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THE MODERN CHALLENGE OF MEDIEVAL CONFLICT OF LAWS

THOMAS LUND*

Conflict of laws has been described as "[perhaps] one of the rare legal subjects about which a page of history is worth less than a blank sheet." That view pounds another nail into the coffin which contains the Year Books. These medieval case reports get little respect. A century ago Victorian ignorance made the mighty Maitland live "in terror" that a foreigner, a Frenchman, would first produce an authoritative edition. Two decades later Sir William Holdsworth lamented

the outlook is now ... even less promising than it was [when Maitland wrote]. The world is poorer; more is taken from us to help the real or supposed poor who have votes; and a very minute fraction of the money taken from us by the state goes to endow the most deserving of the poor—those who devote their lives to those higher studies upon which the literary reputation of [England] depends.4

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2. Of Maitland's work it has been observed, "[n]othing that he wrote can ever be tarnished by time in the matchless attraction of his style or in the brilliant scholarship and originality of thought which he brought to bear upon every topic that he handled." F.W. MAITLAND, SELECTED ESSAYS (H. Hazeltine, G. Lapsley & P. Winfield eds. 1936).


4. W. HOLDSWORTH, SOURCES AND LITERATURE OF ENGLISH LAW 80 (1925) [hereinafter W. HOLDSWORTH, SOURCES AND LITERATURE]. Subjected to such a cheap shot, Holdsworth might have responded that the style and substance of the following article embodies not broad modern analysis, but rather a myopia nothing short of medieval:

[In modern legal instruction] the cases should be studied and reasoned upon, not, as in the period of the Year Books, under the supervision of lawyers who know little else than cases and law books, but [rather] under the supervision of professors who know something of history, jurisprudence, and comparative law.

W. HOLDSWORTH, SOME LESSONS FROM OUR LEGAL HISTORY 181 (1928) [hereinafter W. HOLDSWORTH, LESSONS].

A different form of the clarion call to English historians appears within Charles Elton's excoriating remark meant no doubt to spur his English colleagues to redouble their efforts, and gain the prize: Germans or Americans will probably write the definitive history of English law because "it seems hardly likely that any one in this country [England, to wit] will have the patience or learning to attempt it." C. ELTON, ENGLISH HISTORICAL REVIEW 155 (1889), quoted in F.W. MAITLAND, 2 COLLECTED PAPERS, supra note 3, at 1.
Today the pauper scholar surveys a still bleaker terrain. Not even this brief study claims that medieval law is relevant to modern litigation. While its central concern, the forms of action, may once have "ruled us from their graves," after seven centuries they have skipped too many midnight feedings to make much mischief. Even as bones set upon by scrappy law professors, the materials are deadly dry. Victorian obsessions like Bracton’s debt to Roman law have completely lost their allure. Specialists in arcanum may still toss the odd squib at one another, but today a lawyer on the Clapham omnibus would find the Year Books no more pertinent to her practice than the Leges Barbarorum.

Still, a retooled rationale for Year Book scholarship might underwrite yet another payday for "the most deserving of the poor." Legal education not only transmits useful information, but also nurtures analytical skills. Touted as topical, medieval law may be no flyer; but hawked as challenging exercise, the corpse might levitate a few meters from the grave. The idle peruser may find it a dose of smelling salts, a rush of "the fascination of what's difficult." And difficult it can be. This article applies modern conflict of laws analysis, itself not pablum, to some thorny thirteenth and fourteenth century cases.

As drill serjeants for a forced march, the medieval case reporters cut a dashing figure. They have an abbreviated, dense, confusing style. They

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5. In 1893 Maitland observed, “In the twentieth century students of law will still for practical purposes be compelled to know a good deal about some of the statutes of Edward I.” F.W. MAITLAND, 2 COLLECTED PAPERS, supra note 3, at 479. Today few American law students study any of the statutes of Edward I even for impractical purposes.

6. “The forms of action we have buried, but they still rule us from their graves.” F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 2 (1936) [hereinafter F.W. MAITLAND, FORMS OF ACTION].

7. Consider the following dispute regarding the influence of Roman law upon Bracton, the great medieval synthesizer of English law:

Rather against his will, Maitland came to the conclusion that Bracton did not really understand these books, that he made egregious blunders, that he had never studied Roman law as it was studied at a university, that he was self-educated in that system, and that he remained to the end 'an uninstructed Romanist.'

More recently, the late Hermann Kantorowicz argued that Bracton was a consummate Romanist, using Roman terminology with surprising skill, improving upon its definitions, correcting Justinian, seeing points that Mommsen missed, and systematizing better than his master Azo.

T. PLUCKNETT, EARLY ENGLISH LEGAL LITERATURE 53 (1958) (footnotes omitted).


10. About these decisions, it has been observed [by a breath-taking twist of fate, the insular and arcane learning of the small band of lawyers who argued cases in a corner of Westminster Hall became the law by which a third of the people on the earth were governed and protected, the second of the two great systems of jurisprudence known to the world.

J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 34 (3d ed. 1990).

11. For another session with these demons, see Lund, The Modern Mind of the Medieval Lawyer, 64 Tex. L. Rev. 1267 (1986). The article purports to be a primer for Year Book readers.
recapitulate arguments, but do not disclose the side they support. They avoid black letter law, waffle aimlessly among positions, and at the end forget to identify the triumphant party. In short, they act like American law professors.

The following score of medieval reports manifest the law of judgments of the late thirteenth and early fourteenth centuries. They have been divided into seven groups. An opening discussion of res judicata demonstrates that medieval thought was consistent with the mainstream of modern analysis. Fixed within such traditional boundaries, the discussion shepherds the cases through the various conventional checkpoints. Has good jurisdic-

12. Oral pleadings were put forward by the parties in court, and on these suggested pleadings there was a debate as to which of them were best suited to raise the issue upon which the case turned. It was this debate as to the pleadings best suited to raise this issue which interested the reporter, and fixed the character of the report. W. Holdsworth, Sources and Literature, supra note 4, at 85.

13. The Year Book reporters are not primarily looking for 'authority', still less for substantive law. If they had been, they would have cut short the debates, extracted the point of law, and concentrated upon the decision and the reasons for it. Moreover, they would have devised some scheme of distinguishing important decisions from merely routine judgments upon the ordinary run of cases which inevitably constituted most of a court's daily work. The fact that they did not do so shows clearly that their minds were directed to other matters. Their great preoccupation, I believe, was pleading and procedure. T. Plucknett, supra note 7, at 102-03.

14. The judges, Maitland tells us, [V.B. 3d ed. II (SS), pp. lxxi and 69] were unwilling to decide nice points of law; 'too often when an interesting question has been raised and discussed, the record shows us that it is raised and then tells us no more. A day is given to the parties to hear their judgment. A blank space for the judgment is left upon the roll, and blank it remains after the lapse of six centuries.' Even if judgement were given, it might well be that the reporter did not happen to be in court on that day. In the meantime the report of the debate, which led to the distinct formulation of the issue, contained much sound learning, and showed where the doubt lay. And so it is these arguments leading to the formulation of the issue, which comprise the largest part of the cases reported in the earlier Year Books.

... The Year Books are really the reports of arguments—arguments used by the bar and the bench. It was the argument rather than the final decision which interested the profession, partly because there was then no such rigid theory as to the binding force of decided cases as that to which we are accustomed, and partly because the discussion and the elucidation of legal principles were to be found in the argument rather than in the dry formal decision. W. Holdsworth, Sources and Literature, supra note 4, at 86-87.

15. "As the system [of Year Book reporting] develops it becomes evident that what the public wants is choice examples of forensic fencing by the most admired masters." T. Plucknett, supra note 7, at 104.

16. During this critical watershed, Latin speaking clerics had relinquished control of the system to French speaking lawyers and politicians. These were the formative years of the common law, setting the outlines for the future development of the one great competitor within the west to systems derived from Roman law.

17. See infra notes 24-65 and accompanying text.
tion been established? Does land law merit special "in rem" doctrines? Do the rules of vicarious representation bind those not party to a proceeding? Does the doctrine of mutuality of estoppel apply? Has the judgment reached the merits of a claim? And finally, what issues can a proceeding properly address? And now, onwards into the fray.

RES JUDICATA

Medieval law embodied the modern view that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties." An efficient jurisprudence mandates this doctrine of res judicata. Once a judicial system has applied the procedure thought to provide a full and fair examination of a claim, further litigation will not achieve greater justice but rather serve only to squander the state's judicial resources. Only by mandating respect for its judgments can a judicial system prevent the perpetual pointless recycling of claims.

A medieval case presents the most straightforward context for the application of res judicata: having suffered an adverse judgment, a party pursues again the same claim and the same theory for recovery. In his previous quid juris clamat action, a landlord had failed to saddle a tenant with certain periodic obligations. He thinks he deserves a second chance.

Anon. In a Quid juris clamat the plaintiff was non-suited.

{1} Denom. Heretofore this same plaintiff sued a Quid juris clamat etc., and was non-suited, and the writ was crossed; and so we are puzzled to know how this writ issued, unless it be by the negligence of the clerks; so we pray that he shall not have a writ.

{2} BEREFord, C.J. He shall not have one, without our knowing how (as if to say, non-suit in such a case loses the action). This is doubtful, however. Therefore query.

18. See infra notes 66-106 and accompanying text.
19. See infra notes 107-135 and accompanying text.
20. See infra notes 136-144 and accompanying text.
21. See infra notes 145-150 and accompanying text.
22. See infra notes 151-159 and accompanying text.
23. See infra notes 160-180 and accompanying text.
27. Y.B. Mich. 5. Edw. 2, pl. 82 (1311), reprinted in 63 Selden Society 270 (1947). Throughout this article, the cases have been edited to exclude materials which are irrelevant, redundant, or too confusing. As the meat ax of condensation has been wielded liberally, no textual marks identify the lacunae. Except for materials within brackets, however, this Article adds nothing to Selden Society's translations of the original law French of the medieval manuscripts. Materials within parentheses were added by the Selden Society translators.
The plaintiff has paid the king’s chancery for an order, the writ of *quid juris clamat*, to bring his claim before the royal courts. Undaunted by his first failure, the plaintiff again pays his filing fees, and attempts to have a second go at the process. Chief Justice Bereford agrees with defendant’s lawyer Denom that no encore will be run. Indeed an executive res judicata policy should have stopped this horse at the gate: having ruled against a party’s plea, a court should cancel the implementing writ, and thereafter the chancery clerks should not reissue the process.

Even this simple proceeding, however, generates a dispute regarding res judicata. The sentences “This is doubtful, however. Therefore query.” reflect not the court’s view, but rather the reporter’s. The Year Book reports, the source of all the medieval cases within this Article, were produced privately for the edification of judges, lawyers, and students. Devoted to their duties, the reporters decried error wherever manifest. And here the reporter finds the Chief Justice wanting. Sadly his views are at best “doubtful;” the reporter makes his precise point by highlighting the implications of the decision: “(as if to say, non-suit in such a case loses the action).” While a judgment which embodies a full and fair hearing of a claim merits respect, the reporter considers a nonsuit no full hearing. “Therefore, query.”

If the plaintiff as above successively presses a single claim, he will encounter the defense of “direct estoppel.” If, however, he makes a claim different from that in his first action, he may instead meet the defense of “collateral estoppel.” By contemporary theory “issues of fact and perhaps of law actually litigated in the action are conclusively determined in sub-

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28. “[N]o one can bring his cause before the king’s courts unless he can bring it within the scope of one of those formulas which the Chancery has in stock and ready for sale.” F.W. Maitland & F. Montague, *A Sketch of English Legal History* 101 (1978). See 1 F. Pollock & F.W. Maitland, *supra* note 26, at 195-97.

