian shapes and various sizes" (ibid, 38 (lecture 2)).

disseisin evolved in the 'grey' area surrounding the issues of enfeoffment of termor . In cases of not pure tortious dispossession, the ultimate issue either at the assize or ejectment was a prior seisin: always the matter of fact (witnessed delivery of possession).