29. As Chief Justice Marshall presided over the formative years of American Constitutional law, Chief Justice Bereford guided the youthful development of the common law. His unhesitating confidence was matched only by his brilliance and sensitivity. He was truly a remarkable man. See S. Milsom, *Historical Foundations of the Common Law* 146 (1969).

30. A stable of “serjeants” had the monopoly of arguing all cases before the Court of Common Pleas. See Cohen, *Origins of the English Bar*, 31 Law. Q. Rev. 56, 61 (1915). On occasion several speak for a single litigant; the reader of the reports faces the sometimes minor challenge of catching the drift of a serjeant’s argument in order to determine which position the serjeant intends to advance.

31. This number (and subsequent bracketed numbers) refers to a paragraph of the case excerpt within the text.

32. See W. Holdsworth, *Sources and Literature*, *supra* note 4, at 74-111.


36. *Id.*
sequent proceedings in which the same issues arise, even though the claim may be different.”

The following case adopts that rationale in a complicated context of medieval land litigation. By instituting an assize of novel disseisin, the plaintiff sought possession of land from which the defendant had ejected him. Having lost this first proceeding, the plaintiff buys a “writ of right” to bring a second action. According to medieval theory, his two writs embodied different claims: by the novel disseisin he sought possession, by the writ of right he sought ownership. The plaintiff’s sequence of proceedings therefore raised the question whether a judgment concerning possession would be res judicata regarding an ownership action.

Contemporary law might deny such a consequence, because “if the second case be upon a different cause of action, the prior judgment or decree operates as an estoppel only as to matters actually in issue or points controverted.” A dispute about possession is not a dispute about ownership, unless a litigant is obliged to join together all his claims for land, possession and ownership alike.

A. brought a writ of Right against B., who said that he ought not to be answered, because he (A.) himself had released and quit-claimed to B.

{1} A. We say that we were under age at the time of the execution of the quit-claim; wherefore it ought not to prejudice us.

{2} Mutford. You cannot get to that; for here before such and such Justices you brought the Novel Disseisin against us, and we put forward that quit-claim &c., and you said that it was executed while you were under age and that you were ready to aver it; and we said the contrary; whereupon the Assize was turned into an Inquest, who said that you were of full age; and it was adjudged that you should take nothing by the assise; which judgment is still in full force.

{3} Sutton. We could annul that judgment by the Attaint; a fortiori by this writ, which is purely of the Right.

{4} Mettingham. Was it or was it not found by the Inquest that you were of full age?

37. Id.
38. The writ by which the plaintiff begins his action bids the sheriff summon twelve men to declare (recognoscere) whether since some recent date, e.g. the king’s last voyage to Normandy, the defendant has unjustly and without judgment disseised the plaintiff of ‘his free tenement’ in a certain vill.
2 F. Pollock & F.W. Maitland, supra note 26, at 48 (footnote omitted).
40. “Our law has an action which it says is proprietary—the writ of right.” 2 F. Pollock & F.W. Maitland, supra note 26, at 75.
41. Mendez v. Bowie, 118 F.2d 435, 440 (1st Cir. 1941).
{5} Sutton could not deny it.
{6} Wherefore it was adjudged that he should take nothing by his writ.

Defendant justifies his tenure through the plaintiff's deed, which plaintiff dismisses as the invalid act of a minor. But plaintiff's defense explodes when Justice Mettingham decides that his earlier novel disseisin action had proven he was of full age. Justice Mettingham accords collateral estoppel weight to the first action because he accepts the arguments of defense counsel Mutford. If the second proceeding involves a claim different from the first, according to contemporary views only those issues of fact actually litigated within the first proceeding merit collateral estoppel effect. Tacit recognition of that rationale underlies defense counsel Mutford's argument which focuses upon the basis of the first decision. The assize, the fact finding body established by the assize of novel disseisin, had authority to consider only one question: had the plaintiff been recently ejected from property he had possessed. In strict theory the body could consider nothing else: questions concerning a person's capacity to execute a deed were beyond its charge. But Mutford successfully argues that the plaintiff consented to a larger inquiry, and thereby the very nature of the assize was transformed.

43. W. Reese, M. Rosenberg & P. Hay, supra note 1, at 235.
44. 2 F. Pollock & F.W. Maitland, supra note 26, at 47-48.
45. A more precise statement of the issue posed appears within the following translation of a specimen writ:

Novel disseisin. The king to the sheriff of N., greeting. A. has complained to us that B. unjustly and without judgment disseised him of his free tenement in C. after the first passage of the Lord King Henry, son of King John, into Gascony. And therefore we command you that if the aforesaid A. shall give you security for pursuing his claim, then cause the tenement to be reseised of the chattels which were taken therein and cause the same tenement with the chattels to be in peace until the first assize when our justices shall come into those parts. And in the mean time cause twelve free and lawful men of that neighbourhood to view the tenement, and cause their names to be put onto the writ, and summon them by good summoners that they be before the said justices at the said assize ready to make recognition thereon. And put by gage and safe pledges the aforesaid B. or if he shall not be found his bailiff, that he may be there then to hear the recognition. And have there the summoners, the names of the pledges, and this writ. Witness etc.

J. Baker, supra note 10, at 619.

46. "The proceedings began with a writ to the sheriff to summon twelve free and lawful men of the neighbourhood to answer the questions as to seisin raised by the assize." 1 W. Holdsworth, A History of English Law 329 (1931) (quoting Glanvil xiii6).
48. In course of time the jury, which has its roots in the fertile ground of consent, will grow at the expense of the assize, which has sprung from the stony soil of ordinance; Even an assisa when summoned will often be turned into a jury (veritum in juratam) by the consent of the parties. . . .
Assize was turned into an Inquest."{2}, and the inquiring body addressed the issue of minority vel non.

As with the previous *quid juris clamat* report, this case also considers a finality problem. While the novel disseisin action produced a judgment, plaintiff's lawyer dismisses the ruling as not yet final, still vulnerable to the appellate process known as "attaint."{3} Because plaintiff had not in fact appealed the ruling, his position would fail today,{49} and so it does in the medieval decision.

In the following year, 1294, the Court of Common Pleas undertook an even more extensive collateral estoppel analysis. Here the assize made only the conventional inquiry with regard to questions of possession, and the court found their findings irrelevant to a writ of right proceeding.

Alice brought a writ of Right against the Abbat.\footnote{See R. LEFLAR, L. McDouGAL & R. FELIX, *supra* note 9, at 245-49.}
{1} The Abbat said on this writ she ought not to be answered; for the reason that Alice brought an assise of Novel Disseisin when it was found by the Assise that she was never seised. We pray judgment if, inasmuch as it was found by the Assise that she was never seised &c., she can demand on her own seisin.

{2} *Kingesham*. Sir, the assise may be upset by an Attaint; but a writ of Right is of a higher nature than is an Attaint; so we pray judgment &c.

{3} *Heyham*. Sir, the case put is not similar; for in an Attaint you mention the verdict of the Assise; and if the Assise be attainted on that verdict, the Attaint will give you a freehold {or possession},{52} and all that was done in the Assise will be upset; and for that end was the Attaint provided: but in this writ of Right you make mention of neither of the verdict by the Assise nor of the judgment, &c.

{4} (Justice) *BECkingham*. If she can not recover by this writ, give her another writ.

{5} *Heyham*. Sir, by rule of law it is an Attaint, and so the falsehood of the Assize can be shewn.

{6} (Justice) *BECkingham*. The writ of Right is of a higher nature than is the Attaint or any other writ, because by this writ one demands the fee,\footnote{"[T]he king has given in his court a possessory remedy to every ejected freeholder." *Id*. at 339.}, and it is to be tried by battel or the Great Assise; but the Attaint is only touching the freehold {or possession}.

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49. "This consisted in summoning a jury of twenty-four, and the proceedings were not merely a reconsideration of the facts in dispute, but also a criminal trial of the first jury for perjury." T. PLUCKNETT, CHCL, *supra* note 39, at 131.
50. See R. LEFLAR, L. McDouGAL & R. FELIX, *supra* note 9, at 245-49.
52. "[T]he term 'free tenement' has ever since Henry II's day implied possessory protection by the king's court." I F. POLLOCK & F.W. MAITLAND, *supra* note 26, at 338. "[T]he king has given in his court a possessory remedy to every ejected freeholder." *Id*. at 339.
53. *I.e.*, fee simple.
{7} Gislingham. She brings a writ of Right, and she says that it is her right, and whereof she was seised in her demesne &c.; but it was found in the King's Court which bears record that she was never seised &c.; so it clearly follows that she was never seised in her demesne as of fee and of right.

{8} Saham. In which are we to put trust, in ancient opinions and in the Justices who were before us and from whom we learned the law, or in your modern notions? I think in the ancient opinions: and we have learned from the Justices that no recognition by an Assise or by an Attaint or by an Inquest forecloses or bars one from a writ of Right: for though all other writs fail me, yet I can resort to a writ of Right.

{9} Gosefeld. Sir, judgments given in the King's Court will never be held as given in vain, but shall be taken as stable: and before the Justices it was found by the Assise that she was never seised.

{10} Saham. She wills to upset the Assise by order of law, that is to say by battel or by the Great Assise.

{11} Heyham said, We do not insist on this matter for the purpose of worrying the Court, but because we have heretofore seen it so decided in this Court.

{12} And afterwards, for the pleasure of the Justices, they denied outright the right of Alice and put themselves on the Great Assise of our Lord the King &.

Three independent analyses are brought to bear here on the question of collateral estoppel. First, as in the prior opinion, the case considers whether the logic of res judicata makes determinative the distinctions which separate possessory and proprietary actions. Second, the case addresses whether the difference in fact finding methods called for by possessory and proprietary actions should make one proceeding irrelevant to the other. And, finally, the case examines whether royal precedents are dispositive of all questions about the relationship of possessory and proprietary actions.

In resisting Alice's second complaint, the Abbat argues her pleading includes an assertion of possession, ("whereof she was seised in demesne"),{7} and therefore Alice has relied upon a factual element which was rebutted within a previous ruling of the king's court ("it was found in the King's court which bears record that she was never seised").{7} 54 The Abbat's argument highlights the quest for the efficient administration of

54. The writ of right required that the demandant has to assert ownership of the land. He says that he, or his ancestor, has been seised of the land as of fee 'and of right' and if he relies on the seisin on of an ancestor, he must trace the descent of 'the right' from heir to heir into his own person.

2 F. Pollock & F.W. Maitland, supra note 26, at 75. Alice apparently has been unable to rely upon the seisin of an ancestor, and therefore has had to plead her own seisin, thereby raising the inconsistency with the earlier proceeding.
justice which lies at the heart of the policy of res judicata. If the first decision was erroneous, the defect should have been cured within that proceeding itself: "by rule of law" her remedy was in an appellate procedure, the attaint, directed at the erroneous verdict of the assize, not in the institution of an unrelated procedure, the writ of right.({4} and {5}) Justice Beckingham finds this argument of efficient procedure less persuasive than the theory that a "lower" proceeding cannot have a collateral estoppel effect upon a "higher" action: that is to say, the humble assize of novel disseisin cannot bind the majestic writ of right.55

A second res judicata analysis addresses the difference between the methods of proof which accompany the two proceedings.56 Thirteenth and fourteenth century procedure still authorized a great a variety of fact finding devices57 because the greatest engine of medieval English fact finding, the jury, had not achieved its present hegemony.58 Each medieval writ called for a prescribed method of fact finding, a method part and parcel of the writ that instituted the action.59 The ancient writ of right called for proof by either battle between the parties (or their champions)60 or by the decision making of a particularly distinguished body, the Grand Assise.61 In contrast the assize of novel disseisin submitted the question to a group of neighbors, the assize;62 such humdrum procedure, the plaintiff maintains, cannot pre-empt decision making by God (who intervenes in every battle to secure justice)63 or by the somewhat less august personnel of the Grand Assize.64

55. "The lower remedies were all possessory in the sense that the tenant could not go behind the seisin alleged; but he could do so in another action, going higher into the right until he reached the mystical ultimate of the writ of right itself." S. Millsom, supra note 29, at 126.

56. Burden of proof presents a modern parallel: a jury applying a preponderance of the evidence standard does not produce a judgment entitled to issue preclusion effect for a jury which applies a clear and convincing or beyond a reasonable doubt standard.

57. Such as wager of law, battle, and ordeal. 1 W. Holdsworth, supra note 46, at 305-12.

58. See id. at 312-50.

59. Id.

60. Id. at 308-10.

61. "[By] four knights from the county and from the neighbourhood there be elected twelve legal knights from the same neighbourhood to say upon oath which of the two parties to the action has the better right in the land which is the subject of the action." Glanvil II 10, quoted in 1 W. Holdsworth, supra note 46, at 328.

62. See 1 W. Holdsworth, supra note 46, at 275.

63. Battle "was not merely an appeal to physical force because it was accompanied by a belief that Providence will give victory to the right. Christianity merely transferred this appeal from the heathen deities to the God of Battles. The trial by battle is the judicium Dei par excellence." Id. at 308.

64. By modern practice varying methods of proof, such as a trial to a judge or trial to a jury, yield equally persuasive results; to the extent a modern parallel exists to the plaintiff's argument, perhaps it can be found within sequences of decisions which involve different burdens of proof. Alice has argued an assize may deliver a decision on a lesser standard of accuracy than that adhered to by the Grand Assize (or God, for that matter), and therefore the assize's ruling should not preempt a more grave inquiry into the truth; in a modern context
Persuasive though these varying positions appear, plaintiff’s clinching argument may have been his appeal to the brute force of settled precedent. The writ of right, he contends, has always erased the impact of all junior proceedings, sweeping away all traces of their findings. “In which are we to put trust, in ancient opinions and in the Justices who were before us and from whom we learned the law, or in your modern notions?” In fact our last case gives the lie to plaintiff’s view that no “[i]nquest forecloses or bars one from a writ of Right,” but defendant’s lawyers are overwhelmed. Plaintiff emerges victorious, free from the shackles of res judicata, a victory tinged with a particularly medieval flavor. Within a society in which consensus was valued over conflict, a losing party was to read the wind, and spare the justices the pain of a direct denial. “And afterwards, for the pleasure of the Justices, they ... put themselves on the Great Assize.”

**JURISDICTION**

Having examined the general medieval doctrine of res judicata, we now will consider medieval rules regarding jurisdiction. The law of judgments may involve the law of jurisdiction, because a court will not respect a judgment unless the state rendering the decision had an adequate connection with the parties to the action. Since a complex judicial system contains courts with varying degrees of authority, a court may also have analyze the issue of “competence,” that is, whether a state’s internal division of judicial power has authorized a particular court to hear a dispute.

As for the initial inquiry regarding jurisdiction, when the defendant is not found within the state, a court may consider an exercise of its power inappropriate. But the court’s jurisdictional criteria may be satisfied by the defendant’s past or present connection with the state. Furthermore, a state may choose to assume jurisdiction with regard to citizens, or with regard to claimants to land within the state. The following case touches these jurisdictional bases.

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she might well be arguing that a body which rules on the evidentiary touchstone of “more likely than not” should have no res judicata effect for a proceeding requiring clear and convincing evidence, or proof beyond a reasonable doubt.

65. “[Medieval] judges seem to have been as embarrassed by new questions of law as they were by questions of fact, and did what they could to avoid making decisions if there was a division of opinion on the bench.” J. Baker, supra note 10, at 94. Cf. the continuing practice today with regard to Le roi s’aviser.


67. See id. at 238.


69. Thus in that celebrated case which put the electric question “Can the island of Tobago pass a law to bind the rights of the whole world,” the court suggested that an absent Tobagan might be bound by his past activities on the Caribbean isle. Buchanan v. Rucker, 103 Eng. Rep. 546, 9 East. 192 (K.B. 1808).

70. E.g., Blackmer v. United States, 284 U.S. 421 (1932).

71. E.g., Combs v. Combs, 60 S.W.2d 368 (Ky. 1933).
Horneby v. The Abbot of Croyland.  

{1} One A. brought his writ of cosinage against the abbot of Croyland, and demanded certain tenements in C.

{2} Toudeby. You have a protection for the abbot. (And he put before the court the protection which said that the king had received the abbot and all his property into his protection and defence, for he was going with the king's leave beyond the sea, and that meanwhile he was to be quit of all pleas.)

{3} Denham. He ought not to be quit of pleas by this protection; for this is a protection without cause; for the king does not witness that he is beyond the sea either in his service or on the affairs of the realm. And we ask judgment of his default, and pray that you will record it; for the Great Charter says: 'To no man will we sell or deny etc.'

{4} Beresford, C.J. The king, in whose place we are, has sent word to us that the abbot is quit of all kinds of pleas; and if the king had sent word to us that we should not hold any plea here, could we hold pleas against the order of the king? (as if to say, No.).

{5} And the protection was allowed etc.

While the Chief Justice will not touch the Abbot's interests, he implicitly acknowledges that English jurisdiction reaches travellers on continental junkets. Although abroad, the Abbot needs a "protection" in order to escape the court's authority. Without that protection, the court would move forward to determine his rights. Such a proposition is particularly clear because the litigation concerns English land: by his writ of cosinage, Hornebey asserts that the Abbot has excluded him from his inheritance of land.

The case is remarkable for its implications regarding not jurisdiction, but rather executive power to limit judicial competence regarding constitutional claims. By the Magna Charta the king conceded "to no man will we sell or deny justice;" the plaintiff contends the king has sold the Abbot the justice of which he has been denied. If the royal protection exempts this royal action from judicial review, the plaintiff will have a constitutional right without a remedy. Unmoved, alert to the king's will, the Chief Justice accords the order punctilious respect.

Thirteenth and fourteenth century litigation frequently concerned the appropriate competence of courts within the realm. Contemporary conflict of laws authorities have observed that "[t]he early centralization of power in the king and the establishment of a common law for the whole realm

73. I.e., land.
74. "A protection shall be allowed for year and day and no longer. A protection of course is a royal boon." 2 F.W. Maitland, COLLECTED PAPERS, supra note 3, at 69.
75. A claim based upon the seisin of a first cousin. F.W. Maitland, FORMS OF ACTION, supra note 6, at 31.
put an end to the conflicting laws inside the kingdom and eliminated the intra-national conflict of laws which elsewhere stimulated the development of the subject." While the great Chief Justice Bereford dominated the medieval Court of Common Pleas, this centralization had not yet occurred, and constituent courts proved a rich medium to nourish a law of intranational conflicts. The medieval king presided over a vast territory: England, parts or all of Wales, Ireland, Scotland, even continental possessions like Gascony. Within England alone the sovereign might view a dazzling array of courts. The premier central courts were those of common pleas, kings bench, and exchequer. The royal "eyres" rode circuit. In addition numerous royal surrogates exercised the powers of justice: great men like the earls, small men like the holders of minor manors, all based their powers upon real or supposed franchises granted by the sovereign. And the king guaranteed the functioning of a complex variety of ecclesiastical courts. Whether one court had concurrent or exclusive competence over a matter which was subject to English judicial authority was not a simple question.

Handlo v. Earl of Arundel and Others.65

{1} Edmund Earl of Arundel was attached to answer John de Handlo concerning a plea why he captured and imprisoned him at Clun {in Wales}.

{2} Schardlawe said that Clun was outside the body of the county, where the king's writ does not run—"and we do not think that you will have cognizance of this plea,"

{3} Herle. Clun is within the power of the King, and the king has sent you his writ, and therefore we understand that you have power enough.

{4} Denham. Clun is outside the body of the county, and the law is in the keeping of another.

{5} Herle. You have seen a writ of ael brought in this court in respect of tenements in Wales-shire, and the tenant lost by judgment.

{6} Denham. Invoke the law and not examples, for maybe the tenant wanted to plead and to lose.

76. W. Reese, M. Rosenberg & P. Hay, supra note 1, at 4.
77. The "most masterful of English judges." S. Milson, supra note 29, at 146.
78. See J. Baker, supra note 10, at 33-43.
79. See 1 W. Holdsworth, supra note 46, at 195-203.
80. See id. at 204-31.
81. See id. at 231-42.
82. See id. at 264-85.
83. 1 F. Pollock & F.W. Maitland, supra note 26, at 571.
86. I.e., arrested.
{7} Schardlawe. Gascony is within the power of the king, and yet trespass committed in Gascony shall not be pleaded here.

{8} Bererford, C.J. Gascony is not within the crown of England.

{9} Denham. The earl has the keeping of the law [at Clun] and he has his own chancery, so the king ought not to have cognizance, unless it be by [the earl's] failure. etc.

Having paid four thousand pounds to buy his way out of a Welsh jail, the plaintiff calls upon English justice to cure the outrage. The earl cannot see English law reaching his actions within Clun.

When the plaintiff appeals to an English ruling which addressed a question of title to Welsh land, the defendant distinguishes the case as holding only that personal jurisdiction may support a judgment which has a consequential impact upon matters otherwise outside a court's authority.

The parties to the English action, he maintains, willingly appeared within the proceeding in order to gain a royal record of their title. Such a judgment has no relevance, he contends, to a proceeding involving a protest against jurisdiction.

The defendant contends rather that English courts have no direct jurisdiction over Wales. In rejecting this position, the Chief Justice subsumes Wales within those areas the sovereign holds as part of "his crown," in contrast to those he holds upon another basis, areas such as his French possessions.

The earl's lawyer Denham is forced to abandon these jurisdictional pleas; he makes his stand on the proposition that the controversy is not yet ripe for royal consideration. Royal jurisdiction may reach Wales, he admits, but the crown invokes that power only in one particular situation: when Welsh law, here administered by the earl's own courts, has itself failed to do justice. Until the plaintiff can show he has petitioned these courts for a remedy, the earl asserts, the English courts are not competent to hear the dispute.

A court's competence may depend, as in the previous example, upon whether a party has followed the correct sequence in his application to the constituent parts of a judicial system. Because various constituent judicial systems within England had common authority over the same geographical areas, complex rules determined which system has initial cognizance of a dispute. The previous case set a franchise against a royal court; the next case pits one royal court against another. The king maintained a separate judiciary to govern his "ancient demesne," the royal patrimony from the time of the conquest. The strictly limned authority of these courts contrasts with the competence of the courts of the common law, those courts which administered the royal law which was "common" throughout the realm. In some respects the common law applied to the ancient demesne; whether the

87. 81 Selden Society 131 (from the record).
89. 1 F. Pollock & F.W. Maitland, supra note 26, at 366-89.
courts of the common law or the courts of the ancient demesne were the appropriate forum to resolve a contest over stock provides the subject of the next case.

Noreis v. Northcott.\textsuperscript{90}

\{1\} Noreis brought a writ founded upon the statute \textit{de districcione Scaccarii} in respect of beasts of the plough against Northcott, and he counted that \{Northcott\} had wrongfully and against the peace seized the beasts yoked to his plough.

\{2\} \textit{Judgment} whether he should be received here \{in a common law court\} with respect of a seizure made in the ancient demesne of the King.

\{3\} \textit{Laufer}. We have counted of a trespass done against the peace so cannot he seek justice in this Court?

\{4\} \textit{Bereford}, C.J. So if a stranger make a seizure in the ancient demesne, shall he not answer for it here?—intimating that he would.

\{5\} \textit{Denham}. Brickhill is ancient demesne, and \{Northcott\} is bailiff of the manor, and Noreis is a sokeman of the manor.

\{6\} \textit{Laufer} as before.

\{7\} \textit{Bereford}, C.J. Under this writ the issue may be the same as under a writ of replevin, and so he saith he ought not to plead with you here.

\{8\} \textit{Laufer}. There is other issue under this writ than under a writ of replevin, for this writ layeth the trespass as against the peace. If, then, it be proven against him, he will be sent to prison.

\{9\} \textit{Bereford}, C.J. If you want to say that you are a free man and that you hold freely, say so; for, if you hold in socage, he can distrain you for while you hold the land you are responsible for the charge on it.

\{10\} \textit{Laufer}. We have no need to admit whether we hold in socage, for even though \{Northcott\} be bailiff yet he cannot distrain beasts of the plough.

\{11\} \textit{Bereford}, C.J. If you will neither admit it nor deny it we shall take it as granted.

\{12\} And afterwards the parties came to a settlement.

The court must characterize the complaint as presenting either a violent act subject to the criminal and quasi-criminal rules of the common law,\textsuperscript{91} or a title dispute subject to the rules of the ancient demesne.\textsuperscript{92}

The crown protected an agricultural laborer's means of production. The statute \textit{de Districcione Scaccarii} outlawed the extortionate seizure of plough beasts,\{1\}\textsuperscript{93} and as a national criminal rule (with imprisonment as a penalty

\textsuperscript{90} Y.B. Pasch. 5 Edw. 2, pl. 34 (13120, \textit{reprinted in} \textit{33 Selden Society} 76 (1916).\textsuperscript{1}

\textsuperscript{91} See 2 W. Holdsworth, \textit{supra} note 46, at 357-69.

\textsuperscript{92} See 1 F. Pollock & F.W. Maitland, \textit{supra} note 26, at 366.

\textsuperscript{93} See T. Plucknett, \textit{Legislation of Edward I} 60 (1949) [hereinafter T. Plucknett, \textit{Legislation}].
it relied upon common law courts for enforcement. On the other hand, the courts of the ancient demesne concluded title disputes by ringing down the curtain after a choreographed sequence of landlord and tenant actions. When a tenant refused to perform a disputed obligation, a landlord seized or "distrained" his animals, the tenant brought an action, "replevin," for their return, and the landlord justified or "avowed" the seizure because of the tenant's violation of his obligations. Such litigation would determine the rights and duties flowing out of title to land. Characterized as an act of violence, the seizure made the common law courts competent; characterized as a means to test title, the seizure made the ancient demesne courts competent.

Chief Justice Bereford grapples with the characterization issue. He confirms that common law jurisdiction does indeed reach the ancient demesne, as when a stranger—one who asserts no interest in title to land—seizes a plough beast within its boundaries. Nonetheless, however, he is persuaded by the landlord's position. As an estate manager, a bailiff, Noreis has a proper interest in enforcing tenants' duties. Plaintiff does not deny that his holding is governed by the semi-free socage tenure of the ancient demesne. These events are appropriately characterized not as pitched battle, but rather as a land law squabble. The courts of the ancient demesne are competent to hear the matter.

A closing jurisdictional example considers the consequences of a person's appearance within a proceeding. Contemporary views indicate that in theory any appearance, even an appearance made for the very purpose of objecting to jurisdiction, will endow a court with jurisdiction over a litigant. Modern courts, however, choose not to exercise such a jurisdiction, considering judicial economy better served by encouraging early protest and resolution of jurisdictional disputes. In contrast medieval courts chose to push their jurisdictional powers to their outermost limit, seizing upon even a mistaken appearance as a basis for authority. Vested with "seisin" or possession of a party, a court might force a party (and indeed even his heirs) to appear not only within a particular proceeding, but also within an infinity of subsequent proceedings.

94. See id. at 57.
95. See generally id. (discussing sequences and procedures in landlords' and tenants' actions).
96. See id. at 151-56.
97. Tenures were less easy to subdivide at the lower levels. . . . If [the tenant's] services were unfixed, so that the lord might in theory (but subject to the custom of the manor) demand all manner of work, the tenure was 'unfree' and was called villeinage. If the services were fixed, such as helping the lord with sowing or reaping at fixed times, the tenure was usually called socage. This originally denoted plough-service . . . .

J. Baker, An Introduction to English Legal History 197 (2d ed. 1979); see also 1 F. Pollock & F.W. Maitland, supra note 26, at 336-66.
98. See Restatement (Second) of Conflicts of Law § 33 (1971).
99. See id. § 81.
This draconian sanction is meted out within the following case that concerns not a court's authority to expose a person to the risk of an adverse judicial decision, but rather a court's authority to force a person to staff one of the fact finding bodies essential to the functioning of the medieval judicial system.\(^{100}\)

An Abbot claims the power to force Atte Burgh to serve on his leet, his police court.\(^{101}\) When Atte Burgh refuses to do so, the Abbot seizes his property, Atte Burgh brings a replevin action for its return, and the Abbot justifies or avows his seizure because of Atte Burgh's refusal to staff the leet.

Atte Burgh v. The Abbot of St. Augustin of Canterbury.\(^{102}\)

1. [Atte Burgh] brought his writ of replevin against the Abbot.

2. Stonor. The Abbot avows on the ground that he has the manor of B. [and] the view of frankpledge\(^{103}\) and the plaintiff [has] the duty to come to the leet and to make presentments [but he] refused to do this.

3. Scrope. [W]e are residents in the King's lathe of Canterbury to which we present there the Articles, and this we have done from a time before memory before the Abbot had any interest in the manor of B. Judgment whether, unless he can say that he or his predecessors have been seised of our presentments, you can make avowry.

4. Herle. Then we are in agreement that we have a view of frankpledge and that you are resident within our manor.

5. Scrope. Whether you have a view of frankpledge is no business of mine—that will be a matter between the King and you in a writ of quo warranto.\(^{104}\)

6. Malberthorpe. You are not pleading to our case, which is that we have a manor and a view, and to that you answer that you are within the King's lathe. That is no answer.

7. Bereford, C.J. Though tenants within my view go to a court and there make presentments, I ought not for that reason to be deprived of my view. Maybe you went of your own fault to the King's lathe; you cannot for that reason oust the avowant of that to which he was entitled. And he [sc. Bereford, C.J.] related how a tenant had charged himself with the duty of attending the court of another lord than his own that he might bar his own lord's

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100. See 1 F. Pollock & F.W. Maitland, supra note 26, at 517-568. In modern terms such cases concern not judicial jurisdiction, but rather legislative jurisdiction, that is, a governmental entity's authority to impose a duty upon a person to act in a certain way.

101. See 1 W. Holdsworth, supra note 46, at 135.

102. Y.B. Hil. 8 Edw. 2, pl. 34 (1315), reprinted in 41 SELDEN SOCIETY 79 (1924).

103. Frankpledge was a system of communal responsibility; the franchise "the view of frankpledge" authorized its holder to enforce the system, and enjoy the profits attendant its dereliction. 1 F. Pollock & F.W. Maitland, supra note 26, at 566-68.

104. The king's technique for either recovering or deriving revenue from usurped franchises. Id. at 559, 572.
right, and so had saddled himself with an obligation to attend the courts of both the lords.

\{8\} Scrope. Sir, we are within the King's lathe and we {deny} ever having made presentments at the Abbot's leet.

Atte Burgh's ill-fated defense to the Abbot's jurisdiction relies upon his participation in another police court, the king's lathe of Canterbury.{3} Atte Burgh has there fulfilled a duty of vigilance in uncovering violations of law: as part of a group, he has indicted or presented law breakers.{3} The Abbot seeks a similar staff for his court, but Atte Burgh finds his work for the royal lathe service enough.{2} Indeed whether the Abbot even properly enjoys a judicial franchise, Atte Burgh contends, is of no moment to him {4}; his duties on the king's lathe exempt him, he believes, from all other jurisdiction.

Chief Justice Bereford finds Atte Burgh's appearance on the king's lathe significant, but hardly in the way Atte Burgh had hoped: Atte Burgh may have mistakenly volunteered for continuing royal service,{6} but if the Abbot's right to his service does indeed exist, Atte Burgh will have to do double duty,\textsuperscript{106} for the Abbot and for the king. Appearance provides a rock solid medieval basis for jurisdiction.

**IN REM ANALYSIS**

A general analysis of the medieval law of jurisdiction must be supplemented with a particular analysis of medieval rules regarding land. By carving out this area for special treatment, the medieval common law described a policy which has only recently been (perhaps partially) repudiated.\textsuperscript{107} The view that land requires special jurisdictional rules turns upon two basic considerations. First, the state has a particularly pressing interest in facilitating the final resolution of all disputes regarding its territory.\textsuperscript{108} In the medieval world the value of land relative to all other forms of wealth was even greater than that today,\textsuperscript{109} and the need to assert jurisdiction was commensurately even more significant. Second, landowners practice a vigil-

\\textsuperscript{105} \textit{Id.} at 151-53.
\textsuperscript{106} The final observation of Scrope tenders as the issue whether Atte Burgh has ever in fact made presentments in the Abbot's court, but earlier parts of the case such as \{5\} as well as Bereford's observation "to which [he was] entitled"\{7\} appear to indicate the issue is not whether the Abbot is in seisin, but rather whether he has a right to the appearance before his leet.
\textsuperscript{108} \textit{See} R. Leflar, L. McDougal & R. Felix, \textit{supra} note 9, at 473-75.
\textsuperscript{109} Although Maitland cautions us not to forget the value of other property.
\textsuperscript{2} Not even in the feudal age did men eat or drink land, nor, except in a metaphorical sense, were they vested with land. They owned flocks and herds, ploughs and plough-teams and stores of hay and corn. A Cistercian abbot of the thirteenth century, who counted his sheep by the thousand, would have been surprised to hear that he had few chattels of any value.
\textsuperscript{2} F. Pollock & F.W. Maitland, \textit{supra} note 26, at 148.
lance concerning their property which makes them particularly amenable to the imposition of jurisdiction.\textsuperscript{110}

These rationales may explain the royal judiciary's assertion of power to render final judgments regarding land regardless of whether all claimants had appeared. Litigants flocked to the king's courts to take advantage of these rules. Seeking security from the onslaught of unanticipated claims, parties to the transfer of land sought the safe haven of a judicial record, a judicial record which also had a greater chance of surviving the common medieval perils of theft, fire, and war. The route to this \textit{summum bonum} was through the sham conflict submitted to royal justice, the phony controversy calling for a judicial settlement, an end to the dispute, a "fine."\textsuperscript{111}

Bernard v. Le Fevre.\textsuperscript{112}

{1} Bernard brought his writ of escheat against Le Fevre for the reason [Roger] held of his {Bernard's} father, whose heir he is, and [Roger] died a bastard.

{2} Aldborough. One Hugh was seised after [Roger's] death, and he enfeoffed us. Then a fine was levied between Hugh and ourselves, and by reason of this fine we have been 'in' in these tenements since Hugh's death. When this fine was levied you were of full age, within the four seas, out of prison, and of sound memory; and no claim was entered by you within the year and day. Judgement whether you can claim anything against this fine.

{3} Denham. We do not think that we need to answer to any fine to which we are not a party.

{4} Scrope. If you were a party, we should bar you by the fine; and because you are a stranger we bar you by reason of the non-claim.

{5} Denham. If the Court thinks that we ought to answer to that, we shall answer certainly.

{6} Bereford, C.J. Answer.

{7} Denham. At the time this fine was levied [we] were within age.

By securing a judicial judgment, Le Fevre has achieved a greater measure of security for his property rights. Le Fevre's litigation with Hugh has produced a "fine," the desired outcome of their probably sham conflict.\textsuperscript{2}

And that judgment has a decisive potential with regard to Bernard's interests. Bernard's action against Le Fevre asserts that Bernard's father's

\textsuperscript{110} "The ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 316 (1950).

\textsuperscript{111} "The fine was the most secure of all medieval conveyances, and around so admirable an institution for the security of men's lands there grew up an almost superstitious reverence." A. Simpson, \textit{An Introduction to the History of the Land Law} 116 (1961).

\textsuperscript{112} Y.B. Hil. 11 Edw. 2, pl. 4 (1317), \textit{reprinted in 61 Selden Society} 182 (1942).
tenant Roger died without heirs, and therefore Bernard has a right to his land as an escheat. Le Fevre responds he derives his rights to the very plot not through Roger, Bernard's father's tenant, but rather through a third person, Hugh. That Roger's property escheats to Bernard, he contends, has no relevance to one who holds not Roger's property, but Hugh's. Furthermore, Le Fevre claims Bernard cannot deny his title derives from Hugh because Le Fevre took possession (was 'in') pursuant to a judgment. All parties to that proceeding are bound, and those not party are bound by their failure to object within the statutory period of limitation, a year and a day. This view prevails, and Bernard is forced to contend that he was a minor when the fine was executed.

By integrating the rules of judgments and non-claim, medieval law makers sought to provide security of title through the doctrines of res judicata. But ingenious lawyers were quick to respond by bending the rules to magnify their clients estates at no cost other than legal fees. Within the arsenal of chicane the fine occupied an honored position. Its force was enhanced by the doctrine of voucher, which by a series of sham transactions allowed the substitution of a judgment proof vouchee for the solvent person upon whom the plaintiff had relied for the fulfillment of the obligations of land tenure. Although the system of security of title appeared to hang

113. By describing Roger as a bastard, Bernard has denied the possibility of collateral heirs. "The bastard had the same legal rights as any other free man, with the single exception that he could not be heir to his parents nor have any collateral heir himself." J. Baker, supra note 10, at 558 (footnote omitted).

114. "If the tenant died without leaving an heir, the land necessarily fell to the lord by way of escheat." Id. at 274 (footnote omitted).

115. Speaking precisely, therefore, the person not a party to the judgment is not in fact bound by the in rem effect of the judgment. Rather the person is bound through the application of the doctrine of nonclaim which makes the entry of the judgment a critical element. In terms not of theory, however, but rather of the practical behavior of lawyers and their clients, the effect is the same regardless of how denominated. Speaking of theory and referring to Bracton and Coke, Maitland identifies the exception made against the claimant as not an exceptio rei iudicatae, but more accurately an exceptio ex taciturnitate, as he observed,

[W]e must observe that the judgment in this action [the writ of right] will not preclude a third person from claiming the land. The judgment if it be followed by inaction on his part for some brief period—ultimately year and day was the time allowed to him—may preclude him, should he be in this country and under no disability; but the judgment itself is no bar.

2 F. Pollock & F.W. Maitland, supra note 26, at 75 (footnote omitted).

116. This case recognizes certain traditional exceptions to the full reach of judgments regarding land. Minors and the non compos mentis may well today continue to enjoy an immunity to an in rem proceeding, although prisoners and travelers probably are now subject to a duty of vigilance.

117. For the general grab bag of tricks, see J. Bean, The Decline of English Feudalism 1215-1540 7-39 (1968); T. Plucknett, Legislation, supra note 93, at 73-74; A. Simpson, supra note 111, at 112-34. "[T]he rules of process were extraordinarily elaborate and complex; and, throughout the medieval period, they tended to grow more elaborate and more complex. The natural bent of the lawyers, and the unscrupulous litigiousness of the age, combined to produce this result." W. Holdsworth, Sources and Literature, supra note 4, at 84.

118. See T. Plucknett, CHCL, supra note 39, at 411-12.
upon the fine as its capstone, the Chief Justice was willing to renovate the fabric.

Weylaund v. Weylaund.\(^1\)

{1} (Richard, son of John de Weylaund) brought his writ of
formedon\(^2\) against (William) and (Elizabeth) his wife, and they
vouched to warranty one Lawrence.

{2} Denham. You cannot vouch, for he never had anything in these
tenements since the seisin of (John de Weylaund), from whom we
take our title.

{3} Aldeburgh. On a certain day a fine was levied between Lawrence
and (William and Elizabeth), and Lawrence acknowledged to (Wil-
liam and Elizabeth) that the tenements were theirs by his gift. And
since the fine, which is of record, proves itself that Lawrence was
seised, judgement whether you ought to get to averment against the
record.

{4} Bereford, C.J. (If we admit that), false attorneys will cause
all fines to become void, for they will make people believe that
where a man, having nothing, makes a surrender his fine cannot
be made void, and once that has been put into practice many a
man will lose his inheritance.

{5} Aldeburgh. Lawrence was seised after the seisin of John.

This case pits the defendant's reliance upon a fine against the plaintiff's
reliance upon the terms of a grant. If the fine prevails over the grant, then
lawyers will have the power to manipulate judgments to defeat the guarantees
within a conveyance.

Richard sues to recover land based upon the terms of a grant made by
his father to William and Elizabeth.\(^1\) They defend by saying that in fact
they hold not from his father, but from Lawrence.\(^1\) They produce a
judgment, the fine which concluded the sham dispute between Lawrence,
William, and Elizabeth, which provides that with regard to any action
against them he will intervene,\(^3\) and either vindicate their title or himself
satisfy any judgment.\(^2\) Of course Lawrence just might be a professional
pauper, a hanger-on at the court house willing to step in as a defendant
for the price of a few pints of ale; furthermore, this defense may be only
the first act in a long charade of fraud and delay.\(^2\) Therefore, Richard
attacks the voucher by contending that Lawrence cannot show a possession
subsequent to that of Richard's father, and that, therefore, his rights cannot
prevail over Richard's.\(^2\) Unless Lawrence can show this later possession,

\(^{119}\) See A. Simpson, supra note 111, at 116.
\(^{120}\) Y.B. Trin. 12 Edw. 2, pl. 19 (1319), reprinted in 81 Selden Society 96 (1964).
\(^{121}\) A writ "by means of which the lord could recover the land on the failure of issue,
or the issue could recover the land on the death of the ancestor." 2 W. Holdsworth, supra
note 46, at 350.
\(^{122}\) See T. Plucknett, CHCL, supra note 39, at 411.
\(^{123}\) Id.
he cannot intervene. William and Elizabeth respond that the fine, the judicial judgment, proves the later possession,\(^3\) and that no attack can be made on a matter of record.

Chief Justice Bereford refuses to respect the judgment.\(^4\) He recognizes the value of fines, but concludes that he can preserve their importance only by abrogating them when necessary. The stooge must show actual possession; the fraudulent fine is no invincible record. And as a vigilant landlord Richard will have kept his property under close observation. While a sharp lawyer may have quietly worked through the bogus proceeding, the public ceremony\(^2\) involved in enfeoffing a strawman is a horse of a different color. Richard may yet recover his land.

By striking down William and Elizabeth's fine, Chief Justice Bereford recognized a significant exception to the impact of a final judgment on those not party to the proceeding. Medieval lawmakers created other exceptions to in rem theory. The following case addresses three special policies regarding judgments concerning land: one endows women with an especially secure title, one empowers lessors to regain title from defaulting tenants, and one restricts the church's power to take title. Chief Justice Bereford undertakes the difficult task of integrating the three into a harmonious system.

The women's rights statute comes into play when a woman's heir sues a prioress claiming that her possession of land violates the rights he derives through his late mother. The heir's action, a \textit{a cui in vita}, asserts that the disabilities of marriage prevented his mother from protecting her rights; he now acts to retrieve property which was lost by judgment during her lifetime.

The prioress considers her title secure because it is derived from a judgment she has won in a \textit{cessavit} action.\(^\text{125}\) By that procedure a landlord—the prioress—might recover title from tenants—the heir's parents—who had defaulted in their obligations for two years.\(^4\)

Finally the prioress argues that her judgment is valid despite the king's policy to limit the growth of ecclesiastical landholdings. Because church lands compromised the realm's tax base,\(^\text{126}\) the pious were compelled to buy a royal license before they could donate land to holy purposes.\(^\text{127}\) The odd pious scam to circumvent this restriction inspired a coordinated search for unlicensed transfers concealed under cover of a judgment. The prioress claims her judicial recovery had well and truly passed scrutiny.\(^4\)

\textit{Bydyke v. The Prioress of Kilburn.}\(^\text{128}\)

\begin{footnotes}
\item[124.] 2 W. Holdsworth, \textit{supra} note 46, at 352-53.
\item[125.] See T. Plunknett, \textit{Legislation, supra} note 93, at 90-94; 1 F. Pollock & F.W. Maitland, \textit{supra} note 26, at 333.
\item[126.] As the largest landholder in the realm, the king had much to gain by the doctrines of wardship, marriage, relief, and escheat. But the church was never under age, never married, never died without heirs, and never committed felony. See 1 F. Pollock & F.W. Maitland, \textit{supra} note 26, at 313-15.
\item[127.] See T. Plunknett, \textit{Legislation, supra} note 93, at 100; 1 F. Pollock & F.W. Maitland, \textit{supra} note 26, at 313-16.
\item[128.] Y.B. Trin. 4 Edw. 2 pl. 11 (1311), \textit{reprinted in} 42 Selden Society 39 (1925).
\end{footnotes}
{1} Henry of Bydyke brought his *cui in vita* on the seisin of his mother against the prioress.

{2} Huntingdon. The entry we have is by judgment.

{3} Hengham. By whose judgment?

{4} [Huntingdon.] By default after default. Adam [of Bydyke] and [Joan] his wife {and Henry's mother} held these tenements of the prioress by the services of twenty shillings a year. Adam and [Joan] ceased for two years, for which the prioress brought her cessavit. Adam and [Joan] made default after default. After our recovery a writ was sent to warn the lords if they had anything to say on this recovery in mortmain; and the sheriff caused to come before the Justices knights and other free men to make known whether these tenements were the right of the prioress or whether there was collusion, and the jury said that this recovery was not by collusion. And seeing that this verdict remains in force, we ask whether you can have an action.

{5} Hengham. This judgment ought not to harm us, for this writ is given to us by statute {of Westminster} which provides that if the husband lose by default, the wife shall have her recovery.

{6} Bereford, C.J. In the name of God; you are a step further forward than the woman would be.

{7} Hengham. It is all one reversion as regards the mother and the son.

{8} Stanton, J. Is not this a writ given upon the statute {of Westminster}, and does the statute make any mention of the son?

{9} Bereford, C.J. You take the statute which works for you, but you do not take the statute which works against you, for they tell you that the recovery was made by a cessavit which is founded on the Statute of Gloucester and says that if the tenant come before judgment and render the arrears he can save his tenancy. This your mother could have done, and if she did not do so, then she is foreclosed for ever. The prioress has recovered by judgment. How will you undo that judgment?

{10} Toudeby. No deed which the husband can make can disinherit either the woman or her heirs. Therefore we do not think that the default of the husband ought to bar us.

{11} Bereford, C.J. It is for us to award; and because this is a new case we will be advised. I counsel you that you discuss a settlement between you meanwhile.

Three statutes here considered all provide rules which address the effect of judgments on title to land. The *cui in vita* statute establishes a procedure to defeat judgments that otherwise might validly transfer title; the *cessavit* statute provides that if the husband lose by default, the wife shall have her recovery. The Statute of Marlborough ameliorated many of the difficulties of the Statute of Westminster. See 2 F. Pollock & F.W. Maitland, *supra* note 26, at 70-71. See *id.* at 353.
statute creates the means for an involuntary transfer of title to land by judgment; and the mortmain statute makes certain judgments ineffective to transfer title to land unless certain safeguards are met.

Henry's mother Joan had an interest in land, but during her marriage to Adam she was disabled by the doctrines of marriage from effectively protecting that interest. Despite her protests, her husband had authority to sell her property; upon his death, however, she might recapture the land by using the *cui in vita* procedure established by the Statute of Westminster. And Henry believes as his mother's heir he may also invoke the statute's remedial provisions.

The prioress, however, contends that her title is secured by a judgment arising out of a special statutory law, the *cessavit* proceeding, and as such is immune to a surviving wife's (or her representative's) attack on an intervivos transfer or a fine. The *cessavit* statute enabled a grantor to recover title from a transferee after two years of default; having prevailed in such a procedure against Henry's parents, the prioress claims her title can withstand Henry's attack.

Furthermore, she asserts her judgment is valid despite the king's efforts to keep the church's dead hand (mortmain) off the larger part of his patrimony. This judgment was no holy hoax to buy celestial rest at a cost only to heirs and the royal tax rolls. The litigation was conducted with full notice, and no one decried the judicial proceedings as a sham dispute masking an underlying gift to Rome.

The Chief Justice runs a troubled gauntlet in measuring the *cessavit* judgment against the heir's *cui in vita* action. First the son himself may not be the proper person to bring the action. By its terms the statute arms only the wife; can the heir himself invoke the procedure? Bereford thinks he may be too far removed: "In the name of God; you are a step further than the woman would be." And even if the son can bring the action, can a judicial transfer pursuant to a *cessavit* decree properly be characterized as the matrimonial abuse targeted by the *cui in vita* statute? After all, despite her husband's contempt for the rent collector, the wife might have paid the rent herself, and thereby dodged the judgment. The son denies this view of medieval marital independence; the nonpayment was the "default of the husband."

Finally the statutory issues prove intractable: the Chief Justice adjourns the case, probably to consult with Parliament. Perhaps the parties will settle: all will become moot.

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131. 1 F. Pollock & F.W. Maitland, supra note 26, at 465-68.
132. A significant advance over their position at common law. See id. at 333-37.
134. See T. Plucknett, Legislation, supra note 93, at 94-102.
In rem proceedings are not the only actions which can bind a person who does not appear. In contemporary language, a judgment may bind those who "control an action although not parties to it, those whose interests are represented by a party to the action and those who are successors in interest to a party to the action." A person bound by these doctrines of vicarious representation may be described as having been in privity with a litigant.

Medieval no less than contemporary law closely scrutinized a claim that a litigant's interest was identical to that of a party to an earlier proceeding. Consider an ejectment action which asserts that the defendant is bound by his grandmother's participation in a previous action brought by the plaintiff. The grandmother had there denied the plaintiff's rights, arguing that he was her serf, and thus not a proper litigant within royal court, but nonetheless plaintiff had recovered the land he claimed. Ignoring this judgment, the grandson has thrown the plaintiff off the land. The plaintiff responds in royal court asserting that his earlier victory against the grandmother binds the grandson by the doctrines of vicarious representation.

Thorne v. Peche.

{1} Thorne brought an assize of novel disseisin against Peche.
{2} Passeley. He ought not to be answered, for he is our villein.
{3} Scrope. To that you will not get, for before now the plaintiff brought a mortdancesteror on the death of his father for these same tenements against Lucy Peche your grandmother where it was found that he was free and that his father died seised and he was next heir. We pray judgment whether you can rebut by a plea of villeinage since in a court that bears record he has recovered against your grandmother.
{4} Toudeby. Sir the manor was in the seisin of Herbert our grandfather, and he died seised of it, and of this manor Lucy was endowed in allowance for other tenements. After her death this manor returned to Bartholomew as son and heir of Herbert, and from him it descended to Bartholomew, son of Bartholomew. Since we claim nothing through Lucy but hold her as a stranger in this respect, we pray judgment whether any recovery against her can give you any advantage against us.

136. See Restatement (Second) of Conflicts of Law § 94(d) (1971).
137. See Restatement (Second) of Judgments ch.4 (1982).
139. See 1 F. Pollock & F.W. Maitland, supra note 26, at 395-415.
140. See J. Baker, supra note 10, at 532-35.
141. Y.B. Pasch. 3 Edw. 2, pl. 15 (1310), reprinted in 20 Selden Society 93 (1905).
142. I.e., serf. 1 F. Pollock & F.W. Maitland, supra note 26, at 413.
{5} Herle. In the beginning every man in the world was free, and the law is so favourable to liberty that he who is once found free in a court that bears record shall be holden free for ever. We pray judgment.

{6} Westcote. Lucy could not rebut you. But in her time Bartholomew, against whom this assize is arraigned, was in the cradle. And when he came of age, he saw that William would not submit to be "justiced" as he ought. So he took him and held him as his villein. And we do not think that any recovery against one who could not rebut him would make him a person to whom we must answer. If Lucy had quitclaimed to him every kind of action of villeinage, and we had brought our writ of naifty, still we should not have been barred from demanding on the seisin of our grandfather and father.

{7} Herle. A release is not a title; but a recovery in a court that bears record is a great title against him against whom it is made.

{8} Bereford, C.J. If now he were answered, he would be enfranchised by a recovery against one through whom Bartholomew claims nothing, for Lucy is a total stranger.

{9} (Bereford, C.J. awarded the assize.) And afterwards William was nonsuited.

The judgment against grandmother Lucy established two propositions. First that Thorne was no serf, because to plead with a man in royal court, a court which does not exist to protect the rights of serfs, is to recognize that man as free.\{3\} And second, that Thorne was in proper possession of the land: as the victor in his action of mortdancestor,\textsuperscript{143} he had established himself to be heir to his father who died in possession of the property.\{3\} What impact does Lucy’s judgment have upon her grandson Peche who has ejected Thorne from his asserted patrimony.

Peche succeeds in repudiating the suggestion that he is in privity with his grandmother. He demonstrates that his title does not derive from hers; he holds "her as a stranger in this respect."\{4\} She held the land pursuant to dower rights, rights which were limited to a life estate in Peche’s grandfather’s property.\textsuperscript{144} Once she died, title to the property vested not in her heir, but rather in the heir of her husband, Bartholomew, and thereafter in Bartholomew’s heir, Peche.\{4\} Furthermore, Peche’s interests were not identical to Lucy’s. Had she chosen to enfranchise all the serfs on her property, that act would not have furthered the interests of her husband’s heirs.\{6\} Privity simply does not exist between a grandmother holding a dower interest and a grandson who has succeeded to his grandfather’s estate.\{8\}

\textsuperscript{143} Id. at 126.

\textsuperscript{144} See T. Plucknett, CHCL, supra note 39, at 566-68.
Thus far the subject cases have considered a proceeding's impact upon persons connected to the litigation. In some cases, however, a person attempts to make use of a judgment with which he has no connection. Since he was not a party, the proceeding could not injure his interests, and some argue against his right to use the judgment against a person who was a party. Litigants, they assert, should enjoy equal treatment: either both are bound by an earlier proceeding, or neither is. This doctrine has been described as the rule of mutuality of estoppel: either both parties are mutually estopped by a past judgment, or neither is estopped.

Opponents of this rule appeal to considerations of judicial economy. A person who has had a fair opportunity to litigate in an earlier proceeding should be bound by a judgment. His or her interests have received due judicial consideration: a second proceeding is no more likely to achieve a proper result than the first. Although the judgment has been invoked by a stranger who had nothing there to lose, nonetheless if due process has been provided a litigant, the litigant should be bound by the result.

Medieval lawyers made no use of the rubric "mutuality of estoppel;" they might instead observe, "A transaction between different persons &c."

{1} Note that Henry de Sutton laid it down as a maxim (and said he had seen many instances of it) that if Roger brings an Assize of Novel Disseisin against the Abbat who answers that he does not claim anything in the tenement but says that the tenement belongs to Richard and says besides that Roger was not ever seised, and prays the assise, and the assise says that Roger was not ever seised, and Roger brings a writ against [Richard]

{2} Sutton. Roger will take nothing for his seisin was extinguished by the assise of Novel Disseisin, albeit the assise did not pass between the same persons.

{3} This is strange, because of the rule "A transaction between different persons &c."

Henry de Sutton rejects the application of the rule of mutuality of estoppel to a series of novel disseisin proceedings. Within Roger's first action the fact finder concludes Roger has not had possession of certain property. Roger then institutes the same writ against a second defendant who replies that his lack of possession is a matter of record. Had Roger won the first action, the rights of the second defendant would not have been touched because he was not party to the proceeding. Nonetheless Sutton bars Roger's claim against the second defendant because the first

146. See Hart v. American Airlines, Inc., 61 Misc. 2d 41, 44, 304 N.Y.S.2d 810, 813-14 (N.Y. Sup. Ct. 1969) observing "one who has had his day in court should not be permitted to relitigate the question anew."
action "extinguished" his possession. Through this application of an asymmetrical doctrine, Sutton rejects the principles embodied within the rule of mutual estoppel.

The reporter disagrees, finding Sutton's view "strange" because of the rule "a transaction between different persons &c." This tersely stated rule embodies the principles of the rule of mutuality: since the parties to the present action were not both party to the earlier action, that judgment as a "transaction between different persons" should not receive res judicata effect within the present action.

Proponents of efficiency might applaud Sutton's view. Roger would have had nothing new to say in the second hearing. On the other hand, proponents of fairness might condemn Sutton's view. Roger has had to run a double gauntlet, because if Roger loses either to the abbot or to Richard then Richard wins. Richard himself faces only single jeopardy: even if Roger beats the abbot, he must convince another fact finder in order to dispatch Richard. Roger's double exposure does not trouble Sutton; the era of a party's exponentially greater exposure, the era of the crash of the jumbo jet, is far off in the future.

Another medieval foray into the realm of mutuality of estoppel involves the proceedings of novel disseisin and warranty of charter. A emerges victorious over B in a novel disseisin action because the fact finder concludes that B had tortiously taken possession of the property. In another action B had won a judgment requiring C to guarantee his possession of the land. Invoking this warranty, B brings a judicial procedure (the scire facias) to force C to compensate him for his loss of the land to A. C claims that his warranty binds him only if B acted properly in taking possession, and that A's action against B has conclusively established that B acted improperly. All this raises a mutuality of estoppel problem: because C did not participate in the action between A and B, that proceeding could not injure his rights. Nonetheless C asserts that he may use that judgment to establish that B took possession tortiously.

One A. brought the Novel Disseisin against B. \[1\]

{1} B. answered and lost; and then brought the "scire facias" against C. for that he recognized before all the Justices that he would warrant.

{2} Scoter. We do not think we ought to warrant. The Novel Disseisin found that it was {B's} own tort.

{3} Kynge. We brought a writ of Warranty of Charter against you, and you agreed to warrant when we should be impleaded, whenever that might be.

{4} Metingham. Some persons are of the opinion that if you tortiously enter upon a tenement, and you afterwards speak so

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149. 1 W. Holdsworth, supra note 46, at 452.
effectually with me that I make to you a warranty of that tenement, and you are afterwards impleaded, I ought not to warrant on your tort. \{And regardless\} even if he had agreed to warrant when you should be impleaded, \{if\} you were impleaded and did not bring a writ of warranty before judgment, you would not have satisfaction in value.

\{5\} *Scoter.* We ought not to warrant. If he is willing to say that the Assise made a false oath, he can have the Attaint. If we make recompense in value, and they of the Assise were to be attainted, it would be adjudged that he should recover that which he had lost; and thus he would have what he had lost, and the value also. We shall be no further bound by that grant than if a Fine had been levied between us of the Warranty: but if it were found by the Assise that it was his tort, and then he were to endeavour to recover the value by means of the Fine, we should not be bound to make to him, on his own tort, recompense in value. Neither shall we in the present case.

C proposes three defenses, one of which involves mutuality of estoppel. These are the first two of C’s arguments why B cannot sue him: 1. As a matter of substantive law, B has forfeit his claim to warranty by failing to make it before the conclusion of A’s action.\{4\} 2. Because B may yet overturn the results of the first proceeding, and recover damages against the erroneous fact finder, B cannot be allowed to seek the prohibited windfall of double damages which the action against C entails.\{5\}

The third defense raises the issue of mutuality. The substantive law may well be that the duty to warrant is nullified if the claimant has improperly entered the property,\{4\} as for example by force rather than by proper means. If indeed that is the law, then C argues he should be able to defeat B’s action by reliance upon B’s loss to A, a loss that turned upon the impropriety of B’s entry. C’s lawyer even offers a variation on the theme. C should not be obliged to warrant a tortious entry regardless of whether his obligation arises from a personal judgment, that issuing from warranty of charter, or an in rem judgment, that issuing from a fine. In both cases, C’s lawyer contends, he should be able to rely upon a proceeding to which he was not a party.\{5\}

**A Judgment on the Merits**

Having addressed the connection that a person must have with a proceeding in order to be touched by its outcome, we now turn to an analysis of the litigation itself. Although party to a proceeding, a litigant may try to escape its impact by terminating the action prior to entry of a final judgment. Within contemporary law a decision issuing from so truncated a proceeding may not deserve res judicata respect. The court itself may describe its ruling as “without prejudice” to subsequent actions. And another court analyzing the decision may describe it as neither “final” nor “on the merits.” In the two following cases, medieval lawyers escape the
impact of earlier proceedings to a measure far beyond any contemporary standard.

Warde v. Le Venur comprises a complex series of proceedings. Seeking to recover land, the plaintiff Warde brings three different actions. First he institutes a writ of entry dum fuit infra etatem, a writ which attacks defendants' possession of land as wrongfully based upon a defective lease, a lease executed by the plaintiff while he was a minor.151 Defendants prevail, as the proceeding concludes in a nonsuit. Next the plaintiff brings an assize of novel disseisin, which alleges the defendants ejected him by violent means. Warde again loses: the outcome of his first action indicated he himself had leased the property; that result contradicts his claim of violent ejectment. Finally Warde mounts a third attack with a writ of entry founded upon a novel disseisin.152 By this time the defendants have conveyed the land to one John le Venur. Plaintiff's writ asserts le Venur's tenure derives from the first defendants' ejectment, and therefore is an entry founded upon a novel disseisin. Le Venur "vouches to warranty"153 the original defendants, they intervene themselves to become the defendants, and once again pose the first judgment as a shield against plaintiff's claim. The court must decide if the first two losses bar the plaintiff's claim.

Warde v. Le Venur.154

{1} Warde brought his writ of entry founded upon the novel disseisin against [John le Venur] of tenements into which [John] has not entry save by Richard and Christine who disseised [Warde]. John vouched to warranty Richard and Christine his wife who came and warranted.

{2} Laufare. Warde heretofore brought an assize of novel disseisin against Richard and to this writ Richard said [Warde] had sued against Richard and Christine a writ of entry dum fuit infra etatem and by this writ he alleged that Richard and Christine entered on his lease {which was invalid because he was a minor when he executed it} and not by disseisin. And it was awarded that {Warde} should take nothing by his writ [of assize]. And since he acknowl-

151. [I]f the defendant had entered by reason of a grant made by the plaintiff's ancestor, the plaintiff could anticipate his defence by stating in his writ that the grant was invalid, thereby forcing the defendant to take issue on that point rather than on the right at large. The additional clause asserted that the defendant 'had no entry except by' the means then set out; and this explains their collective name, 'writs of entry.' ... [T]here were almost as many types as there were defects in title; for example, the writs of entry dum non fuit compos mentis and dum fuit infra aetatem (where a grant had been made by an insane or infant ancestor), cui in vita (where a husband had granted away his wife's land, and after his death she sought its return), and sur disseisin (where an ancestor had been disseised).

J. Baker, supra note 10, at 268-69 (footnote omitted).

152. See 2 F. Pollock & F.W. Maitland, supra note 26, at 64-66.

153. See id. at 659.

edged in a court which bears record \{in his novel disseisin action\} that there was no disseisin because he acknowledged that he was never seised after \{institution of the writ of entry dum fuit infra etatem\} and judgment was made \{in his novel disseisin action\} upon that acknowledgment, we ask judgment whether he ought to be answered on this writ founded on the same disseisin.

\{3\} **Scrope.** You wish to be aided by an acknowledgment \{of the judgment in the novel disseisin action\} which ought not to harm us more than the user of the writ of entry \{dum fuit infra etatem\}. The user of the writ ought not to harm us, because we were nonsuited and consequently the acknowledgment should not harm us.

\{4\} **Bereford, C.J.** He tells you that you acknowledge \{in the novel disseisin action\} having brought such a writ; but you did not say that the writ failed through a non-suit. If you omitted something which ought to avail you, attribute that to your own folly.

\{5\} **Willoughby.** If \{in\} this writ of entry dum fuit infra etatem it were found that he did not lease, that would not bar the demandant from being able to use his writ of entry sur disseisin.

\{6\} **Bereford, C.J.** If I bring an action by one writ, and I see that that writ is not in accordance with my action, and then that writ perishes by non-suit, can I not afterwards take another writ which accords with my action? (as if to say, Yes). \{With regard to the novel disseisin action, it\} is acknowledged on both sides that the writ speaks of dum fuit infra etatem and that it was lost by a non-suit. But this acknowledgment will not be so prejudicial that the party cannot have his recovery by [a like writ] or by a writ of another nature. Therefore answer.

\{7\} **Laufare.** We did not disseise him.

Chief Justice Bereford denies res judicata effect to a proceeding which ends in a nonsuit. Combat with writs, he concludes, allows a litigant to take up one weapon, think twice, put it down and take to another. “If I bring an action by one writ, and I see that that writ is not in accordance with my action, and then that writ perishes by non-suit, can I not afterwards take another writ which accords with my action? (as if to say, Yes).”\{6\}

While the nonsuit might bar renewed use of the identical writ,\(^{155}\) plaintiff has jumped from *dum fuit infra etatem* to novel disseisin to entry founded upon novel disseisin.

While the nonsuit problem may seem forthright enough, another res judicata problem presents a more complicated issue. Plaintiff’s second action, his novel disseisin proceeding, ended not in a nonsuit, but in a judgment, a judgment issuing out of plaintiff’s inept pleading. Uninformed by the plaintiff that the first action terminated in a nonsuit, the second

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155. See Anon. Y.B. Mich. 5 Edw. 2, pl. 82 (1311), *reprinted in 63 SELDEN SOCIETY 270* (1944), discussed *supra* at notes 27-37 and accompanying text.
court gave it res judicata effect, and therefore rendered judgment against the plaintiff without further consideration of the issues. In supervising the third proceeding, Chief Justice Bereford has to determine whether to provide res judicata respect to this second judgment. Contemporary law admits of no doubt. Although the second proceeding may embody error, if the judgment is final, the third court must respect it. The last in time prevails.\textsuperscript{156}

The proper place to attack the second proceeding is within the proceeding itself, not within a third independent action.\textsuperscript{157} And during his opening discussion of the problem, the Chief Justice dailles with this view: “If you omitted something {in the second proceeding} which ought to avail you, attribute that to your own folly.”\textsuperscript{4}

Despite this prescient insight, however, the Chief Justice takes another path. The second action was instituted by a writ which referred to the first action, and the parties agree that the first action ended in a nonsuit; in this context, the Chief Justice concludes, neither proceeding bars the plaintiff from renewing his claim.\textsuperscript{6} The parties must themselves litigate the question of ejectment.

By denying respect to a nonsuit, medieval practice encouraged wasteful litigation, trial runs abandoned in midcourse by lawyers hoping for a better start at a later date. The following case presents a particularly profligate specimen. A litigant fails to show that his father died in possession of certain land; despite that failure, the litigant’s son succeeds in retrying the question.

Adam brought a writ of Ael\textsuperscript{158} against B laying a descent from William to Roger to Adam.

\{1\} Spigornel. Sir, we tell you that he can not demand any thing on the seisin of his grandfather for the reason that heretofore Roger brought the mortdancestor against B. for the same tenement, and said his father died seised. The Assize passed, and said that his father did not die seised.

\{2\} Kynge. I care not whether an Assise passed or not; I am willing to aver that it was never judicially decided.

\{3\} CAVE. Spigornel, will you accept the averrment or not?

\{4\} Spigornel. Of a truth, Sir, judgment never passed on the verdict by the Assise: for, after the Assise had passed, the parties had a day given to hear judgment; and the demandant would not come into Court any more: whereupon it was adjudged that he should be in mercy for his nonsuit. Judgment if he ought to be answered.

\{5\} CAVE. Answer over.

By conventional res judicata theory a final judgment in the first action will bar the plaintiff’s claim in the second. The mortdancestor and ael\textsuperscript{159}

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\textsuperscript{156} \textit{Restatement (Second) of Conflicts of Laws} § 114 (1971).
\textsuperscript{157} \textit{See} Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939).
\textsuperscript{158} Y.B. 21 Edw. 1 (1293), \textit{reprinted in} 1 \textit{Rolls Series} 398-400 (1873 rep. 1964).
\textsuperscript{159} 2 F. Pollock & F.W. Maitland, \textit{supra} note 26, at 57.
\end{flushleft}
cases have both raised the identical issue: did William die in possession of land, land to which Roger as son (writ of mortdancestor) and Adam as grandson (writ of ael) lay a claim. Furthermore Adam’s claim derives from Roger’s, since Adam by the very terms of the writ succeeds only if he “lays a descent” through his now deceased father Roger.

Subscribing to this view of res judicata, defendant’s lawyer Spigornel argues he need not litigate the grandfather’s possession, since res judicata mandates his victory. Plaintiff’s lawyer counters that a ruling by the fact finding body, the assize, has no significance if a court has not rendered a judgment based upon its findings. And indeed no judgment was entered, for once Roger learned the assize had ruled against him, he chose not to appear again within court. Justice Cave finds plaintiff theoretically impeccable. By asserting “Answer over,” Cave rejects Spigornel’s reliance upon the first proceeding, and instead compels him to deny the fact that the grandfather died in possession. Another assize will address the facts. Cave’s view must have precipitated a rush from the courthouse, encouraging every lawyer within earshot of an adverse assize to stampede before judicial entry of judgment.

THE MEANING OF A JUDGMENT

The doctrines regarding finality insure that a judgment embodies a full consideration of issues; other rules define the scope of issues that a proceeding may address. Without these restrictions, rulings might ambush parties by addressing matters not apparently comprehended within a cause of action. Such restrictions are effected by rules that govern both the conduct of litigation, and the interpretation of judgments.

Pressure to restrict the factual issues within a proceeding appears in the following prior’s action against a bishop. In justifying his rejection of the prior’s nominee to a church office (and his installation of his own), the bishop tars the prior’s man with three failings. The prior rejoins you must stick to one and only one.

\{1\} The Prior of Lewes brought the Quare incumbravit against the bishop of Ely, and said how the church of Kakestone, which was in his gift, became void by the death of one Robert, in consequence of which the Prior presented a suitable person, but [the Bishop] refused him entirely and fraudulently incumbered the church with a clerk of his own.

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162. Generally an advowson is the right to present a clerk to the bishop for institution as parson of some vacant church; the bishop is bound to institute this presented clerk unless he can show one of some few good causes for refusing to do so.
2 F. POLLOCK & F.W. MAITLAND, supra note 26, at 735 (footnote omitted).
163. See 2 F.W. MAITLAND, COLLECTED PAPERS, supra note 3, at 131.
{2} Toutheby. Sir, whereas he supposes by his writ that he presented to the church a suitable person, we tell you that he did not present a suitable person.
{3} Herle. Wherefore was he not suitable.
{4} Toutheby. He was under age, not sufficiently literate, and not legitimate.
{5} Herle. He presented a suitable person. But consider whether he shall be received to aver these three causes; for the judgment by you now given will be hereafter an authority in every Quare non admisit in England.

The prior's resistance to the bishop's broad brush defense reflects his plans for the future. After all, even were all to go awry here, his nominee might still have glittering prospects. Time will heal his youth; a little learning will cure his illiteracy. If some bishop were to refuse to install this fellow, the prior might bring him to heal by a quare non admisit action. But if this decision can be read bastardize the man, then he will have no choice but to enter another line of work. Herle's prayer may yet preserve a vocation.

The tight focus of medieval litigation might be lost during that stage of the proceeding known as the "count." There a party fleshed out his writ, disclosing more fully the facts he intended to establish. A party who counted beyond the conventional corners of the writ might later solicit enlarged respect for the judgment; the Chief Justice was ever alert to nip such overreaching in the bud.

Anon.

{1} One Adam brought a writ of entry founded on the novel disseisin against B.
{2} Hedon. You see well how they have counted that their ancestor G. was seised of these tenements in his demesne as of fee and of right in the time of king Henry the grandfather. We tell you that G. was not seised in his demesne as of fee and of right.
{3} Hengham. Will you have that for your answer?
{4} Afterwards BEREFORD, C.J. said: Will you teach us something new to take an issue on the right in a writ of possession coloured with right? By God's Sacrament! If you wish to undertake that, we will teach you something new.
{5} Hedon. Sir, we will imparl. (And they did not return.)

Here the parties covertly try to secure a ruling regarding ownership by improperly pleading in a possessory proceeding. The plaintiff counts with

164. See W. Holdsworth, supra note 46, at 25.
165. See 2 F. Pollock & F.W. Maitland, supra note 26, at 394-96.
166. Id. at 602.
167. Y.B. 5 Edw. 2, pl. 76 (1311), reprinted in 63 Selden Society 268 (1944).
the words of ownership “as of fee and of right,” and the defendant attempts to join issue on ownership by himself answering “as of fee and of right.” But Chief Justice Bereford never sleeps. Although these litigants think they can pervert this possessory writ to such deep purposes, the Chief Justice will reform their practice before they will reform his. The parties adjourn to discuss this display of temper. They will not be back.

In its scrutiny of past judgments, the medieval judiciary remained equally alert to restrict a proceeding to tight metes and bounds. While a past judgment might superficially appear to bear upon an ongoing litigation, closer analysis might well expose its irrelevance. The following proceeding examines whether an entrant’s possession of property is based upon a judicial decree, or rather upon an act of violence.

**Terrington v. Cavendish.**

{1} In a writ of entry where the tenant had no entry save by [John] who had disseised the plaintiff,

{2} **Ingham.** Sir, we brought the assise of novel disseisin against you and [John] and recovered these tenements. We ask judgement of this writ, since we are ‘in’ {the property} by a judgement made against you.

{3} **BEREFORD, C.J.** Answer to what he has said.

{4} **Denham.** It is quite true that he recovered by assise; but we tell you that [John] disseised us and then alienated the tenements to him, and then disseised him. He therefore brought the assise against [John] {and us} and recovered. By this he recovered no more than the estate he had before [John] disseised him. So our writ lies against him just as if it had been brought before he was disseised.

{5} **BEREFORD, C.J.** The writ is sufficiently well conceived.

Plaintiff’s complaint about ejectment is met by Cavendish’s argument that his possession is based upon a judgment. This is the history of the events:

Plaintiff was ejected by John who then conveyed the property to Cavendish. Regretting his conveyance, John then cooperated with the plaintiff to oust Cavendish. Thereupon Cavendish brought a novel disseisin against them both, and properly regained possession since he had only to show his ouster by violence. Now off his land by judgment, the plaintiff finally invokes the courts, and brings a writ which attacks Cavendish’s possession as based upon John’s first ejectment.

Cavendish denies his possession is based upon violence: his presence, he claims, is pursuant to the judgment issuing out of his novel disseisin action against the plaintiff and John. But the Chief Justice rejects his position as a misleading reference to an earlier proceeding. The judgment

168. 2 F. POLLOCK & F.W. MAITLAND, supra note 26, at 75.
could serve only to put Cavendish back onto his original estate, the estate he derived from John, and if John's estate was based upon violent ejectment of the plaintiff, that estate was defective.

By invoking the doctrines of res judicata, a party contends that certain matters are beyond dispute. The previous case indicates that although a judgment may establish the propriety of a party's possession at one time, that judgment may be irrelevant to the propriety of possession at another time. The following case applies a comparable analysis to a widow's behavior. Her dower interest, her life estate in one third of her husband's property, was forfeit if she claimed a still larger portion.170 Sueing to recover her widow's share, a woman argues against forfeiture by appealing to a proceeding in which she had disclaimed any interest beyond her proper measure. But the judgment provides no shelter.

Punchardon v. Beaumont.171

{1} Isabel, that was the wife of John [of] Punchardon, brought a writ of dower against Henry and claimed the third part of the manor of C.

{2} Denham. She cannot claim dower. Upon the death of our ancestor and her husband, one William Charles was seised of the manor whereof she claims dower; and she took feoffment in fee172 to our disherison until we brought an assize of mortdancestor of the death of our father.

{3} Friskenev. You brought the mortdancestor against William Charles and against Isabel and Isabel disclaimed and you recovered against the tenant. Judgement, since she claimed naught in a court which bears record.

{4} Denham. She took feoffment to our disherison, and then this William Charles married her. We do not consider that though she had disclaimed, this disclaimer would retrieve previous forfeiture. She took feoffment, and we put it against you, and you do not deny it.

{5} Herle. One ought rather to put faith in a proven thing than in one not proven; and what you allege is no more than a deed but what we allege is a matter of record, fully proven.

{6} Beresford, C.J. They allege a feoffment made to their disherison; and if it be averred, no disclaimer that you may allege will be worth a straw.

{7} Malberthorpe saw that if he delayed, the Court would give judgement against him, and he said: Sir, after the death of her husband, William Charles entered and continued this estate uninterruptedly without Isabel's having anything by his feoffment.

170. See T. Plucknett, Legislation, supra note 93, at 123-25.
172. I.e., fee simple.
After her husband's death, Isabel may well have tried to gobble up her son's property;\textsuperscript{173} she hopes to cure this lapse by pointing to her more maternal behavior within some subsequent litigation. Isabel's troubles began\textsuperscript{174} when she welcomed the intrusion of one William Charles onto her late husband's property. He repaid her favor by enfeoffing her with outright ownership of the land, although her dower rights entitled her to a life estate at best.\textsuperscript{175} No shrinking Hamlet, her son promptly brings a mort d'ancestor against both her and her new husband Charles, demanding the land his father possessed at death. Isabel quickly disclaims any excess interest, but when her son emerges triumphant, she and Charles learn that greed can cause a dowry to evaporate.

In examining the effect of the earlier judgment, Chief Justice Bereford concludes that Isabel has a warped view of the substantive law of dowry. The statute which dissolves an overreaching widow's dowry does not allow a repentant lady to reconstitute her claim. The earlier proceeding may indeed establish that Isabel disclaimed, but that disclaimer is not "worth a straw." For her past chicane, her interests will be forfeit.

The past two cases have subtly construed substantive law in order to circumvent the preclusive effect of a prior judgment. Our discussion of medieval law closes upon a more conventional note, a case in which the Chief Justice marshals an earlier judgment to the cause of judicial economy. Daniel v. Besewick addresses the preclusive effect of a judgment based upon a "fine." During a harmonious moment, Daniel and Besewick presented a sham conflict to the royal court in order to have their charter of transfer enrolled within a royal judicial record. Now discord has followed concord, and Daniel brings the judicial writ, "\textit{scire facias}," which provides quick relief to those careful conveyancers who have procured a fine.\textsuperscript{176} But this proceeding yields a judgment against Daniel's interests. Undaunted he institutes a second action, an action not upon the fine, but rather upon the underlying charter. The Chief Justice disapproves this disrespect for royal judgments.

Daniel v. Besewick.\textsuperscript{177}

\{1\} [John Daniel] brought a writ of formedon in the descender.\textsuperscript{178}
\{2\} Scrope said: Sir, a fine was levied of the same tenements,\textsuperscript{179} and on it you sued the scire facias against us, and by default which the court found lurking in the fine itself they quashed, falsified and

\textsuperscript{173} Henry may have been her stepson.

\textsuperscript{174} In Isabel's defense, we may assume she behaved faithfully during her marriage; otherwise by Westminster II, c.34 she would have thereby forfeit her dower. T. PLUCKNETT, LEGISLATION, \textit{supra} note 93, at 121.

\textsuperscript{175} The widow may concentrate her entire claim upon one fraction of her husband's estate. 2 F. POLLOCE & F.W. MAITLAND, \textit{supra} note 26, at 423.

\textsuperscript{176} See 1 W. HOLDSWORTH, \textit{supra} note 46, at 452.

\textsuperscript{177} Y.B. Trin. 10 Edw. 2, pl. 16 (1317), \textit{reprinted in} 54 \textit{Selden Society} 184 (1935).

\textsuperscript{178} See 2 W. HOLDSWORTH, \textit{supra} note 46, at 350.

\textsuperscript{179} i.e., land.
awarded that it was void. We ask judgment whether you ought to be answered on a writ which contains the same form.

{3} Cambridge. We tell you before any fine we were seised by this charter, wherefore we do not think quashing of the fine could deprive us of our action. If Sir William of Bereford gives me tenements in fee tail,180 and afterwards a fine is levied of the same tenements in fee simple, I say that the first fee which I took by the charter is not changed.

{4} BEREFORD, C.J. He does not plead against you in that way, for he says, heretofore you used a scire facias instead of an original [writ], which contains in itself the form [of the fee] tail which you now demand, in consequence of which you are forjudged from having execution on this writ for ever by award of the court, wherefore he now asks judgment whether any answer ought to be given on a writ which contains the same form.

{5} Cambridge. The fine was avoided because there was false Latin and lack of form, namely, of the usual words.

{6} BEREFORD, C.J. A fine was never false for false Latin. He tells you you were forjudged by award of the court, wherefore he says on the writ which includes the same matter you ought not to be answered. If you had brought a writ and had used the charter and then had been forjudged, you would never have any advantage by the fine which contains the same form, and you are the same persons who were party to the first judgment on the scire facias.

{7} And afterwards the plaintiff was non-suited.

Daniel directs several thrusts at the earlier judgment, but the Chief Justice parries them all. Daniel claims it represents a decision upon a technicality—does not reach the merits—but Chief Justice Bereford denies that royal courts make such rulings: "a fine was never false for false Latin." Daniel claims a judgment quashing the fine does not nullify the underlying charter, just as an ineffective attempt to make a limited estate unlimited does not cancel the limited interest. But the Chief Justice denies that Daniel used the fine to change his estate: the action upon the fine embodied terms identical to the charter. And finally, for good measure, he explains that he would have reached the same result even had the first action been upon the charter. For the great Chief Justice, judgments warrant respect.

CONCLUSION

Because of legal scholarship since Maitland's classic History of English Law historians now respect early English judicial records. As a contemporary historian has observed,

[t]oday the history of English law flourishes as never before, and by no means only as the domain of specialists. There exists an

increasing awareness on the part of nearly all historians that a knowledge of legal history can often provide vital clues to the solution of historical problems which, on the surface, seem far removed from the sphere of law.  

But while historians revere the Year Books, legal educators ignore them. Agreeing with Plucknett that "legal history is not law, but history," law schools have banished medieval law to the hinterlands of interdisciplinary study. In arguing for a more central venue for Justice Bereford and his friends, this article has focused upon the reports as classroom treasures. The quality of their analysis has not been surpassed. Socratic teachers should find a modern challenge within England’s "most original contribution to legal science."